No. __-_____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case is about the scope of a search warrant based on the mere odor of burning marijuana. During a knock-and-talk at Petitioner Melvin Jones's house, police officers smelled the scent of marijuana smoke; they later observed a small, still-smoldering marijuana cigarette on top of an open trash can. Based on this, they obtained a warrant to search the entire home, including locked containers, for items as varied as additional drugs, firearms, and electronic devices. Inside a locked safe in Mr. Jones's bedroom, police found a handgun. He argued that the warrant lacked probable cause and was overbroad. The Fourth Circuit upheld the search, holding as a categorical matter that the smell of burning marijuana *alone* provided sufficient probable cause for police to search the entire house, including locked containers that could not have been the source of the odor. The Fourth Circuit's ruling deepened a longstanding disagreement among state and federal courts.

The question presented: Does probable cause to believe that a small, personal-use amount of drugs is present in a home automatically also provide probable cause to search the entire home (including locked containers inside it) for additional drugs, on the theory that where there is as little as one marijuana cigarette, more drugs are likely to be hidden nearby?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Jones*, No. 18-4448, United States Court of Appeals for the Fourth Circuit. Judgment entered March 3, 2020.

(2) *United States v. Jones*, No. 3:17-CR-71, United States District Court for the Eastern District of Virginia. Judgment entered June 11, 2018.

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PETITION FOR WRIT OF CERTIORARI

Melvin Lee Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 8a of the appendix to the petition and is also available at 952 F.3d 153 (4th Cir. 2020). The district court's memorandum opinion appears at pages 9a to 53a of the appendix.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on March 3, 2020. This Court's order of March 19, 2020, extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution 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

Introduction

Petitioner Melvin Jones was subjected to an extensive search of his entire home, including a locked safe in his bedroom closet, based on nothing more than a police

officer's detection of the odor of marijuana at his front door. The Fourth Circuit held that this smell alone automatically gave the police probable cause to search for drugs and weapons inside the house, even after the police spotted a single, still-smoldering marijuana cigarette. State and federal courts are intractably split over whether odor alone permits an inference that where some drugs are present, more drugs are likely to be found. This Court should grant Mr. Jones's petition and reject the illogical and rigid "some-means-more" assumption.

Factual Background

The investigation into Mr. Jones began in May 2016, when the Richmond Police Department processed an anonymous tip from a hotline that Mr. Jones was selling drugs and possessed a handgun at a house in Richmond. App. 3a-4a. Some three months later, the police went to the house to do a "knock-and-talk" interview. Mr. Jones answered the door within a few seconds. App. 4a.

According to the police, as soon as Mr. Jones opened the door, they smelled the odor of marijuana smoke coming from inside the house. Based on that, they seized him, handcuffed him, and made him sit on the front porch. App. 4a. Officers removed Mr. Jones's niece and nephew from the house and conducted a protective sweep. During the sweep, an officer saw a "still-smoldering marijuana cigarette sitting on top of the trash in an open trash can in the kitchen." App. 4a.

Mr. Jones declined to consent to a search of the house. So an officer obtained a search warrant, relying in the affidavit on the marijuana odor and the burning marijuana joint to establish probable cause of simple possession of marijuana. App.

4a, 18a. The officer acknowledged that if he'd thought he had probable cause to suspect Mr. Jones of firearm offenses or drug distribution, he would have included those offenses in the warrant application. App. 19a-20a.

Even though the officers only asked for permission to search for evidence of simple possession of marijuana, the warrant authorized the police to search Mr. Jones's entire home and any containers therein for "[a]ny controlled substances (marijuana)"; "any" drug paraphernalia; "[a]ny instruments used in the illegal drug usage of marijuana or any other illegal substance"; "[a]ny electronic devices used to aid in the usage of illegal narcotics"; "any firearms and ammunition"; any financial or written records relating to drug use or indicating residence in the house; and "any safes or locked boxes that could aid in the hiding of illegal narcotics" of any type. App. 19a.

Upon executing the warrant, officers discovered within the house some additional marijuana, some crack cocaine, and various items related to packing and weighing drugs. They also found a locked safe in Mr. Jones's bedroom closest, and they discovered a handgun inside it. App. 5a.

