No. 16-449

In the Supreme Court of the United States

JONATHAN BOHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the holding in *Payton* v. *New York*, 445 U.S. 573, 603 (1980), that officers may enter a dwelling to execute an arrest warrant when they have "reason to believe the suspect is within" requires probable cause to believe that the suspect is inside.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 824 F.3d 242. The opinion of the district court (Pet. App. 32a-63a) is reported at 67 F. Supp. 3d 536.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2016. On August 22, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 30, 2016, and the petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is awaiting trial for several drug- and firearms-related offenses. Before trial, he moved to suppress drugs and money seized incident to his ar-

rest, which occurred at a third party's residence. The district court granted the suppression motion, and the government filed an interlocutory appeal. The court of appeals reversed and remanded the case for trial. Pet. App. 1a-31a.

1. In the early morning of December 5, 2013, law enforcement officers executed an arrest warrant for petitioner. They initially planned to arrest him at his residence at 103 Crestview Drive in Bridgeport, Connecticut. Sometime between 5 a.m. and 5:30 a.m., however, investigative agents concluded that petitioner was likely not at home and instead was staying with an acquaintance, Shonsai Dickson, who resided at 34 Morgan Avenue. Pet. App. 4a.

The officers' belief that petitioner was staying at Dickson's apartment was based on several factors. First, although petitioner typically drove rental cars, officers did not observe any rental cars parked in the vicinity of his home at 103 Crestview Drive. Nor did the officers have any other indication that petitioner was at his home. Additionally, cell-site location records from petitioner's cellular service provider indicated that as of 2:38 that morning, when petitioner had last used his cellular phone, the phone was in a sector of Bridgeport that did not include his home at Crestview Drive. Pet. App. 5a.

The cell-site data indicated instead that petitioner was in a sector of Bridgeport that included Dickson's Morgan Avenue residence. Pet. App. 6a. Other information connected petitioner to Dickson and to the Morgan Avenue address. In September and October 2013, petitioner had stated in intercepted text messages, as well as to officers during a traffic stop, that he was at or near Morgan Avenue or was coming

"from Morgan Avenue." *Ibid.* Officers had also watched petitioner driving toward that area and walking into the doorway of 34 Morgan Avenue in mid-October. *Ibid.* And location data from a previous cell phone (which petitioner had used until November 2013) had placed petitioner on several occasions within ten meters of 34 Morgan Avenue. *Id.* at 6a-7a & n.4. Additionally, officers were aware that a second-floor apartment at that address belonged to Shonsai Dickson, a person whom officers had discovered was the prior lessee of another apartment from which petitioner's confederates were suspected of dealing heroin. *Id.* at 7a. Lastly, officers had recently seen a car registered to Dickson parked in front of petitioner's residence and, on the morning of the arrest, they had spotted the same car parked outside 34 Morgan Avenue. *Ibid.*

At 6 a.m., officers entered Dickson's apartment, found petitioner in Dickson's bedroom, and arrested him. While carrying out the arrest, the officers conducted a security sweep of areas in the bedroom immediately surrounding petitioner. They found bags of crack cocaine under the bed (next to which petitioner was standing when he was arrested), as well as a large amount of cash in petitioner's pocket. Pet. App. 7a-8a, 35a-36a; Gov't C.A. Br. 10-13.

After petitioner's arrest, Dickson gave the officers consent to search the rest of the apartment. During that search, officers recovered additional crack cocaine, cash, a scale, three firearms, and ammunition. Dickson also consented to a search of her car, where police found an additional firearm. Pet. App. 4a, 7a-8a.

2. A federal grand jury in the District of Connecticut charged petitioner with conspiracy to distribute

and to possess with intent to distribute at least 500 grams of cocaine and at least 280 grams of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and (B), and 846; possession with intent to distribute over 280 grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A); possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g); and possession of firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. 3a.

