No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAMON RIOS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari
to the Texas Fourteenth Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Fourth Amendment prohibit a warrantless protective sweep of the interior of a home following the arrest of a resident outside his home that had been under 24-hour surveillance for more than two months?

II. Can the plain-view doctrine provide an exception to the warrant requirement when items are stored in opaque black trash bags that law enforcement officers observed while conducting a 30-minute protective sweep of the interior of a home after completing the arrest of the resident outside his home?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption.

LIST OF PROCEEDINGS

Texas Court of Criminal Appeals
No. PD-0673-21
Ramon Rios v. The State of Texas
November 24, 2021

Fourteenth Court of Appeals
No. 14-18-00886-CR
Ramon Rios v. The State of Texas
August 27, 2020

232nd District Court of Harris County, Texas
No. 1491213
The State of Texas v. Ramon Rios
October 4, 2018

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The published opinion of the Texas Fourteenth Court of Appeals is available at *Rios v. State*, 625 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd) and reproduced in Appendix A at 1a–20a.

The published concurring and dissenting opinions from the denial of en banc relief are available at *Rios v. State*, No. 14-18-00886-CR, 2021 WL 3360265, at *1–20 (Tex. App.—Houston [14th Dist.] Aug. 27, 2021, pet. ref'd) and reproduced in Appendix B at 21a–77a.

JURISDICTION

The Texas Court of Criminal Appeals refused discretionary review on November 24, 2021. App. C. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment of the Constitution, which provides:

> "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

This case questions the validity of a warrantless protective sweep of the interior of a home conducted after Harris County Sheriff Deputies had already arrested the resident outside his home, which had been under continuous, 24-hour surveillance for two-and-a-half months when the protective sweep occurred.

Officers set up surveillance of the home. In September 2015, the Harris County Sheriff's Office received a tip that a man was selling narcotics from his home. App. A at 6a. By early October, law enforcement set up 24-hour surveillance on the home. App. B at 35a. They learned that Petitioner lived in the home and that he had two warrants for his arrest for murder. App. B at 46a–47a.

Sheriff Deputy Corey Alexander executed the arrest warrants on the morning of December 9, 2015. App. A at 9a. Alexander testified that he knew:

- the house had been under surveillance 24 hours a day for two-and-a-half months,
- they had information about "the comings and goings of the people who lived at that residence,"
- "there was a child and female at the residence,"
- the child left the residence "every morning" to go to school,

- the mother and child had left the house the morning the arrest warrant was executed,

- they "didn't have any evidence or any information" indicating somebody else was in the house, and

- "as far as [they] knew, there was no one else [at the house]."

App. B at 35a.

Officers arrest Petitioner outside his home. At least 20 officers surrounded the home. App. B at 31a. After being ordered outside the house, Petitioner crawled onto the front porch, where he was handcuffed. App. B at 55a. Officers walked him across the street, placed him in a patrol car, and interviewed him for 10 to 15 minutes. App. B at 34a.

Officers conduct "protective sweep." Following the interview, Alexander entered the home to conduct what he described as a "protective sweep." He testified that "[n]o matter how much intel I'm given, until I physically go inside that residence and look, that I know that 100 percent there's no one inside." App. B at 36a. It is his practice to perform "a protective sweep on every residence that we go to." App. B at 48a. After rummaging through the home during the initial warrantless search, Alexander discovered an open suitcase on the back porch. App. A at 2a. He testified that the suitcase contained black trash bags that, although opaque, he believed to have narcotics in them. App. B at 67a–68a.

Officers conduct second search of home. Following the initial search, Alexander performed "a secondary clear to make sure there [were] no persons inside." App. B at 37a. This secondary clear was "a very slow methodical search." App. B at 37a. One officer testified that the whole process took 30 or 45 minutes. App. B at 37a. During this second search, Alexander discovered a second set of black trash bags (that he presumed to contain narcotics) on top of a cooler. App. B at 37a.

