No. 09-293

# In the Supreme Court of the United States

MODESTO OZUNA,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

The petition demonstrated that the courts of appeals are deeply divided concerning whether a party moving to reopen a suppression hearing to introduce additional evidence must provide justification for its failure to introduce that evidence at the initial hearing (Pet. 11–15); that the question presented is recurring and of substantial importance (*id.* at 15–18); and that the Seventh Circuit's decision is erroneous (*id.* at 19–23). None of the government's contrary arguments justify denial of the petition.

### I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The government asserts that "there is no direct conflict among the courts of appeals." Opp. 9. But as the government admits, the Seventh Circuit expressly "acknowledged that several circuits have adopted rules requiring the government to justify the reconsideration or reopening of suppression hearings." *Id.* at 7; see Pet. App. 11a ("Several of our sister circuits have * * * adopted rules requiring the government to justify reconsidering, reopening, or supplementing suppression hearings"). The court below is far from alone in acknowledging this deep circuit split. The Second Circuit has recognized that courts of appeals have taken "two approaches" to resolving motions to reopen suppression hearings (*United States* v. *Bayless*, 201 F.3d 116, 131 (2d Cir. 2000)), while the Ninth Circuit has squarely "reject[ed] [a] 'justification' requirement" adopted by other circuits. *United States* v. *Rabb*, 752 F.2d 1320, 1323 (9th Cir. 1984), abrogated on other grounds by *Bourjaily* v. *United States*, 483 U.S. 171 (1987)); see also Pet. 12 (citing additional cases acknowledging circuit split).

The government attempts to reconcile the Seventh Circuit's decision with the five circuits that have imposed a justification requirement by asserting that "*all* of the courts of appeals that have considered the issue agree that the decision to reopen a suppression hearing is left to the sound discretion of the district court." Opp. 9. While the courts of appeals agree that rulings on motions to reopen should be reviewed for abuse of discretion, that does not reconcile the circuits' disparate conclusions concerning what constitutes an abuse of discretion. The Seventh Circuit held below that district courts may grant motions to reopen under a "'totality of the circumstances'" approach without requiring the moving party to demonstrate justification. Pet. App. 12a. By contrast, courts adopting the bright-line rule have held that "to properly exercise its discretion the district court *must* evaluate [the moving party's] explanation and determine if it is both reasonable, and adequate to explain why the [moving party] initially failed to introduce evidence that may have been essential to meeting its burden of proof." *United States* v. *Kithcart*, 218 F.3d 213, 220 (3d Cir. 2000). Thus, contrary to the Seventh Circuit's approach, the bright-line rule adopted by the majority of circuits makes it is a *per se* abuse of discretion for a district court to reopen a suppression hearing to admit evidence that was available at the time of the initial hearing without requiring the moving party to justify its failure to introduce that evidence at the initial hearing.

The government also attempts to distinguish cases adopting the bright-line rule on their facts. First, the government claims that "[t]wo of the cases petitioner cites as constituting part of the supposed circuit conflict did no more than recognize that a dis-

trict court may exercise its discretion" by denying reopening absent justification. Opp. 10 (citing *United States* v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999), rev'd on other grounds, 530 U.S. 428 (2000); *United States* v. *Carter*, 374 F.3d 399 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005)). In fact, the Fourth Circuit held in *Dickerson* that "when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, * * * the movant *must* provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress." 166 F.3d at 679 (emphasis added). Similarly, the Sixth Circuit held in *Carter* that "'to properly exercise its discretion the district court *must* evaluate'" the moving party's "'explanation for failure to present the evidence'" at the initial hearing. 374 F.3d at 405 (emphasis added). Thus, the Fourth and Sixth Circuits did not hold merely that district courts may exercise their discretion to deny reopening absent justification. Rather, contrary to the Seventh Circuit, the Fourth and Sixth Circuits held that district courts must deny reopening absent justification.

Second, the government claims that the Third Circuit's decision in *Kithcart* "depends on the prejudice inherent in reopening a suppression hearing long after the original suppression has been ordered." Opp. 11. But in holding that the district court erred in reopening a suppression hearing to allow the government to introduce additional evidence, *Kithcart* did not so much as mention the delay between the two suppression hearings. Instead, the court based its decision on the lack of any justification for the government's failure to introduce the additional evidence at the initial hearing. Thus, the Third Cir-

cuit required the district judge to resolve the parties' dispute based "solely upon the evidence that was presented or offered at the original suppression hearing" because "the government still has not offered any explanation for its failure to introduce additional evidence at the original suppression hearing." *Kithcart*, 218 F.3d at 221; see *United States* v. *Coward*, 296 F.3d 176, 181 (3d Cir. 2002) (*Kithcart* "placed emphasis on the need for an adequate explanation of the failure to present the relevant evidence earlier").

