No. 12-80

In the Supreme Court of the United States

KEVIN MCMANAMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether due process bars application of the doctrine of collateral estoppel to prevent a criminal defendant from relitigating the lawfulness of a search and seizure.

2. Whether the court of appeals properly applied the inevitable discovery and plain view doctrines in affirming the denial of petitioner's motion to suppress evidence of child pornography.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

In the Supreme Court of the United States

No. 12-80

KEVIN MCMANAMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 673 F.3d 841. The order of the district court (Pet. App. 17-57) is unreported but is available at 2010 WL 4103530.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2012. A petition for rehearing was denied on April 18, 2012 (Pet. App. 58). The petition for a writ of certiorari was filed on July 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted on two counts of sexual exploitation of children, in violation of 18 U.S.C. 2251(a) and

(e). Pet. App. 1. He was sentenced to 276 months of imprisonment to be followed by five years of supervised release. *Ibid.*; Pet. C.A. Br. Add. 45-48. The court of appeals affirmed. Pet. App. 1-16.

1. In March 2008, petitioner was indicted by a grand jury on multiple gun and drug charges based in part on inculpatory statements he made to law enforcement officers in 2005 and 2006. Pet. App. 2; see *United States* v. *McManaman*, No. CR08-4025-MWB, 2008 WL 2704557, at *2 (N.D. Iowa July 3, 2008) (*McManaman '08*) ("[Petitioner] admitted he was a convicted felon * * * in possession of some firearms"; that "he had traded a gun for some drugs"; and that "he had disposed of a couple more firearms.").

On April 2, 2008, having secured an arrest warrant related to that indictment, federal and state law enforcement officers arrived at petitioner's home to arrest him. Pet. App. 2. Two Special Agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, Todd Monney and Zane Dodds, knocked on the front door, and petitioner and his wife Tina Frye answered. *Ibid.* Monney told petitioner that he had a warrant for his arrest, asked petitioner to step outside onto the front porch, and arrested him. *Ibid.*

While still on the porch, the officers conducted a pat-down of petitioner and found a marijuana pipe and a methamphetamine pipe in his pockets. Pet. App. 2-3. Without informing him of his *Miranda* rights, Dodds asked petitioner whether the officers should be concerned about anything illegal inside his home. *Id.* at 3. Petitioner responded that there was a shotgun in the basement. *Ibid.* Petitioner offered to have his wife get the gun, but the officers said that one of them would have to accompany her. *Ibid.* Frye then led Agent

Dodds around the house and into the basement to retrieve the gun. *Ibid.*

While inside the basement, Dodds discovered a locked door and asked Frye if he could search the room inside. Pet. App. 3. Frye explained that the door must have been locked accidentally and that they usually used a screwdriver to open it. *Ibid.* Borrowing a pocket knife from an officer, Frye opened the door. *Ibid.* Inside the room was a closet that was padlocked shut. *Ibid.* Frye did not have the key, but with her consent, Agent Monney (who by then had entered the house) took the door off its hinges. *Ibid.* Inside the closet were boxes, a pile of magazines, and several videotapes. *Ibid.* Monney flipped through these materials and discovered mixed in with the magazines several photographs of what appeared to Monney to be nude young females. *Ibid.* Monney also found in the closet a videotape labeled with petitioner's minor stepdaughter's name and the notation "Home XXX Edit." *Id.* at 3-4.

The officers then transported petitioner to the county jail, read him his rights, and interviewed him with respect both to the gun-and-drug indictment and the child pornography they had found in his home. Pet. App. 4. Petitioner made inculpatory statements about the pornography, and the next day officers again searched petitioner's home and secured additional evidence. *Ibid.*

2. In May 2008, during the course of his prosecution on the gun-and-drug indictment, petitioner filed a motion to suppress the shotgun as well as the statements that he had made after his arrest. *McManaman '08*, 2008 WL 2704557, at *1. After an evidentiary hearing, a magistrate judge filed a Report and Recommendation concluding that the officers violated petitioner's Sixth Amendment right to counsel when, before giving the re-

quired *Miranda* warnings, they asked him whether there was anything illegal in the house. *Ibid.* But the Report and Recommendation also concluded that, pursuant to the "inevitable discovery" exception to the exclusionary rule, the shotgun should not be suppressed. *Ibid.*; see Pet. App. 4-5.

The district court accepted the Report and Recommendation and rejected petitioner's objections. *McManaman '08*, 2008 WL 2704557, at *9. Calling it "an exceedingly close question," the district court agreed that suppression of the shotgun was unwarranted under the inevitable discovery doctrine. Pet. App. 5 (quoting *McManaman '08*, 2008 WL 2704557, at *7). The district court explained that "it seems certain that the law enforcement officers would have sought a search warrant for [petitioner's] home upon finding the marijuana pipe and methamphetamine pipe on his person"; that probable cause existed and that a search warrant would have been issued; and that execution of the search warrant would have led officers to discover the shotgun. *McManaman '08*, 2008 WL 2704557, at *7.

