No. 18-7219

IN THE SUPREME COURT OF THE UNITED STATES

JOSE AMADOR AND DIANA MEKAEIL, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals was required to entertain petitioners' argument to suppress crystal methamphetamine and other evidence seized from their hotel room pursuant to a search warrant, where that argument was directly contrary to the position petitioners took in the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not published in the Federal Reporter but is available at 2018 WL 4382199. The memorandum and order of the district court (Pet. App. 20a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2018. Petitions for rehearing were denied on October 26, 2018 (Pet. App. 29a, 30a). The petition for a writ of certiorari was filed on December 26, 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 District of Kansas, petitioner Jose Amador was convicted of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (2012), and using a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Amador Judgment 1. He was sentenced to 108 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. Following a guilty plea, petitioner Diana Mekaeil was convicted of using a communication facility to distribute a controlled substance, in violation of 21 U.S.C. 843(b). Mekaeil Judgment 1. She was sentenced to 48 months of imprisonment, to be followed by one year of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-19a.

1. Brianna Hines-Black was a housekeeper at a hotel in Mulvane, Kansas, attached to a casino. Pet. App. 2a. On November 16, 2015, she entered Room 150 of the hotel to clean the room, after knocking on the door and receiving no response. Ibid. When she entered, she saw "a container of a flammable substance that she believed might be lighter fluid, two glass pipes that she later described to law enforcement agents as crack pipes, a scale, a beaker, and what appeared to be a plastic bag full of crack in an open drawer." Id. at 2a-3a.

Hines-Black reported what she had seen to her supervisor. Pet. App. 3a. The supervisor contacted the hotel manager, who contacted Kansas Racing and Gaming Commission agents assigned to the casino; Agent Craig Pentecost was assigned to respond. Ibid. Agent Pentecost called the Mulvane Police Department and asked the department to send an officer. Ibid. Agent Pentecost also went to the hotel. Ibid. When he arrived, he learned from the hotel manager that Room 150 was rented in the name of Diana Mekaeil, and Hines-Black told him what she had seen in the room. Ibid.

The Mulvane Police Department dispatched Officer Brandon Bohannon. Pet. App. 3a. When he arrived, he conferred with Agent Pentecost; out of concern that Room 150 was being used as a methamphetamine lab and posed a danger to other occupants of the hotel, the two decided to enter the room. Id. at 3a-4a. Inside Room 150, the officers observed in plain view "two butane lighters, a can of acetone, a large box of plastic sandwich bags, two glass pipes, a plastic measuring cup, a metal measuring spoon, a roll of cellophane wrap, and a set of digital scales." Ibid. They also saw "two clear plastic bags containing what appeared to be crystal methamphetamine" in an open drawer. Id. at 5a (quoting affidavit). The officers left the room. Id. at 4a. Officer Bohannon contacted his supervisor, Lieutenant Matthew O'Brien, who came to the hotel and looked inside Room 150. Ibid. Lieutenant O'Brien "concluded that they needed a warrant to search the room." Ibid.

Meanwhile, another agent reviewed hotel surveillance footage and identified two suspects as the occupants of Room 150. Pet. App. 5a. Officers arrested the two suspects -- petitioners Amador and Mekaeil -- when the suspects entered the hotel lobby that afternoon. Ibid. At the time of his arrest, Amador was carrying a backpack that contained a stolen handgun, approximately .25 pounds of cocaine, 1.5 pounds of methamphetamine, "an unspecified quantity of black tar heroin, and prescription pills." Ibid. Both petitioners also possessed keys to Room 150. Ibid.

After the arrest, Lieutenant O'Brien prepared a detailed affidavit for a warrant to search Room 150. Pet. App. 5a-6a. The affidavit reported that Officer Bohannon had responded to a call at the hotel and had spoken with Hines-Black, who "stated that she was servicing [R]oom 150, when she observed in plain view on a table a scale, meth pipe, Ziploc sandwich bags, acetone, and other items." Id. at 5a (quoting affidavit). The affidavit further reported that officers entered Room 150 and saw the items Hines-Black had described, as well as "two clear plastic bags containing what appeared to be crystal methamphetamine." Ibid. (quoting affidavit). Additionally, the affidavit explained that Room 150 was rented to Mekaeil; that male and female suspects later identified as Mekaeil and Amador were observed on surveillance footage exiting Room 150; that Amador was carrying the contraband described above when he was arrested; and that keys to Room 150

were found on both Amador and Mekaeil when they were arrested. See id. at 6a. Finally, the affidavit noted that Mekaeil had previously been arrested for possessing drugs and that Amador "had several arrests for burglary and one for firearms possession." Ibid. (quoting affidavit).

