NO. _____

In The
Supreme Court of the United States

ALVIN ANDRAE DRUMMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Joshua S. Kendrick
Counsel of Record
KENDRICK & LEONARD, P.C.
Post Office Box 6938
Greenville, South Carolina 29606
(864) 760-4000
josh@jkendrickleonard.com

Counsel for Petitioner

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THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

Petitioner Alvin Drummond presents two questions for this Court's review:

1. Whether a misdemeanor crime of violence, not aggravated by any additional force, can properly meet the elements of an Armed Career Criminal Act predicate when it can be committed without physical force as understood under that Act?

2. Whether a search can be conducted pursuant to a search warrant when an affidavit provides no probable cause to support that warrant?

LIST OF PARTIES

Petitioner Alvin Drummond was the Defendant and Appellant below.

The United States of America was the Plaintiff and Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and there are no corporate interests to disclose.

DIRECTLY RELATED PROCEEDINGS

The following proceedings are directly related to this case:

United States v. Alvin Drummond, 6:17-cr-00517-HMH-1, United States District Court, District of South Carolina (Greenville Division), judgment entered March 28, 2018 (App. p. 31a)

United States v. Alvin Drummond, 18-4197, United States Court of Appeals for the Fourth Circuit, petition for rehearing en banc denied September 19, 2019 (App. p. 37a)

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The Fourth Circuit issued a published opinion in *United States v. Drummond*, 925 F.3d 681 (4th Cir. 2019) (App. p. 1a).

STATEMENT OF JURISDICTION

The Fourth Circuit denied a petition for rehearing *en banc* on September 19, 2019. 28 U.S.C. § 1254(1) authorizes jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first question presented involves the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) which states:

> In the case of a person who violates section 922(g) of this title [18 U.S.C.S. § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 U.S.C.S. § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 U.S.C.S. § 922(g)].

This case involves the "violent felony" portion of the statute, 18 U.S.C. § 924(e)(2)(B)(i), which states:

> …the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year … that – has as an element the use, attempted use, or threatened use of physical force against the person of another…

The second question presented involves the Fourth Amendment to the United States Constitution, which states:

> 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.

The Fourth Amendment is applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

Deputy Katharine McGrath, of the Greenville County Sheriff's Office, received a narcotics tip that Nicholas Finley was selling drugs out of a room at the Red Roof Inn in Greenville, South Carolina. Deputy McGrath obtained a written statement from "J.W." regarding Finley's sale of narcotics and firearms. She looked up his record, recognized he was a convicted felon, and began an investigation.

McGrath also testified another witness, "R.B.", gave her a tip Finley was selling drugs out of Room 131 at the Red Roof Inn. McGrath went to the motel on May 11, 2017 to check it out.

McGrath drove to Room 131 at the motel and saw a car parked in front of the room. It was the only car in the parking lot. The car had a paper tag McGrath thought looked false. She got out of her car to look at the Vehicle Identification Number.

As McGrath exited the car, Nicholas Finley came to the door of the hotel room with a large pit bull. McGrath asked if she could enter the hotel room and, according to her testimony at the suppression hearing, Finley consented.

McGrath went inside the motel room. Finley took the dog to the bathroom. Finley told her it was his motel room and McGrath said no one else spoke up in response to her question about whose room it was.

McGrath noticed a large amount of people in the room, which she testified was suspicious. She then asked all the occupants for their identification. McGrath asked

Finley if anyone else was in the room because he had put the dog in the bathroom. Finley denied anyone else was in the bathroom.

Finley gave McGrath permission to check the bathroom to see if anyone else was there. When she entered the bathroom, McGrath said she saw a female sitting on the floor and an orange hypodermic needle cap. McGrath described the needle cap as being significant because it would have gone to a hypodermic needle.[1] McGrath asked the room if anyone had any medical reason they would need a hypodermic needle and said she got no responses. She then obtained a search warrant for the room.

The search warrant was based on the following factors: a tipster had identified Finley as selling drugs from the motel room; there was a vehicle with paper tags present; there were a large number of people in the room; Finley did not tell her about the female in the bathroom; and there was a hypodermic needle cap in the room. The search warrant was granted.

The ensuing search uncovered a backpack in the room containing a Smith & Wesson revolver and ammunition. Based on papers also found in the backpack, Drummond was arrested for being a felon in possession of a firearm and ammunition.

Drummond went to trial and was convicted on August 28, 2017. At sentencing, three alleged prior crimes of violence triggered the Armed Career Criminal Act (ACCA) and its fifteen-year mandatory minimum, as well as an enhanced guidelines range.

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[1] Though the needle cap would become a critical part of the suppression motion, it was never introduced into evidence nor was a picture of it produced.

Drummond objected to the application of the ACCA, arguing two Criminal Domestic Violence High and Aggravated and one Criminal Domestic Violence, 3rd Offense were not crimes of violence. His argument was founded on the theory that a South Carolina criminal domestic violence offense was not a crime of violence. The Fourth Circuit had established the "high and aggravated" portion of the statute would not elevate the offense to a "crime of violence." Only the underlying criminal domestic violence offense's classification as a violent crime could elevate the convictions to predicates for the ACCA. Those objections were overruled at sentencing.

