No. _____

In the

Supreme Court of the United States

Bryan Keith Miller,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did an officer have probable cause to retrieve and field test a loose substance observed in Mr. Miller's vehicle, under the plain view exception to the Fourth Amendment, absent any circumstances corroborating the officer's suspicion that the substance was contraband?

2. Did officers have probable cause to search Mr. Miller's vehicle, under the automobile exception, when they similarly lacked circumstances corroborating their suspicion?

PARTIES TO THE PROCEEDING

Petitioner is Bryan Keith Miller, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Miller*, No. 19-11332 (5th Cir. Jan. 4, 2021)
- *United States v. Miller*, No. 4:19-cr-165-O-1 (N.D. Tex. Dec. 2, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bryan Keith Miller seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Miller*, 839 F. App'x 875 (5th Cir. 2021). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on January 4, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

This case involves the 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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

I. Facts and Proceedings Below

Early in the morning on December 26, 2018, Kennedale Police Department Officers Kjelsen and McDonald responded to a 9-1-1 report of a possible attempted break in at a business. (ROA.215). The caller reported seeing a silver vehicle near the business and three people near that vehicle. (ROA.82). Arriving at the business, the officers found Bryan Keith Miller getting out of a white Dodge Charger. (ROA.82). Officer Kjelsen questioned Mr. Miller, who told the officer he was in town from out of state, knew the business owner, was waiting there "to say 'hi' to him in the morning," and that he was and had been alone. (ROA.215). Officer Kjelsen looked into Mr. Miller's vehicle and patted Mr. Miller down for weapons. ROA.38. The pat down uncovered a knife and a "tactical pen." (ROA.71,100).

After the pat down, Officer Kjelsen resumed questioning Mr. Miller and looking in the Charger's windows. (ROA.72). He observed that the backseat "was full of backpacks and luggage," so that it would be impossible for the car to hold three people. (ROA.82). He also observed a baseball bat inside the vehicle and a coffee cup outside on the steps of the business. (ROA.72). Mr. Miller explained that he used the baseball bat at batting cages and that he had been drinking from the cup while waiting for the business owner. (ROA.72). Officer Kjelsen asked about a few crystals he noticed on the side of the coffee cup, and Mr. Miller said that it was probably sugar. (ROA.51).

While Officer Kjelsen continued looking into the vehicle, Officer McDonald asked Mr. Miller to call the business owner. (ROA.72). Mr. Miller agreed and gave his limited consent for Officer Kjelsen retrieve his phone from the Charger. (ROA.72). Officer Kjelsen then opened the passenger car door and retrieved Mr. Miller's phone, leaving the door open. (ROA.72-73). Officer Kjelsen next asked Mr. Miller if he could search the Charger. (ROA.75). Mr. Miller refused, citing his constitutional rights. (ROA.75). After a moment, Officer Kjelsen returned to the driver's side window and saw "a crystal like substance on the driver floor mat." (ROA.83). Though he had seen no evidence of drugs, he "believed the substance" on the floormat "to be methamphetamine." (ROA.83). He pointed out the substance to Officer McDonald, who "agreed with [his] belief" that it looked like "meth." (ROA.75). Mr. Miller, on the other hand, said he believed it might be sugar. (ROA.83). Officer Kjelsen informed Mr. Miller that he would not search the vehicle but needed to test the substance. (ROA.83).

Retrieving a sample of the substance was difficult. (ROA.83). The substance was "hard" and "stuck on the floor mat." (ROA.83). It "appeared to have gotten wet," which "made it difficult to remove." (ROA.83). Relying on "small bits around the floor mat," Officer Kjelsen "was able to get a sample," which showed "a positive reaction for the presence of methamphetamine." (ROA.83). Based on the test result, Officer Kjelsen handcuffed Mr. Miller and read him his *Miranda* rights. (ROA.215). The officers then searched the Charger, discovering a prohibited weapon. (ROA.215).

Mr. Miller was arrested and charged by an indictment dated May 22, 2019 with one count of violating 26 U.S.C. §§ 5841, 5861(d), and 5871 (possession of an unregistered firearm). (ROA.17-19). Mr. Miller sought to suppress evidence of the illegal weapon on the basis that it was fruit of the poisonous tree, obtained after an unjustified seizure—his unreasonably extended detention and the "plain view testing" of a substance officers had no probable cause to believe was incriminating. *See* (ROA.38-43,101-105). The federal district judge denied Mr. Miller's motion without an evidentiary hearing. (ROA.108-113).

