No. 18-7187

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

WILLIS WHEELER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

LISA B. FREELAND
Federal Public Defender for the Western District of Pennsylvania

RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender
Counsel of Record

1500 Liberty Center
1001 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 644-6565
renee_pietropaolo@fd.org

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I. The warrantless insertion of keys into a locked apartment door to detect information that is unavailable to the naked eye is an unreasonable search according to long-standing Fourth Amendment principals articulated in *Kyllo* and *Katz*. Notwithstanding this Court's settled authority, the Courts of Appeals are divided on this question, and this Court should accept certiorari to resolve this conflict.

This case presents the question whether the Fourth Amendment allows officers acting without a warrant to insert keys seized from within a suspect's car into a locked apartment door within a secured multi-unit dwelling in order to gain information to build its case against that suspect. Mr. Wheeler maintains that by inserting keys in the locked apartment door to gain information, police conducted an impermissible warrantless search under ***both*** a reasonable-expectation-of-privacy theory and a trespass theory. *See United States v. Bain*, 874 F.3d 1 (1st Cir. 2017) (turning key in locked door to gather information was unreasonable warrantless search under ***both*** *Jones/Jardines'* trespassory test and *Katz'* reasonable-expectation-of-privacy test).

The Solicitor General's brief in opposition is predicated entirely on a misapprehension of law as to the issue that would be before this Court if certiorari were granted. The government argues, irrelevantly, that residents lack an objectively reasonable expectation of privacy in the ***common areas*** of a multi-unit dwelling. Thus, officers did not need a warrant to enter and search. Brief in Opposition (BIO) 9. This argument is quite simply misplaced.

The front door to a home—whether that home is an apartment within a secured multi-unit dwelling or in a suburban neighborhood—***is*** the home, or at minimum, the curtilage for purposes of the Fourth Amendment.

The First Circuit had "no difficulty" in determining that the inside of the front door lock of a home is "at least within the home's curtilage" if not within the home itself. *Bain*, 874 F.3d at 14-15. Applying the factors identified in *United States v. Dunn*, 480 U.S. 294 (1987), in making that determination, the *Bain* court explained, "[v]ery few, if any, things are more proximate to the interior of a home than is a lock on the door to the home. Certainly, too, the interior of the lock, from which the crucial information was gathered, is within or adjacent to the enclosure of the door's outer face. The uses of the lock also strongly weigh in favor of finding its penetration to be a search. The lock, after all, is used precisely to bar unwelcome entry and invasion of privacy. Finally, the very design of a lock hides its interior from examination." *Bain*, 874 F.3d at 14-15.

The Third Circuit's own precedent is consistent. *See United States v. Charles*, 290 F.Supp.2d. 610 (D.V.I. 1999), *aff'd* 29 F.App'x 892 (2002) (front doorknob of home is "clearly" within curtilage and protected by the Fourth Amendment such that officers' warrantless "swipe" of doorknob to test for marijuana residue was an unconstitutional search).

Seemingly recognizing the force of that precedent, the government below ***never*** contested that the locked doors were either part of the home or curtilage. *See*

Reply Br.28 n.14. *See also* Appellant's Letter under Fed.R.A.P. 28(j), dated April 6, 2018.

Kyllo controls.

Kyllo reaffirmed that the Fourth Amendment draws a "firm line at the entrance to the house." *Kyllo v. United States,* 533 U.S. 27, 40 (2001). "[A]ny physical invasion of the structure of the home, 'by even a fraction of an inch'" is "too much." *Id.*, 533 U.S. at 37. While it may be difficult to determine whether an individual has an expectation of privacy society is prepared to recognize as reasonable when the search is of telephone booths or automobiles, ***when the search is of a home there is a "minimal expectation of privacy that exists, and that is acknowledged to be reasonable."*** *Id.*, 533 U.S. at 34 (emphasis added).

In opposing the petition, the Solicitor General preliminarily regurgitates the Court of Appeals' indefensible claims that Mr. Wheeler (1) failed to distinguish precedent holding that "a resident lacks an objectively reasonable-expectation-of-privacy in the common areas of a multi-unit apartment building with a locked exterior door" and (2) failed to explain why those circuits reaching a contrary conclusion were wrongly decided. BIO 9. The record is clearly to the contrary

As he does here, Mr. Wheeler argued below that precedent involving searches of common areas was inapposite as the challenged search—the insertion of keys and entry into a residential building's secured front door and the locked door to

Apartment 4—was ***not*** of a multi-unit dwelling's common-areas but of the ***home and/or curtilage.*** *See* Opening Br. 67-69, 73-77; Reply Br. 29-30.

