No. 18-7187

IN THE SUPREME COURT OF THE UNITED STATES

WILLIS WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of a motion to suppress evidence obtained from a search of an apartment pursuant to a warrant, where the warrant affidavit accurately stated that police had previously tested a key in the lock of the apartment without a warrant and petitioner had not argued before the district court that testing the key constituted a trespassory search.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is not published in the Federal Reporter but is reprinted at 742 Fed. Appx. 646.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2018. A petition for rehearing was denied on September 26, 2018 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on December 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiracy to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846; possession with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(i) (2012); and unlawful possession of a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1-2. He was sentenced to 240 months of imprisonment on the conspiracy conviction and to 120 months each on the drug and firearm convictions, to be served concurrently. Judgment 3. The court of appeals affirmed. Pet. App. A1-A35.

1. In March 2011, a Federal Bureau of Investigation (FBI) task force was investigating heroin distribution by gang members in the East Hills Housing Project in Pittsburgh, Pennsylvania. Pet. App. A3. Through their investigation, agents determined that Richard Bush was one of the gang's drug makers, and that he obtained stamp bags and other drug-related material from Mayank Mishra, a local store owner. Ibid. Agents intercepted calls between Bush and Mishra, and learned that another man was advancing Bush money to make purchases from Mishra and that Bush had a drug lab in his basement, accessible from his garage. Ibid.

In January 2012, during surveillance of Bush's garage, agents identified petitioner. Pet. App. A3. They observed that he would

arrive at Bush's residence, enter through the garage, and often stay there for seven or more hours. Ibid. Petitioner would first text Bush that he was on his way over; due to the time lag between the text and petitioner's arrival at Bush's, agents believed that petitioner was stopping at a stash house to pick up raw heroin. Id. at A4. Based on that information and on intercepted calls, agents believed that petitioner was Bush's supplier. Ibid.

On March 14, 2012, agents executed simultaneous search warrants on Bush and petitioner, their homes and their cars. In petitioner's car, agents found 186 grams of 86% pure heroin. At petitioner's residence, agents found a loaded handgun, $28,000 in cash, rubber bands, and bill wraps for thousand dollar bills. Pet. App. A4. At Bush's residence, agents found Bush's lab, guns, drug paraphernalia, and heroin of various purities. Id. at A5.

Before arresting petitioner, agents had first followed his car by airplane to determine where he stopped on his way to Bush's residence. Pet. App. A4. They observed petitioner visiting a multi-unit complex at 500 Mills Avenue, spending 30 minutes there, and then continuing toward Bush's, where he was arrested. Ibid. At the direction of a federal prosecutor, the agents used keys seized from petitioner to enter the Mills Avenue complex. Ibid. Unsure of which unit petitioner had accessed, the agents tested the keys on various doors until they found a lock the keys opened. Id. at A4-A5. The agents did a protective sweep of the unit

pending the issuance of a search warrant. Id. at A5. After obtaining a search warrant based on an affidavit that accurately stated that one of petitioner's keys had unlocked the door to the apartment, officers conducted a search of the unit. Ibid.; see C.A. App. 132j. The search revealed drug paraphernalia and a locked safe containing 761.2 grams of heroin. Pet. App. A5.

Nearly a year later, agents searched Mishra's residence and seized more than $900,000 in cash, cases of stamp bags, and drug-making paraphernalia. Pet. App. A5.

2. A federal grand jury charged petitioner with conspiracy to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846; possession with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(i) (2012); and unlawful possession of a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1, 3, 7.

Petitioner filed a motion to suppress all the evidence found in the search of his apartment. Relying on Florida v. Jimeno, 500 U.S. 248 (1991), and California v. Acevedo, 500 U.S. 565 (1991), petitioner argued that the "touchstone of the Fourth Amendment is reasonableness" and that testing his key on the different locks was a warrantless search. C.A. App. 115 ¶¶ 14, 16 (citation omitted). He did not assert that the insertion of the key into his particular lock constituted a trespass. In response, the

government contended, among other things, that testing the key was not a search because he lacked a reasonable expectation of privacy in a lock. Id. at 125 & n.6 (collecting cases); e.g., United States v. Salgado, 250 F.3d 438, 456-457 (6th Cir.) (finding no reasonable expectation of privacy in a lock), cert. denied, 534 U.S. 916, and 534 U.S. 936 (2001).

