No. 20-5285

IN THE SUPREME COURT OF THE UNITED STATES

MELVIN LEE JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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

# BRIEF FOR THE UNITED STATES IN OPPOSITION


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# QUESTION PRESENTED

Whether the lower courts erred in determining that probable cause supported the scope of the warrant that officers obtained to search petitioner’s residence.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 952 F.3d 153. The opinion of the district court (9a-53a) is not published in the federal supplement but is available at 2018 WL 935396.

## JURISDICTION

The judgment of the court of appeals was entered on March 3, 2020. The petition for a writ of certiorari was filed on July 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1; Pet. App. 5a. He was sentenced to 54 months of imprisonment. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. In May 2016, local police in Richmond, Virginia received an anonymous tip that petitioner was selling crack cocaine and marijuana from his residence. Pet. App. 3a. The tipster stated that he had personally observed petitioner both sell and cook narcotics. Ibid. He further stated that petitioner kept his cooking utensils in a safe in his closet, stored drugs in various places throughout his residence, and kept a firearm somewhere on the premises. Id. at 3a-4a.

On August 24, 2016, Officer Jonathan Myers and two other officers went to petitioner's residence for a "knock and talk" to investigate the tip. Pet. App. 4a. Officer Myers knocked on the door. Ibid. When petitioner opened the door, Officer Myers detected a "strong odor of marijuana smoke" coming from inside the house. Ibid. Officer Myers immediately arrested petitioner based on the marijuana odor and seated him on a chair on the front porch. Ibid.

Petitioner indicated that his niece and nephew were in the house, and the officers called them outside. Pet. App. 4a. Officer Myers and another officer then entered the residence and performed a protective sweep to ensure no one else was inside. Ibid. During the sweep, Officer Myers observed a "still-smoldering marijuana cigarette sitting on top of the trash in an open trash can in the kitchen." Ibid.

Officer Myers asked for consent to search the residence, but petitioner refused. Pet. App. 4a. Officer Myers then left the house to apply for a search warrant, while the other officers remained with petitioner. Ibid. Officer Myers sought a warrant for the offense of marijuana possession. Ibid. His affidavit explained that he and other officers had traveled to petitioner's residence to investigate the anonymous tip; that he had detected a strong odor of marijuana when petitioner opened the door; that petitioner had been detained; and that Officer Myers had observed a burning marijuana cigarette upon conducting a protective sweep. Id. at 4a, 18a.

Based on the affidavit, a magistrate issued a warrant for the search of petitioner's residence, including "any safes or locked boxes that could aid in the hiding of illegal narcotics." Pet. App. 4a (citation omitted). Officer Myers and the other officers then executed the warrant. Id. at 5a. They found marijuana, crack

cocaine, and drug paraphernalia, as well as a handgun in a safe in petitioner's bedroom closet. Ibid.

2. A federal grand jury indicted petitioner for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 5a. Petitioner filed a pretrial motion to suppress the firearm on the theory (as relevant here) that the warrant had been overbroad. Ibid. He contended that the odor of marijuana provided probable cause to search for the immediate source of the odor -- namely, the cigarette in the trash can -- and not "safes [and] locked boxes." Ibid. (brackets in original).

The district court denied the motion. Pet. App. 9a-53a. The court took the view that the protective sweep was unreasonable under the Fourth Amendment, and that evidence of the burning cigarette accordingly could not be considered in assessing the validity of the warrant. Id. at 33a. But it found that "the totality of the circumstances presented in the 'untainted portion of the affidavit'" -- including both the smell of marijuana and the tip, which was corroborated by the officers' observations upon arriving at petitioner's residence -- had provided probable cause for the warrant. Id. at 34a-35a (citation omitted); see id. at 21a, 23a. The court observed that because the tip "indicated that

[petitioner] kept drug cooking utensils in a safe in his closet," "the officers undoubtedly had probable cause to search the safe." Id. at 39a-40a. And it rejected petitioner's "novel theory * * * that the officers had probable cause to search only for actively burning marijuana," explaining that the tip "gave the officers probable cause to believe that there was fresh, unburnt marijuana in the house because the complaint claimed that [petitioner] stored drugs throughout the house." Id. at 41a.

