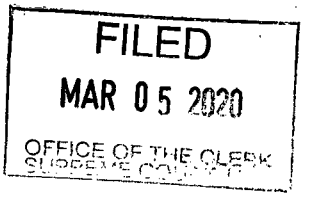
No. 19-8273

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



DEONDAY EVANS — PETITIONER

VS.

UNITED STATES OF AMERICA — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kyle Mothershead, TN BPR 22953

414 Union Street, Suite 900

Nashville, TN 37219

T: (615) 982-8002 / F: (615) 229-6387

E: Kyle@mothersheadlaw.com

QUESTIONS PRESENTED

1. Whether federalism principles require reinterpretation of 18 U.S.C. § 922(g) and 18 U.S.C. § 924 to require a more meaningful commerce nexus;
2. Whether the Fourth Amendment "staleness" doctrine should be tightened such that the search warrant in this case would lack probable cause;
3. Whether, if the Fourth Amendment "staleness" doctrine is tightened, the Exclusionary Rule should apply in Petitioner's case;
4. Whether an NCIC report, standing alone, is a sufficient evidentiary basis for application of U.S.S.G. § 2K.2.1(b)(4)(A), the 2-level Sentencing Guidelines offense level enhancement for a firearm being stolen.

LIST OF PARTIES

All parties appear on the caption of the case on the cover page.

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B and is unpublished.

JURISDICTION

The date on which the Court of Appeals decided the case was **December 11, 2019.**

No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3 ("Commerce Clause")

U.S. Const. amendment IV

18 U.S.C. § 922(g)

18 U.S.C. § 924

STATEMENT OF THE CASE

Petitioner was charged in a four-count indictment charging: (1) Possession for resale of cocaine (21 U.S.C. § 841), (2) Possession of a Firearm as a prohibited felon (18 U.S.C. §§ 922(g), 924), (3) Possession of ammunition as a prohibited felon (18 U.S.C. §§ 922(g), 924), and (4) Possession of a firearm in connection with a controlled substance offense (18 U.S.C. § 924(c)). (R. 1, Indictment, Page ID # 1 – 3). The charges stemmed from the execution of a search warrant against an apartment in which Mr. Evans was found, along with controlled substances and a firearm. In turn, the search warrant was based on two alleged "controlled buys" from that apartment, one of which had taken place within seventy hours of the warrant being issued.

In anticipation of trial, Mr. Evans requested a special jury instruction based on federalism principles that would have required the Government to prove, in connection with Counts 2 and 3 (the possession of firearm and ammunition counts), that Mr. Evans "directly caused" the firearm and ammunition to cross state lines in interstate commerce. (R., Defendant's Proposed Jury Instructions, Page ID # 740 – 743). Relying on *United States v. Murphy*, the District Court denied this request. *United States v. Murphy*, 107 F.3d 1199 (6th Cir. 1997).

Previously, Mr. Evans had moved to suppress the evidence resulting from the search warrant execution, which the District Court denied. (Appendix D, Search Warrant; Appendix E, Memorandum Order, Page ID # 578 – 595).

Mr. Evans went to trial, and was convicted of only Counts 2 and 3, the firearm and ammunition possession counts. (R. 149, Verdict, Page ID # 912 – 913). The jury found Mr. Evans not guilty as to Counts 1 and 4, the counts for drug possession for resale and firearm in connection with drug trafficking. *Id.* Ultimately, the district court sentenced Mr. Evans to serve 72 months on Counts 2 and 3. (Appendix B, Judgment, Page ID # 1487 – 1493). In determining that this sentence was warranted, the District Court applied a 2-level "stolen firearm" enhancement under U.S.S.G. § 2K.2.1(b)(4)(A). The only evidence in support of this 2-level enhancement was a claim by one of the detectives in a report that there was a notation in the "NCIC" database that the firearm had been reported stolen. Mr. Evans had objected to the application of this adjustment on the basis that the NCIC report, standing alone, was insufficient to establish a preponderance.

REASONS FOR GRANTING THE PETITION

A. Commerce Clause Issue

In 1937, the U.S. Supreme Court radically expanded federal power *vis a vis* the states, disrupting what had been settled federalist principles through a dramatic reinterpretation of the Constitution's "Commerce Clause." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Lopez*, 514 U.S. 549, 552 – 558 (1995) (Reciting the history of Commerce Clause jurisprudence, and the "watershed case" of *NLRB*). For the next sixty years, the Supreme Court repeatedly interpreted the Commerce Clause as if it provided *de facto* plenary power to the federal government *vis a vis* the states, even in spheres such as criminal justice

where state sovereignty had traditionally been protected. *Lopez*, 514 U.S. at 561, fn. 3. Thus, in the context of federal firearm possession statutes the Supreme Court interpreted the statutes to require only a minimal commerce nexus, requiring merely that the firearm must have crossed a state line at some point in its history. *Scarborough v. United States*, 431 U.S. 563, 566 – 578 (1977) (construing federal firearm possession statute to require only "a minimal nexus requirement.").