During the suppression hearing, petitioner maintained that the key-insertion was a warrantless search under an expectation-of-privacy rationale. C.A. App. 165-166. He acknowledged, however, that several circuit courts had rejected that position and that none had adopted it. See id. at 166 (petitioner asking the district court "to be brave"). The parties and the district court in turn discussed the issue in terms of petitioner's privacy interest. Id. at 167-170. The court denied the suppression motion, determining that the search was not unreasonable because the "the level of privacy implicated was minimal." Id. at 171.

Petitioner moved to reconsider, again without arguing that the key insertion constituted a trespass. C.A. App. 176-178. The district court denied the motion. Id. at 322-325.

3. The court of appeals affirmed, rejecting petitioner's argument that the district court had erred in denying his motion to suppress. Pet. App. A27-A29; see id. at A1-A35.

First, the court of appeals rejected as barred by Federal Rule of Criminal Procedure 12 an argument that petitioner made for

the first time on appeal, namely, that the use of petitioner's key had violated the Fourth Amendment not on the theory that it infringed on a reasonable expectation of privacy, but on the theory that it was a physical trespass. The court explained that "to preserve a suppression argument, a party must make the same argument in the District Court that he makes on appeal." Pet. App. A27 (quoting United States v. Joseph, 730 F.3d 336, 341 (3d Cir. 2013)). The court of appeals observed that, in the district court, petitioner had raised a general Fourth Amendment claim and accepted as controlling a discussion as to his privacy interest in the lock, without ever raising a trespass theory. Id. at A27-A28; see id. at A28 ("At no point -- in [petitioner's] motion, at the hearing, or in his motion for reconsideration -- was a trespass theory raised."). The court of appeals also found that petitioner lacked good cause for "fail[ing] to present any authority to the District Court in support of his suppression argument and then fail[ing] to apprise the District Court of the trespass theory either at argument or upon his motion for reconsideration." Ibid.

The court of appeals also determined that petitioner's assertion of a Fourth Amendment violation under "reasonable expectation of privacy principles," which petitioner made in "a terse footnote," lacked merit. Pet. App. A28. The court found that a defendant lacks a reasonable expectation of privacy in the common areas of a multi-unit apartment building. Id. at A29. And

it observed that other courts of appeals had determined that inserting a key into a lock did not require a warrant on a reasonable-expectation-of-privacy theory. Ibid. (collecting cases). The court explained that petitioner "ma[de] no argument concerning why those cases were wrongly decided under a reasonable expectation of privacy theory, so cannot prevail on this claim." Ibid.

The court of appeals additionally determined that sufficient evidence supported petitioner's conspiracy conviction. Pet. App. A25-A27. In making that determination, the court found that it was "highly unlikely that the evidence from Mills Avenue swayed the jury in deciding the basic question of whether [petitioner] was even a participant in the conspiracy," and that "even excluding the Mills Avenue drugs, there was ample evidence before the jury to conclude that the conspiracy involved one kilogram or more of heroin." Id. at A26.

ARGUMENT

Petitioner contends (Pet. 10-18) that the evidence found in the Mills Avenue Apartment must be suppressed, on the theory that testing the key in the lock was a warrantless search that violated the Fourth Amendment. That contention lacks merit. The decision below is correct and does not conflict with any decision of this Court or another court of appeals, and no further review is warranted. Although some disagreement exists among the courts of

appeals as to whether a key test can violate the Fourth Amendment, no circuit has held that evidence should be suppressed where, as here, it was ultimately obtained during a search conducted pursuant to a warrant and the warrant affidavit correctly stated that the key test had occurred without a warrant. This case would also be a poor vehicle for reviewing the underlying Fourth Amendment question, as the motion to suppress would have been properly denied even if the key test violated the Fourth Amendment, and petitioner did not preserve a trespass-theory argument in the district court and it was accordingly not passed on by either court below. The court of appeals' ruling that petitioner failed to preserve a trespass argument on appeal also does not warrant review, as every court of appeals to address the question has concluded that a criminal defendant ordinarily cannot raise for the first time on appeal a new theory to support a motion to suppress.

