
BEN GRINGA,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 14-17-00425.

United States Court of Appeals
for the Fourteenth Circuit.

Argued September 19, 2016.

Decided September 5, 2017.

Robert Arthur, River City, South Texas for Ben Gringa.

Tiffany Myers and Lindsay Richards, River City, South Texas for the United States of America.

Before Chief Judge HOPE, Judges HARRINGTON and HOOTEN.

Chief Judge HOPE delivered the opinion for the court.

Appellant, Ben Gringa, has appealed from a conviction in the United States District Court for the District of South Texas for knowingly possessing a controlled substance with intent to

distribute in violation of 21 U.S.C. § 841(a)(1). On appeal, he asks that this Court find that certain evidence obtained by the Government, through two of its Drug Enforcement Agency ("DEA") agents on the night of July 15, 2015, should have been excluded at trial as fruit of searches in violation of the Fourth Amendment. Gringa has provided two reasons for the exclusion of the evidence obtained: first, that the initial warrantless search of his home constituted an unlawful "protective sweep;" and second, that a law enforcement agent's specialized knowledge cannot be used to determine whether a container is in plain view and the agent believes that he knows with certainty that its contents are contraband.

We affirm the conviction.

Background

In 2014, the State of South Texas legalized the use, possession and distribution of marijuana. Marijuana, however, remains largely illegal under federal law, subject to broad regulations and prohibitions under the Controlled Substance Act. *See* 21 U.S.C. § 812; *id.* at § 841. Apparently frustrated with South Texas' contravention of federal policy, the federal government dispatched special DEA task forces to the state in late 2014. The DEA's efforts were particularly focused on the state capital, River City, which has a thriving criminal underground focused on marijuana distribution.

The DEA agents in South Texas operate in a manner similar to local police departments (prior to legalization under state law) in their attempts to combat drug distribution and use of marijuana. Their operation consists mainly of teams of two DEA agents who patrol areas suspected to have high levels of drug activity—more than five incidents of drug activity in a community of 5000 people—based on information collected by the DEA about past drug arrests.

Arendelle is a state-funded housing project in River City known as a key hub in the marijuana trade of the city and state. Analyzing reports of past incidents, the DEA classified Arendelle as one of their top-priority locations and assigned patrol and investigation duties to a highly experienced agent, Special Agent Dominique Hinson and her trainee, Special Agent Christian Dewhurst.

Hinson has been a special agent for the DEA for twenty-one years. Viewed by others as an "old timer," she has consistently provided high-quality work, resulting in over 2000 arrests and 1850 convictions. Superiors handpicked her to help train new agents, and she has done this for the past five years. On the other hand, Dewhurst is a relative newcomer to the DEA, having served previously as an administrative assistant to a local police commissioner (performing only "desk work"). In light of his inexperience in the field, he was paired with Hinson, who was supposed to train him and show him the proper way to perform his duties.

On the night of July 15, 2015, Hinson and Dewhurst were out patrolling the southwest sector of Arendelle. For the first two hours of their shift, there were no incidents or suspicious activity. When Hinson and Dewhurst got to the end of Frozen Lane—the outer boundary of their patrol route, two blocks away from Arendelle proper—and were about to turn around, however, Hinson noticed a two-story residence with a door that appeared to be off its hinges. When they stopped their vehicle to look more closely, the Special Agents could see that the inner glass door to the house was shattered.

Suspecting a burglary was in progress or had recently been committed, the Special Agents cautiously approached the front door and noticed a red liquid. which they suspected at the time to be blood, on it. The Special Agents knocked on the doorframe and shouted inside they were federal agents. Hearing no response, the Special Agents drew their guns and entered the premises, which was unlit. The Special Agents made their way through the entry hall and came upon the owner of the residence, Ben Gringa, unconscious on the living room floor. A television was on, but muted, on a table next to his body.

Dewhurst was able, with some effort, to wake Gringa. He was initially incoherent but became more responsive as Hinson questioned him. During this questioning, Dewhurst posted himself at the doorway between the living room and hallway—the only exit from or entrance to the living room. He also, under instruction from Hinson, requested that another agent come to the scene for backup.

