No. 20-5718

IN THE SUPREME COURT OF THE UNITED STATES

RAHEIM ABDULLAH TRICE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a law-enforcement officer violated the Fourth Amendment by using a motion-activated camera for a single afternoon in a common hallway of an unlocked apartment building.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

United States v. Trice, No. 18-cr-192 (Apr. 25, 2019)

United States Court of Appeals (6th Cir.):

United States v. Trice, No. 19-1500 (July 21, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 966 F.3d 506. The order of the district court denying petitioner's motion to suppress (Pet. App. 13a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2020. The petition for a writ of certiorari was filed on September 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Michigan, petitioner was convicted on one count of possessing with the intent to distribute 50 grams or more of methamphetamine, 28 grams or more of crack cocaine, and detectable amounts of cocaine and heroin, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(viii), (b)(1)(B)(iii), and (b)(1)(C). Judgment 1; see Plea Agreement 1-2. The district court sentenced him to 192 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-12a.

1. In 2018, police officers in Parchment, Michigan, arranged for a confidential informant to purchase heroin from petitioner on multiple occasions. Pet. App. 4a-5a. During the first purchase, officers observed petitioner arrive in a Pontiac driven by a woman, deliver the heroin, and return to the Pontiac. Id. at 4a. During the second purchase, officers saw petitioner leave an apartment building at 114 Espanola Avenue in Parchment, deliver heroin to the informant, and then return to the building. Ibid. The Pontiac's registration and police records revealed that the car belonged to petitioner's wife, who lived at 114 Espanola Avenue in Apartment B5. Ibid.

To confirm that petitioner was living in or using Apartment B5, one of the officers, Investigator Marcel Behnen, visited the apartment building. Pet. App. 4a. Behnen found the front door to

be ajar and unlocked, as well as lacking a doorbell or intercom. Ibid. He entered the building and went to the basement floor, where he found two apartments, one with "B6" on its door and the other unmarked. Ibid. Behnen installed a motion-activated camera that would appear to be a smoke detector on the wall opposite the unmarked door in the common hallway. Id. at 5a, 17a. The camera was programmed to record for two to three minutes when someone entered or left the unmarked apartment. Id. at 5a.

The police then arranged for another heroin purchase by an informant. Pet. App. 5a. Officers observed petitioner leave the apartment building, deliver the heroin, and then return to the building. Ibid. Behnen then retrieved the camera, which had been in place for approximately "four to six hours." Ibid. During that time, the camera had recorded petitioner entering and exiting Apartment B5 "on three or four occasions." Ibid. Although the camera recorded "a view through the threshold of the apartment doorway" as petitioner came in and out of the unit, "nothing inside" was "visible." Ibid. One recording also showed petitioner using his cell phone for a few minutes, but "the display on the cell-phone screen" was "not visible." Ibid.

The police then applied for a warrant to search Apartment B5. Pet. App. 5a. The supporting affidavit stated that police had observed petitioner being driven in a Pontiac registered to his wife; that the Pontiac's registration and police records revealed that she lived at 114 Espanola Avenue in Apartment B5; that

petitioner had entered and exited the apartment building at 114 Espanola Avenue during two controlled purchases of heroin by an informant; and that drug traffickers frequently keep evidence of their crimes at their residences. Ibid.; D. Ct. Doc. 16-1, at 4-9 (Oct. 12, 2018). The affidavit also stated that police had "conducted surveillance" of Apartment B5 during one of the controlled purchases and had "observed [petitioner] entering and exiting" the apartment on "several occasions." D. Ct. Doc. 16-1, at 6; see Pet. App. 5a.

After obtaining a warrant, the police searched Apartment B5. Pet. App. 5a. The search revealed 64 grams of methamphetamine, 43 grams of crack cocaine, 28 grams of cocaine, three grams of heroin, and other paraphernalia associated with drug trafficking. Ibid.

2. A federal grand jury indicted petitioner on three counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing with the intent to distribute 50 grams or more of methamphetamine, 28 grams or more of crack cocaine, and detectable amounts of cocaine and heroin, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(viii), (b)(1)(B)(iii), and (b)(1)(C). Indictment 1-4. Petitioner moved to suppress the evidence obtained during the search of the apartment, contending that the use of the camera had violated the Fourth Amendment. Pet. App. 5a.

The district court held an evidentiary hearing at which Behnen and the property manager of the apartment building testified. Pet.

