IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,

v. Case No. **15-40043-01-CM**

WILLIAM BARBER,
Defendant.

SUPPLEMENTAL MOTION TO SUPPRESS

Posture

William Barber moves to suppress evidence obtained under three warrants. The first warrant — issued by a magistrate judge in the District of Maryland to Google, Inc. in the Northern District of California — authorized the search and seizure of an email account named jesusweptone@gmail.com. That search turned up emails sent or received by an email address titled bigw1991@gmail.com. That discovery prompted a second warrant — issued from the same district to the same company — for the contents of the bigw1991@gmail.com account. That search revealed that Mr. Barber used the bigw1991@gmail.com account, which in turn led the police to discover his home address. Based on the fruits of the first two warrants, a magistrate judge in the District of Kansas issued a search warrant for Mr. Barber's home.

In his motion to suppress, Mr. Barber argues, *inter alia*, that the first two warrants were issued in violation of Federal Rule of Criminal Procedure 41(b) and 28 U.S.C. § 636(a) because those provisions only give magistrate judges authority to issue warrants for property in their districts. Mr. Barber contends that this lack of territorial jurisdiction is a constitutional violation, warranting suppression under the exclusionary rule. Finally, Mr. Barber posits that the probable cause underlying the third warrant rests solely on the unconstitutionally obtained evidence from the first two warrants, so the Court must suppress the fruits of the third warrant as well.

In its response, the government does not deny that the lack of territorial jurisdiction rises to a constitutional violation. Instead, it counters that the Stored Communications Act, 18 U.S.C. § 2703, governs the Maryland warrants. Since that Act permits a court "with jurisdiction over the offense" to issue a warrant for property outside the court's territorial jurisdiction, the government claims, the Maryland warrants were proper. Regarding suppression, the government does not argue that suppression is generally inappropriate. Rather, it claims that a specific exception to the exclusionary rule — the good-faith exception — should apply.

Mr. Barber replies that the government cannot rely on the Act to save the Maryland warrants' jurisdictional flaw. While the statute permits a court "with jurisdiction over the offense" to issue an out-of-district warrant, every court to interpret that provision has held "jurisdiction" means "territorial jurisdiction." Since there is no evidence that the District of Maryland had territorial jurisdiction over the offenses being investigated by the Maryland warrants, he argues, those warrants were still issued without jurisdiction. Nor would any reasonably well-trained officer rely on those warrants, Mr. Barber continues, because the meaning of "jurisdiction" as "territorial jurisdiction" in the Act was settled at the time.

The Court's hearing on Mr. Barber's motion further narrowed the issue. The officer who procured the Maryland warrants testified that he thought that "jurisdiction" under the Act meant subject-matter jurisdiction — meaning that any federal magistrate judge in the country could issue a warrant for property anywhere else in the country — as long as a federal offense was being investigated. On the basis of that interpretation, the officer believed the Maryland warrants valid. That testimony prompted the Court to order the parties to brief the following question:

Does an officer's honest but unreasonable interpretation of the law entitle the government to the good-faith exception?

Questions Presented

The good-faith exception applies to evidence seized under a warrant valid during the seizure but later deemed invalid. Warrants issued without jurisdiction are void at inception and thus never valid. The Maryland warrants were issued without jurisdiction. Does the good-faith exception apply to the evidence seized under those warrants?

The Tenth Circuit refuses to apply the good-faith exception based on a mistake of law — whether reasonable or unreasonable — when the police make the mistake. When an officer obtains a warrant from a magistrate judge lacking authority to issue it, the mistake is the officer's. The officer here obtained warrants from the magistrate judge because the officer mistakenly thought that the Act permitted the magistrate judge to issue them. Does the good faith exception apply?

An officer makes a reasonable mistake of law by objectively relying on an ambiguous statute. An ambiguous statute is one that the courts have yet to interpret. An officer reasonably relies on such a statute if it takes difficult interpretive work to overturn the officer's interpretation. Here, every court interpreted "jurisdiction" to mean "territorial jurisdiction," and the officer's contrary interpretation violates

elementary rules of statutory construction. Did the officer objectively rely on an ambiguous statute?

Arguments & Authorities

I. The good-faith exception only applies to warrants that were valid during the search, so it does not apply to the Maryland warrants because they were void at inception.

The Fourth Amendment protects people and their property from "unreasonable searches and seizures."[1] While the amendment's text contains no remedy, the courts have created the exclusionary rule to address violations of its terms. The "underlying purpose of the exclusionary rule" as "deterrence."[2] Specifically, the rule "seeks to deter objectively unreasonable police conduct, i.e., conduct which an officer knows or should know violates the Fourth Amendment."[3]

So not every Fourth Amendment violation triggers exclusion.[4] An officer may reasonably rely on a warrant,[5] law,[6] or judicial opinion[7] to conduct a search. Even if the warrant is later found invalid, the law

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[1] U.S. Const. am. 4.
[2] *United States v. McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009).
[3] *Id.* (citations omitted).
[4] E.g., *United States v. Leon*, 468 U.S.897, 906 (1984)("Whether the exclusionary rule sanction is appropriately imposed…is an issue separate from the question whether the Fourth Amendment" was violated.)
[5] *Leon*, 468 U.S. 897.
[6] *Illinois v. Krull*, 480 U.S. 340 (1987).
[7] *Davis v. United States*, 564 U.S. 229 (2011).

