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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARYLAND, Petitioner V. JEROME EDWARD BUIE

CASE NO: 88-1369

PLACE: Washington, D.C.

DATE: December 4, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 MARYLAND, :

4 Petitioner :

5 v. :

No. 88-1369

6 JEROME EDWARD BUIE :

7 -----x

8 Washington, D.C.

9 Monday, December 4, 1989

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:48 p.m.

13 APPEARANCES:

14 DENNIS M. SWEENEY, ESQ., Deputy Attorney General of
15 Maryland,

16 Baltimore, Maryland; on behalf of the Petitioner.

17 LAWRENCE S. ROBBINS, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States as amicus curiae,
20 supporting the Petitioner.

21 JOHN L. KOPOLOW, ESQ., Baltimore, Maryland; on behalf of
22 the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

DENNIS M. SWEENEY, ESQ.

On behalf of the Petitioner

3

LAWRENCE S. ROBBINS, ESQ.

On behalf of the United States

as amicus curiae, supporting

the Petitioner

19

JOHN L. KOPOLOW, ESQ.

On behalf of the Respondent

29

PROCEEDINGS

(1:48 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-1369, Maryland v. Jerome Edward Buie.

Mr. Sweeney, you may proceed whenever you're ready.

ORAL ARGUMENT OF DENNIS M. SWEENEY

ON BEHALF OF THE PETITIONER

MR. SWEENEY: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether police officers possessing an -- a arrest warrant for an armed robbery suspect may, at the time of the arrest of the suspect in his home, make a brief security check of the premises to determine if other persons are present. The Maryland Court of Appeals decided that the state must show that there is probable cause to believe that a serious and demonstrable potentiality for danger exists to justify a safety check in this type of situation.

Finding the probable cause for a safety check did not exist in this case. It held that a red running suit seized by one of the officers during the security check should have been suppressed. A new trial was ordered, setting aside Mr. Buie's 35-year sentence for armed robbery and use of a handgun in the commission of a

1 felony.

2 The state asserts that safety checks of homes at
3 the time of arrest, under the authority of an arrest
4 warrant, should be analyzed under the general
5 reasonableness balancing test. Applying this test, the
6 balancing of Mr. Buie's minimal privacy interest affected
7 by the safety check against the compelling need to
8 preserve the safety of officers and others at the arrest
9 scene, is best met by establishing a bright-line rule, a
10 single, workable standard authorizing a brief and limited
11 check of the home, without any need for objective
12 justification in each case.

13 QUESTION: Now, the Solicitor General suggests a
14 test that may differ from that which you are suggesting.

15 MR. SWEENEY: That is correct. We argue that
16 also in the alternative, the reasonable suspicion test.
17 We, however, believe that this is best served by a
18 categorical rule, a bright-line rule which would authorize
19 such checks in every situation of an in-home arrest for a
20 dangerous crime.

21 QUESTION: As a practical matter, what is the
22 police practice on in-home arrests? Is it typical that a
23 so-called protective sweep be made, or is it not?

24 MR. SWEENEY: There is nothing evidentiary in
25 this record on that practice. However, since the -- this

1 Court's decision in Chimel, there have been legions of
2 cases which have been collected by both parties and which
3 have been analyzed in the law reviews, which indicate that
4 this is a very common police practice, indeed a police
5 rubric, after an arrest to conduct a limited sweep of the
6 premises to determine if other individuals are on the
7 premises. This type of procedure has been recognized by
8 the 12 federal circuits, by 33 state courts, as prudent
9 police conduct.

10 QUESTION: In this case, was there sufficient
11 basis on which the officers could have obtained a search
12 warrant at the same time they got the arrest warrant?

13 MR. SWEENEY: If the officers, at the time they
14 obtained the arrest warrant, if there was a standard that
15 required a warrant in such situations, we believe that a
16 warrant could have been obtained, but that is -- in a
17 sense backs right into our bright-line rule. Because, it
18 is our contention, that every arrest for a dangerous crime
19 is the type of situation that requires a safety check to
20 be made.