Gringa informed Hinson that he was the owner of the residence and provided his driver's license as proof. He was evasive when asked directly what had happened to him but denied there were any other persons in the house. Hinson believed Gringa was acting particularly strangely, continually looking nervously, over Hinson's shoulder, toward the hallway, and repeatedly asserting, no matter the question, that he was fine and that no one else was in the house with him. Hinson suspected that Gringa may have been attacked, that his attackers were still present, and that he was withholding information out of fear. Hinson also considered the possibility that there was something somewhere else in the house that Gringa did not want federal agents to see. Hinson's initial suspicions were bolstered when Dewhurst alerted her to intermittent noises coming from down the hall. Hinson listened and also heard the noises, which she described, at trial, as like those of someone trying (unsuccessfully) to move quietly.

When questioned about the noises, Gringa repeated that nobody else was in his home. Special Agent Zaid Husain arrived on the scene as backup and remained in the living room with Gringa while the Special Agents embarked on a limited search to make sure that there were no threats to their safety further down the hallway. Their goal was to ensure that there were no hidden and potentially dangerous persons who might otherwise have an opportunity to catch them by surprise. At this time, Gringa was not under arrest, nor did the Special Agents possess probable cause to arrest him, for any crime.

Proceeding down the hall, the Special Agents checked and cleared the first room they came upon, including its closet. While approaching the second room, they heard a sound coming from inside. Upon opening the door, a female Golden Retriever, the source of the noise, came running out into the hallway. The Special Agents opened the door to the second room's closet, large enough to conceal an individual. No one was inside. Hinson, however, noticed what appeared to be a shaving cream canister in plain view on the shelf, bearing the logo and company name "Barbasal."

Hinson believed the canister to be a type of concealment device with a secret compartment, and the name "Barbasal" to be a fake company name, based on her experience of seeing such canisters used countless times in the past to hide illicit contraband.

Thinking this would be a good time to teach her young partner a lesson, Hinson asked Dewhurst if he noticed anything about the inside of the closet. Upon a cursory glance, Dewhurst said, "Looks clear to me, nothing is inside." Hinson then grabbed the canister and pressed a button on the bottom of it. The top of the canister opened immediately and revealed a hidden compartment inside that was just big enough to hold five small bags of what appeared to be marijuana. Hinson had Dewhurst perform a preliminary field test, which indicated the presence of tetrahydrocannabinol, the chemical compound found in the cannabis plant,

Taking the evidence, the Special Agents moved back downstairs and approached Gringa, who told the Special Agents that the bedroom was his, but denied knowing who the canister belonged to. Gringa was arrested. After the arrest, the Special Agents obtained a warrant to search the remainder of the premises, during which search they discovered various marijuana paraphernalia in amounts significant enough to suggest that Gringa was involved in marijuana distribution.

On November 2, 2015, a grand jury issued two charges against Gringa: knowingly or intentionally possessing with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and conspiring to knowingly or intentionally possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846.

Trial began on January 4, 2016, in the United States District Court for the District of South Texas. The district court judge summarily denied Gringa's motion to exclude all evidence as the fruit of an unconstitutional search. After a two-day jury trial, Gringa was convicted of one count of knowingly possessing a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He was sentenced to incarceration in the federal prison system for sixty months.

Protective Sweep

The first issue presented is whether the initial warrantless search of Gringa's home, characterized by the Government as a "protective sweep," was constitutionally permissible. 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. Searches conducted without warrants supported by probable cause are presumptively unreasonable and, therefore, presumptively unconstitutional. *Kyllo v. United States*, 533 U.S. 27, 32 (2001). The Supreme Court, however, has identified a number of "exceptions to presumptive unreasonableness." *Groh v. Ramirez*, 540 U.S. 551, 572 (2004).

One such exception is the "protective sweeps" exception, as defined and authorized by the Supreme Court in *Maryland v. Buie*, 494 U.S. 325 (1990). The protective sweep doctrine, as articulated in *Buie*, permits law enforcement officers to conduct "a quick and limited search of premises, incident to arrest and conducted to protect the safety of police officers or others," if the officers possess a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger." *Buie*, 494 U.S. at 327, 337.

Gringa argues that *Buie* expressly authorizes protective sweeps only as searches "incident to arrest" and that because this search was not incident to arrest, it is not permissible under *Buie*.

As an initial matter, we note that Gringa is correct in categorizing the search as not executed incident to arrest, a fact the Government acknowledges. A search incident to arrest generally occurs as or just after the suspect is being put in cuffs. *See, e.g., Chimel v. California*, 395 U.S. 752, 762–63 (1969) (permitting a search of the arrestee's person and the area immediately around him as he is being arrested); *United States v. Rabinowitz*, 339 U.S. 56, 56, 59 (1950) (permitting a much broader search, now disallowed, again as the suspect is being placed into custody).

