No. 07-9417

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

BURTON DEAN VIERS, and
KATHI-SUE WIECHERT,
Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The courts have long required that information used to support probable cause be "reasonably trustworthy." See, e.g., *Draper v. United States*, 358 U.S. 307, 333 (1959). In addition, affidavits for search warrants must set forth the factual basis for an informant's or affiant's opinion or conclusion, so that the magistrate can fulfill his vital function as the independent evaluator of probable cause. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 239 (1983); *see also*, *Johnson v. United* States, 333 U.S. 10, 13-14 (1948). In light of these well-established precedents, this case presents the following question:

I. Whether a search warrant affidavit based on a police officer's opinion of detecting the odor of marijuana plants emanating from a residence must state sufficient facts from which the magistrate can independently determine whether the officer's opinion is reasonably reliable, before his opinion can provide probable cause to search the home?

PARTIES TO THE PROCEEDINGS

Petitioner Burton Viers was the Defendant-Appellant below. In addition, Kathi-Sue Wiechert was a "related case" Defendant-Appellant in the Ninth Circuit, Case No. 06-30274, and a party named in the Opinion and the Judgment of the Ninth Circuit sought to be reviewed.

Ms. Wiechert, represented by attorney Marc Friedman, 245 W. 13th Ave., Eugene, Oregon 97401, (541) 686-4890, joins in this Petition for Certiorari , pursuant to Supreme Court Rule 12.4.

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Petitioners, Burton Dean Viers, joined by Kathi-Sue Wiechert, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 10, 2007.

DECISIONS BELOW

The Court of Appeals entered an unpublished memorandum opinion upholding the district court's denial of Mr. Viers' and Ms. Wiechert's jointly-filed suppression motion and affirming their convictions on conspiracy to manufacture marijuana. That opinion did not decide the legal issues central to the questions presented by this petition, although Mr. Viers had both raised and preserved those issues in the district court;[1] fully briefed those issues on appeal,[2] addressed them at oral argument, and raised the court's failure to address those issues in his petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit's memorandum opinion, and order denying rehearing, appears in *United States v. Burton Dean Viers*, CA No. 06-30266 & *United States v, Kathi-Sue Wiechert*, CA No. 06-30274; copies of the opinion and order are included in the Appendix (App.) at pages A-1, and A-22, respectively.

The District Court for the District of Oregon entered an unpublished opinion granting a *Franks* hearing[3] and denying the suppression motion, in *United States v. Burton Dean Viers & Kathie-Sue Wiechert*, CR-04-60094-MRH; a copy of that opinion is included at App: A-10.

JURISDICTION

On October 10, 2007, the Ninth Circuit Court of Appeals entered its opinion and judgment. App: A-1. Mr. Viers filed a timely petition for rehearing and suggestion for rehearing *en banc* on October 22, 2007, which the court denied on November 23, 2007. App: A-22. This Court has jurisdiction under 28 U.S.C. §1254(1).

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[1] Appellant's Excerpt of Record in the Ninth Circuit, pp. 53-55 & 160-162 (hereafter ER: page number(s)).
[2] Appellant's Opening Brief filed in the Ninth Circuit, pp.43-54.
[3] *Franks v. Delaware*, 438 U.S. 154 (1978).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

This petition seeks review of a question of law central to the proper administration of the Fourth Amendment when a warrant is sought based on an officer's claim of having detected the odor of drugs he can't see, emanating from the place he wants to search. This fact pattern is prevalent nationwide.[4] The question presented arises from two, well-established tenets of Fourth Amendment jurisprudence: that the information furnishing probable cause must be reasonably reliable, and that the affidavit must state a factual basis for information relayed in the form of opinion or conclusion. An officer's claim of odor detection is an opinion or conclusion from what he observed. See, e.g., *United States v. Santana,* 342 F.2d 60, 68-69 (1st Cir. 2003)(police officer could offer lay opinion that he smelled marijuana during search of home). Most remarkable is that no federal court has yet articulated that an officer's opinion of smelling the odor of an illegal drug must conform to these probable cause standards before issuing a warrant or upholding a search.

