No. 18-1230

IN THE
Supreme Court of the United States

JUAN ZAMUDIO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Carpenter v. United States, 138 S. Ct. 2206 (2018) 10

Collins v. Virginia, 138 S. Ct. 1663 (2018) 10

Collins v. Virginia, 824 S.E.2d 485 (Va. 2019) 10

Commonwealth v. Pina, 902 N.E.2d 917 (Mass. 2009) 8, 9

Ex parte Perry, 814 So. 2d 840 (Ala. 2001) 7

State v. Hicks, 147 P.3d 1076(Kan. 2006) 9

State v. Tester, 592 N.W.2d 515 (N.D. 1999) 7

Steagald v. United States, 451 U.S. 204 (1981) 9

United States v. Ardd, 911 F.3d 348 (6th Cir. 2018) *cert. denied*, 139 S. Ct. 1611 (2019) 5

United States v. Bain, 874 F.3d 1 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 1593 (2018) 6

United States v. Brown, 828 F.3d 375 (6th Cir. 2016) 3-4, 6

United States v. Carpenter, 926 F.3d 313 (6th Cir. 2019) 10

United States v. Christian, 925 F.3d 305 (6th Cir. 2019) 4

United States v. Coleman, 923 F.3d 450 (6th Cir. 2019) 5

United States v. Correa, 908 F.3d 208 (7th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3480 (U.S. June 3, 2019) (No. 18-1519) 3

United States v. Davis, 751 F. App'x 889 (6th Cir. 2018) 5-6

United States v. Feliz, 182 F.3d 82 (1st Cir. 1999) 7

United States v. Kelly, 772 F.3d 1072 (7th Cir. 2014) 3

United States v. McCoy, 905 F.3d 409 (6th Cir. 2018) 5

United States v. Orozco, 576 F.3d 745 (7th Cir. 2009) 3

United States v. Ribeiro, 397 F.3d 43 (1st Cir. 2005) 7

United States v. Rivera, 825 F.3d 59 (1st Cir. 2016) 6

United States v. Sewell, 780 F.3d 839 (7th Cir. 2015) 3

Yancey v. State, 44 S.W.3d 315 (Ark. 2001) 8, 9

REPLY BRIEF FOR THE PETITIONER

In the Seventh Circuit, the government can obtain a warrant to search the home of an individual who is allegedly engaged in drug dealing on the basis of an officer's generalized affidavit stating that drug dealers often keep evidence in their homes—without showing any facts whatsoever that connect the alleged drug dealing to that individual's home. That is all the evidence the government had when it obtained the warrant in this case, and that was the basis of the Seventh Circuit's decision. Neither the statement of facts in the government's Brief in Opposition nor the court of appeals' opinion offers any more. *See* BIO at 5-6; Pet. App. 6a. And, if there were any doubt, the government, in its argument for a good faith defense, explicitly concedes the point: "[T]he Seventh Circuit ha[s] repeatedly upheld warrants to search drug dealers' residences where the supporting affidavit indicated that the defendant was an active drug dealer and that, based on the affiant's training and experience, drug traffickers generally store drug-related evidence in their residences." BIO at 22.

That holding is in conflict with the holdings of the First Circuit, Sixth Circuit, and multiple state courts of last resort—all of which hold that officers *cannot* establish probable cause to search a home solely on the basis of evidence of drug dealing away from the home. The Court should grant certiorari to resolve this important conflict. An individual's rights under the Fourth Amendment should not depend on the jurisdiction in which he lives.

This case is an excellent vehicle to resolve this conflict because it vividly illustrates both how the Seventh Circuit's approach operates and the threat that

approach poses to Fourth Amendment values. The officers sought and obtained warrants to search 30 residences and five storage lockers. Petitioner's home was among those places even though, as the government concedes, the officers knew that the alleged drugs were being stored at specific locations *other* than Petitioner's home. *See* BIO at 9. Unlike many cases, the officers never observed Petitioner with drugs or drug proceeds.[1] There was no evidence from an informant that implicated Petitioner's home. The officers never conducted a controlled purchase involving Petitioner. In fact, the warrant affidavit, in addition to its assertion that drug dealers generally keep evidence in their homes, also asserted that drug dealers "often times utilize . . . storage facilit[ies]" precisely in order to keep evidence out of their homes. Application for a Search Warrant at 114, ECF No. 762-1.[2]

