NO. 21-1190

In the Supreme Court of the United States

RAMON RIOS, III,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

BRIEF IN OPPOSITION

KIM OGG
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS
HEATHER A. HUDSON
COUNSEL OF RECORD
ASSISTANT DISTRICT ATTORNEY
500 JEFFERSON, SUITE 600
HOUSTON, TX 77002
(713) 274-5826
HUDSON_HEATHER@DAO.HCTX.NET

JUNE 3, 2022 *COUNSEL FOR RESPONDENT*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

This case sets out the following questions for review:

1. Whether law enforcement had articulable facts supporting a reasonable suspicion that Petitioner's residence could harbor an unseen threat to members of law enforcement on the scene following a high-risk arrest.

2. Whether the "plain view" doctrine provides an exception to the warrant requirement when law enforcement conducts a lawful protective sweep and observes in plain view rectangular bundles conspicuously wrapped in a manner consistent with the packaging of narcotics.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

JUDICIAL RULES

OPINIONS BELOW

The published opinion of the Court of Appeals for the Fourteenth District of Texas affirming Petitioner's conviction for possession of a controlled substance with intent to deliver can be found at *Rios v. State*, 625 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd). *See* Petitioner's Appendix A at App.1a. The published opinions concurring in and dissenting from the denial of Petitioner's motion for *en banc* reconsideration are available at *Rios v. State*, No. 14-18-00886-CR, 2021 WL 3360265 (Tex. App.—Houston [14th Dist.] Aug. 3, 2021, pet. ref'd) (to be published). *See* Petitioner's Appendix B at App.21a.

The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review on November 24, 2021. *See* Petitioner's Appendix C at App.78a.

STATEMENT OF THE CASE

In September of 2015, the High Intensity Drug Trafficking Areas (HIDTA) squad of the Harris County Sheriff's Office learned that a man, later identified as Petitioner, was selling narcotics from a residence in Houston. App. A at 12a. The HIDTA squad placed the residence under periodic surveillance and observed Petitioner engaged in an apparent hand-to-hand narcotics transaction. App. A at 6a, 12a-13a. A surveillance camera was installed on the corner of the street which

could be maneuvered to view the driveway and a portion of the front of the residence. App. A at 7a; (III R.R. 142).[1]

During the ongoing narcotics investigation, HIDTA learned that Sandra Martinez lived at the residence along with her three children and Petitioner. App. A at 6a-7a. Deputy Persaud testified at trial that law enforcement had difficulty identifying Petitioner because there was no record that he lived there. App. A at 6a. Law enforcement was finally able to identify him by pulling the birth certificates of the children living at the residence. App. A at 7a. A criminal background check on Petitioner revealed two outstanding arrest warrants for murder charges in Atascosa County and Bexar County. *Id*. HIDTA also learned from a confidential source that Petitioner had guns in the residence, including an AK-47. App. A at 7a, 12a.

A Special Weapons and Tactics (SWAT) team, led by Deputy Alexander, was tasked with executing the high-risk warrants for Petitioner's arrest. App. A at 8a. On the night of December 8, 2015, law enforcement conducted surveillance of the residence to confirm that Petitioner was present. *Id*.

The following morning, the SWAT team postponed making entry to the residence until Martinez left to take the children to school. (III R.R. 158). Then a team comprised of twenty law enforcement officers used an armored vehicle to breach the wrought-iron gate

---

[1] Fact citations are made to the opinions below (which are included in the Petitioner's appendix), and to the transcript of Petitioner's trial. *See* Sup. Ct. R. 12.7. The transcript has been cited as ([volume number] R.R. [page number]).

surrounding the residence and took up positions around the perimeter of the home. App. A at 9a.

