No. 22-6774

IN THE SUPREME COURT OF THE UNITED STATES

DEWAYNE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether law-enforcement officers conducted an unreasonable search in violation of the Fourth Amendment when they brought a drug-detection dog to an exterior open-air hallway outside petitioner's hotel room.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 38 F.4th 527. The opinion and order of the district court (Pet. App. 22a-48a) is unreported but is available at 2017 WL 2928199. The report and recommendation of the magistrate judge is unreported but is available at 2017 WL 9565360.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2022. A petition for rehearing was denied on November 9, 2022 (Pet. App. 49a). The petition for a writ of certiorari was filed

on February 7, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of possessing with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(a)(1). Judgment 1. The district court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-21a.

1. Petitioner was a distributor in a drug-trafficking operation run by a man named Allan Bates. Pet. App. 1a-2a. In December 2014, Bates introduced petitioner to an associate, who -- unbeknownst to Bates and petitioner -- was actually an informant for the Federal Bureau of Investigation (FBI). Id. at 2a-3a. Petitioner drove a black Mercedes SUV to the meeting with the informant and delivered $125,000 in cash. Ibid. Relying in part on information provided by the informant, the FBI obtained warrants to search various locations in Indiana, Ohio, and Texas connected to Bates's drug operation. Id. at 3a. Bates then fled to Mexico with petitioner's assistance. Ibid.

On February 1, 2015, Bates instructed petitioner and another associate to retrieve $1 million and 20 kilograms of cocaine stored

in a barn near Butler, Indiana. Pet. App. 3a. Petitioner and the associate traveled to the barn and reported to Bates that they had found only 19 kilograms of cocaine there. Ibid. At Bates's direction, the associate kept $60,000 in cash, and petitioner transferred the remaining cash and drugs to his car. Ibid.

Around the same time, the FBI obtained search warrants to review text messages to and from a phone that Bates was using in Mexico. Pet. App. 3a. The searches revealed Bates's communications with petitioner, and the U.S. Marshals Service obtained a court order under the Stored Communications Act, 18 U.S.C. 2703(d), authorizing disclosure of location information for a cell phone associated with petitioner. Pet. App. 3a-5a.

On February 3, 2015, Sprint began providing location information, which showed the cell phone's proximity to Greenwood, Indiana. Pet. App. 5a. U.S. Marshals accordingly searched parking lots in Greenwood for a black Mercedes SUV. Id. at 6a. They also contacted local hotels to inquire whether someone matching petitioner's description had recently arrived. Ibid. One officer learned that "Michael Jackson" had checked into Room 211 of the Greenwood Red Roof Inn that morning. Ibid. Room 211 is on the second floor and accessible via an exterior hallway and staircase leading to the hotel parking lot. Id. at 6a-7a.

Sometime after 3 p.m., a woman driving a white Cadillac Escalade arrived in the Red Roof Inn parking lot. Pet. App. 7a.

The woman resembled a picture of petitioner's wife from the Indiana Bureau of Motor Vehicles, and the Cadillac was registered to petitioner. Ibid. The woman took a duffel bag from the car, carried it into Room 211, and left the room a few minutes later. Ibid.

At 3:35 p.m., several officers approached Room 211 and knocked on the door, but no one answered. Pet. App. 7a. At 3:41 p.m., a canine handler walked a trained drug-detection dog up the exterior staircase and along the second-floor exterior hallway. Ibid. After passing seven other doors, the dog alerted at Room 211. Ibid.

Based on the dog sniff, local police officers obtained a search warrant for Room 211. Pet. App. 7a. Upon entry, the officers found petitioner, $2 million in cash, and 19.8 kilograms of cocaine in duct-taped packages. Ibid. Petitioner subsequently confessed to his role in the drug-trafficking organization. Ibid.

2. A federal grand jury in the Northern District of Indiana charged petitioner with one count of possessing with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(a)(1). D. Ct. Doc. 1 (Feb. 5, 2015).

a. Petitioner moved to suppress evidence resulting from the dog sniff, including all evidence from the hotel room and his subsequent confession. Pet. App. 7a-8a. After an evidentiary hearing, a magistrate judge recommended that petitioner's motion

be granted in light of circuit precedent concluding that a dog sniff in the interior hallway of an apartment building had been unlawful. 2017 WL 9565360, at *8-*9 (citing United States v. Whitaker, 820 F.3d 849, 852-853 (7th Cir. 2016)). The district court, however, rejected the magistrate judge's recommendation and denied petitioner's motion to suppress. Pet. App. 22a-48a.

