No. _____

In the
Supreme Court of the United States

MARCOS ALEJANDRO GONZALEZ FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

The lower courts are in conflict about whether the Sixth Amendment's Confrontation Clause, the Fifth Amendment's Due Process Clause, or some other authority guarantees a criminal defendant the right to cross-examine the government's witnesses at a pretrial hearing into whether a search complied with the Fourth Amendment. This case presents a good vehicle for the Court to resolve this conflict by addressing this question:

> When, in an attempt to meet its burden to prove that a search complied with the Fourth Amendment, the government proffers declarations from the searching officers, does the defendant have the right to cross-examine those witnesses before a court denies a suppression motion based on their declarations?

Related Proceedings

United States Court of Appeals for the Ninth Circuit

United States v. Marcos Alejandro Gonzalez Flores, Case Nos. 17-50269 & 17-50270.

Amended Memorandum Decision Entered: June 30, 2020; Mandate Entered: July 8, 2020.

United States District Court for the Central District of California

United States v. Marcos Alejandro Gonzalez Flores, Case No. CR-16-000146-R.

Judgment Entered: June 29, 2017.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Marcos Alejandro Gonzalez Flores petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's amended memorandum decision in *United States v. Gonzalez Flores*, Case Nos. 17-50269 & 17-50270, was not published. App. 13-16a.[1] The district court's order

[1] "App." refers to the attached appendix. "GER" refers to the government's excerpts of record electronically filed in the Ninth Circuit on November 29, 2017 (Docket No. 7 in Case No. 17-50269). "SER" refers to the appellee / cross-appellant's supplemental excerpts of record electronically filed in the Ninth Circuit on March 20 and April 10, 2019 (Docket Nos. 41 & 45 in Case No. 17-50269). "ASB" refers to the appellee / cross-appellant's second brief on cross appeal electronically filed in the Ninth Circuit on March 20, 2019 (Docket No. 40 in Case No. 17-50269). "GTB" refers to the government's third brief on cross appeal electronically filed in the Ninth Circuit on April 19, 2019 (Docket No. 49 in Case No. 17-50269). "ARB" refers to the appellee / cross-appellant's cross-appeal reply brief electronically filed in the Ninth Circuit on June 10, 2019 (Docket No. 54 in Case No. 17-50269). "PFR" refers to the appellee / cross-

denying the motion to suppress evidence in *United States v. Gonzalez Flores*, Case No. CR-16-00146-R, also was not published. App. 1-6a.

Jurisdiction

The Ninth Circuit issued its amended memorandum decision and its order denying the petition for rehearing on June 30, 2020. App. 11-16a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[2]

Constitutional and Statutory Provisions Involved

U.S. Const., Amend. IV provides:

> 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

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appellant's petition for rehearing electronically filed in the Ninth Circuit on February 12, 2020 (Docket No. 72 in Case No. 17-50269).

[2] On March 19, 2020, the Court (due to the ongoing public-health concerns relating to the coronavirus) issued an order providing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing."

particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Introduction

Consider this scenario: A criminal defendant files a motion to suppress evidence derived from a warrantless search, putting the burden on the government to prove that the search complied with the Fourth Amendment. To meet that burden, the government calls three police officers to testify about the circumstances surrounding the search. At the end of each officer's direct testimony, the defendant asks to cross-examine, but the district court says no. The district court, and then the court of appeals, nevertheless relies on the officers' testimony to conclude that the search was constitutional.

That's what happened here, except that the government proffered the three officers' direct testimony via their declarations and the district court then held no evidentiary hearing at all. The end result is the same, however. The district court and the Ninth Circuit found a warrantless search constitutional based on the police-officer declarations submitted by the government without allowing the defendant to cross-examine those witnesses. Doing so was inconsistent with the Court's observations that cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested[,]"[3] "the greatest legal engine ever invented for the discovery of truth[,]"[4] and "critical for ensuring the integrity of the fact-finding process."[5] But the Court has never addressed whether, and to what extent, a criminal defendant has the right to cross-examine government witnesses at a suppression hearing.

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[3] *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

[4] *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (quotation marks omitted).

[5] *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

Without that much-needed guidance, conflicts have arisen among federal and state courts about whether such a right is guaranteed by the Sixth Amendment's Confrontation Clause, the Fifth Amendment's Due Process Clause, or something else. This case presents a good vehicle for the Court to resolve those conflicts.

