No. _____

In The
Supreme Court of the United States

WESLEY PERKINS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court erred by denying Perkins' motion to suppress evidence, methamphetamine, discovered during a Park Ranger's warrantless search of his vehicle on the beach based upon observing marihuana *residue* in the passenger door and *after the canine failed to alert*.

?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption of the case before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISION

STATUTES AND RULES

———————♦———————

PRAYER

Petitioner Wesley Perkins respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on July 11, 2024.

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OPINIONS BELOW

On July 11, 2024, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

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JURISDICTION

As noted, the Fifth Circuit entered its judgment on July 11, 2024. Appendix at 1. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Fourth Amendment guarantees against unreasonable searches or seizures, "Walder v. Unites States, 347 U.S. 62 (1954).

The Fourth Amendment to the United States Constitution provides:

> 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.

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STATEMENT OF THE CASE

Wesley Perkins ("*Perkins*") pled guilty, pursuant to a conditional plea agreement, to possession with intent to distribute methamphetamine. Prior to trial, Perkins sought to suppress methamphetamine found during a warrantless search of his vehicle, which was denied.

The Appeal

On June 7, 2023, Mr. Perkins filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. Perkins raised the following error in his brief:

The District Court erred by denying his motion to suppress evidence, methamphetamine, discovered during a Park Rangers' warrantless search of his vehicle on the beach based upon observing marihuana *residue* in the passenger door and *after the canine failed to alert*.

On June 18, 2024, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. WESLEY PERKINS, United States Court of Appeals, Fifth Circuit Opinion, 2024 WL 3375541 (5th Cir. 2024) (Appendix).

The 5th Circuit affirmed the denial of Perkins' suppression motion holding:

1) Once the Ranger immediately recognized the incriminating and illegal nature of the marijuana- "'little buds of marijuana' or 'marijuana shake'" -based on that observation alone, the rangers possessed knowledge evincing a "fair probability that contraband or evidence of a crime" would be found in Perkins' car, which created probable cause and justified the subsequent warrantless search of the car, which yielded methamphetamine.

2) Perkins presented no evidence the rangers prolonged the stop to do anything more than obtain and run his information, a normal component of a traffic stop.

3) Although the canine failed to alert on the outside of the vehicle, this did not dispel the rangers' probable cause, which had already developed through a visual inspection of the marihuana in the car, especially since the dog was not trained to detect marihuana, it was likely a very windy day at the beach, and the dog did not perform a sniff of the car's interior.

4) Pursuant to a valid traffic stop, an officer can open a car door to visually inspect an occupant without any additional suspicion and without triggering the 4th Amendment; and in this case, the front passenger window was nontransparent and impossible to roll down.

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BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court has jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

As to the question presented, this Court should grant certiorari to address whether Perkins' suppression motion should have been sustained.

Perkins' Fourth Amendment rights were violated when the Government searched his vehicle with an unconstitutional warrantless search lacking probable cause.

On the afternoon of February 22, 2022, Perkins was driving a 4 door sedan on the beach at the Padre Island National Seashore, when he was stopped by a Park Ranger for having a future-dated temporary tag. He was the sole occupant. As the Ranger approached, he saw Perkins either push or pull something from between his legs under the driver's seat, and ordered Perkins to place his hands on the steering wheel. Perkins complied. Soon after, another Park Ranger arrived and stood near the front passenger side door, which was broken and covered with either clear tape or plexiglass and difficult to see through. Perkins cooperated and gave his identification information to the initial Ranger, who headed back to his patrol car to run the information.

Despite the condition of the passenger window, the second Ranger believed he saw Perkins moving his hand while holding keys including the ignition key, so the Ranger opened the passenger door and obtained the keys from Perkins, who complied. The Ranger kept the passenger door open and spoke with Perkins. While doing so, at some point in the dialogue, the Ranger notice a syringe, which was capped and had no liquid, inside the passenger door.

He advised the initial Ranger, who then looked and observed what appeared to be an unusable amount of marijuana residue, or buds, in the passenger door.

The initial Ranger happened to be a canine handler, so he brought out his canine to perform an exterior sniff of the vehicle and the dog failed to alert. Despite this, Rangers advised Perkins they had probable cause to search his vehicle, and did not ask nor obtain his consent.

The Rangers instructed Perkins to get out of the car, and he agreed, but said he needed help due to injuries from a recent traffic accident. One Ranger had seen Perkins walking on the beach earlier, but assisted him out of the car, and they began the search. Inside the vehicle, they found methamphetamine under the driver's seat and on the floorboard, along with plastic baggies, scales and drug paraphernalia.

Perkins then confessed to DEA Agents he had been dealing drugs for the months following his accident.

4th Amendment

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures, *Bailey v. United States*, 568 U.S. 186, 189 (2013). The legality of a traffic stop is analyzed under the standard articulated in *Terry v. Ohio*, 392 U.S. 1 (1968), examining whether the officer had probable cause or reasonable suspicion to initiate the stop and whether the stop was reasonably related in scope to the initial justifiable circumstances.