Petitioner has also filed a supplemental brief contending that he is entitled to a shorter sentence under the First Step Act, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, in which Congress recently amended certain drug sentences. But those amendments only apply to cases "if a sentence for the offense has not been imposed as of" December 21, 2018, § 401(c), and petitioner's sentence was imposed years before that. The petition for review should be denied.

1. The court of appeals correctly affirmed the district court's denial of petitioner's motion to suppress the evidence obtained from his apartment.

a. At the outset, the court of appeals correctly rejected petitioner's argument that a warrant was required under Katz v. United States, 389 U.S. 347 (1967), and its progeny, before testing a key in the lock of petitioner's apartment door. That court had previously determined that a warrant is not required before testing a key in the lock of an apartment door on the ground that "a resident lacks an objectively reasonable expectation of privacy in the common areas of a multi-unit apartment building," including when the exterior door to the building is itself locked. United States v. Correa, 653 F.3d 187, 190-191 (2011), cert. denied, 566 U.S. 924 (2012). Petitioner made "no attempt to reckon with th[at] precedent." Pet. App. A29. In addition, other courts of appeals that "ha[d] addressed the issue under the reasonable expectation of privacy theory" had similarly determined "that inserting a key into a lock is either not a search at all, or else so minimal an invasion of privacy that a warrant is not needed." Ibid. (collecting cases). Petitioner made "no argument concerning why those cases were wrongly decided under a reasonable expectation of privacy theory." Ibid. Presented with no argument that existing precedent was incorrect or that this case was distinguishable in

any respect, the court of appeals correctly concluded that petitioner "cannot prevail on this claim." Ibid.

In any event, contrary to petitioner's argument (Pet. 10-13) in this Court, the court of appeals' conclusion does not conflict with Kyllo v. United States, 533 U.S. 27 (2001). In Kyllo, the Court applied Katz's privacy approach, id. at 34-35, and held that it constituted a "search" of a house to use "a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home" to reveal evidence of whether the defendant was growing marijuana inside the house, id. at 29. The Court emphasized that such a device was "not in general public use," id. at 40; that it employed "sense-enhancing technology" to allow police to "obtain[n] * * * information regarding the interior of the home," id. at 35; and that such information "would previously have been unknowable without physical intrusion," id. at 40. This case is fundamentally different from Kyllo, because testing the key on the lock merely showed from the outside that petitioner had access to the apartment; it did not reveal any information of any kind from inside the apartment. Moreover, unlike thermal imaging technology, nothing is novel or sense-enhancing about using keys to open locks, which are in "general public use" for that purpose. Id. at 35, 40.

b. The court of appeals also correctly declined to entertain a suppression argument that petitioner had never presented to the district court, namely, that a warrant was required on the theory that testing the key on his apartment door involved "obtain[ing] information by physically intruding" on persons, houses, papers, or effects. Florida v. Jardines, 569 U.S. 1, 5 (2013) (quoting United States v. Jones, 565 U.S. 400, 406 n.3 (2012)). Federal Rule of Criminal Procedure 12 governs the timing of pretrial motions, and specifically provides that a party "must" move to suppress before trial. Fed. R. Crim. P. 12(b)(3). A party is required not merely to object to the introduction of the evidence, but to specify the grounds for the objection. See Fed. R. Crim. P. 51(b); see also Fed. R. Evid. 103(a)(1)(B) (party objecting to evidence must state the "specific ground" for the objection). And if a defendant fails to make a timely pretrial motion under Rule 12(b)(3), the district court may consider "the defense, objection, or request" only upon a showing of good cause. Fed. R. Crim. P. 12(c)(3).

