Docket No:

UNITED STATES SUPREME COURT

UNITED STATES,
Plaintiff-Respondent,

v.

DEREK GERRISH,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT C. ANDREWS
Attorney for Derek Gerrish
First Circuit Bar Number 88418
91 Auburn Street Suite J PMB 1155
Portland, ME 04103
Tel. 207-879-9850
Fax 207-879-1883
E-mail rob.andrews.esq@gmail.com

STATEMENT OF THE QUESTIONS PRESENTED

I. Does a bail condition that allows searches by law enforcement officers without probable cause or reasonable suspicion qualify as punishment for purposes of the Due Process Clause of the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

SUPREME COURT CASE

COURT OF APPEAL CASES

FEDERAL STATUTES

OTHER AUTHORITIES

CITATIONS OF OPINIONS AND ORDERS

Judgement United States v, Derek Gerrish, 2:2021-cr-132-JDL Docket Entry 118. Me. 3/29/2023; and Opinion United States v. Derek Gerrish: 2:2021-cr-132-JDL Docket Entry 118. Me. 4/19/2022; *United States v. Derek Gerrish*, 96 F4th 67 (2024).

JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Defendant makes this petition based on the jurisdiction conferred by Article III Section 1 of the United States Constitution, 28 U.S.C. § 1254(1), and Rule 10 of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question and conflicts with other decisions of the Supreme Court of the United States. This Petition is timely as the deadline was enlarged by the Court having been filed within 90 Days of United States Court of Appeals for the First Circuit's Opinion docketed on March 15, 2024.

Appellate Jurisdiction. The Defendant takes this appeal as of right in a criminal prosecution under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the District Court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on March 30, 2023.

Original Jurisdiction. District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231. The indictment in this matter resulted in convictions of Mr. Gerrish for violations of 21 U.S.C. § 841(a)(1).

PROVISIONS OF LAW

U.S. Constitution 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.

U.S. Constitution Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#

#

#

STATEMENT OF FACTS

On March 28, 2023, Chief Judge Jon D. Levey sentenced Derek Gerrish to a sentence of 90 months and three years of supervised release for his conviction of possession with intent to distribute fentanyl in violation 21 U.S.C. § 841(a)(1). The sentence was the result of a conditional guilty plea entered on May 16, 2022 to the single count in the indictment. Prior to his guilty plea, Mr. Gerrish sought to suppress the evidence seized from his car on June 1, 2021. Mr. Gerrish asserted that there was no individualized suspicion as to him when he was searched, the contact with the police was so intrusive that it amounted to an arrest without probable cause, and the bail conditions could not justify the search. Mr. Gerrish filed his notice of appeal on March 30, 2023.

The District Court Facts:

The Scarborough Police Department received a complaint on June 1, 2021 from a hotel's staff member about possible drug trafficking and prostitution at the hotel by some of its guests. Criminal activity, including drug trafficking, has occurred with some frequency at the hotel, and staff had previously provided tips that resulted in successful investigations.

In response to the June 1 tip, two plainclothes officers stationed themselves in a parked, unmarked police car in the parking lot of the business next-door, which gave them an elevated vantage point to observe the hotel's parking lot. Shortly after 2 p.m., the officers saw two cars pull into the hotel's parking lot and back into adjacent spots directly downhill from the officers' location, approximately 10 to 12 feet away. Although the hotel's parking lot was relatively empty, the cars had parked far from the hotel's main entrance. One of the vehicles was a Chrysler 300, and the other was a Toyota Avalon. Each had two occupants. Both cars were

registered to owners with Maine addresses not far from the hotel. The officers saw a woman exit the front passenger door of the Chrysler and walk unsteadily to the main entrance of the hotel. She appeared either intoxicated or sick. The woman then returned from inside the hotel to the Chrysler and lay down so that her torso was inside the car and her legs were outside. One of the officers called the hotel's front desk to ask what the woman had done while inside. He was told that she had rented a room and that it was not ready. While this was happening, Defendant Gerrish, the driver of the Chrysler, was speaking and gesturing to the male passenger of the Toyota. He also exited his car and then reentered it. Because of the incline, the officers were well positioned to see into both cars through their back windshields. The officers saw the driver of the Toyota holding a syringe and flicking its top as if she was getting ready to inject it.

