No. 18-5004

IN THE SUPREME COURT OF THE UNITED STATES

TREMAYNE ANTWANE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPPOSITION

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QUESTIONS PRESENTED

1. Whether police officers violated the Fourth Amendment by sniffing the window and door of petitioner's apartment while standing on a public sidewalk.

2. Whether the court of appeals properly concluded that the district court erred by ruling sua sponte that a police officer made false statements in an affidavit to support a search warrant, where the defendant made no claim, under Franks v. Delaware, 438 U.S. 154 (1978), that the affidavit was false.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is unreported but is available at 720 Fed. Appx. 146. The order of the district court (Pet. App. B1-B20) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2018. The petition for a writ of certiorari was filed on June 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the United States District Court for the Eastern District of Virginia returned an indictment charging petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. The district court granted petitioner's motion to suppress the firearm on Fourth Amendment grounds. Pet. App. B1-B20. The court of appeals reversed. Id. at A1-A13.

1. On June 27, 2016, Newport News police officers Zachary Lyons and Glenn Marshall were on routine bike patrol at Pinedale Manor apartments -- a two-story, garden-style apartment complex in Newport News, Virginia. Sidewalks run the length of each building in the complex, directly abutting the doors and windows of the ground-level apartments. The apartment complex's parking lot and the sidewalks are accessible to the public. Pet. App. A3.

As Officer Marshall passed in front of apartment A6, he smelled a strong odor of burning marijuana. Officer Lyons, who was riding his bicycle on a grassy area between the sidewalk and the parking lot, also smelled marijuana coming from apartment A6. Both officers had training and experience in smelling raw and burnt marijuana. Pet. App. A3. The officers spent several minutes investigating the source of the odor by walking along the first-floor sidewalk and the second-floor landing. Both officers noted that the odor was strongest near apartment A6, a street-level

apartment with a door and window that abut the sidewalk. Id. at A4. Officer Lyons "sniffed the windowsill of A6's exterior screened window," and Officer Marshall "smelled the exterior doorframe of A6's front door." Ibid. The window and the door were slightly "recessed into the building," creating a few inches of space between the window or door and the outside wall of the building. Id. at B2. Confident that the odor was marijuana coming from apartment A6, Officer Lyons knocked on the door. Id. at A4, B3.

Petitioner opened the door, and the officers smelled an even stronger odor of marijuana coming from inside the apartment. The officers drew petitioner and Sean Mitchell, the two occupants, outside by telling them that there was a problem with the apartment window. Once outside, the officers told the occupants that they had smelled marijuana coming from the apartment. The officers frisked and handcuffed both petitioner and Sean Mitchell and asked for consent to search the apartment, but the men declined. Officer Lyons left to obtain a search warrant while Officer Marshall and a back-up officer waited outside the apartment with the two men. Pet. App. A4, B3.

In his affidavit, Officer Lyons stated that he and Officer Marshall had smelled the odor of marijuana from apartment A6 as they were on bike patrol. He further stated that when the occupants opened the door and stepped outside, a strong odor of

marijuana emanated from the apartment. Based on the affidavit, a local magistrate judge issued a search warrant for the apartment, finding probable cause that evidence of marijuana possession would be found inside. The officers executed the search warrant and seized three partially-burned marijuana cigarettes and a loaded semiautomatic firearm. Pet. App. A5, B4.

2. After he was charged with unlawful possession of a firearm, petitioner filed a pretrial motion to suppress the evidence seized from the apartment. D. Ct. Doc. 13 (Feb. 13, 2017). He contended that the officers had conducted a warrantless search of the curtilage of his home in violation of the Fourth Amendment when they sniffed the window and door of his apartment. Id. at 4-10. Petitioner did not challenge the veracity of the affidavit that supported the search warrant. Pet. App. A5-A6.

