NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AARON LEE PORTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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October 11, 2023

QUESTION PRESENTED

Is a finding that an object has been abandoned within the meaning of the Fourth Amendment a question of law subject to de novo review, or a purely factual question reviewed for clear error only?

RELATED PROCEEDINGS

- *United States v. Porter*, No. 22-1134, United States Court of Appeals for the Tenth Circuit. Judgment entered May 2, 2023; Petition for Rehearing Denied June 13, 2023.
- *United States v. Porter*, No. 1:20-cr-00283-RBJ-1, United States District Court for the District of Colorado. Judgment entered April 19, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aaron Lee Porter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at *United States v. Porter*, 66 F.4th 1223 (10th Cir. 2023), and can be found in the Appendix at A19.

JURISDICTION

The court of appeals issued its decision on May 2, 2023, App. A19, and denied Mr. Porter's petition for rehearing on June 13, 2023, A27. On September 1, 2023, this Court extended the deadline to file the petition for certiorari from September 11, 2023, to October 11, 2023. A28.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

U.S. Const., Amendment IV

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.

STATEMENT OF THE CASE

I. Police conduct a warrantless search of Mr. Porter's backpack.

In August 2020 local police arrested Mr. Porter on a warrant in connection with a shooting that had taken place two weeks earlier. Mr. Porter was arrested in the administrative office of the warehouse where he worked. Although police had seen Mr. Porter take a black backpack into the building when he arrived at the warehouse, he was not carrying the backpack at the time of his arrest.

According to a police report written shortly after the arrest, a police officer asked Mr. Porter if Mr. Porter wanted the officer to retrieve his personal belongings from the business. Mr. Porter responded that he did not have any. Around eleven months later, in response to Mr. Porter's motion to suppress, the police officer for the first time asserted that he had followed up on this previously reported exchange with further questioning regarding the backpack. Specifically, the officer testified: "I believe I asked him what about the backpack I watched you walk in with, and he [Mr. Porter] responded he didn't have a backpack." Although Mr. Porter denied that this latter exchange took place, but the district court credited the officer's testimony.

After Mr. Porter was transported to jail, the officer told Mr. Porter's manager that Mr. Porter had brought a backpack to work and asked where Mr. Porter kept his personal belongings. After the manager told the officer that Mr. Porter's workspace was empty, the officer went back into the warehouse to look for himself. He found the black backpack at an adjacent workstation. After confirming that it

belonged to Mr. Porter, he picked it up, shook it, and determined that there was something compact and heavy in the bag. He then unzipped the backpack, looked inside, and rummaged around, locating a gun at the bottom of the bag. After completing this warrantless search of the backpack, the officer handed it to another detective, who applied for a search warrant based on the information obtained during the initial, warrantless search.

II. Mr. Porter's motion to suppress is denied.

Mr. Porter moved to suppress the evidence discovered as a result of the warrantless search of the backpack. Relevant here, the government opposed the motion on the ground that Mr. Porter lacked any objectively reasonable expectation of privacy in the backpack because he had verbally abandoned it during his post-arrest conversation with police.

The district court denied the motion, deeming the officer's testimony credible and finding that, in response to a question about whether Mr. Porter had any personal belongings he wanted retrieved from the warehouse, Mr. Porter had said that he didn't have any personal belongings, and that he didn't have a backpack. On these facts, the district court concluded that Mr. Porter's statements effected an abandonment of the backpack, so that he lacked any objectively reasonable expectation of privacy in its contents.

III. Applying the clear-error standard of review, the Tenth Circuit affirms the denial of the motion to suppress.

Mr. Porter appealed. He argued that, even assuming that the historical facts found by the district court were correct, he nevertheless possessed an objectively reasonable expectation of privacy in the backpack because he had made no clear and unequivocal disclaimer of *ownership* in the backpack. Rather, he argued that within the context of his conversation with the police officer—which concerned whether Mr. Porter had any personal belongings he wanted to take back to the police station—he was simply denying that he had a backpack *that he wanted to take to the police station*.

The Tenth Circuit affirmed the denial of the motion to suppress. In doing so, it rejected circuit precedent holding that the abandonment inquiry "subsumes both a subjective and an objective component," with the objective reasonableness of a defendant's expectation of privacy in an object was a question of law reviewed de novo, *United States v. Garzon*, 119 F.3d 1446, 1449 (10th Cir. 1997), but instead treated abandonment as a purely factual question subject to review for clear error only, A22-23 & n.4. The Tenth Circuit reasoned that Mr. Porter had merely offered a competing interpretation of meaning of his statements, and that "choosing one of two plausible interpretations of the evidence cannot be clearly erroneous." A24 (quoting *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)). Any "plausible ambiguity" created by considering Mr. Porter's statements in the context of the

conversation in which they occurred, the Tenth Circuit reasoned, could "not yield clear error." A24.

REASONS FOR GRANTING THE WRIT

The question presented is recurring and important and has divided the courts of appeal—with the Tenth Circuit on the wrong side of that divide. Certiorari is warranted.

