

18-8943 ORIGINAL
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
DEC 03 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DAVID RAPHAEL CONCEPCION — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Raphael Concepcion
(Your Name)

Moore Haven Correctional Facility, P. O. Box 719001
(Address)

Moore Haven, Florida 33471.
(City, State, Zip Code)

N/A
(Phone Number)

~~RECEIVED
DEC 11 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.~~

QUESTION(S) PRESENTED

1. WHETHER THE HOLDING OF THIS COURT IN *MARYLAND v. BUIE*, 494 U.S. 325, 110 S.Ct. 1093 (1990), TO PROTECTIVE SWEEPS APPLIES ALSO INCIDENT TO ARRESTS MADE JUST OUTSIDE OF A HOME?
2. WHETHER THE HOLDING OF THIS COURT IN *MARYLAND v. BUIE*, 494 U.S. 325, 110 S.Ct. 1093 (1990), TO PROTECTIVE SWEEPS INCIDENT TO ARRESTS MADE JUST OUTSIDE THE HOME, ALLOW TO POLICE OFFICER TO TAKE PICTURES OF THE PREMISES, WHILE DOING THE PROTECTIVE SWEEP?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE.....	4
REASON FOR GRANTING THE PETITION	12
CONCLUSION	24

INDEX TO APPENDICES

APPENDIX A	Order Denying Petitioner's Appeal with Written Opinion
APPENDIX B	Opinion of the U.S. Southern District Court of Florida
APPENDIX C	Fourth Amendment Clause
APPENDIX D.....	<i>Markus v. State</i> , 211 So.3d 894 (Fla. 2017)
APPENDIX E	<i>United States v. Scott</i> , 517 Fed.Appx. 647 (11 th Cir. 2013)
APPENDIX F	Section 810.09, Trespass on Property
APPENDIX G.....	<i>United States v. Concepcion</i> , Report and Recommendations

TABLES OF AUTHORITIES CITED

United States Supreme Court Opinions

<i>Brinegar v. United States</i> , 338 U.S. 160, 69 S.Ct. 1302 (1949)	14, 16
<i>Chimel v. California</i> , 395 U.S. 752, 89 S.Ct. 2034 (1969)	13
<i>Gerstein v. Pugh</i> , 420 U.S. 103, 111, 95 S. Ct. 854, 862 (1975)	16
<i>Graham v. Connor</i> , 490 U.S. 386, 109 S. Ct. 1865, 1872 (1989)	16
<i>Herring v. United States</i> , 555 U.S. 135, 129 S.Ct. 695 (2009).....	14
<i>Horton v. California</i> , 496 U.S. 128, 110 S.Ct. 2301 (1990).....	18
<i>James v. Louisiana</i> , 382 U.S. 36, 86 S. Ct. 151 (1965)	15
<i>Kentucky v. King</i> , 563 U.S. 452, 131 S.Ct. 1849 (2011)	18
<i>Maryland v. Buie</i> , 494 U.S. 325, 110 S.Ct. 1093 (1990)	12, 13, 18, 19, 20, 24
<i>Michigan v. Long</i> , 463 U.S. 1032, 1049-1050, 103 S.Ct. 3469 (1983)	19
<i>Terry v. Ohio</i> , 392 U.S. 1, 21, 88 S.Ct. 1868 (1968)	19

United States Circuit Courts Opinions

<i>Armijo v. Peterson</i> , 601 F.3d 1065 (10 th Cir. 2010)	13
<i>Brooks v. City of Aurora</i> , 653 F.3d 478 (7 th Cir. 2011).....	13
<i>Joyce v. Crowder</i> , 480 Fed.Appx. 954 (11 th Cir. 2012)	17
<i>Marx v. Gumbinner</i> , 905 F.2d 1503, 1506 (11 th Cir. 1990).....	16
<i>Sharrar v. Felsing</i> , 128 F.3d 810, 825 (3 rd Cir. 1997)	22
<i>Sharrar v. Felsing</i> , 128 F.3d 810, 828 (3 rd Cir. 1997)	13
<i>Sutterfield v. City of Milwaukee</i> , 751 F.3d 542, 549 (7 th Cir. 2014)	13
<i>Terrell v. Smith</i> , 668 F.3d 1244, 1252 (11 th Cir. 2012)	17