Proceedings in the District Court

Mr. Jones was indicted for possession of a firearm by a convicted felon, and for possession with intent to distribute cocaine base. App. 5a. He filed a motion to suppress the evidence recovered during the search of his home. Mr. Jones argued primarily that the officers' discovery of one marijuana cigarette did not give them probable cause to believe that more marijuana would be found elsewhere in the house. App. 5a. The officers smelled marijuana and saw a lit joint; nothing about that gave

them reason to believe, in particular, that safes and locked boxes elsewhere in the house would contain more marijuana.

After holding an evidentiary hearing, the district court denied the motion in a written opinion. App. 9a-53a. Mr. Jones then entered into a conditional plea agreement, preserving his right to appeal the denial of his motion. App. 5a. As part of the agreement, the government dismissed the drug count. The district court imposed a sentence of 54 months in prison on the firearm count. App. 5a.

Proceedings in the Court of Appeals

In the Fourth Circuit, Mr. Jones renewed his argument that the search warrant was not supported by probable cause and was overbroad. The court of appeals disagreed and affirmed Mr. Jones's conviction. It first cited circuit precedent that "the odor of marijuana alone can provide probable cause to believe that marijuana is present in particular place." App. 6a (quoting *United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004)). For the court, that inference validated the search of Mr. Jones's entire home, including locked containers. App. 6a. The Fourth Circuit stated that "[c]ommon sense indicates that it was fairly likely that the marijuana Jones was smoking was not the only marijuana in the house," because it was "most likely but a single portion of a larger quantity that was stored somewhere in the house." App. 7a.

In light of its holding that the smell of marijuana smoke alone provided sufficient probable cause for a search of Mr. Jones's entire home (including a locked safe in his bedroom), the court of appeals did not address Mr. Jones's arguments about the scope of the warrant or its execution. And the court did not address whether the

magistrate should have considered the anonymous tip as part its analysis. App. 8a. The Fourth Circuit's holding was categorical: The smell of burning marijuana emanating from a home is sufficient by itself to authorize a search of an entire home, and any containers inside it, for evidence of weapons or drugs, even after the police discover the source of the odor.

REASONS FOR GRANTING THE PETITION

I. State and Federal Courts are Deeply Divided Over Whether the Existence of Some Drugs in a Location Provides Probable Cause to Believe That More Drugs are Present.

The objective of the particularity and probable cause requirements of the Fourth Amendment "is that those searches deemed necessary should be as limited as possible." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). An affidavit in support of a warrant request must, of course, establish probable cause that a crime has been committed. To avoid rigid, categorical rules, the assessment of whether probable cause exists depends on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-35 (1983).

Several courts, however, have held that probable cause to believe that *some* drugs are present necessarily provides probable cause to believe that *more* are present. These decisions are inconsistent with this Court's preference for flexible standards. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (noting that, in applying a totality test under the Fourth Amendment, "we have generally eschewed bright-line rules"). As discussed below, the automatic "some-means-more" assumption fails as a matter of logic. But at a minimum, this Court should grant Mr. Jones's petition to resolve the

dispute and to ensure that the lower courts apply a flexible, fact-specific standard instead of a rigid, automatic rule.

1. On one side of the divide are courts that have applied a firm some-means-more approach to probable cause. For example, in Mr. Jones's case, the Fourth Circuit held, as a categorical matter, that "when evidence showed that Jones had just been using a small amount of marijuana in one room of his house, it reasonably followed that more marijuana or other evidence of the crime of marijuana possession was fairly likely to be found elsewhere in the house." App. 7a. The court did not consider any other evidence, finding that the smell of burning marijuana alone, and automatically, was sufficient to authorize a search of the entire house and any containers inside it. App. 7a-8a.

The Fifth Circuit, like the Fourth Circuit, has a blanket rule that the odor of marijuana alone provides probable cause to search. *United States v. McSween*, 53 F.3d 684, 686-87 (5th Cir. 1995); *United States v. Reed*, 882 F.2d 147, 149 (5th Cir. 1989). Such a search may go beyond the area where the officer detected the smell. *McSween*, 53 F.3d at 687.