On August 14, 2019, Mr. Miller pleaded guilty to one count of possession of an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. (ROA.134). On December 2, 2019, the court sentenced Mr. Miller to 46 months imprisonment and three years supervised release. (ROA.134).

This Fifth Circuit affirmed and this appeal follows.

REASON FOR GRANTING THIS PETITION

I. The officer's entry into Mr. Miller's vehicle to retrieve and test a substance was not justified by the plain view exception because the incriminating nature of the substance was not immediately apparent.

"[E]vidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of [an] illegal search and seizure." *United States v. Buchanan*, 70 F.3d 818, 825 (5th Cir. 1995), as amended (Feb. 22, 1996) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). The general rule under the Fourth Amendment is that "searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable." *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). This general rule is "subject only to a few specifically established and well-delineated exceptions." *Id.*

Here, the officers did not obtain a warrant or Mr. Miller's consent before retrieving a substance from Mr. Miller's vehicle for testing. *See* ROA.215. The test's positive result provided probable cause to search Mr. Miller's vehicle for contraband, which led to the current charge. *See* ROA.215. The government asserts that no Fourth Amendment violation occurred because the crystalline substance was in "plain view." The government's assertion must fail, here, because the incriminating nature of the substance was not immediately apparent. Therefore, the plain view exception was not satisfied and all that flows from the unconstitutional search and seizure must be suppressed as fruit of the poisonous tree. *See, e.g., United States v. Hernandez*, 670 F.3d 616, 620 (5th Cir. 2012).

The plain view exception allows police to seize items where: (1) the police lawfully entered the area where the item was located; (2) the item was in plain view; (3) the incriminating nature of the item was "immediately apparent;" and (4) the police had a lawful right of access to the item. *United States v. Rodriguez*, 601 F.3d 402, 407 (5th Cir. 2010) (citing *Horton v. California*, 496 U.S. 128, 136-37 (1990)). An item's incriminating nature "is 'immediately apparent' if officers have 'probable cause' to believe that the item is either evidence of a crime or contraband." *Rodriguez*, 601 F.3d at 407. Crucially, the Fifth Circuit has held that when "police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object, then its incriminating nature is not immediately apparent and the plain-view doctrine cannot justify its seizure." *Id.* (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)) (internal quotations omitted). So, only if officers had probable cause to believe that the substance on Mr. Miller's floormat was contraband *before* field testing the substance was the seizure of that substance constitutional under the plain view doctrine. *See id.* Here, they did not.

The "standard of probable cause" exists "to protect citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003). For this reason, probable cause must be based on "reasonable ground for belief of guilt." *Id.* at 800. To assess whether an officer's belief of guilt is based on "reasonable ground," a court must "examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable

cause." *Id.* (internal quotations omitted). A probable cause determination considers all "the facts and circumstances known to the officer . . . of which he has reasonably trustworthy information," including the officer's training and experience. *See Buchanan*, 70 F.3d at 826. But "the probable-cause determination must be based on *objective facts* that could justify the issuance of a warrant by a magistrate" and not merely on the subjective, good-faith opinion of an officer. *United States v. Ross*, 456 U.S. 798, 808 (1982).

A. Precedent suggests that some objective evidence corroborating the presence of narcotics is needed to support the belief that an unknown substance is an illegal narcotic.

Probable cause does not require an officer to be scientifically certain that the item in question is contraband. *Rodriguez*, 601 F.3d at 407 (quoting *United States v. Waldrop*, 404 F.3d 365, 369 (5th Cir.2005)). But, "if an officer has only a 'reasonable suspicion,' then he does not have probable cause." *Id.* (quoting *Arizona v. Hicks*, 480 U.S. 321, 326 (1987)). In fact, courts have held that officers can have probable cause to believe that a substance in plain view is contraband before testing that substance. *See Buchanan*, 70 F.3d at 826; *United States v. Rhodes*, 265 F. App'x 382, 382 (5th Cir. 2008) (per curium) (unpublished opinion). But the Fifth Circuit has never held that an officer's belief that a substance resembles an illegal narcotic, when unsupported by facts or circumstances providing objectively reasonable grounds for that belief, gives probable cause to seize that substance. Because so holding would dangerously undermine the citizen privacy and liberty interests the probable cause standard protects, the Fifth Circuit should not extend the limited inference approved

in *Rhodes* and *Buchanan*, but should instead hold that without objective facts to support a pre-testing belief that a substance is an illegal narcotic, an officer has only reasonable suspicion and not probable cause.