Here, the evolution of the traffic stop into a drug investigation was not supported by reasonable suspicion. Perkins readily identified himself to Ranger Calkins. ROA.136. The Government provided no evidence of vague or conflicting answers. Perkins was the only occupant of the vehicle. ROA.153. The stop happened in the afternoon. ROA.11. No one had reported suspicious activity. The vehicle was not observed leaving a suspected drug house. Perkins had no active warrants. Perkins was not belligerent. There was no indication of a

suspicious route of travel. There were no apparent modifications to the body of the vehicle indicative of drug smuggling. There was not any noticeable amount of marihuana remnant when Ranger Calkins spoke with Perkins on the driver's side. ROA.153-156. When Ranger Calkins went back to his vehicle to run Perkins' information, the second Ranger, Jones, eventually, after opening the passenger door and talking with Perkins, observed a capped syringe without liquid in the passenger door. ROA.136, 138-139, 150, 159-160. Ranger Jones advised Ranger Calkins, who then looked and saw marihuana shake in the passenger door. 139-140. No photographs were offered of the syringe or marihuana remnant(s), and there was no testimony either was kept as evidence.

Under the plain view doctrine, "a truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a 'search' for Fourth Amendment purposes, and therefore does not even require reasonable suspicion," *Arizona v. Hicks*, 480 U.S. 321, 328 (1987). If there is probable cause to associate property with criminal activity, the seizure of that property in plain view involves no invasion of privacy and is presumptively reasonable, *Payton v. New York*, 445 U.S. 573, 586-87 (1980).

Perkins disputes there was probable cause to search his vehicle based upon eventually seeing a syringe and, after that, marihuana remnants.

First, the syringe and marihuana shake were not in plain view during Ranger Calkins initial encounter. Ranger Jones viewed the syringe only after opening the passenger door, and even then, he did not see the marihuana shake. ROA.139-140. Ranger Jones did not just look through the *hard-to-see-through* passenger window, he opened the passenger door, retrieved the keys and then continued to detain and speak with Perkins. ROA.136-139. Not right away, but eventually, Ranger Jones saw a syringe in the passenger door. ROA.165-166, 169. The Government presented no evidence that the syringe's incriminating character was immediately apparent. It is questionable and a stretch to argue Ranger Jones was standing

in a lawful place well after he had secured the keys or that it was a cursory inspection at that point. The plain view doctrine allows for a warrantless seizure of evidence if: (1) [t]he officer is lawfully in a place to plainly view the object; (2) the officer has a lawful right of access to the object itself; and (3) the incriminating character of the evidence must be "immediately apparent," *Horton v. California*, 496 U.S. 128 (1990). This Court held in *Wyoming v. Houghton*, 526 U.S. 295 (1999) that the presence of a syringe could support probable cause, but in that case, the syringe was observed in the driver's front pocket and the *Wyoming* defendant told law enforcement he used the syringe to inject drugs. Here, it was not clear if Perkins owned the vehicle or for how long, he was not under surveillance by law enforcement for drug use at that time, and there were no reports of him using drugs in that vehicle. There was no evidence that the needle was ultimately discovered with illegal drugs. ROA.150.

Once he viewed the syringe, Ranger Jones notified Ranger Calkins who then stepped around to look. ROA.139-140. When he observed the syringe, Ranger Jones did not know its purpose - if it was for medication or insulin. ROA. 169-170. Ranger Jones advised Calkins he had noticed, merely, an unopened empty capped hypodermic needle in the passenger side door. ROA. 139, 150. The record does not show Perkins made any res gestae statements. Ranger Calkins testified the syringe he saw was "just a syringe at that point," and he did not base his probable cause on the syringe because of multiple reasons- people can legally have a syringe, diabetics, "things like that." ROA.149.

After being directed to the passenger door, for the first time, marihuana shake or "bud(s)" were observed. ROA. 139-140. This was certainly not a cursory inspection.

The marihuana remnant was not immediately apparent to be incriminating, and, again, it was not even seized.

Probable cause analysis is commonsense, without requiring certainty, and as viewed from the perspective of law enforcement, *Illinois v. Gates*, 462 U.S. 213, 232 (1983). This

Court held in 1982 in *United States v. Ross*, 456 U.S. 798, 825 (1982) that an officer's recognition of marihuana shake inside the vehicle helped to provide sufficient probable cause to enter and search the vehicle. However, the 4th Circuit found in *United States v. Lyles*, 910 F.3d 787, 792 (4th Cir. 2018) there was no probable cause where a single trash pull yielded "a scintilla of marijuana residue or hint of marijuana use." The 8th Circuit disagreed in *United States v. March*, 91 F.4th 975 (8th Cir. 2024), finding that recently discarded marijuana stems from a trash pull suggested ongoing marijuana consumption.

