No. _____

In the

Supreme Court of the United States

WASFI ABBASSI, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

Whether the Ninth Circuit's upholding of a search warrant based almost exclusively on false, misleading and stale information violated the Fourth Amendment.

Whether the Ninth Circuit's upholding of Abbassi being ordered out of his car at gunpoint, handcuffed, arrested, questioned and searched without cause, conflicted with this Court's decisions in *Miranda* and *Terry*.

Statement of Related Proceedings

- *United States v. Wasfi Abbassi*,
  5:17-cr-101-PSG-1 (C.D. Cal. September 12, 2018)

- *United States v. Wasfi Abbassi*,
  18-50338 (9th Cir. February 4, 2020)

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Petition for Writ of Certiorari

Petitioner Wasfi Abbassi respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit in this case.

OPINION BELOW

The Ninth Circuit's February 4, 2020 Memorandum affirming the judgment of the district court in *United States v. Wasfi Abbassi*, Ninth Circuit Case No. 18-50338, is unreported. (See Appendix A, "Memorandum") No written opinions (other than a minute order) were issued by the district court when it issued the rulings which are the subject of this Petition.

JURISDICTION

The Ninth Circuit entered its judgment on February 4, 2020. Pursuant to this Court's March 19, 2020 Order, the deadline for filing a petition for writ of certiorari was "extended to 150 days from the date of the lower court judgment….. See Rules 13.1 and 13.3." This petition is filed within 150 days of the Ninth Circuit Judgment.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. §3231, and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

CONSTITUTIONAL PROVISION 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."

STATEMENT OF THE CASE

A. Indictment

Counts Three and Six of the indictment alleged that on February 24, 2017, Abbassi knowingly and intentionally possessed with the intent to distribute hydrocodone and oxycodone, respectively. (ER187, ER190) Count Nine alleged that on February 24, 2017, Abbassi knowingly possessed at least one of specified firearms in furtherance of a drug trafficking crime. (ER193)

B. Abbassi's Motion to Suppress

1. Factual Background

a. Abbassi's Criminal History

In 1999, at age 19, in the course of about one month, Abbassi suffered one petite larceny and two robbery convictions in New York. (PSR45-47) In 2010 and 2012, Abbassi was convicted of DUI. (PSR48-49) In 2014,

Abbassi was convicted of misdemeanor possession of a controlled substance (hydrocodone pills). (PSR50)

b. December 2014 Search Warrant

On December 5, 2014, SBPD officer Nicholas Koahou sought a search warrant for the following: the residence of Abbassi's brother Yousef (the Leroy residence); the residence of Abbassi's sister Lubna (the Crescent residence); and the persons of Yousef, Lubna, Yousef's wife Ghada, and Abbassi. (ER149) The statutory grounds were possession of marijuana for sale, THC extraction lab and currency in excess of $100,000. (ER152)

In his supporting affidavit, Koahou testified that in the course of searching a barbershop owned by Yousef on December 4, 2014, Lubna arrived. Lubna gave officers consent to search her vehicle and officers located currency therein. Next door to the barbershop was a gift shop in which officers found over 100 bags of marijuana. At Yousef's residence, officers located an active marijuana grow and THC extraction lab. At Lubna's residence (the "Crescent residence"), officers seized 236 pills of hydrocodone and oxycodone, pill bottles and clear pill capsules from Abbassi's bedroom; and shotgun ammunition from the garage. (ER147-49, ER153)

c. February 24, 2017 Arrest

On February 24, 2017, officers from the Anaheim Police Department ("APD") were conducting surveillance in San Bernardino of Chad Justice, who

had multiple outstanding warrants and was wanted in Anaheim for grand theft. Officers observed Justice's Escort leave the Crescent residence at the same time as a black BMW. The two vehicles parked at a car wash. Justice exited the Escort and entered the BMW. APD officers called San Bernardino Police Department ("SBPD") because they wanted assistance arresting Justice on the outstanding warrants. SBPD Officer Rollings and his partner Araceli Mata responded and parked their patrol car near the BMW. The officers approached the BMW with their guns drawn and pointed at the BMW. Mata ordered Justice to exit the BMW and arrested him. (ER83-85)

Rollings, who had been informed (erroneously) that Abbassi was Justice's roommate and who had been informed (correctly) that Abbassi was not wanted by the police (ER83), ordered Abbassi to exit the BMW. Abbassi complied. According to Rollings, he "detained" Abbassi by placing him in handcuffs, so that Rollings could pat Abbassi down for weapons for officer safety. Rollings testified that his concern for officer safety was heightened by Abbassi's apparent association with Justice. (ER84)

After "detaining" Abbassi, Rollings asked Abbassi if he had anything illegal on his person. Abbassi replied that he had a "little bit of coke" in his pocket. At that point Rollings testified that Abbassi had been "detained" for approximately 10-15 seconds. Rollings patted Abbassi down for officer safety purposes and because Abbassi possessed cocaine. Rollings found 3-4

grams of white powder in a torn piece of plastic in Abbassi's pocket. (ER84-85)

