Nos. 04-1445 and 04-9907

In the Supreme Court of the United States

NATHANIEL S. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ANDRE JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence seized pursuant to a search warrant was admissible under the "independent source" doctrine when part of the information on which the warrant was based had been obtained in an unlawful search, but probable cause existed even without that information.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a)[1] is reported at 396 F.3d 751. The opinion of the district court (Pet. App. 20a-39a) is reported at 285 F. Supp. 2d 999.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1445.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2005. The petition for a writ of certiorari in No. 04-1445 was filed on April 26, 2005, and the petition in No. 04-9907 was filed on April 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the United States District Court for the Northern District of Ohio on one count each of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2000 & Supp. II 2002). Petitioners moved to suppress cocaine seized during a search of a hotel room; petitioner Jenkins also moved to suppress items seized during a subsequent search of a house. The district court granted both motions. Pet. App. 20a-39a. The court of appeals reversed and remanded for further proceedings. *Id.* at 1a-19a.

1. On the evening of February 13, 2003, petitioners checked into a Holiday Inn in Beachwood, Ohio. Paying cash, they reserved a room for two nights. Petitioner Thompson provided identification, which the desk clerk photocopied and then returned to him. After checking in, petitioners went to their vehicle, unloaded several bags (which appeared to be very heavy), and took those bags to their room. Finding these circumstances to be suspicious, the desk clerk contacted John Kornek, a local police officer and member of the Ohio High Intensity Drug Trafficking Area (HIDTA) Task Force. Pet. App. 2a, 21a.

Officer Kornek contacted Officer Kevin Grisafo, another local police officer and HIDTA Task Force member, and asked him to go to the hotel to investigate. Of-

ficer Grisafo ran checks on petitioner Thompson and on petitioners' vehicle. He learned that Thompson had been arrested twice for drug-related offenses and had been convicted for carrying a concealed weapon, and that the vehicle was registered to a woman who was living in Cleveland and had been convicted of drug-related and other offenses. Officer Grisafo summoned backup, and he and other officers began surveilling petitioners' room. Pet. App. 3a, 22a.

Around 4:25 a.m., Officer Grisafo saw a Chevrolet Suburban enter, exit, and then re-enter the hotel parking lot. After a woman (later identified as Joyce Bell) left the Suburban and went into the hotel, the Suburban again exited the lot and parked across the street, even though the lot had ample free spaces. Petitioner Jenkins, who was driving the Suburban, then returned to the hotel and, after rejoining the woman, entered his room. Officer Grisafo ran a check on the Suburban and learned that it was registered to a man who had been arrested on several occasions. Pet. App. 3a-4a, 22a-23a.

Around 8:30 a.m., a police drug-detection dog alerted to the presence of narcotics in the Suburban. Around noon, petitioner Jenkins left the hotel room and was approached by Federal Bureau of Investigation Agent Kenneth Riolo, a HIDTA Task Force member. Jenkins identified himself, denied having been in the hotel room, and denied having any contraband on his person. Agent Riolo arrested Jenkins and, after searching him, found a small bag of marijuana, two mobile phones, a pager, and $1500 in cash. Pet. App. 3a-4a, 23a.

Believing that Bell may have witnessed Jenkins's arrest through the window of the hotel room, Agent Riolo directed other officers at the scene to secure the room in order to protect their safety and to prevent the

destruction of evidence. The officers later testified that Bell allowed them into the room; Bell testified that the officers forcibly entered. Pet. App. 4a-5a, 23a-24a.

Upon entering, the officers asked Bell if she would consent to a search of the room, including several bags stacked against the wall. Bell consented, but indicated that neither the room nor the bags were hers. It appears that, at some point, an officer moved one of the bags to the bed; the bag was sufficiently unzipped that officers could see brick-shaped items wrapped in cellophane inside. Pet. App. 5a, 24a-25a.

