NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL ROBINSON,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

Michael C. Holley
Assistant Federal Public Defender
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805
(615) 736-5047

QUESTION PRESENTED

"'Rigid legal rules are ill-suited'" to an analysis of probable cause. *Illinois v. Gates,* 462 U.S. 213, 232 (1986) (citation omitted). Did the Court of Appeals violate this principle by relying on a rule to find a minimally-sufficient probable cause to search the home, instead of examining all the circumstances and seeing that the putative connection of drug-trafficking to the home was utterly meaningless?

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

Statutes, Rules, and Amendments

PRAYER

Petitioner Miguel Robinson prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion in petitioner's case is attached as Appendix A. The order of the district court is attached as Appendix B. The Sixth Circuit's order denying rehearing is attached as Appendix C.

JURISDICTION

The Court of Appeals entered its judgment and opinion on August 3, 2018, denying relief. It denied the petitioner's motion for rehearing on September 17, 2018. This petition is filed within 90 days of that denial as required by Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment of the U.S. Constitution provides that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]"

STATEMENT OF FACTS

In 2015, an informant told local Nashville police that Miguel Robinson was selling cocaine. (Warrant Affidavit, R.15-2, PageID # 58.) Specifically, he told Detective Nearn that Robinson worked at a certain food truck, and that he would sell cocaine from that truck or from a nearby parking lot. (*Id.*)

From July to December 2015, the informant made three controlled buys of cocaine from Robinson. (Police Reports, R.23-2 to 23-4, PageID # 131-61.) Each time, the informant and Robinson met at the parking lot, and he paid Robinson $40 or $50 dollars, obtaining a very small quantity of crack cocaine, *viz.* 0.283 grams, 0.3044 grams, and 0.3457 grams. (*Id.* PageID # 132, 139, 142, 149-50, 152, 159-60.) In total, over the five-month period, he paid Robinson less than $150 and got one gram of cocaine. (*Id.*) A crack user might easily consume a couple grams of crack each day.).*United States v. Hearn*, 549 F.3d 680, 682 (7th Cir. 2008); *State v. Mayes,* 2002 Tenn. Crim. App. LEXIS 594, *6 (Tenn. Crim. App. 2002).

After the third buy, Detective Nearn applied for a warrant to search Robinson's home. (Warrant Affidavit, R.15-2, PageID # 57-63.) But the informant had never even claimed that Robinson sold drugs from his home. (*See id.*) Indeed, he had never claimed to know anything about that home except that Robinson lived there. (*See id.*) And although police had "surveill[ed]" the home at least once during the investigation, no one had ever seen anything resembling drug-trafficking activities in or around the home. (*Id.* PageID # 60.) Nor had police ever seen Robinson leave his house to make a sale to the informant. (*Id.* PageID # 59-60.) Rather, the one time they had watched him travel to the sale, they saw him travel there not from his home but from the food truck. (*Id.* PageID # 60.)

When applying for the warrant, Detective Nearn gave the magistrate an affidavit reporting the following pertinent facts.

- The informant said Robinson sold cocaine from the food truck or a nearby parking lot.
- Robinson's criminal history included numerous arrests and convictions for narcotic offenses (from some unspecified date and place).
- In July 2015, the informant met Robinson in the parking lot and bought cocaine.
- In September 2015, the informant again met him in the parking lot and bought cocaine.
- In December 2015 (within 72 hours of submitting the application on December 11), the informant again met with him in the parking lot and bought cocaine.
- Certain utility records, vehicle records, and police records established that the single-family dwelling at 1806B 5th Avenue North was Robinson's home.

(Warrant Affidavit, R.15-2, PageID # 57-60.)

As mentioned, that home, not the food truck, was the target of the search warrant. With respect to that home, Detective Nearn's affidavit said only the following (apart from the aforementioned information about utility records, etc.).

- After the September buy, police followed Robinson "away from the buy location and followed him to" 1806B 5th Avenue North. (Warrant Affidavit, R.15-2, PageID # 59.) Detective Nearn's affidavit failed to disclose that, after Robinson made the sale to the informant, another man joined Robinson and rode away with him in his car. (Parker Affidavit, R.52-2, PageID # 384.) This fact was documented by photos the police took. (Photos, R.52-1, PageID # 371-82.)

- After the December buy, police "*ultimately* followed [Robinson] back to his residence located at 1806B 5th Avenue North." (Warrant Affidavit, R.15-2, PageID # 59 (italics added).)

The warrant was issued on December 11; the police executed it on December 15; they found about 55 grams of cocaine and two guns in the house; and, Robinson confessed to owning all of it. (PSR, R.77, PageID # 530-32.)