Upon seeing the syringe, one of the officers radioed to a uniformed officer who was nearby in a police cruiser. As that third officer drove into the hotel parking lot with his lights and siren off, the two plainclothes officers exited their car and approached the Chrysler and the Toyota, one toward the passenger side of the Chrysler where the unsteady woman was lying down and the other toward the driver side of the Toyota where the other woman had the syringe. The two officers identified themselves as police. The third police officer parked his cruiser in front of the Toyota at a 45-degree angle, blocking the Toyota without blocking the Chrysler. The uniformed officer exited his car and approached the passenger of the Toyota, the man who had been speaking with Gerrish. The woman in the Toyota who had been holding the syringe identified herself to the plainclothes officer who had approached her. Now closer, the officer saw that the syringe contained a reddish-brown liquid resembling heroin or fentanyl. The uniformed officer asked the male passenger of the Toyota what was in the syringe, and the passenger

responded that it was "dope." The officers directed the woman and the man to exit the Toyota, which they did. The woman stated that there were two more loaded syringes in the car, which the officers found during a search, along with other drug paraphernalia. The woman also stated that she was there to meet Gerrish, who she identified by name. While those events were unfolding at the Toyota, Gerrish and his unsteady passenger identified themselves to the plainclothes officer who had approached the Chrysler. Gerrish asked if he could get out of the car. The officer agreed and met Gerrish by the front of the Chrysler. The officer asked Gerrish whether he was on any bail conditions, and Gerrish stated that he was. The officer asked if the conditions allowed for searches, and Gerrish said yes. In response to a question about what he was on bail for, Gerrish told the officer "everything." Asked what "everything" referred to, Gerrish said robbery, theft, and assault. The officer radioed to dispatch to confirm that Gerrish was on bail and that his conditions allowed for searches. At the time of the stop, Gerrish was subject to at least six separate sets of bail conditions, including for charges related to drug trafficking and possession of hypodermic apparatuses. Five contained provisions requiring him to submit to suspicion-less searches at any time of his person, vehicle, or residence to determine whether he had violated other bail conditions relating to alcohol, drugs, or weapons. The officer who had been questioning Gerrish told Gerrish that he would search the Chrysler for two reasons: first, because the bail conditions allowed it, and, second, because Gerrish was talking to a person in the Toyota and the officers had observed the driver of that vehicle preparing to inject drugs. During the Chrysler search, Gerrish was standing 5 to 10 feet away with a fourth officer who had just arrived. A fifth officer had also responded to the scene by this time. The search of the Chrysler revealed a bag containing what the officer immediately recognized as fingers of either heroin or

fentanyl. At that point, the officer placed Gerrish in handcuffs. The officer then found two handguns, several magazines, and additional illegal drugs in the passenger's side floorboard of the Chrysler. Upon the discovery of the guns, an officer handcuffed the woman who had been observed in the other car with the syringe.

The Court of Appeals Facts:

After tracking several events not relevant here, the officers noticed the driver of one of the cars (a Toyota Avalon) flick a syringe as though she was preparing to inject it. They subsequently approached the two cars, identified themselves as police officers, and searched the Toyota, which revealed additional drug paraphernalia. Upon further questioning, the defendant — who had occupied the other car (a Chrysler 300) — identified himself and acknowledged that he was on pretrial release pending resolution of several Maine state criminal charges. He added that the terms of his release authorized searches without reasonable suspicion — a fact that the officer confirmed with dispatch before proceeding. As matters turned out, the defendant was subject to at least six separate sets of bail conditions pursuant to Maine law. Five of these strictures provided for searches of his person, vehicle, or residence at any time and without suspicion to determine if he had violated other bail conditions. The officer who questioned the defendant provided two justifications for his ensuing search of the Chrysler: the bail conditions authorized the search, and the defendant had been seen speaking to someone in the Toyota whose driver they had observed preparing to inject a syringe. Searching the Chrysler produced a substance that later was confirmed to be fentanyl, along with an assortment of other contraband.

