No. 05-126

In the Supreme Court of the United States

MIN YOON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION 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 a warrantless entry of law enforcement officers into an apartment to arrest petitioner violated the Fourth Amendment where the officers were summoned by a cooperating informant who had been invited into the apartment for a drug transaction and who observed contraband once inside the apartment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 398 F.3d 802.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2005. A petition for rehearing was denied on May 12, 2005 (Pet. App. 26). The petition for a writ of certiorari was filed on July 20, 2005. 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 Middle District of Tennessee, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute 50 kilograms or more of marijuana, in violation of 21 U.S.C.

846, and one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 97 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-25.

1. In June 2002, Meen Kim was arrested while delivering ten pounds of marijuana to a cooperating informant. Following his arrest, Kim agreed to cooperate with the continuing investigation of the Tennessee Bureau of Investigation (TBI). Pet. App. 3; Gov't C.A. Br. 4.

As part of his cooperation, Kim made a series of phone calls to petitioner and arranged to purchase 20 pounds of marijuana from him. Petitioner refused to consign the marijuana to Kim, insisting instead on receiving cash at the time of delivery. Kim informed TBI that he had previously picked up drugs from petitioner at an apartment at 2010 Brentridge Circle. Anticipating that the arranged transaction might occur at the same location, TBI established surveillance on the apartment. Pet. App. 3; Gov't C.A. Br. 4.

Petitioner later called Kim and directed Kim to come over to the apartment to conclude the transaction. TBI did not have sufficient funds to cover the entire cost of the purchase, and it instead gave Kim the $3500 that it had on hand. TBI also provided Kim with an audio transmitter and instructed him to inform the investigators once he saw marijuana inside the apartment. A TBI agent testified that the circumstances, including the lack of sufficient funds to complete the transaction, caused him to be concerned for Kim's safety. Pet. App. 3; Gov't C.A. Br. 5-6.

Kim knocked on the door to the apartment, exchanged greetings with petitioner, and was admitted

into the apartment by petitioner. Once inside, Kim observed the marijuana and notified the officers of his observation by asking petitioner, "[h]ey, are you having to break it down?" Petitioner responded affirmatively. Kim then asked, "[w]ell, is that all there is," to which petitioner responded, "[n]o, no, there's more." Pet. App. 3; Gov't C.A. Br. 6; 10/18/02 Suppression Tr. 35.

Upon hearing that exchange, law enforcement officers entered the apartment and arrested petitioner as he was trying to escape out the window. During a protective sweep of the apartment, officers found approximately 80 pounds of marijuana in plain view. After advising petitioner of his *Miranda* rights, the officers asked him if would consent to a search of the apartment. Petitioner responded, "Go ahead, you're already here." Pet. App. 3.

2. Following his indictment, petitioner moved to suppress the evidence found in the apartment. After receiving testimony and argument, the district court issued an oral ruling denying the motion. In relevant part, the court ruled that the officers' entry into the apartment was authorized by the "consent-once-removed" doctrine recognized in *United States* v. *Pollard*, 215 F.3d 643 (6th Cir.), cert. denied, 531 U.S. 999 (2000). The court also held that the protective sweep was justified and that the marijuana was found in plain view. Pet. App. 4; 10/18/02 Suppression Tr. 181-183. Petitioner subsequently entered a conditional guilty plea, reserving "the right to appeal the determination of the appropriateness of the entry and search of 2010 Brentridge Circle." Pet. App. 4.

3. A divided panel of the Sixth Circuit affirmed. Pet. App. 1-25.[1]

a. The court began by explaining that it had previously held that "the police can enter a suspect's premises to arrest the suspect without a warrant if '[an] undercover agent or informant: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers.'" Pet. App. 6-7 (quoting *Pollard*, 215 F.3d at 648). The subsequent entry of the other officers, the court explained, is valid because "no further invasion of privacy is involved once the undercover officer and informant make the initial consensual entry." Pet. App. 10.