After a hearing, the district court granted petitioner's motion to suppress. Pet. App. B1-B20. The court viewed the officers' sniffing of petitioner's window and door as a warrantless search. Id. at B6-B12. Relying primarily on Florida v. Jardines, 569 U.S. 1 (2013), which involved officers' use of a trained drug-sniffing police dog on the porch of a home, id. at 3, the court concluded that the officers "trespassed into the curtilage immediately surrounding [petitioner's] residence." Pet. App. B8. The court observed that, "[a]lthough both officers were standing on a public walkway outside the apartment," Officer Lyons had

"positioned himself as close to [petitioner's] bedroom window as physically possible," and Officer Marshall had "placed his face up against [petitioner's] front door." Ibid. The court concluded that "[b]oth officers leaned from the public walkway into the recessed spaces separating the window and door" from the outer wall of the building, and that such spaces were part of "the home itself." Ibid.

The district court further concluded that the good-faith exception to the exclusionary rule was inapplicable. Pet. App. B13-B17. The court stated that although the officers seized the firearm pursuant to a search warrant, the warrant was obtained after the magistrate judge "was misled by the knowing or reckless omission of material information from the affidavit." Id. at B15. According to the court, the affidavit "omitted the manner by which Officers Lyons and Marshall localized the source of the marijuana odor to [petitioner's] residence," i.e., that Officer Lyons had sniffed the window and Officer Marshall had sniffed the door. Ibid. The court further stated that "[o]ther indicia of recklessness or gross negligence," such as luring the occupants outside and exceeding the scope of the warrant during the search, "support the conclusion that the affidavit was drafted carelessly." Ibid.; id. at B15-B18.

3. The court of appeals reversed. Pet. App. A1-A13.

a. The court of appeals determined that the officers' sniffs at the window and door of petitioner's apartment were not a search under the Fourth Amendment. Pet. App. A7-A11. The court recognized that a person has a reasonable expectation of privacy in his residence, including its curtilage. Id. at A7. The court observed, however, that a person has no expectation of privacy in things that he knowingly exposes to the public, and that "an apartment dweller maintains no expectation of privacy in the publicly accessible common areas of an apartment complex." Ibid.

Applying those principles, the court of appeals explained that "[l]aw enforcement officers' use of their unenhanced senses in publicly accessible spaces * * * does not amount to a 'search' under the Fourth Amendment." Pet. App. A7. The court accordingly found that the officers here did not conduct a search because they "used their unenhanced sense of smell to investigate the source of the marijuana odor wafting through a public space." Id. at A8.

The court of appeals further explained that the district court had misapplied this Court's decision in Jardines. Pet. App. A10. In Jardines, the Court held that the use of trained police dogs to investigate a home and its immediate surroundings is a search within the meaning of the Fourth Amendment. Id. at A10-A11. The court of appeals explained that unlike Jardines, the officers here used their unenhanced senses, not a drug-sniffing dog. Ibid. The court observed that the officers' "sniffs were no different than

what any passerby could have done," "[n]or was it disputed that the officers caught anew the smell of marijuana after they lawfully knocked on the door and [petitioner] voluntarily opened it." Id. at A11. The court accordingly determined that the officers "were not required to plug their noses as they passed [petitioner's] apartment" and that their sniffs were not a search. Ibid.

b. The court of appeals also determined that the district court had erred in its sua sponte ruling that Officer Lyons had knowingly or recklessly misled the magistrate judge in his search warrant affidavit. Pet. App. A12-A13. The court of appeals stated that it was not necessary to address that issue given its holding that no Fourth Amendment violation had occurred, but it viewed the significance of the district court's error as serious enough to warrant comment. Id. at A12.

