No. 18-5223

In The Supreme Court of the United States

GERAND EARL RATCLIFF,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

ALLISON CASE
Assistant Federal Defender

TOBIE J. SMITH*
Research & Writing Attorney
**Counsel of Record*

505 20th Street North
Suite 1425
Birmingham, Alabama 35203
205-208-7170

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal and State Cases **Page(s)**

Secondary Source **Page(s)**

INTRODUCTION

Mr. Ratcliff has petitioned this Court for a writ of certiorari to resolve an important matter dividing federal courts of appeals and state courts of last resort: Should a trial court's determination that a person voluntarily consented to a search be reviewed de novo on appeal, like other ultimate determinations that control the scope of constitutional protections? Or should voluntary-consent determinations instead be reviewed only for clear error, like ordinary findings of historical fact?

The government argues that reviewing voluntary-consent findings by a different standard than findings of voluntary confessions, probable cause, reasonable suspicion, and *Miranda*[1] "custody" is not incongruous. But it does not identify any distinguishing feature of the voluntariness of consent that warrants a distinct standard of review. Instead, the government contends that the Court should wait until another day to clear up the split of authority, and even outright confusion, in this area of the law. The government's arguments in support of that position, however, rest on flawed premises.

1. The question presented has long divided both federal courts of appeals and state courts of last resort, and it continues to do so. The government asserts that there really is no significant conflict among the federal courts' decisions in this area, and that "variation among state courts does not warrant this Court's intervention here," Br. in Opp'n 12–15. The government is correct that every circuit has extant precedents employing clear-error review. *Id.* at 7–8. But at least eight circuits also

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

have precedents prescribing a bifurcated review that evaluates the ultimate question of voluntariness de novo. The same inconsistency characterizes many state courts' review, while others expressly reject a clear-error standard of review.

2. The question of the proper standard of review is properly presented in this case because it was both pressed and passed upon in the court of appeals. The government argues that the question of the proper standard of review "is not properly presented here" because "[p]etitioner failed to develop that argument below," *id.* at 6. Mr. Ratcliff advocated for de novo review in the court of appeals, though, and the court instead employed clear-error review. He asks the Court to review that choice, not to be "a court . . . of first view," *Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005), *quoted in* Br. in Opp'n 9.

3. The court of appeals' clear-error review of the district court's voluntariness determination was material to the outcome there. The government contends that the standard of review was inconsequential "because the result of petitioner's suppression motion would have been the same under any standard," Br. in Opp'n 7. That contention simply misconstrues the record. Police officers' post-consent search of Mr. Ratcliff's house was, among other things, the point when they first identified pills in a bottle on his dresser as hydrocodone. And that fact was the centerpiece of the search warrant application that a judge ultimately approved. *See* Pet. for Cert. 8–9; Pet. App. 48a.

None of the government's arguments provides a sound reason to deny the petition.

ARGUMENT

The question presented involves a real and enduring split of authority over an important constitutional question that the Court should decide, and this case is an excellent vehicle.

A finding that a person voluntarily consented to a search is a quintessential "constitutional fact." It determines the scope of a constitutional protection. Voluntary consent unlocks the security ordinarily afforded by one of the Constitution's bedrock guarantees—just like actual malice, probable cause, and voluntary confession. The Court has held that the latter findings must be reviewed on appeal as mixed questions of fact and law, with deference to subsidiary findings of historical facts but not to the ultimate, precedential conclusion that applies the law to those facts. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *Miller v. Fenton*, 474 U.S. 104, 112 (1985).

Ultimate determinations of voluntary consent should be reviewed by the same de novo standard on appeal, for two principal reasons. First, de novo review ensures that the Fourth Amendment's protections are enforced with a consistency that deference to individual trial judges' determinations simply cannot provide. *Ornelas*, 517 U.S. at 697 ("[P]ermit[ting] 'the Fourth Amendment's incidence [to] tur[n] on . . . different trial judges['] . . . conclusions [about] the facts' . . . would be inconsistent with the idea of a unitary system of law." (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949))). Second, de novo review provides clear guidance to law enforcement and courts in evaluating whether they should regard an expression of consent as voluntary—guidance that cannot be gleaned from deferential review that assesses

only whether a finding of voluntariness was clearly erroneous. *Id.* at 697–98 ("*[D]e novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined "'set of rules . . . .'"" (quoting *New York v. Belton,* 453 U.S. 454, 458 (1981))).

