No. 18-5223

IN THE SUPREME COURT OF THE UNITED STATES

GERAND EARL RATCLIFF, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied clear-error review to the district court's finding that petitioner consented to a search of his residence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40a-61a) is not published in the Federal Reporter but is reprinted at 725 Fed. Appx. 894. The opinion of the district court (Pet. App. 2a-37a) is reprinted at 202 F. Supp. 3d 1295.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2018. A petition for rehearing was denied on April 11, 2018. (Pet. App. 62a). The petition for a writ of certiorari was filed on July 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Alabama, petitioner was convicted of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Amended Judgment 1. He was sentenced to 120 months of imprisonment, to be followed by four years of supervised release. Amended Judgment 2-3. The court of appeals affirmed. Pet. App. 40a-61a.

1. In November 2015, police officers arrived at petitioner's house in Pleasant Grove, Alabama, based on reports that the OnStar security system had traced a stolen Cadillac Escalade to that location. Pet. App. 42a. Officers peeked through a garage window and saw an Escalade that matched the stolen vehicle's description. Id. at 43a. An officer then knocked on petitioner's front door, after which officers heard a voice and loud footsteps, and saw what appeared to be someone running inside. Ibid. When petitioner opened the door a short time later, officers smelled a strong odor of marijuana. Ibid. They detained petitioner and conducted a sweep of the house, during which they saw in plain view a handgun, an unlabeled pill bottle, and raw marijuana in a toilet. Id. at 43a-44a. They also confirmed

through OnStar that the Escalade in the garage was the stolen one. Id. at 45a.

A narcotics detective arrived after the sweep of the house and spoke with petitioner, who was handcuffed and seated on his couch. Pet. App. 45a. Using a friendly tone, the detective said he had been called because of the smell of marijuana. Ibid. Petitioner said he had flushed "about an ounce" of marijuana down the toilet when the officers arrived. Id. at 45a-46a. The detective then said: "[E]ither you can give me permission to search your residence because I'm here because of the way your house smells, or I can go find a judge, get a search warrant, and then I'll come back and then we will do that." Id. at 46a (brackets in original). Petitioner said he would consent to a search, and he signed a form handwritten by the officer stating that he gave the police "permission under my own free will to search my residence * * * for any illegal narcotics, paraphernalia, [or] documents with information containing the [sale] or purchase of illegal narcotics; including computers, safes, ledgers, money, firearms, etc." Ibid. (second set of brackets in original). The detective began to search the house, starting with some safes in the master bedroom that petitioner opened for him. Id. at 47a. The safes contained large amounts of cash, and petitioner offered to give the detective half of the money if he would let petitioner go. Ibid.

The detective decided to suspend the search until he obtained a warrant. Pet. App. 47a. After obtaining the warrant, officers resumed the search of the house and found "six digital scales with white powder residue, multiple plastic baggies with white powder residue, two loaded handguns, a loaded shotgun, multiple loaded ammunition magazines, approximately $247,460 in cash, and approximately 1.8 kilograms of cocaine." Id. at 49a.

2. A federal grand jury indicted petitioner on one count each of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 41a. Petitioner moved to suppress the evidence obtained from his house and garage, arguing that it was the fruit of multiple Fourth Amendment violations. Id. at 9a.

After an evidentiary hearing, the district court denied the motion to suppress in part and granted it in part. Pet. App. 2a-38a. As relevant here, the court determined that (1) even if officers violated the Fourth Amendment by peeking into petitioner's garage, they would have knocked on his door anyway; (2) after petitioner opened his door, officers had probable cause to detain petitioner based on his suspicious behavior and the smell of marijuana in the house; (3) the sweep of the house was justified either as a protective sweep or based on exigent circumstances to

prevent the destruction of evidence; (4) petitioner's consent to the search of the house was voluntary; and (5) the search warrant was not tainted by any prior illegalities. Id. at 11a-33a.[1]

3. The court of appeals affirmed in an unpublished decision. Pet. App. 40a-61a.

As an initial matter, the court "agree[d] with the district court that the knock and talk was permissible," and did not disturb the district court's finding that the officers would have knocked on petitioner's door based on the OnStar notification even if they had not peeked into the garage. Pet. App. 55a. The court also agreed with the district court that the sweep through the house was justified both "due to the exigent circumstances of preventing the destruction of evidence and as a protective sweep to ensure the officers' safety." Id. at 55a-56a.