Under Rule 12(c)(3), therefore, suppression claims that are not made before trial "may not later be resurrected * * * in the absence of the showing of 'cause' which that Rule requires." Davis v. United States, 411 U.S. 233, 242 (1973) (interpreting a predecessor version of Rule 12). And Rule 12(c)(3) "applies not only to the failure to make a pretrial motion, but also to the

failure to include a particular argument in the motion." United States v. Burke, 633 F.3d 984, 987 (10th Cir.) (citation omitted), cert. denied, 563 U.S. 951 (2011); see, e.g., United States v. Oquendo-Rivas, 750 F.3d 12, 17 (1st Cir. 2014); United States v. Rose, 538 F.3d 175, 184-185 (3d Cir. 2008); United States v. Caldwell, 518 F.3d 426, 430-431 (6th Cir.), cert. denied, 554 U.S. 929 (2008); United States v. Green, 691 F.3d 960, 964-966 (8th Cir. 2012).

Here, petitioner never presented to the district court, at any time, the specific ground for objecting to the introduction of evidence that he raised for the first time on appeal. "At no point -- in [petitioner's] motion, at the hearing, or in his motion for reconsideration -- was a trespass theory raised." Pet. App. A28. Moreover, "[a]t the hearing, defense counsel accepted as controlling the discussion of [petitioner's] reasonable expectation of privacy in the lock." Ibid. Petitioner also failed to identify good cause justifying his failure to raise a trespass theory in the district court. Among other things, the cases he cited – Jones, supra, and Jardines, supra -- were decided before the suppression hearing in this case in 2014. C.A. App. 141. The court of appeals in turn correctly declined to consider the newly minted argument as a potential ground for reversing the district court's denial of the motion to suppress. See Pet. App. A27.

c. In any event, that new trespass theory lacks merit. Testing a key on a door is fundamentally different from the sort of "physical[] intru[sions]" found to violate the Fourth Amendment in Jardines and Jones. Jardines, 569 U.S. at 5 (quoting Jones, 565 U.S. at 406 n.3). In Jardines, officers gathered information from inside the home by "physically entering and occupying [an] area" of private property belonging to the defendant -- the curtilage of his home -- and then using a drug-sniffing dog to determine that drugs were inside the house. 569 U.S. at 6. In Jones, officers physically attached a GPS tracking device to the underside of the defendant's wife's car and used it to monitor the car's movements for four weeks. 565 U.S. at 402-403; see id. at 413 (Sotomayor, J., concurring) (stating that "[t]he Government usurped Jones' property for the purpose of conducting surveillance on him"); see also id. at 430 (Alito, J., concurring in judgment) (finding the use of the GPS tracker for four weeks to be a search).

Here, by contrast, the officers performed the key test while standing on property that petitioner did not own and that was not his private property: the common area of the apartment complex, where any other tenant, guest, or the like could stand. Moreover, the officers merely inserted a key momentarily into the lock to see whether it would open the door. The duration and character of the conduct is thus different in kind: The test did not reveal any information about the inside of the apartment or whether the

apartment was being used in connection with illegal activity, and did it involve surveillance of petitioner or the apartment at all, much less continued surveillance via use of a physically intrusive tracking device for an extended period of time.

The key testing here is thus far removed from the drug-sniffing dog in Jardines, or the installation and use of the GPS device in Jones. Rather, it is more akin to an officer who follows a suspect on a rainy day and watches him enter the lobby of an apartment building but does not know which apartment he entered, so he touches the door handles to see which one is wet; or an officer who knows a suspect just drove into a parking lot but does not know which car he was driving, so he touches the hoods of several cars to see which one is warm.[1] This Court has never held that a warrant is required before an officer can obtain information, like members of the public could do in the same circumstances, through such a trivial and momentary touching of property that is exposed to the public.

d. In any event, even if testing the key violated the Fourth Amendment, the good-faith exception to the exclusionary rule would apply to the evidence obtained from the apartment, which was obtained via a search warrant. See United States v. Leon, 468

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[1] Petitioner's reliance (Pet. 16-17) on Collins v. Virginia, 138 S. Ct. 1663 (2018), is similarly misplaced. In Collins, the Court held that police officers violated the Fourth Amendment by walking onto the curtilage of his residence without a warrant to search a vehicle parked there. Id. at 1668.