21 QUESTION: May I ask about your bright-line
22 rule? Supposing the man to be arrested opened the door
23 when it was rung and said okay, I will go with you, and
24 just walked right out with them. Could you search his
25 house?

1 MR. SWEENEY: I believe the, the best bright-
2 line rule would provide that if the officers do not need
3 to cross the threshold of the home --

4 QUESTION: Supposing he is ten feet -- say he is
5 in the hallway with his coat and hat on, and -- what does
6 the bright-line rule provide then?

7 MR. SWEENEY: The bright-line rule provides that
8 if the officers need to go into the house, which I think
9 they would if he is ten feet inside the house --

10 QUESTION: What if he answered the door and says
11 just a minute, I will get my coat and come right out?

12 MR. SWEENEY: I don't believe the officers could
13 trust that statement if they are dealing with an
14 individual who has a --

15 QUESTION: Well, say it is hanging on a coat
16 rack right in plain sight. He says -- they have to sweep
17 the whole house?

18 MR. SWEENEY: If, if they cross the threshold,
19 the best workable rule would be that the officers can do a
20 limited and brief security check.

21 QUESTION: Well, limited by what?

22 MR. SWEENEY: Limited --

23 QUESTION: The size of the house?

24 MR. SWEENEY: Limited in two ways. One is that
25 it is brief. Limited also in that it is a search for

1 persons. It is --

2 QUESTION: But it's a three-story house, and he
3 is in the hall on the first floor.

4 MR. SWEENEY: That is correct.

5 QUESTION: They can go through the whole house?

6 MR. SWEENEY: That's correct.

7 QUESTION: Well, why would that -- why would it
8 make a difference -- if you found him out on the front
9 steps, you couldn't go in and search the house, is that
10 right?

11 MR. SWEENEY: It -- under the rule that we are
12 proposing --

13 QUESTION: Well, why don't you -- you go in and
14 you find him in the front hall, then you take him outside
15 under arrest. Now can you go back in and search the whole
16 house, which is what happened here?

17 MR. SWEENEY: I don't believe that the record is
18 consistent with that.

19 QUESTION: Oh, you mean, you mean he wasn't
20 taken outside the house?

21 MR. SWEENEY: No, I don't believe -- there is a
22 statement in the court of appeals' decision that indicates
23 that the individual was -- had left the scene --

24 QUESTION: Well, who do we believe?

25 MR. SWEENEY: Well, the record in the case, the

1 trial record in the case says that the individual was
2 handcuffed, and then the second officer, Officer Frolich,
3 Detective Frolich, went down into the basement. There is
4 no indication in the evidentiary record in this case that
5 the officer -- that the individual was taken outside of
6 the house. That statement was made in the court of
7 appeals' decision, but it does not have any support in the
8 factual, in the trial transcript of this case.

9 QUESTION: General Sweeney, maybe the rule you
10 are arguing for is a good rule, but it baffles me why it
11 is a rule that is based upon the need to protect the
12 safety of the officers. It seems to me the best way for
13 them to assure their safety from people hidden in the
14 house when they encounter this fellow in the hall is to
15 grab him and pull him outside, if he is there. You think
16 they are really protect -- preserving their safety by
17 going up to the attic to see if there is anybody up there
18 who might shoot at them?

19 MR. SWEENEY: There's -- there --

20 QUESTION: That just is -- you know, that's just
21 not true, is it?

22 MR. SWEENEY: It is, it is going to be true in
23 very many arrests that the necessary thing to do is to do
24 a sweep of the house. It will not necessarily be true in
25 every arrest. And the safety concern that we're proposing

1 to this Court is not just the safety of the officers, but
2 the safety of others at the arrest scene. And that if the
3 officers make the determination, they don't -- this --
4 they do not have to do a protective sweep of the house,
5 but they are authorized to do a protective sweep of the
6 house if the situation, in their judgment, requires it for
7 their safety or the safety of others.

8 QUESTION: But that is a different rule. You
9 are now saying if in their judgment it requires it. That
10 is not a categorical rule anymore.

