No. 22-7629

IN THE SUPREME COURT OF THE UNITED STATES

JOSE LUIS NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether police officers' protective sweep of petitioner's house, a known gang residence with at least one firearm inside, in conjunction with the arrest of a gang member who had just deposited that firearm while fleeing through the house, violated the Fourth Amendment.

2. Whether, even if the protective sweep violated the Fourth Amendment, the firearms and ammunition found during the protective sweep of petitioner's house were admissible in any event under the inevitable discovery exception to the exclusionary rule.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2022 WL 3229991. A later order of the court of appeals is not published in the Federal Reporter but is available at 2022 WL 17883604. The order of the district court (Pet. App. 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2022. A petition for rehearing was denied, and the opinion was amended on December 23, 2022 (Pet. App. 14a-15a). On March 13, 2023, Justice Kagan extended the time within which to file a

petition for a writ of certiorari to and including May 22, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1; Pet. App. 9a. He was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. Ibid. The court of appeals affirmed. Pet. App. 1a-8a.

1. On February 14, 2019, two deputies of the Los Angeles County Sheriff's Department were on patrol and saw Juan Carlos Gudino standing in the driveway of petitioner's house. Pet. App. 16a; C.A. E.R. 188. The deputies had previously encountered and arrested Gudino -- a known member of a violent street gang called the Compton Varrio Tortilla Flats -- and knew that he was on probation. Pet. App. 16a; C.A. E.R. 192-193. When the deputies approached Gudino to initiate a probation search, Gudino fled into petitioner's residence. Pet. App. 16a. The deputies noticed that Gudino was holding the buttstock of a firearm as he ran. Ibid.

The deputies called for backup and announced their presence to those inside the house. Pet. App. 16a. They heard yelling and commotion inside. C.A. E.R. 193. Gudino then fled the house out of a different door, no longer carrying a firearm, and was caught

a few blocks away. Pet. App. 17a, 19a; C.A. E.R. 193. After Gudino had fled the house, two other "recognized gang members" exited the house with their hands up. Pet. App. 19a; see id. at 16a. Petitioner, also a "known * * * member of the same gang," was seen sitting in a car parked in the driveway. Ibid. Petitioner complied with the deputies' instructions and told them that he was on probation for assault. Id. at 16a.

The gang members who had just exited the residence "could not confirm to the deputies whether anyone else was in the house." Pet. App. 3a. Knowing that "at least one firearm was still located in the [house]," id. at 19a, the deputies entered to conduct a protective sweep and "mak[e] sure there were no other gang members inside," id. at 17a. During the sweep, the deputies found the firearm that Gudino had been carrying, which was loaded. Ibid. They also entered petitioner's bedroom and found two firearms in plain view, one on the bed and the other on the nightstand. Ibid.

The deputies subsequently obtained a warrant to search the entire house. Pet. App. 17a. That search uncovered additional ammunition in petitioner's bedroom. Ibid.

2. A grand jury in the United States District Court for the Central District of California charged petitioner with one count of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). C.A. E.R. 261. Petitioner moved to suppress the firearms and ammunition found in

his bedroom on the theory that the deputies' search violated the Fourth Amendment. Pet. App. 16a-17a.

The district court denied the motion. Pet. App. 16a-23a. The court found that the deputies' search was "justified as a constitutional protective sweep." Id. at 19a. The court explained that a protective sweep is constitutional where "articulable facts," and "rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene." Id. at 17a (citation omitted; brackets in original). And here, the court determined that the deputies permissibly entered "the Residence to conduct the protective sweep" because they "had specific facts that gang members regularly lived [there] and that at least one firearm was still inside." Id. at 18a. The court also determined that once the deputies had entered the house, they permissibly swept petitioner's bedroom because it was "a 'space where a person may be found,'" and then discovered petitioner's guns there "in 'plain view.'" Ibid. (citations omitted).

In addition, although the district court did "not decide th[e] issue," it suggested that the deputies' seizure of petitioner's firearms was independently justified under the "inevitable discovery doctrine." Pet. App. 22a-23a. The court explained that the relevant question under that doctrine is "whether 'by following routine procedures, the police would inevitably have uncovered the evidence' through lawful means." Id. at 22a (citation omitted).