Rollings believed that the 3-4 grams of white powder was cocaine in an amount consistent with sales rather than personal use. (ER84-85) Rollings completed the patdown and placed Abbassi under arrest for possession of cocaine for the purpose of sale. (ER84-85) According to Rollings, he searched the BMW because he believed it might contain additional evidence of narcotics sales. Rollings found two large bags of marijuana, hashish, pills, a digital scale, several small plastic bags, and $643 in currency. (ER85)

After Abbassi was detained, SBPD Sgt. Gary Schuelke arrived and recognized Abbassi from "prior narcotics investigations." Since Abbassi was seen leaving the Crescent residence, and his drivers license listed the Crescent residence as his address, officers left to secure the Crescent residence and obtain a warrant to search it. (ER86)

d. First February 24, 2017 Search Warrant

The first search warrant directed police to search the Crescent residence for evidence of possession of marijuana for sales -- a felony according to the warrant. (ER156)

The affidavit in support of the search warrant was sworn by SBPD Detective Kimberly Hernandez. Hernandez testified that in her experience subjects involved in the possession of narcotics often hide the substances and

paraphernalia in their homes, on their persons and in their vehicles. Subjects involved in narcotics distribution may often possess ledgers pertaining to transactions and other documents identifying the persons involved. These documents are often found in their homes, on their persons, and in their vehicles. (ER160)

Hernandez recited that Rollings asked Abbassi if he had anything illegal on him and Abbassi responded that he had cocaine. Hernandez said that Rollings retrieved a baggie containing approximately 4.5 grams of cocaine. Rollings placed Abbassi under arrest for possession of cocaine. He conducted a search of Abbassi's vehicle incident to arrest and located approximately half a pound of marijuana, several prescription pills including OxyContin and Xanax, over $500, and a digital scale. (ER161)

Hernandez testified that:

> "Based on the fact that ABBASSI has been arrested in the past for the sales of marijuana and prescription medications in the past and based on the fact the during a search of his residence in 2014 narcotics officers located evidence of the sales of controlled substances, your affiant believed that a search of Abbassi's residence would yield further evidence of ABBASSI continuing to participate in the sales of narcotics. ABBASSI told officers that he still lived at [the Crescent residence]." (ER161)

Hernandez testified as follows. She conducted a records check of Abbassi and found that Abbassi had been "arrested and convicted for the possession and sales of controlled substances numerous times." (ER162) He was

arrested for possession of marijuana for sale in October 2008. He was arrested for possession of a narcotic in July 2014. He was arrested for possession of narcotics for sale in December 2014. During each of these arrests, Abbassi gave his residence at the Crescent residence. (ER162) Hernandez testified that:

> "In 2014, when officers served a search warrant at the location, they located marijuana for the purpose of sales, as well as prescription medication for the purposes of sales, including oxycontin. Officers also located over $100,000 in cash." (ER162)

Based on the fact that Abbassi had been arrested for sales of controlled substances in the past and "based on the fact that ABBASSI maintains his residence for the purposes of the sales of controlled substances," Hernandez testified that she believed that search of the location would yield evidence of sales of controlled substances. (ER162)

e. February 24, 2017 Search on Defective Warrant

The search began immediately upon receipt of the defective warrant and continued while Hernandez left the location to amend her probable cause statement and seek a new warrant. At that point the search was largely completed. (ER92)

The officers seized a money counter, three large bags of marijuana, ammunition, guns, $378,200 in currency, baggies, scale, prescription medications. (ER183-84)

f. February 24, 2017 Challenge to Defective Warrant

During the search, Abbassi's attorney James McGee responded to the Crescent residence. McGee reviewed Hernandez' warrant and noticed that it was for possession for sale of marijuana. He told Hernandez that she had a warrant for a misdemeanor [invalid under California law]. Hernandez returned to court to amend the warrant, and McGee followed her. (ER178)

McGee told the court that he came to challenge the validity of the warrant. McGee understood that the warrant had been amended in an attempt to correct the problem he had identified. However, McGee told the court that the first warrant had been served and the search begun and items seized and McGee had made his complaint before the amendment. Once the search warrant had been served and challenged, the warrant could not be amended. (ER179)

The court responded that the probable cause of the original warrant stated that Rollings retrieved approximately 4.5 grams of cocaine, several prescription pills including OxyContin and Xanax, and $500 in currency and a digital scale. Abbassi had been arrested in the past for the sale of prescription medication, and in 2014 they located evidence of sales of controlled substances. (ER179)

The officer had presented an amended affidavit stating that there was probable cause to believe there was possession of cocaine and prescription medication for sale. In addition, there was an addendum to the original warrant and a new warrant for possession of marijuana and medication for sale based on the same probable cause record. (ER180) The court suggested McGee could challenge the legality at a subsequent hearing and the court would make a decision at that point in time. (ER180)

g. Second February 24, 2017 Search Warrant

The second search warrant claimed that there was probable cause to believe that at the Crescent residence there would be evidence of the possession of cocaine for sale, possession of prescription medication for sale, and possession of marijuana for sale, which constituted felonies. (ER166)

The second affidavit contained the same statements recited above. (ER171-72)

