No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVAUS LEANARD MCCOWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Probable cause for a search cannot be based on stale information. That is, the evidence sought must be likely to be found in the searched location *at the time of the search*. In the context of consumable and fungible evidence like narcotics and currency, probable cause findings often rely on establishing a pattern of ongoing criminal activity (like a drug enterprise) to justify a search, even when evidence of discrete crimes (like individual drug sales) will have dissipated. In the Eleventh Circuit, the mere fact of previous drug sales is sufficient to demonstrate a pattern of conduct, while courts in the Sixth and Tenth Circuits require evidence specifically suggesting that the criminal conduct is ongoing.

The question presented is:

Whether two police-orchestrated, controlled buys demonstrate an ongoing pattern of drug sales sufficient to support probable cause for an otherwise-stale search warrant.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is unreported, but is available at *United States v. McCown*, 2019 WL 925530 (11th Cir. 2019) and reproduced as Appendix A. App. 1a.

JURISDICTION

The Eleventh Circuit issued its decision on February 25, 2019. The petition is timely under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION 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

I. INTRODUCTION

In August 2017, Petitioner Davaus McCown was charged in a five-count indictment with drug and firearms offenses related to two controlled-buy crack sales conducted with a confidential informant in mid-July 2017 (counts 1 and 2, the "controlled buy counts"), and to evidence discovered in his apartment several weeks later by officers executing a search warrant premised solely on those two controlled buys (counts 3 through 5, the "search warrant counts"). (DE 6).[1] At the time of his indictment, Mr. McCown was on supervised release for a separate federal offense. (SR DE 65). Probation petitioned for revocation of that supervision based on the "search warrant counts" of the substantive indictment. (SR DE 72). Mr. McCown's subsequent appeals of both the judgment in the substantive case and the related revocation judgment were consolidated in the court below, and are jointly the subject of this petition.

This case presents an important question under the Fourth Amendment that has divided both the federal courts of appeals and state courts of last resort. The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures

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[1] The records for this consolidated appeal will be cited by reference to the document number as set forth in the docket sheet—references to the substantive case will be referenced by the document number only (e.g. "DE XX"), while references to the revocation case will be referenced with "SR" preceding the document number (e.g. "SR DE XX").

shall not be violated" and that "no [w]arrants shall issue, but upon probable cause." U.S. Const. amend. IV. As this Court has explained, "the 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). What is more, "it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time*." *Sgro v. United States*, 287 U.S. 206, 210 (1932) (emphasis added).

II. THE EARLY MORNING SEARCH OF MR. MCCOWN'S HOME.

In early August 2017, Monroe County, Florida Sheriff's Department Detective Vaughn O'Keefe sought and obtained a warrant in state court to search the apartment Davaus McCown shared with his girlfriend and her young children for "cocaine, pre-recorded currency, and drug paraphernalia." (DE 17-1). The affidavit was exclusively premised on two controlled buys Detective O'Keefe and his colleagues had orchestrated between Mr. McCown and a confidential informant on July 10, 2017 and July 14, 2017. *Id.*

In the affidavit, Detective O'Keefe described the drug sales in broad strokes. In a one-page factual recitation, the affidavit set out the mechanics of the two controlled sales, stating, in its entirety, that:

> On July 10, 2017 a plan was formulated to purchase crack cocaine from a black male identified as Davaus McCown. Monroe County Sheriff's Office, Special Operations Unit Detectives Brady, Hill, Blanton, and your affiant (detective

O'Keefe) were working in an undercover capacity. On this date we utilized a Monroe County Sheriffs Office documented Confidential Informant (C.I.).

The C.I. was met at a pre-determined location. Your affiant searched the C.I. for any contraband. No contraband was located on or around the C.I. Your affiant issued the C.I. $50.00 of pre-recorded currency from my Monroe County Sheriff's Office allocated buy funds to be used on this date.

The C.I. proceeded to 240 Sombrero Beach Road while under observation of detectives. There detectives observed McCown leave apartment 11 H of 240 Sombrero Beach Road, verified as his residence through the DAVID system, and meet directly with the C.I. The C.I. exchanged the $50.00 of allocated buy funds for a baggy containing suspect crack cocaine provided to them from McCown. The C.I. was then able to leave the area. McCown then directly returned to his residence.

