No. 21-6154

IN THE SUPREME COURT OF THE UNITED STATES

SHAWN FORD, 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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

SOFIA M. VICKERY
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether police reasonably searched an area of a family home where petitioner had recently been residing pursuant to the consent of his grandmother, who had keys, had recently changed the locks, stored items there, and entered regularly to tend to her plants.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ohio):

United States v. Ford, No. 18-CR-281 (Nov. 19, 2019)

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

United States v. Rogers & Ford, Nos. 19-4175 and 19-4176 (May 27, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is not published in the Federal Reporter but is reprinted at 861 Fed. Appx. 8. The order of the district court is unreported but is available at 2019 WL 2090095.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2021. A petition for rehearing was denied on July 30, 2021 (Pet. App. B1). The petition for a writ of certiorari was filed on October 28, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); four counts of Hobbs Act robbery and attempted robbery, in violation of 18 U.S.C. 1951(a); and three counts of using a firearm during or in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. The district court sentenced petitioner to 403 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A30.

1. In March 2018, petitioner and an accomplice carried out a string of armed robberies of Metro PCS stores in Cleveland, Ohio. Presentence Investigation Report (PSR) ¶¶ 2-3, 5, 7-8. Each robbery followed the same pattern: two men with masks, guns, and blue latex gloves would enter the store, demand money, and then drive away. Pet. App. A2. During the fourth and final robbery, an off-duty police officer chased the robbers as they ran out of the store. Ibid. Instead of stopping, the robbers shot at the officer, who fired back and hit their SUV as they drove off. Ibid.

Police officers soon spotted an SUV matching the description of the robbers', with bullet holes in the driver-side door; found latex gloves, a spent shell casing, and suspected narcotics; and arrested petitioner and his accomplice. Pet. App. A2-A4. From jail, petitioner called a friend and asked him to "take everything"

out of petitioner's home. Id. at A4. Based on that call and the evidence recovered from the SUV, police soon obtained a warrant to search the upstairs unit at 3331 E. 112th Street, petitioner's suspected residence. D. Ct. Doc. 69, at 19-20 (May 13, 2019); Pet. App. A4-A5.

When they arrived at 3331 E. 112th Street, police spoke with petitioner's stepfather, who told the officers that petitioner had access to the whole house; that he lived in the downstairs unit; and that petitioner's grandmother also lived in the downstairs unit. D. Ct. Doc. 69, at 22; Pet. App. A5, A16-A17. Petitioner's stepfather explained that the downstairs unit "was basically [the grandmother's] house"; that the grandmother would "usually be down there"; and that a family "situation" led her to temporarily take care of her grandchildren elsewhere. Pet. App. A17; see D. Ct. Doc. 69, at 22. He also informed the officers that petitioner's grandmother had keys to the downstairs unit. D. Ct. Doc. 69, at 22; Pet. App. A5, A16-A17.

Petitioner's grandmother soon arrived to speak with the police. When asked if she lived in the downstairs unit, she answered "yes and no." D. Ct. Doc. 69, at 23; Pet. App. A17. She explained that she was currently taking care of her grandchildren due to her daughter's incarceration, but she still came to the downstairs unit regularly, had keys and "24-hour access," and continued to keep her things -- including plants to which she regularly tended -- in the unit. Pet. App. A17; see D. Ct. Doc.

69, at 23. She also told the officers that she was in the process of "owning" the unit and that she had just changed the locks on the doors. D. Ct. Doc. 69, at 23. She then consented to the search and used her keys to unlock the front door. Ibid.; Pet. App. A17. As she escorted the police around the unit, she unlocked doors and closets for the officers and watered her plants. Pet. App. A5, A17 & n.2; D. Ct. Doc. 69, at 23. The officers seized a firearm that the grandmother said was hers, as well as ammunition, clothing, and shoes consistent with those used in the robberies. Pet. App. A5.

2. A grand jury indicted petitioner on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); four counts of Hobbs Act robbery and attempted robbery, in violation of 18 U.S.C. 1951(a); and three counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and (iii). Indictment 1-6; Pet. App. A5. Petitioner moved to suppress the evidence seized from the downstairs unit, arguing that his grandmother did not have actual or apparent authority to consent to the search. D. Ct. Doc. 26, at 6-8 (Sept. 28, 2018).