Hernandez added in the "Probable Cause" section that Rollings believed that Abbassi possessed the items in the car for the purpose of the sale of controlled substances, including cocaine, prescription medication and marijuana. (ER171)

In an Addendum, Hernandez stated that in the statutory grounds of the affidavit she had stated that the above constituted evidence which tended to show that a felony had been committed, to wit; possession of marijuana for

purpose of sale. However, in the probable cause of the warrant, Hernandez described that Abbassi was in possession of cocaine for the purpose of sale, as well as prescription medication for the purpose of sales. Based on this information, Hernandez requested that the statutory grounds show that the probable cause tended to show that a felony had been committed to wit, possession of cocaine for sale, possession of prescription medications for sale, and possession of marijuana for sale. (ER175)

h. May 2017 Warrant

In May 2017, SA Angela Kaighin sought a federal warrant alleging that on February 24, 2017, Abbassi possessed with the intent to distribute hydrocodone. Kaighin submitted an affidavit for Abbassi's arrest and for the search of his digital devices in SBPD custody. (ER197)

Kaighin stated that the following items were recovered in the 2017 search. In Abbassi's room were a loaded handgun and ammunition; bottle of promethazine codeine syrup; prescription bottles not bearing his name; approximately $17,600 in cash; pills; and a money counter. In the garage were two more firearms, marijuana, and $360,000 in currency. In total, the search of Abbassi's residence yielded 2.4 pounds of marijuana, .6 pound of concentrated cannabis, 1017 pills of hydrocodone, 131 pills of Xanax, one pint of liquid codeine, a revolver, two handguns, ammunition and $377,500 in currency. (ER204)

2. Abbassi's Motion to Suppress

Abbassi argued that the February 2017 state search warrant, which served as the basis for the June 2017 federal warrant, lacked probable cause and was based on stale information. (ER104)

The state 2017 warrant must be set aside because it contained false statements. (ER104) For example, the officers did not find marijuana or $100,000 in the 2014 search of the Crescent residence. But Hernandez' 2017 affidavit falsely stated that "In 2014, when officers served a search warrant at the location, they located marijuana for the purpose of sales, as well as prescription medication for the purposes of sales, including oxycontin. Officers also located over $100,000 in cash." Hernandez then used that false information as the basis for her statement of probable cause, testifying that:

> "Based on the fact that ABBASSI has been arrested for the sales of controlled substances in the past and based on the fact that ABBASSI maintains his residence for the purposes of the sales of controlled substances, your affiant believes that a search of the location will yield evidence of the sales of controlled substances." (ER105)

Since the probable cause for the 2017 state search warrant authored by Hernandez was based upon the misrepresented prior 2014 contacts, the 2017 warrant must fail.

The defense argued that the misrepresentations in the 2017 warrant were made with reckless disregard for the truth, considering the information was relayed by an officer who was present at the execution of the first search

warrant in 2014. Further, since the misrepresented prior 2014 contacts served the basis of probable cause for the search warrant in Abbassi's 2017 case, under *Franks v. Delaware*, a preliminary showing had been made to traverse the search warrant and exclude the materials seized. (ER106)

Furthermore, the conduct alleged in the state warrant was simple misdemeanor conduct and therefore insufficient to establish probable cause for a search warrant under Penal Code Section 1524(a)(4), the ground under which the warrant was sought. The officer did not state with particularity the crime believed to have been committed nor the evidence that was likely to be found. Thus the search warrant was facially defective and the property was illegally seized and must be suppressed. (ER107)

The warrant was based upon allegations of 2008 and 2014 arrests, which were stale and unreliable under *Groh v. Ramirez*, 540 U.S. 551 (2004); *Aguilar v. Texas*, 378 U.S. 108 (1964); and *Sgro v. United States*, 287 U.S. 206 (1932). (ER108)

The motion to suppress further argued that the amended warrant could not save the invalid original search. Rule 41 requires the executed search warrant to be based on an affidavit articulating probable cause to believe a crime has been or is about to be committed, as well as to identify the person or property to be searched, identify the person or property to be seized, and

designate the magistrate judge to whom it must be returned. Fed. R. Crim. P. 41(d)–(f). (ER109)

The motion to suppress further argued that no good faith exceptions under *United States v. Leon*, 468 U.S. 897 (1984), were available since the officer knew that the warrant was invalid on its face during the search and nonetheless continued the illegal search. Abbassi's counsel McGee made law enforcement aware during the search that the search warrant was deficient yet officers nonetheless continued the illegal search. (ER110)

Since the government failed to demonstrate that the search of Abbassi's residence was conducted pursuant to a valid warrant or that an exception to the warrant requirement applied, the evidence should be suppressed. (ER110)

The motion to suppress further contended that all evidence resulting from the illegal detention of Abbassi must be suppressed pursuant to *Terry v. Ohi*o, 392 U.S. 1 (1968); *Rodriguez v. United States*, 135 S.Ct. 1609 (2015); and progeny. Law enforcement officers can only effectuate a valid arrest if they possess probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *United States v. Watson*, 423 U.S. 411, 417-24 (1976); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Law enforcement officers may effectuate a brief stop of an individual, but only if they possess a reasonable, articulable suspicion that the individual has engaged in, or is about to engage in, illegal

activity. *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *Terry v. Ohio*, 392 U.S. 1, 21 (1968). (ER113-14)