In 1995, the Supreme Court finally checked Congress's *de facto* plenary federal power in *United States v. Lopez*, striking down the federal "Gun Free School Zones Act." *Lopez*, 514 U.S. 549 (1995). In *Lopez*'s wake, scholars published a flood of papers scrambling to understand the scope of its impact. *E.g.*, Stephen McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 Duq. L. Rev. 1 (1995); Steven Calabresi, *In Defense of United States v. Lopez*, 94 Mich. L. Rev. 752 (1995). Five years later, the Supreme Court appeared to confirm the "New Federalism" in *United States v. Morrison*, striking down the Violence Against Women Act's civil remedy on federalism grounds. *United States v. Morrison*, 529 U.S. 598 (2000). *Morrison* led to yet more scholarship, some of which specifically predicted the end of federal criminal firearm statutes like 18 U.S.C. § 922(g). *E.g.*, Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M.L. Rev. 7, 11 (2001) ("I predict, especially after *Morrison*, that we're going to see dozens of federal laws challenged as exceeding the scope of Congress's Commerce Clause authority. Think of the many firearm laws; there is a federal law that says that if a person is covered by a restraining order in a domestic relations case, they are not allowed to have a

firearm. Is this valid under the commerce power in light of *Lopez* and *Morrison?*"); Diane McGimsey, *Comment: The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Calif. L. Rev. 1675 (2002) (Arguing that the existing jurisdictional element case law improperly permits *de facto* unlimited regulation by Congress); Barbara H. Taylor, *Case Note: Close Enough for Government Work: Proving Minimal Nexus in a Federal Firearms Conviction: United States v. Corey*, 56 Me. L. Rev. 187 (2004); Marcus Green, *Note: Guns, Drugs, and Federalism: Rethinking Commerce-Enabled Regulation of Mere Possession*, 72 Fordham L. Rev. 2543 (2004).

However, to date the predicted "federalism revolution" has not happened, and to the chagrin of at least one sitting justice the Supreme Court has not yet meaningfully applied *Lopez* and *Morrison* to the firearm possession statutes. *Alderman v. United States*, 562 U.S. 1163, 1163 – 1168 (2011) (Thomas, J., dissenting) (arguing that *Scarborough* is inconsistent with *Lopez*, and that a "mere jurisdictional hook" should be insufficient to trigger federal authority under the Commerce Clause). However, as articulated by Ms. McGimsey and other commentators it is time for the "jurisdictional element loophole" to be eliminated.

Prior to trial, Mr. Evans requested that the District Court instruct the jury that to convict Mr. Evans of firearm and ammunition possession under 18 U.S.C. § 922(g), the jury had to find that Mr. Evans "directly caused" the firearm and ammunition "to cross state lines through a commercial transaction." (R., Proposed Jury Instructions, Page ID # 740 – 743). Relying on existing precedent, the district

court denied the requested instruction. *United States v. Murphy*, 107 F.3d 1199, 1210 – 1211 (6th Cir. 1997) (Holding that *Lopez* did not overrule *Scarborough's* "minimal nexus" requirement). However, Mr. Evans submits that *Scarborough* and its progeny should be overturned in light of *Lopez*, *Morrison*, and Justice Thomas's dissent in *Alderman*, and submits that Petitioner's requested instruction was proper under the correct, more limited conception of the Commerce Clause. *See generally* McGimsey, 90 Calif. L. Rev. at 1719 – 1736 (Reviewing possible reforms to eliminate the "jurisdictional element loophole."). Because the Government's proof at trial failed to establish a meaningful commerce nexus, Mr. Evans's convictions should be vacated.

B. Fourth Amendment Issue

Mr. Evans submits that his Fourth Amendment-based motion to suppress should have been granted, and that the fruits of the search should have been suppressed. To reach this conclusion, Mr. Evans first argues that existing precedent on the "staleness doctrine" must be tightened in the context of drug cases. The Fourth Amendment to the U.S. Constitution 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.

