No. 19-5445

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD LEWIS COLEMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

ARGUMENT

I. Review of the Fourth Amendment issues here is appropriate because the good-faith exception to the warrant requirement should not shield officers who did not take advantage of their opportunity to ask the magistrate to approve (or the magistrate refused to condone) their intrusion onto protected curtilage.

In its reply, the government argues in favor of applying the good-faith exception to the warrant requirement here, and it tries to make the case that exclusion would provide too drastic a remedy. *See* Opposition Br., pg. 11-12. This position, however, cannot prevail because the officers and agents involved in this case had the opportunity to seek the magistrate's approval of any intrusion onto protected curtilage, and either the officers failed to ask for that approval or the magistrate specifically withheld it. The magistrate judge did not check the box on either of the warrant applications here:

YOU ARE COMMANDED to execute this warrant and begin using the object or installing the tracking device by April 29, 2017 *(not to exceed ten days)* and may continue use for 45 days *(not to exceed 45)*. The tracking may occur within this district or another district. To install, maintain, or remove the device, you may enter *(check boxes as appropriate)*

☑ into the vehicle described above ☐ onto the private property described above

☐ in the daytime 6:00 a.m. to 10:00 p.m. ☑ at any time in the day or night because good cause has been established.

As Mr. Coleman has already highlighted in his original petition, the magistrate judge in this case did not check the boxes to allow entry onto private property. *See* Petition for Writ, pg. 6; *see also* Dist. Ct. RE. 30-2: Br. in Support of Motion to Suppress, Tracking Warrants, PageID 136; RE. 30-3: Br. in Support of Motion to Suppress, Tracking Warrants, PageID 148.

Likewise, the government cannot turn to old Sixth Circuit case law to prevail in this case. *See* Opposition Br., pg. 12. In citing *United States v. Galaviz*, 645 F.3d

347 (6th Cir. 2011), and *United States v. Estes*, 343 F. App`x 97 (6th Cir. 2009), for the proposition that "it was reasonable for the ATF agent to rely on those appellate precedents at the time he installed the tracking devices in April 2017," the government ignores the nature of those older cases and—again—the opportunity the agent enjoyed to have the magistrate approve, with the box on the warrant application, the intrusion onto Fourth Amendment-protected curtilage. The court's conclusions in *Galaviz* rested on "the characteristics of the driveway," and it was only because of these characteristics that the court found that the driveway "was not within the protected curtilage of the house." *Galaviz*, 645 F.3d at 355. The courted took note that "the portion of the driveway where [the defendant's] car was parked directly abutt[ed] the *public* sidewalk." *Id.* at 356 (emphasis added). And "no apparent steps were taken by the residents of the house to protect the driveway from observation by passersby—no hedges or bushes obstructed the view of the driveway from the sidewalk or street, for example." *Id.*

In *Estes*, the Sixth Circuit analyzed the nature of the subject driveway and pointed out—twice—that driveway's location beside an alley. *Estes*, 343 F. App`x at 101. The court admonished that the driveway was "accessible from the adjacent alley." *Id.* And as in *Galaviz*, the defendant had not taken steps to protect the area from observation by passersby. *Id.* The private, protected, one could even say "sheltered," nature of the surrounding condominium complex in Mr. Coleman's case handily distinguishes his case from those of *Galaviz* and *Estes*.

In denying review in *Illinois v. Bonilla*, No. 18-1219 (cert. denied Oct. 7, 2019), this Court seems to have implicitly approved the Illinois Supreme Court's ruling in that case—and lent support to Mr. Coleman's position. In *Bonilla*, of course, the Illinois Supreme Court had held that the search in question had "violated the Fourth Amendment because the warrant issued based on the positive alert of a drug detection dog in the *common area hallway* outside of respondent's apartment door." *Bonilla*, No. 18-1219 (Petition for Writ of Cert., pg. 2) (emphasis added). The Illinois Supreme Court declined to apply the good-faith exception. *Id.* at 2-3. The state in that case asked this Court to grant review and resolve the "deep split" on these issues. *Id.* at 3. Even as the state framed the conclusions of the Illinois Supreme Court, that court likened the common areas of apartment buildings to protected curtilage, like porches. *See id.* at 4. The Illinois Supreme Court explicitly rejected the exact arguments the government makes in Mr. Coleman's case, including arguments related to good faith based on readily distinguishable precedent. *Id.* at 5 (discussing the perspectives of the Illinois Supreme Court justices who dissented in *Bonilla*). In allowing the *Bonilla* decision to stand, this Court seems to have approved, at least to some degree, the Illinois Supreme Court's reasoning.