On February 24, 2017, APD and SBPD Officers approached the BMW to arrest the passenger Justice. After Justice was arrested, the purpose for that contact ceased and the officers were required to release Abbassi absent any reasonable, articulable suspicion that Abbassi had engaged in, or was about to engage in, illegal activity. The officers had no such suspicion, and therefore no basis to continue the detention. To compound the illegal detention, the officers – without reasonable, articulable suspicion – required Abbassi to exit the BMW and inquired whether Abbassi had anything illegal on him. Absent any reason to believe Abbassi had committed a criminal act, there was no basis to question Abbassi because the "mission" for the stop – to arrest Justice on the outstanding warrant – had been accomplished. The line of questioning, and subsequent search, occurred in violation of Abbassi's Fourth Amendment rights. Consequently, the court must suppress all evidence that the officers obtained as a result of the unlawful detention and arrest as fruits of the poisonous tree. This included, but was not limited to, all physical evidence, and any statements attributed to Abbassi by law enforcement officers. *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963); *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961). (ER115)

3. Government's Opposition to Motion to Suppress

The government opposed the motion to suppress. The government contended that after officers arrested Justice, Rollings detained Abbassi to investigate his association with Justice and to ensure officer safety. (ER57)

The government argued that under Ninth Circuit precedent, when officers arrest an occupant of a car pursuant to a warrant, they are permitted to detain and frisk the other occupants of the car for investigatory and officer safety purposes. (ER58) The government claimed that the Ninth Circuit has held that when police officers arrest an occupant of a car on a warrant, they have the right both to detain any other occupants of the car while they search the arrestee and the car, and to frisk the other occupants "for their own safety." *United States v. Vaughan*, 718 F.2d 332, 334–35 (9th Cir. 1983). Vaughan explained that there is a "logical presumption" that "persons in a house or car are there by invitation or consent," which justifies briefly detaining those persons "to ascertain if, in fact, some connection exists between the suspects." Id. at 335 n.6. A brief detention and frisk are also justified to ascertain whether any evidence might be located on the arrestee or in the car that would incriminate the other occupants, or to ascertain whether the other occupants are carrying weapons. (ER67-68) See *United States v. Doan*, 219 F. App'x 663, 665 (9th Cir. 2007) (explaining that Vaughan foreclosed the defendant's argument "that it was unreasonable for

the police to continue to detain him [the passenger in the car] after [] the driver of the car[] was arrested"). The government claimed that Rollings had a stronger basis for temporarily detaining Abbassi than did the officer in Vaughan because Rollings had been falsely informed that Justice and Abbassi were roommates. (ER68)

Second, the government contended that the February 2017 search warrant was valid because it set forth facts that established probable cause to believe evidence of narcotics trafficking would be discovered in Abbassi's residence, including that evidence of drug trafficking was discovered in Abbassi's car, that evidence of narcotics sales had been found in Abbassi's home during a prior investigation, and that drug traffickers often hide evidence of drug trafficking in their homes. (ER58-59)

Specifically, the government claimed that probable cause was established by the following "facts" in the Hernandez affidavit:

> "• On February 24, 2017, the same day the affidavit was written and presented, Offer [sic] Rollings found approximately 4.5 grams of suspected cocaine on defendant's person;
> • On that same date, Officer Rollings also found approximately half a pound of marijuana, several prescription pills (including OxyContin and Xanax), over $500 in cash, and a digital scale in defendant's car;
> • In Detective Hernandez's experience, individuals found in possession of narcotics often hide controlled substances, paraphernalia, and documents pertaining to narcotics transactions in their homes;
> • Defendant had been arrested for narcotics offenses on three prior occasions and, on each of those prior occasions, defendant stated he resided at the Crescent residence;

• In 2014, officers found evidence of narcotics sales at defendant's residence;

• Defendant told officers he still lived at the Crescent residence; and

• Detective Hernandez had been to the Crescent residence that day and had seen a car registered to defendant parked in the driveway." (ER72)

4. Hearing on Motion to Suppress

Defense counsel argued that officers approached the BMW with guns drawn and ordered Justice out of the vehicle, handcuffed him and put him in their patrol vehicle. There was no further reason to contact Abbassi at that point. Rollings then said that he pulled out Abbassi at gunpoint, ordered Abbassi back to his patrol vehicle and handcuffed him. Rollings claimed that this was for officer safety. But since the arrest of Justice was completed, there were no officer safety issues.

