No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CANTRELL LAMONT BURWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the context of the Fourth Amendment, this Court has characterized the voluntariness of consent to a search as "a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Consistent with that, almost every federal court of appeals reviews voluntary-consent findings under a deferential clear-error standard. Only the Eleventh Circuit applies a different standard, reviewing voluntariness determinations *de novo*, at least where the circumstances surrounding the consent are uncontested. It applied that same standard in this case, identifying no clear error yet reversing a district court's factual finding that Mr. Burwell did not consent voluntarily. The question presented is:

> Whether an appellate court should review *de novo* or for clear error a district court's finding that a defendant did not voluntarily consent to a search.

LIST OF RELATED CASES

1. *United States v. Cantrell Burwell*, Case No. 1:17-cr-0471-MHH-TMP, U.S. District Court for the Northern District of Alabama. Memorandum Opinion and Order entered on June 29, 2018.
2. *United States v. Cantrell Burwell*, No. 18-13039, U.S. Court of Appeals for the Eleventh Circuit. Opinion entered on February 27, 2019. Rehearing and Rehearing En Banc denied on May 1, 2019.

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Petitioner Cantrell Lamont Burwell respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the district court is unpublished, but is reported at 2018 WL 3208079 and appears at Appendix "A" to the Petition. The decision of the court of appeals is unpublished, but is reported at 763 F. App'x 840 (11th Cir. 2019) and appears at Appendix "B" to the Petition. The decision of the court of appeals denying rehearing and rehearing en banc is unpublished and appears at Appendix "C" to the Petition.

JURISDICTION

The Eleventh Circuit reversed the district court on February 27, 2019, and denied the petition for rehearing and rehearing en banc on May 1, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely filed in accordance with Sup. Ct. R. 13.

The district court had original subject-matter jurisdiction over this case under 18 U.S.C. § 3231, and entered its Memorandum Opinion and Order granting Mr. Burwell's motion to suppress on June 29, 2019. The Eleventh Circuit had appellate jurisdiction under 18 U.S.C. § 3731.

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

The government charged Mr. Burwell in a three-count indictment with possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The evidence related to all three counts was seized during a search of Mr. Burwell's Chevy Tahoe, which the government justified as a consensual search performed following a lawful traffic stop. Mr. Burwell moved to

suppress that evidence. The district court granted the motion. The Eleventh Circuit reversed.

1. The District Court's Findings

The district court held an evidentiary hearing on the motion to suppress. At that hearing, the government introduced two video recordings of the traffic stop and the testimony of Officer Powers. Mr. Burwell did not submit any additional evidence. Following the hearing, the district court granted the motion to suppress, finding that Mr. Burwell did not consent voluntarily to the search. The district court explained:

> Because Officer Powers used coercive tactics to try and trick Mr. Burwell into giving consent, and because Officer Powers did not tell Mr. Burwell that the traffic stop was over or that he was free to leave without consenting to the search, the Court does not find that Mr. Burwell's consent was voluntary. Under the totality of the circumstances in this case, the consent was not valid. Because Mr. Burwell's consent was not valid, the search of his vehicle violated the Fourth Amendment.

App. A., p. 18.

2. The Eleventh Circuit's Reversal

On appeal, the government argued that the Eleventh Circuit could review the district court's findings about voluntariness *de novo*. Relying on the Eleventh Circuit's prior published precedents, the government argued that the appellate court could "review *de novo* the district court's application of the law about voluntariness to uncontested facts." *United States v. Spivey*, 861 F.3d 1207, 1212 (11th Cir. 2017) (citing *United States v. Garcia*, 890 F.2d 355, 359–60 (11th Cir. 1989)).

Mr. Burwell countered that the voluntariness of his consent was itself a contested fact in the case. Because voluntariness is a question of fact, he argued that the Eleventh Circuit's review should be confined to clear error. In support, Mr.

Burwell pointed to this Court's opinions in *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–249 (1973) ("Voluntariness is a question of fact to be determined from all the circumstances . . . .").

The Eleventh Circuit agreed with the government, reviewed the district court's finding *de novo*, and reversed. App. B., p. 15 (holding that where "the district court applied the law about voluntariness to the uncontested facts, our review is *de novo*"). It stated, "under the totality of the undisputed circumstances, we conclude that the government has shown that Burwell's consent to search the vehicle was voluntary and uncontaminated by coercion." App. B., p. 19.

