No. 16-253

In the Supreme Court of the United States

LEON TRENTON-GERAD BINFORD, 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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QUESTIONS PRESENTED

1. Whether detaining and questioning petitioner during a warrant-authorized search of his apartment violated the Fourth Amendment and required suppression of physical evidence uncovered during the search.

2. Whether an officer's statement "you help me, I'll help you" was so coercive that it rendered a statement by petitioner, who understood and signed a *Miranda* waiver, involuntary under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 818 F.3d 261. The order of the district court (Pet. App. 38a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-26a) was entered on March 31, 2016. On June 19, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 28, 2016, and the petition was filed on August 26, 2016. 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 Michigan, petitioner was convicted of possessing a firearm as a previously convicted felon, in violation of 18 U.S.C. 922(g)(1), and

of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release.[1] The court of appeals affirmed. Pet. App. 1a-24a.

1. In the fall of 2012, a confidential informant for the Oakland County (Michigan) Narcotics Enforcement Team conducted two controlled purchases of marijuana from petitioner in the parking lot of petitioner's apartment building. Pet. App. 3a. Based on the details of those purchases—including audio and video surveillance—officers obtained a search warrant for petitioner's apartment. *Ibid.* Petitioner had a history of "gun-related or violent offenses." *Ibid.* The Special Entry and Response Team (SERT), dressed in "black tactical uniforms," made the initial forced entry into petitioner's apartment. *Id.* at 3a-4a. The SERT handcuffed petitioner, who was standing naked in the doorway of the master bedroom; the team took petitioner's girlfriend and child, who had been in the bedroom, to sit on the living-room couch, and petitioner was given a bedsheet to cover himself. *Ibid.*

The initial sweep took five or six minutes. The SERT then left and Detective Paul Kinal and his investigative team entered petitioner's apartment to conduct the search. Pet. App. 4a. Detective Kinal escorted petitioner to the quietest place in the apartment—the master bathroom, a six foot by five

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[1] Petitioner was initially sentenced to 180 months of imprisonment under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). Pet. App. 30a. In light of this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the court of appeals vacated that sentence and remanded for resentencing at which point the district court imposed the lower sentence. Pet. App. 3a, 59a, 61a.

foot room—to talk with him. *Id.* at 4a-5a. Petitioner sat on the toilet with his hands now cuffed in front of him while Detective Kinal stood near the sink. *Id.* at 5a. Petitioner "immediately started apologizing about what was going on," but Detective Kinal stopped him and gave him *Miranda* warnings, which petitioner understood and waived in writing. *Ibid.*

After signing the *Miranda* waiver, petitioner answered Detective Kinal's questions. Pet. App. 5a-6a. He admitted that he sold small amounts of marijuana in the parking lot behind the apartment building; that "there was a pistol in a boot on the top shelf of the master bedroom closet" and marijuana in the home; and that he knew he was not supposed to have a gun. *Id.* at 6a. In total, they spent about 15 to 20 minutes in the bathroom. *Ibid.* Detective Kinal never told petitioner he was under arrest, but did tell him that he was the focus of the investigation and acknowledged that petitioner was not free to leave. *Ibid.* Detective Kinal never raised his voice or threatened petitioner. *Id.* at 7a.

Petitioner was "eager to become an informant, but [Detective] Kinal never promised him anything in return for his cooperation." Pet. App. 6a. Detective Kinal told petitioner, in a generalized way, something to the effect of "you help me, I'll help you." *Id.* at 7a.

Following the questioning, Detective Kinal took petitioner into the bedroom and petitioner pointed out the location of the gun in the closet. Pet. App. 7a. Near the women's boot hiding the gun was a prescription bottle with petitioner's name on it. *Ibid.* In total, the search netted the gun, 42 grams of marijuana, marijuana packaging devices, and $190 in cash ($40 of which was in petitioner's girlfriend's purse). *Id.* at 8a.