I. This question is recurring, important, and has divided the courts of appeal.

The Tenth Circuit decision deepens an existing divide in authority regarding the standard of review that applies to findings of abandonment in Fourth Amendment cases. Abandoned property is not protected by the Fourth Amendment, and appellate courts often encounter competing claims of abandonment. Despite the frequency with which the courts of appeal are asked to review the question, this Court has never directly addressed the applicable standard of review, and the courts of appeal have reached inconsistent conclusions on the question.

In the decision below, the Tenth Circuit joined the Fourth, Eighth, Ninth, Second, and D.C. Circuits in concluding that whether a defendant has abandoned property—and therefore lacks any reasonable expectation of privacy with respect to it—as a purely factual question subject to review under the deferential clear-error standard. A22-23 & n.4; *see also United States v. Ferebee*, 957 F.3d 406, 416 (4th Cir. 2020) (holding that finding of abandonment is a factual finding reviewed for clear error); *United States v. Crumble*, 878 F.3d 656, 659 (8th Cir. 2018) (same); *United States v. Stephens*, 206 F.3d 914, 916-17 (9th Cir. 2000) (same); *United*

States v. Lee, 916 F.2d 814, 818 (2d Cir. 1990) (same); *United Stats v. Manner*, 887 F.2d 317, 327 n.9 (D.C. Cir. 1989) (same).

By contrast, the Eleventh Circuit and the Maryland Court of Special Appeals have held that an ultimate finding of abandonment encompassses a legal question subject to de novo review. *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001); *Powell v. State*, 776 A.2d 700, 708 (Md. Ct. Spec. App. 2001). So had multiple panels of the Tenth Circuit prior to the decision below. *See, e.g.*, *United States v. Garzon*, 119 F.3d 1446, 1449 (10th Cir.1997) ("[A] determination of whether the defendant retained an objectively reasonable expectation of privacy" in the purportedly abandoned property "is a question of law that we review de novo."); *United States v. Ojeda-Ramos*, 455 F.3d 1178, 1187 (10th Cir. 2006) (same). [1]

Certiorari is accordingly warranted to resolve the division among the courts of appeal on the important and recurring question.

II. The Tenth Circuit is wrong.

The Tenth Circuit conclusion that abandonment is a purely factual question is wrong. Contrary to the conclusion reached by the Tenth Circuit in the decision below, the ultimate question of whether an object has been abandoned—and therefore removed from the protections of the Fourth Amendment—is a "legal, not

[1] Similar to the Tenth Circuit, the D.C. Court of Appeals has reached conflicting conclusions regarding the applicable standard of review, indicating that clarification from this Court is warranted. *Compare Spriggs v. United States*, 618 A.2d 701, 703 (D.C. Ct. App. 1992) (reviewing abandonment finding for clear error); *with Brown v. United States*, 97 A.3d 92, 95 (D.C. Ct. App. 2014) (reviewing abandonment finding de novo).

factual" question that should be reviewed de novo. *Ferebee*, 957 F.3d at 421 (Floyd, J., dissenting). Although the "findings of facts underlying the district courts' conclusion" that an object has been abandoned should be reviewed for clear error, "whether those findings amount to abandonment" is a legal question that should be reviewed de novo. *Id.*

"This comports" with courts' "general approach to Fourth Amendment questions involving a reasonable expectation of privacy." *Ferebee*, 957 F.3d at 421 (Floyd, J., dissenting). "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy,'" which requires a court to determine whether any subjectively held expectation of privacy is one that "society [is] willing to recognize" as objectively reasonable. *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Where a question is stated in such "broad policy terms," "it is to be expected that the de novo standard will be used." 6 Wayne LaFave et al., Search & Seizure § 11.7(c) (6th ed.). As this Court has recognized with respect to findings of reasonable suspicion and probable cause, otherwise applying "[a] policy of sweeping deference would permit, '[i]n the absence of any significant difference in the facts,' 'the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient." *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)). "Such varied results" regarding the scope of the Fourth Amendment's protections "would be inconsistent

with the idea of a unitary system of law" and, "if a matter-of-course, would be unacceptable." *Id.* at 697 (citations omitted). Like an ultimate finding of probable cause or reasonable suspicion, an ultimate finding of abandonment is a legal question that should be subject to de novo review.

Certiorari is therefore warranted to ensure that lower courts review abandonment findings de novo, consistent with the reasoning of *Ornelas*, and in order to support our unitary system of law.

III. This case is a strong vehicle for the resolution of the question presented.

Whether the district court's finding of abandonment was a legal conclusion subject to de novo review or a factual conclusion subject to clear-error review was squarely presented to and decided by the Tenth Circuit. The Tenth Circuit decision, moreover, relied on application of the more-deferential clear-error standard. In affirming the district court's denial of the motion to dismiss, the Tenth Circuit concluded that petitioner had merely presented an alternative interpretation of events, and that "choosing one of two plausible interpretations of the evidence cannot be clearly erroneous." A24 (quoting *Anderson*, 470 U.S. at 574).

Because this case is a strong vehicle for the resolution of the question presented, certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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