U.S. 897 (1984). "The fact that a Fourth Amendment violation occurred * * * does not necessarily mean that the exclusionary rule applies." Herring v. United States, 555 U.S. 135, 140 (2009). To the contrary, this Court has "repeatedly held" that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations," and the Court has therefore "limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.'" Davis v. United States, 564 U.S. 229, 236-237 (2011) (citation omitted). Where "suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'" Id. at 237 (citation omitted); see Herring, 555 U.S. at 141.

Those principles are reflected in Leon, which held that evidence should not be suppressed if it was obtained "in objectively reasonable reliance" on a search warrant, even if that warrant is subsequently held invalid. 468 U.S. at 922. Under Leon, suppression of evidence seized pursuant to a warrant is not justified unless (1) the issuing magistrate was misled by affidavit information that the affiant either "knew was false" or offered with "reckless disregard of the truth"; (2) "the issuing magistrate wholly abandoned his judicial role"; (3) the supporting affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; or (4) the warrant was "so facially deficient -- i.e., in failing to particularize

the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid." Id. at 923 (citation omitted). "[E]vidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 919 (citation omitted).

None of those circumstances is present here. The officers truthfully explained in the warrant application that they had tested the key on the apartment door, and circuit precedent at the time of the key test established that a resident lacked a reasonable expectation of privacy in the common areas of an apartment building, including when the outer door is locked. See Correa, 653 F.3d at 190-191. Once the officers obtained a judicially authorized warrant, they thus had no reason to "know[] that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n.23.

Indeed, the First Circuit in United States v. Bain, 874 F.3d 1 (2017), cert. denied, 138 S. Ct. 1593 (2018), denied a motion to suppress even after concluding (incorrectly) that officers had violated the Fourth Amendment by testing a key. Id. at 22-23. Although the court concluded that its precedent was sufficiently distinguishable that it alone would not trigger the good-faith exception to the exclusionary rule, id. at 19-21, the court

explained that, "[o]nce the magistrate issued a warrant, the relevant question was no longer whether clear precedent blessed the search upon which the warrant was based in part." Id. at 22. Rather, "the question became whether precedent pointed enough in that direction to allow an objectively reasonable officer informed about the law to conclude * * * that he could turn a key in the lock * * * on the basis of a reasonable suspicion short of probable cause." Id. at 22-23. Here, existing precedent suggested that the officers' conduct was lawful. See Pet. App. A29. And, as in Bain, "[w]arrants * * * make a difference." 874 F.3d at 22.[2]

2. As the court of appeals observed (Pet. App. A29), most courts of appeals to consider the question have ruled that a warrant is not required before testing a key in a lock. E.g., United States v. Thompson, 842 F.3d 1002, 1008 (7th Cir. 2016); United States v. Moses, 540 F.3d 263, 272 (4th Cir. 2008), cert.

[2] The First Circuit noted that some courts had categorically refused to apply the good-faith exception when a warrant application included information obtained from an earlier Fourth Amendment violation, without regard to whether the officers' conduct was objectively reasonable. See Bain, 874 F.3d at 22. Those cases were decided before this Court's decision in Herring, however, which upheld the admission of evidence obtained as a result of a negligent constitutional violation by law enforcement officers. 555 U.S. at 147-148; see Davis, 564 U.S. at 238 (noting that suppression is inappropriate where "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful"). Those courts accordingly may revisit that conclusion if given an opportunity to do so with the benefit of this Court's recent decisions.

denied, 556 U.S. 1139 (2009); United States v. Salgado, 250 F.3d 438, 456-457 (6th Cir.), cert. denied, 534 U.S. 916, and 534 U.S. 936 (2001); United States v. $109,179 in U.S. Currency, 228 F.3d 1080, 1087-1088 (9th Cir. 2000). As noted above, see pp. 16-17, supra, however, the First Circuit has recently concluded that officers violated the Fourth Amendment by testing a key without a warrant. See Bain, 874 F.3d at 21. No circuit, however, has required the suppression of evidence in a case like this one, where the evidence introduced at trial was obtained via a search warrant and the warrant affidavit disclosed the fact of the prior key test. Rather, when confronted with an analogous circumstance in Bain, the First Circuit concluded that the good-faith exception applied and thus declined to suppress the evidence. See id. at 22-23.