<i>United States v. Archibald</i> , 589 F.3d 289, 297 (6 th Cir. 2009).....	20
<i>United States v. Berthelot</i> , 326 Fed.Appx 795, 797 (5 th Cir. 2009).....	13
<i>United States v. Biggs</i> , 70 F.3d 913, 914 (6 th Cir. 1995).....	19, 24
<i>United States v. Cash</i> , 378 F.3d 745 (8 th Cir. 2004).....	13
<i>United States v. Cavelly</i> , 318 F.3d 987, 995-96 (10 th Cir. 2003).....	12
<i>United States v. Chaves</i> , 169 F.3d 687, 692 (11th Cir. 1999)	21, 22
<i>United States v. Colbert</i> , 76 F.3d 773 (6 th Cir. 1996)	22
<i>United States v. Colbert</i> , 76 F.3d 773, 776-77 (6 th Cir. 1996)	12
<i>United States v. Flowers</i> , 424 Fed.Appx. 302, 303 (5 th Cir. 2011).....	12
<i>United States v. Foley</i> , 218 Fed.Appx. 139, 143 (3 rd Cir. 2007).....	12
<i>United States v. Gandia</i> , 424 F.3d 255, 257 (2 nd Cir. 2005)	12
<i>United States v. Henry</i> , 48 F.3d 1282, 1284 (D.C. Cir. 1995)	12
<i>United States v. Henry</i> , 48 F.3d 1282, 1284, (D.C. Cir. 1995)	20
<i>United States v. Hoyos</i> , 892 F.2d 1387 (9 th Cir. 1989)	12
<i>United States v. Kimmons</i> , 965 F.2d 1001, 1009-10 (11 th Cir. 1992)	20
<i>United States v. Lawlor</i> , 406 F.3d 37, 41 (1 st Cir. 2005).....	12
<i>United States v. Lemus</i> , 596 F.3d 512 (9 th Cir. 2010)	13
<i>United States v. Maldonado</i> , 472 F.3d 388, 395 (5 th Cir. 2006)	12
<i>United States v. Oguns</i> , 921 F.2d 442, 446 (2 nd Cir. 1990).....	20
<i>United States v. Oguns</i> , 921 F.2d 442, 446-47 (2 nd Cir. 1990).....	12
<i>United States v. Paopao</i> , 465 F.3d 404 (9 th Cir. 2006)	12
<i>United States v. Romo-Corrales</i> , 592 F.3d 915 (8 th Cir. 2010)	13

<i>United States v. Rucker</i> , 2018 U.S. Dist. LEXIS 33607 (2 nd Cir. 2018)	13
<i>United States v. Santa</i> , 236 F.3d 662, 669 (11 th Cir. 2000)	17
<i>United States v. Scott</i> , 517 Fed.Appx. 647 (11 th Cir. 2013)	20, 22
<i>United States v. Smith</i> , 459 F.3d 1276, 1290 (11 th Cir. 2006).....	17
<i>United States v. Thomas</i> , 429 F.3d 282, 287 (D.C. Cir. 2005).....	19
<i>United States v. Watson</i> , 273 F.3d 599, 603 (5 th Cir. 2001).....	12
<i>United States v. Werra</i> , 638 F.3d 326, 348 (1 st Cir. 2011)	12
 <i>Florida Supreme Court Opinions</i>	
<i>State v. Dye</i> , 346 So.2d 538 (Fla. 1977)	15
<i>State v. Outten</i> , 206 So.2d 392, 397 (Fla. 1968)	15
 <i>Florida District Courts Opinions</i>	
<i>K.M.B. v. State</i> , 69 So.3d 311 (Fla. 4 th DCA 2011).....	16
<i>Smith v. State</i> , 778 So.2d 329 (Fla. 2 nd DCA 2000)	17
<i>State v. Varne doe</i> , 443 So.2d 201 (Fla. 3 rd DCA 1983).....	15
<i>State v. Yunker</i> , 402 So.2d 591 (Fla. 5 th DCA 1981)	15
 <i>United States Codes Services</i>	
28 U.S.C § 1254(1).....	2
28 U.S.C § 1257(a).....	2
 <i>Florida Statutes Sections</i>	
§ 810.09(2)(b)	15

IN THE
SUPREME COURT OF THE UNITED STATES
ON PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

[] For case from **federal courts**:

The opinion of the United States Court of Appeal appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[] For case from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court
appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For case from **federal courts**:

The date on which the United State Court of Appeal decided my case was September 4, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeal on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For case from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

- 1). Fourth Amendment of the United States Constitution

STATEMENT OF THE CASE

On August 1, 2015, Opa Locka Police Officer Hugo Alvarado encountered petitioner loitering outside an apartment building at 1360 Sharazad Blvd. an area known for high crime activity. (DE 56:9, 25-26). He made contact with petitioner and gave him a verbal trespass warning because the officer could not identify anyone petitioner was visiting or family members living at the property. (DE 56:9-10). "Loitering" is not a criminal offense in Florida; it simply violates private property management rules. The officer had no recollection that anyone had complained about petitioner's presence at the building. In any event, he was allowed to return if he was visiting family, friends, or he was invited by an authorized person. (DE 56:14-15).

Three weeks later, on August 22, 2015, Officer Alvarado again observed petitioner at the same location at about 6:00 pm, as the officer approached, petitioner ran away, even though, the officer told him, "stop, police". (DE 56:10, 25-26).