A search may also be incident to arrest if it is made before an actual arrest but after probable cause to arrest has developed. *See, e.g., United States v. Lawlor*, 406 F.3d 37, 41 n.4 (1st Cir. 2005) (upholding a protective sweep as incident to arrest under *Buie* because the arresting officers had probable cause to arrest before the search). Gringa was not under arrest at the time the search was made. Nor does the Government contend probable cause to arrest existed at the time, and the record does not support such a finding.

Our sister circuits are split as to the constitutionality of "protective sweeps" that are not incident to arrest. The majority of the appellate courts to consider the issue have held such searches constitutional. *See United States v. Martins*, 413 F.3d 139 (1st Cir. 2005); *United States v. Miller*, 430 F.3d 93 (2d Cir. 2005); *Leaf v. Shelnutt*, 400 F.3d 1070 (7th Cir. 2005); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004) (en banc); *United States v. Taylor*, 248 F.3d 506 (6th Cir. 2001); *United States v. Patrick*, 959 F.2d 991 (D.C. Cir. 1992). We agree with the conclusion of these circuits that *Buie* is not to be narrowly restricted to the incident-to-arrest context.

We reach this opinion by focusing on *Buie*'s underlying rationale. The protective sweep warrant exception introduced in *Buie* was meant to protect the "interest of [law enforcement] officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." 494 U.S. at 333.

The strong government interest in protecting its faithful officers from preventable harm was famously brought to the forefront in the seminal *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* authorized warrantless "stop-and-frisks" to enable police on the street to more safely perform a dangerous job, saving them the impractical work of getting a magistrate's approval every time they spotted a suspicious character. *Id.* at 23, 27. The Court recognized, as do we, the intrusion on personal privacy that a frisk for weapons entails, but ultimately determined that, on balance, the need for officers to keep themselves safe outweighed that intrusion. *Id.* at 26–27.

To ensure no more imposition than necessary on the public's Fourth Amendment right to be free from unreasonable searches and seizures, the Court mandated that an officer may conduct a *Terry* frisk only when "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" because he is "dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27. *Terry*, by its terms, applies only to searches made prior to and without probable cause for arrest.

Buie applied the *Terry* balancing test

to a protective sweep of a home, specifically in the context of an incident-to-arrest situation. The Fifth Circuit Court of Appeals has interpreted *Buie*, we believe correctly, as emphasizing the fact of arrest only "because the arrest exposed the officers to danger." *Gould*, 364 F.3d at 581 (internal citation omitted). That court went on to state that "*Buie* gives no indication that circumstances other than arrest which expose police officers to a comparable degree of danger could not also justify a similar protective response." *Id.*

In *Buie*, the fact of an arrest functioned as one of several indicia of danger—perhaps even the most important of them. But it was the danger to the police considered as a whole that provided the *Buie* court with a reason to uphold the sweep as reasonable. As the Second Circuit Court of Appeals observed, "[t]he Court's paramount concern in Buie was not why the officers were present in the home, but rather, why the officers might fear for their safety and what they could do to protect themselves.

Buie's logic therefore applies with equal force when officers are lawfully present in a home" for a reason other than to make an arrest, and when probable cause to arrest is not present. *Miller*, 430 F.3d at 98–99. On this reading, it seems completely arbitrary to treat two equally perilous situations differently merely because in one the officers have made or are prepared to make an arrest.

Gringa's suggestion we employ a bright-line rule that makes in-home arrest situations per se more dangerous than non-arrest situations is untenable. The Government points out the *Buie* Court also noted "an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.'

An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Id.* The dangerousness of in-home encounters is present whether or not the reason for the officer's presence in the home is to make an arrest.

Here, we think the threat to the officer's safety was great enough that their interest in protecting themselves far outweighs the minimally invasive nature of the protective sweep.

The sweep was designed only to search the places that may have contained an individual that threatened the safety of the officers. This comports with *Buie*'s requirement that a protective sweep may be made only when an officer has an objectively reasonable belief that there is a danger of hidden assailants and he may then only search areas where assailants may actually be for only as long as necessary to ensure that the house is safe, and those only cursorily. *Id.* at 334–36. These protections are more than adequate, especially given that the officers in question must be lawfully on the premises to begin with.