After his motion to suppress was denied, petitioner pleaded guilty to three of the six drug and firearm counts and was sentenced to 75 months of imprisonment, which he is now serving. Pet. App. 6. Petitioner did not appeal the 2008 judgment.

3. In May 2010, approximately two years after his indictment on the gun-and-drug charges, petitioner was indicted on eight counts of violating various child pornography statutes. Pet. App. 18. As he did during his 2008 prosecution, petitioner filed a motion to suppress the statements and evidence connected with his April 2, 2008, arrest and the subsequent search. *Id.* at 6, 18. A magistrate judge held an evidentiary hearing and filed a

Report and Recommendation concluding that petitioner's motion to suppress should be denied. *Id.* at 19.

As relevant here, the magistrate judge determined that petitioner was collaterally estopped from relitigating whether officers would have secured a search warrant after discovering drug paraphernalia in his pockets. Pet. App. 20. As to the child pornography, the magistrate judge determined that collateral estoppel did not apply because the seizure of evidence relating to child pornography had not been previously litigated. *Ibid.*; see *id.* at 4. The magistrate judge nevertheless concluded that suppression was unwarranted because, pursuant to the search warrant that could have been issued, the officers would have been authorized "to search for guns and ammunition, drugs, and drug paraphernalia, and the ensuing search would have led inevitably to discovery of" the child pornography. *Id.* at 20; see also *id.* at 6-7.

The district court adopted the Report and Recommendation and denied petitioner's motion to suppress. Pet. App. 56. The district court rejected petitioner's objection to the application of collateral estoppel, explaining that the court of appeals had previously held that a defendant may be collaterally estopped from moving to suppress evidence previously found to be legally obtained. *Id.* at 37 (citing *United States* v. *Rosenberger*, 872 F.2d 240, 242 (8th Cir. 1989)). Consequently, the district court found "conclusively established," *id.* at 41, the court's determination in *McManaman '08* "that a search warrant could have been issued for [petitioner's] residence which would have permitted the officers to search for guns and ammunition, drugs, and drug paraphernalia," *id.* at 39. And because such a warrant would have allowed the officers to "search any container large enough to hold a gram, or less, of drugs," the officers

"would have been acting within the scope of the search warrant when they examined the box containing the photos." *Id.* at 42-43.

The district court further held that, although the child pornography would not have been covered by the warrant, "at least some of the photographs appear to be nude photographs of minor females" and therefore "the incriminating nature of the photographs was immediately apparent to the officers and they were permitted to seize them without a warrant under the plain view exception" to the exclusionary rule. Pet. App. 43. Accordingly, the district court rejected petitioner's objections to the Report and Recommendation's conclusion that petitioner's suppression motion should be denied. *Ibid.*

Petitioner subsequently entered a conditional guilty plea to two counts of sexual exploitation of children, in violation of 18 U.S.C. 2251(a) and (e), reserving the right to appeal the denial of his motion to suppress. Pet. App. 1-2.

4. The court of appeals affirmed. Pet. App. 2. The court of appeals held that the district court's decision in *McManaman '08* collaterally estopped petitioner from rearguing that the officers lacked probable cause to secure a search warrant for his home. *Id.* at 9-10. The court of appeals alternatively held that on the merits—*i.e.*, without applying collateral estoppel—petitioner's argument was unavailing because the officers' discovery of drug paraphernalia on petitioner would have provided sufficient probable cause for a search warrant. *Id.* at 11.

The court then considered "the one argument that is new to the present case: that the evidence of child pornography would have been outside the scope of a properly obtained search warrant." Pet. App. 12. The court rejected that argument. Although "[a]ny search war-

rant that would have been issued would have been limited to evidence for guns, drugs, or ammunition," *ibid.*, such a warrant would have permitted the officers to search through boxes containing photographs and videotapes and so would inevitably have led to the discovery of the child pornography, *id.* at 13-14. And "[b]ecause the incriminating nature of this evidence was immediately apparent to the officers, they were entitled to seize it under the plain view doctrine." *Id.* at 14.

ARGUMENT

Petitioner challenges (Pet. 10-13) the court of appeals' holding that collateral estoppel bars a criminal defendant from relitigating the suppression of evidence previously determined to have been legally obtained. The court of appeals' decision does not conflict in any pertinent way with any decision of this Court or of any other court of appeals. In any event, this case does not provide an appropriate vehicle for considering the issue because the court of appeals also resolved petitioner's argument on the merits.

