No. _____

In the

Supreme Court of the United States

PAUL HUSKISSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JASON M. WILCOX
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
(202) 879-5200
jason.wilcox@kirkland.com
Counsel for Petitioner

October 17, 2019

QUESTIONS PRESENTED

1. Does the independent source exception to the exclusionary rule, like all other exclusionary rule exceptions, take into account the flagrancy and deliberate nature of the underlying Fourth Amendment violation?

2. Recently, Congress passed and the President signed the First Step Act of 2018. Part of the Act lowered the mandatory minimum for many drug offenses. It also retroactively applies "to any offense that was committed before [December 21, 2018], if a sentence for the offense has not been imposed as of" that day. Should the Court grant the petition, vacate the judgment below, and remand to the Seventh Circuit to consider whether the First Step Act applies to cases still on direct appeal?

PARTIES TO THE PROCEEDING

Paul Huskisson is the petitioner here and was the defendant-appellant below.

The United States of America is the respondent here and was the plaintiff-appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the U.S. District Court for the Southern District of Indiana and the U.S. Court of Appeals for the Seventh Circuit:

United States of America v. Paul Huskisson, No. 16-CR-48 (S.D. Ind.)

United States of America v. Paul Huskisson, No. 18-1335 (7th Cir.)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

INTRODUCTION

This petition presents an important question about the reach of the exclusionary rule and its independent source exception. Exclusion is the traditional remedy where the government seeks to introduce evidence obtained as a result of an unconstitutional search or seizure. By excluding this illegally obtained evidence, the exclusionary rule assures compliance with the Fourth Amendment "by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). A handful of exceptions to this general rule of exclusion exist, but each center on "an assessment of the flagrancy of the police misconduct." *United States v. Leon*, 468 U.S. 897, 911 (1984). Thus, despite these exceptions, courts must suppress evidence obtained through deliberate and flagrant Fourth Amendment violations. Those violations fall within the heartland of the exclusionary rule because they are both culpable enough to be worth the loss of incriminating evidence and deliberate enough to yield meaningful deterrence.

The Seventh Circuit's decision in this case ignores these well-established principles. It is difficult to imagine more deliberate or obviously unconstitutional behavior than law enforcement's actions in this case. Agents assigned to an Indianapolis DEA task force formed and executed a plan to enter Paul Huskisson's home uninvited and without a warrant. Once inside, the agents seized and tested four saran-wrapped packages sitting on the kitchen counter for the presence of methamphetamine. The agents then sought a warrant to search the home they had already illegally entered. In their warrant application, the

agents disclosed both what they observed inside Huskisson's home and the positive test results. A magistrate, informed that the agents had already confirmed Huskisson had illegal drugs in his home, issued the requested warrant.

The Seventh Circuit held below that the exclusionary rule did not require suppressing that evidence. That is so, the court asserted, because the search warrant acted as an independent source for the evidence the agents discovered inside Huskisson's home. Never mind that the warrant application relied on evidence the agents obtained by illegally searching Huskisson's home before seeking a warrant. And never mind that the agents' decision to first search Huskisson's home without a warrant and then apply for a warrant based on that illegally obtained evidence represents willful and flagrantly unconstitutional conduct. The Seventh Circuit declared that the flagrant nature of a Fourth Amendment violation is categorically irrelevant when applying the independent source exception to the exclusionary rule.

But the independent source exception was never meant to spare deliberate and obviously unconstitutional conduct from the exclusionary rule. Purposeful or flagrant police misconduct, after all, is most in need of deterrence and most likely to change in response to adverse suppression rulings. Thus, no other exception to the exclusionary rule exempts evidence obtained via deliberate constitutional violations or where law enforcement obtained the evidence by exploiting its unlawful presence in a suspect's home. Nothing in principle or precedent suggests the independent source exception alone gives

law enforcement a free pass when deterrence is needed most.

The Seventh Circuit's contrary conclusion is not only wrong, but creates a direct and acknowledged circuit conflict. The Eighth Circuit and several states have recognized that the independent source exception categorically does not apply to "a warrantless search when police officers exploit their presence in the home." *United States v. Madrid*, 152 F.3d 1034, 1041 (8th Cir. 1998). The First Circuit has suggested that it agrees. Any other rule, as these courts have recognized, would give law enforcement "carte blanche to trample constitutional rights" the moment they have probable cause to seek a warrant. *Id.*

This case, in short, has all the ingredients for a grant of certiorari: a manifestly erroneous decision that creates a direct and acknowledged conflict among the federal courts of appeals on an important and recurring question of federal constitutional law. *See* U.S. S. Ct. R. 10. Indeed, the decision below leads to the anomalous and untenable result that the exclusionary rule is *less likely* to exclude illegally obtained evidence as law enforcement take *more deliberate and egregious steps* to profit from their unconstitutional actions. As the decision below illustrates, revealing the illegally obtained evidence in a warrant application virtually guarantees both that a warrant will issue and that the illegally obtained evidence will not be suppressed. The agents' actions here are also not a one-off incident. A "search first, warrant later" approach is becoming increasingly common. Accordingly, this Court should grant the

petition to resolve the circuit conflict and correct the Seventh Circuit's deeply flawed decision.

