

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2021

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No. \_\_\_\_\_

ROBERT CAPELLI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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*PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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September 20, 2022

## **QUESTION PRESENTED**

Whether the vehicle exception to the Fourth Amendment's warrant requirement applies to the search of a private plane.

List of All Proceedings

1. United States District Court, D.Ct. (New Haven), Docket No. 17-cr-157-JBA-1; United States v. Capelli; amended judgment entered 1/3/20.
2. United States Court of Appeals for the Second Circuit, Docket No. 19-4362-cr; United States v. Bodnar; judgment entered 6/21/22.

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Petitioner, Robert Capelli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit Court of Appeals entered in this proceeding on June 21, 2022.

### **OPINION BELOW**

The decision of the Second Circuit, United States v. Bodnar, 37 F.4th 833 (2d Cir. 2022), appears in the Appendix hereto.

### **JURISDICTION**

The judgment of the Second Circuit was entered on June 21, 2022. A timely filed Petition for Rehearing/Rehearing En Banc was denied on July 22, 2022. This petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

### **CONSTITUTIONAL PROVISION INVOLVED**

U.S. Constit., Amend. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

Petitioner Robert Capelli was charged with Conspiracy to Distribute, and to Possess with Intent to Distribute, 1,000 kilograms or more of marijuana, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(vii) and 846; Possession with Intent to Distribute 100 Kilograms or more of marijuana, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(vii); Conspiracy to Launder Money, in violation of 18 U.S.C. §1956(h); and Money Laundering, in violation of 18 U.S.C. §1956(a)(1)(A)(i).

Capelli moved pretrial to suppress evidence obtained as the result of a warrantless search of the private plane transporting what turned out to be the final shipment of marijuana. He asserted, *inter alia*, that he had a subjective and reasonable expectation of privacy in the duffle bags of marijuana on the plane, and that the police should have obtained a warrant before the search. The court denied that motion.

The evidence showed that law enforcement, suspicious of a series of trips made between Connecticut and California by a small private plane, conducted a ‘ramp check’ of that plane upon landing at Sikorsky Airport in Stratford, Connecticut on June 29, 2017. The pilot, co-defendant Donald Burns, was nervous and eventually admitted there was marijuana on the

plane and consented to a search of the plane. The police, acting without a warrant, seized 14 black duffle bags containing marijuana, and another two duffle bags the following day. The total weight came to about 178 kilos.

Burns directed police to an address in Derby, Connecticut where he was supposed to take the marijuana. Capelli and others were arrested there. Search warrants were obtained for electronic devices seized from the participants, including a thumb drive taken from Capelli that appeared to be a Lego piece. That thumb drive included spread sheets the government alleged detailed trips to California to purchase marijuana, and the expenses and profits of the operation. The private plane was used to bring cash to California, and to transport marijuana back to Connecticut for resale.

The jury convicted Capelli of Count One, but found beyond a reasonable doubt that the amount of marijuana involved was 100 kilograms or more, not the 1,000 kilograms or more charged by the government; it convicted him of Count Two, possession of 100 kilograms or more of marijuana; and acquitted him of Counts Three and Four, the money laundering counts. The Second Circuit denied Capelli's appeal, and his Petition for Rehearing. It held, *inter alia*, that law enforcement did not need to secure a warrant prior to searching the private plane.

## REASONS FOR GRANTING THE PETITION

**This case presents an important question of federal law that has not been, but should be, settled by this Court – that is, whether the automobile exception to the warrant requirement applies to private aircraft.**

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” This means that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions.” Katz v. United States, 389 U.S. 347, 357 (1967). This Court should grant this petition for writ of certiorari to make clear that the ‘specifically established and well delineated’ automobile exception to the warrant requirement does not extend to private aircraft.

The United States Court of Appeals for the Second Circuit here held, for the first time, that the automobile exception to the warrant requirement applied to private planes. The rationale of the Court of Appeals in so holding was misguided. The appellate court relied on (1) the inherent mobility of an airplane, Bodnar, 37 F.4th at 841-42, and (2) what it found to

be a reduced expectation of privacy, to support application of the automobile exception to an airplane. Id. at 842-43.

However, this Court has squarely held that the mobility of the thing to be searched is not sufficient justification for abandoning the warrant requirement. United States v. Chadwick, 433 U.S. 1, 13 (1977)(warrant needed to search footlocker).

And the expectation of privacy in a private airplane is significantly greater than for an automobile. “A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view.” Cardwell v. Lewis, 417 U.S. 583, 590 (1974). Not so an aircraft.<sup>1</sup>

Although there may be significant regulatory requirements governing aviation and aircraft, that is the only respect in which an airplane is like an automobile for the purposes of evaluating the reasonable expectation of privacy. “Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and

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<sup>1</sup> See “The Aeroplane,” by Gordon Boshell (“I sweep the skies with fire and steel/ My highway is the cloud ...I rove an endless road unfurled/ Where the mile stones are the stars...”).

inspection.” Rakas v. Illinois, 439 U.S. 128, 154 n.2 (1978)(Powell, J., concurring). The fact that automobiles are highly regulated is only part of what serves to reduce the expectation of privacy – the other part, minimized and dismissed by the Second Circuit, is that cars are “capable of traveling on the public highways.” California v. Carney, 471 U.S. 386, 392 (1985).

An aircraft, unlike a car, does not travel public thoroughfares where both its occupants and its contents are in plain view, and it cannot simply be pulled over the way that a motor vehicle can be. “As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.” South Dakota v. Opperman, 428 U.S. 364, 368 (1976). A greater expectation of privacy arises from the fact that a plane is flown in sparsely traveled air space.

Accordingly, this Court should grant this Petition for Writ of Certiorari, to make clear that the automobile exception to the warrant requirement is inapplicable to private aircraft.

Conclusion

For the foregoing reasons, Petitioner Robert Capelli respectfully requests that this Petition for Writ of Certiorari be granted.

September 20, 2022

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