NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

SHERI LEE PUALANI KAPAHU
Petitioner-Appellant-Defendant

- vs -

UNITED STATES OF AMERICA
Respondent-Appellee-Plaintiff

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

PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

&

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A police-citizen encounter does not implicate the Fourth Amendment when consensual. Once a reasonable person would no longer feel free to ignore the police, walk away, and go about her business, however, the encounter loses its consensual character and becomes a detention that does implicate the Fourth Amendment.

The question presented here is whether a reasonable person would feel free to ignore a federal agent's direct accusation of drug possession, and go about her business of boarding a plane for elsewhere, taking the drugs that the agent had said he "already knew" she possessed with her.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sheri Lee Pualani Kapahu respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's order denying Kapahu's petition for rehearing en banc (App. at 1) is unreported. The Ninth Circuit's unpublished memorandum opinion (App. at 2) can be found at 729 Fed.Appx. 600 (CA9 July 3, 2018). The unpublished order of the United States District Court for the District of Hawaii denying Kapahu's suppression motions (App. 6) can be found at 2016 WL 5853717 (D. Haw. Oct. 5, 2016).

JURISDICTION

The Ninth Circuit entered judgment on July 3, 2018, and denied Kapahu's timely petition for rehearing en banc on July 31, 2018. App. at 1–5. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people be secure in their persons … and effects, against unreasonable searches and seizures, shall not be violated[.]"

CASE STATEMENT

Pertinent facts are not disputed. On a tip from an unproven source conveyed by a state law enforcement officer, two federal agents went to Honolulu International

Airport with the idea of conducting a consensual encounter with Kapahu.[1] They approached her shortly before 9 pm as she stood in the boarding line for her flight home to Kauai. They told her she was free to leave and asked her a few relatively innocuous questions, which she willingly answered. They unsuccessfully tried to solicit an admission she was carrying drugs back to Kauai. They unsuccessfully tried to obtain consent to search her purse. Then, as he recalled when testifying at her suppression hearing, Agent Jones told Kapahu "that he already knew that she had drugs and that he needed her help to be able to catch the people she got the drugs from and the people on Kauai where they were going to." App. at 11–12. Kapahu responded to Agent Jones's unequivocal accusation of engaging in criminal activity in his presence by putting her hands to her face and saying she wanted to go home. Ignoring that attempt to end the encounter, Agent Jones immediately demanded to know "where the drugs were" (in her purse, she confessed), "how much" (five ounces, she confessed), and "of what" (ice, she confessed). App. at 12. In short order, the two agents directed Kapahu out of the boarding line, searched her purse, found and seized the ice, and transported her to their office.

In the district court, the petitioner sought suppression of the drugs and her confession. She, however, did not clearly articulate the claim pursued here, that the encounter ripened into a detention without reasonable suspicion, thereby tainting

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[1] The agents and the district court alike recognized that the source was not sufficiently reliable to establish reasonable suspicion that would have justified temporarily detaining Kapahu without her consent. App. at 8-9 ("the tip had been provided by an informant who had no past history of providing reliable information" and only suggested a crime "might" occur) and 26.

and rendering inadmissible at trial her confession and the drugs. But in rejecting the claims she did articulate (custodial interrogation absent *Miranda* warnings and warrantless search of her purse absent an exception to the warrant requirement), the district court expressly ruled that reasonable suspicion supported detention before Kapahu confessed. Amidst discussion of Fifth Amendment custody, the district court ruled that "a reasonable person would not have thought she was being detained" at the point, right after Agent Jones accused her of committing a crime in his presence, "when she put her hands over her face" and said she wanted to go home. App. at 21. More explicitly, the district court further ruled:

> "I want to go home" is not a clear revocation of Kapahu's earlier agreement to talk with Agent Jones. While the present discussion concerns Fifth Amendment rights, this court notes that, in the Fourth Amendment context, the law requires that a revocation of consent to search must be clear and unequivocal. …. [And in any event,] Agent Jones by then had a reasonable suspicion that Kapahu had drugs on her under *Terry v. Ohio*, 392 U.S. 1 (1968), and so could have briefly detained her even without her consent.

App. at 25. The district court combined the tip from the unproven source with the agent's testimony that the petitioner appeared nervous to him during the encounter, along with Kapahu's act of covering her face when accused, to find reasonable suspicion to detain her. App. at 25.