A state judge granted the search warrant application on the evening of the incident, and officers returned to Room 150 to execute it. Pet. App. 23a. Among other things, officers recovered multiple plastic bags of methamphetamine from the room. Ibid.

2. A grand jury in the District of Kansas charged each petitioner with one count of conspiring to distribute and possess with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 846. Indictment 1-2. The grand jury also charged Amador with three counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). Indictment 3-4.

Petitioners moved under Rule 12(b)(3) of the Federal Rules of Criminal Procedure to suppress the evidence obtained from Room 150. Pet. App. 23a; D. Ct. Doc. 36, at 1 (Apr. 10, 2016). Their written memorandum in support of the Rule 12 motion consisted of two parts. The first part argued that the officers' warrantless entry into Room 150 was unlawful. D. Ct. Doc. 37, at 3-12 (Apr. 10, 2016) (Suppression Mem.). The second part argued that, "[w]ithout the observations of [the] officers/agents during the

unlawful search, the warrant affidavit would not have contained sufficient evidence for the court to conclude that there was probable cause to issue the warrant." Id. at 13 (capitalization altered). In particular, petitioners invoked the Tenth Circuit's decision in United States v. Sims, 428 F.3d 945 (2005), which they summarized as providing that, "when a search is made based on a warrant that contains illegally obtained information, the [c]ourt must consider whether the warrant affidavit, with the challenged information excised, still established probable cause to issue the warrant." Suppression Mem. 14. In their view, that rule required suppression here because the affidavit in support of the search warrant lacked sufficient information to demonstrate the "veracity or reliability of the house keeper, Ms. Hines-Black." Ibid.; see id. at 15-16 (arguing that, without the officers' observations from their warrantless entry into Room 150, "the magistrate was left with nothing [in the affidavit] but the wholly unsubstantiated allegations of this virtually unknown Source of Information").

After an evidentiary hearing, the district court denied petitioners' motion to suppress. Pet. App. 20a-28a. The court agreed with petitioners that the officers' initial search of Room 150 was unlawful because no exigent circumstances existed to justify a warrantless search. Id. at 24a-25a. But the court found suppression of the evidence obtained from Room 150 to be unwarranted because the affidavit for the search warrant

"contained sufficient * * * untainted evidence" to show probable cause even without the portions of the affidavit traceable to the officers' initial search. Id. at 25a (quoting Sims, 428 F.3d at 954). In particular, the court noted that the affidavit described Hines-Black's "explicit and detailed" observations of "a scale, meth pipe, ziplock sandwich bags, acetone, and other items" in Room 150 and contained sufficient information for a judge to credit those observations -- including identifying Hines-Black by name and describing the first-hand basis of her knowledge. Id. at 26a.

The district court also noted that the affidavit described the drugs, stolen gun, and room keys recovered from petitioners when they were arrested. Pet. App. 27a. Petitioners had not moved to suppress that evidence, although they had argued at the suppression hearing that the arrest was also tainted by the earlier warrantless search of Room 150. Id. at 27a n.17; see 6/13/16 Suppression Hearing Tr. 117-118. In declining to suppress the evidence obtained from Room 150, the district court also explained that, "[t]o the extent [petitioners] challenge their arrest," the arrest was lawful because it was based on "sufficient information from a reasonably trustworthy source [i.e., Hines-Black] to give the officers probable cause to believe that an offense had been or was being committed" by petitioners. Pet. App. 27a n.17.

Petitioners subsequently pleaded guilty while preserving their right to appeal the district court's order denying their

motion to suppress. Pet. App. 2a. Amador pleaded guilty to one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (2012), and one count of using a communication facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Amador Judgment 1. He was sentenced to 108 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. Mekaeil pleaded guilty to one count of using a communication facility to distribute a controlled substance, in violation of 21 U.S.C. 843(b). Mekaeil Judgment 1. She was sentenced to 48 months of imprisonment, to be followed by one year of supervised release. Id. at 2-3.