This case would therefore be an unsuitable vehicle for addressing any disagreement among the circuits whether a key test requires a warrant, because the officers' reliance on a later-obtained warrant would render suppression inappropriate even in the First Circuit. This case is also an unsuitable vehicle for the further reason that petitioner failed to preserve his "trespass" theory in the district court. As a result, any review of the Fourth Amendment question would be limited to a Katz-based theory, unless (1) this Court also granted certiorari on and reversed the court of appeals' holding that petitioner failed to preserve a trespass theory; and (2) this Court went on to consider

the trespass theory in the first instance, notwithstanding that neither the district court nor the court of appeals addressed it. But as set forth more fully below, see pp. 19-22, infra, the court of appeals' preservation claim does not independently warrant certiorari, and this Court is a "court of review, not of first view." United States v. Stitt, 139 S. Ct. 399, 407 (2018) (citation omitted).

3. Petitioner also argues (Pet. 19-23) that a circuit conflict exists over the circumstances in which a party can raise new claims, theories, or arguments on appeal of a suppression motion. Although the courts of appeals use somewhat different language in describing preservation requirements in suppression cases, every court to have addressed the question appears to agree that a criminal defendant cannot raise on appeal for the first time a new basis for why evidence should have been suppressed.

Consistent with the decision of the court of appeals here, several courts of appeals have explained that a party must make the same contention on appeal that he made in the district court to support a motion to suppress. E.g., United States v. White, 584 F.3d 935, 948-949 (10th Cir. 2009), cert. denied, 559 U.S. 985 (2010); United States v. Schwartz, 535 F.2d 160, 163 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977). The Seventh Circuit's decision in United States v. Rahman, 805 F.3d 822 (2015), is likewise consistent with the court of appeals' decision here. In

Rahman, the defendant raised a Fourth Amendment trespass argument on appeal even though he had not raised it in the district court. The Seventh Circuit stated that it might have concluded that that argument was forfeited under normal circumstances, but that it would reach the merits because the government had waived its forfeiture argument by not raising it in the court of appeals. Id. at 831. Here, by contrast, the government pressed the waiver issue in the court of appeals. See Gov't C.A. Br. 17-21.

The Ninth Circuit has permitted the government to raise on appeal a new or more specific argument for why a motion to suppress should not be granted. See United States v. Williams, 846 F.3d 303, 311 (government could argue on appeal that police had probable cause to arrest suspect because he violated a state statute when he ran, when it had argued more generally in the district court that it had probable cause to arrest him because he ran, without referring to the statute), cert. denied, 137 S. Ct. 2145 (2017); United States v. Guzman-Padilla, 573 F.3d 865, 873 n.1 (9th Cir. 2009) (government could argue on appeal that officers did not need probable cause to search because of the border exception to the Fourth Amendment, when it had argued in the district court that the officers did not need probable cause in general), cert. denied, 559 U.S. 956, and 562 U.S. 949 (2010). In those cases, however, the government was not the movant and accordingly was not subject to Federal Rule of Criminal Procedure 12(b)(3)'s requirement that

a party move to suppress before trial. Here, by contrast, petitioner failed to comply with Rule 12(b)(3) by failing to ask the district court to suppress the evidence on the basis that the search was trespassory. And petitioner identifies no court of appeals that has held that a criminal defendant can evade that requirement and raise a new basis for suppressing evidence for the first time on appeal, without a showing of good cause, which Rule 12(c)(3) requires before consideration of a belated suppression request.

4. This case is also a poor vehicle for reviewing either the key-test or waiver question because any error in admitting the evidence from the apartment would have been harmless. See Chapman v. California, 386 U.S. 18, 20-24 (1967). The court of appeals repeatedly stated that petitioner's heroin conspiracy conviction did not depend on the evidence seized from the apartment. Pet. App. A25-A27. Indeed, it observed that it was "highly unlikely that the evidence from Mills Avenue swayed the jury in deciding the basic question of whether [petitioner] was even a participant in the conspiracy," and that "even excluding the Mills Avenue drugs, there was ample evidence before the jury to conclude that the conspiracy involved one kilogram or more of heroin." Id. at A26. Petitioner's Section 922(g)(1) conviction also did not depend in any way on the key test, because the firearm was seized from

his residence, not the Mills Avenue apartment. Further review of either question is accordingly unwarranted.