The Fifth Circuit's prior decisions rely on the existence of facts that corroborate an officer's belief that a visible substance may be contraband. The Fifth Circuit has held that a police officer has probable cause to seize a substance found in plain view, which he suspects of being an illegal narcotic, when that substance is packaged in a way typical for drug trafficking and other indicia of drug activity are present; it has never, by contrast, held that a police officer's unsupported opinion that a loose substance looks like an illegal narcotic gives probable cause to seize and test that substance. *See Rhodes*, 265 F. App'x at 382 (finding probable cause where white substance officer "reasonably believed" to be cocaine base was packaged in clear plastic bag containing smaller bags) (per curium) (unpublished case); *Buchanan*, 70 F.3d at 826 (finding probable cause to seize and test baggies of white powder found in plain view, where officers had been surveilling the property and its occupants for months on suspicion of drug activity and officers knew defendant's spouse had recently been arrested on drug charges); *see also Texas v. Brown*, 460 U.S. 730, 742 (1983) (finding probable cause to seize party balloons containing substance, where officer observed additional drug paraphernalia in plain view and knew party balloons of this type to be commonly used as drug packaging); *c.f. United States v. Jacobsen,* 466 U.S. 109, 142 (1984) (Brennan, J. dissenting) (suggesting a permissible inference of illegality when white powdery substance was packaged for transport in plastic bags

and taped within mailing tube, but not for the same substance observed loose or in circumstances not obviously indicating illegality).

For example, in *Buchanan*, police forcibly entered a known drug house to arrest an occupant. *Buchanan*, 70 F.3d at 824. While conducting a "protective sweep" of the residence, officers "observed several large baggies containing white powder residue on the kitchen counter," as well as "white powder and small rock crumbs on the kitchen counter, floor, and sink." *Id.* Believing the substance to be cocaine, officers seized and field tested the bagged substance, relying on the plain view exception. *Id.* The home's occupant challenged the seizure, arguing that the substance's illicit nature was not "immediately apparent." *Id.* at 826. Evaluating this claim, the court emphasized that, in addition to seeing the substance both bagged and loose, officers were aware of drug activity at the location of the search and had been investigating the occupants for several months, and were aware that one occupant had been arrested on drug charges just a week earlier. *Id.* "Based upon the totality of these circumstances," the court held, "the officers had probable cause to believe that the white powder residue contained in the plastic baggies was contraband or evidence of a crime" and the plain view exception was satisfied. *Id.*

Though numerous circumstances supported probable cause in *Buchanan*, such extensive supporting facts are not always needed. An officer also has probable cause when the officer's belief that the substance is an illegal narcotic is supported by (1) packaging characteristic of drug trafficking, or (2) the presence of drug paraphernalia. *See Brown*, 460 U.S. at 742; *Rhodes*, 265 F. App'x at 382. For example,

in *Brown*, officers had probable cause to seize opaque party balloons they believed to contain illegal narcotics. When the balloons were in plain view, officers also saw drug paraphernalia in the vehicle, and officers knew party balloons were commonly used as packaging in drug transactions. *Brown*, 460 U.S. at 742. Similarly, in *Rhodes*, an officer had probable cause to seize a large plastic bag containing smaller plastic bags filled with a substance he believed to be cocaine. *Rhodes*, 265 F. App'x at 382.

B. Here, there were no circumstances or evidence corroborating the officers' belief that the substance "looked like meth."

The 9-1-1 call justifying Mr. Miller's investigative detention alerted officers to a potential burglary, not a drug offense. (ROA.108). The pat down of Mr. Miller revealed no drugs or drug paraphernalia. (*See* ROA.108). No odor of drugs was noted, nor were baggies of substance or drug paraphernalia seen in plain view as they were in *Buchanan*, *Rhodes*, and *Brown*. *Compare* ROA.108-09, *with Buchanan*, 70 F.3d at 824; *Brown*, 460 U.S. at 742; *Rhodes*, 265 F. App'x at 382. Instead, every item the officers observed was more probably *not* contraband: a baseball bat, a coffee mug with crystals that were likely sugar, bags and luggage in a traveler's back seat, and a loose substance on a car floormat—a place where unknown substances are particularly likely. (*See* ROA.72,82-83).

Instead, the only evidence here supporting probable cause to seize the substance was Officer Kjelsen's belief, based on his training and experience, that the loose "crystal like" substance he saw on Mr. Miller's floormat was methamphetamine, and Officer McDonald's agreement with that belief. (ROA.75,83). Such subjective

belief, absent objective supporting facts, is not probable cause. *See Ross*, 456 U.S. at 808.

