

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TAC TRAN,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether – consistent with this Court’s opinion in *Minnesota v. Carter*, 525 U.S. 83 (1998), and opinions from the Second, Fourth, and Tenth Circuits, and contrary to the Ninth Circuit’s opinion in this case – a person has Fourth Amendment standing to challenge the constitutionality of a search of the home of his nephew and niece when he is (1) a frequent guest at the home, (2) present at the time of the search, and (3) the target of the search.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF AUTHORITIES.....	iii
PETITION FOR WRIT OF CERTIORARI.....	1
OPINION BELOW.	1
JURISDICTION.....	2
RELEVANT CONSTITUTIONAL PROVISION.....	2
STATEMENT OF THE CASE.	2
I. The Search Of Harson Chong’s Home.	2
II. District Court Proceedings.....	3
A. Initial Suppression Motion.....	3
B. Renewed Suppression Motion.....	4
C. Relevant Trial Evidence.....	7
III. Ninth Circuit Panel Opinion.	8
REASONS FOR ALLOWING THE WRIT.	8
CONCLUSION.	13
APPENDIX	
PROOF OF SERVICE	

TABLE OF AUTHORITIES

	<i>Page</i>
 FEDERAL CASES	
<i>Bonner v. Anderson</i> , 81 F.3d 472 (4 th Cir. 1996)	12
<i>Figueroa v. Mazza</i> , 825 F.3d 89 (2d Cir. 2016)	10, 12
<i>Marks v. United States</i> , 430 U.S. 188 (1977)	12
<i>Minnesota v. Carter</i> , 525 U.S. 83 (1998)	8, 9, 10, 11, 13
<i>Minnesota v. Olson</i> , 495 U.S. 91 (1990)	9, 10, 11
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1992)	9, 11
<i>United States v. Chong</i> , __ Fed. App'x __, 2017 WL 6349274 (9 th Cir. 2017)	1, 8, 9, 13
<i>United States v. Duenas</i> , 691 F.3d 1070 (9th Cir. 2012)	8
<i>United States v. Fields</i> , 113 F.3d 313 (2d Cir. 1997)	10, 12
<i>United States v. Grandberry</i> , 730 F.3d 968 (9 th Cir. 2013)	4, 5
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	8
<i>United States v. Oaxaca</i> , 233 F.3d 1154 (9 th Cir. 2000)	4
<i>United States v. Perea-Rey</i> , 680 F.3d 1179 (9th Cir. 2012)	8

<i>United States v. Thomas</i> , 211 F.3d 1186 (9 th Cir. 2000).....	7
<i>United States v. Thomas</i> , 372 F.3d 1173 (10 th Cir. 2004).....	12
<i>United States v. Zermeno</i> , 66 F.3d 1058 (9 th Cir. 1995).....	9
FEDERAL STATUTES	
28 U.S.C. §1254(1).	2
FEDERAL RULES	
S. Ct. R. 10.....	8
MISCELLANEOUS	
6 Wayne R. LaFave, <i>Search and Seizure</i> §11.3(b) (5 th ed. 2004).	8, 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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Tac Tran respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 13, 2017.

OPINION BELOW

On December 13, 2017, a Ninth Circuit panel filed an unpublished opinion affirming the district court's denial of Tac Tran's motion to suppress the fruits of an unlawful search of his nephew's and niece's home. Tran was a frequent guest at the home, was present at the time of the search, and was the target of the search. The panel nonetheless held that Tran did not have Fourth Amendment standing to challenge the search. *See United States v. Chong*, __ Fed. App'x __, 2017 WL 6349274, *1 (9th Cir. 2017) (attached in Appendix). Tran filed a petition for panel rehearing, which was denied on January 30, 2018. *See* 1/30/2018 Order (attached in Appendix).

JURISDICTION

This petition is timely filed under Supreme Court Rule 13, and this Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states, “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 person or things to be seized.”

