No.___-_____

IN THE
SUPREME COURT OF THE UNITED STATES

TREMAYNE ANTWANE MITCHELL

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in overruling the District Court's decision to suppress evidence obtained by police officers when they sniffed the windowsill and doorframe of Petitioner's apartment.

Whether the Court of Appeals erred in ruling that the District Court's decision to address the "good faith" issue after finding a 4th Amendment violation occurred, pursuant to *United States v. Leon*, was actually a *sue sponte* "*Franks*" hearing and was therefore an "abrogation of the procedures announced in *Franks*," and was therefore improper.

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit appears in Appendix A to the Petition and is unpublished.

The decision of the district court for the Eastern District of Virginia appears in Appendix B to the Petition and is unpublished.

JURISDICTION

The district court for the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over the government's appeal pursuant to 18 U.S.C. § 3731. That court issued its opinion on March 28, 2018. No petition for rehearing was filed.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Overview

This petition for a writ of certiorari seeks review of the decision of the Fourth Circuit Court of Appeal's in overturning the district court's decision to grant Petitioner's Motion to Suppress. Petitioner was originally charged with

Possession of a Firearm by a Convicted Felon in violation of 18 U.S.C. § 922(g)(1). Prior to trial, Petitioner filed a suppression motion seeking to suppress evidence obtained from police officers after body camera footage revealed the officers were smelling the recessed areas of Petitioner's bedroom window and door frame prior to their obtaining a warrant.

In granting Petitioner's motion, the district court first addressed the constitutional violation as it related to what it perceived to be a trespass to private property. Afterwards, the district court then addressed whether or not exclusion was appropriate under the good faith exception to the exclusionary rule. Finding both that there was a constitutional violation and that the government could not rely on the good faith exception to the exclusionary rule, the district court granted Petitioner's motion to suppress. *See* Pet. App. B.

The government then noted an interlocutory appeal, as the government would have had no evidence to offer in its trial against Petitioner should the district court's ruling stand. The Fourth Circuit Court of Appeals issued an unpublished opinion on March 28, 2018 reversing the district court's decision finding that there was no expectation of privacy in the aroma outside of Petitioner's apartment, and further that the district court essentially took up a *sua sponte* "*Franks*" hearing (see *Franks v. Delaware*, 438 U.S. 154 (1978).) and therefore the district court acted improperly. *See* Pet. App. A.

Due to the importance of resolving this interlocutory issue as the outcome is determinative on whether the government can procced with its case, Petitioner is seeking this writ of certiorari to review the ruling of the court of appeals.

Events at Issue

On July 27, 2016, around 2:40p.m., officers Marshall and Lyons of the Newport News Police Department were riding around on bike patrol in a private apartment complex when they allegedly smelled what they believed to be marijuana in the 700 block of Adams Drive in Newport News, Virginia. Both officers parked their bikes, dismounted, and began to search for the source of the odor. The officers walked around the apartment complex, checking the upstairs and downstairs of the building. During their search for the source of the odor, their body cameras clearly show Officer Lyons leaning up against the window and closely smelling the window frame of apartment A6 (Petitioner's home). After Officer Lyons sniffed the window, he notified Officer Marshall, who was searching the apartment complex's upstairs exterior for the source of the odor. Officer Marshall then came downstairs to join Officer Lyons. Officer Marshall sniffed the crevice of the door to the Mitchells' apartment, and subsequent to the sniff of the window and door, Officer Lyons banged on the Mitchells' door.

Mr. Sean Mitchell and Mr. Tremayne Mitchell were both napping in their home when they heard a loud banging at the front door. Tremayne and Sean jumped

out of their respective bedrooms to answer the door, where they were confronted by the two police officers who introduced themselves and then immediately told them to step outside. Officer Lyons told Sean and Tremayne that he needed them to look at something outside on the window. Tremayne, who seemed confused, pushed past Sean to step outside at the direction of the officer. Upon a question from Officer Lyons, Tremayne confirmed that the window Officer Lyons was sniffing at was his bedroom window. As Tremayne was taking one step towards the window to take a look and Sean stepped back into the apartment, Officer Lyons immediately stopped him, telling both men they were being detained for the odor of marijuana coming from the bedroom. Both men were then immediately placed in handcuffs directly in front of the door to their home. Newport News police officers detained them there for at least two (2) hours while Officer Lyons went to get a search warrant for the house.

