No. 19-5429

IN THE SUPREME COURT OF THE UNITED STATES

CANTRELL LAMONT BURWELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's consent to a search of his SUV was involuntary, where he offered that consent during a friendly conversation, during which he was free to leave, that followed the issuance of a warning (rather than a ticket) for a traffic infraction.

ADDITIONAL RELATED PROCEEDINGS

District Court (N.D. Ala.):

United States v. Burwell, No. 17-cr-00471 (June 29, 2018)

Court of Appeals (11th Cir.):

United States v. Burwell, No. 18-13039 (Feb. 27, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5429

CANTRELL LAMONT BURWELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B29) is not published in the Federal Reporter but is reprinted at 763 Fed. Appx. 840. The opinion and order of the district court (Pet. App. A1-A20) are not published in the Federal Supplement but are available at 2018 WL 3208079.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2019. A petition for rehearing was denied on May 1, 2019 (Pet. App. C1). The petition for a writ of certiorari was filed on July

30, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the United States District Court for the Northern District of Alabama returned an indictment charging petitioner 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 possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court granted petitioner's motion to suppress evidence of the gun and drugs found in his car. Pet. App. A1-A20. The court of appeals reversed and remanded the case for further proceedings. Id. at B1-B29.

1. On September 16, 2016, at around 3 a.m., Officer Josh Powers of the Anniston, Alabama police department stopped a black SUV driven by petitioner for failure to stay in its lane. Pet. App. B2-B3. Officer Powers was wearing a body camera, providing audio and video of the stop. Id. at B2. Petitioner told Officer Powers that he and his passenger were returning home to Toney, Alabama after fishing at a friend's pond in LaGrange, Georgia. Id. at B3. Petitioner and his passenger provided their driver's licenses, and Officer Powers returned to his patrol car to check for outstanding warrants and call for backup. Ibid.

Another Anniston police officer arrived five minutes later. Pet. App. B3. Officer Powers told the newly arrived officer that petitioner had prior drug possession convictions, that he seemed "real nervous," and that his fishing-trip story was suspicious. Ibid. Officer Powers then said that he was going to "try to get in that car" by telling petitioner that he was "going to write him a warning" and by "try[ing] to sweet talk my way in." Id. at B4. Officer Powers later testified that by "sweet talk" he meant asking questions to de-escalate the situation. Id. at B4 n.2. He explained that he tries to put individuals at ease so that they will cooperate and voluntarily consent to a search. Ibid.

When he returned to petitioner's car, Officer Powers told petitioner that he was going to give him a warning for improper lane usage. Pet. App. B4. In response to Officer Powers' requests, petitioner stepped out of the car and gave Officer Powers permission to search his pockets. Id. at B5. Officer Powers found $600 in cash in petitioner's front pocket, which petitioner claimed to have earned from work. Ibid.

Officer Powers and petitioner then walked back to the patrol car so that Officer Powers could complete the paperwork. Pet. App. B5. After finishing that paperwork, Officer Powers returned the licenses of petitioner and his passenger, joking about the number of times he accidentally kept someone's license. Ibid. Officer Powers then said "all right man, here's that warning. Like I said, that's for when I had you pulled over, you were swerving

a little bit, not terrible but you come over on that fog line a couple times. So I was just making sure you was alright." Ibid. Officer Powers handed petitioner the warning, and petitioner began to return to his car. Id. at B5-B6.

While petitioner was walking toward his car, Officer Powers said "hey before you go, you care if I ask you a few more questions?" Pet. App. B6. Petitioner said "sure." Officer Powers told petitioner that his "boss has been on us pretty bad about being productive and trying to, you know, do work -- they like to see us out here working. Part of our job is to, you know, find drugs, large amounts of money, firearms, anything -- stuff like that. You don't have anything like that in the car do you?" Ibid. Petitioner responded, "no sir, you can check." Ibid. Officer Powers then confirmed that he had petitioner's consent to search his vehicle: "You don't care if I search it real quick?" Ibid. Petitioner again consented. Ibid.

Officer Powers searched the passenger compartment of the car and then opened the car's hood and looked in the engine compartment. Pet. App. B6. He found a gun and approximately 55 grams of methamphetamine partially hidden under the fuse box. Ibid. Officer Powers arrested petitioner, who admitted that the gun and drugs belonged to him. Ibid.