Two months after that, at about 6:20 pm, on October 14, 2015, Opa Locka police Detective Roberto DeMoya was sitting in an unmarked police vehicle conducting surveillance for narcotics activity on the 1300 block of Sharazad Blvd. (DE 56:57; DE 95:21). Other officers accompanied him on patrol, including Officer Alvarado. Detective DeMoya saw petitioner walk into the surveillance area as he departed from 1325 Sharazad and crossed the street toward 1360 Sharazad. Detective DeMoya saw baggies of marijuana in petitioner's hands. (DE 56:57-58; DE

95:21). At the point, Detective DeMoya radioed Officer Alvarado telling him that the petitioner was in the apartment building with narcotics in his hands, and that the officer should try to make contact with the petitioner. (DE 56:58; DE 95:21).

Officer Alvarado remembers only that it had something to do with the petitioner being on the property and some kind of narcotics issue or similar involvement. (DE 56:11). Since he believed had had probable cause to arrest petitioner for trespass just for being on the property again, he decided to look for him. (DE 56:26). Officer Alvarado approached the 1360 apartment building on foot. He observed petitioner outside the apartment building with a couple of other males. (DE 56:10, 26). The officer also observed multiple baggies on the ground, some of which appeared to contain marijuana. He told them to "stop, police", but petitioner took off running. The other males scattered in the other directions, but officer took chase after petitioner, briefly. (DE 56:11, 28-29). Because other officers were at the apartment building, he stopped his pursuit, radioed to them about the incident, and kept a visual on petitioner. (DE 56:11, 29-30). Although, he did not immediately follow petitioner any further, Officer Alvarado watched him "fleeing on foot" toward the apartment building across the street. When Officer Alvarado returned to where he initially saw the men, the baggies were gone. (DE 56:11).

Detective DeMoya heard Alvarado's radio call that the petitioner is running and at that point he saw petitioner running alone across the street from 1360 back to 1325 Sharazad. He was approximately 30 to 40 feet away. He saw another officer

chasing him, but Detective DeMoya did not personally participate in the chase. (DE 56:58-59, 90).

Another Opa Locka police officer, Detective Hanes, radioed that she saw petitioner run into Apartment # 2 of the 1325 building, and that he had not come out. She referred only to a single suspect, not multiple people. (DE 56:90; DE 92:23). As a result of her radio communication, Detective DeMoya went to the apartment door, where he joined Detective Hanes. Detective DeMoya then attempted to force entry into apartment # 2 by prying open the apartment door using a Halligan tool, a crowbar specifically design for prying doors open. (DE 56:60, 92; DE 95:22).

The door he attempted to pry with the Halligan tool received extensive damage. (DE 56:93). Detective DeMoya was not successful opening the door. But while he was attempting to do so, he was advised that other officers had seen petitioner exit from a door on the opposite side of the building, run into the waiting arms of an officer, and that he was in custody. (DE 56:60, 92, 94; DE 95:22). Petitioner had entered through the back door on the east side and exited through the front door on the west side of a very small one-bedroom apartment of approximately 400 square feet. (DE 56:61; DE 84:31; DE 136:24). This all occurred in a matter of seconds. (DE 56:94; DE 95:22).

The officer making the apprehension was Detective Alvarado. Eventually, he had followed across the street to assist other officers in front of the apartment # 2 building. He saw petitioner peek his head out an apartment door. He then closed the door and abruptly came right out. He ran toward the north side of the property

where officers were able to converge and we able to take him into custody. (DE 56:11-12).

Officer Alvarado then arrested petitioner for trespass for being on property on the prior date of August 22 and on October 14, as well as for resisting arrest. (DE 56:11). The arrest occurred at 6:35 pm. (DE 56:110-111; DE 95:22).

Prior to the arrest, when petitioner peeked his head out the door and then when he ran out the door, Officer Alvarado could not see into the apartment, did not see any drugs in the apartment and does not recall smelling marijuana emanating from inside the apartment door. (DE 56:34-35, 38). He thinks he first saw the marijuana and firearm inside the apartment either during the initial post-arrest sweep or afterward, although, he was not sure if he even participated in the sweep. (DE 56:35, 38).

Detective DeMoya saw petitioner in custody in the exterior yard of 1325 Sharazad and then returned to the door he was trying to breach to remove the Halligan tool bar and tools. (DE 95:22-23). The door was still closed. (DE 56:95-96). As he attempted to remove the Halligan bar and tools, he heard a woman crying and the female finally opened the door. (DE 56:96-97; DE 95:22). The woman was half-dressed and distraught as she stood at the door. It was, Ms Mitchell-Sweeting, the apartment leaseholder with whom police later learned petitioner had a relationship. (DE 56:61-62, 65, 96-97). She was crying nervous, shook up and saying they just ran up in here. (DE 56:62). With the door opened, he smelled marijuana from inside. (DE 56:63, 97).

Neither Detective DeMoya nor any of the officers saw anyone other than petitioner enter the apartment. (DE 56:90, 97). Nevertheless, Detective DeMoya decided to go into apartment # 2 to conduct a security sweep of the apartment to protect his officers and Mrs. Mitchell-Sweeting because petitioner had run who were known to him to be armed and dangerous. (DE 56:62, 106; DE 95:23).