Multi-family or "communal" dwellings and housing choices only continue to grow in prevalence. The growth of urban settings, the need to optimize land use in crowded regions, and population and environmental concerns as a whole fuel the popularity of these housing arrangements. Fourth Amendment concerns cannot and should not hinge on the nature of the housing a person chooses. *Cf. id.* at 10 (citing

the Seventh Circuit's conclusions in *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016)). A driveway constitutes protected curtilage, regardless of whether another family may "share" it. *Cf.* Opposition Br., pg. 10.

Recognizing the protected nature of communal spaces within multi-family housing enclaves ensures, too, that the Fourth Amendment's reach does not get curtailed for those who perhaps cannot afford a private, landscaped, set back home in the suburbs or country. *Compare Whitaker*, 820 F.3d at 854. The *Whitaker* court pointed out that "a strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." According to the Census's American Housing Survey for 2013, 67.8% of households composed solely of white residents live in one-unit detached houses. *Id.* For households solely composed of African Americans, that number dropped to 47.2%. *Id.* For Hispanic households, that number came to 52.1%. *Id.* Statistically, "[t]he percentage of households that live in single-unit, detached houses consistently rises with income." *Id.*

While a condominium complex like Mr. Coleman's may not raise exactly the same socio-economic concerns, the Fourth Amendment stakes remain the same, and protecting the communal spaces of private communities serves the same Fourth Amendment purposes as protecting the common areas of apartment buildings. One can draw an analogy to this Court's statement in *Collins* that, "[s]o long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully

enclosed garage." *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018). The Court in *Collins* rejected the idea of affording greater protections to more "lavish" housing arrangements. In that case, the state's "proposed bright-line rule automatically would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage." *Id.*

Denying application of the good-faith exception in Mr. Coleman's case would not punish "innocent," "nonculpable" police behavior. *Cf. Bonilla*, No. 18-1219 (Petition for Writ of Cert., pg. 13). One can hardly call innocent an agent's failure to have a magistrate approve his or her intrusion onto protected curtilage when such approval involves a simple review and check of a box on a warrant application. As in *Bonilla*, the agent "knew very well" that Mr. Coleman's driveway "was not a public sidewalk." *See Bonilla*, No. 18-1219 (Opposition Br., pg. 20).

Nor would denying application of the exception create jurisprudential upheaval. As Mr. Bonilla pointed out in his brief in opposition to certiorari, no gaping jurisprudential schism exists in this context. *See id.* at 6, 11. While Mr. Bonilla circled the wagons and read the Illinois Supreme Court's conclusions narrowly in his case—to protect the outcome—his suggestion that the case did not address "common areas such as lobbies, basements, parking lots, or hallways" does not impede Mr. Coleman's position here at all. *Cf. id.* at 6, 10. The Illinois Supreme Court's decision did not involve those things. It involved a threshold that enjoys protections very similar to

those of the curtilage of a driveway. *Compare Collins*, 138 S. Ct. at 1674-75; *see also Bonilla*, No. 18-1219 (Opposition Br., pg. 18 ("The threshold of the door to a unit in a multi-unit dwelling . . . is much more like a driveway") (citing *Collins*)).

As Mr. *Bonilla* distilled the issues, "the lower courts are generally coalescing around a sensible distinction": Officers "may conduct uninvited dog sniffs in common areas not immediately adjacent to individual units, such as shared basements and parking lots, where many people share the same space," but they may not conduct these sniffs at the threshold of units, "where a resident does not reasonably expect anyone but himself to be present except for very short periods of time and for certain narrow purposes, such as when guests ring the doorbell." *Id.* at 11. This distillation of the *Bonilla* holding, taken in conjunction with *Collins*, supports Mr. Coleman's position. This Court should grant review here and clarify support for the *Bonilla* position.