STATEMENT OF THE CASE

I. The Search Of Harson Chong’s Home

On July 12, 2012, Los Angeles Sheriff’s deputies staked out the home of Tac Tran’s nephew, Harson Chong, expecting that Tran would soon arrive. Tran was on state parole and the deputies planned to do a “parole search.” Tran showed up at Chong’s home at 9:00 p.m., parked his motorcycle out front, and went inside. Shortly thereafter, the garage door opened and deputies saw Tran and two other men standing inside. Deputies approached the garage and detained the three men, then went inside and detained the residents of the home: Chong, his girlfriend, Tran’s niece, and Tran’s niece’s son. Deputies then began searching and, according to a police report, found “approximately eight grams of . . . methamphetamine” in the garage and \$3900 cash on a couch in the house, next to where Chong was sitting.

After a short time, the deputies stopped searching and applied for a search warrant. To establish probable cause the warrant application relied on the eight grams of methamphetamine found in the garage and the \$3900 cash found on the couch inside. Shortly after 11:00 p.m., a

warrant was issued and officers resumed their search, during which they found an array of drugs and two firearms. Tran was subsequently charged with several drug and gun offenses.

II. District Court Proceedings

A. Initial Suppression Motion

Tran filed a motion to suppress the fruits of the July 12 searches and argued that the parole search exception to the warrant requirement did not apply because the deputies did not have probable cause to believe that Tran lived at Chong's residence. The government responded that the deputies had probable cause to believe that Tran lived at the residence. In a one paragraph alternative argument, however, the government claimed that the initial seizure of the 8 grams of methamphetamine was lawful because "Detective Lee, while approaching the open garage [at Chong's home], observed [Tran] throw a bag onto a coffee table that he recognized as methamphetamine. Thus, under the plain view exception and inevitable discovery doctrine, [Tran's] motion lacks merit." The government supported its alternative argument with a declaration from DHS Agent Nunez, who was not present during the July 12 search and did not even become involved with the case until September 2012. In his declaration, Agent Nunez wrote, "I have been advised that when the LASD detectives approached the garage of [Chong's] house, Detective Lee saw [Tran] throw a baggie onto a table, which appeared to contain, and in fact contained, methamphetamine."

In a reply memorandum, Tran pointed out that the contemporaneous LASD report about the events states:

It should be noted that during the search of the location, Dep. Lee told me that *during the initial entry into the garage*, he saw [Tran] toss from his right hand the zip-lock baggie containing an off white crystalline substance resembling methamphetamine . . . onto the coffee table.

This suggests that Deputy Lee was already in the garage, and thus inside Chong's home, when he allegedly saw Tran toss the baggy. *See United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000). If so, Deputy Lee's observation was indisputably fruit of an illegal search/entry. The conclusion that Deputy Lee was in the garage when he allegedly saw Tran toss the baggy is also supported by the affidavit that was submitted to support issuance of the search warrant, in which Deputy Duong wrote:

Prior to conducting a parole compliance check [at 2514 Abonado Place], Your Affiant saw Tac Tran drive to the location on a motorcycle. Tac Tran entered the front door of the residence. Shortly afterwards, Your Affiant saw the garage door open and Tac Tran standing inside the garage.

Members of Operation Safe Streets – Asian Gang Team detained the occupants of the location. *While they were searching the location, they saw in plain view* on the coffee table inside the garage a baggy containing an off-white crystalline substance resembling methamphetamine measuring approximately eight grams.

At an August 19, 2013 motions hearing, the district court did not address the government's plain view/exigent circumstances argument. Instead, it held that the initial "parole search" at Chong's residence was lawful because deputies had "probable cause to believe that [Tran] was using [Chong's home] as his abode." Because the court held that the initial "parole search" was lawful, its fruits (*i.e.*, the 8 grams of methamphetamine and \$3900 cash) could not have tainted the search warrant.