Following the denial of his motion to suppress, petitioner entered a conditional guilty plea to the charge of possessing a firearm by a felon, reserving his right to appeal the denial of the suppression motion. Pet. App. 5a. The government agreed to dismiss the distribution count. Ibid. The district court sentenced petitioner to 54 months in prison. Ibid.

3. The court of appeals affirmed. Pet. App. 1a-8a. It emphasized that in determining whether to issue a warrant, a judicial officer must "'make a practical, common-sense' determination" of whether the evidence offered in the warrant application "establish[es] 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" Id. at 6a (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). The court also observed that a reviewing court must accord "great deference" to the magistrate's determination that probable cause

existed, and must accordingly limit its review to whether the magistrate had a "substantial basis" for its determination. Ibid. (quoting Gates, 462 U.S. at 238-239). Applying those principles, the court found sufficient support for the warrant in this case, and rejected petitioner's argument that the search should have been limited to the burning cigarette in the trash can. Ibid.

The court of appeals noted that "as soon as [petitioner] opened the front door, [Officer Myers] 'could smell a strong odor coming from inside the home' and * * * he believed the odor to be that of marijuana based on his 'training and experience,'" thus providing "evidence that [petitioner], who was the only adult in the house at the time, had been smoking marijuana in the single-family residence where he lived when the officers knocked on the front door." Pet. App. 6a-7a. And the court reasoned that under the circumstances, "[c]ommon sense indicates that it was fairly likely that the marijuana [petitioner] was smoking was not the only marijuana in the house," such that "a reasonable officer would be entitled to infer that it was most likely but a single portion of a larger quantity that was stored somewhere in the house." Id. at 7a. The court further noted it would "be reasonable to conclude that there was a fair probability that the house contained evidence of the source of the marijuana or the scope of [petitioner's] possession violation," and that, "of course, common sense would

also indicate that such evidence is often stored out of sight." Ibid. It accordingly found that "because the warrant properly authorized a search of [petitioner's] house, including any safes and locked boxes, the officers legally discovered the handgun that [petitioner] kept in the safe in his bedroom closet." Id. at 7a-8a.

ARGUMENT

Petitioner renews his contention (Pet. 15-18) that the search warrant was overbroad in violation of the Fourth Amendment, and further contends (Pet. 4-14) that the lower courts are in conflict over the question presented. The court of appeals' decision is correct and does not conflict with the decision of any other court of appeals or state supreme court. In any event, this case would be a poor vehicle for deciding the question presented because the decision below can be sustained on multiple alternative grounds. Further review is unwarranted.

1. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. Probable cause "is 'a fluid concept' that is 'not readily, or even usefully, reduced to a neat set of legal rules.'" District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)). Instead, "probable cause 'deals with probabilities and depends on the totality of the circumstances,'" ibid. (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)),

including "the factual and practical considerations of everyday life," Pringle, 540 U.S. at 370 (citations omitted). Accordingly, a probable-cause determination "does not deal with hard certainties," and evidence "must be seen and weighed * * * as understood by those versed in the field of law enforcement," who are entitled to "formulate[] certain common-sense conclusions about human behavior." Gates, 462 U.S. at 231-232 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

The probable-cause standard "is not a high bar." Wesby, 138 S. Ct. at 586 (quoting Kaley v. United States, 571 U.S. 320, 338 (2014)). To the contrary, probable cause "requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act." Kaley, 571 U.S. at 338 (brackets, citations, and internal quotation marks omitted). It "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands." Gerstein v. Pugh, 420 U.S. 103, 121 (1975); see also Gates, 462 U.S. at 235.

In the context of a search warrant, the probable-cause standard requires a magistrate judge to conduct a "totality-of-the-circumstances analysis" to determine whether the warrant application establishes a "fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238. In making that determination, the magistrate

judge may draw "reasonable inferences" from the evidence described in the supporting affidavit. Id. at 240. And a reviewing court should uphold the magistrate judge's determination so long as the magistrate judge had a "substantial basis" for finding probable cause. Id. at 242 (citation omitted).

Applying those "well settled" principles and considering the totality of the circumstances, the court of appeals correctly determined that the magistrate judge had a substantial basis for finding probable cause to search petitioner's house. Pet. App. 6a. The court noted that "as soon as [petitioner] opened the front door, [Officer Myers] 'could smell a strong odor coming from inside the home' and * * * believed the odor to be that of marijuana based on his 'training and experience.'" Ibid. And it further observed that petitioner "was the only adult in" the "single-family residence" "at the time." Id. at 7a.