Agent Riolo entered the room about five minutes after the other officers. Upon learning that Bell had consented to a search of the room, Agent Riolo told the officers that they should wait for a warrant before conducting the search. Agent Riolo, however, proceeded to pick up all of the bags and feel them, determining that they were full of "bricks" and very heavy. Pet. App. 5a-6a, 25a-26a.

While events at the hotel were unfolding, officers at the hotel were in contact with Internal Revenue Service Agent Mark Kahler, a HIDTA Task Force member who was preparing an affidavit for a search warrant for the hotel room. Before the affidavit was filed, Agent Kahler was informed, apparently by Agent Riolo, that the bags in the room contained brick-shaped objects. Agent Kahler did not include that information in the affidavit because he believed that the affidavit was already "more than sufficient." As Agent Kahler presented the affidavit to the magistrate, however, he orally informed the magistrate about the discovery of brick-shaped objects in the bags. When asked whether he thought that information influenced the magistrate's decision to issue the warrant, Agent Kahler later testified that, "if I thought

it affected his decision as much as occurred in the past, he would have instructed me to add a paragraph [to the affidavit]." The magistrate issued the warrant. While Agent Kahler was still in the magistrate's chambers, Agent Riolo executed the warrant and informed Agent Kahler that the bags contained approximately 70 kilograms of cocaine. Pet. App. 4a, 6a-8a, 26a-27a.

Based partly on the fact that cocaine was found in the hotel room, officers subsequently obtained and executed a search warrant for the address in Cleveland to which petitioners' vehicle was registered. There, officers found two guns, a Rolex watch worth $17,000, and $68,000 in cash. Pet. App. 8a, 27a-28a.

2. On March 18, 2003, a federal grand jury in the Northern District of Ohio returned an indictment charging petitioners with one count each of possession of cocaine with intent to distribute. Petitioners moved to suppress the cocaine seized from the hotel room; petitioner Jenkins also moved to suppress the items seized from the house in Cleveland.

The district court granted both motions. Pet. App. 20a-39a. The court noted that the search of the bags could not be justified by Bell's consent because Bell lacked actual or apparent authority either for the hotel room or for the bags. *Id.* at 30a-32a. The court then determined that, even "assumin[g] that the destruction of evidence and officer safety concerns justified a warrantless entry to secure the room," *id.* at 34a, the search of the bags was invalid. The court reasoned that the initial act of moving one of the bags to the bed, and Agent Riolo's subsequent act of squeezing the bags, constituted "searches" that were not justified by exigent circumstances. *Id.* at 35a-36a. The court concluded that "[t]he subsequent search warrant obtained for [the hotel

room] does not remove the taint of these illegal searches." *Id.* at 36a. The court rejected the government's reliance on the "independent source" doctrine—under which evidence is admissible if it is discovered through sources independent of any constitutional violation—on the ground that the warrant was not "wholly independent" of the illegal searches. *Ibid.* The court explained that "[t]he fruits of the illegal searches * * * were one of the pieces of information made available to [the magistrate] before he issued the warrant." *Id.* at 37a. The court also concluded that, because the search warrant for the house in Cleveland was based partly on the cocaine that was found in the hotel room (and because there was not probable cause absent reference to the cocaine), the warrant was defective, and the items seized during the search of the house were also inadmissible. *Id.* at 37a-39a.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-19a. On appeal, the government conceded that Agent Riolo's squeezing of the bags constituted an unlawful search, but renewed its contention that the cocaine was nevertheless admissible under the "independent source" doctrine. *Id.* at 9a, 10a n.8. The court of appeals noted that, under this Court's decision in *Murray* v. *United States*, 487 U.S. 533 (1988), the critical inquiry was whether the information obtained during the earlier, unlawful search was presented to the magistrate and affected his decision to issue the warrant. Pet. App. 10a. The court added, however, that courts of appeals applying *Murray* had uniformly required that the tainted information "must affect the [magistrate's] decision in a *substantive*, meaningful way." *Id.* at 11a. Under that standard, the court reasoned, the "independent source" doctrine precluded

suppression if the warrant application, absent the tainted information, still supported a determination of probable cause, unless the tainted information prompted the officers to seek the warrant in the first place. *Ibid.*