The Court should also grant, vacate, and remand Huskisson's sentence in light of the First Step Act of 2018. The Act changed the sentencing-enhancement requirements and lowered the mandatory minimum sentence for many drug offenses. These changes retroactively apply "to any offense that was committed before [December 21, 2018], if a sentence for the offense has not been imposed as of" that day. First Step Act of 2018, Pub. L. No. 115-391, § 401(c), 132 Stat. 5194, 5220. This Court has twice before remanded for the courts of appeals to consider whether the sentencing reductions in the First Step Act apply to cases still pending on direct review. It should do so again here.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 926 F.3d 369 and reproduced in the Appendix ("App.") at App.1-15. The oral and written decisions of the district court denying Huskisson's motion to suppress are unreported, and those decisions are reprinted at App.16-20, App.21-29, and App.30-41 respectively.

JURISDICTION

The Seventh Circuit issued its opinion on June 5, 2019. App.1. On August 22, 2019, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including October 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment states:

> 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.

U.S. Const. amend. IV.

The relevant provisions of 21 U.S.C. § 841 and the First Step Act of 2018 are reproduced at App.57-71.

STATEMENT OF THE CASE

A. Background

Early on the morning of February 5, 2016, members of a DEA task force arrested Anthony Hardy for conspiracy to distribute methamphetamine. App.2. Hardy quickly agreed to become a cooperating witness. *Id.* He also identified Paul Huskisson as one of his two main suppliers. *Id.* Hardy told the agents that Huskisson expected another shipment of methamphetamine the next day. *Id.*

The agents decided to conduct a buy-bust operation to build the government's case against Huskisson. App.2-3. When planning the operation, the agents concluded Hardy should meet Huskisson at his home or business the next day, confirm the shipment had arrived, and then step back outside to give the agents a predetermined signal indicating that he observed drugs inside. CA-Appx126:5-13, 141:24-

142:5, 173:3-16; App.2-4.[1] Rather than wait for a search warrant, a DEA entry team would then immediately enter the building, arrest Huskisson, and secure the premises. CA-Appx126:14-17, 141:24-142:10, 173:3-16, 227:12-19. "[S]hould [they] find the methamphetamine" in plain view, the agents planned to ask Huskisson for consent to search the premises and to obtain a search warrant if he refused. CA-Appx136:23-137:1, 141:24-142:5; App.6.

Through a series of cryptic recorded phone conversations, Hardy arranged to meet Huskisson at his home on Laclede Street in southwest Indianapolis. App.2-3 & n.1. None of the recorded conversations between Hardy and Huskisson mentioned methamphetamine or any other drug. CA-Appx204.

Around 5 p.m. the next day, the DEA agents outfitted Hardy with a hidden video camera and gave him a few last-minute instructions. CA-Appx125:14-126:4, 173:3-16, 174:18-175:5. Hardy then drove his car to Huskisson's home and went inside around 5:45 p.m. App.3. A half hour later, a white Mazda pulled into Huskisson's driveway. *See* App.3. One man emerged from the Mazda and headed inside. CA-Appx128:16-129:9, 179:4-180:10. Another man stepped out of the car a few minutes later carrying a blue cooler. App.3; CA-Appx129:10-23, 180:11-181:19. Hardy soon emerged from the house, walked to his car, and gave the agreed-upon signal that he had seen

[1] "CA-Appx" refers to the Appellant's Appendix filed in the court of appeals, 7th Cir. No. 18-1335 (filed July 13, 2018), Dkt. #11.

methamphetamine inside by removing his hat. App.3-4.