Further, Mr. Wheeler explained that the out-of-circuit authority cited by the government upholding the warrantless insertion of keys into a locked *house* door—*see* Appendix 125 (citing *United States v. Salgado*, 250 F.3d 438 (6th Cir. 2001) (equating privacy interest implicated by insertion of key into locked apartment door (without considering whether door lock is part of home or curtilage) with insertion of key into *car* door) and *United States v. Concepcion*, 942 F.2d 1170 (7th Cir. 1991) (in upholding search, the court focused on the inevitability of the police's discovery of information gleaned from within lock))[1]—was decided ***before*** *Kyllo* and does not survive *Kyllo* or is inapposite. *See* Opening Br. 71; Reply Br. 25. *See United States v. Wheeler*, No. 16-3780, Recording of oral argument, April 12, 2018 (hereinafter "OA"), at 4:35-5:23, 4:10-12, *available at* http://www2.ca3.uscourts.gov/oralargument/audio/16-3780USAv.Wheeler.mp3; *See also* Appellant's Informational Letter, April 16, 2018.[2]

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[1] As the Third Circuit did here, newer authority simply cites those older cases without reasoning or analysis and without discussing *Kyllo*. *See United States v. Thompson*, 842 F.3d 1002 (7th Cir. 2016); *United States v. Moses*, 540 F.3d 263 (4th Cir. 2008).

[2] Other authority offered by the government involved the use of keys in storage lockers or cars, not homes, and is therefore inapposite. *See United States v. Lyons*, 898 F.2d 210 (1st Cir. 1990); *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080 (9th Cir. 2000); *United States v. DeBardeleben*, 740 F.2d 440 (6th Cir. 1984). *See* Opening Br. 70-71 & Reply Br. 34 (distinguishing cases). Notably, the First Circuit itself distinguished its *Lyons* decision, which concerned use of keys on a storage locker, as not controlling the question of whether the insertion of keys into a ***home's lock*** is a search. *Bain*, 874 F.3d at 16.

Kyllo expressly rejected the position taken in those cases that the existence of a privacy interest depends on the *type* of information gathered such that the information gleaned from the instant search, that the key turns the lock, is too insignificant to warrant protection. *See also Bain*, 874 F.3d at 18-19 (rejecting argument that the type of information gathered was so minor as to render the search reasonable; "The key point is that officers intruded without…warrant into the curtilage of Bain's 'home' solely to gather information to be used in building a criminal case against him.'"). "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. ***In the home, all details are intimate details***…." *Kyllo*, 533 U.S. at 37 (emphasis added).

Mr. Wheeler also explained that *Salgado's* view that the apartment door lock is visible and accessible to passersbys and thus undeserving of protection, 250 F.3d at 457, also does not survive *Jardines'* holding that the Fourth Amendment protects the curtilage of a home notwithstanding its accessibility to the public. *See also* Appellant's Letter under Fed.R.A.P. 28(j), June 8, 2018 (citing *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018)).

In *Collins*, this Court reaffirmed that the curtilage is "part of the home itself for Fourth Amendment purposes" and entitled to the same protections. *Id.*, 138 S. Ct. at 1670. Thus, an officer who intrudes on curtilage to gather evidence—there, by standing in the curtilage (driveway), lifting a tarp from a motorcycle, and

identifying and running its plate number—commits a search that is presumptively unreasonable absent a warrant. *Id.*, 138 S. Ct. at 1670-71.

This Court in *Collins* rejected the state's view, espoused by the government here, *see* BIO 13, of the "constitutional significance of visibility." *Collins*, 138 S. Ct. at 1675. "***The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible….So long as it is curtilage…[it] is…protect[ed] from trespass and a warrantless search…"*** *Id.* (emphasis added).

In the same way, the officers here entered the home or curtilage by standing in the apartment's threshold and inserting keys into the locked apartment door, without a warrant, for the purpose of obtaining information (learning that keys in Mr. Wheeler's possession accessed this apartment, where heroin was stored). The warrantless search violated Mr. Wheeler's reasonable-expectation-of-privacy.

Without acknowledging either case, the Third Circuit issues a holding that directly conflicts with this Court's opinion in *Kyllo* and the First Circuit's opinion in *Bain* on a matter of federal constitutional law.