Next, the court of appeals upheld the validity of the consent-based search of the house. Pet. App. 58a. The court stated that it must give "a great deal of deference" to the district's finding of consent, and reverse "only if [it was] left with the definite and firm conviction that the trial judge erred." Ibid. (quoting United States v. Garcia, 890 F.2d 355, 359 (11th Cir. 1989)). The court observed that, in this case, the officers "did not employ any tactics to add to the coercion inherent in any arrest," but instead "made [petitioner] comfortable, spoke to him respectfully,

[1] The district court also determined that some of petitioner's statements should be suppressed. Pet. App. 33a-36a.

and proceeded calmly." Ibid. The officers told petitioner "that he could withhold consent" and "gave [petitioner] time to review and sign the handwritten consent form." Ibid. The court explained that it had "nothing near a definite and firm conviction that the trial judge erred in finding that [petitioner's] consent was voluntary," and it therefore determined that the money found in the safes during the ensuing search was admissible. Ibid. (citation and internal quotation marks omitted).

Finally, the court of appeals determined that the search warrant was "properly supported by probable cause independent of any improperly obtained evidence." Pet. App. 60a.

ARGUMENT

Petitioner contends (Pet. 16-26) that the court of appeals should have reviewed de novo, rather than for clear error, "the voluntariness of consent under the Fourth Amendment." Pet. 26. Petitioner failed to develop that argument below, so it is not properly presented here. In any event, the unpublished decision of the court of appeals correctly stated the standard of review, and the court's decision is consistent with the decisions of every other court of appeals. This Court has denied petitions for writs of certiorari in cases involving arguments like the one petitioner presents, see Penn v. United States, 138 S. Ct. 98 (2017) (No. 16-9194); Carter v. United States, 543 U.S. 1155 (2005) (No. 04-7093); Bostic v. United States, 519 U.S. 933 (1996) (No. 96-5185), and it should follow the same course here.

Furthermore, even if the question presented otherwise warranted review, this case would be an unsuitable vehicle in which to review it, because the result of petitioner's suppression motion would have been the same under any standard.

1. a. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), this Court explained that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Id. at 227. It is well settled that appellate courts review factual determinations for clear error. See, e.g., Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015); Pierce v. Underwood, 487 U.S. 552, 558 (1988). Accordingly, in United States v. Mendenhall, 446 U.S. 544 (1980), this Court reversed a court of appeals decision that had set aside a district court's finding that the defendant voluntarily consented to accompany law enforcement agents, explaining that "the totality of the evidence in this case was plainly adequate to support the District Court's finding" and that the court of appeals should not have "substitut[ed] for that finding its view of the evidence." Id. at 557-558; see also id. at 558-560 (same conclusion as to a finding of consent to search the defendant's body).

Consistent with Schneckloth and Mendenhall, the federal courts of appeals have all held that "[t]he voluntariness of consent to search is a factual question," under which the court

"must affirm the determination of the district court unless its finding is clearly erroneous." United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996) (en banc); see United States v. Hughes, 640 F.3d 428, 440 (1st Cir. 2011); United States v. Guerrero, 813 F.3d 462, 467 (2d Cir.), cert. denied, 137 S. Ct. 98 (2016); United States v. Murray, 821 F.3d 386, 391 (3d Cir.), cert. denied, 137 S. Ct. 244 (2016); United States v. Blevins, 755 F.3d 312, 324 (5th Cir. 2014); United States v. Lee, 793 F.3d 680, 684 (6th Cir.), cert. denied, 136 S. Ct. 517 (2015); United States v. Contreras, 820 F.3d 255, 269 (7th Cir. 2016); United States v. Morgan, 842 F.3d 1070, 1075 (8th Cir. 2016), cert. denied, 137 S. Ct. 2176 (2017); United States v. Brown, 563 F.3d 410, 414 (9th Cir. 2009); United States v. Salas, 756 F.3d 1196, 1202-1203 (10th Cir. 2014); United States v. Yeary, 740 F.3d 569, 581 (11th Cir. 2014), cert. denied, 135 S. Ct. 1153 (2015); United States v. Wilson, 605 F.3d 985, 1027 (D.C. Cir.) (per curiam), cert. denied, 562 U.S. 1116 (2010).

b. The unpublished decision below properly recited and applied the clear-error standard to the facts of this case. Pet. App. 57a-58a. The court of appeals considered the relevant facts and concluded that it had "nothing near a 'definite and firm conviction that the trial judge erred' in finding that [petitioner's] consent was voluntary." Id. at 58a (quoting United States v. Garcia, 890 F.2d 355, 359 (11th Cir. 1989)).

