No.

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES MASSENGILL,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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DENNIS C. BELLI
536 South High St. Fl. 2
Columbus, Ohio 43215-5785
Phone:(614) 300-2911
Fax: (888) 901-8040
Email:
bellilawoffice@yahoo.com
ATTORNEY FOR PETITIONER

## QUESTION PRESENTED FOR REVIEW

Whether reasonable suspicion is required for a law enforcement officer to conduct a warrantless search of a parolee or his residence in the absence of a state statute authorizing a suspicionless search by someone other than a parole officer?

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Petitioner Charles Massengill ("Petitioner") respectfully prays that a writ of certiorari will issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in Case No. 17-5249 on May 1, 2019.

## OPINION BELOW

On May 1, 2019, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed an opinion and order affirming Petitioner's convictions and sentence for multiple narcotics and firearm offenses. (App. 1a). The opinion is unofficially reported at 769 Fed.Appx. 342. The court of appeals denied Petitioner's petition for rehearing en banc by

order filed June 12, 2019. (App. 2a) The United States District Court entered its criminal judgment on February 28, 2017. (App. 19a).

## JURISDICTION

Petitioner seeks review of the opinion and order of the United States Court of Appeals for the Sixth Circuit entered on May 1, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), which permits a party to petition to review any civil or criminal case before or after rendition of judgment or decree.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Fourth Amendment:

> 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.

Tenn. Code Ann. §40-28-102(6):

> "Parole" means the release of a prisoner to the community by the board prior to the expiration of the prisoner's term subject to conditions imposed by the board and to supervision by the department, or when a court or other authority has issued a warrant against the prisoner and the board, in its discretion, has released the prisoner to answer the warrant of the court or authority[.]

## STATEMENT OF THE CASE

Petitioner served a lengthy term of imprisonment in the State of Georgia for robbery and aggravated assault. Following his release from confinement in 2010, his parole supervision was transferred to the State of Tennessee pursuant to an interstate compact.

Petitioner was required to sign an agreement with the Tennessee authorities as a condition of the transfer of his parole supervision. The parole certificate purported to authorize "a search without a warrant of his person, vehicle, property or place of residence by any probation or parole officer or law enforcement officer at any time without reasonable suspicion."

In 2014, Petitioner was living in a single-family dwelling in Cleveland, Tennessee. In early May, an informant told Detective Marshall Hicks of the Bradley County Sheriff's Office that Petitioner was engaged in illegal activity involving methamphetamine.

On May 14, 2014, Detective Hicks and members of the Tenth Judicial Drug Task Force traveled to Petitioner's residence to conduct a "parolee search."[1] After gaining entry, they found Petitioner inside the premises along with two young females.

A search of the bedroom resulted in the seizure of approximately 1.1 kilograms of methamphetamine, 1.3 kilograms of marijuana, a 9 mm. handgun, and over $100,000 in

[1]Testimony elicited during a suppression hearing established that a"parolee search" is a device used by task force officers to circumvent the process for obtaining a search warrant in instances where probable cause is lacking. The detective admitted that task force officers never bring a parole officer to accompany them during the search.

cash. Petitioner was restrained with handcuffs in the living room during the course of the "parolee search."

Following his arrest, the federal grand jury of the Eastern District of Tennessee indicted Petitioner for conspiracy to possess with intent to distribute 500 or more grams of a mixture containing methamphetamine; possession with intent to distribute 50 or more grams of actual methamphetamine, or 500 or more grams of a mixture containing methamphetamine; possession with intent to distribute marijuana; possession of a firearm in furtherance of a drug trafficking crime; and being a felon in possession of a firearm.

Petitioner's attorney filed a motion to suppress the drugs and firearm seized from his client's residence. He asserted that the so-called "parolee search" had "evolved into a pretextual method of avoiding the necessity of attempting to obtain a search warrant where the officer is unable to do so." The attorney argued that the search "was totally void of any element of parole supervision and ha[d] crossed the line into a pure law enforcement investigative tool." Following an evidentiary hearing, the district judge denied the motion.

At trial, the government offered into evidence the drugs and handgun seized from Petitioner's bedroom. A jury found Petitioner guilty of all counts. The district judge sentenced him to an aggregate prison term of 264 months and a five-year term of supervised release.

On direct appeal, Petitioner challenged the legality of the "parolee search" and the denial of his motion to suppress. The court of appeals affirmed the district court judgment.

## REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

### REASONABLE SUSPICION IS REQUIRED FOR A LAW ENFORCEMENT OFFICER TO CONDUCT A WARRANTLESS SEARCH OF A PAROLEE OR HIS RESIDENCE IN THE ABSENCE OF A STATE STATUTE AUTHORIZING A SUSPICIONLESS SEARCH BY SOMEONE OTHER THAN A PAROLE OFFICER.

