No. 98-2016

In the Supreme Court of the United States

JOSEPH GUARINO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court reviewing the constitutionality of a search warrant may look to evidence other than the affidavit accompanying the warrant application and a contemporaneous record of the warrant hearing to determine whether the warrant was issued on probable cause.

2. Whether, on the facts of this case, petitioner was entitled to an evidentiary hearing to challenge affidavits presented to establish that the search warrant in question was issued on probable cause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 169 F.3d 418. The opinion of the district court (Pet. App. B1-B10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1999. A petition for rehearing was denied on March 17, 1999 (Pet. App. D1). The petition for a writ of certiorari was filed on June 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the Northern District

of Illinois to one count each of illegal possession of machine guns, in violation of 18 U.S.C. 922(*o*), possession of an unregistered firearm, in violation of 26 U.S.C. 5861, and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841. He was sentenced to 42 months' imprisonment. The court of appeals affirmed. Pet. App. A4-A7.

1. On May 2, 1995, Judge Nello Gamberdino of Cook County, Illinois, issued a search warrant for petitioner's residence. Pet. App. C1. The warrant was based on a complaint that relayed, in first person narrative, the observations of a confidential informant referred to as "John Doe." The informant indicated that he had purchased cocaine from petitioner on repeated occasions and represented that, while in petitioner's residence one day earlier, he was told that petitioner had just received a large shipment of cocaine; the informant also reported that he saw petitioner bring up from the basement a clear plastic bag filled with many smaller packages of cocaine. *Id.* at A2-A3, C3-C4. The complaint, however, was not signed by the confidential informant; instead, it was signed by the officer who requested the warrant, Ken Howard. *Id.* at A3, C4. When county police officers executed the warrant on May 3, 1995, they seized numerous items, including the guns and drugs that formed the basis of the federal indictment against petitioner. *Id.* at A3-A4.

Petitioner moved to suppress all evidence seized pursuant to the warrant, claiming that the warrant had been issued in violation of the Fourth Amendment. Petitioner argued that because John Doe did not sign the complaint himself, there was no evidence that Doe had been placed under oath as required by the Oath or

Affirmation Clause of the Fourth Amendment.[1] Petitioner also argued that the complaint was constitutionally defective because it contained no information establishing Doe's reliability as an informant.

In response, the government presented affidavits from Judge Gamberdino (Pet. App. C6-C7) and Officer Howard (*id.* at C8-C9). Judge Gamberdino stated in his affidavit that both Officer Howard and John Doe (whom the Judge understood to be appearing under a pseudonym), had appeared personally before him on May 2, 1995, for the warrant hearing. The Judge also stated that he issued the warrant only "[a]fter reviewing the complaint * * * and considering the under oath statements of both individuals." *Id.* at C6. Moreover, although he could not recall his particular questions on May 2, the Judge stated that it was his "usual and regular practice to question both the officer and the informant" regarding reliability and credibility. *Id.* at C6-C7. See also *id.* at A5.

Officer Howard stated in his affidavit that he and John Doe had both appeared personally before Judge Gamberdino, and that the Judge had questioned them both about the complaint under oath. Officer Howard also stated that, although he did not recall the specific

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[1] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV (emphasis added). The Clause requires that a person giving information to support a finding of probable cause "manifest a recognition of his duty to speak the truth." *United States* v. *Richardson*, 943 F.2d 547, 549 (5th Cir. 1991).

questions Judge Gamberdino had asked, he did recall "that they concerned the reliability and credibility of the informant and his basis of knowledge for the facts alleged in the * * * complaint for search warrant." Pet. App. C8-C9. See also *id.* at A5.

Based on those affidavits, the District Court for the Northern District of Illinois denied petitioner's motion to suppress. Pet. App. B2. The court stated that, without more, the warrant on its face might violate the Fourth Amendment. *Id.* at B5. However, the court concluded that the affidavits established both that the Oath or Affirmation Clause was satisfied (by John Doe's sworn testimony concerning the complaint before Judge Gamberdino), and that the credibility and reliability requirement was presumptively satisfied (by Judge Gamberdino's questioning of Doe and Howard in court). Thus, Judge Gamberdino did not err in issuing the warrant. *Id.* at B5-B7.