Prior to conducting, the security sweep, Detective DeMoya retrieved from his police vehicle a department issued Cannon EOS Digital Rebel XSi camera, which he would use to photograph inside apartment # 2. He also brought into the apartment his case file, which he placed on the dining room table. (DE 56: 117-119).

Then, he conducted what he described as a "30 second" security sweep; he used the Cannon digital camera to capture 14 photographic images over a period of 4 minutes, 11 seconds. (DE 56:117-119). Nine of those photographs were of the interior of the apartment, taken over a span of just under 2 minutes.

The photographs showed Detective DeMoya case file on the dining room table in the apartment during the claimed security sweep. (DE 56:131). The Detective specifically admitted it was his case file that he captured in photographs he took during the security sweep. (DE 56:131).

Detective DeMoya testified that he noticed marijuana on tables as well as rolling papers and scales in plain view. (DE 56:101-103; DE 95:24).he also testified that he saw two extended firearms magazines protruding out of a drawer. (DE 56:103-104; DE 95: 23). Detective DeMoya did not see any firearms, ammunitions,

or cash during the security sweep. (DE 56:101, 103; DE 95: 24). He then arrested Mrs. Mitchell-Sweeting. (DE 56:98; DE 95:24).

Nothing was seized at that time. Detective DeMoya then secured the premises and decided to apply for a search warrant, which took at least a couple hours to prepare and obtain from a state judge. (DE 56:63, 67). He instructed other officers that no one was to enter the apartment in the interim. (DE 56:105).

Sometime after 8:00 pm, Detective DeMoya returned with a signed search warrant. (DE 56:115-116). He executed the search warrant at apartment # 2, finding and seizing the firearm and marijuana that were charged in Count 3 and 4 of the indictment, as well as other contraband items not charged in the indictment. (DE 56:68). Photographic images of the search were introduced into evidence, and a composite defense exhibit. (DE 56-65, 69).

Carter Vance Conrad, Jr., an expert in metadata, testified about the electronically stored information automatically created and embedded in each of the digital photographs taken with Detective DeMoya Cannon digital camera. (DE 84:7-38). The government stipulated to his expertise in metadata. (DE 84:8). And the report and recommendation credited his testimony. (DE 95:7).

Using a special software tool, Mr. Conrad was able to extract and organize metadata from each of the photographic images, including the original date and time the camera registered when each image was created. (DE 25). In addition, to the timestamp, the metadata for each image is extensive, including the type of

camera and lenses used, whether a flash was used, the aperture, and much more. (DE 84:15-16; DE 86-5; DE 86- 8).

The metadata for each image identified a sequence of 61 consecutive photographs taken by the same camera, a Cannon EOS Digital Rebel XSi with a lens type of Cannon EF-S 18-55 mm f/3.5-5.6 IS. (DE 86-8; DE 86-9).

Mr. Conrad provided expert testimony that the metadata for the 14 photographs taken by Detective DeMoya in and around apartment # 2 numbered IMG_1057 through IMG_1520, were taken on October 14, 2015 between 5:57 pm and 6:02 pm. (DE 84:25-26). The time elapsed between images IMG_1057 through IMG_1520 was therefore 4 minutes, 11 seconds.

Mr. Conrad also considered just the nine photographs of the inside of the apartment – IMG_1508 through IMG_1511 and IMG_1513 through IMG_1517 – and concluded that those were taken over a period of just under 2 minutes. (DE 84:30).

The 14 photographs (and the subset of 9 photographs) corresponded to those taken by Detective DeMoya during the apartment sweep before a search warrant was obtained.

The metadata for the next image in the camera, IMG_1521, shows that it was taken on the same day, 4 hours later, at 10:09 pm. (DE 86). Beginning at the time, another sequence of photographs was taken between 10:09 pm and 10:39 pm. These images, IMG_1521 through IMG_1564, corresponded to the photographs taken in apartment # 2 during execution of the search warrant.

The government did not produce the actual camera in discovery or at the suppression hearing. Although, its identity was established by the metadata. Consequently, the camera's internal clock could not be compared with actual time. Of note, even if the camera's internal date and time were not set to the actual date and time, the respective date and times of a series of sequential images will still accurately represent the relative time each image was made in relation to the others. (DE 84:25-26). Thus, IMG_1507 through IMG_1520 were created 4 minutes and 11 seconds apart. In addition, IMG_1521 was made 4 hours later. Each of the images following IMG_1521 was taken after it and at least 4 hours after the initial group of 14 images. Whether the camera's date and time were correctly set, the metadata for the relative time of the sequence remains accurate.

Police recorded a conversation between petitioner and Mrs. Mitchell-Sweeting while they were in custody in a police vehicle. (DE 95:25). The conversation occurred after the security sweep took place and involved the location of contraband in the apartment. Nothing said in the conversation was used to provide probable cause in support of the search warrant.