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[1] The affidavit in this case contained only three alleged incidents related to Petitioner. First, officers intercepted text messages they interpreted to be arranging a drug transaction and then witnessed a suspected drug transaction in which an individual left Petitioner's vehicle with a basket-ball sized box; officers did not recover the box or confirm what was inside. Second, officers intercepted a call between Petitioner and his brother, in which Petitioner affirmed that individuals had "le[ft] the fifteen." Third, Petitioner answered his brother's phone and then relayed the caller's request that officers interpreted to be for methamphetamine to his brother. *See* Pet. App. 5a-6a; *see also* BIO at 2-3.

[2] In the Brief in Opposition, the government—perhaps sensing the weakness of its position—tries to buttress the court of appeals' ruling by suggesting that the alleged conspiracy in this case had a "modus operandi" of storing drugs in conspirators' homes. BIO at 9. The warrant affidavit, of course, said no such thing. In fact, it said essentially the *opposite*—that drug dealers "often times" avoid storing evidence in their homes.

1. The court of appeals' ruling in this case is not an aberration. The Seventh Circuit has repeatedly stated that "'[i]n the case of drug dealers, evidence is likely to be found where the dealers live'" and has repeatedly upheld searches of individuals' homes on that basis. *See United States v. Orozco*, 576 F.3d 745, 749 (7th Cir. 2009) (quoting *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991)); *see also United States v. Sewell*, 780 F.3d 839, 846 (7th Cir. 2015) (same); *United States v. Kelly*, 772 F.3d 1072, 1080 (7th Cir. 2014) (same); *United States v. Correa*, 908 F.3d 208, 220 (7th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3480 (U.S. June 3, 2019) (No. 18-1519) (holding that "[i]f officers have probable cause to arrest someone, there is a good chance they also have probable cause to search his home for evidence."). Indeed, as we noted, the government concedes as much. *See* BIO at 22. The government also acknowledges that "a number of courts of appeals and state courts of last resort" have adopted the rule that a search warrant for a home can be issued solely based on evidence that its resident is engaged in drug dealing activity elsewhere. *See* BIO at 10-11, 13-14.

2. Unsurprisingly, other circuits and several state courts of last resort do not accept this approach. The government does not refute that the Sixth Circuit, First Circuit, and five state courts of last resort each hold the opposite of the Seventh Circuit: a search warrant for a home *cannot* issue solely based on evidence that its resident is engaged in drug-dealing activity elsewhere.

Sixth Circuit. The Sixth Circuit has squarely and repeatedly held that "[w]e have never held[] that a suspect's 'status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in his home.'" *United States v. Brown*, 828 F.3d 375, 383 (6th

Cir. 2016) (quoting *United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005)). The government's claim that the Sixth Circuit has nonetheless adopted the Seventh Circuit's position is without merit.

For one thing, the government does not even mention the Sixth Circuit's recent *en banc* decision in *United States v. Christian*, 925 F.3d 305 (6th Cir. 2019) (en banc). The search warrant affidavit in that case contained significant evidence that the defendant was engaged in drug dealing activity, including testimony from four subjects and an informant that defendant was dealing drugs, as well as a controlled buy from defendant. Yet the *en banc* court premised its analysis of the legality of the search warrant not on the generalized evidence that the defendant was a drug dealer, but on whether "there was evidence of drug trafficking in [defendant]'s home." *Id.* at 311. Because there was such evidence—including the defendant's history of trafficking from his residence and surveillance indicating that a customer carried drugs from the residence to his car—the *en banc* court affirmed the district court's denial of defendant's motion to suppress. *Id.* ("[The evidence] clearly point[ed] to one conclusion: that [defendant] was dealing drugs from [his residence]."). The *en banc* majority and dissent disputed whether the home-specific evidence was sufficient to support the warrant, *see id.* at 311, 329, but the Seventh Circuit would have upheld the warrant simply on the basis of the evidence showing that the defendant was a drug dealer. The Sixth Circuit's analysis cannot be reconciled with the Seventh Circuit's holding in this case.

