No. 13-1368

In the Supreme Court of the United States

HAROLD R. WELLS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, an on-duty police officer, had a reasonable expectation of privacy from video or audio surveillance while he and another officer conducted a consent search of a suspected drug dealer's motel room, during the suspect's brief detention outside the room.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-46) is reported at 739 F.3d 511. The memorandum opinion and order of the district court (Pet. App. 59-73) is reported at 789 F. Supp. 2d 1270.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47-48) was entered on January 3, 2014. A petition for rehearing was denied on February 11, 2014 (Pet. App. 74-75). The petition for a writ of certiorari was filed on May 12, 2014. 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 Northern District of Oklahoma, petitioner was convicted of conspiring to possess with

intent to distribute methamphetamine, in violation of 21 U.S.C. 841 and 846; conspiring to steal public funds, in violation of 18 U.S.C. 371; stealing public funds, in violation of 18 U.S.C. 641 and 2; and using a communications facility to facilitate a drug felony, in violation of 21 U.S.C. 843(b). Pet. App. 49-50. He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. *Id.* at 51-52. The court of appeals affirmed. *Id.* at 1-46.

1. In May 2009, petitioner was an officer with the Tulsa Police Department. He was close friends with John "J.J." Gray, a fellow Tulsa police officer. Through cooperating witnesses, the Federal Bureau of Investigation (FBI) learned that Gray was stealing money and drugs while performing his official duties. Pet. App. 2-3, Gov't C.A. Br. 5, 7.

The FBI investigated Gray through a sting operation in which FBI Special Agent Joe McDoulett posed as a methamphetamine dealer known as "Joker."[1] In May 2009, Joker rented a room at a Super 8 Motel in Tulsa and placed over $13,000 in government funds throughout the room. The FBI also installed covert audio and video recording equipment in the room. When the room was ready, an FBI cooperating witness told Gray and petitioner that a methamphetamine dealer with a large amount of drugs and cash was doing business from the room. Pet. App. 3-4 & n.4; Gov't C.A. Br. 5-6.

On May 18, 2009, when Tulsa police officers saw Joker leave his motel room for the lobby, they handcuffed him and detained him in a patrol car. While Joker was detained, petitioner obtained his consent to

[1] For ease of syntax, this brief refers to Special Agent McDoulett as "Joker." Accord Pet. App. 3 n.3.

search the motel room. Pet. App. 4-5, Gov't C.A. Br. 8. One of petitioner's subordinates continued to detain Joker while Gray and petitioner went inside the room to conduct a search. *Ibid.* Gray and petitioner were in the room and out of Joker's presence for about 15 minutes, and the recording equipment captured much of their conduct during that time. Pet. App. 5, 25; Gov't C.A. Br. 31. The recordings, along with Gray's later trial testimony, reflected that Gray and petitioner stole $2000 from the room and allowed other officers to take money as well. Pet. App. 5; Gov't C.A. Br. 9.

When Gray and petitioner had completed the search, they brought Joker to the motel room, where Joker told the officers details of his purported drug operation. Pet. App. 5-6; Gov't C.A. Br. 9-10. In that and later conversations, Gray and petitioner agreed not to arrest Joker and to facilitate his sale of methamphetamine, without law-enforcement interference, on condition that they would arrest selected drug customers and take some of Joker's drug profits from those sales. Pet. App. 6, 8-9; Gov't C.A. Br. 9-10.

The investigation continued and developed additional evidence that petitioner conspired with fellow police officers to allow Joker to traffic drugs by insulating Joker from arrest. The evidence showed that petitioner and his co-conspirators then sought access to Joker's drug customers from whom they could steal cash and illegal drugs. Pet. App. 6-9, 30-34.

2. A grand jury in the Northern District of Oklahoma returned a 13-count indictment charging petitioner and other Tulsa police officers in connection with their role in the foregoing and related offenses. As relevant here, the indictment charged petitioner

with conspiring to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841 and 846; conspiring to steal public funds, in violation of 18 U.S.C. 371; stealing public funds, in violation of 18 U.S.C. 641 and 2; and using a communications facility to facilitate a drug felony, in violation of 21 U.S.C. 843(b). Indictment 10-15.

