No. 25-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Roger Moss,

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 A WRIT OF CERTIORARI

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Questions Presented

Courts generally recognize that probable cause to believe a person committed a crime does not alone establish probable cause to search their home. However, the courts are divided on how this principle applies when the suspected offense involves drug-trafficking. For example, the Tenth Circuit has held that probable cause of drug-trafficking necessarily establishes probable cause to search the suspect's home; the Eleventh Circuit has held that the affiant's opinion that drug-traffickers often have evidence in their home suffices; while the First Circuit has required specific facts in addition to the affiant's opinion to establish the requisite nexus.

Thus, the questions presented are:

1. Does probable cause to believe a person is engaged in a drug-trafficking offense per se establish probable cause to search their home?

2. If not, is the affiant's opinion that drug dealers often have evidence in their homes sufficient to establish probable cause?

Related Proceedings

- *United States v. Moss*, No. 6:20-cr-10038-JWB-1, United States District Court for the District of Kansas (amended judgment entered May 20, 2022).

- *United States v. Moss*, No. 22-3101, United States Court of Appeals for the Tenth Circuit (judgment entered October 22, 2024; rehearing denied November 22, 2024).

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Opinion Below

The decision of the United States Court of Appeals for the Tenth Circuit is available at *United States v. Moss*, No. 22-3101, 2024 WL 4541738 (10th Cir. October 22, 2024, and can be found in the Appendix at A1.

Basis for Jurisdiction

The Tenth Circuit issued its opinion affirming the district court's judgment on October 22, 2024. (A1.) The Tenth Circuit denied rehearing on November 19, 2024. (A7.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

Amendment IV. Searches and Seizures; Warrants

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

After a warrant-based search of Mr. Moss's apartment uncovered firearms and controlled substances, Mr. Moss was charged with three counts of possession with intent to distribute in violation of 21 U.S.C. § 841, one count of possessing a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c), and one count of being an unlawful "user" in possession of a firearm in violation of 18 U.S.C. § 922(g)(3). Mr. Moss moved for a *Franks* hearing, alleging officers recklessly omitted material information from the warrant affidavit, namely that previous surveillance of and trash pulls from Mr. Moss's apartment had failed to yield any evidence of drug trafficking. The district court denied the motion.

At trial, testimony revealed additional exculpatory information that was not included in the warrant affidavit. Officer Gray testified that he believed Mr. Moss was not selling drugs out of his apartment, and Officer Van Daley testified they were aware that Mr. Moss had a storage unit that was potentially involved in his drug-trafficking. Mr. Moss did not renew his motion for a *Franks* hearing based on this new evidence.

Ultimately, the jury convicted Mr. Moss on each count, and the district court sentenced him to 255 months of imprisonment.

On appeal, Mr. Moss argued that he was plainly entitled to a *Franks* hearing based on the new evidence adduced at trial. That is, he could plainly make the requisite "substantial preliminary showing" that material information was recklessly

omitted, and thus the court should remand for a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154, 155 (1978).

As Mr. Moss explained in his opening brief, the affidavit on its face—i.e., before the reckless omissions are considered—was already weak. That's because it is well established that "probable cause 'to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime.'" *United States v. Mora*, 989 F.3d 794, 800 (10th Cir. 2021) (citation omitted). Rather, some "additional evidence" must link the suspect's home to "the suspected criminal activity." *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998). Here, officers had probable cause that Mr. Moss conducted drug transactions away from his home. However, there was no evidence affirmatively linking Mr. Moss's home to his drug-trafficking activities, besides the mere fact that he lived there. Rather, the affidavit inferred that he was storing drugs at his house because officers could not identify a different stash house.

As Mr. Moss explained, this is not a strong link, and it is negated by the three pieces of evidence that were recklessly omitted. First, that Officer Gray was unable to find any evidence of drug-trafficking activity during multiple trash pulls and hours of surveillance suggests that Mr. Moss did not keep drugs and other evidence of trafficking at his house. Second, Officer Gray's opinion that Mr. Moss was not selling drugs at his apartment significantly minimizes any nexus between Mr. Moss's drug trafficking activity and his apartment and seriously diminishes the likelihood that any evidence of drug-trafficking would be found there. And third, Officer Van Daley's

testimony that a storage unit might be involved indicates that the storage unit, as opposed to Mr. Moss's apartment, was the location where evidence of his drug-trafficking activity was likely to be found. The existence of another potential stash house is particularly important here considering the theory of probable cause—that Mr. Moss must be storing drugs at home because the officers were unable to identify another stash house. Together, these three pieces of exculpatory information would have sufficiently undermined the already weak link between Mr. Moss's apartment and his drug-trafficking activity and negated probable cause. Or at the very least, Mr. Moss has clearly made the requisite "substantial preliminary showing" and was plainly entitled to an evidentiary hearing to try to prove his *Franks* claim.