The district court found Drummond was subject to a 15-year mandatory minimum and an advisory guidelines range of 235 to 293 months. Drummond was sentenced to 247 months incarceration.

REASONS FOR GRANTING THE PETITION

1. Whether a misdemeanor crime of violence, not aggravated by any additional force, can properly meet the elements of an Armed Career Criminal Act (ACCA) predicate when it can be committed without physical force as understood under that Act?

The decision below was wrong

A South Carolina criminal domestic violence (CDV) charge does not require the requisite force necessary to qualify as an ACCA predicate. The Fourth Circuit based its ruling on the theory that a CDV required more than a South Carolina assault, which it has held does not qualify as an ACCA predicate. *Drummond*, 925 F.3d at 691.

The Fourth Circuit opinion in this case disregards a South Carolina state appellate opinion interpreting South Carolina law. The South Carolina Court of Appeals held in *State v. Lacoste* that criminal domestic violence is simple assault against a household member. 553 S.E.2d 464, 472 (S.C. Ct. App. 2001). The opinion below reaches the opposite conclusion. South Carolina criminal domestic violence involves an assault on a household member and nothing more, contrary to the Fourth Circuit's opinion.

The Fourth Circuit previously found, in a published opinion, that the South Carolina crime of assault and battery of a high and aggravated nature does not involve "physical force" as required by the Armed Career Criminal Act. *United States v. Hemingway*, 734 F.3d 323, 335 (4th Cir. 2013).

The Fourth Circuit reached a similar conclusion in *United States v. Jones*, when it found that an assault in South Carolina is an attempt or offer to commit a violent injury. *United States v. Jones*, 914 F.3d 893, 902 (4th Cir. 2019). *Jones* held a South Carolina assault could be committed without the use, attempted use, or threatened use of violent physical force. *Id*. at 902-03. That language is very similar to the second subsection of CDV, which prohibits an "offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability…" S.C. Code § 16-25-20(A)(2).

Jones rejected the argument that "assault" had an elevated meaning because of its placement within the statute at issue in that case. *Id.* at 904. The *Jones* opinion noted it was faithful to the *Hemingway* opinion. *Id.* at 903. The Fourth Circuit opinion

in Drummond's case is an outlier. It conflicts with both *Hemingway* and *Jones* because it assigns more meaning to a South Carolina assault than South Carolina allows.

South Carolina does not draw a distinction between "violent injury" and "physical harm or injury." The language in the CDV statute has been interpreted by South Carolina courts and the Fourth Circuit is bound by that interpretation. The panel opinion is based on the difference between "violent injury" and "physical harm or injury." There is none; they are one and the same.

The Supreme Court's precedent has been clear in ACCA cases. "[A] good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same…" *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016). If the least culpable conduct required for a conviction does not require "physical force" as defined by the Supreme Court, the ACCA does not apply. *Stokeling v. United States*, 139 S. Ct. 544, 558 (2019).

Force as required for ACCA enhancement must be capable of causing physical pain and injury to another person. *Johnson v. United States*, 559 U.S. 133, 140 (2010). Such force is not required to convict for criminal domestic violence in South Carolina.

Why this Court should grant certiorari

For purposes of the Armed Career Criminal Act, the Court has been clear that physical force is required. *Stokeling*, *supra*. Physical, violent force is required to trigger the ACCA, not just mere offensive touching. *Johnson*, *supra*. Determining how

much force is required for conviction under a state offense will nearly always require federal courts to interpret state law.

The risk of allowing federal courts to broadly interpret state law to ensure application of the ACCA causes a disturbing problem. As the dissent pointed out below, those state laws may become less effective as they are interpreted by federal courts:

> "The majority's reading of a higher threshold of force into CDV offenses assumes a higher bar for obtaining a CDV conviction than an assault conviction, a result seemingly at odds with the essential purpose of the [CDV] statute … to protect against harm and violence from members of an individual's household. I see no commonsense reason for South Carolina to try to protect people from violence at the hands of their own household by creating a statutory crime that is harder to prove than common law assault. Yet the majority's analysis requires us to assume that South Carolina did just that. I cannot agree. For this reason and the reasons already stated, I cannot agree that CDV is categorically a violent felony under the ACCA."

Drummond, 925 F.3d at 698 (internal citations omitted). The Fourth Circuit has essentially made a South Carolina criminal charge much harder to prove in exchange for using it to apply the ACCA.

As described earlier, South Carolina case law makes it entirely possible to commit a criminal domestic violence without physical force as understood in the ACCA context. A state should be allowed to define its crime in a broad manner, serving the interests of its general police power. The ACCA, on the other hand, should remain a narrow enhancement targeting a specific group of offenders. When the two theories do not reconcile, the state law should control.

2. Whether a search can be conducted pursuant to a search warrant when an affidavit provides no probable cause to support that warrant?