The district court observed that the dog sniff in this case "occurred in an unenclosed, common area that was readily accessible to the public at all hours," and that "[n]o key was required to access the area, and it was fully visible to anyone who might walk by, even from the adjacent parking lot." Pet. App. 36a. Finding that "the hallway of the Red Roof Inn was not within the curtilage of the hotel room," the court explained that "the officers did not physically intrude [on] a protected area" under the Fourth Amendment. Ibid. The court also found that, "[b]ecause the drug-detecting dog could not reveal any information other than the likely presence of illegal narcotics," the dog sniff "did not compromise an expectation of privacy that society is prepared to consider reasonable." Id. at 37a.

Petitioner waived his right to a jury trial, and following a three-day bench trial, he was convicted of the charged offense. Pet. App. 8a-9a. The district court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-21a. The court noted two ways of approaching the question whether the officers' conduct here "amount[ed] to a search" for Fourth Amendment purposes. Id. at 9a. The court stated that under a "property-based approach," "a search occurs when an officer enters a constitutionally protected area, such as the home, for the purpose of gathering evidence against the property owner." Ibid. (citing Florida v. Jardines, 569 U.S. 1, 6 (2013)). "Alternatively," the court observed, "the privacy-based approach * * * ask[s] whether a person has a legitimate expectation of privacy in a given situation." Id. at 10a (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

The court of appeals then found that neither approach supported petitioner's claim "that the dog sniff outside his hotel room constituted a search." Pet. App. 11a; see id. at 12a-14a. As an initial matter, the court of appeals agreed with the district court that because "the hallway of this particular hotel was open-air and accessible via an exterior staircase that led directly to a parking lot" and petitioner "lacked the right to exclude members of the public from passing through," the area was not "constitutionally protected," so "there was no search under the property-based approach." Id. at 12a. And the court of appeals also agreed with the district court that petitioner "fares no better under the privacy-based approach." Ibid.

Specifically, the court of appeals agreed with the district court that this Court's decisions in Illinois v. Caballes, 543 U.S. 405 (2005), and United States v. Place, 462 U.S. 696 (1983), demonstrate that any subjective expectation of privacy petitioner might have had "was not reasonable." Pet. App. 13a. The court of appeals observed that in both decisions, this Court had rejected a Fourth Amendment challenge to law enforcement's use of a drug-detection dog in a public setting on the ground that "the sniff discloses only the presence or absence of narcotics, a contraband item." Ibid. (citation omitted); see Place, 462 U.S. at 707; accord Caballes, 543 U.S. at 408 ("[A]ny interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest.") (citation and internal quotation marks omitted). The court of appeals then found that "the exterior hallway of a hotel adjacent to a parking lot," which was publicly accessible from the parking lot and which petitioner lacked the right to exclude others from entering, resembled "the public settings in Caballes and Place." Pet. App. 14a. While the court acknowledged "that hotel guests have some legitimate expectations of privacy," it determined that petitioner could not "reasonably [have] expect[ed] to be free of dog sniffs in the exterior hallway" of the Greenwood Red Roof Inn. Ibid.

ARGUMENT

Petitioner renews (Pet. 6-12, 12-18) his contentions that law enforcement officers trespassed on constitutionally protected curtilage outside his hotel-room door and that the drug-detection dog's sniff outside the door intruded on his reasonable expectation of privacy. The court of appeals' factbound decision rejecting both contentions is correct, and petitioner identifies no decision of this Court, another court of appeals, or any state court of last resort that has reached a contrary result on analogous facts. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 6-12) that law-enforcement officers violated the Fourth Amendment by trespassing on an area that should be deemed the protected curtilage of his hotel room. The court of appeals correctly rejected that claim, and its factbound decision on that issue does not warrant this Court's review.