struck down, or the opinion superseded, the officer still followed the law at the time of the search. So there is nothing to deter, and thus no reason to apply the exclusionary rule. These kinds of situations fall into the exclusionary rule's good-faith exception. In deciding whether to apply this exception, "the inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all circumstances."[8]

A. The good-faith exception applies to evidence seized under a warrant that was valid during the seizure.

The good-faith exception to the exclusionary rule originates from the United States Supreme Court's decision in *United States v. Leon*.[9] The Court framed the question before it as whether to modify the exclusionary rule "so as not to bar…evidence obtained by officers acting in reasonable reliance on a search warrant…ultimately found to be unsupported by probable cause."[10] The Court carefully constrained its analysis to warrants that were valid during the search: "suppressing evidence obtained in objectively reasonable reliance on a *subsequently invalidated* search warrant cannot justify" exclusion.[11] The Court went

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[8] *McCane*, 573 F.3d at 1044 (citing *Herring v. United States*, 129 S.Ct. 695, 701 (2009))(quotation marks omitted).
[9] 468 U.S. 897.
[10] *Id.* at 900.
[11] *Id.* at 922 (emphasis added).

on to clarify that it was not deciding what makes a warrant void at inception: "we leave untouched…the various requirements for a valid warrant."[12]

The Court emphasized this point in *Massachusetts v. Sheppard*.[13] There, the Court was faced with a warrant which mistakenly authorized a search for controlled substances, when in reality the court meant to authorize a search for evidence of a homicide. In finding the good-faith exception applied, the Court stressed that the warrant was valid at the time of the search: "In Massachusetts, as in most jurisdictions, the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure."[14] The Court further distinguished warrants that are valid until proven otherwise from warrants that are void at inception: "[t]his is not an instance in which 'it is plainly evident that a magistrate or judge had no business issuing a warrant.'"[15]

The Court defined what a "valid warrant" meant long before its decisions in *Leon* or *Sheppard*. In 1932, the Court said in *United States*

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[12] *Id*. at 923.
[13] 468 U.S. 981 (1984).
[14] *Id*. at 990 (citations omitted).
[15] *Id*. at 990 n.7 (quoting *Illinois v. Gates*, 462 U.S. 213, 264 (1983)(White, J., concurring)).

v. Lefkowitz that a "valid warrant" must emanate from "magistrates empowered to issue them."[16] Accordingly, when the Court spoke about the need for a "valid warrant" in *Leon* and *Sheppard*, it must have meant a warrant issued by a court with lawful authority to do so.

The take-away from *Lefkowitz*, *Leon*, and *Sheppard* is that the good-faith exception applies to warrants that were valid during the search, but later overturned. Thus, police must have a valid warrant — one from a magistrate empowered to issue it — before the good-faith exception will apply. While the Court implied that the exception would not apply to evidence seized when a warrant was never valid in the first place, it would be another 20 years until it was squarely confronted with the question.

B. Warrants issued without jurisdiction are not valid during the evidence's seizure.

The case containing that question was titled *Groh v. Ramirez*.[17] The plaintiffs sued the police for searching their home without a valid warrant. Specifically, the warrant failed to describe the items to be seized, in violation of the Fourth Amendment's particularity clause.[18] The Court began its analysis succinctly: "The warrant was plainly

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[16] 285 U.S. 452, 464 (1932).
[17] 540 U.S. 551 (2004).
[18] *Id.* at 554-55.

invalid."[19] When the police implicitly asked the Court to apply the good-faith exception — by arguing that the search was nonetheless "reasonable" — the Court balked: "the warrant was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law."[20] And the Court minced no words on where the responsibility lay: "It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted."[21]

Groh makes three relevant points. First, an unlawfully authorized warrant is no warrant at all. While *Groh* dealt with a separate constitutional prerequisite — the particularity requirement — territorial jurisdiction is also a constitutional necessity. Second, when police search under an unlawfully authorized warrant, the law treats the search as "warrantless." This means that the warrant was void at inception, as opposed to being subsequently invalidated. Since the good-faith exception only comes into play when a court subsequently invalidates a once-valid warrant, it stands to reason that the exception would not apply to a never-valid warrant. Third, it is the officer's responsibility —

[19] *Id.* at 557.
[20] *Id.* at 558 (citations omitted).
[21] *Id.* at 563.

as opposed to the magistrate's — to ensure that the law authorizes the magistrate to issue the warrant.

C. The good-faith exception does not apply to evidence seized under an invalid warrant.

1. The Tenth Circuit would likely hold that the good-faith exception does not apply to evidence seized under an invalid warrant.

Whether the good-faith exception applies to warrants that are void at inception is an open question in this circuit. The court came close to answering the question in a 1990 case, decided before *Groh*, titled *United States v. Baker*.[22] There, a state court judge issued a warrant for evidence on Indian land. After holding that the state court lacked statutory jurisdiction to issue the warrant, the panel turned to whether the good-faith exception could apply, *at all*, to such an invalid warrant. It acknowledged the paucity of authority on the subject, before assuming without deciding that the exception applied and then holding that the officer failed to meet its requirements: "While we acknowledge this issue…we do not purport to resolve it, as it is unnecessary to our disposition of this appeal."[23]

[22] 894 F.2d 1144 (10th Cir. 1990).
[23] *Id.* at 1148.