Petitioner moved to suppress the evidence seized incident to his arrest and the evidence found in the subsequent searches of Dickson's apartment and car. First, citing *Steagald* v. *United States*, 451 U.S. 204 (1981), petitioner argued that the officers' entry into Dickson's apartment was unlawful because they did not have a separate search warrant for that location. Second, and as relevant here, petitioner contended that, even if a separate search warrant was not required, the officers lacked "reason to believe" that he was in Dickson's home when they executed the arrest warrant, as required under *Payton* v. *New York*, 445 U.S. 573, 603 (1980). Petitioner also argued that Dickson's consent to search the rest of the apartment and her car was tainted by the officers' initial unlawful entry and was not voluntary. Pet. App. 9a.

The district court granted the suppression motion with respect to evidence seized incident to petitioner's arrest and with respect to evidence seized in the subsequent search of the apartment.[1] First, the court

[1] The district court denied the motion to suppress the firearm found in Dickson's car. It held that, although petitioner had a reasonable expectation of privacy with respect to Dickson's apartment

held that petitioner, as the subject of the underlying arrest warrant, could not invoke *Steagald* to claim that his rights were violated by the police entry into a third party's residence without a search warrant. Pet. App. 41a-43a. Rather, the court applied the *Payton* rule allowing officers to enter a premises to execute an arrest warrant "when there is reason to believe the suspect is within." 445 U.S. at 603.

Applying *Payton*, the district court concluded that the officers lacked the requisite "reason to believe" that petitioner was in Dickson's home. Pet. App. 50a; see *id.* at 43a-51a. As such, the court ordered suppression of the evidence found incident to petitioner's arrest—namely, the cash found in petitioner's pockets and the crack cocaine found under the bed. *Id.* at 43a-51a. The court also found that Dickson's consent for the subsequent search of her apartment was not valid and ordered suppression of the drugs, cash, scale, firearms, and ammunition found in that search. *Id.* at 51a-62a.

3. The government filed an interlocutory appeal only with respect to the evidence seized incident to petitioner's arrest, and the court of appeals reversed.[2]

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as an overnight guest, he lacked such an expectation of privacy with respect to Dickson's car. Pet. App. 40a-41a.

[2] Because the government did not appeal the order suppressing evidence found in the subsequent search of Dickson's apartment, the instant petition does not concern the admissibility of that evidence. In particular, the government did not seek review of the portion of the district court's order suppressing the firearms, ammunition, and scale (along with the additional crack cocaine and cash) found in Dickson's apartment. The only evidence that was at issue before the court of appeals and is at issue in this petition is the evidence that was seized incident to petitioner's arrest: the cash found in his pocket and the crack cocaine found under the bed

The court of appeals affirmed the district court's holding that *Steagald* was not applicable to petitioner, as the subject of the arrest warrant, and it instead applied the "reason to believe" test articulated in *Payton*. Pet. App. 21a; see *id.* at 13a-21a.

With respect to that standard, the court of appeals noted that under binding circuit precedent, "reason to believe" is a "lesser standard" than probable cause. Pet. App. 21a-22a (citing *United States* v. *Lauter*, 57 F.3d 212, 215 (2d Cir. 1995)). The court acknowledged some disagreement among the circuits on that question, although it also noted that petitioner was not disputing the applicable standard and that petitioner had "cite[d] approvingly to" the relevant circuit precedent "in urging [the court] to conclude * * * that officers entering Dickson's apartment lacked the requisite reason to believe that [petitioner] was then in the premises." *Id.* at 23a. The court also indicated its view that petitioner had waived any challenge to the *Lauter* standard. *Ibid.* (noting petitioner's failure to challenge *Lauter* standard and citing *United States* v. *Quinones*, 511 F.3d 289, 311 n.14 (2d Cir. 2007), cert. denied, 555 U.S. 910 (2008), for proposition that an "argument not raised on appeal [is] waived").

The court of appeals found that several factors supported a reasonable belief that petitioner was at Dickson's residence that morning. In particular, the court noted that the cell phone data, which showed that petitioner had used his phone for the final time that night within a sector that did not include his home on Crestview Drive, combined with the officers'

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during the officers' security sweep. See Pet. App. 10a & n.6. Therefore, the "weapons in the closet" referenced in the petition (Pet. 2, 4) are not at issue here.

physical observations that no rental car was parked in front of petitioner's home, provided an "articulable and objective basis" to suspect that petitioner had retired for the night somewhere else. Pet. App. 26a. Further, the court explained, while the cell-site data from that morning did not identify petitioner's precise location, it did place him within a sector that included Dickson's residence. That evidence, the court concluded, when combined with other evidence linking petitioner to the address at 34 Morgan Avenue and to Dickson, provided "reason to believe" that petitioner was within Dickson's apartment. *Id.* at 27a-29a.

