No.

IN THE SUPREME COURT OF THE UNITED STATES

DAVON MERKIESE KEMP,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a police officer's generalized opinion that drug dealers often keep drugs and other evidence of their trafficking activities in their homes is sufficient to support a finding of probable cause for the issuance of a warrant to search a home following the arrest of its occupant for a drug offense that was not committed inside the home?

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Petitioner Davon Merkiese Kemp ("Petitioner") respectfully prays that a writ of certiorari will issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 17-1126 on April 24, 2018.

OPINION BELOW

On April 24, 2018, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed its opinion and order affirming Petitioner's conviction and sentence for attempted possession with intent to distribute 500 or more grams of cocaine. (App. 1a). The

opinion and order are unpublished. The United States District Court entered its criminal judgment without opinion on January 30, 2017. (App. 16a).

JURISDICTION

Petitioner seeks review of the opinion and order of the United States Court of Appeals for the Sixth Circuit entered on April 24, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

> 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

On June 25, 2015, a Texas state trooper stopped a vehicle hauler for an equipment inspection. He became suspicious after noticing the windows of one of vehicles on the trailer, a Chevrolet Silverado pickup truck, had an illegal tint, the license plates were missing, and the bill of lading listed the same name for both the shipper and the receiver of the cargo.

The trooper obtained the driver's consent to search the pickup truck. He cut open the spare tire and found almost five kilograms of cocaine inside. The driver agreed to assist the authorities in a controlled delivery of the pickup truck to its destination in Ferndale, Michigan.

After the vehicle hauler arrived in Michigan, a drug task force officer re-packed the spare tire of the pickup truck with an imitation substance containing a representative sample of the real cocaine. The driver then delivered the pickup truck to the address (a grocery store parking lot) listed on the bill of lading.

An Hispanic male met the driver of the vehicle hauler and paid her the transport fee. He placed Arizona license plates on the pickup truck, exited the parking lot, and entered onto the street.

Task force surveillance officers followed the pickup truck. They observed a Saab SUV and a Nissan Pathfinder driving "in tandem" with the truck. At one point, the Saab SUV separated from the other two vehicles. Several of the officers followed the Silverado pickup truck and Nissan Pathfinder into a gated parking lot of an apartment complex.

Once inside, the officers arrested three men, including Travoughn Daniels, as they were in the process of removing the spare tire from the pickup truck. Daniels told the officers he lived in one of the apartments in the complex.

Meanwhile, other officers stopped the Saab SUV about six blocks away from the apartment complex. They arrested its driver, and Petitioner, a front seat passenger.

A task force officer applied for warrant to search Daniels' apartment. His probable cause affidavit asserted that he "is aware based on prior investigations" that "drug traffickers commonly maintain" a) documents and electronic devices containing information identifying their criminal associates; b) photographs and videos of themselves, their criminal associates, and their drug proceeds and assets; and c) narcotics, narcotics paraphernalia, narcotics proceeds, and firearms. A state court judge issued the warrant.

Upon entry, the task force officers discovered that the premises consisted of three loft apartments linked by a common hallway. A search of the apartments resulted in the seizure of crack cocaine, marijuana, heroin, an assault rifle, drug ledgers, instructions on operating a drug business and avoiding detection by law enforcement, $35,000 in cash, two Arizona license plates, a FoodSaver vacuum sealer, and unused heat seal bags. The officers also found a piece of luggage with airline tags and a passport in Petitioner's name.

A federal grand jury in Detroit returned an indictment charging Petitioner, Daniels, and the three other men with attempted possession with intent to distribute cocaine, and conspiracy to possess with intent to distribute cocaine. Petitioner filed a motion to suppress the evidence seized from the loft apartments. He asserted that he was an overnight guest, and that the entry and search violated his Fourth Amendment rights. *See Minnesota v. Olson*, 495 U.S. 91, 99-100 (1990) (overnight guests have standing to raise a Fourth Amendment violation). The district court denied the motion.

During trial, the government offered into evidence the items seized from the apartments pursuant to the search warrant. The United States Attorney argued that these

items connected Petitioner to drug trafficking activity at the premises and the attempt to take delivery of the faux cocaine concealed in the Silverado pickup truck.

The jury found Petitioner guilty of the attempted possession count, but not guilty of the conspiracy count. The district court sentenced him to a 180-month prison term, and a 3-year term of supervised release.

