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APPENDIX A

Affirmed and Majority Opinion
filed August 27, 2020

In The

FOURTEENTH COURT OF APPEALS

No. 14-18-00886-CR

RAMON RIOS, III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1491213

MAJORITY OPINION[1]

Appellant Ramon Rios, III appeals his conviction for possession of a controlled substance with intent to deliver. In one issue he asserts the trial court abused its discretion in refusing to suppress evidence first discovered in a protective sweep officers made in the course of executing warrants for his arrest for murder. We affirm.

[1] Justice Bourliot dissents without opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Members of the Harris County Sheriff's Office SWAT team arrested appellant at a house in Houston. They sought appellant's arrest based on outstanding warrants issued in two counties for murder charges. In making the arrest, the SWAT team conducted a two-part sweep of the house. They found narcotics and got a warrant to search areas inside and outside the house. Law enforcement officers executed the search warrant the same day.

In executing the search warrant, officers seized fourteen guns (including assault rifles and uzi-style handguns) and 44 kilograms of cocaine, including over 400 grams of the substance in conspicuous packaging in an open suitcase on the back porch. Based on the discovery of narcotics, the Harris County District Attorney's office pursued charges for possession of a controlled substance with intent to deliver. The indictment also included a deadly-weapon enhancement paragraph. Before and at trial, appellant moved to suppress evidence obtained under the search warrant, alleging that law enforcement acquired the evidence from an unlawful protective sweep.

The trial court denied the motion to suppress, found appellant guilty as charged in the indictment, and found the deadly-weapon paragraph true. The trial court assessed punishment at 18 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant timely appealed.

II. SUPPRESSION OF THE EVIDENCE

We review the trial court's ruling on a motion to suppress for an abuse of discretion. *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014). A trial court's ruling should be reversed only if it is arbitrary, unreasonable, or "outside the zone of reasonable disagreement." *Id.* In a motion-to-suppress hearing, the trial court stands as the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Lerma v. State*, 543 S.W.3d 184, 190 (Tex. Crim. App. 2018). Therefore, we afford almost complete deference to the trial court in determining historical facts. *Id.* The trial court may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted, because the trial court has the opportunity to observe the witness's demeanor and appearance. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

Neither appellant nor the State of Texas asked the trial court to make findings of fact and conclusions of law on its motion-to-suppress ruling. When the trial court fails to issue findings of fact, we view the evidence in the light most favorable to the trial court's ruling and presume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record. *Lerma*, 543 S.W.3d at 190. We will uphold the trial court's ruling if it is correct under any theory of law applicable to the case. *Id.*

A protective sweep is a quick, limited search of the premises, generally incident to arrest and

conducted to protect the safety of law enforcement officers or others. *Reasor v. State*, 12 S.W.3d 813, 815 (Tex. Crim. App. 2000). A police officer may sweep the house only if the officer holds an objectively reasonable belief, based on specific and articulable facts, that a person in that area poses a danger to that police officer or to other people in the area. *Id*. at 817. In conducting a protective sweep law enforcement officers must stay within the appropriate scope. *Id.* Though limited in nature, the protective sweep "may last long enough to dispel the reasonable suspicion of danger." *Id*. (internal quotations omitted). The sweep is to be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

To support his assertion that the trial court erred in denying his motion to suppress evidence, appellant contends the two-part protective sweep was unlawful because (1) he was not arrested in his home, which he contends is an essential requirement of a protective sweep, (2) the record fails to show specific articulable facts that would warrant a reasonable belief that the area swept harbored an individual posing a danger to those on the arrest scene, and (3) the sweep took too long to be cursory. The State argues that even if the second part of the sweep was unlawful, the trial court's ruling can be upheld upon a finding that the first part of sweep was valid and thus the information acquired during that part of the sweep and put into the search-warrant affidavit was legal and clearly established probable cause. *See United States v. Karo*, 468 U.S. 705, 720–21, 104

S.Ct. 3296, 3306, 82 L.Ed.2d 530 (1984); *Castillo v. State*, 818 S.W.2d 803, 805 (Tex. Crim. App. 1991), *overruled on other grounds by*, *Torres v. State*, 182 S.W.3d 899, 901–02 (Tex. Crim. App. 2005); *Romo v. State*, 315 S.W.3d 565, 571 (Tex. App.—Fort Worth 2010, pet ref'd). In evaluating the legality of the sweep, we consider the particular facts and circumstances in our record to determine if the sweep could be justified.

Though, at times, the parties and witnesses referred to the protective sweep in the singular, at trial and on appeal the parties mostly refer to a bifurcated protective sweep with two distinct phases.[2] The SWAT team leader, Corey Alexander testified that the total time to conduct both phases of the sweep, or "clear the residence," lasted "anywhere between 20 to 45 minutes, more than 5 minutes."

Alexander testified that officers devoted the first part of the sweep to determining if any individuals were in the open spaces, rooms, or "any livable spaces." During the second part of the sweep, he explained, law enforcement would clear any space a person could possibly fit — looking underneath beds, and in closets, crawl spaces, and the like.

Alexander testified that during the first phase of the sweep, while standing in the kitchen of the house, he saw through the open back door what appeared to be a brick of cocaine in a red, opened suitcase on the back porch ("Outside Narcotics").

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[2] The parties also note other pre-search warrant entries into the house.

Alexander originally testified that also during the first phase of the sweep, officers spotted narcotics in the kitchen, but he later explained that these narcotics were found on top of an ice chest in front of the laundry room, inside the house, during the second phase of the sweep ("Inside Narcotics"). But Officer Jonathan Persaud testified the ice chest where the Inside Narcotics were found was located in the kitchen.

A. Does the evidence support implied findings under which the first phase of the protective sweep (including entry) was lawful?

The answer to each search-and-seizure question must turn on the facts of the particular case. *Gonzales v. State*, 648 S.W.2d 684, 687 (Tex. Crim. App. 1983). Our analysis of the facts surrounding the first phase of protective sweep begins with the circumstances that led to the execution of the arrest warrants.

Officer Persaud with the High Intensity Drug Trafficking Areas unit testified that he began investigating appellant more than two months before the arrest after receiving information that someone was selling narcotics from the house. Persaud explained that his unit placed the house under surveillance and saw a man (later identified as appellant) conducting what appeared to be a narcotics transaction in front of the house. Persaud testified that the police had a difficult time identifying appellant at the location because there was no record that appellant lived there. But Persuad identified Sandra Martinez as a resident of

the house and determined that three children also lived in the house. With assistance from the Federal Bureau of Investigation, law enforcement identified appellant through the children's birth certificates. After identifying appellant, officers conducted a criminal history check. The check revealed that appellant had warrants outstanding for his arrest in two Texas counties (Atascosa and Bexar).

Persaud testified about the surveillance of the property in the months leading to appellant's arrest, giving the following pertinent facts:

Officers conducted some physical surveillance of the property during the two-month period before the arrest, but that surveillance did not include 24-hour, seven days a week physical surveillance. According to Persaud, officers installed one "pole cam" that recorded constantly, but no records showed when or what surveillance footage was seen or reviewed. Persaud could not testify about — and denied the existence of any notes taken that would indicate — the amount of time that anyone spent reviewing the surveillance footage. He estimated that two to five cars left the residence, but he had only information about the date on which one of these cars was seen. Persaud testified that he provided his information to Alexander to assist Alexander and his SWAT team unit in executing the arrest warrants. Persuad told Alexander that he knew from the pole cam that children lived in the house. According to Persaud, he told Alexander that "there may be an infant" in addition to school-aged children. Persaud conveyed to the SWAT team that he learned from an informant that an "AK-47" was kept in the house. Persaud

testified about appellant's coming and going from the house, but Persaud "didn't keep record of how many days he [appellant] left and came back from the house." According to Persuad, officers conducted physical surveillance on the property the night before the arrest "to confirm that Mr. Rios was indeed at the house before we had the high-risk operations unit execute the arrest warrant[s]."

Intelligence Gathering Before Execution of the Arrest Warrants

Alexander testified that his unit (SWAT team) handles high-risk operations, typically felony and other high-risk warrants involving dangerous people. Alexander explained that his team conducts its own intelligence. He described the layout of the property, which included "a wrought iron fence all around it," a deep ditch in the front yard, and "an outbuilding" in the back. He described his concerns with respect to these elements, and specifically, with respect to the back, stating:

It also had an outbuilding on the backside of it that was pretty large that we didn't know if it — it looked like it was kind of like a cabana-type area where they did barbecues. But there was also rooms on the backside of it. So, we didn't know if it was storage, if somebody else was living in that particular residence, or if there was restrooms, you know, whatever the case might be.

Alexander further noted that the team's intelligence gathering revealed the possibility of weapons and narcotics on the property.

Alexander explained the high level of risk associated with the operation, noting from his experience that at times intelligence gathering may not reveal high risks of danger. He cited examples in which intelligence gathering had suggested a single occupant when there were actually twenty. He also cited times when despite overnight surveillance, the police found individuals inside that they did not know were there. In sum, surveillance provides some information but can be inaccurate and incomplete, leaving law enforcement officers uncertain about the true state of the situation.

Execution of the Arrest Warrants

Alexander testified that on the morning of December 9, 2015, his team executed the murder arrest warrants. He explained that a SWAT vehicle crashed through the locked gate to the driveway and as they began making announcements on the loudspeaker, the SWAT team surrounded the entire property and then breached the front door as well as some windows. Law enforcement officers instructed appellant to crawl out onto the house's front porch. Appellant did. Law enforcement officers then handcuffed appellant on the front porch and escorted him to a patrol car across the street.

Suspected Presence of Other Individuals in the House

Alexander testified about the suspected presence of other individuals in the house, at times giving conflicting testimony. First, he stated that before executing the warrants he received information over the radio that "the wife and child are detained," and later testified about a concern that children were in

the house.[3] He explained that these facts dictated the methods they would use when breaching the house. Alexander also testified that he had not received information that appellant was the only one in the house, yet, during cross examination, Alexander also answered "yes" to the question "So, you think there's no children present, right?"

Presence of Weapons in the House

Alexander noted that during the operation he could see through the doorway into the living room a closed rifle case with a rifle on top or near the rifle case. Alexander then explained his process of conducting the protective sweep to deem it safe before his SWAT team leaves the site. As appellant was secured away from the house, Officer Persuad asked appellant whether any people, animals, weapons, or anything that would harm them were in the residence. He was told that there were several dogs on the property. Officer Persuad testified that at this time he asked appellant to identify himself, and that appellant identified himself as "Elijah Villarreal," rather than giving his real name. The first protective sweep followed.

Citing a case from the United States District Court for the Northern District of Texas, appellant asserts that the law limits protective sweeps to arrests made inside the house. *See United States v.*

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[3] Alexander's testimony includes the following reference to children in the home: "Q. And, so, when you break the windows, are y'all doing the flash bang? A. Nope. That's what I'm saying, because of the children in the residence we decided not to do that."

Brodie, 975 F. Supp. 851, 855 (N.D. Tex. 1997). Although the Supreme Court of the United States has not spoken on this issue, many federal courts of appeals have concluded that the protective sweep doctrine applies to an arrest near a door of the home but outside the residence. *See United States v. Lawlor*, 406 F.3d 37, 41–42 (1st Cir. 2005); *United States v. Oguns*, 921 F.2d 442, 445–46 (2d Cir. 1990); *United States v. Jackson*, 700 F.2d 181, 189–90 (5th Cir. 1983); *United States v. Colbert*, 76 F.3d 773, 776–77 (6th Cir. 1996); *United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989), *overruled on other grounds by United States v. Ruiz*, 257 F.3d 1030, 1032 (9th Cir. 2001) (en banc); *United States v. Cavely*, 318 F.3d 987, 995–96 (10th Cir. 2003); *United States v. Henry*, 48 F.3d 1282, 1284 (D.C. Cir. 1995). This court has no binding precedent addressing whether the protective sweep doctrine extends beyond the physical walls of the house. The First Court of Appeals recently approved protective sweeps in the absence of an in-house arrest. *See Lipscomb v. State*, 526 S.W.3d 646, 655 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd).

We think that an arrest that occurs just outside the home can pose an equally serious threat to arresting officers as one that occurs in the home. *See Lawlor*, 406 F.3d at 41. We accept the position that a protective sweep may be conducted following an arrest that takes place just outside the home, if sufficient facts exist that would warrant an officer to reasonably believe that an individual in the area in question posed a threat to those at the scene. *See Lawlor*, 406 F.3d at 41–42; *Colbert*, 76 F.3d at 776–

77; *Henry*, 48 F.3d at 1284. Therefore, the arrest of appellant on the front porch of the house does not preclude application of the protective-sweep doctrine. *See Lawlor*, 406 F.3d at 41–42; *Oguns*, 921 F.2d at 445–46; *Jackson*, 700 F.2d at189–90; *Colbert*, 76 F.3d at 776–77; *Hoyos*, 892 F.2d at 1397; *Cavely*, 318 F.3d at 995–96; *Henry*, 48 F.3d at 1284.

