

No. 05-321

In the Supreme Court of the United States

RICHARD HICKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court correctly denied petitioner's motion to suppress evidence seized pursuant to a search warrant that was obtained after police entered petitioner's house and arrested him without a warrant because of exigent circumstances.

2. Whether the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 389 F.3d 514.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2004. A petition for rehearing was denied on December 7, 2004 (Pet. App. 36a). The petition for a writ of certiorari was due on March 7, 2005. On that date, petitioner filed a motion for an extension of time within which to file his petition for a writ of certiorari. On March 10, 2005, Justice Scalia denied the motion. The petition for a writ of certiorari was filed on September 2, 2005, and is therefore out of time under Rule 13.1 of the Rules of this Court. 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 Eastern District of Texas, petitioner was convicted of eight counts of possessing a firearm or ammunition while subject to a domestic restraining order, in violation of 18 U.S.C. 922(g)(8). He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-35a.

1. On November 25, 2000, Officers Michael Webster and Kevin Lamance of the Bells, Texas, Police Department observed petitioner leaving the Dusty Saddle, a local bar, in a white pickup truck. When petitioner began driving erratically, the officers attempted to pull him over. Petitioner then led the officers on a high-speed chase that ended when the officers' vehicle became stuck in a field. Pet. App. 2a.

On December 20, Officer Lamance and his brother, Officer James Lamance, again observed petitioner leaving the Dusty Saddle in a white pickup truck. When petitioner began driving erratically, the officers attempted to pull him over. Another high-speed chase ensued, during which petitioner struck a bridge, damaging his truck. When petitioner entered the same field as in the previous chase, the officers decided not to follow suit. Officers subsequently located the damaged truck at petitioner's house. Pet. App. 2a.

On or about December 22, petitioner purchased a new white pickup truck. Around 1 a.m. on December 23, Officers Kevin and James Lamance spotted a new white pickup truck leaving the Dusty Saddle. When the driver began driving erratically, the officers attempted to pull him over. The truck entered the same field as in the

previous chases, and the officers again stopped at the edge of the field. This time, however, the truck stopped approximately 200 yards away. Kevin Lamance later testified that he then heard and felt a bullet whiz by his head. Shortly thereafter, he heard another shot. That shot hit his brother, James, in the head, and killed him. Pet. App. 2a-3a.

Deputy Sheriff Matt Robbins was in the vicinity when the shots were fired. As Deputy Robbins approached the scene, he saw a pickup truck matching a description that had been given over the radio by James Lamance. Deputy Robbins followed the truck to petitioner's house. Pet. App. 3a-4a.

Officers immediately placed petitioner's house under surveillance. At 2 a.m., officers called in a SWAT team from a neighboring county. After assembling and gathering its equipment, the SWAT team left for petitioner's house around 3:45 or 4 a.m. The SWAT team conducted visual, aerial, and thermal surveillance in order to determine the best method of entering the house. The SWAT team first fired tear gas and pepper spray into the house, then entered and arrested petitioner. Pet. App. 4a, 18a-19a.

Officers later obtained a search warrant for the house. While conducting the search, officers found a .30-30 rifle, which they had seen while arresting petitioner. A ballistics expert matched the rifle to .30-30 shell casings found in the field where James Lamance was shot. Pet. App. 4a.

2. Petitioner was charged in state court with capital murder and related offenses. After a jury trial, he was found not guilty. Pet. App. 4a.

3. On October 10, 2002, a federal grand jury in the Eastern District of Texas indicted petitioner on eight

counts of possessing a firearm or ammunition while subject to a domestic restraining order. Pet. App. 4a-5a.

