

18-8893

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

MARK M. BROWN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ORIGINAL

Supreme Court, U.S.  
FILED

NOV 26 2018

OFFICE OF THE CLERK

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

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PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

## **QUESTION PRESENTED**

**DOES PROBABLE CAUSE TO ISSUE A WARRANT EXTEND TO SITUATIONS WHERE A WITNESS TO ALLEGED CRIMINAL BEHAVIOR WAS SEVERLY IMPAIRED?**

**SHOULD A CIRCUIT COURT REVIEWING A LOWER COURT RECORD FOR THE CORRECTNESS OF A DENIAL OF A SUPPRESSION MOTION TAKE INTO ACCOUNT A WITNESS IMPAIRED MENTAL STATE WHEN DETERMINING WHETHER THE WITNESS'S STATEMENT IS REASONABLY TRUSTWORTHY?**

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## OPINION BELOW

The decision of the Sixth Circuit affirming Petitioner's conviction was issued on September 7, 2018, and is unpublished. The opinion is attached as Appendix A to this Petition.

## STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1) to review the decision rendered by the United States Court of Appeals for the Sixth Circuit.

## STATUTORY 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, \*\*\*

## STATEMENT OF THE CASE

On September 8, 2016, a federal grand jury in the Eastern District of Kentucky returned an indictment charging Petitioner Mark M. Brown with possession of methamphetamine with intent to distribute, knowing possession of a firearm in furtherance of a drug trafficking offense, and possession of a firearm by a convicted felon. The indictment arose from an incident occurring between August 5<sup>th</sup> and 6<sup>th</sup> of 2016 at the Super 8 Motel in Maysville, Mason County, Kentucky, wherein officers from the Maysville Police Department were dispatched to the motel in response to a possible domestic violence situation. Mason County is in the Eastern District of Kentucky. During a warrantless search of Petitioner's motel room, two handguns were discovered, along with a glass pipe. Though Petitioner was initially arrested along with another female defendant on state charges, Petitioner's case was referred to the DEA. Ms. Chasity Smith, the other arrestee, was not charged federally and state case appears to have been dismissed.

Petitioner moved to suppress the fruits of the search of his motel room on November 11, 2016. On February 3, 2017, The District Court subsequently denied said motion to suppress. A jury trial commenced on August 21, 2017. After a full day of trial, on the morning of August 22, 2017, Petitioner pled guilty to the first two counts of the indictment on the condition that he could appeal the District Court's denial of his Motion to Suppress.

On August 6, 2017, at roughly 5:30A.M., Maysville Police received a call from the Super 8 Motel in Maysville, KY about a female hiding in the office of the motel itself, a male who was possibly armed, and potentially one or more persons in the motel, with their whereabouts unknown. Four officers arrived at the scene: Officer Bickmeyer, Officer Fuller, Officer Smith, and Sergeant Hylander. When Officer Bickmeyer initially spoke to Chasity Smith in the motel lobby, a floor down from room 223 (where Petitioner had rented a room) he stated

"[s]he was jittery, kind of going [a] hundred miles an hour, just kept talking and talking and talking." Officer Bickmeyer stated that Ms. Smith was under the influence at the time. Sergeant Hylander found Chasity Smith in the motel office and testified that "[s]he was nervous, but she was shaking as well. Kind of slurred, a little speech. A little more hyperactive than normal person talking to you." Further, Officer T. Smith of the Maysville Police Department stated that Chasity Smith was intoxicated based on her appearance and behavior, and sergeant Hylander testified, upon reading the statement of Chasity Smith given shortly after her arrest, that the statement was jumpy and made little sense. A cursory viewing of the document, Chasity's handwriting and signature are barely legible if at all, and the statement's contents are nonsensical. Chasity communicated that Petitioner had a gun, that she thought he had killed someone in the past, and that there were one or two other people who where in need of assistance.

The officers at the scene also spoke with Marlene Smith, the front desk clerk at Motel 8 at the time. Marlene informed them that there was a female in the motel office, and that she had rented a room out to a man with whom the female had been. Marlene testified at trial that between roughly 1:55 A.M and the time the police arrived that Chasity had spent "a lot of" time in the lobby, not in the motel room, and that she in fact never saw Chasity and Petitioner go into the room together at all. Marlene testified that from roughly 2:30 until the arrival of the police she spent much of the time trying to leave, and that she had recalled stating that she had never seen Petitioner give her a key card. Marlene never saw two other people – only Petitioner and Chasity.

