No. 11-6971

IN THE SUPREME COURT OF THE UNITED STATES

RALPH DOUGLAS TRACEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the good-faith exception to the Fourth Amendment exclusionary rule applies when a search warrant fails to describe with particularity the items to be searched and seized but does refer to images of the "possible exploitation of children," cites the relevant state statute prohibiting possession of images of children under 18 engaged in sexual acts, and includes an attached affidavit and warrant application, reviewed and signed by the issuing magistrate, that adequately particularizes the material sought.

IN THE SUPREME COURT OF THE UNITED STATES

No. 11-6971

RALPH DOUGLAS TRACEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The interlocutory opinion of the court of appeals (Pet. App. B1-B20) is reported at 597 F.3d 140. The opinion of the district court is not published in the Federal Supplement but is available at 2008 WL 2622908.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2011. The petition for a writ of certiorari was filed on October 17, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was charged in the United States District Court for the Middle District of Pennsylvania with possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2010), and with receiving and distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) (Supp. IV 2010). After the district court suppressed evidence obtained from a warrant-authorized search, the court of appeals reversed, holding that the evidence was admissible pursuant to the good-faith exception to the exclusionary rule. Pet. App. B. Petitioner then pleaded guilty to the possession charge and was sentenced to 63 months of imprisonment, to be followed by ten years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. D1.

1. a. On January 9, 2006, Officer Robert Jones of the Greensburg, Pennsylvania, police department conducted an online investigation into the distribution of child pornography on the internet by examining various peer-to-peer trading networks, which allow users to trade computer files. Pet. App. B16. Officer Jones searched for files titled "pedo," a designation that indicates child pornography. Ibid. He located a video depicting a minor female engaged in sexual intercourse with an adult male. Ibid.; see id. at B4. Officer Jones determined that the video was available for download from a computer associated with a specific internet protocol (IP) address; police subpoenaed the internet

service provider Adelphia and learned that, at the time Officer Jones downloaded the image, that IP address was assigned to petitioner at his residence in Fairfield, Pennsylvania. Id. at B4-B5, B16-B17.

b. Police applied for a warrant to search petitioner's residence and an adjoining auto shop. Pet. App. B12. James Holler, the Chief of Police of Liberty Township, Pennsylvania, prepared a warrant application and an accompanying seven-page affidavit of probable cause. Id. at B4, B12-B19. The warrant application was a standardized form entitled "Application for Search Warrant And Authorization," which contained the warrant and application on a single page divided into multiple sections. Id. at B4, B12. The form contained a section entitled "Identify Items To Be Searched For And Seized" and directed applicants to "be as specific as possible." Ibid. In that space, Chief Holler wrote:

> Any items, images, or visual depictions representing the possible exploitation of children including video tapes or photographs.
>
> COMPUTERS: Computer input and output devices to include but not limited to keyboards, mice, scanners, printers, monitors, network communication devices, modems and external or connected devices used for accessing computer storage media.

Ibid. The form also contained a section entitled "Violation Of," in which Chief Holler wrote "6312(c), (d) PA Criminal Code," and a section entitled "Specific Description Of Premises And/Or Persons To Be Searched," in which he listed petitioner's residence and the adjoining auto shop. Ibid. Chief Holler also checked off boxes

indicating that a district attorney had approved the warrant application and that the affidavit of probable cause was attached. Ibid.

Chief Holler's seven-page affidavit explained the details of Officer Jones' investigation. Pet. App. B4-B5, B16-B17. The affidavit also stated:

> Your affiant, based upon his experience and expertise, expects to find within [petitioner's residence] items which are/were used to commit the crime of Sexual Abuse of Children, to wit, 18 PA. C.S.A. section 6312(c), (d). Your affiant has delineated the items your affiant expects to find within said location which is captioned under "Items to be searched for and seized", and your affiant incorporates that list herein. Possession of these items are either in and of themselves a crime or they are/were utilized to commit a crime, to wit, Sexual abuse of children, 18 PA.C.S.A. section 6312 (c), (d).

Id. at B14; see id. at B5. In a section entitled "Seizure of Computers and Digital Evidence," the affidavit described the sort of evidence associated with crimes involving child pornography –– including floppy disks, hard drives, and tapes –– and explained why it was necessary to seize those types of items and search them offsite. Id. at B5, B18-B19.