Many courts review voluntariness determinations only for clear error, though, because in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court stated that "whether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances." 412 U.S. at 227. The government also argues that clear error is the "correct[] . . . standard of review," Br. in Opp'n 6. It contends that a clear-error standard does not "conflict[] with this Court's decisions" in *Ornelas* (de novo review of probable cause and reasonable suspicion), *Miller* (de novo review of voluntariness of confession), and *Thompson v. Keohane*, 516 U.S. 99 (1995) (de novo review of custodial status during interrogation). Br. in Opp'n 9. But the government does not suggest any reason that the principles that warrant de novo review of those matters would apply with less force to the voluntariness of consent.

Rather, it devotes most of its brief to arguing that this is not the right case for the Court to consider the matter. But the government bases that argument on unsound premises. This case is an excellent vehicle for the Court to resolve an important constitutional question that has divided the nation's appellate courts for decades.

A. Federal and state appellate courts have employed conflicting and inconsistent standards of review for voluntary-consent findings.

The government asserts that the clear-error review of voluntariness by the court of appeals in this case "is consistent with the decisions of every other court of appeals." Br. in Opp'n 6. In support of that claim, it cites decisions employing that standard of review in every circuit, *id.* at 8, and dismisses as outliers decisions in which those same circuits reviewed voluntariness de novo, *id.* at 12–13. The government does not dispute that state courts of last resort are split on the matter, but it argues that "variation among state courts does not warrant this Court's intervention here," in a federal case. *Id.* at 15. The division of authority over this matter, however, is not confined to state courts, nor to the margins, even in federal courts of appeals. And those courts' statements in the forty-five years since *Schneckloth* indicate that the division will persist until this Court directly decides the correct standard of review.

1. Most federal circuits have binding precedents that review the voluntariness of consent de novo.

The government's brief depicts de novo federal appellate review of voluntary-consent determinations as an isolated matter of a defunct Sixth Circuit decision and a jurisprudential hiccup from the Eighth Circuit. Br. in Opp'n 12–13 (citing *United States v. Moon*, 513 F.3d 527 (6th Cir. 2008); *United States v. Magness*, 69 F.3d 872 (8th Cir. 1995)). But the reality is quite different. The Sixth and Eighth Circuits are in the majority, in fact; right now, most federal circuits have binding precedents holding that the voluntariness of consent should be reviewed de novo on appeal.

The government's brief characterizes *Magness* as an "outlier . . . within the Eighth Circuit's own jurisprudence," and in support cites other decisions in which that court conducted clear-error review. *Id.* at 13 & n.2. None of those decisions has been overruled or vacated, and all continue to be valid precedent in the Eighth Circuit; so does *Magness*. The government advocates allowing that circuit "to reconcile its internal difficulties," *id.* at 14 (quoting *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam)), but the difficulties extend beyond that circuit. *Moon*, the government correctly notes, was subsequently criticized by a different Sixth Circuit panel that cited it in noting that "this court has inconsistently announced both a de novo and a clearly erroneous standard of review." *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015). And while the government states that *Lee* "held that *Moon* is not good law," Br. in Opp'n 13, *Lee* did not overrule *Moon*, even in part. *See Lee*, 793 F.3d at 684. *Moon*, like *Magness*, continues to have precedential weight—as do decisions in which the First,[2] Fourth,[3] Fifth,[4] Seventh,[5] Eleventh,[6] and

---

[2] *See United States v. Casey*, 825 F.3d 1, 14 (1st Cir. 2016) ("This court reviews the ruling on suppression de novo, accepting its underlying factual findings unless clearly erroneous. The issue of consent to search is reviewed de novo." (citation omitted)).

[3] *See United States v. Carter,* 300 F.3d 415, 423 (4th Cir. 2002) ("Because the 'voluntariness' of a search is a matter of law, it is reviewed de novo.").

[4] *See United States v. Asibor*, 109 F.3d 1023, 1038 (5th Cir. 1997) ("We review *de novo* the voluntariness of consent to a search.").

[5] *See United States v. Wade*, 400 F.3d 1019, 1021 (7th Cir. 2005) ("Questions of law—that is, the legal conclusion of whether Wade's consent was voluntary and whether he was illegally seized—are reviewed *de novo.*").

[6] *See United States v. Spivey*, 861 F.3d 1207, 1212 (11th Cir. 2017) ("[W]e will review *de novo* the district court's application of the law about voluntariness to uncontested facts.").

D.C.[7] circuits have reviewed voluntariness de novo.

2. The sharp split of authority among state courts of last resort further demonstrates the need for this Court's guidance.

The states are perhaps even more divided than the federal circuits as to the proper standard of review for voluntariness determinations. *See* Pet. for Cert. 11–13 & nn.1–2. The government acknowledges that fact, but suggests it is a separate matter from the question presented in the petition because this case is not a state proceeding. *See* Br. in Opp'n 14. And, it argues, "variation among state courts does not warrant this Court's intervention here." *Id.* at 15.

