United States of America
First Circuit Court of Appeals

NO. 2016-2465

UNITED STATES OF AMERICA
Appellee,

v.

TODD RASBERRY
Defendant/Appellant.

APPEAL FROM FEDERAL DISTRICT COURT
DISTRICT OF MAINE

BRIEF OF DEFENDANT/APPELLANT TODD RASBERRY

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On June 15, 2016 Todd Rasberry was found guilty after pleading guilty, in the United States District Court for the District of Maine, to possession with intent to distribute heroin, contrary to 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 841(b)(1)(C).

On December 2, 2016, the court (*Jon D. Levy*, J.), sentenced Mr. Rasberry to 138 months committed, plus three years of supervised release.

A notice of appeal was filed on December 3, 2016.

STATEMENT OF ISSUES

I. Did agents transform Mr. Rasberry's detention from a *Terry* stop into an arrest lacking probable cause, when they held Mr. Rasberry beyond the time necessary to dispel danger?

II. Was a second search, into Mr. Rasberry's underwear, conducted beyond the agents' authority to dispel danger, in that there was no probable cause for the search, and anything hidden there was inaccessible as a weapon?

III. Was the information gathered by Agent Wolf's feel into Mr. Rasberry's underwear insufficient to provide probable cause to arrest, in that the agent did not and could not immediately discern the bulge was contraband?

IV. Were agents effectively trespassing when they seized an item from Mr. Rasberry's underwear, where they lacked lawful access?

STATEMENT OF FACTS

I. Elusive Mr. Rasberry

As a DEA agent for 20 years assigned to the Portland, Maine office, Paul Wolf's job was to "investigate narcotics offenses, … drug trafficking, money laundering and drug-related offenses." *Suppr.Hrg*.[1] at 9; WOLF AFFIDAVIT ¶1 (July 16, 2015), *Appx*. at 3. He says he had been investigating the defendant, Todd Rasberry, for "between 3 and 4 years." *Suppr.Hrg* at 10, 73.

Despite the DEA's opinion that Mr. Rasberry "was overseeing an organization … in the Portland … area distributing heroin and cocaine," which employed "a vast network of people," *Suppr.Hrg* at 10, 114, the DEA had been unsuccessful in attaining an arrest warrant against him. *Suppr.Hrg* at 37. Agent Wolf believed this was because Mr. Rasberry was "very elusive," "very accomplished at his job and he uses layers of people between him and us." *Suppr.Hrg* at 114, 37. Agent Wolf said he had "made several controlled purchases from what I believed was his organization or from him, but at least one layer removed from" Mr. Rasberry. *Suppr.Hrg* at 37-38, 73.

Although the DEA did not produce details of its investigation stretching back three or four years to 2012 or 2011, agents encountered Mr. Rasberry several times.

In December 2014, seven months before the events at issue here, the DEA found

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[1]Following the defendant's motion to suppress, on October 15, 2015 the Maine Federal District Court (*Jon D. Levy*, J.) held a suppression hearing, at which four agents and officers testified. WITNESS LIST (Oct. 15, 2015), *Appx*. at 42. The transcript of that hearing is cited herein as "*Suppr.Hrg.*" without repeated reference to its date, and is included in the appendix. Other transcripts referenced herein include the date of hearing in their citation, but are not included in the appendix.

Mr. Rasberry in a Portland-area motel room with $3,870 in his pocket, but could not connect him to drugs or weapons found at the scene. MAINE DEA INVESTIGATIVE REPORT (Nov. 26, 2014), Gov't Exh. 7, *Sealed Appx*. at 217.[2] Stemming from that incident, the State of Maine was able to convict Mr. Rasberry for misstating his identity; he was sentenced to 30 days. STATE OF MAINE CRIMINAL DOCKET RECORD (Nov. 24, 2014), Gov't Exh. 8, *Sealed Appx*. at 243; STATE OF MAINE JUDGMENT AND COMMITMENT (Feb. 20, 2015), Gov't Exh. 19, *Sealed Appx*. at 248; *Sentencing Hrg.* (Dec. 2, 2016) at 12.

In April 2015, three months before the events here, a drug addict gave agents a statement naming Mr. Rasberry as the addict's regular source of personal-use quantities of drugs. REPORT OF INVESTIGATION (May 26, 2015), Gov't Exh. 12, *Sealed Appx*. at 230; *see also* GRAND JURY TESTIMONY OF [UNNAMED WITNESS] (Oct. 8, 2015), *Sealed Appx*. at 255. In May 2015, two months before the events here, the police busted up an "unwanted party" at an otherwise vacant property, but Mr. Rasberry left the gathering before they were able to question him. SOUTH PORTLAND POLICE INCIDENT REPORT (May 11, 2015), Gov't Exh. 6, *Sealed Appx*. at 225.

[2]The sealed documents referenced herein, and contained in a sealed appendix hereto, were offered by the government at the sentencing phase of the prosecution, but were not made available to the court at the time of the suppression hearing. They nonetheless largely confirm Agents Wolf's rendition of the facts.

II. Feds Get a Lead, Find Mr. Rasberry, Are Sure They Have Their Man

Agent Wolf believed one Julie Wilson participated in delivery of drugs in association with Mr. Rasberry. On July 15, Agent Wolf was surveilling her, thought she was on such an errand, and approached her. Ms. Wilson told Agent Wolf that Mr. Rasberry was currently in Ms. Wilson's motel room – to which she supplied a key and gave consent to search – and that he would be in possession of contraband. *Suppr.Hrg* at 10-15, 16-18, 29, 120, 140; WOLF AFFIDAVIT ¶¶ 4, 6, 9; REPORT OF DRUG PROPERTY SEIZED (July 21, 2015), Gov't Exh. 3B, *Sealed Appx*. at 239.