The court of appeals concluded that the district court had erred by discounting each of these factors as inconclusive individually. The court of appeals stated that, "while no individual fact might be sufficient to provide officers with reason to believe that [petitioner] might be found in Dickson's apartment" that morning, the "totality of the[] facts * * * provided an articulable, objective reason" to support that belief. Pet. App. 29a.

ARGUMENT

Petitioner contends (Pet. 19-21), for the first time in this case, that the "reason to believe" standard in *Payton* v. *New York*, 445 U.S. 573, 603 (1980), requires a showing of probable cause.[3] This case does not present a suitable vehicle for review of that issue, because (1) the case is in an interlocutory posture, and (2) petitioner forfeited that argument by failing to

[3] Petitioner does not pursue his argument raised below that *Steagald* v. *United States*, 451 U.S. 204 (1981), requires suppression of the evidence seized incident to his arrest because the officers lacked a search warrant for Dickson's residence. See Pet. 5 n.3.

raise it below. In any event, the court of appeals correctly concluded that *Payton*'s "reason to believe" standard does not require that officers have probable cause that a suspect is present before executing an arrest warrant, but is satisfied by reasonable suspicion, *i.e.*, "specific and articulable facts that, taken together with rational inferences drawn therefrom, provide a particularized and objective basis for thinking that the arrest-warrant subject may be present within a specific premises." Pet. App. 25a. The division of authority within the circuits is narrow and in practice does not appear to have resulted in divergent outcomes. And this Court has recently and repeatedly denied certiorari on the *Payton* issue. See *Weeks* v. *United States*, 132 S. Ct. 1858 (2012); *Tiewloh* v. *United States*, 559 U.S. 941 (2010); *Barrera* v. *United States*, 550 U.S. 937 (2007); *Pruitt* v. *United States*, 549 U.S. 1283 (2007). Further review is unwarranted.

1. As an initial matter, the Court should deny certiorari at this time because petitioner seeks review of an interlocutory ruling. The interlocutory character of this case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.18, at 283 n.72 (10th ed. 2013). This practice promotes judicial efficiency by allowing the defendant, if ultimately convicted, to consolidate all of his claims in a single petition. See *Major League Baseball Play-*

ers Ass'n v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). And if petitioner is acquitted, the arguments presented in the instant petition will be moot.

Petitioner suggests (Pet. 18) that the interlocutory character of this case does not detract from the suitability of review because, he asserts, the Second Circuit's decision "dictates the outcome of two of the four counts of the indictment against him." That suggestion is unfounded for at least three reasons. First, as petitioner acknowledges, two other counts remain, and the Second Circuit's decision does not control those counts. Second, the Second Circuit left "for [the district court's] consideration on remand" whether the "search of [petitioner's] pants pocket and seizure of money therefrom, as well as the contemporaneous search under Dickson's bed and later seizure of drugs seen thereunder, were also lawful." Pet. App. 30a n.15. While petitioner may be signaling that he is not pressing those issues, he has not formally conceded them and they remain unresolved and relevant to the ultimate issue of admissibility. Finally, assuming a finding of guilt on one or more counts, the issue of sentencing remains. A final judgment would allow a single petition to cover suppression, trial, and sentencing issues.

2. This Court should also deny review of petitioner's *Payton* argument because he failed to raise that argument below. As the court of appeals emphasized, petitioner did not dispute below that the legal standard governing the Fourth Amendment analysis was

set forth in the court's prior decision in *United States* v. *Lauter*, 57 F.3d 212 (2d Cir. 1995). Pet. App. 21a-22a. In *Lauter*, the court of appeals had held that *Payton* does *not* require probable cause, a standard that the court described as "too stringent." 57 F.3d at 215. The *Lauter* court had also stated that "the proper inquiry is whether there is a *reasonable belief*" that the suspect is present at the place to be searched. *Ibid.* (emphasis added); see Pet. 7, 11 (describing *Lauter* in these terms).