REASON FOR GRANTING THE PETITION

In this case, this Honorable Court will have the opportunity to clarify its holding in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990). This court has never had the opportunity to apply its holding in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990), to protective sweeps incident to arrests made just outside the home. The Federal Circuit Courts of Appeal are in conflict as to when *Buie* case applies to some circumstance, especially when the arrest of the defendant took place outside of his/her residence, as in the instant case.¹

¹ For example, some of the federal courts upheld “a protective sweep of the interior of a house when the defendant had been arrested just outside the door to the house.” See, *United States v. Paopao*, 465 F.3d 404 (9th Cir. 2006)(“upholding the protective sweep of the interior of a house when the defendant had been arrested just outside the door to the house.”); *United States v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989); *United States v. Lawlor*, 406 F.3d 37, 41 (1st Cir. 2005)(“An arrest that occurs just outside the home can pose an equally serious threat to arresting officer as one that occurs in the home.”); *United States v. Cavey*, 318 F.3d 987, 995-96 (10th Cir. 2003)(“Depending on the circumstances, the exigencies of a situation may make it reasonable for officers to enter a home without a warrant in order to conduct a protective sweep.”); *United States v. Watson*, 273 F.3d 599, 603 (5th Cir. 2001)(upholding a protective sweep of a house where the arrest was made on the porch outside the house); *United States v. Colbert*, 76 F.3d 773, 776-77 (6th Cir. 1996)(affirming the general principle that a protective sweep of the interior of a house can follow an arrest outside the house, but ultimately holding the sweep in that case to be illegal due to a lack of justification for the sweep); *United States v. Henry*, 48 F.3d 1282, 1284 (D.C. Cir. 1995)(upholding a sweep inside the dwelling where the arrest was made outside); *United States v. Oguns*, 921 F.2d 442, 446-47 (2nd Cir. 1990)(allowing the protective sweep where the officers could have reasonably believed that people inside the apartment heard them arresting the defendant outside the apartment). Notwithstanding, their holding, some of these federal courts have also held that “a protective sweep may be conducted only in-home arrest.” See, *United States v. Werra*, 638 F.3d 326, 348 (1st Cir. 2011)(“circumstances surrounding in-home execution of arrest warrant authorize a “protective sweep”); *United States v. Lawlor*, 406 F.3d 37, 41 (1st Cir. 2005)(“an in-home arrest, police officers may conduct a protective sweep of the premises if “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.”); *United States v. Gandia*, 424 F.3d 255, 257 (2nd Cir. 2005)(“once properly inside a person’s home, police officers are permitted to conduct protective sweeps even when they have not entered the home with an arrest warrant...”); *United States v. Foley*, 218 Fed.Appx. 139, 143 (3rd Cir. 2007)(“an in-home arrest puts the officer at the disadvantage of being on his adversary’s ‘turf.’”); *United States v. Flowers*, 424 Fed.Appx. 302, 303 (5th Cir. 2011)(“After an officer knocked on Flowers’s front door, he took approximately 14 minutes to answer his door, and prior to answering, he attempted to escape through an upstairs window and then through his back door. A motorcycle, which officers determined was stolen, was in the backyard and two cars were parked in Flowers’s driveway.”); *United States v. Maldonado*, 472 F.3d 388, 395 (5th Cir. 2006)(determining that a protective sweep was justified based, inter alia, on

The Eleventh Circuit Court of Appeal in denying petitioner's appeal held that the protective sweep made by Detective DeMoya in the petitioner's girlfriend apartment was constitutionally allowed by this court holding in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990).

In the *Buie*'s Court, the Supreme Court outlined two types of "sweeps" that officers may perform incident to a lawful arrest: (1) a precautionary sweep, which officers may perform incident to arrest, without probable cause or reasonable

the fact that agents were exposed in a open area surrounding a trailer although agents had no certain knowledge that other individuals were in the trailer); *United States v. Berthelot*, 326 Fed.Appx 795, 797 (5th Cir. 2009)(determining that a protective sweep was justified due to, inter alia, "the time it took defendant to answer the door"); *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 549 (7th Cir. 2014)(“authorizes officers making an in-home arrest to conduct a protective sweep of the premises to determine whether other persons are present.”); *United States v. Romo-Corrales*, 592 F.3d 915 (8th Cir. 2010)(“once in the home, to protect officer safety and preserve evidence, officers may search the person of an arrestee and the area within his immediate control, citing *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969).”); *United States v. Cash*, 378 F.3d 745 (8th Cir. 2004)(Bye, Circuit Judge, dissenting Opinion)(“The Fourth Amendment allows limited protective sweeps as a precautionary measure in conjunction with in-home arrests. ... A protective sweep is only permissible if the officer “possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others.”); *United States v. Lemus*, 596 F.3d 512 (9th Cir. 2010)(Chief Judge Kozinski, with whom Judge Paez joins, dissenting from the denial of rehearing en banc)(“But *Buie* says nothing at all about police who conduct an arrest outside of the home. It does not authorize police to enter a home for the very purpose of conducting a search. ... *Buie* only authorizes a suspicionless search when the police make an “in-home arrest” (and then only for a small area near the arrest, not a grand tour of the entire apartment). ... The entire justification *Buie* gives for a warrantless search is that officers must be able to protect themselves when they perform an “in-home arrest.”); *Armijo v. Peterson*, 601 F.3d 1065 (10th Cir. 2010)(“a ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.”); *United States v. Rucker*, 2018 U.S. Dist. LEXIS 33607 (2nd Cir. 2018)(“Where agents execute an arrest “just outside” the home, they are authorized to sweep the house if “there are articulable facts that would warrant the reasonable belief that someone within the home is aware of the arrest outside the premises and might destroy evidence, escape or jeopardize the safety of the officers or the public.”, citing *United States v. Oguns*, 921 F.2d 442, 446 (2nd Cir. 1990).”); *Sharrar v. Felsing*, 128 F.3d 810, 828 (3rd Cir. 1997)(“The Supreme Court has never had the opportunity to apply its holding in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990), to protective sweeps incident to arrests made just outside the home.”); *Brooks v. City of Aurora*, 653 F.3d 478 (7th Cir. 2011)(“Unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s ‘turf.’ An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.”, citing *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990).”).