2. A grand jury in the Northern District of Alabama returned an indictment charging petitioner with possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21

U.S.C. 841(a)(1) and (b)(1)(A); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. B7.

Petitioner moved to suppress the gun and drugs found in his car, arguing that he did not consent to the search of the engine compartment and that Officer Powers had unlawfully detained him beyond the traffic stop in order to search the car. Pet. App. B7. After an evidentiary hearing during which petitioner testified, the district court concluded that the search was unconstitutional on a different ground. Although petitioner had not argued or testified that his consent was coerced, Id. at B17-B18, the district court took the view that the search was unconstitutional because petitioner's consent was involuntary. Id. at B7.

The district court first determined that the traffic stop was completed before Officer Powers asked to search the car because the officer had already returned the license and given the warning and its explanation. Pet. App. B7. The district court then concluded that petitioner's consent to the search was not voluntary because Officer Powers employed coercive "sweet talk." Id. at B8. Specifically, Officer Powers "used a friendly tone and joked with [petitioner] to exert a subtle form of pressure -- the pressure of a debt that Powers created by letting [petitioner] off with a warning instead of a citation, which made [petitioner] feel compelled to oblige the officer's requests." Ibid. According to

the district court, "[t]he Supreme Court's careful discussion of law enforcement pressure tactics in Miranda v. Arizona dispels any notion that Officer Power's conduct was constitutionally sound" because Miranda condemned the "tactic of an officer showing himself to be 'a kindhearted man' who befriends the subject and tries to help him." Id. at A14 (quoting Miranda v. Arizona, 384 U.S. 436, 452 (1966)).

3. The government appealed, and the court of appeals reversed in an unpublished opinion. Pet. App. B1-B29. The court determined that the post-stop conversation was not a seizure; that petitioner had voluntarily consented to a search of his SUV; that the scope of the consent included the engine compartment; and that the traffic stop had not been overly prolonged. Ibid.

With respect to consent, the court of appeals stated that "[v]oluntariness is a question of fact that [the court of appeals] may disturb only if clearly erroneous." Pet. App. B14 (citing United States v. Spivey, 861 F.3d 1207, 1212 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018)). It explained that "[n]ormally, we will accord the district judge a great deal of deference regarding a finding of voluntariness, and we will disturb the ruling only if we are left with the definite and firm conviction that the trial judge erred." Ibid. (quoting United States v. Fernandez, 58 F.3d 593, 596–597 (11th Cir. 1995) (per curiam)). The court then stated that "where[,]as here, the district court applied the law about voluntariness to the

uncontested facts, our review is de novo." Id. at B15 (citing Spivey, 861 F.3d at 1212).

The court of appeals determined that "the district court erred in finding that [petitioner] did not voluntarily consent to the search of his vehicle because the record does not support that finding." Pet. App. B15. It explained that the district court's view that the consent was involuntary had been based on the erroneous premise that Officer Powers "engaged in what [the district court] deemed the coercive technique of using 'sweet talk.'" Id. at B17. The court of appeals noted that "coercion is one factor a court may consider in determining whether a consent is voluntary," but the court of appeals found "no trace of such coercion in the record." Ibid. In particular, it found "no evidence of any inherently coercive tactics, either from the nature of Powers's questioning or the environment in which it took place;" and "[n]othing in the video and audio record show[ing] that Powers lied, deceived, or tricked" petitioner. Ibid. It instead "appear[ed]" to the court of appeals that the district court's view that coercion had occurred was "largely based on Powers's own statements to [the other officer] at the scene that he was going to try to 'sweet talk his way in' to the vehicle.'" Id. at B18-B19. The court of appeals explained, however, that "Powers's subjective purpose * * * does not affect the voluntariness of [petitioner's] consent," observing that "'consent is about what

the suspect knows and does, not what the police intend.'" Id. at B19 (quoting Spivey, 861 F.3d at 1215)(brackets omitted).

The court of appeals also explained that the district court erred in relying on Miranda, because this Court "has made clear that 'there is a vast difference'" between the Fifth Amendment rights at stake in Miranda and the Fourth Amendment rights at stake in this case. Pet. App. B18 n.3 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973))(brackets omitted). The court of appeals further noted the district court's misunderstanding of the "kindhearted man" tactic discussed in Miranda, observing that the Court described that tactic as part of a "good-cop, bad cop" ploy, and there was "no evidence that Powers engaged in that ploy here." Id. at B19 n.3. And the court of appeals accordingly reasoned that, "under the totality of the undisputed circumstances," petitioner's "consent to search the vehicle was voluntary and uncontaminated by coercion." Id. at B19.

