No. ____

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Several federal courts of appeals, including the Seventh Circuit in the decision below, hold that the mere fact a defendant has engaged in drug trafficking can establish probable cause for a search warrant to search the defendant's home, even if there is no specific evidence linking the drug trafficking to the defendant's home.

Two federal courts of appeals and at least five state courts of last resort, in contrast, require that the search warrant application provide a particularized nexus between the drug trafficking activity and the home to be searched.

The question presented is:

Whether a search warrant application that fails to provide any particularized nexus between an individual's alleged drug trafficking activity and the individual's residence can provide probable cause for a warrant to search the residence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 909 F.3d 172. The opinion of the United States District Court for the Southern District of Indiana granting Petitioner's Motion to Suppress (Pet. App. 10a–29a) is reported at 291 F. Supp. 3d 855.

JURISDICTION

The court of appeals issued its judgment on November 20, 2018. Petitioner filed a timely application for an extension of time within which to file a petition for a writ of certiorari on February 8, 2019. Justice Kavanaugh granted that application on February 8, 2019, making the petition for a writ of certiorari due on March 21, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states: "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."

INTRODUCTION

This case presents an important question under the Fourth Amendment that has divided both the federal courts of appeals and state courts of last resort. The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated" and that "no [w]arrants shall issue, but upon probable cause." U.S. Const. amend. IV. As this Court has explained, "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 the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978).

The federal courts of appeals and state courts of last resort are sharply split on whether probable cause for a warrant to search a residence can be established merely through evidence that an individual residing there has engaged in drug trafficking activity somewhere else. The Seventh Circuit in this case, like several other federal circuits and state courts of last resort, answers that question in the affirmative, holding that a search warrant application need not contain *any* specific nexus between the alleged drug trafficking activity and the residence to be searched. As the Seventh Circuit explained in this case, it does not require such a nexus because "'[i]n the case of drug dealers,' this circuit has recognized 'evidence is likely to be found where the dealers live.'" Pet. App. 6a (quoting *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991)). Two federal circuits and other state courts of last resort disagree. As

the Sixth Circuit has explained, "our cases teach, as a general matter, that if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity[] * * * it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer." *United States v. Brown*, 828 F.3d 375, 384 (6th Cir. 2016). This split has been acknowledged in decisions and treatises.

This case is an excellent vehicle for this Court to resolve this important question. The search warrant application in this case sought the search of 35 different locations, one of which was Petitioner's home. It is undisputed that the search warrant application did not provide any particularized evidence that any criminal activity occurred at or around Petitioner's home. Rather, the search warrant application alleged merely that Petitioner participated in drug trafficking activities on three occasions at the home of his brother (the head of the alleged drug trafficking operation) and in public places. The magistrate judge granted the warrant to search Petitioner's home based on the search warrant application. The case therefore squarely presents the question on which the lower courts disagree.

The question presented is dispositive in this case, as well. Before trial, the United States District Court for the Southern District of Indiana granted Petitioner's motion to suppress evidence obtained in the search of his home, holding that the search warrant application failed to show a sufficient nexus between activities related to drug trafficking and his home and that there accordingly was no probable cause to search the home. *See* Pet. App. 27a–28a. The court of appeals reversed, holding that the affidavit gave the magistrate judge who issued the

warrant "sufficient information suggesting a 'fair probability' that evidence of a crime would be found at [Petitioner's] home." *Id.* at 6a. Thus, this is precisely the sort of case in which the rule makes a difference.

The question presented in this case recurs frequently and is the subject of a substantial and acknowledged conflict of authority. It also is an important issue. "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." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quotation marks omitted). An individual's protections under the Fourth Amendment should not depend on the jurisdiction in which he lives. The Court should grant certiorari to resolve the conflict.

STATEMENT OF THE CASE

A. Factual Background

In February 2016, the FBI began an "investigation into Jose Zamudio's drug trafficking organization." United States' Response and Opposition, Defendant's Motion to Suppress at 2, ECF No. 762. The government performed surveillance on, and intercepted phone calls between, a number of individuals connected to Jose Zamudio. *Id.* One of these individuals was Jose Zamudio's brother, Petitioner Juan Zamudio. *Id.* at 2. (For sake of clarity, we refer to Petitioner's brother as "Jose," as the Seventh Circuit did in its opinion below.)

On November 14, 2016, the government applied for a warrant to search 35 separate locations. *Id.* at 44–46. This included Petitioner's residence, in addition to 29 other residences, three storage units, and two

commercial sites. *Id.* The application was supported by an 83-page affidavit by FBI Special Agent Tim Bates.

As the government itself acknowledges, "[t]he affidavit, however, did not identify any drug-distribution activity that had occurred at [Petitioner's] home." Gov't CA7 Br. at 5. Nor did it identify any other activity that occurred in or around Petitioner's home—including, for example, any allegation that Petitioner had been observed leaving from or returning to his residence. Instead, the search warrant application included details of three separate alleged incidents related to Petitioner, which the government claimed justified a search of his residence. Pet. App. 2a–4a. Specifically, the affidavit contained the following allegations:

1. The first incident took place in a Kroger grocery store parking lot in October 2016. Officers intercepted a call between Jose and Petitioner and then text messages between Petitioner and two co-defendants, all of which the officers interpreted to be arranging a drug transaction. Application for a Search Warrant at 85–86, ECF No. 762-1. Petitioner and the co-defendant arranged to meet in the parking lot of a Kroger grocery store. *Id.* at 85. Once there, surveillance officers witnessed one of the individuals enter Petitioner's vehicle and emerge with a basketball-sized box. *Id.* There is no allegation that the officers recovered the box or confirmed what was inside it.

2. The second incident took place at Jose's residence and a Long John Silver's restaurant parking lot a week later. Officers observed two co-defendants leave Jose's house and meet another individual at a restaurant near Petitioner's place of work. *Id.* at 81. (There is no

allegation that Petitioner was at Jose's house or in the Long John Silver's parking lot during these meetings.) Officers later intercepted a call between Jose and Petitioner, in which Petitioner and his brother had the following exchange:

> Petitioner: I have the guys here, they're done.
>
> Jose: Did they leave the fifteen?
>
> Petitioner: Yes. Look, um the guy was telling me right now for you to have the house dark[,] because the dogs were following them.

Id. at 83a–84a. In the search warrant application, Agent Bates interpreted these statements to be Petitioner reporting that the drug transaction had been completed and that he had collected $15,000 from the co-defendants. *Id.*

3. The final incident took place at Jose's residence in November 2016. A co-defendant called Jose's phone, but Petitioner answered. *Id.* at 102. The co-defendant indicated that he wanted to purchase methamphetamine, and Petitioner relayed this information to his brother.[1] *Id.* at 102–03. According to the government, Petitioner then told the co-defendant that he was with Jose at Jose's residence, and that the co-defendant could "swing by." *Id.* at 103.

The search warrant application thus did not include any evidence specific to Petitioner's residence, and

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[1] The affidavit transposed Petitioner's name for his brother's in describing this incident (and some others). Thus, while the affidavit stated that Petitioner relayed this information to Petitioner, the context indicates that it meant that Petitioner relayed this information to his brother. *See* Gov't CA7 Br. at 4.

instead stated that his alleged drug trafficking activities occurred at Jose's house and in parking lots. Agent Bates asserted in the affidavit that Petitioner had his own customer base in addition to working at the direction of his brother, but the affidavit did not contain evidence supporting this assertion. Pet. App. 4a.

To support a search of Petitioner's residence (as well as the 29 other residences), the affidavit also included generalized statements based on Agent Bates's training and experience. First, Agent Bates stated that "[b]ased on my training and experience, I am aware that drug traffickers generally store their drug-related paraphernalia in their residences or the curtilage of their residences." Application for a Search Warrant at 111, ECF No. 762-1. Agent Bates also stated in the affidavit that:

> I know that drug traffickers often times utilize storage lockers to maintain drugs, drug proceeds, and other evidence of their drug trafficking activities, rather than at their residences. I believe that they do so because they believe the storage facility (as opposed to their home residence) provides them with some deniability or distance between the illegal activity and law enforcement.

Id. at 114.

The magistrate judge approved a search warrant for all 35 locations. Law enforcement searched Petitioner's home and seized methamphetamine, among other items. Pet. App. 11a. The government charged Petitioner with conspiracy to possess with intent to distribute and to distribute controlled substances, possession with an

intent to distribute controlled substances, being an illegal alien in possession of ammunition, and conspiracy to launder monetary instruments. *Id.* at 10a.