a. This Court has set forth four factors to determine whether an area adjacent to a home is constitutionally protected "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. United States v. Dunn, 480 U.S. 294, 301 (1987). In Florida v. Jardines, 569 U.S. 1 (2013), this Court concluded that officers' use of a drug-detection dog on

the porch of a home was a "search" within the meaning of the Fourth Amendment because "[t]he front porch is the classic exemplar" of the curtilage, id. at 7, meaning that it is "'part of the home itself for Fourth Amendment purposes,'" id. at 6 (citation omitted), and the officers exceeded the scope of any license to enter the curtilage by bringing a drug-sniffing dog with them, id. at 9. The Jardines Court emphasized that the defendant's front porch was "an area belonging to [the defendant] and immediately surrounding his house," to which "'the activity of home life extends,'" and "which [the Court has] held enjoys protection as part of the home itself." Id. at 5-7 (citation omitted).

As the court of appeals correctly recognized, however, nothing in Jardines suggests that the publicly accessible exterior hallway in front of petitioner's hotel room at the Greenwood Red Roof Inn is constitutionally protected curtilage. As a threshold matter, petitioner was "a mere guest, not a resident" of the Red Roof Inn; hotel staff had permission to enter even the hotel room itself. Pet. App. 14a; see Stoner v. California, 376 U.S. 483, 490 (1964) ("[W]hen a person engages a hotel room he undoubtedly gives implied or express permission to such persons as maids, janitors or repairmen to enter his room in the performance of their duties.") (citation and internal quotation marks omitted). And the court correctly found that "[t]he exterior hallway of the Red Roof Inn is even farther afield from a front porch than an interior

apartment hallway, so there was no search under the property-based approach." Pet. App. 12a.

The area in front of petitioner's hotel-room door was not enclosed and, "[u]nlike the homeowner in Jardines, [petitioner] lacked the right to exclude members of the public from passing through." Pet. App. 12a. The area was instead part of an open-air common hallway that led directly to the parking lot, which members of the public were free to observe or enter. Id. at 6a-7a, 12a. It was thus in no way "an area belonging" to petitioner, nor one "immediately surrounding" a residence belonging to him. Jardines, 569 U.S. at 5-6.

b. The court of appeals' factbound determination that the area outside petitioner's hotel-room door was not constitutionally protected does not warrant this Court's review.

The court of appeals' determination does not conflict with any of this Court's cases. Neither Stoner nor Jardines addressed the constitutional status of a hotel building's exterior common areas. See Jardines, 569 U.S. at 7 (holding that the front porch of defendant's own home was protected curtilage); Stoner, 376 U.S. at 490 (holding that the interior of a hotel room is constitutionally protected). Indeed, petitioner identifies no precedent of this Court suggesting that a hotel guest has a constitutionally protected property interest in a publicly

accessible exterior hallway outside his hotel room like the one at issue here.

Nor does the decision below conflict with decisions from any other court of appeals or state court of last resort. Petitioner asserts (Pet. 7-9) that the decision below conflicts with decisions from the Eighth Circuit, but that court -- like the Seventh Circuit here -- has rejected the contention that a dog sniff in a common hallway violates the Fourth Amendment. See United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010) ("Supreme Court and Eighth Circuit precedent support the conclusion that [a drug-detection dog's] sniff of the apartment door frame from a common hallway did not constitute a search subject to the Fourth Amendment."), cert. denied, 562 U.S. 1160 (2011).

Petitioner references (Pet. 7) two decisions in which the Eighth Circuit classified the space immediately in front of a townhouse as curtilage. See United States v. Hopkins, 824 F.3d 726, 732 (area six to eight inches in front of townhouse door), cert. denied, 137 S. Ct. 522 (2016); United States v. Burston, 806 F.3d 1123, 1127 (2015) (area six to ten inches in front of townhouse window). But in both cases, the Eighth Circuit emphasized that the dog sniff had not occurred in a common area. See Hopkins, 824 F.3d at 732 ("In our case, * * * there is no 'common hallway' which all residents or guests must use to reach their units."); Burston, 806 F.3d at 1129 ("[T]he area searched in

this case was within six to ten inches of Burston's window, that is to say, an uncommon area. No common walkway leads to Burston's window."). These decisions accordingly do not conflict with the decision below, which involved a dog sniff in a common area of a hotel.