Buie establishes that the legitimate and weighty interest in officer safety is enough to permit a carefully circumscribed search of a home for a carefully circumscribed purpose. That purpose is the protection of law enforcement officers, and must be given effect when it is needed most, regardless of whether the officers are in possession of an arrest warrant.

Accordingly, we join the majority of our sister circuits in holding that *Buie* protective sweeps may be executed even if not incident to arrest, as long as *Buie*'s other conditions are met.

The initial search of Gringa's house, including the search of the bedroom where the canister was observed, was therefore

reasonable and constitutional.

Plain View

The second issue presented here is whether a container in plain view may be searched if its contents are known to constitute a crime. Implicit in this question is whether a law enforcement agent's personal experience and knowledge can aid in this determination. The Supreme Court has held that a warrant is required for the search of property and that this is the "very essence" of liberty. *Gould v. United States*, 225 U.S. 132, 147 (1925). However, we find that here, the officer's search of the container falls into the plain view exception to the warrant requirement. This requires the law enforcement agent "had a prior justification for an intrusion in the course of which he came . . . across a piece of evidence incriminating the accused," and the evidence in plain view must constitute a crime. *See Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971).

The Special Agents had prior lawful justification for access to the closet, which is where they came across the incriminating container. As such, if the marijuana were not housed in the container, Gringa would have no argument. The difficulty here is that Gringa's property was in the form of a canister that concealed its contents. Therefore, to find that the Special Agents were justified in searching and seizing the property under the plain view exception, the officers must have known beyond a doubt that contraband would be found within. *See Katz v. United States*, 389 U.S. 347 (1967).

This Court holds that because the contents were known to constitute a crime, it was lawful for the officers to search and seize Gringa's canister without first obtaining a warrant by extending the plain-view doctrine via the single-purpose exception.

In making this decision, we again look to our sister circuits. A single-purpose exception has been found to exist, further extending the plain-view doctrine, where if a container has only one known purpose, and that purpose is of a criminal nature, then the contents are considered within plain view and thus searchable without a warrant. The Eight Circuit Court of Appeals has held that if a container is "readily identifiable" and thus serves only one possible purpose (that purpose being criminal), then it can lawfully be searched without a warrant. *United States v. Banks*, 514 F.3d 769, 774-75 (8th Cir. 2008). Furthermore, the First Circuit Court of Appeals has held that a container can betray its content's legality so as to indicate clearly what is inside. *See United States v. Meada*, 408 F.3d 14 (1st Cir. 2005). Finally, as the Supreme Court held in *Payton v. New York*, 445 U.S. 573, 587 (1980), property in plain view that is searched and seized is "presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."

Applying similar reasoning, it is clear that Hinson was able to recognize Gringa's canister for what it was, a device used to conceal illegal drugs.Hinson testified that every time he had previously come into contact with this exact type of container, it had contained illicit substances, and therefore he was certain, in light of the circumstances, that this canister too contained drugs. Therefore, because the canister was in the plain view of the Special Agents, the single purpose for which it was used betrayed its contents, and the contents were known to a certainty to be criminal, the single purpose exception extends the plain view doctrine to cover a warrantless search and subsequent seizure of Gringa's container and its contents.

Gringa argues that the Supreme Court has upheld the sanctity of privacy in terms of safes and containers, when it held that "by placing personal effects inside a double-locked footlocker, defendants manifested an expectation that the contents would remain free from public examination." *United States v. Chadwick*, 433 U.S. 1, 9 (1977). The key distinction here, however, is that Special Agent Hinson, as evidenced by her testimony, was absolutely certain that the contents of the canister were illicit. Despite the seemingly innocuous nature of the canister as a normal shaving cream canister, Special Agent Hinson knew that the brand displayed was fake. Based on her personal experience, she knew that it was a device designed to contain illicit substances and drugs.

Gringa argues that if a container is searchable without a warrant, the warrant exception is effectively swallowed. *See Robbins v. California*, 453 U.S. 420 (1981) (holding that, as a general rule, a closed, opaque container may not be opened without a warrant, even if found during the course of lawful search). Although this is similar to a concern raised by the Ninth Circuit Court of Appeals in *United States v. Gust*, 405 F.3d 797 (9th Cir. 2005), we believe that this is not an issue because warrants are still required when the contents of a container are not completely certain to constitute a crime or be contraband. The only time a warrantless search and seizure may be used for something that is not in plain view (such as the case involving a closed container) is when the agents have reason to believe beyond a doubt that the contents constitute a crime.