A five-member DEA entry team waiting nearby immediately burst into Huskisson's home and announced their presence by yelling "police." App.4; CA-Appx130:14-24, 182:7-15, 240:10-19. There was no attempt to ask Huskisson's permission to come inside and no knock at the door before the agents entered. *Id.* Once inside, the entry team observed Huskisson and the two men standing in the kitchen. App.4; CA-Appx230:7-231:7. The agents placed all three men under arrest. *Id.* During a pat-down search, the agents found $10,250 in Huskisson's pocket. CA-Appx260:9-25, 108. The entry team performed a protective sweep of the residence, observing ten saran-wrapped packages of suspected methamphetamine on the kitchen counter. App.4, 49 ¶ 15. A field test of the packages confirmed the presence of methamphetamine. *Id.*

Soon almost thirty agents and officers were at Huskisson's home. CA-Appx140:7-12. Members of the DEA task force asked Huskisson, now sitting handcuffed in his living room, for permission to search the premises. App.4; CA-Appx133:16-20, 231:8-12, 239:1-3. When Huskisson said no, the agents decided "at that point" to apply for a search warrant. CA-Appx133:21-134:4. Special Agent Michael Cline, who had left the scene to debrief Hardy, was tasked with securing the warrants for the Laclede Street residence and the No Limit Motors car lot. App.4.

In his warrant affidavit for both locations, Agent Cline highlighted the drugs found in Huskisson's home during the DEA's warrantless entry. App.49

¶ 15. Agent Cline recounted that "law enforcement officers observed an open cooler with ten saran wrapped packages that contained suspected methamphetamine" shortly after entering the residence. *Id.* And he revealed that the "suspected methamphetamine later field tested positive for the presence of methamphetamine." *Id.*

The rest of the warrant affidavit described the recorded conversations between Huskisson and Hardy, the buy-bust operation, and Agent Cline's conversations with Hardy. App.46-50 ¶¶ 6-16; *see also* App.4. This included a conversation shortly after Hardy walked out of Huskisson's house, in which Hardy told Agent Cline that he watched one of the men remove ten saran-wrapped packages from a hidden compartment in the cooler. App.49-50 ¶ 16. Hardy told Agent Cline that Huskisson then cut one of the packages open with a knife, revealing what appeared to be methamphetamine. *Id.* Despite equipping Hardy with a hidden camera, Agent Cline did not review that camera footage before submitting his warrant affidavit to confirm Hardy's account. *Id.*; CA-Appx183:9-184:23.

A magistrate issued the requested warrants around 10:30 p.m. App.5. The agents occupying Huskisson's home executed the warrant for the Laclede Street residence later that evening, discovering a razor blade and a money-counting machine but little else. CA-Appx234:3-12, 243:25-244:5, 256:23-257:12, 106, 107. Meanwhile, Agent Cline and a few other task force members executed the warrant for No Limit Motors. CA-Appx186:25-187:11, 194:15-17. Their search turned up a digital scale on

top of a cabinet and a money-counting machine in a storage area. CA-Appx195:13-25, 197:4-198:12, 109, 110.

B. Proceedings Below

A grand jury indicted Huskisson for possessing with the intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1). Huskisson moved to suppress all evidence obtained from the government's warrantless entry into his home on Fourth Amendment grounds. App.5.

The district court held a suppression hearing on the motion. *Id.* At the hearing, the government called a single witness: Noel Kinney, an Indiana State Police detective assigned to the Indianapolis DEA task force. App.3, 5. Detective Kinney testified that he and Agent Cline formed a plan to get a warrant only if after entering Huskisson's home and "discover[ing] the methamphetamine," Huskisson would not give "consent to search." CA-Appx141:24-142:5. He reiterated at other points in his testimony that the agents planned to enter Huskisson's home as soon as Hardy indicated he observed drugs inside and "*should we find the methamphetamine*, gather a consent to search. If it was not granted, obtain a search warrant." CA-Appx136:16-137:1 (emphasis added); *see also* App.6. "[N]o part of the plan was to start the process for obtaining a warrant prior to entry into the Laclede Street residence." CA-Appx137:5-8.

Detective Kinney explained why. Staying outside "waiting for the four plus hours to get the search warrant" made little sense in his opinion "[b]ecause during drug investigations, you are never sure of the actual location where" an undercover purchase will

take place. CA-Appx144:21-145:2. In fact, Detective Kinney testified that in his experience a controlled buy often does not take place "where you believe it's going to occur." CA-Appx142:9-10. Rather than spending time applying for an unnecessary warrant, he thus again acknowledged that the agents made "an actual articulated decision to not seek a warrant until after entry, and only if [they] couldn't obtain consent." CA-Appx142:6-10.

The district court denied the suppression motion. App.30. It recognized that no exigent circumstances justified the warrantless entry into Huskisson's home and therefore assumed that the agents' warrantless entry violated the Fourth Amendment. App.34. The district court nonetheless held that the evidence was admissible under the independent source exception to the exclusionary rule. App.40.