"Here," the court reasoned, "[b]ased only on Gudino's actions," "it seems likely the Deputies would have easily shown probable cause for a warrant to search the Residence which would have included [petitioner's] bedroom." Ibid. Thus, the court found "a strong implication that [petitioner's] firearms would have been discovered during the course of routine, lawful police procedure." Ibid.

Petitioner then pleaded guilty to possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), while reserving his right to appeal the district court's denial of his suppression motion. C.A. E.R. 56, 58.

3. The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. 1a-8a. The court of appeals agreed with the district court that the deputies had a reasonable basis to conduct the protective sweep. Id. at 2a-3a. It observed that "the record demonstrates that the deputies who conducted the sweep watched an armed known gang member enter [petitioner's] house," "heard a commotion inside the house," "saw the gang member leave without the weapon," and saw "two other gang members le[ave] the house," neither of whom could "confirm to the deputies whether anyone else was in the house." Id. at 3a. "Based on these specific and articulable facts," the court found that "the deputies had a reasonable belief that there may have been people in the home who

had access to at least one firearm and thus posed a threat to the deputies' safety." Ibid.

The court of appeals then additionally "affirm[ed] the denial of the motion to suppress on the alternate ground that [petitioner's] firearms and ammunition would have been inevitably discovered." Pet. App. 4a. The court cited the deputies' "expla[nation] in their declarations that had they not conducted the sweep, they still would have sought a search warrant pursuant to standard departmental operating procedures." Ibid. (internal quotation marks omitted). And the court noted the district court's finding that "there was likely probable cause for a warrant authorizing the search of the house even without reliance on the guns seized during the protective sweep." Ibid. "Indeed," the court continued, "the deputies did ultimately seek and obtain a search warrant, the execution of which uncovered additional ammunition not found during the officers' initial sweep." Id. at 4a-5a. The court therefore determined that petitioner's "firearms and ammunition would have been inevitably discovered during a subsequent lawful search." Id. at 5a.

ARGUMENT

Petitioner renews his contention (Pet. 21-27) that the search of his house violated the Fourth Amendment. But the courts below correctly determined that, based on the record evidence, the officers conducted a lawful protective sweep. The court of appeals also correctly determined, in addition, that the officers would

have inevitably discovered petitioner's firearms and ammunition when executing a valid search warrant in any event. Neither of those factbound determinations -- in the context of a nonprecedential, unpublished court of appeals decision -- implicates any conflict of authority among the courts of appeals or state high courts. And the presence of alternative grounds for affirmance makes this case an unsuitable vehicle for resolving either of the questions presented. This Court's review is unwarranted.

1. a. The lower courts correctly determined that the search of petitioner's house fell within the scope of the protective-sweep exception to the warrant requirement.

In Maryland v. Buie, 494 U.S. 325 (1990), this Court held that "arresting officers are permitted * * * to take reasonable steps to ensure their safety after, and while making, [an] arrest." Id. at 334. The Court accordingly interpreted the Fourth Amendment to permit a protective sweep of the premises if "articulable facts * * * , taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Ibid. The Court emphasized that the sweep must be limited to a "cursory inspection of those spaces where a person may be found" and must "last[] no longer than * * * necessary to dispel the reasonable suspicion of danger." Id. at 335-336.

Although Buie involved a protective sweep incident to an in-home arrest, its principle is not limited to that context. When officers perform an arrest outside a house but reasonably suspect that they may be endangered by persons inside, they may enter the premises to conduct a protective sweep. As courts have reasoned, an arrest "outside the home can pose an equally serious threat to arresting officers as one that occurs in the home." United States v. Lawlor, 406 F.3d 37, 41 (1st Cir. 2005). "[A] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another." United States v. Paopao, 469 F.3d 760, 766 (9th Cir. 2006) (citation omitted), cert. denied, 550 U.S. 938 (2007). Numerous circuits thus agree that a protective sweep of a house is reasonable under the Fourth Amendment when an arrest occurs in proximity to the residence and "sufficient facts exist that would warrant a reasonably prudent officer to fear that the area in question could harbor an individual posing a threat to those at the scene." Lawlor, 406 F.3d at 41.[1]