B. The District Court Grants Petitioner's Motion To Suppress

On February 21, 2018, during pretrial proceeding, Petitioner filed a motion to suppress all evidence seized during the search of his home, asserting that there was no probable cause for the warrant to search his home because there was no nexus between his alleged criminal conduct and his home. ECF No. 745. The United States District Court for the Southern District of Indiana agreed and granted the motion to suppress. Pet App. 10a–12a. The district court held that probable cause did not exist to support the search warrant for Petitioner's residence "[b]ecause the Affidavit contained no nexus between [Petitioner's] alleged drug activities and [his residence], and the Affidavit alleges that all of [Petitioner's] drug related activity either took place at Jose Zamudio's residence or in public locations." Pet. App. 24a–25a.

The district court rejected the government's assertions that "probable cause does not require direct evidence linking a crime to a particular place" and that the magistrate judge could instead infer that evidence is likely to be found at suspected drug dealers' residences. *Id.* at 17a. The district court agreed with Petitioner that "being suspected of drug trafficking miles away from his home, with no allegations that he left his home, returned to his home[,] or conducted any drug trafficking activity at or even near his home, does not lead to a reasonable belief that evidence of drug trafficking would be found at his residence," and found there was "absolutely no

evidence linking [Petitioner's] presence or his drug dealing activity to [his residence]." *Id.* at 17a, 22a. Without a reasonable nexus established in the affidavit between Petitioner's alleged criminal drug activity and his residence, the district court found that there was not a fair probability that contraband would be found at Petitioner's residence. *Id.* at 22a.

The district court additionally noted that the only three instances cited in the affidavit involving Petitioner "provided no nexus to [Petitioner's] residence." *Id.* at 23a. Rather, the district court acknowledged that most of the drug-related activity in the affidavit regarded *Jose*'s home and that the affidavit "supports the proposition that Jose Zamudio's home was the drug-dealing headquarters." *Id.* In contrast to the numerous references in the affidavit to drug-related activities at Jose's home, "[n]one of [Petitioner's] drug related activities are alleged to have occurred at his residence, rather they are alleged to have occurred in public places." *Id.*

The district court thus distinguished the cases cited by the government. The district concluded that, unlike other cases, this was not a case in which "either a confidential informant reported activity at the residence; or through surveillance drug related activity was observed at the residence; or there was no hint of any other location where defendant would keep materials related to his drug dealings and therefore, it was logical to infer that such materials existed at the defendant[']s residence." *Id.* at 24a. Since there was no nexus whatsoever to connect Petitioner's alleged drug activities to his home, the district court found that probable cause did not exist and the evidence seized

during the search of Petitioner's home must be suppressed. *Id.* at 25a, 27a.

The district court ruled that the government failed to argue that the good faith exception to the exclusionary rule should apply. *Id.* at 27a. The district court also held that, in any event, "[g]iven the deficiencies in the affidavit, 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. Accordingly, the district court held that the evidence seized during the search of Petitioner's residence must be suppressed. *Id.*

C. The Seventh Circuit Reverses The District Court

The government filed an interlocutory appeal of the district court's suppression order to the Seventh Circuit. In its appeal, the government argued that the affidavit established probable cause that Petitioner was a drug dealer, and that the search warrant therefore established probable cause to search Petitioner's home. Gov't CA7 Br. at 19–20. The government also acknowledged that it had failed to preserve its argument that the good faith exception applied but argued that the Seventh Circuit should apply the exception under the plain error standard of review. *Id.* at 21–23.

The Seventh Circuit reversed. The Seventh Circuit agreed with the district court that "[m]issing from the affidavit—and the reason for this appeal—was

information that drug-trafficking activity actually took place at [Petitioner's] residence." Pet. App. 4a. The Seventh Circuit nevertheless held that the affidavit provided probable cause to search Petitioner's residence. It noted that there was no dispute that the affidavit provided probable cause to conclude that Petitioner was engaged in a drug trafficking operation. *Id.* With regard to drug dealers, the court relied on circuit precedent to hold that "evidence is likely to be found where the dealers live." *Id.* at 6a (quoting *Lamon*, 930 F.2d at 1188). The Seventh Circuit thus held that the evidence in the affidavit pertaining to Petitioner's alleged drug dealing activities, combined with Agent Bates's statements about his experience with drug dealers and his belief that drug dealers store paraphernalia at their homes, were sufficient to suggest "that evidence of a crime would be found at Petitioner's home." *Id.* at 6a.

The Court deferred to Agent Bates's expertise in drug investigations and accepted as valid his assertion that "drug traffickers generally store their drug-related paraphernalia and maintain records relating to their drug trafficking at their residences" and that "drug dealers commonly store large sums of drug money and evidence of financial transactions from drug sales in their residences." *Id.* at 6a–7a. The Seventh Circuit emphasized that it has consistently held that probable cause "does not require direct evidence linking a crime to a particular place." *Id.* at 5a (quoting *United States v. Anderson*, 450 F.3d 294, 303 (7th Cir. 2006)). Rather, "an affidavit submitted in support of a warrant application 'need only contain facts that, given the nature of the evidence sought and the crime alleged, allow for a reasonable inference that there is a fair probability that

evidence will be found in a particular place.'" *Id.* at 5a–6a (quoting *United States v. Aljabari*, 626 F.3d 940, 944 (7th Cir. 2010)).

Although the Seventh Circuit asserted that it was not announcing a bright-line rule that probable cause to arrest someone for drug dealing always establishes probable cause to search the suspect's home, it held that "the issuing judge reasonably drew the inference that indicia of drug-trafficking would be found at [Petitioner's] home" solely on the basis of evidence Petitioner engaged in drug dealing and Agent Bates's statement that drug dealers often keep evidence in their homes. *Id.* at 7a. The Seventh Circuit thus held that the decision is ultimately "left to the magistrate judge issuing the search warrant." *Id.* at 8a (citing *Illinois v. Gates*, 462 U.S. 213, 239 (1983)). It also held that, given its holding, it need not address the parties' arguments regarding the good faith exception to the exclusionary rule. *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

There is a longstanding and significant circuit split on the question presented in this case. At least six federal circuits and at least four state courts of last resort agree with the Seventh Circuit that the mere fact someone is engaged in drug trafficking activity away from his home can provide probable cause for a search warrant to search his home. The First and Sixth Circuits and at least five state courts of last resort, in contrast, require more. Specifically, they require that the search warrant application provide a particularized nexus between the drug trafficking activity and the home to be searched. The split is acknowledged and entrenched, and only this Court can resolve the conflict. The issue is plainly

important and recurs frequently. This case provides an excellent vehicle for resolving the question. This Court's review is therefore warranted.

I. There Is An Acknowledged Split Between The Federal Courts Of Appeals And Among The State Courts Of Last Resort On The Question Presented.

This Court held in *Illinois v. Gates* that probable cause to issue a search warrant exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. 213, 238 (1983). Probable cause requires that there be a nexus between the defendant's criminal conduct and the place police seek to search. *See Payton v. New York*, 445 U.S. 573, 582 n.17 (1980) ("governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed"). The Court has explicitly ruled that the government must show "reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought." *Zurcher*, 436 U.S. at 556. The federal courts of appeals and state courts of last resort are split regarding the recurring issue of what evidence the government must offer to establish the necessary nexus between a defendant's home and his alleged drug trafficking activity.

Several federal circuits and states permit magistrates to issue search warrants for a defendant's home based exclusively on a showing that there is probable cause to believe the defendant was involved in drug trafficking away from his home. In contrast, two federal circuits and other states hold that probable cause to search a home only exists once police offer actual,

particularized evidence linking the defendant's residence to the alleged drug trafficking. In these jurisdictions, the defendant's status as an accused drug dealer cannot itself provide probable cause to search his or her home. Thus, there exists a clear and unmistakable split between and among the federal circuits and state high courts. This split is acknowledged in both cases and treatises. *See, e.g.*, 2 Wayne R. LaFave, *Search & Seizure* § 3.7(d) (5th ed. 2012); *Eaton v. State*, 889 N.E.2d 297, 303–04 (Ind. 2008) (Rucker, J., dissenting); *State v. O'Keefe*, 141 P.3d 1147, 1156–57 (Ct. App. Idaho 2006); *People v. Pressey*, 126 Cal. Rptr. 2d 162, 165 (Ct. App. 2002).

A. A Number Of Jurisdictions Hold That A Warrant To Search An Individual's Home Can Be Based Solely On Evidence The Individual Has Engaged In Drug Trafficking Activity Somewhere Else.