The court of appeals correctly determined that in those circumstances, it was "reasonable to conclude that there was a fair probability that the house contained evidence of the source of the marijuana or the scope of [petitioner's] possession violation." Pet. App. 7a; see Wesby, 138 S. Ct. at 587 n.5 ("[A] reasonable officer could infer, based on the smell, that marijuana had been used in the house."). And, "of course, common sense would also indicate that such evidence is often stored out of sight." Pet. App. 7a; see United States v. Ross, 456 U.S. 798, 820 (1982)

("Contraband goods rarely are strewn across the trunk or floor of a car[,] since by their very nature such goods must be withheld from public view.").

Petitioner's contrary arguments lack merit. His suggestion (Pet. 16) that the warrant should have been limited to the cigarette in the kitchen cannot be squared with his argument -- which the district court adopted, see Pet. App. 33a -- that the evidence from the protective sweep (including the cigarette) could not be considered in assessing the validity of the warrant. In any event, the magistrate who issued the warrant could have permissibly concluded, based on the strong odor detected by the officers, that the house likely contained more than a single marijuana cigarette and that petitioner stored drugs out of sight. Petitioner offers no support for his categorical assertion (Pet. 16) that closed containers necessarily block the odor of marijuana. And a rule under which a suspect can vitiate probable cause simply by lighting, extinguishing, and tossing a single marijuana cigarette somewhere in plain view would make little sense. Petitioner likewise errs in suggesting (Pet. 15) that even if the warrant was valid, the officers were required to terminate the search upon seizing the cigarette.

2. Petitioner incorrectly asserts (Pet. 4-14) that the decision below conflicts with the decisions of other courts of appeals and state supreme courts. None of the cases petitioner

cites involves facts similar to those presented here, and each is meaningfully different from the decision below.

In United States v. McPhearson, 469 F.3d 518 (2006), the Sixth Circuit concluded only that the seizure of cocaine from the defendant's person outside his residence did not provide probable cause for a warrant to search inside his residence. Id. at 524-525. Here, in contrast, the officers relied on the odor of marijuana originating from inside petitioner's residence in obtaining the warrant. This case therefore reflects "the requisite nexus between the place to be searched and the evidence to be sought" that the court found lacking in McPhearson. Id. at 524.

In United States v. Underwood, 725 F.3d 1076 (2013), the Ninth Circuit concluded that "the personal-use amount of marijuana observed in [defendant's] home fail[ed] to support the conclusion that [defendant] [wa]s a courier for an ecstasy trafficking organization" -- "a drug entirely different from marijuana" -- "or that evidence of such trafficking would be found at [defendant's] home." Id. at 1082-1083. No similar discrepancy between the "factual allegation[s]" and "the crime charged" exists in this case. Id. at 1084. Petitioner notes (Pet. 10) that Underwood relied on United States v. Weber, 923 F.2d 1338 (9th Cir. 1990), but that case involves substantially different facts relating to non-drug offenses. See id. at 1344 (concluding that anticipated

controlled delivery of child pornography to defendant did not justify a broad search for other pornographic materials).

Petitioner also cites several decisions involving automobile searches, primarily finding that the odor or presence of drugs in one part of a car did not justify officers searching for drugs in another part of the car, such as the trunk. Pet. 10-13 (citing, e.g., United States v. Nielsen, 9 F.3d 1487 (10th Cir. 1993)). As a threshold matter, it is not clear that the reasoning of those decisions involving cars -- which are occupied for shorter periods and in which certain areas (like a trunk) may be hard to access while driving -- would apply to a residence with a single adult who could readily conceal his personal-use stash before engaging with officers. In any event, in addressing such warrantless vehicle searches, the reviewing courts did not apply the same judicial deference that the decision below accorded to the magistrate's finding of probable cause in issuing the warrant. Compare Pet. App. 6a (evaluating warrant for "substantial basis") (citation omitted), with, e.g., Nielsen, 9 F.3d at 1489 ("We review de novo the trial court's legal conclusion that the search was reasonable under the Fourth Amendment."); see Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Ritter, 416 F.3d 256, 263-264 (3d Cir. 2005). Petitioner accordingly fails to show that the courts that decided those cases would have reached

a different result from the court below in the posture of this case.