B. Renewed Suppression Motion

Harson Chong was later named as a defendant, and he then filed a motion to suppress the fruits of the July 12 search. Like Tran, Chong argued that the "parole search" was unlawful because officers did not have probable to believe that Tran lived at Chong's home. Tran also filed a renewed motion to suppress that relied on the Ninth Circuit's then-recent opinion in *United States v. Grandberry*, 730 F.3d 968 (9th Cir. 2013). The facts and holding in *Grandberry* confirmed that the

“parole search” at Chong’s home was illegal because there was not probable cause to believe that Tran lived there. Furthermore, as Tran pointed out in his renewed motion, “[b]ut for the illegal parole search by which law enforcement entered [Chong’s property], they would not have had probable cause to obtain a search warrant,” thus the court should suppress “all of the drugs and guns found in the search of” Chong’s home.

The government opposed the motions and again argued that “officers had ample reason to believe that Tran lived at [Chong’s] residence.” Undoubtedly recognizing the impact of *Grandberry*, however, the government put more effort into its alternative justifications for the warrantless search, arguing:

(1) the officers’ initial warrantless entry into the garage was justified by exigent circumstances because they had just seen Tran throw a baggie of drugs in the garage and (2) the subsequent initial warrantless entry into the rest of the house, during which \$3,900 was observed in plain view, was to conduct a protective sweep, which was also justified by exigent circumstances. The officers then obtained a search warrant, pursuant to which the bulk of the evidence was seized.

With respect to the first point, the government asserted that deputies “were standing on the driveway of the residence when they observed, through the fully opened garage door, Tran throw a baggie of what appeared to be methamphetamine onto a table.” The government argued that “the driveway was not curtilage such that a warrant was required” because it “leads directly from the street to the garage, with no gate or other enclosures blocking it off.”

To support its claim that “officers were standing in the driveway when they” observed Tran throw the baggy, the government submitted a declaration from Deputy Lee that stated:

At around 9:00 p.m. that night, I and several other police officers walked across the yard of the house next door and approached the fully opened garage door of the Abonado residence. . . . As I stepped onto the driveway of the Abonado residence, I could see Tac Tran, the parolee, and two other Asian males inside the garage. When Tran saw us, he looked startled and scared. He immediately threw a baggie containing an off-white, crystalline substance onto a table in front of him, as if

reflexively trying to get it away from his person. . . . After Tran threw the baggie, I and the other officers entered the garage, detained Tran and the other two males, and seized the suspected methamphetamine.

Deputy Lee's affidavit is dated August 5, 2014 – more than two years after the events – and is contrary to the contemporaneous (1) LASD report and (2) search warrant affidavit discussed above, which indicated that deputies were already inside the garage when they first saw the baggy of methamphetamine. At any rate, there is no doubt that Deputy Lee was within the home's curtilage when he allegedly saw Tran throw the baggie.

At an August 25, 2014 motions hearing, the district court reversed its prior holding that the initial searches were lawful under the parole search exception to the warrant requirement. But the court found that it was nonetheless “reasonable for the officers to conclude that when they saw Mr. [Tran] toss the baggie, that it contained illegal substances, and . . . it was certainly appropriate for them to have secured the scene until a warrant could be obtained.” Tran's counsel responded that she had “a parole audio search” recording that “makes clear . . . that it was not until [deputies] were already on the property that they had an opportunity to view the drugs,” and she requested “an opportunity to cross-examine” Deputy Lee on that point. The court denied that request, responding that “from the photographs” of the property that had been attached to the parties' filings “it is clear to me that just getting out of your car, they would be able to clearly look inside that open garage door and see the activity that was taking place.”

It is doubtful that an officer standing on the street at 9:00 p.m. could have observed Tran throw a baggy inside the garage and reasonably conclude that the baggy contained methamphetamine. It is also irrelevant, because Deputy Lee said he was on the driveway, not the street, when he saw Tran throw the baggy. And, as defense counsel pointed out, the driveway was

within the home's curtilage. The government responded by claiming the driveway is "not curtilage because it wasn't blocked off." The district court agreed.