On appeal, Petitioner challenged the legality of the search warrant on the ground that the task force officer's opinion that drug dealers keep evidence of their trafficking activities in their homes was not sufficient to establish probable cause to search the apartments. The court of appeals disagreed, finding that "[t]he district court did not err in concluding that the affidavit provided a substantial basis for the magistrate judge to find a fair probability that contraband or evidence of a crime would be found in the place to be searched." (App. 10a)

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

A POLICE OFFICER'S GENERALIZED OPINION THAT DRUG DEALERS OFTEN KEEP DRUGS AND OTHER EVIDENCE OF THEIR TRAFFICKING ACTIVITIES IN THEIR HOMES IS NOT SUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE FOR THE ISSUANCE OF A WARRANT TO SEARCH A HOME FOLLOWING THE ARREST OF ITS OCCUPANT FOR A DRUG OFFENSE THAT WAS NOT COMMITTED INSIDE THE HOME.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. This Court has emphasized that "[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." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (footnote omitted).

This petition presents the question of whether the issuance of a search warrant for a dwelling based on a narcotics officer's generalized opinion that drug dealers keep evidence of their illegal activities in their homes violates the distinction, drawn in *Zurcher*, between probable cause to arrest versus probable cause to search.

The affidavit for the search warrant in this case recites ample facts to suspect that Travaughn Daniels was committing the offense of attempted possession with intent to distribute cocaine when he and his two companions were in the process of removing the spare tire from the Silverado truck. The circumstantial evidence raised a fair inference that Daniels believed that five kilograms of cocaine were concealed inside the spare tire.

However, these facts alone did not support the additional inference that drugs, drug paraphernalia, or other contraband would be found in his apartment. *See United States v. Eng*, 571 F. Supp.2d 239, 249 (D. Mass. 2008) (collecting cases holding that "the mere fact [] that a defendant has dealt in drugs, without more, will not support such an inference, nor will such an inference be drawn merely from the fact that he has conducted a drug transaction at a place near his home.") After all, Daniels' effort to take possession of the faux cocaine in the spare tire was interrupted by the task force agents before he could take it to another location, whether the destination was his apartment or someplace else.

To get around this inconvenient fact, the search warrant affiant asserted that his experience from "prior investigations" led him to believe that drug offenders, such as Daniels, "commonly maintain" such items in their homes. Was the insertion of this generalized opinion into the affidavit enough to convert the probable cause to arrest Daniels

to probable cause to search his home without violating the "critical element" identified by this Court in *Zurcher*?

The Sixth Circuit seemed to think so. It reached this determination without mentioning its decision in *United States v. Schultz*, 14 F.3d 1093, 1097-98 (6th Cir. 1994), wherein a different panel held that an officer's "training and experience" cannot serve as the sole basis for establishing a nexus between a drug dealer's trafficking activity and the location to be searched. The *Schultz* panel reasoned that "[t]o find otherwise would be to invite general warrants authorizing searches of any property owned, rented, or otherwise used by a criminal suspect--just the type of broad warrant the Fourth Amendment was designed to foreclose." *Id.* at 1098.

A majority of federal and state courts agree with *Shultz*. *See e.g. Eng*, 571 F. Supp.2d at 250; *United States v. Rosario*, 918 F.Supp. 524, 531 (D.R.I.1996) ("To permit a search warrant based upon the self-avowed expertise of a law enforcement agent, without any other factual nexus to the subject property, would be an open invitation to vague warrants authorizing virtually automatic searches of any property used by a criminal suspect."); *United States v. Rios*, 881 F.Supp. 772, 776-77 (D.Conn. 1995) ("general averments based on training and experience do not, standing alone, constitute a substantial basis for the issuance of a search warrant."); *United States v. Gomez*, 652 F.Supp. 461, 463 (E.D.N.Y.1987) ("[W]here as here, there is nothing to connect the illegal activities with the arrested person's apartment, to issue a warrant based solely on the agent's expert opinion would be to license virtually automatic searches of residences of persons arrested for narcotics offenses."); *State*