During the two-day trial, the drugs, money, and other evidence found in Huskisson's home and at his business were admitted. CA-Appx195:18-196:12, 197:10-198:17, 232:8-235:15, 237:2-16, 257:8-258:9, 261:1-18. The government also introduced video footage Hardy captured during the buy-bust operation, along with audio and transcripts of the calls the government recorded between Hardy and Huskisson. CA-Appx169:16-170:16, 183:16-184:11. The jury returned a guilty verdict. App.7. Based on the amount of drugs involved and Huskisson's criminal history, the district court entered a twenty-year mandatory minimum sentence. *Id.*; *see also* 21 U.S.C. § 841(b)(1)(A)(viii) (2010).

The Seventh Circuit agreed that the agents violated the Fourth Amendment but affirmed that the

independent source exception applied. App.7, 15. Even though the warrant application revealed that the agents had already discovered drugs inside Huskisson's home, the Seventh Circuit held "the inclusion of tainted evidence in the warrant application" did not "affect[] the magistrate's decision to issue a search warrant." App.12-15. The court acknowledged "the methamphetamine evidence" was "highly probative of probable cause," but held the magistrate "would have issued the search warrant even without the discussion of the field-tested methamphetamine." App.11, 13. The Seventh Circuit separately held "the DEA's illegal entry and field test" did not affect the government's decision to seek a warrant. App.13-15.

A central issue in the appeal was whether the independent source exception applies where law enforcement engages in deliberate and obviously unconstitutional behavior. The Seventh Circuit relegated that issue to a footnote. App.8 n.2. In that footnote, the Seventh Circuit created a circuit split by refusing to consider the flagrant nature of the constitutional violation *at all*. *Id.* The court acknowledged that the Eighth Circuit does not apply the independent source exception when confronted with "egregious police misconduct." *Id.* The Seventh Circuit refused to adopt a similar standard, explaining that "[o]ur precedent [] bars us from applying [a] 'flagrant misconduct standard.'" *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Establish That The Flagrancy Of The Police Misconduct Matters In The Independent Source Analysis.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Although the Fourth Amendment does not specify a remedy for violations of this constitutional guarantee, exclusion has been the traditional remedy when the government seeks to introduce evidence obtained as a result of an unconstitutional search or seizure. *See Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

The "flagrancy of the police misconduct" has always been an important factor when applying the exclusionary rule because it is directly tied to the rule's underlying rationale—deterring future Fourth Amendment violations. *United States v. Leon*, 468 U.S. 897, 911 (1984); *see also Strieff*, 136 S. Ct. at 2064. Purposeful or flagrant police misconduct is most in need of deterrence and the most likely to change in response to adverse suppression rulings. *See Strieff*, 136 S. Ct. at 2064; *Herring v. United States*, 555 U.S. 135, 144 (2009). For that reason, courts applying the exclusionary rule suppress unlawfully obtained evidence where law enforcement's actions are "culpable enough to be worth the price paid by the justice system" from losing the evidence and "deliberate enough to yield meaningful deterrence." *Davis v. United States*, 564 U.S. 229, 240 (2011) (cleaned up).

The Seventh Circuit ignored these principles when applying the independent source exception. That doctrine is a narrow exception to the exclusionary rule that allows courts to admit evidence "obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Strieff*, 136 S. Ct. at 2061; *see also Murray v. United States*, 487 U.S. 533, 537 (1988). In its decision, the Seventh Circuit held a search warrant that issued based on an application *that mentions the illegally obtained evidence* can serve as an independent source and that any flagrant police misbehavior is irrelevant to the independent source analysis. That cannot be right, and the Seventh Circuit's decision creates an important circuit split only this Court can resolve.

A. The Seventh Circuit's Decision Creates A Direct And Acknowledged Circuit Conflict.

This case presents a circuit conflict about as stark as they come. The Eighth Circuit, in *United States v. Madrid*, held that the independent source doctrine does not extend to "a warrantless search when police officers exploit their presence in the home." 152 F.3d 1034, 1041 (8th Cir. 1998). The agents and officers in that case made a warrantless entry into Madrid's home as part of a narcotics investigation. *Id.* at 1036. Before obtaining a warrant, the agents "wander[ed]" upstairs and to the basement two or three times, discovering two scales, some scale weights, and a razor blade "in plain view." *Id.* at 1036, 1041. All of this evidence made it into the government's application for a search warrant. *Id.* at 1036. Without resolving

whether the illegally obtained evidence ultimately affected the magistrate's decision to issue a search warrant, the Eighth Circuit ordered the district court to suppress all of the evidence discovered in the house both before and after the warrant issued. *Id.* at 1040 n.8, 1041.