Before trial, petitioner moved to suppress firearms and other evidence seized pursuant to the search warrant. Petitioner contended, *inter alia*, that the evidence should be suppressed because the earlier, warrantless entry into his house to arrest him was unconstitutional, and because the application for the warrant was based on information gathered during that entry. The district court denied the motion. 2 R. 1077-1089. The court reasoned that the warrantless entry was justified by exigent circumstances because (1) the officers had probable cause to believe that petitioner had committed a serious crime; (2) the officers had reason to believe that petitioner was armed and in the house; and (3) the officers were in a rural area in the middle of the night. *Id.* at 1086. The court concluded that “it was not unreasonable [for the officers] not to delay their efforts to arrest [petitioner] until a warrant could be obtained.” *Ibid.*

Petitioner was convicted on all eight counts. At sentencing, the district court, applying the Sentencing Guidelines, determined that petitioner had used one of the firearms in connection with an offense resulting in death, and that, under the cross-reference contained in Guidelines § 2K2.1(c)(1)(B), the “most analogous offense” was second-degree murder. Because the victim of the offense was a law-enforcement officer, the district court applied the enhancement in Guidelines § 3A1.2. The net effect of these determinations was to raise petitioner’s total offense level from 20 to 36, and to raise petitioner’s guidelines range (based on criminal history category I) from between 33 and 41 months to between 188 and 235 months. After granting petitioner’s motion for a downward departure, the district court sentenced

petitioner to a total of 180 months of imprisonment. Pet. C.A. Br. 46-47; Gov't C.A. Br. 45-46; Presentence Investigation Report ¶¶ 19-32.

4. The court of appeals affirmed. Pet. App. 1a-35a.

a. As relevant here, the court of appeals first upheld the district court's denial of petitioner's motion to suppress. Pet. App. 16a-20a. At the outset, the court noted that petitioner's theory was that evidence seized pursuant to the search warrant should be suppressed because the application for the warrant was based on information gathered during the earlier, allegedly unconstitutional entry. *Id.* at 17a.

The court of appeals, however, rejected petitioner's contention that the earlier entry was unconstitutional because it was not justified by exigent circumstances. Pet. App. 17a-20a. Citing circuit precedent, the court explained that exigent circumstances exist “[where] officers reasonably fear for their safety, where firearms are present, or where there is a risk of a criminal suspect's escaping or fear of destruction of evidence.” *Id.* at 18a (quoting *United States v. Rico*, 51 F.3d 495, 501 (5th Cir.), cert. denied, 516 U.S. 883 (1995)). “First and foremost,” the court noted, “the officers were confronted with a suspect who they believed had just shot and killed a fellow police officer.” *Ibid.* Moreover, the court observed, the officers reasonably believed that petitioner was armed and dangerous; had reason to believe that petitioner had previously gone to great lengths to avoid capture; and did not know whether any other persons were in the house. *Id.* at 18a-19a.

The court of appeals specifically rejected petitioner's contention that, because nearly five hours elapsed between the time officers arrived at petitioner's house and the time they entered, exigent circumstances did not

exist since “police could easily have used this time to obtain a warrant.” Pet. App. 18a. The court reasoned that petitioner’s contention that “nothing happened” during the five-hour period was “disingenuous.” *Id.* at 19a. The court noted that officers notified the SWAT team at 2 a.m. that it would be needed; that, once the team had assembled and gathered its equipment, it left for petitioner’s house around 3:45 or 4 a.m.; that the team thereafter formulated its plan of action and conducted surveillance in order to determine the best method of entering the house; that the team fired tear gas and pepper spray into the house; and that the team then entered and effectuated the arrest. *Ibid.* The court determined that, “[i]n light of the fact that the police believed that [petitioner] was armed, had just killed a police officer, and did not want to be captured, exigent circumstances existed and the SWAT team had no reason to delay entry * * * once it was ready to act.” *Ibid.* Because exigent circumstances existed, the court concluded, the entry was constitutional, and the subsequent search warrant was therefore valid. *Id.* at 19a-20a.

b. The court of appeals also upheld the district court’s decision to increase petitioner’s sentence based on its determination that petitioner had committed second-degree murder by killing Officer James Lamance. Pet. App. 20a-25a. Rejecting petitioner’s reliance on this Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004), the court noted that “it is well-settled in this circuit that a district court may increase a defendant’s sentence under the Sentencing Guidelines based on facts found by the court by a preponderance of the evidence.” Pet. App. 24a.