The question indirectly returned to the Tenth Circuit last year in *United States v. Krueger*.[24] The police obtained a warrant from a Kansas magistrate to search property located in Oklahoma. While the majority based its decision — that the Kansas court lacked jurisdiction to issue the warrant — on a reading of Rule 41(b), Judge Gorsuch wrote separately to address the government's argument: "To justify its search…the government relies exclusively on the claim that it had a warrant. But," he continued, "and by its own concession[,] the magistrate judge who issued the warrant lacked statutory authority to do so."[25] Judge Gorsuch termed such a warrant a "phantom warrant," reasoning — after surveying the meaning of the Fourth Amendment near the time it was adopted — that "a warrant issued for a search or seizure beyond the territorial jurisdiction of a magistrate's powers under positive law was treated as no warrant at all…as null and void… ."[26]

This reasoning persuaded the panel of the Tenth Circuit that decided *Handy v. City of Sheridan*.[27] The defendant argued that an arrest warrant was void because the offense did not occur within the issuing court's territorial jurisdiction. The court quoted Judge Gorsuch's

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[24] 809 F.3d 1109 (10th Cir. 2015).
[25] *Id.* at 1117 (Gorsuch, J., concurring).
[26] *Id.* at 1123 (Gorsuch, J., concurring.)
[27] --- F.3d ---, No. 15-1048, 2016 WL 66170 (10th Cir. Jan. 6, 2016).

Krueger concurrence in setting out its standard for evaluating the claim: "[a] warrant issued beyond [a] magistrate's territorial authority 'was no warrant at all for Fourth Amendment purposes[.]'"[28]

In summary, the Tenth Circuit has never held that a void warrant nevertheless qualifies for the good-faith exception. In *Baker*, the Tenth Circuit acknowledged the issue but declined to decide it. In *Krueger*, Judge Gorsuch reasoned that a warrant issued by a magistrate who lacked the power to do so was no warrant at all. The panel in *Handy* agreed, citing Judge Gorsuch's concurrence. The opinions have some common threads: 1) there is a difference between subsequently invalidated warrants and warrants void at inception; and 2) the Tenth Circuit is particularly suspicious of the latter.

One other Tenth Circuit case bears mentioning, though its prologue comes from a different decision in a district court. A court in the District of Montana decided *United States v. Evans*, in which it confronted a warrant that had not been signed by the magistrate.[29] The magistrate later testified that he had intended to sign the warrant and his failure to do so was merely an oversight. The testimony did not

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[28] *Id.* at *12 (quoting *Krueger*, 809 F.3d at 1123-26 (10th Cir. 2015)(Gorsuch, J., concurring)).
[29] 469 F.Supp.2d 893 (D.Mont. 2007).

persuade the court. It first found that the lack of a signature meant that the warrant was never "issued," and "a warrant that is not issued is no warrant at all."[30] Turning to the government's good-faith argument, the court reasoned that it did not apply to an invalid warrant: "The *Leon* good faith exception may possibly excuse a deficiency in the language of the warrant, but it does not apply to excuse the absence of a warrant."[31]

In an unrelated case in 2014, the Tenth Circuit refused to adopt some of *Evans*'s reasoning.[32] Specifically, it found that a magistrate's signature on the warrant was not necessary for it to be issued.[33] Thus, the panel found that the warrant in front of it — also unsigned — was valid. But while it quoted *Evans*'s conclusion that an invalid warrant could not merit the good-faith exception, it did not quibble with it.[34]

2. Other courts have refused to apply the good-faith exception to invalid warrants.

A district court outside our circuit reached the same result as *Evans* in 2002. In a case titled *United States v. Neering*, a court in the Eastern District of Michigan found that a Michigan judge issued a

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[30] *Id.* at 897 (citations omitted).
[31] *Id.* at 900 (citing *Leon*, 468 U.S. at 922).
[32] *United States v. Cruz*, 774 F.3d 1278, 1289-90 (10th Cir. 2014).
[33] *Id.* at 1290.
[34] *Id.* at 1289.

warrant without statutory authority.[35] It went on to hold that the good-faith exception did not apply to the warrant because it was void at inception: the judge's "lack of authority to issue the search warrant in this case rendered it void. The evidence seized pursuant thereto must be suppressed."[36]

Numerous state courts have similarly held that the good-faith exception does not apply to warrants void at inception. For instance, in a 1989 case titled *Commonwealth v. Shelton*, the Kentucky Supreme Court held the exception inapplicable to a warrant issued without jurisdiction: "[I]n the case at bar, we are not confronted with a technical deficiency, but rather a question of jurisdiction. We do not believe that *Leon* would be applicable were we otherwise inclined to follow its precedent."[37]

The Supreme Court of South Dakota came out the same way in a more recent case. Decided in 2000, *State v. Wilson* presented the court with a search warrant issued by a judge who lacked territorial jurisdiction to issue it.[38] The officer who sought the warrant "believed that [the judge] was authorized to issue the warrant[]", and the judge

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[35] 194 F.Supp.2d 620, 627 (E.D.Mich. 2002).
[36] *Id.* at 628.
[37] 766 S.W.2d 628, 629-30 (Ky. 1989).
[38] 618 N.W.2d 513 (S.D. 2000).