A Pennsylvania magistrate approved the application. Pet. App. B12. The magistrate signed and affixed a seal on the one-page application and on each page of Chief Holler's affidavit. Id. at B12-B19.

Chief Holler and three other officers executed the warrant and conducted the search of petitioner's residence. Pet. App. B5. Petitioner was present, and Chief Holler explained that they were

searching for child pornography. Ibid. When Chief Holler asked what they would find, petitioner said they would find a movie on his computer containing child pornography that he may have accidentally downloaded. Ibid.; id. at A2. Police found and seized one working laptop computer, one broken laptop computer, two floppy discs, two computer towers, and 43 videotapes. Ibid. A subsequent search of one of the computer towers uncovered 189 images and 33 movies of child pornography. Ibid.

2. A federal grand jury indicted petitioner on one count of receiving and distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) (Supp. IV 2010), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2010). Pet. App. A1. Petitioner filed a motion to suppress the computer files and the statement he made to police during execution of the warrant. Ibid.; id. at B7.

The district court granted the motion. Pet. App. A1-A5. The court concluded that the warrant was a "general warrant" because it did not state with sufficient particularity the things to be seized, as required by the Fourth Amendment. Id. at A2-A3. According to the court, Chief Holler's attached affidavit did not cure the lack of sufficient particularity in the warrant because it was not expressly incorporated into the warrant. Id. at A3-A4. The court declined to apply the good-faith exception to the exclusionary rule because, in the court's view, the section of the

warrant identifying the items to be seized –– i.e., "[a]ny items, images, or visual depictions representing the possible exploitation of children," id. at B12 –– was "so facially defective that no reasonable police officer should have relied on it." Id. at A4.

3. The court of appeals reversed. Pet. App. B1-B20. The court agreed that the warrant did not expressly incorporate Chief Holler's affidavit. Id. at B5-B7. The court also determined that the government had waived the argument that any deficiency in the warrant's particularity was cured by the fact that the search was confined to the narrower scope of the unincorporated affidavit. Id. at B7-B8.

The court concluded, however, that suppression was not appropriate because the good-faith exception to the exclusionary rule applied. Pet. App. B8-B11. The court explained that a violation of the Fourth Amendment does not necessarily require application of the exclusionary rule and that exclusion is not warranted "'when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.'" Id. at B8 (quoting United States v. Leon, 468 U.S. 897, 919-920 (1984)). The court based its conclusion that the officers had relied on the warrant in good faith on several factors. First, the court found that a reasonable officer in Chief Holler's position could have assumed that the warrant incorporated the affidavit because the warrant application required attachment

of the affidavit, Chief Holler checked the box indicating compliance with that requirement, and the magistrate signed and sealed each page of the attached affidavit. Id. at B9. Second, the court concluded that the "use of the phrase 'possible exploitation of children' on the face of the warrant [did] not make it 'so facially deficient' that no reasonable officer could rely on it." Id. at B10. The court explained that the warrant specified that it sought evidence of a violation of "6312(c), (d) PA Crimes Code," which criminalizes "the dissemination and possession of media containing depictions of 'a child under the age of 18 years engaging in a prohibited sexual act.'" Ibid. (quoting 18 Pa. Const. Stat. Ann. § 6312 (West 2006)). Third, the warrant was approved by a district attorney and a magistrate. Ibid. Fourth, Chief Holler –– who led the team that conducted the search –– drafted the affidavit and was aware of its limits. Ibid.

The court rejected petitioner's argument that the good-faith exception did not apply because the warrant was a "general warrant." Pet. App. B10. The court concluded that the warrant was not "general" because it did not vest "the executing officers with unbridled discretion to conduct an exploratory rummaging through [a defendant's] papers in search of criminal evidence." Ibid. (internal citations and quotations omitted; brackets in original). Rather, although the warrant broadly authorized the seizure of items "representing the 'possible exploitation of children,'" the

court explained that the warrant "specifically cite[d] on its face the statutory provision criminalizing possession and distribution of images of children engaged in prohibited sexual acts." Id. at B11. Thus, the court concluded, "[r]ead as a whole, th[e] warrant did not authorize an exploratory rummaging." Ibid.

4. Pursuant to a plea agreement, petitioner pleaded guilty to possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2010). See Judgment 1; Pet. App. C1. In the plea agreement, petitioner waived his right to appeal his conviction and sentence in the court of appeals but preserved his ability to seek review in this Court of the court of appeals' earlier decision reversing the district court's suppression order. Pet. App. C1-C2. The district court sentenced petitioner to 63 months of imprisonment, to be followed by ten years of supervised release. Judgment 1-3. The court of appeals granted the government's motion for summary affirmance. Pet. App. D.