App. 17a-18a. The manager testified that none of the entrances to the building were locked or had "other barriers to entry"; that "the building [was] freely accessible through the front door"; that "[a]nyone could freely access the common hallways"; and that the building lacked "No Trespassing" signs or other indications that it was closed to the public. Id. at 17a; see 11/29/18 Tr. (Tr.) 9-13, 23-27. He added that the common hallway outside Apartment B5 led to a shared laundry room, which was open to all tenants "by design." Tr. 23-24; see Pet. App. 22a. And he further testified that no one from the building's management company had "authority to remove anybody" from the building, Tr. 25, and that tenants who believed that visitors were unlawfully loitering in common areas were advised to call the police, Tr. 22, 25-26; see Pet. App. 17a-18a.

Following the hearing, the district court denied the motion to suppress. Pet. App. 13a-27a. The court determined that petitioner lacked a reasonable expectation of privacy in the common hallway outside the apartment, id. at 21a-22a; that the use of the camera was a constitutionally permissible use of technology, id. at 22a-24a; that the common hallway was not the "curtilage" of the apartment, id. at 24a; and that the limited use of the camera here "did not test the outermost limits" of permissible technological surveillance, id. at 25a. The court added that in any event, suppression would have been unwarranted under the good-faith exception to the exclusionary rule, explaining that no "reasonably

well-trained officer would have known of any impropriety in entering the unlocked apartment building and its common hallways, and in making limited use of a camera in the common hallway to corroborate a reasonable belief that [petitioner] resided in Apartment B5." Id. at 26a.

In exchange for dismissal of the three heroin-distribution counts, petitioner entered a conditional guilty plea to the drug-possession count in which he reserved his right to challenge the suppression ruling on appeal. Plea Agreement 1-4. The district court accepted petitioner's plea and sentenced him to 192 months of imprisonment, to be followed by five years of supervised release. Judgment 1-3.

3. The court of appeals affirmed. Pet. App. 1a-12a.

The court of appeals observed that petitioner had not made any "property-based" argument under the Fourth Amendment, but had contended only that the police's use of the "camera violated his reasonable expectation of privacy." Pet. App. 6a. And it determined that petitioner lacked an objectively reasonable expectation of privacy in the hallway outside Apartment B5. Id. at 6a-7a. The court observed that the unlocked apartment building lacked an "intercom system, doorbell, or any other way to alert tenants about the presence of a visitor," meaning that "anyone who wanted to knock on a tenant's door would need to enter through the exterior door, walk through the common hallway, and locate the door of the individual unit." Id. at 7a. It accordingly found

that the hallway outside Apartment B5 "was effectively a common area, open to all" and that petitioner had made no efforts to "maintain his privacy" in that area. Ibid. (citation omitted).

The court of appeals rejected petitioner's contention that the hallway was the "curtilage" of Apartment B5 subject the same Fourth Amendment protections as the apartment itself. Pet. App. 7a-8a. The court explained that, other than being near the apartment's front door, the hallway did not have any of the features of curtilage identified in this Court's decision in United States v. Dunn, 480 U.S. 294, 301 (1987). Pet. App. 7a-8a. The court noted that rather than "in an enclosure around the home," the hallway was "accessible to any passerby" and "used by other tenants as a passageway to the basement laundry unit." Id. at 8a. And the court emphasized that not only had petitioner not taken "any measures to protect the area from observation," he did not have "any authority" over it in the first place. Ibid. The court observed that, for example, petitioner could not have prevented the apartment manager from posting "flyers or signs" where the camera had been located. Ibid. And the court explained that rather than according "greater protections to those who live in homes than those who live in apartments," its determination that the hallway was not curtilage in fact declined to grant "more favorable" treatment to petitioner than to the resident of a stand-alone home by permitting him to invoke Fourth Amendment protections

for a place that he did not own and in which he had no reasonable expectation of privacy. Id. at 12a n.8.