3. The court of appeals affirmed in an unpublished and non-precedential decision. Pet. App. 1a-19a.

Petitioners contended that the district court committed "legal error" by applying the Tenth Circuit decision petitioners themselves had relied on in their motion to suppress, United States v. Sims, supra, to conclude that the search warrant contained sufficient evidence of probable cause even absent the "tainted" information obtained from the officers' warrantless entry into Room 150. Mekaeil C.A. Br. 19; see Amador C.A. Br. 40. Petitioners argued that the district court should instead have considered whether "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry." Mekaeil C.A. Br. 17 (quoting Murray v. United States, 487 U.S. 533, 542 (1988)). The

government argued, among other things, that petitioners had failed to preserve that argument for appeal because they had failed to raise it in their Rule 12 motion to suppress the evidence. 17-3135 Gov't C.A. Br. 36-37; 17-3018 Gov't C.A. Br. 36-37; see Fed. R. Crim. P. 12(c)(3).

The court of appeals determined that petitioners' claim did not provide a basis for reversing their convictions. The court observed that petitioners, "consistent with [the court's] decision in Sims, asked the district court to resolve their suppression simply by examining the search warrant application and deciding whether, absent the observations made by the law enforcement officers in Room 150, it contained sufficient information to provide probable cause for issuance of the search warrant." Pet. App. 17a. And the court of appeals noted that the district court had "applied the precise analytical framework that defendants argued in their motion to suppress should be applied." Id. at 15a. The court of appeals thus found, "[i]n light of these circumstances," that petitioners' claim that the district court had legally erred in doing so was not properly before it, labeling the issue one of "invited error." Id. at 19a; see id. at 16a-19a. The court of appeals also "readily agree[d] with the district court that the officers had probable cause to conduct [the] warrantless arrest of Amador," based on Hines-Black's observations inside Room

150 and the hotel surveillance footage connecting Amador to Room 150. Id. at 12a.

ARGUMENT

Petitioners contend (Pet. 12-16) that the court of appeals erred in finding their claim -- that the district court should not have applied the legal rule petitioners asked the court to apply -- not to be properly raised on appeal. That contention lacks merit. The court of appeals correctly determined that petitioners had relinquished the argument they sought to present for the first time on appeal, and its unpublished decision does conflict with any decision of another court of appeals. Furthermore, this case would be an unsuitable vehicle for addressing the question petitioners seek to present, because the district court's decision denying petitioners' motion to suppress would have been affirmed on appeal even if petitioners' appellate argument had been reviewed under the plain-error standard that they contend the Ninth Circuit would have applied.

1. The court of appeals correctly rejected petitioners' effort to "change [their] position on the way from the district court to the court of appeals," United States v. Wells, 519 U.S. 482, 488 (1997). Petitioners asked the district court to apply the Tenth Circuit's decision in United States v. Sims, 428 F.3d 945 (2005), and thereby relinquished any argument that the district court erred by applying Sims.

a. Federal Rule of Criminal Procedure 12(b)(3) provides that a motion to suppress evidence "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Rule 12(c)(3) in turn provides that, when a defendant fails to make a timely pretrial motion under Rule 12(b)(3), the district court may consider "the defense, objection, or request" only upon a showing of good cause. Fed. R. Crim. P. 12(c)(3).

Under Rule 12(c)(3), therefore, suppression claims that are not made before trial "may not later be resurrected * * * in the absence of the showing of 'cause' which that Rule requires." Davis v. United States, 411 U.S. 233, 242 (1973) (interpreting a predecessor version of Rule 12); see Wainwright v. Sykes, 433 U.S. 72, 84 (1977) ("[W]e concluded [in Davis] that review of [a claim waived under Rule 12] should be barred * * * on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation."). And Rule 12(c)(3) "applies not only to the failure to make a pretrial motion, but also to the failure to include a particular argument in the motion." United States v. Burke, 633 F.3d 984, 987 (10th Cir.) (quoting United States v. Dewitt, 946 F.2d 1497, 1502 (10th Cir. 1991)), cert. denied, 563 U.S. 951 (2011); see, e.g., United States v. Oquendo-Rivas, 750 F.3d 12, 17 (1st Cir. 2014); United States v. Green, 691 F.3d 960, 964-966

(8th Cir. 2012); United States v. Rose, 538 F.3d 175, 184-185 (3d Cir. 2008); United States v. Caldwell, 518 F.3d 426, 430-431 (6th Cir.), cert. denied, 554 U.S. 929 (2008).

