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

REPLY BRIEF OF PETITIONER

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ARGUMENT

This Court should grant Melvin Jones's petition to resolve the deep and persistent division among a host of state and federal courts over the proper scope of probable cause based solely on the odor of marijuana. Some courts, including the Fourth Circuit in this case, have applied an automatic "some means more" assumption to permit widespread searches in places unconnected to the odor and for items other than marijuana. Other courts have been faithful to this Court's precedent and the Fourth Amendment's particularity requirement by rejecting a per se rule and limiting searches to the places and for the items for which probable cause exists.

The government's arguments in opposition to certiorari are unpersuasive. The split is genuine, and this case provides an excellent opportunity to settle it. The Court should grant the petition and, on the merits, hold that the smell of burning marijuana, by itself, does not create probable cause to search distant places for other items.

I. The Government's Attempt to Minimize the Split Among State and Federal Courts Does Not Succeed.

The government nibbles at the edges of the split Mr. Jones described in the petition, but is unable to erase it. The government's brief is an exercise in hair-splitting, a search for the thinnest of factual distinctions between cases. Opp. 11–13. Fourth Amendment cases, by their nature, often turn on their specific facts. Not every factual difference is a material one, though. The government's efforts bring to mind the old saw about distinguishing cases based on the color of the horse at issue. *See Reid v. Covert*, 354 U.S. 1, 50 (1957) (Frankfurter, J., concurring) ("If a precedent involving a black horse is applied to a case involving a white horse, we are not

excited.") (quotation omitted); *see also* Whitehorse Case, *Black's Law Dictionary* 1831 (10th ed. 2014). The distinctions the government points to in its brief are equally unavailing.

For instance, the government observes (Opp. 11) that in *United States v. McPhearson*, drugs were found on the defendant's person *outside* his home, and that according to the Sixth Circuit, there was no probable cause based on those drugs to suspect that more drugs would be found *inside* the home. 469 F.3d 518, 524–25 (6th Cir. 2006). The government suggests that the fact that McPhearson had the drugs outside his home is a crucial distinction with Mr. Jones's case, where officers smelled marijuana at his front door. But the government neglects to mention that McPhearson was arrested at his own front door and walked to a police car, whereupon he was searched incident to arrest; that search revealed drugs in his pocket. *Id.* at 520. There was no indication that McPhearson might have somehow acquired the drugs while being escorted by police from his porch to the squad car. He obviously possessed those drugs while inside the home. The fact that the drugs were not actually found until he was brought outside was not material to the Sixth Circuit's probable cause decision, because the drugs were on his person while he was inside the house as well.[1] Upon examination, the distinction between *McPhearson* and this case evaporates.

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[1] The government acknowledged as much in its brief to the Sixth Circuit. Indeed, its argument focused on McPhearson's possession of drugs inside his home: "With this quantity of drugs in possession of the defendant *as he left his residence* it would be reasonable to infer that there would be other evidence of use or distribution of the cocaine base in the residence." Br. of United States 11–12, *United States v. McPhearson*, No. 05-5534, 2005 WL 6066115 (6th Cir. Nov. 3, 2005) (emphasis added).

Similarly, the government notes (Opp. 11) that in *United States v. Underwood*, the Ninth Circuit held that a police officer's observation of a personal-use amount of marijuana did not provide probable cause to believe that the defendant also possessed ecstasy. 725 F.3d 1076, 1082–83 (9th Cir. 2013). For the government, *Underwood* does not conflict with this case because of that discrepancy between marijuana and ecstasy: the "factual allegation[s]" did not match "the crime charged." Opp. 11 (quoting *Underwood*, 725 F.3d at 1084). But the same thing happened here. The police used the odor of burning marijuana to get a warrant to search for "marijuana or *any other illegal substance*," as well as firearms, financial records, and electronic devices. App. 4a (emphasis added). And Mr. Jones was never charged with a marijuana offense; he was initially charged with possession with intent to distribute crack cocaine, before that count was dropped as part of his plea. App. 5a. Just as in *Underwood*, the police used the presence of a personal-use quantity of marijuana to infer that he was a trafficker of other drugs. There is no daylight between the material aspects of these cases, yet the circuit courts reached opposite conclusions on whether the police had probable cause.