In affirming the district court's denial of Petitioner's motion to suppress, the court of appeals stated that "*Samson* [*v. California*, 547 U.S. 843 (2006)] governs here, as Massengill signed a clear and unambiguous warrantless search condition on the parole certificate, diminishing his reasonable expectation of privacy. Given Tennessee's interest in adequately supervising Massengill's parole status, the parolee search of his residence was reasonable[.]" (App. 8a)

*Samson* involved a challenge by a parolee to a California law requiring every prisoner eligible for parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." The issue before the Court was "whether a suspicionless search, *conducted under the authority of this statute*, violates the Constitution." *Id*. 547 U.S. at 846 (emphasis supplied). This Court held that the statute was constitutional under the Fourth Amendment. *Id.* at 857.

The majority opinion explained that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id*. at 850. It pointed out that "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules

during the balance of the sentence." *Id*. quoting *Morrisey v. Brewer*, 408 U.S. 471, 477 (1972).

The majority opinion recognized that "[t]he California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders." This conclusion, said the Court, made "eminent sense." *Id*. at 854.

There is conflict in the Circuits as to the question of whether the rule announced in *Samson* - dispensing with the need for reasonable suspicion to justify a warrantless search of a parolee - applies in jurisdictions that have not enacted a statute similar to the one in California. Several appellate panels have upheld a warrantless, suspicionless search of a parolee based solely on authorizing language in a parole agreement, even in the absence of specific statutory authorization. *See United States v. Massey*, 461 F.3d 177, 179 (2d Cir.2006); *United States v. Pickens*, 295 Fed.Appx. 556, 558 (4th Cir. 2008).

The court of appeals in *United States v. Freeman*, 479 F.3d 743, 748 (10th Cir. 2007) has taken a significantly narrower view. The Tenth Circuit held that a warrantless search of a parolee under a Kansas statute must be supported by reasonable suspicion, explaining:

> Samson does not represent a blanket approval for warrantless parolee or probationer searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law. Kansas has not gone as far as California in authorizing such searches, and this search therefore was not permissible in the absence of reasonable suspicion.

*Id.* 479 F.3d at 748. A parolee search, said the Tenth Circuit panel, falls within the "the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law." *Id.* at 747-48.

Neither the Sixth Circuit panel nor the government in Petitioner's case identified a state statute authorizing a suspicionless search of a parolee in the State of Tennessee. The statute defining "parole" under Tennessee law merely provides that the release of a prisoner into the community prior to the expiration of his sentence shall be "subject to conditions imposed by the board [of parole] and to supervision by the department [of correction]." Tenn. Code Ann. §40-28-102(6).

Under the approach taken in *Freeman*, the parole certificate signed by Petitioner was not sufficient to eliminate the reasonable suspicion requirement to conduct a "parolee search." The failure to enforce a reasonable suspicion standard in Petitioner's case was prejudicial.

During the suppression hearing, Detective Hicks testified that he has used a "parolee search" on at least three prior occasions as a device for bypassing an application for a search warrant in instances where he did not have probable cause. He admitted he has never brought a parole officer with him during such searches. He acknowledged his purpose in conducting a "parolee search" is to "investigate" a possible drug offense, not a parole violation. He conceded this was his purpose in traveling to Massengill's residence.

Detective Hicks gave conflicting responses to questions regarding the nature of the tip from the informant. On direct examination, he said he was told "Mr. Massengill was

selling large amounts of methamphetamine" and "was known to have a gun." On cross-examination, the witness initially stated the informant had personally observed the drug sales. Yet two questions later, he said he did not know whether the tip was based on the informant's observations. Later in the cross-examination, the detective stated the informant "smoked methamphetamine with Mr. Massengill" and may have "assumed" he was selling the methamphetamine.

The detective acknowledged the informant was seeking favorable treatment in respect to a pending drug charge. The prosecutor agreed to recommend probation in lieu of a jail sentence in exchange for his information.

Reasonable suspicion means "a particularized and objective basis for suspecting criminal activity." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The informant's tip was too flimsy to provide a reasonable and objective basis to justify a warrantless search. Detective Hicks all but conceded he did not have probable cause to obtain a search warrant. Tellingly, even after being informed of the allegations, Massengill's parole office declined to accompany the detective during the search.

In sum, the district court's denial of Petitioner's motion to suppress rested entirely on the search condition in the Tennessee parole certificate. The court did not make a finding as to whether reasonable suspicion existed to justify the intrusion of his privacy interests. The court did not consider whether this intrusion furthered a legitimate law enforcement concern. This ruling deprived Petitioner of the protections against unreasonable search and seizure under the Fourth Amendment.

## CONCLUSION

The is a clear conflict between the decision of the Sixth Circuit in Petitioner's case and the Tenth Circuit's decision in *Freeman*. The Tenth Circuit has held that reasonable suspicion of wrongdoing is required for a law enforcement officer to search a parolee or his residence unless a state statute authorizes a suspicionless search. The Sixth Circuit has taken the opposite position. In fact, it has gone so far as to permit a suspicionless search if such a condition is verbally communicated to the parolee during video and orientation discussions. *United States v. Smith*, 526 F.3d 306, 310 (6th Cir. 2008).

For the foregoing reasons, Petitioner asks this Court to grant his petition for a writ of certiorari to resolve the conflict and settle the law on this important issue.

Respectfully submitted,

Dated: August 27 , 2019

s/Dennis C. Belli

DENNIS C. BELLI
ATTORNEY FOR PETITIONER