No. _____

In The Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

Petitioners,

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, and WILLIAM JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that police officers who procure and execute warrants later determined invalid are entitled to qualified immunity, and evidence obtained should not be suppressed, so long as the warrant is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 920, 923 (1984); *Malley v. Briggs*, 475 U.S. 335, 341, 344-45 (1986).

The Questions Presented are:

1. Under these standards, are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search?

2. Should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Augusta Millender, Brenda Millender, and William Johnson, plaintiffs, appellees below, and respondents here.
- Robert J. Lawrence and Curt Messerschmidt, defendants, appellants below, and petitioners here.

The County of Los Angeles was a defendant in the underlying action and an appellant below, but is not a party to this petition.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	3
A. Background and District Court Proceedings	3
B. The Appeal	6
REASONS TO GRANT THE PETITION	9
I. THE "SO LACKING IN INDICIA OF PROBABLE CAUSE" STANDARD WAS INTENDED TO SET A HIGH BAR FOR IMPOSING LIABILITY OR EXCLUDING EVIDENCE BASED UPON A POLICE OFFICER'S PROCURING A WARRANT SUBSEQUENTLY DETERMINED TO BE INVALID	14
II. THE NINTH CIRCUIT'S MISAPPLICATION OF THE *MALLEY/LEON* STANDARD DEMONSTRATES THE NEED FOR CLARIFICATION FROM THIS COURT	20

TABLE OF CONTENTS – Continued

Page

III. REVIEW IS NECESSARY TO CLARIFY THE *MALLEY/LEON* STANDARDS BECAUSE FEDERAL AND STATE COURTS CANNOT CONSISTENTLY APPLY THE "SO LACKING IN INDICIA OF PROBABLE CAUSE" TEST 29

IV. REVIEW IS NECESSARY TO CLARIFY OR RECONSIDER THE "SO LACKING IN INDICIA" STANDARD AND TO PROVIDE SPECIFIC GUIDELINES FOR RESOLVING QUALIFIED IMMUNITY AND SUPPRESSION ISSUES 39

CONCLUSION 43

APPENDIX

August 24, 2010, Opinion, *Millender v. County of Los Angeles, et al.*, United States Court of Appeals for the Ninth Circuit ..... App. 1

Dissenting opinion by Judge Callahan ..... App. 39

Dissenting opinion by Judge Silverman ..... App. 73

October 2, 2009, Order granting rehearing *en banc*, *Millender v. County of Los Angeles, et al.*, United States Court of Appeals for the Ninth Circuit ..... App. 77

May 6, 2009, Opinion, *Millender v. County of Los Angeles, et al.,* United States Court of Appeals for the Ninth Circuit ..... App. 79

Concurring opinion by Judge Fernandez ..... App. 94

TABLE OF CONTENTS – Continued

Page

Dissenting opinion by Judge Ikuta .....App. 98

March 15, 2007, Order (1) Granting In Part And Denying In Part Plaintiffs' Notice of Motion And Motion For Summary Adjudication; (2) Granting In Part And Denying In Part Individual Defendants' Notice Of Motion And Motion For Summary Judgment And/Or Summary Adjudication Of Issues; And (3) Granting In Part And Denying in Part Municipal Defendants' Notice of Motion for Summary Judgment Or, In the Alternative, For Summary Adjudication of Issues, *Millender v. County of Los Angeles, et al.*, United States District Court, Central District of California.....App. 106

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).....17, 18

Groh v. Ramirez, 540 U.S. 551 (2004).....*passim*

Illinois v. Gates, 462 U.S. 213 (1983).....21, 22, 25, 27

Malley v. Briggs, 475 U.S. 335 (1986).....*passim*

Ortiz v. Van Auken, 887 F.2d 1366 (9th Cir. 1989).....27

Poolaw v. Marcantel, 565 F.3d 721 (10th Cir. 2009).....30, 31

Ruby v. Horner, 39 F.App'x 284 (6th Cir. 2002).....31

United States v. Campbell, 256 F.3d 381 (6th Cir. 2001).....23

United States v. Helton, 314 F.3d 812 (6th Cir. 2003).....33

United States v. Hove, 848 F.2d 137 (9th Cir. 1988).....34

United States v. Kow, 58 F.3d 423 (9th Cir. 1995).....27

United States v. Laughton, 409 F.3d 744 (6th Cir. 2005).....33

United States v. Leon, 468 U.S. 897 (1984) .....*passim*

United States v. Luong, 470 F.3d 898 (9th Cir. 2006).....34

TABLE OF AUTHORITIES – Continued

Page

United States v. McPhearson, 469 F.3d 518 (6th Cir. 2006) 32

United States v. Sanders, 351 F.App'x 137 (7th Cir. 2009) 23

United States v. Stubbs, 873 F.2d 210 (9th Cir. 1989) 27

United States v. Zimmerman, 277 F.3d 426 (3d Cir. 2002) 31, 32

STATE CASES

Agurs v. State, 998 A.2d 868 (Md. 2010).....37

Commonwealth v. Shelton, 766 S.W.2d 628 (Ky. 1989) 38

Kelley v. State, 269 S.W.3d 326 (Ark. 2007).....36

People v. Gutierrez, 222 P.3d 925 (Colo. 2009).....35

People v. Leftwich, 869 P.2d 1260 (Colo. 1994).....35

People v. Miller, 75 P.3d 1108 (Colo. 2003) 35

State v. Belmontes, 615 N.W.2d 634 (S.D. 2000) 37

State v. Dalpiaz, 783 N.E.2d 976 (Ohio App. 2002) 36

State v. Gales, 757 N.E.2d 390 (Ohio App. 2001) 35

State v. Hollis, 649 N.E.2d 11 (Ohio App. 1994).....37

State v. Young, 765 N.E.2d 938 (Ohio App. 2001) 36

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

42 U.S.C. §1983 (2003) 1, 9, 12, 16

28 U.S.C. §1254(1) (2006).....1

18 U.S.C. §922(g) (2006).....23

STATE STATUTES

California Penal Code §12021(a)(1) (West 2009).....23

California Penal Code §1524 (West 2000) 23

OPINIONS BELOW

The Ninth Circuit's *en banc* opinion, the subject of this petition, is reported at 620 F.3d 1016 (9th Cir. 2010). (Appendix ["App."]1-76.) The Ninth Circuit's initial opinion is published at 564 F.3d 1143. (App.79-105.) Its order granting rehearing *en banc*, filed October 2, 2009, is published at 583 F.3d 669. (App.77-78.) The district court's decision denying qualified immunity was not published in the official reports. (App.106-209.)