Based on the information discovered while conducting the two searches, Harris County Sheriff Deputies finally decided to get a search warrant for the home. App. A at 2a. They executed the warrant the same day and seized the items observed earlier. App. A at 2a. Petitioner was charged with possession of a controlled substance with intent to deliver. App. A at 2a. The indictment included a deadly-weapon enhancement. App. A at 2a.

Trial court denies motion to suppress. Petitioner moved to suppress the evidence obtained with the search warrant, alleging that law enforcement acquired it from an unconstitutional search. App. A at 2a. The trial court denied the motion. App. A at 2a. Petitioner was convicted and sentenced to 18 years' confinement. App. D at 79a.

Court of appeals affirms conviction. A divided panel of the Fourteenth Court of Appeals affirmed. App. A at 1a–20a. A divided court denied en banc relief. App. B at 21a–77a. The Texas Court of Criminal Appeals denied a petition for discretionary review. App. C at 78a.

ARGUMENT

I. Harris County Sheriff Deputies had no reasonable belief that Petitioner's home harbored a dangerous person after they arrested him outside his home that had been under 24-hour surveillance for two-and-a-half months.

Petitioner was arrested outside his home and had no control over the interior of his home at the time of his arrest. Under these circumstances, entry into his home was permissible only if the officers "possesse[d] a reasonable belief based on specific and articulable facts that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 337 (1990). They did not. The majority's conclusion to the contrary conflicts with clearly established Fourth Amendment principles and this Court's precedent.

First, the officers had already arrested Petitioner before they entered his home. In *Buie*, this Court emphasized that 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." 494 U.S. at 335–36. Here, the officers had already completed the arrest, handcuffed Petitioner, and placed him in a patrol car before entering the home 10 to 15 minutes later. There was no reasonable suspicion of danger and the search took significantly longer than the time needed to complete the arrest and leave. The search exceeded the constitutional constraints on warrantless protective

sweeps recognized by this Court in *Buie*. The search was unconstitutional. *Id.* at 335–36; *United States v. Silva*, 865 F.3d 238, 243 (5th Cir. 2017).

Second, no specific and articulable facts suggest that Petitioner's home could have harbored a dangerous individual. By his own admission, Alexander had no such belief and no facts in the record would support one. He admitted that officers had been surveilling the house, they expected people to leave, they watched people leave, they "didn't have any evidence or any information" someone else was in the house, and "as far as [they] knew, there was no one else there." App. B at 47a. Yet Alexander searched the home anyways because his team performs "a protective sweep on every residence that we go to," and would do so "no matter how much intel" they had. App. B at 48a.

The search of Petitioner's home is precisely what the Fourth Amendment is designed to guard against. Blessing this kind of search sets a precedent that "officers who conduct warrantless arrests outside homes can now force their way inside to ensure there are no dangers inside, even when they have had the property under surveillance for months and are virtually certain no one is there." App. B at 50a. This represents a stark departure from the protections afforded by the Fourth Amendment, controlling jurisprudence from this Court, and a substantial number of decisions from both state courts of last resort,[1] and United States Courts of Appeals

[1] *State v. Spietz*, 531 P.2d 521, 525 (Alaska 1975); *People v. Celis*, 93 P.3d 1027, 1033–36 (Cal. 2004); *People v. Aarness*, 150

concerning protective sweeps.[2]