C. Relevant Trial Evidence

During trial, additional evidence was adduced that is relevant to the curtilage issue. *See United States v. Thomas*, 211 F.3d 1186, 1192 (9th Cir. 2000). As photographs introduced during the trial show, there is a wall that runs along the left side of Chong's property. Deputy Lee testified that he and the other deputies entered Chong's property by "hugging onto the residence" next door and then going over that wall. The deputies then quickly approached the garage by going between its left front wall/doorframe and a car parked in the driveway. Deputy Lee said that when "[w]e made entry into the house [*i.e.*, the garage] . . . I saw Tac Tran discard narcotics from his body with his right hand." This testimony was consistent with the conclusion that Deputy Lee was inside the garage when he first spotted the baggy of methamphetamine. In the best case scenario for the government, Deputy Lee was no more than a few feet outside the garage when he first saw the baggy. At that point, he and the other deputies had already climbed over a wall to get onto Chong's property, crossed over a paved parking area and walkway to the front door, and walked to within a few feet of the house.

Following Deputy Lee's testimony, Tran's counsel renewed the suppression motion and pointed out that it was apparent from Lee's testimony that he was inside the garage when he observed the baggy of methamphetamine. The government replied that Deputy Lee was outside the garage when he first spotted the baggy, and that at that point he was not inside the curtilage because "there's no barrier or anything from street to driveway." The court denied the renewed motion, stating that it did "not have enough now to suppress the search." Tran was subsequently convicted of several drug and gun offenses.

III. Ninth Circuit Panel Opinion

On appeal, Tran argued that the search was unlawful because prior to any alleged exigency arising the deputies unlawfully entered the curtilage of Chong's home, and everything seized was fruits of that initial unlawful entry. Tran also pointed out that the government's argument that the deputies were permitted to enter onto the curtilage without legal justification because it was visible from the street was contrary to this Court's holding in *United States v. Jones*, 565 U.S. 400 (2012). Indeed, Ninth Circuit case law issued since *Jones* holds as much. See *United States v. Duenas*, 691 F.3d 1070, 1080 (9th Cir. 2012); *United States v. Perea-Rey*, 680 F.3d 1179, 1185 (9th Cir. 2012). The Ninth Circuit did not disagree, it instead held that "Tran does not have standing to challenge an unlawful search of [Chong's] house." *Chong*, 2017 WL 6349274, *1 (attached in Appendix).

REASONS FOR ALLOWING THE WRIT

The Ninth Circuit's holding that Tran lacks standing to challenge the search of Chong's residence is contrary to *Minnesota v. Carter*, 525 U.S. 83 (1998). That is evident from the review of standing law found at 6 Wayne R. LaFave, *Search and Seizure* §11.3(b) (5th ed. 2004), the thrust of which is summarized below. The Ninth Circuit's opinion is also contrary to case law from at least three other circuits – the Second, Fourth, and Tenth. For these reasons, the Court should grant the writ. See S. Ct. R. 10(a) & (c).

Before turning to a discussion of those points, it is useful to emphasize key background facts. As discussed, the government initially sought to justify the search of Chong's residence by arguing that it was a permissible parole search of Tran. In making that argument, the government relied on the following facts as showing that deputies had probable cause to believe that Tran lived at Chong's residence: (1) Tran's vehicle was seen at Chong's residence several times; (2) Tran frequently met people there; (3) he was at the residence until "close to midnight" on June 8, 2012; (4) he arrived at

the residence “late [at] night” on July 12, 2012; and (5) he was permitted to let himself into the residence. The government asserted that these facts showed Tran “had full access to and dominion over the” residence. As an alternative, however, the government claimed that Tran’s connection to the property was insufficient to give him standing to challenge the search.