II. This Court's jurisprudence suggests that preservation provides the key in these First Step Act cases: defendants who properly preserved their First Step Act issues have received relief in the form of GVR dispositions, while defendants who failed to raise their issues in the lower courts (or as soon as possible) have received no review or relief at all. Mr. Coleman raised his issues as soon as possible.

In support of denying Mr. Coleman any sort of relief on the issue of applying the First Step Act, the government points out two cases, namely *Sanchez v. United States*, No. 18-9070 (cert. denied Oct. 7, 2019), and *Pizarro v. United States*, No. 18-9789 (cert. denied Oct. 7, 2019). In each of those cases, the defendant-petitioners had failed to raise their First Step Act claims as soon as possible, failing to bring them in the appellate courts in any form. Rather, they waited and raised the issues for the

first time before this Court. *See United States v. Pizarro*, No. 18-30201 (5th Cir. 2018); *United States v. Sanchez*, No. 18-1092 (6th Cir. 2018). In *Pizarro*, the appellant's Fifth Circuit brief raised a single issue—one related to Rule 404(b) other-acts evidence—and made no mention of the First Step Act. No reply brief appears on the Fifth Circuit docket, nor do any letters with additional citations under Federal Rule of Appellate Procedure 28(j). The petition for rehearing made no mention of the First Step Act. In *Sanchez*, the case revolved around three trial issues. The First Step Act appears in none of the briefs in the case. Nor does a Rule 28(j) letter or anything similar appear docketed.

The First Step Act first arose as an issue in Mr. Sanchez's case in his petition for a writ of certiorari, filed in this Court April 30, 2019. *See Sanchez*, No. 18-9070 (Petition for Writ of Cert., pg. 19) (conceding that "[t]his issue was not raised in the Sixth Circuit"). As the government pointed out, this Court had recently granted writs of certiorari, vacated judgments, and "remanded in two matters presenting substantially the same question" of application of the First Step Act. *Sanchez*, No. 18-9070 (Opposition Br., pg. 7). It cited *Richardson v. United States*, No. 18-7036 (cert. granted June 17, 2019), and *Wheeler v. United States*, No. 18-7187 (cert. granted June 3, 2019). *Id.* These cases involved First Step Act claims raised in supplemental briefs filed shortly after passage of the First Step Act while the petitioners were seeking review of other issues in this Court. *See Richardson*, No. 18-7036 (Supp. Br., pg. 2); *Wheeler*, No. 18-7187 (Supp. Br., pg. 1). In *Richardson*, the petitioner argued that the First Step Act's amendments to the provisions of 18 U.S.C. § 924(c) should apply to

him. *Richardson*, No. 18-7036 (Supp. Br., pg. 4). The provision addressing application of those amendments to defendants with cases pending at the time of the act's passage tracks the language at issue in Mr. Coleman's case—the language of § 401(c) of the First Step Act. The government acknowledges this congruence. *See* Opposition Br., pg. 15 n.*. In *Wheeler*, the petitioner made the same argument Mr. Coleman is making, related to § 401(c) of the act. *See Wheeler*, No. 18-7187 (Supp. Br., pg. 4).

In *Richardson* and *Wheeler*, of course, this Court granted certiorari, vacated the judgments, and remanded. Unlike the defendants in those cases, however, the government said in *Sanchez*, the *Sanchez* "petitioner had the opportunity to present his First Step Act claim to the court of appeals in the first instance," and "[h]e failed to do so, thus forfeiting the claim and obviating any grounds to remand." *Sanchez*, No. 18-9070 (Opposition Br., pg. 7).

Later, the government reiterated that, "[u]nlike the defendants in [*Richardson* and *Wheeler*], petitioner [in *Sanchez*] had the opportunity to present his claim for resentencing under the First Step Act to the court of appeals, but he failed to do so." *Id.* at 12. Likewise, in *Pizarro*, the act arose in the first place in Mr. Pizarro's petition for a writ of certiorari—application of the act appeared as the sole issue. *See Pizarro*, No. 18-9789 (Petition for Writ of Cert., pg. i). Mr. Pizarro stated that, "[i]n light of [his] initial understanding of [the First Step Act's] language, he did not attempt to supplement his appellate argument with a claim to entitlement to the application of the lower of [sic] statutory maximum given that the district court imposed sentence several months before the enactment date of the First Step Act." *Id.* at 2. And as in