Several federal circuits and state courts of last resort hold that a showing of probable cause to believe that the defendant was involved in drug trafficking is sufficient to establish probable cause to search the defendant's home. These courts do not require the police to offer particularized observational or informant-derived evidence linking the home to the alleged drug trafficking.

The Seventh Circuit applied that rule in this case in reversing the district court. *See* Pet. App. 6a ("In the case of drug dealers, this circuit has recognized, evidence is likely to be found where the dealers live." (internal quotation marks omitted), quoting *Lamon*, 930 F.2d at 1188). As the Seventh Circuit held in an earlier case, where there is probable cause to find that "an

individual has committed a crime involving physical evidence, and when there is no . . . reason to believe that evidence of that crime was not . . . hidden in that individual's home, a magistrate will generally be justified in finding probable cause to search that individual's home." *United States v. Aljabari*, 626 F.3d 940, 946 (7th Cir. 2010).

Several other federal circuits apply the same rule as the Seventh Circuit. For example, the Tenth Circuit has held that "when police officers have probable cause to believe that a suspect is involved in drug distribution, there is also probable cause to believe that additional evidence of drug-trafficking crimes (such as drug paraphernalia or sales records) will be found in his residence" even when police can offer no evidence linking the defendant's home to the crime. *United States v. Sanchez*, 555 F.3d 910, 914 (10th Cir. 2009). The Third, Fourth, Eighth, Ninth, and D.C. Circuits similarly have held that evidence a defendant is engaged in drug dealing away from his home—either alone, or in conjunction only with an officer's general statement that evidence of drug-related crimes is often kept in the home—can be sufficient to establish probable cause for a warrant to search his home. *See, e.g.*, *United States v. Job*, 871 F.3d 852, 864 (9th Cir. 2017) ("Because [the] affidavit provides sufficient facts to support the conclusion that [defendant] was involved in the distribution of drugs, the Court may draw the reasonable inference that evidence is likely to be found where [defendant] lives."); *United States v. Cardoza*, 713 F.3d 656, 661 (D.C. Cir. 2013) ("When there is probable cause that a defendant is dealing drugs, there often tends to be probable cause that evidence of that drug dealing will be found in the defendant's residence.");

United States v. Keele, 589 F.3d 940, 943 (8th Cir. 2009) (holding that, where evidence of drug trafficking and manufacturing recovered at accident scene, "[agent's] affidavit established the required nexus between the evidence being sought in the warrant application and [defendant's] residence"); *United States v. Williams*, 548 F.3d 311, 319 (4th Cir. 2008) (noting that the Fourth Circuit has "upheld warrants to search suspects' residences and even temporary abodes on the basis of (1) evidence of the suspects' involvement in drug trafficking combined with (2) the reasonable suspicion (whether explicitly articulated by the applying officer or implicitly arrived at by the magistrate judge) that drug traffickers store drug-related evidence in their homes"); *United States v. Hodges*, 246 F.3d 301, 306–307 (3d Cir. 2001) ("It is reasonable to infer that a person involved in drug dealing on such a scale would store evidence of his dealing at his home.").

Several states follow this approach, as well. *See, e.g.*, *State v. Yarbrough*, 841 N.W.2d 619, 623–24 (Minn. 2014); *Eaton*, 889 N.E.2d at 300; *State v. Ward*, 604 N.W.2d 517, 523 (Wis. 2000); *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992). Thus, in these jurisdictions, no particularized evidence beyond probable cause that the defendant is involved in drug trafficking is needed to establish a nexus between the place to be searched and the defendant's alleged conduct.

B. Several Other Jurisdictions Hold That A Warrant To Search An Individual's Home Must Be Based On Something More Than Mere Evidence The Individual Has Engaged In Drug Trafficking Activity Somewhere Else.

The First and Sixth Circuit, as well as at least five state courts of last resort, are on the other side of this split, requiring police to offer some specific observational or informant-derived evidence that establishes a link between the defendant's home and his or her alleged drug trafficking activity in order to secure a search warrant for the home. Generalized inferences about drug trafficking and police officers' generalized claims based on expertise are insufficient to establish a nexus in these jurisdictions.

In *United States v. Brown*, 828 F.3d 375 (6th Cir. 2016), for example, the Sixth Circuit recently reiterated 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.'" *Id.* at 383 (quoting *United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005)). In that case, the government secured a search warrant for the defendant's home based on evidence that the defendant sold drugs in the Detroit-area, a drug-dog sniff test of the defendant's car indicating that narcotics were present, and the affiant officer's belief that dealers would conceal evidence of their crimes within their residences. *See* 828 F.3d at 378–79. In reviewing the defendant's suppression motion, the court noted that the government's failure to establish "[a] more direct connection" between the conduct and the defendant's home prevented a finding of

probable cause. *Id.* at 383. The court thus rejected the government's argument that the magistrate ought to have been allowed to infer the existence of probable cause to search the defendant's home from the circumstances of the crime alleged, instead holding that the government would need to present "some reliable evidence connecting the known drug dealer's ongoing criminal activity to the residence," such as an informant's claim to have observed drug sales at the specific location. *Id.*[2]

The First Circuit agrees with the Sixth Circuit's approach. It recently stated, for example: "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

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[2] The Sixth Circuit has recently agreed to review *en banc* a case involving a search of a drug dealer's home, but there is no reason to believe that the decision there will upset the key holdings of *Brown*. In the case to be reviewed, *United States v. Christian*, 893 F.3d 846 (6th Cir. 2018), *reh'g granted en banc, opinion vacated*, 904 F.3d 421 (6th Cir. 2018), police presented several pieces of evidence that linked the defendant's home to his drug dealing activities, but the court found the evidence either too stale or unverified to establish probable cause. *See* 893 F.3d at 863-64. In the *en banc* rehearing, the government argues that it was error for the panel to have considered the evidence offered in the warrant application in isolation rather than applying the totality of the circumstances approach mandated by *Illinois v. Gates*. The government does not argue that it does not have the burden to offer particularized evidence showing a link between the place to be searched and the defendant's alleged crime. *See* Supplemental Brief on Rehearing *en banc* for Plaintiff-Appellee at 6, *United States v. Christian*, 904 F.3d 421 (6th Cir. 2018), No. 17-1799, 2018 WL 6200537 ("the panel majority erroneously reviewed and attacked each category of information in the affidavit in isolation").

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." *United States v. Bain*, 874 F.3d 1, 23–24 (1st Cir. 2017) (internal citations omitted), *cert. denied*, 138 S. Ct. 1593 (2018). The First Circuit's cases finding probable cause for a search warrant of a residence emphasize the existence of particularized evidence that shows a connection between the defendant's residence and his or her alleged drug trafficking activities. *See, e.g.*, *United States v. Rivera*, 825 F.3d 59, 66 (1st Cir. 2016) (probable cause where the evidence "indicated that [defendant] participated in a drug-related phone call from his home").[3]

In addition, several states also hold that the nexus requirement cannot be met by a generalized, conclusory affidavit stating that drug dealers usually keep drugs in their house. The Supreme Court of Alabama's decision in *Ex parte Perry*, 814 So. 2d 840 (Ala. 2001) is illustrative. In *Perry*, officers completed three controlled drug buys with the defendant. *Id.* at 841–43. All three occurred at a place other than the defendant's home, and the only nexus to the defendant's home was an officer affidavit stating that drug dealers typically

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[3] Both the First and Sixth Circuits recognize that evidence a defendant has run a major and continuous drug trafficking operation over a long course of time may be sufficient to create probable cause to search his home. *See, e.g.*, *United States v. Newton*, 389 F.3d 631 (6th Cir. 2004) (evidence defendant engaged in drug trafficking on 20 occasions), *vacated on other grounds*, 546 U.S. 803 (2005); *United States v. Feliz*, 182 F.2d 82 (1st Cir. 1999) (evidence defendant engaged in drug trafficking for at least 12 years). That is not the fact pattern of this case, nor is it a basis on which the Seventh Circuit found probable cause in this case.