JURISDICTION

The Ninth Circuit initially filed its opinion on May 6, 2009. (App.79.) Respondents timely petitioned for rehearing, and on October 2, 2009, the Ninth Circuit ordered the case reheard *en banc*. (App.77-78.) The *en banc* panel issued its opinion on August 24, 2010. (App.1-2.) This Court has jurisdiction under 28 U.S.C. §1254(1) (2006) to review on writ of certiorari the Ninth Circuit's August 24, 2010 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. §1983 (2006), which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege petitioners violated their rights under the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Background and District Court Proceedings.

Jerry Ray Bowen had a violent temper and had repeatedly physically assaulted his girlfriend, Shelly Kelly. Kelly decided to end the relationship and move out of her residence. (App.3; 1ER 121.) Fearing Bowen, she asked sheriff's deputies to stand by while she packed. When the deputies left to field a call, Bowen attacked her. He attempted to throw her off the second-story landing, bit her and tried to drag her by the hair back into the residence. When Kelly managed to run to her car, Bowen followed, holding "a black sawed-off shotgun with a pistol grip." (App.4.) Standing in front of the car, he pointed the gun at Kelly and shouted, "If you try to leave, I'll kill you bitch." (App.4.) Although Kelly managed to drive away, Bowen fired a shot at her, blowing out the car's left front tire. He then chased the car firing and missing four more times. (App.4.)

Kelly reported the attack and identified Bowen, a known Mona Park Crip gang member, from a photo lineup assembled by petitioner Curt Messerschmidt, a sheriff's detective. (App.4-5.) Kelly told Messerschmidt Bowen's current address was 2234 E. 120th St., Los Angeles. (App.5.) Messerschmidt confirmed Bowen resided there, which was the home of his foster mother, respondent Augusta Millender. (App.5, 8; 1ER 123.) Messerschmidt determined Bowen had a prior criminal record, was on summary probation for

spousal battery and driving without a license, had several previous felony convictions and misdemeanor arrests, and was a "third strike" candidate under California law. (App.8.)

Messerschmidt prepared an affidavit and warrants to arrest Bowen for assault with a deadly weapon and to search the 120th St. residence. (App.3-8.) The affidavit stated Messerschmidt had 14 years' experience as a peace officer, was a "Gang Investigator" in a special unit for gang-related crimes, and had considerable training and experience as a gang detective, including extensive knowledge concerning "manners in which gang related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (1ER 119-20.)

The affidavit recited Kelly's description of the assault, and stated Messerschmidt had "conducted an extensive background search" on Bowen using "departmental records, state computer records, and other police agency records," confirming Bowen resided at the location. (App.3-5; 1ER 121-123.) The affidavit requested night service of the search warrant because Bowen was affiliated with the Mona Park Crip gang and the nature of the crime – assault with a deadly weapon – showed "night service would provide an added element of safety to the community" and "the deputy personnel serving the warrant, based on the element of surprise." (App.5-6; 1ER 124.) The affidavit opined "recovery of the weapon could be invaluable" in successfully prosecuting Bowen and curtailing "further crimes." (App.5-6; 1ER 124.)

The affidavit did not mention Bowen's prior criminal record and felony convictions, although it noted Bowen "ha[d] gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang database." (App.41 n.1; 1ER 124.)

The warrant allowed search and seizure of (1) items tending to establish the identity of persons in control of the premises, (2) all firearms and firearm-related items, and (3) articles of evidence showing, or relevant to, gang membership. (App.6-7, 10, 41.)

The warrants and affidavit were reviewed by Messerschmidt's superiors, including petitioner Sergeant Robert Lawrence and a lieutenant, and a deputy district attorney, before a magistrate approved them. (App.9.)

The Sheriff's Department's SWAT team served the warrants at 5:00 a.m. on November 6, 2003. (App.9.) Messerschmidt and Lawrence were present but did not participate in the search. (App.9.) The officers seized Augusta Millender's personal shotgun (a black 12-gauge "Mossberg" with a wooden stock), a box of .45 caliber "American Eagle" ammunition, and a letter from Social Services addressed to Bowen. (App.9.) The officers did not find Bowen or the sawed-off shotgun at the residence. (App.9.)

Plaintiffs filed suit under 42 U.S.C. §1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, Sheriff Leroy Baca, and 27 Los Angeles County deputies, including Messerschmidt and Lawrence. (App.10.) As relevant,

plaintiffs alleged violations of their Fourth Amendment rights. (App.10.) The parties filed cross motions for summary adjudication on the validity of the arrest and search warrants. (App.10.) The district court concluded the arrest warrant was facially valid and granted defendants' motion for summary adjudication on the issue. Plaintiffs did not appeal this ruling. (App.10.)

The district court also held the search warrant's authorization to search for all firearms, firearm-related materials, and gang-related items was unconstitutionally overbroad, but its authorization to search for evidence of control of the premises was constitutional. (App.10.) Accordingly, the court granted plaintiffs' motion for summary adjudication as to firearm- and gang-related evidence, but granted defendants' motion as to identification evidence. (App.10.) The district court then rejected the deputies' claim of qualified immunity, holding their actions were not objectively reasonable. (App.10.)

B. The Appeal.

Messerschmidt and Lawrence appealed the denial of qualified immunity. (App.11.) On May 6, 2009, the Ninth Circuit reversed. (App.79-105.) Judges Callahan and Fernandez, in separate opinions, concluded defendants were entitled to qualified immunity. Judge Ikuta dissented. (App.79-105.)

Plaintiffs petitioned for rehearing, and on October 2, 2009, the Ninth Circuit ordered the case reheard

en banc. (App.77-78.) On August 24, 2010, the *en banc* panel issued a new opinion affirming the denial of qualified immunity. (App.1-39.)

First, the court held the warrant's authorization to search for all firearms and firearm-related materials was overbroad, because although the deputies had probable cause to search for the "black sawed-off shotgun with a pistol grip," the affidavit contained no evidence that Bowen possessed other firearms, that "such firearms were contraband or evidence of a crime," or that such firearms were likely present at plaintiffs' residence. (App.15-16, 24.)

Second, the court held the authorization to search for indicia of gang membership lacked probable cause, because the affidavit's statements that Bowen was a gang member did not suggest "'contraband or evidence of a crime' . . . would be found at [plaintiffs'] residence." (App.28-29, citation omitted.)

Finally, the court held the deputies were not entitled to qualified immunity, reasoning the affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'" because the "affidavit indicated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items." (App.31, 35, 38, citation omitted.)