Here, the Government has sufficiently proven that Hinson knew the contents of the canister constituted a crime. She has seen such canisters in the past with the fake label "Barbasal" and in each such circumstance, illegal drugs were found inside. Because the canister was in plain view, and its contents were known to a certainty to be illicit, Agents Hinson and Dewhurst were lawfully authorized to search and seize the container.

Conclusion

The judgment of the United States District Court for the District of South Texas is affirmed.

Judge HARRINGTON, dissenting.

I disagree with both aspects of the majority's decision.

Protective Sweep

The language of *Buie* is clear in permitting protective sweeps only incident to arrest. The very first sentence of the opinion defines a "protective sweep" as "a quick and limited search of premises, incident to arrest." *Buie*, 494 U.S. at 327 (emphasis added). There can therefore be no "protective sweep" that is not incident to arrest.

The Tenth Circuit Court of Appeals "briskly disposed" with a claim that protective sweeps were permissible in non-arrest situations, simply pointing to the definition in the "first sentence of *Buie*." *United States v. Davis*, 290 F.3d 1239, 1242 n.4 (10th Cir. 2002) (pointing out that "no one was under arrest, and at that time, there was no probable cause to arrest anyone"). That the search occurred incident to arrest is a necessary component of the protective sweep exception to the Fourth Amendment's warrant requirement. *See United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000);

see also Chimel v. California, 395 U.S. 752, 762B63 (1969) (permitting as reasonable under the "'search incident to arrest' principle" the search of an arrestee's person and the area within his immediate control Awhen an arrest is made"); *Preston v. United States*, 376 U.S. 364, 367 (1968) (describing searches "incidental to a lawful arrest" as those "contemporaneous" to the arrest); *Trupiano v. United States*, 334 U.S. 699, 708 (1948) ("A search or seizure without a warrant as an incident to a lawful arrest . . . grows out of the inherent necessities of the situation at the time of arrest.").

Additionally, courts have construed "incident to arrest" in the protective sweep context to embrace searches made prior to an actual arrest but subsequent to a probable cause for arrest. *See United States v. Torres-Castro*, 470 F.3d 992, 997-98 (10th Cir. 2006) (a search may be "incident to arrest" if there is a "legitimate basis for arrest prior to the search" and an arrest quickly follows); *United States v. Lawlor*, 406 F.3d 37, 41 n.4 (1st Cir. 2005) (a search may be "incident to arrest" if probable cause to arrest existed before the search).

The conclusion that incidence to arrest is a necessary condition of a protective sweep, not merely a sufficient one, is bolstered by the Court's language throughout *Buie*. The Court was emphatic in its repeated use of Aarrest." *See, e.g.*, *Buie*, 494 U.S. at 334 ("[T]he arresting officers are permitted . . . to take reasonable steps to ensure their safety after, and while making, the arrest." (emphasis added)). The Court held that "incident to arrest" officers may, as a matter of course, look in closets "immediately joining the place of arrest," and may look elsewhere in the house if there is danger to those "on the arrest scene." *Id.* The sweep is "aimed at protecting the arresting officers" and can last "no longer than it takes to complete the arrest." *Id.* at 335-36.

Gringa was not under arrest at the time of the search. Nor does the Government claim that Special Agents Hinson and Dewhurst had probable cause to arrest Gringa prior to the search.

Indeed, any such claim would fail, as no grounds for probable cause existed before the officers' eventual discovery of contraband. While "[t]he probable-cause standard is incapable of precise definition," *Maryland v. Pringle*, 540 U.S. 366, 371 (2003), the basic question is whether "the facts and circumstances within [officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)) (internal quotation marks omitted). To arrest a particular person, probable cause must be "particularized with respect to that person." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

A protective sweep is unreasonable without the particular dangerousness of arrest situations. *Buie*'s rationale, as well its language, compels the conclusion that protective sweeps are allowed only incident to arrest. Because arrest situations are more dangerous for police than non-arrest situations within the home, *Buie* should not be extended to embrace the latter. The essential motivation for the Court's decision in *Buie* was "the need for law enforcement officers to protect themselves and other prospective victims of violence." *Buie*, 494 U.S. 325 at 332 (quoting *Terry v. Ohio*, 392 U.S. 1, 24 (1968)). The government's interest in protecting officers was the rationale underlying the Court's previous

decisions in *Terry*, 392 U.S. 1, and *Michigan v. Long*, 463 U.S. 1032 (1983), which permitted officers with a reasonable suspicion of danger to perform narrowly circumscribed warrantless searches of individuals and automobiles in non-arrest situations.