It was the question posed by Rollings after the arrest that was at issue. Rollings said that he needed to search Abbassi for weapons for officer safety. But Rollings did not ask whether Abbassi had weapons; instead, Rollings asked whether Abbassi had anything illegal, to which Abbassi honestly replied that he had coke. Rollings' question was outside the reason for the stop. The officer was only allowed to ask questions related to the justification for the investigation, which in this case was officer safety. Asking whether Abbassi had anything illegal went beyond that. And if the questions go outside the scope of the stop, *Miranda* is required according to

United States v. Davis, 530 F.3d 1069 (2008). If it is a *Terry* stop, the questions must be related solely to the reason for the stop. (ER14)

The court stated that the government's opposition (page 16, lines 1-20) outlined the basis for probable cause. (ER15) Defense counsel responded that the officer listed the facts and circumstances but did not say how that in any way related to a search of the house. The claimed basis for the search of the house was Abbassi's prior arrest. (ER16) Hernandez knew that probable cause was lacking because she had to add to it in the second affidavit and warrant. She went back to court after the search was finished to add to the probable cause declaration. She added a second part about what was found in the vehicle and tied it to the house. (ER16-17)

The court ruled:

> "The motion to suppress is denied. It was appropriate for the officer to stop and frisk the defendant after arresting the companion. The simple question 'Do you have anything illegal' did not unduly prolong the stop.
>
> There was probable cause for the issuance of the search warrant by the state court judge for the reasons summarized at page 16, lines 1 through 21 of the opposition." (ER17-18)

C. Conditional Guilty Plea

The parties entered into a conditional plea agreement providing that defendant reserved the right to seek appellate review of the adverse determination of his motion to suppress evidence. (ER21-41)

D. Ninth Circuit Memorandum

On February 4, 2020, the Ninth Circuit issued a Memorandum Disposition stating as follows:

> "1. Abbassi was not unreasonably detained by Officer Rollings in violation of the Fourth Amendment, and the circumstances of the detention did not amount to an arrest. Officers approaching a vehicle to arrest one or more occupants inside the car may briefly detain other, unknown occupants and may conduct a frisk of such persons. *United States v. Vaughan*, 718 F.2d 332, 335 (9th Cir. 1983).
>
> This sort of brief "detention does not automatically become an arrest when officers draw their guns [or] use handcuffs." *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002) (citations omitted). Under the circumstances here, the officers' choices to draw their weapons while executing the felony arrest warrants for Justice, who was seated in the passenger seat of Abbassi's car, and to use handcuffs on Abbassi while conducting a frisk for weapons immediately after, were "reasonable response[s] to legitimate safety concerns on the part of the investigating officers" that did not transform the detention into an arrest. *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996) (emphasis omitted).
>
> 2. Officer Rollings was not required to read Abbassi his *Miranda* rights before asking him if he "had anything illegal on his person," as he began the frisk for weapons. When officers have the authority necessary to conduct a brief stop, they may question the detained individual about matters "beyond the initial purpose of the stop," even without particularized suspicion regarding the subject matter of the questioning, so long as the questioning "does not prolong the stop." *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007). The officer's question, whether Abbassi had "anything illegal on his person," and Abbassi's response, a "little bit of coke," happened within the first fifteen seconds that Officer Rollings had Abbassi out of the car and in handcuffs and before the officer completed the frisk. This question did not prolong the stop.
>
> Further, when Officer Rollings asked Abbassi whether he had anything illegal on his person, Abbassi was not "in custody" such that *Miranda* warnings were required. See *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). Abbassi had been detained only briefly by Officer Rollings in the course of the execution of the warrants to arrest

Justice, and, despite the officer's use of handcuffs, a *Miranda* warning was not required when, as here, the defendant was not placed in custody. *United States v. Bautista*, 684 F.2d 1286, 1292 (9th Cir. 1982) ("Handcuffing a suspect does not necessarily dictate a finding of custody. . . . Strong but reasonable measures to insure the safety of the officer or the public can be taken without necessarily compelling a finding that the suspect was in custody.") (quotations omitted).

3. The warrant to search Abbassi's residence was valid and based on probable cause. Whether the warrant correctly identified possession of marijuana for the purpose of sales as a misdemeanor under California law is irrelevant. Under the Fourth Amendment, a warrant may be issued to search a location where "there is a fair probability that contraband or evidence of a crime will be found . . . ." *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (emphasis added).

The Superior Court judge issuing the warrant had "a substantial basis for determining the existence of probable cause." Id. at 239. Abbassi's only preserved arguments that the warrant was not supported by probable cause are (1) that the warrant application falsely described the search at the Crescent Avenue residence in 2014 as uncovering marijuana and more than $100,000 cash, and (2) that information about his three prior arrests between 2008-2014 was irrelevant because the arrests were "stale." He has not shown good cause for why the additional arguments he now raises should be considered for the first time on appeal. See Fed. R. Crim. P. 12(c)(3); *United States v. Guerrero*, 921 F.3d 895, 898 (9th Cir. 2019) (per curiam).

There is no evidence that Detective Hernandez "intentionally or recklessly made false or misleading statements" in the affidavit about the discovery of marijuana and $100,000 cash at the Crescent Avenue residence in 2014. See *United States v. Martinez-Garcia*, 397 F.3d 1205, 1215 (9th Cir. 2005).

Additionally, any inaccuracy was not material. See id. Even excising the statement that in 2014 marijuana and $100,000 cash had been found at the residence, the remaining facts in the affidavit were enough to support a probable cause finding.