v. Vasquez-Marquez, 204 P.3d 178, 120 (Utah App. 2009) ("the affidavit ultimately relied only on a generalization about where drug dealers keep their drugs, and such a generalization, as we discussed above, is insufficient to support a finding of probable cause."); *Sowers v. Commonwealth*, 643 S.E.2d 506, 508 (Va.App. 2007)(officer's assertion that "[i]t is [] this affiants (*sic*) experience that narcotics and the paraphernalia Associated with the use of Narcotics are often hidden inside the user's residence for safe keeping" deemed insufficient); *State v. Thein*, 977 P.2d 582, 590 (Wn. 1999) ("The officers' general statements regarding the common habits of drug dealers were not alone sufficient to establish probable cause."); *State v. Johnson*, 578 N.W.2d 75, 83 (Neb.App. 1998) ("supporting affidavit contain[ing] generalizations about the habits of users and dealers of controlled substances" insufficient in absence of facts indicating that "these generalizations applied to" defendant); *State v. Mische*, 448 N.W.2d 415, 416 (N.D.1989) (declining to sustain search warrant supported by police officer's assertion that, based on his training and experience, he believed "individuals who regularly deal in controlled substances keep controlled substances, paraphernalia and documentation at their residence.")

The minority view holds that an experienced narcotics officer's opinion that drug dealers keep evidence of their illegal activities in their homes supplies probable cause for a search warrant even in the absence of facts linking the residence to any drug activity. *See United States v. Luloff*, 15 F.3d 763, 768 (8th Cir. 1994); *United States v. Thomas*, 989 F.2d 1252, 1254-55 (D.C. Cir. 1993).

This divergence in views explains the very different outcomes reached in *Eng* and Petitioner's case despite similar facts. In *Eng*, federal agents arranged for a cooperating witness to make a controlled delivery of marijuana to the defendants. The drop off occurred in the driveway of the first-floor apartment of one of the defendants. The agents intervened and arrested the suspects immediately after the transfer of the marijuana.

One of the agents then applied for a search warrant for the apartment. After describing the facts surrounding the delivery of the marijuana in the driveway, his affidavit offered the following opinion:

> Based on my training and experience I know that large-scale narcotics dealers don't carry large sums of money on them. They do this for a couple of reasons. One being, that they don't want to get "ripped" of by the person supplying the narcotics. Second they don't want to get stopped by the Police with large sums of money. Based on this information I know that these dealers will leave their money at a safe place. Usually this safe place will be their residence. Once they see the narcotics they will travel to this "safe" place where they would retrieve the money.

Id. 571 F. Supp.2d at 245-46.

A state judge issued the warrant. The agents then entered the apartment and seized a pound of marijuana, two handguns, and various drug-related items. The federal district judge granted the defendants' motions to suppress. He reasoned that:

> There is no permissible inference that drug money or records of drug dealing (or additional drugs) would be found in the first-floor apartment [] as: (1) the agents had no information connecting defendants with the location (other than their one-time presence in the driveway); (2) no instance of prior drug activity at [the apartment] was known to the agents; and (3) the agents had no information implicating any defendant as a drug dealer, much less an established and successful one.

Id. at 250 (footnotes omitted).

Petitioner submits that the approach espoused by a majority of courts, such as *Eng*, correctly preserve the distinction between probable cause to arrest versus probable cause to search, drawn by this Court in *Zurcher*. The Sixth Circuit's approach, which does not cite *Zurcher* and is devoid of any recognition or analysis of the distinction, does not.

In closing argument, the AUSA told the jury that the seizure of Petitioner's passport, airline receipts, and luggage tags "linked" him to the apartment. She argued that the airline documents corroborated a co-defendant's testimony regarding previous deliveries of cocaine to Petitioner in Detroit. She insisted, "you have everything about the search warrant execution and you see how the defendant is tied to this transaction." In light of the importance that the government's closing argument placed on the results of the search, the erroneous admission of the illegally seized evidence was not harmless beyond a reasonable doubt.

CONCLUSION

In light of the divergent outcomes between Petitioner's case and cases following the majority view, such as *Eng*, this petition presents an especially suitable record for this Court to resolve the conflict in the case law on this important Fourth Amendment issue. For the foregoing reasons, Petitioner asks this Court to grant his petition for a writ of certiorari and to order full briefing and oral arguments on the merits.

Respectfully submitted,

Dated: July 16, 2018

s/Dennis C. Belli

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ATTORNEY FOR PETITIONER