Other Specific Articulable Facts Warranting the Sweep

Appellant claims law enforcement officers did not have specific articulable facts that would warrant a reasonable belief that the area swept harbored an individual posing a danger to those on the arrest scene. Viewing the evidence in the light most favorable to the trial court's ruling, the record shows the following:

- Intelligence from law-enforcement entities showed narcotics traffic at the house.
- The arrest warrants executed related to charges for a violent crime—murder.
- Informants had reported guns were on the premises.
- Alexander testified that he saw a rifle in the residence upon the initial entry into the house.
- Witnesses gave conflicting accounts about how many children were in the car that left the home, which suggested that not all of the children left the home and at least one might still be inside the house

- When questioned by law enforcement officers immediately following his arrest, appellant lied about his identity, initially identifying himself as "Elijah Villarreal."
- Law enforcement officers saw suspected narcotics activity at the house. Alexander testified to the heightened level of risk associated with apprehending suspects in narcotics-trafficking scenarios
- Appellant reported dogs on the premises and in the house.
- Alexander testified he was concerned about the safety of the law enforcement officers.
- Photographs in the record show that parts of the residence were highly cluttered, obscuring lines of sight into places individuals could be hiding or lying in wait.
- According to Alexander, the ongoing surveillance did not provide adequate information for the purposes of executing the warrants. The surveillance on the home was not continuous and, as a result, yielded inconsistent information. Nothing in the record shows the presence of physical surveillance or attention to the video surveillance in the days leading up to the arrest other than the night before the arrest.
- The surveillance confirmed that appellant was at the residence the night before the arrest. But, Alexander testified that law enforcement officers could not be certain that there were no other

> people in the residence and that the sweep was conducted to ensure the safety of others standing around the residence.

Viewing the evidence in the light most favorable to the trial court's ruling, the record evidence supports an implied finding by the trial court that Alexander held an objectively reasonable belief, based on specific and articulable facts, that guns remained in the house and that a person in that area posed a danger to Alexander and to other people in the area. *See Jackson*, 700 F.2d at 190 ("The agents at the motel had observed the suspects leaving the room in which the agents later discovered the evidence. They had no way of knowing that the two suspects were the only remaining people involved in the exchange. Although Hicks had said that the suspects were armed, a pat-down search following the arrest did not reveal a weapon. Thus, the agents had reason to believe that a gun was somewhere in the motel. It is clear to us that the cursory search of the motel rooms resulted from the agent's reasonable belief that an immediate security sweep of the premises was required for their own safety and the safety of others at the motel"); *Lerma*, 543 S.W.3d at 190; *see also Lipscomb*, 526 S.W.3d at 656 (concluding protective sweep was lawful where officers had received conflicting information from dispatch operator making them unsure about whether anyone was still inside the apartment). Thus, we presume that the trial court made this implied finding. *See Lerma*, 543 S.W.3d at 190.

Duration of the First Phase of the Protective Sweep

Appellant also contends the sweep took too long to be a "cursory sweep." Appellant asserts that a 30 to 45-minute search of a small home by trained professionals cannot be considered "cursory." In *Buie,* the Supreme Court stated that a lawful protective sweep "lasts no longer than is necessary to dispel the reasonable suspicion of danger," and that officers may "look in closets and other spaces immediately adjoining the place of arrest." *Buie*, 494 U.S. at 335–36. When characterizing the overall sweep Alexander described it as slow and methodical at times, but responded to an inquiry about the quick processes of "recogniz[ing] whether a person is in there or not" as something that occurred "initially." Viewing the evidence in the light most favorable to the trial court's ruling, we presume that the trial court credited Alexander's testimony that "[i]t could have took me 20 minutes," and discredited his other longer estimates about the duration of the total sweep. Viewing the evidence in the light most favorable to the trial court's ruling, the record evidence supports implied findings by the trial court that the total sweep lasted 20 minutes and that the first phase of the sweep (that consisted merely of scanning the rooms or "livable spaces") lasted five to ten minutes, a quarter to roughly half of the time of the total sweep. *See Lerma*, 543 S.W.3d at 190.

Taking into account all of the facts, the discovery of the opened back door, and accounting for the additional time it might take to clear the smaller spaces that were big enough for a person to hide (and spring an attack on law enforcement occupants), and

considering that the back door was discovered to be open during their entry, we could hardly find a 20-minute timeframe excessive. The SWAT team's discovery of the opened back door provided reasonable additional basis for heightened concern over the potential for people in the house. *See Oguns*, 921 F.2d at 446–47 (holding that security sweep of defendant's apartment was permissible because the agents conducting the sweep noticed that the door to the defendant's apartment was open).

Alexander's testimony initially was consistent with the statement in the search-warrant affidavit that officers discovered the cocaine found in the house on a cooler in the kitchen, as he affirmatively responded to questions about this discovery in the kitchen. Although Alexander himself later contradicted[4] this version of the facts, Persaud, who memorialized Alexander's report on the day of the search, corroborated this account at trial. The trial court was free to credit Alexander's initial testimony that he first found narcotics in the kitchen before finding the narcotics outside, and reasonably infer that both discoveries occurred during the initial sweep. Viewing the evidence in the light most favorable to the trial court's ruling, the record evidence supports implied findings by the trial court that officers discovered the cocaine found in the house on a cooler in the kitchen, as described in the search-warrant affidavit, and that the law

[4] Alexander contradicted this testimony by stating: "You're saying that the first narcotics saw was inside the residence. I'm not saying that. I'm saying the first narcotics I saw were in the red bag right outside the back door."

enforcement officers did not exceed the scope of a permissible protective sweep during the first phase of the sweep. *See Buie*, 494 U.S. at 335–36; *Lerma*, 543 S.W.3d at 190. Under these implied findings, all of the information used to support the search-warrant affidavit was obtained during the first phase of the sweep, and therefore none of that information was obtained as a result of an unreasonable search that violated the Fourth Amendment of the United States Constitution. See Buie, 494 U.S. at 335–36; Jackson, 700 F.2d at 190; Lerma, 543 S.W.3d at 190.

B. If Alexander discovered the Inside Narcotics during the second phase of the sweep, did the trial court err in denying the motion to suppress?

Appellant asserts that Alexander discovered the Inside Narcotics during the second phase of the sweep, and some evidence in the record would support this proposition. In the alternative, we presume this point for the sake of argument and consider whether the trial court erred in denying the motion to suppress if Alexander discovered the Inside Narcotics during the second phase of the sweep.[5]

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[5] Additional sweeps of the house were made before the execution of the search warrant. Alexander testified that during a third phase, members of his team went through the house collecting their tools, and during a fourth phase, which Alexander explained overlapped with the third phase, his crew would take photographs of the damage caused by the breach. Although neither search was aimed at protecting law enforcement officers and so would fall outside the scope of a permissible protective sweep, no information obtained during these phases formed the basis of the search warrant.

Propriety of the "Secondary Clear"

Alexander testified that during the "secondary clear" he and his team walked into every room to secure every possible place that a human body could possibly fit, "underneath beds, looking in closets, looking in crawl spaces, all that kind of stuff." He explained that, as with the original sweep, the purpose of this secondary search was to protect officer safety, and his testimony suggests that the secondary sweep was essential to protect his team's safety before retreating from the residence.

For the sake of argument, we presume that (1) the second phase of the sweep violated the Fourth Amendment; and (2) Alexander discovered the Inside Narcotics during the second phase of the sweep when not lawfully on the premises such that this information in the search-warrant affidavit was tainted and could not be considered as support for the search warrant of the house. *See State v. Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015) (stating that a search warrant based in part on tainted information is nonetheless valid if it clearly could have been issued on the basis of the untainted information in the affidavit). We consider whether the remaining untainted information, namely, the plain view sighting of the Outside Narcotics, could support the search warrant for items inside the residence.

The search warrant authorizing a search inside the home could have been issued on the basis of the first search, the sighting of cocaine directly outside the home along with other information about the residence. Excluding all information derived from the second part of the sweep, including the information regarding the Inside Narcotics, under the totality of the circumstances, the remaining information in the search-warrant affidavit, including the report of the finding of the narcotics sitting outside the back porch in plain view and tips that narcotics were being sold from the house, clearly establishes probable cause to search the entire residence for narcotics. *See Flores v. State*, 319 S.W.3d 697, 703 (Tex. Crim. App. 2010) (concluding that anonymous tip coupled with presence of marihuana in the residence's garbage can twice within a five-day period aided probable cause for search of residence); *Wright v. State*, 401 S.W.3d 813, 822–23 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *see also Le*, 463 S.W.3d at 879 (odor of marijuana can provide probable cause to support a search warrant). So, even if Alexander discovered the Inside Narcotics during the second part of the sweep and even if this part of the sweep violated the Fourth Amendment, the search warrant still would be valid, and appellant would not have shown that the trial court erred in denying the motion to suppress. *See Flores*, 319 S.W.3d at 703; *Wright v. State*, 401 S.W.3d 813, 822–23.

III. CONCLUSION

The trial court did not err in denying the motion to suppress. We overrule appellant's sole issue and affirm the trial court's judgment.

/s/ Kem Thompson Frost

Chief Justice

APPENDIX B

Order, Concurring Opinion on Denial of En Banc Relief, and Dissenting Opinions from Denial of En Banc Relief filed August 3, 2021

In The

FOURTEENTH COURT OF APPEALS

No. 14-18-00886-CR

RAMON RIOS, III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1491213

CONCURRING OPINION ON DENIAL OF EN BANC RELIEF

Jerry Zimmerer, Justice

I concur in the denial of en banc relief and write separately. Military style "no-knock warrants" have been held to be unreasonable in factual scenarios

similar to those in this case.[1] The reasonableness of the no-knock portion of this warrant was never raised, not briefed, and is therefore not before us. The panel opinion follows well-established precedent of the United States Supreme Court and Texas Court of Criminal Appeals, and I agree with the majority of this Court in denying en banc relief.

FACTS

This case involves a "high-risk arrest" of a suspected narcotics dealer with two outstanding warrants for murder who, at the time of the execution of the arrest warrant, was in possession of guns and illegal drugs. The Houston Police High Risk Operations Unit ("SWAT") breached the house to arrest appellant while executing a "no knock" arrest warrant. Unchallenged by appellant was the initial and violent "breaching" of the residence, which started when the SWAT team pushed down the outside gate with an armored police vehicle, surrounded the house with approximately twenty police officers, who broke in the doors and windows, then pointed guns into the residence, and finally ordered appellant to the ground while he was still inside the residence. There he remained until "later" when officers "eventually" ordered him to crawl out to the front porch where he was "secured" first by being handcuffed, and then by placing him into a nearby police vehicle, while the SWAT team continued to hold their position outside the house.

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[1] As to search warrants, "[I]n the absence of express statutory authorization, no-knock search warrants are without legal effect in Florida." *State v. Bamber*, 630 So.2d 1048, 1051 (Fla. 1994).

Having secured appellant, SWAT then performed a protective sweep. They first secured the residence room by room with multiple officers in each room, presumably with weapons drawn. (First, "two guys will go in ... once they start clearing that room and they need to move on to the next room, then the next person goes in." It is "slow and methodical."). Officer Alexander usually goes in, "like, three or four guys back." Alexander testified he was "not looking for guns but "just looking strictly for people." As the lead officer, Alexander will sweep each room, checking "underneath beds, looking in closets, looking in crawl spaces." Only after Officer Alexander completed the protective sweep was everyone asked to "walk out." It was during this "initial" sweep "as soon as we went inside the residence" Officer Alexander observed what he suspected to be (and was later confirmed to be) bricks of illegal drugs. Although Officer Alexander may not have been the only officer to observe the illegal drugs, only his observations were cited in the affidavit supporting the subsequent search warrant reviewed and granted by a Harris County Criminal District Court Judge.

At trial, before a different Harris County Criminal District Court Judge, appellant, seeking to exclude evidence obtained from inside the house, made arguments challenging the admissibility of the seized evidence. First, claiming the arrest was made outside the house, appellant argues the protective sweep and any evidence observed must be excluded as fruits of an illegal sweep. Second, even if the intrusion was legal as a protective sweep, the efforts of Officer Alexander constituted a second, more thorough

"search" and therefore the evidence must be excluded as beyond that necessary to secure the legitimate safety concerns of the officers, which was presumably accomplished by the officers who went in with weapons drawn.

Appellant was provided by hearing an opportunity to develop the facts. The trial court found the sweep reasonable under the circumstances and thus held it did not violate appellant's Fourth Amendment rights. The trial court denied appellant's motion to suppress. Appellant was tried, convicted, and sentenced to 18 years in the Institutional Division of the Texas Department of Criminal Justice.