suspicion, in which officers may look in closets and other spaces “immediately adjoining the place of arrest from which an attack could be immediately launched”; and (2) a protective sweep beyond the precautionary sweep, for which “there must be 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.”

However, The Government has not demonstrated any “articulable facts” that would lead to the rational inference of a threat requiring a protective sweep after petitioner had been arrested, was under control of the police, and was inside of the police cruiser outside by the time the protective sweep occurred, instead the evidence shows a protective sweep was unnecessary, because the only persons besides petitioner who could possess danger for the police officers where the other people hanging out with the petitioner, and they scattered when the police arrived to arrest petitioner, none of the officer observed them entering Mrs. Mitchell-Sweeting House.

When an arrest is made without a warrant, it must be based on probable cause that an offense has been committed. See, *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695 (2009). Probable cause exists where the facts and circumstances known to the police officer at the time of the arrest are sufficient to warrant belief by a prudent person that an offense has been committed. See, *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949). Those facts, however, need not meet the standard of proof required to convict. See, *State v. Outten*, 206 So.2d 392, 397 (Fla.

1968); *State v. Varnedoe*, 443 So.2d 201 (Fla. 3rd DCA 1983). Thus, "an arresting officer must have a substantial reason at the time of a warrantless misdemeanor arrest to believe from his observation and evidence at the point of arrest that the person was then and there committing a misdemeanor in his presence." See, *State v. Yunker*, 402 So.2d 591 (Fla. 5th DCA 1981).

In the present case, the owner and leaseholder, Mrs. Mitchell-Sweeting, did not authorize the police officer to issue any warning to petitioner. The petitioner had authorization and consent from Mrs. Mitchell-Sweeting to enter the premises at any time. However, in previous encounter with the police officers, the police officer had warned petitioner against trespassing in this location. The petitioner came back to the apartment, because, he had authorization and consent to be there by the owner and leaseholder. See, *State v. Dye*, 346 So.2d 538 (Fla. 1977); § 810.09(2)(b), Fla. Stat.

Unknowing to Detective DeMoya that the petitioner had been on the premises legally months earlier, and that the petitioner had no reason to stay away from the premises, thus, the officer had no reason to stop him and inquire as to his purpose for being on the property. Since, the petitioner need not to explain his presence in the apartment's complex, the officer had no probable cause to make the arrest. Having made an unlawful arrest, the search-performed incident to the arrest was unlawful and the evidence seized was inadmissible. See, *James v. Louisiana*, 382 U.S. 36, 86 S. Ct. 151 (1965).

Florida law permits a law enforcement officer to make a warrantless arrest when an individual has committed a felony or misdemeanor in the presence of the officer, when a felony has been committed and the officer reasonably believes that the individual committed it, or when the officer reasonably believes that a felony has been or is being committed and that the person to be arrested has committed or is committing it. See, *Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S. Ct. 854, 862 (1975); *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11 (1949); *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 1872 (1989) (“As in other Fourth Amendment contexts, the ‘reasonableness’ inquiry … is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”); *Marx v. Gumbinner*, 905 F.2d 1503, 1506 (11th Cir. 1990) (“When the facts are not in dispute, whether probable cause existed is a question of law, and summary judgment is appropriate.”).

For example, “to convict for violating Florida’s trespassing statute, a misdemeanor violation. The State must prove four elements: (1) the defendant willfully entered or remained on property; (2) other than a structure or conveyance; (3) without being authorized, licensed, or invited; (4) when notice against entering or remaining had been given to the defendant.” See, *K.M.B. v. State*, 69 So.3d 311 (Fla. 4th DCA 2011).