The court of appeals also found that the use of the camera was constitutionally permissible. Pet. App. 8a-11a. It explained that law enforcement generally may "record on video what it could have observed through ordinary surveillance" from "'a public vantage point.'" Id. at 8a (citation omitted). And it observed that here, the police could have obtained the same information -- petitioner's entry and exit of Apartment 5B "on the way to the controlled buy" -- "by posing as one of the many individuals" that he "could reasonably have expected in the hallway, be it 'maintenance staff,' 'mail service,' 'garbage service,' an invited guest of a tenant, or another tenant using the shared laundry room." Id. at 10a (citation omitted). The court rejected petitioner's analogy of the camera to the use of the historical cell-site location information at issue in Carpenter v. United States, 138 S. Ct. 2206 (2018), and emphasized "the limited scope of [its] holding." Pet. App. 11a; see id. at 10-11a. The court stressed that the police had employed the camera for the "singular and narrow purpose" of confirming that petitioner was using Apartment 5B and that the information it obtained consisted of three or four short "video clips" lasting two to three minutes showing only his "entry and exit to and from his apartment" over the span of a few hours; and it suggested that a different result might be warranted in cases involving a "'sophisticated sensing

device'" or "multi-unit dwellings with locked doors." Id. at 10a-11a, 12a nn.6, 8 (citation omitted).

ARGUMENT

Petitioner contends (Pet. 8-20) that the police violated the Fourth Amendment by entering an unlocked apartment building and installing a camera that recorded his entry and exit of one of the units. The court of appeals correctly rejected that contention, and the court's fact-bound application of Fourth Amendment precedent does not conflict with any decision of this Court or of any other court of appeals. Pet. App. 1a-12a. In any event, this case presents a poor vehicle for addressing the question presented. No further review is warranted.

1. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. Absent the existence of recognized property rights capable of invasion through "physical intrusion," Florida v. Jardines, 569 U.S. 1, 5 (2013) (citation omitted), the touchstone of a Fourth Amendment search is an affirmative showing that the defendant had a "legitimate expectation of privacy in the invaded place," Minnesota v. Olson, 495 U.S. 91, 95 (1990) (citation omitted). Here, petitioner -- in accord with his arguments below -- does not advance a "property-based" challenge, but contends only that Behnen's conduct

"violated his reasonable expectation of privacy." Pet. App. 6a; see Pet. 8-20.* That contention lacks merit.

a. Petitioner first contends (Pet. 12-16) that the hallway outside the door of Apartment B5 should be treated as the "curtilage" of that apartment entitled to the same constitutional protection as the apartment itself. In United States v. Dunn, 480 U.S. 294 (1987), this Court set forth four factors to guide the determination of whether an area adjacent to a home is "curtilage": (1) proximity to the home; (2) whether the area is included within an enclosure surrounding a home; (3) the nature and uses of the area; and (4) steps taken by the resident to protect the area from observation. Id. at 301; see Pet. App. 7a (same). The court of appeals correctly determined that those factors show that the

* Although petitioner characterizes Behnen's entry into the apartment building as a "trespass[]," Pet. 12, 16, 19-20, his Fourth Amendment claim rests solely on his asserted "expectation of privacy" in the hallway outside Apartment 5B, Pet. 10-11. Furthermore, the record does not support the assertion that Behnen was trespassing. As explained above, see pp. 4-5, supra, the property manager testified at the suppression hearing, among other things, that "the building [was] freely accessible through the front door"; that "[a]nyone could freely access the common hallways"; that the building lacked "No Trespassing" signs or other indications that it was closed to the public; and that no one from the building's management company had "authority to remove anybody" from the building. Pet. App. 17a-18a; Tr. 9-13, 23-27. In any event, petitioner had no possessory interest in the building's common hallways, see Pet. App. 11a (citing Michigan law), and thus any trespass would not have implicated his Fourth Amendment rights. See Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which * * * may not be vicariously asserted.").

hallway outside Apartment B5 is not curtilage of that apartment. Pet. App. 7a-8a.

As the court of appeals observed, although the camera was close to petitioner's apartment door, "the other three factors weigh strongly against him": (1) the camera was placed "in a common unlocked hallway" rather than in an enclosure around a home; (2) petitioner lacked "any authority" over that area; and (3) he had taken no "measures to protect the area from observation." Pet. App. 8a. Accordingly, there was "nothing about the hallway wall to suggest that it was 'an area adjacent to the home and to which the activity of home life extends.'" Ibid. (quoting Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018)) (internal quotation marks omitted). And contrary to petitioner's contention (Pet. 14-16), the fact that some homes do have curtilage does not bear on the straightforward application of the curtilage factors to the feature of the common hallway outside his apartment.