Three judges dissented in two separate opinions. (App.39-76.) First, Judge Callahan, joined by Judge Tallman, found the officers had probable cause to search for firearms and firearm-related materials because Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; thus, there was "a 'fair probability'" he had other firearms in his residence and they were "'contraband or evidence of a crime.'" (App.41-42, citation omitted.) Moreover, the officers' and residents' safety justified seizing any firearms encountered in the nighttime search for a dangerous felon. (App.42-43.)

All three dissenting judges found the warrant's authorization to search for gang-related indicia unconstitutionally overbroad, but concluded the officers were entitled to qualified immunity for that provision, as well as any alleged overbreadth in the authorization to search for firearms and firearm-related items. (App.72-73.)

Regarding gang-related items, the dissent[1] noted Messerschmidt knew Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; he believed Bowen resided at plaintiffs' residence. (App.63.) Messerschmidt also had extensive experience with gang-related crimes, including "the manners in which gang-related assaults are committed, the motives for such assaults, and the

[1] We refer to Judge Callahan's dissent simply as "the dissent," and to Judge Silverman's dissent by name.

concealment of weapon(s) used in such assaults." (App.64 n.17.) Thus, Messerschmidt could "reasonably have conceived of possible ties between the crime, the weapon and the gang." (App.63-64.)

In concluding the officers were entitled to qualified immunity as to both firearms and gang-related indicia, the dissent noted: (1) there was probable cause for a nighttime search of plaintiffs' residence (App.60-61); (2) the search and arrest warrants were facially valid (App.61); (3) Messerschmidt's superiors and a deputy district attorney approved the warrants (App.62); (4) there was no indication Messerschmidt acted dishonestly in procuring the warrant (App.62-63, 74); (5) when Messerschmidt sought the warrant, no clear precedent established it lacked probable cause (App.65-67); and (6) since the deputies undisputedly were entitled to search for disassembled parts of the sawed-off shotgun, the warrant's purportedly overbroad provisions did not expand the scope of the search (App.69).

REASONS TO GRANT THE PETITION

In *United States v. Leon*, 468 U.S. 897 (1984) and *Malley v. Briggs*, 475 U.S. 335 (1986), this Court set a high bar for excluding evidence in a criminal proceeding or imposing civil liability under 42 U.S.C. §1983 on a police officer arising from obtaining and relying on an invalid warrant. Specifically, an officer was entitled to rely upon the magistrate's judgment so

long as the warrant documents were not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923; *see also Malley*, 475 U.S. at 344-45. This standard struck a balance between encouraging police officers to apply for warrants, and deterring officers from outright misconduct. *Leon*, 468 U.S. at 916, 918, 920; *Malley*, 475 U.S. at 341, 343. Thus, civil liability or exclusion of evidence is appropriate only where it can be said that the officer, in seeking the warrant, was "plainly incompetent" or "knowingly violate[d] the law." *Malley*, 475 U.S. at 341.

Yet, the "so lacking in indicia of probable cause" standard has, over the past 24 years, degenerated to essentially no standard at all. Far from protecting police officers who reasonably seek a warrant from a magistrate before effecting an arrest or search, the standard has been applied on an *ad hoc* basis, resulting in imposition of liability on officers and exclusion of evidence in criminal proceedings where, at the end of the day, judges themselves disagree on the question of whether the underlying warrant was invalid.

The Ninth Circuit's decision here underscores the absence of any meaningful standards as to what constitutes "so lacking in indicia of probable cause" so as to impose civil liability on a police officer or exclude evidence in a criminal trial following a magistrate's approval of a warrant. Here, a suspect, a known gang member and felon, threatened to kill his girlfriend and fired a sawed-off shotgun at her in public. Before seeking a warrant to search the

suspect's residence, petitioners prepared an extensive affidavit and had the affidavit and application reviewed and approved by both their superiors and a deputy district attorney. A judge issued the warrant, authorizing search and seizure of all firearms and firearms-related materials, and indicia of gang membership. (App.6-9.)

The *en banc* majority concluded that there was no probable cause to search for any firearm other than the sawed-off shotgun, and no probable cause to search for indicia of gang membership, since the crime was not gang-related. (App.15-16, 24, 28-29.) It further found that the warrant was "so lacking in indicia of probable cause" that no reasonable officer could believe the warrant valid, and denied qualified immunity. (App.31-38.) It did so notwithstanding that two judges of its own court believed that there was probable cause to search for firearms, and three believed that the relationship between gang affiliation, the crime, the presence of firearms, and the danger presented by the search would lead a reasonable officer to believe that there might be probable cause to search for indicia of gang membership as well as firearms. (App.39-41, 72-73.)

Further, as the dissenting opinions noted, the officers' conduct in preparing a substantial affidavit and warrant application, and seeking review and approval by supervisors and an attorney, bespoke good faith, and the fine legal distinctions debated by the majority and the dissenters on the issue of probable cause mandated qualified immunity. (App.62, 72,

74.) A police officer, without legal training, cannot be penalized simply for guessing wrong as to how judges will eventually resolve a murky point of law.

That the "so lacking in indicia of probable cause" standard is bereft of substance is also illustrated by the numerous state and federal appellate decisions in which, notwithstanding sharp dissents concerning whether an underlying violation occurred at all, courts nonetheless find that no reasonable police officer could believe the warrant valid for purposes of invoking qualified immunity or allowing introduction of evidence. Even assuming the occasional judge acting outside of the judicial "mainstream," it would be untenable to suggest the appellate courts harbor so many judicial officers who are "plainly incompetent" or "knowingly violate the law." *Malley*, 475 U.S. at 341. Rather, the disturbing number of cases that have provoked dissents concerning the underlying constitutional violation and rejection of qualified immunity or suppression of evidence suggests that the "so lacking in indicia" standard is being misapplied on a routine basis.

It is essential that this Court grant review and provide clear standards for when a police officer's reliance on a warrant will be deemed reasonable for purposes of qualified immunity under section 1983 and the good-faith exception for admission of evidence under the Fourth Amendment. The amorphous "so lacking in indicia" test should be supplanted by specific criteria addressed to the core concern the Court expressed in *Leon* and *Malley* – that deliberate

misconduct by police officers be discouraged, and officers not punished and evidence not excluded simply because the officers relied on a judicial officer properly, but erroneously, carrying out his or her duties. Such criteria might include whether:

- Officers intentionally and recklessly gave the magistrate false information;

- The magistrate abandoned his or her neutral judicial role or was incapable of fulfilling it due to particular circumstances;

- The affidavit is "bare-bones" or insubstantial;

- The affidavit and other materials were reviewed by a supervisor or a district attorney prior to submission to the magistrate;

- Probable cause existed for the search even if the officers inadvertently, though reasonably given their responsibilities and circumstances, omitted facts establishing probable cause from the affidavit; and

- The warrant, even if overbroad, did not expand the scope of the search beyond areas properly searched if the warrant were narrowly tailored.

