No. 11-677

In The Supreme Court of the United States

DAVID L. MOORE,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITY,
Petitioner,

v.

ESPERANZA GUERRERO, ET AL,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This petition raises a purely legal issue of great importance to the criminal justice system. That issue is whether the Fourth Amendment prohibits police officers from serving magistrate-issued summonses in the same manner as warrants. Respondents do not deny that several states' laws specifically allow police officers to serve such summonses in the same manner as warrants, and that the instant case is the first in the nation that specifically disallows it. Furthermore, the ruling of the court of appeals in this case conflicts with that of another circuit.

Respondents sidestep this important legal issue and oppose review for three reasons, none of which are valid.

First, respondents claim that factual disputes divest this Court of jurisdiction.[1] However, factual disputes are not the subject of this petition.

The question presented in this petition is purely legal: whether the Fourth Amendment prohibits police officers from serving magistrate-issued summonses in the same manner as warrants,

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[1] Respondents also repeat a litany of claims and allegations that were summarily dismissed by the district court. One of these allegations is that petitioner and defendants acted with discriminatory intent pursuant to a county immigration policy. Those allegations are not supported by law or fact, and the district court has taken under advisement whether respondents should be punished in accordance with Rule 11 of the Federal Rules of Civil Procedure.

and whether such law was "clearly established" at the time of this incident. The district court has ruled, and the court of appeals has affirmed, that the Fourth Amendment does prohibit such service, and that such law was clearly established. App. 4, 22-23; *Guerrero v. Deane,* 750 F. Supp. 2d 631, 646 (E.D. Va. 2010). These are purely legal rulings. In *Johnson v. Jones,* the Court reiterated the well-settled rule that purely legal issues of what law is "clearly established" are subject to appellate review. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995) *citing Mitchell v. Forsyth* 472 U.S. 511 (1985). Therefore, the Court has jurisdiction to review the legal rulings in this case, regardless of whether some facts are disputed.

Second, respondents argue that there is no reason for the Court to review this case. This ignores Rule 10 of the Rules of the Supreme Court of the United States, which contains a non-exhaustive list of reasons the Court might grant a writ of certiorari. Among the reasons given is that a court of appeals has entered a decision in conflict with a decision of another court of appeals, or that a case presents "an important question of federal law that has not been, but should be, settled by this Court."

There is a conflict between the circuits. In *Petersen v. Farnsworth*, 371 F.3d 1219 (10th Cir. 2004), the Tenth Circuit concluded that magistrate-issued summonses are just as good as warrants for Fourth Amendment arrest purposes.

In addition, this case involves an important question of federal law that has not been, but should

be, settled by this Court. Four states explicitly allow summonses to be served like warrants. *See* Mich. MCLS § 764.9a(3); R.R.S. Neb. § 29-425(2); ORC Ann. 2935.12; Tenn. Code Ann. § 40-6-215. Virginia provides that summonses in lieu of warrants must be "personally served." § 19.2-76 VA Code Ann. The ruling of the district court and affirmation by the court of appeals disallowing such service is likely to affect all of these state laws.

Third, respondents claim that three prior cases are "on-point" and address the questions presented in the petition. Br. in Opp. P. 22. On the contrary, none of the cases cited by respondents deal with the service of *magistrate*-issued summonses. Instead, all of the cases cited deal with *police officer* initiated citations or searches. Respondents conflate *police officer* initiated actions with *magistrate*-issued summonses. In the first instance, there is no independent judicial review of probable cause. In the second instance, there is an independent judicial review, which satisfies the Fourth Amendment's privacy concerns. The cases cited by respondents are patently inapposite due to this important difference.

Rather than deny this petition without review, petitioner respectfully requests that the Court grant a Writ of Certiorari and review the ruling of the court of appeals. *Payton v. New York* did not settle the question of how magistrate-issued criminal summonses may be served, and the resolution of this question is of great importance. *Payton v. New York*, 445 U.S. 573 (1980).

This case presents a perfect vehicle to determine the proper constitutional rule for serving magistrate-issued criminal summonses.