The SWAT team forcibly breached the front door and several windows. App. A at 9a. The back door of the residence, however, was standing open when the SWAT team arrived. App. A at 5a, 15a-16a. Through the breached front door, Alexander could see into the living room where he observed a closed rifle case and a rifle on top of the case or nearby. App. A at 10a. The SWAT team gave Petitioner verbal commands to get on the ground and crawl out of the home. App. A at 9a. When Petitioner exited onto the front porch, Deputy Alexander handcuffed him and escorted him to a police vehicle across the street while the SWAT team continued to maintain their positions surrounding the residence. *Id.*

Alexander questioned Petitioner as to whether there were weapons or anything else in the home that could pose a risk to the officers. App. A at 10a. Petitioner responded that there were multiple dogs on the property. *Id.* Petitioner also falsely identified himself to law enforcement as "Elijah Villarreal." *Id.*

Approximately ten to fifteen minutes after removing Petitioner from the front porch, the SWAT team performed an initial protective sweep of the residence for additional occupants. App. B at 30a; (III R.R. 37). After clearing each room, the SWAT team conducted a secondary, more extensive sweep for unseen third parties who might be concealed underneath beds or inside closets. App. A at 18a. Alexander estimated that it took "anywhere between 20 to 45 minutes, more than 5 minutes" to conduct both phases of the sweep. App. A at 5a.

During the initial protective sweep, Alexander observed an open red suitcase on the back porch through the open back door. *Id*. Inside the suitcase, in plain view, were fourteen bundles conspicuously wrapped in black tape which appeared to be kilograms of narcotics. App. A at 2a; App. B at 32a; (III R.R. 132); (V R.R. SX 12, DX 6). During the second more extensive sweep, additional black bundles were observed in a trash bag placed on a cooler in front of the laundry room. App. A at 6a.

After the scene was secured, law enforcement officers obtained a warrant to search the residence for narcotics. Officers recovered fourteen firearms—including assault rifles and uzi-style handguns—from the residence as well as 44 kilograms of cocaine. App. A at 2a.

The trial court denied Petitioner's motion to suppress evidence of narcotics obtained pursuant to the search warrant. On appeal, the court below rejected Petitioner's arguments challenging the constitutionality of the protective sweep. Relevant here, the court below overruled Petitioner's arguments that the duration of the protective sweep was excessive, and law enforcement lacked reasonable suspicion to sweep the residence for an unseen threat. Petitioner now seeks review on a writ of certiorari to correct these perceived errors. Petitioner also seeks review—for the first time—of the appellate court's determination that narcotics were observed by law enforcement in plain view during the protective sweep.

REASONS FOR DENYING THE PETITION

I. REVIEW OF PETITIONER'S FIRST QUESTION PRESENTED IS UNMERITED BECAUSE THE DECISION BELOW LACKS PRECEDENTIAL VALUE.

The appellate court's determination that the protective sweep was constitutionally permissible does not warrant this Court's review because the appellate court's analysis turns on the unique facts of this particular case. *See United States v. Henderson*, 748 F.3d 788, 791 (7th Cir. 2014) (whether law enforcement has specific articulable facts supporting the belief that the area to be swept harbors an individual who could pose a threat is an "exceptionally fact-intensive" inquiry); *United States v. Hauk*, 412 F.3d 1179, 1186 (10th Cir. 2005) (the question of reasonable suspicion is fact-intensive). Due to the fact-bound nature of the appellate court's reasonable-suspicion inquiry, its decision upholding the protective sweep has limited precedential value and does not merit review.

II. THE APPELLATE COURT'S DECISION COMPLIES WITH THIS COURT'S FOURTH AMENDMENT PRECEDENT.

Petitioner contends that the decision of the court below conflicts with established Fourth Amendment principles and this Court's own precedent. Petitioner alleges: (1) the decision below contravenes *Maryland v. Buie*, 494 U.S. 325 (1990), because the protective sweep lasted longer than was necessary to dispel the reasonable suspicion of danger; (2) the protective sweep violated the Fourth Amendment because law enforcement lacked specific articulable facts warranting a

reasonable belief that the residence harbored an individual who could pose a danger to SWAT officers stationed outside; and (3) the appellate court engaged in a "distorted analysis" that conflicts with Fourth Amendment principles and this Court's precedent.

The Fourth Amendment guards against unreasonable searches and seizures. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). In determining the reasonableness of a search, the intrusion upon an individual's Fourth Amendment interests is balanced against the promotion of legitimate governmental interests. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Warrantless searches are deemed unreasonable *per se* under the Fourth Amendment, subject to certain exceptions. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

In *Maryland v. Buie*, this Court recognized protective sweeps incident to an in-home arrest as an exception to the Fourth Amendment's prohibition against warrantless searches. *See Buie*, 494 U.S. at 334. The police executed an arrest warrant in Buie's house after he and his accomplice were suspected of armed robbery. Buie was arrested after he emerged from the basement of his home. A detective then entered the basement "in case there was someone else" down there. While checking the basement, the detective seized a red running suit that matched the description of a suit worn by one of the robbery suspects.