Petitioner also challenges (Pet. 13-18) the court of appeals' determination that the officers inevitably would have discovered the child pornography, which the officers permissibly seized under the plain view doctrine. The court of appeals correctly resolved that factbound inquiry consistent with this Court's precedent, and petitioner identifies no conflicting decision of any other court of appeals. No further review is warranted.

1. a. Petitioner contends (Pet. 10-11) that review is warranted in this case to resolve a conflict among the courts of appeals on whether due process considerations proscribe the government's offensive use of collateral estoppel against a criminal defendant. The court of ap-

peals' decision in this case, however, does not implicate any such disagreement.

As the Fifth Circuit has explained, "it is often assumed that collateral estoppel cannot be used to prevent a criminal defendant from re-litigating an element of the offense charged in a second prosecution." *United States* v. *Hamilton*, 931 F.2d 1046, 1053 (1991); see, *e.g.*, *United States* v. *Pelullo*, 14 F.3d 881, 896 (3d Cir. 1994) ("[A] right to a jury trial necessitates that every jury empaneled for a prosecution considers evidence of guilt afresh and without the judicial direction attending collateral estoppel."). But, the Fifth Circuit noted, "preclusion may be appropriate as to collateral matters" such as those involving "[r]ulings on the lawfulness of searches and seizures." *Hamilton*, 931 F.2d at 1052.

Here, the court of appeals held that the application of collateral estoppel to prevent a criminal defendant from relitigating the lawfulness of a search and seizure is consistent with due process. Pet. App. 10 (discussing *United States* v. *Rosenberger*, 872 F.2d 240, 241-242 (8th Cir. 1989)); see also *United States* v. *Thoresen*, 428 F.2d 654, 667 (9th Cir. 1970) ("[T]he circumstances that Thoresen's suppression hearing was under a superseding indictment does not entitle him to relitigate the issues [resolved in an earlier suppression decision]."). Some courts of appeals have suggested that estopping a criminal defendant from relitigating the suppression of evidence might raise due process concerns. See, *e.g.*, *United States* v. *Price*, 13 F.3d 711, 720 (3d Cir.), cert. denied, 511 U.S. 1096, 512 U.S. 1241, 513 U.S. 853 (1994), 514 U.S. 1023 (1995); *United States* v. *Harnage*, 976 F.2d 633, 663 & n.2 (11th Cir. 1992); *Hamilton*, 931 F.2d at 1053 n.1. But none of those courts resolved that issue. See *Price*, 13 F.3d at 720 ("We need not decide that issue

in this case."); *Harnage*, 976 F.2d at 663 n.1 ("[A] discussion of the due process implications is unnecessary."); *Hamilton*, 931 F.2d at 1053 ("We find it unnecessary to resolve the issue on this basis."). Accordingly, petitioner has identified no pertinent disagreement among the courts of appeals.

b. This case, in any event, is not an appropriate vehicle for considering whether due process proscribes the application of collateral estoppel to prevent a criminal defendant from relitigating the lawfulness of a search and seizure. In affirming the district court's order denying petitioner's motion to suppress, the court of appeals alternatively held that petitioner's suppression motion failed on the merits. Pet. App. 11-12; see Pet. 11 (noting that the court of appeals also resolved the issue "[o]n the merits of the question"). The court of appeals concluded that the officers' discovery of drug paraphernalia in petitioner's pockets provided probable cause for a search warrant. Pet. App. 11. Petitioner disputes the correctness of that holding. Pet. 11-12. But it provides an alternative ground for affirmance, making this case a poor vehicle for addressing the first question presented.

2. Petitioner contends (Pet. 13-18) that the court of appeals erred in concluding that the seizure of the child pornography was permissible under the inevitable discovery and plain view doctrines. Those fact-bound issues were correctly decided by the court of appeals. They present no substantial question of law nor any identified conflict among the circuits. Review by this Court is therefore unwarranted.

a. The inevitable discovery doctrine provides that the exclusionary rule does not apply "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have

been discovered by lawful means." *Nix* v. *Williams*, 467 U.S. 431, 444 (1984). "This inquiry necessarily entails reasoning about hypothetical circumstances contrary to fact." *McManaman '08*, 2008 WL 2704557, at *6 (quoting *United States* v. *Feldhacker*, 849 F.2d 293, 296 (8th Cir. 1988)). The inquiry here is (i) whether the officers, having discovered the drug paraphernalia on petitioner's person and aware that petitioner had previously engaged in the trade of guns for drugs, would have sought and been issued a search warrant for petitioner's home, and (ii) if so, whether the officers inevitably would have discovered the child pornography.

The officers plainly would have had probable cause for a search warrant. Probable cause exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). The inquiry is a "practical, common-sense" one that takes account of the "totality of the circumstances." *Ibid.*; see also, *e.g.*, *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 370 (2009). As the magistrate judge, the district court, and the court of appeals properly concluded, the officers' discovery of drug paraphernalia in petitioner's pockets and the officers' knowledge that petitioner had been involved in the drug trade were sufficient under a practical, common-sense inquiry to establish the requisite fair probability that contraband would be found in petitioner's home. Pet. App. 11-12; *McManaman '08*, 2008 WL 2704557, at *7.