The remaining cases cited by the government similarly fail to refute that the Sixth Circuit would

require a nexus to the home in this case. Much of the government's argument consists of out-of-context quotations. For example, the government misleadingly claims that the affidavit in *Brown* did not establish probable cause to search the home because it "did not 'establish[] the defendant as an *active* drug dealer.'" BIO at 14, citing *United States v. Coleman*, 923 F.3d 450, 458 (6th Cir. 2019). In fact, in the quoted case, the Sixth Circuit reaffirmed its nexus requirement—and stated that the warrant applications in *Brown* and other circuit cases did not establish probable cause because they "had much weaker facts linking the drugs to the defendant's home, and none of them established the defendant as an *active* drug dealer." *Coleman*, 923 F.3d at 458 (finding probable because the affidavit provided "precisely" the sort of nexus to the home required by *Brown*). The government further mischaracterizes Sixth Circuit precedent by citing multiple cases that deal with an officer's good-faith reliance on a potentially insufficient warrant, which requires a weaker link between the defendant's home and criminal activity. *See United States v. McCoy*, 905 F.3d 409, 417 (6th Cir. 2018) ("[A] link between the drug dealer's activities and his home that would be insufficient to establish probable cause may suffice to establish good-faith reliance on the warrant."); *see also United States v. Ardd*, 911 F.3d 348, 351-52 (6th Cir. 2018) *cert. denied*, 139 S. Ct. 1611 (2019). These holdings only reinforce that the Sixth Circuit requires a particularized nexus to establish probable cause to search the home.[3]

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[3] The government also invokes an unpublished pre-*Christian* decision in which a home search warrant was upheld where the defendant was discovered with eleven kilograms of cocaine and identified by an informant as a "large scale [h]eroin dealer." *United*

First Circuit. As we established in our petition, the First Circuit has disapproved of the reasoning adopted by the Seventh Circuit. *See United States v. Bain*, 874 F.3d 1, 23-24 (1st Cir. 2017) ("We have expressed skepticism that probable cause [to search a home] can be established by the combination of the fact that a defendant sells drugs and general information from police officers that drug dealers tend to store evidence in their homes. However, the addition of specific facts connecting the drug dealing to the home can establish a nexus." (internal citations omitted)), *cert. denied*, 138 S. Ct. 1593 (2018).

Far from refuting this, the government's cases show that the First Circuit consistently upholds search warrants if they are based on "specific facts" establishing a nexus between the alleged drug-dealing activity and the home. *See Bain*, 874 F.3d at 24 (affidavit established that defendant's practice was to deliver drugs near his residence, he was arrested exiting the residence while carrying heroin, and no other location was identified); *United States v. Rivera*, 825 F.3d 59, 64 (1st Cir. 2016) (affidavit contained evidence showing defendant "used his home as a communications point to

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States v. Davis, 751 F. App'x 889, 891–92 (6th Cir. 2018) (quotation marks omitted) (cited in BIO at 14); *see also Brown*, 828 F.3d at 383 n.2 (explaining pre-*Christian* that such cases were "distinct from the typical drug trafficking case, . . . because the affidavits did not just establish that the defendants were drug dealers, but contained *overwhelming evidence* that the defendants were major players in a large, ongoing drug trafficking operation (emphasis added)). There is nowhere close to this type of evidence in the instant case, as Petitioner was never observed with any confirmed drugs (let alone large quantities of drugs), and the affidavit contained no informant evidence regarding Petitioner.

further his drug crimes"); *United States v. Ribeiro*, 397 F.3d 43, 49-50 (1st Cir. 2005) (during three controlled buys, defendant left his apartment and "appeared to go directly to the rendezvous"); *United States v. Feliz*, 182 F.3d 82, 87-88 (1st Cir. 1999) (affidavit did not identify any other residence or drug-dealing headquarters and presented informant testimony that defendant engaged in successful drug trafficking for twelve years). Unlike the Seventh Circuit, therefore, the First Circuit would not have allowed a warrant in this case simply based on the search warrant affidavit stating that drug dealers generally keep contraband at home.

State Courts. The government acknowledges that five state courts of last resort hold that a warrant to search a home cannot be based solely on evidence of drug dealing away from the home and an officer's affidavit stating that drug dealers often keep drugs in their home. The government attempts to distinguish these decisions on their facts, *see* BIO at 17, but these attempts are unsuccessful.