This Court held that officers may, as a precaution, "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" without first securing a search warrant. *Id*. This Court further held that law enforcement may sweep additional areas to ensure their

safety if they possess "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." *Id.*

The "protective sweep" must be a "quick and limited search of premises . . . conducted to protect the safety of police officers and others." *Id.* at 328. "It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* at 327.

A. The Initial Protective Sweep Lasted No Longer than Was Necessary to Dispel the Reasonable Suspicion of Danger.

Petitioner alleges that the appellate court's holding disregards the admonition in *Buie* that a protective sweep must 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" because ten to fifteen minutes transpired between the arrest and the initiation of the protective sweep. *See* (Pet. 5) (quoting *Buie*, 494 U.S. at 335-36).

Law enforcement officers could not immediately depart the premises upon effecting the defendant's arrest because they had reason to believe firearms and other contraband were located inside the breached residence. Consequently, SWAT team members continued to remain stationed outside the premises while the defendant was questioned by Alexander regarding the existence of potential threats to law enforcement inside the residence. The SWAT team members positioned in close proximity to the home were exposed to potential threats from within. *See United States v. Burrows*, 48 F.3d 1011, 1016 (7th Cir. 1995) (recognizing

that "officers may be at as much risk while in the area immediately outside the arrestee's dwelling as they are within it"); *United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989) ("A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another."), *overruled on other grounds*, *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001).

Although the protective sweep occurred subsequent to the completion of the arrest, *Buie* permits law enforcement to take reasonable steps to ensure their safety "*after*, and while making, the arrest." *Buie*, 494 U.S. at 334 (emphasis added); *see also United States v. Henderson*, 748 F.3d 788, 793 (7th Cir. 2014) (duration of protective sweep was reasonable where SWAT team entered the house within ten minutes of detaining the defendant); *see also United States v. Taylor*, 248 F.3d 506, 513-14 (6th Cir. 2001) (*Buie*'s authorization of a limited protective sweep to ensure the safety of the officers making an arrest applies in equal measure to an officer left behind to secure the premises while a search warrant is obtained).

Moreover, the court below did not err in upholding the initial phase of the protective sweep given the brevity of the search. Generally, courts have sanctioned cursory protective sweeps lasting a few minutes in duration. *See United States v. Silva*, 865 F.3d 238, 243 (5th Cir. 2017) (sweep of a trailer home lasted less than a minute); *United States v. Alatorre*, 863 F.3d 810, 815-16 (8th Cir. 2017) (two-minute scan of places large enough to conceal a person was constitutional); *United States v. Henderson*, 748 F.3d 788, 793 (7th Cir. 2014) (cursory sweep of residence which lasted no longer than five minutes was reasonable); *United States*

v. Hauk, 412 F.3d 1179, 1184 (10th Cir. 2005) (protective sweep of residence lasted approximately five to ten minutes).

The protective sweep of the residence in this case occurred in two distinctive phases. During the initial sweep, the SWAT team scanned each room for individuals who could potentially pose a threat. App. A at 15a. The SWAT team then conducted a secondary, more intensive sweep underneath beds, and inside closets and crawl spaces where a person could potentially be concealed. (III R.R. 82). Due to the cluttered nature of the residence, visibility into areas where individuals could hide was obscured. App. A at 13a. The SWAT team also encountered guns throughout the residence. (III R.R. 122-23). Alexander estimated that the entire process, including the initial cursory scan and the more thorough secondary scan, took anywhere from twenty to forty-five minutes, or "more than five minutes." App. A at 5a. Alexander clarified that once the SWAT team was inside the residence, the initial scan of each room was very quick. App. A at 15a.

The court below correctly concluded that the available facts supported an implied finding by the trial court that the initial phase of the sweep lasted no longer than five to ten minutes. App. A. at 15a. Under the particular circumstances of this case, a five-minute cursory sweep of a residence following a high-risk arrest does not violate the "quick and limited search" approved by *Buie*.

B. Law Enforcement Had Articulable Facts Supporting a Reasonable Belief That the Area Swept Harbored an Individual Who Could Pose a Danger to Officers on the Scene.