Similarly, it was proper for the detective to include Abbassi's prior arrest information in her affidavit in support of the warrant, and it was proper for the judge to rely upon it. See *Greenstreet v. Cty. of San Bernardino*, 41 F.3d 1306, 1309 (9th Cir. 1994). But even if the information about those prior arrests was omitted from the warrant application, there still would have been probable cause to search his home."

REASONS FOR GRANTING THE WRIT

Abbassi moved to suppress all evidence obtained by the government as a result of his unlawful detention and search by law enforcement on February 24, 2017, as well as his statements on that date and evidence returned as a result of subsequent search warrants. The motion was based on the ground that the evidence was derived from a violation of his Fourth Amendment rights to be free from unreasonable search and seizure, a violation of his *Miranda* rights, and the illegality of the search warrants. (ER95)

A. Abbassi's Motion to Suppress Should Have Been Granted Because the Search Warrant and Affidavit Therefor Were Constitutionally Defective

1. The Constitution Requires a Valid Search Warrant Supported by Probable Cause

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated.'" *United States v. Jones*, 565 U.S. 400, 404 (2012). A search is presumed unreasonable under the Fourth Amendment if it is not supported by probable cause and not conducted pursuant to a valid search warrant. Because of the Fourth Amendment's explicit preference for search warrants, warrantless searches and seizures are per se unreasonable unless they fall within an exception to

the warrant requirement. Id. *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993). In the case of warrantless searches, the government -- the party claiming an exception to the search requirement -- has the burden to demonstrate that such an exception applies.

As a general rule, facts of reliability or corroboration must be set forth in the affidavit to a search warrant; an affidavit based on mere suspicion or belief, or stating a conclusion with no supporting facts, is wholly insufficient. The information presented to a magistrate supporting probable cause to issue a search warrant must consist of "facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." *Sgro v. United States*, 287 U.S. 206, 210-211 (1932). As stated in Sgro, it is insufficient, to justify a finding of probable cause, "that at some time there existed circumstances that would have justified the search in the absence of reason to believe that those circumstances still exist." *Sgro*, 287 U.S. at 211.

As a general rule, evidence obtained in violation of the Fourth Amendment cannot be used by the government in its case-in-chief in a criminal prosecution against the subject of the illegal search and seizure. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

In *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978), the Supreme Court held that where -- as here -- a warrant is based on false statements, and an examination of the warrant affidavit yields insufficient probable cause without those statements, the warrant must be set aside.

2. Here the Warrant and Affidavit Were Based Upon False and Stale Information

In this case, almost every purported fact relied upon to show probable cause for the search warrant was false or stale.

To begin with, the search warrant affidavit stated that there was probable cause for believing that evidence of possession of marijuana for the purpose of sale, a felony in California, would be at the Crescent residence. (ER156, ER164) However, as to Abbassi, sale of marijuana would be a felony only if Abbassi intended to sell "to a person under the age of 18 years." California Health & Safety Code § 11359(c)(3). The affidavit does not state with particularity any reason why there was probable cause to believe that Abbassi intended to sell to a minor. Thus the warrant was facially deficient for failing to properly allege the type of crime for which the search warrant could constitutionally issue. (ER49)

As a further indication of the inattention with which the affidavit was prepared, the affidavit states that the property described is "lawfully seizable

pursuant to Penal Code Section 1524(3)." (ER159) There is no such code subsection.

The affidavit was also defective in that Hernandez stated that in her experience, persons who possess narcotics often hide the substances and paraphernalia in their homes. (ER160) While perhaps true, the statement is irrelevant and misleading in this context. The alleged offense for which the warrant was sought was not possession for use but possession for sale.

Hernandez' affidavit further falsely claimed as probable cause that Rollings "retrieved a baggie containing approximately 4.5 grams of a white powdery substance that he believed to be cocaine. He placed ABBASSI under arrest for possession of cocaine." (ER161) This statement is untrue because Rollings stated that he believed that he found "approximately three to four grams of white powder." (ER84) Hernandez' affidavit increased the amount of powder that Rollings testified he found, in order to make the cocaine appear more like a distribution quantity than a personal-use quantity.1

Hernandez further spuriously claimed that in "Abbassi's vehicle," Rollins found half a pound of marijuana, several prescription pills, currency of $500

1 Cocaine in the amount of approximately 3.5 grams has been characterized as a personal-use quantity. See, e.g., *Collins v. Buss*, 2011 U.S. Dist. LEXIS 117827 (N.D. Fla. 2011); *State v. Fountain*, 356 Wis. 2d 327, 855 N.W.2d 492 (Wisc. Ct. App. 2014); *People v. Ellison*, 987 N.E.2d 837, 842 (Ill. App. 2013).

and a digital scale. (ER161) Hernandez' statement that it was "Abbassi's vehicle" was misleading because the BMW was not registered to Abbassi. A Toyota Camry at the Crescent residence was registered to Abbassi and there was no evidence of anything incriminating found in the Camry. (ER161)

Hernandez further represented that Abbassi had been arrested in the past for the sale of marijuana and prescription medication. Based on the fact that during a search of his residence in 2014 officers located evidence of the sales of controlled substances, Hernandez believed that a search of Abbassi's residence would yield further evidence of Abbassi continuing to participate in the sales of narcotics. (ER161) Information dating back to 2008 was stale.