The Solicitor General next contends that the Third Circuit's holding does not conflict with *Kyllo* because, in its view, *Kyllo's* protections are limited to only those devices that are "novel" or not in "general public use." BIO 10. *But see Kyllo*, 533 U.S. at 36 (characterizing the technology involved as "relatively crude").[3]

[3] The government also attempts to distinguish *Kyllo* by contending that the information gleaned was outside the apartment. BIO 10. *Cf. Kyllo*, 533 U.S. at 36 (rejecting dissent's reliance on distinction between "off-the-wall" and "through-the-

In his *Jardines* dissent, Justice Alito similarly argued that *Kyllo* was concerned about new technology not in general use, not dogs, which have been domesticated for thousands of years and used in law enforcement for centuries. *Jardines*, 569 U.S. at 16-17 (Alito, dissenting). The *Jardines* concurrence rejected that view: "[T]he dissent's argument that the device is just a dog cannot change the equation. As *Kyllo* made clear, the '***sense-enhancing' tool at issue may be 'crude' or 'sophisticated,' may be old or new***…may be either smaller or bigger than a breadbox…." *Jardines*, 569 U.S. at 15 (Kagan, concurring) (emphasis added).

Here, the sense-enhancing tool was a key: officers were not able to determine with the naked eye that the key worked in the door. (Indeed, agents initially took the keys to Mr. Wheeler's home, where they did not work, before transporting them to the Mills Avenue location). They inserted keys into a locked apartment door (within the home or curtilage) to "explore details of the home" that were "unknowable" without that intrusion—that keys seized from Mr. Wheeler's car accessed the apartment. *See Kyllo*, 533 U.S. at 40.

The government also contends that the Third Circuit's opinion is not in conflict with the First Circuit's *Bain* opinion because, in *Bain*, the First Circuit relied on the good faith exception to affirm. Whether there is a conflict among the circuits is determined by looking at *holdings*. *See, e.g., Corn Products Refining Co.*

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wall" observations). This claim, too, is predicated on the government's mistaken view of the apartment door and lock as the common area, rather than the home or curtilage.

v. C.I.R., 350 U.S. 46, 47 (1955) (granting certiorari because of conflict among circuit court holdings); *Blau v. United States,* 340 U.S. 159, 160 (1950) (same).

The First Circuit holds that turning a key in a locked apartment door to gather information is an unreasonable warrantless search under both a reasonable-expectation-of-privacy test (*see Katz v. United States*, 389 U.S. 347 (1967) and a trespassory test. *United States v. Bain*, 874 F.3d 1 (1st Cir. 2017). *See also United States v. Thomas*, 757 F.2d 1359, 1366-67 (2d Cir. 1985) (while canine sniff in a public airport is not a search, a warrantless canine sniff outside the door to an apartment intrudes on legitimate expectation of privacy). The Third Circuit, by contrast, holds that the officers' insertion of keys into an apartment door's lock does not violate the resident's reasonable expectation of privacy (and deems the trespass argument waived). Appendix A at 29.[4]

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[4] Mr. Wheeler also maintains that the Third Circuit improperly deemed waived argument that the officers' warrantless physical intrusion (the insertion of keys) into a constitutionally protected area (a house) to gather information (that keys seized from the suspect accessed the apartment) was a search under a common-law trespassory test. *See Florida v. Jardines* 569 U.S. 1, 11 (2013); *United States v. Jones*, 565 U.S. 400, 404-05 (2012). *See* Petition 19-23.

In response, the government contends that a physical intrusion into a constitutionally protected area does not occur (1) if police are standing in a common area when they reach into the protected area or (2) if the intrusion is not lengthy. BIO 13-14. Mr. Wheeler has already responded to the first point. *See* Petition 16-17 (discussing *Collins v. Virginia*); *see also* Reply to Brief in Opposition, *supra*, 5-6. Responding to the new point, Mr. Wheeler notes that the government overlooks that this view—that officers are not committing a trespass when their intrusion is fleeting—was expressed by the dissent in *Jardines* and rejected. There, Justice Alito, in criticizing the majority's finding that officers' use of a drug sniffing dog on the curtilage was a trespass, stressed that the dog did not linger but completed the sniff in less than a minute or two. *Jardines*, 569 U.S. at 17-18.

This case presents an ideal vehicle for resolving the conflict.

The Solicitor General contends that assuming police conducted an "unreasonable, warrantless search," when they turned a key in the lock of a door in a multi-unit-dwelling to gather information, they acted both in good-faith reliance on circuit precedent and on the warrant.[5] Thus, the government suggests, this case does not present a good vehicle for addressing the questions presented. BIO 14-15.

Officers were not acting in good-faith reliance on clear precedent or a warrant.

First, the government's reliance on *Correa* is misplaced. *Correa* held that a resident of a secured multi-unit apartment building lacks an objectively reasonable expectation of privacy in the building's common areas (the stairwell). *United States v. Correa*, 653 F.3d 187, 188 (3d Cir. 2011). It does not speak to an officer's warrantless physical intrusion into the home or curtilage to gather information.