store illegal drugs at their residences. *Id.* Resting on Alabama and Eleventh Circuit decisions interpreting the Fourth Amendment, the Alabama Supreme Court required a more substantial basis—something more than conclusory statements—for probable cause. *Id.* at 842–43 (citing *United States v. Lockett*, 674 F.2d 843, 846 (11th Cir. 1982); *Illinois v. Gates*, 462 U.S. 213 (1983)). The Arkansas, Massachusetts, North Dakota, and Kansas Supreme Courts apply the same rule following the Fourth Amendment. *See, e.g.*, *Commonwealth v. Pina*, 902 N.E.2d 917, 919 (Mass. 2009) (holding that "probable cause to expect that drugs will be present in the home is not established by the fact that the defendant lives there"); *Yancey v. State*, 44 S.W.3d 315, 323–24 (Ark. 2001) (finding no probable cause where evidence of drug dealing, but affidavit "is devoid of any direct or circumstantial evidence of marijuana or any contraband or that evidence of a crime would likely be found in the two homes searched"); *State v. Tester*, 592 N.W.2d 515, 521–22 (N.D. 1999) (holding that "police must have more than mere suspicion contraband exists at a particular place to satisfy the nexus requirement"); *State v. Longbine*, 896 P.2d 367, 371–72 (Kan. 1995) (holding that affidavit providing evidence that defendant was part of a drug trafficking network was insufficient to state a fair probability that contraband would be found at his residence), *disapproved of on other grounds by State v. Hoeck*, 163 P.3d 252 (Kan. 2007).[4]

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[4] *See also City of Bismarck v. Brekhus*, 908 N.W.2d 715, 723–24 (N.D.) (recognizing that state has not interpreted its constitution to provide greater protections than the Fourth Amendment), *cert. denied*, 139 S. Ct. 187 (2018); *State v. Zwickl*, 393 P.3d 621, 627 (Kan. 2017) (same); *Commonwealth v. Banville*, 931 N.E.2d 457, 464 (Mass. 2010) (same); *State v. Schultz*, 850 P.2d 818, 823, 829–30 (Kan.

II. This Case Presents An Excellent Vehicle To Resolve The Question Presented.

This case presents an optimal vehicle for the Court to resolve the question presented for three reasons.

First, this case cleanly and squarely presents the question presented. The Seventh Circuit noted in its opinion that there is no dispute that the search warrant affidavit provided probable cause that Petitioner engaged in drug trafficking. Pet. App. 4a. It also is undisputed that the search warrant affidavit and application did not contain any particularized nexus between Petitioner's alleged drug trafficking activity and his residence. Indeed, the government conceded below that "[t]he affidavit * * * did not identify any drug-distribution activity that had occurred at [Petitioner's] home." Gov't CA7 Br. at 5. Nor did the affidavit contain any other particularized evidence about activities that had occurred in or around Petitioner's home. Accordingly, it is undisputed that the search warrant was based solely on (1) probable cause that Petitioner engaged in drug trafficking activities at his brother's house and in public places and (2) Agent Bates attesting to the likelihood that drug dealers often conceal evidence of criminal activity at home.

Second, the rule applied by the Seventh Circuit in this case was outcome determinative. The Seventh Circuit held that there could be probable cause for a search warrant to search Petitioner's home, because there was probable cause that he had engaged in drug trafficking activity away from his home. Had the

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1993) (same); *Yancey*, 44 S.W.3d at 319-20 (applying standard announced by the Supreme Court under the Fourth Amendment).

warrant application to search Petitioner's residence been submitted in jurisdictions on the other side of the split, however, those courts would have held that there could not be probable cause based on these facts. *See* Section I.B above.

Finally, the straightforward nature of this case makes it a strong vehicle for resolving this issue. The magistrate judge granted the warrant application after reviewing Agent Bates's affidavit. The district court then granted Petitioner's motion to suppress because there was "absolutely no evidence (other than the Affiant's statements that drug dealers keep evidence where they live) linking [Petitioner's] alleged drug activity with [his residence]." Pet. App. 24a. The Seventh Circuit acknowledged that "information that drug-trafficking activity actually took place at [Petitioner's] residence" was "[m]issing from the affidavit." Pet. App. 4a. But it nevertheless reversed the district court's findings, holding that there was probable cause on these facts. This case therefore presents an excellent vehicle for this Court to resolve the deep split among the federal courts of appeals and state high courts.

III. The Question Presented Is Important.

This question of what evidence is required to show probable cause sufficient to issue a warrant to search a home is important and recurring. This Court and the Constitution recognize that the home deserves special protection under the Fourth Amendment. The Fourth Amendment protects "[t]he right of the *people* to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures…" and ensures "no Warrants shall issue, but upon probable

cause." (emphasis added). This Court has long recognized the sanctity of the home and the importance of the Fourth Amendment protections of the home. "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." *Kyllo*, 533 U.S. at 31 (quotation marks omitted). Thus, this Court has warned that, "[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free from governmental intrusion not authorized by a warrant." *United States v. Karo*, 468 U.S. 705, 714 (1984).

The issue of what evidence is sufficient to justify a search of the home frequently arises in this context—when an individual is engaged in alleged drug trafficking entirely away from his or her residence. The split among the lower courts and volume of cases on this issue demonstrates that this issue is recurrent. *See, e.g.*, 2 LaFave, *supra*, § 3.7(d) (compiling cases).

The split also means that an individual's Fourth Amendment protections turn on where and by whom he is arrested. The search in this case was by federal officers in Indiana (within the Seventh Circuit), rendering evidence of a specific nexus to Petitioner's home unnecessary. But had Petitioner instead lived across state lines in Michigan, Ohio, or Kentucky (in the Sixth Circuit), this same warrant would not have provided the federal officers with probable cause to search his residence, given the Sixth Circuit's holding that a nexus must exist between the place to be searched and the criminal activity or evidence to be found there. The outcome should not depend on the forum.

Moreover, in at least Arkansas, Kansas, and North Dakota, state courts are interpreting the Fourth Amendment differently than their federal circuits. *See* Section I above. As a result, in those states, the very same conduct would not support a search warrant under the Fourth Amendment in state court, but would support a search warrant under the Fourth Amendment in federal court. The Fourth Amendment's protections in a given state should not turn on whether a state magistrate or a federal one is issuing the warrant.

IV. The Seventh Circuit's Decision Was Incorrect.

This Court should also grant review because the Seventh Circuit's decision was incorrect. As this Court has explained, the "immediate evil[] that motivated the framing and adoption of the Fourth Amendment" was the indiscriminate search under authority of a "general warrant." *Payton*, 445 U.S. at 583-85. And, as the Court recently reaffirmed, "[o]ur cases have recognized that the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U.S. 373, 403 (2014).

The Seventh Circuit's approach—particularly in this case, in which 35 separate locations were searched—contravenes this Court's instructions. It mistakenly permits law enforcement to obtain general warrants for all locations that may be remotely connected to the subject of a drug investigation, even when the evidence points to only some of the locations (such as Jose's home in this case) as the actual sites of the alleged drug-related activity. It also allows law enforcement to do so

based only on an agent's statement that there "generally" is evidence of drug trafficking activities in residences, even when the agent also stated that drug dealers often do *not* keep evidence of their drug trafficking activities in their residences. *See* Application for a Search Warrant at 114, ECF No. 762-1 ("I know that drug traffickers often times utilize storage lockers to maintain drugs, drug proceeds, and other evidence of their drug trafficking activities, rather than at their residences. I believe that they do so because they believe the storage facility (as opposed to their home residence) provides them with some deniability or distance between the illegal activity and law enforcement.").

The Court has long required something more than an affiant's "belief" and "cause to suspect" the occurrence of a crime on certain premises to establish probable cause. *Nathanson v. United States*, 290 U.S. 41 (1933); *see also Aguilar v. Texas*, 378 U.S. 108 (1964) (an officer's statement based on a tip that heroin is stored in a home is insufficient), *abrogated on other grounds*, *Illinois v. Gates*, 462 U.S. 213, 240 (1983) (favoring a totality-of-the-circumstances approach over a rigid two-part test). Recently, in *District of Columbia v. Wesby*, the Court found that arresting officers had probable cause because the officers' assessment of probabilities, *as applied to* "the totality of the circumstances," led to reasonable suspicion of criminal activity. 138 S. Ct. 577, 586 (2018). The Seventh Circuit erred by permitting only the officer's statement of general probabilities to form the sole basis to find probable cause. As this case demonstrates, this allows officers to search homes not because they were particularly linked to any crime, but

because they were associated generally with the suspects of the investigation.

This Court's precedents foreclose the Seventh Circuit's approach. The Seventh Circuit permits officer testimony about experience and training to satisfy the probable cause requirement even in the absence of *any* connections to the particular residence at issue. And while the Seventh Circuit claims to be deferring to the magistrate judge's exercise of discretion, that exercise of discretion must be based on some specific evidence—not on sweeping generalities. Without specific facts to inform the finding of probable cause, the magistrate relies on the officer's assessment of those probabilities alone, without ever considering the case's "particular factual context[]." *Gates*, 462 U.S. at 232. As this Court has recognized, blanket exceptions to the Fourth Amendment's requirements for drug trafficking crimes raise serious concerns because they contain considerable overgeneralization, impermissibly insulate cases from judicial review, and create an exception for one category of crimes that can just as easily be applied to others. *See Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (invalidating Wisconsin statute allowing no-knock warrants in all felony drug cases).