P.3d 1271, 1280 (Colo. 2006) (holding seizure constitutional because police had articulable suspicion that another occupant remained inside the house because they were told someone was upstairs); *State v. Spencer*, 848 A.2d 1183, 1195–96 (Conn. 2004) (explaining that generalized possibility that an unknown, armed person may be lurking is not an articulable fact sufficient to justify a protective sweep); *State v. Revenaugh*, 992 P.2d 769, 772 (Idaho 1999) ("[A]rresting officers would still have to have a reasonable, articulable suspicion that someone might be in the residence who could pose a threat in order to conduct even a limited protective sweep."); *Smith v. State*, 565 N.E.2d 1059, 1063 (Ind. 1991) (search not justified by "unparticularized suspicion or hunch" that did not constitute "specific and articulable facts demonstrating any reasonable suspicion of danger"), *overruled on other grounds by Albaugh v. State*, 721 N.E.2d 1233, 1235 (Ind. 1999); *State v. McGrane*, 733 N.W.2d 671, 679 (Iowa 2007) (State offered no evidence defendant had weapons in his home, that dangerous people may have been hiding on the premises, or that officers encountered anyone who was dangerous); *State v. Huff*, 92 P.3d 604, 608, 611 (Kan. 2004) (affirming dismissal of charges after finding "officers' entry into the apartment unsupported by an articulable suspicion that there was anyone inside"); *Brumley v. Commonwealth*, 413 S.W.3d 280, 287 (Ky. 2013) (sweep violated Fourth Amendment where "officers had no information whatsoever that an accomplice or other third party may have been with [defendant] in the residence"); *Commonwealth v. Lewin*, 555 N.E.2d 551, 557 (Mass. 1990); *State v. Rutter*, 93 S.W.3d 714, 725 (Mo. 2002); *State v. Francis*, 117 A.3d 158, 163 (N.H. 2015); *State v. Davila*, 999 A.2d 1116, 1126 (N.J. 2010); *People v. Johnson*, 193 A.D.2d 35, 40 (N.Y. App. Div. 1993), *aff'd*, 633 N.E.2d 1100 (N.Y. 1994); *State v. Dial*, 744 S.E.2d 144, 148 (N.C. 2013); *State v. Schmidt*, 885 N.W.2d 65, 70 (N.D. 2016); *State v. Guggenmos*, 253 P.3d 1042, 1047 (Or. 2011); *State v. Sanders*, 752 N.W.2d 713, 719 (Wis. 2008).

[2] *United States v. Paradis*, 351 F.3d 21, 29 (1st Cir. 2003) ("[G]overnment's protective sweep argument fails because the

Third, the majority engages in a distorted analysis that cannot be reconciled with bedrock Fourth Amendment principles or this Court's precedent. For example, the majority relies on the "highly cluttered" nature of the home to justify the officers' entry because it "obscure[d] lines of sight." App. A at 13a. But an untidy home does not give rise to a reasonable belief that the area harbors a dangerous individual. *See, e.g.*, *United States v. Ford*, 56 F.3d 265, 269 n.6 (D.C. Cir. 1995) (noting that "[p]oor lighting . . . [has] nothing to do with a belief that the area harbors 'an individual posing a danger to those on the arrest scene'"); *see also United States v. Archibald*, 589 F.3d 289, 299–300 (6th Cir. 2009) (officers' inability to see certain parts of the arrestee's residence did not demonstrate that another person was present and posed a danger).

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officers had no reason to believe that there might be an individual posing a danger to the officers or others"); *United States v. Menchaca-Castruita*, 587 F.3d 283, 295 (5th Cir. 2009) (finding "no articulable reason to believe that someone else might be inside [the] residence posing a threat to the officer or the bystanders . . . "); *Benas v. Baca*, 159 F. App'x 762, 767 (9th Cir. 2005) ("[The officers'] 'look into the door of a room' cannot be permitted as a 'protective sweep' because no 'specific and articulable facts' to justify the warrantless intrusion."); *United States v. Carter*, 360 F.3d 1235, 1242–43 (10th Cir. 2004) ("[T]he government has pointed to no specific, articulable facts suggesting that the backyard or garage harbored anyone who posed a danger to them . . . . there could always be a dangerous person concealed within a structure. But that in itself cannot justify a protective sweep."); *United States v. Scott*, 517 Fed. App'x 647, 649 (11th Cir. 2013) (invalidating protective sweep where officers could not articulate any basis to conclude that anyone else was inside the home).