According to the state search warrant, the search was requested in relation to a violation of the Virginia Drug Control Act, Possession of Marijuana – 18.2-250.1. The affidavit in support of the search warrant states that Officer Lyons and Officer Marshall were on bike patrol riding around 749 Adams Drive when they detected the smell of "fresh marijuana," "made contact with the residence" of apartment A6 and "had them step out of the residence." The affidavit further stated, "once both occupants stepped out[,] Officer Lyons advised them of the situation and told them

they were both detained for a narcotics investigation[.]" Officer Lyons also noted he smelled the odor of marijuana emitting from the apartment when the occupants opened the door.

Upon securing a search warrant and searching the home, evidence was collected and Tremayne Mitchell was subsequently indicted on November 11, 2016, for one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1).

REASONS FOR GRANTING THE PETITION

The district court was correct in suppressing the evidence obtained by the police officers in this matter, and the court of appeals erred when it focused solely on the expectation of privacy in an aroma and ignored the physical intrusion of a constitutionally protected area. When Officer Lyons placed his nose immediately outside the bedroom window in an effort to obtain the evidence he needed to pinpoint the aroma of marijuana, he placed his face inside of the recessed area of Petitioner's home. This area was correctly determined by the district court to be protected curtilage. When Officer Marshall then approached Petitioner's door he likewise placed his nose inches from the doorframe inside of the protected curtilage of defendant's home.

These actions were not the sort of customary usage considered appropriate by an unlicensed visitor. They were done with the sole intent and purpose to gather evidence to use in their effort to secure a search warrant. The court of appeals analysis based on Petitioner's expectation of privacy overlooks the property based distinction in this case where the officers were placing their noses into an area so closely related to the home that it is afforded Constitutional protection.

Furthermore, the district court was well within its purview to discuss the good-faith exception as it is a natural consideration when determining if suppression is warranted. The court of appeals erred in determining that the district court held a *sua sponte* "*Franks*" hearing.

Argument

I. The Police Officers Unlawfully Searched Mr. Mitchell's Property When They Trespassed His Curtilage And Sniffed His Window And Door To Investigate.

The district court was correct in concluding that the officers conducted an illegal search prior to obtaining a search warrant. The court of appeal's emphasis on the location of the officer's feet on a public walkway is misplaced as it overlooks the officer's conduct in placing their noses into an area immediately

outside of the defendant's door and bedroom window frame in order to locate an odor from inside of the home.

The Fourth Amendment protects homes and the "land immediately surrounding and associated" with homes, known as curtilage, from unreasonable government intrusion. *Oliver v. United States*, 466 U.S. 170, 180 (1984). "This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013) (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* at 1414 (quoting *Silverman v. United States,* 365 U.S. 505, 511(1961)). "This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." *Id.*

To search a home and its curtilage, the government needs probable cause, and without a warrant, a search of the curtilage is presumptuously unreasonable. *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001); *see also United States v. Jackson*, 585 F.2d 653, 660 (4th Cir. 1978) ("Of course, a search of one's home or its curtilage,

effected as a result of a trespass, is an encroachment on a person's expectancy of privacy and is for that reason, but not because of the trespass, a violation of the Fourth Amendment if not based on probable cause or authorized by a search warrant."). When "'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'" *Jardines*, 133 S. Ct. at 1412 (quoting *United States v. Jones*, 132 S. Ct. 945 (2012)).

In *Jardines*, police officers went to the defendant's home with a drug-sniffing dog to investigate an unverified tip that marijuana was being grown in the home. *Jardines*, 133 S. Ct. at 1411. The officers had the trained K-9 on a six-inch leash and had the dog sniff the front porch of the defendant's home. *Id.* When the dog gave a positive alert for narcotics, the police officers then went to get a search warrant to search the home, which subsequently revealed marijuana plants in the home. *Id.* The lower courts granted the defendant's motion to suppress the evidence, and this Court affirmed, holding that the police officers' use of a trained detection dog to sniff for contraband odors on the front porch of a private home is a "search" within the meaning of the Fourth Amendment and requires prior use of consent or a search warrant. *Id.* at 1411-12.