Similarly, the Third Circuit has held that a driver's admission that he purchased and used cocaine earlier in the day, plus the observation of a bottle of white crystalline substance, gave police probable cause to search the driver's car, including the trunk, for more drugs. *United States v. Schecter*, 717 F.2d 864, 870 (3d Cir. 1983), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009). These facts were enough for the court to make a some-means-more assumption.

Other circuits have held that the discovery of a small portion of drugs allows police to search a person's home or car for more. The Sixth Circuit has held that seeing a small amount of marijuana on the floorboard of a car permitted police to search the rest of the car, including closed containers in the trunk, for more marijuana. *United States v. Burnett*, 791 F.2d 64, 66-67 (6th Cir. 1986). For the Seventh Circuit, the discovery of a small packet of off-white powder tucked in a driver's hat gave police probable cause to search his entire car, including the trunk, for more drugs. *United States v. Johnson*, 383 F.3d 538, 545-46 (7th Cir. 2004). The Eighth Circuit concluded that discarded "marijuana seeds and stems in [the defendant's] garbage were sufficient *stand-alone* evidence to establish probable cause" to search a house. *United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003) (emphasis in original); *see also United States v. Williams*, 955 F.3d 734, 737 (8th Cir. 2020) (odor of marijuana alone provides probable cause for warrantless search of car).

The D.C. and Eleventh Circuits hold similarly. *See, e.g.*, *United States v. Turner*, 119 F.3d 18, 20-21 (D.C. Cir. 1997) (smell of marijuana and discovery of torn cigar paper and a baggie of weed-like substance in passenger area permitted search of entire car and trunk, even if evidence was consistent with mere personal use); *United States v. Corley*, 408 F. App'x 245, 247 (11th Cir. 2011) (smell of marijuana and recovery of a small bag of marijuana from driver's pocket gave probable cause to search a box in the trunk) (citing *United States v. Lueck*, 678 F.2d 895, 903 (11th Cir. 1982)); *see also United States v. Murat*, No. 08-20479-CR, 2008 WL 4394788, at *12-*13 (S.D. Fla. Sept. 26, 2008).

State courts have addressed the issue, too. Several courts have relied on the inference that the smell or sight of some quantity of drugs provides probable cause to believe that more drugs are present, thereby permitting a more invasive search. *E.g.*, *State v. Abrams*, 263 So.2d 736, 743 (Ala. Crim. App. 2018); *State v. Sisco*, 373 P.3d 549, 555-56 (Ariz. 2016); *State v. Betz*, 815 So.2d 627, 633 (Fla. 2002); *Hill v. State*, 830 S.E.2d 478, 483 (Ga. Ct. App. 2019); *State v. Longo*, 608 N.W.2d 471, 473-74 (Iowa 2000) (expressing "substantial doubts" as to argument that odor alone limits search area to passenger compartment and not trunk); *State v. MacDonald*, 856 P.2d 116, 120 (Kan. 1993); *Mayfield v. Com.*, 590 S.W.3d 300, 302-05 (Ky. Ct. App. 2019); *State v. Arnold*, 60 So.2d 599, 600 (La. 2011); *State v. Barclay*, 398 A.2d 794, 797 (Me. 1979); *Robinson v. State*, 152 A.3d 661, 680 (Md. Ct. App. 2017); *People v. Kazmierczak*, 605 N.W.2d 667, 672 (Mich. 2000) (over three-Justice dissent urging totality test instead of automatic probable cause based on smell); *State v. Schinzing*, 342 N.W.2d 105, 110 (Minn. 1983) (discovery of marijuana blunt in ashtrary gave probable cause to search entire car for more marijuana); *Martin v. State*, 240 So.2d 1047, 1054 (Miss. 2017); *State v. Seckinger*, 920 N.W.2d 842, 849-50 (Neb. 2018); *State v. Sandoval*, 590 P.2d 175, 177 (N.M. 1979); *People v. Brown*, 497 N.Y.S.2d 934, 935-36 (N.Y. App. Div. 1986); *Hagler v. State*, 726 P.2d 1181, 1183 (Okla. Crim. App. 1986) (warrant obtained on basis of marijuana observed during defendant's arrest was not limited to that marijuana and instead authorized search of entire house); *Levine v. State*, 794 S.W.2d 451, 454 (Tx. Ct. App. 1990); *Dickerson v. Com.*, 543 S.E.2d 623, 629 (Va. Ct. App. 2001).