Appellant appealed his conviction to this Court, and the majority of a panel of three Justices affirmed the reasonable inferences of the magistrate and the factual findings of the trial court. One Justice on the panel dissented without opinion. Appellant then sought and was granted en banc review and an en banc oral argument was granted. At each stage, appellant challenged the Constitutionality of the protective sweep and separately Officer Alexander's portion of the sweep as a separate "search."

I. The Arrest occurred in the residence.

The United States Supreme Court has established the Fourth Amendment applies whenever a person is seized and restrained of their freedom to walk away. *See Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968). "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* In this case appellant was

seized when he was ordered to the floor of the residence.

The Supreme Court has rejected unnecessarily strict restrictions on police in determining when a protective sweep is justified. *Maryland v. Buie*, 494 U.S. 325, 336–37, 110 S. Ct. 1093, 1099–100, 108 L. Ed. 2d 276 (1990) ("We conclude that by requiring a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals [ ] applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest 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.").

II. Manor and Means of the Protective Sweep

Appellant argues, even if the protective sweep was reasonable under the circumstances, the securing portion of the operation should have concluded the protective nature of the sweep and thus Officer Alexander's observations were the result of an improper "secondary" search. However, the testimony indicated Officer Alexander entered the premises contemporaneously with the other officers. Accordingly, appellant's arguments relate to the manner and means of the protective sweep and fail to appreciate the apparent safety concerns of police and their need to perform the protective sweep safely

under circumstances already deemed to be a "high risk operation."

Having addressed, at least arguably, the legal basis for officers to perform a protective sweep of the house I move to the more troubling procedural aspect of this case, whether en banc reconsideration should have been granted at all.

III. Neither appellant nor the dissents follow the en banc standard required by the Rules of Appellate Procedure.

"En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration." Tex. R. App P. 41.2(c). As stated in *Thompson*, "[t]he standard for en banc consideration is not whether a majority of the en banc court may disagree with all or a part of a panel opinion. Neither is an assertion that an issue is 'important' sufficient. Rather, when there is no conflict among panel decisions, the existence of 'extraordinary circumstances' is required before en banc consideration may be ordered. Here, en banc consideration is not 'necessary' to maintain uniformity with prior [Fourteenth] Court of Appeals decisions. Moreover, the panel's limited holding ... does not amount to an 'extraordinary circumstance' which 'requires' en banc consideration." *Thompson v. State*, 89 S.W.3d 843, 856 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (Jennings, J., concurring in denial of en banc consideration) (internal citation omitted).

Here, en banc relief is not necessary to maintain uniformity with prior Fourteenth Court of Appeals decisions. Neither appellant nor the dissents identified a prior Fourteenth Court decision that conflicts with the panel decision in this case. Moreover, the panel's holding, which is limited to the facts and circumstances of this case, does not amount to an "extraordinary circumstance" requiring en banc consideration.

Appellant and the dissent assert the panel opinion conflicts with the opinion from the Court of Criminal Appeals in *Reasor v. State*, 12 S.W.3d 813 (Tex. Crim. App. 2000). The instant case is distinguishable from *Reasor* in two ways. First, Reasor's arrest occurred exclusively outside the residence after Reasor had driven home. *Id.* at 815. Officers entered the residence and obtained consent after the arrest occurred in the driveway. *Id.* Second, unlike the instant case, not only did the officers fail to articulate facts supporting any concern that the residence harbored any threat, one officer testified he considered Reasor's driveway "a safe place for him, his fellow officers, and the appellant." *Id.* at 817.

IV. In asserting the panel majority erred in its analysis, the dissents abandon the constitutional role of an appellate court to give due deference to the factfinder's credibility determinations.

"The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' "

Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S. Ct. 330, 332, 54 L. Ed. 2d 331 (1977) (quoting *Terry*, 392 U.S. at 19, 88 S.Ct. at 1878). Reasonableness, of course, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2579, 45 L.Ed.2d 607 (1975)

A protective sweep is an exception to the warrant requirement. *Reasor*, 12 S.W.3d at 815–16. 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." *Id.* at 815 (quoting *Buie*, 494 U.S. at 327, 110 S. Ct. at 1093). A protective sweep is permitted when the officer possesses a reasonable belief that the area to be swept harbors an individual posing a danger to those on the scene. *Buie*, 494 U.S. at 337, 110 S.Ct. at 1093; *Reasor*, 12 S.W.3d at 816. Officers may not conduct a protective sweep as a matter of right. *Buie*, 494 U.S. at 336, 110 S.Ct. at 1093; *Reasor*, 12 S.W.3d at 816 ("[T]he protective sweep is not an automatic right police possess when making an in-home arrest."). To the contrary, a protective sweep is permitted only when "justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene." *Buie*, 494 U.S. at 336, 110 S.Ct. at 1093; *Reasor*, 12 S.W.3d at 816.

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). First, we afford almost total deference to

the trial judge's findings of historical fact as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Abney v. State*, 394 S.W.3d 542, 547 (Tex. Crim. App. 2013). The trial judge is the sole judge of a witness's credibility and the weight given to the witness's testimony. *Ex parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013).

The trial court and the majority panel opinion concluded that the protective sweep in this case was justified by a reasonable, articulable suspicion that the house was harboring a person posing a danger to those at the scene.

In addressing the trial court's denial of appellant's motion to suppress, the dissent argues (1) there were no specific and articulable facts that appellant's home harbored an individual who posed a danger; (2) officers had completed the arrest and departed the premises before conducting the protective sweep; and (3) the panel majority relied on "materially incorrect" and "irrelevant" facts.

To the contrary, the record reflects the following specific and articulable facts from which the trial court could have determined the protective sweep was justified:

• Before executing the arrest warrant, officers knew a woman and at least one child lived in the house, but their intelligence and surveillance led them to believe there would be weapons and an "unknown number of people that were going to be at the residence."

• Officers avoided using "explosive tools," such as flash-bang grenades when executing the warrant because they did not know whether children would be in the house.

• At the time law enforcement breached the house they did not know who was in the house and could not observe each room of the house.

• After officers announced their arrival, appellant came out to the front porch of the house.

• As Officer Alexander was removing appellant from the front porch, he looked into the front living room and saw "a rifle case and a rifle sitting on top of it or there close."

• Officer Alexander spent 10 to 15 minutes escorting appellant to a patrol car and asking appellant if any persons or dogs were inside the home.

• In Officer Alexander's experience, he had gone to similar locations and found other occupants in the home and Officer Alexander did not know whether other persons were in the house.

• While officers try to determine who is living at a residence, the information does not always turn out to be accurate.

• Officer Alexander further testified, "Even though there's a particular number of residents that live there, that doesn't mean that that's necessarily what's there at the time that I serve the warrant."

• Officer Alexander admitted he did not have information that other people were in the home, but

testified he had no way to know that until he went inside the house.

These and other facts were found sufficient by the majority panel opinion to support the trial court's decision to deny the motion to suppress. Although appellant had been removed from the home, there were approximately twenty officers at the scene at the time of appellant's arrest. The above facts in addition to those recited in the panel opinion were sufficient to establish that individuals may have been in the house and those individuals could have posed a danger to the officers at the scene.

In quoting Officer Alexander's testimony, the dissent quotes, "as far as [they] knew, there was no one else there." Dissenting op. at p. 12. In the same sentence of his testimony, however, Officer Alexander testified, "but I didn't 100 percent know that." Officer Alexander further testified that although appellant was placed in a patrol car, the house was open and the officers outside the house were not safe until the house was "cleared."

Both appellant and the dissent fail to give deference to the trial court's ruling by considering the evidence in the light most favorable to that ruling. *See Romano v. State*, 610 S.W.3d 30, 33–34 (Tex. Crim. App. 2020) (court of appeals erred in reversing appellant's conviction because court of appeals failed to give proper deference to the factfinder's findings); *see also* Tex. Const. art. V, § 6. Contrary to the dissent's assertions, the record reflects specific and articulable facts that appellant's home harbored an individual or individuals who posed a danger to the

officers at the arrest scene. Inconsistencies or contradictions in a witness's testimony do not destroy that testimony as a matter of law. *McDonald v. State*, 462 S.W.2d 40, 41 (Tex. Crim. App. 1970).

As to the panel majority's holding on the plain-view doctrine, Officer Alexander testified that, "the first narcotics I saw were in the red bag right outside the back door." Officers went into the backyard because there was an out-building that might have had someone living in it. The back door was "already open, and the bag [was] sitting right there right outside the back door." The bag was open and contained "black bags wrapped up that look like kilos of narcotics." Officer Alexander did not open the bags but testified, according to his training and experience, the bags looked like they contained narcotics. *See Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007) ("[T]he training, knowledge, and experience of law enforcement officials is taken into consideration."). Again, the dissent has chosen to substitute its credibility determination for that of the magistrate and the trial court.

The simple fact is that whether a protective sweep was justified and whether drugs were appropriately seized are fact-intensive questions. These decisions, by their nature, must be based on the facts of each particular case, and the en banc Court has appropriately given deference to the panel's judgment.

Conclusion

The panel majority opinion does not in any way deviate from precedent of this Court, and its limited

holding on the unique facts of this case does not amount to "extraordinary circumstances" requiring en banc relief. The panel opinion objectively followed the rule of law. Even if other members of this Court disagree with the panel's decision, it was the panel's decision to make. I therefore concur in the denial of en banc relief in this case.

DISSENTING OPINION FROM DENIAL OF EN BANC RELIEF

Meagan Hassan, Justice

I dissent from this court's denial of en banc relief because the panel majority's opinion (1) is contrary to controlling precedent from the United States Supreme Court concerning two important federal questions involving the Fourth Amendment to the United States Constitution (*i.e.*, (a) whether police officers may conduct protective sweeps of private homes even when (i) they complete an arrest outside, (ii) there are no specific and articulable facts that anyone inside said homes poses any danger to anyone, and (iii) police have already completed their arrest and departed the premises with the arrestee; and (b) whether the plain view doctrine applies even (i) under the foregoing facts, (ii) when officers neither search nor seize the evidence in question before acquiring a warrant, and (iii) when officers cannot see the narcotics made the basis of a search warrant because the narcotics are inside an opaque black trash bag inside another bag inside a home); (2) is contrary to controlling precedent from the Texas Court of Criminal Appeals; and (3) conflicts with the

decisions of numerous state courts of last resort and United States courts of appeals concerning clearly established Fourth Amendment rights under the United States Constitution.

I. Facts

Appellant was inside his home when police arrived with two warrants authorizing his arrest for murder. They breached the door, broke out the windows, and ordered him outside. He complied and was arrested on his front porch. Officers could see inside through the broken windows, but did not see anyone else therein. Officers handcuffed him, took him across the street, placed him in a police car, and interviewed him for approximately 10-15 minutes. After those 10-15 minutes passed, officers returned to his house, entered it, and performed several searches without a search warrant.

Deputy Alexander (the High-Risk Operations Unit ["HROU"][1] team leader responsible for planning the operation) testified that he "had the duties to do a protective sweep of the residence to make sure it's secure for any investigators or anybody else" and that he saw narcotics "in the initial search as soon as [they] went inside the residence ... in the red bag right outside the back door."[2] Pictures of the red bag and the black bags in the residence were introduced at trial.[3] The panel majority accepted Deputy Alexander's testimony that (based on viewing the

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[1] HROU is Harris County's predecessor to SWAT.

[2] 3 RR 86-87.

[3] 5 RR, at exhibits 11 and 12.

bags) the black bags contained narcotics. *See Rios v. State*, No. 14-18-00886-CR, 2020 WL 5048593, at *2 (Tex. App.—Houston [14th Dist.] Aug. 27, 2020, no pet. h.) ("Maj. Op.") ("Alexander testified that ... while standing in the kitchen of the house, he saw ... what appeared to be a brick of cocaine....").

At trial, Deputy Alexander also admitted that officers knew (1) the house in question had been under surveillance 24 hours a day for two and a half months,[4] (2) officers conducted surveillance the night before the arrest warrant was executed, (3) they had information about "the comings and goings of the people who lived at that residence," (4) "that there was a child and female at the residence," (5) "every morning" the child was going to leave the residence to go to school, (6) the mother and child had left the house the morning the arrest warrant for Appellant was executed (because officers had physically stopped and "contained"/"detained" them), (7) they "didn't have any evidence or any information" indicating that there was somebody else in the house, and (8)

[4] Despite this surveillance, these recordings were not provided to Appellant or his defense counsel because they had been overwritten. This failure facially implicates the Michael Morton Act. While this issue was preserved at the trial court, it was not presented on appeal. At trial, Appellant's counsel also made a general allusion to spoliation, but not one that was sufficient to present the issue to the trial court or to preserve it for appellate review. Similarly, the record troublingly reveals relevant emails were "purged", but this issue was not presented to us on appeal.