Here, similar to *Jardines*, the officers trespassed onto Mr. Mitchell's protected curtilage and conducted an unlawful search within the meaning of the Fourth

Amendment. The officers were on bike patrol in the area when they parked their bikes and walked around the complex searching for the source of a marijuana odor. The officers went upstairs and from apartment to apartment sniffing windows and doors until they settled on Mr. Mitchell's as the likely source of the smell. The Axon body camera that Officer Lyons was wearing at the time of the incident clearly shows the officers moving from apartment to apartment trying to localize the source of the odor. The video then shows how Officer Lyons went to Tremayne's bedroom window, placed his face up to the glass, and sniffed the window. Officer Lyons then sought out Officer Marshall, who was searching the upstairs exterior of the apartment complex for the source. When Officer Marshall came downstairs to Mr. Mitchell's apartment, he sniffed the crevice of the apartment door. It was only after searching various units in the apartment complex and pressing their faces against the window and door of Mr. Mitchell's apartment to sniff that the officers decided to knock on Mr. Mitchell's door, detain the occupants, and obtain a warrant for a search.

Furthermore, "[t]he *Katz* reasonable-expectations test 'has been *added to,* not *substituted for,*' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." *Id.* at 1417, quoting *United States v. Jones* 565 US ---, 132 S.Ct. 945 at 951-952 (emphasis supplied),

see also Katz v. United States 389 U.S. 347 (1967). The district court correctly ruled that the recessed areas of the window and door frames were protected curtilage, a part of the home. The court of appeals failed to make the distinction from the property based analysis used traditionally and highlighted in *Jardines*, and the expectation of privacy analysis used in *Katz*.

As applied to this situation, the officers in this case were searching for evidence in the immediate curtilage of Petitioner's bedroom window and doorframe, thus physically intruding into protected areas. As Justice Scalia explained in *Jardines,* "we need not decide whether the officers' investigation of Jardines home violated his expectation of privacy under *Katz*. *Id.* This Court did not need to decide the issue of expectation of privacy because, "the officers learned what they learned only by physically intruding on *Jardines* property to gather evidence is enough to establish that a search occurred." *Id.*

II. The Good Faith Exception Was A Proper Step In The District Court's Decision And Was Not A *Sua Sponte* "Franks" Hearing.

After ruling that the district court erred in finding a constitutional violation, the court of appeals then made additional findings concerning what it determined to be a *sua sponte* "*Franks*" hearing. However, the district court's actions were appropriate as the district court then was making a determination under the holding

in *United States v. Leon*, 468 U.S. 897 (1984), regarding the good faith exception to the exclusionary rule. The court of appeals erred in finding that the district court acted inappropriately and this Court should review this finding.

When a search warrant is determined to be invalid, the seized items need not be suppressed if the officers have obtained the warrant form a magistrate in good faith. *United States v. Leon*, 468 U.S. 897 (1984). However, "suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." *Id.* at 923.

After the district court had made the determination that the officers actions amounted to a violation of Petitioner's Fourth Amendment rights, the district court then turned to the issue of whether or not the exclusionary rule was appropriate under these circumstances. Based on the district courts order detailing multiple concerns the court had with the officer's conduct in obtaining the warrant, it is clear that suppression was the appropriate remedy. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217, 80 S. Ct. 1437 (1960). The district court took issue with the manner in which the officer's

obtained the warrant, such conduct the court sought to prevent form future repetition. In these circumstances suppression is appropriate as, "…the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures…" *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613 (1974).

The court of appeals took issue with the district court's manner in determining whether or not exclusion was appropriate, and incorrectly ruled that the district court had held its own "*Franks*" hearing. However, the district court was conducting an appropriate analysis on the suppression issue since it had just found a constitutional violation and needed to determine whether suppression under these facts was proper. After listening to the officer's testimony and reviewing the information they submitted to the magistrate in obtaining their warrant, the district court felt the officer's conduct was concerning enough that exclusion of the evidence in this case was an appropriate remedy. The court of appeals stated correctly the procedure to obtain a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). The problem with the court of appeals analysis is that the district court was not conducting a "Franks" hearing, it was weighing the appropriateness of using exclusion. The Supreme Court should take this issue up and shed further light on the distinction between a "*Franks*" hearing and whether or not suppression is an appropriate remedy when there is a Fourth Amendment violation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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