Petitioner also asserts (Pet. 9-10) that the court of appeals' decision conflicts with decisions of the Supreme Courts of Illinois and Nebraska concluding that areas outside apartment doors constituted protected curtilage. But those decisions likewise addressed substantially different facts. In each case, the defendant's apartment was in a multi-dwelling unit, with steps taken to ensure that the area where the drug sniff occurred was not publicly accessible. See People v. Burns, 50 N.E.3d 610, 613, 620-621 (Ill. 2016) (emphasizing that the landing in front of defendant's apartment was "a clearly marked area within a locked building with limited use and restricted access"; the apartment building contained 12 units in total and was secured by "two locked entrances," and "the 'common areas' of the secured apartment building were clearly not open to the general public"); State v. Ortiz, 600 N.W.2d 805, 800, 819 (Neb. 1999) ("[T]he degree of privacy society is willing to accord an apartment hallway may depend on the facts, such as whether there is an outer door locked to the street which limits access; the number of residents using the hallway; the number of units in the apartment complex; and the

presence or absence of no trespassing signage.") (citations omitted).

It is thus far from clear that those state courts would find that the area outside petitioner's hotel-room door constituted a protected curtilage. Indeed, the Supreme Court of Illinois has since explicitly recognized that "[i]f [a] defendant was only a guest at [a] motel for a day or a few days, it would be difficult to say that [a] room was his home and, consequently, difficult to say that the alcove was its curtilage." People v. Lindsey, 181 N.E.3d 1, 8 (2020), cert. denied, 141 S. Ct. 2476 (2021); see Ortiz, 600 N.W.2d at 818 ("[C]ase law recognizes that there is a greater degree of privacy expected in the home than in a hotel or a motel."). And the only other state decision on which petitioner relies (Pet. 10), Lindsey v. State, 127 A.3d 627 (Md. App. 2015), is a decision of an intermediate appellate court that rejected a Fourth Amendment challenge to a dog sniff. Id. at 642-644.

2. The court of appeals also correctly determined that the dog sniff outside petitioner's hotel-room door did not infringe his reasonable expectation of privacy.

a. This Court has repeatedly recognized that a sniff by a drug-detection dog does not infringe a legitimate privacy interest so as to qualify as a search under the Fourth Amendment. This Court first addressed the legality of a canine sniff for narcotics in United States v. Place, 462 U.S. 696, 707 (1983), which

considered whether a dog sniff of luggage at an airport constituted a Fourth Amendment search. The Court found that it did not, reasoning that a "canine sniff is sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." Ibid. Thus, the Court concluded, even though "the sniff tells the authorities something about the contents of the luggage," the information obtained is so limited that it does not infringe a protected privacy interest. Ibid.; see City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (applying the same reasoning to a canine sniff of a car at a drug-interdiction checkpoint).

In Illinois v. Caballes, 543 U.S. 405 (2005), the Court again determined that a sniff by a trained drug-detection dog does not intrude on any legitimate privacy interest, holding that the Fourth Amendment permits police to use a narcotics-detection dog to sniff a vehicle during a valid traffic stop. Id. at 407-409. The Court explained that "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.'" Id. at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)). The Court found that conclusion "entirely consistent" with Kyllo v. United States, 533 U.S. 27 (2001), where the Court held that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Caballes, 543 U.S. at 409. The device in Kyllo,

the Court explained, "was capable of detecting lawful activity -- in that case, intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.'" Id. at 409-410 (quoting Kyllo, 533 U.S. at 38). In contrast, the Court stated, "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Id. at 410.

Petitioner does not dispute that the dog sniff outside his hotel-room door revealed only the presence of illegal drugs. Thus, as the court of appeals correctly recognized, a straightforward application of this Court's precedents demonstrates that the dog sniff did not infringe petitioner's reasonable expectation of privacy. See Pet. App. 12a-14a (citing Caballes, 543 U.S. at 408, and Place, 462 U.S. at 707).

b. Contrary to petitioner's assertion (Pet. 15-18), this Court's opinion in Jardines does not support petitioner's expectation-of-privacy argument. As explained above, see pp. 8-9, supra, Jardines concluded that the officers' actions amounted to a Fourth Amendment search because they had trespassed on a constitutionally protected area (the front porch of the defendant's home) and exceeded the scope of any consent or implied societal license to do so by bringing a drug-sniffing dog along to explore the area in the hope of obtaining evidence of a crime.