Plain View

The rationale for the plain view doctrine is that the owner of property in plain view of others has a low expectation of its privacy. The Supreme Court qualified the plain view doctrine, holding that if an object's "incriminating character" is not immediately apparent "without conducting some further search of the object, the 'plain view' doctrine cannot justify its search and subsequent seizure." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

Under the plain view doctrine, the Special Agents violated Gringa's privacy interests in searching and seizing the sealed contents of his canister. There were no exigent circumstances that made their first obtaining a warrant impracticable. Therefore, this Court should find that the contents were unconstitutionally searched and seized, and they should be excluded as inadmissible evidence.

A law enforcement officer may search and seize an object without a warrant only if he has a legal basis for being in the object's location, the object is in plain view, the object readily appears to be associated with criminal activity, and there are no overwhelming privacy interests at play. The plain view doctrine thus balances the owner's privacy interest with the law enforcement officer's interest in seizing contraband if it is in "plain view."

The plain view doctrine creates a narrow exception to the general rule that an officer must secure a warrant to conduct a search. It is applicable only in situations where a law enforcement agent, lawfully authorized to be in a location, comes upon something in plain view that he believes, with a high degree of certainty, to be illegal. *See Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971). The plain view doctrine was further articulated by the Supreme Court, which in *Arizona v. Hicks*, 480 U.S. 321, 325 (1987), held that "if an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy."

Even if the canister itself had been in the Special Agents' plain view when they lawfully entered Gringa's residence, the contents of the canister themselves were not visible to them and thus could not be searched and later seized without the Special Agents' first obtaining a warrant.

The marijuana contained within the canister was not visible from the outside, and nothing in the plain view of the Special Agents definitively disclosed the criminality of the canister's contents. Accordingly, because the criminal nature of the canister's contents were not within the plain view of the Special Agents, the search and subsequent seizure of the canister's contents violated Gringa's "possessory interest." *See Maryland v. Macon*, 472 U.S. 463, 469 (1985)(holding that an illegal search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed") (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

The "single-purpose container" exception has been interpreted by some circuit courts as an outgrowth of the Supreme Court's holding in *Arkansas v. Sanders*, 442 U.S. 753, 801 (1979) (excluding from evidence marijuana found within a closed suitcase because nothing

criminal was plainly apparent from the outside of its contents, and no warrant was first sought).

The shaving cream canister was completely solid, with no indication that it contained contraband or anything of a criminal nature, and thus did not fall within the "single purpose container" corollary to the plain view doctrine. In *United States v. Gust*, 405 F.3d 797, 801 (9th Cir. 2005), the Ninth Circuit Court of Appeals said that the warrant requirement would be "swallowed" if containers were permitted to be searched based on the circumstances in which they were found (lending credence to a "single-purpose"), holding that officers were not justified in searching gun cases that seemingly served only the single purpose of containing guns. Similarly, in *United States v. Bonitz*, 826 F.2d 954 (10th Cir. 1987), the Tenth Circuit Court of Appeals did not allow the warrantless search of plastic envelopes located directly next to an illegally owned automatic rifle, because their criminality was not facially or readily apparent; the envelopes were later discovered to contain "sear kits" that are used to convert rifles into automatic weapons, a federal offense.

Here, the container searched by the Special Agents was not transparent and was not open. Nothing about it indicated that its use was solely criminal in nature, nor did it have any distinctive feature that would allow one to draw such a conclusion. To view its contents, a special button had to be pressed. As the Eighth and Ninth Circuit courts have held, such a container cannot constitutionally be searched without first applying for, and then obtaining, a warrant. *See United States v. Banks*, 514 F.3d 769, 773 (8th Cir. 2008); *United States v. Miller*, 769 F.2d 554, 561 (9th Cir. 1985).

The Special Agents could not infer the contents of the container with any reasonable degree of certainty. There was no reason the Special Agents could not have first obtained a legitimate warrant and no evidence suggests an independent basis or inevitable discovery of the canister's contents.