Sanchez, the government argued that, "[u]nlike the defendants in [*Richardson* and *Wheeler*], however, petitioner had the opportunity to present his First Step Act claim to the court of appeals in the first instance," but "[h]e failed to do so, thus forfeiting the claim and obviating any grounds to remand here." *Pizarro*, No. 18-9789 (Opposition Br., pg. 4). It asked that the Court deny Mr. Pizarro a writ of certiorari. *Id.*

Mr. Coleman, in contrast to the petitioners in *Sanchez* and *Pizarro*, raised his First Step Act arguments as soon as possible, filing a letter of additional citation under Federal Rule of Appellate Procedure 28(j) in the Sixth Circuit. *See United States v. Coleman*, No. 18-1083 (6th Cir. docket entry 38, filed Jan. 15, 2019). Likewise, Mr. Coleman raised the issue during oral argument on January 17, 2019. This procedural background places his case beside those of *Richardson* and *Wheeler* and distinguishes it from *Sanchez* and *Pizarro*. Thus, should the Court not grant review of his Fourth Amendment issues, he should at least receive the grant of certiorari on the First Step Act issue, the vacating of his judgment, and the remand that *Richardson* and *Wheeler* received.

The Sixth Circuit's decision in *United States v. Wiseman*, 932 F.3d 411 (6th Cir. 2019), does not alter this conclusion. As Mr. Pizarro pointed out in his reply to the government's brief in opposition to his petition before this Court, the *Wiseman* court failed to acknowledge this Court's disposition of *Richardson* and *Wheeler*. *See Pizarro*, No. 18-9789 (Reply Br., pg. 1 n.2). Given the timing of each of these decisions, the *Wiseman* court may not have even considered the *Richardson* and *Wheeler* results.

This Court granted the *Wheeler* petition on June 3, 2019, and judgment entered July 5, 2019. It granted the *Richardson* petition on June 17, 2019, and judgment entered July 19, 2019. The *Wiseman* decision came out July 26, 2019. Going beyond this timing, the *Wiseman* court's discussion of application of the First Step Act's provisions and § 401(c) is, at best, dicta. The case actually revolved around the fact the First Step Act did not alter 21 U.S.C. § 841(b)(1)(C)'s provisions. *See Wiseman*, 932 F.3d 411, 2019 U.S. App. LEXIS 22290, at *9-*10.

Simply, the *Wiseman* court's consideration of § 401(c) had no bearing on the outcome of the case. Because the *Wiseman* defendant "was convicted under 21 U.S.C. § 841(b)(1)(C), not § 841(b)(1)(A) or (B), the First Step Act's narrowing of qualifying convictions to serious drug felonies rather than felony drug offenses under those provisions would not impact him, even if he had been sentenced after the First Step Act's effective date." *Id.* at *10.

Even considering the *Wiseman* court's dicta on § 401(c), that discussion adds nothing to the jurisprudence surrounding these matters. The court dismissed the question in a single paragraph, addressing none of the arguments Mr. Coleman and the petitioners in *Richardson* and *Wheeler* have presented. The *Wiseman* court failed to even mention the Rule of Lenity and never cited this Court's decisions in *Hamm v. City of Rock Hill*, 379 U.S. 306, 308 (1964), and *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Cf. id.* at *9. In *Hamm*, as Mr. Coleman and the petitioners in *Wheeler* and *Richardson* have all pointed out in their supplemental briefs, this Court concluded that, while the conduct at issue in that case (and the prosecutions and convictions)

occurred prior to enactment of the Civil Rights Act of 1964, "the still-pending convictions were abated by [that Act's] passage." *Hamm*, 379 U.S. at 308. In *Griffith*, this Court held 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. at 328.

CONCLUSION

For these reasons and those in his original and supplemental briefs, Mr. Coleman asks this Honorable Court to grant this Petition for a Writ of Certiorari, vacate the Judgment of the Sixth Circuit Court of Appeals, and remand for reconsideration of his conviction and sentence in light of this Court's Fourth Amendment jurisprudence and the provisions of the First Step Act.

Dated: November 6, 2019

Respectfully Submitted,

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