b. Petitioners failed to preserve, in a timely pretrial Rule 12 motion, the suppression argument they sought to raise for the first time on appeal. See 17-3135 Gov't C.A. Br. 36-37; 17-3018 Gov't C.A. Br. 36-37. In the district court, petitioners relied on Sims to argue that "when a search is made based on a warrant that contains illegally obtained information, the [c]ourt must consider whether the warrant affidavit, with the challenged information excised, still established probable cause to issue the warrant." Suppression Mem. 14 (citing Sims, 428 F.3d at 954). They further argued that the warrant affidavit at issue here would "lack[] probable cause" when considered "[w]ithout the unlawful observations of [the] agents and officers." Id. at 15.

In Sims, law enforcement officers conducted two warrantless searches (later found to be unlawful) and obtained warrants to search the defendant's office, computer, and computer disks, based in part on information obtained from those warrantless searches. 428 F.3d at 950, 954. The court of appeals explained that, "[w]hen a warrant is tainted by some unconstitutionally obtained information, [a court] nonetheless uphold[s] the warrant if there was probable cause absent that information." Id. at 954 (citing United States v. Cusumano, 83 F.3d 1247, 1250 (10th Cir. 1996) (en

banc)); see United States v. Snow, 919 F.2d 1458, 1460 (10th Cir. 1990) ("An affidavit containing * * * unconstitutionally obtained information invalidates a warrant if that information was critical to establishing probable cause. If, however, the affidavit contained sufficient accurate or untainted evidence, the warrant is nevertheless valid.") (citing United States v. Karo, 468 U.S. 705, 719 (1984)).

The district court addressed petitioners' argument by applying Sims, as petitioners had asked it to do, and determined that the search warrant affidavit contained sufficient untainted evidence of probable cause -- principally in the form of Hines-Black's detailed and first-hand observations of what appeared to be illegal drugs and drug paraphernalia in Room 150 -- without the information derived from the officers' warrantless search of Room 150. Pet. App. 26a-27a; see pp. 6-7, supra. On appeal, however, petitioners switched course and argued that "Sims, a traditional 'tainted' warrant case, did not provide the applicable standard here," because in Sims the officers had not sought a warrant to search the same location they had previously searched without a warrant. Mekaeil C.A. Br. 19-20; see Amador C.A. Br. 40-41 (arguing that "Sims is analytically distinguishable" because "the fruit of the original unlawful search of Room 150 and the fruit of the execution of the search warrant at Room 150 are the same"). Petitioners contended that, under the circumstances, this Court's

decision in Murray v. United States, 487 U.S. 533 (1988), required the district court to consider not only whether the affidavit for the search warrant contained sufficient untainted evidence of probable cause but also whether "the officers' decision to seek the warrant was prompted by what they had seen during their initial, unlawful entry." Mekaeil C.A. Br. 19; see Amador C.A. Br. 38.

Rule 12 precluded petitioners from identifying a new basis for their challenge for the first time on appeal. Petitioners never presented their argument on appeal to the district court in a timely Rule 12 motion; as a result, the case was framed very differently there. The district court understood the case to concern the question whether evidence collected pursuant to a warrant, which would presumptively be admissible, was instead inadmissible because the warrant affidavit was tainted by unlawfully collected evidence. The district court would not have understood petitioners to be challenging the lawfulness of the decision to seek the warrant, and it therefore did not address that issue. Petitioners never suggested that Sims was inapposite -- indeed, quite the contrary -- and never asked the district court to make any factual findings regarding whether the officers would have sought a search warrant based on Hines-Black's observations of Room 150, even without the officers' own observations during their warrantless search. Rule 12 required petitioners to identify

their arguments in the district court, and petitioners never identified any good cause for being excused from that rule. Indeed, the absence of any relevant factual findings would impede, if not preclude, meaningful appellate review. Under those circumstances, petitioners were properly foreclosed from "resurrect[ing]," Davis, 411 U.S. at 242, on appeal a suppression argument they failed to make in a timely manner under Rule 12.

c. The unpublished decision below reached that result under the doctrine of "invited error," rather than by applying Rule 12(c)(3), as the government had urged. Pet. App. 15a-19a; see 17-3135 Gov't C.A. Br. 36-37; 17-3018 Gov't C.A. Br. 36-37. Invited error is a "'species of waiver' that 'precludes a party from arguing against a proposition the party willingly adopted' before the district court." Pet. App. at 16a (quoting United States v. Rodebaugh, 798 F.3d 1281, 1304 (10th Cir. 2015)); see Wells, 519 U.S. at 488 (describing invited error as the rule that "a party may not complain on appeal of errors that he himself invited or provoked the district court . . . to commit") (brackets and citation omitted); cf. Johnson v. United States, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him.").