Petitioner further contends that the court below departed from this Court's precedent, as well as decisions from numerous federal courts and state courts of last resort, by upholding the protective sweep despite the absence of any facts supporting a reasonable suspicion that the residence harbored a potential threat to those on the scene. *See* (Pet. 6-8); App. B at 50a-53a.[2] Petitioner declares that the appellate court's decision sets an improper precedent that

---

[2] Petitioner cites to a host of cases involving protective sweeps, but the reasonable-suspicion inquiries in those cases turn on their particular facts and circumstances. Consequently, the cases cited by Petitioner are factually distinguishable. For instance, in many of the cases cited, law enforcement had no reason to believe there were weapons on the premises. *See*, *e.g.*, *People v. Celis*, 93 P.3d 1027, 1035-36 (Cal. 2004) (officers did not have a reasonable suspicion that a dangerous person would be found inside the defendant's house where, after detaining the defendant in his backyard, they did not have "any information as to whether anyone was inside the house" at the time of the protective sweep and there was no indication that either the defendant or his accomplice were armed); *State v. McGrane*, 733 N.W.2d 671, 679 (Iowa 2007) (suspicion of narcotics trafficking alone was insufficient to justify protective sweep because there was no evidence that defendant was believed to have weapons in his home and no evidence to suggest dangerous people could be hiding on the premises); *State v. Huff*, 92 P.3d 604, 610 (Kan. 2004) (protective sweep was not justified where there was no reason for officers to expect an armed confrontation); *State v. Guggenmos*, 253 P.3d 1042, 1051 (Or. 2011) (the facts did not raise a reasonable suspicion that the police were facing an immediate threat of injury where officers saw no evidence that the occupants of the house were armed and they lacked reliable information from police informants that other people in the house were armed or

law enforcement can conduct protective sweeps "even when they have had the property under surveillance for months and are virtually certain no one is there." (Pet. 6) (quoting App. B at 50a).

Contrary to Petitioner's assertion, the majority opinion relied on a number of pertinent facts and circumstances giving rise to reasonable suspicion, including the following:

- "Intelligence from law-enforcement entities showed narcotics traffic at the house.[3]

---

dangerous); *United States v. Menchaca-Castruita*, 587 F.3d 283, 293-95 (5th Cir. 2009) (no exigent circumstances justified warrantless search of defendant's residence where officers had a reasonable belief that narcotics were in the home, but they had no reason to believe anyone else was inside or any reason to believe anyone was armed). Other cases are inapposite because the police conducted protective sweeps despite having certain knowledge that the areas swept did not contain any individuals who posed a threat of danger. *See*, *e.g.*, *State v. Sanders*, 752 N.W.2d 713, 720-21 (Wis. 2008) (protective sweep of a small beef jerky canister was not justified because the canister could not possibly conceal a person); *State v. Rutter*, 93 S.W.3d 714, 725 (Mo. 2002) (law enforcement were not permitted to re-enter home under the guise of a protective sweep because they had confirmed during their prior entry that the only individual inside was the deceased victim); *United States v. Paradis*, 351 F.3d 21, 29 (1st Cir. 2003) (protective sweep was invalid because the police had already searched the entire apartment during the execution of the arrest warrant for the defendant and confirmed that no one else was present).

[3] Information that other individuals are coming to and from the residence is a factor supporting a protective sweep. *See United States v. Vazquez*, 406 F. App'x 430, 433 (11th Cir. 2010) (holding that officers' awareness that an informant had previously observed individuals inside the defendant's residence, that there were guns inside, and that individuals had gone in and out of the

- "Intelligence from law-enforcement entities showed narcotics traffic at the house.[4]
- 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

---

residence while it was under surveillance justified a protective sweep).

[4] Information that other individuals are coming to and from the residence is a factor supporting a protective sweep. *See United States v. Vazquez*, 406 F. App'x 430, 433 (11th Cir. 2010) (holding that officers' awareness that an informant had previously observed individuals inside the defendant's residence, that there were guns inside, and that individuals had gone in and out of the residence while it was under surveillance justified a protective sweep).

associated with apprehending suspects in narcotics-trafficking scenarios.[5]

- Appellant reported dogs on the premises and in the house.[6]
- 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.