After a suppression hearing, the district court denied the motion. D. Ct. Doc. 69, at 22-25. The court found that "[t]he totality of the facts known to the officers supports a reasonable conclusion that, at a minimum, [petitioner's grandmother] had apparent authority to consent" to the search of the downstairs

apartment. Id. at 24. The court emphasized that the evidence demonstrated that, "at various times," she had "resided in the unit, kept property there, maintained plants on the premises, and had exercised control over the premises by recently changing the locks." Ibid.

Following a six-day jury trial, petitioner was convicted on all counts. Judgment 1; Pet. App. A5. The district court sentenced petitioner to 403 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A30. The court agreed with the district court that a reasonable officer could have believed that petitioner's grandmother "had more than limited access to the residence and instead possessed the common authority" necessary to consent to the search of the downstairs unit. Pet. App. A19 (internal quotation marks omitted). Emphasizing that "no one fact is determinative," id. at A17 (citation and ellipsis omitted), the court observed that petitioner's stepfather had told police multiple times that the unit was "[petitioner's grandmother's] house" and that the grandmother herself confirmed that she "had keys to the unit, recently changed the locks on the doors, accessed the home to water her plants, and kept personal property in the home," id. at A19. The court also stated that "cohabitation need not be uninterrupted to support a reasonable belief in common authority." Ibid. (citation and internal quotation marks omitted). And the court

found that, based on "the facts known to the officers at the time of the search[,] * * * an officer of reasonable caution" could have "conclude[d] that [petitioner's grandmother] had joint access or control for most purposes and so could consent to the search." Id. at A16-A17 (internal quotation marks omitted); see also id. at A19.

Judge Clay dissented in relevant part. Pet. App. A22-A30. In his view, officers could not reasonably have viewed petitioner's grandmother, who said that she was currently staying "elsewhere," to have had "apparent authority to authorize [the] search." Id. at A22, A27-A28.

ARGUMENT

Petitioner renews his contention (Pet. 7-17) that the search of the downstairs unit violated his Fourth Amendment rights on the theory his grandmother lacked apparent authority to consent to the search. The court of appeals correctly rejected that factbound contention, and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. This Court has held that, absent a "physically present inhabitant's express refusal of consent to a police search," it is reasonable under the Fourth Amendment for the government to search property with the consent of a third party who possesses common authority over the place to be searched. Georgia v. Randolph, 547 U.S. 103, 122 (2006); see id. at 120-122; see also United States

v. Matlock, 415 U.S. 164, 171 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). The common "authority which justifies the third-party consent * * * rests * * * on mutual use of the property by persons generally having joint access or control for most purposes." Matlock, 415 U.S. at 171 n.7. And even if the third party in fact lacks such common authority, a search is nonetheless reasonable if "'the facts available to the officer at the moment'" would "'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises." Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (citation omitted).

The court of appeals correctly applied these principles in finding, based on a "contextual, fact-specific inquiry," that petitioner's grandmother had apparent authority to consent to a search of the downstairs unit. Pet. App. A19; see id. at A15-A19. Petitioner's stepfather, who resided in the upstairs unit, informed the police that petitioner's grandmother had keys to the downstairs unit and usually lived there -- according to him, it was "basically her house." Id. at A17; see D. Ct. Doc. 69, at 22. Petitioner's grandmother herself told the police that although she was currently staying elsewhere to take care of her grandchildren, she continued to keep her personal property in the downstairs unit and to regularly access it. Pet. App. A19. She also said she was in the process of "owning" the unit and had recently put new locks on the doors. D. Ct. Doc. 69, at 23. Given those circumstances, the court of appeals did not err in holding that she "had more

than limited access to the residence and instead possessed the common authority sufficient for an officer of reasonable caution to believe she could consent to the search." Pet. App. A19 (internal quotation marks omitted). And any factbound error would not warrant this Court's review. See Sup. Ct. R. 10.

2. Petitioner asserts (Pet. 7-14) that the decision below conflicts with this Court's decisions in United States v. Matlock, supra, Illinois v. Rodriguez, supra, Georgia v. Randolph, supra, and Fernandez v. California, 571 U.S. 292 (2014). According to petitioner, Matlock and its progeny establish the categorical rule that, in order to effectively consent to a search, a third party must "reside[] in, occup[y] or inhabit[] the premises to be searched." Pet. 7. That is incorrect. While "shared tenancy" is one type of relationship that might confer common authority, Randolph, 547 U.S. at 111, this Court has consistently made clear that the critical inquiry is whether the third party had "joint access or control for most purposes." Matlock, 415 U.S. at 171 n.7; accord Randolph, 547 U.S. at 110; Rodriguez, 497 U.S. at 181. Courts have thus found with "regularity" that third-party consent can arise out of, inter alia, bailment, employment, and educational relationships. 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 8.6, at 314 (6th ed. 2020); see id. at 314-315. And the facts known to the officers here -- including possession of keys, storage of property, regular visits, and

control over the locks -- reasonably justified them in relying on the consent and access provided by petitioner's grandmother.