In the Ninth Circuit, Kapahu raised the detention claim pursued here, contending that the encounter ripened into a detention before she confessed her purse contained five ounces of ice, but that the agents lacked reasonable suspicion for that detention (a tip from an unproven source that all agree wasn't sufficient to establish reasonable suspicion isn't made any more reliable by nervousness and being

publically shamed by an official accusation of wrongdoing). She also contended that plain error review of her detention claim wasn't really justified, since the district court explicitly ruled on the issue, but that the error was plain enough even if not. Without pausing over the plain error point, the Ninth Circuit held that it did not need to resolve the reasonableness of detention at the point of accusation because the petitioner "was free to disregard Agent Jones' questioning until she was taken out of the boarding line to be arrested." App. at 5; accord App. at 3 (holding there was no Fifth Amendment custody because, among other things, "[a]lthough Agent Jones claimed to know that she was carrying drugs, he never confronted [her] with actual evidence," so "a 'reasonable person' in Kapahu's position would have felt 'free to leave'"). The Ninth Circuit, that is, held that there was no Fourth Amendment detention at the point Agent Jones accused Kapahu of committing a crime in his presence, and, immediately thereafter, responded to her attempt to terminate the encounter by demanding to know where the drugs were.

REASON TO GRANT THE WRIT

A reasonable person would not feel free to walk away from an armed police officer accusing her of committing a crime.

The Fourth Amendment principles in play here are not complex. A consensual encounter does not implicate the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). But a temporary detention does. *Bostick*, 501 U.S. at 434; *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968). The line between the two is drawn by when a

reasonable person no longer feels free to leave. *Bostick*, 501 U.S. at 434; *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984).

The test isn't a subjective one. It calls, rather, for pinning the moment when "the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business,'" *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)), or "otherwise terminate the encounter," *Bostick*, 501 U.S. at 439. Asking questions, asking to examine identification, requesting consent to search typically "do not convey a message that compliance" with those requests "is required" and, thus, are insufficient to convert an encounter into a detention. *Bostick*, 501 U.S. at 435. But here, Agent Jones went a step (or two) further. *After* doing of all of that, only to have Kapahu deny having drugs and refuse consent to search her purse, Agent Jones unambiguously told Kapahu that he knew she was carrying drugs and, in response, heard her say she wanted to go home. Such a direct accusation of committing a crime, especially when coupled with the interrogation he used in response to her equally unambiguous remark expressing a desire to terminate the encounter, communicated with perfect clarity that she was not at liberty to ignore him and go about her business of boarding the plane for home (with the drugs he knew she had). No reasonable person would think she was free to leave at that point.

The Ninth Circuit drew a line between unambiguous accusation of guilt and confronting a suspect with evidence of guilt. App. at 3. So did the district court. App. at 16–17. Both lower courts used that line to distinguish in- and out-of- circuit cases

holding that a reasonable person would not feel free to leave when confronted with evidence of guilt and to conclude that a reasonable person *would* feel free to walk away from a direct accusation. App. at 3–4, 5, 21, 24–26. The lower courts' reasoning isn't sloped right. An official accusation of guilt is far more coercive than simply confronting a suspect with evidence of guilt. The latter implies that police are giving a suspect an opportunity to explain away that evidence. An official accusation of guilt, on the other hand, unambiguously signals that the time for explanations has past and that the suspect is no longer free to leave without police permission (much more so where, as here, that accusation is one involving present drug possession or committing some other crime in the officer's presence).

CONCLUSION

This case presents an opportunity to draw a bright line demarcating detention from a consensual encounter—the point of unambiguous accusation. When a police officer tells a suspect that the officer knows the suspect is committing a crime in his presence, no reasonable person would feel free to ignore the officer, turn a back upon that officer, and walk away from that officer to go about her business. Drawing that bright-line, on the uncomplicated and undisputed facts presented here, would provide a much-needed baseline in this niche of Fourth Amendment jurisprudence. No one, Kapahu included, should be denied the protection of the Fourth Amendment on the idea that walking away from an armed police officer's unambiguous assertion of guilt—here that she was in possession of illegal drugs—is what a reasonable person would feel free to do.

This Court should grant this petition. Even though the courts below elected not to publish their decisions, the district and circuit courts alike decided the question presented in a way so anathema to common sense, and the practical dynamics and psychology of police-citizen interactions, as to warrant this Court's intervention to clearly and correctly answer it. And in doing so, this Court will provide a welcome bright line of national importance on a frequently recurring Fourth Amendment issue.

DATED: Honolulu, Hawaii, September 25, 2018.

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