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[4] See, e.g., *Odor Detectable by Unaided Person as Furnishing Probable Cause for Search Warrant*, 106 A.L.R.5th 397 (originally published in 2003). This annotation collects and analyzes state and federal cases, which have discussed whether a person's detection of an odor is sufficient, either in itself or when accompanied with other facts, to establish probable cause supporting the issuance of a search warrant.

Mr. Viers' case presents the current state of uncontroverted, scientific knowledge concerning the highly-subjective and unreliable ability of humans—including experienced law enforcement officers—to accurately detect marijuana plant odors. When the courts fail to scrutinize officers' claims of smelling marijuana plant odors in light of current knowledge and these traditional Fourth Amendment safeguards, and simply accept such claims upon an officer's assurance that he knows the smell from past experience, it reduces the Warrant Clause to a rubber stamp.

Mr. Viers raised the question presented here in the district court, ER: 53-55 & 160-162, and the facts needed to decide it were fully litigated by the parties. ER: 59-165. The District Court's opinion mistook the issue, and rested on a finding that the officer was credible in his claim of smelling marijuana plants, even if reporting a faulty conclusion. App: A-17 to A-19. The Ninth Circuit's opinion is resoundingly silent as to the issues Viers renewed on appeal. Because this legal issue was entitled to *de novo* review, the Ninth Circuit's failure to decide the issue should present no impediment to this Court accepting review.[5] *See, e.g., Campbell v. Louisiana*, 523 U.S. 392, 403 (1998)(Observing that defendant has burden of showing issue was raised and preserved before Supreme Court will review issue not discussed in the lower courts' opinions); *United States v. Hasting*, 461 U.S. 499, 510 & n.8 (1983)(Noting that Court may review the record to evaluate a claim when it is in same the position as was the Court of Appeals); *and cf., Carlson v. Green*, 446 U.S. 14, 16-17 & n.2 (1980)(Addressing question on certiorari that was not presented in either the District Court or Court of

[5] By limiting review to the district court's factual findings on the *Franks* issues, the Ninth Circuit applied the deferential "clearly erroneous" standard of review to affirm the district court, rather than engage in the *de novo* review required for the errors of law preserved and renewed by Viers on appeal.

Appeals, and stating rule that while Court does not normally decide issues not presented below, it is not precluded from doing so.).

Mr. Viers appealed from the final judgment by the United States District Court for the District of Oregon, imposed following his conditional plea of guilty to Conspiracy to Manufacture Marijuana, 21 U.S.C. §841(a)(1) and §846. Ninth Circuit jurisdiction was based on 28 U.S.C. §1291 and 18 U.S.C. §3742(a)(1). The district court sentenced Viers to 48 months in prison, on April 18, 2006; and later granted his motion to stay execution of sentence on appeal. Mr. Viers self-surrendered for service of sentence in December 2007, after the Ninth Circuit's decision became final.

The question presented by this petition relates solely to the validity of his conviction, which could not have been affirmed if the district court's denial of the suppression motion had been reversed. The facts material to consideration of this petition are as follows:

Mr. Viers and his co-defendant below, Kathi-Sue Wiechert, were long-term acquaintances. According to the Government, they had rented a home at 1558 Hackett Drive, LaPine, Oregon, where she lived and he frequented. On June 3, 2004, DEA Special Agent Gary Landers and a team of police executed a search warrant at that residence. They discovered an indoor marijuana grow of modest size[6].

The search warrant affidavit relied on three factors to establish probable cause: (1) a tip from a confidential informant; (2) Agent Landers' opinion that the electric power consumption for the residence was high enough to support an indoor marijuana grow; and

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[6] They found approximately 100 marijuana plants, about a foot high, growing in one bedroom of this doublewide mobile home, and approximately 80 starter plants ("clones") rooting in the laundry room. Agents also seized several pounds of dried, harvested marijuana. ER: 78-81.

