No. 19-5445

IN THE SUPREME COURT OF THE UNITED STATES

RONALD LEWIS COLEMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated when an agent entered petitioner's ungated condominium complex and walked on his shared, unenclosed driveway in the course of attaching warrant-authorized tracking devices to petitioner's vehicles.

2. Whether petitioner, who was sentenced in January 2018, is entitled to resentencing under a provision of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, that applies only "if a sentence for the offense has not been imposed as of" December 21, 2018. § 401(c), 132 Stat. 5221.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mich.)

United States v. Coleman, No. 17-cr-136 (Jan. 23, 2018)

United States Court of Appeals (6th Cir.)

United States v. Coleman, No. 18-1083 (May 3, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 923 F.3d 450.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2019. The petition for a writ of certiorari was filed on July 31, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Michigan, petitioner was convicted of

conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(B)(ii), and (b)(1)(C) (2012), and 846; possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(i) and (b)(1)(C); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. He was sentenced to 120 months of imprisonment, to be followed by eight years of supervised release. Judgment at 2-3. The court of appeals affirmed. Pet. App. A1-A10.

1. In March 2017, a cooperating informant told case agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) that he could purchase cocaine from Eddie Powell, whom the informant identified as a mid-level drug dealer in the Grand Rapids, Michigan area. Presentence Investigation Report (PSR) ¶ 16. The same informant identified petitioner as one of Powell's suppliers. Ibid.

Agents began investigating petitioner and observed him using two automobiles -- a Chevrolet Trailblazer and a Buick Enclave -- in connection with suspected drug sales to Powell. Pet. App. A2; PSR ¶ 17. Further investigation revealed that both vehicles were registered in petitioner's father's name and that petitioner had felony convictions in 2006 and 2009 for delivery or manufacture of a controlled substance. Pet. App. A2. Based on this background information and further details about the suspected drug sales, a federal magistrate judge issued warrants authorizing the

attachment of GPS tracking devices to both of petitioner's vehicles. Ibid.

On April 20, 2017, an ATF agent visited the Silverleaf Condominium Complex, where petitioner lived, in order to attach the tracking devices. Pet. App. A2-A3. Petitioner's condominium sits roughly a mile down the road from the entrance to the ungated complex, in a building shared by three other families. Id. at A3. The agent parked in a public parking spot across the street from petitioner's residence and attached a tracking device to his Enclave, which was parked on a driveway shared between petitioner and his next-door neighbor. Ibid. The agent then attached a tracking device to petitioner's Trailblazer, which was parked across the street in a spot shared by residents and guests. Ibid.

On May 4 and May 10, 2017, petitioner again sold cocaine to Powell. Pet. App. A3; PSR ¶ 17. Based in part on the GPS tracking data from petitioner's Enclave during the May 10 sale, a different federal magistrate judge issued a search warrant for petitioner's residence. Pet. App. A3. Agents executed that search on May 31, 2017, and seized, inter alia, approximately 500 grams of powder cocaine and a loaded Ruger semiautomatic pistol. Pet. App. A3; PSR ¶ 23. Petitioner admitted possession and ownership of the cocaine and the firearm. Pet. App. A3.

2. A federal grand jury returned an indictment charging petitioner with one count of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1),

(b)(1)(B)(ii), and (b)(1)(C) (2012), and 846; one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a) and (b)(1)(C); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-3.

Petitioner moved to suppress the fruits of the tracking and search warrants, contending that the warrants were not supported by probable cause and that the agent had violated the Fourth Amendment in the process of attaching the tracking device to petitioner's Enclave. Following a suppression hearing, the district court determined that petitioner's shared driveway was not within the curtilage of his home; that each warrant was supported by adequate probable cause; and that, even if the warrants contained some defect, the ATF agents relied on them in good faith. Pet. App. A4.

Petitioner subsequently pleaded guilty to the three counts against him pursuant to a plea agreement permitting him to appeal the court's suppression ruling. Pet. App. A4. On January 23, 2018, the court sentenced him to 120 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A10. In pertinent part, the court rejected petitioner's contention that the ATF agent who attached the tracking devices to petitioner's vehicles had violated the Fourth Amendment while doing so.

The court of appeals noted that petitioner had asserted "two Fourth Amendment violations[:] * * * the first when the agent entered [petitioner]'s condominium complex despite there being a sign reading 'PRIVATE PROPERTY,' and the second when the agent walked onto [petitioner]'s driveway to install the GPS tracker" on his Enclave. Pet. App. A5. In determining whether the curtilage of petitioner's home encompassed either the condominium complex as a whole or the driveway petitioner shared with his neighbor, the court applied the "four factors" identified by this Court in United States v. Dunn, 480 U.S. 294, 301 (1987), "as a guidepost to determining whether an individual has a reasonable expectation of privacy in an area": "(1) proximity to the home; (2) whether the area is within an enclosure around the home; (3) uses of the area; and (4) steps taken to protect the area from observation by passersby." Pet. App. A6.

