

No.

IN THE SUPREME COURT OF THE UNITED STATES

TRACY D. THOMAS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the common-sense standard of probable cause be so reduced as to allow a search warrant to be issued on the basis that a person rented a vehicle that was subsequently used in a shooting, when other evidence points to a different perpetrator?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioners and the United States).

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

Petitioner Tracy Thomas respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued on January 17, 2019, affirming the judgment of conviction and sentence. Appx. A.

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit affirming petitioner's convictions is unpublished and is attached as Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming petitioner's judgment of conviction and sentence was entered on January 17, 2019. Appx. A. This Petition is filed within 90 days of January 17, 2019. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

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 July 29, 2016, a federal grand jury sitting in the Central District of California returned an Indictment against Tracy Devon Thomas, alleging that on or about June 20, 2016, he unlawfully possessed a firearm and ammunition, having previously been convicted of a felony, in violation of 18 U.S.C. § 922(g). On January 13, 2017, the grand jury returned a first superseding indictment, alleging the same charge, but identifying an additional prior felony conviction.

On September 30, 2016, Mr. Thomas moved to suppress evidence stemming from his warrantless arrest, made at gunpoint, the subsequent search of his apartment pursuant to a search warrant, and his statements, made in a post-arrest custodial interview. The court denied the motion on November 7, 2016, without an evidentiary hearing.

The case was tried to a jury on March 14 and 15, 2017. The jury convicted Mr. Thomas of the single count. The court sentenced him to 41 months' imprisonment.

Statement of Lower Court Jurisdiction Under Rule 14.1(i).

The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231. The jurisdiction of the court below was invoked under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

In this case, a search warrant for petitioner's apartment was issued on the basis that petitioner was identified as the renter of a vehicle identified as having been used in a drive-by shooting. Another person's belongings were discovered in the rental car, and one of the victims identified a photograph of that person, not the petitioner, as involved in the shooting. Nonetheless, after locating petitioner, the putative renter of the vehicle, Los Angeles Police officers obtained a search warrant for petitioner's apartment. During the search, officers seized 100 rounds of .223 ammunition from a drawer that was part of a sofa, and a .9 mm handgun, which was discovered in a toiletries bag. ER 7, 14. The firearm recovered was not the gun used in the drive-by shooting. ER 15. Petitioner, who was a prohibited person, was charged with and convicted of being a felon in possession of a firearm. He was never charged with involvement in the drive-by shooting.

The district court denied the motion to suppress, finding that the seizures and statements resulted from the search conducted pursuant

to the warrant. The court further ruled that the warrant was supported by probable cause . The United States Court of Appeals affirmed. Appx. A.

The Standard for Probable Cause has Become Unduly Reduced, to the Point that Virtually Any Link Between a Person to be Searched and a Firearm Provides Probable Cause.

Probable cause to search requires that, under the totality of the circumstances set forth in the affidavit, “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 (1983). There must be a fair probability both that a crime has been committed and that evidence of that crime will be present in the location to be searched. *See United States v. Fernandez*, 388 F.3d 1199, 1254 (9th Cir. 2004)(quoting *United States v. Peacock*, 761 F.2d 1313, 1315 (9th Cir. 1985), overruled on other grounds by *Gomez v. United States*, 490 U.S. 858 (1989)); accord *United States v. Parks*, 285 F.3d 1133, 1142 (9th Cir. 2002)(judicial officer must determine that a fair probability exists of

“finding evidence considering the type of crime, the nature of the items sought, the suspect’s opportunity for concealment....”).

This case presents the question whether there was a fair probability that firearms or other evidence of the drive-by shooting would be found on petitioner’s premises given the minimal linkage between petitioner and the crime.

The affidavit submitted in support of the search warrant was minimal: the only information it provided was that Mr. Thomas, a Burbank resident, had rented a vehicle that was suspected of being used in a crime. The police officers had gathered information that petitioner had rented a vehicle that had been identified as possibly being used in a drive-by shooting committed many miles away, in South Los Angeles, California. The remainder of the affidavit connected Mr. Thomas to the apartment to be searched, but not to a firearm. Nor did the affidavit provide any facts that supported an inference that the firearm used in the shooting (believed to be a .40 caliber weapon based on the casings discovered), would be present at the apartment.

More importantly, the affidavit failed to provide information supporting an inference that Mr. Thomas was the shooter or an accomplice. Rather, the contrary is true. In the affidavit, the affiant stated that a prescription document for a Terrence Mcglothen was found in the suspect car on June 6, 2016. The affidavit further provided that on June 7, a photographic lineup was conducted with the victim of the shooting, who identified Mcglothen as the individual involved. *Id.* No witness identified petitioner as the shooting suspect or as present in the vehicle when the shooting occurred.¹ No witness saw petitioner associating with the shooting suspect. No one saw petitioner in possession of a firearm. Moreover, no evidence placed petitioner in South Los Angeles at any point in time.

The remainder of the affidavit linked petitioner to a different vehicle – his own – and the apartment that was ultimately searched.

¹ In fact, the investigation subsequently revealed that petitioner was at work when the shooting occurred.

Thus, the only basis for probable cause was petitioner's link to the rented vehicle.

The search warrant plainly lacked probable cause, because petitioner's link to the crime was simply too minimal. Moreover, there was no link between the crime, and the likelihood that that a firearm would be found on the premises. *See Navarette v. California*, 572 U.S. 393, 398-99 (2014) (eyewitness knowledge of dangerous driving and description of vehicle that had run caller off the road). Law enforcement agents were not seeking evidence of drug trafficking, which the United States Court of Appeals for the Ninth Circuit has held it is reasonable to infer may be found at a residence. *United States v. Gil*, 58 F.3d 1414, 1418-19 (9th Cir. 1995). This Court has not reached such a conclusion for a defendant suspected of involvement with an offense involving a weapon. *Cf. Messerschmidt v. Millender*, 565 U.S. 535, 548-49 (2012) (reasonable to search for all firearms where warrant established probable cause to believe that defendant had shot an ex-girlfriend with

a sawed-off shotgun). Unlike in *Messerschmidt*, nothing suggested that petitioner was personally involved in the shooting.

The affidavit, in essence, claimed probable cause on the basis that Mr. Thomas had rented a vehicle that allegedly was used in a shooting about two weeks earlier. The affidavit failed to establish probable cause to search Mr. Thomas' apartment, because there was an utter absence of facts suggesting that the firearm or ammunition from the shooting would be found at Mr. Thomas' apartment. *United States v. Grant*, 682 F.3d 827, 833-34 (9th Cir. 2012).

The standard for probable cause is a practical one, *Gates, supra*, 462 U.S. at 231-32, but it cannot be reduced to level of mere formality. The Ninth Circuit's holding that probable cause was present in this search warrant reduces the definition of probable cause to mere suspicion.

CONCLUSION

For all the reasons discussed in this petition, the Court should grant a writ of certiorari to review the judgment of the United States

Court of Appeals for the Ninth Circuit affirming the judgment of conviction.

Dated: April 12, 2019

Respectfully submitted,

/s/Karen L. Landau
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