Agent Wolf hurriedly gathered three colleagues, to whom he gave a briefing of just "a minute or two." *Suppr.Hrg* at 98-99. Together they drove to the motel room, the entrance of which was directly from the street, and, three guns drawn, *Suppr.Hrg* at 26, 39, 42-45, 118-19, confronted a surprised but cooperative Mr. Rasberry, who was attired in a tank top, cargo shorts, and gym shoes. The police testified that they did not have probable cause to arrest Mr. Rasberry, and that their mission was "[t]o find narcotics." *Suppr.Hrg* at 25, 38, 140; WOLF AFFIDAVIT ¶ 15.

Upon entry, Mr. Rasberry was immediately handcuffed by one of the officers, *Suppr.Hrg* at 26-27, 45-47, 86, 119, and told he was "being detained," and not free to leave. *Suppr.Hrg* at 29, 52. When the officer first put handcuffs on Mr. Rasberry, he "frisked the center of his back … to check areas that were readily accessible to him while he was still in handcuffs with his hands behind his back," finding a bandanna and keys, but did not check his front pockets, groin, ankles, or shoes. *Suppr.Hrg* at 88-89, 102-03,

110. One of the officers stood adjacent to and maintained physical control of Mr. Rasberry for the entire incident. *Suppr.Hrg* at 90, 104.

The officers explained that they entered with guns drawn and immediately neutralized Mr. Rasberry with handcuffs because they had prior information that Mr. Rasberry might be armed, they needed to perform a safety sweep of the room, and the room itself was a confined space. *Suppr.Hrg* at 20-22, 25, 39, 56-57, 75, 99, 100, 104, 116. The officers determined within"5 to 10 seconds" that Mr. Rasberry was alone. *Suppr.Hrg* at 46.

While Mr. Rasberry was detained, handcuffed, and put in the physical guard of one of the officers, the other agents first had a meeting to "come up with a plan on how we're going to search, what our next steps are." *Suppr.Hrg* at 120. They then searched the room, looking for "[d]rugs, contraband, anything illegal." *Suppr.Hrg* at 87, 129. Although the space was "not a very big hotel room," *Suppr.Hrg* at 26, 82-83, they searched "[a]nywhere concealable," including in the drawers, under the mattresses, between the sheets, in the toilet, in "cracks, crevices, anywhere drugs can be hidden." *Suppr.Hrg* at 30, 52, 129-30.

The agents interrupted the search several times. Agent Wolf left the room twice: first, to move his car, fetch search equipment, and retrieve the officer who had been stationed behind the motel, *Suppr.Hrg* at 29-30, 51, 54-55, 93; and second, when a taxi arrived at the room expecting Mr. Rasberry as a fare, prompting two interviews with the cabbie. *Suppr.Hrg* at 30, 53-55, 122, 136. The second officer left twice to get search

supplies, and doff his vest. *Suppr.Hrg* at 121. The third officer left the room to call, and then call-off, a K9. *Suppr.Hrg* at 90-93. Mr. Rasberry remained handcuffed for about 25 minutes. *Suppr.Hrg* at 55, 74, 95-97, 106-07, 125, 130, 133-34; SCARBOROUGH POLICE DEPT DISPATCH LOG (July 15, 2015), Gov't Exh. 1, *Sealed Appx*. at 238; WOLF AFFIDAVIT ¶ 15. He was calm and cooperative throughout. *Suppr.Hrg* at 27, 29, 45, 86, 101-02.

In a repeat of the December 2014 incident, the search revealed nothing untoward belonging to Mr. Rasberry. *Suppr.Hrg* at 120. Although the agents did find syringes, a scale, a phone, and some baggies, which they considered evidence of drug transactions, *Suppr.Hrg* at 30-31, 122, 143-44; WOLF AFFIDAVIT ¶ 18, there were no other people in the room, and no drugs. *Suppr.Hrg* at 46, 119, 127; WOLF AFFIDAVIT ¶¶ 14, 18.

III. Rasberry is Almost Free, But For One Last Thing

Disappointed in their mission, the agents knew they had to remove the handcuffs and release Mr. Rasberry. *Suppr.Hrg* at 30, 32, 62, 87.

Although Mr. Rasberry informed Agent Wolf that he had already been frisked by the officer who had handcuffed and controlled him, Agent Wolf did not credit Mr. Rasberry's assertion, and had not observed the first frisk. *Suppr.Hrg* at 27, 48-49, 50-51, 71, 91, 107. Agent Wolf also claimed to understand that the first frisk of Mr. Rasberry had not been thorough, *Suppr.Hrg* at 33, 48-49, 108, 123, or at least that he didn't "know of any examination of his crotch." *Suppr.Hrg* at 49.

Confined in a small space, *Suppr.Hrg* at 21, feeling "uncomfortable" removing handcuffs without first checking for weapons, *Suppr.Hrg* at 32-33, 77, 91, 107, 123, and knowing that a handgun can be hidden between one's legs, Agent Wolf commenced a second frisk, including Mr. Rasberry's cargo shorts. *Suppr.Hrg* at 33. Agent Wolf considered the frisk a "safety tool, … a quest for weapons, … to determine whether or not [the detainee] ha[s] anything that can do harm to me or to the other people in the room." *Suppr.Hrg* at 32. Agent Wolf thus explained to Mr. Rasberry he was going to perform a second frisk before letting him go. *Suppr.Hrg* at 31-32.