In Florida, “a law enforcement officer may not make a warrantless arrest for a misdemeanor, such as this trespass, unless every element of the crime is

committed in his presence." See, *Smith v. State*, 778 So.2d 329 (Fla. 2nd DCA 2000). However, "both the United States Supreme Court and the Florida Supreme Court have allowed the collective knowledge of the investigating officers to be imputed to each participating officer." In the instant case, the collective knowledge of another officer cannot be imputed to each participating officer. See, *Terrell v. Smith*, 668 F.3d 1244, 1252 (11th Cir. 2012)(noting the "fellow officer rule"). See, also, *Joyce v. Crowder*, 480 Fed.Appx. 954 (11th Cir. 2012)(“In Florida, a law enforcement officer may not make a warrantless arrest for a misdemeanor unless every element of the crime is committed in his presence.”).

In addition to the above argument, petitioner, further, asserts that the "plain view" doctrine permits a warrantless seizure, only, "where (1) an officer is lawfully located in the place from which the seized object could be plainly viewed and must have a lawful right of access to the object itself; and (2) the incriminating character of the item is immediately apparent." See, *United States v. Smith*, 459 F.3d 1276, 1290 (11th Cir. 2006). Exigent circumstances exist where there is the "risk of loss, destruction, removal, or concealment of evidence." See, *United States v. Santa*, 236 F.3d 662, 669 (11th Cir. 2000).

The warrantless seizure of the marijuana and firearm were impermissible under the "plain view" doctrine because (1) Detective DeMoya was unlawfully present in the living room; (2) the detective-created his own exigency circumstances, in his attempt to circumvent the Fourth Amendment requirements for a search warrant. See, *Smith*, 459 F.3d at 1290.

It is uncontested that Mrs. Mitchell-Sweeting did not voluntarily open the apartment door. She opened it in response to Detective DeMoya's warrantless invasion of her home with the Halligan bar. The observations of Detective DeMoya made after she opened the door, such as her demeanor, and her statement, saying, "they ran up in here" and smelling marijuana are the "Fruit of the Poisonous Tree" based on this warrantless search, and therefore, cannot legally support his entry into the apartment for a security sweep. See, *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849 (2011) ("the police-created exigency doctrine ... may apply so long as "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment."); See also, *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990).

Nevertheless, viewing the facts in the light most favorable to the Government, and, thereby assuming a protective sweep was necessary to ensure that no individual posing a danger lurked, the search of the apartment was longer than the United States Supreme Court authorized as a "protective sweep" as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Thus, the taking of the pictures while doing this unconstitutional protective sweep was beyond the scope of the meaning set forth as protective sweep by the Supreme Court. See, *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990).

In order to find the protective sweep constitutional under *Buie*, the officers must articulate why it was reasonable for them to undertake a warrantless search of place from the arrest site once they had the petitioner under their control. See, *United States v. Biggs*, 70 F.3d 913, 914 (6th Cir. 1995). “A protective sweep may last ‘no longer than is necessary to dispel the reasonable suspicion of danger’ and ‘no longer than it takes to complete the arrest and depart the premises.’” See, *United States v. Thomas*, 429 F.3d 282, 287 (D.C. Cir. 2005).

“The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest only, when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” As an incident to an in-home arrest, police may, as a precautionary measure and without a search warrant, 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; beyond that, however, the Fourth Amendment permits a protective sweep, without a search warrant, in conjunction with an in-home arrest-extending only to a cursory inspection of those spaces where a person may be found, lasting no longer than is necessary to dispel the reasonable suspicion of danger. See, *Michigan v. Long*, 463 U.S. 1032, 1049-1050, 103 S.Ct. 3469 (1983)(quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968)), that the area swept harbored an individual posing a danger to the officer or others. See, *Maryland v. Buie*, 494 U.S. 325, 337, 110 S.Ct. 1093 (1990).

Moreover, a protective sweep of a home, incident to an arrest outside the home, cannot be justified routinely. Where a defendant is arrested outside his or her home, a warrantless protective sweep of the defendant's home is permissible only if the officers have a reasonable, articulable suspicion that the protective sweep is necessary due to a safety threat or the destruction of evidence. See, *United States v. Scott*, 517 Fed.Appx. 647 (11th Cir. 2013); *United States v. Archibald*, 589 F.3d 289, 297 (6th Cir. 2009)(adopting position of several courts that a sweep incident to an arrest made outside the home requires officers to have reasonable suspicion that there is a dangerous individual in the house); *United States v. Henry*, 48 F.3d 1282, 1284, (D.C. Cir. 1995)(requiring reasonable suspicion of the presence of a dangerous individual to justify a sweep incident to an arrest made outside of front door); *United States v. Oguns*, 921 F.2d 442, 446 (2nd Cir. 1990)(adopting *Buie's* reasonable suspicion test for evaluating security sweeps incident to arrests made outside of the home); *United States v. Kimmons*, 965 F.2d 1001, 1009-10 (11th Cir. 1992)(holding that protective sweep was justified incident to arrest outside residence where officers had reasonable suspicion that dangerous individuals were in apartment).