In reaching that result, the Eighth Circuit rejected the government's argument that the independent source exception applies whenever the police have sufficient probable cause to obtain a warrant even without the illegally obtained evidence. *Id.* at 1040 n.9. Adopting such a rule, the Eighth Circuit explained, would grant law enforcement a license to "violate constitutional rights the moment they have probable cause to obtain a search warrant." *Id.* at 1041. The court saw nothing in the Constitution or this Court's precedent granting law enforcement "carte blanche to trample constitutional rights" in this way. *Id.* Thus, *Madrid* concluded an independent source exception that turned a blind eye to blatant police misconduct would undermine *both* the warrant requirement *and* the exclusionary rule's deterrent function. *Id.*[2]

The First Circuit has expressed agreement with the Eighth Circuit's approach. The police officers in

---

[2] *Madrid* speaks in terms of the inevitable discovery doctrine, but commentators generally agree it is best understood as an independent source decision. *See, e.g.*, 6 Wayne R. LaFave, *Search & Seizure* § 11.4(f) n.443 (5th ed. 2019). Inevitable discovery is a closely related exclusionary rule exception where the evidence "would have been discovered even without the unconstitutional source." *Strieff*, 136 S. Ct. at 2061. This Court has observed that inevitable discovery is "an extrapolation from the independent source doctrine." *Murray*, 487 U.S. at 539.

United States v. Dent decided to enter what they believed was an empty apartment while applying for a search warrant, fearing a violent confrontation if they arrived with a warrant after Dent returned home. 867 F.3d 37, 39 (1st Cir. 2017). Although that entry was illegal, none of what the officers observed inside the apartment made it into the warrant application. *Id.* at 39-40. The First Circuit therefore held the independent source exception applied, but not before stating that it may have "follow[ed] *Madrid*" if the officers had engaged in a more "blatant search" and exploited their unlawful presence. *Id.* at 41.

Several states have adopted similar rules when applying state-law equivalents of both the independent source exception and its close cousin, the inevitable discovery doctrine. The New Jersey Supreme Court, for instance, will not apply the independent source exception unless the prosecution proves "that the initial impermissible search was not the product of flagrant police misconduct." *State v. Holland*, 823 A.2d 38, 48 (N.J. 2003). The North Dakota Supreme Court has rejected "a mechanical application of the inevitable-discovery doctrine," recognizing that, without an exception for situations where law enforcement "act[s] in bad faith to accelerate the discovery of the evidence," law enforcement would have an incentive to take unconstitutional shortcuts. *State v. Holly*, 833 N.W.2d 15, 31-33 (N.D. 2013); *State v. Phelps*, 297 N.W.2d 769, 774-75 (N.D. 1980). In *Smith v. State*, the Alaska Supreme Court likewise held the inevitable discovery doctrine is not available in circumstances where law enforcement "intentionally or knowingly violate[] a suspect's rights." 948 P.2d 473, 481 (Alaska 1997).

The Seventh Circuit, in sharp contrast, held the deliberate or obviously unconstitutional nature of the Fourth Amendment violation is irrelevant. App.8 n.2. The court explained that "our circuit applies the independent source doctrine to all cases" even in the face of "egregious police misconduct." *Id.* Although the court acknowledged this conflicted with the Eighth Circuit's approach, it held "[o]ur precedent [] bars us from applying the 'flagrant misconduct standard' of *Madrid*." *Id.*

To support its conclusion that its hands were tied, the Seventh Circuit cited two of its prior decisions: *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993) and *United States v. Etchin*, 614 F.3d 726 (7th Cir. 2010). Both admitted evidence that the police obtained after submitting a warrant application that mentioned evidence obtained during an illegal search. *See Etchin*, 614 F.3d at 737 (warrant affidavit mentioned information learned during illegal entry); *Markling*, 7 F.3d at 1311, 1316 (warrant affidavit mentioned drug paraphernalia found during illegal search of briefcase).

This direct and acknowledged conflict on a question of federal constitutional law warrants this Court's review. The Eighth Circuit's opinion in *Madrid* extensively canvassed the relevant issues, and there is no indication the Eighth Circuit or any other court that has adopted a similar rule will reconsider its position. Likewise, the decision of the Seventh Circuit below reflects that court's longstanding view that the independent source exception gives law enforcement a free pass for flagrantly unconstitutional behavior.

B. The Seventh Circuit's Decision Is Manifestly Incorrect.

The Seventh Circuit not only created a direct and acknowledged circuit conflict, but it chose the wrong side. Its decision reflects a manifest misunderstanding of this Court's exclusionary rule precedents, and in particular the independent source analysis in *Segura* and *Murray*.