Agent Wolf patted down Mr. Rasberry's shorts, pockets, buttocks, and "inside his groin area." *Suppr.Hrg* at 33, 91-92, 145-46. He paid attention there because "I have seen many times custom made underwear that allows for a pocket in order to hide things in." *Suppr.Hrg* at 34-45. He "felt a hard object about the size of a tennis ball, hanging low near

the inseam of the shorts," and "knew immediately it was not part of Rasberry's anatomy." WOLF AFFIDAVIT ¶ 15.

Agent Wolf did not testify he knew right away the item was contraband. Rather, he said he determined that the feel of what he found was "consistent with an amount of cocaine or heroin." *Suppr.Hrg* at 34. Likewise, he did not testify that he knew it was contraband, but only that he thought it was, because he believed "that drug traffickers will frequently hide illegal drugs in that area in order to avoid detection," *Suppr.Hrg* at 34; WOLF AFFIDAVIT ¶ 15, and because the information from Ms. Wilson was that Mr. Rasberry had drugs in his possession in the motel room.

Believing the object was drugs, Agent Wolf informed Mr. Rasberry that he was under arrest, and then conducted a search incident to the arrest. *Suppr.Hrg* at 34, 91-92, 124, 145-46. He reached into Mr. Rasberry's underwear and withdrew an outer plastic "sandwich bag that had several smaller sandwich bags inside it." *Suppr.Hrg* at 35, 146-47; WOLF AFFIDAVIT ¶ 16-17. One of the other officers, looking on, reported that Agent Wolf "reached up inside between the pants and his underwear, started removing something out of there" which was "[a] plastic packed ball, maybe about the size of a softball." *Suppr.Hrg* at 125.

The interaction embarrassed everybody. Agent Wolf testified:

> Initially, it was a little bit awkward. I was – I could feel the object down – it felt like it was in the underwear that he was wearing. … For 60 seconds or so, I was trying to access it from the rear unsuccessfully and Mr. Rasberry eventually said to me you have to take it out from the front. We switched around. I reached inside from the front and withdrew a sandwich bag that had several smaller sandwich bags inside it.

Suppr.Hrg at 35.

The interior "several smaller sandwich bags" enclosed three yet smaller "baggie corners," *Suppr.Hrg* at 16, containing brown powder the agents field-tested as heroin, and one additional baggie corner containing white powder the agents field-tested as cocaine. *Suppr.Hrg* at 35-36. Although what was field-tested as heroin was indeed about 53 grams of heroin, DEA CHEMICAL ANALYSIS REPORTS (Aug. 3, 2015), Gov't Exh. 1 & 3A, *Sealed Appx*. at 242, what was field-tested as cocaine was actually about 25 grams of quinine, a non-contraband substance. DEA CHEMICAL ANALYSIS REPORT (Aug. 3, 2015), Gov't Exh. 2 *Sealed Appx*. at 241.

The government did not produce a picture of the package as removed from Mr. Rasberry's underwear; it offered at sentencing only pictures of the innermost baggie corners. PHOTO OF BAGGIES (undated) Gov't Exh. 4, *Sealed Appx*. at 240 (#12 quinine, #13 heroin). The picture shows that each of the baggie corners seized from Mr. Rasberry (#12 and #13 in the photo[3]), have a tail. The tails comprise enough excess plastic to form a knot, and the tails and knots compete in length and bulk with the portion of the baggie corners encapsulating the powder.

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[3]Sample #11 shown in the same photo was heroin seized from Julie Wilson, not from Mr. Rasberry. *Suppr.Hrg* at 16, 35-36; *Sentencing Hrg.* at 14.

STATEMENT OF THE CASE

Mr. Rasberry filed a motion to suppress the products of Agent Wolf's search, to which the government objected. MOTION TO SUPPRESS (July 22, 2015), *Appx*. at 11; OPPOSITION TO MOTION TO SUPPRESS (Aug. 27, 2015), *Appx*. at 16; RESPONSE TO OPPOSITION TO MOTION TO SUPPRESS (Sept. 8, 2015), *Appx*. at 26; GOVERNMENT'S POST-HEARING MEMO ON MOTION TO SUPPRESS (Oct. 19, 2015), *Appx*. at 31. On October 15, 2015, the Maine Federal District Court (*Jon D. Levy*, J.) held a suppression hearing, at which Agent Wolf and the other three officers testified. WITNESS LIST (Oct. 15, 2015), *Appx*. at 42.

On November 17, 2015, the court issued an order denying suppression. ORDER ON DEFENDANT'S MOTION TO SUPPRESS (Nov. 17, 2015) at 6, *Appx*. at 34; *Addendum* at 37. The court held that the entry into the motel room was consensual, that entering with guns drawn and detention using handcuffs were justified, that the initial *Terry* detention of Mr. Rasberry was reasonable, that the circumstances and duration of the detention did not transform it into an arrest, that "valid concerns for safety" justified the first frisk, that the first frisk was cursory, and that the second frisk "was effectively the first complete frisk for weapons." *Id.* In addition, regarding the second frisk, the court held:

> During the pat-down, SA Wolf felt an object whose contour or mass makes immediately apparent its identity as contraband, and which may then be lawfully seized under the plain-feel doctrine. Alternatively, the discovery of an object in Rasberry's shorts that SA Wolf immediately identified as contraband, together with the other facts and circumstances known to him at the time, gave him a reasonable belief that Rasberry was engaged in drug possession or trafficking, and therefore probable cause to arrest Rasberry and search him incident to arrest.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS (quotations and citations omitted).