Petitioner contends (Pet. 24-25) that appellate review should be de novo. He argues that the courts of appeals have misread Schneckloth to support a clear error standard, Pet. 16-17, because Schneckloth "did not involve or address the appropriate standard of appellate review," so "[t]he Court's acknowledgment that * * * voluntariness determinations are fact-intensive * * * does not suggest that the Court believed conclusions about the voluntariness of consent were entitled to greater deference" on appeal. Pet. 20-21. Petitioner did not make this argument in the court of appeals, see Pet. C.A. Br. 29, 44, so the issue is not properly presented for review in this Court. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" precluding review of issues that were "not pressed or passed upon below") (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

c. Even if petitioner had raised the standard of review below, he errs in suggesting (Pet. 16-18, 23) that the court of appeals' decision conflicts with this Court's decisions in Ornelas v. United States, 517 U.S. 690 (1996), Thompson v. Keohane, 516 U.S. 99 (1995), or Miller v. Fenton, 474 U.S. 104 (1985).

Ornelas addressed the appellate standard of review governing reasonable-suspicion and probable-cause determinations under the Fourth Amendment. 517 U.S. 690. This Court held that, although a court of appeals should "review findings of historical fact only

for clear error," "as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." Id. at 699. Ornelas did not address the standard of review for assessing the voluntariness of a defendant's consent to a search. See, e.g., United States v. Tompkins, 130 F.3d 117, 120-121 (5th Cir. 1997), cert. denied, 523 U.S. 1036 (1998). And this Court has reiterated since Ornelas that the "Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'" Ohio v. Robinette, 519 U.S. 33, 40 (1996) (brackets in original) (quoting Schneckloth, 412 U.S. at 248-249).

In Thompson, this Court addressed the standard that applies on habeas corpus review to the question whether a defendant was "in custody" at the time of interrogation, a Fifth Amendment inquiry that turns on whether a "reasonable person" would "have felt he or she was not at liberty to terminate the interrogation and leave." 516 U.S. at 112. This Court held that application of that test "presents a mixed question of law and fact" that is not entitled to the presumption of correctness that 28 U.S.C. 2254(d) requires federal courts to accord state courts' factual findings on habeas review. Id. at 102. Thompson nowhere addressed the standard to be applied when a court of appeals reviews the voluntariness of consent to a search, which this Court has described as a factual rather than a mixed question.

Finally, in Miller, this Court addressed whether the Section 2254(d) presumption applies to a federal court's habeas corpus review of a state court's finding that a defendant's confession was "voluntar[y]" and therefore admissible. 474 U.S. at 105-106. The Court held that "subsidiary factual questions," such as "whether in fact the police engaged in the intimidation tactics alleged by the defendant," were entitled to a statutory "presumption of correctness," while "the ultimate question whether * * * the challenged confession was obtained in a manner compatible with" constitutional requirements was "a matter for independent federal determination." Id. at 111-112. That case likewise did not concern direct appellate review of a district court's finding regarding consent to a search.

Petitioner suggests (Pet. 19-21) that the standard of review that applies to the voluntariness of a confession must also necessarily apply when assessing the voluntariness of consent to a search. But the two inquiries involve different constitutional provisions and different constitutional analyses. Miller explained that "asking whether [a] confession was 'involuntary'" is a "'convenient shorthand'" for a "legal inquiry" into whether "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause." 474 U.S. at 109 (citation omitted). The Court observed that its "confession cases hold that

the ultimate issue of 'voluntariness'" in that context "is a legal question." Id. at 110. In contrast, this Court has repeatedly stated that "[v]oluntariness" as that term is used in the Fourth Amendment search context "is a question of fact to be determined from all the circumstances." Robinette, 519 U.S. at 40 (brackets in original) (quoting Schneckloth, 412 U.S. at 248-249); cf. Tompkins, 130 F.3d at 120 n.10 (stating that "[c]are should be taken not to confuse voluntariness of consent to search in the Fourth Amendment context with voluntariness of criminal confessions in the Fifth or Fourteenth Amendment contexts").