Petitioner notes (Pet. 7-11) that this Court's third-party consent decisions several times refer to "co-occupants" or "co-inhabitants." But in each cited example, the Court was either describing the facts at hand -- see, e.g., Fernandez, 571 U.S. at 294 (holding that co-occupant's consent was valid where objecting co-occupant was not physically present); Randolph, 547 U.S. at 106 (holding that "a physically present co-occupant's stated refusal to permit entry prevails" over another co-occupant's consent); Matlock, 415 U.S. at 171 (considering whether woman dressed in a bathrobe and holding a child could validly consent to the search of a bedroom) -- or providing an example of a valid search, see, e.g., Rodriguez, 497 U.S. at 186 (explaining that the Fourth Amendment is not violated "when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises"). This Court has never held that co-occupancy is the only relationship to a premises that can suffice to establish common authority.

Nor has it limited "occupancy" solely to current residency. Petitioner suggests that Fernandez v. California, supra, established an exclusive list of relationships that confer common authority by using the terms "'occupant,' 'resident,' and 'tenant' interchangeably to refer to persons having 'common authority' over

premises within the meaning of Matlock." Pet. 9 (quoting Fernandez, 571 U.S. at 294 n.1). But that footnote simply specified the terms the Court would use to discuss the issue presented in Fernandez (namely, consent by a co-occupant); it did not establish a broader rule about the parameters of common authority. See Randolph, 547 U.S. at 109 n.2 ("Mindful of the multiplicity of living arrangements, we vary the terms used to describe residential co-occupancies.").

In any event, this case would be a poor vehicle to examine the circumstances in which relationships other than co-occupancy might support valid third-party consent. Petitioner has never disputed that the officers were informed that his grandmother had resided in the downstairs unit before her daughter's incarceration. Thus, the only question presented here was whether the "[]interrupt[ion]," Pet. App. A19 (citation omitted), in his grandmother's tenancy for a limited purpose eliminated her authority over the premises, when other circumstances -- including that she regularly accessed the unit, kept her things there, and not only had her own keys but recently changed the locks -- indicated that she maintained "joint access or control for most purposes," Matlock, 415 U.S. at 171 n.7. And contrary to petitioner's assertion (Pet. 9-10, 12-14), the lower courts' factbound determination that she did is consistent with Rodriguez, in which this Court determined that the defendant's girlfriend -- who had "moved out" prior to the search, never accessed the

apartment when the defendant was not home, and only had a key because she took it without permission -- lacked authority to consent to a search of the defendant's apartment. 497 U.S. at 181. Here, by contrast, petitioner's grandmother maintained independent access to and control over the downstairs unit, even after she began taking care of her grandchildren elsewhere.

3. Petitioner also contends (Pet. 14-17) that the decision below conflicts with other Sixth Circuit decisions. But any intra-circuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). And in any event, petitioner identifies no decision in which the Sixth Circuit reached a different result on facts analogous to those presented here. Indeed, in each decision that he cites the court upheld the validity of a consent-based search, by residents and others. United States v. Penney, 576 F.3d 297, 308 (6th Cir. 2009) (reasonable for police to believe that individual who consented to the search was the defendant's "girlfriend and co-occupant with common authority over the residence"), cert. denied, 559 U.S. 940 (2010); United States v. Ayoub, 498 F.3d 532, 539 (6th Cir. 2007) (finding authority based on consent from property caretaker who lived elsewhere), cert. denied, 555 U.S. 830 (2008); United States v. Hudson, 405 F.3d 425, 442 (6th Cir. 2005) (finding apparent authority "largely on the basis of the girlfriend's statements that she lived at the defendant's apartment"); accord, e.g., United States v. Gillis, 358 F.3d 386, 388, 391 (6th Cir.)

(finding apparent authority where consenting party told police she had stopped living at the searched residence and did not have all the necessary keys to unlock the doors), cert. denied, 543 U.S. 856 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

SOFIA M. VICKERY
Attorney

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