"as far as [they] knew, there was no one else there [at the house]."[5]

Despite these indisputable facts, officers testified that they entered Appellant's home and conducted a (so-called) "protective sweep". The HROU team leader explained 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." (emphasis added).

• His team performs "a protective sweep on *every* residence that we go to." (emphasis added). *But see*

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[5] The concurrence on denial of en banc relief (hereinafter, "the concurrence") nonetheless concludes the facts "were sufficient to establish that individuals may have been in the house and those individuals could have posed a danger to the officers at the scene." Concurring Op. at 9 (footnotes omitted). But, given the unambiguous record before us, no reasonable person could conclude there was any specific and articulable fact supporting a belief that anyone other than Appellant was in the house, and thus the concurrence misapplies the applicable standard of review. *See Kothe v. State*, 152 S.W.3d 54, 62 (Tex. Crim. App. 2004) ("On appeal, the question of whether a specific search or seizure is 'reasonable' under the Fourth Amendment is subject to *de novo* review.") (citing *Ornelas v. United States*, 517 U.S. 690, 691 (1996) ("[w]e hold that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*"); *United States v. Sargent*, 319 F.3d 4, 8 (1st Cir. 2003) ("[t]his court reviews *de novo* the ultimate conclusion as to whether a search was reasonable within the meaning of the Fourth Amendment"); *United States v. Flynn*, 309 F.3d 736, 738 (10th Cir. 2002) ("[w]e review *de novo* the ultimate question of whether a search or seizure was reasonable under the Fourth Amendment"); and *United States v. Spikes*, 158 F.3d 913, 922-23 (6th Cir. 1998)).

Concurring Op. at 10 ("The simple fact is that whether a protective sweep was justified and whether drugs were appropriately seized are fact-intensive questions. These decisions, by their nature, must be based on the facts of each particular case[.]").

When the initial search was completed, the HROU team leader did "a secondary clear to make sure there [were] no persons inside"; this secondary clear was "a very slow methodical search" because he was "looking for people". During this warrantless secondary sweep, Deputy Alexander discovered a second set of black bags (that he presumed contained narcotics) on top of a white cooler.

Deputy Alexander also testified that after the house was cleared, officers "go one last time through the residence and pick up anything that we might have used during the operation and bring it out"; this could include "breakaway tools, the battering ram. Anything that we might have used during that operation, they're going back through and making sure we clean up all of our equipment." Despite this testimony, there is no evidence in the record of any such tools being used inside the house or being removed by officers. According to Deputy Alexander, the whole process took approximately 20 minutes (and more than five); according to another officer, it took 30 or 45 minutes. Officers were only instructed to depart the residence after Deputy Alexander personally went through every room, looked in every place where a body could fit, and personally deemed the residence safe. After this third warrantless search, officers sent in a photographer to document

the damage (an independent and documented warrantless invasion of the home).

Deputy Persaud (who was investigating "mid-level drug traffic" at the residence) testified he arrived on-scene after the residence was secured and was told by Deputy Alexander that narcotics were inside the home. Based thereon, Deputy Persaud drafted an affidavit for a search warrant. Said affidavit states (in relevant part):

> Deputy Alexander advised your Affiant that he observed a gun case on the right side of the living room containing an assault rifle and a handgun when he went into the house.... Deputy Alexander advised your Affiant continued [sic] to make his way toward Roman Rios III location [sic]; Deputy Alexander advised your Affiant that he observed brick shaped packages wrapped in black electrical tape, that are consistent with the shape and size of a kilogram of cocaine.... Deputy Alexander advised your Affiant that he observed ... an open red piece of luggage/suit case. Deputy Alexander advised your affiant that he observed the red suitcase was open and observed what appeared to be kilogram packages that were rectangular, wrapped in black electrical tape. Deputy Alexander advised your Affiant that based on his training and experience, he knows that the type of packaging is consistent with the way cartels and others in the narcotics industry package narcotics for distribution.

This affidavit, however, is contrary to the record.

Specifically, Deputy Persaud's affidavit states Deputy Alexander told him the red suitcase

contained rectangular kilogram packages wrapped in black electrical tape. However, Deputy Alexander's testimony never mentions tape (much less electrical tape) or rectangular packages; instead, Deputy Alexander testified that during his initial search, he saw black "bags" inside of a red suitcase.[6] Additionally, Deputy Alexander did not see either an assault rifle or a handgun upon entry into the home; instead, he unambiguously testified that the gun case in question was closed.[7] As a result, the subsequently issued search warrant was predicated upon materially false information combined with information that was acquired during the second warrantless search. *See, e.g.*, 5 RR 10 (showing the rectangular packages found on top of the cooler during the second warrantless search). The panel majority presumed that "the second phase of the sweep violated the Fourth Amendment." Maj. Op. at 14.

Appellant produced an uncontroverted expert at the hearing on his motion to suppress. This expert testified that (1) he reviewed the reports and there was no evidence of someone else entering or leaving the residence, (2) there were four separate entries into the residence without a warrant, (3) a protective sweep in a house that size with that many officers

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[6] During questioning, these bags were referred to as "trash" bags or "garbage" bags without correction or modification.

[7] 3 RR 216 ("Q. You saw a gun case, right? A. I saw the gun case. Q. But it was closed? A. Right. Q. Okay. That says that there were two firearms inside the gun case at the time you went into the house. But it was closed, right? A. It was closed, yes.").

should take two or three minutes, (4) the officers knew there was only one person in the house, (5) the initial sweep took too long, and (6) the officers put themselves at greater risk by entering the house.

II. Law

Certain basic facts about the Fourth Amendment are already well-settled law. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' "[8] Searches conducted without a warrant inside a home are presumptively unreasonable absent consent or exigent circumstances. *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987); *see also Steagald v. United States*, 451 U.S. 204, 211, 222 (1981); *Gutierrez v. State*, 221

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[8] *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972)); *see also Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals."); *Payton v. New York*, 445 U.S. 573, 585 (1980) (same) (quoting *U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. at 313); *Torrez v. State*, 34 S.W.3d 10, 18 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) ("One of the shined foundations of the rule of law is its abhorrence of the warrantless search of a home. When neither life nor limb of the police are endangered, their foremost duty to protect liberty must persist. Even in the face of real or objectively perceived threat, the police response must always be rational, dispassionate and measured. *The goal of police work is not the invasion but the protection of liberty*.") (emphasis added).

S.W.3d 680, 685 (Tex. Crim. App. 2007) (citing *Payton v. New York*, 445 U.S. 573, 586 (1980)).

If governmental actors conduct a warrantless search inside a home, they bear a heavy burden to prove it was reasonable and permitted by the Fourth Amendment.[9] This burden is particularly heavy given that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *See Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984). There is no evidence in the record that Appellant (or anyone else) consented to the search and the State never argued that there was an exigency. Therefore, the search was presumptively unreasonable as a matter of controlling law. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

The relevant exception to the Fourth Amendment's warrant requirement relied upon by the State can be found in the doctrine of protective sweeps. *See generally Maryland v. Buie*, 494 U.S. 325, 327-28 (1990); *see also United States v. Garcia-Lopez*, 809 F.3d 834, 838 (5th Cir. 2016); *United States v. Wilson*, 36 F.3d 1298, 1306 (5th Cir. 1994). "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." *Buie*,

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[9] *Welsh*, 466 U.S. at 749-50 ("[P]olice bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."); *see also Gutierrez*, 221 S.W.3d at 685 ("[T]he warrant requirement is not lightly set aside, and the State shoulders the burden to prove that an exception to the warrant requirement applies.") (citing *United States v. Robinson*, 414 U.S. 218, 243 (1973); *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003)).

494 U.S. at 327; *Reasor v. State*, 12 S.W.3d 813, 815 (Tex. Crim. App. 2000). The United States Supreme Court has identified two distinct types of constitutionally permissible protective sweeps:

(1) "[A]s 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";[10] and

(2) "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."[11]

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[10] *Buie*, 494 U.S. at 334; *see also id.* at 332-33 ("Possessing an arrest warrant and probable cause to believe [defendant] was in his home, the officers were entitled to enter and to search anywhere in the house in which [he] might be found. Once he was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.").

[11] *Id.* at 337; *see also United States v. Mendez*, 431 F.3d 420, 428 (5th Cir. 2005) (quoting *United States v. Gould*, 364 F.3d 578, 587 (5th Cir. 2004) (en banc), *cert. denied*, 543 U.S. 955 (2004)); *Torrez*, 34 S.W.3d at 17 ("[A] police officer may only conduct a protective sweep of a residence where he possesses an objectively reasonable belief, based on specific and articulable facts, that a person in the area poses a danger to that police officer or to other people in the area.") (citing *Reasor*, 12 S.W.3d at 816-17); *cf. United States v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977) ("The law in this circuit holds that police officers have a right to conduct a quick and cursory check of a residence when they have reasonable grounds to believe that there are

Despite the HROU team leader's testimony that HROU performs a protective sweep on *every* residence to which it goes, "[a] protective sweep is not an automatic right the police possess", even when making an in-home arrest.[12]

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." *Buie*, 494 U.S. at 335-36; *Torrez*, 34 S.W.3d 10, 18 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (citing *Buie*, 494 U.S. at 335).[13] "The sweep must not be a 'full search

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other persons present inside the residence who might present a security risk.").

[12] *See Torrez*, 34 S.W.3d at 18 (citing *Reasor*, 12 S.W.3d at 816); *Arceo v. State*, No. 14-98-00854-CR, 2000 WL 1421560, at *2 (Tex. App.—Houston [14th Dist.] Sept. 28, 2000, pet. ref'd) (not designated for publication) ("[T]he protective sweep is not an automatic right police possess. It is permitted only when 'justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.' ") (citing *Buie*, 494 U.S. at 336); *see also United States v. Brodie*, 975 F. Supp. 851, 855 (N.D. Tex. 1997) ("Officers may conduct a warrantless protective sweep in conjunction with an in-home arrest when the officers have 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.... The protective sweep doctrine is inapplicable in this case because (1) Brodie was *arrested outside* of his residence; (2) the officers *did not articulate any specific facts* which led them to believe that Brodie's residence harbored individuals posing a danger to those on the arrest scene; and (3) the warrantless search *extended beyond the rooms* 'immediately joining the place of arrest.' ") (emphases added).

[13] *See also United States v. Paradis*, 351 F.3d 21, 29 (1st Cir. 2003); *Zuniga-Perez v. Sessions*, 897 F.3d 114, 123 (2d Cir.

of the premises.' Rather, it may only extend 'to a cursory inspection of those spaces where a person may be found' and may only last long enough to 'dispel the reasonable suspicion of danger.' " *Torrez*, 34 S.W.3d at 18 (quoting *Reasor*, 12 S.W.3d at 816-17); *United States v. Roberts*, 612 F.3d 306, 311 (5th Cir. 2010).

III. Analysis

It is undisputed that Appellant was arrested outside his home. *See* Maj. Op. at 8 ("Law enforcement officers then handcuffed appellant on the front porch...."). Further, there is no evidence Appellant had any control over the interior of his home at the time of his arrest. Therefore, the first type of protective sweep (incident to arrest and into other spaces immediately adjoining the place of arrest) cannot authorize the officers' storming of the home's interior. *See Price v. State*, No. PD-0722-19, 2020 WL 5754618, at *3 (Tex. Crim. App. Sept. 23, 2020) (The search-incident-to-arrest exception "has historically been formulated into two distinct propositions. The first is that a search may be made

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2018); *United States v. Foley*, 218 F. App'x 139, 143 (3d Cir. 2007); *United States v. Laudermilt*, 677 F.3d 605, 610 (4th Cir. 2012); *United States v. Silva*, 865 F.3d 238, 243 (5th Cir. 2017); *United States v. Shores*, 93 F. App'x 868, 870 (6th Cir. 2004); *United States v. Tapia*, 610 F.3d 505, 510 (7th Cir. 2010); *United States v. Davis*, 471 F.3d 938, 944 (8th Cir. 2006); *United States v. Lemus*, 582 F.3d 958, 962 (9th Cir. 2009); *United States v. Banks*, 884 F.3d 998, 1013 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 638 (2018); *United States v. Yeary*, 740 F.3d 569, 580 (11th Cir. 2014); and *United States v. Thomas*, 429 F.3d 282, 287 (D.C. Cir. 2005).

of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area *within the control* of the arrestee.") (emphasis added) (quoting *United States v. Robinson*, 414 U.S. 218, 224 (1973)).[14] Consequently, the officers' protective sweep was only authorized if they "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." *Buie*, 494 U.S. at 337.