Petitioner and his co-defendants moved to suppress —under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211 (18 U.S.C. 2510 *et seq.*)—the audio and video recordings depicting events that occurred during the 15 minutes when Joker was outside of the motel room.[2] See Pet. App. 59-60, 62-63. Petitioner argued that, in Joker's absence, he had a reasonable expectation that he would not be subject to audio or video surveillance within the room. 10-cr-00116 Docket entry Nos. 120-123 (Apr. 25, 2011) (Pet. Mots. to Suppress).

After an evidentiary hearing, the district court denied petitioner's motion to suppress in a memorandum opinion and order. Pet. App. 59-73. The court concluded that petitioner had no reasonable expectation of privacy in the motel room, under either the Fourth Amendment or Title III.[3] *Id.* at 63-73.

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[2] Petitioner and his co-defendants did not seek suppression of recordings depicting events that occurred when Joker was in the room. See Pet. App. 61 (citing, *inter alia*, *United States* v. *Longoria*, 177 F.3d 1179, 1184 (10th Cir.), cert. denied, 528 U.S. 892 (1999)).

[3] The district court noted that Title III applies only to oral communications "that are made while the communicator has exhibited 'an expectation that such communication is not subject to interception under circumstances justifying such expectation.'" Pet. App. 62 (quoting 18 U.S.C. 2510(2)). "[T]herefore," the court pointed

The district court acknowledged that "[v]ideo and audio surveillance are highly intrusive forms of investigative mechanisms and, for that reason, have been subjected to a high level of scrutiny." Pet. App. 63. Relying on *Minnesota* v. *Carter*, 525 U.S. 83 (1998), however, the court observed that "individuals who are on the premises at the invitation of the resident but are merely there to perform a commercial transaction" do not ordinarily have an "expectation of privacy at all," even where audio and video surveillance are involved. Pet. App. 66. The court reasoned that since petitioner was "merely present" in Joker's motel room to conduct a search, he was not a guest with any "degree of acceptance into [the] * * * household." *Id.* at 67-68.

The district court found that petitioner had "access to" Joker's motel room, and could "exclude" Joker from it, "only because [he] and the other police officers were law enforcement officers carrying out the authority of the state." Pet. App. 71, 73. In the court's view, "society would [not] accept as reasonable" an assertion of officer privacy under those circumstances, particularly because "[p]olice officers are public officials * * * expected to carry out their duties openly and subject to the reasonable scrutiny of the citizens they serve." *Id.* at 70-71. For the same reason, the court distinguished petitioner's primary authority for suppression, *United States* v. *Nerber*, 222 F.3d 597 (9th Cir. 2000). See Pet. App. 64-66. The court underscored that in *Nerber*, the defendants were "guests invited into [a] hotel room" for an interaction

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out, "there is no difference in analysis" under the Fourth Amendment and Title III, because both turned on whether petitioner had a reasonable expectation of privacy.

"ostensibly * * * benefi[cial]" both to themselves and to the residents, whereas the officers here—in their capacity as agents of the State—could not "be considered [Joker's] guests, either social or commercial." *Id.* at 65-66 (internal quotation marks omitted).

Following a jury trial, which included admission of the challenged recordings into evidence, petitioner was convicted as noted above. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. Pet. App. 51-52.

3. The court of appeals affirmed (Pet. App. 1-46), rejecting petitioner's suppression claim.[4] It agreed with the district court that petitioner had no reasonable expectation of privacy in the motel room during the officers' search for evidence of drug trafficking, *id.* at 20-27, and it "largely adopt[ed]" the district court's analysis, *id.* at 11.