Application of such criteria will assure that the courts remain focused on the ultimate question of whether, in fact, police misconduct would be deterred by the imposition of liability or the exclusion of evidence. It grants proper deference to a magistrate's initial determination of probable cause and

an officer's reasonable reliance on such a determination, allowing it to be disturbed only upon satisfaction of specific objective criteria that go directly to the heart of the question of "good faith" in seeking and obtaining the warrant.

Police officers seek warrants on a routine basis, and it is essential that they be provided with firm guidance on how and when such conduct will result in liability or the exclusion of evidence at trial. Absent such clear standards, officers may be tempted to forego reasonable leads in investigating a matter, or to forego obtaining a warrant in borderline cases and rely instead upon established exceptions to the warrant requirement. This is bad law and worse policy. It is essential that this Court grant review.

I. THE "SO LACKING IN INDICIA OF PROBABLE CAUSE" STANDARD WAS INTENDED TO SET A HIGH BAR FOR IMPOSING LIABILITY OR EXCLUDING EVIDENCE BASED UPON A POLICE OFFICER'S PROCURING A WARRANT SUBSEQUENTLY DETERMINED TO BE INVALID.

In a trio of cases, this Court has addressed the important and recurring issue of potential civil liability and exclusion of evidence in criminal cases arising from a police officer's having procured a warrant that is subsequently determined to be invalid. In each case, the Court has emphasized the need to strike a balance between deterring officers from engaging in deliberate misconduct and, at the same time,

encouraging officers to seek judicial intervention before effecting an arrest or search.

In *United States v. Leon*, 468 U.S. 897, the Court addressed the issue of whether evidence procured in violation of the Fourth Amendment by reason of an invalid warrant would nonetheless be admissible in a criminal proceeding. The Court held that so long as the officer procured or executed the warrant in objective good faith, the evidence would be admissible. *Id.* at 920-22.

The Court noted that it had expressed a "strong preference for warrants" because "'the detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.'" *Id*. at 913-14 (citations omitted). Moreover, because "[r]easonable minds frequently may differ on . . . whether a particular affidavit establishes probable cause, . . . the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Id.* at 914.

The Court reasoned further that the exclusionary rule is "designed to deter police misconduct" and should be applied "only in those unusual cases" where exclusion will further that purpose. *Id*. at 916-18. The Court emphasized that an officer ordinarily "cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient." *Id*.

at 921. Thus, an officer was entitled to rely on a magistrate's determination, and any evidence procured would be admissible, absent some showing that the officer's reliance was, in no way, "objectively reasonable." *Id*. at 920, 922 n.23.

The Court explained that under this standard, evidence would be suppressed in only the most extraordinary circumstances, where the officer's conduct or reliance on the warrant bespoke bad faith. For example, an officer's reliance on a warrant would be unreasonable, and the evidence subject to suppression, where the officer intentionally or recklessly submitted false information to the magistrate, or where the magistrate "wholly abandoned his judicial role" and served as part of the prosecution team. *Id*. at 923. Or, 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." *Id*. The Court also concluded that suppression would be justified in those instances where it would be untenable for an officer to believe probable cause might exist – that is, where the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id*. (citation omitted).

In *Malley v. Briggs*, 475 U.S. 335, the plaintiff sued police officers under 42 U.S.C. §1983 for having procured an arrest warrant without probable cause. Invoking *Leon*, and noting that qualified immunity turns "on the objective reasonableness" of the officers'

conduct, the Court held that qualified immunity should be denied "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id*. at 344-45.

The Court again emphasized that this was a high standard to meet – *i.e.,* that an officer could not be held liable simply because he or she was ultimately incorrect as to whether there was probable cause for arrest. The Court noted that it was not requiring "the police officer to assume a role even more skilled than the magistrate." *Id*. at 346 n.9. As the Court explained, since magistrates obviously are "more qualified than police officer[s]" to determine probable cause, "where a magistrate acts mistakenly in issuing the warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable." *Id*. The Court underscored that qualified immunity would be denied in only the most egregious cases and would afford protection "to all but the plainly incompetent or those who knowingly violate the law." *Id*. at 341.

In *Groh v. Ramirez*, 540 U.S. 551 (2004), the plaintiffs sued federal agents under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), alleging that the officers had executed a facially invalid warrant against their property. Specifically, although the affidavit and warrant application specified the items to be searched and seized in the plaintiff's residence – a stockpile of firearms – the warrant itself did not list the items. *Id*. at 554-55.

The Court held that the warrant was invalid on its face because it did not specify the evidence sought. *Id*. at 557. The Court also denied qualified immunity, noting that the law was clearly established as to what was required on the face of the warrant. *Id*. at 563-65.

The Court acknowledged that in *Malley* it suggested that something more than mere negligence by a police officer was required in order to impose liability on a police officer for executing a warrant issued by a magistrate. *Groh*, 540 U.S. at 565. The Court noted, however, that in *Leon* it had observed that a warrant that failed to particularize the place to be searched or the things to be seized was so facially deficient that an executing officer could not reasonably presume it to be valid. *Id*. at 565, *citing Leon*, 468 U.S. at 923.

Significantly, in dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded that since the warrant affidavit and application both specified the items to be seized, the omission from the warrant was nothing more than a clerical error and a reasonable "mistake of fact," given the numerous "serious responsibilities" an officer must fulfill in executing a search warrant for illegal weapons, including "difficult and important tasks" that "demand the officer's full attention in the heat of an ongoing and often dangerous criminal investigation." *Id*. at 567-68. As Justice Thomas, joined by Justice Scalia, similarly noted in dissent from the denial of qualified immunity, "[g]iven the sheer number of warrants prepared and executed by officers each year," including

"detailed" and sometimes "comprehensive" supporting documents, "it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors." *Id*. at 579.

The Court's decisions in *Leon*, *Malley* and *Groh* underscore the core principle that police officers should be encouraged to seek warrants, and in all but the most egregious cases a magistrate's determination should insulate an officer from liability and permit the admission of evidence even where a warrant is subsequently determined to be invalid. Those cases where qualified immunity is to be denied or evidence excluded are confined to the most egregious circumstances where the officer's conduct is "plainly incompetent" or he has "knowingly violate[d] the law." *Malley*, 475 U.S. at 341.

Yet, as we discuss, the "objective reasonableness" standard has generated confusion and applications inimical to its purposes. In particular, the Court's directive that qualified immunity should be denied or evidence suppressed where an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" is woefully open-ended, encouraging courts to adopt an "I know it when I see it" standard they cannot apply consistently. The resulting decisions deter officers not from misconduct, but from zealously performing their duties and from applying for warrants when they have probable cause to do so.