Furthermore, Officer Kjelsen's own description that the substance was "immediately apparent" as methamphetamine is undermined by the terrible difficulty its condition and position on the floormat gave him in obtaining a sample. (*See* ROA.83). There is no evidence in the record to support the idea that Officer Kjelsen was so familiar with the appearance of methamphetamine that has "gotten wet," and been trodden into "small bits" on a floormat that he would, at plain view, understand its illicit nature to be immediately apparent. (*See* ROA.83). For these reasons, the officers here lacked probable cause to seize this substance and the seizure is not justified by the plain view exception.

II. Because the officers lacked probable cause to retrieve the unknown substance, their search also cannot fit under the automobile exception.

In denying Mr. Miller's Motion to Suppress, the district court suggested, *sua sponte*, that the officers' search of Mr. Miller's vehicle might have been alternatively justified by the "automobile exception" to the Fourth Amendment's warrant requirement, if it was not justified by the "plain view exception." *See* ROA.112 (citing an unbriefed automobile exception case, *United States v. Castelo*, 415 F.3d 407, 412 (5th Cir. 2005)).[1] But the automobile exception, like the plain view exception, requires probable cause—which was not present here.

[1] The district court's opinion denying the Motion to Suppress also cites *United States v. Satterwhite*, 980 F.2d 317, 321n.5 (5th Cir. 1992). But *Satterwhite* is not a warrantless search exception case. *See id.* Furthermore, *Satterwhite* is inapplicable

"Under the 'automobile exception' to the warrant requirement, officers may conduct a search if they have probable cause to believe that the vehicle contains contraband or evidence of a crime." *United States v. Ned*, 637 F.3d 562, 567 (5th Cir. 2011) (quoting *United States v. Buchner*, 7 F.3d 1149, 1154 (5th Cir.1993)). Probable cause exists to search the vehicle "when facts and circumstances within the knowledge of the arresting officer would be sufficient to cause an officer of reasonable caution to believe that an offense has been or is being committed" and that the vehicle contains evidence of that offense. *See Ned*, 637 F.3d at 567–68.

Probable cause to search a vehicle on suspicion of drugs can be supplied by facts and circumstances including observation of drug paraphernalia or packaging, observation of a substance or item whose contraband nature is "immediately apparent," smelling a strong drug-related odor, or a tip indicating that the vehicle is likely to contain illegal drugs. *See Ned*, 637 F.3d at 567-69. For example, in *Ned*, the court found that officers had probable cause to conduct a warrantless search of a vehicle under the automobile exception, where a girlfriend called officers to inform them that her boyfriend, driving a vehicle with a specific license plate number, could be found selling drugs at a nightclub. *Id.* The vehicle, she told them, contained a

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to the facts in Mr. Miller's case, as in that case probable cause for a warrant to issue was supported by an confidential informant's affidavit stating that the location to be searched contained drugs, and by the corroborating statements of another witness. *See id.* at 321-22. In Mr. Miller's case, the caller who alerted police to Mr. Miller's presence in the parking lot reported that he suspected Mr. Miller might be attempting to break into the business, which did not provide reasonable cause to suspect his car contained contraband narcotics. And, as discussed above, there was no corroborating evidence of either burglary or drug activity.

"Gucci bag inside with a large amount of crack cocaine inside." *Id.* Locating the vehicle parked outside the club, officers "looked inside the vehicle and saw a Gucci bag in the back . . . [along with] a box of sandwich baggies that was sticking out of the Gucci bag." *Id.* A trained drug-detecting canine with the officers also alerted on the car, "indicating that narcotics were present." *Id.* This evidence—a credible tip involving drugs, visual observation of drug packaging, and the drug dog's alert—the court found, gave the officers probable cause to search the vehicle. *Id.*

Or, a vehicle's or driver's suspicious characteristics may provide probable cause to search the vehicle, as in the *Castelo* case cited by the district court. In *Castelo*, state department of transportation officers stopped a commercial trucker to weigh his rig. *Castelo*, 415 F.3d at 408. Inspecting the driver's official paperwork, the officers discovered that the driver had illegally altered the vehicle's registration paperwork. *Id.* Additionally, the seal upon his trailer's load was unfixed. *Id.* These factors, in addition to the logbook's record that the truck was coming from a "known 'source city' for illegal drugs" and the driver's "abnormal behavior" during the stop, were sufficient to support a finding of probable cause for a warrantless search of the trailer. *Id.* at 412.