ARGUMENT

1. The petition for a writ of certiorari is untimely. The petition was due on March 7, 2005, but was not filed until September 2, 2005. This Court has the discretion to consider an untimely petition in a criminal case. See *Schacht v. United States*, 398 U.S. 58, 63-64 (1970). Petitioner contends (Pet. 2-6) that the Court should exercise that discretion because he had retained other counsel to file a timely petition, but counsel failed to do so (instead filing an application for an extension of time on the day the petition was due),¹ and failed to inform him that no timely petition had been filed. This Court has previously considered an untimely petition where the petitioner was falsely told by court-appointed counsel that a timely petition had been filed. See *Wilkins v. United States*, 441 U.S. 468, 468-470 (1979) (per curiam). The circumstances of this case differ in some respects from *Wilkins*: here, counsel was retained, not appointed, and, unlike in *Wilkins*, the court of appeals has already denied a late petition for rehearing and motion to recall the mandate. See Pet. 4. Nevertheless, the Court may wish to exercise its discretion to consider the petition.

2. On the merits, petitioner contends (Pet. 14-18) that the court of appeals erred by upholding the district court's denial of his motion to suppress evidence seized

¹ In that application, prior counsel stated that he had been "retained * * * recently," had "just obtained" the case file from petitioner's current counsel, and had "just filed" an application for admission to the bar of this Court. Mot. for Extension of Time 1. Under this Court's rules, an application to extend the time to file a petition for a writ of certiorari filed less than 10 days before the final filing date will not be granted except in "the most extraordinary circumstances." Sup. Ct. R. 30.2. Justice Scalia denied the motion.

pursuant to a search warrant that was obtained after police entered his house and arrested him without a warrant. That contention lacks merit.

a. In *Payton v. New York*, 445 U.S. 573 (1980), this Court held that it was “presumptively unreasonable” for officers to enter a suspect’s house in order to arrest him without a warrant. *Id.* at 586. The Court had no occasion, however, to address “the sort of emergency or dangerous situation, described in our cases as ‘exigent circumstances,’ that would justify a warrantless entry into a home for the purpose of either arrest or search.” *Id.* at 583. Although this Court has recognized that “probable cause plus exigent circumstances” will justify entry into a house, *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam), it has never set out a definitive test for determining the existence of “exigent circumstances.” Nevertheless, the Court has noted that a lower court “applied essentially the correct standard” when it observed that (1) “a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect’s escape, or the risk of danger to the police or to other persons inside or outside the dwelling”; (2) “in the absence of hot pursuit there must be at least probable cause to believe that one or more of the other factors justifying the entry were present”; and (3) “in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered.” *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (citations omitted); cf. *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (noting that “an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made”).

Consistent with the standard approvingly cited in *Olson*, the court of appeals in this case correctly determined that exigent circumstances existed to justify the officers' warrantless entry. Specifically, with regard to the risk of harm, the court of appeals noted that the underlying crime was the murder of a police officer and that the officers had reason to believe that petitioner was armed and dangerous. Pet. App. 18a. With regard to the need to prevent escape, the court of appeals noted that the officers had reason to believe that petitioner had previously "gone to great lengths" to avoid capture. *Ibid.* Petitioner does not challenge the court of appeals' reliance on any of those factors, and the court of appeals' ultimate determination that exigent circumstances existed constitutes nothing more than a "fact-specific application of the proper legal standard." *Olson*, 495 U.S. at 100.

b. Petitioner instead renews his contention (Pet. 15) that exigent circumstances could not have existed because of the time that elapsed before officers entered the house, during which the officers could have sought a warrant. Petitioner seemingly contends (Pet. 17) that the delay in entering the house indicates that exigent circumstances were never present. For the reasons just stated, however, the court of appeals correctly determined that exigent circumstances existed at the time the officers initially arrived at the house. And for the same reasons, the exigent circumstances that existed at the outset did not dissipate while the officers were taking reasonable precautions before effectuating entry.