"also believed that he was authorized to issue" it.[39] After finding that the issuing judge, in fact, lacked jurisdiction to issue it, the court turned to the good-faith argument. It reasoned that the good-faith exception dealt with "technical violations of statutes or procedural rules", as opposed to constitutional violations.[40] Holding that this violation was constitutional, rather than technical, the court remarked that "[a]ctions by a police officer cannot be used to create jurisdiction, even when done in good faith."[41]

The Supreme Court of Wisconsin followed suit in 2010.[42] Presented with a warrant that was issued without jurisdiction, the court found "[t]he warrant had no basis in fact or law and was void from the moment it was issued[.]"[43] The court recognized the distinction between warrants that were valid during the seizure but later invalidated, and those void at inception: "Case law on the good-faith exception generally proceeds from a warrant that was valid when issued," the court explained, but "in this case the warrant was void *ab inito*."[44] After finding that the "fundamental constitutional and statutory requirements

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[39] *Id.* at 516.
[40] *Id.* at 520.
[41] *Id.*
[42] *State v. Hess*, 327 Wis.2d 524 (Wis. 2010).
[43] *Id.* at 540.
[44] *Id.* at 583.

for issuing a warrant" were "completely absent," the court concluded "the good faith exception cannot save the resulting unconstitutionally obtained evidence."[45]

Closer to home, the Kansas Supreme Court held — without mentioning the good-faith exception by name — that the fruits of an invalid warrant must be suppressed. In *State v. Rupnick*, decided in 2005, police obtained a warrant from a judge who lacked the territorial jurisdiction to issue it.[46] The court found that the warrant's "execution outside the jurisdiction designated by the statute was not a mere technical irregularity" but one that "affected the substantial rights of the defendant" and suppressed the fruits of the search.[47]

D. The Act requires territorial jurisdiction over offense being investigated.

The Stored Communication Act only permits a "court of competent jurisdiction" to issue a warrant for property located outside of the issuing court's territorial jurisdiction.[48] The Act defines a "court of competent jurisdiction" as, *inter alia*, any district court or magistrate "that has jurisdiction over the offense being investigated."[49] Though the

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[45] *Id.* at 585.
[46] 280 Kan. 720, 734-35 (2005).
[47] *Id.* at 735.
[48] 18 U.S.C. § 2703(a).
[49] 18 U.S.C. § 2711(3)(A)(i).

Act does not specify what type of "jurisdiction" the issuing court must have over the offense, every court has interpreted it to mean "territorial jurisdiction."[50] The Department of Justice echoed that interpretation in its training manual, published in 2009, which explained:

> [A]lthough most search warrants obtained under Rule 41 are limited to "a search of property . . . within the district" of the authorizing magistrate judge, search warrants under § 2703 may be issued by a federal "court with jurisdiction over the offense under investigation," even for records held in another district. *See United States v. Berkos*, 543 F.3d 392, 396-98 (7th Cir. 2008); *In re Search of Yahoo, Inc.*, 2007 WL 1539971, at *6 (D. Ariz. May 21, 2007); *In Re Search Warrant*, 2005 WL 3844032, at *5-6 (M.D. Fla. 2006) *("Congress intended 'jurisdiction' to mean something akin to territorial jurisdiction")*.[51]

Accordingly, a court without territorial jurisdiction over the investigated offense lacks legal authority to issue an out-of-district warrant to investigate that offense. This was the unanimous view of the courts in 2012 — when the police sought and obtained the Maryland warrants.

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[50] *E.g., United States v. Berkos*, 543 F.3d 392, 396-98 (7th Cir. 2008); *In re Search of Yahoo, Inc.*, 2007 WL 1539971, at *6 (D. Ariz. May 21, 2007); *In Re Search Warrant*, 2005 WL 3844032, at *5-6 (M.D. Fla. 2006).

[51] Department of Justice, "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations," 3d. ed.(2009) 133-134 (available at: http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf)(emphasis added).

E. Maryland lacked territorial jurisdiction over the investigated offenses.

As the officer admitted, Maryland did not have territorial jurisdiction over the offenses he sought to investigate with the Maryland warrants. Yet a magistrate judge sitting in the District of Maryland issued the warrants for property located outside that district. Thus, the Maryland warrants were issued in defiance of the Act's limitations because the Maryland court never had the lawful authority to issue them. The Tenth Circuit treats such warrants, issued by a court beyond its authority, as "essentially void *ab inito*… ."[52]

The good-faith exception to the exclusionary rule applies to evidence seized under a once-valid warrant subsequently invalidated. But a warrant issued without lawful authority is void at inception, meaning it was never valid. The Maryland warrants were issued without lawful authority, rendering them void at inception. Since they were never valid, the good-faith exception does not apply to the seized evidence.

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[52] *Handy*, at *12 (citing *Baker*, 894 F.2d at 1147 (quotations and brackets omitted).