Statement of the Case

Marcos Alejandro Gonzalez Flores entered conditional guilty pleas to possession of marijuana with the intent to distribute and possession of a firearm in furtherance of that crime. GER 24-41, 49-60; ASB 4, 20. Those convictions are based on evidence seized by police officers during the execution of a search warrant. GER 32-33; SER 58-88, 111-16; ASB 4. The warrant authorized only the search of Gonzalez's business in a particular suite of a commercial building, but officers nevertheless searched an adjacent suite (which he also rented) as well, resulting in the discovery of the drugs and guns. SER 44-88; ASB 6-18.

Gonzalez moved to suppress this evidence on the grounds that the warrant violated the Fourth Amendment's particularity requirement, the officers exceeded the scope of the warrant by entering the second suite, and the officers conducted the search in an unreasonable manner. SER 126-34, 361-71; ASB 19. Gonzalez asserted that his motion was based not only on the written filings but also on "all other arguments, authorities, and exhibits that may be provided in support of this motion and at the hearing on this motion." SER 363; *see also* SER 364 (motion "based on the attached memorandum of points and authorities, the files and records in this case, and any

additional evidence and argument that may be submitted at or before the hearing on this motion.").

The government opposed the suppression motion, arguing that the warrant was broad enough to encompass the second suite, that (at most) the officers' entry into second suite was a reasonable mistake that didn't violate the Fourth Amendment under *Maryland v. Garrison*,[6] that the search was conducted in a reasonable manner, and that Gonzalez and his codefendant lacked standing to challenge the search. SER 16-43, 336-42. To support those arguments, the government proffered declarations totaling 13 pages from three police officers, who described some aspects of their pre-search investigation and how they purportedly conducted the search. SER 44-56. Despite relying on these declarations to make its case that the search complied with the Fourth Amendment, the government insisted that Gonzalez was not entitled to an evidentiary hearing, citing Ninth Circuit precedent that a defendant has no right to cross-examine the government's witnesses at a suppression hearing unless he first creates disputed factual issues by presenting evidence contradicting particular assertions in government-proffered declarations. SER 341-42.

After the parties filed their suppression-related pleadings, the district court took the matter under submission without holding any hearing. GER 82; ASB 19. It subsequently issued an order denying the motion. App. 1-6a. The district court acknowledged that the warrant did not describe the second suite with particularity because the police did not intend to search it. App. 3a. But it also concluded that, given the circumstances recounted in the government-proffered

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[6] 480 U.S. 79 (1987).

declarations, a reasonable officer would interpret the warrant to include the second suite as a purported storage room of the suite named in the warrant. App. 2-4a. Furthermore, the police officers did not act unreasonably in executing the warrant, according to the district court. App. 4-5a.

On appeal,[7] Gonzalez first argued that searching the second suite exceeded the scope of the warrant. ASB 54-59; ARB 3-12. Alternatively, he contended that the warrant failed to comply with the Fourth Amendment's particularity requirement to the extent it was ambiguous enough to cover the second suite. ASB 60-62; ARB 2-3. Next, Gonzalez argued that *Garrison*'s reasonable-mistake standard was not satisfied because even the incomplete existing record reflects that the searching officers knew, or should have known, there were two separate units, only one of which was covered by the warrant. ASB 62-67; ARB 13-25. Finally, and most important to this petition, Gonzalez maintained that, at a minimum, remand for an evidentiary hearing was necessary—and constitutionally required—because no court could properly conclude that the officers acted reasonably until after he is allowed to cross-examine those government-proffered witnesses. ASB 67-71; ARB 25-31.

In response, the government—relying on the information contained the declarations it proffered below—argued that the second suite was within the scope of the warrant as a purported

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[7] The government appealed Gonzalez's sentence, and he cross-appealed the denial of his suppression motion. App. 14a. With regard to the government's appeal, the Ninth Circuit vacated Gonzalez's sentence and remanded for resentencing. App. 14-15a. Only the cross-appeal is at issue here, however.

storage room of the named suite, that reasonable officers would have interpreted the warrant in that way, and that (at worst) the officers' search of the second suite was a reasonable mistake under *Garrison*. GTB 37-49. It also insisted that Gonzalez had no right to cross-examine the government-proffered witnesses before a court could rely on their declarations to deny his suppression motion. GTB 49-52.