The Opinion Below

The Court of Appeals did not address the mere propinquity argument over suspicion and

only addressed the propriety of the suspicion-less search bail condition. The First Circuit Panel rejected the assertion that the bail condition could not justify the search in this case:

> [Mr. Gerrish] raised an apparent conflict between Gates and the decision in United States v. Scott, 450 F.3d 863 (9th Cir. 2006). There, the Ninth Circuit held that probable cause was required to drug test or search the home of a defendant on pretrial release even though he had consented to searches without suspicion as a condition of his release. See id. at 865-66, 874-75. The court below countered that the bail conditions in Scott were unsupported by individualized judicial findings. See Gerrish, 2022 WL 1156057, at *5 (citing Scott, 450 F.3d at 865, 872 & n.12). In contrast, the Maine Bail Code mandates that judicial officers impose the least restrictive bail conditions that, inter alia, reasonably ensure a defendant will appear wherever and whenever required. See Me. Rev. Stat. Ann. tit. 15, § 1026(3)(A), (4)(C). And Maine law requires that the bail decision be predicated on "an interview with the defendant, information provided by the defendant's attorney and information provided by the attorney for the State or an informed law enforcement officer if the attorney for the State is not available and other reliable information." Id. § 1026(4). Thus, the court held that the Ninth Circuit's reasoning in Scott was inapplicable to the defendant's circumstances here. See Gerrish, 2022 WL 1156057, at *5.

United States v. Gerrish, 96 F4th 67, 70 (2024). The First Circuit reasoned that courts could delegate their Fourth Amendment role in determining the existence of probable cause as neutral magistrate so long as the court imposing the condition did so through a bail hearing analysis. In the First Circuit's view, bail procedures were enough to justify a reduced expectation privacy because it was analogous to parole searches.

The First Circuit Panel rejected the analysis that should have been employed against a challenge to using bail conditions to justify suspicion-less searches, and choose to maintain the analogy:

> Dictum or not, we see no reason to retreat from the language in Gates. Indeed, reasoning from Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) — to which Gates cites — illustrates the point. There, the Court held that a person on parole could be searched without suspicion because he had submitted to these searches as a condition of his parole. See id. at 852, 126 S.Ct. 2193. In so holding, the Court reasoned "that acceptance of a clear and

> unambiguous search condition 'significantly diminishe[s] [one's] reasonable expectation of privacy.' " Id. (quoting United States v. Knights, 534 U.S. 112, 120, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001)). Because bail provides a similar mechanism for a defendant to avoid custody while the criminal legal process unfolds, one who is on pretrial release likewise faces a diminished expectation of privacy. And a state maintains legitimate interests — such as ensuring the integrity of the criminal legal process — in supervising persons on pretrial release.

Id. The First Circuit Panel used this analogy to bypass the due process analysis that should have been employed. The Panel made this possible in the tautological response it adopted from the District Court: "because the issue here is not necessarily the search itself but, rather, the bail conditions that authorized the search." Id. The First Circuit Court of Appeals simply refuses to recognize that either the search or the condition itself must pass the due process standard for pre-conviction treatment of the accused.

ARGUMENT

I. This is an important federal question regarding the use of Bail Conditions that allow for searches without any suspicion for which a split between the circuits and the states has developed.

There is a Circuit split on the effect of bail conditions that do not require any level of suspicion. The First Circuit has endorsed, although not necessary to the holding, that bail conditions justify a search without any level of suspicion:

> In all events, the district court took a belt-and-suspenders approach: it also supportably found that the search was independently justified by the extant bail conditions. After all, the defendant had agreed, as part of his bail conditions incident to the charges of disorderly conduct and resisting arrest, to submit to searches of his person and residence at any time, even in the absence of articulable suspicion. We see no reason why we should not give the plain language of such a bail condition force and effect. Cf. Samson v. California, 547 U.S. 843, 852–57, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) (holding that a suspicionless search of a parolee did not violate the Fourth Amendment where the parolee had previously submitted to a parole condition authorizing such searches); United States v. Barner, 666 F.3d 79, 81, 84–86 (2d Cir.2012) (approving warrantless search when

> parole condition provided that parolee's "person, residence and property [were] subject to search and inspection" (alteration in original)).

United States v. Gates, 709 F.3d 58, 64 (2013). The First Circuit emphasizes the agreement to the condition instead of focusing on the due process analysis and the punishment standard. The cases used to support the use of bail conditions under the First Circuit's analogy all require a relaxed standard because they are all part of a sentence that was being served and the suspicion-less search conditions were a part of the sentence. Mr. Gerrish was not subject to any sentencing term that included terms of supervision at the time of the search in this case.