I. THE QUESTIONS PRESENTED ARE PURELY LEGAL AND THEREFORE SUBJECT TO APPELLATE REVIEW, EVEN IF SOME FACTS ARE IN DISPUTE

Respondents urge the Court not to review the ruling of the court of appeals because some facts in the case are disputed. The disputed facts raised by respondents concern whether petitioner attempted to serve the summons-in-lieu-of-a-warrant in accordance with the warrant requirements of *Steagald v. United States,* 451 U.S. 204 (1981).[2]

The existence of disputed facts, however, does not divest the Court of jurisdiction to review the ruling of what law has been "clearly established." It is well settled that the question of what law has been "clearly established" is separate from the merits of the underlying case, and that the question of what

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[2] Not all facts are disputed. It is undisputed that 1) petitioner possessed a valid, magistrate-issued summons that was based upon probable cause, 2) petitioner went to the address shown on the summons as the accused's address, 3) a "warrant cover sheet" indicated service had been attempted the previous month and that the subject was seen looking out the window, 4) it was a Saturday morning, a time when people are normally at home, 5) petitioner heard voices inside the home, 6) petitioner's twenty years of experience in serving warrants and summons informed him that the suspect may be evading service and hiding inside the house.

constitutes clearly established law is subject to appellate review. *Mitchell v. Forsyth,* 472 U.S. 511, 528-529 (1985).

Pursuant to *Mitchell*, a decision denying qualified immunity is appealable when two criteria are met. *Id.* at 527. The decision must "conclusively determine the disputed question," and the question must involve a "claim of right separable from, and collateral to, rights asserted in the action." *Id. citing Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). Respondents concede that the decision in this case is a collateral order, so the remaining question is whether the decision is "conclusive." Br. in Opp. P. 1. This Court ruled in *Mitchell* that a decision is conclusive when a trial court concludes that, "even if the facts are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of qualified immunity." *Id.*

In this case, the district court has held, and the court of appeals affirmed, that even if the facts are as asserted by petitioner (that he entered the respondents' house to serve a magistrate-issued criminal summons), he is not entitled to qualified immunity, because the Fourth Amendment prohibits entry of a first party residence to serve the resident with a magistrate-issued summons, and that such law was clearly established by *Payton v. New York*, 445 U.S. 573 (1980). *See* App. 4; App. 22-23; *Guerrero v. Deane,* 750 F. Supp. 2d 631, 646 (E.D. Va. 2010). As a result of this ruling, "there will be nothing in the subsequent course of the proceedings

in the district court that can alter the court's conclusion that the defendant is not immune." *Mitchell v. Forsyth,* 472 U.S. at 527. If the ruling of the district court stands - that officers may not make entry of a home to serve a resident with a magistrate-issued summons - then it makes no difference if petitioner proves as a matter of fact that the *Steagald* standard was met. As a matter of law, the district court has ruled that it is unconstitutional to attempt entry of a first party residence based on a summons.

The following facts cannot be disputed: under Virginia law, when a magistrate finds probable cause to believe that *any* misdemeanor has been committed, the magistrate may issue either an arrest warrant or a summons in lieu of a warrant. § 19.2-73 VA Code Ann. In this case, the magistrate did find probable cause to believe a misdemeanor had been committed. The magistrate did issue a summons-in-lieu-of-a-warrant. Finally, petitioner was in the process of serving the magistrate-issued summons when he entered respondents' home.

Based on the foregoing, the question of whether the Fourth Amendment prohibits police officers from serving magistrate-issued summonses in the same manner as warrants is ripe for review. The question of whether such law was clearly established at the time of this incident, given that no federal court had ever issued such a ruling, and several state laws specifically allow criminal summonses to be served in the same manner as warrants, is similarly ripe for review.

II. THE COURT OF APPEALS RULING CONFLICTS WITH THAT OF ANOTHER FEDERAL CIRCUIT, AND THE RULING MIGHT IMPACT SEVERAL STATES' LAWS

The questions presented in this petition are important federal questions and are appropriate for review, because the court of appeals' ruling in this case conflicts with one from the Tenth Circuit, and the ruling might affect other parties in other states.