The court of appeals noted that a search warrant is clothed with a presumption of validity, but that under Franks v. Delaware, 438 U.S. 154 (1978), that presumption may be overcome if the defendant makes a substantial preliminary showing that the affiant acted in bad faith by knowingly or recklessly misrepresenting or omitting facts essential to a warrant's issuance. Pet. App. A12-A13. The court stated that the district court had "turned th[e Franks] process on its head" by finding a Franks violation even though petitioner did not raise a Franks claim and thus never made the required preliminary showing. Id. at A13. The court of

appeals observed that the district court did not hold a Franks hearing or ask the parties to brief the propriety of suppressing evidence obtained pursuant to a validly executed search warrant. Ibid. Finally, the court of appeals observed that "no record evidence supports the district court's finding that Officer Lyons' application knowingly or recklessly misled" the local magistrate judge who issued the warrant. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-11) that he is entitled to suppression of evidence found in a warrant-based search of his home on the theory that Officers Lyons and Marshall violated the Fourth Amendment by trespassing into the curtilage of his home to sniff his apartment door and window. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner further contends (Pet. 11-13) that the district court appropriately considered, as part of its good-faith analysis, whether Officer Lyons had deliberately or recklessly misled the magistrate judge in obtaining a search warrant for petitioner's apartment. That issue is relevant only if petitioner prevails on the first question presented, and the court of appeals' criticism of the district court's approach is correct in any event. Further review of the unpublished decision below is accordingly unwarranted.

1. This Court's review is unwarranted for the threshold reason that this case is in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"). The court of appeals reversed the district court's order suppressing petitioner's firearm and remanded to the district court for proceedings on the merits. Pet. App. A13. If petitioner is acquitted at trial, his claim will be moot. If petitioner is convicted, he will have an opportunity to raise the claim pressed here, in addition to any claims arising from a plea, trial, or sentencing, in a single petition for a writ of certiorari. See Hamilton-Brown Shoe Co., 240 U.S. at 258; see also Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioner provides no sound reason to depart in this case from this Court's usual practice of awaiting final judgment.

2. 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." U.S. Const. Amend. IV.

Absent the existence of recognized property rights capable of invasion through "physical intrusion," Florida v. Jardines, 569 U.S. 1, 5 (2013) (citation omitted); United States v. Jones, 565 U.S. 400, 404 (2012), the defendant must show that he had a "'legitimate expectation of privacy in the premises' searched," Byrd v. United States, 138 S. Ct. 1518, 1526 (2018) (quoting Rakas v. United States, 439 U.S. 128, 143 (1978)).

This Court has recognized that a police officer may observe a suspect's residence or curtilage from a public space. See California v. Ciraolo, 476 U.S. 207, 212-215 (1986) (officers viewed curtilage of a residence from public airspace). It has also recognized that an officer does not violate the Fourth Amendment by approaching a residence, knocking, and then waiting briefly to be received. Jardines, 569 U.S. at 8 (citing Kentucky v. King, 563 U.S. 452, 469-470 (2011)). And it has recognized that the occupant of a residence has no legitimate expectation of privacy with respect to odors that can be smelled by police officers outside the residence. See United States v. Johns, 469 U.S. 478, 482 (1985); United States v. Ventresca, 380 U.S. 102, 111 (1965).

Under those principles, the court of appeals correctly determined that the officers did not conduct a Fourth Amendment search by sniffing the door and window of petitioner's apartment from a public sidewalk. Pet. App. A7-A11. Petitioner had no

property right or reasonable expectation of privacy either in the odors emanating from his apartment or on the public walkway where the police officers were standing. Ciraolo, 476 U.S. at 214-215; Johns, 469 U.S. at 482; Ventresca, 380 U.S. at 111. Accordingly, the sniffs by the officers were not searches, nor did the officers conduct a search by knocking on the door of petitioner's apartment to request entry. King, 563 U.S. at 471.

Petitioner's argument (Pet. 7-11) that the officers trespassed onto the curtilage of his apartment is incorrect. This Court has set forth four factors to determine whether an area adjacent to a home is "curtilage": (1) proximity to the home; (2) whether the area is included within an enclosure surrounding a home; (3) nature and uses of the area; and (4) steps taken by the resident to protect the area from observation. United States v. Dunn, 480 U.S. 294, 301 (1987). Petitioner has identified no case law in support of the district court's conclusion that a few inches of recessed space between the outside wall of the building and the window and door were "curtilage" of his apartment, and the Dunn factors make clear that it is not. Other than "proximity of the area," the recessed space was not enclosed, was not used for anything, and was not protected in any way from observation. Ibid. To the contrary, the court of appeals correctly determined that the officers smelled the odor of marijuana from a "walkway open to the public" and then sniffed "in spaces open and accessible to the

public." Pet. App. A8. That factbound determination does not warrant this Court's review.