As the court of appeals' opinion makes clear, petitioner nowhere challenged *Lauter*'s analysis that *Payton* does not require probable cause. Pet. App. 21a-23a. Indeed, the court noted that petitioner "cite[d] approvingly to *Lauter*" in urging the panel to conclude that the officers lacked a reasonable belief that he was in Dickson's home. *Id.* at 23a; see Pet. C.A. Br. 9-10. Petitioner's appellate brief affirmatively quoted *Lauter* for the propositions that (1) the appropriate test is *not* "whether [officers] have probable cause," (2) the probable cause standard is "too stringent," and (3) *Payton* allows officers to execute an arrest warrant at a home "when they have a reasonable basis to believe that the arrestee will be present." Pet. C.A. Br. 9-10 (emphasis omitted) (quoting *Lauter*, 57 F.3d at 215).[4] The court of appeals correctly concluded that petitioner "does not dispute that *Lauter* controls *Payton* review in this circuit," and the court cited additional circuit precedent for the proposition that an "argument not raised on appeal [is] waived." Pet. App. 23a (citing *United States* v. *Qui-*

[4] Petitioner's filings in his suppression motion at the district court level also failed to raise this issue. See D. Ct. Doc. 362, at 8 (Nov. 11, 2014) (quoting *Lauter* and related case law approvingly).

nones, 511 F.3d 289, 311 n.14 (2d Cir. 2007), cert. denied, 555 U.S. 910 (2008)).

Petitioner now argues (Pet. 11-12, 19-21) that *Lauter* was wrong and that *Payton* in fact requires probable cause. But petitioner forfeited that argument by failing to make it below. It is well established that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Thornton* v. *United States*, 541 U.S. 615, 624 n.4 (2004) (quoting *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (internal quotation marks omitted)). Petitioner nowhere challenges the court of appeals' determination that he embraced *Lauter*'s interpretation of *Payton* below, or that any argument challenging *Lauter* was "not raised" and therefore "waived." Pet. App. 23a. This Court should decline review in these circumstances.

3. In any event, the court of appeals correctly concluded that *Payton*'s "reason to believe" standard does not require that officers have probable cause to believe a suspect is present in the dwelling at issue before executing an arrest warrant.

In *Payton*, the Court held that it is permissible under the Fourth Amendment for officers who possess a valid warrant for a suspect's arrest "to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within." 445 U.S. at 603 (emphasis added). In reaching that holding, the Court expressly rejected the notion that officers must have "a search warrant based on probable cause." *Id.* at 602. The Court explained that, "[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is

constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* at 602-603.

The court of appeals correctly applied that holding here. The court first explained that rather than requiring probable cause, *Payton*'s "reason to believe" standard requires "specific and articulable facts that, taken together with rational inferences drawn therefrom, provide a particularized and objective basis for thinking that the arrest-warrant subject may be present within specific premises." Pet. App. 25a. The court modeled that standard on this Court's precedents addressing the reasonable-suspicion standard, while not "assum[ing] that it equates exactly to *Payton*'s reason-to-believe standard for determining the likelihood of presence." *Ibid.*

The court of appeals explained that here, multiple factors supported a reasonable belief that petitioner was at Dickson's residence. In particular, (1) the cell phone data and the officers' surveillance indicated that petitioner did not stay at his home overnight on the night in question; (2) the data placed him within a sector of Bridgeport that included Dickson's residence; and (3) other evidence indicated that petitioner had previously visited Dickson's address and linked him to Dickson. Pet. App. 6a-7a, 25a-29a. As the court concluded, when "[v]iewed in their totality and in a commonsense manner, the record facts provided an articulable, objective reason to believe that [petitioner] might then be present in Dickson's apartment." *Id.* at 29a.