Prior to the 911 call and the arrival of Maysville Police Department, roughly 1:55 A.M., Petitioner signed the registration form for the room, Marlene gave him key cards. Marlene stated that at no point did Petitioner request that Marlene give Chasity a key card. Marlene

lastly stated that there is a policy on giving key cards out: "when the person rents, we give them two keys, but it goes to the person who signs the paper, and it's up to them who to give the other key to." She further agreed that she would not have given Chasity a key if she had asked due to her state of mind. The officers at the scene were also aware that Chasity Smith had no key card with which she could utilize to enter the room had it been fully closed.

When Petitioner arrived, he alone signed for room 223 at Super 8 and the officers on the scene were aware that Petitioner's name, not Chasity Smith's, was on the registration form. The police officers never saw Petitioner and Chasity together nor entering or exiting the room together. The police encountered Petitioner in the lobby of the Motel. After an initial pat-down and search of his person, no drugs nor any guns were found to be on him, and the only person who had in fact possessed narcotics was Chasity Smith, who gave the police officers a bag of methamphetamine. Neither the police officers nor the front desk clerk Marlene Smith ever saw Petitioner with a handgun or with drugs. The police on the scene never located any other people in the motel lobby, the parking lot, the room itself nor in any adjoining areas. Chasity could not identify them at the time or tell the police where these other "people" were. None of the officers at the scene could smell methamphetamine cooking and some of their number had never been to an active methamphetamine "cook" nor had any training regarding identifying the smell of actively cooking methamphetamine. In the end of events, no active methamphetamine laboratory was ever discovered.

Once the police encountered Petitioner, they detained, patted down, and searched him. Immediately thereafter, Sergeant Hylander and Officer Fuller continued their detention of Petitioner along with a barking canine, and Officers Smith and Bickmeyer took Chasity upstairs in order to gain entry into room 223. Before Chasity and the two-officered went upstairs in and around 223, Petitioner was detained. Sgt. Hylander asked Petitioner "what

was going on." And Petitioner stated he would let his lawyer do the talking, and he remained silent. Petitioner produced his wallet and identification on request and the officers then took it and secured it, without giving it back. During his detention, Petitioner was held at gunpoint and had a canine barking at him in his close vicinity. Officer Smith stated that he never spoke to Petitioner in the lobby at the suppression hearing, but at trial he claimed that he gained the consent of Petitioner to search his person. Being unable to leave the motel lobby or to return to his room, Petitioner was reduced to sitting on the floor of the lobby. Petitioner never consented to the search of his motel room and was never afforded the possibility to object at the door. In fact, according to the affidavit for the search warrant cited in the District Court's opinion, it states "[d]ue to the objection of Mark Smith [sic] a search warrant is being obtained.

Returning upstairs, contemporaneous with Petitioner's detention, Officer Smith, with Officer Bickmeyer in tow, escorted Chasity to room 223 in order to gain entry into Petitioner's room. Officer Smith asked for consent from Chasity to search Petitioner's room under the pretense of escorting Chasity to retrieve her ID. Officer Smith pushed his way through a slightly ajar door after Chasity gave consent to search Petitioner's room. Officer Smith located two handguns in what he describes as "plain view." He picked the guns up, emptied them of their rounds, read serial numbers of the guns and reported the serial numbers back to Maysville Police Department dispatch. Officer Smith physically picked up the handguns and read the serial numbers to dispatch before it was determined that Petitioner was a convicted felon, and there is nothing in the record suggestion the guns were suspected of being stolen. Any fingerprint evidence as to whom the firearms actually belonged was contaminated by this action.



At this point, Petitioner is being detained after he was searched, his ID had been taken, and he was still at gunpoint with a dog barking at him while he was sitting in a motel lobby. Officer Bickmeyer is waiting at the door of Petitioner's room while Officer Smith is in the room, searching guns for serial numbers without a warrant and without knowledge of Petitioner's status as a convicted felon. Officer Hylander stays with Petitioner while Officer Fuller goes upstairs with his canine. Before a warrant was obtained, Officer Fuller conducted a dog sniff on the exterior and entranceway of Petitioner's motel room.