11 MR. SWEENEY: No, it's a categorical rule like
12 the Belton rule. The Belton rule says that officers can
13 search every container --

14 QUESTION: Right. Which would mean here they
15 could search, even if their judgment wasn't that it
16 required it, but they thought well, if we go through the
17 attic we might find somebody else or some evidence that
18 would be useful.

19 MR. SWEENEY: Well, it's an objective test.

20 QUESTION: Right. And I mean, there is nothing
21 wrong with that if the rule authorizes it, it is perfectly
22 all right to take a look.

23 MR. SWEENEY: It's an objective -- it's an
24 objective test. And if the, if the rule, if the bright-
25 line rule is, does not require specific justification,

1 which we contend it does not then, then the officers can
2 conduct the sweep of the premises.

3 QUESTION: Well, I am sure the police chief
4 would say make it standard operating procedure. Every
5 time you arrest a person within the home, make a sweep of
6 the entire house and keep your eyes open. It seems to me
7 a very prudent law enforcement practice.

8 MR. SWEENEY: It, I would agree with you. It
9 could very well be a very prudent law enforcement
10 practice.

11 QUESTION: Do you expand the -- do you expand
12 the reason that you urge for making the sweep for persons
13 to make sure that there is no person around that might
14 destroy evidence?

15 MR. SWEENEY: That is not this case. Obviously,
16 if the officers see someone who is destroying evidence, or
17 who is --

18 QUESTION: Well, I understand, but you don't try
19 to include within your rule the advisability of making
20 sure that evidence won't be destroyed?

21 MR. SWEENEY: We have not -- we have not argued
22 that to this Court. But obviously that is a, an ancillary
23 event that occurs if a protective sweep occurs. The
24 primary reason why a protective sweep should occur is for
25 protection. Now, it will also serve the benefit of

1 preventing the destruction of evidence that may be --

2 QUESTION: If you find somebody there.

3 MR. SWEENEY: If you find -- if you find
4 someone. You never are going to be guaranteed that you
5 will find someone. But that is precisely the point that I
6 think makes this a particularly appropriate case for a
7 bright-line rule.

8 QUESTION: Do you think there is any
9 inconsistency between your position and the court's
10 opinion in Chimel, or Chimel, however you want to
11 pronounce that?

12 MR. SWEENEY: No, I don't believe that there is
13 any inconsistency there. As a matter of fact, I believe
14 it is a natural extension of Chimel. In Chimel the court
15 decided that for protective reasons primarily, as I read
16 the case, the officers could do a limited search of the
17 person and a limited search of the wingspan area. That
18 was to take care of concerns regarding the arrestee. But
19 --

20 QUESTION: It also said you can't get outside
21 that area.

22 MR. SWEENEY: It said, as I read that decision,
23 it says that in connection with the concern regarding the
24 arrestee. It does not deal with safety concerns regarding
25 others, regarding accomplices, who may be at the scene.

1 This --

2 QUESTION: You mean to tell me that everybody
3 has been reading Chimel not to forbid you to go in other
4 parts of the house when you have an arrest warrant and you
5 make arrest in the house?

6 MR. SWEENEY: A -- those decisions have read it
7 when there is a search for evidence, that is where Chimel
8 is read to go beyond the wingspan area, to prevent those
9 type of searches.

10 There has been -- Chimel is very interesting
11 because that is when you begin to see the protective sweep
12 cases. There has been 20 years of protective sweep cases
13 from the 12 circuits, 33 state courts, all recognizing
14 that protective sweeps are prudent police conduct. It is
15 a natural outgrowth of the Chimel case that, because it
16 did not consider the safety concerns surrounding the
17 arrests that go beyond the arrestee.

18 This case presents those additional safety
19 concerns. And Chimel is in fact a bright-line rule --

20 QUESTION: Why do you want to go all the way to
21 the fourth floor?

22 MR. SWEENEY: I am sorry, Justice --

23 QUESTION: Why do you want to go all the way to
24 the fourth floor for protection?

25 MR. SWEENEY: That -- that's correct.

1 QUESTION: Why do you need that?

2 MR. SWEENEY: Well, because an individual may be
3 on the fourth floor, may be down in the basement, may be
4 anywhere in that house, who could present a danger to the
5 officers. In this case --

6 QUESTION: Not if he stayed on the fourth floor.

7 (Laughter.)