ARGUMENT

Petitioner contends (Pet. 4-10) that the court of appeals erred in applying a de novo standard of review to the issue of whether he consented to a search of his SUV. The unpublished, interlocutory decision below correctly identified legal errors in the district court's analysis of voluntariness and reversed the district court's suppression order. The court of appeals recognized that clear error review typically applies to voluntariness determinations, and any suggestion that it might

apply de novo review in the absence of legal error does not warrant this Court's review. Indeed, this case would be an unsuitable vehicle for review of the question presented because the result would be the same under any standard of review.

1. Certiorari is unwarranted for the threshold reason that this case is in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"). The court of appeals reversed the district court's order suppressing the evidence and remanded to the district court for further proceedings. Pet. App. B29. If petitioner is acquitted at trial, his claim will be moot. If petitioner is convicted, he will have an opportunity to raise the claim pressed here, in addition to any claims arising from a plea, trial, or sentencing, in a single petition for a writ of certiorari. See Hamilton-Brown Shoe Co., 240 U.S. at 258; see also Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioner provides no sound reason to depart in this case from this Court's usual practice of awaiting final judgment.

2. In any event, the court of appeals' articulation of the standard of review for the voluntariness of a consent to a search does not warrant this Court's review.

a. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), which also involved an automobile search, this Court explained that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Id. at 227. It is well settled that appellate review of factual determinations is for clear error. See, e.g., Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015); Pierce v. Underwood, 487 U.S. 552, 558 (1988). Accordingly, in United States v. Mendenhall, 446 U.S. 544 (1980), this Court reversed a court of appeals decision that had set aside a district court's finding that the defendant voluntarily consented to accompany law enforcement agents, explaining that "the totality of the evidence in this case was plainly adequate to support the District Court's finding" and that the court of appeals should not have "substitut[ed] for that finding its view of the evidence." Id. at 557-558; see also id. at 558-560 (same conclusion as to finding of consent to search the defendant's body).

Consistent with Schneckloth, and Mendenhall, the courts of appeals -- including the Eleventh Circuit -- have all held that "[t]he voluntariness of consent to search is a factual question," under which the court "must affirm the determination of the

district court unless its finding is clearly erroneous." United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996) (en banc); see United States v. Hughes, 640 F.3d 428, 440 (1st Cir. 2011); United States v. Guerrero, 813 F.3d 462, 467 (2d Cir.), cert. denied, 137 S. Ct. 98 (2016); United States v. Murray, 821 F.3d 386, 391 (3d Cir.), cert. denied, 137 S. Ct. 244 (2016); United States v. Blevins, 755 F.3d 312, 324 (5th Cir. 2014); United States v. Lee, 793 F.3d 680, 684 (6th Cir.), cert. denied, 136 S. Ct. 517 (2015); United States v. Contreras, 820 F.3d 255, 269 (7th Cir. 2016); United States v. Morgan, 842 F.3d 1070, 1075 (8th Cir. 2016), cert. denied, 137 S. Ct. 2176 (2017); United States v. Brown, 563 F.3d 410, 414 (9th Cir. 2009); United States v. Salas, 756 F.3d 1196, 1202-1203 (10th Cir. 2014); United States v. Yeary, 740 F.3d 569, 581 (11th Cir. 2014), cert. denied, 135 S. Ct. 1153 (2015); United States v. Wilson, 605 F.3d 985, 1027 (D.C. Cir.) (per curiam), cert. denied, 562 U.S. 1116, and 562 U.S. 1117 (2010).

b. The unpublished decision below likewise stated that "[v]oluntariness is a question of fact that [the court of appeals] may disturb only if clearly erroneous." Pet. App. B14 (citing United States v. Spivey, 861 F.3d 1207, 1212 (11th Cir. 2017), cert. denied, 138 S. Ct. 2620 (2018)). It explained that "[n]ormally, we will accord the district judge a great deal of deference regarding a finding of voluntariness, and we will disturb the ruling only if we are left with the definite and firm

conviction that the trial judge erred." Ibid. (quoting United States v. Fernandez, 58 F.3d 593, 596-597 (11th Cir. 1995) (per curiam)). The court of appeals further stated that "where[,]as here, the district court applied the law about voluntariness to the uncontested facts, our review is de novo." Id. at B15 (citing Spivey, 861 F.3d at 1212). But petitioner errs in asserting (Pet. 8-9) that the court of appeals improperly "treat[ed] the voluntariness inquiry as a matter of law" in this case. Pet. 8.