The court of appeals first determined that the Dunn factors did not support petitioner's contention that the agent had violated the Fourth Amendment by entering the condominium complex. The court took note of the "PRIVATE PROPERTY" sign at the entrance to the complex, but it pointed out that "anyone could drive into the complex without express permission," because "[n]o gate prevented outsiders from entering, and the condo association had not taken any effort to keep non-residents out." Pet. App. A6. And even the "PRIVATE PROPERTY" sign -- the only indicium of privacy that the court could find -- "did not require permission to enter,

prohibit outside visitors, or * * * state 'no trespassing.'" Ibid.

The court of appeals similarly applied the Dunn factors to find that the common and accessible driveway was outside the curtilage of petitioner's home. Pet. App. A6-A8. The court stated that "[w]hether the ATF agent intruded onto the curtilage of [petitioner]'s building by entering his driveway" was "a closer question." Pet. App. A6. In addressing that question, the court examined this Court's decision in Collins v. Virginia, 138 S. Ct. 1663 (2018), which held that a specific "driveway enclosure" adjacent to a particular private residence was "properly considered curtilage" and entitled to Fourth Amendment protection. Pet. App. A7 (quoting Collins, 138 S. Ct. at 1671). The court of appeals observed, however, that unlike "[t]he top portion of the driveway" at issue in Collins -- which was "past the front perimeter of the home, enclosed on three sides[,] * * * and not on the way to the front door of the residence" -- petitioner's Enclave "was sitting in front of the residence, was not enclosed by anything, and was on the way to the entrance of his home." Ibid. The court further observed that "[t]he Collins motorcycle was * * * covered with a tarp" while "[petitioner]'s car was not," and petitioner's "driveway was in fact shared with other families and other condo residents frequently walked past cars parked in front of condo units." Ibid. The court accordingly reasoned that in light of the "quite different" facts, Collins did

not render petitioner's shared, unenclosed driveway curtilage, and thus that "the ATF agent * * * did not run afoul of the Fourth Amendment" while installing the tracking device. Id. at A7-A8.

ARGUMENT

Petitioner renews his contentions (Pet. 12-27) that the ATF agent conducted warrantless Fourth Amendment searches under Collins v. Virginia, 138 S. Ct. 1663 (2018), by (1) entering the condominium complex in which petitioner resided and (2) stepping onto petitioner's shared driveway to install the tracking device on his vehicle. He also asks (Pet. 27-32) this Court to decide in the first instance that he is eligible for resentencing under Section 401 of the First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5220. Because none of petitioner's claims has merit, no further review is warranted.

1. Petitioner contends (Pet. 12-27) that the ATF agent committed multiple Fourth Amendment violations by intruding on areas that should be deemed the curtilage of his residence -- namely, the common space of the ungated condominium complex in which petitioner lived and the unenclosed driveway that petitioner shared with his neighbors. The court of appeals correctly rejected those factbound contentions, and its decision does not warrant this Court's review.

a. The lower courts correctly determined that petitioner did not have a constitutionally protected interest in the entirety of the condominium complex in which he resided. In United States

v. Dunn, 480 U.S. 294 (1987), this Court set forth four factors to guide the determination whether an area adjacent to a home is "curtilage": (1) proximity to the home; (2) whether the area is included within an enclosure surrounding a home; (3) the nature and uses of the area; and (4) steps taken by the resident to protect the area from observation. Id. at 301. Those factors make clear that the expansive area comprising the condominium complex is not curtilage of petitioner's home. Although petitioner's home is included within the complex, the complex was not enclosed; was not protected in any way from observation; and was a common area that any resident -- as well as non-residents, such as "the mail carrier, the trash collector, the snow remover," and petitioner's "neighbors' guests," Gov't C.A. Br. 13-14 -- was permitted to enter. As the court of appeals properly recognized, because "anyone could drive into the complex without express permission," and "the condo association had not taken any effort to keep non-residents out," "the agent's entry onto the condominium complex" did not "violate[] [petitioner's] Fourth Amendment rights." Pet. App. A6.