II. There is no good-faith exception to the exclusionary rule for mistakes of law committed by the police.

Regardless of whether the mistake is objectively reasonable or not, there is no good-faith exception to the exclusionary rule when the police make a mistake of law. While the United States Supreme Court held in *Heien v. North Carolina* that an officer's objectively reasonable mistake of law means that a resulting seizure does not violate the Fourth Amendment,[53] that remains a separate inquiry from whether to apply the exclusionary rule. The *Heien* Court took pains to explain that its decision was confined to "addressing the question" of whether a "mistake of law" made it "reasonable for an officer to suspect that the defendant's conduct was illegal",[54] not whether to apply the exclusionary rule.

The Tenth Circuit does not apply the exclusionary rule to an officer's mistake of law. It concluded so in 2006, while deciding *United States v. Herrera*.[55] There, the government asked the court to apply the good-faith exception when an officer stopped a vehicle based on the officer's erroneous conclusion that the vehicle was subject to administrative search. The court refused, holding that it had never extended the exception to situations in which the police, as opposed to

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[53] *Heien v. North Carolina*, 135 S.Ct. 530 (2014).
[54] *Id.* at 539.
[55] 444 F.3d 1238 (10th Cir. 2006).

some third party, made the error: "Thus, the application of *Leon*'s good faith exception to the exclusionary rule turns to a great extent on whose mistake produces the Fourth Amendment violation."[56]

And it cited the Supreme Court's decision in *Groh* to mean that the error belongs to the officer — as opposed to the magistrate — when the officer prepares an invalid warrant.[57] It interpreted *Groh* as "refusing to apply the good-faith exception…where the officer 'himself prepared the invalid warrant' and so 'he may not argue that he reasonably relied on the Magistrate's assurance that the warrant…was therefore valid.'"[58]

That reasoning bears with equal force on this case. The officer testified that he prepared the warrants, and that he believed that the Act empowered the Maryland magistrate judge to issue them. This belief was a mistake of law — the Act did not permit the Maryland magistrate judge to issue the warrants. And it was the officer's mistake, since he prepared the warrants. Accordingly, regardless of whether his mistake of law was reasonable or not, the good-faith exception would not apply.

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[56] *Id.* at 1250.
[57] *Id.* at 1251(citing *Groh*, 540 U.S. at 563-64).
[58] *Id.* (ellipses added).

The majority of circuits have similarly found the exception inapplicable to mistakes of law. The Ninth Circuit announced in 2000 that "there is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law."[59] The Eleventh Circuit concurred in 2003: "the good faith exception…is inapplicable when a search is based on an officer's mistake of law."[60] The Seventh Circuit joined the chorus in 2006: "there is no good faith exception…when, as here, an officer makes a stop based on a mistake of law and the defendant is not violating the law."[61]

The Tenth Circuit has done nothing to indicate that it would retreat from this majority view. In *United States v. Prince*, Judge Marten suppressed evidence because "the investigation as it relates to the defendant was a mistake of law" and "the good faith exception…is inapplicable when a search is based on an officer's mistake of law."[62] Though the Tenth Circuit reversed, it did so on a limited basis; finding

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[59] *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000)(citation omitted).
[60] *United States v. Chanthasouxat,* 342 F.3d 1271, 1279–80 (11th Cir.2003).
[61] *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006)(citations omitted).
[62] *United States v. Prince*, No. 09-10008-JTM, 2009 WL 1875709, at *3 (D. Kan. June 26, 2009)(citing *Chanthasouxat,* 342 F.3d at 1279-80), *rev'd on other grounds*, 593 F.3d 1178 (10th Cir. 2010).

that "the mistake of law at issue did not result in any such seizure…[it] simply led to two consensual encounters… ."[63] It did not criticize, much less reverse, Judge Marten's determination that the good-faith exception did not apply to a mistake of law.

The Tenth Circuit refuses to apply the good-faith exception to a mistake of law — whether reasonable or unreasonable — committed by the police. Even if a judge signs off on a warrant that it lacks the authority to issue, the police commit the mistake when they are the ones who prepare the warrant. Here, the officer mistakenly believed that the Act entitled the Maryland magistrate judge to issue the warrants. The officer prepared the warrants, so the mistake is the officer's. Accordingly, the Court should not apply the good-faith exception.

III. The government fails to carry its burden that the exception applies because no reasonably well-trained officer would conclude that the law authorized the Maryland court to issue the warrants.

Even assuming that the good-faith exception applies when a warrant is void at inception, and that it further applies when the police make a mistake of law, the government still fails to satisfy the exception's requirements. The good-faith exception turns on "whether a

[63] *United States v. Prince*, 593 F.3d 1178, 1185 (10th Cir. 2010).

reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[64] The *Leon* court made this point explicit: "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued."[65]

For instance, the Court explained, officers could not objectively rely on a warrant "so facially deficient…that the executing officers cannot reasonably presume it to be valid."[66] The government "bears the burden of proving that its agents' reliance upon the warrant was objectively reasonable."[67] This question is not limited to merely the officer executing the warrant, but extends to "the actions of all the police officers involved[]" in obtaining the warrant.[68]

The government advances two arguments that boil down to one question. First, the government contends that the officers reasonably relied on the text of the Act itself. Second, the government contends that the officers reasonably relied on the warrants themselves. But the officers' belief in the warrants' validity rests exclusively on their

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[64] *Leon*, 468 U.S. at 922 n.23.
[65] *Id*. at 922-23.
[66] *Leon* at 923.
[67] *United States v. Corral-Corral*, 899 F.2d 927, 932 (10th Cir. 1990)(citations and quotation marks omitted).
[68] *Herring*, 555 U.S. 135, 140 (2009)(citing *Leon*, 468 U.S. at 923, n. 25).

interpretation of the Act. Put another way, the officers believed the warrants valid because the officers construed the Act as authorizing the Maryland magistrate to issue the warrants. So, both of the governent's arguments collapse into one question: Would a reasonably well-trained officer believe that the Act permitted the Maryland court to issue these warrants?