A. The Fourth Circuit Ruling Conflicts with a Ruling from the Tenth Circuit

There is a conflict between the circuits. In *Petersen v. Farnsworth*, 371 F.3d 1219 (10th Cir. 2004), the Tenth Circuit concluded that magistrate-issued *summonses* are just as good as *warrants* for Fourth Amendment arrest purposes. The Fourth Circuit, however, has ruled that summons do not carry the same Fourth Amendment weight as warrants. These rulings conflict with each other.

In *Petersen,* Utah law provided that after a magistrate finds "probable cause to believe that an offense has been committed and that the accused has committed it, the magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused." *Petersen,* 371 F.3d at 1220; *citing* Utah R. Crim. P. 6(a). Further, the law provided that a magistrate could issue a summons "in lieu of a warrant of arrest" when it appears the defendant would appear as ordered. *Id.* The magistrate in *Petersen* issued a summons in lieu of a warrant. *Petersen,* 371 F.3d at 1221. Petersen was

served with the summons and he voluntarily appeared at the county jail, was booked and briefly held in a cell. *Id.* Petersen later filed a § 1983 action against the sheriff and his deputies, claiming that the detention in the cell was an unreasonable search and seizure, because he was not held pursuant to an arrest warrant. *Id.*

The Tenth Circuit Court of Appeals disagreed and ruled that,

> Under Utah Rule of Criminal Procedure 6, a criminal summons, like an arrest warrant, may only issue upon a judicial determination that there is 'probable cause to believe that an offense has been committed and that the accused has committed it.' *The requisite probable cause determination is the same regardless of whether an arrest warrant or a summons is issued.*
>
> *Id.* at 1222. (*emphasis added*)

The Tenth Circuit held that magistrate-issued summonses, which are based on probable cause, offer the same Fourth Amendment protections as warrants, because both are issued only after a magistrate has made the probable cause determination. The Fourth Circuit, however, has ruled in this case that a magistrate-issued summons, which was also based on an independent judicial determination of probable cause, does not carry the same weight as a warrant. These rulings conflict with each other.

B. The Ruling Will Jeopardize Many Cost Saving Measures Enacted by the Several States

Many states allow magistrates to issue summonses in lieu of warrants. Four states explicitly allow summonses to be served like warrants. *See* Mich. MCLS § 764.9a(3); R.R.S. Neb. § 29-425(2); ORC Ann. 2935.12; Tenn. Code Ann. § 40-6-215. The state of Ohio expressly allows officers to break down doors to serve a summons. ORC Ann. 2935.12. Virginia provides that summonses in lieu of warrants must be "personally served." § 19.2-76 VA Code Ann.

The states enacted these laws because issuing summonses instead of arrest warrants reduces the burdens on the criminal justice system. *See* commentary to Ala. R. Crim. P. Rule 3.1 and La. C.Cr.P. Art. 209. It is cheaper to issue a summons to the accused, commanding him to appear on a later date in court, rather than arrest and book him and command him to appear later in court. The court of appeals ruling disallowing summonses to be served like warrants is likely to affect these state laws, and increase the costs to the criminal justice system.

For the aforementioned reasons, contrary to respondents' claims, this petition falls within Rule 10 of the Rules of the Supreme Court of the United States, and petitioner respectfully requests that the Court grant a review.

III. ALL OF THE CASES CITED BY RESPONDENTS ARE INAPPOSITE, BECAUSE THEY DO NOT CONCERN MAGISTRATE-ISSUED CRIMINAL SUMMONSES AND DO NOT ADDRESS THE ISSUES PRESENTED IN THIS PETITION

The respondents cite three cases, calling them "on-point," and allege the cases settle the issues presented in this petition. Br. in Opp. P. 16, 20, 22. This is incorrect.

Respondents direct the Court's attention to *Knowles v. Iowa,* 525 U.S. 113 (1998), *Lovelace v. Commonwealth*, 522 S.E.2d 856 (Va. 1999) and *Farrow v. Commonwealth*, 525 S.E.2d 11 (Va. App. 2000).