The independent source exception was never meant to spare obviously unconstitutional conduct from the exclusionary rule. No other exception to the exclusionary rule turns a blind eye to deliberate and flagrant Fourth Amendment violations. Indeed, the key insight of the good-faith exception for officers who rely on a facially valid warrant is that "an assessment of the flagrancy of the police misconduct constitutes *an important step* in the" exclusionary rule "calculus." *Leon*, 468 U.S. at 912 (emphasis added). As this Court later elaborated, the exclusionary rule applies when there is "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 144. Thus, when the police exhibit "deliberate" disregard for Fourth Amendment rights, the good-faith exception does not apply and the exclusionary rule favors suppression. *Davis*, 564 U.S. at 238.

The attenuation doctrine, too, accounts for "the purpose and flagrancy of the official misconduct." *Brown v. Illinois*, 422 U.S. 590, 603-05 (1975) (excluding evidence where "[t]he impropriety of the arrest was obvious"). This exception is rooted in the notion that suppression serves no purpose when the connection between the challenged evidence and the

unconstitutional conduct is too remote. *Strieff*, 136 S. Ct. at 2061. But because the touchstone of the exclusionary rule is deterrence of flagrant police misconduct, court of appeals have uniformly emphasized that the flagrancy of the constitutional violation is the "most important" factor in the attenuation analysis. *E.g.*, *United States v. Conrad*, 673 F.3d 728, 735 (7th Cir. 2012); *United States v. Stark*, 499 F.3d 72, 77 (1st Cir. 2007); *United States v. Mendez*, 885 F.3d 899, 914 (5th Cir. 2018); *United States v. Wolfe*, 166 F. App'x 228, 237 (6th Cir. 2006). Because the independent source exception is an outgrowth of this Court's attenuation cases, *see Segura v. United States*, 468 U.S. 796, 805 (1984), it would be passing strange for the independent source exception to treat the seriousness of the constitutional violation as any less important.

This Court's cases applying the independent source exception are consistent with this principle that the severity of the police misconduct matters. Each of those cases involved less culpable conduct where law enforcement did not "in any way exploit[] their presence" in the suspect's home. *Segura*, 468 U.S. at 812. Indeed, the Eighth Circuit did not interpret *Segura* or *Murray* to require mechanically applying the independent source exception regardless of "the severity of the police misconduct" precisely because both cases involved less offensive police behavior and warrant applications "significantly less tainted by illegally obtained information" than the circumstances in *Madrid* and in this case. *Madrid*, 152 F.3d at 1041.

First, *Segura*. There, DEA agents arrested Segura in the public lobby of his apartment building while waiting for a warrant to search his apartment. 468 U.S. at 800. Segura and the agents went up to his apartment, and when a woman answered the door, the agents entered "without requesting or receiving permission." *Id.* Once inside, the agents observed several "accouterments of drug trafficking" in plain view during a protective sweep. *Id.* at 800-01. Two agents remained in the apartment until the search warrant arrived several hours later, at which point the agents discovered cocaine, cash, and other evidence. *Id.* at 801. The Supreme Court held the warrant was an independent source "sufficiently distinguishable" from the unlawful entry that washed away the taint of the agents' earlier unconstitutional conduct. *Id.* at 814.

Central to the Court's analysis was its finding that the agents in no way "exploited" their presence in Segura's apartment, but rather simply waited for a warrant. *Id.* at 812. As the *Segura* court explained, a warrantless entry becomes more troubling when the police try to use their unlawful presence to further their investigation. *Id.* The Court thus emphasized that "[n]o information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant." *Id.* at 814. The government instead secured the warrant based *solely* on information "unrelated to the [unlawful entry]" and known to the agents "*before* they entered the apartment." *Id.* at 799, 814 (emphasis added).

Murray involved a brief warrantless intrusion followed by a search several hours later pursuant to a

warrant "obtained on the basis of information *wholly unconnected* with the initial entry." 487 U.S. at 535-36 (emphasis added). After intercepting a shipment of marijuana that federal agents had previously observed leaving a South Boston warehouse, several agents entered the warehouse without a warrant. *Id.* at 535. The agents found the warehouse unoccupied, but observed several burlap-wrapped bales that were later discovered to contain marijuana. *Id.* Without disturbing the bales, the agents left the warehouse and did not re-enter until they had a search warrant—a warrant the government got without revealing to the magistrate anything the agents observed during their warrantless entry. *Id.* at 535-36.

This Court once again held that the independent source exception could potentially apply in those circumstances as the agents never exploited their brief unlawful presence inside the warehouse to further their investigation. *Id.* at 541-43. Because the police did not exploit their presence, it concluded that the warrantless entry did not influence the magistrate's decision to issue the warrant, while remanding for the district court to decide whether anything the agents observed inside the warehouse prompted their decision to seek a warrant in the first place. *Id.* at 543-44.