II. THE NINTH CIRCUIT'S MISAPPLICATION OF THE *MALLEY/LEON* STANDARD DEMONSTRATES THE NEED FOR CLARIFICATION FROM THIS COURT.

As noted, in *Malley* and *Leon*, the court emphasized that officers were to be shielded from liability and evidence admitted notwithstanding a warrant subsequently determined to be invalid, absent the most egregious transgression by a police officer. As *Malley* succinctly put it, qualified immunity will protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Accordingly, to say that an officer sought a warrant "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" is tantamount to saying that the officer's conduct was flatly incompetent or intentionally illegal. *Leon*, 468 U.S. at 923; *see Malley*, 475 U.S. at 344-45.

However, as the Ninth Circuit's decision here demonstrates, in practice the "so lacking in indicia of probable cause" standard has been stripped of any substance. It results in the imposition of liability where it stretches credibility to assert that the police officers were "incompetent" or "knowingly violate[d] the law."

The *en banc* majority held that the search warrant was invalid in that it allowed search and seizure of all firearms and not simply a sawed-off shotgun of the sort used in the attack. (App.24.) The court also found the warrant invalid insofar as it allowed a

search for evidence concerning gang affiliation because there was no indication that the assault was gang-related. (App.28-29.) Moreover, the majority found that the issue of probable cause was so clear that the officers were not entitled to immunity, *i.e.*, that the warrant was so lacking in indicia of probable cause that no reasonable officer should have attempted to procure it. (App.35-36, 38.)

In short, in the language of *Malley*, the court essentially found that the officers' actions were "incompetent" or "knowingly violate[d] the law." *Malley*, 475 U.S. at 341.

What is striking is that the *en banc* majority so holds, notwithstanding the fact that two of its colleagues disagreed with its resolution of the probable cause issue. (App.41, 73.) While it is doubtful that the *en banc* majority believes its colleagues to be incompetent or supporting a knowing violation of the law, that would be the plain implication if in fact the majority was applying the rigorous test for qualified immunity articulated by this Court in *Malley*. As a review of the dissents reveals, the probable cause issue was a close one, and the circumstances surrounding procurement of the warrant bespoke the officers' good faith.

Probable cause exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This is a "'practical, nontechnical conception'"

that permits law enforcement officers to formulate "common-sense conclusions about human behavior." *Id.* at 231-32 (citation omitted). Reviewing courts should pay "great deference" to a magistrate's determination of probable cause. *Id.* at 236.

As the dissent observed, the officers had probable cause to search for all firearms and firearm-related materials at plaintiffs' residence. The real object of the search and accompanying arrest warrant was Bowen, who Messerschmidt believed resided at the location. (App.41.) Bowen was reasonably considered armed and dangerous. He had recently threatened to kill his girlfriend, had attempted to do so by firing a sawed-off shotgun – which he apparently kept handy – at her in public, and was a member of a street gang, a group organized for criminal activity and known to use firearms illegally on people. (App.41-42.)

Messerschmidt's affidavit recounted his extensive experience investigating gang activity, including "concealment of weapon(s) used in [gang-related] assaults." (App.64 n.17.) Messerschmidt also knew Bowen had previous felony convictions and was a "third strike candidate" under California law. (App.8, 41-42.) Because of Bowen's dangerousness, the magistrate approved the warrant for night service, and the district court found such service justified. (App.41.)

Given the circumstances, the officers had probable cause to search for and seize all firearms in plaintiffs' residence. Bowen likely had other firearms

besides the sawed-off shotgun, kept them where he resided, and would use them on Kelly or the officers. California law allows issuance of a search warrant for items possessed "with the intent to use them as a means of committing a public offense," Cal. Penal Code §1524 (West 2000), and the warrant recited this authorization. (1ER 115.) Thus, the officers could legitimately seize all firearms Bowen might use to carry out his threat to kill Kelly.

Moreover, numerous laws render it criminal for felons to possess firearms. *E.g.*, Cal. Penal Code §12021(a)(1) (West 2009); 18 U.S.C. §922(g) (2006). Thus, there was at least a "fair probability" firearms at plaintiffs' residence would be "contraband or evidence of a crime." (App.42.) Significantly, other circuits have held a warrant to search for all firearms at a convicted felon's residence is not overbroad even if the alleged crime involved a specific weapon, because felons cannot lawfully possess firearms. *United States v. Campbell*, 256 F.3d 381, 389 (6th Cir. 2001); *United States v. Sanders*, 351 F.App'x 137, 139 (7th Cir. 2009).

Additionally, because "firearms are inherently dangerous," as the dissent explained, the officers' and residents' safety "requires that officers seeking the nighttime arrest of a dangerous felon be allowed to seize any firearm that they come across in their search for that individual or for evidence that is otherwise properly covered by the search warrant. Indeed, securing any weapons found during the

search is justified to protect the officers executing the warrant from harm while doing so." (App.42-43.)

The majority notes the affidavit did not explicitly say Bowen was a convicted felon and a "third strike" candidate, although Messerschmidt undisputedly knew these facts when he sought the warrant. (App.8, 25 & n.7.) But these facts could reasonably be inferred from the affidavit's other facts – specifically, the nature of the crime, the type of weapon used, and Bowen's gang membership.[2] Even had the officers not known Bowen was a felon and "third strike" candidate, the affidavit's other facts are sufficient to support the magistrate's determination that probable cause existed to search for firearms and firearm-related materials.

More important, for qualified immunity purposes, a reasonable officer could *believe* the above facts – with or without the statement that Bowen was a felon and "third strike" candidate – established probable cause, and submit any doubt to a magistrate. Indeed, assuming the warrant was deficient because the affidavit did not say Bowen was a felon and "third strike" candidate, this omission was a reasonable "mistake of fact" to which qualified immunity should apply. *See Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting). The affidavit was not "bare-bones" and

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[2] Moreover, the affidavit stated Messerschmidt knew Bowen was a Mona Park Crip gang member based partly on information in "the cal-gang database." (1ER 124; App.41 n.1.)

conclusory. *See Leon*, 468 U.S. at 915; *Gates*, 462 U.S. at 239. Rather, it detailed Bowen's assault on Kelly, Messerschmidt's background search on Bowen, Messerschmidt's experience with gangs and their use of weapons, and why night service was warranted. (1ER 119-24.) In the course of investigating Bowen's crime and performing the numerous tasks surrounding obtaining and executing the warrant, Messerschmidt could reasonably fail to recognize he had omitted this information. *See Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting), 579 (Thomas, J., dissenting).

