No. AMC3-SUP 2015-37-06

FOR THE APPELLATE MOOT COURT COLLEGIATE CHALLENGE

CHANNING MERCHANDISE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to

the Supreme Court Of The United States

BRIEF FOR THE PETITIONER

TEAM 221
Jacob Haskins
Gabriel Lazarus

QUESTIONS PRESENTED

1) Whether the Fourth Amendment permits law enforcement officers to conduct a protective sweep of a home without a warrant when the sweep is not incident to a lawful arrest.

2) Whether a law enforcement agent may incorporate specialized experience and knowledge in determining if a container has illegal contraband, thereby justifying a lawful warrantless search under the plain view doctrine.

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SUPREME COURT OF THE UNITED STATES
CASE No. AMC3-SUP 2015-37-06

CHANNING MERCHANDISE,
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UNITED STATES OF AMERICA,
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BRIEF FOR THE PETITIONER

JURISDICTION

The United States Supreme Court may review cases from the Twentieth Circuit Court of Appeals if this Court grants a Writ of Certiorari by any party to a civil or criminal case. On June 1, 2013, Petitioner filed a Writ of Certiorari with this Court appealing the verdict in *Channing Merchandise v. United States of America*. R. at 06-51. On June 14, 2013, the Supreme Court of the United States of America granted the Writ for Certiorari. *Id.* at 06-52.

STATEMENT OF THE CASE

This action arises out of a dispute as to whether the arrest of the Petitioner, Channing Merchandise, was based on an unconstitutional search and seizure of his home by the Drug Enforcement Agency. On January 5, 2013, Petitioner was convicted of knowingly possessing a controlled substance with intent to distribute in violation of 21 U.S.C. § 841 (a) (1). R. at 06-21. Petitioner then filed an appeal with the United States Court of Appeals for the Twentieth Circuit on January 7, 2013. *Id.* at 06-21. On April 9, 2013, Petitioner filed a brief with the Twentieth Circuit. *Id.* at 06-22. On April 28, 2013, respondent filed a brief with the Twentieth Circuit. *Id.* at

06-34. On May 30, 2013, the United States Court of Appeals for the Twentieth Circuit affirmed the decision of the lower court. *Id*. at 06-50. On June 1, 2013, Petitioner filed for a Writ of Certiorari with the Supreme Court of the United States. *Id.* at 06-51. On June 14, 2013, the Supreme Court granted certiorari to the Petitioner. *Id.* at 06-52.

STATEMENT OF THE FACTS

On July 15, 2012, two Drug Enforcement Agency officers, Arlo Crimejustice and Hammel Loosecannon, entered the home of Channing Merchandise, suspecting a possible burglary. R. at 06-4. The two found Mr. Merchandise unresponsive on the ground and proceeded to conduct a protective sweep of the home. *Id.* at 06-4. During the sweep, one of the agents opened Mr. Merchandise's closet and found a shaving cream canister on the floor. *Id.* at 06-4. Relying upon knowledge of similar shaving cream canisters being used in the past to conceal illicit substances, Agent Crimejustice proceeded to open the container, which held marihuana. *Id.* at 06-4. The agents then arrested Mr. Merchandise before searching the rest of the house and finding drug paraphernalia. *Id.* at 06-5. Mr. Merchandise was indicted and charged with possession with intent to distribute a controlled substance and conspiracy to possess with intent to distribute a controlled substance. *Id.* at 06-20.

SUMMARY OF THE ARGUMENT

This Court should rule that the Drug Enforcement Agency officers violated the Fourth Amendment in their search of the home of Mr. Channing Merchandise, and that any physical evidence recovered during the search be inadmissible. The Fourth Amendment establishes freedom from unreasonable search and seizure, and that an individual be protected at all reasonable costs, particularly in his own home. In order for officers to search an individual's home and seize his property, they must have probable cause and, ideally, a warrant.