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[1] See United States v. White, 748 F.3d 507, 512 (3d Cir. 2014); United States v. Jones, 667 F.3d 477, 485 n.10 (4th Cir. 2012); Wilson v. Morgan, 477 F.3d 326, 337-339 (6th Cir. 2007); United States v. Davis, 471 F.3d 938, 944-945 (8th Cir. 2006); United States v. Cavely, 318 F.3d 987, 994-996 (10th Cir.), cert. denied, 539 U.S. 960 (2003); United States v. Watson, 273 F.3d 599, 603 (5th Cir. 2001); United States v. Henry, 48 F.3d 1282, 1284-1285 (D.C. Cir. 1995); United States v. Tobin, 923 F.2d 1506, 1508, 1513 (11th Cir.), cert. denied, 502 U.S. 907 (1991); United States v. Oguns, 921 F.2d 442, 445-447 (2d Cir. 1990).

Here, the lower courts correctly recognized that the deputies knew "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Buie, 494 U.S. at 334; see Pet. App. 3a, 17a-19a. As the court of appeals observed, "the record demonstrates" that the deputies "watched an armed known gang member enter [petitioner's] house, heard a commotion inside the house, and saw the gang member leave without the weapon." Pet. App. 3a. In addition, the house "was known to be a gang residence," id. at 19a; the "two men that exited * * * were recognized gang members," ibid.; and "those two individuals could not confirm to the deputies whether anyone else was in the house," id. at 3a. "Based on these specific and articulable facts, the deputies had a reasonable belief that there may have been people in the home who had access to at least one firearm and thus posed a threat to the deputies' safety." Ibid.

b. Petitioner's challenge (Pet. 13) to the lower courts' uniform determinations includes assertions about the record that are not reflected in the court of appeals' decision. He argues that "there is no suggestion in the record that the arresting officers were or could have been subject to any danger emanating from [petitioner's] home," ibid., asserting (inter alia) that the officers were "merely observing from the street," ibid.; that they "easily could have safely secured" the home, ibid.; and that

entering the home "subject[ed] [the] officers to increasing danger," Pet. 14. But the lower courts' findings do not support those assertions. And the Court should follow its longstanding policy of "not grant[ing] a [writ of] certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Indeed, "under what [the Court] ha[s] called the 'two-court rule,' th[at] policy has been applied with particular rigor when," as here, "[the] district court and court of appeals are in agreement as to what conclusion the record requires." Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see, e.g., Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949).

Petitioner also claims that the court of appeals erroneously held that "an officer's lack of knowledge about a potential threat can justify a protective sweep." Pet. 15 (emphasis omitted). But even if the court of appeals' memorandum disposition had precedential weight, it would not stand for that proposition. Like the district court, the court of appeals determined that the deputies did in fact have knowledge of "specific and articulable facts" -- derived from their own observations and experience -- that there was a "threat to [their] safety" from inside the home. Pet. App. 3a; see id. at 19a (relying on "specific articulable

facts" based on what the deputies "actually observed"). The occupants' lack of assurances that the house was now empty was simply part of the totality of the circumstances, reinforcing the suspicion that someone could be inside with a gun. The "determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior," Illinois v. Wardlow, 528 U.S. 119, 125 (2000); to the extent that petitioner would require more from the officers here, he would invite the very "risk of danger" to officers that the protective-sweep exception aims to prevent, Buie, 494 U.S. at 333.

Petitioner likewise errs in suggesting (Pet. 22) that the court of appeals' unpublished decision would justify a protective sweep of "any home in a neighborhood in which an arrest takes place." The deputies here swept a particular home based on particular facts they knew about that home -- namely, that the arrestee (Gudino) had just fled from the home while leaving his firearm there, that the home was a gang residence with multiple occupants, and that one or more of those occupants might still be inside with the firearm. Upholding the protective sweep here would not suggest that the officers could have swept other homes in the neighborhood about which they lacked knowledge of similar "specific and articulable facts." Pet. App. 3a.