The court of appeals stated that such an approach was "consistent with the rationale underlying *Murray*." Pet. App. 12a. "The idea behind *Murray*," the court explained, "is that police who carry out a search that they should not have carried out should be put in the same, *but no worse*, position than they would have been absent any error or misconduct." *Ibid.* The court reasoned that, when evidence is suppressed on the ground that "the magistrate was affected in some minor way by tainted information," notwithstanding the fact that the warrant would have been issued even without that information, officers would be put in a worse position than they would have been if the tainted information had not been presented. *Ibid.*

Applying that approach, the court of appeals decided that the written affidavit supported a determination of probable cause even without the orally conveyed information that the bags contained brick-shaped objects. Pet. App. 15a-16a. Citing circuit precedent for the proposition that probable cause exists if there is a "fair probability" that evidence will be found at the premises to be searched, the court determined that "the affidavit for [the hotel room] contains a particularized account of facts and circumstances that amount to a 'fair probability' that evidence could be found in the room." *Id.* at 16a. Specifically, the court cited "the payment of cash, the suspicious driving pattern of the Suburban, the criminal history of the renter of the room and the owner of the Suburban, the police canine's positive indication for narcotics in the Suburban, and the marijuana found

on [petitioner] Jenkins." *Ibid.* "Taken by itself," the court concluded, "the affidavit provides sufficient probable cause for the warrant." *Ibid.*

Finally, because it had determined that the cocaine was admissible, the court of appeals reasoned that there was no need to strike the reference to the cocaine for purposes of assessing the validity of the subsequent search warrant for the house in Cleveland, and thus concluded that the fruits of that search were also admissible. Pet. App. 17a-18a.

ARGUMENT

Petitioner Thompson claims (04-1445 Pet. 2-12) that the court of appeals erred by holding that the cocaine seized pursuant to the search warrant was admissible under the "independent source" doctrine. Petitioner Jenkins claims (04-9907 Pet. 10-13) that the officers' initial entry into the hotel room was unlawful. Further review of those claims is unwarranted.

1. As an initial matter, petitioners' claims are not ripe for review. Petitioners have not yet been tried or convicted on criminal charges to which the challenged evidence is relevant. Rather, after the court of appeals' decision on the government's interlocutory appeal in this case was issued (but before the petitions for a writ of certiorari were filed), a federal grand jury in the Northern District of Ohio returned a new indictment charging numerous defendants, including petitioners, with participation in a broader drug conspiracy. And after the petitions were filed, the district court dismissed the underlying indictment in this case. Petitioners have not yet been tried on the charges brought in the new indictment.

The dismissal of the original indictment against petitioners does not moot the issue whether the evidence challenged in this case is admissible, because the government intends to introduce the same evidence during petitioners' trial on the charges brought in the new indictment. But review is still not appropriate now. If petitioners are acquitted at trial on the new indictment, the claims that petitioners raise in the instant petitions will be moot. In contrast, if petitioners are convicted and preserve the instant claims, they will be able to raise those claims—together with any other claims they might have—in petitions for a writ of certiorari seeking review of the final judgment against them. Accordingly, this Court's review is not necessary at this time.

2. Petitioner Thompson does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, but instead contends only that it conflicts with this Court's decision in *Murray* v. *United States*, 487 U.S. 533 (1988). That contention lacks merit.

a. In *Murray*, the Court held that the "independent source" doctrine provides an exception to the exclusionary rule when evidence is seized pursuant to a search warrant based on lawfully obtained information, even though that evidence had previously been discovered during an illegal search. 487 U.S. at 536-541. The Court explained that the "independent source" doctrine is premised on the notion that, where there is an independent source for challenged evidence, the police should be placed in no worse a position than if the unlawful conduct had not occurred. *Id.* at 537. In applying the "independent source" doctrine to the facts at hand, the Court stated that "[t]he ultimate question * * * is whether the search pursuant to warrant was in fact a

genuinely independent source of the information and tangible evidence at issue here." *Id.* at 542. "This would not have been the case," the Court continued, "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Ibid.* (footnote omitted).