The decision below was wrong

The probable cause affidavit in this case stated Deputy McGrath received information about drug activity in the hotel room where Drummond was arrested. Though not solely determinative of whether an informant's information establishes probable cause, the informant's veracity and basis of knowledge are factors to consider in analyzing a search warrant affidavit. *Massachusetts v. Upton*, 466 U.S. 727, 731 (1984). The degree to which the story is corroborated is also an important factor. *Id*.

McGrath offered no information about her informant or the informant's perceived credibility. The search warrant provides no corroborating information, other than the fact Nicholas Finley was present at the motel room. Other than his mere presence, there were no other details provided by the informant to lend credibility to the information on criminal activity. It is not just the identity of a person and the person's presence somewhere that helps establish probable cause. There must be at least some detail related to suspected criminal activity. In this case, there was none.

A proven, reliable informant is far more credible than an unknown tipster. *Florida v. J.L.*, 529 U.S. 266, 270 (2000); *Adams v. Williams*, 407 U.S. 143, 146-47 (1972). In this case, the informant added no credibility to the alleged probable cause supporting the search warrant.

The only other relevant fact in the search warrant was the location of an orange hypodermic needle cap. There was no information in the search warrant affidavit linking the needle cap to illegal activity. The cap was labeled as "drug paraphernalia" without explanation. At the suppression hearing, McGrath testified the cap was made so that it could not be reattached or reused. Though she did not want to admit it, the cap was essentially trash.

What was important was the lack of anything related to the needle cap that would render it incriminating. The search warrant affidavit cites no additional evidence of drug possession or distribution. There was no other alleged paraphernalia. There was no evidence of drug use. There was no evidence of drug intoxication. There were no drugs.

The needle cap could only support probable cause if its incriminating nature was readily apparent. Probable cause requires a fair probability contraband or evidence of a crime will be found. *Florida v. Harris*, 568 U.S. 237, 243 (2013). There is no evidence of any crime in the search warrant affidavit. The needle cap stands alone as the only thing approaching support for probable cause; there was not even an accompanying needle found to support some suspicion of crime.

On the barebones facts presented in the search warrant affidavit, there was no probable cause. The search warrant and any evidence found because of its issuance should have been suppressed.

Why this Court should grant certiorari

Probable cause is a bedrock of the criminal justice system. The Fourth Amendment clearly states probable cause is required for a search warrant. While Courts have strictly enforced the language of the Constitution in areas such as the Second Amendment, they regularly neglect the Fourth Amendment. Rather than allowing rare exceptions to the rule, it is has become the rare exception for the Fourth Amendment to be enforced.

The most common villain in this attack on the Fourth Amendment is "probable cause." A neutral magistrate was intended to shield against unreasonable searches. That magistrate must remain neutral and detached and make certain it does not become nothing more than the policeman's rubber stamp. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

The search warrant in this matter stated:

> The Affiant obtained knowledge that the occupant of this room, Nicholas Finley was selling Methamphetamine from room 131 at this motel. When I performed an extra patrol of this motel, I observed a suspicious vehicle parked in front of the motel room with a fake paper tag. As I walked up to the vehicle, Nicholas Finley began exiting the hotel room. I observed multiple people inside the hotel room along with a large pitbull. As Nicholas put the dog in the bathroom, I asked if I could enter the hotel room and Nicholas stated I could. Due to the large amount of people in the room I asked to see identification and asked if anyone else was in the room. I was advised there was no one else. After checking everyone's identifications, I asked Nicholas if I could check the bathroom and ensure no one else was in the room. I found a female that could not be identified at this time by her name given and I observed a orange hypodermic needle cap on the floor next to her feet. No one in the room was a diabetic and could provide a reason for having this drug paraphernalia. I believe through the execution of this search warrant, more narcotics and paraphernalia will be located.

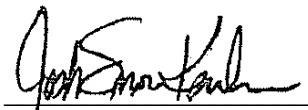
Law enforcement believed there would be evidence of a crime; they were suspicious a crime was being committed. The affidavit was based on nothing more than feelings.

Yet not a single fact or circumstance was presented to support probable cause, as this Court requires. *Nathanson v. United States*, 290 U.S. 41, 47 (1933). This is becoming all too common in the criminal justice system. The barest of descriptions are placed in a search warrant and courts approve of searches, regardless of whether there is truly probable cause. It is of pressing importance this Court reiterate the requirements of probable cause to bring the lower courts back in line with the intention of the Founders.

CONCLUSION

Drummond respectfully requests this Court grant the petition, vacate the decision of the Fourth Circuit, and remand this matter with instructions to either suppress the evidence found as a result of the illegal search or sentence Drummond without Armed Career Criminal enhancement.

Respectfully submitted,



Joshua Snow Kendrick
Counsel of Record
KENDRICK & LEONARD, P.C.
P.O. Box 6938
Greenville, South Carolina 29606
(864) 760-4000
Josh@KendrickLeonard.com

Counsel for the Petitioner