By contrast, when no such corroborating facts and circumstances are present, officers merely have "reasonable suspicion" and not probable cause to believe the vehicle contains drugs. *See United States v. Wisniewski*, 358 F. Supp. 2d 1074, 1094 (D. Utah 2005), aff'd, 192 F. App'x 749 (10th Cir. 2006). A warrantless vehicle search is not justified under these circumstances. *See id.* For example, in *Wisniewski*, a police

officer stopped a pickup truck after observing the driver cross the highway's lane dividing line. *Id.* at 1077. The officer noted that the driver seemed fatigued and nervous, and that he did not correctly identify the last name of the truck's registered owner after stating that he had borrowed the truck from a friend. *Id.* The driver said he was returning home from Las Vegas where he had been seeking construction work, an explanation the officer found "somewhat spurious." *Id.* The officer also smelled a "strong perfume odor [and saw] . . . a cell phone, road atlas, and a radar detector . . . but very little luggage . . . and no visible construction tools in the cab of the truck." *Id.* at 1078. Detaining the driver, the officer conducted a pat down, which revealed no weapons, and ran a check that revealed the driver had a current driver's license, no criminal history, and that the vehicle had not been reported stolen. *Id.* After the driver refused a request for consent to search the covered truck bed, the officer searched the truck bed without a warrant. *See id.*

Evaluating these facts and circumstances, the *Wisniewski* court "clearly [found] that [the officer] possessed reasonable suspicion that [the driver] was involved in illegal activity." It did not, however, "find the existence of probable cause to search," satisfying the automobile exception. *Id.* at 1094. Probable cause for a warrantless vehicle search on suspicion of drugs, the court emphasized, requires some corroborating evidence of drug activity. *See id.* Specifically, the officer "did not smell drugs in the vehicle, nor did he see any drug paraphernalia about the cab of the truck." *Id.* The officer saw no drug packaging, such as "plastic baggies 'of the size and type used to distribute drugs.'" *Id.* Nor did he "notice anything about the vehicle, such

as evidence of secret compartments, that would have raised his reasonable suspicion to probable cause." *Id.* And while the driver appeared "extremely nervous," he engaged in no activity, "such as . . . fleeing from the scene, that would have elevated [the officer's] reasonable suspicion to probable cause." *Id.*

While *Wisniewski* was decided by the Tenth Circuit and is not binding upon this Court, it is on all fours with the present case and should guide this Court's decision.

As in *Wisniewski* (and in contrast to *Castelo*), nothing about Mr. Miller's vehicle, the items observed in the vehicle, or Mr. Miller's actions during his detention support probable cause for a warrantless search. *See id.* Like in *Wisniewski*, the officers Mr. Miller observed no plainly contraband items in and around Mr. Miller's vehicle. *See id*. Instead, they saw only luggage in the backseat of a traveler, a coffee cup, a baseball bat, a knife, a pen, and an unidentified substance on the floormat. (*See* ROA.71-72,82-83,100). Of these items, only the substance observed on Mr. Miller's floormat could have provided the necessary probable cause and, as discussed above, the substance was not "immediately apparent" as an illegal narcotic absent facts and circumstances to make it so.

Furthermore, Mr. Miller, unlike the drivers in *Wisniewski* and *Castelo*, was not "extremely nervous" or behaving "abnormally." *See Wisniewski*, 358 F. Supp. 2d at 1094; *Castelo*, 415 F.3d at 412. On the contrary, Mr. Miller was calm and cooperative. (*See* ROA.49-54). Nor was there any signal Mr. Miller's vehicle was likely carrying contraband, such as the forged vehicle registration certificate and

unfastened cargo seal officers saw in *Castelo*. *See Castelo*, 415 F.3d at 412; *see also Wisniewski*, 358 F. Supp. 2d at 1094 (noting that evidence of a hidden compartment can elevate reasonable suspicion to probable cause, but considering lack of such a compartment as a factor cutting against probable cause for a search in that case). Neither Mr. Miller's behavior nor his vehicle gave rise to probable cause.

For these reasons, Mr. Miller's case is like that of the pickup truck driver in *Wisniewski,* not like the commercial truck driver in *Castelo* or the Gucci-bag transporting drug dealer in *Ned*. While the officers here had reasonable suspicion to detain Mr. Miller, they did not have probable cause to search his vehicle under the automobile exception. Their search therefore violated the Fourth Amendment.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be granted. Petitioner asks that this Court either reverse the Fifth Circuit outright or set the case for oral argument.

Respectfully submitted,

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