The panel majority erred when it concluded the protective sweep at issue was reasonable under the Fourth Amendment because officers (1) had no specific and articulable facts that anyone was in the home (let alone that anyone presented a danger to anyone), (2) had already completed their arrest of Appellant, (3) had already departed the premises with him, and (4) subjectively believed "there was no one else there [at the house]." We should "*strictly* scrutinize such alleged precautionary searches to insure that there exists a serious and demonstrable potentiality for danger." *United States v. Smith*, 515 F.2d 1028, 1031-32 (5th Cir. 1975) (per curiam) (emphasis added). Here, there is no such demonstrable potentiality for danger, thereby

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[14] *See also Price*, 2020 WL 5754618, at *3 (searches of broader areas where arrest occurred may require "the State to establish that the arresting officer had reason to believe the arrestee could possibly gain access to a weapon or evidence before the Fourth Amendment permits a warrantless search."); *Buie*, 494 U.S. at 332-33 ("Once [defendant] was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.").

exacerbating the officers' presumptively unreasonable conduct under the Fourth Amendment to the United States Constitution.

A. The protective sweep doctrine is inapplicable.

1. There are no specific and articulable facts that Appellant's home harbored an individual who posed a danger to anyone.

The State argued (and the panel majority accepted) that the officers' intrusion into Appellant's home was constitutionally authorized because there were "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 officers had no such belief and no facts in the record are capable of supporting one. Therefore, the State cannot overcome either (1) its burden to "demonstrate an urgent need that might justify warrantless searches or arrests" (*see Welsh*, 466 U.S. at 749-50) or (2) the presumptive unreasonableness of the officers' warrantless search of Appellant's home. *See Hicks*, 480 U.S. at 326-27; *Steagald*, 451 U.S. at 211, 222.

According to the State's brief, the "specific and articulable facts" justifying the officers' protective sweep are limited to (1) the absence of testimony that the front porch or yard were safe, (2) testimony that the protective sweep was conducted to protect officers, (3) officers' "reason to believe that drug trafficking was occurring at the residence," (4)

officers' "information that [Appellant] had firearms inside," (5) Appellant's two warrants for murder, (6) the presence of a rifle case in the living room, (7) the presence of dogs, (8) an open back door, and (9) the foreseeability that "a reasonably prudent officer could have believed that a third person might be inside who could pose a threat to the officers outside." Despite these facts being accepted by the panel majority (*see* Maj. Op. at 10-11), none of them even arguably tend to show that any officer believed the inside of Appellant's home harbored an individual posing any danger to anyone.

Instead, Deputy Alexander (the team leader) admitted that officers had been surveilling the house, that they expected people to leave it, that they watched people leave it, that they "didn't have any evidence or any information" someone else was in the house, and that "as far as [they] knew, there was no one else there." There is no conceivable basis (much less a reasonable one) upon which these admitted facts can generate an objectively reasonable belief that there was anyone inside the home who presented a danger to anyone after Appellant was arrested. *See Reasor*, 12 S.W.3d at 816 (citing *Buie*, 494 U.S. at 337); *see also* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.4(c) (6th ed. 2020) ("The *Buie* reasonable suspicion test, stated in terms of a basis for belief 'that the area to be swept harbors an individual posing a danger to those in the arrest scene,' appears to require reasonable suspicion both (a) that another person is there, and (b) that the person is dangerous."). Despite this absence of specific and articulable facts, Deputy

Alexander testified that his team (1) performs "a protective sweep on *every* residence that we go to" and (2) would do so "*no matter how much intel*" they had received. (emphases added). This brazenly shocking systemic disregard of the Fourth Amendment demands correction that this en banc court lacks the will to provide.[15]

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[15] *See United States v. Reynolds*, 526 F. Supp. 2d 1330, 1339-41 (N.D. Ga. 2007) ("Deputy Henry testified that his policy when executing a warrant was to look through the house wherever the suspect named on the warrant might be found.... By definition, protective sweeps within the meaning of *Buie* cannot be based on general policy.") (citing *Florida v. J.L.*, 529 U.S. 266, 272-73 (2000) (declining to adopt a firearm exception to stop-and-frisk *Terry* analysis); *Mincey v. Arizona*, 437 U.S. 385, 390-91 (1978) (rejecting an exception to the warrant requirement for searches of homicide scenes); and *United States v. Hauk*, 412 F.3d 1179, 1187 (10th Cir. 2005)); *United States v. Schultz*, 818 F. Supp. 1271, 1274 (E.D. Wis. 1993) ("Although Hausner testified it is 'standard procedure' to conduct protective sweeps whenever arrest warrants for a suspect are executed within a suspect's home, this Court does not read *Buie* as giving *carte blanche* authority for law enforcement officers to conduct protective sweeps in all such cases. If it did, the requirement for reasonable suspicion based on specific and articulable facts, would be meaningless."); *United States v. Warwick*, No. 16-CR-4572-WJ, 2018 WL 3056049, at *11 (D. N.M. 2018) (observing in dicta that a custom of conducting protective sweeps "suffices to show that such a policy exceeds the bounds of the Fourth Amendment"); *see also United States v. Menchaca-Castruita*, 587 F.3d 283, 295-96 (5th Cir. 2009) ("There will always be some *possibility* that an unknown person might be hiding somewhere inside a residence, waiting for an opportunity to attack law enforcement officers or to destroy evidence.") (emphasis in the original); *Kirkpatrick v. Butler*, 870 F.2d 276, 282 (5th Cir. 1989) ("Despite the police's belief in the likelihood that a confederate of an arrested individual may almost always be in the arrestee's apartment, the police *must* articulate

reasonable grounds for believing that the suspected accomplice is indeed there. An unsubstantiated belief that confederates may gather in a single apartment does not suffice to permit the police to search an apartment that they would otherwise lack a valid basis to search.") (emphasis added), *cert. denied*, 493 U.S. 1051 (1990); *Reasor*, 12 S.W.3d at 817 (concluding a protective sweep was illegal where officer "did not express his belief that any third persons were inside the appellant's home" and did not "once articulate his belief that a third person inside the home was attempting to jeopardize either his or the public's safety."); *accord United States v. Gandia*, 424 F.3d 255, 264 (2d Cir. 2005) (requiring more than lack of information to justify a protective sweep); *United States v. Moran Vargas*, 376 F.3d 112, 116 (2d Cir. 2004) ("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.") (citing *United States v. Taylor*, 248 F.3d 506, 514 (6th Cir. 2001) (generalized suspicion that defendant was a drug dealer was inadequate, standing alone, to justify protective sweep)); *id.* ("No facts specific to this case support a finding that the agents reasonably believed (1) that anyone other than Moran was present inside the motel room, or (2) that anyone so concealed posed a danger to their safety.... Not only was there no objective basis to warrant a reasonable suspicion of danger from a second person, there was also no evidence of subjective fear on the part of the agents."); *State v. Fisher*, 250 P.3d 1192, 1195 (Ariz. 2011) ("[I]f officers act purely on speculation, a protective sweep is unreasonable."); and *id.* at 1196 ("Officers cannot conduct protective sweeps based on mere speculation or the general risk inherent in all police work. Because the officers here did not articulate specific facts to establish a reasonable belief that someone might be in the apartment, the protective sweep was invalid."). *Cf. Sayers v. State*, 433 S.W.3d 667, 679 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Although Officer LaPoint testified that when approaching a house officers generally 'have

The Fourth Amendment was designed to protect against this exact type of invasion into the privacy of private homes and there are no "specific and articulable facts" in this case which can even begin to justify an exception thereto. *See Buie*, 494 U.S. at 332 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Under the majority's (and the concurrence's) reasoning, 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. This constitutes an unacceptably unreasonable departure from controlling jurisprudence, the basic guarantees of the Fourth Amendment, and a significant number of decisions from both state courts of last resort[16] and

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to be careful' because '[y]ou never know what could happen,' he did not testify that he, or any of the other arresting officers, believed that appellant or Scalia posed a threat to their safety, nor did he testify to any specific, articulable facts that would have supported such a belief.").

[16] *See Torrez*, 34 S.W.3d at 18; *see also 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 P.3d 1271, 1280 (Colo. 2006) (holding seizure was constitutional because "the police had an 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) ("The generalized *possibility* that an unknown, armed person may be lurking is not, however, an articulable fact sufficient to justify a protective sweep. Indeed, nearly every arrest involving a large quantity of drugs, in or just outside of a home, carries the same possibility. To allow the police to justify a warrantless search based solely upon that possibility would threaten to swallow the general rule requiring search warrants.") (emphasis in original), *cert. denied*, 543 U.S. 957 (2004); *State v. Revenaugh*, 992 P.2d 769, 772

(Idaho 1999) ("In either case, the arresting 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) (concluding search was not justified by "inchoate and 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) (the State offered no evidence McGrane had weapons in his home, that dangerous people may have been hiding on the premises, or that officers encountered anyone who was dangerous; "The State is still required to allege specific facts and circumstances upon which reasonable inferences could be drawn to support a reasonable police officer's belief that weapons were on the premises and that someone else could have had access to those weapons and inflicted harm."); *State v. Huff*, 92 P.3d 604, 608, 611 (Kan. 2004) (affirming judge's *sua sponte* 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) (concluding sweep violated the Fourth Amendment where "the officers had no information whatsoever that an accomplice or other third party may have been with Brumley in the residence" and "the arrest warrant issued for Brumley was for possession of a controlled substance which did not involve accomplices[;] [r]eviewing the evidence as a whole, the Commonwealth has failed to demonstrate that the information obtained by law enforcement officers concerning the presence of guns in the residence, *coupled with the noise coming from inside*, created a rational inference that the mobile home harbored an individual posing a danger to officers on the scene.") (emphasis added); *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*,

United States courts of appeals[17] concerning protective sweeps. This court's material departure

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253 P.3d 1042, 1047 (Or. 2011); and *State v. Sanders*, 752 N.W.2d 713, 719 (Wis. 2008). Additionally, several other states' intermediate courts of appeals also agree. *See Copeland v. State*, 247 So.3d 645, 647 (Fla. Dist. Ct. App. 2018); *Groves v. State*, 199 A.3d 239, 243 (Md. Ct. Spec. App. 2018); *State v. Bergerson*, 671 N.W.2d 197, 202 (Minn. Ct. App. 2003); *State v. Levengood*, 61 N.E.3d 766, 771 (Ohio Ct. App. 2016); *State v. McLin*, No. 2019 KW 0082, 2019 WL 1253827, at *1 (La. Ct. App. Mar. 18, 2019); and *People v. Romeo*, No. 265384, 2007 WL 466047, at *2 (Mich. Ct. App. Feb. 13, 2007).

[17] *See Paradis*, 351 F.3d at 29 ("The government's protective sweep argument fails because the officers had no reason to believe that there might be an individual posing a danger to the officers or others.... The police knew that Bell, Benning, and Bean were not in the apartment because they had seen them leave and had an officer posted at the door at all relevant times. They also knew that Bean's child was not present.... The government implicitly argues that this court should expand the protective sweep doctrine, go beyond *Maryland v. Buie*, and countenance the continuation of searches in situations such as this one, where there is no reasonable basis to conclude that there was a risk to officers or others.... [W]e reject the government's argument."); *Menchaca-Castruita*, 587 F.3d at 295 (where there was "no articulable reason to believe that someone else might be inside [the] residence posing a threat to the officer or the bystanders, or that any evidence was at risk of destruction or removal"); *Benas v. Baca*, 159 F. App'x 762, 767 (9th Cir. 2005) ("Based on the record before us, [the officers'] 'look into the door of a room' cannot be permitted as a 'protective sweep' because the defendants have not provided 'specific and articulable facts' to justify the warrantless intrusion."); *United States v. Carter*, 360 F.3d 1235, 1242-43 (10th Cir. 2004) ("Here, the government has pointed to no specific, articulable facts suggesting that the backyard or garage harbored anyone who posed a danger to them.... [T]he officers had no reason to believe a third person had stayed behind, or that such a person would attack them while they

were outside.... Of course, there could always be a dangerous person concealed within a structure. But that in itself cannot justify a protective sweep, unless such sweeps are simply to be permitted as a matter of course, a result hardly indicated by the Supreme Court in *Buie*. Accordingly, we conclude that the officers' entry into the backyard and garage was unreasonable under the Fourth Amendment."); *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); *see also United States v. Reynolds*, 526 F. Supp. 2d 1330, 1339-41 (N.D. Ga. 2007) (concluding protective sweep exception to the Fourth Amendment's warrant requirement did not apply where officers could not point to any specific and articulable facts "that would have caused a reasonable officer to believe the house harbored an individual posing a danger to them"); *United States v. Rudaj*, 390 F. Supp. 2d 395, 401 (S.D. N.Y. 2005) (invalidating "protective sweep" where "[t]he agents made no observations that morning that would lead them to believe that somebody else was at the Rudaj residence, nor had they received any prior information to that effect"), *aff'd sub nom. United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009); *Schultz*, 818 F. Supp. at 1274 ("Under *Buie*, sweeping officers must have reason to believe the premises harbors an individual posing a danger to arresting officers. The officers had no reason to believe that any persons, other than the defendant and his wife, were present on the premises."); *United States v. O'Connell*, 408 F. Supp. 2d 712, 724 (N.D. Iowa 2005) ("[T]he search conducted in this case was ... not a valid protective sweep. The officers did not have articulable facts to warrant the belief that the van harbored a dangerous person."); *United States v. Neal*, No. 11-028, 2011 WL 4527363, at *4 (E.D. La. Sept. 28, 2011) ("[T]he Government presented no evidence that the agents saw lights, heard movement, or saw anything else to indicate the possibility of other persons in the residence. Nor was there any evidence that defendant sold drugs with others, or was in a position to warn anyone in the house once he was detained."); *United States v. Fitzgerald*, No. 2:04CR320, 2006 WL 1453108, at *2 (W.D. Pa. Mar. 15, 2006) ("In general, an articulable basis to support the belief that there is a reasonable possibility that another