Bain is instructive. The First Circuit in *United States v. Lyons*, 898 F.2d 210 (1st Cir. 1990), had upheld the warrantless use of keys on storage container locks, not a house lock. The *Bain* Court *rejected* the district court's finding that officers acted in good-faith reliance on the *Lyons* decision as "clear and settled" precedent. Given that *Jones* and *Jardines* were decided before the challenged search, "it could

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[5] Importantly, the government below waived this argument by failing to assert good-faith reliance on the warrant or precedent in the district court, where it bore the burden, or in its responsive appellate brief. *See United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013) (government waived good-faith argument by belatedly raising it on appeal; declining to affirm on ground for which government bore the burden below and failed to carry it).

not have been 'clear and well-settled'" that prior—inapposite—caselaw would apply to testing keys on house locks. *Id.,* 874 F.3d at 15-16, 20.

Nor were officers relying in good faith on the warrant.

Good-faith reliance on a warrant is improper where the warranted search was preceded by an unlawful warrantless search and information derived from the illegal predicate search was essential to establish probable cause to secure the warrant; the warrant itself is fruit of the illegality. *See United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (*Leon* exception inapplicable where essential facts showing probable cause to obtain warrant derived from prior illegal warrantless search); *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008) (*Leon* inapplicable; exclusionary rule operates to penalize officers for Fourth Amendment violation preceding magistrate's involvement—the original illegal warrantless search); *United States v. McGough*, 412 F.3d 1232 (11th Cir. 2005) (rejecting good-faith exception where information derived from illegal predicate home search was used to obtain warrant); *United States v. Cos*, 498 F.3d 1115 (10th Cir. 2007) (good-faith inapplicable where police unlawfully entered home and used information found therein to obtain warrant).[6]

"The constitutional error was made by the officer[s,] not by the magistrate as in *Leon,*" those whose conduct the exclusionary rule is aimed at deterring. *Vasey*, 834 F.2d at 789. The inclusion of the unlawfully seized evidence in the warrant application "does not sanitize the taint of the illegal warrantless search." *Id; O'Neal*,

[6] *Bain*, 874 F.3d at 22 (noting Bain did not advance this argument).

17 F.3d 239 (8th Cir. 1994) (if evidence is seized thorough illegal predicate search, evidence obtained under resulting warrant should be excluded; "[i]f clearly illegal police behavior can be sanitized by" issuance of warrant "the protective aims of the exclusionary rule will be severely impaired…").

Here, the essential fact establishing probable cause to search the apartment was evidence that the key found in Mr. Wheeler's possession accessed the Mills Avenue apartment. Excising the unlawfully-obtained-evidence, there is ***no nexus*** between the illegality and Mills Avenue. In particular, despite five months of wiretaps and surveillance, officers knew only that Mr. Wheeler visited *a* unit in that building once for 30-minutes. There was no evidence of drug transactions there and nothing connecting any of the thirty related defendants to Mills Avenue. Opening Br. 78-82. The fact that the warrant application recited that officers inserted the keys into the apartment doors cannot save the unlawful search; rather, the warrant was fruit of the illegality.

In this prosecution based entirely on circumstantial evidence, the critical question before jurors was whether Wheeler was Bush's heroin supplier. The government's case was circumstantial and not overwhelming. In attempting to prove Mr. Wheeler supplied this vast conspiracy, the government pointed to the existence of the "stash house." In the agent's view, Wheeler operated the Mills Avenue property as his "stash house" from where he retrieved heroin before heading to Bush's house, where the drug was processed. The jury's view of Mr. Wheeler's purported role in the charged conspiracy would have been undermined by the

suppression of the drugs seized from the stash house (760 grams) and, necessarily, of knowledge of the existence of the "stash house" to which Mr. Wheeler had ready access. Further, the jury reasonably may have determined that the conspiracy, if it existed, did not involve a kilogram or more of heroin, which finding would have resulted in a statutory penalty of 10, not 20 years. *See* 21 U.S.C. §841(b)(1)(A)(i); § *id.,* 841(b)(1)(B)(i), § 851.

In sum, the conflict is clear, and the questions presented are outcome-determinative. This case presents the right opportunity for this Court to resolve the conflict.

CONCLUSION

As set forth in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case. Alternatively, this Court may vacate the judgment and remand for resentencing under the First Step Act, or, vacate and remand to the Court of Appeals for the Third Circuit for further proceedings.

Dated: April 16, 2019

Respectfully submitted,

LISA B. FREELAND
Federal Public Defender for the Western District of Pennsylvania

s/ Renee Domenique Pietropaolo
RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender
Counsel of Record

1500 Liberty Center
1001 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 644-6565