8 MR. SWEENEY: Well, if he -- if the police
9 officers had the reassurance --

10 QUESTION: If you don't go up there.

11 MR. SWEENEY: Well, that is, that -- you know,
12 there are many judgments that, regarding police practice
13 or police procedure, that can be -- can be -- alternatives
14 can be considered, police judgments can be second guessed.
15 I think one of the things these, this Court's decision
16 teaches, for example in Pennsylvania v. Mimms, about the
17 bright-line rule for individuals to leave the vehicle if
18 the officer requests it at the scene, is that, while that
19 is a very acceptable police practice, the dissent notes
20 that some police manuals counsel the exact opposite of
21 that procedure.

22 So simply the fact that there may be an
23 alternative procedure is not the type of thing, as this
24 Court said in United States v. Sharpe, that courts should
25 get into second-guessing officer practices. It is a

1 reasonable Fourth Amendment conduct for police officers to
2 do a protective sweep of the premises -- to --

3 QUESTION: You mention that one of the reasons
4 for that was for the protection -- excuse me. If the

5 officers MR. SWEENEY: I am sorry. I am sorry that he is there,

6 present, QUESTION: Why not search the house next door?

7 It is just as close as the fourth floor. then -- if you

8 can't MR. SWEENEY: That requires the crossing of
9 another threshold. That requires entry into a home.

10 QUESTION: It is closer than the fourth floor.

11 MR. SWEENEY: It may be closer than the fourth
12 floor, but one of the things this Court's decisions have
13 said over and over again is there shall be no breach of
14 the entry, no crossing of the threshold without legal
15 authority. It is very important to remember that the
16 officers in this case are on the premises lawfully, as a
17 result of the arrest warrant. regarding the breaching of

18 the threshold QUESTION: In order to enter that house, you not
19 only had to have an arrest warrant with you, but you had
20 to have probable cause to believe the man was there. house
21 Right? the arrests --

22 MR. SWEENEY: You had to have the -- arrested.

23 QUESTION: You don't need to have a search
24 warrant, but -- you can use your arrest warrant, but you
25 have to have probable cause to enter the house. considering

1 MR. SWEENEY: I believe the arrest warrant
2 provides probable cause for the officers to --

3 QUESTION: Not to enter a house.

4 MR. SWEENEY: Well, the officers -- if the
5 officers have probable cause to believe that he is there,
6 present, --

7 QUESTION: Exactly. But what then -- if you
8 can't -- if you don't have the probable cause you can't
9 cross that threshold.

10 MR. SWEENEY: That is correct.

11 QUESTION: Right. And if you haven't got
12 probable cause to believe there is somebody else in the
13 house, why can you go to the fourth floor?

14 MR. SWEENEY: Well, if you are lawfully on the
15 premises, if you are -- if the officers are lawfully on
16 the premises and inside of the house, then the concerns
17 that this Court has enunciated regarding the breaching of
18 the threshold of the house, I think, are -- the arrest has
19 to be seen in context at that point. The -- under the
20 Payton decision, the officers can go anywhere in the house
21 to find the arrestee --

22 QUESTION: Only, only to hunt the arrestee.

23 MR. SWEENEY: Only to find the arrestee. They
24 can go from the fourth floor to the basement, and the
25 additional intrusion here, and remember we are considering

1 Mr. Buie's interest here, the additional intrusion is a
2 minimal intrusion over and above that intrusion which is
3 already authorized by this Court's decisions in Payton v.
4 New York --

5 QUESTION: You mention that one of the purposes
6 for the sweep search is to protect the safety of others?

7 MR. SWEENEY: Yes.

8 QUESTION: How does that work? Give me an
9 example.

10 MR. SWEENEY: I'll give you an example from this
11 case. There were two girls who were immediately outside
12 the door of the house who could have been in danger if
13 there had been an attack on the officers as the officers
14 were leaving the scene. They could have been in the line
15 of fire --

16 QUESTION: Well, that is substantially the same
17 as protecting the officers.

18 MR. SWEENEY: I am sorry?

19 QUESTION: That is substantially the same as --
20 the rationale is to protect the officers from an ambush or
21 an attack?