569 U.S. at 7-9. Because that physical intrusion was "enough to establish that a search occurred," the Court had no need to "decide whether the officers' investigation of Jardines' home violated his expectation of privacy." Id. at 11.

Petitioner nonetheless relies (Pet. 15-16) on the three-Justice concurrence in Jardines expressing the view that such a violation occurred, see 569 U.S. at 12-16 (Kagan, J., concurring). But four dissenting Justices (the only others to address the issue) saw "no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand." Id. at 24 (Alito, J., dissenting). Similarly, no other Justices endorsed the view that use of a drug-detection dog constitutes, like the thermal-imaging device at issue in Kyllo, "'a device that is not in general public use'" that enables the government "'to explore details of the home that would previously have been unknowable without physical intrusion,'" such that "police officers cannot use it to examine a home without a warrant." Id. at 14-15 (Kagan, J., concurring)(quoting Kyllo, 533 U.S. at 40).

c. Petitioner contends (Pet. 16-17) that lower courts are divided over whether a dog sniff outside an apartment door infringes the apartment dweller's reasonable expectation of privacy. This case, however, involves a dog sniff outside a hotel

room in which petitioner was "a mere guest, not a resident." Pet. App. 14a. Although a hotel guest has standing to assert Fourth Amendment rights, see Stoner, 376 U.S. at 490, the court of appeals correctly recognized that "an expectation of privacy that is reasonable in a home (i.e., to be free of warrantless dog sniffs)" is not "necessarily reasonable in a hotel room." Pet. App. 14a. A hotel guest's "legitimate expectations of privacy" would not include an expectation of privacy in the shared hallways or other common areas of the hotel -- "particularly where, as here, [the] exterior hallway [wa]s accessible from a staircase leading directly to the parking lot." Ibid. Accordingly, any conflict regarding the Fourth Amendment's application to dog sniffs outside an apartment in which a defendant resides is not implicated here.

In any event, petitioner fails to identify any conflict that would warrant this Court's review. To the extent petitioner asserts (Pet. 17) that the decision below conflicts with other Seventh Circuit decisions, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). Petitioner's reliance on the Second Circuit's nearly four-decade-old decision in United States v. Thomas, 757 F.2d 1359, 1366-1367 (1985), cert. denied, 474 U.S. 819 (1985), 479 U.S. 818 (1986), is similarly misplaced. The Second Circuit has explained that its "analysis in Thomas turned on the heightened expectation of privacy in the home

as opposed to other settings," and moreover recognized that even in that context, Thomas's approach "has fallen out of favor with our sister circuit courts." United States v. McKenzie, 13 F.4th 223, 232-233 (2021), cert. denied, 142 S. Ct. 2766 (2022). Thomas thus would not control the outcome on facts like the ones here, and the Second Circuit may be open to revisiting it entirely in an appropriate case.

Nor has petitioner identified any conflict between the decision below and a decision from a state court of last resort. Although petitioner notes (Pet. 16-17) that two state courts have held that a dog sniff outside an apartment or condominium door infringed the defendant's reasonable expectation of privacy, petitioner also correctly recognizes (ibid.) that those courts reached that conclusion as a matter of state constitutional law, not the Fourth Amendment. See State v. Kono, 152 A.3d 1, 16 (Conn. 2016); People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990), cert. denied, 501 U.S. 1219 (1991); see also State v. Correa, 264 A.3d 894, 915 (Conn. 2021) (extending Kono's holding under the state constitution to dog sniffs of motel rooms). Those courts either rejected, or declined to reach, the parallel claim under the Fourth Amendment. See Kono, 152 A.3d at 16 (explaining that it "need not decide whether a canine sniff of an apartment door inside a multiunit building violates the fourth amendment"); Dunn, 564

N.E.2d at 1056 (holding that the dog sniff "did not constitute a search within the meaning of the Fourth Amendment").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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