U.S. Const., amend. IV. Thus, this provision protects "The right of the people to be secure in their houses, papers, and effects." *Carpenter v. United States*,138 S. Ct. 2206, 2213 (2018). The purpose of this protection "is to safeguard the safety and

security of individuals against arbitrary invasions by governmental officials." *Id.* However, over the course of the 50-year-long "War on Drugs," several Supreme Court cases carved out a *de facto* "drug exception" to the Constitution. *See, e.g., United States v. Leon*, 468 U.S. 897, 928 – 929 (1984) (Brennan, J., dissenting) ("[I]n case after case, I have witnessed the Court's gradual but determined strangulation of the [exclusionary] rule. It now appears that the Court's victory over the Fourth Amendment is complete."); *New Jersey v. T.L.O.*, 469 U.S. 325, 373 – 374, 385 (1985) (Stevens, J., dissenting) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.... One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstances. The Court's decision today is a curious moral for the Nation's youth."); *California v. Acevedo*, 500 U.S. 565, 602 (1991) (Stevens, J., dissenting) ("It is too early to know how much freedom America has lost today. The magnitude of loss is, however, not nearly as significant as the Court's willingness to inflict it without even a colorable basis for its rejection of prior law."); *Utah v. Strieff*, 136 S. Ct. 2056, 2070 – 2071 (2016) (Sotomayor, J., dissenting) ("[T]his case tells everyone... that your body is subject to invasion while the courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just

waiting to be cataloged."). Indeed, Justice Sotomayor's characterization of America in the 21st century as a "carceral state" appears apt, given that America imprisons its citizens at many times the rate of comparable advanced democracies. Prison Policy Initiative, States of Incarceration: The Global Context 2018;[1] Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173 (2016) (Discussing the connection between the "War on Drugs" and mass incarceration in the American carceral state.). While it will of course require a wide array of reforms for Americans to liberate themselves from this self-imposed "carceral state," one of the essential components must be restoring the Fourth Amendment.

1. The Staleness Doctrine Must be Tightened

One of the myriad aspects of the "drug exception" to the Fourth Amendment is in the application of the "staleness doctrine." Under existing precedent, a single drug transaction at a residence appears to provide ongoing probable cause for a search of the residence for at least days, if not longer, afterward. *United States v. Lattner*, 385 F.3d 947, 953 (6th Cir. 2004) (Two-day-old surveillance of suspected drug trafficking at residence was not stale); *United States v. Jackson*, 470 F.3d 299, 308 (6th Cir. 2006) (Three-day gap between controlled buy from known seller and issuance of the warrant insufficient to render the evidence stale). However, these precedents contradict common sense as well as the competing principle that "[i]n the context of drug crimes, information goes stale very quickly 'because drugs are usually sold and consumed in a prompt fashion.'" *United States v. Brooks*, 594 F.3d

[1] Available at: https://www.prisonpolicy.org/global/2018.html.

488, 493 (6th Cir. 2010) (Quoting *Frechette*, 583 F.3d at 378). Thus, to fulfill the original purpose of the Fourth Amendment, the seemingly conflicted "staleness doctrine" must be tightened – as a general rule, probable cause in a case like this, based on controlled buys at a residence for an unnamed amount of drugs, should last no longer than twelve hours. *See generally* Levin, 84 Fordham L. Rev. at 2185 – 2187 (discussing the so-called "drug exception to the Constitution"); *California v. Acevedo*, 500 U.S. 565, 585 – 602 (Stevens, J., dissenting).

If this tightening is adopted, the buys at Petitioner's apartment were simply too old to justify issuance of the search warrant. Here, the allegation was that two purchases of unknown amounts of cocaine were made by unnamed drug users over the course of April, the latter of which was within seventy hours of the issuance of the warrant. (Appendix D, Search Warrant, Page ID # 501 – 502). In addition, the seller(s) from the buys was (were) unknown, such that the warrant targeted only the residence, and simply named "John and Jane Doe." Thus, even assuming that the allegations were sufficient to establish probable cause as of the moment of the buys, that probable cause should have gone stale no more than twelve hours after the last controlled buy because of the transient nature of controlled substances, the unnamed, presumptively small amounts of drugs involved, and the anonymity of the seller(s). *Id.* Therefore, under a properly tightened conception of the staleness doctrine, the search warrant in Petitioner's case lacked probable cause.