22 MR. SWEENEY: An ambush or an attack, to protect
23 the officers, to protect others at the scene, to protect
24 the arrestee himself.

25 QUESTION: Just from an ambush or an attack?

1 MR. SWEENEY: I -- for any safety concern that
2 an arrest has attendant to it. I can't think of other --
3 an attack or an ambush, or let's say a young child comes
4 out from a room, and, during the arrest scene, and creates
5 a confusion. There is a safety dimension to that -- to
6 that also.

7 QUESTION: I was going to ask, suppose there is
8 an unattended child, infant, left in the house after the
9 arrestee is taken. Is that grounds for a sweep search?

10 MR. SWEENEY: That not only -- not on the basis
11 of the safety to the officers, that obviously is a safety
12 concern regarding others at the -- at the arrest scene.
13 We have not --

14 QUESTION: Is that one of the grounds that you
15 urge for the sweep search?

16 MR. SWEENEY: We have not urged that ground.

17 QUESTION: General Sweeney, how do you say that
18 there is only minimal additional intrusion? I mean, let's
19 assume I am being arrested for a securities fraud or
20 something, and I meet them in the anteroom, and I say
21 okay, I am ready to go. And they say wait a minute, we
22 want to search your house. And, you know, they walk
23 through my whole house, bedroom, all the rooms. Why -- I
24 think that is -- why is that not a terrible intrusion?

25 MR. SWEENEY: It is not a terrible intrusion. I

1 would concede it is a greater intrusion than, say, in
2 Pennsylvania v. Mimms, they're just standing outside the
3 car. But the intrusion has to be measured and balanced
4 against the compelling need for officers' lives and
5 officers' safety here.

6 QUESTION: Different question, but not whether
7 it is minimal.

8 MR. SWEENEY: I think it is also minimal in
9 connection with the limits. It has to be brief, it's got
10 to be quick, it has got to be limited to searches for
11 persons.

12 I would like to -- I am sorry?

13 QUESTION: Is it clear that it can take place
14 after the arrest has been accomplished? Do you draw any
15 distinction at all between a pre-arrest sweep and a post-
16 arrest sweep?

17 MR. SWEENEY: The pre-arrest is governed by the
18 Payton v. New York. Our vision of the arrest, which is
19 important here, is the arrest is not completed, for safety
20 purposes, until the officers are off of the scene.

21 QUESTION: Well, supposing in this case -- I
22 understand you say the record doesn't support it, but
23 supposing the arrestee had been taken out of the house.
24 Would it have been then too late to conduct a sweep?

25 MR. SWEENEY: No, it's -- in our --

1 QUESTION: So you do not draw a distinction
2 between a pre-arrest and a post-arrest sweep? That is
3 what I am asking you.

4 MR. SWEENEY: If the officers were -- the post-
5 arrest occurs after the officers and the individual are
6 safely out of the arrest scene area.

7 I would like to reserve the balance of my time,
8 if I could.

9 QUESTION: Thank you, Mr. Sweeney. Mr. Robbins,
10 we'll hear now from you.

11 ORAL ARGUMENT OF LAWRENCE S. ROBBINS

12 ON BEHALF OF THE UNITED STATES

13 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

14 MR. ROBBINS: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 The Maryland Court of Appeals, in our view, got
17 off to the right start in this case. It explained
18 correctly that in deciding what legal standard to apply to
19 a protective sweep a court must consider the objective
20 expectation of privacy that may exist and the governmental
21 interest served by the intrusion. But having taken that
22 first step, the court erred, in our view, in elaborating
23 that rule in this context, by overstating the
24 intrusiveness of a protective sweep and undervaluing the
25 governmental interest to justify those searches.

1 The court resolved upon what we believe to be an
2 untenable legal standard, that a protective sweep may be
3 conducted only upon a showing of probable cause.

