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No.

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IN THE  
SUPREME COURT OF THE UNITED STATES

ARTHUR WATERS,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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

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## QUESTION PRESENTED

Almost thirty years ago, this Court established the parameters of a protective sweep incident to an in-home arrest in *Maryland v. Buie*, 494 U.S. 325 (1990). As part of its holding, the Court said that searches beyond the spaces immediately adjoining the place of arrest must be supported by “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.* at 335.

Ignoring *Buie* and breaking with precedent from the Second and Sixth Circuits, the Eighth Circuit has adopted an automatic protective sweep doctrine that permits a sweep of an arrested individual’s home if that person is linked to drug distribution. Historically, this Court has declined to permit categorical Fourth Amendment exceptions for particular offenses. See, *Richards v. Wisconsin*, 520 U.S. 385 (1997) and *Florida v. J.L.*, 529 U.S. 266 (2000). This Court should accept certiorari to review the following question: Should *Buie* be expanded to permit protective sweeps in all cases involving in-home arrests of suspected drug distributors?

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Petitioner, Arthur Waters, respectfully asks this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 28, 2018, affirming the district court's judgment.

**OPINION BELOW**

The Eighth Circuit's opinion affirming the judgment of the district court is reported as *United States v. Waters*, 883 F.3d 1022, (8<sup>th</sup> Cir. 2018), and is included

in Appendix A. A copy of the order denying rehearing is included in Appendix B.

## **JURISDICTION**

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 18 U.S.C. § 3231, because Mr. Waters was charged and convicted of unlawful possession of a firearm as a previously convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924 (a)(2).

Mr. Waters appealed from his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291.

The United States Court of Appeals for the Eighth Circuit denied rehearing on April 23, 2018. In accordance with Rule 13.3, Sup. Ct. R., this Petition for Writ of Certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order affirming the district court's judgement in this case. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

## **CONSTITUTIONAL PROVISION INVOKED**

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. U.S. Const., Amend. IV.

## **STATEMENT OF THE CASE**

### **A. Procedural History**

On October 1, 2015, Mr. Waters was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). On December 30, 2015, Mr. Waters filed a motion to suppress all evidence seized during a search of his residence and all fruits of the invalid search. On January 8, 2016, the government filed suggestions in opposition to the motion to suppress. The district court heard evidence on January 22, 2016.

On February 8, 2016, the magistrate judge issued a Report and Recommendation recommending that the motion to suppress be denied. On February 22, 2016, Mr. Waters filed his objections to the Report and Recommendation. On February 24, 2016, the district court issued an order adopting the Report and Recommendation and denying the motion to suppress.

On June 21, 2016, Mr. Waters entered a conditional guilty plea, reserving his right to appeal from the denial of his motion to suppress. On February 8, 2017, the district court sentenced Mr. Waters to 87 months' imprisonment to be followed by three years of supervised release. Mr. Waters filed a timely appeal, which was

denied by the United States Court of Appeals. *United States v. Waters*, 883 F.3d 1022 (8th Cir. 2018). His petition for rehearing was denied on April 23, 2018.

## **B. Testimony and Evidence Presented on the Motion to Suppress**

On September 3, 2015, at approximately 9:45 a.m., law enforcement officers with the Kansas City, Missouri, Police Department, started surveillance of a duplex where Arthur Waters lived with his girlfriend, Dannaica James, and their two children. The officers planned to arrest Mr. Waters on an outstanding warrant.

At approximately 12:50 p.m., officers stopped a vehicle driven by a man, who, the officers believed, knew Mr. Waters. The man identified a photograph of Mr. Waters and told the officers that he had obtained narcotics from Mr. Waters in the past. The man placed a phone call to Mr. Waters, verifying that he was at home and would be there for a while. During the phone call, Mr. Waters purportedly told the man, “he could get what he was looking for.”

Officers maintained surveillance for approximately five hours, but did not see anyone come or go from the duplex. At approximately 2:50 p.m., Ms. James exited the duplex, walked towards her car, but then briefly returned to the duplex as if she had forgotten something. She knocked on the door and was allowed inside. She left the duplex a second time and got in her car. Officers detained her and asked whether Mr. Waters was in the duplex. She confirmed that he was home

and said that no one else was present.

Officers surrounded the house and a team approached the back door, knocked, and announced that they were police officers. Officers saw window blinds move on the second floor of the duplex and then observed window blinds move on the first floor. The officers waited a couple minutes and, not receiving an answer to their knock, forced open the back door.

The back door to the duplex opened into a utility room and the kitchen was to the left. The living room was next to the kitchen. Detective Michael Miller heard Mr. Waters say that he was coming down, presumably meaning that he was coming downstairs. Detective Miller saw Mr. Waters in the living room and an officer directed Mr. Waters to enter the kitchen, where he was arrested, handcuffed, and removed from the residence.