The Ninth Circuit agreed with Gonzalez that, contrary to what the government claimed, the second suite was not covered by the search warrant. App. 9a, 15a. Citing *Garrison*, however, it "conclude[d] that, under the circumstances, it was 'objectively understandable and reasonable' for the officers to believe this second space was part of [the suite named in the warrant] and thus to search it." App. 9-10a, 15-16a. Gonzalez filed a petition for rehearing pointing out that the court failed to address his claim that, at a minimum, there must be an evidentiary hearing where he can cross-examine the officer-witnesses proffered by the government before any court may conclude the officers acted reasonably under *Garrison*. PFR 1-5. The Ninth Circuit denied that petition but issued an amended decision rejecting the request for an evidentiary hearing based on circuit precedent putting the burden on defendants to present counterevidence before being allowed to cross-examine government-proffered witnesses at suppression hearings. App. 11-16a.

Reasons for Granting the Writ

The Court should grant review to resolve conflicts among the lower courts concerning whether a criminal defendant has the right to cross-examine law-enforcement witnesses proffered by the government in an attempt to meet its burden to prove that a search complied with the Fourth Amendment.

The government bears the burden to prove that a warrantless search falls within an exception to the Fourth Amendment's warrant requirement. That fact-specific inquiry requires considering the totality of all circumstances relevant to the reasonableness of the searching officers' actions. But Ninth Circuit precedent ignores the government's fact-intensive Fourth Amendment burden and requires a defendant to establish contradictory facts before being allowed to cross-examine government-proffered witnesses at a suppression hearing. That bad precedent is part of a larger problem. The federal and state courts are in conflict about whether the Sixth Amendment's Confrontation Clause applies to pretrial suppression hearings. Lower courts are also in conflict about whether the Fifth Amendment's Due Process Clause guarantees the right of cross-examination at such hearings. The Court should therefore grant review to decide whether, and to what extent, the Confrontation Clause, the Due Process Clause, or anything else requires giving defendants the opportunity to cross-examine government witnesses at suppression hearings.

1. The government bears the burden to prove that a warrantless search falls within an exception to the Fourth Amendment's warrant requirement.

The Fourth Amendment protects people from unreasonable searches and seizures and generally requires a warrant issued upon probable cause. U.S. Const., Amend. IV. The Court has therefore "repeatedly held that searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are per se unreasonable[,] subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015) (brackets and quotation marks omitted). "The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative. *The burden is on those seeking the exemption to show the need for it*." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (brackets and quotation marks omitted) (emphasis added).

2. Whether a search complied with the Fourth Amendment generally requires a fact-specific inquiry into the totality of all circumstances relevant to the reasonableness of the searching officers' actions.

Whether a search is reasonable under the Fourth Amendment "depends on *the totality of the circumstances*, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. 306, 310 (2015) (emphasis added). "In applying this test[,]" the Court has "consistently eschewed bright-line rules, instead emphasizing the *fact-specific nature* of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (emphasis added). Accordingly, the Court has required fact-

based inquiries into the totality of the circumstances for particular warrantless searches and seizures. *See, e.g.*, *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020) (reasonable suspicion for traffic stop); *Missouri v. McNeely*, 569 U.S. 141, 149-50 (2013) (exigent circumstances for search); *United States v. Drayton*, 536 U.S. 194, 206-07 (2002) (consent to search).

Such a totality-of-the circumstances analysis is also required by the case on which the Ninth Circuit relied here: *Maryland v. Garrison*, 480 U.S. 79 (1987). App. 16a. In that case, a warrant authorized the search of the suspect's apartment, described as the third floor of a certain building, but it turned out that floor actually had two apartments, one rented by the suspect and another rented by someone else. *Id*. at 80. The officers claimed they didn't realize the floor had separate apartments until after they had searched the other man's unit and found drugs. *Id*. The Court viewed the case as presenting "two separate constitutional issues, one concerning the validity of the warrant and the other concerning the reasonableness of the manner in which it was executed." *Id*. at 84. With regard to the first issue, the warrant would have been invalid "if the officers *had known, or even if they should have known*, that there were two separate dwelling units on the third floor" when they sought the warrant. *Id*. at 85 (emphasis added). The warrant's validity depended on "the information that the officers disclosed, *or had a duty to discover and to disclose*, to the issuing Magistrate." *Id*. (emphasis added). Similarly, "[i]f the officers *had known, or should have known*, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to [the suspect's] apartment." *Id*. at 86 (emphasis added). Moreover, the officers had to stop searching the second apartment "*as*