(3) Landers' opinion that he smelled the odor of growing or freshly-harvested marijuana from an unspecified distance outside the curtilage of this semi-rural home on two occasions.[7]. Defendants Viers and Wiechert jointly challenged the warrant, on grounds that Landers had deliberately or recklessly omitted material information on all three factors; simultaneously, they mounted a facial challenge to the validity of the warrant, claiming the affidavit failed to provide a factual basis to assess the reliability of Landers' conclusory opinions regarding power consumption and marijuana odor, and thereby failed to state probable cause.

The district court conducted a *Franks* hearing, and found reckless omission of materials facts concerning the informant's tip; the Ninth Circuit agreed, but held the tip was not used to establish probable cause. App: A-13 to A-14. That left Landers' opinions to establish probable cause. At the conclusion of the *Franks* hearing, the district court noted: "[What] everyone's focusing on is whether the officer could smell the marijuana grow. The other aspects, frankly, are a little more than consistent or arguably consistent with such a grow. . . And so without going through each of those items, to me that's really what this hinges on." ER: 158-159.

The affidavit contained few facts to evaluate Landers' claim of smelling marijuana plants. It stated that Landers detected the "odor of growing or freshly harvested marijuana" while standing in a wooded area outside the curtilage of the residence during the nighttime hours of April 15th and May 20th, 2004.[8] Both times he positioned himself downwind of the house, there was only a slight breeze, and "based on the wind

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[7] A copy of the affidavit is included in the Appendix to this Petition, beginning on page A-24.

[8] Search Warrant Affidavit paragraphs 23 & 30 (hereafter, SW¶23 & ¶30), App: A-30 & A-31.

conditions and placement of buildings," he concluded the odor could not have come from any other location than the suspect residence. Omitted from the affidavit was that, on April 15th, Landers was between 67 and 80 feet distant from the house when he claimed to smell this odor, and at least a few more than 36 feet to about 60 feet distant from the house when he smelled the same odor on May 20th.[9]

The affidavit stated Landers had experience investigating marijuana grows, and "[t]hrough this experience, SA Landers has learned that the marijuana plant has a recognizable odor that is especially noticeable when the plant is flowering (budding), but not exclusively so."[10] The affidavit contained no assertions that Landers had correctly identified the odor of marijuana at such distances or in similar circumstances on any prior occasions.

At the *Franks* hearing, Agent Landers testified that he had received no special training in the recognition of marijuana odors, and that there is no reliability testing or certification of law enforcement agents' ability to detect marijuana odor.[11] Agent Landers testified that he had been unsuccessful in smelling the odor of marijuana around the suspect property on five occasions prior to his first detection of the odor there on April 15th. He was again successful on his next, and final effort on May 20th. ER: 112-113. It was his opinion that unless he could smell marijuana, there would not be probable

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[9] ER: 105, 111-112.

[10] SW¶4, App: A-24 to A-25.

[11] Landers also testified that his method of standing downwind of the suspect residence in efforts to detect marijuana odor was "just common sense." ER: 69, 100. Among Dr. Woodford's specific criticisms of Landers' qualifications was Landers' reliance on walking in a "zig zag pattern" downwind from the residence in efforts to detect marijuana odor. ER: 13; SW¶30, App: A-31. Woodford explained that walking in a zig-zag pattern, like a dog following a scent, only works when the scent is anchored to the ground, not when the odor is airborne and subject to turbulence and movement. With "the dissipation and movement of marijuana [molecular] ingredients into the air, they go everywhere." ER: 143.

cause to apply for a search warrant. ER: 66.