When addressing Robinson's suppression motion, the district court recognized that the fact that police saw Robinson go home at some point after two of the sales merely served to confirm that he lived in that home, explaining "I'm very skeptical of inferring too much [from those trips home] because we all go home." (Supp. Hr'g Tr., R.51, PageID # 346-47; Order, R.35, PageID # 283-84.) It held the warrant affidavit failed to establish probable cause to search Robinson's home.

On appeal, the Sixth Circuit held that, although the affidavit might have failed to establish probable cause, its showing of a nexus to the home was not so deficient as to fail the good-faith test for a "bare bones" affidavit. (Ex. A, Opinion at 5-6.) The Dissent opined that the affidavit did fail the good-faith test, and this conclusion was compelled by *United States v. Brown*, 828 F.3d 375 (6th Cir. 2016). (*Id.* at 9 (Moore, J., dissenting).)

Argument

I. The Court should grant certiorari in order to correct a fundamental error.

"At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and be free from unreasonable government intrusions." *Silverman v. United States*, 368 U.S. 505, 511 (1961). To intrude on a home, the government ordinarily must first obtain a search warrant from a magistrate. U.S. Const. Amend. 4. "The task of the issuing magistrate is

simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1986). "'Rigid legal rules are ill-suited'" to this analysis of probable cause. *Id.* at 232.

When police have obtained a search warrant and executed it, yet that warrant was issued on an affidavit failing to show probable cause, the fruits of that search will be suppressed when the affidavit was "so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable." *United States v. Leon,* 468 U.S. 897, 923 (1984).

Here, the Sixth Circuit assumed *arguendo* that the warrant affidavit failed to establish probable cause to search Robinson's home. It moved directly to the *Leon* good-faith test, and so it assessed whether the affidavit established a "'minimally sufficient nexus between the illegal activity and the place to be searched.'" (Ex. A, Opinion at 5 (citation omitted).) But when it did so it mechanically applied a rigid legal rule regarding probable cause instead of using common sense to assess all the circumstances. It cited this rule: "'[w]e have long accepted the reasonable inference that drug contraband is likely to be found inside drug traffickers' homes, especially when there is evidence of drug activity near or around the home[.]'" (*Id.* citation omitted).) And it applied this rule by blandly observing: "The police witnessed Robinson sell drugs, return to his home, and enter it less than 72 hours before the execution of the warrant." (*Id.*) On that simplistic basis, it found the *Leon*-diluted standard for probable cause satisfied. *Id.*

What the Sixth Circuit plainly failed to do was consider "all the circumstances" recited in the warrant affidavit and make a "practical, common-sense" analysis of whether those circumstances even minimally tied the illegal activity to Robinson's home. *Gates,* 462 U.S. at 238. As the district court and dissent recognized, those circumstances did not do that necessary

work when viewed using practical, common sense.

That is so because everyone goes home. The home is precisely the place to which one will "ultimately" return at some point in the day. (Warrant Affidavit, R.15-2, PageID # 59.) Here, the informant said Robinson sold these tiny amounts of drugs from or near his workplace. As far as the affidavit showed, Robinson made these tiny sales only to the informant and only on a less-than-monthly basis. And his profit from each sale was so small he could easily spend it in one visit to the grocery store. Thus, it is utterly meaningless that the police "ultimately" saw Robinson go home at some point in the day after having made the small sale to the informant. Seeing him go home confirmed only that he lived at the home, not that his home had anything to do with the small sale he had made at some point earlier that day. Thus, the Sixth Circuit's holding is tantamount to saying that a minimally sufficient probable cause to search a defendant's home exists whenever he commits a crime somewhere and goes home later in the day.

This approach to probable cause conflicts with that of other circuits that hold that "residential searches have been upheld only where some information links the criminal activity to the defendant's residence." *United States v. Lalor*, 996 F.2d 1578, 1583 (4th Cir. 1993) (collecting cases). "Where no evidence connects the [criminal] activity to the residence, the courts have found the warrant defective." *Id.* Here, although evidence connected Robinson to the home, no evidence connected his criminal activity to his home. The Sixth Circuit's approach to probable cause conflicts with this general principle. Instead of following this general principle and instead of practically assessing the circumstances, it followed a rigid rule of its own creation that will automatically find the *Leon* standard satisfied whenever the target of the search was the home of someone who at least sporadically sells drugs.

The Court should grant certiorari to correct this gross deviation from the dictates of *Gates.*

CONCLUSION

For the foregoing reasons, petitioner Miguel Robinson respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

Date: December 14, 2018

Respectfully submitted,

s/ Michael C. Holley

MICHAEL C. HOLLEY
Assistant Federal Public Defender
Attorney for Petitioner
810 Broadway, Suite 200
Nashville, Tennessee 37203
Telephone: (615) 736-5047