Hernandez testified that she conducted a records check and found that Abbassi "has been arrested and convicted for the possession and sales of controlled substances numerous times." (ER162) That was an untrue and extremely misleading statement. (PSR45-50) And if Hernandez had, as she represented, actually reviewed Abbassi's records, she knew that it was untrue. Hernandez was misleadingly conflating arrests and convictions. Abbassi had not been convicted of sales of controlled substances. Abbassi was only convicted of simple possession, in one case.

Abbassi had one conviction for possession of a controlled substance. By lumping together arrests and convictions, and possession and sales, Hernandez spuriously suggested that all the arrests that she then described

had resulted in sales convictions. Thus, after the misleading claim that Abbassi was "arrested and convicted … numerous times," Hernandez enumerated various arrests. (ER162) Her initial misleading statement suggested that these arrests resulted in convictions. And notably, Hernandez made no effort to correct her statement by clarifying that none of the arrests she described resulted in a conviction.

Hernandez listed three arrests, without disclosing that the arrests did not result in any convictions for possession for sale. She then falsely stated that in 2014, officers served a search warrant at the "location" and located "marijuana for the purpose of sales, as well as prescription medication for the purposes of sales, including OxyContin. Officers also located over $100,000 in cash." (ER162) This statement is mostly false; neither marijuana nor $100,000 in cash was seized from the Crescent residence in 2014.

Hernandez concluded that "Based on the fact that ABBASSI has been arrested for the sales of controlled substances in the past and based on the fact that ABBASSI maintains his residence for the purposes of the sales of controlled substances," a search of the location would yield evidence of the sales of controlled substances. (ER162) Hernandez's conclusion is as flawed as the basis therefor. She reiterated that Abbassi had been arrested for sales, while again failing to disclose that Abbassi had never been convicted of sales. She claimed that Abbassi maintained the Crescent

residence for the purpose of sales, again without disclosing that Abbassi had never been convicted of sales, and also without disclosing that Abbassi's parents and sister lived at the Crescent residence.

The relevant facts, which were not in the affidavit for the search warrant, were that Abbassi had been convicted once of possession when he was found in possession of hydrocodone pills during a traffic stop. Abbassi had never been convicted of sale of controlled substances. (PSR50) Rollings had found approximately 3-4 grams of cocaine, a personal-use quantity, in Abbassi's possession. In the car that Abbassi was driving, but was not registered to Abbassi, were several pills and a half pound of marijuana.

3. In Upholding the Warrant, the Court Relied Upon False and Stale Information

In upholding the warrant, the district stated that there was probable cause for issuance of the search warrant by the state court judge based upon the following statements from the government's opposition to the motion to suppress. (ER15, ER18)

> "• On February 24, 2017, the same day the affidavit was written and presented, Offer [sic] Rollings found approximately 4.5 grams of suspected cocaine on defendant's person;
> • On that same date, Officer Rollings also found approximately half a pound of marijuana, several prescription pills (including OxyContin and Xanax), over $500 in cash, and a digital scale in defendant's car;
> • In Detective Hernandez's experience, individuals found in possession of narcotics often hide controlled substances, paraphernalia, and documents pertaining to narcotics transactions in their homes;

• Defendant had been arrested for narcotics offenses on three prior occasions and, on each of those prior occasions, defendant stated he resided at the Crescent residence;

• In 2014, officers found evidence of narcotics sales at defendant's residence;

• Defendant told officers he still lived at the Crescent residence; and

• Detective Hernandez had been to the Crescent residence that day and had seen a car registered to defendant parked in the driveway." (ER72)

The only true facts relevant to all the false and misleading statements set forth in the Hernandez affidavit, on which the district court relied, are the following: On February 24, 2017, Rollings found Abbassi in possession of a personal-use quantity of cocaine. In a car which was not registered to Abbassi, Rollings found a few pills and half a pound of marijuana (which would not be illegal to sell unless it were sold to a minor). Although arrested, Abbassi had never been convicted of the sale of a controlled substance. In 2014, a search found over $100,000 in currency in a car belonging to Abbassi's sister, over 100 bags of marijuana next door to a barbershop belonging to Abbassi's brother, an active marijuana grow in the residence of Abbassi's brother, and 236 pills, along with bottles and capsules, in Abbassi's bedroom in the Crescent residence in which Abbassi's parents, sister and Abbassi resided.

Accordingly, the affidavit, on which the state and district courts relied, contained almost exclusively false and misleading claims. With all the false and misleading claims excised, the remaining and correct claims are

insufficient to establish probable cause. Therefore Abbassi's motion to suppress should have been granted.

Thus all evidence seized in violation of the Fourth Amendment, including any subsequently discovered fruits thereof, may not be used in a criminal proceeding against Abbassi. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Mapp v. Ohio*, 367 U.S. 643, 655 (1951).