The defense presented Dr. James Woodford, a forensic chemist and recognized expert on marijuana odor, who testified to the following facts about human detection of marijuana plant odors: The basic mechanism for humans to smell any odor is the same. First the odor must be generated at the source. The odor then must become airborne and reach a person's nose in sufficient quantity to interact with the nerve endings of the olfactory system.[12] What we call an "odor" is actually one or more molecules. Some odors are single molecules, like ammonia. There are also complex odors, including marijuana, that are comprised of intercoils of different molecules.[13]

Science has identified the different individual molecules that are combined in marijuana odor.[14] These different ingredients have different molecular weights, causing the intercoiled molecules to uncoil and travel different distances once airborne, as the heavier molecules fall off and the lighter ones move on.[15] Turbulence and wind cause the composite marijuana odor to break apart more quickly, but even in still air, the odor disintegrates due to gravity's pull on the different ingredients' molecular weights. "And

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[12] Scientific American, *Stereochemical Theory of Odor* by John E. Amoore, James W. Johnston, Jr., & Martin Rubin, pp. 42-49, (Feb. 1964); Physiology of Behavior, *Olfaction*, Neil Carlson, p. 247, (Allyn and Bacon, Inc., Publisher 1977).

[13] ER: 131-133.

[14] Journal of Natural Products, *Chemical Composition of the Volatile Oil of Cannabis Prepared for Fresh and Dried Buds,* Vol. 59, No.1, p. 50 Table 2 (1996); Nature, *Headspace Volatiles of Marijuana*, Vol. 242,pp. 402-403 (April 1972).

[15] Other odors share some of these individual molecules. For example, 84 percent of the marijuana odor molecules are found in juniper odor, and 73 percent of the marijuana odor molecules are found in pine odor, [ER:134; CR#118], both of which plant species are common in the LaPine area. See, Science, "*Major Monoterpenes Analyzed from Cortical Tissues of Ponderosa Pine Twigs*, Vol. 213, p. 1273, Table 1 (Sept. 11, 1981); iHerb.Com (juniper plant) http://www.herbalgram.org/iherb/expandedcommissione/he054.asp#ChemPharm.The presence of these odors in the same air as disintegrating marijuana odor molecules compounds the difficulty of reliable detection.

the more volume of air, the more it dissipates, it comes apart."[16] Picture a drop of ink dissolving in a glass of water and causing some discoloration, versus dissolving in a tub of water and becoming invisible.

Simply put, the characteristic marijuana odor disassembles, and thus, no longer exists, as it moves through air. For any human to detect marijuana plant odor, "you need to have all the ingredients going into that little space of the nose all at one time. Anything less than that, you start getting huge error. And it is subjective and unreliable."[17] "You do the studies and test the officers in a blind, scientific way, you find that smell is extremely unreliable, particularly when it comes to the kind of smell [of] multi-component odors like marijuana odor, which is made of up many ingredients."[18]

Woodford testified that marijuana produces different odors depending on the stage of growth of the plant. Vegetative marijuana, i.e., that has not started budding, has "a non-distinctive green plant-like odor . . . . that's reminiscent of the grass . . . it's not characteristic of marijuana at that point." That is because the characteristic odor is

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16 ER:133-134, 143-144.

17 ER:134-135. See, e.g., Journal of Pharmaceutical Sciences, *Recommendations to Eliminate Subjective Olfactory Methods from Compendial Identification Tests,* George Schwartzman, Vol. 67, No. 4, pp. 539-545 (1979). This FDA researcher's introduction states: "Olfactory methods are inherently undesirable, both because of the possible toxic nature of the inhaled substances and because all such tests are markedly and unpredictably influenced by such subjective and idiosyncratic factors as the experience and discriminatory powers of the analyst, sensory fatigue, and the presence of masking odors." See also, Accident Analysis and Prevention, Moskowitz, H., Burns, M. & Ferguson, S., Vol. 31, pp. 175-180 (1999), discussing research in which subjects who drank various types of alcohol and ate foods, breathed through a hole in the wall where police officers on the other side were unable to distinguish by smell whether the beverage was beer, wine, bourbon or vodka, and others were unable to distinguish between alcohol, acetone, perfume, and ice cream.