The answer to that question is no, for several reasons. First, every court to examine the Act came to a different — and contrary — interpretation than the officers. Second, the Department of Justice itself had trained its agents that "jurisdiction" under the Act meant "territorial jurisdiction." Third, the Tenth Circuit has held, in a similar question over territorial jurisdiction, that no reasonably well-trained officer would adhere to the interpretation advanced by the officer.

A. An officer makes a reasonable mistake of law when he interprets an ambiguous statute in a way that would require hard interpretive work to contradict.

The United States Supreme Court has decided several cases regarding legal errors and the exclusionary rule. The Court decided *Illinois v. Krull* in 1984, holding that when officers reasonably rely on a statute authorizing a search, the good-faith exception saves the fruits of

that search even if the law is later struck down.[69] But the Court avoided the question of what happens when an officer makes a mistake of law: "we decline the State's invitation to recognize an exception for an officer who erroneously, but in good faith, believes he is acting within the scope of a statute."[70]

The Court came a bit closer to accepting that invitation in *Heien v. North Carolina*.[71] The Court had to answer whether an officer's mistake of law — whether a particular act was a crime — made the resulting seizure a Fourth Amendment violation. While the question in this case turns on whether to apply the exclusionary rule after a constitutional violation, as opposed to *Heien*'s question of whether there had been any violation at all, both inquires ask the same question: whether the officer reasonably believed that a statute authorized a search or seizure. Stressing that that the error must be objectively reasonable, the majority warned that the standard was "not as forgiving" as the one used to determine whether an officer was entitled to qualified

[69] 480 U.S. 340.
[70] *Id.* at 360 n.17.
[71] 135 S.Ct. 530.

immunity.[72] "Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."[73]

Concurring in the judgment and joined by Justice Ginsburg, Justice Kagan elaborated on what would *not* be a reasonable error: "[T]he test is satisfied when the law at issue is so doubtful in construction that a reasonable judge could agree with the officer's view."[74] Accordingly, Justice Kagan continued, "[i]f the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not."[75]

The Tenth Circuit cited Justice Kagan's concurrence in its 2015 opinion titled *United States v. Cunningham*.[76] Dealing with the reasonableness of a mistake of law in a traffic-stop context, the panel summarized *Heien*'s "ground rules" as: "an officer's mistake of law may be reasonable if the law is ambiguous (reasonable minds could differ on the interpretation and it has never been previously construed by the

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[72] *Id.* at 539.
[73] *Id.*
[74] 135 S.Ct. at 541 (Kagan, J., concurring).
[75] *Id.*
[76] --- F.3d ---, No. 15-1042, 2015 WL 7444847, at *3 (10th Cir. Nov. 24, 2015).

relevant courts.)"[77] Turning to its own analysis, the panel found the officer's mistake reasonable because: 1) the district court had ruled that the officer's interpretation was not merely reasonable but correct, 2) an analogous case from the state's intermediate appellate court interpreted the statute in the same way the officer did, 3) the trial courts were divided, and 4) the panel's own analysis of the statute supported the officer's interpretation.[78]

B. The officer's interpretation of the Act was not objectively reasonable because every court had reached a contradictory conclusion.

Applying *Heien*'s "ground rules," as announced by the Tenth Circuit in *Cunningham*, shows that the mistake in this case was not objectively reasonable. First, the relevant courts *had* construed the Act, and they unanimously disagreed with the officer's interpretation. Before the officer sought the search warrants in this case, numerous courts — including the Seventh Circuit,[79] the District Court of Arizona,[80] and the Middle District of Florida[81] — had all interpreted "a court with jurisdiction over the offense" to mean "territorial jurisdiction." In

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[77] *Id.* (citing *Heien* at 540).
[78] *Id.* at *3-4.
[79] *Berkos*, 543 F.3d 392.
[80] *Yahoo,* 2007 WL 1539971, at *6.
[81] *Search Warrant*, 2005 WL 3844032, at *5-6.

contrast, no court had ever construed the Act to mean what the officer believed — that "jurisdiction" meant "subject-matter jurisdiction."

C. The officer's interpretation was not objectively reasonable because it ignores elementary rules of statutory construction.