soon as they discovered that there were two separate units on the third floor and therefore were *put on notice of the risk* that they might be in a unit erroneously included within the terms of the warrant." *Id*. at 87 (emphasis added). "The officers' conduct and the limits of the search" had to be "*based on the information available* as the search proceeded." *Id*. (emphasis added). Because the Court "allow[s] some latitude for *honest mistakes* that are made by officers ... executing search warrants[,]" the validity of the search of the second apartment "depend[ed] on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." *Id*. at 87-88 (emphasis added). Considering the officers' testimony at the evidentiary hearing, the Court concluded that "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id*. at 88; *see id*. at 85 n.10 (referring to suppression-hearing testimony); *id*. at 97-100 (Blackmun, J., dissenting) (same).

Thus, *Garrison* demands a fact-based inquiry focusing on exactly what the officers knew, or should have known, both before obtaining the warrant and moment-by-moment throughout the search. Therefore, to support its *Garrison* argument in Gonzalez's case, the government proffered declarations totaling 13 pages from three police officers, who described some aspects of their pre-search investigation and how they purportedly conducted the search. SER 44-56.

3. Ninth Circuit precedent ignores the government's Fourth Amendment burden and requires a defendant to establish contradictory facts before being allowed to cross-examine government-proffered witnesses.

The Ninth Circuit accepted the government's *Garrison* argument and saw no problem with doing so despite Gonzalez never having had the opportunity to cross-examine the three police-officer witnesses whose direct testimony was proffered by the government via declarations. App. 15-16a.[8] To deny Gonzalez an evidentiary hearing, the Ninth Circuit cited this precedent: "'An evidentiary hearing on a motion to suppress need be held only when the *moving papers* allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.' *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000)." App. 16a (emphasis added). Under that precedent, "[a] hearing will not be held on a defendant's pre-trial motion to suppress merely because a defendant wants one." *Howell*, 231 F.3d at 621 (quotation marks omitted). The focus on the "moving papers" is not surprising if one traces this line of authority to its roots in *United States v. Ledesma*, 499 F.2d 36, 39 (9th Cir. 1974).[9] The only case *Ledesma* cited for the standard was *Cohen v. United States*, 378 F.2d 751, 760-61 (9th Cir. 1967). That case, in turn, cited *Grant v. United States* for the proposition that

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[8] The Ninth Circuit implicitly rejected Gonzalez's argument that *Garrison* should not extend to cases where (as here) the search warrant was not facially broad enough to cover the officers' search and therefore the search was warrantless to the extent it exceeded the warrant's scope. ASB 62-63; ARB 13-14.

[9] *See Howell*, 231 F.3d at 620, citing *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986), citing *United States v. Licavoli*, 604 F.2d 613, 621 (9th Cir. 1979), citing *Ledesma*.

"evidentiary hearings should not be set as a matter of course, but only when *the petition* alleges facts which if proved would require the grant of relief." 282 F.2d 165, 170 (2d Cir. 1960) (emphasis added). As the reference to "the petition" suggests, *Grant* did not involve a motion to suppress evidence in a pending criminal case; rather, it addressed a petition for something akin to a temporary injunction or restraining order to preclude the government from presenting to a grand jury certain evidence that had allegedly been obtained in violation of the Fourth Amendment. *Id*. at 166-67. In particular, the petitioners invoked a then-existing rule of criminal procedure which allowed persons to seek suppression of evidence independent of any criminal proceeding. *Id*. at 168. In that unique context, petitioners (at that point only potential criminal defendants) had the burden to "allege[] facts which if proved would require the grant of relief." *Id*. at 170.