2. Other state and federal courts have rejected an automatic some-means-more inference, and have instead applied a totality test. In particular, these courts have limited the area that may be searched based on the odor or sight of some drugs to the immediate area. They have not allowed the presence of some drugs, or an odor emanating from the passenger compartment or the defendant's person, without more, to authorize a search of more distant sites, like car trunks or the inner recesses of the home.

For example, in a Sixth Circuit case, police arrested a man at the door of his house on an assault warrant. *United States v. McPhearson*, 469 F.3d 518, 520 (6th Cir. 2006). When officers searched the man before putting him in a police car, they found a baggie containing crack cocaine. The officers used that evidence to get a warrant to search the entire home for more drugs. *Id.* at 521-22. The Sixth Circuit held that the discovery of a personal-use quantity of drugs on the defendant's person did not provide probable cause to believe that additional drugs were inside. The court expressly rejected the government's argument that "an individual arrested outside his residence with drugs in his pocket is likely to have stored drugs and related paraphernalia in that same residence." *Id.* at 524.

Similarly, the Ninth Circuit has held that a police officer's observation of a personal-use amount of marijuana in a home "supports only the inference that [the defendant] is a marijuana user," and did not provide probable cause to believe he used ecstasy, or that he was a drug trafficker. *United States v. Underwood*, 725 F.3d 1076, 1082 (9th Cir. 2013). *Underwood* and *McPhearson* are in direct conflict with the

Fourth Circuit's holding in Mr. Jones's case, where the court allowed an extensive search of an entire home for firearms and any type of drug based only on the smell of burning marijuana. In *Underwood*, the Ninth Circuit relied on its decision in *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990). In that case, the defendant had ordered four sets of photographs purportedly depicting child pornography from a government-produced advertisement. Based on a controlled delivery of those photos, the police obtained a warrant not only to seize the photographs, but also to search for an array of items related to the production and distribution of child pornography, including cameras and film equipment. *Id.* at 1340-41. The Ninth Circuit rejected this warrant as lacking probable cause. *Id.* at 1343-45. In particular, the court held that "probable cause to believe that some incriminating evidence will be present at a particular place does not necessarily mean there is probable cause to believe that there will be more of the same." *Id.* at 1344 (citing 2 Wayne LaFave, *Search and Seizure* § 3.7(d)).

A line of cases from the Tenth Circuit has likewise refused to give police an automatic license to search stemming from a some-means-more inference. In *United States v. Nielsen*, for instance, the court held that the smell of burnt marijuana coming from the interior of a car did not provide probable cause to believe that more marijuana was in the trunk. 9 F.3d 1487, 1491 (10th Cir. 1993); *accord United States v. Wald*, 216 F.3d 1222, 1226 (10th Cir. 2000); *United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998).

As with the Ninth Circuit, the Tenth Circuit has declined to apply the automatic some-means-more assumption that the Fourth Circuit applied in this case. And it has

required police to restrict their searches to areas where probable cause applies, rather than using an automatic rule that smelling marijuana in one place allows police to search other places. *Nielsen*, 9 F.3d at 1489; *see also United States v. Cunningham*, 145 F. Supp. 2d 964, 967 (E.D. Wis. 2001) ("The presence of cocaine traces in garbage does not necessarily give rise to an inference that additional drugs are located on the premises."); *Garrett v. Goodwin*, 569 F. Supp. 106, 120 (E.D. Ark. 1982) ("Finding marijuana seeds, a pipe with marijuana residue in it, a 'roachclip,' or a few 'roaches' in the passenger compartment does not, without more, give probable cause to believe that marijuana or other drugs are being transported in the trunk.").

The Seventh Circuit recently discussed the split of authority but avoided a direct ruling, finding that the odor of burnt marijuana plus other suspicious circumstances gave police probable cause to search a car's trunk. *See United States v. Kizart*, ___ F.3d ___, ___, 2020 WL 4331343, at *3-*5 (7th Cir. 2020). Notably, however, the Seventh Circuit did not hold that the smell alone authorized the trunk search.