Second, it requires virtually no interpretive effort, much less hard work, to overturn the officer's interpretation. A federal court already has subject-matter jurisdiction over violations of federal law by virtue of 18 U.S.C. § 3231. Accordingly, Congress would have no reason to repeat itself to again grant that authority in the Act.[82] Such an unnecessary repetition violates the rule against surplusage: a statute should be interpreted "that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[83] The District of Arizona referred to this conclusion as mere "[c]ommon sense… ."[84]

And the government cannot really be caught off-guard by this interpretation, since it was the one who advanced it as early as 2006: "As the United States suggests, it makes little sense to require the government, once it has opened an investigation into an alleged federal crime *in the district where that crime actually occurred*, to have to

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[82] 18 U.S.C. § 2711(3)(A)(i).
[83] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).
[84] *Yahoo*, 2007 WL 1539971, at *4.

look…in another district where certain evidence may be found to procure a warrant… ."[85]

D. The officer's interpretation was not objectively reasonable because his own agency told its agents that "jurisdiction" meant "territorial jurisdiction."

Third, a reasonably well-trained officer would have known that "jurisdiction" meant "territorial jurisdiction" because that is precisely what the Department of Justice had taught its agents. In 2009, some three years before the officer in this case sought his warrants, the Department of Justice published its third edition of "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations."[86] That training manual, in its section dealing with the Act, cited all of the cases mentioned above, adding a parenthetical explanation that "Congress intended 'jurisdiction' to mean something akin to territorial jurisdiction."[87]

The officer here is an agent of the Department of Justice. A reasonably well-trained agent would have read this instruction, and logically conclude that "jurisdiction" under the Act mean "territorial jurisdiction." After all, that interpretation is set out plainly in black-and-

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[85] *Search Warrant*, 2005 WL 3844032, at *5 (emphasis added).
[86] Available at: http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf
[87] *Id*. at 133-134.

white. Even giving a generous benefit of the doubt to the officer, a natural reading of the manual would have led a well-trained officer to have some doubt over the meaning of "jurisdiction." But no reasonable officer would have read the explanation that "jurisdiction" meant "territorial jurisdiction" and then conclude that "jurisdiction" meant "subject-matter jurisdiction."

E. The Tenth Circuit has consistently held that no well-trained officer would rely on warrants issued by a court that lacked authority to do so.

Finally, the Tenth Circuit has held that this type of jurisdictional error is not entitled to the good-faith exception. In *United States v. Baker*, the government asked the court to apply the exception to evidence seized under a state-court warrant for property on Indian land.[88] Assuming without deciding that the exception would apply to a never-valid warrant, the court nevertheless refused for two reasons. First, the law "clearly established" that the state court lacked jurisdiction to issue the warrant.[89] Second, the affidavit showed that the officer applying for the warrant "knew the two crucial facts undermining the state court's authority to issue the warrant… ."[90]

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[88] 894 F.2d 1144 (10th Cir. 1990).
[89] *Id.* at 1148.
[90] *Id.*

When the government argued that the court should apply the good-faith exception merely because the officer obtained a warrant, the court pointed out that a reasonable officer would have known the judge had no power to issue the warrant in the first place: "where…a reasonably well-trained officer should himself have been aware that a proposed search would be illegal, a judicial official's concurrence in the improper activity does not serve to bring it within the rule of *Leon* and *Sheppard*."[91]

The rationale against applying the good-faith exception in *Baker* applies here as well. In both cases, the law was clearly established that the magistrate judge lacked the legal authority to issue the warrant that the officer sought. In both cases, a reasonably well-trained officer would have known that clearly established law. And, just like in *Baker*, the officer here knew the operative facts that made the warrant unlawful: the issuing court was in the District of Maryland, the property was outside the District of Maryland, and Maryland had no territorial jurisdiction over any offense being investigated.

The more recent decisions of Judge Belot and the Tenth Circuit in *United States v. Krueger* reinforce the view that the exception should not

[91] *Id.* at 1149 (citations omitted).

apply. At the district court level, the defendant in *Krueger* argued that a warrant issued by a Kansas magistrate for property in Oklahoma ran afoul of Federal Rule of Criminal Procedure 41(b).[92] The government countered with the good-faith argument, an argument which the court quickly dispatched by quoting from a D.C. Circuit opinion: "It is quite a stretch to label the government's actions in seeking a warrant so clearly in violation of Rule 41 as motivated by 'good faith.'"[93] Instead, the court found that "exclusion of the evidence will serve the 'remedial objectives' of the exclusionary rule."[94]

Though the government appealed Judge Belot's opinion, it did not appeal the good-faith portion of it. In fact, the government conceded that the warrant violated Rule 41, which prompted the court to comment: "Given the obviousness of this Rule 41 defect on the record before us, the Government's belated concession is a prudent one."[95] The court went on to note that the government was "expressly not appealing" Judge Belot's

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[92] 998 F.Supp.2d 1032, 1035 (D.Kan. Feb. 7, 2014), *aff'd at* 809 F.3d 1109 (10th Cir, 2015).
[93] *Id.* at 1036 (quoting *United States v. Glover*, 736 F.3d 509, 516 (D.C.Cir. 2013))(brackets omitted).
[94] *Id.* (citing *Leon*, 468 U.S. 897).
[95] *Krueger*, 809 F.3d at 1113.

decision that the warrant "was so facially deficient that the good-faith exception should not apply."[96]

The error here is on all fours with the one in *Krueger*. In both cases, the jurisdictional rules spelled out the powers of a magistrate to issue a warrant. In both cases, the officers seeking the warrant, honestly yet unreasonably, believed that the jurisdictional rules permitted the magistrates to issue the warrants they sought. The magistrates presumably believed the same thing, as evinced from their signatures. Accordingly, the result in the cases should be the same: the good-faith exception should not save the fruits of a search conducted on the basis of such an obvious jurisdictional error.