A search warrant was eventually obtained by the Maysville Police Department, with Sergeant Hylander signing the warrant affidavit. In the room methamphetamine was discovered.

After pleading guilty to two of the charges in the indictment, Petitioner appealed the denial of the motion to suppress. In upholding the district court's decision to deny suppression in this case the Sixth Circuit Court of Appeals found that probable cause existed to issue the warrant to search Petitioner's motel room. In so doing the Court of Appeals merely commented on the condition of the witness who gave the statement to police which justified probable cause to issue the warrant.

## **REASON FOR GRANTING WRIT**

### **ARGUMENT**

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**The Court of Appeals in affirming that probable cause existed to issue a search warrant to search Petitioner's hotel room failed to address whether the diminished condition of the complaining witness undermined her reliability to a degree where a finding of probable cause would be precluded.**

Probable cause is required to justify most governmental intrusions upon interests protected by the Fourth Amendment. See *Ornelas v United States*, 517 U.S. 690, 695 (1996). This Court defines probable cause to search as "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). For

purposes of obtaining a warrant or conducting a warrantless action, probable cause exists when police have knowledge of facts and circumstances grounded in reasonably trustworthy information sufficient in itself to warrant a belief by a prudent person that an offense has been or is being committed by a suspect. Indeed, this Court in **Wong Sun v United States**, 371 U.S. 471, 479 (1963), taught that it “is basic that [probable cause] must stand upon firmer ground than mere suspicion.” *Id.* Thus, a finding of probable cause justifying governmental intrusion must be trustworthy. In fact this Court has called probable cause “a practical, nontechnical conception” based on “common sense conclusions about human behavior.” **Gates**, 462 U.S. at 231. To this end a judge considering whether probable cause existed must first determine the “historical facts,” the events that occurred leading up to the search. See **Ornelas**, 517 U.S. at 690. Secondly, a judge must decide “whether [the] historical facts, viewed from the standpoint of an objectively reasonable police officer,” amounted to probable cause. *Id.*

In this case Petitioner contends that the Sixth Circuit’s decision affirming the denial of the suppression hearing failed to consider whether the information received from Chastity Smith could be considered “reasonably trustworthy” in light of her intoxicated state and unsupported details. Indeed, while mentioning Smith’s intoxication, the Court failed to explore whether the extent of her intoxication along with the false details she gave, presumably because of her intoxication, merited the conclusion that the account was not trustworthy to a point that precluded a finding of probable cause.

The historical facts of this case revealed that the complaining witness, Chasity Smith, was found to have Marijuana, Cocaine, MDMA, Amphetamine, Methamphetamine, Benzodiazepines, Psilocybin, Suboxin, and Opiates in her system at the time of the incident in question. The historical facts also indicate that these drugs were having an effect on Smith.

Indeed, this detail is bore out from Maysville Police Officers who responded to the 911 call. One officer stated that Smith was jittery and going a hundred miles an hour. Another officer stated that Smith has slurred speech and was hyperactive. Finally, it was observed that Smith's written statement was jumpy and made little sense. All of these observations serve to show that Smith was in no condition to give testimony that could be consider "reasonably trustworthy" so as to make a finding of probable cause. At least one other circumstance in the historical facts of this case supports such a notion. Indeed, the record indicates that Smith told officers that there were one to two other people in the motel room who needed help. However, as the front desk clerk indicated, no one else was present with Movant and Smith in the room. All of these details conspire to demonstrate that Smith was simply not a trustworthy witness. In fact Smith was so untrustworthy of a witness that DEA Agent Andy Muse ended an interview with her on the day of her arrest. Doubtless, this was due to Smith's extremely intoxicated state. Yet despite all of this evidence in the historical facts of this case, the Sixth Circuit's opinion fails to consider or question whether the diminished state of Smith presented an obstacle to a finding of probable cause. In light of the fact that this Court requires such a finding to rest on circumstances grounded in reasonably trustworthy information before probable cause can be found, the Sixth Circuit's decision lacks such an analysis. For this reason this Court is asked to remand the case back to the Circuit for consideration of such.

#### CONCLUSION

Petitioner respectfully requests that the Supreme Court grant his petition to review this case and order a remand to the Court of Appeals for consideration of the identified issue.

Respectfully submitted this 26<sup>th</sup> day of November 2018.

/s/ Mart Balun