Finally, it is particularly relevant that among the 35 places selected to be searched in this warrant, the only one at issue in this case is a personal residence. As this Court has explained, "[w]hen it comes to the Fourth Amendment, the home is first among equals." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018), quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (bracket in original); *see also Payton*, 445 U.S. at 585–86 ("physical entry of the home is the chief evil against which the wording of the

Fourth Amendment is directed." (quotation marks omitted)). To permit an officer's rough assessment of probabilities to form the basis for a search warrant is incorrect as a general matter, and it presents an especially troubling violation of Fourth Amendment principles that relate specifically to a person's home.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 18-1529

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JUAN ZAMUDIO,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:16-cr-00251-TWP — **Tanya Walton Pratt**, *Judge*.

ARGUED OCTOBER 23, 2018 — DECIDED NOVEMBER 20, 2018

Before KANNE, HAMILTON, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. A grand jury returned a third superseding indictment charging defendant Juan Zamudio with participating in a drug-trafficking conspiracy after law enforcement executed a search warrant at his home seizing approximately 11

kilograms of methamphetamine, a loaded gun, and a cell phone used to make intercepted calls, among other items. Prior to trial, the district court granted Zamudio's motion to suppress the seized items. The government brings this interlocutory appeal arguing that the district court erred in granting Zamudio's motion to suppress the evidence seized at Zamudio's home pursuant to a search warrant. We agree and reverse.

I. Background

In February 2016, the FBI's Safe Streets Gang Task Force began investigating numerous individuals in Indianapolis, Indiana for drug-related activities. The investigation led to judicial authorization to intercept calls from ten different cell phones. During its authorized surveillance, the government intercepted phone calls between the apparent head of the drug-trafficking conspiracy, Jose Zamudio, and his brother Juan Zamudio. (For the sake of clarity, we will refer to defendant as "Zamudio" and to his brother as "Jose.")

Approximately nine months later, the government applied for a search warrant to search 34 separate locations, including Zamudio's residence at 64 N. Tremont Street in Indianapolis. That same day, the magistrate judge approved the application for the search warrant. FBI Special Agent Tim Bates prepared the application and 84-page affidavit, in which he set forth three specific instances of Zamudio's participation in the drug-trafficking conspiracy.

First, in October 2016, Jose called Zamudio to discuss a potential methamphetamine sale to co-defendant Jeffrey Rush. After the call, Zamudio texted Rush and identified himself as a contact for future drug transactions. Rush texted back stating he wanted to purchase two pounds of methamphetamine. Zamudio and Rush then planned to meet at a Kroger grocery store. When they met, surveillance officers observed Rush exit a vehicle and enter Zamudio's vehicle. Then, Rush exited Zamudio's vehicle with a "basketball-sized red box."

Next, a week after the Kroger transaction, surveillance officers observed Rush and co-defendant Jeremy Perdue enter Jose's residence and exit a few minutes later. Rush and Perdue then went to a Long John Silver's restaurant across the street from where Zamudio worked and met with co-defendant Joseph Coltharp. When Coltharp left the restaurant, police pulled him over for a traffic violation, and, after searching his vehicle, found a package of narcotics on the vehicle's floorboard. In the interim, Zamudio reported back to his brother that the drug transaction had been completed and that he had collected $15,000 from Rush and Perdue.

Last, in November 2016, co-defendant Adrian Bennett called Jose's phone, but Zamudio answered. Bennett and Zamudio discussed a shipment of marijuana. Bennett told Zamudio that he had "some change" (drug proceeds) and also needed "more of his usual" (marijuana). In addition, Bennett stated that he needed "some ice cream" (methamphetamine). Zamudio relayed this information to his brother and

then told Bennett to stop by. Bennett said he would do so in an hour.

Agent Bates averred Zamudio's other drug-trafficking activities, including that he had his own customer base in addition to working at the direction of his brother. Further, Agent Bates's affidavit identified Zamudio's address as 64 N. Tremont Street, that he paid utilities at this address, and that his vehicle was routinely parked there overnight. Missing from the affidavit—and the reason for this appeal—was information that drug-trafficking activity actually took place at Zamudio's residence. Nevertheless, Agent Bates stated that based on his experience and training, drug traffickers "generally store their drug-related paraphernalia in the residences or the curtilage of their residences," and "drug traffickers generally maintain records relating to their drug trafficking activities in their residences or the curtilage of their residences." He further averred that "[t]ypically, drug traffickers possess firearms and other dangerous weapons at their residence to protect their profits, supply of drugs, and themselves from others who might attempt to forcibly take the trafficker's profits or supply of drugs."

II. Discussion

The government argues that the district court erred in granting Zamudio's motion to suppress because the search warrant established sufficient probable cause to search Zamudio's home. Although Zamudio conceded at oral argument that Agent Bates's affidavit was sufficient to indicate probable cause that he was engaged in a drug-trafficking operation, he argues—as

the district court concluded—that there was not a sufficient nexus between the criminal conduct and his home.

We review *de novo* a district court's determination of probable cause and give great deference to the judgment of the magistrate judge who issued the warrant. *United States v. Haynes*, 882 F.3d 662, 665 (7th Cir. 2018) (per curiam); *United States v. Fifer*, 863 F.3d 759, 764 (7th Cir. 2017); *see also Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) ("the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for … conclud[ing] that probable cause existed") (internal quotations omitted). Probable cause for a search warrant exists when the supporting affidavit presents a total set of circumstances creating a "fair probability" that evidence of a crime will be found. *Gates*, 462 U.S. at 238; *United States v. Bradford*, 905 F.3d 497, 503 (7th Cir. 2018).

This circuit has consistently held that, for a search warrant, probable cause "does not require direct evidence linking a crime to a particular place." *United States v. Anderson*, 450 F.3d 294, 303 (7th Cir. 2006); *see also United States v. Aljabari*, 626 F.3d 940, 944 (7th Cir. 2010) ("we have made clear that direct evidence linking a crime to a particular place, while certainly helpful, is not essential to establish probable cause to search that place"); *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991) ("Warrants may be issued even in the absence of 'direct evidence linking criminal objects to a particular site.'") (citation omitted). Rather, issuing judges may draw reasonable inferences about where evidence is likely to be found

based on the nature of the evidence and the offense. *United States v. Orozco*, 576 F.3d 745, 749 (7th Cir. 2009); *Lamon*, 930 F.3d at 1188. Thus, an affidavit submitted in support of a warrant application "need only contain facts that, given the nature of the evidence sought and the crime alleged, allow for a reasonable inference that there is a fair probability that evidence will be found in a particular place." *Aljabari*, 626 F.3d at 944. "In the case of drug dealers," this circuit has recognized, "evidence is likely to be found where the dealers live." *Lamon*, 930 F.2d at 1188; *see also Haynes*, 882 F.3d at 666 ("judges may permissibly infer that evidence of drug dealing is 'likely to be found where the dealer[ ] live[s]'") (citation omitted).

Accordingly, our inquiry is whether Agent Bates's affidavit gave the magistrate judge sufficient information suggesting a "fair probability" that evidence of a crime would be found at Zamudio's home. It did. As Zamudio admitted at oral argument, the affidavit established a reasonable probability that he had engaged in a drug-trafficking operation. *Accord United States v. Correa*, --- F.3d ----, 2018 WL 5780728, at *8 (7th Cir. Nov. 5, 2018) ("[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").

Agent Bates had been an FBI Special Agent since January 2009, had participated in federal electronic wiretap investigations, had been involved in drug investigations and searches, and was familiar with the ways narcotics traffickers conducted their business. Based on Agent Bates's experience and training, he

asserted that drug traffickers generally store their drug-related paraphernalia and maintain records relating to their drug-trafficking at their residences—a fact we too have recognized. *See Lamon*, 930 F.2d at 1188. He further swore that drug dealers commonly store large sums of drug money and evidence of financial transactions from drug sales in their residences. Drug traffickers, according to Agent Bates, also typically possess firearms at their residences to protect their profits and drug supplies.