Petitioner identifies no court that has treated as "curtilage" -- or otherwise recognized a reasonable expectation of privacy in -- a common hallway in an unlocked apartment building. To the contrary, every court of appeals to have considered the question has determined that a resident generally does not have a reasonable expectation of privacy in the common areas of a multi-unit residential building. See, e.g., United States v. Hawkins, 139 F.3d 29, 32 (1st Cir.), cert. denied, 525 U.S. 1029 (1998); United States v. Barrios-Moriera, 872 F.2d 12, 14 (2d Cir.), cert.

denied, 493 U.S. 953 (1989), abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991); United States v. McGrane, 746 F.2d 632, 634 (8th Cir. 1984); United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993); United States v. Maestas, 639 F.3d 1032, 1039-1040 (10th Cir. 2011); United States v. Miravalles, 280 F.3d 1328, 1333 (11th Cir. 2002); United States v. Anderson, 533 F.2d 1210, 1214 (D.C. Cir. 1976).

Petitioner observes (Pet. 11, 14-15) that some courts, including the court of appeals below, have recognized exceptions to that general rule, but none of the decisions he cites involved circumstances similar to those here. Specifically, petitioner's authorities involve either common areas in a locked multi-unit residential building, see United States v. Whitaker, 820 F.3d 849, 850 (7th Cir. 2016); United States v. Heath, 259 F.3d 522, 533-534 (6th Cir. 2001); United States v. Carriger, 541 F.2d 545, 550-551 (6th Cir. 1976); or shared spaces in communal dwellings, see, e.g., United States v. King, 227 F.3d 732, 750 (6th Cir. 2000) (determining that duplex basement was not akin to "a multi-unit apartment building"); Reardon v. Wroan, 811 F.2d 1025, 1027 n.2 (7th Cir. 1987) (per curiam) (determining that hallways in fraternity house were unlike "common areas of apartment buildings"); State v. Titus, 707 So. 2d 706, 711 (Fla. 1998) (determining that shared hallway and kitchen in communal rooming

house were distinct from "common hallways in unlocked apartment buildings").

b. In asserting a reasonable expectation of privacy, petitioner also focuses (Pet. 16-20) on the use of a camera. But surveillance of activities that are "clearly visible" "from a public vantage point" does not violate any expectation of privacy "that society is prepared to honor" as reasonable, California v. Ciraolo, 476 U.S. 207, 213-214 (1986), including those activities done "in the doorway" of a home exposed to public view, United States v. Santana, 427 U.S. 38, 40 (1976); see id. at 42. Thus, had Behnen observed petitioner "enter or exit the unit" by "posing as one of the many individuals" that he "could reasonably have expected in the hallway," petitioner plainly would not have a cognizable claim. Pet. App. 10a.

Behnen's use instead of a camera did not violate the Fourth Amendment. Police officers may, within reasonable limits, "augment[] the sensory faculties bestowed upon them at birth" by using ordinary "scien[tific] and techn[ical]" means of surveillance to observe and record activities visible from a public vantage point. United States v. Knotts, 460 U.S. 276, 282-283 (1983); see, e.g., Ciraolo, 476 U.S. at 213-214 (determining that aerial flyover from 1000 feet in the air to observe marijuana plants in the fenced-in backyard of a home was permissible). The courts of appeals have recognized that "[t]he use of video equipment and cameras to record activity visible to the naked eye

does not ordinarily violate the Fourth Amendment." United States v. Jackson, 213 F.3d 1269, 1280 (10th Cir.), judgment vacated on other grounds, 531 U.S. 1033, and cert. denied, 531 U.S. 1038 (2000); see, e.g., United States v. Houston, 813 F.3d 282, 287-290 (6th Cir.), cert. denied, 137 S. Ct. 567 (2016); United States v. Vankesteren, 553 F.3d 286, 290-291 (4th Cir.), cert. denied, 556 U.S. 1269 (2009); United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991). Petitioner identifies no court of appeals that would find a Fourth Amendment violation on the facts of this case.

Contrary to petitioner's suggestion (Pet. 17-18), the confined use of the camera here is not analogous to the use of historical cell-site location information at issue in Carpenter v. United States, 138 S. Ct. 2206 (2018), a decision that expressly declined to "call into question conventional surveillance techniques and tools, such as security cameras," id. at 2220. Far from exposing the "vast store of sensitive information on a cell phone," the camera here was put to the "'limited use'" of recording only a few minutes of video, in connection with a "'discrete'" transaction, when its motion sensor detected a person entering or leaving the apartment. Id. at 2214-2215 (quoting Knotts, 460 U.S. at 284-285). The camera was not used -- and could not have been used -- to track petitioner's movements over an extended period of time or to otherwise uncover intimate details of his private life. See Pet. App. 10a-11a. And both courts below specifically rejected petitioner's assertion (Pet. 16, 19) that the camera recorded

activities within the apartment itself. Pet. App. 12 n.7; see id. at 5a, 23a (explaining that "[t]he camera captured no more than what a person passing through the hallway would have seen" and that "nothing inside the apartment [was] visible").