---

[5] Involvement in narcotics trafficking is commonly associated with violence. *See Harmelin v. Michigan*, 501 U.S. 957, 1002-03 (1991) (citing studies showing a direct link between illegal drugs and crimes of violence); *see United States v. Hauk*, 412 F.3d 1179, 1192 (10th Cir. 2005) (observing that a reasonably prudent police officer executing an arrest warrant for a defendant involved in the drug trade would anticipate a threat of danger).

[6] *See United States v. Starnes*, 741 F.3d 804, 808 (7th Cir. 2013) (one of the factors justifying a reasonable belief that law enforcement or bystanders could be in danger was information that two aggressive pit bulls were on the premises and only one had been subdued).

- 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."

App. A at 12a-14a.

In addition to these facts, there was testimony from Alexander that, in his experience with similar locations, law enforcement discovered other occupants in the home. App. B at 30a. In this case, there was also a large outbuilding located at the rear of the property with a "cabana-type area" and rooms on the backside that might have been occupied by other individuals. App. A at 8a. Significantly, the back door to the residence was open when law enforcement arrived at the scene. App. A at 15a-16a.[7] And Alexander observed a firearm in the living room, raising heightened concern about the possibility of unseen individuals who could be armed.

---

[7] *See United States v. Oguns*, 921 F.2d 442, 446-47 (2nd Cir. 1990) (holding that an open door to the defendant's apartment provided agents with a reasonable belief that others were inside the apartment who could pose a threat to the police outside)); *see also United States v. Biggs*, 70 F.3d 913, 916 (6th Cir. 1995) (although the defendant was arrested 20 to 75 feet outside of a motel room, a protective sweep of the room was justified because the defendant left the motel room door open giving any potential unknown person in the room a clear view of the officers outside).

i. Petitioner's Argument Mischaracterizes the Degree of Surveillance Conducted.

The decision below does not create precedent authorizing protective sweeps when law enforcement is almost certain that no other individuals are present in the area to be swept. Petitioner disregards evidence that surveillance of the residence was not continuous, and therefore did not extinguish the potential threat of danger to officers at the scene. Although the surveillance camera was operating 24 hours a day for over two months, there was no evidence at trial that the footage was monitored continuously by law enforcement. App. A at 7a. To the contrary, Alexander testified that the house was watched "periodically," and surveillance was deliberately conducted the night before the execution of the warrants to confirm that Petitioner was present. App. A at 8a; (III R.R. 54).

Alexander also testified that he was not "100 percent" certain no one else was inside the residence, and officers outside the residence were not safe until it was "cleared." App. B at 31a. Alexander provided cover while escorting Petitioner to the patrol car because there was still a potential threat of danger from an unseen third party inside the home. (III R.R. 70). Considering the limited nature of the information available to law enforcement, it was rational to infer that an "unknown number of people" could be at the residence. App. B at 29a.

ii. The Decision Below Does Not Sanction a Policy of Automatic Protective Sweeps.

Petitioner further contends that the sweep violated the Fourth Amendment because Alexander testified that the SWAT team routinely performs protective

sweeps as a matter of policy. *See* (Pet. 6). Petitioner ignores Alexander's testimony that the purpose of the protective sweep in this case was to ensure that the investigators standing outside the residence would not be hurt by someone still inside. (III R.R. 38). Moreover, the subjective motivations of the officers undertaking the sweep do not determine its legality. *See*, *e.g.*, *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404-05 (2006) (the officer's subjective motivation is irrelevant in a Fourth Amendment challenge); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Hauk*, 412 F.3d at 1187 (the legality of a protective sweep depends not on the subjective motivations of the police, but on whether there was an objectively reasonable basis for it).

Thus, the court of appeals was well within its discretion to conclude that law enforcement possessed a reasonable belief, based on specific and articulable facts, that the residence could harbor an unseen threat to the officers at the scene.

C. The Reasonable-Suspicion Analysis Employed by the Court Below Does Not Run Afoul of Fourth Amendment Principles.

Finally, Petitioner alleges that the decision below applies a "distorted analysis" which violates the fundamental tenets of the Fourth Amendment. Petitioner maintains that it was improper for the appellate court to justify the warrantless entry based upon the cluttered nature of the residence and the officers' obscured lines of sight because courts have determined that visibility has no bearing on the reasonable-suspicion inquiry. *See* (Pet. 8) (citing *United States v.*

Ford, 56 F.3d 265, 269 n.6 (D.C. Cir. 1995) and *United States v. Archibald*, 589 F.3d 289, 299-300 (6th Cir. 2009)).