Like the district court, the court of appeals acknowledged "the heightened scrutiny applicable to audio and video surveillance," but it concluded that affirmance was nevertheless warranted under *Carter*.[5] Pet. App. 26. In the court's view, petitioner "had no

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[4] The court of appeals also rejected petitioner's contentions that the evidence was insufficient (Pet. App. 27-37), that the district court erred in excluding certain defense evidence (*id.* at 37-42), and that the government elicited unfairly prejudicial testimony (*id.* at 42-46). Petitioner does not renew those contentions in this Court.

[5] Also like the district court, the court of appeals noted that, "for purposes of this case," there is no "material difference in analysis between Title III and the Fourth Amendment," because the question under both is whether "the individual whose actions are being recorded has [a] reasonable expectation of privacy at the time of the surveillance." Pet. App. 10-11 n.16.

socially meaningful connection to [Joker's] motel room," particularly because he spent only about "fifteen minutes in the room outside Joker's presence." *Id.* at 25. The court pointed to similarities between this case and *United States* v. *Larios*, 593 F.3d 82 (1st Cir.), cert. denied, 560 U.S. 935, and 130 S. Ct. 3527 (2010), where, as here, the defendant's presence in a motel room was "fleeting," the defendant "did not have a key" to the room, and he was not an "overnight guest." Pet. App. 22-25 (citation omitted). At the same time, the court of appeals distinguished *Nerber* as having "little meaningful to say about the facts in this case," "for the reasons identified by the district court." *Id.* at 26 n.19. The district court had found a "crucial difference" between this case and *Nerber* in that petitioner and Officer Gray "obtained access to the room not as guests [as in *Nerber*], but as law enforcement officers using the power of the state to obtain consent from the room's occupant." *Id.* at 14-15.

More broadly, the court of appeals rejected petitioner's argument that the district court erred by considering "where [petitioner's] speech took place, rather than [focusing] on [his] personal privacy expectations in the content of his conversations." Pet. App. 20. The court recognized that "the Fourth Amendment protects people, not places," *ibid.* (quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967)), but it observed that, under *Carter*, "the extent to which the Fourth Amendment protects people may depend upon where those people are," *ibid.* (quoting *Carter*, 525 U.S. at 88). The court concluded that endorsement of petitioner's assertion of privacy while searching Joker's motel room would be tantamount to adopting a

per se "rule of exclusion as to electronic surveillance" based solely on a defendant's subjective expectation of privacy, without regard to its "objective reasonableness." *Id.* at 26-27.

ARGUMENT

Petitioner asks this Court to grant a petition for a writ of certiorari in order to decide whether "a police officer conducting a consensual search in a closed motel room," in the absence of the person renting the room, has a reasonable expectation that he will not be subject to audio and video surveillance. Pet. ii (emphasis omitted); see Pet. 6-24. The court of appeals correctly concluded that petitioner had no such reasonable expectation of privacy, and its fact-bound decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. This Court has long "held that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable," *i.e.*, an expectation that is "recognized and permitted by society." *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143-144 & n.12 (1978)).

In *Carter*, a police officer looked through a gap in the closed blinds of an apartment's ground-floor window and saw the defendants packaging cocaine. 525 U.S. at 85. The defendants "had come to the apartment for the sole purpose of packaging the cocaine," they "were only [there] * * * for approximately 2½ hours," and they had given the householder some of the cocaine as payment for using the apartment. *Id.* at 86. This Court held "that any search which may

have occurred did not violate [the defendants'] Fourth Amendment rights" because they "had no legitimate expectation of privacy in the apartment." *Id.* at 91. The Court reasoned that, unlike overnight guests who enjoy "a degree of acceptance into [a] household," the defendants were "merely present with the consent of the householder" for a "business transaction," they "lack[ed] * * * any previous connection" to the householder, and their visit lasted "only * * * a matter of hours." *Id.* at 90-91. The Court concluded that such a "short-term business visit by a stranger" does not, standing alone, "entitle[] the visitor to share the Fourth Amendment protection of the * * * home." *Id.* at 90 n.*.

b. Petitioner does not dispute that the court of appeals correctly stated the principles enunciated in *Carter*. See Pet. App. 20-23, 26. Instead he contends (Pet. 18-22) that the court's application of *Carter* to the facts here is in tension with *Katz* v. *United States*, 389 U.S. 347 (1967). That is incorrect.