Petitioners urged the district court to apply Sims, with no suggestion that Sims was inapposite or otherwise incomplete. See Pet. App. 16a-17a. "In light of these circumstances," the court of appeals reasonably determined that any error in applying Sims to the facts of this case was an error petitioners themselves "invited" the district court to make and therefore could not challenge on appeal. Id. at 19a.

2. Petitioners contend (Pet. 8-11) that the courts of appeals are divided on the question whether an invited error must be "deliberate." That contention does not warrant this Court's review. The putative disagreement petitioners identify is not significant and, in any event, is not implicated here.

As explained above, invited error is a form of waiver. See p. 15, supra. It rests on the premise that a party who invites the district court to take some action may not challenge that action as a basis for reversal on appeal. See Pet. App. 16a ("[H]aving induced the [district] court to rely on a particular erroneous proposition of law or fact, a party . . . may not at a later stage . . . use the error to set aside the immediate consequences of the error.") (quoting United States v. Deberry, 430 F.3d 1294, 1302 (10th Cir. 2005), cert. denied, 549 U.S. 850 (2006)). The courts of appeals have long recognized such a rule, which protects against unfair gamesmanship. See, e.g., United States v. Quinones, 511 F.3d 289, 321 (2d Cir. 2007), cert. denied,

555 U.S. 910 (2008); United States v. Hamilton, 499 F.3d 734, 736 (7th Cir. 2007), cert. denied, 552 U.S. 1129 (2008); Virgin Islands v. Rosa, 399 F.3d 283, 290-291 (3d Cir. 2005); United States v. Perez, 116 F.3d 840, 845 (9th Cir. 1997) (en banc); United States v. Herrera, 23 F.3d 74, 75 (4th Cir. 1994).

Petitioners argue (Pet. 8) that the decision below is inconsistent with the Ninth Circuit's en banc decision in Perez, supra. In Perez, the Ninth Circuit reasoned that the invited-error doctrine is a form of waiver rather than forfeiture and that it should require some showing that the defendant "was aware" of the right he relinquished. 116 F.3d at 845 (citing United States v. Olano, 507 U.S. 725, 733 (1993)); see id. at 844-845. The Ninth Circuit concluded that without such a showing, the defendant has merely forfeited the claim of error, and plain-error review is available on appeal. See id. at 846 (citing Johnson v. United States, 520 U.S. 461, 465-466 (1997)). As petitioner observes (Pet. 8-9), the Second and Third Circuits have likewise stated that a defendant must have some awareness about the consequences of the error he induces in order for the invited-error doctrine to apply. See United States v. Bastian, 770 F.3d 212, 218 (2d Cir. 2014) ("[T]he invited error doctrine seeks to avoid rewarding mistakes stemming from a defendant's own 'intelligent, deliberate course of conduct' in pursuing his defense.") (citation omitted); Rosa, 399 F.3d at 292-293 (following Perez, supra).

Petitioners err in alleging (Pet. 9-10) a sharp distinction between those decisions and United States v. Appt, 354 F.3d 1269 (10th Cir. 2004), in which the Tenth Circuit observed that a defendant need not have been "fully aware of all the possible legal arguments that could be raised in support of the intentionally abandoned position" in order to have invited error, id. at 1284 (emphases added). The Tenth Circuit explained that a waiver does not ordinarily require such exquisite "specificity," id. at 1281, or "lawyerly omniscience," id. at 1284. The court did not suggest that invited error could result from "inadvertent[]" conduct (Pet. 9). See Appt, 354 F.3d at 1281 (explaining that the defendant's stipulation to the admission of an exhibit constituted an "intentional relinquishment" of any "challenge [to] the [exhibit's] admissibility") (emphasis added) (citing Perez, 116 F.3d at 849, 851-852 (Kleinfeld, J., concurring in the judgment)); accord Rodebaugh, 798 F.3d at 1304 ("[I]nvited error precludes a party from arguing against a proposition the party willingly adopted.") (emphasis added).