4 We urge a different rule, the rule that has been
5 approved by virtually every federal circuit other than, I
6 think, the Fifth Circuit, and one that is based on our
7 quite different assessment of the competing interest.
8 That rule is the one derived from Terry against Ohio, and
9 it is this: Following an arrest inside a suspect's
10 premises, the, a protective sweep is lawful when the
11 police have a reasonable belief that their security is in
12 jeopardy.

13 Now, that rule --

14 QUESTION: How would that unfold in this case,
15 on these facts?

16 MR. ROBBINS: On these facts, Justice O'Connor,
17 we believe that the police did indeed have a reasonably --
18 a reasonable suspicion that their security was at risk in
19 the execution of this arrest warrant. And we say that --

20 QUESTION: How so?

21 MR. ROBBINS: Several factors, we think, combine
22 to make that suspicion reasonable. First of all, this was
23 a violent crime. An armed robbery committed only 48 hours
24 before the search. There was probable cause to believe
25 that an accomplice had participated in that search, that

1 is the result of the issuance of an arrest warrant. There
2 was a weapon used in the offense; it was an armed robbery.
3 And finally and critically, there was a strong likelihood
4 that there was at least one other person in the house at
5 the time the police went to arrest the Respondent.

6 You will recall from the record that just before
7 the police went in, a secretary at police headquarters
8 called up the house to find out if indeed Respondent was
9 home. They didn't get Respondent on the phone right away,
10 they got a woman of some undetermined age. She has been
11 referred to as a girl, a young woman. All we know is that
12 she is a female. We don't know who she is, how old she is
13 --

14 QUESTION: I am not sure that I understand why
15 the mere suspicion that another person might be in the
16 house amounts to reasonable suspicion that the officer
17 might be at risk.

18 MR. ROBBINS: Of course, Justice --

19 QUESTION: I just, it doesn't track, does it?

20 MR. ROBBINS: Well, it depends what you mean by
21 the mere fact. Obviously, we are not relying solely on
22 the fact that there was a good reason to think there was
23 someone else in the house --

24 QUESTION: Well, suppose that's all you had. It
25 wasn't a crime of violence for which an arrest was made.

1 You didn't -- the police didn't know that a weapon was
2 used, allegedly, in the offense. Yet an arrest is made.
3 Just because another person may be in the house --

4 MR. ROBBINS: No, no.

5 QUESTION: -- justifies a walk-through?

6 MR. ROBBINS: Not at all. And we urge no such
7 rule. Our rule is a rule of reasonable suspicion, and it
8 obviously turns on the presence of all of the factors. If
9 this were, for example, a securities fraud, to return to
10 Justice Scalia's hypothetical, and the only -- the only
11 suspicion you had was that the defendant's three-year-old
12 child was at home, that would hardly, in our judgment,
13 amount to reasonable suspicion. Reasonableness is as
14 reasonableness does.

15 QUESTION: Well, what about the woman? She is
16 not the accomplice. You didn't suspect that she was the
17 accomplice, did you?

18 MR. ROBBINS: In this, in the present case --
19 there was no way --

20 QUESTION: All you know is some woman answered
21 the phone.

22 MR. ROBBINS: Well, of course, it couldn't be --
23 it couldn't be the accomplice in Mr. Buie's case --

24 QUESTION: Right.

25 MR. ROBBINS: -- because it wasn't a woman.

1 QUESTION: So you had no basis for assuming the
2 accomplice was present.

3 MR. ROBBINS: That's correct -- well, there was
4 no basis for believing that the one confirmed person in
5 the house, a woman, was indeed the accomplice, because it
6 wasn't a woman.

7 QUESTION: And there is no basis for believing
8 she was dangerous, was there?

9 MR. ROBBINS: Well, there was no basis for
10 eliminating that prospect. And given the fact that this
11 was a violent crime, with in all likelihood a weapon in
12 the house and a high risk to the police in executing such
13 an arrest the fact that there was some person in the house
14 --

15 QUESTION: But you know what strikes me as
16 strange about this case, the man was in the basement and
17 he was armed, I gather, might have been armed, and they
18 didn't go into the basement when they thought he was
19 there, did they?