2. Petitioner moved to suppress the evidence obtained during the search on the grounds that it was tainted by his statements, which were, he claimed, both the product of an illegal arrest and coerced. Pet. App. 8a. After a hearing at which Detective Kinal and petitioner testified, the district court denied the motion. *Ibid.* The court found that it was "clear [petitioner] understood his rights and signed the Miranda rights form" and no reason existed to impugn the waiver. *Id.* at 52a. Considering the totality of the circumstances, the court also found that Detective Kinal's statement "you help me, I'll help you" did not "rise to the level of police coercion required for suppression of [a] statement." *Ibid.*

Petitioner proceeded to trial before a jury and was convicted. Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-24a. First, the court held that petitioner's "detention was permissible under *Michigan v. Summers*, 452 U.S. 692 (1981), and its progeny" and "did not amount to an illegal arrest." Pet. App. 10a. Under *Michigan* v. *Summers*, 452 U.S. 692 (1981) the court continued, officers may detain individuals in a home while they execute a search warrant. *Ibid.* And under *Muehler* v. *Mena*, 544 U.S. 93, 99-101 (2005), "they may question occupants during the search so long as the questioning does not prolong the search." Pet. App. 10a. Because Detective Kinal's questioning of petitioner in the bathroom was a "brief investigatory detention" supported by the same probable cause underlying the search warrant, designed "to confirm or dispel his suspicions quickly," and Detective Kinal did not remove petitioner from the home, the court found it permissible. *Id.* at 10a-15a (citation and brackets

omitted). Alternatively, the court held that because the questioning did not prolong the search, it was not a separate seizure from the execution of the warrant and posed no Fourth Amendment problem. *Id.* at 15a-16a.

Second, the court of appeals conducted a "three-step analysis" of the coercion claim, considering whether: "(i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant's will; (iii) and the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statements." Pet. App. 17a (quoting *United States* v. *Mahan*, 190 F.3d 416, 422 (6th Cir. 1999)). The court concluded that petitioner's argument failed at the first step because Detective Kinal's statements were not objectively coercive. *Id.* at 18a-19a. "[A]t most," Detective Kinal implied leniency for petitioner if petitioner cooperated, and that promise was neither broken nor illusory. *Ibid.* As a drug-task-force detective, the court explained, Detective Kinal "had the authority" to make the promise. *Id.* at 19a. And "there [wa]s no evidence, and [petitioner did] not allege, that [Detective] Kinal broke his promise" because petitioner refused to cooperate. *Ibid.*

ARGUMENT

Petitioner renews his contentions that the evidence against him should have been suppressed because it flowed from his allegedly illegal arrest (Pet. 8-22) and his allegedly coerced confession (Pet. 22-31). The court of appeals correctly rejected these arguments. Despite petitioner's suggestions to the contrary, the courts of appeals are not divided on either question and this Court has already resolved the Fourth

Amendment issue in *Muehler* v. *Mena*, 544 U.S. 93 (2005). Further review is unwarranted.

1. Petitioner's Fourth Amendment claim does not merit further review.

a. The court of appeals correctly determined that Detective Kinal's questioning of petitioner during the execution of the search did not independently implicate the Fourth Amendment. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court noted that the detention of an occupant of a place being searched for contraband only marginally intrudes upon the occupant's privacy interests, *id.* at 701-702, while advancing substantial law enforcement interests such as "preventing flight," "minimizing the risk of harm to the officers," and "orderly completion of the search," *id.* at 702-703. Accordingly, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnote omitted). The *Summers* rule, as this Court has since noted, is "categorical" and inherently includes "the authority to use reasonable force to effectuate the detention." See *Muehler*, 544 U.S. at 98-99.

Petitioner's detention here was essentially the same as that in *Muehler*. As in *Muehler*, petitioner was handcuffed by the special response team that initiated the search and detained in a part of the residence that was not being searched. Compare *Muehler*, 544 U.S. at 96, with Pet. App. 4a-5a. And as in *Muehler*, this quantum of force—using handcuffs—was reasonable where the "warrant authorize[d] a search for weapons." 544 U.S. at 100; see Pet. App. 3a-4a.