Petitioner's reliance on cases finding that a warrant authorizing a search for a specific physical item (such as an "'Uzi-type' weapon," Taylor v. State, 7 P.3d 15, 18 (Wyo. 2000)) did not justify a continued search after that particular item was located is similarly misplaced. Pet. 13; see ibid. (also citing People v. John, 52 V.I. 247, 260 (V.I. 2009) (per curiam) (notebooks)). As the court of appeals explained (Pet. App. 7a), this case is different from that scenario, because the warrant was not limited to a "specific object," Taylor, 7 P.3d at 21, and the underlying factual circumstances provided probable cause to search for drugs in the house generally -- not, for example, for a particular item of drug paraphernalia.

In a supplemental brief, petitioner cites Lewis v. State, 233 A.3d 86 (Md. 2020), which concluded -- in light of Maryland's decriminalization under state law of possessing a small quantity of marijuana -- that the odor of marijuana standing alone did not provide probable to arrest a defendant and search him incident to that arrest. Id. at 101. This case, however, involves a state-law scheme that at the time criminalized possession of any amount of marijuana, see Pet. App. 3a, and a warrant-based, rather than warrantless, search.

Finally, petitioner cites (Pet. 12-13) various decisions from intermediate state appellate courts, but those cases do not justify an exercise of certiorari jurisdiction. See Sup. Ct. R. 10(a) (referring to conflicts between decisions of federal courts of appeals and "state court[s] of last resort").

3. In any event, this case would be an unsuitable vehicle for considering the question presented. That question is not outcome-determinative here, because the decision below could be affirmed on two alternative grounds not addressed by the court of appeals. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) (prevailing party may rely on any ground to support the judgment, even if not considered below).

a. First, the good-faith exception to the exclusionary rule applies. As this Court has explained, the exclusionary rule is a "'judicially created remedy'" "designed to deter police misconduct rather than to punish the errors of judges and magistrates." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." Illinois v. Krull, 480 U.S. 340, 347 (1987). And because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity," the exclusionary rule does not apply "where [an] officer's conduct is objectively

reasonable." Leon, 468 U.S. at 919. Instead, to justify suppression, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" for the exclusion of probative evidence. Herring v. United States, 555 U.S. 135, 144 (2009).

With respect to warrants specifically, this Court has long held that evidence should not be suppressed if it was obtained "in objectively reasonable reliance" on a search warrant, even if that warrant was subsequently held invalid. Leon, 468 U.S. at 922. Instead, suppression of evidence seized pursuant to a warrant is not justified unless (1) the issuing magistrate was misled by affidavit information that the affiant either "knew was false" or offered with "reckless disregard of the truth"; (2) "the issuing magistrate wholly abandoned his judicial role"; (3) the supporting affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; or (4) the warrant was "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers [could not] reasonably presume it to be valid." Id. at 923 (citation omitted). As the Court has emphasized, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the

search was unconstitutional under the Fourth Amendment." Id. at 919 (citation omitted).

Suppression would be inappropriate here, even if the warrant was not supported by probable cause. Petitioner does not challenge the specificity of the warrant's terms or contend that the magistrate judge either was misled by the affidavit or wholly abandoned his judicial role. And at a minimum, the affidavit was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (citation omitted). Furthermore, the court of appeals' prior decisions would have bolstered a reasonable officer's belief that the search warrant was valid. See Davis v. United States, 564 U.S. 229, 239 (2011) (holding that suppression is inappropriate "when the police conduct a search in objectively reasonable reliance on binding judicial precedent"). As the court of appeals observed, "[it] ha[d] 'repeatedly held that the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place.'" Pet. App. 6a (quoting United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004)).

b. Second, the warrant was supported not only by the odor of marijuana, but also the information in the anonymous tip. Although the court of appeals did not rely on the tip, Pet. App. 8a, the district court found that the tip -- which was corroborated by circumstances at the scene, id. at 23a -- "indicated that

[petitioner] kept drug cooking utensils in a safe in his closet" and "stored drugs throughout the house," thus providing the officers with probable cause "to search the safe." Id. at 39a-41a. Because the tip amplifies the basis for probable cause, answering the question presented in petitioner's favor would not require suppression in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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