F. Suppression is the appropriate remedy because it will deter similar constitutional violations.

When the police violate the Fourth Amendment deliberately, recklessly, or with gross negligence, "the deterrent value of exclusion is strong and tends to outweigh the resulting costs."[97] The Tenth Circuit held in *Krueger* that cases such as this one fit the bill; finding suppression was the appropriate remedy because it "furthers the

[96] *Id.* (citing Government Br. at 21 n.4)(quotation marks omitted).
[97] *Davis*, 564 U.S. at 2427 (citing *Herring*, 555 U.S. at 144).

purpose of the exclusionary rule by deterring law enforcement from seeking and obtaining warrants that clearly violate Rule 41(b)(1)."[98]

Exclusion in this case would serve the same purpose. In *Krueger*, the police obtained a warrant that violated Rule 41 because the magistrate lacked the authority to issue it. Here, the police obtained a warrant that violates 18 U.S.C. § 2711(3) because the magistrate lacked the authority to issue it. In *Krueger*, the court found that deterring the police from getting warrants from those unauthorized to issue them was enough to justify suppression. Here, suppression has an identical justification: deterring police from getting warrants from those unauthorized to issue them. So the result in *Krueger* should be the same here.

IV. The exclusionary rule should apply when it serves purposes other than police deterrence.

Mr. Barber recognizes at the outset that this argument is foreclosed by United States Supreme Court precedent, and this Court is bound to follow such precedent. He writes only to preserve this issue for appeal.

[98] 809 F.3d at 1117.

The United States Supreme Court currently recognizes but a single purpose of the exclusionary rule: deterrence.[99] Yet this ignores the rule's other purposes, no less important. For instance, as Justice Brennan pointed out in dissent in *United States v. Calandra*, the exclusionary rule ensures that the judiciary "avoid[s] the taint of partnership in official lawlessness… ."[100] If courts turn a blind eye to such lawlessness — which is the practical effect of recognizing an illegal search but failing to provide a remedy — then they "seriously undermin[e] popular trust in government."[101]

This is so because, by refusing to suppress illegally obtained evidence, the judiciary tacitly gives its stamp of approval on the illegality. As the Court observed in *Terry v. Ohio*: "A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."[102] Indeed, how would a lay person, untrained in the constitution's intellectual acrobatics, ever call a conviction produced by illegally obtained evidence a legal result?

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[99] E.g., *Herring*, 555 U.S. at 137.
[100] 414 U.S. 337, 357 (Brennan, J., dissenting).
[101] *Id.*
[102] 392 U.S. 1, 13 (1968).

The judiciary should no longer attempt to rationalize its use of illegally obtained evidence. While deterring future illegalities is a laudable goal of the exclusionary rule, it should not be the only goal. Instead, courts should refuse to become an accessory after the fact to a constitutional violation, "in order to maintain respect for law [and] to preserve the judicial process from contamination."[103]

Here, exclusion would foster those purposes. It would demonstrate that the judiciary is not an accomplice to Fourth Amendment violations. Instead, suppression would demonstrate that the courts will not rely on the fruits of an unlawful act to reach a lawful result. And that the Fourth Amendment is more than a "chimera" — more than "a guarantee that does not carry with it the exclusion of evidence obtained by its violation… ."[104]

Conclusion

The good-faith exception to the exclusionary rule applies to evidence seized while a warrant was valid. A warrant issued by a person who lacks lawful authority to issue it is void at inception — never a warrant at all. The Maryland warrants were issued by a magistrate who

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[103] *Olmstead v. United States,* 277 U.S., 438, 484 (1928)(Brandeis, J., dissenting).
[104] *Calandra*, 414 U.S. at 361 (Brennan, J., dissenting).

lacked lawful authority to issue them, rendering them void at inception. Accordingly, the good-faith exception does not apply to evidence seized under those "phantom warrants."

If the Court should determine that the exception does apply to evidence seized under void warrants, it should nevertheless refuse to apply it here because an officer's mistake of law — whether reasonable or unreasonable — does not justify the exception. The officer in this case mistakenly concluded that the Act authorized the Maryland magistrate judge to issue the warrants. This was a legal mistake made by the officer. Thus, the Court should not apply the good-faith exception.

If the Court finds that the good-faith exception does apply to an officer's mistake of law, it should decline to do so here because the officer's mistake was unreasonable. An officer commits a reasonable mistake of law when she interprets an ambiguous statute in a way that would take hard interpretive work to disagree with. Here, the statute was not ambiguous because it had been interpreted numerous times in a way contrary to the officer's interpretation. And the officer's interpretation would take little effort to contradict, as it violates an elementary rule of statutory construction. Since no reasonably well-trained officer would come to the conclusion that the officer did here, the Court should not apply the exclusionary rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court on March 1, 2016, by using the CM/ECF system, which will send a notice of electronic filing to the following:

Christine Kenney
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s/ Branden A. Bell
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