The split of authority among state courts is not a separate problem from the split among federal courts. Both are components of a single problem, and its persistence suggests that only this Court can resolve it. State and federal courts alike have wrestled with the significance of *Schneckloth*'s "question of fact" characterization. 412 U.S. at 227. Several states' highest courts have indicated that they believe *Schneckloth* requires deferential review of voluntariness determinations. *See, e.g.*, *State v. Varie*, 26 P.3d 31, 34–35 (Idaho 2001); *State v. Moore*, 154 P.3d 1, 13 (Kan. 2007); *Commonwealth v. Gray*, 990 N.E.2d 528, 540 (Mass. 2013); *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011); *In re J.M.*, 619 A.2d 497, 500–01 (D.C. 1992).

[7] *See United States v. Lewis*, 921 F.2d 1294, 1301 (D.C. Cir. 1990) ("[L]ike the court in *Garcia,* 'we will review the judge's finding of voluntariness *de novo*,' and determine, on the basis of the uncontroverted evidence taken as a whole, whether Lewis's consent was voluntary." (citation omitted) (quoting *United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989))).

State courts' division on this point cannot simply be set aside because this is a federal case. In prescribing independent, de novo review of other fact-intensive findings that determine the scope of constitutional protections, the Court has relied on principles that are as valid in state proceedings as federal. *See Miller*, 474 U.S. at 115–16 ("Although sometimes framed as an issue of 'psychological fact,' the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." (citation omitted) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961))); *Ornelas*, 517 U.S. at 697 (de novo review of reasonable-suspicion and probable-cause determinations allows "appellate courts . . . to maintain control of, and to clarify, the legal principles"); *Thompson*, 516 U.S. at 114–15 (unlike findings of historical facts, "'in custody' determinations do guide future decisions," and a lower court "is not 'in an appreciably better position . . . to make [the ultimate] determination' of . . . [compliance] with the federal *Miranda* warning requirement" (quoting *Miller*, 474 U.S. at 117)); *Bose Corp.*, 466 U.S. at 510–11 (requirement of "independent appellate review" of actual-malice determinations "is a rule of federal constitutional law . . . to preserve the precious liberties established and ordained by the Constitution").

Moreover, even if there were merit to the government's suggestion that a standard of review established by this Court might not bind state appellate courts, *see* Br. in Opp'n 15, the fact would remain that state courts share federal courts' uncertainty about the proper standard precisely because they *have* sought to follow this Court's lead. Many state courts already believe *Schneckloth* binds them to a

deferential standard that *Schneckloth* does not explicitly require and that is inconsistent with the standard of review for other "constitutional" facts. But many others disagree or do not consistently apply a single standard. That disagreement further demonstrates why the petition should be granted.

B. The question presented in this case was both pressed and passed upon in the court of appeals.

In his initial brief in the court of appeals, Mr. Ratcliff advocated for a uniform standard of review for all of the district court's rulings on his motion to suppress: the "legal determinations"—i.e., "the district court's holdings regarding warrantless entries into and searches of Mr. Ratcliff's house"—all should be "reviewed *de novo* on appeal." Pet'r's Initial Ct. App. Br. 29 (citing *Ornelas*, 517 U.S. at 699; *United States v. King*, 509 F.3d 1338, 1341 (11th Cir. 2007)). Only "the district court['s] . . . findings of *historical* facts," the brief stated, should be "reviewed for clear error," *id.* (emphasis added) (citing *Ornelas*, 517 U.S. at 696, 699).

The court of appeals passed upon the question of the proper standard of review for voluntary-consent determinations, specifically prescribing the same deferential standard as for findings of historical facts: "When a district court finds that consent was voluntarily given, we give 'a great deal of deference' to that finding. We will disturb such a finding 'only if we are left with the definite and firm conviction that the trial judge erred.'" Pet. App. 58a (citations omitted) (quoting *Garcia*, 890 F.2d at 359).

The government argues, however, that the issue of the correct standard of review for voluntary-consent determinations "is not properly presented here" because

"[p]etitioner failed to develop that argument below," Br. in Opp'n 6. Pointing to a specific statement regarding *Schneckloth* in Mr. Ratcliff's petition, the government again contends that "the issue is not properly presented for review in this Court" because "[p]etitioner did not make this argument in the court of appeals," *id.* at 9.

The question presented in the petition is properly presented for the Court's review. If the government means to suggest that the question would be properly presented only if the standard of review had been the central focus of the briefs in the court of appeals, then it misapplies this Court's rule. "Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). In this case, the issue of the proper standard of review for the voluntary-consent determination was both pressed and passed upon in the court of appeals, and either of those is sufficient to present the issue for review here. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'" (quoting *Williams*, 504 U.S. at 41)).