Next, the government is wrong to dismiss Mr. Jones's discussion of cases involving searches for particular items, during which police used the presence of some contraband to infer that more of the same would be nearby. *See* Opp. 13; Pet'n 13; *Taylor v. State*, 7 P.3d 15 (Wyo. 2000). The government asserts that Mr. Jones's case is different because the warrant here was "to search for drugs in the house generally –

not, for example, a particular item of drug paraphernalia." Opp. 13. That reasoning is circular: The *problem* with the warrant here is that it relied on a some-means-more assumption to authorize a general search of an entire house for any contraband based only on the smell of marijuana. That is why the warrant here is overbroad. It would not have been overbroad if it had been limited to the specific item and places that the police had probable cause to search. Cases like *Taylor* rejected the very some-means-more inference that the Fourth Circuit embraced, and that is why they are relevant to Mr. Jones's petition.

Likewise, cases involving automobile searches are relevant, despite the government's contention to the contrary. Opp. 12. Mr. Jones cited several cases rejecting the proposition that the smell or sight of small amounts of drugs in the passenger area of a car permits a search of the trunk. Pet'n 10–13. The interior of a person's home deserves at least as much protection from unreasonable searches as the trunk of a person's car. *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

The government's reliance on the distinction between warrantless searches and searches conducted pursuant to warrants is similarly misplaced. The government notes that courts afford deference to magistrates' finding of probable cause, and asserts that because warrantless searches are reviewed de novo, the latter should not be considered in assessing the depth of the split. Opp. 12–13. Again, the distinction the government highlights is not a material one.

First, even when courts give deference to a magistrate's determination, "[t]his standard does not mean that reviewing courts should simply rubber stamp a magistrate's conclusions." *United States v. Conley*, 4 F.3d 1200, 1205 (3d Cir. 1993) (quotation omitted). And "a warrant application cannot rely merely on conclusory statements." *United States v. Griffith*, 867 F.3d 1265, 1271 (D.C. Cir. 2017) (alteration and quotation omitted). Courts applying deference as well as courts applying the de novo standard have rejected an automatic and conclusory some-means-more proposition.

Moreover, the Fourth Circuit's per se rule is a legal conclusion, and no amount of deference gives magistrates license to make an error of law. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) (noting that an error of law is "by definition" an abuse of discretion). The standard of review does not matter in the Fourth Circuit because, going forward, both warrantless and warrant-based searches will be permissible if the police smell burning marijuana.[2] The government's invocation of differing standards of review is a red herring.

In the end, the government can quibble with the exact dimensions of the split, but cannot plausibly deny that a divergence exists. Even when pared down to the narrow parameters the government would accept—circuit or state high court decisions

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[2] Surely the government does not concede that, on de novo review, a reviewing court should suppress the fruits of a warrantless search made in reliance on a per se rule like the Fourth Circuit's that the smell of marijuana alone permits a comprehensive search for more drugs. In fact, it argues the opposite. *E.g.*, *United States v. Kizart*, 967 F.3d 693, 696 (7th Cir. 2020). The government's own arguments demonstrate that the standard of review is not a sticking point when evaluating the question of law at the heart of this case.

dealing with warrant-based searches of houses for drugs—the split is real. *Compare* App. 8a; *State v. Sisco*, 373 P.3d 549, 555-56 (Ariz. 2016); *and Hagler v. State*, 726 P.2d 1181, 1183 (Okla. Crim. App. 1986); *with McPhearson*, 469 F.3d at 524; *and Underwood*, 725 F.3d at 1082.