This case involves far more egregious conduct that warrants exclusion and demands deterrence. Unlike in *Segura* and *Murray*, the agents here formed a deliberate plan to enter Huskisson's home in a flagrantly unconstitutional manner and exploited their unlawful presence by revealing the fruits of their search in the warrant application. CA-Appx125-26,

130-31, 136-37, 141-42, 147. Not only did Agent Cline's warrant affidavit disclose that Detective Kinney and others entered Huskisson's home without a warrant, but it also revealed that the agents found "ten saran wrapped packages" that "later field tested positive for the presence of methamphetamine." App.49 ¶ 15. Each of these missteps by law enforcement also resulted from conduct that is sufficiently culpable and deliberate to justify suppression. The agents' actions reflect a pre-meditated plan to violate Huskisson's Fourth Amendment rights, rather than a split-second decision made in dangerous circumstances. CA-Appx141:24-142:5, 227:12-19; *see also* App.6.

The Seventh Circuit's decision deviates from *Segura* and *Murray* in another important respect as well. In *Murray*, this Court held that the "ultimate question" is whether "the search pursuant to [a] warrant was in fact a *genuinely independent source*" for the challenged evidence. 487 U.S. at 542 (emphasis added). And in both cases this Court emphasized that the government did not mention the fruits of its illegal search in the warrant application. *Id.* at 543; *Segura*, 468 U.S. at 814.

The Seventh Circuit completely ignored this Court's guidance. Despite what the Seventh Circuit held, the warrants in this case cannot possibly be a truly independent source for the challenged evidence "wholly unrelated" to the agents' unlawful entry and illegal seizure, as this Court's cases require. *Segura*, 468 U.S. at 814; *Murray*, 487 U.S. at 542. Revealing that the agents had already discovered drugs inside the home unquestionably "affected" the magistrate's

decision to issue a warrant. *Murray*, 487 U.S. at 542; *see also* App.50 ¶ 16. There is a reason the Fourth Amendment generally requires the government to identify the facts establishing probable cause for a search warrant *before* making a warrantless entry. Establishing probable cause *after* the government discovers drugs inside is too easy.

C. The Seventh Circuit's Decision Presents An Important And Recurring Question Of Federal Law.

Finally, this Court's review is warranted because the decision below presents an important and recurring question of federal law. "At the very core" of the Fourth Amendment's protections "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The Fourth Amendment has thus drawn a firm line at the entrance of the home. Absent exigent circumstances, all searches and seizures inside a home without a warrant and without consent are *per se* unreasonable. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

Yet law enforcement is increasingly taking a "search first, warrant later" approach. Courts nonetheless routinely excuse these obvious constitutional violations by invoking the independent source exception, often despite the warrant application describing the fruits of these illegal searches. *See, e.g.*, App.4; *Dent*, 867 F.3d at 39 (officers entered apartment to secure the scene while waiting for a warrant); *Etchin*, 614 F.3d at 732 (same); *United States v. Soto*, 799 F.3d 68, 78-80 (1st Cir. 2015) (officer peeked through garage window and

revealed that he saw a stolen motorcycle in subsequent warrant applications); *United States v. Dessesaure*, 429 F.3d 359, 369-70 (1st Cir. 2005) (officers entered apartment and warrant application disclosed drug paraphernalia observed inside). As these decisions illustrate, courts are interpreting the independent source exception expansively and preventing the exclusionary rule from having its intended deterrent effect on egregious law enforcement behavior.

Only this Court can put an end to this troubling and increasingly common pattern. At its core, the exclusionary rule "is designed to safeguard Fourth Amendment rights." *Herring*, 555 U.S. at 139-40. It is not having that effect when law enforcement is allowed time and again to illegally enter the home and use the evidence it discovers inside in a subsequent criminal case. Society as a whole loses when fundamental constitutional protections mean so little.

This case also presents an excellent vehicle for resolving the circuit conflict and reaffirming that the independent source exception only applies to sources "wholly unrelated" to the constitutional violation. *Segura*, 468 U.S. at 814. There is no dispute that the agents' actions violated the Fourth Amendment. App.7, 15. Nor is there any dispute that the agents formed a plan to make a warrantless entry, and assembled an entry team, hours before they even reached Huskisson's home. App.3-4; *see also* CA-Appx125-26, 130-31, 136, 141-42, 147. It is thus clear that the agents violated the Fourth Amendment and did so deliberately. Without any disputes over those issues, the Court can focus exclusively on defining the

limits of the independent source exception to the exclusionary rule.