2. The Fruits of the Search Warrant Against Mr. Evans's Residence Should be Suppressed

Of course, even assuming the tightening of the "staleness" doctrine as discussed above, the Government could still claim the protection of *Leon*'s good faith limitation on the Exclusionary Rule to protect the use of the evidence in Mr. Evans's case. However, to the extent that *Leon* bears on this case, it should be overruled, and the "good faith" exception eliminated, for the reasons articulated by Justice Brennan in his *Leon* dissent. *United States v. Leon*, 468 U.S. 897, 928 – 960 (1984) (Brennan, J., dissenting). Alternatively, even if not overruled *Leon* should not apply in this case, because Agent Fields's warrant affidavit and trial testimony contained several omissions, incredible assertions, and impeached claims that render Fields's overall credibility highly suspect. *See* (6th Circuit Case No. 19-5122, ECF 15, Petitioner's Brief, at 19 – 23 (recounting the weaknesses in Fields's trial testimony); (R., Motion to Suppress, Page ID # 486 – 491) (recounting the various misleading elements of the warrant affidavit); R. 92, Reply in Support of Motion to Suppress, Page ID # 574 – 576) (addressing the audio and video recordings from the buys, including the newly produced video clip from the second buy); *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005) (*Leon* does not apply when the affiant knows, or is reckless in not knowing, that the warrant contains false information); *United States v. Boyce*, 601 F. Supp. 947, 955 (D. Minn. 1985) ("[O]nce a reviewing court finds a search warrant affiant to be dishonest or reckless, suppression is appropriate under *Leon* regardless of whether or not the misrepresentation or

omission would be material under *Franks*). Thus, the evidence resulting from execution of the search warrant should be suppressed.

C. Stolen Firearm Enhancement

Prior to Mr. Evans's sentencing hearing, he objected to the Presentence Report's recommendation that the Court impose a 2-level "stolen firearm" increase to Mr. Evans's offense level pursuant to U.S.S.G. § 2K1.1(b)(4)(A). (R. 157, Defendant's Objections to PSR, Page ID 1462; R. 158, Defendant's Sentencing Memorandum, Page ID # 1467 – 1468). Mr. Evans objected that the Government was unable to prove by a preponderance that the firearm was, in fact, stolen, because the Government's claim was based only on an investigative summary alleging that the "handgun was checked through NCIC and found to be stolen." (R. 99-1, Investigative Summary, Page ID # 615). The Government filed a response to Appellant's objection and memorandum claiming that "the Government intends to introduce evidence [at sentencing] that the firearm was stolen ... through testimony of Agent Todd Stacy." (R. 159, USA Sentencing Memorandum, Page ID # 1471). However, at the sentencing hearing the Government indicated that it would *not* be calling anyone to testify about the gun's history. (R. 171, Transcript, Page ID # 1587 – 1589). Rather, the Government acknowledged that when Agent Stacy ran a "stolen firearm" search on the gun through NCIC in preparation for the hearing Stacy found no record whatsoever showing that the gun was stolen.[2] *Id.* Thus,

[2] The Government explained this problem away by asserting that once a gun is recovered for an owner, the stolen firearm report is removed from NCIC. However, no actual evidence was produced to this effect. (R. 171, Transcript, Page ID # 1587 – 1589).

while attempting to corroborate the "stolen firearm" claim the Government ended up effectively impeaching it. Nonetheless, the district court imposed the 2-level increase anyway. *Id.* at 1591 – 1592.

As the FBI's website description of the NCIC program concedes, NCIC reports are not sufficiently reliable to establish even probable cause:[3]

> However, **a positive response from NCIC is not probable cause for an officer to take action. NCIC policy requires the inquiring agency to make contact with the entering agency to verify the information is accurate and up-to-date.** Once the record is confirmed, the inquiring agency may take action to arrest a fugitive, return a missing person, charge a subject with violation of a protection order, or **recover stolen property.**

Id. ("How NCIC Is Used") (emphasis added). Thus, because NCIC reports do not even establish probable cause, much less a preponderance, as a matter of law an NCIC report standing alone should be considered insufficient to impose the 2-level stolen firearm enhancement. *See Kaley v. United States*, 571 U.S. 320, 338 (2014) ("Probable cause, we have often told litigants, is not a high bar...."); *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) ("[Probable cause] does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands...."); U.S.S.G. § 6A1.3, Commentary ("The Commission believes that a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."); *United States v. Carroll*, 893 F.2d 1502, 1505 (6th Cir. 1990) (holding that preponderance is the appropriate evidentiary standard for

[3] Available at: https://www.fbi.gov/services/cjis/ncic.

resolving contested Sentencing Guidelines issues); *United States v. Nguyen*, 19 Fed. Appx. 282, 286 (6th Cir. 2001) (noting that some circuits use a clear and convincing evidence standard to resolve "dramatic" sentence enhancements, but that the Sixth Circuit uses a preponderance standard). Therefore, even assuming that the NCIC report did at one point exist, it was insufficient to establish a preponderance and Appellant is should be resentenced without the 2-level enhancement.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

Kyle Mothershead, TN BPR 22953
414 Union Street, Suite 900
Nashville, TN 37219
T: (615) 982-8002 / F: (615) 229-6387
E: Kyle@mothersheadlaw.com