18 ER:130. See, *Marijuana Odor Perception*: *Studies Modeled from Probable Cause Cases*, Doty, R.L., Wudarski, T.J. & Hastings, L., Law & Human Behavior, Vol. 28, pp. 223-233 (2004)(concluding that the odor of both "immature" growing marijuana and dried, packaged marijuana was not reliably discernable by persons with an excellent sense of smell, and that higher "false positive" rates "would be expected in persons who would have greater benefit in detecting the presence of marijuana, as might occur in some law enforcement situations." *Id*., at 223 & 231.

emitted from glands called "glandular trichome" that do not develop until the plant buds. "When you have the flowering bud, you have a characteristic odor. But when the plants are in what's called vegetative state, as we learned they were found in this case, the characteristic odor is not developed in the plant yet."[19] ER: 136. Additionally, mature marijuana that is budding does not all smell the same. "There are many different smells," some of which are usually described as "skunky," "sweet," "bubble gum," "shoe polish," "chocolate," and "leathery." ER: 138-139.

Woodford testified, based on scientific studies and experiments, that the characteristic marijuana odor, if present in sufficient quantity, e.g., from a large marijuana grow exhaust system venting directly outside a building, could be detected as "a whiff," "every once in a while," from a maximum distance of 25-30 feet, but would be impossible for humans to smell at greater distances. "It takes a huge amount of odor to smell it very far outside," and substantially more than what would seep through normal cracks and crevices around siding, windows, etc.[20]

Woodford testified that, to a reasonable degree of scientific certainty, Landers could not have detected the odor of marijuana coming from the residence on either April

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[19] See, e.g., Marijuana Botany, *Glandular Trichome Types,* Robert Connell Clarke, p. 97 (AND/OR Press Berkeley, CA); American Journal of Botany, *Quantitative Determination of Cannabinoids in Individual Glandular Trichomes of Cannabis Sativa*, Turner, J.C., Hemphill, J.K., and Mahlberg, P.G., Vol. 65, No. 10, pp. 1103-1106. In the Doty study, *supra,* n. 31, researchers noted "three of the four immature Cannabis plants never were found to have a distinctive marijuana odor." "Immature" is different than "vegetative." Had that study criteria used solely "vegetative" plants, none would have emitted the distinctive marijuana odor. With indoor grows, it is impossible for the plants to begin growing the odor glands until daylight is decreased from 18 hours (vegetative) to 12 hours per day (decreasing light mimicking fall harvest).

[20] ER: 130-131, 142-143, 148-149. See, Odors from Stationary and Mobile Sources, *Characterization of Odorant Transport*, Ch. 5, pp. 169-178, (National Academy of Sciences, Washington, D.C. 1979); Police, *Olfactronic Detection of Narcotics and other Controlled Substances*, Krotoszynski, B.K., Mullaly, J.M., and Dravnieks, A., pp. 20-25 (Jan.-Feb. 1969). Dr. Woodford has also conducted marijuana odor distance studies for individual criminal cases; e.g., *United States vs. Avance*, CRNo. 90-303-FR (D. OR 1990).

15th or May 20th. The primary basis for his conclusion was that the agent was too distant from the residence to detect an odor, given the science of odor detection.[21] Charles McCormick, a licensed private investigator and former veteran police officer who specialized in drug enforcement, testified that in all of his investigations of marijuana grows, he had never smelled the odor of marijuana from an indoor grow from a distance of 40 feet or more outside the residence.[22]

Dr Woodford also testified regarding the scientifically recognized phenomenon of selective perception in odor detection; i.e., that a person will believe he smells what he wants to smell. ER: 129. He opined that Landers' "planned smell" versus "plain smell" of marijuana at Hackett Drive could be the result of selective perception, rather than intentional falsehood. ER: 148, 153-155. However, Woodford noted police officers are trained about the dangers of selective perception, and the high probability of false positives, so not taking steps to protect against that and thereby insure that officers' investigative conclusions are reliable is dishonest.[23] ER: 154-157.