The inapplicable rule rooted in *Grant* has been repeated over the intervening years to deny defendants evidentiary hearings on their motions to suppress where *the government* bears the burden to prove a search was constitutional. That results from the government's practice of citing this circuit precedent, as it did here, to immunize from cross-examination police officers whose declarations it proffers unless the defendant first proffers "contradictory facts." GTB 51-52; *see also* SER 341-42. Another example is one of the most recent cases to rely on this authority: *United States v. Zavala-Reyes*, 2020 WL 5891742 (E.D. Cal. Oct. 5, 2020). At issue there was whether, taking into account all surrounding circumstances, the interaction between police officers and the defendant was a voluntary encounter or a Fourth Amendment seizure. *Id*. at *1-2. To support its fact-dependent claim that only a voluntary encounter occurred (and that

there was reasonable suspicion, if required), the government presented police reports and the police officers' declarations that the reports were true and correct. *Id*. at *1-2 & n.1, 4 & n.2. The district court faulted the defendant for disputing the officers' story (and asking to cross-examine them) without directly refuting facts in those police reports and declarations via his own declaration or a declaration from the person who was with him at the time of the encounter. *Id*. at *2, 5. Citing *Howell*, the district court wrote: "It appears that, despite offering no evidence or proffer of evidence, defendant nonetheless wishes to test the officers' police reports and declarations by cross-examination. This is an insufficient basis upon which to request for an evidentiary hearing." *Id.* at *5.

The Ninth Circuit also has another similar and frequently-invoked rule allowing district courts to deny an evidentiary hearing if a defendant purportedly fails to comply with a local rule requiring a suppression motion to be supported by a declaration. *See United States v. Wardlow*, 951 F.2d 1115, 1116 (9th Cir. 1991); *see also* SER 246-47 (government asserting this rule in response to second suppression motion filed by Gonzalez but not at issue in this petition). For example, in one recent case, the Ninth Circuit held that a district court could properly limit an evidentiary hearing on a suppression motion to only delve into particular factual assertions made by police officers that were directly refuted by the defendant in his own declaration. *United States v. Lopez*, 757 Fed. Appx. 586, 588-89 (9th Cir. 2018). Although the Ninth Circuit did not rely on this rule in rejecting Gonzalez's request for an evidentiary hearing, it nevertheless reflects that court's improperly narrow view of when such hearings are required.

Gonzalez's case exemplifies the problem with the Ninth Circuit approach to evidentiary hearings on motions to suppress evidence. His suppression motion presented the search-warrant affidavit, the officers' account of the search (as reflected in a police report), and photos taken during the search to establish that the officers exceeded the scope of the warrant to search an adjacent suite. SER 361-438. That put the burden on the government to prove the facts necessary to establish an exception to the Fourth Amendment's warrant requirement as to that area. *See supra* Part 1. The government tried to meet that burden with three police-officer declarations alleging facts that purportedly showed they made the kind of reasonable mistake excused by *Garrison*. SER 16-56, 336-42. The nature of the *Garrison* inquiry—what the officers knew or should have known at specific point in time—means most, if not all, the relevant evidence must come from the officers themselves. *See supra* Part 2. By proffering the police officers' declarations, *the government* put their credibility and every relevant observation made by them before and during the search (including any *not* disclosed in their declarations) at issue. Those declarations—the equivalent of the officers' direct testimony at a hearing—assert a version of the facts that may be false, or at least incomplete. As they say, the devil is in the details. Undoubtedly, the Court has seen enough Fourth Amendment cases with full evidentiary hearings to know that the relevant facts are rarely as straightforward and uncomplicated as officers' declarations or direct testimony often suggest. Moreover, a district court cannot gauge the officers' credibility without a hearing. *See Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (noting that appellate courts generally defer to district courts' credibility findings because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so

heavily on the listener's understanding of and belief in what is said."). Gonzalez must therefore have the chance to cross-examine the officers before the Ninth Circuit (or any court) can properly rely on those as-yet-untested declarations to conclude that the government met its *constitutional* burden to prove that, given the totality of the circumstances, the search complied with the Fourth Amendment.

In denying Gonzalez an evidentiary hearing, the Ninth Circuit ignored his arguments that both the Confrontation Clause and the Due Process Clause give him the right to cross-examine the government's witnesses. App. 15-16a; ASB 69-71; ARB 27-28; PFR 4. As discussed below, lower courts are in conflict about these important constitutional issues.

4. There is a conflict among federal and state courts about whether the Sixth Amendment's Confrontation Clause applies to pretrial suppression hearings.

The Confrontation Clause of the Sixth Amendment guarantees the right of the accused "to be confronted with the witnesses against him" in "all criminal prosecutions[.]" U.S. Const., Amend. VI. "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to expose testimonial infirmities through cross-examination." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (quotation marks and brackets omitted). The lower courts are in conflict about whether this right extends to pretrial suppression hearings.