The majority also cites the presence of narcotics traffic at the home and Petitioner's arrest warrants "related to charges for a violent crime" to support its analysis. App. A at 12a. But this crime-based approach endorses what *Buie* rejects—a bright-line rule permitting protective sweeps whenever officers are responding to violent crimes. 494 U.S. 325, 334 n.2. The fact that the officers were serving an arrest warrant for murder is legally irrelevant. *Brumley*, 413 S.W.3d at 286. A defendant's own dangerousness has no bearing on "whether the arresting officers reasonably believed that *someone else inside the house* might pose a danger to them." *United States v. Colbert*, 76 F.3d 773, 777 (6th Cir. 1996). Specific and articulable facts are required. And the officers here had none.

Not surprisingly, this Court has expressed concern with categorized judgments based on the "'culture' surrounding a general category of criminal behavior," such as narcotics. *Richards v. Wisconsin*, 520 U.S. 385 (1997) (rejecting proposed per se rule dispensing with requirement that police knock and announce their presence when executing a search warrant in a felony drug investigation.). First, an exception carving out narcotics' cases contains considerable overgeneralization, and such a blanket rule insulates cases from judicial review so long as certain elements are present. *Id.* at 393–94. Second, "the reasons for creating an exception in one category can, relatively easily, be applied to others." *Id.* The majority's reliance on Petitioner's alleged crimes to support the warrantless search promotes a bright-line rule that replaces particularized suspicion.

The simple truth is that the officers did not conduct a protective sweep based on specific and articulable facts. They conducted a protective sweep based on their practices and predilections. Absent intervention from this Court, law enforcement officers patrolling the third most populous county in the country will continue to conduct routine warrantless searches of homes as a matter of course and without consequence. These "protective sweeps" are not authorized by the Constitution and fly in the face of this Court's decision in *Buie*. The opinion cannot stand.

II. The plain-view doctrine does not apply because law enforcement was not lawfully on the premises, and the criminal nature of the contents of the black trash bags was not immediately apparent.

The majority found that the narcotics in the trash bags were in plain view. App. A at 18a–19a. The plain-view doctrine applies only if law enforcement is lawfully on the premises where the alleged contraband is observed. *Horton v. California*, 496 U.S. 128, 136–37 (1990). Because the officers did not have specific, articulable facts that a dangerous person was in the home, they were not lawfully on the premises. Nor could the officers lawfully sweep the home because Petitioner had already been arrested and removed from the scene. For these reasons, the plain-view doctrine could not apply.

More fundamentally, however, the plain-view doctrine cannot apply because the criminality of the trash bag contents was not immediately apparent.

The majority concluded that "the finding of the narcotics sitting outside the back porch in plain view and tips that narcotics were being sold from the house, firmly establishes probable cause to search the entire residence for narcotics." App. A at 19a. But before an item can be searched and seized without a warrant under the plain-view doctrine, the "incriminating nature of the item must be immediately apparent." *Coolidge v. New Hampshire*, 403 U.S. 443, 465–66 (1971).

There is zero evidence capable of supporting the conclusion that the incriminating nature of the opaque trash bags was immediately apparent. After Petitioner was arrested, removed from the property, and interviewed for 10 to 15 minutes, Alexander entered the home and observed a red suitcase on the back porch containing unopened black bags. App. B at 67a–69a. He did not touch, open, or smell the black trash bags. And no evidence suggests he could see through the opaque bags.

It defies law and logic to conclude that while conducting an ostensibly legitimate protective sweep for threats inside a house, an officer who perceives black trash bags inside a suitcase can reasonably conclude that criminality is "immediately apparent." Any number of innocuous objects could be wrapped in black trash bags in a suitcase inside a home. Yet the majority blindly accepts that an officer—who neither touched, opened, nor smelled the black trash bags in question—legitimately concluded criminality was immediately apparent. The majority's conclusion constitutes a flagrant and impermissible attack on our clearly established Fourth Amendment rights.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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