The Ninth Circuit has adopted the opposite rule and held that waiver of such rights is constrained by constitutional doctrine. In the Ninth Circuit bail conditions do not operate as a waiver:

> It may be tempting to say that such transactions—where a citizen waives certain rights in exchange for a valuable benefit the government is under no duty to grant—are always permissible and, indeed, should be encouraged as contributing to social welfare. After all, Scott's options were only expanded when he was given the choice to waive his Fourth Amendment rights or stay in jail. Cf. Doyle v. Cont'l Ins. Co., 94 U.S. 535, 542, 24 L.Ed. 148 (1877). But our constitutional law has not adopted this philosophy wholesale. The "unconstitutional conditions" doctrine, cf. Dolan v. City of Tigard, 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary. Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections. Where a constitutional right "functions to preserve spheres of autonomy ... [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands." Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L.Rev. 1413, 1492 (1989); see generally id. at 1489–1505; Richard A. Epstein, The Supreme Court, 1987 Term–Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L.Rev. 4, 21–25 (1988). The doctrine is especially important in the Fourth Amendment context.

United States v. Scott, 450 F.3d 863, 866-67 (2006). The rules in the Ninth and First Circuits are directly at odds both in allowing conditions that include suspicion-less searches and the importance of waiver of Fourth Amendment protection. The Ninth Circuit, though, recognized the importance of due process analysis and the role of *Bell v. Wolfish*, 441 U.S. 520 (1979), *United States v. Salerno*, 481 U.S. 739 (1987), and *Maryland v. King*, 569 U.S. 435 (2013). Mr. Gerrish asserts that the ninth Circuit's view is required by this Court's prior precedent deprivation of liberty for the accused pre-conviction.

II. The United States Court of Appeals for the First Circuit has applied a standard that is inconsistent with this Court's requirements for Due Process Clause analysis and the punishment standard.

The First Circuit's reliance on the analogy with search conditions as part of a sentence is contrary to this Court's precedent for bail conditions. This Court has clearly articulated the analysis for pre-conviction restrictions:

> In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.

Bell v. Wolfish, 441 U.S. 520, 535 (1979). In this case, the First Circuit Panel justified its position by relying on the court process that accompanies the bail conditions that were placed on Mr. Gerrish by Maine's judicial system. The problem with the Panel's position is that it is a delegation of authority to law enforcement that the Fourth Amendment categorically restricts with the exception of a few carefully delineated circumstances. Mr. Gerrish asserts that the Fourth Amendment protection here is not just searches, but also on the Court's ability to delegate its

authority in a manner that is contrary to the Fourth Amendment protections against unreasonable searches.

In the context of pre-trial detention, this Court promulgated the punishment standard as a check against jailhouse abuses. This Court has said that the punishment standard depends on the purpose behind the restriction:

> Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Id. 539. While Bell's context is different than Mr. Gerrish's context, the punishment standard is a better measure of the constitutionality of the suspicion-less bail condition than either the bail procedure's similarity to a sentencing procedure or the condition similarity to suspicion-less search conditions as part of a sentence. Mr. Gerrish asserts that this suspicion-less bail condition is in large part unreasonable because he is not subject to a sentence nor convicted of the charges through which the restriction was placed on him. The District Court and the Court of Appeals were simply not free to ignore what most courts have characterized as his presumption of innocence.

The difficult part of Mr. Gerrish's case is analyzing the purpose behind the suspicion-less bail condition imposed on him. This Court has made the constitutionality dependent on the purpose and extent of the effect of the condition:

> Therefore, the determination whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose.

Id. 561. On the one hand, a suspicion-less search condition discourages further criminal conduct and the waiver of Fourth Amendment protection to gain release seems reasonable in view of the consent search exception to Fourth Amendment protection. On the other hand, the delegation of authority acts as a general warrant, a type of search the Fourth Amendment was meant to categorically prohibit and places no restrictions on how that general warrant power may be executed by law enforcement. The First Circuit failed to account for this Due Process Clause analysis in its decision.

While this Court has endorsed preventing further criminal conduct as a legitimate government objective, the punishment standard also requires an analysis into its necessity in view of that legitimate purpose. While the Government may prevent further criminal conduct by detaining a defendant, detention was only justified by the process that accompanied the decision:

> On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.

United States v. Salerno, 481 U.S. 739, 750-51 (1987). It is the bail process that clearly cabins the difference between Ninth Circuit's approach and the First Circuit's approach. To the extent, the First Circuit's rule relies on the process, there is nothing about those imposition of bail standards that ensures suspicion-less searches are not excessive. In other words, there is nothing about unrestricted suspicion-less searches that address either Mr. Gerrish's drug addiction problem or his drug dealing problem, the condition only makes it easier for law enforcement to gain evidence

against him.