As to the search for gang-related items, the dissent explains that when Messerschmidt prepared his affidavit, he knew Bowen had fired a sawed-off shotgun at a person in public, was a felon, and was a gang member. (App.63.) The affidavit recounted Messerschmidt's extensive training and experience in gang-related crimes, including "the manners in which gang-related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (App.64 n.17; 1ER 120.) When he applied for the warrant, he did not know Bowen's assault on Kelly was not gang-related; given what he knew, he could reasonably have believed otherwise. (App.64.) Moreover, as Judge Silverman explained in his dissent, "[h]ad Mona Park Crip paraphernalia been found in close proximity to guns during the search of [plaintiffs'] house – say, a gun concealed in Mona Park Crip clothing – such a discovery would have tended to prove that the guns were Bowen's"

and not plaintiffs'. (App.75.) In short, even if ultimately these facts do not establish probable cause, Messerschmidt could reasonably have thought there might be sufficient probable cause to submit the issue to his superiors, a deputy district attorney, and eventually a magistrate. (App.64.)

As this Court made clear in *Malley* and *Leon*, this is precisely what we want officers to do. Allowing officers to reasonably rely upon a magistrate's determination of probable cause encourages officers to procure warrants in lieu of effecting warrantless searches and arrests. *Malley*, 475 U.S. at 346 n.9, 353-54 (Powell, J., concurring & dissenting); *Leon*, 468 U.S. at 913-14. The temptation to forego a magistrate's determination of probable cause and to rely instead upon borderline exigent circumstances to justify a warrantless search would be particularly strong in a case such as this one involving an assault with a deadly weapon by a known felon and gang member who presents an imminent danger to the public.

Here, petitioners properly sought judicial approval for their actions. There is no accusation that they deliberately omitted or manufactured any information in order to procure the warrant. Nor is there any indication they would have reason to believe that the magistrate was acting in other than an impartial manner after careful reflection.

As the dissent noted, certainly no case law would have put the officers on notice that their conduct was improper, let alone so improper as to render them "incompetent" or knowingly violating the law. Two prior Ninth Circuit decisions denying qualified immunity involved facially invalid warrants, not a facially valid warrant of the sort at issue here. (App.65-67 [discussing *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), and *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989)]; *see also* App.56-57.) Moreover, the Ninth Circuit had applied qualified immunity in *Ortiz v. Van Auken*, 887 F.2d 1366, 1367-68 (9th Cir. 1989), where, as here, a deputy district attorney as well as the magistrate reviewed the warrant and it was not facially overbroad. *Id.* at 1370-71. (App.55-56 & n.11.)

As this Court commented in *Gates*, probable cause deals not with "hard certainties," but "probabilities." 462 U.S. at 231. Law enforcement officers are expected to "formulate[ ] certain common-sense conclusions about human behavior," and the search for evidence "must be seen . . . not in terms of library analysis by scholars, but as understood by those versed in . . . law enforcement." *Id.* at 232. Accordingly, probable cause depends on the "totality of the circumstances" and "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner." *Id.* at 231, 233, 236 (citation omitted). Similarly, application of qualified immunity turns on whether an officer's conduct was objectively reasonable, *Malley*, 475 U.S.

at 344 – considered, as the dissents in *Groh* noted, in the context of an officer's day-to-day realities in investigating crime. *Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting), 578-79 (Thomas, J., dissenting).

The majority reads the affidavit with the mindset of legal technicians or lawyers preparing a case for trial, not an officer conducting a criminal investigation. The search for evidence is often circuitous, based on inferences drawn from common sense and an officer's law enforcement experience. Both the evidence sought and the evidence supporting the search may be circumstantial rather than direct, and officers may seek evidence ultimately inadmissible or irrelevant at trial, because it may lead to other, admissible evidence. Considering this process, it is entirely reasonable for an officer to believe a gang member who had fired a sawed-off shotgun at his girlfriend in public and threatened to kill her might have other firearms and keep them where he resided, the assault might have been gang-related, and a magistrate might constitutionally authorize the search for such evidence.

The Ninth Circuit's decision directly undermines both law enforcement and the Fourth Amendment by effectively discouraging recourse to the warrant procedure. As the dissent noted, "the majority's parsing of the search warrant will lead to uncertainty and needless litigation" by creating "considerable incentive to challenge all but the narrowest warrants." (App.70-71.) This "parsing" is only made possible

by virtue of the Ninth Circuit's loose standard for determining when a warrant is "so lacking in indicia of probable cause" that no reasonable officer could rely on it.

It is essential that this Court grant review to clarify the *Leon*/*Malley* standards and assure that courts make a determination of qualified immunity – and in the context of criminal cases, exclusion of evidence under *Leon* – with due consideration of the practical realities of law enforcement and the ultimate goal of deterring gross misconduct, without discouraging reasonable investigative practices.

III. REVIEW IS NECESSARY TO CLARIFY THE *MALLEY*/*LEON* STANDARDS BECAUSE FEDERAL AND STATE COURTS CANNOT CONSISTENTLY APPLY THE "SO LACKING IN INDICIA OF PROBABLE CAUSE" TEST.

As noted, the standard for excluding evidence under *Leon* or denying qualified immunity under *Malley* in cases where a police officer procures a warrant from a magistrate is a very high one – the officer's action in procuring a warrant must essentially be "incompetent" or in knowing violation of the law. Thus, evidence should be excluded, and immunity denied, only in the clearest cases. If a legal question is even remotely debatable, it would seem to fall outside the *Leon*/*Malley* standard.

Nonetheless, review of appellate decisions from both federal and state courts applying the "so lacking in indicia of probable cause" standard, in the context of both civil rights and criminal cases, reveals a large and disturbing number of cases where immunity is denied or evidence is excluded notwithstanding a strong disagreement among members of the court as to whether a constitutional violation occurred at all. While it is certainly true that reasonable minds may differ on a point of law, and even appellate judges can make the occasional egregious error, both the number and nature of cases in which there have been dissenting opinions on the core constitutional issue and the objective reasonableness of officers' actions strongly suggest that the *Malley*/*Leon* standard is not being applied with the rigor which this Court intended. Qualified immunity is being denied, and evidence is being excluded, in a large number of cases in which, notwithstanding the majority's incantation of the *Malley* standard, there is serious dispute as to whether a constitutional violation occurred in the first instance.