Detective Miller explained that he and other officers then cleared the living room, the second floor bedrooms, and the bathroom, looking for other individuals who could possibly be in the duplex. Officers noticed on the living room floor, in plain view, a small amount of marijuana, a pipe, and a grinder.

Deputy Marshall Jason Roberts started a protective sweep of the living room. Deputy Marshall Roberts explained the basis for the protective sweep as follows:

Q. Okay. What made you think there was somebody else in the home besides Mr. Waters?

A. That's why we were doing the sweep. We didn't know if anyone else was in the home.

Q. But did you have reason to think someone else was? You just didn't know.

A. Like we said, we did not know, and –

Q. Okay.

A. – for officer safety reasons, we want to make sure that there's nobody else there that's going to harm us.

Q. Okay.

A. And we'd seen the blinds move upstairs. There were just several things that, we wanted to make sure everything was safe.

Deputy Roberts testified that he went to a couch that was on the right side of the living room and “gave it a hip check, just to try and move it and see, you know, the weight of the couch.” The couch moved after Deputy Roberts bumped it with his hip. Deputy Roberts then “moved it away from the wall, so that [he] could check behind it” and see if anyone was “hiding back there that could harm us.” Deputy Roberts testified that the couch was large enough for somebody to hide behind or inside. He recalled that the couch was between two end tables with lamps and that it was a “tight fit” between the tables. After Deputy Roberts pulled

the couch away from the wall, he saw a gun on the floor where the couch had been.

After Mr. Waters was arrested and the protective sweep was done, officers obtained a search warrant and found a digital scale, two small bags of marijuana in the bedroom, and two pills.

Ms. James, Mr. Waters' girlfriend, testified that when the police stopped her as she was leaving her home, they told her that they were looking for Mr. Waters. She informed them that Mr. Waters was in the home and no one else was present. The officers indicated that they were going to kick in the back door, so she asked them to wait while she called Mr. Waters on her phone to ask him to come to the door. She made the call and spoke to Mr. Waters who was in the bathroom, which was on the second floor. She told the police that he was coming down, nonetheless the officers kicked in the door.

Ms. James testified that before Mr. Waters' arrest, the couch in her living room was against a wall with approximately one or two inches of space between the wall and the couch. Later, an investigator for the Federal Public Defender photographed the couch and determined that there was not enough space for a person to hide under the couch.

### **C. The Eighth Circuit's Opinion**

The Court of Appeals concluded that the movement of the window blinds on

the first and second floors of the residence provided specific and articulable facts from which a reasonable officer could have concluded that another person was in the residence. *United States v. Waters*, 883 F.3d 1022, 1026 8th Cir. 2018). The court further concluded that because Mr. Waters had distributed illegal drugs in the past, it was reasonable for officers to believe that any other person in the residence was dangerous:

Further, we have recognized the association between drug offenses and violence in upholding protective sweeps of residences of known drug traffickers. See *United States v. Cash*, 378 F.3d 745, 748-49 (8th Cir. 2004). Here, officers were aware that Waters had distributed illegal drugs in the past and, based on the controlled call, could ostensibly supply the informant with drugs that day. The presence of drugs was also immediately ascertainable to officers upon entering the living room, where marijuana and drug paraphernalia were found in plain view. That officers did not have exact details on the extent of Waters's distribution of illegal drugs does not render the district court's finding erroneous. It was reasonable for officers to believe that any other person in the residence was dangerous.

*Id.* at 1027.

The court also concluded that the district court did not err in concluding that a dangerous individual could have hidden behind or inside the couch. *Id.* Having upheld the search on *Buie*'s second prong, requiring reasonable suspicion to search spaces not immediately adjoining the place of arrest, the court declined to "address

the government's alternative argument that a search behind the couch was justified as an area immediately adjoining the place of arrest and from which an attack could be immediately launched." *Id.*

## **II. REASONS FOR GRANTING REVIEW**

This Court should grant certiorari, because the United States Court of Appeals for the Eighth Circuit has expanded the scope of a protective sweep pursuant to *Maryland v. Buie*, 494 U.S. 325 (1990), beyond what is tenable under the Fourth Amendment and this Court's precedent. The Eighth Circuit's opinion in this case and in *United States v. Cash*, 378 F.3d 745 (8th Cir. 2004), extends far beyond the narrow and carefully circumscribed exception for protective sweeps set forth in *Buie*, and creates a categorical exception permitting a search anytime the arrestee has a connection to drug distribution. Under the Eighth Circuit's reasoning, if a person other than the defendant is present when an in-home arrest is made, he is presumably dangerous because of his association with the arrestee. The Supreme Court has rejected this type of offense-based categorical carve out to the Fourth Amendment in *Buie*, *Richards v. Wisconsin*, 520 U.S. 385 (1997), and *Florida v. J.L.*, 529 U.S. 266 (2000).