Mr. Rasberry pleaded guilty to one count of possession with intent to distribute heroin, *Change of Plea Hearing* (June 15, 2016) at 8; JUDGMENT IN A CRIMINAL CASE (Dec. 2, 2016), *Addendum* at 44,[4] preserving for appellate review the search and seizure issues herein addressed. CONDITIONAL PLEA (June 15, 2016), *Appx*. at 41; *Change of Plea Hearing* (June 15, 2016) at 5-6.

On December 2, 2016, Mr. Rasberry was sentenced to 138 months imprisonment. JUDGMENT IN A CRIMINAL CASE.

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[4]The count involving the alleged cocaine, which was actually quinine, was dismissed. A conspiracy count was also dismissed. JUDGMENT IN A CRIMINAL CASE; *Sentencing Hrg.* at 56.

SUMMARY OF ARGUMENT

Mr. Rasberry first argues that he was detained longer than the few seconds it took officers to determine there was no danger in the motel room, thus turning the detention into an unlawful arrest, and requiring suppression of items found incident to it.

After canvassing the law regarding agents' authority during citizen encounters, Mr. Rasberry proposes that the second search into his underwear was beyond that authority, and argues that items stowed there were hard to reach and did not pose the police any threat.

Regarding the "plain feel doctrine," Mr. Rasberry notes that to constitute a lawful seizure, the dangerous or contraband nature of the seized item must be immediately apparent. He points out that the seizing officer did not testify it was immediately apparent to him that the package found in Mr. Rasberry's underwear was dangerous or contraband, and that if he did, the amount of material between the officer's feel and the contraband makes the claim implausible. Mr. Rasberry also notes that the court made plain-feel findings beyond the facts offered by the agents.

Finally, Mr. Rasberry notes the third prong of the plain-feel doctrine, which requires that seizures pursuant to plain-feel can occur only when the government has lawful access to the item. He suggests that seizures from one's underwear pose privacy concerns such that the officers were trespassing when they seized the package from Mr. Rasberry's crotch.

Mr. Rasberry argues that on any one of these grounds, the seized item should have been suppressed.

ARGUMENT

I. Detention Was Transformed Into Unlawful Arrest

When three officers confronted Mr. Rasberry at the motel with guns drawn, and immediately restrained him with handcuffs, and then sent his taxi away, he was not free to leave, and was thus "seized within the meaning of the fourth amendment." *United States v. Streifel*, 781 F.2d 953, 960 (1st Cir. 1986); *Flowers v. Fiore*, 359 F.3d 24, 29 (1st Cir. 2004) ("Generally, we say that an investigatory stop constitutes a *de facto* arrest when a reasonable man in the suspect's position would have understood his situation, in the circumstances then obtaining, to be tantamount to being under arrest.") (quotations omitted).

The government does not dispute that it lacked probable cause upon entering the motel room. The question here is whether the initial *Terry* detention transformed into an arrest lacking probable cause, thus requiring suppression of the evidence ultimately found.

Detention with restraints is normally regarded as an arrest. *United States v. Acosta-Colon*, 157 F.3d 9, 15 (1st Cir. 1998) ("Handcuffs are restraints on movement normally associated with arrest. Clearly, the thought of allowing police officers to handcuff persons where probable cause to arrest is lacking is a troubling one.") (quoting *United States v. Glenna*, 878 F.2d 967, 972 (7th Cir.1989)). Confrontation by multiple officers, and entry with guns drawn is likewise indicia of an arrest. *See United States v. Taylor*, 162 F.3d 12, 21 (1st Cir. 1998); *United States v. Zapata*, 18 F.3d 971, 975 (1st Cir. 1994) (not an arrest

because officers "neither voiced threats nor brandished their weapons").

The government has the burden of proving a detention is not an arrest. *Acosta-Colon*, 157 F.3d at 14 ("[W]here a defendant challenges the constitutionality of a warrantless seizure undertaken on the basis of suspicion falling short of probable cause, the government bears the burden of proving that the seizure was sufficiently limited in its nature and duration to satisfy the conditions of a *Terry*-type investigative stop."). The determination "requires a fact-specific inquiry into whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course." *Id.* at 15.

When a detention transforms into an unlawful arrest, it becomes an arrest lacking probable cause, and any evidence seized during the arrest must be suppressed. *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

Here, officers detained Mr. Rasberry for 25 minutes. Yet they admitted they dispelled their safety concern within "5 to 10 seconds," and that they nonetheless continued their efforts – with Mr. Rasberry handcuffed and not free to leave – because they were flummoxed by the absence of the contraband they envisioned. Moreover, the officers interrupted their search to send away Mr. Rasberry's taxi; to call and cancel a K9; as well as to discuss strategy, change their clothes, and fetch evidence equipment they were sure they would need. These interruptions extended the detention beyond that necessary to effectuate the purpose of officer safety, *See Rodriguez*, 135 S. Ct. at 1609 (absent reasonable suspicion, police may not extend traffic stop to conduct dog sniff), and

confirmed Mr. Rasberry's understanding that his situation had gone beyond mere detention.

The purpose of the entry was to search the room for drugs – that is what Julie Wilson's consent provided, and that is what the agents hoped to harvest for probable cause against Mr. Rasberry. When they encountered him, the officers were justified in assuring their own safety, which took only a moment. But frustrated by the prospect of Mr. Rasberry outmaneuvering their grasp, rather than detaining him for just the time necessary to dispel danger, the agents kept him handcuffed and guarded until they could find something to pin on him. Mr. Rasberry's detention beyond the first few seconds was an arrest lacking probable cause, and accordingly unlawful. This court should reverse, and order suppression of items seized incident to the arrest.