5. Finally, petitioner has filed a supplemental brief contending (Supp. Pet. 1-13) that he is no longer subject to a 20-year mandatory minimum sentence because of the First Step Act, which was enacted on December 21, 2018, after the petition for a writ of certiorari was filed. That contention lacks merit.[3]

The First Step Act amended 21 U.S.C. 841(b)(1)(A) to reduce the statutory minimum sentence for certain drug offenses by recidivists from 20 years to 15 years. See First Step Act § 401(a)(2). But in Section 401(c), titled "Applicability to Pending Cases," Congress provided that "the amendments made by th[at] section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." § 401(c) (emphasis added). Here, petitioner's sentence was imposed in 2016, long before the First Step Act was enacted, and petitioner has been serving that sentence since that time. See 18 U.S.C. 3553(a) (sentencing court "shall impose a sentence" after considering various factors); 18 U.S.C. 3584(a) (multiple terms of

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[3] This Court ordinarily requires a motion for leave to amend a petition when the petitioner seeks to add a new question presented to a case. See Stephen M. Shapiro et al., Supreme Court Practice § 6.27, at 472-473(10th ed. 2013). The supplemental brief here is appropriately treated as a motion for leave to amend, and that motion may be granted. For the reasons set forth above, the petition for a writ of certiorari should be denied.

imprisonment may be "imposed on a defendant" concurrently or consecutively, and the choice of how to "impose" them involves consideration of the Section 3553(a) factors); Fed. R. Crim. P. 32(b)(1) ("The court must impose sentence without unnecessary delay"). The First Step Act is thus inapplicable to petitioner.

Petitioner's contention (Supp. Pet. 4) that the First Step Act applies to all criminal cases pending on "direct appellate review" is incompatible with the language of the statute. Congress instructed that the relevant provisions of the First Step Act apply only to pending cases where "a sentence * * * has not been imposed." First Step Act § 401(c). Petitioner's position is also inconsistent with the "ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." Dorsey v. United States, 567 U.S. 260, 280 (2012). That practice is codified in the saving statute, 1 U.S.C. 109, which provides that the repeal of any statute will not have the effect "to release or extinguish any penalty, forfeiture, or liability incurred under such statute" unless the repealing act so provides.

The cases petitioner relies upon (Supp. Pet. 9) do not support his atextual reading of Section 401(c). In The General Pickney, 9 U.S. (5 Cranch) 281 (1809), this Court held that "in admiralty cases an appeal suspends the sentence altogether," because the "cause in the appellate court is to be heard de novo, as if no

sentence has been passed." Id. at 283. But this is not an admiralty case. And in United States v. Clark, 110 F.3d 15 (1997), the Sixth Circuit held that 18 U.S.C. 3553(f)'s safety valve applied to a case where the defendant had appealed his sentence and Congress had provided that Section 3553(f) applied "to all sentences imposed on or after" the date of enactment. Pub. L. No. 103-322, § 80001(a), 108 Stat. 1985-1986; see Clark, 110 F.3d at 17-18. Whatever Clark's merit, the language of the statute here is different: The change at issue in Clark applied to "all sentences imposed" after enactment, ibid. (emphasis added), whereas the provision here applies only to pending cases where "a sentence * * * has not been imposed," First Step Act § 401(c) (emphasis added) -- thus expressly excluding cases such as this one, where the defendant has already been sentenced.

The First Step Act is thus unambiguously inapplicable, and no sound basis exists for granting, vacating, and remanding to the court of appeals. Normally, this Court does not consider questions not pressed or passed on below. E.g., United States v. Williams, 504 U.S. 36, 41 (1992). And this Court will not grant, vacate, and remand in light of an intervening development absent "a reasonable probability" that the court of appeals will reach a different conclusion on remand and "it appears that such a redetermination may determine the ultimate outcome of the litigation." Greene v. Fisher, 565 U.S. 34, 41 (quoting Lawrence

v. Chater, 516 U.S. 163, 167 (1996) (per curiam)). No such probability exists here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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