None of these cases address the issue in the instant case, namely, whether the Fourth Amendment prohibits a police officer from serving a *magistrate-issued* criminal summons like a warrant. *Knowles* dealt with a police officer-issued citation, not a magistrate-issued criminal summons. *Knowles,* 525 U.S. at 114. *Lovelace* and *Farrow* dealt with officer initiated searches, not searches approved by a magistrate. *Lovelace,* 522 S.E.2d at 856-858; *Farrow* 525 S.E.2d at 519. All three cases essentially dealt with the "search incident to arrest" exception to the warrant requirement, not searches or seizures authorized by an independent magistrate after a finding of probable cause.

Not a single case cited by the respondents deals with a summons, citation, or search that was

issued by a magistrate after a finding of probable cause. Instead, they all deal with citations and searches that were initiated by police officers, in the field, with no independent judicial review. The cases cited by respondents are, therefore, inapposite.

Professor Abraham Goldstein summarized the value of a magistrate's review in providing Fourth Amendment protections:

> The magistrate, and the concept of probable cause, are the first line of defense against the risk that the police will be unduly zealous in concluding that they have an adequate basis to conduct a search. Only a "judicial officer," the Supreme Court said in *Johnson v. United States,* is qualified to decide "[w]hen the right of privacy must reasonably yield to the right of search." "The point of the Fourth Amendment" is that the inferences leading to a finding of probable cause must be drawn "by a neutral and detached magistrate," an official who, unlike the police, is not "engaged in the often competitive enterprise of ferreting out crime."

Abraham S. Goldstein, *The Search Warrant, The Magistrate, and Judicial Review,* 62 N.Y.U.L. Rev. 1173, 1178 (1987), *citing Johnson v. United States,* 33 U.S. 10, 13-14 (1948).

The Fourth Amendment concern that there be an independent judicial review of probable cause prior to a search or seizure is satisfied by the magistrate-issued summons. A magistrate-issued

criminal summons carries no less constitutional protection than a warrant, because both are issued only after a magistrate has found probable cause to believe a crime was committed. It follows that the magistrate-issued summons should be able to be served like a warrant. "It would be inconsistent with the general provisions of criminal law to permit an individual to avoid service of a summons by merely refusing to open his door." App. 69; 1982 Va. AG LEXIS 326, *2, *citing Payton v. New York,* 445 U.S. 573, 586 (1980).[3]

Similar to *Petersen v. Farnsworth,* "this case presents a significantly different scenario than the typical case involving the arrest of a suspect by an officer performing ordinary law enforcement duties...[The] defendants' interest in Petersen was based solely on the criminal summons." *Petersen,* 371 F.3d at 1222. "Thus, it is not helpful to compare this case to cases that discuss the scope of police authority to make arrests based upon officers' personal observations." *Id.* Petitioner's interaction with the respondents was based on the summons he was trying to serve.

CONCLUSION

In Virginia, after finding probable cause to believe any misdemeanor has been committed, a magistrate can either issue a warrant or a summons

[3] The fact that the Virginia Attorney General cited *Payton* for the proposition that officers *could* enter first party residences to serve magistrate-issued summonses illustrates that *Payton* did not settle the issue presented in this petition. Furthermore, it shows that the law was not clearly established at the time of this incident.

in lieu of a warrant. In this case, the magistrate issued a summons. Under Virginia law, petitioner had the duty to "personally serve" the summons upon the accused, and he was attempting to do so when he entered the respondents' home. Such entries had never been found to violate the Fourth Amendment by any court anywhere in the United States. In fact, several states' laws specifically allow such entries.

If such service is a violation of the Fourth Amendment, petitioner has rightfully invoked qualified immunity, because the law was not clearly established. The lack of clarity is evidenced by two conflicting opinions of the Virginia Attorney General. Indeed, even the Virginia Attorney General's opinion, upon which the district court and the court of appeals relied in this case, specifically stated that the question has not been addressed by courts. App. 66; 2003 Va. AG LEXIS 59, *5. None of the cases cited by respondents were cited by the lower courts in this case, or in the Virginia Attorney General's opinion. *Id.*

The purely legal issue presented in this petition is of great importance to the criminal justice system. The issue can settled by this Honorable Court. The petitioner therefore respectfully requests that the Court grant a Writ of Certiorari.

Respectfully Submitted,

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