No. 19-5280

In The
Supreme Court of the United States

CHARLES D. TUTTOILMONDO,
Petitioner,
v.
STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to
the Court of Criminal Appeals
of the State of Texas

BRIEF IN OPPOSITION OF THE STATE OF TEXAS

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STATEMENT OF THE CASE

Petitioner, a commercial truck driver, was stopped by a Texas Department of Public Safety (DPS) highway patrol trooper, an officer certified to administer the Texas implementation of the Federal Motor Carrier Safety Act's (FMCSA) regulations.[1] The trooper was also a member of a narcotics task force which had

[1] 49 U.S.C. § 113, 502 (2012); TEX. TRANSP. CODE ANN. § 644.001 (West 2012).

developed individualized suspicion that Petitioner was engaged in narcotics trafficking using his commercial truck. In the course of the safety inspection, the trooper noted FMCSA infractions for failure to keep a log and travel book, and asked for Petitioner's consent to search the cargo. Petitioner consented to the search, and the trooper discovered over 1,500 pounds of packaged marijuana.

Petitioner was charged with second-degree felony possession of marijuana, in the 49th District Court of Zapata County, Texas. He filed a motion to suppress, but did not urge suppression of the search on the grounds of a Fourth Amendment violation; he merely challenged the resulting statements. Upon his conviction, he appealed to the Court of Appeals for the Fourth District in San Antonio, which held Appellant's Fourth Amendment issue was not preserved. The Texas Court of Criminal Appeals refused discretionary review and Petitioner now seeks the same from this Court.

SUMMARY OF ARGUMENT

The novelty exception to preservation is ill-applied here because it does not serve the Fourth Amendment exclusionary rule's deterrent nature. Moreover, Petitioner's argument is self-defeating: he asserts that the trooper's *individualized suspicion* of Petitioner as a drug trafficker undermines the validity of the search under the regulatory exception to the warrant requirement; he instead casts the search as a violation of the roving-patrol doctrine, which condemns searches conducted *without individualized suspicion*. This irony, combined with Petitioner's consent to the

search during the safety inspection, refutes his argument.

Moreover, Petitioner seeks to inject a subjectivity component into the Fourth Amendment, adulterating its focus on the reasonableness of the search itself. The relief sought is better provided through other constitutional remedies, such as the Sixth Amendment right to effective counsel and the Fourteenth Amendment's right to equal protection and prohibition of arbitrary state action.

ARGUMENT

I. THE NOVELTY ARGUMENT TO PRESERVATION SHOULD NOT APPLY TO ISSUES ON DIRECT APPEAL.

1. "A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack." *Murray v. Carrier*, 477 U.S. 478, 490, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397, 409 (1986). The States have a strong interest in the finality of the judgments of their courts, and so may require constitutional error to be raised in the court of first instance; this "type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow…." *Id.* (quoting *Reed v. Ross*, 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1, 10 (1984)).

Texas considers preservation of error to be a systemic requirement, but exempts certain "fundamental" rights. *Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993). The Fourth Amendment's search clause is not one of them. *Little v. State*, 758 S.W.2d

551 (Tex. Crim. App. 1988, cert. denied, 488 U.S. 934, 109 S.Ct. 328, 102 L.Ed.2d 346) (Oct. 31, 1988)).

2. Petitioner argues that the *Marin* bar protects Texas from having its search-and-seizure practices vetted. However, regardless of any state rule of procedural bar, a litigant may raise an issue that was defaulted in a subsequent habeas corpus proceeding. *Murray*, 477 U.S. at 485-86, 106 S.Ct. at 2643, 91 L.Ed.2d at 406. Novel issues not raised in the trial court should wait for habeas; there, a record can be developed of the reasons why said issue was not raised, further promoting justice and economy by preventing procedural gamesmanship and preserving legitimate strategic choices of defense counsel. *See id.*

II. THE FOURTH AMENDMENT IS PROPERLY FOCUSED ON THE OBJECTIVE REASONABLENESS OF A SEARCH.

1. The core of the Fourth Amendment is the objective reasonableness of searches; the subjective intentions of the officers are irrelevant. *Kentucky v. King*, 563 U.S. 452, 464-65, 31 S.Ct. 1849, 1858-59, 179 L.Ed.2d 865, 877 (2011). Generally, warrantless searches are unreasonable subject to exceptions like the pervasively-regulated industry doctrine that applies to truckers like Petitioner. *Id.*; *U.S. v. Fort*, 248 F.3d 475, 479-80 (5th Cir. 2001) (citing *N.Y. v. Burger*, 482 U.S. 691, 107 S.Ct. 2636 96 L.Ed.2d 601 (1987)).

2. Petitioner says that a drug task force that employs FMCSA-enforcing troopers is really a revival of the roving patrols held unconstitutional in *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 882, 95 S.Ct. 2574,

2580-81, 45 L.Ed.2d 607, 67 (1975). The evil of the rovers was their lack of individualized suspicion; the rovers' subjective whims that Mexicans are suspicious took the place of the Fourth Amendment's requirement of objectively reasonable suspicion. *Id.* But Petitioner's objection is precisely that the trooper *had* specifically fingered *him* as a drug trafficker. This proves the point that subjective suspicion has zero to do with the objective reasonableness of a search.

The actual difference between our trooper and the Border Patrol rovers in *Brignoni-Ponce* was whether the searchees' expectation of privacy was *objectively* reasonable. It didn't matter that the rovers' motive was to stop Mexicans; it mattered whether the stop was at the border or not. *Id.* For the Petitioner, what matters is that he voluntarily chose to participate in a pervasively regulated industry; his proposal to instead make the *subjective* intent of the searcher control weakens the Fourth Amendment. The Amendment's exclusionary rule is, in part, a deterrent measure meant to check police conduct. *Brown v. Ill.*, 422 U.S. 590, 559-60, 95 S.Ct 2254, 2259-60, 45 L.Ed.2d 424-45 (1975). The Amendment loses its deterrent power if some police or some searchees are more equal than others, such that a search under X circumstances is okay if done for purpose Y but not for purpose Z. The "true motivations" of the officer could easily be misrepresented, whether by the officer, the prosecution or the defense. Subjectivity is an invitation to gamesmanship, not justice. The reasonableness of the search must be tied to the practices of the searcher and not their purpose, lest Petitioner invite more of the very evil he is supposedly against.

3. The Constitution already provides protections against the kinds of abuses feared by Petitioner. On habeas review, the merits of Petitioner's claim can be reached via an ineffective-assistance claim, with the benefit of a further-fleshed record. *Murray*, 477 U.S. at 485-86, 106 S.Ct. at 2643, 91 L.Ed.2d at 406. The Fourteenth Amendment's guarantees would protect Petitioner, or anyone else, from being targeted by the troopers for some irrational purpose. *Peterson v. Greenville*, 373 U.S. 242, 248, 83 S.Ct. 1119, 1121, 10 L.Ed.2d 323, 326 (1962).

* * *

The Fourth Amendment's purposes—prophylaxis and privacy—are not served by reviving a procedurally-barred search claim on direct appeal. A serious inquiry into subjective police bias is better done under the auspices of the Sixth or Fourteenth Amendment via a collateral proceeding, in which the record can better show the motivations of all involved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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