II. Purpose of *Terry* Search is to Discover Weapons that Pose a Danger to Police

Mr. Rasberry has a constitutional right to privacy.[5] The police in this case exceeded their authority, and the package found in Mr. Rasberry's genital area should have been suppressed.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court wrote:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, … and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons *in an attempt to discover weapons which might be used to assault him*. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Terry, 392 U.S. at 30-31 (emphasis added).

The *Terry* search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26. *Sibron v. New York*, 392 U.S. 40, 65-66 (1968), decided the same day as *Terry*, held that "[t]he search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." But if "[t]he search was not reasonably limited in scope to the accomplishment

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[5]"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. CONST. amend IV.

of the only goal which might conceivably have justified its inception – the protection of the officer by disarming a potentially dangerous man" – the fruits of the search must be suppressed. *Sibron*, 392 U.S. at 65.

"The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams v. Williams*, 407 U.S. 143, 146 (1972). Evidence stemming from an unlawful search must be suppressed. *Sibron*, 392 U.S. at 40.

III. A Second Search is Allowed Only When *Terry* Purposes Are Unfulfilled by First Frisk

Once the purpose of *Terry* is fulfilled – police have determined that the suspect is not armed so they can conduct their job in safety – they cannot conduct a second frisk without re-establishing probable cause.

For example, in *People v. Cobbin*, 692 P.2d 1069 (Colo. 1984), a suspect was running away from a possible robbery. A first officer reported it on the police radio, which a second officer heard. The second officer saw the suspect, stopped, handcuffed, and frisked him, and determined he was not dangerous. The first officer then arrived, re-frisked, and found contraband. The Colorado Supreme Court suppressed the contraband, writing: "once it was ascertained that the defendant was not armed, the officers exceeded the proper scope of their search by again searching the defendant's pockets and confiscating the contents." *Cobbin*, 692 P.2d at 1072.

Likewise, in *Purnell v. State*, 832 A.2d 714 (Del. 2003), the police received a description of a person the caller believed was armed and dealing drugs. An officer confronted the suspect, noticed a bulge in his pants pocket, frisked him, and found no weapons. Then, after a short conversation, the officer re-frisked, and discovered evidence leading to contraband. The Delaware Supreme Court noted that "[t]he officers did not have authority to conduct this second search because the first search revealed that [the defendant] did not have any weapons. Thus, the second search was not for the purpose of protecting the officers." *Purnell*, 832 A.2d at 723.

Similarly, in *State v. Flowers*, 734 N.W.2d 239 (Minn. 2007), while signaling a car

to pull over for a traffic violation, officers saw the driver furtively lean from side to side. Once stopped, with the suspect on the ground and handcuffed, they conducted a first frisk of him and a flashlight look inside the car, but found nothing dangerous. From having observed the suspect furtively leaning, the police nonetheless still believed contraband was hidden in the car, and entered the car for subsequent searches, which revealed contraband. The Minnesota Supreme Court suppressed the evidence, holding that "[t]he reasonable suspicions the officers had when they searched Flowers and the vehicle had dissipated, and without more, the officers could not conduct another search of the vehicle based on the same suspicions." *Flowers*, 734 N.W.2d at 255.

Thus, when the potential danger to officers has dissipated, a second search is not authorized. A second search is permitted only when the potential lingers or reignites.

In *United States v. Osbourne*, 326 F.3d 274 (1st Cir. 2003), three officers saw a felon who they believed was involved in a gang war and probably armed, walking with another man. One of the officers frisked Osbourne, and quickly moved to the other man. A second officer re-frisked Osbourne and found a gun in his waistband. The First Circuit rejected a "categorical rule" urged by the defendant, "that a second pat-frisk is *per se* unreasonable." *Osbourne*, 326 F.3d at 278. Rather, it held that because it was "a rapidly evolving situation in which the investigating officers needed to keep tabs on not one suspect but two," *Osbourne*, 326 F.3d at 278, the second frisk was acceptable.

Although the facts of *Osbourne* did not present the issue, the court allowed that a second frisk might also be justified if "the first frisk was cursory or … the subject of the

frisk had an opportunity to arm himself in the interim." *Osbourne*, 326 F.3d at 278. Thus, in *Balentine v. State*, 71 S.W.3d 763 (Tex. Crim. App. 2002), an officer confronted a person walking briskly away from the scene of a crime, frisked him, and found no weapons. A subsequent conversation, however, revealed information which "heightened" the officer's suspicions, and which, the court held, justified a second frisk. *Balentine*, 71 S.W.3d at 770.

When the officers in Mr. Rasberry's case entered the motel room, he was cooperative, and they immediately neutralized any risk by handcuffing him, frisking him, and stationing an officer to guard him. Within a few seconds the agents established that there was no one else in the room: danger dissipated. The situation was not "rapidly evolving," and did not involve multiple suspects. Mr. Rasberry was cooperative throughout, and did nothing to re-heighten police suspicion. At the time of the second frisk, the purposes of *Terry* had been satisfied, and the officers acted unlawfully in conducting a second frisk without having re-established probable cause. *United States v. Aquino*, 674 F.3d 918, 926-27 (8th Cir. 2012) ("This was not a rapidly evolving situation where [defendant] made a furtive gesture which may have given [the officer] reason to believe his safety was threatened by a readily accessible weapon.").