The decision below does not conflict with *Ford* or *Archibald* because, in those cases, the government relied almost exclusively on the officers' inability to view the entire residence to justify the protective sweep. *See Ford*, 56 F.3d at 269 n.6 (where law enforcement had no indication that accomplices could be present in the residence, the poor lighting conditions within did not form a reasonable basis for the belief that the area harbored an individual posing a danger to those on the arrest scene); *see Archibald*, 589 F.3d at 293, 299-300 (the officer's "perceived vulnerability" as he stood in the doorway of the defendant's apartment and his inability to see obscured areas of the residence, without more, was insufficient to support a reasonable belief that a third party was present in the home).

Here, the SWAT team's inability to see into the residence would not have established an independent basis for the sweep. Obstructed visibility was merely one circumstance the appellate court considered in concluding that the sweep was constitutionally permissible. The analysis of the court below is consistent with other state courts that have found an officer's inability to see into the area swept, combined with other facts and circumstances, can suffice to support a reasonable belief that an individual could be concealed who poses a threat to officers on the scene. *See*, *e.g.*, *State v. Revenaugh*, 992 P.2d 769, 773-74 (Idaho 1999) (although officer did not have proof that someone else was inside the residence where narcotics trafficking was taking place, the protective sweep was justified because the officer could not see into the house, the defendant had

suspiciously retreated into the house before re-emerging and being taken into custody, and the officer was dealing with an apparent marijuana operation which, in his training and experience, often involved paranoid people and "quite a few weapons."); *State v. Francis*, 117 A.3d 158, 163 (N.H. 2015) (protective sweep of a vehicle was justified because, among other factors, the tinted windows obscured the interior of the vehicle).

Petitioner also argues that the court below overstepped this Court's binding precedence in *Buie* by espousing a bright-line rule automatically justifying protective sweeps when officers are responding to violent crimes. Specifically, Petitioner asserts the court below should have disregarded evidence that he was wanted for murder and that he was involved in narcotics trafficking because the dangerousness of the defendant has no bearing on whether the area to be swept conceals another person who could pose a threat to officers. *See* (Pet. 9) (citing *Brumley v. Commonwealth*, 413 S.W.3d 280, 286 (Ky. 2013) and *United States v. Colbert*, 76 F.3d 773, 777 (6th Cir. 1996)).

The officers' awareness of the defendant's dangerousness does not "itself directly justify the sweep." *United States v. Henry*, 48 F.3d 1282, 1284 (D.C. Cir. (1995) (finding articulable suspicion based on information that defendant had weapons and that his "boys" might be with him). However, the threat of danger posed by the defendant may be relevant to a reasonable-suspicion inquiry if law enforcement has reason to believe the defendant may be affiliated with other potentially dangerous accomplices. *See United States v. Silva*, 865 F.3d 238, 242 (5th Cir. 2017) (taking into consideration the defendant's extensive violent criminal history, his seven outstanding arrest warrants, and his

affiliation with a gang in determining that a protective sweep of the defendant's trailer was justified—after the defendant had been detained outside—because officers could reasonably infer the defendant might be affiliated with people who would want to help him and who might be hidden in the trailer); *see United States v. Howard*, 106 F.3d 70, 75 (5th Cir. 1997) (the absence of direct or circumstantial evidence supporting a belief that the defendant or an unknown third person in the house may have posed a threat to the officers outside was not controlling because there was testimony that narcotics cases often involve people armed with weapons).

In this case, law enforcement had information that the defendant was armed, dangerous, and involved in narcotics trafficking. Officers also knew that firearms were kept in the residence, and that a number of people were seen frequenting the residence. Law enforcement could rationally infer there was a reasonable possibility the defendant was affiliated with potentially dangerous accomplices in the illegal drug trade who might be present in the home.

The court below correctly determined that, under the unique facts and circumstances of the case, law enforcement was justified in conducting a protective sweep of the residence as a precaution to ensure their safety. The court's analysis does not merit review as it does not directly contradict the decisions of other courts, nor is the court below a state court of last resort. *See* Sup. Ct. R. 10(b) (a petition for writ of certiorari may be granted if "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals[.]").

Accordingly, Petitioner's first question presented does not warrant review.