Following the district court's decision, petitioner pleaded guilty to several of the charges in the indictment against him. He reserved the right to appeal the denial of his pretrial motion to suppress. Pet. App. A7.

2. On appeal, petitioner challenged the denial of his pretrial motion to suppress, and claimed for the first time that he was entitled to an evidentiary hearing to challenge the affidavits the government had submitted. Pet. App. A8.

The court of appeals affirmed. Pet. App. A1-A22. Although the court opined that "the preferred practice counsels that the issuing judge require that informants' statements be reduced to writing," the court also concluded that the "procedure employed in this case gave the judicial officer sufficient opportunity to obtain, under oath, enough information from the informant to satisfy the concerns protected by the oath or affirma-

tion requirement." *Id.* at A13. In particular, the court explained, "the issuing judicial officer's questioning of both Officer Howard and John Doe under oath prior to signing the search warrant was sufficient to satisfy the constitutional 'oath or affirmation' requirement," because Doe had been "subjected * * * to the possibility of prosecution for perjury," and the Judge's questioning had "enabled the judge to assess John Doe's credibility and reliability." *Id.* at A14.

Regarding petitioner's request for an evidentiary hearing, the court stated that the request would be reviewed only for plain error. No plain error had occurred, the court concluded, because petitioner had not offered any evidence to refute the affidavits and therefore had failed to raise a "significant disputed factual issue" requiring a hearing. Pet. App. A16-A17.

ARGUMENT

On June 21, 1999, this Court denied the petition for a writ of certiorari in *Wilson* v. *United States*, 119 S. Ct. 2383, a case arising from the same underlying facts as this petition, and involving issues identical to those presented here.[2] Petitioner's case is no more worthy of this Court's review.

1. Petitioner argues (Pet. 6-11) that the district court incorrectly relied on the affidavits of the issuing judge and the requesting officer to find probable cause.

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[2] Both petitioner and Wilson were named in the May 2, 1995 search warrant, both resided in the residence searched, and both were indicted based on items seized during that search. Wilson joined petitioner's motion to suppress, which was denied. Pet. App. A2-A5. In his petition for a writ of certiorari (at ii, 11), *Wilson* v. *United States*, *supra* (No. 98-9497), Wilson requested review of a question essentially identical to the first question presented in this case.

He claims that the Fourth Amendment requires that a court reviewing the constitutionality of a search warrant confine itself to the assessment of records made contemporaneously with the warrant proceeding. Petitioner does not, however, identify a division in circuit authority, or any other reason why review by this Court is currently appropriate.

Petitioner is, moreover, incorrect on the merits. The Fourth Amendment declares that search warrants shall not issue "but upon probable cause, supported by Oath or affirmation." U.S. Const. Amend. IV. Nothing in the Fourth Amendment requires that the oath or affirmation or the basis for probable cause be reduced to writing. The courts of appeals have, as a result, concluded not only that a judge may issue a warrant based on sworn testimony outside the warrant affidavit, see *United States* v. *Clyburn*, 24 F.3d 613, 617 (4th Cir.) (upholding warrant because oral testimony at warrant hearing supplied basis for issuing judge's finding that informant was reliable), cert. denied, 513 U.S. 907 (1994), but also that the Constitution does not require that such supplemental information be recorded, see *United States* v. *Shields*, 978 F.2d 943, 946 (6th Cir. 1992) ("The Fourth Amendment does not require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit."). See also *Clyburn*, 24 F.3d at 617 (citing cases from the Third, Fifth and Eighth Circuits). If the Constitution does not require contemporaneous recording of the evidence supporting probable cause, it surely cannot require that the reviewing court ignore all evidence other than the

contemporaneous recording when assessing whether probable cause was established.[3]