The scope of what officers are able to do without probable cause or a warrant is limited. While they are permitted to perform a protective sweep, it must be incident to an arrest and in situations where there is a reasonable likelihood of danger. Additionally, in seizing property without a warrant, the property must be in plain view. Furthermore, it is unconstitutional for an officer to rely on his or her personal specialized knowledge when it is not known to other law enforcement agents. These violations of the Fourth Amendment during the search and seizure in the home of Mr. Merchandise render inadmissible all recovered evidence.

ARGUMENT

American citizens are entitled to protection under the Fourth Amendment, which grants the right to be "secure" in one's person and home, thereby prohibiting unreasonable searches and seizures by police officers. See U.S. Const. amend. IV; Boyd v. United States, 116 U.S. 616 (1886). Both the "protective sweep" performed by the agents on Appellant's home, and the search and seizure of Appellant's container were constitutionally impermissible violations of Appellant's Fourth Amendment rights. All physical evidence seized by the government officials is the fruit of the poisonous tree, and because of the violations of Appellant's Fourth Amendment freedoms, the lower court's ruling cannot stand.

The Court has long held a strong preference for searches of a home or property only after a warrant is obtained. Coolidge v. New Hampshire, 403 U.S. 443, 460 (1971) (quoting Carroll v. United States, 267 U.S. 132, 153 (1925)). Additionally, evidence is inadmissible at trial if it was recovered "'by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.'" Terry v. Ohio, 392 U.S. 1, 29 (1968) (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967)). As a result, when the Fourth Amendment is violated in an unreasonable search and seizure, any recovered evidence is inadmissible. Mapp v. Ohio, 367 U.S. 643,

655 (1961). Even if the Court were to find that the search in this case was permissible, the shaving canister and its contents fall clearly outside the protective purpose of the search.

I. THE CIRCUIT COURT ERRED IN HOLDING THE PROTECTIVE SWEEP CONSTITUTIONALLY PERMISSIBLE.

This Court recognizes that "warrantless searches are presumptively unconstitutional." Kyllo v. United States, 533 U.S. 27, 32 (2001). There are, however, several "exceptions to presumptive unreasonableness." Groh v. Ramirez, 540 U.S. 551, 572 (2004). The officers in Appellant's home relied upon the protective sweep doctrine, in which law enforcement officials can conduct "a quick and limited search of premises, incident to an arrest, and conducted to protect the safety of police officers or others," so long as the officers have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger." Maryland v. Buie, 494 U.S. 325, 327, 337 (1990).

A. BUIE ONLY PERMITS WARRANTLESS PROTECTIVE SWEEPS OF HOMES THAT ARE INCIDENT TO ARREST

Buie is clear in permitting only protective sweeps incident to arrest. A "protective sweep" is clearly defined by this Court as a "quick and limited search of premises, *incident to arrest.*" Buie, 494 U.S. at 327 (emphasis added). Consequently, there cannot be a "protective sweep" that is not incident to arrest. The Court was clear in Buie that if a defendant is not under arrest, as was the case at the time Agents Crimejustice and Loosecannon searched Mr. Merchandise's house, officers are not permitted to conduct a protective sweep. Furthermore, under Buie, in the instance of an arrest, officers are permitted only to search the area within the immediate control of the arrestee's person. Mr. Merchandise was in the living room of his house, while the officers were

searching some distance away in his bedroom. See Chimel v. California, 395 U.S. 752, 762-63 (1969).

While courts have held that reasonable protective sweeps can occur prior to an actual arrest, they have been limited to situations where probable cause prompted the arrest itself. See United States v. Torres-Castro, 470 F.3d 992, 997-98 (10th Cir. 2006). It is incontrovertible that the Appellant was not under arrest at the time of the search. Furthermore, there is no allegation or proof on the part of the Drug Enforcement Agency that probable cause existed to warrant the agents arresting the Appellant prior to the search. It must be established that "the facts and circumstances within [officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (internal quotation marks omitted).