The C.I. returned to a pre-determined meet location and met with detective Hill and your affiant. There the C.I. turned over to your affiant the suspect crack cocaine. Your affiant again searched the C.I. for contraband with none found.

Detective Brady later processed and weighed the suspect crack cocaine. He did receive a positive field test for the presence of cocaine and an approximate weight of 0.9 grams loose.

On July 14, 2017 a plan was formulated to purchase crack cocaine from a black male identified as Davaus Mccown. Monroe County Sheriffs Office, Special Operations Unit Detective Brady and your affiant (detective O'Keefe) were working in an undercover capacity. On this date we utilized a Monroe County Sheriff's Office documented Confidential Informant (C.I.).

The C.I. was met at a pre-determined location. Your affiant searched the C.I. for any contraband. No contraband was located on or around the C.I. Detective Brady issued the C.I. $50.00 of pre-recorded currency from his Monroe County Sheriff's Office allocated buy funds to be used on this date.

> The C.I. proceeded to 240 Sombrero Beach Road while under observation of detectives. There, detectives observed McCown meet directly with the C.I. in the vicinity of his apartment. The C.I. exchanged the $50.00 of allocated buy funds for a baggy containing suspect crack cocaine provided to them from McCown. The C.I. was then able to leave the area. McCown then left the area.
>
> The C.I. returned to a pre-determined meet location and met with your affiant. There the C.I. turned over to your affiant the suspect crack cocaine. Your affiant again searched the C.I. for contraband with none found.
>
> Detective Brady later processed and weighed the suspect crack cocaine. He did receive a positive field test for the presence of cocaine and an approximate weight of 0.7 grams loose.

(DE 17-1 (date of birth omitted)).

The entirely retrospective affidavit described only facts regarding the two prior sales, which had taken place several weeks earlier. *Id.* It did not allege or imply any on-going criminal operation, and, aside from the two sales, it did not provide any facts that could form the basis for such an allegation. Similarly, it provided no information regarding the informant, her credibility, or any potential links between Mr. McCown's apartment and ongoing criminal activity. *Id.* It also did not contain any statements relating Detective O'Keefe's (or anyone else's) informed, professional judgments. *Id.* In short, the *entire* basis for the search of Mr. McCown's home was his participation in two police-orchestrated, small-quantity drug deals weeks earlier.

Nevertheless, the warrant was issued, and just after dawn on August 3, 2017, a score of officers converged on the small apartment Mr. McCown shared with his girlfriend and her two young children. (DE 72:170). Receiving no answer to their "knock and announce," officers breached the front door with a ram and pry bar, and

fanned out to search each of the apartment's rooms. (DE 72:170). Officers thoroughly searched the home, finding a handgun on the floor of the bedroom, a small baggie of powder cocaine on top of the nightstand, 20 similar baggies of cocaine inside the nightstand (7 grams in all), various sums of money stashed in various locations around the house, and a box of ammunition in the closet. In a kitchen cabinet, they found a baggie containing just under 9 grams of crack cocaine, a small digital scale, and baggies which could be used for packaging cocaine. (DE 72:152-154; *see also* DE 60:5).

Officers took Mr. McCown into custody. Initially, he invoked his right to silence. (DE 19:4). But when officers on the scene also took his girlfriend into custody and prepared to transport both of them to jail—leaving behind her young children—Mr. McCown spontaneously took full responsibility for the "stuff" found in the search. *Id.*

III. PROCEEDINGS BELOW

A. Mr. McCown's motion to suppress

Through counsel, Mr. McCown filed a motion to suppress evidence and statements obtained during the execution of a search warrant at his apartment on August 3, 2017. (DE 13); (DE 17). Mr. McCown argued that the information in the search warrant affidavit did not support probable cause because there were no facts connecting his residence to the drug transactions, and because the delay in seeking a warrant rendered information on the two controlled buys stale since it did not reveal a pattern of ongoing drug activity. (DE 13:3).

The government filed a response arguing that the affidavit established probable cause, or in the alternative, that law enforcement relied on the warrant in good faith. (DE 19). The district court held a hearing, during which the parties provided argument largely in line with the written submissions. (DE 70). Counsel for Mr. McCown additionally was given the opportunity to make an oral reply to the government's response asserting the applicability of the good faith exception to the exclusionary rule. (DE 70:4).