Finally, petitioner's repeated emphasis (Pet. 13, 24, 26) on the distance between the location of Gudino's ultimate arrest and petitioner's house misses the point. Gudino had fled through the

house in his efforts to avoid the police. During that rapidly evolving situation, the deputies reasonably detained the three other known gang members (including petitioner) on the premises of that house, to prevent them from interfering with the arrest. And as part of their efforts to ensure that they would be able to safely take Gudino into custody, the deputies reasonably sought to "protect [themselves] from harm," Buie, 494 U.S. at 333, by sweeping the house to ensure that they would not be shot by a different gang member with Gudino's gun (or another gun) from inside.

c. The decision below does not implicate any conflict of authority regarding the scope of the protective-sweep exception to the warrant requirement.

First, petitioner asserts (Pet. 10) a conflict over whether a protective sweep must "be performed in conjunction with an arrest." But this case does not implicate any such conflict, because the protective sweep here was performed in conjunction with Gudino's arrest. As the district court observed, "Gudino was arrested outside of the Residence by two separate deputies, and as those deputies were securing Gudino, [the primary deputies] continued into the Residence to conduct the protective sweep." Pet. App. 18a.

Nor has the court below even taken a definitive view on "whether a protective sweep may be done 'where officers possess a reasonable suspicion that their safety is at risk, even in the

absence of an arrest'"; instead, its precedents are "split" on that issue. Mendez v. County of Los Angeles, 815 F.3d 1178, 1191 (9th Cir. 2016), vacated on other grounds, 581 U.S. 420 (2017) (citation omitted). Compare United States v. Reid, 226 F.3d 1020, 1027 (9th Cir. 2000) (arrest required), with United States v. Garcia, 997 F.2d 1273, 1282 (9th Cir. 1993) (no arrest required). And because "unpublished memorandum disposition[s] * * * do[] not bind [future] panel[s]," Ballentine v. Tucker, 28 F.4th 54, 65 (9th Cir. 2022), the decision below does not itself create any binding law on the issue. Accordingly, even if the issue were properly presented here, any resolution of the intracircuit disagreement would be the task of the court of appeals, not this Court. See Wisniewski v. United States, 353 U.S. 901, 901-902 (1957) (per curiam).

Second, petitioner contends (Pet. 15) that the decision below "created a new split" of authority by holding that "an officer's lack of knowledge about a potential threat can justify a protective sweep." As explained above (see pp. 10-11, supra), however, the court of appeals' decision should not be read to turn on that ground, but instead on the totality of circumstances that provided "specific and articulable facts" justifying the protective sweep. Pet. App. 3a. Indeed, the district court differentiated this case from one where officers knew "no facts supporting a reasonable belief that there were individuals inside the house who threatened the officers' safety," United States v. Garcia, 749 Fed. Appx.

516, 520 (9th Cir. 2018), emphasizing that the officers here knew the house "to be a gang residence," that "two men that exited" were "gang members," and that "at least one firearm was still located in the Residence," Pet. App. 19a; see ibid. ("Deputies had no way of knowing how many other gang members remained in the Residence or what level of danger those gang members may have posed.").

Accordingly, the decision below is consistent with petitioner's cases (Pet. 15-16) rejecting protective sweeps where the officers "had no information at all" about potential "danger from inside [a] home." United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996); see, e.g., Sharrar v. Felsing, 128 F.3d 810, 825 (3d Cir. 1997) (concluding that "'[n]o information' cannot be an articulable basis for a sweep") (citation omitted; brackets in original).[2] And at all events, as noted earlier, the court of

[2] See also Luer v. Clinton, 987 F.3d 1160, 1169 (8th Cir. 2021) (per curiam) (rejecting a protective sweep where officers had only a "speculative hunch" that their safety was threatened) (citation omitted); United States v. Delgado-Perez, 867 F.3d 244, 256 (1st Cir. 2017) (rejecting a protective sweep where "there were not articulable facts -- even when considered as a whole -- supporting the presence of another individual in [the defendant's] residence"); United States v. Jones, 667 F.3d 477, 484 (4th Cir. 2012) (upholding a protective sweep where "there were specific articulable facts underlying the officers' suspicions that other dangerous individuals could be in the [defendant's] residence," including that "known drug users were frequenting the house, some of who[m] were known to carry firearms"); United States v. Maldonado, 472 F.3d 388, 395 n.2 (5th Cir. 2006) (upholding a protective sweep where "the totality of circumstances" showed that "the agents had an articulable basis on which to support their reasonable suspicion of danger from inside the home"); United States v. Moran Vargas, 376 F.3d 112, 117 (2d Cir. 2004) (rejecting

appeals' unpublished memorandum disposition is nonprecedential, see Ballentine, 28 F.4th at 65, and petitioner cites no other Ninth Circuit decision adopting the lack-of-knowledge rule that he ascribes to it.