Petitioner's reliance on Jardines is misplaced. In Jardines, this Court held that police officers conducted a Fourth Amendment search when they took a drug-sniffing dog to the front porch of a suspect's residence, where the dog moved to the base of the front door and alerted to the presence of drugs inside the residence. 569 U.S. at 4, 11-12. The Court described the front porch as curtilage, noting that "[t]he front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" 569 U.S. at 7 (citation omitted). The Court concluded that the officers' actions amounted to a Fourth Amendment search because they had physically entered a constitutionally protected area and they had exceeded the scope of any consent or implied societal license to approach the front door by bringing a drug-sniffing dog along to explore the area in hopes of obtaining evidence. Id. at 7-9.

Jardines does not help petitioner. It reaffirms that officers may use their unenhanced senses while stationed on public thoroughfares, see 569 U.S. at 7, and the officers here did just that. The window and door of petitioner's apartment abut a public sidewalk, and nothing prevents any member of the public from walking within inches of the window or door and smelling anything emanating from inside the apartment. Jardines also indicates that

even if petitioner were correct that the officers entered into curtilage, they did not exceed any implied license to approach the door by using their unenhanced sense of smell to detect marijuana. Id. at 8-9. Petitioner has therefore not identified any conflict between the decision below and Jardines.

3. Petitioner's argument (Pet. 11-13) that the court of appeals erred in determining that the district court misapplied Franks v. Delaware, 438 U.S. 154 (1978), and the good-faith exception to the exclusionary rule, does not warrant this Court's review. The court of appeals expressly stated that its statements on that issue were unnecessary in light of its determination that no Fourth Amendment violation had occurred. Pet. App. A13. Thus, they would be directly relevant to petitioner's case only if this Court were to grant review on the first question presented and hold in favor of petitioner.

In any event, the court of appeals was correct. Under the good-faith exception to the exclusionary rule, evidence obtained by the police acting in reasonable reliance on a search warrant that is issued by a neutral and detached magistrate, but that is ultimately found to be invalid under the Fourth Amendment, will not be suppressed at a criminal trial. United States v. Leon, 468 U.S. 897, 911-913 (1984). The good-faith exception does not apply, however, if the affidavit that supported the issuance of the search warrant included a knowing or reckless falsehood by the affiant in

violation of Franks, supra. Leon, 468 U.S. at 914. In Franks, this Court addressed the circumstances in which a defendant seeking to suppress evidence collected pursuant to a warrant may challenge the veracity of the affidavit on which the warrant was based. The Court held that a defendant is entitled to an evidentiary hearing if he makes a "substantial preliminary showing" that the affidavit included a false statement made "knowingly and intentionally, or with reckless disregard for the truth," and if the alleged falsehood was "necessary to the finding of probable cause." 438 U.S. at 155-156. The evidence must be suppressed if the defendant establishes at the hearing that the false statement was intentional or reckless and the court then finds that "the affidavit's remaining content is insufficient to establish probable cause." Id. at 156.

Consistent with the decision below, the Sixth Circuit has held that a district court should not conduct a good-faith or Franks inquiry until the defendant has made a substantial preliminary showing of falsity in the affidavit. See United States v. Archibald, 685 F.3d 553, 558-559 (2012), cert. denied, 568 U.S. 1109 (2013). Petitioner has not identified any circuit decision to the contrary.

Moreover, as the court of appeals correctly recognized, the district court's Franks ruling was especially unwarranted here. Petitioner did not raise a Franks claim in the district court and

did not make the required preliminary showing of falsity. Accordingly, the court did not hold a Franks hearing at which the officer could have testified to the issue, or even ask the parties to brief it before ruling against the government. Pet. App. A13. And, as the court of appeals observed, the record does not support the district court's conclusion that Officer Lyons intentionally or recklessly misled the magistrate judge. Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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