Importantly, Mr. Moss also acknowledged that, in the context of drug-trafficking, the Tenth Circuit had held that an affiant's opinion that drug dealers often keep evidence of drug-trafficking in their home provides a sufficient nexus. *Mora*, 989 F.3d at 801.[1] However, as he explained, the affiant here did not represent to the issuing magistrate that in his experience drug dealers commonly store drugs and other evidence of trafficking in their homes. Accordingly, given the weak nexus

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[1] As discussed below, the Tenth Circuit has sometimes employed a per se rule that "when police officers have probable cause to believe that a suspect is involved in drug distribution, there is also probable cause to believe that additional evidence of drug-trafficking crimes (such as drug paraphernalia or sales records) will be found in his residence." *United States v. Sanchez*, 555 F.3d 910 (10th Cir. 2009. Other times, they have suggested that something more is required—e.g., "an affiant officer's statement that certain evidence—in his or her professional experience—is likely to be found in a defendant's residence." *United States v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009).

to begin with, when the omitted information is considered, Mr. Moss made the requisite "substantial preliminary showing" entitling him to a *Franks* hearing.

The Tenth Circuit rejected Mr. Moss's *Franks* claim and affirmed his convictions.

Critically, in assessing the relative strength of the affidavit's showing of probable cause, the Tenth Circuit gave significant weight to the affiant's conclusion that probable cause existed. That is, the Tenth Circuit acknowledged that in drug-trafficking cases, an affiant's opinion that evidence is often found in a drug-trafficker's home establishes probable cause. Moss, 2024 WL 4541738, at *2. "We have such a statement here," it concluded. *Id.* In support, it pointed only to the affiant's conclusion that "the officer believed probable cause existed to search Defendant's residence for evidence of drug dealing." *Id.*

Based on this ostensibly strong showing of probable cause, the Tenth Circuit concluded that "the affidavit would still establish probable cause to search Defendant's residence for evidence of drug dealing even if the affidavit contained the omitted matters about which he now complains." *Id.* at *3. Accordingly, "the district court did not err by denying Defendant a *Franks* hearing on his motion to suppress. *Id.*

The Tenth Circuit denied rehearing.

Mr. Moss now petitions the Supreme Court for a writ of certiorari to decide what additional evidence, if any, is required to provide a sufficient nexus between a

drug-trafficking offense and the suspect's home—an issue on which the Courts of Appeals are divided.

Reasons for Granting the Petition

The Courts of Appeals are divided over what evidence, if any, is required to establish a sufficient nexus between a drug-trafficking offense and the suspect's home.

It is well established that "[p]robable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person's home to the suspected criminal activity." *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998); *accord United States v. Reed*, 993 F.3d 441, 444 (6th Cir. 2021) ("[P]robable cause to arrest a suspect for a crime does not necessarily create probable cause to search the suspect's home."). However, the Courts of Appeals have "struggled" to apply this seemingly straightforward principle when the suspected criminal activity involves drug-trafficking. *Id.* ("We have 'struggled' to answer this question in a consistent way . . . ."); *id.* at 449 ("For what it is worth, other courts struggle with this issue too.") (citing *United States v. Cardoza*, 713 F.3d 656, 661 (D.C. Cir. 2013); *United States v. Dixon*, 787 F.3d 55, 60 (1st Cir. 2015); *United States v. Hodge*, 246 F.3d 301, 306 (3d Cir. 2001); *United States v. Grossman*, 400 F.3d 212, 217–18 (4th Cir. 2005); *United States v. Haynes*, 882 F.3d 662, 666 (7th Cir. 2018); *United States v. Ross*, 487 F.3d 1120, 1123 (8th Cir. 2007); *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986); *United States v. Biglow*, 562 F.3d 1272, 1278–80, 1283 (10th Cir. 2009); *United States v. Cunningham*, 633 F. App'x 920, 922 (11th Cir. 2015)).