First, the government's argument that no state court has created a rule that would require suppression in Petitioner's case is wrong. *See, e.g.*, *State v. Tester*, 592 N.W.2d 515, 521-22 (N.D. 1999) ("[P]olice must have more than mere suspicion contraband exists at a particular place to satisfy the nexus requirement."); *Ex parte Perry*, 814 So. 2d 840, 843 (Ala. 2001) ("[A] defendant's possession of illegal drugs does not, without more, make reasonable a search of the defendant's residence.").

Second, the government cannot distinguish the state court decisions on the ground that some of them involved warrants authorizing searches of multiple locations. *See*

BIO at 17, 19 (arguing that the Alabama and North Dakota holdings are limited to warrants "identifying two possible locations in which officers might find illegal drugs, without providing any cause to search one location over the other," or that authorize the "search of another residence in a different location" when there was stronger circumstantial evidence in connection with a different location (internal quotation marks omitted)). The warrant application in this case in fact went much further—as the government concedes, seeking to search *35 different locations*, and seeking to search Petitioner's home despite evidence that the alleged drugs were being stored elsewhere. *See* BIO at 9. The fact that multiple locations were searched, without evidence providing any cause to search Petitioner's home over any other location, is actually a similarity between these cases rather than a distinguishing fact.

Finally, the government erroneously attempts to distinguish the cited cases from Massachusetts, Arkansas, and Kansas based on facts not relied on by the courts in reaching their holdings—namely, that the warrant affidavits in those cases did not establish the amount of drugs the defendants had dealt in the past. BIO at 18-19. Contrary to the government's assertion, the courts in those cases relied on the lack of evidence linking drug-dealing to the searched location, not the lack of evidence about the quantity of drugs. *Commonwealth v. Pina*, 902 N.E.2d 917, 919 (Mass. 2009) ("The 'fundamental flaw' in the affidavit before us is that it does not explain why there was probable cause to believe that drugs or related evidence would be found at [the defendant's home] other than it being the residence of the defendant." (quotation marks omitted) (alterations in original)); *Yancey v. State*, 44 S.W.3d 315,

323 (Ark. 2001) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that specific things to be searched for and seized are located on the property to which entry is sought."). And in any event, those jurisdictions require a nexus to the home even when there is *stronger* evidence than contained in the affidavit in this case. *See Pina*, 902 N.E. 2d at 918 (evidence from a confidential informant and a controlled buy); *Yancey*, 44 S.W. 3d at 325-26 (direct observation of defendants with drugs); *State v. Hicks*, 147 F.3d 1076, 1078-79 (Kan. 2006) (evidence of prior drug-related convictions, witness reports of suspicious activity in and around the home, and trash bags outside the home testing positive for drugs). The government thus has failed to refute that the state courts of last resort, too, have split from the Seventh Circuit on the question presented.

3. The government is wrong that the good faith exception creates a vehicle issue in this case. First, the government waived this argument by failing to raise it in the district court. *See* BIO at 21 & n.*; Pet. App. 27a; *see also Steagald v. United States*, 451 U.S. 204, 209 (1981). Even assuming that the government can raise its good faith exception argument under the plain error standard of review, *see* BIO at 21 & n.*, there was no plain error in this case. As the district court correctly explained, "[g]iven the deficiencies in the [a]ffidavit, particularly the lack of nexus between [Petitioner's] alleged criminal activities and [Petitioner's residence] (and that [Petitioner's] drug activities tied back to Jose Zamudio's residence), the good faith doctrine does not apply to the facts of this case because a reasonable well-

trained officer would have known the search was illegal." *Id.* at 27a.

In any event, the Court need not address the government's good faith exception argument in this case. It instead can resolve the circuit split presented in this case, and then remand the case for consideration of any remaining questions regarding the good faith exception, as it has done in other recent cases. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018); *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018); *see also United States v. Carpenter*, 926 F.3d 313, 318 (6th Cir. 2019) (considering good faith exception argument following remand from Supreme Court); *Collins v. Virginia*, 824 S.E.2d 485, 496 (Va. 2019) (same).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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