This Court has further held, in *Muehler*, that questioning someone detained during a search pursuant to *Summers* does not expand the scope of the search or otherwise independently implicate the Fourth Amendment so long as the questioning does not prolong the search. *Muehler*, 544 U.S. at 101; see *Rodriguez* v. *United States*, 135 S. Ct. 1609, 1614 (2015) (critical question for Fourth Amendment purposes was whether the "unrelated investigation[]" prolonged the traffic stop).

Petitioner attempts (Pet. 11) to distinguish *Muehler*, arguing that the defendant there was "asked questions *incident to* [her] detention" whereas petitioner "was subjected to an enhanced detention that bore the hallmarks of an arrest solely *for the purpose* of interrogating him." That argument is flawed in three ways. First, as discussed above, petitioner's detention was no more "enhanced" than that in *Muehler* and it did not bear the most obvious hallmark of arrest: removing the suspect from the place of detention to a police station or jail, or at the least, a police vehicle. See Pet. App. 14a. Second, the officer's subjective motivation in detaining or questioning the individual is not relevant under the Fourth Amendment. See *Whren* v. *United States*, 517 U.S. 806, 813 (1996). Third, the interrogation in *Muehler* was even less related to the search than the interrogation here, and *Muehler* shows that a connection between the search and the questioning is not necessary. In *Muehler*, the agents were executing a warrant related to violent gang activity. 544 U.S. at 95-96. They brought an immigration agent with them, and that agent asked the suspects incriminating questions about their immigration status, which was unrelated

to—and therefore not "incident to"—the search. *Id.* at 96. This Court was not concerned with either the incriminating nature of the questioning or its lack of connection to the search. *Id.* at 101. Here, Detective Kinal's questioning related directly to the subject matter of the search. Pet. App. 5a-6a.

Even if, despite *Summers* and *Muehler*, Detective Kinal's questioning of petitioner required reasonable suspicion, that existed here because the probable cause underlying the search warrant pertained to petitioner personally. Pet. App. 14a. Petitioner's rejoinder (Pet. 14-17) that a search warrant and an arrest warrant are two different things misses the point: petitioner was not arrested. At most, petitioner was detained for additional investigation to confirm or dispel the officer's reasonable suspicions about possible criminal activity. Pet. App. 15a.

b. Petitioner does not dispute (Pet. 11) that law enforcement officers "have a categorical right under *Summers* to detain occupants for the duration of a search." He contends instead (*ibid.*) that the courts of appeals are split on how to determine whether the detention was "effectuated in a reasonable manner." This is not so. All courts weigh the intrusion on the individual against the need to serve legitimate law-enforcement interests in determining whether the manner of detention was reasonable. See *Stewart* v. *United States*, 101 F.3d 1392, 1996 WL 387219, at *2 (2d Cir. 1996) (Tbl.) (unpublished) (handcuffing children for 42 minutes acceptable due to the "inherent dangerousness of executing the search warrant"); *United States* v. *Allen*, 618 F.3d 404, 408-409 (3d Cir. 2010) (balancing police interests against employee's privacy when he was detained at his place of employ-

ment at gunpoint), cert. denied, 563 U.S. 938 (2011); *Unus* v. *Kane*, 565 F.3d 103, 120 (4th Cir. 2009) (the manner of detention, "specifically, the handcuffing" must be reasonable considering the circumstances), cert. denied, 558 U.S. 1147 (2010); *Baird* v. *Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009) (collecting cases on whether pointing a gun at someone during a detention is excessive);[2] *United States* v. *Stout*, 439 Fed. Appx. 738, 747 (10th Cir. 2011) (unpublished) (ordering suspect to kneel and then handcuffing suspect was "reasonable means" where search warrant authorized search for weapons, an "inherently dangerous situation") (citation omitted), cert. denied, 132 S. Ct. 1599 (2012); *Croom* v. *Balkwill*, 645 F.3d 1240, 1250-1253 (11th Cir. 2011) (per curiam) (holding under the "clear and categorical rule laid down in *Summers*, as reinforced by its application [in] *Mena*, [that] Croom's initial seizure was plainly constitutional" and the de minimis use of force involved at the beginning of the search was reasonable when it occurred on the front lawn of a house known to be involved in the distribution of controlled substances).