Finally, the government makes an ineffective attempt to dismiss any comparison between this case and *Lewis v. State*, 233 A.3d 86 (Md. 2020), the case discussed in Mr. Jones's supplemental brief. The government asserts that *Lewis* is distinguishable because Maryland has decriminalized the possession of small quantities of marijuana. Opp. 13. But decriminalization, or even legalization, of user quantities is meaningless if police can apply a some-means-more inference to suspect that a person who smells of marijuana must be hiding trafficker-level quantities of it. And the government has no response to Mr. Jones's argument, based on *Lewis*, that someone in Maryland could use a small, legal amount of marijuana—or even simply be near someone else who used marijuana—and nevertheless be subject to a search for evidence of crimes other than marijuana possession, yet the legality of that search would depend on whether that person was prosecuted in state or federal court. Supp. Br. 3.

The split among state and federal courts is deep, wide, and intolerable. The issue is a frequently recurring one, and guidance is urgently necessary. *See Com. v. Barr*, ___ A.3d ___, ___, 2020 WL 5742680, at *17 (Pa. Super Ct. Sept. 25, 2020) (agreeing with trial judge that per se probable cause based on smell was incorrect, but remanding because trial court gave that factor no weight at all). This Court should step in now to resolve the dispute.

II. This Case Is an Ideal Vehicle.

The government contends that Mr. Jones's case is "unsuitable" for this Court's review because of potential alternative dispositions. Opp. 14–17. That is mistaken. This case presents as good an opportunity to resolve the issue as the Court is likely to find. That is because the Fourth Circuit's holding was categorical: The smell of burning marijuana, by itself and automatically, provides police with probable cause to search areas far distant from the odor and to search for other items in addition to marijuana. App. 8a. This Court is fully capable of weighing in on this pure question of law.

First, the government is wrong to suggest that the good-faith exception to the exclusionary rule is a valid reason for the Court to deny review. Opp. 14–15 (citing *United States v. Leon*, 468 U.S. 897, 922–23 (1984)). Neither the district court nor the court of appeals addressed good faith. In its brief to the Fourth Circuit, the government devoted only a few stray sentences to a good-faith argument, and did not even cite *Leon*. It would require sheer speculation to intuit what either lower court would have done if it had squarely addressed the issue.

Further, rejecting a petition because of how a court *might* rule on good faith would create a skewed perspective of Fourth Amendment law. Under that theory, this Court would not be able to take a Fourth Amendment case unless the constitutional violation was so egregious that the good-faith exception could not even arguably apply. The substantive law would ossify.

Courts already have the flexibility to decide cases on the basis of good faith (or whether a violation is clearly established) without reaching the constitutional question. *E.g.*, *Pearson v. Callahan*, 555 U.S. 223, 236, 241–42 (2009) (discussing *Leon*). It is notable, therefore, that both courts in Mr. Jones's case deliberately chose not to jump over the constitutional issue straight to good faith. If those courts thought that the issue of good faith was as clear as the government now argues it is, there would have been no reason not to rely on it. This Court should not use the government's counter-factual hypothetical to effectively decide the issue in the first instance.

The same is true of the government's invocation of another issue the Fourth Circuit did not consider, the anonymous tip that led police to Mr. Jones's door. Opp. 16–17. The court of appeals affirmatively chose not to analyze the tip, even though Mr. Jones challenged its reliability. App. 8a. The tip is not an issue that Mr. Jones sought to avoid, but rather one he argued the court should have considered (and found lacking) as part of a totality test. Now the government asks this Court's assistance in putting Mr. Jones through the whipsaw action of having the Fourth Circuit decline to reach his argument, only to have this Court deny review based on its supposition of what the court of appeals would have said if it had agreed with him about the proper test.

This Court should avoid guessing about what the lower courts might have decided on issues they chose not to decide. Instead, the Court should follow its routine practice of leaving such issues for remand, even when they would have constituted alternative grounds for affirming. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1530–31 (2018) (after deciding standing issue, leaving other issues for remand,

including whether merits argument had been preserved); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 & n.9 (2016) (rejecting per se consent rule and remanding for application of totality analysis); *Flippo v. West Virginia*, 528 U.S. 11, 15 (1999) (rejecting per se "murder scene exception" to Warrant Clause and remanding for consideration of whether any other exception permitted search); *Thompson v. Louisiana*, 469 U.S. 17, 23 (1984) (same); *Mincey v. Arizona*, 437 U.S. 385, 395 n.9 (1978) (same).