Under the circumstances, the issuing judge reasonably drew the inference that indicia of drug-trafficking would be found at Zamudio's home. *Orozco*, 576 F.3d at 749 ("a magistrate evaluating a warrant application is entitled to take an officer's experience into account in determining whether probable cause exists"); *see also United States v. Kelly*, 772 F.3d 1072, 1080 (7th Cir. 2014) (law enforcement's statement "that drug dealers are likely to keep contraband in their residences" and purchase of drugs at different location created a "fair probability" that law enforcement would find drugs at the residence). This conclusion is consistent with our opinion in *Orozco* where the only support for the link between a high-ranking gang member and the likelihood of locating drug-dealing evidence at his home was the FBI agent's belief informed by his ten years of experience investigating drug-trafficking crimes. *Id.* at 749. In *Orozco*, we concluded that the issuing magistrate judge was entitled to credit the FBI agent's lengthy experience and high degree of confidence that the sought-after evidence was likely to be found at the

defendant's home. *Id.* at 750. Similarly, at the time he executed the affidavit, Agent Bates had years of experience in investigating narcotics traffickers and how they conduct their business. He stated that drug traffickers commonly conceal large sums of money and possess firearms at their residences, along with drug-related paraphernalia.

Zamudio believes this ruling will endorse a categorical approach that in every case where a drug trafficker is involved, we will uphold a finding of probable cause to search the drug trafficker's residence. We have repeatedly rejected that approach, *see, e.g.*, *United States v. Wiley*, 475 F.3d 908, 916 (7th Cir. 2007), and we do again now. In the end, probable cause is a practical, common-sense decision best left to the magistrate judge issuing the search warrant. *See Gates*, 462 U.S. at 239.

On a final note, although the district court based its decision, in part, on errors in the affidavit where Zamudio's name was transposed with his brother's name, on appeal, Zamudio does not base his arguments on any resultant confusion. Indeed, despite the occasional name switching, there was no confusion as to materially outcome-determinative facts: Zamudio participated in the drug-trafficking conspiracy; he lived at 64 N. Tremont Street; and, based on Agent Bates's training and experience, drug traffickers store drug-related items at their residences. This was enough to create a fair probability that Zamudio's home contained evidence of a crime.

Because we conclude that there was probable cause to search Zamudio's residence, we need not address

whether the good-faith exception to the exclusionary rule applies.

III. Conclusion

We therefore REVERSE the district court's decision and REMAND for further proceedings consistent with this opinion.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:16-cr-00251-TWP-MJD
	)	
JUAN ZAMUDIO (02),	)	
	)	
Defendants.	)	

ENTRY ON MOTION TO SUPPRESS

This matter is before the Court on Defendant Juan Zamudio's Motion to Suppress. (Filing No. 745.) Juan Zamudio is charged in Count One: Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances; Count Six: Possession with Intent to Distribute Controlled Substances; Count Seven: Illegal Alien in Possession of a Ammunition; and Count Thirteen: Conspiracy to Launder Monetary Instruments. He petitions this Court to suppress any and all items seized pursuant to a search warrant, from his residence at 64 N. Tremont Street, Indianapolis, Indiana ("64 N. Tremont"). For the reasons set forth below, Juan Zamudio's Motion to Suppress is **granted**.

I. BACKGROUND

The FBI began an investigation into Jose Zamudio's Drug Trafficking Organization ("DTO") in February of 2016 and culminated in the FBI receiving judicial authorization to intercept ten different cellular phones, including a phone utilized by Jose Zamudio. (Filing No. 762 at 2.) As part of the investigation, the Government intercepted phone calls between Jose Zamudio and various other individuals in the DTO including his brother, Juan Zamudio. *Id.* Agents performed surveillance on a number of individuals believed to be in Jose Zamudio's DTO. *Id.* On November 14, 2016, the Government applied for a search warrant that requested judicial authorization to search numerous locations, including Juan Zamudio's residence at 64 N. Tremont, Indianapolis, Indiana. *Id.* The Application and Affidavit for the Search Warrant was 125 pages long and sought the search of 34 separate locations. (Filing No. 762-1.) The Magistrate Judge approved the Application for a Search Warrant that same day. During execution of the search warrants, agents located approximately 11,405 grams of pure methamphetamine at 64 N. Tremont, Indianapolis, Indiana.

Juan Zamudio's role in the DTO is explained in the Search Warrant application. The parties both cite to three specific incidents in the Affidavit that connect Juan Zamudio to drug trafficking. On October 27, 2016, police surveillance observed co-defendants Jeremy Perdue ("Perdue") and Jeffrey Rush ("Rush") enter Jose Zamudio's house on 1126 South Auburn Street, Indianapolis, Indiana, at 11:41 a.m., and exit a few

minutes later. (Filing No. 762 at 3.) At approximately 1:00 p.m., that same day, Rush, Perdue, and Joseph Coltharp ("Coltharp") met at a Long John Silver's restaurant in Indianapolis. (Filing No. 762-1 at 81.) Just after the meeting, Coltharp was stopped by an Indianapolis Metropolitan Police Department ("IMPD") officer, after he committed a traffic violation. *Id.* at 82-83. The IMPD officer located a package of narcotics on the floorboard of the passenger side of the vehicle, which was later determined to be 852 grams of pure methamphetamine. Cell phone pings from Perdue and Juan Zamudio's cell phones showed both individuals in the area of Juan Zamudio's place of employment, which is a tire shop across the street from the Long John Silver's restaurant. The Affidavit reveals an intercepted telephone call between Jose Zamudio and Juan Zamudio:

> Juan: I have the guys here, they're done.
>
> Jose: Did they leave you the fifteen?
>
> Juan: Yes. Look, um the guy was telling me right now for you to have the house dark, because the dogs were following them.

(Filing No. 762-1 at 83-84). The Government explains that this conversation meant that Rush and Perdue met with Juan Zamudio for a drug transaction, and reported they had been followed by law enforcement from Jose Zamudio's house that morning. (Filing No. 762 at 4.) The drug activity on this date took place at Jose Zamudio's house on 1126 South Auburn Street and the Long John Silver's restaurant near Juan Zamudio's place of employment.

The second, and more significant act attributed to Juan Zamudio occurred on October 20, 2016. Officers were conducting surveillance on Juan Zamudio, Perdue, and Rush. *Id.* at 4. Co-defendant David Silnes is also observed in the activity.

> Later that day on October 20, 2016, PERDUE and RUSH took part in the purchase of two pounds of methamphetamine from Juan ZAMUDIO and delivered methamphetamine to SILNES. Surveillance officers that day were conducting surveillance on PERDUE, RUSH, and Juan ZAMUDIO as a result of intercepted telephone calls over Target phones 8 and 9. At approximately 1:44 p.m. on October 20, 2016, Jose ZAMUDIO called Juan ZAMUDIO at Target Phone 8. In this call Jose Zamudio stated, "Can you put in a call to the white guy? Tell him that if he needs something, for him to, to call you (Juan ZAMUDIO should call RUSH and explain to RUSH that he is to call Juan ZAMUDIO when he needs to purchase methamphetamine)." At approximately 1:47 p.m., on October 20, 2016, Juan ZAMUDIO sent an outgoing test to RUSH, at TARGET Phone 9, utilizing Target Phone 8. This text message stated, "Primo sed if you. Need call me bro [sic] (RUSH should call Juan ZAMUDIO rather than Jose ZAMUDIO when Rush needs to purchase methamphetamine)." At approximately 6:20 p.m., on October 20, 2016, RUSH, utilizing Target Phone 9, sent an outgoing text to Juan ZAMUDIO at Target Phone 8. This text

> message, in part, stated, "Yeah I need two (RUSH wished to purchase two pounds of methamphetamine from Juan ZAMUDIO." At 7:40 p.m. Juan ZAMUDIO responded to RUSH, "Meet me at Kroger." At 7:42 p.m. RUSH responded, "Ok we are here (RUSH and PERDUE had both arrived at Kroger to pick-up the two pounds of methamphetamine)." Subsequently, at 7:42 p.m. on October 20, 2016, surveillance officers observed RUSH exist an unknown Chevy Pickup truck, and enter Juan ZAMUDIO's Chevy Trailblazer. A short time later RUSH exited Juan ZAMUDIO's vehicle, in possession of a basketball sized red box, and reentered the passenger seat of the pickup. Surveillance officers followed the pickup truck away from the scene, and observed it travel directly to David SILNES' resident at 732 South Norfolk Street, Indianapolis, Indiana. Surveillance officers observed RUSH exist the passenger side of the pickup carrying the same red box he was observed exiting Juan ZAMUDIO's vehicle with, and also observed PERDUE exit the driver's door of the pickup, and enter SILNES' residence. I believe that PERDUE and RUSH were in the process of delivering methamphetamine to SILNES during this surveillance.