To the extent that petitioner suggests (Pet. 26) that the court of appeals' determination conflicts with the Illinois Supreme Court's decision in People v. Bonilla, 120 N.E.3d 930, cert. denied, No. 18-1219, 2019 WL 4921288 (Oct. 7, 2019), that suggestion is misplaced. Bonilla did not address facts analogous to this case, but instead considered "whether the warrantless use

of a drug-detection dog at the threshold of an apartment door, located on the third floor of an unlocked apartment building containing four apartments on each floor, violated defendant's fourth amendment rights." Id. at 933-934. Taking the view that "the dog sniff of the threshold of defendant's apartment is similar to the dog sniff of the door on the front porch in [Florida v.] Jardines[, 569 U.S. 1 (2013)]," the court "conclude[d] that the threshold of the door to defendant's apartment falls within the curtilage of the home." Id. at 936-937. Here, by contrast, there is no contention that the ATF agent ever approached the threshold of petitioner's door; instead, petitioner contends that the entirety of the condominium complex should be treated as the protected curtilage of his home. That contention is well afield of Bonilla.

b. The lower courts' application of the Dunn factors to petitioner's shared driveway was likewise correct and does not conflict with any decision of this Court, of another court of appeals, or of a state court of last resort. The court of appeals correctly observed that, "[w]hile the proximity of the driveway to the residence here may lean in favor of considering it to be curtilage, the other Dunn factors -- whether the area is within an enclosure around the home, the uses of the area, and the steps taken to protect the area from observation by passersby -- all point toward the opposite conclusion." Pet. App. A8. That

factbound application of well-established law does not warrant this Court's review.

Petitioner errs in asserting (Pet. 13-18) that the lower courts' conclusion in his case is inconsistent with this Court's decisions in Collins, supra, and Jardines, supra. Neither Collins nor Jardines addressed the constitutional status of a shared, unenclosed driveway. See Jardines, 569 U.S. at 7 (determining that the front porch of a house was curtilage); Collins, 138 S. Ct. at 1670-1671 (determining that the partially enclosed section of a driveway abutting a house was curtilage). And the court of appeals exhaustively catalogued the factual differences between the portion of driveway at issue in Collins -- "past the front perimeter of the home, enclosed on three sides (two by a brick wall, one by the home itself), and not on the way to the front door of the residence" -- and the place where petitioner's Enclave was parked -- "in front of the residence, * * * not enclosed by anything, * * * on the way to the entrance of [petitioner's] home," in a driveway "shared with other families" and in full public view of "other condo residents [who] frequently walked past cars parked in front of condo units." Pet. App. A7. Given the "quite different * * * facts" at issue in Collins, ibid., the decision below is neither inconsistent with this Court's precedent nor otherwise deserving of certiorari.

c. In any event, this case is not a suitable vehicle for addressing the Fourth Amendment questions because, as the

government argued below, see Gov't C.A. Br. 37-38, suppression of evidence resulting from any intrusion onto petitioner's curtilage would be unwarranted in light of the good-faith exception to the exclusionary rule.

The exclusionary rule is a "judicially created remedy" designed to "safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Leon, 468 U.S. 897, 906 (1984) (citation omitted). This Court has emphasized, however, that suppression is an "extreme sanction," id. at 916, because the "exclusion of relevant incriminating evidence always entails" "grave" societal costs, Hudson v. Michigan, 547 U.S. 586, 595 (2006). Most obviously, it allows "guilty and possibly dangerous defendants [to] go free -- something that 'offends basic concepts of the criminal justice system.'" Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Leon, 468 U.S. at 908).

This Court has thus held that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144. Suppression may be warranted "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." Davis v. United States, 564 U.S. 229, 238 (2011) (citation omitted). "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, * * * the deterrence rationale

loses much of its force, and exclusion cannot pay its way." Ibid. (citations and internal quotation marks omitted). Reliance on binding appellate precedent can establish the applicability of the good-faith exception. Id. at 239-241.

As the government argued in the court of appeals, under those principles, suppression would not be appropriate here even if the agent's actions were held to violate the Fourth Amendment. Gov't C.A. Br. 37-38. The court of appeals identified two of its precedents that, "[t]hough prior to the Collins ruling, * * * survive Collins and are factually more on point." Pet. App. A8. Those decisions -- United States v. Galaviz, 645 F.3d 347 (6th Cir. 2011), and United States v. Estes, 343 Fed. Appx. 97 (6th Cir. 2009), cert. denied, 558 U.S. 1134 (2010) -- "involved driveways with similar characteristics to the one here: adjacent to a home, not enclosed, abutting a sidewalk or alley, with no steps taken to obstruct the view of passersby." Pet. App. A8. As the court of appeals noted, "[i]n both instances, th[e] court held that the officers did not intrude upon the building's curtilage by entering the driveway." Ibid. Petitioner does not attempt to distinguish these precedents but instead simply asserts (Pet. 11) that "the Sixth Circuit fell back on its own pre-Collins case law to uphold the intrusion on [his] curtilage." Even if petitioner were correct that this Court's May 2018 decision in Collins effectively abrogated Galaviz and Estes, it was reasonable for the ATF agent to rely on those appellate precedents at the time he

installed the tracking devices in April 2017. Under these circumstances, petitioner has not demonstrated that the agent displayed the sort of "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" that is required to justify the high costs of suppression. Davis, 564 U.S. at 238 (citation omitted).