It is precisely because the lower courts avoided those issues that Mr. Jones's case comes to this Court so cleanly. The Fourth Circuit's holding was a stark, per se rule that the odor of burning marijuana allowed police to search an entire home for unburnt marijuana, other drugs, firearms, and electronic devices. Whether a mere sniff grants such sweeping authority is the subject of a deep divide among state and federal courts. Those alternative bases for affirming are present in many other cases. But not here. Mr. Jones's case is perfectly teed up for this Court's review of a purely legal issue, the sole basis for the Fourth Circuit's decision. No vehicle concerns should prevent this Court from granting the petition.

III. The "Some-Means-More" Assumption Cannot Amount to Per Se Probable Cause.

On the merits, the government's position fares no better than its arguments for denying review. The gravamen of its argument is an echo of the Fourth Circuit's unsupported conclusion that the mere odor of marijuana likely indicates that drug trafficking and other crimes are afoot. Opp. 8–9; App. 7a. The only basis provided for

such a claim is "common sense." Opp. 9; App. 7a. There are two primary faults with this reasoning.

First, it is not true. Marijuana is the most commonly used psychoactive drug other than alcohol. Government health agencies report that in 2018, ten percent of American adults—almost 25 million people—had used marijuana in the prior month, and nearly 40 million people had used it in the previous year.[3] Those numbers likely will grow as more states roll back prohibitions on marijuana use. If common sense tells us anything, it is that not all of those people are drug traffickers. Yet the Fourth Circuit's per se rule invites police to make precisely that assumption whenever they detect the odor of marijuana. And as a result, millions of people are at risk of having their homes searched—not just for evidence of marijuana possession, but also for evidence of other drugs and firearms—even when they are acting in compliance with state law, and even when they may not be the source of the odor. *See Lewis*, 233 A.3d at 99 (rejecting rule that would give police "probable cause to arrest and search someone whose only exposure to marijuana is from second-hand smoke"). Even if probable cause is not a high bar, the facts must still present the police with some "substantial basis" for believing that the crime under investigation is occurring, not "wholly conclusory statement[s]." *Illinois v. Gates*, 462 U.S. 213, 239 (1983). And that nexus must be particularized to comply with the Fourth Amendment. *Id.* at 238; *see*

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[3] U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Admin., National Survey on Drug Use and Health, Tables 1.26A, 1.26B, 1.27A, 1.27B (Aug. 2019), available at https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables (last accessed Dec. 17, 2020).

also Barr, ___ A.3d at ___, 2020 WL 5742680, at *17 ("The odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity when hundreds of thousands of Pennsylvanians can lawfully produce that odor."). In short, common sense is not on the government's side, and "bare conclusions" are an insufficient substitute for analysis. *Gates*, 462 U.S. at 239.

Second, and relatedly, "[r]igid legal rules are ill-suited" to determinations of probable cause. *Id.* at 232. If nothing else, this Court should reverse the Fourth Circuit's application of an inflexible, per se rule that the mere odor of marijuana always establishes probable cause. Particularly in an ever-changing legal landscape, police and courts can no longer rely on a presumption that the smell of marijuana automatically stems from illegal activity. This Court should recognize the reality that most marijuana users are not drug dealers, and that marijuana use is common enough that even someone who never smokes might reek of it after doing nothing more nefarious than riding on the subway next to heavy users. The Fourth Circuit was wrong to adopt its per se "some means more" rule.

"By limiting the authorization to search to the specific area and things for which there is probable cause to search, the [Fourth Amendment's particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). State and federal courts are deeply divided over whether the particularity requirement is automatically satisfied based on nothing more than the mere odor of marijuana. This Court should resolve the

dispute and reject the Fourth Circuit's per se rule that the smell of burning marijuana permits police to search an entire home for items other than marijuana in locations far removed from the source of the odor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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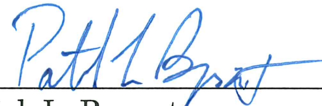

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