In support of its invocation of the good faith exception, the government introduced the testimony of the affiant, Detective Vaughn O'Keefe. (DE 21; DE 70). Apparently in response to the Eleventh Circuit's holding in *United States v. Martin*, 297 F.3d 1308, 1318 (11th Cir. 2002), the government's evidence through Detective O'Keefe focused on facts outside the four corners of the affidavit in order to demonstrate that reliance on the warrant was in good faith. (DE 70). While his affidavit had relied on the two controlled buys alone, Detective O'Keefe's testimony at the suppression hearing focused on the opposite—discussing only information learned through investigations that were conducted during the 18 days *after* the second of the two controlled buys but before the search warrant was executed. (DE 70:25).

His brief testimony—spanning five pages of transcript—added just two additional facts to the record. (DE 70:24-29). First, Detective O'Keefe testified that at some point after the second controlled buy, the informant told law enforcement that "the narcotics sales [by Mr. McCown] were ongoing." (DE 70:26). Detective O'Keefe

did not provide any other information on this tip. Second, Detective O'Keefe testified that based on the informant's tip, in the 18 days after the second controlled buy, law enforcement "routinely perform[ed] surveillance" of the apartment Mr. McCown shared with his girlfriend and her young children. (DE 70:25). Despite conducting surveillance of the apartment "probably every two or three days," and seeing "definite narcotics activity" in the housing complex more generally, detectives did not observe any suspicious activity by Mr. McCown or related to his apartment. (DE 70:25-26). The only traffic that detectives observed entering or leaving Mr. McCown's apartment was "family members. Things like that." (DE 70:28).

At the close of the hearing, the magistrate issued a factual finding confirming this limited evidence: "the only additional evidence that [law enforcement] had [beyond what was in the search warrant affidavit] was that the confidential informant said there was continuing drug activity by the defendant but there was no indication based on the officer's surveillance that anything was going on." (DE 70:30). The government agreed. *Id.*

Mr. McCown argued that the good faith exception was unavailable because the case fit within two of the four excluded circumstances identified by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). (DE 23:6). Specifically, he asserted "that the warrant was based on an affidavit that is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," and second "that the judge who issued the search warrant wholly abandoned her judicial role and became a 'rubber stamp' for the police." (DE 23:6).

The magistrate entered a written report recommending the denial of Mr. McCown's suppression motion. (DE 22). Without making any factual findings, or expressly weighing the evidence presented, the report and recommendation found "that there remained a 'fair probability' that drugs, money and drug paraphernalia would be found at the Defendant's residence." (DE 22:6).

The ruling was far from emphatic, crediting Mr. McCown's arguments "that the amount of cocaine and cash involved in each of the drug buys was too small to create the inference that drugs or cash would remain with him[,] that two transactions were insufficient to create a pattern of conduct. . . [and] that no one observed any drugs or other contraband inside the Defendant's residence, indicating that the drugs sold to the C.I. could have come from somewhere else." The report acknowledged that "the search warrant application was weakened by these factors." *Id.* Recognizing the "weakened" probable cause showing, the report and recommendation included an alternative ground for upholding the search—*Leon's* good faith exception to the exclusionary rule. (DE 22:6).

Over Mr. McCown's written objection, (DE 23), the district court conducted de novo review and adopted the magistrate judge's report and recommendation without discussion. (DE 25).

B. Guilty verdict and revocation

Mr. McCown proceeded to trial, and the jury found him guilty on all five counts. (DE 47; DE 62). Evidence obtained through the challenged search of his home was the sole basis for Mr. McCown's convictions on counts 3 through 5. The district

court imposed a bottom-of-the-guidelines sentence of 101 months, which included a statutorily-mandated consecutive five-year sentence for count 5's violation of § 924(c)(1)(A)(i). (DE 62).