2. Petitioner contends (Pet. 10) that federal and state courts are "deeply divided" regarding the standard of review for the voluntariness of consent to a search. But he has not identified any disagreement that warrants this Court's review in this case.

a. As noted above, all federal courts of appeals with jurisdiction over criminal cases have held that the inquiry into whether a defendant voluntarily consented to a search is a question of fact subject to clear-error review. See pp. 7-8, supra. Petitioner suggests (Pet. 13 n.2) that the Sixth and Eighth Circuits have held otherwise, but he is mistaken.

Petitioner points first to the Sixth Circuit's statement in United States v. Moon, 513 F.3d 527, 536 (2008), cert. denied, 553 U.S. 1062 (2008), that the court "review[s] the determination of the ultimate question of whether there was consent de novo."

But the Sixth Circuit has subsequently recognized that Moon is inconsistent with Schneckloth and with prior circuit precedent, including an en banc decision. See Lee, 793 F.3d at 684 (citing United States v. Erwin, 155 F.3d 818, 822 (6th Cir. 1998) (en banc), cert. denied, 525 U.S. 1123 (1999)). The Sixth Circuit has thus held that Moon is not good law.

Petitioner next points to the Eighth Circuit's statement in United States v. Magness, 69 F.3d 872, 874 (1995), that the court would "review the ultimate question of voluntariness de novo but uphold the district court's factual findings unless they are clearly erroneous." Magness addressed both the voluntariness of a confession under the Fifth Amendment and the voluntariness of consent to a search under the Fourth Amendment, and the court mistakenly applied the same standard of review to both. See ibid. The court's approach in Magness was inconsistent with both the Eighth Circuit's prior and subsequent decisions, including an en banc decision.[2] Magness's outlier status within the Eighth Circuit's own jurisprudence does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per

[2] See, e.g., United States v. Steinmetz, 900 F.3d 595, 598 (8th Cir. 2018); United States v. LeBeau, 867 F.3d 960, 970 (8th Cir. 2017); Morgan, 842 F.3d at 1075; United States v. Rogers, 661 F.3d 991, 995 (8th Cir. 2011); United States v. Saenz, 474 F.3d 1132, 1136 (8th Cir. 2007); United States v. Winn, 969 F.2d 642, 644 (8th Cir. 1992); United States v. McKines, 933 F.2d 1412, 1423 (8th Cir.) (en banc), cert. denied, 502 U.S. 985 (1991).

curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

b. Petitioner also contends that this Court should grant certiorari to resolve a conflict in the state courts regarding the appropriate standard of review. Pet. 11-15, 22-23. Many state courts of last resort, consistent with all of the federal courts of appeals, have held that a trial court's finding that a defendant's consent to a search was voluntary is reviewed for clear error or under a comparably deferential standard.[3] Other state courts adopt a two-step approach, under which the findings underlying the trial court's determination of voluntariness are reviewed deferentially, while the ultimate question of voluntariness is considered a legal issue that is reviewed de novo.[4]

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[3] See, e.g., State v. Butler, 302 P.3d 609, 613 (Ariz. 2013) (en banc); People v. Monterroso, 101 P.3d 956, 967-968 (Cal. 2004), cert. denied, 546 U.S. 834 (2005); State v. Jenkins, 3 A.3d 806, 833 (Conn. 2010); In re J.M., 619 A.2d 497, 500-501 (D.C. 1992); Knight v. State, 690 A.2d 929, 932 (Del. 1996); State v. Varie, 26 P.3d 31, 35 (Idaho 2001); People v. Smith, 827 N.E.2d 444, 452 (Ill. 2005), abrogated on other grounds by People v. Luedemann, 857 N.E.2d 187 (Ill. 2006); Commonwealth v. Gray, 990 N.E.2d 528, 540 (Mass.), cert. denied, 571 U.S. 1014 (2013); State v. Diede, 795 N.W.2d 836, 846 (Minn. 2011); State v. King, 209 A.2d 110, 114 (N.J. 1965); State v. $217,590.00 in U.S. Currency, 18 S.W.3d 631, 633 (Tex. 2000); Campbell v. State, 339 P.3d 258, 265 (Wyo. 2014).