It is well-established that where "the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 n.15 (1982); see also, e.g., Abbott v. Perez, 138 S.Ct. 2305, 2326 (2018) ("[W]hen a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand."); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984) (appellate courts have the "power to correct errors of law, including those that may infect a * * * finding of fact that is predicated on a misunderstanding of the governing rule of law"). And here, the court of appeals pointed to two mistakes with respect to the "law about voluntariness" that infected the district court's factual finding. Pet. App. B15. First, the district court's view that petitioner's consent was coerced was "largely based on Powers's own statements to [the other officer]" about his subjective motivation for his use of a friendly tone.

Id. at B18-B19. But, as the court of appeals explained, "the subjective motivation of police officers is irrelevant in determining whether a consent is voluntary." Ibid.

Second, the district court believed that "Miranda v. Arizona dispels any notion" that "sweet talk" is a constitutionally permissible tactic. Pet. App. A14. But as the court of appeals explained, the district court had misapplied Miranda in the Fourth Amendment context and misunderstood Miranda's discussion of the "kindhearted man" tactic. Ibid.

In light of those errors with respect to the "applicable legal principles," the court of appeals was "not bound by the clearly erroneous standard." Inwood Labs., Inc., 456 U.S. at 855 n.15. And the prior circuit decision that the court of appeals cited for a de novo standard of review, Pet. App. B15, similarly invoked de novo review in the context of "the application of the law," and emphasized that clear error review applies to factual findings. Spivey, 861 F.3d at 1212 (citation omitted); see id. at 1212-1218. The decision below therefore should not be understood as generally endorsing a de novo standard.

3. Petitioner accordingly errs in asserting (Pet. 5) that the Eleventh Circuit has "split from all of the other federal circuits." Some circuits have, like the Eleventh Circuit, suggested that de novo review applies where the district court's voluntariness finding is based on the application of law to uncontested facts. United States v. Wade, 400 F.3d 1019, 1021

(7th Cir. 2005) (stating that clear error review applies where there are "credibility findings at issue," and de novo review applies to questions of law); United States v. Lewis, 921 F.2d 1294, 1301 (D.C. Cir. 1990) (applying de novo review where the district court's involuntariness finding was based on "uncontroverted evidence"). But petitioner recognizes that all circuits fundamentally "treat voluntariness as a question of fact that is reviewed for clear error." Pet. 5-6; see pp. 10-11, supra. To the extent that any circuit's precedents on this issue are internally inconsistent "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." Wisniewski v. United States, 353 U.S. 901-902 (1957) (per curiam). And petitioner does not identify any court of appeals that would have applied deferential clear error review in the context of legal errors like the ones that the district court committed here.

Just last Term, this Court denied a petition for a writ of certiorari from a criminal defendant asking this Court to review the Eleventh Circuit's application of the clear error standard to a district court's finding regarding the voluntariness of a consent to a search. See Ratcliff v. United States, 139 S. Ct. 479 (2018) (No. 18-5223). This Court has denied a number of other similar petitions in the past, declining to grant review of a question on which the federal courts of appeals are uniform. See Penn v. United States, 138 S. Ct. 98 (2017) (No. 16-9194); Carter v. United States, 543 U.S. 1155 (2005) (No. 04-7093); Bostic v. United

States, 519 U.S. 933 (1996) (No. 96-5185). It should follow the same course here.

4. In any event, this case would be a poor vehicle for reviewing the question presented because the standard of review was not outcome determinative. The court of appeals would have reversed the district court's voluntariness finding under any standard because the district court clearly erred in concluding that Officer Powers' "sweet talk" unconstitutionally coerced petitioner's consent to the search.

The clear error standard is satisfied where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985). Here, the court of appeals found "no trace of [police] coercion in the record." Pet. App. B17. It emphasized that "there [was] no evidence of any inherently coercive tactics, either from the nature of Powers's questioning or the environment in which it took place." Ibid. Thus, even if the court of appeals had applied clear error review, the outcome would have been the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

OCTOBER 2019