Although the present case is similar to *Pollard*, the court noted that it differed from *Pollard* in one respect. In *Pollard*, an informant and an undercover officer had been invited into the premises. In the present case, only the informant had been invited in. It was thus necessary for the court to decide whether the doctrine of "consent once removed" recognized in *Pollard* also applied where an undercover officer did not accompany the informant into the premises. Pet. App. 7-9. The court held that the doctrine applied in that situation, relying in large

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[1] Petitioner also challenged a sentencing enhancement he had received for obstructing justice based on his having posted an anonymous webpage displaying a photograph of Kim, identifying Kim as an "FBI Informant," and threatening Kim with both an image of a pistol firing at Kim's head and text expressing the hope that Kim "would 'get . . . [his] ass beat daily.'" Pet. App. 4. The court of appeals rejected petitioner's sentencing challenge because he had waived his right to appeal his sentence in his plea agreement. *Id.* 4-5, 11. Petitioner does not renew his sentencing challenge in this Court.

part on similar cases from the Seventh Circuit. See *id.* at 10-11 ("Today, we extend [*Pollard*] to cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest."); *id.* at 9-10 (discussing the decisions of the Seventh Circuit and adopting the reasoning in those cases).

Considering the specific facts of this case, the court of appeals explained that Kim had been invited into the apartment, had observed the marijuana after he was inside, and had immediately notified the awaiting officers. The court therefore concluded that "all three criteria of the 'consent once removed' doctrine were established in the present case." Pet. App. 10.

b. Judge Kennedy filed a concurring opinion to amplify the reasons that the doctrine of "consent once removed" applies where the initial entry is by an informant. Pet. App. 12-17. Judge Kennedy explained that the doctrine is grounded in the recognition that, "once the suspect invites the agent or informant into his house and displays his illegal activity to him," the "back-up officers[']entry into the suspect's home does not offend the Constitution because the suspect's expectation of privacy has been previously compromised." *Id.* at 15-16. With respect to the ensuing arrest, Judge Kennedy reasoned that, "once the invitee establishes probable cause to arrest, he may call for additional officers to *assist* him in effectuating the arrest." *Id.* at 16. Because the arrest power under the law of many States (including Tennessee) extends beyond law enforcement officers to encompass citizens, Judge Kennedy perceived "no justifiable distinction between [an] undercover officer's and an informant's ability to call upon the police to aid in the arrest." *Id.* at 17.

c. Judge Gilman dissented. Pet. App. 18-25. In his view, the "doctrine of consent once removed is made conceptually possible by law-enforcement powers that have been granted to the police, but never to civilians," namely, the power to seize evidence in plain view and the theory that the knowledge of one law enforcement officer can be imputed to another officer involved in the same investigation. *Id.* at 20-21. He therefore believed that applying the doctrine in this case impermissibly entrusted informants with powers previously limited to the police. *Id.* at 22.

ARGUMENT

Petitioner contends (Pet. 3-16) that the court of appeals erred in extending the doctrine of consent once removed to a situation in which a cooperating informant (rather than an undercover officer) is invited into a residence, observes contraband and a felony occurring within the residence, and immediately signals the police monitoring him to arrest the suspect. That contention does not merit this Court's review.

1. As petitioner effectively acknowledges (Pet. 4-7), there is no conflict among the courts of appeals concerning the validity of the doctrine of consent once removed. To the contrary, the three courts of appeals to have addressed the issue have adopted the doctrine. See *United States* v. *Pollard*, 215 F.3d 643, 648-649 (6th Cir.), cert. denied, 531 U.S. 999 (2000); *United States* v. *Bramble*, 103 F.3d 1475, 1478-1479 (9th Cir. 1996); *United States* v. *Diaz*, 814 F.2d 454, 459 (7th Cir.), cert. denied, 484 U.S. 857 (1987). See also *State* v. *Johnston*, 518 N.W.2d 759, 762-766 (Wis.), cert. denied, 513 U.S. 1021 (1994); *State* v. *Henry*, 627 A.2d 125, 130-131 (N.J.), cert. denied, 510 U.S. 984 (1993).

Few decisions address the applicability of the doctrine to the circumstances of this case, where the initial consensual entry is by a cooperating informant rather than an undercover officer. Nevertheless, the Sixth and Seventh Circuits, the only two courts of appeals to have addressed the issue, agree that the doctrine applies where a cooperating informant acting on behalf of the government is invited into the residence. See Pet. App. 6-11; *United States* v. *Paul*, 808 F.2d 645 (7th Cir. 1986).