The Sixth and Eighth Circuits do not disagree. See, *e.g.*, *Burchett* v. *Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002) (although detention permissible under *Summers*, excessive force claim not subject to summary judgment where officers detained plaintiff "for three hours in an unventilated police car in extreme heat"); *Lykken* v. *Brady*, 622 F.3d 925, 933 (8th Cir. 2010)

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[2] In the case petitioner cites (Pet. 11), *United States* v. *Bullock*, 632 F.3d 1004 (2011), the Seventh Circuit first affirmed the defendant's detention as a *Terry* stop, *id.* at 1018, in that he had left the residence before the search and was pulled over "a few blocks away," before discussing, in dictum, *Summers*, *id.* at 1019.

(examining the length and intrusiveness of a *Summers* detention to determine reasonableness).

In arguing otherwise, petitioner conflates an officer's questioning of a detained individual with the manner of detention. The latter concerns the physical attributes of detention: its duration, the use of handcuffs, the drawing of weapons, permitting detainees to use the restroom, and so on. See, *e.g.*, *Mlodzinski* v. *Lewis*, 648 F.3d 24, 34 (1st Cir. 2011) (in analyzing an excessive force claim, the "duration of the use of handcuffs must be objectively reasonable given the context"); *Heitschmidt* v. *City of Houston*, 161 F.3d 834, 836-839 (5th Cir. 1998) (manner of detention unreasonable where plaintiff allegedly "suffered permanent serious injury to his wrists" from handcuffs that were applied too tightly for four and a half hours).[3]

The sole case petitioner cites involving questioning of the detained individuals, *Ganwich* v. *Knapp*, 319 F.3d 1115 (9th Cir. 2003), both predates *Muehler* and differs from this case in a critical respect. In *Ganwich*, the court found no problem with the detention of several employees at their employer's office during the execution of a search warrant when the employer company was suspected of fraud. *Id.* at 1121. The court, however, reversed the grant of summary judgment in the officers' favor because they allegedly "told the plaintiffs, who already had been detained for more than an hour, that they would not be released until they submitted to individual interrogations" and "this sort of coerced interrogation is a serious intrusion

[3] To the extent *Heitschmidt* weighed the propriety of the plaintiff's detention itself, as opposed to its manner, against the officers' interests, it erred, as demonstrated by *Muehler*'s later pronouncement that *Summers*' rule is "categorical." *Muehler*, 544 U.S. at 98.

upon the sanctity of the person." *Ibid.* Notably, the *Ganwich* court lacked this Court's guidance in *Muehler* that questioning during a *Summers* detention does not implicate any independent Fourth Amendment interest. And more importantly, *Ganwich* addressed a unique situation: officers conditioned a person's release from custody on his providing a statement. That is not what happened here. Detective Kinal's questioning lasted only a short time, during which the search was ongoing. Petitioner would have been detained in any event, as in *Muehler*. And Detective Kinal Mirandized petitioner, explicitly affording him the right not to speak. Both because it has been abrogated in part by *Muehler* and because its facts were unique, *Ganwich* provides no basis for finding a split amongst the circuits.

c. Even assuming that the Fourth Amendment limits on questioning the subject of a criminal investigation during the search of that subject's home might merit review in some case, this case presents a poor vehicle for those issues. Even if petitioner had been subject to an illegal arrest, he would not be entitled to the suppression of the gun and other physical evidence. At the time Detective Kinal questioned petitioner, other officers were actively engaged in searching petitioner's apartment for drugs, money, and firearms pursuant to a valid search warrant. One officer was already searching the closet where the gun was found. Decl. of Leon Trenton-Gerald [*sic*] Binford (D. Ct. Doc. 34-5, at 2) (July 15, 2013). Accordingly, the officers inevitably would have discovered the gun even without petitioner's statements. Suppression is therefore not warranted under the inevitable discovery doctrine. See *Nix* v. *Williams*, 467 U.S. 431, 449 (1984)