Even if the first frisk was "cursory," any threat Mr. Rasberry posed had been neutralized, and the police could have respected his constitutional rights by allowing him egress from the room to the street, which, based on the arrival of the taxi, had clearly been his intent. A ruling that mere removal of handcuffs justifies a second frisk would

be both impermissibly broad, and the type of "categorical rule" rejected by this court in *Osbourne*.

Accordingly, the second frisk was in violation of Mr. Rasberry's rights, and the package found in the course of the second search should have been suppressed.

IV. Items in Mr. Rasberry's Underwear Did Not Pose Danger to Police

As noted, an officer may conduct a pat-down frisk to "discover weapons which might be used to assault him." *Terry*, 392 U.S. at 30. Thus in *Sibron v. New York*, 392 U.S. at 67, the court held that in a *Terry* frisk, it is permissible to seize "an object in [defendant's] pocket which might have been used as a weapon." But that permission does not extend to places that, although a weapon could conceivably be concealed there, pose no danger to the police.

> The need is only to find implements which could readily be grasped by the suspect during the brief face-to-face encounter, not to uncover items which are cleverly concealed and which could be brought out only with considerable delay and difficulty.

4 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(b) (5th ed.).

For example, in *State v. Woodford*, 269 N.E.2d 143 (Ohio Misc. 1971), an officer extended a *Terry* search to the inside hatband of the hat the suspect was wearing, based on his "previous experiences with prisoners secreting razor blades in their hats," and found a small amount of marijuana. *State v. Woodford*, 269 N.E.2d at 148. The court held that a "razor blade in [defendant's] hat, did not represent a reasonable ground for fear for [the officer's] 'own or other's safety' in the contemplation of *Terry*." *Id; see also State v. Crook*, 485 N.W.2d 726, 730 (Minn. App. 1992) (no basis for removing and looking into defendant's baseball cap, as it is "reasonable to conclude that a weapon such as a razor blade hidden in the cap would not present harm or danger to a police officer armed with a gun.").

In Mr. Rasberry's case, after the first frisk, the officers' *Terry* concerns had been allayed, and they could have allowed Mr. Rasberry to leave, especially when the taxi came to get him. As demonstrated by the difficulty Agent Wolf had in extricating the package from Mr. Rasberry's crotch, like the razor in the hatband, anything down his pants could have been "brought out only with considerable delay and difficulty."

Items in Mr. Rasberry's underwear did not pose a danger. Once the officers were satisfied Mr. Rasberry could not harm them with a weapon easily available, and had no other probable cause to detain him, they had a duty to release him. The search of Mr. Rasberry's underwear was therefore beyond their authority, and the product of that search should have been suppressed.

V. Contraband Was Not Discovered by Plain Feel

A. Incriminatory Nature Must Be Immediately Apparent

As noted, in *Sibron v. New York*, 392 U.S. at 67, the court held that in a *Terry* frisk, it is permissible to seize "an object in [defendant's] pocket which might have been used as a weapon." In *Michigan v. Long*, 463 U.S. 1032 (1983), the United States Supreme Court further noted that "[i]f, while conducting a legitimate *Terry* search …, the officer should … discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Michigan v. Long*, 463 U.S. at 1050. Thus plain-view evidence was admissible in *Horton v. California*, 496 U.S. 128 (1990), for example, where the police noticed what was obviously a firearm during a residential search for which they otherwise had a warrant, and in *Texas v. Brown*, 460 U.S. 730 (1983), where the police noticed what was obviously drugs during a legitimate traffic stop.

Because this "plain view" occurs when the police are already legitimately in the place where the plain view occurred, the "plain view doctrine" is not an exception to the Fourth Amendment warrant requirement. Rather "[t]he doctrine serves to supplement the prior justification – whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused – and permits the warrantless seizure." *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *Texas v. Brown*, 460 U.S. 730, 738-39 (1983) ("'Plain view'" is perhaps better understood … not as an independent 'exception'

to the warrant clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be.").

But, "the extension of the original justification is legitimate only where it is *immediately apparent* to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Horton v. California*, 496 U.S. at 136 (quoting *Coolidge*, 403 U.S. at 466) (emphasis added). The mere presence of a bulge on a person or their clothing is not itself probable cause or reasonable suspicion. *United States v. Aquino*, 674 F.3d at 924 ("an officer's observation of a concealed bulge, standing alone, does not amount to probable cause to support an arrest"); *United States v. Greene*, 129 F.3d 1252 (1st Cir. 1997) ("The bulge, even if alone not enough to support a reasonable suspicion, was surely a factor to be considered with the others.") (*per curiam*, unpublished opinion).

If the object's "incriminating character is not immediately apparent, the plain-view doctrine cannot justify its seizure." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (quotations and citations omitted). Thus, in *Arizona v. Hicks*, 480 U.S. 321 (1987), the police were legitimately in the defendant's apartment on other business, but suspected some stereo equipment was stolen property. To determine its province, however, the police conducted an additional investigation – moved the equipment, recorded serial numbers, and phoned their office – making the criminal nature of the equipment not immediately apparent.

"Immediately apparent" means that the sensory information alone – view, smell, feel – provide the police probable cause to believe the item is contraband. *Texas v. Brown*, 460 U.S. at 742. To be immediate, the probable-cause belief must be simultaneous with the moment of the sensory impression. *United States v. Sanchez*, 612 F.3d 1, 5 (1st Cir. 2010) ("both the motorcycle and its license plate were easily visible to the naked eye"); *United States v. Cowan*, 674 F.3d 947, 953 (8th Cir. 2012) (an item's incriminatory nature is immediately apparent if the officer at that moment had probable cause to associate the property with criminal activity); *United States v. Roberts*, 612 F.3d 306, 313 (5th Cir. 2010) ("incriminating nature of the weapons was not apparent at the moment they were seized").