For example, in *Poolaw v. Marcantel*, 565 F.3d 721, 730-32 (10th Cir. 2009), the Tenth Circuit denied qualified immunity for a warrant to search a homicide suspect's in-laws' property. Although the majority held that the warrant was so lacking in indicia of probable cause that no reasonable officer would have relied upon it, the dissent found ample grounds for probable cause, noting that the officers could reasonably presume the suspect would seek assistance from

his pregnant wife, who had stayed at her parents' property the night of the murder and had behaved peculiarly the next morning, indicating she had contact with the suspect. *Id*. at 739-40 & n.1, 741. The dissent explained that at the very least qualified immunity should apply, noting that the affidavit was not "bare-bones," the officers followed proper procedures, and there was no factually on-point case law. *Id*. at 744-45, 747.

Similarly, in *Ruby v. Horner*, 39 F.App'x 284 (6th Cir. 2002), the Sixth Circuit denied qualified immunity over a strong dissent. There, the suspect's residence was in the same building as a restaurant owned by his brother, the plaintiff. *Id*. at 285. The court held that there was no probable cause to search the restaurant, and that no reasonable officer could have believed so based upon the facts. *Id*. at 287. The dissent noted, however, that there were ample facts to support a reasonable police officer's belief in probable cause. Specifically, the dissent observed that the officers had received multiple tips that the suspect was selling drugs from the restaurant, the suspect had ready access to the restaurant, and the police obtained the warrant only after the suspect was arrested with cocaine. *Id*. at 288.

Given the ubiquitous nature of suppression proceedings, it is not surprising that departure from the *Malley/Leon* standard is particularly pronounced in criminal appeals. For example, in *United States v. Zimmerman*, 277 F.3d 426, 429, 431 (3d Cir. 2002), officers obtained a warrant to search for adult and

child pornography, including searching computer equipment, at the residence of a high school coach who allegedly molested students. The Third Circuit suppressed child pornography seized during the search. *Id.* at 431-34.

Then-Judge Alito dissented, concluding probable cause supported the warrant. *Id*. at 439-40. The affidavit stated defendant had repeatedly molested and shown students a pornographic video clip, suggesting the video had been downloaded. Moreover, defendant's use of pornography in his extended course of conduct, including at home, suggested he possessed similar materials there; and the affidavit contained information that pedophiles often collect child pornography and use adult pornography in victimizing minors. *Id*. at 440.

Judge Alito further applied the good-faith exception, commenting "there is no bright line between fresh and stale probable cause," especially given the "'protracted and continuous'" criminal activity alleged. *Id*. (citation omitted). Moreover, the magistrate and the district court had also found probable cause. *Id*.

Numerous other federal cases suppressing evidence have produced dissents on the good-faith exception. *See*:

- *United States v. McPhearson*, 469 F.3d 518, 524, 527-28 (6th Cir. 2006) (majority holds that warrant failed to establish nexus between place to be searched

and evidence sought; dissent concluded good-faith exception should apply because affidavit stated that police arrested defendant leaving his residence and found 6 grams of cocaine in his pocket; "It is a reasonable inference that at least some people who carry crack cocaine around with them in their homes would leave some of the contraband . . . elsewhere in their homes," and "only a police officer with extraordinary legal training would have detected any potential deficiencies in the affidavit because it failed to articulate this inference");

- *United States v. Laughton*, 409 F.3d 744, 746, 753 (6th Cir. 2005) (similar holding; dissent applied good-faith exception because warrant listed address to be searched, and statements that defendant kept drugs in his "residence" could be linked to that address; not to do so was "an unwarranted hypertechnicality"; also, affidavit went well beyond "bare-bones" and a county prosecutor approved it);

- *United States v. Helton*, 314 F.3d 812, 815, 825-26 (6th Cir. 2003) (dissent reasoned that 27-page affidavit contained information about telephone calls and "stacks" of money in house; informant had been told the money belonged to a drug trafficker and defendant's girlfriend was storing it because she had no criminal record; " 'line-by-line scrutiny [is] . . . inappropriate in reviewing [a] magistrate's

decisions'" and "'a hypertechnical critique of warrants would only, in the end, encourage warrantless searches'" (citations omitted));

- *United States v. Hove*, 848 F.2d 137, 139-41 (9th Cir. 1988) (warrant to search suspect's father's residence; dissent reasoned officer could conclude defendant resided there because 5-page affidavit indicated she might have been residing in the area, and affidavit linked bombing incident to automobiles to be searched at father's address; also, officer had seen toys and defendant's car at the father's address, connecting the residence to defendant, and the officer's "misconduct" in "fail[ing] to catch the stenographer's error in transcribing" these facts into the affidavit was "not the type of flagrant misconduct meant to be deterred under the exclusionary rule");

- *United States v. Luong*, 470 F.3d 898, 901, 904-05 (9th Cir. 2006) (refusing to consider facts outside affidavit to show that officers acted in good faith; dissent found good-faith exception applicable because agent orally gave issuing judge additional facts to support "colorable" probable cause determination).

State appellate decisions suppressing evidence under the "so lacking in probable cause" standard from *Malley* and *Leon* have also spawned numerous

dissents, on both probable cause and the good-faith exception. *See*:

- *People v. Gutierrez*, 222 P.3d 925, 949-50, 952 (Colo. 2009) (dissent concluded search warrant established probable cause to search tax preparer's office for identity-theft evidence because tax preparer admitted she helped taxpayers file tax returns under false tax identification numbers);
- *People v. Miller*, 75 P.3d 1108, 1117-19 (Colo. 2003) (dissent concluded affidavit established probable cause and was not based on "stale" information, because it alleged ongoing criminal activity; "[h]aving a good faith exception serves little purpose if acting in good faith means nothing more than accurately predicting the ultimate conclusion of the courts");
- *People v. Leftwich*, 869 P.2d 1260, 1278-79 (Colo. 1994) (dissent found probable cause supported search warrant because police corroborated informant's non-criminal information, and found good-faith exception applicable because officer's supervisor, legal advisor, and deputy district attorney approved affidavit);
- *State v. Gales*, 757 N.E.2d 390, 398-99 (Ohio App. 2001) (dissent was "at a loss to understand" how the majority could conclude a search warrant affidavit lacked probable cause; "the majority opinion would . . . seem to require that

magistrates . . . disregard circumstantial evidence in determining . . . probable cause");

- *State v. Dalpiaz*, 783 N.E.2d 976, 983-84, 988-90 (Ohio App. 2002) (dissent concluded search warrants for illegal drugs were not overbroad where defendant was suspected of growing marijuana; "a witness does not have to see someone bite off another's ear to testify against the biter. It is sufficient that the witness merely sees the biter spit out the ear to give credibility to the witness's testimony");
- *State v. Young*, 765 N.E.2d 938, 942-43, 947, 950-51 (Ohio App. 2001) (dissent found probable cause and applied good-faith exception where officers obtained search warrant for drugs and related contraband in defendant's residence after observing a marijuana baggie and hemostat there; warrant was not facially deficient, there was "no police illegality to deter," and since the majority found probable cause to search for marijuana and related paraphernalia, the warrant's purported overbreadth did not expand the scope of the search);
- *Kelley v. State*, 269 S.W.3d 326, 333-37 (Ark. 2007) (dissent applied good-faith exception to nighttime search warrant because affidavit contained facts that could support a nighttime search, and

officer gave issuing judge additional facts supporting nighttime search);