(suppression inappropriate where search party was looking for victim's body when the defendant identified its location even though the search party was more than two miles from the body at that time).[4] Because the physical evidence would not have been suppressed regardless of whether petitioner's statement was the product of any inappropriate detention or arrest, this case presents a poor vehicle for addressing the government's ability to detain and question the occupants of a home during the execution of a search warrant.

2. Petitioner's Fifth Amendment claim, which challenges the lower courts' conclusion that his statement was voluntary, does not merit further review, either.

a. The court of appeals correctly determined that Detective Kinal did not coerce petitioner into making an incriminating statement. An individual's confession is involuntary only if, because of the government's conduct, "his will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (citation

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[4] Petitioner argues (Pet. 22) that the government conceded that absent the confession the police would not have found the gun and that the government would not have obtained convictions. That is incorrect. In opposing suppression of petitioner's statement and the firearm for a purported *Miranda* violation, the government argued that, under the inevitable discovery rule, suppression was unwarranted because officers were actively searching for guns, drugs, and paraphernalia in petitioner's closet when petitioner pointed out the location of the firearm and would have discovered them pursuant to that search. See Gov't Resp. to Mot. to Suppress 9-10 (D. Ct. Doc. 34). The same analysis applies to a purported Fourth Amendment violation. The government has never repudiated the application of the inevitable discovery doctrine to this case.

omitted). A court must consider "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. The relevant characteristics of the individual include his age, education, physical condition, and mental health; the relevant details of the interrogation include the use of coercive tactics, the length of the interrogation, and the location. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 693-694 (1993); *Schneckloth*, 412 U.S. at 226; *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958).

As this Court has noted, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986). Detective Kinal's statement "you help me, I'll help you" is the only police activity that petitioner contends is coercive. The coercive effect, if any, of an officer's promise of leniency depends on the facts and circumstances of the case. Although this Court said in *Bram* v. *United States*, 168 U.S. 532 (1897), that "a confession, in order to be admissible, * * * must not be * * * obtained by any direct or implied promises, however slight," that 119-year-old statement is no longer accurate. *Id.* at 542-543 (citation omitted). As this Court has since recognized, "this passage from *Bram* * * * under current precedent does not state the standard for determining the voluntariness of a confession." *Arizona* v. *Fulminante*, 499 U.S. 279, 285 (1991). In the wake of *Fulminante* and other decisions by this Court, "there has been a movement away from treating * * * promises of leniency as *per se* producing involuntariness." 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c), at 625 (3d ed. 2007).

Instead, like the court of appeals in this case, lower courts have treated a promise of leniency as but one factor in the totality of the circumstances under which the voluntariness of a confession is judged. See, *e.g.*, *Green* v. *Scully*, 850 F.2d 894, 901 (2d Cir.) (asserting that "the presence of a direct or implied promise of help or leniency alone has not barred the admission of a confession where the totality of the circumstances indicates it was the product of a free and independent decision"), cert. denied, 488 U.S. 945 (1988); *Miller* v. *Fenton*, 796 F.2d 598, 608 (3d Cir.) (noting that "it does not matter that the accused confessed because of [a] promise, so long as the promise did not overbear his will"), cert. denied, 479 U.S. 989 (1986); see also *United States* v. *Jacobs*, 431 F.3d 99, 109 (3d Cir. 2005) (concluding that an officer's promise to a suspect "in exchange for that person's speaking about the crime does not automatically render inadmissible any statement obtained as a result of that promise," but that "a promise * * * is a factor (indeed, a potentially significant one) in the totality of the circumstances inquiry as to whether a statement was voluntary") (citation omitted). In *United States* v. *LeBrun*, 363 F.3d 715 (2004), cert. denied, 543 U.S. 1145 (2005), the en banc Eighth Circuit reiterated the principle that "a promise made by law enforcement does not render a confession involuntary per se." *Id.* at 725 (citation and internal quotation marks omitted).