B. A PROTECTIVE SWEEP IS UNREASONABLE WITHOUT THE PARTICULAR DANGER POSED BY ARREST SITUATIONS

Buie makes allowance for protective sweeps during arrests because such situations can pose additional threat to arresting officers. There are no grounds to extend Buie to encompass non-arrest instances within a home. Buie allows law enforcement agents to "protect themselves and other prospective victims of violence." Buie, 494 U.S. 325 at 332 (quoting Terry, 392 U.S. 1, 24 (1968)). The rationale of Buie as well as Terry is that officers in dangerous situations should be allowed to conduct reasonable and limited warrantless searches in non-arrest situations to ensure their safety and that of any other individuals who could be threatened by the situation. It is well settled that police are only entitled to conduct narrow, limited searches in *non-arrest situations*, when there is an "articulable and objectively reasonable belief that the suspect is potential-

ly dangerous." Michigan v. Long, 463 U.S. 1032, 1033 (1983) (emphasis added). In this case, the law enforcement agents were explicitly concerned not with the "suspect" (Mr. Merchandise), but with the possibility of "other people in the house." R. at 06–22.

The Court established a balancing test under Terry to recognize exceptions to requiring warrants for limited frisks. Officers must "balance the need to search (or seize) against the invasion which the search (or seizure) entails. Terry, 392 U.S. at 21. Furthermore, Terry established that officers must be able to "point to specific and articulable facts which, taken together with rational inferences, reasonably warrant intrusion. Terry, 392 U.S. at 21. Buie can be seen as an extension of Terry and Long, with more power being given to officers using the Terry balancing test. Buie held that there is an interest of officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other dangerous individuals. Buie, 494 U.S. at 1097-98. In this case, Appellant had not been arrested and the officers' sweep went beyond the scope of searching for dangerous individuals. Under the Terry balancing test, there were no specific or articulable facts, nor rational inferences, that permitted the officers to enter Appellant's closet.

II. THE CIRCUIT COURT ERRED IN HOLDING THE SEARCH AND SEIZURE OF THE CANISTER CONSTITUTIONALLY PERMISSIBLE.

A. THE DOCTRINE OF PLAIN VIEW CANNOT APPLY TO THE CONTENTS OF A SEALED, OPAQUE, GENERIC CONTAINER

Contents of a container found during a warrantless search are generally protected under the Fourth Amendment. Robbins v. California, 453 U.S. 420, 428–429 (1981). Robbins relates to the matter presently before the Court not merely because it established the relevant precedent for

containers, but also because Robbins demonstrates how even exigent circumstances surrounding the search cannot override the Fourth Amendment protection afforded to such containers. In Robbins, the police had substantial evidence indicating that the Petitioner was in possession of marihuana. At the time that the police pulled Robbins over, they "smelled marihuana smoke" and found "marihuana as well as equipment for using it" in the passenger compartment. *Id.* at 422. This circumstance prompted the police to search for additional drugs and eventually led to the police opening two sealed opaque packages from the trunk, which each contained a significant quantity of marihuana. Yet despite the fact that the police's search was "lawful," and that the officers had good reason to be looking specifically for marihuana, the court nonetheless ruled that "a container may not be opened without a warrant." *Id.* at 428.

By contrast, agents Crimejustice and Loosecannon had no indication that Mr. Merchandise was in possession of marihuana. At best, the state in which they found Mr. Merchandise and his home indicated only that, in the words of Agent Crimejustice, there was "something or someone in the house." R. at 06-12. Even if the court concludes that the officers acted appropriately in conducting a sweep of the residence, nothing about the scene provided reason to believe that Mr. Merchandise was concealing a controlled substance in his home. If in Robbins, where the officers had good reason to look for marihuana, that probable cause was still insufficient to justify opening the containers, then in this case, given that there was no evidence of drugs, there can be no justification for violating Appellant's privacy.