2. The court of appeals also correctly determined, in the alternative, that even if the protective sweep had violated the Fourth Amendment, application of the exclusionary rule was unwarranted because the officers would have inevitably discovered the firearm and ammunition evidence during a subsequent lawful search of petitioner's house. Pet. App. 4a-5a.

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a protective sweep based on "the absence of 'articulable facts'" to "justify" the sweep) (citation omitted); United States v. Carter, 360 F.3d 1235, 1242 (10th Cir. 2004) (rejecting a protective sweep where "the officers had no reason to believe a third person had stayed behind, or that such a person would attack them while they were outside"); United States v. Chaves, 169 F.3d 687, 692 (11th Cir.) (rejecting a protective sweep where "the officers had no information regarding the inside of the warehouse"), cert. denied, 528 U.S. 1022, and 528 U.S. 1048 (1999); State v. Radel, 267 A.3d 426, 446 (N.J. 2022) (rejecting a protective sweep where "the police did not have reasonable and articulable suspicion to believe that 'the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene'") (citation omitted; brackets in original); Brumley v. Commonwealth, 413 S.W.3d 280, 288 (Ky. 2013) (rejecting a protective sweep where the officers lacked "a rational inference that the mobile home harbored an individual posing a danger to officers on the scene"); State v. Fisher, 250 P.3d 1192, 1196 (Ariz. 2011) (en banc) (rejecting a protective sweep where "nothing indicated that anyone else was inside the apartment"); State v. Spencer, 848 A.2d 1183, 1196 (Conn.) (rejecting a protective sweep where "the officers' testimony reveals that they had no information that any person who posed a threat to the officers or to others might have been in the apartment at th[e] time"), cert. denied, 543 U.S. 957 (2004); People v. Celis, 93 P.3d 1027, 1035 (Cal. 2004) (rejecting a protective sweep where "[t]he facts known to the officers before they performed the protective sweep fell short of what Buie requires").

a. The inevitable discovery doctrine "allows for the admission of evidence that would have been discovered even without the unconstitutional source." Utah v. Strieff, 579 U.S. 232, 238 (2016). As this Court recognized in Nix v. Williams, 467 U.S. 431 (1984), "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means" then "logic, experience, and common sense" dictate that "the deterrence rationale" for the exclusionary rule "has so little basis that the evidence should be received." Id. at 444.

The court of appeals correctly applied that principle here. The "deputies involved in the protective sweep explained in their declarations" that even if they had "not conducted the sweep, they still would have sought a search warrant pursuant to 'standard departmental operating procedures,'" and the warrant would have been supported by "probable cause * * * even without reliance on the guns seized during the protective sweep." Pet. App. 4a. The deputies "developed probable cause" wholly independent of the protective sweep, based on their observation of "Gudino r[u]n[ning] from police into [the] home while carrying a weapon," and then "exit[ing] the house without the weapon and after a commotion." Id. at 5a.

Petitioner errs in suggesting (Pet. 20) that the "'lawful means' element of the Nix test * * * require[s] that police already be in active pursuit of an alternative and independent

line of investigation that would have turned up the same evidence." As the Court explained in Nix, like the fruit-of-the-poisonous-tree doctrine, "derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct." 467 U.S. at 444. Injecting an "active-pursuit" requirement into the inevitable discovery doctrine would be inconsistent with that approach, and "reject logic, experience, and common sense," ibid., by requiring the exclusion of evidence based solely on an officer's (assertedly) mistaken belief that a search was already justified (e.g., by the protective-sweep doctrine), thereby obviating the necessity to undertake an alternative process (e.g., the process of seeking a warrant) that would have procured the same evidence.