The arresting officer must have both (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons were aware of the arrest outside the premises and might destroy evidence, escape or jeopardize the safety of the officers or the public. Where suspects are arrested outside a home and police officers have no reason to believe that other individuals dangerous to their safety are inside the home, entry into the dwelling cannot be justified merely

because the police do not know, as an absolute certainty, whether more people could be in the home. See, *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir. 1999)([I]n the absence of specific and articulable facts showing that another individual, who posed a danger to the officers or others, was inside the warehouse, the officers' lack of information cannot justify the warrantless sweep in this case.”).

In the instant case, Detective DeMoya had neither one of them, according to police; Mrs. Mitchell-Sweeting opened the rear apartment door and said, “They ran up in here”. With the door opened, Detective DeMoya smelled marijuana. However, her opening of the door, her visible demeanor, and her statement were all the product of Detective DeMoya’s unconstitutional attempted invasion of apartment # 2. Detective DeMoya intended to breakdown the door and enter using a powerful tool devised for that very purpose. His damaging assault was plainly visible to the occupant inside of the apartment.

In addition, Mrs. Mitchell-Sweeting opened the door in direct response to the initial Fourth Amendment violation. Certainly, she did not open the door on her own volition. Rather, the evidence shows that she opened the door, half-dressed, in response to Detective DeMoya efforts to forcibly enter her home with the Halligan Tool. The crowbar like tool had breached far inside of the metal clad door and doorframe.

Furthermore, petitioner arrested took place outside of Mrs. Mitchell-Sweeting apartment, thus, a protective sweep of Mrs. Mitchell-Sweeting home,

incident to petitioner's arrest cannot be justified in this case and it is unconstitutional. See, *United States v. Scott*, 517 Fed.Appx. 647 (11th Cir. 2013).

In addition, Detective DeMoya could not rebut the presumption of unreasonableness based upon his knowledge the subject who was known to be armed and gang member had run from the premises. (DE 95 at 103). Detective DeMoya's rationale for the sweep was that he did not know if anybody else is in the house armed, and Mr. Concepcion is a known gang member associated to violence who ran from police. (DE 56:98).

A lack of information about whether another dangerous person is inside a residence cannot justify a sweep. See, *United States v. Chaves*, 169 F.3d 687 (11th Cir. 1999)(“[I]n the absence of specific and articulable facts showing that another individual, who posed a danger to the officers or others, was inside the warehouse, the officers' lack of information cannot justify the warrantless sweep in this case.”).

Moreover, petitioner's perceived dangerousness cannot justify the sweep inside of the apartment because he was already in custody outside the apartment at the time Detective DeMoya entered for a security sweep; and no one else was seen entering the apartment. See, *United States v. Colbert*, 76 F.3d 773 (6th Cir. 1996) (“Lack of information cannot provide an articulable basis upon which to justify a protective sweep.”); See also, *Sharrar v. Felsing*, 128 F.3d 810, 825 (3rd Cir. 1997)(“agreeing with ... Colbert that ‘no information cannot be an articulable basis for a sweep that requires information to justify it in the first place’ ”).

Additionally, the other two suspects scattered in different directions and no one saw them or anyone else enter apartment # 2. Therefore, there was no articulable belief that a protective search of the apartment premises was needed.

In summary, the evidence in this case has not shown that a protective sweep was justified after petitioner was arrested. The Government has not demonstrated any "articulable facts" that would lead to the rational inference of a threat requiring a protective sweep after petitioner had been arrested, was under control of the police, and was inside of the police cruiser outside by the time the protective sweep occurred, instead the evidence shows a protective sweep was unnecessary, because the only persons besides petitioner who could possess danger for the police officers were the other two people hanging out with the petitioner, and they scattered when the police arrived to arrest petitioner.

Nevertheless, viewing the facts in the light most favorable to the Government, and, thereby assuming a protective sweep was necessary to ensure that no individual posing a danger lurked, the search of the apartment was longer than the United States Supreme Court defined a "protective sweep" as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Thus, the taking of the picture while doing this unconstitutional protective sweep was beyond the scope of the meaning set forth as protective sweep by the Supreme Court.

In order to find the protective sweep constitutional under *Buie*, the officers must articulate why it was reasonable for them to undertake a warrantless search of place from the arrest site once they had the petitioner under their control. See, *United States v. Biggs*, 70 F.3d 913, 914 (6th Cir. 1995).

CONCLUSION

The petition for a writ of certiorari should be granted in order to resolve an issue that it is of great public importance for the citizens of the United States.

Respectfully Submitted,



David Raphael Concepcion
DC # M45478

CERTIFICATE OF SERVICE

I CERTIFY THAT the foregoing document has been furnished to the Office of the Florida Attorney General at Criminal Appeals Division, PL-01, The Capitol, Tallahassee, Florida 32399-1050, via U.S. mail on 3rd day of December 2018.

Respectfully Submitted,



David Raphael Concepcion
DC # M45478
Moore Haven Correctional Facility
P. O. Box 719001
Moore Haven, Florida 33471.