individual who poses danger is in the premises or in the immediate area is all that is required for a protective sweep following an arrest just outside the home.... But the officers' lack of information or possession of no information concerning such a possibility cannot supply the articulable basis needed for the sweep in the first instance.") (citing *Sharrar v. Felsing*, 128 F.3d 810, 824 (3d Cir. 1997) (quoting *United States v. Colbert*, 76 F.3d 773, 778 (6th Cir. 1996) (" 'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place."))); *id.* at *3-4 ("The testimony of the government's witnesses failed to establish specific articulable facts which would lead a reasonably prudent officer to believe there was a reasonable possibility that another individual who could pose a danger to the officers or others on the scene.... All information gained about the inside of the apartment indicated defendant was the only male inside.... All information gained by the officers in surveillance positions was consistent with this understanding and no information was generated to suggest otherwise.... Each officer called to testify for the government was forced to admit on cross examination that they had no specific information suggesting any other individual was inside the apartment. Each admitted that the only basis for assuming that another individual might be inside was past historical experience indicating that reliance on the facts and circumstances known about any particular situation may not always prove to be true in the end.... Of course, historical experience about other past situations and events cannot without more supply the specific and articulable facts needed to support a belief that in the present situation there is a reasonable possibility that another individual who may launch an attack against the police is inside. Nor can the mere prior gang association of the individual who has been arrested.... A protective sweep conducted on the premise that a male voice had threatened the officers from inside and they could not eliminate the possibility that there might have been another male inside, without any specific facts and inferences creating a reasonable suspicion that such was the case, is nothing more than a search based on no information."); *United States v. Romy*, No. 96-CR-607 (JG), 1997 WL 1048901, at *9-11 (E.D. N.Y. Apr. 24, 1997) ("Lack of information [suggesting that

from established and widely accepted Fourth Amendment jurisprudence evidences a fundamental misunderstanding and inexplicable subjugation of clearly established constitutional protections that have been a cornerstone of American freedom from state-sponsored incursions since the ratification of the Fourteenth Amendment in 1868.

2. The officers had completed their arrest and departed the premises with Appellant.

Officers arrested Appellant on his front porch, went across the street for 10-15 minutes, then entered his home to conduct the first of at least four separate warrantless searches. 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*." *Buie*, 494 U.S. at 335-36 (emphasis added). Although the panel majority acknowledged the first part of this controlling analysis (*see* Maj. Op. at 6-7), both it and the concurring opinion inexplicably refused to even mention the second part; this refusal naturally leads to a wholesale disregard of the controlling facts that officers had already completed

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another individual was present] cannot provide an articulable basis upon which to justify a protective sweep."); and *United States v. Ali*, No. 05-CR-785(NG)(SMG), 2006 WL 929368, at *7 (E.D. N.Y. Apr. 7, 2006) ("Even if the officers suspected that Hassan or someone else might be present, they had no basis to believe that the individual was dangerous. As noted above, before conducting the second type of *Buie* protective sweep, law enforcement officers must reasonably believe 'that the area to be swept harbors an individual *posing a danger*.' ") (emphasis in the original).

the arrest, departed the premises with Appellant, handcuffed him, and placed him in a police car. *See State v. Smith*, No. 2020-KK-00711, 2020 WL 6154322, at *1 (La. 2020) (per curiam) ("The issue of a protective sweep ... would nevertheless not seem to be applicable where, as here, the defendant was in handcuffs in a police car when the search was conducted."). This error is significant and requires correction that this en banc court refuses to provide.

In fact, there is no evidence officers had any right to enter the house at all because they had no articulable reason (as evidenced by their inability to articulate a reason) to believe anyone else would be found inside. Therefore, there was no reasonable suspicion of danger and the officers' search took significantly longer than the time it took to complete the arrest of Appellant and to depart the premises with him. This unavoidable reality renders this search unconstitutional. *See Buie*, 494 U.S. at 335-36; *see also United States v. Silva*, 865 F.3d 238, 243 (5th Cir. 2017); *United States v. Maxwell*, 734 F. Supp. 280, 284 (S.D. Tex. 1990). Additionally, Appellant produced uncontroverted expert testimony that the arresting officers' conduct after Appellant's arrest placed them in greater risk under the circumstances. Here, such increased risk to officers runs afoul of the precise justifications for protective sweeps.[18]

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[18] *See Buie*, 494 U.S. at 327 ("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."); *cf. Menchaca-Castruita*, 587 F.3d at 295 ("[T]he officers in the instant case were safely outside of the subject residence and all bystanders even further removed. If anything, the officers increased the

This court's steadfast refusal to even acknowledge (never mind adhere to) a controlling constitutional test from the United States Supreme Court applicable to the officers' departure from the premises with Appellant earns us a truly dubious and disquieting distinction in the annals of Fourth Amendment jurisprudence, particularly given the number of state courts that at least recognize the existence of said test.[19]

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potential danger to themselves and the bystanders when they proceeded to enter the residence."); *United States v. Owens*, 782 F.2d 146, 151 (10th Cir. 1986) (once police arrest a person in a hallway outside his hotel room and retreat to safe area, justification for protective sweep evaporates).

[19] *See, e.g., Brand*, 204 P.3d at 385; *State v. Marshall*, No. 1 CA-CR 09-0046, 2010 WL 286773, at *7 (Ariz. Ct. App. Jan. 26, 2010); *Spencer*, 848 A.2d at 1195-97; *Green v. United States*, 231 A.3d 398, 407 (D.C. 2020); *Copeland*, 247 So.3d at 647; *State v. Schaffer*, 982 P.2d 961, 965 (Idaho Ct. App. 1999); *People v. Curtis*, No 1-15-2308, 2018 WL 1998015, at *7 (Ill. App. Ct. Apr. 25, 2018); *Smith*, 565 N.E.2d at 1062; *McGrane*, 733 N.W.2d at 678; *State v. Luttig*, 54 P.3d 974, 977 (Kan. Ct. App. 2002); *Dieterlen v. Commonwealth*, No. 2010-CA-002309-MR, 2012 WL 333757, at *2 (Ky. Ct. App. Feb. 3, 2012) (citation omitted); *Smith*, 2020 WL 6154322, at *1; *State v. Ledford*, 914 So.2d 1168, 1174 (La. Ct. App. 2005); *Groves*, 199 A.3d at 243; *Commonwealth v. Saywahn*, 79 N.E.3d 1078, 1080 (Mass. App. Ct. 2017); *People v. Brown*, No. 286716, 2009 WL 4827066, at *2 (Mich. Ct. App. Dec. 15, 2009); *Bergerson*, 671 N.W.2d at 202; *Rutter*, 93 S.W.3d at 725; *State v. Farber*, 498 N.W.2d 797, 801 (Neb. Ct. App. 1993); *Francis*, 117 A.3d at 163; *Davila*, 999 A.2d at 1126; *Johnson*, 193 A.D.2d at 40; *Dial*, 744 S.E.2d at 148; *Schmidt*, 885 N.W.2d at 70; *Levengood*, 61 N.E.3d at 771; *Guggenmos*, 253 P. 3d at 1047; *Commonwealth v. Hand*, No. 2579 EDA 2016, 2017 WL 5942045, at *4 (Pa. Super. Ct. Nov. 27, 2017); *State v. Batey*, No. M2001-02958-CCA-R3-CD, 2003 WL 1337834, at *3 (Tenn. Crim. App. Mar. 19, 2003);

3. The panel majority relies upon materially incorrect facts.

The panel majority also concluded that "witnesses gave conflicting accounts about how many children were in the car that left the home, which suggested that not all of the children left the home and at least one might still be inside the house." Maj. Op. at 10. My review of the record, however, reveals no inconsistent testimony concerning the number of children in the car; instead, (1) Deputy Alexander (the team leader) testified that he thought there were no children in the home, (3 RR 61) (2) Deputy Alexander believes "[i]t's always a possibility" that there are more children in a home, (3 RR 59) and (3) officers were informed that "there may be an infant — a small child" at the house. (3 RR 158) Without exceptionally particularized information not present herein, no reasonable officer could ever justifiably believe that an infant or small child (even if present) would elect to take up arms and present *any* constitutionally adequate threat to justify a warrantless governmental entry into the home. Additionally, there is no specific and articulable fact in this record capable of supporting a finding that any officer at the scene had such a fear (or even claimed one). *See Sayers v. State*, 433 S.W.3d 667, 679 (Tex. App.—Houston [1st Dist.] 2014, no pet.)

Commonwealth v. Williams, 99 Va. Cir. 321, 2018 WL 8619841, at *2-5 (Va. Cir. Ct. July 6, 2018); *State v. Smith*, No. 66143-4-I, 2012 WL 1071384, at *3-4 (Wash. Ct. App. Apr. 2, 2012); and *State v. Sanders*, 752 N.W.2d 713, 719 (Wis. 2008); *accord Garcia-Lopez*, 809 F.3d at 838-39; *Davila v. United States*, 713 F.3d 248, 259 (5th Cir. 2013); and *Maxwell*, 734 F. Supp. at 284.

("Although Officer LaPoint testified that when approaching a house officers generally 'have to be careful' because '[y]ou never know what could happen,' he did not testify that he, or any of the other arresting officers, believed that appellant or Scalia posed a threat to their safety, nor did he testify to any specific, articulable facts that would have supported such a belief."); *Reasor*, 12 S.W.3d at 817; *accord United States v. Moran Vargas*, 376 F.3d 112, 116 (2d Cir. 2004) ("Not only was there no objective basis to warrant a reasonable suspicion of danger from a second person, there was also no evidence of subjective fear on the part of the agents.").

Finally, the panel majority (and the concurrence) also found that "Alexander testified he saw a rifle in the residence upon the initial entry into the house." Maj. Op. at 10. This finding plainly mischaracterizes Deputy Alexander's unequivocal testimony that the gun case "was closed" upon his entry. *See* 3 RR 216.

This en banc court's refusal to correct material factual errors utilized by the panel majority to support its flawed constitutional analysis is indefensible.

4. The panel majority relies upon irrelevant facts.

The majority cites the "highly cluttered" nature of the home to be a factor justifying the officers' entry into Appellant's home because it "obscure[d] lines of sight." *See* Maj. Op. at 5. This consideration should be irrelevant to our analysis concerning protective sweeps because (without more) it cannot support a reasonable belief that Appellant's home harbored an

individual posing a danger to anyone. *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' ") and *United States v. Archibald*, 589 F.3d 289, 299-300 (6th Cir. 2009) (officers' perceived vulnerability and inability to see certain parts of the arrestee's residence did not demonstrate that another person was present and posed a danger).

The panel majority also states the surveillance of the home "was not continuous and, as a result, yielded inconsistent information." *See* Maj. Op. at 6. This is insufficient because "allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep. ... The officers' lack of information 'cannot be an articulable basis for a sweep that requires information to justify it in the first place.' " *State v. Spencer*, 848 A.2d 1183, 1196 (Conn. 2004) (quoting *United States v. Colbert*, 76 F.3d 773, 778 (6th Cir. 1996)).[20] The officers' lack of

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[20] *Accord United States v. Nelson*, 868 F.3d 885, 889 (10th Cir. 2017) (citing *Colbert*, 76 F.3d at 778); *id.* ("As we've previously explained, 'there could always be a dangerous person concealed within a structure. But that in itself cannot justify a protective sweep, unless such sweeps are simply to be permitted as a matter of course....' ") (quoting *Carter*, 360 F.3d at 1242-43); *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir. 1999) ("Much of the government's argument why a sweep was needed for protective purposes is not based on any specific facts in the government's possession, but rather is based on the lack of

information is particularly problematic when they have access to information from other officers who deliberately surveilled the house for months before entry.