In *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993), the Supreme Court extended plain view to plain feel: "We think that this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search."

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minnesota v. Dickerson, 508 U.S. at 375-76.

But the Court was careful to limit the scope of the plain feel doctrine. In *Dickerson*, the officer "determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket – a pocket which the

officer already knew contained no weapon." *Id.* at 378. Because "the officer determined that the item was contraband only after conducting a further search," *Id.* at 379, the contraband evidence had to be suppressed.

This court has hewed to the limitation of the plain feel doctrine that the incriminating character must be immediately apparent. *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) ("[T]he 'plain feel' doctrine permits an officer to seize an object, if its incriminating character is immediately apparent during a lawful protective pat-search."). In *United States v. Henry*, 827 F.3d 16, 27 (1st Cir.), *cert. denied*, 137 S. Ct. 374 (2016), the officer "recognized from his initial pat-down that the bulge in [defendant's] pocket was a large amount of cash and that he was immediately aware of the cash's incriminating nature." In *United States v. Proctor*, 148 F.3d 39, 42 (1st Cir. 1998), the officer, "upon patting down the defendant, made an immediate determination that the bulge was in fact a glassine bag containing marijuana." But an "indiscriminate removal of items … that were readily identifiable by touch as non-weapons," is a "flawed" frisk. *United States v. Campa*, 234 F.3d 733, 737, 739 (1st Cir. 2000). There was no plain feel when an officer shook a small box rattling contraband bullets inside. *United States v. Miles*, 247 F.3d 1009, 1015 (9th Cir. 2001).

Where an item is contained within packaging making it not otherwise immediately identifiable as contraband, the plain view doctrine cannot apply. *United States v. Doe*, 61 F.3d 107 (1st Cir. 1995) (no plain view when item wrapped in opaque packaging). Thus, where "crack cocaine which was removed from the defendant was contained in six small

plastic bags [and] [t]he plastic bags were wrapped in a white athletic sock," the court held that the officers could not plainly feel the contraband. *United States v. Mitchell*, 832 F. Supp. 1073, 1079 (N.D. Miss. 1993).

B. Package Found On Mr. Rasberry Was Not Obviously Contraband

Agent Wolf immediately knew the object in Mr. Rasberry's groin was not a weapon. He testified only that he "knew immediately it was not part of Rasberry's anatomy," and that the bulge was "consistent with an amount of cocaine or heroin." Two agents testified the item was a "ball" of some size, and it weighed just 3 ounces – not the contour or mass of a weapon.[6] Given that the purpose of *Terry* is to uncover weapons that pose danger to an officer, and the bulge in Mr. Rasberry's pants was not obviously a weapon or contraband, that should have ended the matter. *Dickerson*, 508 U.S. at 378 (invalidating persisting investigation of "a pocket which the officer already knew contained no weapon").

Even if he had authority to go further, Agent Wolf could not have immediately known what he felt was contraband. This is because the number of layers of material between the powder and Agent Wolf's touch, and their configuration, makes immediate knowledge implausible.

The agents testified the object withdrawn from Mr. Rasberry's underwear was a

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[6]The total weight of the item found in Mr. Rasberry's underwear, including the exterior bag and the interior bags, was 84 grams (57 grams + 27 grams = 84 grams, or 2.96 ounces), *Suppr.Hrg* at 35-36, which is *much* lighter – about one seventh the weight – than even the lightest pistols on the market. *See, e.g.,* https://us.glock.com/products/model/g26 (visited June 4, 2017) (Glock 26, "baby Glock," weighs 615 grams or 21.71 ounces unloaded, and 740 grams or 26.12 ounces loaded).

plastic sandwich bag – variously the size of a tennis ball or a softball. They testified that the outer bag packaged several smaller sandwich bags, which in turn contained the smaller baggie corners. Those smaller baggie corners contained powder.

Mr. Rasberry had on cargo shorts and underwear, comprising at least two layers of fabric. His custom-made underwear pocket – the record is not clear whether he had one or Agent Wolf thought he did – would be an additional layer. Thus, in order to feel something "consistent with … cocaine or heroin," Agent Wolf was feeling through five or six layers of material – three layers of plastic bag, and two or three layers of clothing. Claiming to know there was heroin layers inside would require "remarkable powers of discernment." *Henry*, 827 F.3d at 27; *see also United States v. Tovar-Valdivia*, 193 F.3d 1025, 1028 (8th Cir. 1999) ("The bulges could have been bandages about his body, a money belt worn about his ribs, or any number of non-contraband items.").

Moreover, two agents reported the package resembled either a tennis ball or a softball; presumably it had a roughly spherical shape. "Sandwich bags" are flat when new, and to be formed into a ball would have to be wadded to some degree. Further, each of the baggie corners had a knotted tail, longer and similar in bulk with the portion of the corner that contained powder, which would have provided additional wadding inside the middle bag of the package.

Agent Wolf admitted he had no immediate incriminating knowledge. He testified that what he touched was "*consistent* with an amount of cocaine or heroin." *Suppr.Hrg* at 34 (emphasis added). But he did not say he immediately knew it was contraband. Agent

Wolf testified that he thought it was contraband only because he expected from Julie Wilson that there would be drugs somewhere in the motel room, which his search had not yet yielded, because he presumed Mr. Rasberry was a drug dealer who had cleverly frustrated arrest, and because he supposed "that drug traffickers … frequently hide illegal drugs in that area in order to avoid detection." *Suppr.Hrg* at 34; *see Terry*, 392 U.S. at 27 ("in determining whether the officer acted reasonably … due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to … specific reasonable inferences").