In *Katz*, the Court held that the government conducted a search and seizure when it used an electronic device attached to a phone booth to record and listen to the conversations of a person in that booth. 389 U.S. at 352-353. The Court reasoned that (1) a person who enters a telephone booth and shuts the door behind him manifests an expectation that his conversations will not be recorded; and (2) such a person, under customary social norms, is reasonably "entitled to assume" as much. *Id.* at 352; see *id.* at 361 (Harlan, J., concurring) (agreeing that those facts met the "twofold requirement" that a person manifest "an actual (subjective) expectation of privacy" which "society is prepared to recognize as 'reasonable'").

The decision below is consistent with both *Carter* and *Katz*. Under both cases, the dispositive question is whether—in view of objective societal norms—petitioner, in his capacity as a police officer, had a reasonable expectation of privacy while conducting a search of a suspect's motel room.[6] *Carter*, 525 U.S. at 88; *id.* at 101 (Kennedy, J., concurring); *Katz*, 389 U.S. at 352; *id.* at 361 (Harlan, J., concurring). And that is also how the court of appeals framed the issue. Pet. App. 21.

As petitioner emphasizes (Pet. i, 7, 20), *Katz* did state that "the Fourth Amendment protects people, not places." 389 U.S. at 351. But this Court has made clear that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Carter*, 525 U.S. at 88 (quoting *Rakas*, 439 U.S. at 143). That fact-specific inquiry depends upon the strength of the defendant's connection to the property and the nature of control that the person exerts over it. See *id.* at 88-91.

This Court has further held that, where a person's activities are subject to public exposure, no reasonable expectation of privacy arises. See, *e.g.*, *California* v. *Greenwood*, 486 U.S. 35, 40-41 (1988) (finding public accessibility of garbage bag on public street defeats

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[6] As both courts below recognized (Pet. App. 10 n.16, 62; see notes 3 & 5, *supra*), and as petitioner does not contest, that is likewise the dispositive inquiry under Title III, which regulates "oral communication[s] uttered by a person exhibiting an expectation that such communication[s] [are] not subject to interception *under circumstances justifying such expectation*." 18 U.S.C. 2510(2) (emphasis added).

an individual's claim of Fourth Amendment protection); *California* v. *Ciraolo*, 476 U.S. 207, 211-213 (1986) (upholding aerial observation of fenced-in back yard visible from public airspace); accord *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection.").

c. The courts below (Pet. App. 20-27, 63-73) correctly concluded that society does not recognize as reasonable an officer's expectation of privacy under the particular circumstances of this case.

Petitioner was an on-duty police officer engaged in official police business—namely, searching the motel room for evidence of drug trafficking. That circumstance defeats the objective reasonableness of any expectation of privacy. As the district court observed, "[p]olice officers are public officials * * * expected to carry out their duties openly and subject to the reasonable scrutiny of the citizens they serve." Pet. App. 71; see *Biehunik* v. *Felicetta*, 441 F.2d 228, 231 (2d Cir.) ("[I]t is a correlative of the public's right to minimize the chance of police misconduct that policemen, who voluntarily accept the unique status of watchm[e]n of the social order, may not reasonably expect * * * full privacy and liberty from police officials that [they] would otherwise enjoy."), cert. denied, 403 U.S. 932 (1971); Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 Yale L.J. 1549, 1555 (2008) ("[C]ourts recognize that police officers must expect less privacy than private citizens, both because of the public interest in monitoring police for abuses of power, and because police communications in the line of duty are generally less

intimate in nature than private citizens' communications."); *id.* at 1555-1556 nn.43-45 (citing cases).