The Court of Appeals entirely disregarded this Court's requirement of the reasonableness inquiry. The Court has previously applied reasonableness inquiry to Due Process Clause limitations on bail conditions:

> The reasonableness inquiry here considers two other circumstances in which the Court has held that particularized suspicion is not categorically required: "diminished expectations of privacy [and] minimal intrusions." McArthur, 531 U.S., at 330, 121 S.Ct. 946. This is not to suggest that any search is acceptable solely because a person is in custody. Some searches, such as invasive surgery, see Winston, 470 U.S. 753, 105 S.Ct. 1611, or a search of the arrestee's home, see Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), involve either greater intrusions or higher expectations of privacy than are present in this case. In those situations, when the Court must "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable," McArthur, supra, at 331, 121 S.Ct. 946, the privacy-related concerns are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.

Maryland v. King, 569 U.S. 435, 463 (2013). The First Circuit Panel, like the District Court, refused to apply the limitations of *King* to the bail condition at issue in this case by concluding it was inapposite. The terms of King are really quite explicit and set against the back ground of *Bell* and *Salerno*. *King* is also a clear application of the excessive prong of the punishment standard. The Court of Appeals committed error when it refused to engage in the excessive analysis to punishment standard.

III. The United States Supreme Court should grant the Petition for a Writ of Certiorari to resolve the significant issues that surround this split among the circuits because there was no individualized suspicion justifying the search of Mr. Gerrish.

Under the Fourth Amendment, people are protected from unreasonable searches and seizures by probable cause. The Fourth Amendment specifically requires that a law enforcement

officer has probable cause in order to justify a search:

> Turning to the facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed 'have been talking about the World Series.' The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin.

Sibron v. New York, 392 U.S. 40, 62-63 (1968). As noted by the District Court, Mr. Gerrish relied on Sibron for the proposition communicating with the passenger of the other car whose driver was using drugs was not sufficient reasonable articulable suspicion. Here there is no evidence that Mr. Gerrish was engaged in criminal activity at the time he was approached by the police officers. At best they had evidence that someone Mr. Gerrish had spoken to was using drugs, but this suspicion did not transfer probable cause or reasonable articulable suspicion to Mr. Gerrish.

The District Court decided that there a was sufficient reasonable articulable suspicion to conduct an investigatory stop instead of analyzing this case under the probable cause framework necessary for a full-fledged arrest and search of Mr. Gerrish's vehicle. For the District Court, the First Circuit's articulation of the difference between mere propinquity and culpable propinquity was the deciding factor:

> In contrast, the cases in which courts find that probable cause exists generally involve substantially more than a momentary, random, or apparently innocent association between the defendant and the known criminal activity. For instance, in United States v. Patrick, 899 F.2d 169 (2d Cir.1990), the court upheld the search of a male defendant (Patrick) who crossed the border from Canada into New York at

about the same time as a woman (Taylor) who was found to be carrying narcotics. Id. at 170. When the two entered the Immigration Office, there were no other travellers present, and both defendants told the same unusual story: they had accidentally crossed the border by bus and were simply returning to the United States. Id. at 171. When cocaine base was found in the woman's purse, the man was also arrested. Id. at 172. Distinguishing Ybarra, the court found that the fact that the man and woman had simultaneously entered the Immigration Office at a time when no others were present and that both told the same unusual story "provided an adequate basis for the officials to reasonably believe that Patrick was not just a mere innocent traveling companion but was travelling and acting in concert with Taylor in transporting the cocaine." Id. Similarly, in United States v. Halliman, 923 F.2d 873, 881– 82 (D.C.Cir.1991), police officers suspected that a group of narcotics traffickers was living at and operating out of several rooms at the Holiday Inn. Id. at 875. Pursuant to a valid search, the officers seized a substantial amount of cocaine and arrested defendant Halliman. Id. at 876–77. Subsequently, two men entered the hotel lobby and headed for the rooms that had just been searched. The night manager informed police that the two men were "in the group" of narcotics who had been frequenting the hotel for the past month. The men stopped in front of one of the rooms in which the cocaine had been seized and contemplated the broken lock. The police then arrested them and seized the cocaine they were carrying. Id. at 877. In upholding the arrest, the court distinguished Ybarra by noting that "the police here were aware of more than a momentary, casual, or random association among the defendants, the location, and Halliman." Id. at 882. In Hillison, 733 F.2d at 697, the defendant registered at a hotel under an alias and occupied a room adjacent to two men known to be engaged in narcotics trafficking. The three men visited back and forth between the two rooms and used their automobiles interchangeably. The court found probable cause to arrest the defendant based on his close association with the drug traffickers over the course of three days, noting that "it taxes credulity to assert that [the defendant] spent as much time in [the drug-traffickers'] company ... without knowing about their drug dealing activity." Id. In United States v. Holder, 990 F.2d 1327, 1329 (D.C.Cir.1993), the court found probable cause to arrest a defendant found at the scene of a narcotics transaction. The court's analysis focused on the fact that the transaction occurred in a private apartment where the drugs were openly on display. The court distinguished Ybarra, stating that while Ybarra's "presence in a public tavern was ostensibly innocent, [the defendant's] presence in a private apartment just a few feet from a table full of cocaine can hardly be so described.... The logical inference ... was that [he] was either a party to the distribution of drugs or a customer." Id.