4. Petitioner correctly points out (Pet. 8-14) that the courts of appeals have reached different conclusions on whether *Payton*'s reason-to-believe test requires probable cause. Three circuits have held that

Payton's "reason to believe" standard need not amount to "probable cause." See Pet. App. 22a-23a (citing *United States* v. *Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005), cert. denied, 549 U.S. 1055 (2006); *Valdez* v. *McPheters*, 172 F.3d 1220, 1224-1226 (10th Cir. 1999); *Lauter*, 57 F.3d at 215). By contrast, at least two circuits have interpreted *Payton* to require probable cause. See *United States* v. *Vasquez-Algarin*, 821 F.3d 467, 477-480 (3d Cir. 2016); *United States* v. *Gorman*, 314 F.3d 1105, 1112 (9th Cir. 2002); see also Pet. App. 22a (citing *United States* v. *Barrera*, 464 F.3d 496, 501 & n.5 (5th Cir. 2006), cert. denied, 550 U.S. 937 (2007), as requiring probable cause.)[5]

Courts have observed, however, that "[t]he disagreement among the circuits has been more about semantics than substance; the courts that distinguish the terms have done so because 'probable cause' is a term of art" typically associated with the initial issuance of a warrant. *Barrera*, 464 F.3d at 501 n.5 (citing

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[5] See also Wayne R. LaFave, *Search and Seizure*, § 6.1(a), at 354-357 & n.22 (5th ed. 2012) (cataloging state and federal cases taking each position). Other courts of appeals have declined to address specifically whether *Payton*'s standard requires a showing of probable cause, either because the evidence at issue satisfied that standard, see *United States* v. *Hamilton*, 819 F.3d 503, 506 n.5 (1st Cir. 2016); *United States* v. *Jackson*, 576 F.3d 465, 469 (7th Cir.), cert. denied, 558 U.S. 1062 (2009), or because the evidence did not satisfy even a lesser standard, *United States* v. *Hardin*, 539 F.3d 404, 416 (6th Cir. 2008). In *Jackson*, the court opined that it "might be inclined" to adopt the view "that 'reasonable belief' is synonymous with probable cause" if it were to reach the issue, 576 F.3d at 469, and the court in *Hardin* stated in what it acknowledged to be dicta that it believed probable cause is the correct standard, 539 F.3d at 416 n.6.

United States v. *Route*, 104 F.3d 59, 62 (5th Cir.), cert. denied, 521 U.S. 1109 (1997)); see also *United States* v. *Magluta*, 44 F.3d 1530, 1535-1536 (11th Cir.), cert. denied, 516 U.S. 869 (1995) (noting that it is "difficult * * * to compare the quantum of proof" that *Payton*'s "reason to believe" standard requires "with the proof that probable cause requires," but that courts have generally assessed the "totality of circumstances" and employed a "common sense approach").

It is therefore not clear that courts will apply the two standards in ways that regularly produce different outcomes.[6] Even in this case, it is not clear that the choice between probable cause and a "reason to believe" standard would make any difference with respect to outcome. Accordingly, absent a significant reason to believe that the differently articulated standards are leading to a pattern of disparate results, this Court's intervention is not warranted.[7]

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[6] While Professor LaFave advocates a probable cause standard, he recognizes that "frequently" officers will lack "hard evidence" about a suspect's "whereabouts at a particular time," and that "common sense" should be employed such that the "drawing of reasonable inferences from the circumstances is not impermissible." LaFave, *supra* note 5, § 6.1(a) at 356-357; see also *id.* at 357-359 & nn.39-40 (describing specific facts and considerations). Given the heavily fact-dependent nature of the inquiry, the precise articulation of the standard does not often seem to be the controlling consideration. See also *id.* at 355 (suggesting that the Court's phrasing in *Payton* may have been designed "so as not to encourage lower courts to adopt a hard-nosed, 'probable cause to believe the suspect is at home' test").

[7] Amici Connecticut Criminal Defense Lawyers Association *et al.* point out that this issue arises with regularity but do not substantiate any claim that the difference in articulated standards often produces different outcomes. Speculation about the frequency of that situation (Br. 5) does not demonstrate its importance. Nor

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2016

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does the concern about third parties (*id.* at 6-10) justify review; those third parties are already protected by *Steagald*'s requirement of a search warrant to enter third-party residences to execute an arrest warrant. Petitioner does not (and cannot) raise any claim based on those third-party rights.