ARGUMENT

Petitioner renews his argument (Pet. 6-8) that the evidence seized pursuant to the warrant should have been suppressed because the warrant was "general." Review of that issue is not warranted because the court of appeals correctly concluded that the good-faith exception to the exclusionary rule applied, and its decision does not conflict with any decision of this Court or any other court of appeals.

1. The court of appeals correctly applied the good-faith exception to the Fourth Amendment exclusionary rule. It is well established that the exclusionary rule is a "judicially created remedy" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). The rule therefore does not apply "where [an] officer's conduct is objectively reasonable" because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Id. at 919-920. Indeed, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 919 (citation omitted). In order to justify suppression, the "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" in suppressing the evidence. Herring v. United States, 555 U.S. 135, 144 (2009).

As the court of appeals explained, the officers' conduct in this case was objectively reasonable and not sufficiently culpable to warrant suppression. Pet. App. B8-B10. Even if petitioner is correct that the warrant's authorization to search for and seize "items, images, or visual depictions representing the possible

exploitation of children" did not satisfy the Fourth Amendment's particularity requirement, the court of appeals correctly held that the warrant was not "'so facially deficient' that no reasonable officer could rely on it." Id. at B9-B10. The warrant referenced 18 Pa. Cons. Stat. Ann. § 6312 (West 2006), a provision prohibiting the possession or dissemination of media containing depictions of children under 18 engaging in sexual acts. A reasonable officer reading the phrase "possible exploitation of children" in conjunction with the cited statute could have believed that "the type of exploitation of children [the police] were authorized to search for was limited to sexual abuse of children in violation of" that statute. Pet. App. B10.

The court of appeals also correctly concluded that, although the warrant did not explicitly incorporate Chief Holler's affidavit by reference, Pet. App. B6, a reasonable officer in Chief Holler's position "would assume that the warrant incorporated and would be construed with the attached affidavit," id. at B9. Such an assumption would have been reasonable because Chief Holler had checked a box on the warrant application to indicate that he had attached the affidavit to the warrant, and because the magistrate had signed and sealed both the warrant and each individual page of the attached affidavit. Ibid.

The execution of the search confirms the reasonableness of the assumption that the affidavit was incorporated. When Chief Holler

and his search team executed the warrant, their search was confined to the narrower scope of the search warrant (prepared by Chief Holler) rather than the broader scope of the warrant language. Pet. App. B10. Chief Holler thus informed petitioner that the officers were searching for child pornography and all of the items the officers seized were consistent with the affidavit's indication that the evidence sought pertained to child pornography. Ibid. In addition, the warrant application indicated that it had been approved by a district attorney, thereby providing further justification for a reasonable officer to rely on it. Ibid.; see Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984) (good-faith exception applies when officer had district attorney approve affidavit); United States v. Capozzi, 347 F.3d 327, 334 (1st Cir. 2003) (good-faith exception applies in part because officer sought advice of an assistant district attorney before submitting warrant application), cert. denied, 540 U.S. 1168 (2004); United States v. Freitas, 856 F.2d 1425, 1431 (9th Cir. 1988) (good-faith exception applies in part because officers sought advice of Assistant United States Attorney before submitting warrant application to magistrate).

Petitioner suggests (Pet. 7-8) that the warrant was deficient because it did not include the text of the state statute, which prohibits the depiction of a minor engaging "in a prohibited sexual act." But the probable-cause affidavit both indicated that the

statute was directed at the sexual abuse of children, Pet. App. B14, and described the circumstances giving rise to the warrant application –– namely, the discovery of a video portraying a minor girl engaged in sexual intercourse with an adult male, which was linked to petitioner's computer account, id. at B16-B17. That information was sufficient to inform the officers executing the search warrant that the warrant's authorization to search for "visual depictions representing the possible exploitation of children" was an authorization to search for child pornography –– which is exactly what they searched for.

In sum, even if the warrant was itself legally deficient, the court of appeals correctly held that suppression was not warranted because the officers' conduct in relying on it was objectively reasonable.