Furthermore, the Eighth Circuit's holdings in this case and in *Cash* conflict with other circuits, which have held that a protective sweep is not authorized any

time officers conduct an in-home arrest of a suspected drug dealer. *United States v. Moran Vargas*, 376 F.3d 112, 116 (2nd Cir. 2004); *United States v. Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982).

### **III. ARGUMENT**

In *Maryland v. Buie*, the Court addressed whether and to what extent police could search a home when making an in-home arrest pursuant to a warrant. 494 U.S. 325 (1990). The Court held “that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” *Id.* at 334. For a protective sweep to extend beyond the spaces immediately adjoining the place of arrest, “there must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.*

Under either of these two prongs of *Buie*, a protective sweep is “not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes

to complete the arrest and depart the premises.” *Id.* at 335. Thus, a protective sweep is limited both spatially and temporally. To permit a search without probable cause or reasonable suspicion, the search must be in the immediate area of the arrest and it only extends to spaces where a person may be found.

The search authorized by *Buie* is “decidedly not automatic, but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.” *Id.* at 336. In *Buie*, the officers were making an in-home arrest of a suspected armed robber. *Id.* at 328. Armed robbery typically involves the threat of violence or the use of force. Nonetheless, the Court in *Buie* rejected the state’s argument that police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime. *Buie*, 494 U.S. at 330.

In cases other than *Buie*, the Court has declined to create categorical exceptions to the Fourth Amendment for drug and firearm cases. In *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Court rejected the Wisconsin Supreme Court’s holding that police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation, due to the risk of violence to the officers executing the warrant and the potential for destruction of evidence. The Court rejected the categorical rule, because it

overgeneralized. *Id.* at 393. Not every drug investigation poses risks of injury or evidence destruction to a substantial degree. *Id.* “In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry. Wisconsin’s blanket rule impermissibly insulates these cases from judicial review.” *Id.*

The Court also rejected the categorical rule for drug cases, because it could be extended to other contexts and the Fourth Amendment’s reasonableness requirement would become meaningless. *Id.* at 394. The Court said, “Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment’s reasonableness requirement would be meaningless.” *Id.*

In *Florida v. J.L.*, the Court refused to create a Fourth Amendment exception permitting an officer to frisk a person anytime an anonymous tipster alleged that the person was carrying a firearm. 529 U.S. 266, 272-73 (2000). The Court recognized that armed criminals pose a serious threat to public safety, but

held that an automatic firearm exception from the reasonable suspicion required under *Terry v. Ohio*<sup>1</sup> “would rove too far.” *Id.* at 272.

The Eighth Circuit has ignored the binding precedent of this Court and created an automatic protective sweep doctrine in drug cases. In *United States v. Cash*, an unidentified person informed police that his child care provider, a woman named Karen, had a brick of white powder and a brick of marijuana in her house. 378 F.3d at 746. The man had been in her house and seen the drugs. *Id.* He confronted her about the situation, but she merely shrugged and said she had to make a living. *Id.* Officers investigated and learned that a woman named Karen Cash lived at the residence and she had an outstanding arrest warrant for violating an order of protection. *Id.*

Officers went to the residence and spoke with Ms. Cash who was extremely nervous. *Id.* at 747. While speaking with the officers, she attempted to conceal a shopping bag behind a kitchen island. *Id.* The officers arrested Ms. Cash and did a protective sweep, during which an officer saw some marijuana on the kitchen island. *Id.* He saw more marijuana in the shopping bag she had previously tried to conceal. *Id.*

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

The Eighth Circuit relied on *Terry v. Ohio*, 392 U.S. 1 (1968), to justify the sweep. The court wrote, “an officer confronting a nervous and furtive suspect on the street has an articulable reason to be concerned for his safety and may therefore conduct a *Terry* stop and frisk, it follows that an officer arresting a nervous and furtive suspect in an unfamiliar residence has an articulable reason to be concerned for his safety and may therefore conduct a *Buie* sweep.” *Id.* at 748. The court said that it is reasonable for an officer to assume that an individual suspected of being involved in drug transactions is armed and dangerous. *Id.* The court continued with its analogy to *Terry*:

Since an officer approaching a suspected drug trafficker in the open is justified in conducting a *Terry* stop and frisk out of concern that the suspect may resort to violence to thwart the encounter, it follows that an officer arresting a suspected drug trafficker in one room of a multi-room residence is justified in conducting a *Buie* sweep out of concern that there could be individuals lurking in the other rooms who may resort to violence to thwart the arrest.

*Id.* at 749.

The Eighth Circuit used a distorted application of *Terry* to circumvent the requirements of *Buie*. One obvious flaw in the court’s tortured reasoning is that a *Buie* protective sweep occurs not on the street, but in a person’s *home*, where Fourth Amendment protections are at their highest. *Florida v. Jardines*, 569 U.S.