III. PETITIONER HAS WAIVED ANY ARGUMENT THAT THE COURT BELOW MISAPPLIED THE "PLAIN VIEW" DOCTRINE.

Petitioner's second question presented should not be reviewed because his legal arguments in the court below were limited strictly to the constitutionality of the protective sweep. The court below overruled Petitioner's challenge to the validity of the sweep, and concluded that law enforcement observed contraband in plain view during the sweep which formed the basis for a search warrant. Petitioner failed to challenge this conclusion either in his motion for rehearing or his motion for *en banc* reconsideration. Because Petitioner did not argue below that the "plain view" doctrine did not apply, he has waived this argument and this Court should deny the petition for writ of certiorari in regard to the second question presented.

IV. REVIEW OF PETITIONER'S SECOND QUESTION PRESENTED IS UNMERITED BECAUSE THE COURT BELOW CORRECTLY APPLIED THE "PLAIN VIEW" DOCTRINE TO CONTRABAND OBSERVED DURING THE PROTECTIVE SWEEP.

The court below was correct to apply the "plain view" doctrine to narcotics observed during the protective sweep. Under the "plain view" doctrine, police officers may seize evidence without a warrant if they are lawfully in a position from which they can view the evidence, the incriminating nature of the evidence is immediately apparent, and the officers have a lawful right of access to the evidence. *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The incriminating

nature of an item is "immediately apparent" if the police have probable cause to believe that the item in plain view is contraband without conducting an additional search of the item. *Id.* Probable cause is a "flexible, common-sense standard" which only requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" that the item may be contraband. *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Law enforcement is not required to have an "unduly high degree of certainty" that the item is contraband for the "plain view" doctrine to apply. *Id.* at 741.

During the first phase of the lawful protective sweep, Alexander observed through the open back door what appeared to be a brick of cocaine in plain view on the back porch. App. A at 5a. Petitioner contends that no evidence exists to support the appellate court's conclusion that the incriminating nature of the narcotics was immediately apparent because the narcotics were contained within unopened opaque "black trash bags," and Alexander did not touch, open, or smell the bags. (Pet. 11). Petitioner's inaccurate characterization of the contraband as "trash bags" is derived from testimony referring to closed bags containing narcotics that were found during the secondary sweep, rather than the brick-shaped packages observed in plain view during the initial sweep. (III R.R. 93-95).

The court below properly determined that Alexander had probable cause to believe the bundles contained contraband due to their distinctive appearance.[8]

---

[8] Photographs of the brick-shaped packages were submitted at trial. (V R.R. SX 11, 12).

Alexander described the bundles as "black bags wrapped up that look like kilos of narcotics." App. B at 32a; (III R.R. 88). Alexander also advised Persaud that the bundles appeared to be "kilogram packages that were rectangular, wrapped in black electrical tape." (V R.R. DX 6). Alexander recognized the packaging of the bundles from his training and experience to be consistent with the packaging of narcotics for distribution. *Id*.

Although Alexander could not see the contents of the opaque packages, their incriminating nature was nevertheless immediately apparent to his trained eye. *See Texas v. Brown*, 460 U.S. 730, 742-43 (1983) (holding that the incriminating nature of an opaque green balloon was immediately apparent despite the fact that the officer could not see the contents of the balloon because he was aware that narcotics were typically packaged in balloons); *see also United States v. Castorena-Jaime*, 285 F.3d 916, 924-25 (10th Cir. 2002) (highway patrol trooper's warrantless seizure of an opaque, brick-like bundle wrapped in tape on the rear floorboard of the defendant's vehicle was justified under the "plain view" doctrine because the incriminating nature of the bundle was immediately apparent to the trained eye of the trooper). As such, the appellate court's application of the "plain view" doctrine does not offend Fourth Amendment principles.

The court below followed this Court's binding precedent and correctly applied the law to the unique facts of this case in upholding the validity of the protective sweep. For all these reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

For the forgoing reasons, the Respondent asks this Court to refuse Petitioner's petition for a writ of certiorari.

Respectfully submitted,

KIM OGG
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS
HEATHER A. HUDSON
COUNSEL OF RECORD
ASSISTANT DISTRICT ATTORNEY
500 JEFFERSON, SUITE 600
HOUSTON, TX 77002
(713) 274-5826
HUDSON_HEATHER@DAO.HCTX.NET

COUNSEL FOR RESPONDENT

JUNE 3, 2022