The Court does recognize two exceptions to Fourth Amendment protections as they apply to the contents of a container. Both exceptions stem from the plain view doctrine. The first exception is for contents that are literally "open to 'plain view'" because the container is transparent or open. Robbins, 453 U.S. 420, 427 (1981); *Cf.* Michigan, 463 U.S., 1032, 1032 (1082), in

which the court held that the seizure of marihuana was reasonable because it was in "an open pouch." It is undisputed that the shaving cream canister found at Mr. Merchandise's home was opaque and sealed when the police found it, and therefore it does not fall under this first exception.

Second, the Court has found that "some containers... by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Robbins v. California, 453 U.S. 420, 427 (1981) (quoting Arkansas v. Sanders, 422 U.S., 753, 764–765 (1979)). Every party to this case agrees that it was the express purpose of the "Fillette" containers to conceal their contents — i.e., to prevent such inference from their outward appearance to the conclusion that they contained an illicit substance.

B. SPECIALIZED KNOWLEDGE OF A PARTICULAR OFFICER IS NOT SUFFICIENT GROUNDS FOR INVADING A SUSPECT'S PRIVACY

An individual officer may not use personal knowledge to invade an individual's privacy. The respondent begs to differ with the assertion that the containers, by their very nature, prevented an inference as to their contents. The State asserts that Agent Crimejustice had specialized knowledge about similar containers that put him in a unique position to make such an inference; that this container likely contained illicit contents. The Court has been clear, however, that an individual officer's knowledge is insufficient grounds to make a specialized knowledge exception to the Fourth Amendment.

In establishing whether or not probable cause exists, one must look at "'the evidence... as understood by those versed in the field of law enforcement.'" Texas v. Brown, 460 U.S. 730, 742 (1983) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). Put slightly differently in the same ruling, the court held that the standard is that of "'a man of reasonable caution.'" *Id.* at 742

(quoting Carroll v. United States, 267 U.S., 132, 162 (1925)). The bar, then, is not any particular individual officer's happenstance knowledge, but rather the training and experience of a reasonable law enforcement official. To that end, the majority opinion made special note of the fact that the arresting officer in Texas knew of the balloons like the one in the respondent's possessed not only from "previous narcotics arrests," but also from "discussions with other officers." *Id.* at 742. Furthermore, the court considered the fact that the officer could actually see "quantities of loose white powder" in the respondent's glove box. *Id.* at 734. Finally, "a police department chemist" corroborated the assertion that the special use of these balloons was common knowledge to law enforcement officials. *Id.* at 743.

These various elements in Texas all go to support the assertion that the average "man of reasonable caution" would have found it likely that the respondent's balloon possessed an illegal substance. *Id.* at 742. Yet of the elements relied upon in Texas, only one is present in the case now before the Court. Namely, Agent Crimejustice testified that he had previously seen these shaving cans in at least fifteen other cases. R. at 06-15. There is no evidence that other officers knew that these containers often contained contraband (in fact, the other officer on the scene, Agent Loosecannon, explicitly stated that he did not suspect the container to contain drugs); there is no evidence that criminalistics experts have experience with such canisters; and there is no evidence that there was any other indication in the vicinity of the can that it held anything illegal. *Id.* at 06-19. As such, Agent Crimejustice's "specialized knowledge" is merely an idiosyncratic hunch. It has long been held by this court that the Fourth Amendment is fundamentally a right to privacy. Mapp v. Ohio, 367 U.S., 643, 652–653 (1961). That right is meaningless if, in justifying intrusions upon a citizen's privacy, individual law enforcement agents may rely upon pieces of trivial knowledge that a citizen would not reasonably expect an officer to possess.

CONCLUSION

For the foregoing reasons, the Petitioner, Channing Merchandise, respectfully requests that the Supreme Court reverse the decision of the Twentieth Circuit and hold that the two violations of the Fourth Amendment render any recovered physical evidence inadmissible.

Respectfully Submitted,

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TEAM 221