Mr. Burwell petitioned the Eleventh Circuit for rehearing and rehearing en banc, arguing that the panel erred in reviewing the district court's consent finding *de novo*. Not only did it conflict with this Court's precedents, it conflicts with the position taken by every other circuit. *See United States v. Tompkins*, 130 F.3d 117, 121 (5th Cir. 1997) (describing the circuits as "virtually monolithic" "in affording deferential review to voluntariness inquiries raised by consensual searches"). The Eleventh Circuit denied rehearing and rehearing en banc. App. C., p. 1.

REASONS FOR GRANTING THE PETITION

When relying upon consent to justify the lawfulness of a search under the Fourth Amendment, the government "has the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). Once a district court has answered this question in a particular case, only the Eleventh Circuit holds that it may be revisited

de novo on appeal. All of the other federal courts of appeals have held that the voluntariness of a consent is an issue of fact that should only be reviewed for clear error. The Eleventh Circuit, however, is firmly entrenched in its contrary position that it can review the voluntariness of consent *de novo*, at least where the circumstances surrounding the consent are uncontested. In this case, the Eleventh Circuit declined to revisit its standard of review even when Petitioner Burwell raised the issue of the circuit conflict. App. C. This Court's intervention is therefore necessary to resolve this conflict and ensure consistent appellate review of this federal constitutional matter throughout the country.

1. The Eleventh Circuit has split from all of the other federal circuits on the question presented.

The Eleventh Circuit holds that as long as the circumstances surrounding a consent are undisputed, it can review the voluntariness of that consent *de novo*. *Spivey*, 861 F.3d at 1212 ("[W]e will review *de novo* the district court's application of the law about voluntariness to uncontested facts."); *United States v. Valdez*, 931 F.2d 1448, 1451–52 (11th Cir. 1991) (reviewing determination of voluntariness *de novo* because "we believe that we are in as good a position as the district court to apply the law to the uncontroverted facts"). The Eleventh Circuit first adopted the *de novo* standard in *Garcia*, because it "believe[d] that the trial court found as a matter of law, rather than fact, that . . . Garcia's consent to the search could not have been voluntary." 890 F.2d at 359–60.

The Eleventh Circuit's use of *de novo* review conflicts with the position taken by all of its sister circuits. All of the other federal courts of appeals treat voluntariness

as a question of fact that is reviewed for clear error, consistent with this Court's characterization of the matter in *Schneckloth* and *Robinette*. *See United States v. Weidul*, 325 F.3d 50, 53 (1st Cir. 2003) ("Our rule has been that voluntariness of consent is a factual matter that is subjected to the clear error standard of review, and we adhere to that rule."); *United States v. Isiofia*, 370 F.3d 226, 232 (2d Cir. 2004) ("[I]t is important to remember that we review the District Court's conclusions on the voluntariness of Isiofia's consents for clear error."); *United States v. Price*, 558 F.3d 270, 278 n.7 (3d Cir. 2009) ("The District Court's determination of voluntariness is a finding of fact. . . . As such, we review for clear error."); *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (en banc) ("The voluntariness of consent to search is a factual question, and as a reviewing court, we must affirm the determination of the district court unless its finding is clearly erroneous."); *Tompkins*, 130 F.3d 117, 121 (5th Cir. 1997) (describing the circuits as "virtually monolithic" "in affording deferential review to voluntariness inquiries raised by consensual searches"); *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015) ("We will therefore review the question of consent under the 'clear error' standard."); *United States v. Johnson*, 495 F.3d 536, 541 (7th Cir. 2007) ("Because the voluntariness of a defendant's consent to search is a factual determination, we review a district court's resolution of this question for clear error."); *United States v. Steinmetz*, 900 F.3d 595, 598 (8th Cir. 2018), cert. denied, 139 S. Ct. 948 (2019) ("Whether a person voluntarily consented to a search is a factual determination that we review for clear error."); *United States v. Todhunter*, 297 F.3d 886, 891 (9th Cir. 2002) ("We review for clear error a district court's

determination of the voluntariness of a defendant's consent to a search."); *United States v. Harrison*, 639 F.3d 1273, 1277 (10th Cir. 2011) ("Whether consent was voluntarily given is a question of fact we review for clear error."); *United States v. Mason*, 966 F.2d 1488, 1493 (D.C. Cir. 1992) ("Because the voluntariness of a consent is a question of fact . . . it is subject to the 'clearly erroneous' standard of review.").