A leading state case is *Wimberly v. Superior Court*, 547 P.2d 417, 424-26 (Cal. 1976). There, the California Supreme Court "conclude[d] that the existence of probable cause to search the interior of a car is not necessarily sufficient to justify the search of the car's trunk." *Id.* at 424. The court reasoned that people have a greater expectation of privacy in closed areas and closed containers than they do in places open to plain view. *Id.* at 425. Ultimately, the court rejected an automatic rule and held that "the search of a car like all other searches must be properly circumscribed to be 'reasonable' within the meaning of the Fourth Amendment . . . ." *Id.* at 426.

Other state courts agree, and limit the site and scope of a search to the particular places and things supported by probable cause. *See State v. Villines*, 801 S.W.2d 29, 31-32 (Ark. 1980) ("The reasoning behind these holdings is that the presence of cigarette butts or marijuana seeds, without more, is just as consistent, or perhaps more so, with having only that small amount for personal use as it is with having a cache of marijuana; there is simply no articulable fact to indicate a cache is located in the trunk."); *People v. Coates*, 266 P.3d 397, 400 (Colo. 2011) (discovery of one Xanax pill did not create probable cause to believe defendant had more); *State v. Schmadeka*, 38 P.3d 633, 638 (Idaho Ct. App. 2001) (odor of marijuana only establishes probable cause to search area associated with that odor); *State v. Astalos*, 390 A.2d 144, 148-49 (N.J. Super. Law Div. 1978) (small amount of hashish on driver's person did not permit search of car's trunk); *Com. v. Overmeyer*, 11 N.E.2d 1054, 1057-58 (Mass. 2014) (where state argued that "the discovery of some controlled substances gives probable cause to search for additional controlled substances in the vicinity," noting that the court's recent decisions "have rejected that proposition as to marijuana"); *State v. Humble*, 474 S.W.3d 210, 217-18 & n.8 (Mo. Ct. App. 2015) (discovery of small quantity of drugs in car's center console did not provide probable cause to search trunk for more; expressly rejecting automatic some-means-more inference); *State v. Schoendaller*, 578 P.2d 730, 734 (Mont. 1978) (rejecting "plain smell" doctrine altogether); *State v. Gauldin*, 259 S.E.2d 779, 781 (N.C. Ct. App. 1979) (strong odor of marijuana coming from "rear portion" of car did not give probable cause to search suitcase inside trunk); *State v. Price,* 986 N.E.2d 553, 559 (Ohio Ct. App. 2013) ("[T]he odor of burnt

marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of a vehicle. This proposition is established by the common sense observation that an odor of burning marijuana would not create an inference that burning marijuana was located in a trunk.") (quotations and citations omitted); *State v. Huff*, 291 P.3d 751, 754 (Or. 2012) ("[W]e have held that the current possession of a small amount of illegal drugs in a person's home does not give rise to probable cause to search the home for additional drugs."); *State v. Wright*, 977 P.2d 505, 507-08 (Utah Ct. App. 1999) (following *Nielsen*, *supra*, and holding that smell of raw marijuana might support inference that marijuana was stored in car's trunk, but smell of burning marijuana would only give probable cause to search passenger area); *Zullo v. State*, 205 A.3d 466, 501 (Vt. 2019) (odor of marijuana alone did not provide probable cause to search car); *Taylor v. State*, 7 P.3d 15, 23 (Wyo. 2000) (where warrant was for one "Uzi-type" gun, discovery of that gun did not justify continued search for another weapon, noting that this was not "a case where a 'one-means-more' inference is permissible"); *see also People v. John*, 52 V.I. 247, 260 (2009) (warrant for two notebooks relating teacher's unlawful contact with students, which were found early in search, did not establish probable cause to continue to search for and seize additional notebooks).