At the time of his indictment in the substantive case, Mr. McCown was on supervised release for a separate federal offense. (SR DE 65). As a result of the evidence found during the search of his apartment, probation petitioned for revocation of that supervision. (SR DE 72). The petition alleged that Mr. McCown had committed five overlapping violations, all dated August 3, and all corresponding to the conduct alleged in the three search warrant counts of the substantive case indictment (counts 3, 4, and 5). *Id.* The petition did not allege any violations related to the controlled-buy counts of the substantive case (counts 1 and 2). *Id.*

The government introduced a copy of the judgment in Mr. McCown's substantive case as its sole evidence of the charged violations, explaining that it would not be introducing other evidence because the judgment itself was "sufficient to meet our burden of proof in this case." (SR DE 88:8-9). The district court ultimately accepted the fact of the judgment as sufficient to carry the government's burden, and found that Mr. McCown had violated the conditions of his supervision. (SR DE 88:14). The court revoked Mr. McCown's supervision and imposed the statutory maximum: two years to run consecutive to his sentence in the substantive case. (SR DE 83).

IV. APPEAL AND RULING BELOW

In a consolidated appeal, Mr. McCown challenged the judgments in both the substantive and revocation cases. Arguing that the district court erred in denying his

motion to suppress, Mr. McCown maintained that the warrant to search his apartment lacked probable cause. First, he urged that the facts of the two controlled buys orchestrated by law enforcement "with the ultimate goal of doing a search warrant," (DE 72:37), were insufficient to establish probable cause to search his home. In particular, because police planned and orchestrated every element of the buys, the warrant did not demonstrate a sufficient link between Mr. McCown's apartment and the evidence sought.

Second, he argued that even if such a link existed at the time of the two controlled buys, that information became stale by the time the warrant was issued. He urged that there was no plausible argument that probable cause existed to believe that evidence of the two controlled buys was still in his home. That is, law enforcement clearly did not expect weeks later to find the drugs he had already sold (and thus no longer possessed) nor the assortment of small-denomination bills he had allegedly received in return. Instead, he argued, the facts recited in the affidavit could only support a finding of probable cause if combined with information demonstrating ongoing drug dealing. He urged that there was no reasonable basis for such a conclusion based on an affidavit which recited *only* the facts of the two controlled buys.

The government argued that the proximity of the controlled buys to Mr. McCown's residence was a sufficient link to establish probable cause to search his home. It next argued that the information was not stale, relying on Eleventh

Circuit cases finding similar controlled buys were sufficient in themselves to demonstrate an ongoing drug enterprise.

In an unreported opinion, the Eleventh Circuit affirmed both Mr. McCown's convictions in the substantive case, and the judgment revoking his supervised release. App., infra, at 7a-8a. The court first rejected Mr. McCown's argument that there was an insufficient factual link between his apartment and the criminal activity. Side-stepping the fact that the circumstances of both controlled buys were, in fact, controlled by law enforcement, the court held that "[t]he affidavit established that McCown left his apartment with drugs on his person, sold those drugs at a location near his apartment, and returned to his apartment with the proceeds from the sale of the drugs," and that this "connection between McCown's apartment and the criminal activity is enough." App., infra, at 5.

The court similarly rejected Mr. McCown's argument that the bare fact of two controlled sales was insufficient to demonstrate an ongoing pattern of drug activity. While it seemingly acknowledged that such a pattern was a necessary element of probable cause in this case, it nevertheless concluded that "the information alleged in the affidavit was sufficient to show that McCown was engaged in an ongoing pattern of selling drugs within close proximity to his apartment." App., infra, at 6. Having determined that the search was supported by probable cause, the court declined to reach the thorny issue of good faith reliance. App., infra, at 7.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S APPROACH CONFLICTS WITH OTHER FEDERAL CIRCUITS, AND IS CLEARLY INCOMPATIBLE WITH THE FOURTH AMENDMENT.

This Court held in *Illinois v. Gates* that probable cause to issue a search warrant exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. 213, 238 (1983). Probable cause requires that there be a nexus between the defendant's criminal conduct and the place police seek to search. *See Payton v. New York*, 445 U.S. 573, 582 n.17 (1980) ("[G]overnmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed"). What is more, this Court has long-held that information can be so stale as to vitiate probable cause. *See Sgro*, 287 U.S. at 210 ("[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.").