2. Petitioner separately contends (Pet. 27-32) that he is entitled to resentencing under a provision of the First Step Act that alters the predicate offenses associated with the recidivist drug-trafficking enhancement set forth in 21 U.S.C. 841(b)(1)(A) (2012). This Court recently denied a petition for a writ of certiorari that presented a similar issue in a case from the same circuit. See Sanchez v. United States, No. 18-9070, 2019 WL 4921588 (Oct. 7, 2019). It should do likewise here.

a. Petitioner was sentenced under 21 U.S.C. 841(b)(1)(B)(ii) (2012). Judgment 1; PSR ¶ 89. At the time of petitioner's 2017 offense conduct and his January 2018 sentencing, Section 841(b)(1)(B) provided for a minimum penalty of ten years of imprisonment for a defendant who conspired to commit a violation of 21 U.S.C. 841(a) involving 500 grams or more of a substance containing cocaine "after a prior conviction for a felony drug offense ha[d] become final." 21 U.S.C. 841(b)(1)(B) (2012); see 21 U.S.C. 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of

which was the object of the attempt or conspiracy."). Section 401(a) of the First Step Act altered the predicate offenses that trigger the enhanced penalty. See § 401(a)(2)(A)(ii), 132 Stat. 5220 (amending 21 U.S.C. 841(b)(1)(B) (2012) to replace the term "felony drug offense" with the term "serious drug felony"); see also § 401(a)(1), 132 Stat. 5220 (amending 21 U.S.C. 802 to add a new definition of "serious drug felony"). Petitioner contends (Pet. 27-28) that, if he "were to face sentencing today, he would not qualify for the ten-year mandatory minimum sentence he is now serving" because he "does not have a prior drug conviction involving a sentence in excess of twelve months," the new threshold for "serious drug felon[ies]."

Petitioner, however, is not eligible to benefit from that amendment. Section 401(c) of the First Step Act provides that "the amendments made by [Section 401] 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." § 401(c), 132 Stat. 5221 (emphasis added). Petitioner's sentence was imposed on January 23, 2018, see Judgment 1 -- well before the First Step Act was enacted on December 21, 2018. See 18 U.S.C. 3553 ("Imposition of a sentence") (emphasis omitted). Accordingly, the amendments made by Section 401 do not apply to petitioner's offense.

b. This Court recently granted two petitions for writs of certiorari, vacated the respective judgments, and remanded to the

courts of appeals to consider the First Step Act, notwithstanding the government's contention that the defendants' sentences had been imposed before the enactment of the statute. See Richardson v. United States, 139 S. Ct. 2713 (2019); Wheeler v. United States, 139 S. Ct. 2664 (2019).* But the Court has denied petitions in a similar posture to this one. See Sanchez, supra; Pizarro v. United States, No. 18-9789, 2019 WL 4922424 (Oct. 7, 2019). A similar disposition is warranted here, because petitioner's argument on remand would be foreclosed by binding, correct, and uncontroverted circuit precedent.

In United States v. Wiseman, 932 F.3d 411 (2019), the Sixth Circuit determined that a defendant could not benefit from Section 401's amendment to the recidivist drug-trafficking enhancement on direct appeal when he was sentenced before the effective date of the First Step Act. The court observed that "the First Step Act is largely forward-looking and not retroactive, applying only where 'a sentence for the offense has not been imposed as of [the] date of enactment.'" Id. at 417 (citation omitted; brackets in original). Because "[t]he First Step Act had an effective date of December 21, 2018, but Wiseman was sentenced on September 19,

* Richardson concerned Section 403(b) of the First Step Act, governing the applicability of Section 403, whereas Wheeler concerned Section 401(c), the same provision at issue here. See Br. in Opp. at 12-16, Richardson, supra (No. 18-7036); Br. in Opp. at 22-25, Wheeler, supra (No. 18-7187). The two provisions have the same wording.

2018," the Act's "limited retroactivity d[id] not apply to him." Ibid.

Petitioner does not attempt to distinguish Wiseman, nor does he assert a circuit conflict. Indeed, the Seventh Circuit recently agreed with the Sixth Circuit's decision in Wiseman, likewise determining that a defendant's "[s]entence was 'imposed' * * * within the meaning of § 401(c) when the district court sentenced the defendant, regardless of whether he appealed a sentence that was consistent with applicable law at that time it was imposed." United States v. Pierson, 925 F.3d 913, 928 (2019). And the Third Circuit joined the consensus last month, observing that "'[i]mposing' sentences is the business of district courts" and "Congress's use of the word 'imposed' thus clearly excludes cases in which a sentencing order has been entered by a district court [before December 21, 2018] from the reach of the amendments made by the First Step Act." United States v. Aviles, 938 F.3d 503, 510 (2019). No court of appeals has held otherwise, and no reason exists to believe the Sixth Circuit would revisit its holding if this case were remanded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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