20 MR. ROBBINS: They called down --

21 QUESTION: Freeze. Once he came out they went
22 right down in the basement. Did they think somebody else
23 armed was in the basement, do you suppose --

24 MR. ROBBINS: I think, Justice Stevens --

25 QUESTION: -- that was about to shoot them?

1 MR. ROBBINS: I think, Justice Stevens, what
2 they thought, or in any event what the objective factors
3 would have justified them in thinking, was that in fact
4 another person could well have been in the house and would
5 pose a risk of interference with that arrest and a risk of
6 injury to the police.

7 QUESTION: Do you think there was a greater risk
8 of violence by entering the basement or staying out of the
9 basement?

10 MR. ROBBINS: Well, I think that's that kind of
11 judgment that cops have got to be allowed to make.

12 QUESTION: Well, but the judgment this cop made
13 was I am not going in the basement until this fellow comes
14 out.

15 MR. ROBBINS: Well, he took, I think, a less
16 intrusive first step. And that is a sensible thing. Come
17 up if you are there. But I don't think that he was
18 obliged to eliminate from his mind the very real prospect
19 that in this set of facts a reasonable -- a reasonably
20 founded suspicion of risk was present.

21 QUESTION: Mr. Robbins, --

22 QUESTION: May I just ask one other? Could he
23 have waited until the suspect was safely in the police car
24 before he went down in the basement?

25 MR. ROBBINS: I think that once he --

1 QUESTION: It would minimize the risk if he got
2 that man out of the way first.

3 MR. ROBBINS: Well, if the question is whether
4 he can go back in --

5 QUESTION: The question is whether, if he took -
6 - they got the man in the police car and they waited at
7 the head of the stairs to the basement, after they got him
8 in the police car, could they have gone into the basement?

9 MR. ROBBINS: I think that would be a much
10 harder case.

11 QUESTION: I know it's a harder question.
12 What's the answer?

13 MR. ROBBINS: If they were all entirely out of
14 the house, and Mr. Buie was in the police car, I don't
15 think they could go back in --

16 QUESTION: No, no, no. I didn't say that. I
17 said they got the suspect into the police car, however men
18 it took to do that. There are three or four officers
19 still in the house; they see him in there. Can they now
20 go down in the basement? It's a simple question.

21 MR. ROBBINS: On this, on the set of facts
22 presented in this case, I think the answer is no. On the
23 other hand, Justice Stevens, I think this Court's Fourth
24 Amendment cases make clear that the simple fact that one
25 can imagine a less intrusive way of doing the same

1 operation does not make it unreasonable to do it in the
2 way that they did it.

3 QUESTION: Well, why is it any less intrusive to
4 wait 30 seconds until they get him out to the car? It's
5 exactly the same intrusion when they go down to the
6 basement. Why is it less intrusive? It's just less
7 dangerous.

8 MR. ROBBINS: Well, I -- I am not at all
9 persuaded that it would be less dangerous to wait -- if
10 they believed, as they did, that there was someone else
11 present in the house, the process of taking --

12 QUESTION: How do you know they believed someone
13 was in the basement? They didn't say that.

14 MR. ROBBINS: No, that's correct. They didn't
15 testify to that. On the other hand, I believe the facts
16 are sufficient to justify a reasonable belief that they
17 were at risk. And during the process of taking the
18 suspect out of the house, that risk continues. And the
19 question is how are the police to eliminate that risk, or
20 at least minimize that risk? Now, what --

21 QUESTION: Was that risk on the fourth floor?

22 MR. ROBBINS: I am sorry, Your Honor?

23 QUESTION: Was that risk on the fourth floor?

24 MR. ROBBINS: I believe it was, yes.

25 QUESTION: What basis do you have for that?

1 MR. ROBBINS: Well, I think, Your Honor, that
2 where you are dealing with weapons and an armed robbery
3 and the possibility of violence, the fact that someone is
4 on the fourth floor rather than in the next room --