Indeed, a critical cornerstone of Fourth Amendment principles is that probable cause dissipates with the passage of time and ultimately grows stale, and that once it does, the staleness of information provided in support of a warrant can defeat the existence of probable cause. The critical element is 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. *See, United States v. Grubbs*, 547 U.S. 90, 95 (2006); *Gates*, 462 U.S. at 238; *Zurcher*, 436 U.S. at 556 (government must show "reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought."). To this end, "[i]t is manifest that proof must be of facts so closely related to the time of the issue of the warrant as to

justify a finding of probable cause at that time." *Sgro*, 287 U.S. at 210; *Grubbs*, 547 U.S. at 95 n.2.

Whether information is too stale to establish probable cause depends on the nature of the criminal activity and is determined by the circumstances of each case. *Sgro*, 187 U.S. at 210. Thus, where the property sought is likely to remain in one place for a long time, probable cause may be found even though there was a substantial delay between the occurrence of the event relied on and the issuance of the warrant. By contrast, staleness is an essential inquiry where the item or goods sought are perishable, consumable, or easily transferrable, such as drugs. *Compare United States v. Sevier*, 692 F.3d 774, 777 (7th Cir. 2012) ("'Staleness' is highly relevant to the legality of a search for a perishable or consumable object, like cocaine[.]") *with United States v. Carroll*, 750 F.3d 700, 704-05 (7th Cir. 2014) (recognizing that under certain circumstances, long periods of time can pass between information about child pornography offenses without rendering the information stale because collectors and distributors of child pornography rarely dispose of their collections).

Where the evidence sought is of a perishable, consumable or fungible nature, probable cause is often premised on a conclusion that the criminal activity is ongoing. In the context of drug offenses, while probable cause to search for evidence of a particular drug sale may dissipate quickly, it may persist when that drug sale is part of a larger pattern of activity. *United States v. Abernathy*, 843 F.3d 243, 250 (6th Cir. 2016) ("In the context of drug crimes, information goes stale very quickly because

drugs are usually sold and consumed in a prompt fashion[.]"); *accord United States v. Brooks*, 594 F.3d 488, 493 n.4 (6th Cir. 2010) ("Given the mobile and quickly consumable nature of narcotics, evidence of drug sales or purchases loses its freshness extremely quickly.").

The federal courts of appeals and state courts of last resort are split regarding the recurring issue of what evidence the government must offer to establish a pattern of ongoing drug activity. The Eleventh Circuit, as it did below, regularly finds the mere fact of controlled-buy drug sales sufficient to establish probable cause of an ongoing operation. *See, e.g., United States v. Williams*, 177 F.App'x 914, 921 (11th Cir. 2006) ("[D]rug-dealing is an ongoing activity, not an isolated occurrence. Because selling drugs requires a dealer to establish a supply source and develop a customer base or reputation, it is not something that a person can simply do on impulse. It is reasonable to infer that the use of a house for sale of drugs will continue over some period of time . . ."); *see also United States v. Akel*, 337 F. App'x 843, 857 (11th Cir. 2009) ("The fact that the two controlled buys were conducted a month-and-a-half apart indicates that Akel's drug trafficking conduct was ongoing."); *United States v. Johnson*, 290 F. App'x 214, 223 (11th Cir. 2008) (upholding district court's rejection of a staleness challenge, and finding that "there is no question that the description of the two controlled drug transactions in the affidavit was sufficient to establish probable cause of criminal activity at the premises"); *United States v. Montgomery*, 152 F. App'x 822, 824-25 (11th Cir. 2005) (finding a search warrant was supported by probable cause where it detailed two controlled cocaine buys from the defendant's

home a month before the search warrant was issued, reasoning that "the two drug transactions at Defendant's home suggest an ongoing drug trafficking operation and not a mere isolated violation").

By contrast, at least two other federal courts of appeal and one state court of last resort have expressly rejected this conclusion. As the Sixth Circuit has explained:

> The crime at issue in this case—the sale of drugs out of a residence—is not inherently ongoing. Rather, it exists upon a continuum ranging from an individual who effectuates the occasional sale from his or her personal holdings of drugs to known acquaintances, to an organized group operating an established and notorious drug den.