B. Abbassi's Motion to Suppress Should Have Been Granted Because Abbassi Was Illegally Arrested, Interrogated and Searched

Abbassi was unlawfully arrested and interrogated without being advised of his *Miranda* rights. Rollings' illegal questioning of Abbassi which resulted in Abbassi's admission that he possessed a little bit of cocaine, was spuriously used as a justification by Rollings to search Abbassi and the BMW. The results of those searches were then used as a basis for the search of the Crescent residence. Abbassi's motion to exclude all of this evidence was erroneously denied by the district court.

> "*Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977).

Abbassi was ordered out of his car at gunpoint, after Justice had already been ordered out of the car at gunpoint and arrested. Abbassi was handcuffed and surrounded by four armed officers and police cars.

Regardless of whether Rollings described what occurred as a detention or an arrest, or could have done more to restrict defendant's liberty, no reasonable person would have felt free to leave under those circumstances. See *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (a person is in custody whenever movement has been restrained to the degree associated with a formal arrest).

The use of handcuffs substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical *Terry* stop. Police conducting on-the-scene investigations involving potentially dangerous suspects may take precautionary measures if they are reasonably necessary. *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982). Here, since the government failed to prove that handcuffing Abbassi was reasonably necessary, the would-be *Terry* stop was instead an arrest requiring *Miranda* warnings.

In attempting to justify Rollings' conduct, the government relied upon *United States v. Vaughan*, 718 F.2d 332, 334-36 (9th Cir. 1983) (ER67-70). In Vaughan, the defendant was a passenger in a car containing two men who had warrants out for their arrest. One agent, Clem, stopped the car containing the three men. When Clem stopped the car, all three men got out. Clem drew his gun and ordered them to freeze. Vaughan, carrying a briefcase under his arm, started to walk away. Clem brought Vaughan back

to the car. Vaughan started to walk away again. Clem again brought Vaughan back to the car, and this time handcuffed Vaughan. By this time other agents were on the scene. Thus in Vaughan there was one agent and three unrestrained men, two of whom had warrants for their arrest, and the third of whom repeatedly tried to leave, and repeatedly ignored orders to stop. Those facts rendered Vaughan's restraint reasonably necessary.

Here, by contrast, Abbassi complied with Rollings' request to exit the car and made no effort to abscond. Nonetheless, Rollings immediately handcuffed Abbassi. Notably, at the time Abbassi was handcuffed, he was surrounded by four armed officers. The only other occupant of the BMW was already handcuffed in a police car. Thus here there was no reasonable necessity for the handcuffs.

Terry allows a reasonable search for weapons for the protection of the police officer, "where he has reason to believe that he is dealing with an armed and dangerous individual." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The officer's belief that his safety or the safety of others is in danger must be based not on his inchoate and unparticularized suspicion or "hunch," but on specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Id. Here no facts were identified which could reasonably give rise to any inference that Abbassi was a danger to anyone.

Rollings claimed that his only concern in asking Abbassi whether he had anything illegal, was whether Abbassi had on his person anything that could endanger officer safety. (ER84) If that was the case, then Rollings' inquiry should have been directed to that concern. Rollings' question whether Abbassi had anything "illegal" was both overinclusive and underinclusive for Rollings' professed purpose. Rollings' inquiry encompassed illegal items that would not endanger officer safety, and did not encompass legal items that might endanger officer safety. Instead, the true purpose of Rollings' inquiry was to get Abbassi to incriminate himself, which is the reason why *Miranda* warnings are required in such circumstances. What question could possibly be more intended to elicit an incriminating response than the question "Do have anything illegal on your person?" (ER84)

"*Miranda* warnings are only required when a suspect is both in custody and subjected to interrogation." *United States v. Esquerra-Nunez*, 215 F.3d 1334 (9th Cir. 2000) (citing *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966)). "A person is in custody only where 'there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *United States v. Norris*, 428 F.3d 907, 912 (9th Cir. 2005) (quoting *United States v. Crawford*, 372 F.3d 1048, 1059 (9th Cir. 2004) (en banc)). Here, Abbassi was clearly in custody as he was immediately placed in handcuffs.

Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom. *United States v. Butler*, 249 F.3d 1094, 1098 (9th Cir. 2001).

> "Voluntary statements are not considered the product of interrogation. The term 'interrogation' means 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.'" *United States v. Washington*, 462 F.3d 1124, 1132 (9th Cir. 2006) (quoting Rhode Island v. Innis, 446 U.S. 291, 300 (1980)).

See also *United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981) ("the ultimate test for whether questioning constitutes interrogation is whether, in light of all the circumstances, the police should have known that a question was reasonably likely to elicit an incriminating response.").

Here, no question could have been more intended to elicit an incriminating response than Rollings' question whether Abbassi had anything illegal.

As such, the district court erred in denying Abbassi's motion to suppress, and the evidence of the coke found on Abbassi, as well as the evidence discovered during the resulting searches of the BMW and the Crescent residence, must be suppressed.

CONCLUSION

For all the foregoing reasons, Petitioner Wasfi Abbassi submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: July 1, 2020

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