(Filing No. 762-1 at 85-86.). The drug activity involving Juan Zamudio on this date took place in his Chevy Blazer automobile and at the Kroger store parking lot.

The third incident involved Co-defendant Adrian Bennett, Jose Zamudio, and Juan Zamudio. The Government describes this incident in its Response.

> On November 3, 2016, Bennett called Jose Zamudio, but Juan Zamudio answered the phone. Bennett and Juan Zamudio then discussed if Jose Zamudio had received his shipment of marijuana. Bennett then told Juan that he had "some change (drug proceeds) for him, and also that he needed, "more of his usual (more controlled substances)." Bennett then stated that he needed "some ice cream (methamphetamine)." Juan Zamudio was then heard relaying that information to Jose Zamudio, and then Juan Zamudio told Bennett if he wanted to "swing by there (Jose ZAMUDIO's residence), they are there." Bennett then stated that he would be at Jose Zamudio's residence in an hour.

(Filing No. 762 at 5) (internal citations omitted). The drug activity surrounding this incident took place at Jose Zamudio's residence. The Affiant states that based on his training and experience, he is aware that drug traffickers generally store their drug-related paraphernalia in their residence or the curtilage of their residences. (Filing No. 762-1 at 111.)

II. <u>LEGAL STANDARD</u>

The Fourth Amendment 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.

U.S. Const. amend. IV. "If the search or seizure was effected pursuant to a warrant, the defendant bears the burden of proving its illegality." *United States v. Longmire*, 761 F.2d 411, 417 (7th Cir. 1985). In reviewing the issuance of a search warrant:

> a magistrate's determination of probable cause…should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.

United States v. Norris, 640 F.3d 295, 300 (7th Cir. 2011) (quoting *United States v. Spry*, 190 F.3d 829, 835 (7th Cir. 1999)). Instead of focusing on technical aspects of probable cause, the reviewing court should consider all facts presented to the magistrate. *United States v. Lloyd*, 71 F.3d 1256, 1262 (7th Cir. 1995). And "[w]here the police have acted pursuant to a warrant, the independent determination of probable cause by a magistrate gives rise to a presumption that the arrest or search was legal." *Id.* Probable cause affidavits supporting applications for warrants are to be "read as a whole in a realistic and common sense manner," and "doubtful cases should be resolved in favor of upholding the warrant." *United States v. Quintanilla*, 218 F.3d

674, 677 (7th Cir. 2000) (citation omitted). A judge determines probable cause exists to search when the "known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996) (citations omitted). "When a search is authorized by a warrant, deference is owed to the issuing judge's conclusion that there is probable cause." *U.S. v. Sutton*, 742 F.3d 770, 773 (7th Cir. 2014). Moreover, where "an affidavit is all that was presented to the issuing judge, the warrant's validity rests on the strength of the affidavit." *Id.*

III. DISCUSSION

A. Probable Cause

Juan Zamudio moves to suppress the evidence seized from the search of his residence on November 17, 2016. (Filing No. 745.) He asserts that the four corners of the Affidavit provided no probable cause to support an objective belief that 64 N. Tremont contained evidence of a crime. (Filing No. 745 at 11.) Specifically, he contends that being suspected of drug trafficking miles away from his home, with no allegations that he left his home, returned to his home or conducted any drug trafficking activity at or even near his home, does not lead to a reasonable belief that evidence of drug trafficking would be found at his residence. (Filing No. 745 at 10.) The Government responds that, while nexus must exist between the crime alleged and the place to be searched, probable cause does not require direct evidence linking a crime to a particular place. (Filing No. 762 at 6.) The Government contends that the issuing judge could

draw reasonable inferences that evidence is often found at the residences of suspected drug traffickers, such as Juan Zamudio. *Id.* "On the issue of nexus, [p]robable cause does not require direct evidence linking a crime to a particular place. Instead, issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense. In the case of drug dealers, evidence is often found at their residences." *United States v. Wiley*, 475 F.3d 908, 916 (7th Cir. 2007) (quoting *United States v. Anderson*, 450 F.3d 294, 303 (7th Cir. 2007).

Juan Zamudio argues that there is a factual distinction in his case and the cases which support the proposition that participation in drug trafficking activity provides an inference for a magistrate to find probable cause to search a defendant's home.

In *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991) the Seventh Circuit found probable cause existed to search a suspects second home, undisputedly unconnected to any drug activity, on the basis of information gathered for probable cause relating to a *first home which was used to sell drugs* out of to a reliable confidential informant. *Id.* The second home was the defendant's primary home, and the first home was his part-time home. An informant indicated that the defendant only sold drugs out of the first (part-time) home. The Seventh Circuit held because evidence had already seized from the first home, and in the detective's experience drug dealers often hide money, drugs, and other incriminating evidence at their

permanent homes, the affidavit provided a substantial basis for probable cause. *Id.* at 1190.

In *United States v. Feliz*, 182 F.3d 82 (1st Cir.1999), the court overturned the district court's determination of no probable cause to search the suspect's home, where substantial information had been presented that the suspect was engaged in illegal drug trafficking and no other drug-dealing headquarters was identified in the affidavit. *Id.* at 87–88. The court reasoned that probable cause to search a home in drug cases often will rest not on direct observation, but rather "can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide" evidence of the crime in question. *Id.* at 88.

In *United States v. Reddrick*, the search warrant for a home was obtained based on information from a confidential informant who told police that he had seen about 13 kilograms of cocaine inside of the defendant's residence. 90 F.3d 1276, 1278-79 (7th Cir. 1996). The confidential informant, had been used previously, and was known to be reliable. Quoting the Supreme Court in *Zurcher v. Stanford Daily*, 436 U.S. 547, 557 (1978), the Seventh Circuit noted, "[t]he 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 the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Reddrick*, 90 F.3d at 1281. Ultimately, the *Reddrick* court held that while the confidential informant's information regarding the amount of cocaine he saw in the defendant's residence would not

be enough for probable cause to search the house alone, testimony concerning three controlled buys (which tended to show the defendant was a drug dealer), combined with the informant's information was enough to support issuance of a search warrant. *Id. Reddrick*, thus was not a case that concerned a search warrant based on a defendant's status alone as an alleged drug dealer; rather, there was also indirect information which linked the drug dealing activity to the defendant's residence.

Juan Zamudio argues that in this Circuit, there is no categorical rule that being a drug dealer alone, is sufficient to evidence to establish probable cause for the search of the drug dealers home. "We agree with the district court that it would be inappropriate to adopt a categorical rule that would, in every case, uphold a finding of probable cause to search a particular location simply because a suspected drug trafficker resides there." *United States v. Wiley*, 475 F.3d 908, 916 (7th Cir. 2007).

> We do not read either *Lamon* or *Feliz* as holding flatly that there is always probable cause to search a drug dealer's home, merely because there is probable cause to believe that he or she is engaged in drug trafficking. The facts of a particular case may indicate, for example, that the dealer uses a "safe house" or another participant's property for all of his drug-related business, perhaps to keep information about his activities from others in the home. As usual, the inquiry is highly fact-specific.

United States v. Walker, 145 F. App'x 552, 555 (7th Cir. 2005) (unpublished).

Juan Zamudio argues that the Affidavit regarding his drug activities does not involve his residence[1] and relies on nothing more than his alleged status as a drug trafficker. (Filing No. 745 at 10.) The Government has not responded directly to Juan Zamudio's argument that the Affidavit does not contain one single averment that Juan Zamudio kept, dealt, or distributed anything from his home or even near his home. (Filing No. 745 at 13.) Rather, the Government bases its argument that the search was based on probable cause due to the fact that issuing judges are entitled to draw reasonable inferences (in this case that drugs are likely to be found where drug dealers live) (Filing No. 762 at 6-7).

U.S. v. McNeal 82 F. Supp.2d 945, 956 (S.D. Ind. 2000), is instructive considering the facts of this case.

> Perhaps it may be understood by a judge's common sense that a drug dealer, like any other criminal, might use his/her home as a storage place for illegal proceeds and contraband separate from the drugs themselves. A fatal flaw in this concept, though, is that nothing in the affidavit places McNeal (or anyone else connected with the drug activity, for that matter) at (or even near) 7150 N. Lakeside Drive before, during or after the drug transactions.

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[1] Juan Zamudio concedes that *Lamon* is reasonable under its facts; that having been caught with drugs in your residence, whether secondary or primary, would lead to the reasonable belief that drugs are in the other residence as well. (Filing No. 745 at 10.)

> The affidavit merely attributes control of the property to McNeal, not presence at the location.