Police searches, in particular, are subject to the scrutiny of others. An officer working at a crime scene may expect that, at any time, a fellow officer or supervisor could enter the location. Moreover, an officer ordinarily has a duty to document his actions in conducting the search, report them to his supervisors, and, where necessary, testify about them in open court. Such testimony frequently recounts the conversations among officers working at the scene. See, *e.g.*, *United States* v. *Massenburg*, 654 F.3d 480, 492-493 (4th Cir. 2011) (relying upon information actually communicated between officers to make a probable cause determination); *United States* v. *Harris*, 585 F.3d 394, 400-401 (7th Cir. 2009) (examining the degree of communication between officers at the scene of an arrest to decide suppression claim), cert. denied, 559 U.S. 1100 (2010).

This Court has recognized that it is "reasonable for police officers to themselves videotape home entries as part of a 'quality control' effort to ensure that the rights of homeowners are being respected, or even to preserve evidence." *Wilson* v. *Layne*, 526 U.S. 603, 613 (1999). And officers' actions are regularly recorded in analogous contexts such as traffic stops. See, *e.g.*, *United States* v. *Harmon*, 742 F.3d 451, 454 (10th Cir. 2014) (noting a standard police mechanism that "activate[s] [an] in-dash video recording system" whenever an officer turns on his cruiser's emergency lights).

Petitioner had no other "socially meaningful connection to the motel room." Pet. App. 25. Petitioner had not rented the room or entered it for personal

purposes. At the time of the challenged surveillance, petitioner had been in Joker's motel room for a matter of minutes solely to conduct a search. And although Joker consented to the search, petitioner was not Joker's invited guest. Rather, petitioner was present in the motel room only by virtue of his official position as a law enforcement officer who had "us[ed] the power of the state to obtain consent from the room's occupant." *Id.* at 15. The court of appeals therefore correctly found that petitioner had no reasonable expectation of privacy under *Carter* or *Katz*. *Id*. at 25-27.

2. Petitioner contends (Pet. 14-16) that the decision below conflicts with decisions from the Third and Ninth Circuits. But none of the cases petitioner cites involved facts remotely similar to those presented here: the audio and video surveillance of a police officer conducting a consensual search of a suspect's motel room. These cases therefore do not support petitioner's assertion that his expectation of privacy was reasonable, and they do not conflict with the decisions below.

In *United States* v. *Nerber*, 222 F.3d 597 (9th Cir. 2000), the defendants were private individuals, not police officers, who spent several hours (not 15 minutes) alone in the informants' motel room. *Id.* at 599. The informants in *Nerber* had invited the defendants into the room as guests—albeit ones who might potentially engage in an illegal drug transaction—not as law enforcement officers engaged in their public duties. *Ibid.* The courts below correctly distinguished *Nerber* on those bases. Pet. App. 14-15, 25 n.19, 66.

United States v. *Lee*, 359 F.3d 194 (3d Cir.) (Alito, J.), cert. denied, 543 U.S. 955 (2004), also does not

support petitioner's claim. *Lee* upheld the validity of video and audio recordings of private parties made inside an informant's own hotel room, while the informant was present. *Id.* at 198-199. Although the court stated in passing that Lee had an expectation of privacy when he was alone in the hotel room, *id.* at 201, the hotel room had been rented for Lee and Lee occupied it solely in his private capacity, *id.* at 199. *Lee* did not address the issue presented here of whether a police officer has a reasonable expectation of privacy while conducting a search of a third-party's room.

Finally, although the defendants in *United States* v. *Taketa*, 923 F.2d 665 (9th Cir. 1991), were law-enforcement officers, the surveillance in that case occurred in an individual officer's locked office, not in a location to which he had no social or commercial connection. *Id.* at 668-669, 674-675. That an officer might colorably expect some degree of privacy in his personal work space, see *O'Connor* v. *Ortega*, 480 U.S. 709 (1987), says nothing about the reasonableness of such expectations at premises of a third party that he enters solely to conduct a search. Because *Taketa* considered only a law enforcement officer's expectation of privacy in his office space and not in a place he enters to search, it creates no conflict with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2014