For example, the Second Circuit has held that the Confrontation Clause applies at such hearings. *See United States v. Clark*, 475 F.2d 240, 246 (2d Cir. 1973). So has the Fifth Circuit:

> We recognize that the right to cross-examine is a trial right designed to prevent improper restrictions on the types of questions that defense counsel may ask

> during cross-examination. However, we safeguard the right to cross-examine at the suppression hearing because the aims and interests involved in a suppression hearing are just as pressing as those in the actual trial. While the pre-trial nature of the hearing is a consideration in some judicial inquiries determining rights of confrontation, compromise of confrontation clause protections before trial seems to be allowed only when a defendant is given a full opportunity to cross-examine adverse witnesses.

United States v. Stewart, 93 F.3d 189, 192 n.1 (5th Cir. 1996) (citations omitted); *see also United States v. Daniels*, 930 F.3d 393, 405 (5th Cir. 2019) (reaffirming *Stewart*'s holding that, "although the Sixth Amendment right to confront is a trial right, it also applies to suppression hearings."). On the other hand, the Eighth Circuit has held that "[t]he right of confrontation does not apply to the same extent at pretrial suppression hearings as it does at trial" because "[t]he interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself." *United States v. Thompson*, 533 F.3d 964, 969 (8th Cir. 2008). And the Eleventh Circuit has left open "whether the Confrontation Clause could ever apply to a pretrial determination[.]" *United States v. Campbell*, 743 F.3d 802, 808-09 (11th Cir. 2014).

The state courts are just as conflicted on the matter. The Supreme Court of Vermont has held that a defendant has the right under the Confrontation Clause to be present and confront witnesses against him at a suppression hearing. *State v. Grace*, 204 Vt. 68, 73-77 (2016). An Ohio appellate court similarly observed that "[a] hearing on a motion to suppress is a critical stage of the prosecution, and the confrontation clause of the Sixth Amendment guarantees an

accused the right to confront witnesses[,]" which includes cross-examination. *Village of Kirtland Hills v. Deir*, 2005 WL 737411, *5 (Ohio Ct. App. 2005). But Texas appellate courts are internally conflicted about whether the right of confrontation applies to pretrial suppression hearings. *See Atkins v. Texas*, 2017 WL 6612909, *2 (Tex. Ct. App. 2017) (noting conflict). And the District of Columbia Court of Appeals has acknowledged the differing opinions on the matter without deciding the issue. *Dawkins v. U.S.*, 41 A.3d 1265, 1270 (D.C. Ct. App. 2012).

Perhaps the best example of the conflict over applying the Confrontation Clause to suppression hearings is the Supreme Court of Wisconsin's split decision in *State v. Zamzow*, 374 Wis.2d 220 (2017). That court's majority began with the observation that this Court has never directly addressed the question. *Id*. at 227-28. The majority then delved into the federal and state cases on the subject, ultimately concluding that "the Confrontation Clause does not require confrontation of witnesses at suppression hearings." *Id*. at 228-40. But two dissenting justices considered the same authority at length and reached the opposite conclusion. *Id*. at 243-70 (Abrahamson, J., joined by Bradley, J., dissenting). They found that "the text and historical analyses of the Confrontation Clause lead to the conclusion that the confrontation right is of great significance in Anglo-American jurisprudence and that the significance of the confrontation right lies in the accused's right to cross-examine a witness." *Id*. at 249. The dissenters also concluded that this Court has "kept the door open for an accused's Sixth Amendment confrontation right to apply at a suppression hearing" by "indicat[ing] that the Sixth Amendment text 'in all criminal proceedings' includes a pretrial proceeding that lays the groundwork for a fair trial and enables the accused to cross-examine witnesses." *Id*. at 259. The

dissenters then observed that "the pretrial suppression hearing has in many instances supplanted the trial." *Id*. at 261. After all, "the suppression hearing is the turning point in many criminal prosecutions." *Id*. at 264. "[G]uilt or innocence is often at stake at suppression hearings" given that the "the result of the suppression hearing is often determinative of the case." *Id*. at 265. "Because the suppression hearing involves adversarial and trial-like practices, is frequently outcome-determinative, and requires [a] court to weigh testimony as fact-finder and apply the law to the facts, the Sixth Amendment, in [the dissenters'] opinion, compels a court to recognize that defendants have a right to confrontation at a suppression hearing." *Id*. at 267.