In several cases, courts have considered the amount of time required to obtain a warrant as one factor in assessing the existence of exigent circumstances. See, *e.g.*, *United States v. Rodea*, 102 F.3d 1401, 1404-1405 (5th

Cir. 1996), cert. denied, 520 U.S. 1269 (1997); *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981); *United States v. Rubin*, 474 F.2d 262, 268-269 (3d Cir.), cert. denied, 414 U.S. 833 (1973). With regard to that factor, however, courts have acknowledged that it may be difficult, even impractical, to obtain a warrant late at night. See, e.g., *Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970). Although the court of appeals did not expressly address that factor, the district court did note that “[t]he officers were in a rural area operating in the dark of night.” 2 R. 1086. Moreover, petitioner concedes (Pet. 17) that, while the officers could have *sought* a warrant in the time that elapsed between the officers’ initial arrival and the SWAT team’s eventual entry, there is no evidence on whether they could have *obtained* one. To the extent that the amount of time required to obtain a warrant is relevant to the inquiry, therefore, petitioner fails to demonstrate that it cuts in his favor—much less that it outweighs all of the other factors on which the court of appeals relied in determining that exigent circumstances existed. At a minimum, petitioner identifies no conflict with any decision of this Court, or of another court of appeals, that warrants this Court’s review.²

c. In any event, this case would present a poor vehicle for consideration of any question concerning the

² Petitioner cites (Pet. 15, 18) this Court’s decision in *Roaden v. Kentucky*, 413 U.S. 496 (1973), for the proposition that exigent circumstances exist only when officers must act “now or never” to preserve evidence of a crime. *Id.* at 505. In *Roaden*, however, the Court was considering the narrower question of the circumstances under which officers could seize material arguably protected by the First Amendment without a warrant—a type of seizure that the Court described as “plainly a form of prior restraint.” *Id.* at 504.

exigent-circumstances doctrine. Even if petitioner could show that no exigent circumstances existed (and thus that the earlier entry was invalid), petitioner could not demonstrate that the court of appeals erred by upholding the district court's denial of his motion to suppress evidence seized pursuant to the subsequent search warrant. Evidence seized pursuant to a warrant based in part on illegally obtained information is nevertheless admissible if "sufficient untainted evidence was presented in the warrant affidavit to establish probable cause," *United States v. Karo*, 468 U.S. 705, 719 (1984), and the decision to seek the warrant was not based on the fruits of the illegal entry, *Murray v. United States*, 487 U.S. 533, 542 (1988). Even without the information allegedly obtained during the earlier entry (*i.e.*, a statement that officers saw firearms in the house), the warrant application contained more than sufficient information to establish probable cause to search petitioner's house. Specifically, the supporting affidavit recited all of the events leading up to petitioner's arrest, including the fact that petitioner had previously fled from police in a similar manner and the fact that the vehicle from which the shots were fired was parked outside petitioner's house. R. 1818. That information, untainted by any observations made during the earlier entry, amply provided probable cause to search petitioner's house for the firearm used to kill James Lamance, and there is every reason to believe that the police would have sought the search warrant in any event. Even if the court of appeals erred in determining that exigent circumstances existed for the initial warrantless entry, therefore, the court of appeals' decision to uphold the admission of the evidence was nevertheless correct.

3. Petitioner also contends (Pet. 11-14) that his sentence was imposed in violation of *United States v. Booker*, 125 S. Ct. 738 (2005), and that, even after *Booker*, a heightened standard of proof is required in determining whether the cross-reference to the homicide guideline is applicable. In *Booker*, this Court held that the Sixth Amendment, as construed in *Blakely v. Washington*, 542 U.S. 296 (2004), applies to the federal Sentencing Guidelines. 125 S. Ct. at 748-756. In answering the remedial question, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Id.* at 757-769. Petitioner contends that he raised a Sixth Amendment issue at sentencing (Pet. 11), and the court of appeals rejected his claim that the district court's use of a preponderance standard in applying the Guidelines violated due process (Pet. App. 24a). Accordingly, the appropriate disposition of petitioner's case—if the Court chooses to exercise its discretion to consider this untimely petition—is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker*. The court of appeals can then decide what effect, if any, that decision has on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error. See 125 S. Ct. at 769.

CONCLUSION

If the Court chooses to exercise its discretion to consider this untimely petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Booker*. Otherwise, the petition should be denied.

Respectfully submitted.

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