2. Petitioner asserts (Pet. 6) a conflict between decisions of this Court and the court of appeals' conclusion that the warrant was not a general warrant that would preclude application of the good-faith exception, Pet. App. B10. Petitioner is incorrect.

Petitioner relies primarily on this Court's decisions in Marcus v. Search Warrant, 367 U.S. 717 (1961), and Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). Neither decision supports petitioner's position. In Marcus, this Court held that a warrant authorizing the seizure of "obscene" materials violated the Due Process Clause of the Fourteenth Amendment because it "gave the

broadest discretion to the executing officers" and was not based on a judge's independent evaluation of whether the materials alleged to be obscene were in fact so. 367 U.S. at 731-733. In Lo-Ji Sales, the Court held that the execution of a warrant to seize obscene materials from an adult bookstore violated the Fourth Amendment because the "things to be seized" portion of the warrant was left nearly blank (two allegedly obscene films were listed). Instead of particularizing the items to be seized in the warrant, the magistrate accompanied the officers to the store and personally evaluated various items within the store to determine whether they were obscene, listing those items determined to be so in the warrant as he went. 442 U.S. at 321-323. This Court later described Lo-Ji Sales as a case in which "the issuing magistrate wholly abandoned his judicial role." Leon, 468 U.S. at 923.

Although both cases concerned defective warrants, neither holding is applicable to petitioner's case because both decisions pre-date this Court's adoption in Leon of a good-faith exception to the exclusionary rule. It is now well established that the failure of a warrant to satisfy the Fourth Amendment's particularity requirement does not necessarily demand that evidence seized pursuant to the warrant must be suppressed. In Leon, the Court recognized that, "depending on the circumstances of the particular case, a warrant may be so facially deficient –– i.e., in failing to particularize the place to be searched or the things to be seized

–– that the executing officers cannot reasonably presume it to be valid." 468 U.S. at 923. But where, as here, "the circumstances of the particular case" indicate that a reasonable officer would not have viewed the warrant as a general warrant –– when, in other words, a warrant is not "so facially deficient" as to preclude objectively reasonable reliance by officers –– the good-faith exception may apply. The Court made clear in Leon that "all of the circumstances" of the case must be considered when evaluating the objective reasonableness of law-enforcement conduct. Id. at 922 n.23; see also Herring, 555 U.S. at 145-146 (noting that all of the circumstances are relevant to the good-faith inquiry).

Here, as the court of appeals found, Chief Holler conducted the search in good-faith reliance on the warrant, as limited by the particularity of the attached affidavit of probable cause. By signing and sealing each page of the affidavit, the magistrate gave his written assurance that he had considered the scope of the search in relation to the probable cause and had approved the specific request submitted to him. The officers in this case acted accordingly, limiting the search to the items specified in the magistrate-signed warrant application and affidavit. Thus, even if (as the court of appeals found) the warrant ultimately failed the Fourth Amendment's particularity requirement because it did not expressly incorporate the affidavit, the central purpose of the particularly requirement –– to prevent wide-ranging exploratory

searches, see Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) –– was satisfied. Pet. App. B10. Because, under the circumstances of the case, Chief Holler's reliance on the warrant and attached affidavit was objectively reasonable, the court of appeals correctly concluded that the good-faith exception applied.

Petitioner does not identify any court of appeals decision that would dictate a different result in his case. Petitioner points to two court of appeals decisions holding that a warrant satisfied the Fourth Amendment's particularity requirement by authorizing the search for "child pornography" as defined in a particular state statute. Pet. 7-8 (citing United States v. Gleich, 397 F.3d 608, 611-612 (8th Cir. 2005); United States v. Peden, 891 F.2d 514, 517-518 (5th Cir. 1989)). But because neither case concerns the good-faith exception to the exclusionary rule, neither case conflicts with the court of appeals' correct holding in petitioner's case.*

* The Court need not hold the petition in this case for Messerschmidt v. Millender, No. 10-704 (argued Dec. 5, 2011). The question in that case is whether qualified immunity attached to the execution of a facially valid search warrant because no competent officer would have relied on the magistrate's determination of probable cause. Although this Court has equated the qualified-immunity test in this context with the good-faith test under Leon, see Malley v. Briggs, 475 U.S. 335, 344 & n.6 (1986), the issue in Messerschmidt –– pertaining to probable cause –– is distinct from the issue in this case –– pertaining to the particularity requirement –– and the decision in Messerschmidt is unlikely to have any direct bearing on the proper resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

January 2012