Third, the government seeks to distinguish *United States* v. *Thompson*, 710 F.2d 1500 (11th Cir. 1983), because in that case the government conceded at the initial suppression hearing the legal argument that it later sought to press at a second hearing. Opp. 12–13. That distinction is beside the point. The Eleventh Circuit held that the government waived its right to reconsideration not simply because it had conceded the legal argument supporting its motion, but because it "offered no justification for its failure to raise and develop the issue at the [initial] suppression hearing." *Thompson*, 710 F.2d at 1504; accord *United States* v. *Villabona-Garnica*, 63 F.3d 1051, 1055 (11th Cir. 1995).

Finally, the government claims that in *McRae* v. *United States*, 420 F.2d 1283 (D.C. Cir. 1969), the D.C. Circuit "confined its holding" to "the unusual circumstances in which one district judge reconsidered a suppression order entered by a different district judge." Opp. 12. The D.C. Circuit did no such thing. To the contrary, in a subsequent case where the government sought reconsideration of the *same* district judge's suppression order, the D.C. Circuit cited *McRae* in holding that "[t]he government cannot relitigate the issues resolved by a suppression

order without advancing some justification for its failure to develop those issues fully at the initial hearing." *United States* v. *Greely*, 425 F.2d 592, 593 (D.C. Cir. 1970). Thus, contrary to the government's position, the Seventh Circuit was correct in citing *McRae* as "requiring the government to justify reconsidering, reopening, or supplementing suppression hearings." Pet. App. 11a.

## II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

The government asserts that this case presents a "poor vehicle" to resolve the question presented because petitioner "would not be entitled to relief under the bright-line rule." Opp. 15. In doing so, the government claims that the Seventh Circuit held that "the government's request to reopen the suppression hearing was justified because the authenticity of petitioner's signature was not at issue until the suppression hearing." *Id.* That is incorrect.

In holding that the district court did not abuse its discretion by reopening the suppression hearing, the Seventh Circuit noted that "[i]t does not appear" that the authenticity of the signature on the consent-to-search form "was clearly at issue until the first suppression hearing." Pet. App. 13a. The Seventh Circuit did not, however, suggest that its speculation about whether the authenticity of the signature on the consent-to-search form was "at issue" before the initial suppression hearing constituted an alternative holding that would suffice to provide justification for reopening under the bright-line rule. Moreover, as the government concedes, petitioner "specifically asserted that he did not consent to the search" in his motion to suppress filed *before* the initial hearing. Opp. 15–16; see C.A. App., Tab 21 at 14–15.

Thus, contrary to the government's assertion (at 16), it had reason to believe that the authenticity of the signature on the consent-to-search form would be in dispute before the initial suppression hearing. In any event, the government should present any claimed justification for its failure to introduce handwriting analysis at the initial hearing in the district court to allow that court to resolve any such claim under the bright-line rule.

## III. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT.

The petition explains that the bright-line rule adopted by the majority of circuits promotes predictability, finality, and the prompt adjudication of motions to suppress by placing litigants on notice that they must introduce all relevant, available evidence at the initial hearing. Pet. 19–23. The government's defense of the Seventh Circuit's "totality of the circumstances" approach does not justify rejecting the bright-line rule.

The government first claims that "reopening the proceedings does not necessarily unduly extend the proceedings." Opp. 14. While that may be true, it is indisputable that reopening a suppression hearing to introduce additional evidence at a successive hearing will generally cause delay, as the facts of this case amply demonstrate. Pet. 17–18. The government next claims that "a party has every incentive to introduce at the original suppression hearing all the evidence available to it." Opp. 14. The sheer number of cases addressing disappointed litigants' motions to reopen suppression hearings suggests, however, that there is not incentive enough. Pet. 15–16 & n.2. Finally, the government claims that "allowing a district court broad discretion to correct its own errors may

likely serve to enhance judicial economy by conserving appellate resources." Opp. 14. In fact, the bright-line rule provides district courts with discretion to reopen suppression hearings upon a showing of justification. Moreover, the district court does not need justification to correct "its own errors"; justification is required only when the movant seeks to reopen a suppression hearing to introduce additional evidence that was available at the time of the initial hearing. Therefore, the totality of the circumstances approach adopted by the Seventh Circuit will not conserve appellate resources.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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