The Tenth Circuit's approach is similar to other circuits'. See United States v. Mariano, 729 F.3d 874, 881 (8th Cir. 2013) (collecting cases). To the extent that the Ninth Circuit may take a narrower view of invited error, that difference in approach does not warrant this Court's review. Contrary to petitioners' suggestion, any distinction between the Ninth and Tenth Circuits

concerns not whether the invitation to error must be deliberate, but rather what the record must show in order to find that the defendant acted deliberately. Petitioners do not explain why such a distinction would be dispositive in a significant number of cases. And the putative disagreement is inapposite here because this case involves a pretrial suppression issue subject to Rule 12(c)(3), see pp. 11-15, supra, unlike the cases on which petitioners rely. Although sometimes denominated as a "waiver" (including in a prior version of Rule 12), Rule 12 "has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion." Fed. R. Crim. P. 12 Advisory Committee Notes (2014 Amendments) (emphasis added); see United States v. Anderson, 472 F.3d 662, 668-669 (9th Cir. 2006) (explaining that Rule 12 "does not require the voluntary or intentional relinquishment of a known right" in order to bar an untimely claim).

3. Finally, review of petitioners' question presented is not warranted on the facts of this case because the issue made no difference to the outcome. If petitioners forfeited the suppression argument at issue, rather than relinquishing it, the court of appeals would still review the argument only for plain error. See Perez, 116 F.3d at 844. To show plain error, a defendant must establish (i) error that (ii) was "clear or obvious,

rather than subject to reasonable dispute," (iii) "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and (iv) "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (citations omitted); see Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018); United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004). The district court did not commit plain error in denying petitioners' motion to suppress.

Petitioners assert (Pet. 16) that this Court's decision in Murray, supra, required suppression of the crystal methamphetamine and other evidence found in petitioners' hotel room unless "no information gained from the illegal entry affected law enforcement's decision to seek the warrant." In Murray, this Court held that, under the "independent source" doctrine, evidence seized pursuant to a search warrant may be admissible even when that evidence had previously been discovered during an illegal search. 487 U.S. at 536-541. In applying the "independent source" doctrine to the facts at hand, the Court stated that "[t]he ultimate question * * * is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." Id. at 542. "This would not have been the case," the Court continued, (1) "if the agents'

decision to seek the warrant was prompted by what they had seen during the initial entry," or (2) "if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." Ibid. (footnote omitted).

Declining to suppress the evidence obtained from Room 150 was not plain error under Murray. The district court determined -- and petitioners do not dispute -- that the affidavit contained sufficient probable cause even without the information derived from the officers' warrantless search. Pet. App. 25a-26a. Petitioners thus appear to acknowledge that the second rationale for suppression identified in Murray, regarding whether unlawfully obtained information affected the magistrate's decision to issue the warrant, is absent here. See Pet. 5; see also Pet. App. 19a. And nothing in the record suggests, let alone plainly, that petitioners would have been entitled to suppression had the district court considered Murray's first suppression rationale, regarding whether unlawfully obtained information prompted the decision to seek a warrant. To the contrary, the record suggests that the officers would have sought a search warrant even without the information they obtained in their warrantless entry. They had ample reason and basis to do so, in light of Hines-Black's detailed and credible description of the drugs and drug paraphernalia she observed in plain view when she entered Room 150 to clean it. Cf. Murray, 487 U.S. at 543 (describing the relevant

inquiry as whether "the agents would have sought a warrant if they had not earlier entered the warehouse" without a warrant). In addition to that, when the officers applied for a warrant, they had already arrested petitioners (an action petitioners no longer challenge) and had found significant quantities of drugs on Amador, along with petitioners' keys to Room 150. See p. 4, supra. Officers had also already connected petitioners to Room 150 with surveillance footage. Ibid. At a minimum, therefore, the district court did not commit plain error in denying petitioners' motion to suppress on these facts.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

MARCH 2019

* Review is unwarranted as to petitioner Amador for the additional reason that any error regarding the suppression was harmless. His conviction does not rest on evidence obtained from Room 150, but rather on the gun found on his person when he was arrested and his use of a cellphone to arrange drug sales. See 17-3018 Gov't C.A. Br. 40-41; Amador Plea Agreement 2.