As to what I believe this case is really about, I do not believe specialized knowledge of experienced law enforcement Agents should be used in analyzing the purpose of a container. Circuit courts have split as to the appropriate standard for determining if a container is subject to the "single-purpose doctrine": namely, whether the criminal nature of its contents need be readily apparent to a reasonable person, or whether the subjective assessment of an individual with specialized knowledge would suffice.

On this issue, the First Circuit Court of Appeals, in *United States v. Meada*, 408 F.3d 14 (1st Cir. 2005), held that the contents of a container should be assessed according to Ageneral social norms" of an ordinary layperson, and not that of an experienced law enforcement agent.

Similarly, the Ninth Circuit Court of Appeals held that law enforcement agents should not be allowed to search the contents of a container merely because the circumstances in which it was found led them to assume that it contained illegal items. *See Miller*, 769 F.2d 554 (disallowing a warrantless search of a wrapped package spilling out a white powder, despite its giving rise to the direct inference that it contained illegal drugs); *Gust*, 405 F.3d at 797.

Additionally, the Tenth Circuit Court of Appeals has held that just because a case could be recognized as a gun case, permissibility of a warrantless search would be denied because it could Aequally [be] suspected of carrying a violin or something like that." *Bonitz*, 826 F.2d at

955.

Gringa's container appeared to be a normal canister of shaving cream; an ordinary person would have thought the container was nothing more than that. It was only because of Agent Hinson's previous twenty-one years of experience and advanced level of training that she was able to surmise a guess as to what might inside. As such, this Court should not allow external experience and specialized knowledge to be utilized in determining the legality of a container's unseen contents. The plain view exception should apply only if the criminality of the container's contents are readily apparent on its face, and not guessed at without certainty.

Gringa's canister gave no indication that its contents were directly criminal, and therefore a warrant was required for the Special Agents to search it. Applying the Tenth's Circuit court's reasoning, just because Gringa's canister could have contained illegal substances, does not mean that it definitely did. *Bonitz*, 826 F.2d at 955.

Furthermore, direct knowledge of the illegality of the container's contents was not present here. If the circumstances in *Miller*, where the white powder contained in a package actually spilled out, were not strong enough to indicate with certainty that illegal substances were involved, then certainly the circumstances of the instant case, where the contents of Gringa's canister remained concealed the entire time and there was no indication, other than the guess of one of the Special Agents, that the canister contained drugs, should not be strong enough.

The requisite level of certainty cannot be found because there were multiple uses for the container. Several circuit courts have held that if a container has only one purpose, and that purpose gives rise to a claim of illegality, its contents may be considered to be in plain view. *See United States v. Banks*, 514 F.3d 769, 774 (8th Cir. 2008) (holding that a plastic case shaped like a rifle and with a stamped label indicating it contained a firearm gave rise to only one conclusion). At best, the Special Agents were able to deduce that there was a possibility that the container held something that Gringa did not want easily viewable to those entering the room. There was nothing about the circumstances that indicated that the container held anything illicit. It could just as easily have been holding money or other valuables. The mere fact that the canister had a secret compartment does not automatically denote illegality. *See Miller*, 769 F.2d at 554 (holding that the search of a fiberglass container with a small inner chamber that had fallen out of a suitcase was unconstitutional because the container had no "distinctive" characteristics giving rise to the inevitable conclusion that what was inside was surely illicit). Similarly, the Special Agents could not have known with complete certainty that the contents of the canister were contraband; it is equally possible that the container could have been put to legal uses.

For these reasons, I respectfully dissent.

Supreme Court of the United States

BEN GRINGA,	§	
	§	
Petitioner,	§	
v.	§	No. 18-311
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER

The Court sets the case for briefing and oral argument on the following issues:

1. Whether the Fourth Amendment permits law enforcement officers to conduct a protective sweep of a home without a warrant when the sweep is not incident to a lawful arrest.

2. Whether a law enforcement agent may incorporate specialized experience and knowledge in determining if a container has illegal contraband, thereby justifying a lawful warrantless search under the plain view doctrine.

Briefs are due in electronic form no later than October 6, 2018. Briefs are due in bound form no later than October 9, 2018.

An order scheduling oral argument will issue in due course.

Clerk of the Court

DATE: August 24, 2018