5. Lower courts are also in conflict about whether the Fifth Amendment's Due Process Clause (or something else) guarantees the right of criminal defendants to cross-examine the government's witnesses at a suppression hearing.

Even if the Confrontation Clause does not guarantee the right of criminal defendants to cross-examine the government's witnesses at a suppression hearing, that right is encompassed within the Fifth Amendment's prohibition on depriving a defendant of his liberty "without due process of law[.]" U.S. Const., Amend. V. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Indeed, the Court has described cross-examination as "the greatest legal engine ever invented for the discovery of truth." *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (quotation marks omitted). Thus, cross-examination "is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). Accordingly, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity

to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *cf. Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

The D.C. Circuit has eloquently explained the importance of allowing cross-examination at suppression hearings:

> It is clear that a defendant has some right to cross-examine Government witnesses at a suppression hearing. For two centuries judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony. Thus cross-examination is not a mere privilege but is the right of the party against whom a witness is offered. The adversary procedure of suppression hearings is well established in the federal courts, and there is no suggestion before us that a District Court could totally eliminate a defendant's right of cross-examination at this stage of the criminal proceedings. Indeed, the suppression hearing is a critical stage of the prosecution which affects substantial rights of an accused person; the outcome of the hearing—the suppression vel non of evidence—may often determine the eventual outcome of conviction or acquittal. Thus, whether we describe the right of cross-examination as deriving from the fundamental concepts embedded in the Due Process Clause or as implicit in the rules governing federal criminal proceedings, we have no doubt of the applicability of the right here or of its importance.

United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (citations and quotation marks omitted); *see also United States v. Hodge*, 19 F.3d 51, 53 (2d Cir. 1994) (following *Green*); *United States v. Gray*, 491 F.3d 138, 161 n.2 (4th Cir. 2007) (Michael, CJ, dissenting) ("[E]lemental due process ensures that a defendant at a suppression hearing retains the core of the rights to confrontation, cross-examination, and compulsory process.") (citing cases).

Contrary to this authority, the Supreme Court of Wisconsin held in *Zamzow* that "[a]ny right to confrontation and cross-examination implicated by the Due Process Clause is ... relaxed at a suppression hearing." 374 Wis.2d at 240-42. Thus, in that court's opinion, neither the Confrontation Clause nor the Due Process Clause "mandate that statements considered at a suppression hearing face the crucible of cross-examination." *Id*. at 242.

The *Zamzow* dissenters emphasized the "serious problem for future suppression hearings" created by the majority's decision—that "[a] paper review in which trial courts read police reports and review evidence such as dash cam videos to determine whether evidence should be suppressed may become the norm." 374 Wis.2d at 268-69. This process leaves no role for the "crucible of cross-examination in evaluating the government's accusations." *Id*. at 269 (quotation marks omitted). The majority brushed off this concern, naively believing that "[b]ecause of the weight live testimony carries when it emerges intact from the gauntlet of cross-examination, a prosecutor has no incentive to intentionally weaken the State's own case by failing to bring an available witness before the court to defend against a defendant's suppression motion." *Id*. at 237 n.12.

Gonzalez's case demonstrates that the *Zamzow* majority was wrong and the dissenters were right. At least under the evidentiary-hearing standard adopted by the Ninth Circuit, the government has every incentive to do what it did here—put its best case forward in police-officer declarations and then insist that the defendant has no right to potentially weaken that case through cross-examination of those witnesses about their allegations. *See supra* Part 3. That practice is inconsistent with this Court's pronouncements that cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested" (*Davis*), "the greatest legal engine ever invented for the discovery of truth" (*Lilly*), and "critical for ensuring the integrity of the fact-finding process" (*Stincer*). This case therefore merits review so the Court can resolve the conflict among the lower courts on whether, and to what extent, the Confrontation Clause and the Due Process Clause require giving defendants the opportunity to cross-examine government witnesses at suppression hearings. Even if the Court concludes that the right of cross-examination is only "implicit in the rules governing federal criminal proceedings" (*Green*, 670 F.2d at 1154), that would provide much needed guidance to the lower courts.

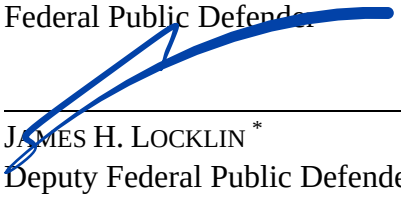
Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

November 19, 2020

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender



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