1, 6 (2013) (“At the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable government intrusion”).

Searches and seizures inside a home without a warrant are presumptively unreasonable. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

Although *Terry* and *Buie* both apply a reasonable suspicion threshold, they do so in completely different contexts. Under *Terry*, officers need reasonable suspicion that they are dealing with an armed and dangerous suspect. Under *Buie*, to search beyond the immediate area of arrest, officers must have reasonable suspicion that someone other than the arrestee is in the home and poses a threat to the officers. The dangerousness of the arrestee is not imputed to anyone else who might be present. In *Cash*, the Eighth Circuit merely assumed that someone other than the arrestee could be “lurking in other rooms.” *Cash*, 378 F.3d at 749. The court did not require the arresting officers to articulate any facts that would lead a reasonably prudent officer to believe “that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 334.

Protective sweeps must be justified on an individualized basis, not on categorical assumptions as to what offenses pose a greater risk to arresting officers. *Id.* at 336 (a sweep “is decidedly not ‘automatic’” and must be justified by a reasonable, articulable suspicion). As the dissenting judge in *Cash* pointed out, if

an unparticularized and speculative hunch permitted a sweep, “the police could sweep search a home in every instance where uncertainty exists as to the number of people in the residence, merely to rule out the possibility.” *Cash*, 378 at 751.

In Mr. Waters’ case, the Eighth Circuit extended its faulty reasoning in *Cash* even further. Unlike the defendant in *Cash*, Mr. Waters did not possess large quantities of drugs, and the police had no reason to believe otherwise. There was no evidence that Mr. Waters was a drug trafficker or that he ran a drug operation out of his duplex. The person that the police spoke to before they searched Mr. Waters’ house said that he sometimes got drugs from Mr. Waters, and that Mr. Waters had told him that “he could get what he was looking for.” There was no evidence as to what the man obtained in the past or what he was looking for that day. It could have been a single marijuana joint.

The fact that the officers saw a personal use amount of marijuana, a pipe, and a grinder in Mr. Waters’ living room, hardly suggests that Mr. Waters trafficked in drugs and says absolutely nothing with respect to whether other people were in the home *and* posed a danger to the officers. The movement of window blinds does not provide reasonable suspicion of the presence of a *dangerous* individual. Thus, in *Waters*, the Eighth Circuit sanctions an automatic protective sweep anytime an arrestee has distributed drugs in the past—even if he

did not traffic large amounts of drugs and the police have no basis for a sweep other than the mere possibility that a dangerous person could be present.

Other circuits have rejected such a toothless interpretation of *Buie*. In *United States v. Moran Vargas*, law enforcement officers searched the defendant's motel bathroom and found drugs. 376 F.3d 112 (2<sup>nd</sup> Cir. 2004) The government tried to justify the search as a valid protective sweep on the grounds that the defendant was a drug courier and someone could have been hiding in the bathroom. *Id.* at 114. The Second Circuit rejected the government's argument:

The government contends that the agents had a reasonable belief that other people might be in the motel room due to their suspicion that Moran was a drug courier, their experience that drug couriers often meet up with their contacts, and their awareness that drug traffickers are frequently armed and dangerous. Although the district court and magistrate agreed with this argument, we find that such generalizations, without more, are insufficient to justify a protective sweep.

*Id.* at 116.

In *United States v. Hatcher*, officers conducted a protective sweep of the defendant's home after arresting him on drug charges. 680 F.2d 438 (6th Cir. 1982). Although the district court had concluded that there was no evidence that the defendant was a dangerous person and no indication that other persons were in the house at the time of his arrest, the district court upheld the search as a valid

protective sweep. The district court reasoned that the sweep following the defendant's arrest, was justified because "the subject of drugs is a dangerous one, dangerous for all of those persons involved in it, especially those who are on the law enforcement side." *Id.* at 444. In rejecting this kind of automatic protective sweep, the Sixth Circuit said, "[t]hat reasoning may be too easily applied to any number of categories of criminal arrests, and would permit wholesale abrogation of the Fourth Amendment reasonableness requirement whenever an arrest is made in such subject areas." *Id.*

Although *Buie* rejected the State of Maryland's argument that "police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime," the Eighth Circuit has brazenly ignored *Buie* and created an automatic protective sweep doctrine for drug distribution based on a generalized possibility that another person might be present and might be dangerous. *Buie*, 494 U.S. at 330. The Eighth Circuit's decisions in *Waters* and *Cash* defy this Court's precedents.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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## **APPENDIX**

Appendix A - Opinion of the Eighth Circuit Court of Appeals

Appendix B – Order denying rehearing by the Eighth Circuit Court of Appeals

Appendix C – Transcript of the suppression hearing