The defense contended that, as a matter of law, to give weight to Landers' opinion that he smelled marijuana, the court must first evaluate the reliability and reasonableness of that opinion.[24] The district court found Landers "credible with respect to his representations regarding the detection of marijuana odor," while noting that he may have made a "false-positive" detection. App: A-18 to A-19. The Ninth Circuit held "the

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[21] ER:146-148. The Government did not challenge Woodford's qualifications as an expert in the science of marijuana odor detection, nor did it present any contrary expert opinion or scientific evidence to rebut any of his testimony on this topic.

[22] Transcript of hearing, p. 136; transcript filed as #118 in the District Court's case file.

[23] See, Patrol Procedure, George T. Payton, Observation and Perception: *Mechanics of Faulty Perception*, Ch. VI, p. 191, (Legal Book Corp, Los Angeles, CA).

[24] ER: 53-55 & 160-162.

district court did not clearly err in concluding that the appellants failed to show that Agent Landers' statement in the affidavit about detecting the marijuana odor constituted a deliberate or reckless misrepresentation," while noting "[t]he district court could have made a contrary finding on the evidence presented, but did not." App: A-7 to A-9. The Ninth Circuit failed to engage in a *de novo* review of whether there was a factual basis in the affidavit to establish the reliability of Landers' opinion that he smelled marijuana, but relied on the "smell of marijuana" to support probable cause.

In his petition for rehearing and suggestion for rehearing *en banc*, Viers objected that nowhere in its opinion did the Ninth Circuit panel address or even acknowledge the questions of law he had preserved and raised on appeal attacking the facial validity of the affidavit on the key component of probable cause: Landers' opinion that he detected the odor of marijuana plants. Viers' challenges to the reliability of Landers' opinion that he smelled marijuana plants concerned questions of law distinct from the factual assessment of Landers' credibility. Not addressed by the Ninth Circuit were Viers' claims (1) that the affidavit failed to set forth a factual basis for the magistrate to evaluate the accuracy of Landers' opinion; (2) that the scientific evidence regarding the unreliability of human detection of marijuana plant odors—unchallenged on the record and not discredited by the district court's findings—underscores the need for courts to scrutinize the reliability of such opinions, and to discount their weight in the probable cause calculus; and (3) that the district court's finding that Landers may have made a "false positive" detection supported a finding that his opinion about smelling marijuana, even if entitled to some

consideration, was not "reasonably trustworthy" to serve as the primary basis for probable cause.[25]

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the question presented (1) involves the standards to be used by magistrates to independently evaluate probable cause for issuance of search warrants based on an officer's claim of drug odor detection, (2) addresses a nation-wide, recurring fact pattern, and (3) is therefore exceptionally important to the administration of justice.

The Fourth Amendment requires that information used to support probable cause be "reasonably trustworthy." See, e.g., *Draper, supra*. In addition, affidavits for search warrants must contain the factual basis for police officers' opinions, so that the magistrate's review is not merely a ratification of the bare conclusions of others. See, e.g., *Illinois v. Gates, supra*.

For too long, these Fourth Amendment safeguards have been dodged by "the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, *supra*, 333 U.S. at 14, who claims to have smelled the marijuana plants that he can't see. The courts have deemed the officer to be credible, and stopped all further inquiry, without determining whether the officer's opinion about detecting the odor is reliable, i.e., "reasonably trustworthy" information.

> Even assuming 'credibility' amounting to sainthood, the judge still may not accept the bare conclusion of that 'credible' informant any more than he may accept the bare conclusion of a sworn and known and trusted police-affiant. To do so would be an unconstitutional delegation of the decision-making function which the Fourth Amendment lodges exclusively in the judge himself. *Id.* (citation omitted). LaFave, 2 Search & Seizure §3.3 (4th ed.).

[25] Appellant's Opening Brief, pp. 28-30, 43-63.

