No. 20-5285

IN THE

Supreme Court of the United States

MELVIN LEE JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Melvin Lee Jones submits this supplemental brief under this Court's Rule 15.8 to bring to the Court's attention a new decision supporting his petition for certiorari.

The question presented in this case is whether the odor of burning marijuana emanating from a home, by itself and automatically, provides sufficient probable cause to search the entire home for more drugs, including in containers that could not be the source of the odor. The state and federal courts are deeply divided over that issue. In the decision below, the Fourth Circuit took the side of the split applying a "some-means-more" assumption by holding, without considering any other evidence, that an officer's detection of the odor of marijuana *alone* permitted the officer to search Mr. Jones's entire house. Other courts have rejected this rigid rule and have instead applied a totality-of-the-circumstances test, holding that the presence or odor of some drugs does not automatically mean that more are located nearby. *See* Pet. 6-13.

The Court of Appeals of Maryland recently addressed this issue in *Lewis v. State*, ___ A.3d ___, 2020 WL 4282177 (Md. 2020).[1] The court held that "the odor of marijuana, without more, does not provide law enforcement officers with the requisite probable cause to arrest and perform a warrantless search of that person incident to the arrest." *Id.*, 2020 WL 4282177, at *1. In the court's words, "[t]he odor of marijuana alone does not indicate the quantity, *if any*, of marijuana in someone's possession." *Id.* at *10 (emphasis added).

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[1] The *Lewis* decision issued four days before Mr. Jones filed his petition, but counsel did not discover it until just after the filing.

In *Lewis*, a police officer was investigating a tip about a possibly armed man in a convenience store. Inside the store, Mr. Lewis walked directly in front of the officer, and the officer smelled marijuana coming from Lewis's breath and body. *Id.* at *2. The officer then seized and handcuffed Mr. Lewis and searched his pockets and a bag he was carrying. *Id.*

The *Lewis* court ruled that the odor of marijuana, standing alone, was insufficient to justify an arrest of Mr. Lewis or a full-blown search of his person. Although possession of small quantities of marijuana has been decriminalized in Maryland, the drug remains contraband (subject to at least a civil infraction). But the smell of marijuana by itself did not allow police to infer that more marijuana—that is, a criminal amount—was present. *Id.* at *7-*9.

The court quoted the concern expressed by an intermediate-court judge that

> if the mere odor of burnt marijuana on a citizen's breath gives the police probable cause to make an arrest, it would seem to follow that the odor of marijuana smoke on a person's clothes or hair would give probable cause as well. If so, it is not difficult to imagine scenarios in which police officers would have probable cause to arrest and search someone whose only exposure to marijuana is from second-hand smoke—e.g., someone who was standing inside a bus enclosure in the rain while others smoked marijuana; someone whose family members or housemates smoke marijuana; someone who borrowed a piece of clothing or outerwear from an acquaintance who smokes marijuana; someone who just came from a concert at which members of the audience were smoking marijuana; etc. In fact, the officers would have probable cause to arrest and search someone who got off a bus or subway train in Maryland after smoking marijuana in the District of Columbia, where the private use and possession of up to two ounces has been legalized (and not merely decriminalized).

Id. at *8 (alteration, emphasis, and citation omitted). In addition, the court cautioned that "there is no way to challenge or verify what the officer smelled, no way to test whether a person actually smelled of marijuana, and no way to control for the fully legal and otherwise non-criminal or second-hand ways someone could come to smell like marijuana." *Id.* at *9 (alterations, quotation, and citation omitted).

Lewis explains why the Fourth Circuit was wrong to approve of a police officer making the illogical leap from the mere odor of marijuana to reason to search Mr. Jones's entire home for drugs and weapons. *See* Pet. 15-18. The *Lewis* decision deepens the existing split of authority over whether the odor of drugs alone creates the inference that more drugs will be found near the smell.

Worse, though, is that *Lewis* creates a split between a circuit court of appeals and a state high court within that circuit. The split already satisfied this Court's criteria for granting certiorari. S. Ct. R. 10. But the division between Mr. Jones's case and *Lewis* presents the intolerable situation where citizens and law enforcement are subject to two opposing interpretations of the Fourth Amendment, and a citizen's freedom could depend on whether he is charged in state or federal court.

This Court has consistently expressed concern over such a "double standard" if state and federal courts in the same location had different governing rules. *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961). And the Court has often granted certiorari to resolve conflicts like this. *E.g.*, *Herring v. United States*, 555 U.S. 135, 139 (2009) (noting split between Eleventh Circuit and Florida and Georgia courts); *Florida v. White*, 526 U.S. 559, 563 (1999) (noting split between Eleventh Circuit and Florida

Supreme Court); *Hagen v. Utah*, 510 U.S. 399, 409 (1994) (noting split between Tenth Circuit and Utah Supreme Court); *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985) (noting split between Eleventh Circuit and Alabama Supreme Court); *Lakeside v. Oregon*, 435 U.S. 333, 336 n.3 (1978) (noting split between, inter alia, Seventh Circuit and Indiana Supreme Court).

The *Lewis* decision strengthens Mr. Jones's argument that this Court's review is necessary. The Court should not let the split persist any longer. The Court should grant Mr. Jones's petition and reverse the Fourth Circuit's judgment.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

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