United States v. Martinez-Molina, 64 F.3d 719 727-28 (1995). The District Court used this explanation of culpable propinquity to find the Scarborough Police Officer's suspicion to be

particularized to all of the people detained and to lower the quantum of suspicion because it was not necessary to have probable cause to arrest Mr. Gerrish. The basis for this finding that reasonable articulable suspicion was sufficiently particularized was the vague reports of criminal activity in what is a relatively quiet suburban part of greater Portland, criminal activity in the past associated with hotels in that area, the proximity of vehicles, there arrival together, and the conversation between Mr. Gerrish and the passenger of the other vehicle. The District Court's interpretation of culpable propinquity is too broad.

The Supreme Court first articulated the need for suspicion to be particularized in Terry v. Ohio, 392 U.S. 1, 30 (1968). In Terry, the Supreme Court first recognized the standard for investigatory detentions:

> And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 27. Within the context of the brief statement in the opinion, the need for particularized suspicion is not immediately apparent. The facts of Terry also did not demonstrate a concern over what might be considered particularized suspicion: the officer's experience told him that something was wrong and his continued observations confirmed that the two people were up to something that the officer considered suspicious. On its face, the need for particularized suspicion seems to be nothing more that some person is doing something suspicious.

Some years later the Supreme Court began to understand that particularized suspicion needed additional explanation. The Supreme Court eventually held that valid searches required something more than a desire to search by law enforcement:

> Nothing in Terry can be understood to allow a generalized "cursory search for

> weapons" or indeed, any search whatever for anything but weapons. The "narrow scope" of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.

Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979) (Emphasis Added). By 1979, the Supreme Court was reigning-in law enforcement's authority to conduct investigatory searches. Even a person's proximity to a suspicious place where a search warrant was being executed by itself was not enough to legitimately search a bar patron who happened to be at the bar when the police executed a search warrant. After Ybarra, particularized had to mean something more than mere connection to some generalized suspicion.

The District Court was too quick to disregard Mr. Gerrish's innocent explanations in his assertion of mere propinquity. Long before the more recent terminology, the Supreme Court had established the true breadth of mere propinquity:

> In view of Reed's character as an informer, it is questionable whether a conspiracy is shown. But if the presence of Di Re in the car did not authorize an inference of participation in the Buttitta-Reed sale, it fails to support the inference of any felony at all There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject. Reed, the informer, certainly knew it if any part of his transaction was in Di Re's presence. But he was not called as a witness by the Government, nor shown to be unavailable, and we must assume that his testimony would not have been helpful in bringing guilty knowledge home to Di Re. An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit.

United States v. Di Re, 332 U.S. 581, 593 (1948). Analogizing the facts of Di Re to the facts in this case demonstrates the over breadth of the District Court's interpretation of culpable propinquity. Di Re upheld the Second Circuit's decision reversing the District Court's finding the search lawful, holding the search to be without probable cause and not subject to a valid arrest. Moreover, Martinez-Molina recognized the relevance of Di Re in defining culpable propinquity. The fact that Mr. Gerrish may have seen the other driver using drugs is not determinative and is counter acted by the public nature of the parking lot where they were all visible to any passersby. Even the Scarborough Police officers had a clear view. In addition, the police officers knew that Mr. Gerrish's passenger was there waiting for her room to be ready.

CONCLUSION

The Supreme Court should review the conclusion of the Court of Appeals for the First Circuit and grant this petition for writ of certiorari.

Dated at Portland, Maine this 10th day of June, 2024.

Robert C. Andrews
Attorney for Derek Gerrish
Bar Number 88418
ROBERT C. ANDREWS ESQUIRE P.C.
P.O. Box 17621
Portland, ME 04112
(207) 879-9850

APPENDIX