Given the current state of scientific knowledge concerning the highly-subjective and faulty ability of humans to accurately detect marijuana plant odors, this judicial approach is one of undue deference to law enforcement, akin to continuing to accept opinions that the Earth is flat or that the Sun revolves around the Earth, long after disproved by science, because those opinions are professed by respected members of society. Moreover, the police officer seeking a warrant has a vested interest in believing he smelled the drug odor he believed he was going to smell, based on his investigation.

In *Johnson*, this Court stated:

> If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character. 333 U.S. at 13.

Mr. Viers contended that in order for the magistrate to find the affiant is "qualified to know the odor," the magistrate must find more than simply the affiant is familiar with the odor; the magistrate must also consider the affiant's ability to reliably detect the odor under the totality of the circumstances.

The Courts of Appeal have required a showing of reliability for before canine drug odor detection may establish probable cause, but thus far have not required any showing of reliability for human drug odor detection, notwithstanding that the dog's sense of smell is far superior to that of humans.[26] Instead, the Courts have pared down

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[26] See, e.g.,*United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993)(a canine sniff alone can supply the probable cause necessary for issuing search warrant if the affidavit establishes the dog's reliability); *United States v. Sundby*, 186 F.3d 873, 876 (8th Cir.1999); *United States v. Hill*, 195 F.3d 258, 273-274 (6th Cir. 1999); *United States v. Beale*, 674 F.2d 1327, 1334-35 (9th Cir. 1982), *judgment vacated on other grounds*, 463 U.S. 1202(1983)("[p]roperly trained canines are extremely reliable and any mistake is one of omission, favoring the suspect," but should its "concept of canine reliability" prove inaccurate, the Court would alter the role of canine drug detection in establishing probable cause.).

this *dicta* from *Johnson* to a rule that an officer's detection of drug odors can by itself establish probable cause to search, and have upheld warrants to search private residences based on little more than a claim of marijuana odor detection by an officer who claims familiarity with that smell. See, e.g., *Miller v. Sigler*, 353 F.2d 424, 427 (8th Cir. 1965); *United States v. Kerr*, 876 F.2d 1440, 1445 (9th Cir. 1989); *United States v Elkins*, 300 F.3d 638, 659 (6th Cir. 2002); *but cf., United States v. DeLeon*, 979 F.2d 761, 765 & n.1 (9th Cir. 1992)(recognizing that growing marijuana plants have no commonly recognized odor, based on testimony by Dr. Woodford in that case).

Given the prominence and prevalence of drug odor detection in justifying searches, and the undisputed science establishing the high unreliability of human detection of marijuana plant odors, continued adherence to this line of authority undermines the judicial duty to independently assess probable cause. Thus, Mr. Viers' case presents an exceptionally important question of law intrinsic to the judiciary's role in enforcing the Fourth Amendment. *See also, e.g.*, *United States v. Ventresca*, 380 U.S. 102, 105 (1965)(certiorari granted "to consider the standards by which a reviewing could should approach the interpretation of affidavits supporting warrants"); *Illinois v. Gates, supra*, 462 U.S. at 217 (certiorari granted "to consider application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip).

II. A search warrant affidavit relating a police officer's opinion of detecting the odor of marijuana plants emanating from a residence must state sufficient facts from which the magistrate can independently determine whether the officer's opinion is reasonably reliable, before the opinion can be used to find probable cause to search the home.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Johnson*, *supra,* 333 U.S. at 13-14.

An officer's claim of odor detection is an opinion or conclusion from what he observed. See, e.g., *United States v. Santana, supra,* 342 F.2d at 68-69; *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982)(what a witness sees or smells is an opinion); *United States v. Rhiger*, 315 F.3d 1283, 1292 n.5 (10th Cir. 2003)(discussing, without deciding, whether officer's testimony about smelling drug odors on defendant's clothing was expert or lay opinion).

In *Gates*, the Court noted that a warrant affidavit "must provide the magistrate with a substantial basis for determining the existence of probable cause" and must not be "a mere conclusory statement that gives the magistrate virtually no basis at all for making [such] a judgment." 462 U.S. at 239; see also, *Aguilar v. Texas*, 378 U.S. 108 (1964)(rejecting warrant where magistrate "necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion' ").