In plain feel cases, this court reviews the district court's findings of facts for clear error, *Schiavo*, 29 F.3d at 8, and affirms only "if the decision to deny a suppression motion … is supported by any reasonable view of the evidence." *Campa*, 234 F.3d at 737. "Determinations of probable cause and reasonable suspicion, relevant to the constitutionality of law enforcement seizures and arrests under the Fourth Amendment, present mixed questions of law and fact which we review *de novo*." *Proctor*, 148 F.3d at 41.

The government acknowledged it did not have probable cause to arrest Mr. Rasberry before agents entered the room. The only new information learned during the motel room episode that could have created probable cause was Agent Wolf's frisk. The court's finding – that it was immediately apparent to Agent Wolf that the plastic packaging contained baggies of contraband – was implausible, and also beyond the agent's own testimony. It was thus not a "reasonable view of the evidence," and the

court's ruling denying suppression was clearly erroneous. Accordingly, Agent Wolf's feel did not provide probable cause to arrest, and therefore the products of his search incident to arrest should have been suppressed.

In addition to the factual review, this case involves the constitutionality of a seizure based on an erroneous inference not grounded in the record, which this court reviews *de novo*. The court's factual finding – that Agent Wolf immediately knew what he felt was contraband – is not an accurate reportage of Agent Wolf's testimony, nor a clear inference. Agent Wolf testified what he found was "consistent with" contraband; he thought it was drugs because "drug traffickers will frequently hide illegal drugs in that area in order to avoid detection," and that is what Julie Wilson led him to expect. Thus, for this reason also, this court should reverse.

VI. Search of Mr. Rasberry's Crotch Was a Trespass

There are three elements to the plain view doctrine: 1) the police must lawfully be in the place such that they can see or feel the object, 2) it must be immediately apparent that the object is contraband, and 3) the officer "must also have a *lawful right of access to the object* itself." *Horton v. California*, 496 U.S. at 137 (emphasis added).

Regarding the third element, an officer cannot access an object in a way that "would require trespassing onto private property." *United States v. Jones*, 187 F.3d 210, 221 (1st Cir. 1999) (citing *Horton*); *cf.*, *United States v. Sanchez*, 612 F.3d 1, 7 (1st Cir. 2010) (police "could access the motorcycle without trespassing").

A person has at least as much privacy interest in their private parts as in their property. A cop reaching into your underwear is a trespass, more intrusive than any other, not merely a "petty indignity." *Terry v. Ohio*, 392 U.S. at 17; *Swain v. Spinney*, 117 F.3d 1, 6-7 (1st Cir. 1997) ("The Seventh Circuit has described strip searches involving the visual inspection of the anal and genital areas as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.") (quotation and citation omitted). The Fourth Amendment protects "[t]he right of the people to be secure in their *persons*." Once beyond a touch to make sure Mr. Rasberry was not armed, Agent Wolf had no further business infringing on Mr. Rasberry's privacy.

Mr. Rasberry contests the first plain-feel element: while the police had authority to be in the motel room, they had no authority for the second frisk. He also contests the second element: it was not immediately apparent the object was contraband. As to the

third element, the District Court ignored it, ruling:

> During the pat-down, SA Wolf felt an object whose contour or mass makes immediately apparent its identity as contraband, and which may then be lawfully seized under the plain-feel doctrine. Alternatively, the discovery of an object in Rasberry's shorts that SA Wolf immediately identified as contraband, together with the other facts and circumstances known to him at the time, gave him a reasonable belief that Rasberry was engaged in drug possession or trafficking, and therefore probable cause to arrest Rasberry and search him incident to arrest.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS (Nov. 17, 2015) at 6, *Appx*. at 34; *Addendum* at 37 (quotations and citations omitted).

The court made no finding that Agent Wolf had access to Mr. Rasberry's groin without a trespass. And it could not have, because reaching to a person's genitalia is "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Spinney*, 117 F.3d at 6-7; *United States v. Aquino*, 674 F.3d at 925 ("Searching under articles of clothing, whether it be a man's pant leg or a woman's blouse, is necessarily more intrusive than a pat down."); *United States v. Casado*, 303 F.3d 440, 449 (2d Cir. 2002) ("*Terry*, *Sibron*, and their progeny teach that the Fourth Amendment protects [the defendant] against an intrusion into his privacy either by a patdown or by an invasion of his clothing, but that the latter is more serious than the former, and that this difference has constitutional significance.").

This court "afford[s] no deference, … to findings of the district court under the wrong legal standard." *Schiavo*, 29 F.3d at 8. Because the District Court neglected to apply the third element, it committed an error of law, and this court should reverse.

CONCLUSION

For the foregoing reasons, this court should reverse, hold that Mr. Rasberry was arrested without probable cause, and order suppression of the products of the search incident to the unlawful arrest.

Respectfully submitted,

Todd Rasberry
By his Attorney,

Law Office of Joshua L. Gordon

s/

Dated: June 29, 2017

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Todd Rasberry requests that Attorney Joshua L. Gordon be allowed oral argument.

I hereby certify that on June 29, 2017, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X6, and that it contains no more than 8,091 words, exclusive of those portions which are exempted.

s/

Dated: June 29, 2017

Joshua L. Gordon, Esq.

ADDENDUM

ORDER ON DEFENDANT'S MOTION TO SUPPRESS (Nov. 17, 2015). 37

JUDGMENT IN A CRIMINAL CASE (Dec. 2, 2015). 44