- *State v. Hollis*, 649 N.E.2d 11, 17-18 (Ohio App. 1994) (dissent applied good-faith exception because affidavit described long-standing history of illicit sexual activities, recent sale of material officer believed was "obscene" at defendant's residence, and a 5-year investigation; "If [the issuing] judge did not recognize the 'staleness' or the necessity for a judicial determination of 'obscenity,' I do not find it surprising that the officers . . . did not have a greater degree of legal perspicuity. . . .");
- *Agurs v. State*, 998 A.2d 868, 895, 898 (Md. 2010) (dissent applied good-faith exception because affidavit was not "bare-bones" and stated facts "sufficient to allow reasonable officers . . . to believe that there was a fair probability that [defendant's] house contained evidence of his suspected drug activity");
- *State v. Belmontes*, 615 N.W.2d 634, 644-46 (S.D. 2000) (dissent applied good-faith exception because affidavit was not "bare-bones," and officers had reason to believe informant was reliable although they failed to include that information in the affidavit; the majority's decision "requires that a law enforcement officer . . . possess a more sophisticated understanding of this area of the law than is

> required of a judge. . . . Rather than promote the use of warrants . . . [the majority's reasoning] invites abandonment of applications for a search warrant by law enforcement in the more promising hope that a warrant exception may come to the officer's rescue");

- *Commonwealth v. Shelton*, 766 S.W.2d 628, 630-31 (Ky. 1989) (dissent applied good-faith exception because officers relied on a facially valid search warrant, though issued by a commissioner lacking jurisdiction).

Again, while it is certainly true that reasonable judges may differ on points of law and dissents are to be expected, the number and nature of dissents in cases involving the *Malley*/*Leon* standard is troubling. If, as this Court has repeatedly held, police officers may rely upon a magistrate's determination of probable cause absent the most egregious circumstances, *i.e.*, where the officer is incompetent or deliberately violating the law, then it is disturbing, to say the least, that numerous appellate jurists, as demonstrated by their dissents, are similarly "incompetent" or willing to "deliberately violate the law."

That such a proposition is preposterous underscores the wide gap between the *Malley*/*Leon* standards as announced by this Court, and application of those standards in practice. It is vital that this Court grant review to further clarify the circumstances in which a police officer will be held liable, or evidence

will be excluded, based upon having procured a warrant subsequently determined to be invalid.

IV. REVIEW IS NECESSARY TO CLARIFY OR RECONSIDER THE "SO LACKING IN INDICIA" STANDARD AND TO PROVIDE SPECIFIC GUIDELINES FOR RESOLVING QUALIFIED IMMUNITY AND SUPPRESSION ISSUES.

As explained above, the Ninth Circuit's decision in this case, as well as the startling number of appellate decisions with sharp dissents concerning application of the *Malley*/*Leon* standard, underscore the need for this Court to revisit and clarify the circumstances under which evidence will be excluded or liability imposed when an officer procures a warrant that is subsequently determined to be invalid.

The "so lacking in indicia of probable cause" standard is, at this point, little more than a talisman invoked to explain the ultimate conclusion that an officer is not entitled to qualified immunity or evidence must be suppressed, untethered to any specific standard. While paying lip service to the standard qualified immunity inquiry as to whether the law was "clearly established," as this case illustrates, immunity is being rejected in circumstances where it can hardly be said that the officers were "incompetent" or essentially acting deliberately in violation of the law based upon what they should have believed the legal standard to be. The fact that two circuit judges themselves would have found

probable cause for the search should cause any court to pause before proclaiming that the law is "clearly established" so that any reasonable officer would know that the warrant was so "lacking in indicia of probable cause."

As this Court emphasized in *Leon* and *Malley*, a magistrate's determination of probable cause is entitled to deference, and an officer's reliance on that determination should not be found unreasonable absent the clearest cases of misconduct, where exclusion of evidence or denial of immunity would deter future misconduct. It most assuredly is not proper where a warrant fails because of a mere technicality or there is a serious debate as to whether probable cause existed at all.

Petitioners submit that the Court should grant review for purposes of reconsidering, or at least clarifying, what it means for a warrant to be "so lacking in indicia of probable cause" that no reasonable law enforcement officer could rely upon it. Such a standard must surely be more than a simple failure by the officer to discern or resolve subtle points of law. Indeed, given the court's statement in *Malley* that immunity should be denied only where the officer is plainly incompetent or knowingly violates the law, it may well be that liability is warranted only where it can be said that the officer's conduct was completely reckless, *i.e.*, without any legal or logical basis to seek the warrant in the first instance.

In addition, the Court could make it clear that the lower courts are required to consider the totality of circumstances surrounding procurement of the warrant in determining whether an officer's conduct is so egregious as to fall outside the scope of qualified immunity or justify exclusion of evidence. Actions which bespeak good faith and reasonable conduct by the officer, such as submission of a detailed (as opposed to "bare-bones") affidavit and application, seeking review by superiors and/or an attorney prior to the submission to the magistrate, or submission in such a manner as to allow proper reflection by the magistrate, are the proper touchstones for determining whether qualified immunity applies or evidence should be excluded.

Pragmatic factors should also be considered. These might include whether probable cause existed for the search, even if officers may have inadvertently omitted facts establishing probable cause from an application or affidavit. Or whether a warrant, even if overbroad, did not expand the scope of the search beyond areas properly searched if the warrant had been narrowly tailored.

Requiring courts to specifically consider these factors will allow imposition of liability and exclusion of evidence in the most appropriate cases where an officer has misled the magistrate through providing false or misleading information, the judicial officer has abdicated his or her independent role in reviewing evidence, and at bottom, there is no meaningful

judicial evaluation of probable cause in the first instance. At the same time, application of such standards will foreclose liability in cases such as this one, where, as the dissenting judges noted, the police officers did everything they reasonably could to procure a valid warrant to search for evidence and a suspect in a serious criminal matter.

If, as this Court stated in *Malley* and *Leon*, qualified immunity is unavailable or evidence should be excluded in a criminal proceeding only where an officer's conduct in relying on a warrant is so egregious that he can be said to be "incompetent" or "deliberately violat[ing] the law," it is essential that this Court grant review to halt the wholesale departure from this rigorous standard.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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