The circuits are split even if the Eleventh Circuit's application of *de novo* review is limited to cases where the facts and circumstances surrounding the consent are undisputed. At least three circuits have explicitly held that the clear error standard applies even if the circumstances of the search are video-recorded or otherwise undisputed. In the Fourth Circuit case *Lattimore*, the district court made a finding of voluntariness after "hearing testimony from [the police officer], receiving the written consent form signed by Lattimore, and viewing the videotape of the encounter." 87 F.3d at 650. On appeal, the Fourth Circuit reviewed for clear error, explaining that "even when an appellate court is convinced that it would have reached an opposite conclusion had it been charged with making the factual determination in the first instance, and although the temptation to substitute its judgment is particularly seductive when the encounter was recorded, a reviewing court may not reverse the decision of the district court that consent was given voluntarily unless it can be said that the view of the evidence taken by the district court is implausible in light of the entire record." *Id.* at 651.

Likewise, in *United States v. Quintero*, the government argued to the Eighth Circuit that it could apply *de novo* review to the question of voluntariness "because

the entire encounter was recorded, and [the person who consented to the search] did not testify at the hearing." 648 F.3d 660, 665 (8th Cir. 2011). The Eighth Circuit rejected that argument, explaining, "the clear error standard we employ here reinforces the district court's province to make factual findings regarding the nuances, tone of voice, and other subtle aspects inherent in determining whether an individual voluntarily consented to a search." *Id.* at 666. And in *Lee*, the Sixth Circuit noted that the "facts of this case are basically undisputed," but still reviewed "the question of consent under the 'clear error' standard." 793 F.3d at 682, 684.

The Eleventh Circuit's application of *de novo* review has thus created a split of authority that is firmly entrenched. This Court's review is needed to bring uniformity to the federal courts of appeals.

2. The Eleventh Circuit's decisions conflict with the decisions of this Court.

By applying *de novo* review, the Eleventh Circuit treats the voluntariness inquiry as a matter of law, not of fact. *See Spivey*, 861 F.3d at 1212 ("[W]e will review *de novo* the district court's application of **the law about voluntariness** to uncontested facts." (emphasis added)); *Garcia*, 890 F.2d at 359–60 ("[W]e believe that the trial court found **as a matter of law, rather than fact**, that . . . Garcia's consent to the search could not have been voluntary." (emphasis added)). But this Court has repeatedly stated that the voluntariness inquiry under the Fourth Amendment is a question of fact to be determined from the totality of the circumstances. *Robinette*, 519 U.S. at 40 ("The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from

all the circumstances.'"(quoting *Schneckloth*, 412 U.S. at 248–249)); *United States v. Mendenhall*, 446 U.S. 544, 557 (1980) ("The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances."). And questions of fact are reviewed only for clear error. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) ("[R]eview of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.").

In addition to explicitly stating that voluntariness is question of fact, this Court has also applied the clear error standard to a lower court's finding that a consent search was voluntary. In *Mendenhall*, a district court had concluded that the defendant had voluntarily accompanied federal agents to their office and consented to a strip search. 446 U.S. at 557–58. The court of appeals overturned the district court. *Id.* This Court, however, explained that the evidence was "plainly adequate to support the District Court's finding," and thus, "the Court of Appeals was mistaken in substituting for that finding its view of the evidence." *Id*. This Court so held even though, just as in the instant case, the defendant did not testify at the suppression hearing and the facts below were uncontested. *Id*. at 557–58.

The decision below extends a line of Eleventh Circuit decisions that is in apparent conflict with *Robinette*, *Mendenhall*, and *Schneckloth*, and every other circuit's precedents. This Court should therefore grant the petition to resolve the conflict.

3. This case is an excellent vehicle to resolve the conflict among the courts of appeals.

This case squarely presents a question needing resolution by this Court. And the question is an important one. *See*, *e.g.*, *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018) (granting writ of certiorari to determine appellate standard of review); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 835 (2015) (same). Given the prevalence of consent searches, the issue is also frequently recurring. *See Ric Simmons, Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L.J. 773, 773 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."). Without this Court's intervention, the lower courts will remain divided. *See Roseanna Sommers, Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L.J. 1962, 1971 (2019) ("Reflecting further confusion about the voluntariness test, lower courts are deeply divided about what exactly the standard is meant to capture."); *James C. McGlinchy, "Was That A Yes or A No?" Reviewing Voluntariness in Consent Searches*, 104 Va. L. Rev. 301, 302 (2018) ("[L]ower courts are divided on how to review the voluntariness of a defendant's consent."). The petition should accordingly be granted.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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