Further, this Court has found that context matters, and officers must account for exculpatory facts as well as incriminating ones, *Kansas v. Glover*, 140 S.Ct. 1183, 1191 (2020). Here, the dog did not alert. ROA.143-144. Moreover, there was no indication there was an odor of marihuana nor burning embers nor smoke inside or emanating from the vehicle nor any remnants of marihuana on Perkins' person nor any indication of observed impaired driving. Ranger Calkins believed the vehicle had been moving for only a short period of time, which would not show, for example, that marihuana had recently been used inside the vehicle. ROA.145. The Rangers did not take any photographs of the marihuana bud(s) or preserve it as evidence. The shake was not a full grown marihuana plant nor a joint nor was it at the bottom of a plastic bag. ROA.148-149. No plastic bags were observed. No bundles of marihuana were observed. No packages of marihuana were observed. The Rangers did not observe marihuana cigarette butts in the ashtray. There was no smell of marihuana, not even when the passenger door was opened by Ranger Jones. The presence of marihuana shake in the crevice of the door tends to suggest that the marihuana, or whatever it was, had already been consumed. The Government presented no evidence Perkins was intoxicated at the time of his arrest, nor did it identify when he had last used marihuana. There was no evidence presented that Perkins was asked if he was under the influence. This was not a usable amount of marihuana.

In addition, there was no indication Ranger Calkins asked about Perkins' movements under the seat nor that he viewed anything that indicated Perkins was actively engaged in criminal activity aside from the traffic violation justifying the stop; it appears Perkins pulled over promptly. ROA. 135, 143. Ranger Calkins returned to his vehicle to run Mr. Perkins' name through the central system. ROA.136. He left Mr. Perkins in the vehicle so presumably he did not believe Mr. Perkins posed a safety risk. Ranger Jones took no steps to restrain Mr. Perkins inside the vehicle, and placed his keys on the outside top of the car. ROA.165, 169-170. Mr. Perkins gave no indication he was attempting to flee- other than speculation by Ranger Jones that Mr. Perkins was holding his keys while fidgeting, although he never tried to place the key in the ignition. ROA.136-138. Mr. Perkins was not combative with officers. ROA.157. No weapons were found. ROA.156.

Considering all of these facts, the only reasonable conclusion is that somebody may have smoked marihuana in the car but certainly not on that occasion. The plain view doctrine is not applicable in this situation because the incriminating nature of the item(s), a syringe and marihuana shake, were not readily apparent to the Rangers.

Nor was there any indication Perkins displayed extreme nervousness. Early on, the Ranger observed Perkins leaning forward under the driver's seat to either reach for an item or push an item under it, but did not know why. ROA.153-155. Ranger Calkins ordered Perkins to show his hands, and he complied. ROA.136-137, 156. This certainly would not support an assertion Perkins was extremely nervous nor warrant a search of the vehicle. Ranger Jones noticed Perkins was holding the keys in one hand while moving that hand, but was not trying to put the key in the ignition. ROA.136-138, 159-161, 169. His hands were always visible. ROA.136-138, 159-161, 169. The Ranger was not in fear Perkins was attempting to hide something, but only was worried he *might* try to drive away. ROA.165, 169-170. Perkins immediately handed the keys to the Ranger when the Ranger opened the

passenger door. ROA.165, 169-170. Nothing drew Ranger Jones' attention when he opened the passenger door and began talking with Perkins. Rather than shut the door, the Ranger kept the passenger door open. ROA.165-166, 169.

Surely, the dog's failure to alert to the vehicle dispelled any suspicions. In *United States v. Villafranco-Elizondo*, 897 F.3d 635 (5th Cir. 2018), the Fifth Circuit Court found the search of a truck was justified even after a canine failed to alert because the totality of other factors, including improper modifications to the truck's trailer, weak welds on the tailgate, mud smeared underneath, bondo dust, fresh paint, inconsistent density meter readings, and an implausible story by the driver, supported probable cause. Unlike Villafranco, as outlined above, there were no such supportive factors here. It appears Ranger Calkins was not sure, and deployed the canine for development of probable cause. Why else would he have done so. "[I]f ... the 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," *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

It should be noted that the 6th Circuit in *United States v. Davis*, 430 F.3d 345 (6th Cir. 2005) addressed reasonable suspicion for a Terry stop, and held that once the first canine failed to alert to the presence of narcotics in a vehicle, the officers' suspicions were dispelled even though the defendant had been observed meeting with known narcotic smugglers.

There was not a multitude of suspicious facts, the justification for probable cause has fatal shortcomings, the Rangers' actions were not supported by reasonable suspicion and the search was not warranted.

CONCLUSION

For the foregoing reason, the petition for writ of certiorari should be granted.

Date: October 8, 2024

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APPENDIX A- United States Court of Appeals, Fifth Circuit Opinion
(July 11, 2024) 2024 WL 3375541 (5th Cir. 2024)