2. There is no merit to petitioner's contention (Pet. 7-16) that the decision below is inconsistent with this Court's decisions. Although the Fourth Amendment generally requires that police officers have a warrant before entering a suspect's residence to make an arrest, this Court has long recognized an exception to the warrant requirement where the suspect consents to an agent's entry into the home. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Pollard*, 215 F.3d at 648. Here, there is no dispute that petitioner consented to Kim's entry into the apartment. There thus is also no dispute that Kim, although an agent of the government, was authorized under the Fourth Amendment to enter the apartment, to have the government monitor and record his conversation with petitioner, and to observe anything in plain view within those areas encompassed by petitioner's consent. See, *e.g.*, *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Paul*, 808 F.2d at 648; *United States* v. *Janik*, 723 F.2d 537, 548 (7th Cir. 1983).

The consent-once-removed doctrine is grounded in the implications of that initial consensual entry for petitioner's privacy interests in his apartment. As the court explained in *Paul*, "[t]he interest that the *Payton* decision protects is the interest in the privacy of the home,"

and that interest was "compromised" when petitioner invited Kim, an agent acting on behalf of the government, into the apartment. 808 F.2d at 648; *Bramble*, 103 F.3d at 1478.

In inviting Kim into the apartment, petitioner exposed the contraband and the apartment to the government. The entry of additional agents into the apartment to arrest petitioner, while Kim remained there, worked no constitutionally significant incremental interference with petitioner's privacy interests. The agents were exposed to the same area and contraband that Kim had seen and continued to witness. See, *e.g.*, Pet. App. 10; *Pollard*, 215 F.3d at 649; *Bramble*, 103 F.3d at 1478; *Paul*, 808 F.2d at 648; *Janik*, 723 F.3d at 548. Cf. *United States* v. *Jacobsen*, 466 U.S. 109, 119-120 (1984) (privacy interest not invaded where government reexamines package previously examined by private party because the expectation of privacy has already been frustrated by the private search); *Illinois* v. *Andreas*, 463 U.S. 765, 771-772 (1983) (reopening container government previously searched not a new search because the government already knew its contents); *United States* v. *Rubio*, 727 F.2d 786, 797 (9th Cir. 1984) (once consent to search provided, using additional officers to conduct the search would not further diminish the consenting party's privacy interest).[2]

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[2] Petitioner is mistaken in contending (Pet. 12) that the doctrine of consent once removed renders the "rules concerning the requisites of a warrant application * * * [un]necessary." Petitioner's argument fails to appreciate the limited scope of the doctrine, which is bounded both temporally and by the scope of the initial consent. See, *e.g.*, Pet. App. 7 n.1 ("doctrine does not permit the officers who enter * * * to conduct a general search" but is instead limited to calling them in, once probable cause is established, "to assist in effectuating the *arrest*");

Significantly, petitioner does not contest the validity of the consent-once-removed doctrine where the initial entry is by an undercover officer. See Pet. 7. He instead contends that the doctrine cannot constitutionally be applied where the initial entry is by a cooperating informant. That contention lacks merit. As the foregoing discussion demonstrates, the doctrine does not rest on the notion that the admitted party possesses particular law enforcement powers. Instead, it is grounded in the diminished interest in privacy resulting from the consensual exposure of the premises to an agent of the government. See Pet. App. 15-17. Insofar as a particular law enforcement authority bears on the validity of petitioner's arrest, it is the arrest authority. And as the court of appeals explained, private citizens often possess—including under Tennessee law—the authority to make an arrest based on probable cause to believe that a felony has been committed. Pet. App. 10 n.2, 16-17.

Bramble, 103 F.3d at 1478-1479 (backup officers limited from going beyond areas covered by the consent, absent a separate constitutional basis for doing so); *Diaz*, 814 F.2d at 459 (emphasizing that the doctrine is temporally limited). In addition, insofar as there may be questions about the potential scope of the doctrine, those questions are not raised by the factual circumstances of this case. The officers in this case entered while Kim was still in the apartment; they immediately arrested petitioner; and their additional examination of the apartment was a permissible protective sweep following the arrest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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