Contrary to petitioner's assertion, the decision below does not "threaten[] to 'swallow the'" warrant requirement. Pet. 21 (citation omitted). As this Court explained in Nix, while rejecting a similar argument, police officers will have "little to gain from taking any dubious 'shortcuts' to obtain the evidence" when they know that they can otherwise obtain it by lawful means, and "the possibility of departmental discipline and civil liability" will provide "[s]ignificant disincentives" to intentional "police misconduct." 467 U.S. at 446. Nor is petitioner correct in claiming that the court of appeals in this case adopted "a standard that overcomes exclusion so long as officers say they 'would have sought a search warrant' that

'likely' would have been granted." Pet. 21 (quoting Pet. App. 4a). Instead, the unpublished decision relies on multiple factors -- the police department's particular warrant-seeking policy and the existence of independent probable cause -- that will not be present in every case. See, e.g., United States v. Mejia, 69 F.3d 309, 319 (9th Cir. 1995) (declining to apply inevitable-discovery doctrine where, inter alia, it was "unclear whether there was competent evidence that would have supported an application for a warrant").

b. Petitioner asserts (Pet. 20) that the courts of appeals disagree about whether the inevitable discovery doctrine contains an active-pursuit requirement. But petitioner overstates the scope of any circuit disagreement. Two cases that petitioner cites as applying an active-pursuit requirement were decided before this Court's "adoption" the inevitable discovery doctrine in Nix, 467 U.S. at 444. See United States v. Alvarez-Porras, 643 F.2d 54, 63 (2d Cir.), cert. denied, 454 U.S. 839 (1981); United States v. Griffin, 502 F.2d 959, 961 (6th Cir.) (per curiam), cert. denied, 419 U.S. 1050 (1974). And as other circuits have pointed out, under Nix, "the 'active-pursuit element' may no longer be necessary to invoke the inevitable discovery rule." United States v. Jackson, 596 F.3d 236, 242 (5th Cir.), cert. denied, 562 U.S. 950 (2010) (citation omitted); see United States v. McManaman, 673 F.3d 841, 846 (8th Cir.), cert. denied, 568 U.S. 1026 (2012); United States v. Thomas, 524 F.3d 855, 862 (8th Cir. 2008)

(Colloton, J., concurring) (explaining that the active-pursuit requirement "contravenes the command of Nix that police should not be placed in a worse position than they would have occupied in the absence of error or misconduct").

In any event, this case does not clearly implicate any circuit disagreement because the facts here would appear to satisfy the active-pursuit requirement even in the circuits that have applied it. "'Active pursuit' does not require that police have already planned the particular search that would obtain the evidence." United States v. Johnson, 777 F.3d 1270, 1274 (11th Cir.), cert. denied, 577 U.S. 880 (2015), overruled on other grounds by United States v. Watkins, 10 F.4th 1179 (11th Cir. 2021). "The government must instead establish that the police would have discovered the evidence 'by virtue of ordinary investigations of evidence or leads already in their possession.'" Ibid. (citation omitted). Here, the officers' active pursuit of the arrest of Gudino after he had fled from them and left a gun in petitioner's house, and the deputies' simultaneous detention of three known gang members on the premises, were "ordinary," "'lawful means'" of police investigation. Id. at 1275 (citation omitted). And consistent with departmental policy, the officers would have sought (and, even with the protective sweep, still did seek) a warrant to search the house, which would have been supported by probable cause, and thus inevitably "would have led" to the discovery of petitioner's firearms and ammunition. Ibid.

3. Finally, even assuming that either of the questions presented were worthy of the Court's review, this case would be an unsuitable vehicle for addressing that question because it would not be outcome-determinative. To prevail in this case, petitioner would have to show that the court of appeals erred both in upholding the deputies' protective sweep and in finding that officers would have inevitably discovered the evidence at issue in any event. So long as the court was correct on either question, then petitioner would not be entitled to relief. And this Court could simply answer that question while declining to address the other. See Pet. App. 23a ("Since the Court has found the protective sweep lawful, we need not decide [the inevitable discovery] issue here.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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