b. Petitioner Thompson contends (04-1445 Pet. 6-8) that, by stating that the "independent source" doctrine is inapplicable where unlawfully obtained information "affected [the magistrate's] decision to issue the warrant," 487 U.S. at 542, *Murray* requires a reviewing court to determine whether the tainted information *subjectively* influenced the magistrate's decision. Even before *Murray*, however, it was well established that a search warrant is valid if there was probable cause for the issuance of the warrant absent any improper information included in the affidavit. In *Franks* v. *Delaware*, 438 U.S. 154 (1978), this Court held that evidence seized pursuant to a warrant based on an affidavit that contained a deliberately false statement (or a statement made with reckless disregard for the truth) was not automatically inadmissible. *Id.* at 171-172. Instead, the Court reasoned that the relevant inquiry, when a statement was deliberately false, was whether, absent that statement, "there remains sufficient content in the warrant affidavit to support a finding of probable cause." *Id.* at 172. Similarly, in *United States* v. *Karo*, 468 U.S. 705 (1984), the Court held that evidence seized pursuant to a warrant based on an affidavit containing information illegally obtained through a beeper in a private residence was admissible. *Id.* at 721. Citing *Franks*, the Court stated that the appropriate test was whether

"sufficient untainted evidence was presented in the warrant affidavit to establish probable cause." *Id.* at 719.

Nothing in *Murray* suggests that the Court was retreating from the rule applied in *Franks* and *Karo*. Indeed, in *Murray*, the Court ultimately remanded not on the ground that unlawfully obtained information affected the magistrate's decision to issue the warrant (because the officers did not include any such information in their affidavit in the first place, see 487 U.S. at 543), but rather on the discrete ground that it was unclear whether the officers would have *sought* a warrant if they had not engaged in the earlier unlawful search, see *ibid.* And, to the extent that petitioner Thompson's reading of *Murray* would allow for suppression in at least some instances in which probable cause otherwise existed to support the search warrant, such a reading would contravene the purpose of the "independent source" doctrine, as stated in *Murray* itself: namely, to ensure that the police are placed in no worse a position than if the unlawful conduct had not occurred. *Id.* at 537. *Murray* therefore does not stand for the proposition that, in applying the "independent source" doctrine, a reviewing court must determine whether tainted information subjectively influenced the magistrate's decision.

As the court below noted (Pet. App. 11a-12a), courts of appeals applying the "independent source" doctrine have specifically rejected the reading of *Murray* advanced here by petitioner Thompson. Instead, those courts have consistently held that, in deciding whether unlawfully obtained information "affected" a magistrate's decision to issue a warrant for purposes of *Murray*, a reviewing court should determine whether there was probable cause for the issuance of the warrant in the absence of the unlawfully obtained information.

See, *e.g.*, *United States* v. *Walton*, 56 F.3d 551, 553-554 (4th Cir. 1995); *United States* v. *Ford*, 22 F.3d 374, 378-380 (1st Cir.), cert. denied, 513 U.S. 900 (1994); *United States* v. *Markling*, 7 F.3d 1309, 1314-1317 (7th Cir. 1993); *United States* v. *Restrepo*, 966 F.2d 964, 968-971 (5th Cir. 1992), cert. denied, 506 U.S. 1049 (1993); *United States* v. *Herrold*, 962 F.2d 1131, 1139-1144 (3d Cir.), cert. denied, 506 U.S. 958 (1992); cf. 6 Wayne R. LaFave, *Search and Seizure* § 11.4(f) at 328 n.301 (4th ed. 2004) (citing similar cases from highest state courts). Because Thompson does not point to any circuit conflict on the appropriate reading of *Murray*, and because Thompson's reading of *Murray* is incorrect in any event, further review on that issue is unwarranted.

c. Petitioner Thompson contends that the court of appeals erred in two additional respects. Both contentions lack merit.