United States v. Hython, 443 F.3d 480, 485-86 (6th Cir. 2006). The *Hython* court found that stale information might not defeat probable cause "when the affidavit as *a whole* establishes that the criminal activity in question is ongoing and continuous, or closer to the 'drug den' end of the continuum[.]" *Id.* (emphasis added). However, where the facts recited in the affidavit "do[] not *eliminate the possibility* that the criminal activity in question is very close to the opposite end of the continuum," the court concluded that stale information will be fatal. *Id.* (emphasis added). The Tenth Circuit has taken a similar approach, citing *Hython* and explaining that "the use of a residence in a drug enterprise 'is not inherently ongoing,' but rather exists on a continuum from a single use of the home in dealing drugs to the use of the home as a 'drug den.'" *United States v. Cordova*, 792 F.3d 1220, 1224–25 (10th Cir. 2015) (quoting *United States v. Hython*, 443 F.3d 480, 485–86 (6th Cir. 2006)). The Illinois Supreme Court came to a similar conclusion this year, adopting *Hython*'s "continuum" approach for "the sale of drugs out of a residence" and finding that the

facts set forth in the affidavit before it "were more suggestive of an occasional sale than a full-scale drug operation, much less a drug operation run out of defendant's home." *People v. Manzo*, 2018 IL 122761, ¶ 51 *People v. Manzo*, 2018 IL 122761 (2018).

In this case, the facts and inferences as set forth in Detective O'Keefe's sworn affidavit did not shed any light on where on this continuum Mr. McCown's alleged drug crimes fell. In short, beyond the two controlled-buy drug sales themselves, Detective O'Keefe's affidavit provided no basis for concluding that the drug activity was ongoing, nor did it detail or explain any ongoing investigation or provide information that this residence was the target of a historical drug conspiracy. There was no information provided as to how law enforcement could have a bona fide belief that there was ongoing criminal activity.

As a result, had Mr. McCown resided in the Sixth or Tenth Circuits, Detective O'Keefe's affidavit would have been insufficient to establish probable cause. Thus, there exists a clear split between and among the federal circuits and state high courts. This Court should intervene to elucidate this essential area of Fourth Amendment jurisprudence. *Cf.* 2 Wayne R. LaFave, Search & Seizure § 3.7(a) (5th ed. 2012) (noting that this Court "has had little more to say on the subject since *Sgro*" but cautioning that "[t]his should not be taken to mean that the issue is an unimportant one, however, for it arises in the lower courts with considerable frequency").

II. MR. MCCOWN'S CASE IS AN IDEAL VEHICLE TO ADDRESS THIS IMPORTANT ISSUE.

This case is an ideal vehicle to decide this important Fourth Amendment question. First, all of the evidence supporting the search warrant counts in the

substantive case was obtained as a result of the unconstitutional search of Mr. McCown's apartment. As Mr. McCown argued below, this includes the statements he made as a result of the illegal search—"fruit from the poisonous tree"—which are likewise tainted and must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963) (describing "fruit of the poisonous tree" doctrine, which prohibits the introduction of derivative evidence, both tangible and testimonial, that is acquired as an indirect result of an unlawful search); *see also United States v. Timmann*, 741 F.3d 1170, 1182 (11th Cir. 2013) (explaining that admissions or confessions must be suppressed where "illegal police conduct caused the defendant's response"). The government bears the burden of "demonstrating that evidence was not obtained as a direct result of the illegal search." *Timmann*, 741 F.3d at 1182. This makes the suppression issue dispositive of the challenged convictions, as well as the revocation judgment based on those convictions.

Finally, this case presents an important and recurring issue central to our system's concept of ordered liberty. Nowhere is the Fourth Amendment protection against unreasonable government action more sacred than the forcible entry of police into a person's home. As this Court has found, "[t]he zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England[ ] and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." *Payton v. New York*, 445 U.S. 573, 596-97 (1980); *see also Moore v. Pederson*, 806 F.3d 1036, 1043 (11th Cir. 2015) ("[T]he Framers considered the hallowed stature of the home to be so important that they directed two

amendments in the Bill of Rights at it, protecting the privacy of the home with both the Fourth Amendment and the Third Amendment.").

As a result, "[t]he Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home." *Wilson v. Layne*, 526 U.S. 603, 610 (1999). Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 313 (1972); *see also Kyllo v. United States*, 533 U.S. 27, 34 (2001) (the home is "the prototypical . . . area of protected privacy"). To instead establish a structure by which an individual who can be persuaded to participate in a controlled-buy drug sale with law enforcement thumbs the scale *in favor* of home searches and betrays this fundamental protection.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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