II. This Court Should Also Grant, Vacate, And Remand For The Seventh Circuit To Address The First Step Act.

The Court should also grant, vacate, and remand for the Seventh Circuit to address how the recently enacted First Step Act affects Huskisson's 20-year mandatory minimum sentence. *See* CA-Appx91-96.

21 U.S.C. § 841(a)(1) makes "unlawful for any person knowingly or intentionally … to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Offenses involving "50 grams or more of methamphetamine" have a mandatory minimum of 10 years if the person had "a prior conviction for a felony drug offense." 21 U.S.C. § 841(b)(1)(A)(viii) (2010). But if the person had a prior felony drug conviction, then the version of § 841 in effect at the time of Huskisson's conviction imposed a higher 20-year mandatory minimum sentence. *Id.*

After Huskisson was sentenced, and after briefing concluded in his appeal below, Congress passed and the President signed the First Step Act. The Act altered 21 U.S.C. § 841 in two important ways.

First, the Act changed who is eligible for an increased mandatory minimum sentence. Rather than applying an enhancement for any defendant with "a prior conviction for a *felony drug offense*," the Act amends § 841 to require "a prior conviction for a *serious drug felony*." First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2)(A)(i), 132 Stat. 5194, 5221

(emphasis added). A "serious drug felony" is one where (1) "the offender served a term of imprisonment of more than 12 months" and (2) "the offender's release from any term of imprisonment was within 15 years of the commencement of the … offense." *Id.* at §401(a).

Second, the First Step Act lowered the mandatory minimum for a defendant with a prior serious drug felony conviction from 20 years to 15. *Id.* at § 401(a)(2)(A)(i).

Huskisson should benefit from both statutory changes. He served less than 12 months in prison for his prior offense, so he no longer qualifies for an enhanced mandatory minimum. And even if his prior offense were a serious drug felony, the First Step Act would knock five years off the enhanced mandatory minimum sentence he received.

By its terms, the First Step Act applies to a defendant that is still on direct appeal. The Act's retroactivity clause says:

> (c) Applicability to Pending Cases.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Id. § 401(c) (cleaned up). Huskisson committed his offense before the Act's enactment. So the issue hinges on whether "a sentence for the offense has not been imposed as of" December 21, 2018. *Id.* It had not.

A statute's meaning "does not turn solely on dictionary definitions of its component words." *Yates*

v. United States, 135 S. Ct. 1074, 1081 (2015). Context matters. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 356 (2013) ("Text may not be divorced from context."); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). And here context is conclusive.

Two bedrock canons of statutory interpretation focused on context reveal that imposing a sentence occurs when a court enters final judgment.

First, the presumption-of-consistent-usage canon. Two other clauses of the Act show that Congress knew how to make the First Step Act exclude Huskisson and others whose conviction and sentence were on appeal when the Act was passed:

- "(b) Applicability.—The amendments made by this section shall apply only to a *conviction* entered on or after the date of enactment of this Act." Pub. L. No. 115-391, § 402(b) (cleaned up) (emphasis added).
- "(3) Applicability.—The amendments made by this subsection shall apply with respect to *offenses committed* before, on, or after the date of enactment of this Act, except that such amendments shall not apply with respect to offenses committed before November 1, 1987." *Id.* § 102(b)(3) (cleaned up) (emphasis added).

Under both provisions, Huskisson would be excluded because these clauses refer to convictions or refer only to when the act was committed. But Congress did not use that language here. So under

this canon, when Congress used different language, the text should be given a different meaning. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."); *Murphy v. Smith*, 138 S. Ct. 784, 789 (2018).

Second, the title-and-headings canon. "[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text." *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991). Here, the clause's heading specifies "pending cases." A *pending case* is a case "awaiting decision." *Pending*, Black's Law Dictionary (11th ed. 2019). That is Huskission's case. Because those on direct review are still awaiting decision, the retroactivity of the First Step Act applies to them.

This reading mirrors the default retroactivity rule in criminal cases. This Court has declared that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Indeed, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review," this Court emphasized, "violates basic norms of constitutional adjudication." *Id.* at 322.

The Seventh Circuit did not have an opportunity to consider these arguments because briefing was complete when the Act became law. In similar

circumstances, the Court has twice before granted, vacated, and remanded for the court of appeals to address the applicability of the First Step Act in the first instance. *See Richardson v. United States*, 139 S. Ct. 2713 (2019) (mem.); *Wheeler v. United States*, 139 S. Ct. 2664 (2019) (mem.). It should do so again here.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

JASON M. WILCOX
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
jason.wilcox@kirkland.com

Counsel for Petitioner