Petitioner contends (Pet. 12) that probable cause was lacking because, "[w]hile there was paraphernalia found in his pocket on the day of his arrest, there was no evidence as to whether there was any residue or sign of recent use in the paraphernalia." But probable cause re-

quires only a "fair probability" that contraband would be found. *Gates*, 462 U.S. at 238. And there is plainly a fair probability that an individual who carries on his person at his home two pieces of drug paraphernalia for two different drugs would have drugs or related contraband in his home. This is all the more so where, as here, the individual is known to the arresting officers as someone previously involved in the drug trade. See Pet. 4 ("Prior to the indictment and subsequent arrest, Dodds had interviewed McManaman about his drug and firearms activities on more than one occasion.").

Petitioner further contends (Pet. 12) that the officers on the scene had "stale" information because their last knowledge of petitioner's criminal conduct occurred three years earlier, in 2005. But that argument "significantly downplays the drug paraphernalia that was found on [petitioner's] person the night he was arrested." Pet. App. 11. "[T]he existence of drug paraphernalia 'in or around a suspect's house is significant on the issue of probable cause.'" *Ibid.* (quoting *United States* v. *Hernadez Leon*, 379 F.3d 1024, 1028 (8th Cir. 2004)); see also *McManaman '08*, 2008 WL 2704557, at *7 ("Here, the finding of the marijuana and methamphetamine drug pipes on [petitioner's] person at his residence when combined with his admitted history of trading drugs for firearms reasonably suggest that consumption of narcotics were occurring within the premises.").

With ample probable cause for issuance of a warrant, and under the circumstances presented here, the courts below correctly concluded that officers would have sought and been issued a warrant. During the course of the ensuing search, as the courts below held, the officers properly and inevitably would have searched the boxes, magazines, and papers in the locked closet for drugs,

guns, and related material, where they would have discovered the child pornography.

b. The plain view doctrine would have allowed the officers to seize the child pornography when they discovered it. "Under th[e plain view] doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993). Petitioner contends (Pet. 14) that the incriminating character of the child pornography could not have been "immediately apparent" to the officers. That is mistaken.

As explained above, under the inevitable discovery doctrine, the officers had lawful authority to search the house "for guns, drugs, and ammunition" and so "would have had the authority to search in any closet, container, or other closed compartment in the building large enough to contain the possible contraband." Pet. App. 13 (citing *United States* v. *Ross*, 456 U.S. 798, 820-821 (1982)). The incriminating nature of the photographs was immediately apparent to the officers "because at least some of the photographs appear[ed] to be nude photographs of minor females." *Id.* at 43; see *id.* at 3. And even if the pictures were folded, the "officers would have had reason to unfold the documents to determine whether they contained drugs, which often are contained within folded pieces of paper." *Id.* at 14 (citation omitted). Likewise, the incriminating nature of the videotape would have been immediately apparent to Agent Monney because the videotape bore a label "on which was written a name that Monney knew to be the same as [petitioner's] minor daughter's name, followed by 'Home

XXX edit,' and a date." *Id.* at 28 (citation omitted); see *id.* at 4.

Petitioner contends (Pet. 14) that the incriminating nature of the child pornography was not immediately apparent to the officers because the only way the officers could discern their character was to manipulate the photographs and videotape, in violation of this Court's decision in *Arizona* v. *Hicks*, 480 U.S. 321 (1987). That argument lacks merit. In *Hicks*, this Court held that on a warrantless search justified only by reasonable suspicion, the plain view doctrine does not allow officers to manipulate an item to find out whether it is contraband. *Id.* at 326. In this case, however, the inevitable discovery inquiry presumes that the officers would have been acting pursuant to a warrant supported by probable cause. Thus, *Hicks* has "no bearing" on this case, as the court of appeals correctly observed. Pet. App. 13.

Petitioner attempts to bolster his *Hicks* argument by suggesting (Pet. 15) that because the warrant would have been limited to drugs, firearms, and ammunition, the officers had no right to search through the magazines and videotapes they discovered. But that ignores the court of appeals' common-sense conclusion that drugs could have been hidden among papers or other items stored in the boxes. Pet. App. 14.[*]

---

[*] Petitioner contends that there was no evidence that Agent Monney reasonably believed "that the child mentioned on the tape cover was the child who resided in the house" or that he reasonably believed "that the pictures were child pornography at the time he looked at those pictures in the closet." Pet. 16. Those factual disagreements with the court of appeals do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
ROSS B. GOLDMAN
Attorney

OCTOBER 2012