Petitioner Thompson suggests (04-1445 Pet. 9-12) that, even if the court of appeals articulated the correct standard for determining whether the "independent source" doctrine was applicable, it erred by proceeding to make that determination itself, rather than remanding for the district court to do so. As discussed above, however, the court of appeals held that the appropriate inquiry under the "independent source" doctrine was whether there was probable cause for the issuance of the warrant in the absence of the unlawfully obtained information. Where, as here, there is no dispute concerning any historical facts, whether probable cause exists is subject to *de novo* appellate determination, see *Ornelas* v. *United States*, 517 U.S. 690, 697-698 (1996), and it was therefore appropriate for the court of appeals to resolve that question itself. Other courts of appeals applying *Murray* have similarly decided the existence of probable

cause on their own. See, *e.g.*, *Restrepo*, 966 F.2d at 971 (noting that, "[w]hen, as here, the determinative facts are not in dispute, the question of probable cause is one of law and may be resolved by this court"). Although the court of appeals retained the discretion to remand to the district court to determine the existence of probable cause, it did not err by opting to make that determination itself.

In the alternative, petitioner Thompson asserts (04-1445 Pet. 7-8) that the court of appeals erred by concluding that probable cause existed for the issuance of the warrant even in the absence of the unlawfully obtained information. That fact-bound contention does not warrant further review, and is in any event incorrect. As the court of appeals noted (Pet. App. 16a), the written affidavit supporting the warrant application stated, *inter alia*, that petitioners had paid for the hotel room in cash; that Thompson had been arrested for drug-related offenses, and that petitioners' vehicle was registered to a person who had been convicted of similar offenses; that petitioner Jenkins had driven the Suburban in a suspicious manner before returning to the hotel; that the police drug-detection dog had alerted to the presence of narcotics in the Suburban; and that marijuana had been found on Jenkins when he had been arrested. Those facts provided ample probable cause to believe that contraband would be found in petitioners' hotel room. The court of appeals therefore correctly held that the "independent source" doctrine was applicable, and that the cocaine seized during the search was not subject to suppression.[2]

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[2] Petitioner Thompson does not expressly contend that the "independent source" doctrine was inapplicable on the other ground

3. Petitioner Jenkins contends (04-9907 Pet. 10-13) that the officers' initial entry into the hotel room was invalid, apparently on the ground that the entry was not justified by exigent circumstances. The district court, however, assumed that "the destruction of evidence and officer safety concerns justified a warrantless entry to secure the room," Pet. App. 34a, and Jenkins did not affirmatively contend before the court of appeals that the officers' initial entry was invalid. Because Jenkins's claim was neither pressed nor passed upon below, this Court should not consider it. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *FW/PBS Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, Jenkins's claim is of no relevance to the correct disposition of this case. In the court of appeals, the government conceded that Agent Riolo's squeezing of the bags constituted an unlawful search, see Pet. App. 10a n.8, and the court of appeals operated on that assumption in applying the "independent source" doctrine, see *id.* at 10a. Even if the officers' initial *entry* into the hotel room were invalid, that would at most provide an additional justification for the conclusion (consistent with the court of appeals' assumption) that the subsequent search of the bags was unlawful. Because no other information obtained after the officers' initial entry was submitted with the application for the warrant

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articulated in *Murray*: namely, that "the agents' decision to seek the warrant was prompted by what they had seen" during their unlawful conduct. 487 U.S. at 542. Any such contention in this case would lack merit, because Agent Kahler had begun preparing the application for a search warrant even before the officers entered the hotel room. See, *e.g.*, Pet. App. 4a (noting that Agent Kahler had been preparing the affidavit "[t]hroughout the morning").

to search the hotel room, the fact that the officers' initial entry was unlawful would not affect the analysis under the "independent source" doctrine.[3] Jenkins's petition therefore presents no claim that warrants further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2005

[3] Moreover, it does not appear that any other information obtained after the officers' initial entry was submitted with the application for the subsequent warrant to search the house in Cleveland. See Pet. App. 38a.