On August 19, 2013, the district court held that the “parole search” at Chong’s residence was lawful because deputies had “probable cause to believe that [Tran] was using [Chong’s home] as his abode.” A year later, the court changed its ruling, holding that the parole search justification failed but that the search could be justified by exigent circumstances. The district court never held that Tran lacked standing to challenge the search. There is an obvious reason for that – given Tran’s substantial connections with the residence and its occupants, it is obvious he had an expectation of privacy in the residence.

Nonetheless, in its opinion the Ninth Circuit panel stated, “Tran does not have standing to challenge an unlawful search of [Chong’s residence]. *See Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (denying Fourth Amendment protection to visitors who had gathered to package and distribute drugs); *United States v. Zermeno*, 66 F.3d 1058, 1061 (9th Cir. 1995) (holding that using another’s house as a ‘stash house’ for drugs does not establish a legitimate expectation of privacy).” *Chong*, 2017 WL 6349274, *1 (attached in Appendix). The pivotal case in this context is *Carter*, which was decided three years after *Zermeno* and clearly establishes that Tran has standing.

A person has Fourth Amendment standing if he has an “expectation of privacy in the invaded place” “that society is prepared to recognize as reasonable.” *Rakas v. Illinois*, 439 U.S. 128, 143 (1992) (quoting *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990)). In the context presented, the two key cases are *Carter* and *Olson*. In *Olson*, the Court held that overnight guests have Fourth Amendment standing because they legitimately expect privacy in their hosts’ homes, and hosts are

generally “willing to share [their] . . . privacy with [their] guest[s].” *Id.* at 98-99. It was not, strictly speaking, the overnight aspect of the equation that controlled the outcome, but rather what that circumstance showed about the relationship between the guest and the host. That is, “[t]he Fourth Amendment looks with favor on ‘overnight guests’ not because there is something talismanic about a person’s intent to stay in a dwelling on a particular night, but because a host’s willingness to take in a guest to sleep . . . indicates that the guest has been accepted into the private sphere of the household.” *Figueroa v. Mazza*, 825 F.3d 89, 110 (2d Cir. 2016); *see also United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997).

The holding in *Carter* is more complicated to dissect because a concurrence by Justice Kennedy defines the majority holding in a case that was otherwise split 4-4. That case originated when an informant told an officer that “he had walked by the window of a ground-floor apartment and had seen people putting a white powder into bags. The officer looked in the same window through a gap in the closed blind and observed the bagging operation for several minutes.” *Carter*, 525 U.S. at 85. When two men, Carter and Johns, left the apartment they were arrested, and a woman named Thompson was arrested at the apartment shortly thereafter. “The police later learned that while Thompson was the lessee of the apartment, Carter and Johns lived in Chicago and had come to the apartment [in Minnesota] for the sole purpose of packaging . . . cocaine. Carter and Johns had never been to the apartment before and were only in the apartment for approximately 2½ hours. In return for the use of the apartment, Carter and Johns had given Thompson one-eighth of an ounce of the cocaine.” *Id.* at 86.

In addressing whether Carter and Johns had Fourth Amendment standing, the five-justice majority opinion noted two poles for its analysis: (1) the holding in *Olson* that overnight guests have

Fourth Amendment standing; versus (2) the holding in *Rakas*, 439 U.S. at 128, that being on a premises lawfully does not alone confer standing. The Court then stated:

If we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely “legitimately on the premises” as typifying those who may not do so, the present case is obviously somewhere in between. But *the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder*, all lead us to conclude that respondents’ situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights.

Carter, 525 U.S. at 91 (emphasis added). The majority opinion also stated that the facts involved did not show “anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household.” *Id.* at 473.