C. <u>The standard of review is material to the outcome of this appeal.</u>

The proper standard of review for voluntary-consent determinations is a crucial matter in this case. When police obtained Mr. Ratcliff's consent, they were in the midst of an extended, warrantless intrusion inside his house. The surrounding circumstances present a significant likelihood that the court of appeals would not

have held his consent to be voluntary if it had independently reviewed that finding. *See* Pet. for Cert. 5–7 (summarizing facts). And that holding, in turn, was crucial to the admissibility of the physical evidence seized in a subsequent warrant search.

The government contends that this case is "an unsuitable vehicle" for the Court to decide the correct standard of review, "because the result of petitioner's suppression motion would have been the same under any standard." Br. in Opp'n 7. It bases that contention on the apparent premise that the consent search played little role in the issuance of a search warrant. *Id.* at 17 ("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." (citing Pet. App. 48a–49a)). The government's characterization misconstrues the record.

Before Mr. Ratcliff consented to a search, police performed a protective sweep of his house. During the sweep, an officer saw a pill bottle without a label on a bedroom nightstand, Pet. App. 5a–6a, but he testified that he "did not look inside of it" at that time. During a post-consent walk-through, a detective inspected the pill bottle's contents for the first time and identified "multiple suspected hydrocodone pills." *Id.* at 7a. That discovery, the district court found (as a matter of historical fact), was the centerpiece of the warrant application that a judge subsequently approved. *Id.* at 48a ("Detective Reed prepared two search warrant affidavits, one based on the pill bottle and the other based on the marijuana floating in the toilet. The judge signed the warrant based upon the pill bottle."); *see also* Pet. for Cert. 8–9.

In a broader sense too, standards of review are significant, often even outcome-determinative. *See Gee v. Boyd*, 471 U.S. 1058, 1060 (1985) (White, J., dissenting from denial of cert.) ("Certainly, there are individual cases in which application of one standard rather than the other makes no difference. But the lower courts that have wrestled with the question of what rule to adopt clearly have not viewed the issue as one that might be settled by the flip of a coin."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1394 (1995) ("[O]nce a sharp divergence in a standard [of review] is articulated, it basically does the [appellate] court's work for it. Rather than going through a genuine analysis in each case, the court [can] merely invoke[] the 'tough' or 'easy' version of the standard of review.").

The court of appeals' deferential review of the voluntariness determination was plainly material to its disposition of this appeal. There is a reasonable probability that the court would have assessed that determination differently if it had independently reviewed the matter of voluntariness. And a holding that Mr. Ratcliff's consent was not voluntary would cast substantial doubt on the validity of the search warrant. *See United States v. Karo*, 468 U.S. 705, 719 (1984) (information obtained in violation of Fourth Amendment can invalidate a search warrant if the information was "critical to establishing probable cause for the issuance of the warrant"). The government's assertion that "the result of petitioner's suppression motion would have been the same under any standard [of review]," Br. in Opp'n 7, is based on a misunderstanding of the record and should not prevent this Court's review.

In any event, the government's disagreement about the merits is beside the point at this stage. The petition asks the Court to decide only the proper standard of review, not to decide whether Mr. Ratcliff's consent was voluntary. If the Court were to hold that the court of appeals employed the wrong standard, the case should be remanded for that court to review de novo the ultimate determination of voluntariness. *Cf. Ornelas*, 517 U.S. at 700 ("We vacate the judgments and remand the case to the Court of Appeals to review *de novo* the District Court's determinations that the officer had reasonable suspicion and probable cause in this case."). The government's assertion that "the result of petitioner's suppression motion would have been the same under any standard [of review]," Br. in Opp'n 7, is based on a misunderstanding of the record and should not cause the Court to deny review.

D. The Court's denial of other petitions presenting the same question does not bear on the merit of the petition in this case.

In addition to its other arguments for the denial of the petition in this case, the government contends, "This Court has denied petitions for writs of certiorari in cases involving arguments like the one petitioner presents, and it should follow the same course here." Br. in Opp'n 6 (citations omitted). But those denials mean nothing as to the merit of the argument. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) ("[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted . . . . [A] denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.").

The question presented is an important one that has sharply divided the nation's appellate courts. That division stems from disagreement about the significance of the Court's use of the words "question of fact" forty-five years ago in *Schneckloth*. Lower courts' analysis of the issue suggests that the division will persist until this Court decides the matter. This case provides an excellent vehicle for the Court to do so.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted this, the 23rd day of October, 2018.

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

ALLISON CASE
Assistant Federal Public Defender

TOBIE J. SMITH
Research & Writing Attorney

Northern District of Alabama
505 20th Street North, Suite 1425
Birmingham, Alabama 35203
(205) 208-7170
Tobie_Smith@fd.org