2. In any event, this case would be an unsuitable vehicle for reviewing the question presented, because petitioner could not prevail even if this Court were to decide that question in his favor. The warrant to search Apartment B5 was supported by probable cause even without the information obtained from the camera. And even if a Fourth Amendment violation occurred, the good-faith exception to the exclusionary rule would apply in any event.

a. Even without the information obtained from the camera, the warrant application still would have demonstrated probable cause to search Apartment B5. See United States v. Karo, 468 U.S. 705, 719 (1984) ("[I]f sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid.").

The probable-cause standard "is not a high bar." District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (citation omitted). In the context of a search warrant, a magistrate need only determine whether "reasonable inferences" from the evidence described in the warrant application establish a "fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238, 240 (1983). Because the

probable-cause standard deals not "with hard certainties, but with probabilities," id. at 231 (citation omitted), the facts presented to the magistrate need only "'warrant a person of reasonable caution in the belief' that contraband or evidence of a crime is present," Florida v. Harris, 568 U.S. 237, 243 (2013) (brackets and citation omitted).

Even if the statement that police had "conducted surveillance of" Apartment B5 and "observed [petitioner] entering and exiting [it] on several occasions" on the day of a controlled purchase were excised, D. Ct. Doc. 16-1, at 6, the affidavit supporting the search warrant here amply established a fair probability that evidence of petitioner's illicit activities would be found in that apartment. The affidavit described petitioner's sale of heroin to a confidential informant on two occasions, both of which involved petitioner exiting the apartment building at 114 Espanola Avenue, selling heroin, and then returning to the building. Id. at 4-6. The affidavit further explained that petitioner had been seen riding in a Pontiac that was registered to his wife and that the car's registration documents and police records indicated that his wife's address was Apartment B5 at 114 Espanola Avenue. Id. at 4-5. Finally, the affidavit averred that drug traffickers often keep evidence of their crimes in their residences. Id. at 7-9.

Although the camera confirmed that petitioner was in fact using Apartment B5, such certainty was not required to establish probable cause. Gates, 462 U.S. at 231. The magistrate reasonably

could have inferred that, in light of the evidence that petitioner was seen leaving and returning to 114 Espanola Avenue during two controlled drug transactions, and that his wife lived in Apartment B5 in that building, there was at least a fair probability that he was using the apartment in connection with his drug activities. Accordingly, the search warrant was supported by probable cause even without the information provided by the surveillance camera.

b. In any event, the district court correctly determined that even if petitioner's Fourth Amendment rights had been violated, the evidence seized from Apartment B5 still would have been admissible under the good-faith exception to the exclusionary rule. Pet. App. 26a.

The exclusionary rule is a " 'judicially created remedy' " that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). To justify suppression, a case must involve police conduct that is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" in suppressing evidence. Herring v. United States, 555 U.S. 135, 144 (2009). Accordingly, suppression will be warranted "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Leon, 468 U.S. at 919 (citation omitted).

The officers executing the search warrant here had ample reason to believe that it was valid. The warrant had been approved by a magistrate based on extensive evidence that petitioner was using Apartment B5 at 114 Espanola Avenue as a base of operations for drug distribution. See D. Ct. Doc. 16-1, at 4-9. The warrant was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (citation omitted). Moreover, as the court of appeals explained, its own precedent supported a determination that no warrant was necessary to enter the common hallway of an unlocked apartment building and install a surveillance camera. Pet. App. 6a-7a, 8a-11a (citing, among other things, Houston, 813 F.3d at 287-290, and United States v. Dillard, 438 F.3d 675, 682-683 (6th Cir.), cert. denied, 549 U.S. 925 (2006)); see Davis v. United States, 564 U.S. 229, 239 (2011) (explaining that suppression is inappropriate under the good-faith exception "when the police conduct a search in objectively reasonable reliance on binding judicial precedent"). At the very least, the fact that both courts below determined that no Fourth Amendment violation occurred demonstrates that the police could have reached the same conclusion in good faith. Accordingly, the outcome of petitioner's case would be unaffected regardless of how this Court might decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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