3. This split among various state and federal courts is entrenched and has no hope of resolution absent this Court's intervention. On rare occasions, a state court may overrule its prior decisions in this area, *see Osban v. State*, 726 S.W.2d 107, 109-10 (Tex. Crim. App. 1986), or a decision may be upended by statutory changes, *see Com.*

v. Cruz, 945 N.E.2d 899, 910 (Mass. 2011) (holding that after new state law decriminalized possession of less than an ounce of marijuana, odor of marijuana alone could not create probable cause that person possessed a *criminal* amount of the drug). But with so many cases on each side of the divide, there is no reason to think they will all harmonize before this Court steps in. And given the decades of deliberation from virtually every jurisdiction in the country, further percolation is both unnecessary and unlikely to add any useful insight.

The courts themselves have long acknowledged the split. *See, e.g.*, *Nielsen*, 9 F.3d at 1491 n.5 (expressly disagreeing with Fifth Circuit's *Reed* decision); *Betz*, 815 So.2d at 633 n.5 & 634 n.6 (discussing divergent opinions among state and federal courts); *Com. v. Garden*, 883 N.E.2d 905, 913-14 & n.11 (Mass. 2008) (noting opposing views); *Wilson v. State*, 921 A.2d 881, 887-92 (Md. Ct. Spec. App. 2007) (surveying cases); *People v. Jones*, 40 N.Y.S.3d 889, 893-94 (N.Y. Co. Ct. 2016) (same); *see also* Michael A. Sprow, *Wake Up and Smell the Contraband: Why Courts That Do Not Find Probable Cause Based on Odor Alone Are Wrong*, 42 Wm. & Mary L. Rev. 289, 292 (2000) (arguing that "the contradictory application of the plain smell doctrine in some jurisdictions leaves law enforcement and attorneys with little certainty as to whether searches based solely on scent are valid").

This deep division satisfies all of this Court's criteria for certiorari review. *See* S. Ct. R. 10(a), (b), (c). The Court should grant Mr. Jones's petition to resolve the split.

II. Courts on the Fourth Circuit's Side of the Split Are Wrong to Hold That Seeing or Smelling a Small Amount of Marijuana Automatically Permits an Invasive Search for More Drugs.

The Fourth Circuit, and the courts agreeing with it, have failed to follow this Court's preference for balancing in the Fourth Amendment context. This Court should reject the some-means-more inference arising from nothing more than the smell of marijuana and the sight of one still-burning cigarette.

Mr. Jones does not dispute the proposition that, *if* police have probable cause to believe that contraband is located in a particular place, they may search it, be it a suitcase in a car's trunk or a safe in a person's home. Typically, that comes from the inclusion of "profile" evidence in a warrant application about how drug dealers usually store or transport their drugs. But probable cause to search a place does not arise automatically from the existence of contraband somewhere else. And smell alone does not provide the additional suspicion allowing for a some-means-more assumption.

In this case, probable cause began and ended when the officers discovered the source of the smell of smoking marijuana: the actual still-smoking marijuana cigarette. Because they knew exactly where the smell of marijuana came from, they had no probable cause to search for firearms or other narcotics, in safes or elsewhere.

Various courts have recognized this problem. "(G)eneric classifications in a warrant are acceptable only when a more precise description is not possible." *United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980); *United States v. Spilotro*, 800 F.2d 959, 964 (9th Cir. 1986) ("[T]he government could have narrowed most of the descriptions in the warrants either by describing in greater detail the items one

commonly expects to find on premises used for the criminal activities in question, or, at the very least, by describing the criminal activities themselves rather than simply referring to the statute believed to have been violated."); *Montilla Records of Puerto Rico v. Morales*, 575 F.2d 324, 326 (1st Cir.1978) (the greater the feasibility of a precise, specific description in a warrant, the less justifiable the employment of a general or generic description).

This Court has provided the proper standard: "Police with a warrant for a rifle may search only places where rifles might be and *must terminate the search once the rifle is found*." *Horton v. California*, 496 U.S. 128, 141 (1990) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 517 (1971) (White, J. concurring and dissenting) (emphasis added)). Here, a narrow description was not only possible, it was evident from the face of the warrant application. Because the warrant application specified the source of the marijuana smell, the warrant itself should have been limited to the marijuana that constituted the suspected violation of Virginia Code § 18.2-250.1, the simple possession statute. That is, the warrant—and the resulting search—should have been limited to the marijuana cigarette which officers knew was the source of the smell. The some-means-more assumption is inconsistent with *Horton* and the specificity requirement of this Court's Fourth Amendment precedents.