Id. In *McNeal*, the district court granted a motion to suppress where the affidavit for probable cause did not contain any information that placed the defendant or any of his operatives at the residence that was searched at any time. *Id.* Similar to *McNeal*, there is absolutely no evidence linking Juan Zamudio's presence or his drug dealing activity to 64 N. Tremont.[2] Because the Affidavit fails to establish a reasonable nexus between Juan Zamudio's alleged criminal drug activity and 64 N. Tremont, a fair probability that contraband would be found at 64 N. Tremont does not exist.

In addition, to the lack of evidence linking his alleged drug activity to his residence, Juan Zamudio asserts that the Affidavit contains other facts that negate an inference supporting probable cause. Specifically, he argues that the cases which found probable cause based on a defendant's alleged status as a drug trafficker are diminished when one looks at the facts raised in the affidavit.

> According to the Affidavit, Juan distributed drugs at the direction of Jose Zamudio. *See* Affidavit, ¶ 121. And each time an instance of Juan being involved in drugs is mentioned, it directly ties back to Jose Zamudio and his home at 1126 South Auburn Street. Thus, the force of those cases *are* diminished, because if Juan's

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[2] Juan Zamudio argues that the only nexus between him and 64 N. Tremont (the place to be searched) was that "Juan lives there." (Filing No. 745 at 13.)

> drug trafficking activities are limited to distribution of drugs at Jose's behest, and each instance the affiant gave the magistrate to consider tied directly to Jose's home, there is not a reasonable probability that a drug mule would store product at his home.

(Filing No. 777 at 2) (emphasis in original).

Here, the Affidavit supports the proposition that Jose Zamudio's home was the drug-dealing headquarters. In their Response, the Government repeatedly refers to Jose Zamudio's residence as the residence where many drug transactions occurred. While Juan Zamudio is alleged to have picked up money for Jose Zamudio at a Long John Silver's restaurant, and selling drugs (at the direction of Jose) in a Kroger parking lot, these acts provide no nexus to Juan Zamudio's residence. Instead, most of the drug-related activity occurred at Jose Zamudio's home, and none of it is alleged to have occurred at Juan Zamudio's home. Intercepted wiretaps and police surveillance confirm that 1126 South Auburn Street is the residence where methamphetamine dealings occurred. None of Juan Zamudio's drug related activities are alleged to have occurred at his residence, rather they are alleged to have occurred in public places.

U.S. v. Walker is also instructive. In that case, the DEA agent's assertion that drugs or evidence of drug dealing was likely to be found in Walker's home rested solely on what the agent knew from training and experience, namely, that "drug traffickers generally store their drug-related paraphernalia in their residences." 45 Fed. Appx. at *555. The *Walker* court

determined there was probable cause based on the DEA agent's assertion and the defendant's status as an alleged drug trafficker. The court noted that its ruling "was close to the edge" and that a different result might be warranted dependent on facts that show a hint that another location is used for the participant's drug-related business. *Id.* at *555-56. Here, similar factual averments are presented, however, this case crosses the explicit hypothetical edge posed by the Seventh Circuit in *Walker*. Not only does the Affidavit confirm that another location/residence was used for the drug trafficking activities, but the Government's Response makes repeated references to drug trafficking activities occurring at Jose Zamudio's home. (*See* Filing No. 762 at 3-6.) The fact that Jose Zamudio's home was used as the drug-dealing headquarters distinguishes this case from other cases finding probable cause solely based on the fact that the defendant is an alleged drug trafficker. There is absolutely no evidence (other than the Affiant's statement that drug dealers keep evidence where they live) linking Juan Zamudio's alleged drug activity with the 64 N. Tremont address. In all of the cases cited by the parties, in addition to alleging that the defendant was a drug dealer, there was some other nexus connecting the defendant to the property searched—either a confidential informant reported activity at the residence; or through surveillance drug related activity was observed at the residence; or there was no hint of any other location where defendant would keep materials related to his drug dealings and therefore, it was logical to infer that such materials existed at the defendants residence. Because the Affidavit contained

no nexus between Juan Zamudio's alleged drug activities and 64 N. Tremont, and the Affidavit alleges that all of Juan Zamudio's drug related activity either took place at Jose Zamudio's residence or in public locations, probable cause does not exist to support the search warrant for his home.

B. Good Faith Exception

Juan Zamudio asserts that the good-faith exception does not apply in this case because there was no substantial basis for the Magistrate Judge to have concluded that probable cause existed, and given the substantial deficiencies, a reasonably well-trained officer would have known that the search was illegal, despite the search warrant being issued. (Filing No. 745 at 13.) The Government did not respond to this argument.

> The good faith doctrine does not apply if: (1) the magistrate issuing the warrant abandoned his detached and neutral role; (2) the officers were dishonest or reckless in preparing the affidavit for probable cause; (3) the affidavit is "so lacking in indicia of probable cause" that an officer's belief in its existence is entirely unreasonable; or (4) the warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid.

United States v. McNeal, 82 F. Supp. 2d 945, 961 (S.D. Ind. 2000) (citing *United States v. Leon*, 468 U.S. 897, 923-26 (1984). Juan Zamudio argues that the Affiant made knowing and recklessly false statements in the Affidavit for probable cause. While the Court does not

believe that the Affidavit contains knowing and recklessly false statements, it is concerning that the Affidavit at times confuses Juan Zamudio with Jose Zamudio, which the Government attributes to scrivener's errors that transposed the names.[3] (Filing No. 762 at 9-10.) In any event, the transposed names and other mistakes cited by Juan Zamudio do not concern portions of the Affidavit that are materially outcome-determinative, even if they could be construed as negligent.

Juan Zamudio's final argument is that the Affidavit provides no probable cause to support an objective belief that 64 N. Tremont contained evidence of a crime. (Filing No. 745 at 11.) He asserts that a reasonably well-trained officer would have known that the search was illegal because the Affidavit alleges no nexus or necessary factual averments between the alleged criminal activity and the place to be searched. *Id.* at 11-13. The Court agrees with Juan Zamudio that the Affidavit contained substantial deficiencies, and that a reasonably well-trained officer would have known that the search was illegal despite the Magistrate Judge's authorization. There are numerous

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[3] For example, in paragraph 130 of the Affidavit, the Affiant references Target Phone 6 (Jose Zamudio's phone) and Jose's girlfriend, Maria Gonzalez. While the entire paragraph references a series of text messages involving Target Phone 6 (Jose's phone) and Jose Zamudio is explicitly referenced as the sender of multiple text messages to sell methamphetamine to Evelyn Perez within the string, the very same paragraph concludes and inexplicably reattributes all of these actions to Juan despite the Affiant referencing Jose and Jose's phone. (*See* Filing No. 762-1 at 98-99.)

errors where Juan Zamudio is transposed with Jose Zamudio, and in some instances the transposed names change the entire outcome of who the acts are attributed to. (*See* Filing No. 762-1 at 98 ¶ 130.) There are no factual averments that drug activity occurred at Juan Zamudio's residence, or that Juan Zamudio was seen leaving his home to deliver drugs just before meeting with Rush, in a Kroger parking lot, where police saw Juan Zamudio deliver what appeared to be drugs in a basketball-sized red box. With regards to the drug proceeds, the Affidavit does not contain any factual averments that Juan Zamudio returned to his home following any meetings with suspected drug dealers. To the contrary, the Affidavit shows that Juan Zamudio followed up with Jose Zamudio after receiving drug proceeds. The Affidavit (and the Government's Response) contains numerous references to Jose Zamudio's house (and no alleged drug activity related to Juan Zamudio's house), including one instance where Juan Zamudio told Bennett to come to Jose's house to pick up some marijuana and methamphetamine. Given the deficiencies in the Affidavit, particularly the lack of nexus between Juan Zamudio's alleged criminal activities and 64 N. Tremont (and that Juan Zamudio'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 reasonably well-trained officer would have known the search was illegal. Accordingly, the evidence seized during the search must be suppressed.

IV. CONCLUSION

The Affidavit presented to the magistrate established probable cause that Juan Zamudio was engaged in drug trafficking activities and he does not dispute the he resided at 64 N. Tremont Street. However, there is no nexus whatsoever to connect his drug activities to the residence that was searched. For the reasons set forth above, Juan Zamudio's Motion to Suppress (Filing No. 745) is **GRANTED**. The evidence seized during the search of 64 N. Tremont Street, Indianapolis, Indiana, on November 17, 2016 is **suppressed**.

SO ORDERED.

Date: 3/7/2018

/s/
TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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