Courts have generally taken three different approaches to this issue.

First, several courts have held that no additional evidence is required at all. The Tenth Circuit, for example, "think[s] it merely common sense that a drug supplier will keep evidence of his crimes at home." *United States v. Sanchez*, 555 F.3d 910 (10th Cir. 2009). Thus, a magistrate judge can simply infer that probable cause exists to search the suspected drug-trafficker's home without any "particular facts to support the inference that a drug trafficker keeps his supply in his home." *Id.*; *accord Hodge*, 246 F.3d at 306 ("It is reasonable to infer that a person involved in drug dealing on such a scale would store evidence of that dealing in his home."); *Grossman*, 400 F.3d at 218 ("[I]t is reasonable to suspect that a drug dealer stores drugs in a home to which he owns a key."); *Haynes*, 882 F.3d at 666 ("[J]udges may permissibly infer that evidence of drug dealing is 'likely to be found where the dealer[] live[s].'" (citation omitted) (second and third brackets in original)); *Angulo-Lopez*, 791 F.2d at 1399 ("In the case of drug dealers, evidence is likely to be found where the dealers live."). In other words, these courts have employed a per se rule that "when police officers have probable cause to believe that a suspect is involved in drug distribution, there is also probable cause to believe that additional evidence of drug-trafficking crimes (such as drug paraphernalia or sales records) will be found in his residence." *United States v. Sanchez*, 555 F.3d 910 (10th Cir. 2009).

Other courts have required just the slightest bit more—an affiant's representation that drug dealers often have evidence in their homes and/or their subjective opinion that evidence is likely to be found in the suspect's home. *See, e.g.*,

United States v. Joseph, 709 F.3d 1082, 1100 (11th Cir. 2013); *Ross*, 487 F.3d at 1123. Although, as just discussed, the Tenth Circuit has taken the first "per se" approach, it has also suggested at times that something more may be required—namely, "an affiant officer's statement that certain evidence—in his or her professional experience—is likely to be found in a defendant's residence." *United States v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009). Indeed, that's the approach the Tenth Circuit took in Mr. Moss's appeal below, relying on the affiant's statement that he "believed probable cause existed to search Defendant's residence for evidence of drug-dealing." *Moss*, 2024 WL 4541738, at *2.

Finally, at least one Circuit, the First, has held that an affiant's opinion as to drug dealers in general is not enough—rather, particular evidence must link the suspect's drug dealing to their home. *United States v. Roman*, 942 F.3d 43, 51-52 (1st Cir. 2019). In *Roman*, the First Circuit acknowledged that it had already "rejected a per se rule automatically permitting the search of a defendant's home when he has engaged in drug activity." *Id.* And it adopted its previously "expressed skepticism that probable cause can be established by the combination of the fact that a defendant sells drugs and general information from police officers that drug dealers tend to store evidence in their homes." *Id.* (citation omitted). Rather, it found "'generalized observations' of this type should be 'combined with specific observations,' or facts 'connecting the drug dealing to the home' to permit an inference of nexus to a defendant's residence." *Id.* (citations omitted). That could include, for example, "evidence that drug distribution 'was being organized from the defendant's residence,'

that the defendant used his home as a communications hub for drug activity, or that the defendant 'moved back and forth from his residence in relation to drug transactions.'" *Id.* (citations omitted). Because the affidavit in *Roman* lacked any such particular facts, the First Circuit found that it failed to establish the requisite nexus, notwithstanding the affiant's "statement that traffickers commonly store relevant evidence at their homes." *Id.* at 54.

Of course, in several jurisdictions, this statement alone would suffice to establish probable cause to search a drug-trafficking suspect's home. Accordingly, there is a clear split among the federal courts, and this Court should grant certiorari to resolve it.

Moreover, this Court should grant certiorari because this split implicates the most fundamental Fourth Amendment interest—the sanctity of the home. This Court has consistently emphasized that "when it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961). The per se rule adopted by several circuits significantly undermines this fundamental right by impermissibly collapsing what should be two distinct inquiries—whether there is probable cause to arrest someone and whether there is probable cause to search their home—into one.

Finally, given the frequency with which federal drug cases are prosecuted, this is undoubtedly a commonly recurring issue. And it is one with which the Courts of

Appeals have already consistently "struggled." *Reed*, 993 F.3d at 444, 449. Accordingly, this Court should grant certiorari to provide much needed clarity to this important constitutional question.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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