The panel majority also cites the presence of narcotics traffic at the house as a factor supporting its analysis. Maj. Op. at 10. While we are not the first court to confront this issue, it appears we are the first court willing to permit suspected narcotics trafficking to constitute a permissible basis for a protective sweep without specific and articulable facts that the area harbored an individual posing a danger to anyone.[21] The panel majority's reliance

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information in the government's possession. The testimony at the suppression hearing indicates that the officers had no information regarding the inside of the warehouse. However, in 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.") (citing *Colbert*, 76 F.3d at 778; *Sharrar*, 128 F.3d at 825 ("agree[ing] with ... *Colbert* that '[n]o information cannot be an articulable basis for a sweep that requires information to justify it in the first place' ")); *United States v. Mark*, Crim. No. 09-20, 2009 WL 5286598, at *3 (D. V.I. Dec. 28, 2009); *see also Torrez*, 34 S.W.3d at 18 ("The state offered no evidence of what the officers expected to find in the house. Other than a conclusory statement, the affidavit for the state fails to produce additional objective facts or circumstances to indicate that there was another individual inside the dwelling, much less that such an individual was armed and dangerous.").

[21] *See United States v. Ellis*, 499 F.3d 686, 691 (7th Cir. 2007) ("[I]f we affirm the district court's decision in this case, we have effectively created a situation in which the police have no reason to obtain a warrant when they want to search a home with any type of connections to drugs."); *see also Spencer*, 848

upon narcotics in the home as a fact supporting the purported reasonableness of a warrantless search represents a continued insistence on extending constitutional exceptions beyond the breaking point.

The panel majority similarly relies upon the fact that the arrest warrants "related to charges for a violent crime — murder." *See* Maj. Op. at 5. Such a consideration also undermines the Supreme Court's rationale in *Buie*, thereby making it unreasonable under the Fourth Amendment.[22] The panel majority's

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A.2d at 1195-96 ("The generalized *possibility* that an unknown, armed person may be lurking is not, however, an articulable fact sufficient to justify a protective sweep. Indeed, nearly every arrest involving a large quantity of drugs, in or just outside of a home, carries the same possibility. To allow the police to justify a warrantless search based solely upon that possibility would threaten to swallow the general rule requiring search warrants.") (emphasis in the original); *Taylor*, 248 F.3d at 514 (generalized suspicion that defendant was a drug dealer was inadequate, standing alone, to justify protective sweep); *Moran Vargas*, 376 F.3d at 116; and *Brumley*, 413 S.W.3d at 287.

[22] *See Brumley*, 413 S.W.3d at 286 ("Similarly, the fact that the officers were there to serve a felony arrest warrant on Brumley is irrelevant to our analysis. If it were otherwise, a protective sweep would be permitted every time an officer serves a felony arrest warrant. Such a result would render *Buie* meaningless. In any event, a defendant's own dangerousness is not relevant in 'determining whether the arresting officers reasonably believed that *someone else inside the house* might pose a danger to them.' ") (quoting *Colbert*, 76 F.3d at 777 (emphasis in original)); *see also id.* ("Even a defendant's prior arrests for violent crimes have been determined to be 'irrelevant' under a protective sweep analysis.") (citations omitted); *Archibald*, 589 F.3d at 298-99 ("[I]n [*Colbert*, 76 F.3d at 777], we held that a defendant's own dangerousness is not relevant in 'determining whether the arresting officers reasonably believed that someone else inside the house might pose a danger to them[,]' as those

reliance upon the nature of Appellant's alleged crime as a viable variable when analyzing the propriety of protective sweeps inside private homes continues the improper expansion of existing law while signaling to prosecutors and trial court judges alike that the alleged crime alone can create a "reasonable suspicion of danger" (*see Buie*, 494 U.S. at 335-36; *Torrez*, 34 S.W. 3d at 18) despite the absence of any specific and articulable facts that there is anyone inside a home. The panel majority's conclusion presumes that those who are indicted (1) are effectively guilty and (2) lose their clearly established rights to privacy inside their homes due to said unadjudicated guilt. The panel majority's unreasonable expansion of police authority to conduct warrantless searches inside homes despite Fourth Amendment protections requires correction that this en banc court refuses to provide.

Finally, this en banc court fails to correct both the State's and the panel's express reliance upon "information that [Appellant] had firearms inside the residence" as one of its purportedly "specific and articulable facts" justifying the officers' protective sweep. *See* Maj. Op. at 10 ("Other specific Articulable Facts Warranting the Sweep ... Informants had reported guns were on the premises."). No known court has ever permitted the alleged presence of

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facts reflected only the dangerousness of the arrested individual, not others."); *Colbert*, 76 F.3d at 777 ("If district courts are allowed to justify protective sweeps based on the dangerousness of the arrestee, nearly every arrest taking place in or near a home will include a protective sweep."); *accord State v. Eckard*, 281 P.3d 1248, 1255-56 (N.M. Ct. App. 2012).

firearms inside a home (without a person capable of wielding them) to be a factor that officers can consider when determining whether to perform a constitutionally permissible protective sweep. Millions of Texas gunowners should not be expected to sacrifice their clearly established Fourth Amendment rights to privacy inside their homes simply because they elect (or worse, allegedly elect) to keep guns inside their homes in accordance with the Second Amendment.[23]

B. The plain view doctrine is inapplicable.

1. Officers were not legitimately present in Appellant's home.

The State argues (and the panel majority and concurrence accept) that the drugs found during the initial search were found in plain view. *See* Maj. Op.

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[23] *See Brumley*, 413 S.W.3d at 285 ("[C]ommon sense suggests that an overwhelming amount of law abiding citizens in Kentucky have guns in their homes for lawful purposes. In other words, Brumley's rights under the Fourth Amendment cannot be diminished simply by exercising his rights under the Second Amendment. Therefore, this knowledge alone does not create "reasonable suspicion" that the officers were in imminent peril."); *cf. United States v. Kolodziej*, 706 F.2d 590, 596-97 (5th Cir. 1983) (concluding information that the defendant carried a firearm did not justify a "cursory safety check inspection" of his residence because officers failed to show there was "a serious and demonstrable potentiality for danger.") (citing *United States v. Capote-Capote*, 946 F.2d 1100, 1103 (5th Cir. 1991)) ("[T]he mere presence of weapons or destructible evidence does not alone create exigent circumstances.") (citing *United States v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986); *United States v. Smith*, 515 F.2d 1028, 1031 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 917 (1976)).

at 15; Concurring Op. at 9-10. This conclusion is both plainly erroneous and unsupported by the record. The plain view doctrine only applies if the officers in question were legitimately in the place where the doctrine purportedly applies. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993); *Ramos v. State*, 934 S.W.2d 358, 365 (Tex. Crim. App. 1996) (citing *State v. Haley*, 811 S.W.2d 597, 599 (Tex. Crim. App. 1991) (en banc); *Stoker v. State*, 788 S.W.2d 1, 9 (Tex. Crim. App. 1989)). The officers had no right to be inside Appellant's home as evidenced by (1) the absence of specific and articulable facts that said home harbored an individual posing a danger to those on the arrest scene (*Buie*, 494 U.S. at 337) and (2) officers' completion of the arrest and departure from the scene with Appellant (*id.* at 335-36). Therefore, the plain view doctrine does not apply and cannot permissibly bootstrap an unconstitutional search.

2. The drugs were neither searched nor seized before a warrant was issued.

Assuming *arguendo* that the officers had a right to be inside Appellant's home, the narcotics in question were neither searched nor seized before a search warrant was acquired; this important fact distinguishes this case from most cases involving the plain view doctrine.[24] The relevant invasion of

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[24] *See United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Even when government agents may lawfully seize ... a package to protect loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.") (footnote omitted); *Horton v. California*, 496 U.S. 128, 130 (1990) (addressing warrantless seizure under the plain-view doctrine);

privacy at issue was the officers' entry into Appellant's home, not their viewing of black opaque trash bags therein that (under the circumstances) obscured immediately apparent criminality. *See infra.* Therefore, I believe the panel majority's reliance upon the plain view doctrine is improper.

3. The opaque bag in which the narcotics were concealed did not reveal immediately apparent criminality.

The law of the land clearly states that before searching or seizing evidence without a warrant, the "incriminating nature of the item must be immediately apparent."[25] The Texas Court of Criminal Appeals has defined the "immediately apparent" component of the plain view doctrine to mean "probable cause to associate the item with

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Coolidge v. New Hampshire, 403 U.S. 443, 464 (1971) (same); *Dickerson*, 508 U.S. at 368 (same); *Illinois v. Andreas*, 463 U.S. 765 (1983) (same); *Payton*, 445 U.S. at 586-87 (same); *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (same); *Hicks*, 480 U.S. at 327-28 (analyzing warrantless search under the plain-view doctrine); *United States v. Ross*, 456 U.S. 798, 800 (1982) (analyzing warrantless search when items are not in plain view); *Texas v. Brown*, 460 U.S. 730, 749-51 (1983) (Stevens, J., concurring) (plain view doctrine supports the warrantless seizure of a closed container but not the warrantless search of its contents that were not visible to the police).

[25] *See Ramos*, 934 S.W.2d at 365 (citations omitted); *State v. Rodriguez*, 521 S.W.3d 1, 18 (Tex. Crim. App. 2017) (citing *State v. Dobbs*, 323 S.W.3d 184, 187 (Tex. Crim. App. 2010)); *see also Dickerson*, 508 U.S. at 375 (citing *Horton*, 496 U.S. at 136-37); *Coolidge*, 403 U.S. at 465-66.

criminal activity." *Ramos*, 934 S.W.2d at 365.[26] Both the panel majority and the concurrence erroneously concluded (without any meaningful analysis) 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 [sic] establishes probable cause to search the entire residence for narcotics." Maj. Op. at 15; Concurring Op. at 9-10 ("Alexander did not open the bags but testified, according to his training and experience, the bags *looked like* they contained narcotics.") (emphasis added). This conclusion evidences a misunderstanding of the Fourth Amendment.

Despite these erroneous conclusions, a "brick of cocaine in a red, opened suitcase on the back porch" was not in plain view. *See* Maj. Op. at 5. Deputy Alexander testified that (1) "the first narcotics [he] saw were in the red bag right outside the back door," (2) they were in *closed black bags*, and (3) State's exhibits 11 and 12 depict the scene in the same condition in which he first saw them. Using the same

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[26] *See also Dickerson*, 508 U.S. at 375 ("If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object — *i.e.*, if 'its incriminating character [is not] "immediately apparent" ' ... — the plain-view doctrine cannot justify its seizure.") (internal citations omitted, brackets provided by the Supreme Court); *Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012) (citing *Martinez v. State*, 17 S.W.3d 677, 685 (Tex. Crim. App. 2000) (citing *Ramos*, 934 S.W.2d at 365)); *Ford v. State*, 179 S.W.3d 203, 211 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *cf. Hicks*, 480 U.S. at 326 (not requiring probable cause "would be to cut the 'plain view' doctrine loose from its theoretical and practical moorings").

terminology for the secondary search, he testified that to him, it looked like the subsequently discovered narcotics were in black trash bags[27] *that were unopened* and that officers "did not touch" them. Deputy Alexander then testified that other officers acquired a search warrant based on information he acquired during his first search; specifically, he swore: "I said that I saw narcotics on the back porch and inside in plain view."

These facts illustrate the lengths to which both police officers and this Court will go to ignore the nuanced contours of Fourth Amendment jurisprudence. There is zero evidence capable of supporting this court's implicit conclusions that Deputy Alexander could see through the opaque bags shown in State's exhibits 11 and 12,[28] that the bags clearly announced their contents without further exploration or examination, or that the incriminating nature thereof was immediately apparent. *See Ramos*, 934 S.W.2d at 365. Deputy Persaud then swore in his search warrant affidavit that Deputy

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[27] *See* 3 RR 94-95 ("Q. How did you know or how did you suspect that narcotics were in there? A. Just by my training and experience. Q. Just by your training and experience you see these trash bags there and you suspect narcotics? A. I mean, that's what it looked like to me, yes. Q. Okay. But you could not see? A. No, I did not physically open them and look at them, no."). *See also* 3 RR 154-155 ("Q. Did you see who tore open the bags, the garbage bags? A. ... Those bags were found by Special Agent Broussard.... Q. So Broussard was the one that opened the bags and tore them apart? A. Yes, ma'am.").

[28] *See Bond v. United States*, 529 U.S. 334, 336-37 (2000) (court held defendant preserved his privacy on a bus by placing the drugs in an opaque bag).