Probable cause to search for *burning* marijuana does not extend to a closed container (such as a safe) that could not possibly contain burning marijuana. "[T]he scope of the search is defined by the object of the search and places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798,

824 (1982). The Fourth Circuit should have aligned with decisions like *Nielsen*, which correctly held that the odor of burnt marijuana did not permit a search of places that could not have been the source. *Nielsen*, 9 F.3d at 1489-91 (citing *California v. Acevedo*, 500 U.S. 565, 579-80 (1991)).

Some of the decisions cited above involving cars can be explained by a court's fixation on the automobile exception and the inherent mobility of a vehicle. But that reasoning does not apply to a home. Rather, the decisions declining to apply a some-means-more inference are much more compatible with the home's primacy in the constitutional firmament. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). Even if the odor or sight of a small amount of marijuana provides probable cause to search a car from bumper to bumper, that same evidence should not give police the liberty to rummage through a person's entire home, particularly into closed containers in rooms far distant from the source of the odor.

This Court should reject the Fourth Circuit's inflexible rule that wherever police smell burning marijuana, they are entitled to a comprehensive search, even after they locate the source of the odor. The Court should instead approve the decisions that apply a totality test, under which an officer's olfactory response is but one ingredient, and which limit the place to be searched in accord with the probable cause that the scent-producing item will be found there. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 201 (2002) (noting that per se rules are inappropriate when considering the totality of the circumstances); *see also Wong Sun v. United States*, 371 U.S. 471, 479

(1963) ("The quantum of information which constitutes probable cause—evidence which would warrant a man of reasonable caution in the belief that a crime has been committed—must be measured by the facts of the particular case.") (citation, quotation, and alteration omitted).

At bottom, the Fourth Circuit's conclusion was that anyone who smokes a marijuana cigarette—just one joint—is reasonably likely to have more drugs and potentially even weapons stashed nearby. Numerous courts have refused to accept that proposition, for good reason. It defies the "common sense" on which the Fourth Circuit purported to rely. An automatic "some-means-more" inference is inappropriate in this context, particularly with respect to a search of every inch of a home for evidence of unrelated crimes based on the odor of burning marijuana.

On the merits, the Court should reverse the Fourth Circuit's too-rigid judgment and approve the better-reasoned decisions like *Nielsen*, *McPhearson*, and *Underwood*.

III. This Case is a Good Vehicle to Decide This Important Question.

Mr. Jones's petition provides this Court with an excellent opportunity to resolve a persistent split of state and federal authority. The issues were thoroughly litigated in the lower courts, resulting in two written decisions. App. 1a, 9a. The Fourth Circuit's decision was published, making it binding precedent in five states. *But see Gauldin*, 259 S.E.2d at 781 (North Carolina Court of Appeals opinion holding that odor alone did not permit search of car's trunk). If Mr. Jones had lived in one of the states in the Sixth, Ninth, or Tenth Circuit, or one of the states agreeing with those courts, the police would have needed more than a mere sniff of marijuana at his front door in

order to have probable cause to search his entire house, including a locked safe in his bedroom that could not have contained burning marijuana.

Moreover, this case is well suited for certiorari review because the Fourth Circuit's decision was so stark. In no uncertain terms, the court of appeals applied a bright-line rule. In the Fourth Circuit, "the smell of marijuana smoke from within [a person's] house provide[s] probable cause sufficient for the issuance of a warrant to search the house." App. 8a. The court made clear that it was not considering any other potential evidence or arguments about the scope of the warrant or execution of the search. App. 8a. If the Fourth Circuit purported to apply a totality-of-the-circumstances test, one circumstance alone was the totality of the court's reasoning.

That makes this case a clean vehicle, unencumbered by factual disputes, procedural hurdles, or alternative holdings. The Court can grant review and either adopt the Fourth Circuit's rigid and overbroad rule or instead re-affirm its preference for totality tests and searches limited to the places where specific probable cause applies. The Court should grant Mr. Jones's petition, reverse the Fourth Circuit's judgment, and remand the case for consideration of all the facts, with a proper understanding that burning marijuana only gives police probable cause to search the places where that marijuana could be located.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

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