Here, Detective Kinal's promise was the type of "vague promise[] of leniency for cooperation [that is] just one factor to be weighed in the overall calculus and generally will not, without more, warrant a finding of coercion." *United States* v. *Gaines*, 295 F.3d 293, 299 (2d Cir. 2002). Kinal's statement that "you

help me, I'll help you," did not convey any specific form of help or assure petitioner that his words would not be used against him under any circumstances. And offering petitioner a chance to cooperate and thereby mitigate criminal exposure (if that is what Kinal's statement meant) did not undercut the *Miranda* warnings or prevent petitioner from exercising his rights. Furthermore, as the district court found, the questioning "lasted a short time," petitioner "understood his rights and signed the Miranda rights form" and was old enough and intelligent enough to comprehend his rights, and he was not physically punished or threatened. Pet. App. 52a. Thus, considering the totality of the circumstances, petitioner's statement was voluntary notwithstanding what petitioner characterizes as a promise of leniency.

b. Petitioner erroneously contends (Pet. 24-27) that the courts of appeals are split "into four camps" over how to consider an officer's promise of leniency in the totality-of-the-circumstances calculus. No substantive disagreements exist. The courts of appeals agree that the voluntariness of a confession is a fact-intensive inquiry accounting for all the circumstances of a case. They also agree that an officer's promise of leniency—including its specificity and magnitude—is a relevant fact and can be, depending on the circumstances, quite important. But none of the cases petitioner identifies demonstrate any abiding disagreement amongst the courts of appeals in evaluating voluntariness under *Schneckloth* and *Connelly*.

Petitioner acknowledges that five circuits (the First, Second, Fourth, Fifth, and Eighth) treat a promise of leniency as one factor for the court to consider in determining voluntariness. See, *e.g.*, *United*

States v. *Walton*, 10 F.3d 1024, 1030 (3d Cir. 1993) ("[T]he focus of our inquiry is on the totality of the circumstances, not solely on [the officer]'s promise."). Because it is only one factor, the absence of "additional evidence of coercion" or "a specific benefit" (Pet. 25) are likely, in most cases, to show that a defendant's "will [was not] overborne" by police coercion. *Schneckloth*, 412 U.S. at 225. The remaining courts do not disagree.

Petitioner argues (Pet. 25) that three circuits (the Third, Ninth, and Eleventh) apply a conflicting approach of weighing a promise of leniency as "the most important factor in assessing voluntariness," but he exaggerates any disagreement. For example, petitioner relies on a quotation from *Jacobs*, Pet. 25, but the Third Circuit in that case did not announce a novel test. Rather, the *Jacobs* court articulated a rule consistent with other circuits: A promise of leniency "is a factor (indeed, a *potentially* significant one) in the totality of the circumstances inquiry as to whether a statement was voluntary." 431 F.3d at 109 (emphasis added). In any event, after listing eight points to consider in evaluating implied promises of leniency, including petitioner's quoted language, the Third Circuit declined to "determine whether there was an implied promise" at all. *Id.* at 110-112.

Similarly, the Ninth Circuit has held that "[i]n the absence [of] other coercive pressures," an agent's promise to convey to the prosecutor the defendant's cooperation or its absence did "not entail the conclusion that [the defendant]'s statements were involuntary." *United States* v. *Jenkins*, 214 Fed. Appx. 678, 680 (2006), cert. denied, 552 U.S. 859 (2007). And in other cases, although courts have noted the officer's

implied promise of leniency, their focus was on other coercive aspects of the interrogation. Compare *United States* v. *Preston*, 751 F.3d 1008, 1023-1027 (9th Cir. 2014) (en banc) (discussing at length the defendant's intellectual disability and related suggestiveness and the impropriety of certain interrogation techniques, such as planting details of the crime in the questions, with such defendants), with *United States* v. *Carr*, 761 F.3d 1068, 1075 (9th Cir. 2014) (statement voluntary where suspect felt "pressure to cooperate" but was not mentally impaired in any way), cert. denied, 135 S. Ct. 1722 (2015).