For related reasons, courts have consistently upheld warrants based on non-contemporaneous testimony regarding what occurred during the warrant hearing. See, *e.g.*, *United States* v. *Causey*, 9 F.3d 1341, 1343 (7th Cir. 1993) (upholding pseudonym warrant based on requesting officer's testimony that issuing judge knew informant was using pseudonym), cert. denied, 511 U.S. 1024 (1994); *United States* v. *Smith*, 9 F.3d 1007, 1012 (2d Cir. 1993) (upholding warrant based on issuing Judge's testimony at suppression hearing that he had relied on sworn testimony outside the affidavit). Indeed, if petitioner were correct, there would be no need for a suppression hearing when a warrant is challenged, as the reviewing court would be confined to written and electronically-recorded evidence; it would have no need for oral testimony regarding what actually occurred. In sum, the United States is aware of no authority supporting petitioner's position.[4]

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[3] Petitioner's reliance (Pet. 8) on *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971), is misplaced. There, the Court indicated that an "insufficient affidavit cannot be rehabilitated" through testimony that was "not disclosed to the issuing magistrate." *Ibid.* Here, the question is whether an affidavit can be supplemented by testimony that *was* disclosed to the magistrate in order to give a fuller and hence more accurate picture of whether the warrant was issued on the basis of probable cause.

[4] Petitioner apparently relies (Pet. 10) on Federal Rule of Criminal Procedure 41, which requires a contemporaneous recording of search warrant proceedings before a federal court. Rule 41 does not apply in petitioner's case because the warrant in question was issued by a state court and executed by state police officers. See, *e.g.*, *Clyburn*, 24 F.3d at 616. Petitioner does not suggest that the Constitution incorporates the procedural requirements of Rule 41.

To the extent that petitioner challenges the court of appeals' finding that the warrant in this case was based on probable cause (Pet. 11), that challenge is factbound and without merit. The confidential informant, under oath, indicated that he personally had bought cocaine from petitioner; that petitioner had told him that a large shipment of cocaine had arrived; and that he saw petitioner bring a clear bag full of smaller cocaine packages up from his basement. Pet. App. A2-A3, C3-C4. The judge that issued the warrant had the opportunity to question the informant, observe his demeanor, and make a reliability determination. *Id.* at A13, C6-C7. Because the judge that issued the warrant had a "'substantial basis for . . . conclud[ing]' that probable cause existed," the courts here properly declined to set that determination aside. *Illinois* v. *Gates*, 462 U.S. 213, 238-239 (1983) (quoting *Jones* v. *United States*, 362 U.S. 257, 271 (1960)).

2. Petitioner also argues (Pet. 12-15) that he is entitled to an evidentiary hearing to challenge Judge Gamberdino's and Officer Howard's affidavits. The court of appeals was correct to review that claim only for plain error, see Fed. R. Crim. P. 52(b), and it is clear that the district court did not commit an "obvious" error that "affect[ed] [petitioner's] substantial rights" by failing sua sponte to hold an evidentiary hearing concerning the content of the affidavits. See *United States* v. *Olano*, 507 U.S. 725, 732-733, 734 (1993).

Petitioner claims (Pet. 13) that he is entitled to a hearing because "[i]t is beyond real dispute that the statements in [Judge Gamberdino's] affidavit are conclusionary in form and ambiguous." There is no need, however, to hold a hearing to consider that type of claim; it can be resolved by looking to the affidavit itself, and already has been—to petitioner's detriment.

Petitioner, moreover, offered no evidence to suggest that Judge Gamberdino's or Officer Howard's accounts were untruthful or incorrect. Under those circumstances, the district court did not commit plain error by failing to hold the hearing that petitioner never requested.

Finally, petitioner claims (Pet. 12) that the "importance of review" requires that oral testimony, instead of written affidavits, be offered in support of a finding of probable cause. The argument is difficult to reconcile with petitioner's contrary argument that, when reviewing whether probable cause was established, the court should look at the written record alone. In any event, petitioner offers no explanation why a court cannot review testimony equally well in written or oral form.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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