[4] See, e.g., People v. Chavez-Barragan, 379 P.3d 330, 338 (Colo. 2016); Wyche v. State, 987 So. 2d 23, 33-34 (Fla.), cert. denied, 555 U.S. 1070 (2008); State v. Ransom, 212 P.3d 203, 209 (Kan. 2009); Payton v. Commonwealth, 327 S.W.3d 468, 473 n.9 (Ky. 2010); State v. Nadeau, 1 A.3d 445, 454 (Me. 2010); State v. Tyler, 870 N.W.2d 119, 127 (Neb. 2015), cert. denied, 136 S. Ct. 1207

That variation among state courts does not warrant this Court's intervention here. This Court has not addressed whether state courts, in reviewing a trial court's adjudication of a motion to suppress on Fourth Amendment grounds, are bound to follow the same appellate-review standards established by this Court in its supervision of the federal courts. Indeed, one state court decision cited by petitioner (Pet. 12) adopted petitioner's preferred approach on the understanding that "the standard of review is a question to be determined by the law of the forum performing the appellate review" and the state court accordingly was not required to apply Schneckloth and Mendenhall. State v. Thurman, 846 P.2d 1256, 1266-1267 (Utah 1993); cf. Clark v. State, 287 S.W.3d 567, 572 (Ark. 2008) (concluding that state courts "are not constitutionally mandated to apply the Ornelas standard of review when considering the voluntariness of a defendant's confession," and collecting cases).

Because this case arises from a federal court of appeals, it is an unsuitable vehicle for determining whether state and federal courts are bound to follow the same appellate standards when reviewing Fourth Amendment claims. Compare, e.g., Carter v. Illinois, 329 U.S. 173, 175 (1946) ("States are free to devise their own systems of review in criminal cases.") with, e.g., Bose

(2016); State v. Davis, 304 P.3d 10, 13 (N.M. 2013); State v. Stevens, 806 P.2d 92, 103 (Or. 1991) (en banc); State v. Shelton, 990 A.2d 191, 199 (R.I. 2010); State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993); State v. Weisler, 35 A.3d 970, 982-983 (Vt. 2011); State v. Phillips, 577 N.W.2d 794, 801 (Wis. 1998).

Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-511 (1984) (holding that "[t]he requirement of independent appellate review" of a finding of "actual malice" in cases governed by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), "is a rule of federal constitutional law"). Differences between the uniform federal approach and the approaches of some state courts thus present no reason to grant certiorari here.

3. In any event, this case would be a poor vehicle for reviewing the question presented because doing so would not affect the outcome of this case.

First, even on de novo review, it is clear that petitioner's consent was voluntary. Although petitioner was handcuffed at the time he gave consent, he was seated on his couch and comfortable, and the detective used a "friendly" tone of voice. Pet. App. 45a. Moreover, petitioner signed a written consent form after both being read the form aloud and being given an opportunity to read it himself. Id. at 46a.

Petitioner argues that the court of appeals "could have concluded" that his consent was simply "an expression of resignation -- of acquiescence to the officers' implied claim of lawful authority to explore his house." Pet. 25. Contrary to petitioner's suggestion, however, the officers did not "false[ly] claim * * * that they c[ould] immediately proceed to make the search in any event." Ibid. (citation and internal quotation marks omitted). Instead, the detective said that, if petitioner did not

consent to a search, the detective would "go find a judge" and "get a search warrant" based on "the way your house smells." Pet. App. 46a. The detective's statement was accurate because, as the court of appeals correctly concluded, the officers had probable cause to obtain a search warrant. Id. at 59a-60a. And if "in fact there were grounds for the issuance of a search warrant," then "the well founded advice of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion." United States v. Faruolo, 506 F.2d 490, 494-495 (2d Cir. 1974); see 4 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 8.2(c) (5th ed. 2012).

Second, even a conclusion that petitioner's consent was involuntary would not have affected the outcome of petitioner's suppression motion in this case. The only evidence that officers discovered as a result of petitioner's consent, prior to obtaining the warrant, was the cash in the safes. But the detective's affidavit in support of the warrant application did not mention the cash. See Pet. App. 48a-49a. And the officers would have inevitably discovered the money during the execution of the warrant. See C.A. App. 252 (detective's testimony that they would have opened the safes after obtaining a warrant). Thus, even if the court of appeals had disagreed with the district court that petitioner's consent was voluntary, the result of the proceedings would have been the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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