The Eleventh Circuit has noted that when an officer's "deception goes directly to the nature of the suspect's rights and the consequences of waiving them," that deception can overbear a defendant's will. *United States* v. *Farley*, 607 F.3d 1294, 1329, cert. denied, 562 U.S. 945 (2010). *Farley* involved no such deception, however, *ibid.*, and the court made clear that it adheres to the general rule that "statements [are] involuntary because of police trickery only when other aggravating circumstances were also present." *Id.* at 1328.

Petitioner next relies (Pet. 26) on *United States* v. *Lopez*, 437 F.3d 1059 (2006), to argue that the Tenth Circuit treats an express promise of leniency as an overriding factor in considering voluntariness. But *Lopez* actually stands for the opposite proposition. There, the government appealed the suppression order, arguing that "the district court erred by basing its decision to suppress Lopez's confessions on a single factor," the promise of leniency. *Id.* at 1063. Rather than affirming on that ground, the court rejected the government's premise, holding that the district

court "properly considered and weighed all the factors relevant to the voluntariness of Lopez's confessions." *Ibid.*; see *id.* at 1066-1067 (noting that officers' misrepresentations of the strength of the evidence also played a significant role in inducing Lopez's confessions).

Finally, petitioner contends (Pet. 26) that the Sixth Circuit "applies a unique test" focused on whether the officer's promises were illusory or broken. Although the Sixth Circuit does consider those factors, its analysis is not as rigid as petitioner describes. For example, in this case, the court of appeals discussed promises by saying that "in some situations" a promise could be coercive and that "generally" whether the promise was illusory or broken is a relevant consideration. Pet. App. 18a. Even in *United States* v. *Johnson*, 351 F.3d 254 (2003), in which the Sixth Circuit distilled the importance of illusory and broken promises from its prior cases, determining the effect of the officer's promise was but the first step in considering the totality of the circumstances regarding voluntariness. See *id.* at 260-262 (discussing the three-step *Mahan* test).

c. Again, even were this Court interested in the Fifth Amendment issue petitioner raises, this case would be a poor vehicle for deciding that issue. Petitioner was convicted of two possession offenses, one involving marijuana and the other involving a firearm. The physical evidence for both crimes was found in petitioner's apartment pursuant to the search warrant and, as discussed above, would not have been subject to suppression regardless of any flaws in obtaining petitioner's statements. See pp. 11-12, *supra*. The existence of the inherently incriminating physical

evidence and proof of ownership in petitioner's apartment, combined with the prior lawfully obtained surveillance of petitioner selling drugs to the confidential informant, overwhelmingly proves petitioner's guilt of the two offenses of conviction. See Gov't Ex. List (D. Ct. Doc. 44) (Exs. 20-22, photographs of blue jeans in petitioner's size with his driver's license in the same pocket as a bag of marijuana, and Exs. 25-28, photographs of a prescription pill bottle bearing petitioner's name and apartment address on the closet shelf next to the boots containing the gun); see also Pet. App. 7a. Given that the physical evidence was found in petitioner's apartment, and that he was observed dealing drugs in the adjacent parking lot, any rational jury would have attributed the firearm and drugs to him. Any error in admitting petitioner's statements at trial was, therefore, harmless. See *United States* v. *Brinson-Scott*, 714 F.3d 616, 622 (D.C. Cir. 2013) (admission of unwarned statement elicited during a *Summers* detention harmless in possession case where ample evidence found in the warrant-authorized search established defendant's connection to the apartment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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