The Courts of Appeal have recognized the need for the affidavit to contain particularized facts from which the magistrate can determine whether the opinions or conclusions of police officers, as well as informants, are reasonably reliable. See, e.g., *United States v. Vigeant*, 176 F.3d 565, 571 (1st Cir. 1999)(police officer's conclusion

that suspect's businesses were "front companies"); *United States v. Clark*, 31 F.3d 831 (9th Cir. 1993), *cert. denied*, 513 U.S. 1119 (1995)(officer's conclusion that suspect residence had high power consumption indicative of marijuana grow); *United States v. Pope*, 476 F.3d 912, 920 (5th Cir. 2006)(noting that conclusory statements deprive magistrate of the facts and circumstances needed for the magistrate to independently determine probable cause); *United States v. Weaver*, 99 F.3d 1372, 1377-1378 (6th Cir. 1996) (boilerplate statements do not suffice to show "particularlized facts" needed to support conclusions).

Thus far, however, the federal courts have not expressly applied this Fourth Amendment jurisprudence to an officer's conclusion that he smelled the odor of drugs that he could not see.

There were insufficient facts in the affidavit in Mr. Viers' case for the magistrate to evaluate the reliability of Agent Landers' claim of detecting the odor of marijuana. Looking only within the "four corners" of the affidavit, easily supplied facts for the magistrate to evaluate the reliability of Landers' opinion are missing:

1. There is no information about his distances from the residence when he claims to detect the odor.
2. There is no mention of open windows, chimney or vent pipes, or other observed means of odors within the house escaping to the outside air, a prerequisite to anyone smelling the odor.
3. There is no assertion that Landers had correctly detected the odor of marijuana by the methods he employed here in any prior cases. The affidavit simply states that Landers has experience investigating indoor and outdoor marijuana

grows, and based on that experience he has learned that marijuana has a recognizable odor. [27]

4. Once properly stripped of the unreliable informant's two-year old stale tip based on hearsay about a grow at the residence, there were no facts suggestive of an ongoing marijuana grow at the residence to corroborate that whatever odor, if any, Landers detected was that of marijuana.

Furthermore, the district court acknowledged the defense expert's opinion that, to a reasonable degree of scientific certainty, it would have been impossible for the officer to have actually detected the odor of marijuana plants, and found that the officer may have made a false-positive detection. That finding by the district court of "false-positive detection(s)" supports a finding of unreliability. *Cf., Illinois v. Caballes*, 543 U.S. 405, 409 (2005)(trial court found dog sniff alert to narcotics sufficiently reliable to establish probable cause; Supreme Court notes the record contained no evidence or findings regarding error rates or false positives).

The record in Viers' case proves wrong the judicial presumption that officers familiar with drug odors are reasonably reliable in detecting the odors regardless of circumstances such as distance from the odor source, or the particular type of drug odor, e.g., young marijuana plants versus mature, budding marijuana plants; it highlights the likelihood of false-positive claims of detection due to the highly-subjective and fallible nature of human odor detection. It calls for a decision by this Court that requires the weight given to an officer's claim of smelling marijuana plants in establishing probable cause to conform with common sense based on current scientific knowledge, and that

[27] SW¶4, App: A-27.

requires courts nationwide to scrutinize such claims under the Fourth Amendment's commands that information supporting probable cause be reasonably reliable, and that the facts needed for the magistrate to make that determination be supplied in the affidavit.

CONCLUSION

The Fourth Amendment should protect citizens from home invasion by police armed with a warrant based almost solely on the investigating officer's opinion of having smelled the odor of marijuana plants he can't see, when the affidavit leaves the magistrate in the dark without sufficient facts to evaluate the reliability of that opinion. To remedy this, this Court should grant Mr. Viers' Petition for Writ of Certiorari, joined by Ms. Wiechert.

RESPECTFULLY SUBMITTED this _____ day of February, 2008.

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