Justice Kennedy joined the majority in *Carter* but also wrote a special concurring opinion. It began, “I join the Court’s opinion, for its reasoning is consistent with my view that *almost all social guests* have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host’s home.” 525 U.S. at 99 (Kennedy, J., concurring) (emphasis added). Justice Kennedy explained:

I would expect that most, if not all, social guests legitimately expect that, in accordance with social custom, the homeowner will exercise her discretion to include or exclude others for the guests’ benefit. As we recognized in *Minnesota v. Olson*, 495 U.S. 91 (1990), where these social expectations exist – as in the case of an overnight guest – they are sufficient to create a legitimate expectation of privacy, even in the absence of any property right to exclude others. In this respect, the dissent must be correct that reasonable expectations of the owner are shared, to some extent, by the guest. This analysis suggests that, as a general rule, social guests will have an expectation of privacy in their host’s home.¹

¹ The four justices who dissented on the standing issue concluded that “when a homeowner or lessee personally invites a guest into her home to share in a common endeavor . . . that guest should share his host’s shelter against unreasonable searches and seizures.” *Carter*, 525 U.S. at 106 (Ginsburg, J., dissenting); *see also id.* at 103 (Breyer, J., concurring in the judgment).

Id. at 101-02. Justice Kennedy concluded that those were not the facts in *Carter* because:

[R]espondents have established nothing more than a fleeting and insubstantial connection with Thompson’s home. For all that appears in the record, respondents used Thompson’s house simply as a convenient processing station, their purpose involving nothing more than the mechanical act of chopping and packing a substance for distribution. There is no suggestion that respondents engaged in confidential communications with Thompson about their transaction. Respondents had not been to Thompson’s apartment before, and they left it even before their arrest

Id. at 102. In short, Justice Kennedy joined the majority holding because the defendants “established no meaningful tie or connection to the owner, the owner’s home, or the owner’s expectation of privacy.” *Id.*

Accordingly, the principle that commanded a majority in *Carter* – and that has precedential effect, *see Marks v. United States*, 430 U.S. 188, 193 (1977) – is that almost all social guests have standing to challenge the search of a residence, but visitors who have a fleeting connection to the property and its owner(s) do not. *See also* 6 Wayne R. LaFare, *Search and Seizure* §11.3(b) (5th ed. 2004) (synthesizing the holding in *Carter* as discussed above). Tran falls decidedly into the former category.

To begin with, he was not just a social guest, his hosts were family members. *See Figueroa*, 825 F.3d at 110 (holding that familial relationship cuts in favor of standing). He was also a frequent guest at the home, *see Bonner v. Anderson*, 81 F.3d 472, 475 (4th Cir. 1996) (holding that a “frequent visitor” has standing), and his conduct showed, in the words of the government, that he “had full access to and dominion over the” residence. And there is no doubt that Tran’s hosts intended to share their privacy with him. These facts are more than enough to support Fourth Amendment standing. *See also United States v. Thomas*, 372 F.3d 1173, 1176 (10th Cir. 2004) (finding standing for “even social guests who do not stay the night”); *Fields*, 113 F.3d at 321 (“Because Fields . . . had

a sufficient interest in the apartment to establish a legitimate expectation of privacy, we believe Crawley, as his invited guest, had one as well”).

Notably, the Ninth Circuit panel opinion’s parenthetical cite to *Carter* states that the Court in that case “den[ied] Fourth Amendment protection to visitors who had gathered to package and distribute drugs.” *Chong*, 2017 WL 6349274, *1 (attached in Appendix). That is true, but that is hardly the thrust of the holding in *Carter*. Instead, the thrust of *Carter* is that most social guests have standing to raise a Fourth Amendment challenge to a search at their host’s home, whereas those with a fleeting connection to the home and its residents do not. Tran clearly falls into the former category, especially because of the family relationship and his “full access and dominion over the” residence. The opinions from the Second, Fourth, and Tenth Circuits cited above, as well as the thorough discussion in the LaFave treatise, support that conclusion, and conflict with the Ninth Circuit’s opinion in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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