Alexander told him the drugs found in the red suitcase were wrapped in black electrical tape despite (1) the absence of any evidence tending to prove they were wrapped in black electrical tape and (2) Deputy Alexander's unambiguous testimony that they were in black bags. We are not permitted to either rewrite or ignore material portions of Deputy Alexander's clear testimony concerning what he saw in an attempt to justify a plainly unconstitutional search.[29]

In sum, it simply defies reason to conclude that while conducting an ostensibly legitimate protective sweep for threats inside a small house (that, according to uncontroverted expert testimony, should have taken two or three minutes), an officer who perceives black trash bags inside of a red suitcase can reasonably conclude that the criminality thereof is "immediately apparent". Despite the fact that any number of flat, box-like innocuous objects could be wrapped in black trash bags inside a suitcase inside a home (including small boxes, books, DVD box sets, several video game boxes, or wrapped gifts), we are expected to blindly accept that an officer who neither touched, opened, nor smelled the black trash bags in question while conducting a sweep for threats

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[29] The concurrence opines, "Again, the dissent has chosen to substitute its credibility determination for that of the magistrate and the trial court." Concurring Op. at 10. Again, this demonstrates a misunderstanding of the law; even when I accept *arguendo* that the State's evidence is completely true, the officers' conduct remains unreasonable under the Fourth Amendment and clearly established precedents interpreting same.

legitimately and acceptably concluded their criminality was immediately apparent. This unsupportable expectation constitutes a continued and flagrant attack on clearly established Fourth Amendment rights.

C. The panel majority relies upon readily distinguishable precedents.

The panel majority's analysis also relies upon readily distinguishable federal authorities. In *United States v. Hoyos*, 892 F.2d 1387, 1395 (9th Cir. 1989), *overruled on other grounds by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001) (en banc), the court recognized that "additional suspects ... were expected to be found" at the residence in question. Specifically, multiple officers testified that they knew four people had been seen at the residence and believed "there were others in the house who could pose a danger" to the officers' safety or could "attempt to destroy evidence." *Id.* Here, officers did not expect to find anyone at the residence after two and a half months of recorded and physical surveillance. Therefore, *Hoyos* is readily distinguishable.

In *United States v. Jackson*, 700 F.2d 181, 184, 190 (5th Cir. 1983), the arrestee "indicated that two other individuals were involved in the case and that they might be armed"; agents then observed suspects leaving a motel room, "had no way of knowing that the two suspects were the only remaining people involved in the exchange," and "had reason to believe that a gun was somewhere in the motel." Under those facts, it was "clear" to the Fifth Circuit "that the cursory search of the motel rooms resulted from the

agent's reasonable belief that an immediate security sweep of the premises was required for their own safety and the safety of others at the motel." *Id.* at 190. Here, officers did not have any fact leading them to believe anyone else was in the home. Therefore, *Jackson* is readily distinguishable.

In *United States v. Lawlor*, 406 F.3d 37, 39 (1st Cir. 2005), a police officer received reports of a gunshot, detained two combatants outside a home, and saw spent shotgun shells. After Lawlor refused to identify the whereabouts of the weapon, the officer entered the home and found a sawed-off shotgun. *Id.* at 39-40. The First Circuit determined the officer's entry was lawful because (1) he had received a report of a gunshot, (2) he believed Lawlor and his brother both lived at the home, (3) he did not know the whereabouts of the brother, (4) he did not know the whereabouts of the gun, and (5) Lawlor refused to answer questions about the gun.[30] *Id.* at 42-43. None

[30] The First Circuit subsequently refined its holding concerning protective sweeps in *United States v. Delgado-Pérez*, 867 F.3d 244 (1st Cir. 2017). There, the court observed that the distinguishing factor between the two cases was that the officers in *Lawlor* had "knowledge of facts ... that provided them with an *articulable reason* to suspect that some person other than the one arrested could be present in the residence and pose a danger to officers." *Id.* at 252 (emphasis added); *see also id.* at 253 (despite surveillance and intel, there was no "evidence than another person might be present in the home at the time of the arrest, let alone that another dangerous person would be."); *Paradis*, 351 F.3d at 29 (affirming district court's granting of a motion to suppress where officers watched several people leave, knew neither they nor a known child were present in the home, and "had no reason to believe that there might be an individual posing a danger to the officer or others[.]").

of these facts are present here; therefore, *Lawlor* is inapposite.

In *United States v. Oguns*, 921 F.2d 442, 445-46 (2d Cir. 1990), officers knew Oguns lived with his brother, arrested him for possession of heroin outside his home, saw an open apartment door, and (after learning it belonged to Oguns) conducted a two-minute protective sweep. There, the Second Circuit re-affirmed its previous holding that protective sweeps are permissible when arresting officers have "(1) a reasonable belief that third persons [are] inside, and (2) a reasonable belief that the third persons [are] aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public." *Id.* at 446 (quoting *United States v. Vasquez*, 638 F.2d 507, 531 (2d Cir. 1980) (quoting *United States v. Agapito*, 620 F.2d 324, 336 n.18 (2d Cir. 1980))). None of these facts are present herein, thereby rendering *Oguns* inapposite.

In *United States v. Cavely*, 318 F.3d 987, 994 (10th Cir. 2003), officers went to a home to execute an arrest warrant, knew firearms had previously been found therein during a previous search, performed an arrest outside the home, and were told there was someone else inside the house. Officers went inside, announced their presence, received no response, conducted a protective sweep (to which the arrestee consented), found the other individual, and brought him outside. *Id.* at 994-95. Officers were inside the home for approximately 90 seconds. *Id.* at 995. Therefore, *Cavely* is not even close.

IV. Response to the Concurrence

In his concurring opinion, Justice Zimmerer (1) endeavors (without citation to any relevant authority) to substitute personal post-hoc judicial perceptions of specific and articulable facts for the officers' failures to articulate such facts, (2) endeavors (without citation to any relevant authority) to substitute Deputy Alexander's personal experience and uncertainty for specific and articulable facts, and (3) demonstrates a serious misunderstanding of the Fourth Amendment via an apparent effort to sanitize governmental violations of clearly established constitutional rights. *Compare* Concurring Op. at 4 (Zimmerer, J., concurring in the denial of en banc relief) ("In this case appellant was seized when he was ordered to the floor of the residence.") *with Wexler v. State*, 593 S.W.3d 772, 779 (Tex. App.—Houston [14th Dist.] 2019) (Zimmerer, J.) ("The fact that appellant's freedom of movement was restricted [when she was ordered to leave a house by police officers then placed in a police car] does not establish that she was under custodial arrest...."), *aff'd*, No. PD-0241-20, 2021 WL 2677427, at *1-6 (Tex. Crim. App. June 30, 2021).

V. Conclusion

We are charged with the task of "lay[ing] course between the overhanging absurdity of the sporting theory of justice on the one side and the menace of police irruption into residences on the other." *United States v. Cravero*, 545 F.2d 406, 418 (5th Cir. 1976). A majority of this court has now abdicated its responsibility to the people of our district and instead

has chosen to authorize warrantless 20-minute comprehensive searches of private homes, even when (1) the subject of the only proper warrant is arrested outside, (2) no fact suggests anyone can be found inside, (3) no fact supports a reasonable suspicion of danger, (4) officers have completed their outdoor arrest, and (5) officers have departed the premises with their arrestee for 10 to 15 minutes before returning to the premises to enter the home.

This court effectively approves a new rule that swallows the Fourth Amendment; if police break in a home's doors and windows without a search warrant, they are authorized to conduct a search to make sure there was no reason to conduct a search and to secure any items that may have warranted one. "Under the Court's decision, the Fourth Amendment no longer stands as a bar to such tyranny and oppression." *Harris v. United States*, 331 U.S. 145, 194 (1947) (Frankfurter, J., dissenting), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969). This court's constitutional activism relies upon no applicable precedent precisely because it cannot co-exist with a reasonable interpretation of the Fourth Amendment.

This court also unreasonably expands warrantless (and therefore presumptively unreasonable) police entry into private residences by permitting that which the Fourth Amendment plainly prohibits. This expansion is contrary to this court's precedent, controlling precedent, and substantial persuasive precedent from state and federal courts from across the country and demands relief this en banc court refuses to provide. Aside from relying upon

materially incorrect facts, it also constitutes an extraordinary departure from basic principles of constitutional law concerning the sanctity of private homes and the right to bear arms. Left uncorrected, this court's decision simultaneously and unacceptably (1) diminishes Texans' protections under both the Fourth Amendment and the Second Amendment to the United States Constitution and (2) implicitly approves this Harris County unit's custom or practice of conducting protective sweeps on every house to which it is called regardless of how much information it receives, how much information is readily available, and officers' subjective beliefs that no one is inside.

"[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Hicks*, 480 U.S. at 329. Essentially, this court has (again) unilaterally disregarded constitutional protections in a misguided effort to protect the police from the public.[31] This constitutes a fundamental misunderstanding of the Bill of Rights.

Therefore, I dissent.

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[31] *See Harris Cty. v. Coats*, 607 S.W.3d 359, 394 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (Bourliot, J., dissenting from denial of en banc reconsideration) ("The majority opinion neuters the protections set forth in *Monell*—protections carefully designed to ensure that citizens can hold local government and other municipalities accountable for violating their clearly established constitutional rights through unconstitutional policies, practices, customs, or procedures.") (citation omitted).

/s/ Meagan Hassan

Justice

DISSENTING OPINION FROM DENIAL OF EN BANC RECONSIDERATION

Margaret "Meg" Poissant, Justice

I respectfully dissent from this court's denial of en banc reconsideration and join Section A of Justice Hassan's dissent in that the officers in this case failed to articulate specific and articulable facts upon which they could have reasonably believed that anyone other than Rios was present inside the house or that anyone concealed posed a danger to their safety. Absent such facts, the protective sweep in this case was unreasonable and invalid under the Fourth Amendment. *See Maryland v. Buie*, 494 U.S. 325, 334 (1990); *Reasor v. State*, 12 S.W.3d 813, 816–17 (Tex. Crim. App. 2000).

I also agree with Section B.1 of Justice Hassan's dissent that the officers therefore did not have a legitimate reason to be present in the house, negating the majority's opinion that the drugs found during the initial search were in plain view. *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (citations omitted); *Ramos v. State*, 934 S.W.2d 358, 365 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1198 (1997) (citing *State v. Haley*, 811 S.W.2d 597, 599 (Tex. Crim. App. 1991); *Stoker v. State*, 788 S.W.2d 1, 9 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 951 (1990)).

/s/ Margaret "Meg" Poissant

Justice

APPENDIX C

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

FILED NOVEMBER 24, 2021

P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

APPENDIX D

Case No. 149121301010

Incident No./TRN: 9171423958A001

The State of Texas	§	In the 232nd District
v.	§	Court
Rios, Ramon III	§	Harris County, Texas

JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL

Judge Presiding:	Hon. MIKE WILKINSON
Date Judgment Entered:	10/04/2018
Attorney for State:	CRYSTAL OKORAFOR
Attorney for Defendant:	CONN, MARY E

Offense for which Defendant Convicted:

POSS W/ INT MAN/DEL CS PG1 >400G

Charging Instrument:

INDICTMENT

Statute for Offense:

N/A

Date of Offense:

12/09/2015

Degree of Offense:

1ST DEGREE FELONY

Plea to Offense:

NOT GUILTY

Findings on Deadly Weapon:

YES, A FIREARM

Terms of Plea Bargain:

N/A – COURT TRIAL.

Plea to 1st Enhancement Paragraph:

Not Applicable

Findings on 1st Enhancement Paragraph:

Not Applicable

Plea to 2nd Enhancement Paragraph:

Not Applicable

Findings on 2nd Enhancement Paragraph:

Not Applicable

Date Sentence Imposed: 10/04/2018

Date Sentence to Commence: 10/04/2018

Punishment and Place of Confinement:

18 YEARS INSTITUTIONAL DIVISION, TDCJ

THIS SENTENCE SHALL RUN CONCURRENTLY.

Fine:

$10,000.00

Court Costs:

$ As Assessed

Restitution:

$ N/A

Sex Offender Registration Requirements do not apply to the Defendant. Tex. Code Crim. Proc. chapter 62

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Harris County, Texas**. Defendant appeared in person with Counsel.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. The Court then admonished Defendant as required by law. It appeared to the Court that Defendant was mentally competent to stand trial, made the plea freely and voluntarily, and was aware of the consequences of this plea. The Court received the plea and entered it of record. Having heard the evidence submitted, the Court found Defendant guilty of the offense indicated above. In the presence of Defendant, the Court pronounced sentence against Defendant.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND**

DECREES that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of Tex. Code Crim. Proc. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all finds, court costs, and restitution as indicated above.

The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the **Director, Institutional Division, TDCJ**. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court. **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the **Harris County District Clerk's office**. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

The Court **ORDERS** Defendant's sentence **EXECUTED**.

Furthermore, the following special findings or orders apply:

THE COURT FINDS DEFENDANT USED OR EXHIBITED A DEADLY WEAPON, NAMELY, A FIREARM, DURING THE COMMISSION OF A

FELONY OFFENSE OR DURING IMMEDIATE FLIGHT THEREFROM OR WAS A PARTY TO THE OFFENSE AND KNEW THAT A DEADLY WEAPON WOULD BE USED OR EXHIBITED. TEX. CODE CRIM. PROC. ART. 42.12 §3G.

Signed and entered on 10/04/2018

MIKE WILKINSON

JUDGE PRESIDING