5 QUESTION: Would that cover the roof?

6 MR. ROBBINS: I am sorry, Your Honor?

7 QUESTION: Would it cover the roof?

8 MR. ROBBINS: Well, I think at some point --

9 QUESTION: You don't know where it is, do you?

10 MR. ROBBINS: Well, Your Honor, I think the
11 question is one of reasonableness. At some point --

12 QUESTION: Well, what about the reasonable rule
13 that you should search the area where he is?

14 MR. ROBBINS: Well, I wouldn't -- I wouldn't say
15 it is reasonable only to search his arms reach, because
16 the risk --

17 QUESTION: Why not?

18 MR. ROBBINS: Well, because the risk of people
19 interfering with an arrest stem from more than the place
20 where the suspect --

21 QUESTION: Well, how can anybody on the fourth
22 floor stop you from taking the man out the front door?

23 MR. ROBBINS: By shooting him.

24 QUESTION: From the fourth floor?

25 MR. ROBBINS: That happens all the time.

1 QUESTION: When?

2 MR. ROBBINS: And I think the police are --

3 QUESTION: When? You say all the time. That's
4 no answer.

5 MR. ROBBINS: Well, Your Honor --

6 QUESTION: You can't shoot -- how can you shoot
7 down through the floors?

8 MR. ROBBINS: Your Honor, the possibility that
9 there can be ambush from rooms on a different floor is
10 just not that far fetched.

11 QUESTION: There is a possibility that you could
12 be ambushed from the fourth floor, if you are on the
13 basement?

14 MR. ROBBINS: Your Honor, the question is
15 whether this arrest will be allowed to take place, and
16 whether the police have a reasonable apprehension of
17 injury. And I think that the fact that somebody may be
18 outside the arms reach of the suspect --

19 QUESTION: (Inaudible) a locked door, do you
20 have a right to break that in?

21 MR. ROBBINS: I think that would make it a
22 harder case to justify.

23 QUESTION: Would it?

24 MR. ROBBINS: The answer is, of course, in any
25 other reasonable suspicion -- as in any other reasonable

1 suspicion is, it depends. I suspect in this case it would
2 not have been a reasonable police practice for them to do
3 that. But recall, all they did here was to go one flight
4 below the very place where their man was in custody. That
5 was reasonable.

6 QUESTION: (Inaudible) the fourth floor. You
7 and your attorney general brought the fourth floor in.

8 MR. ROBBINS: What I have said is --

9 QUESTION: You want us to say fourth floor.

10 MR. ROBBINS: You don't have to in this case.

11 What I am saying is don't preclude them --

12 QUESTION: You want us to --

13 MR. ROBBINS: I am saying, Your Honor, that you
14 needn't have a rule that precludes the police, in an
15 appropriate case, from looking beyond the floor that they
16 happen to be on. If, for example, it was the Palace of
17 Versailles, you wouldn't have to go in the next wing. But
18 in a small house you may have to go upstairs.

19 QUESTION: (Inaudible) many robbers in
20 Versailles.

21 (Laughter.)

22 QUESTION: Thank you, Mr. Robbins.

23 Mr. Kopolow, we'll hear now from you.

24 ORAL ARGUMENT OF JOHN L. KOPOLOW

25 ON BEHALF OF THE RESPONDENT

1 MR. KOPOLOW: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 There are a number of points I would like to
4 respond to that came up in the arguments we just heard,
5 beginning with the question of whether there was a
6 reasonable belief, following in other words, or assuming
7 for the time being, the Solicitor General's preferred
8 standard. What has to be remembered is that the
9 reasonable belief must be particularized. In a situation
10 like this there has to be a reasonable belief that someone
11 is in the particular place to be searched, in other words,
12 in this case, the basement.

13 Now, the Solicitor General --

14 QUESTION: Why must it be that particularized,
15 Mr. Kopolow? You mean, you have to feel that someone is
16 in the basement, rather than on the second floor?

17 MR. KOPOLOW: Well, in this particular case the
18 police had searched, apparently, through the rest of the
19 house. There was one remaining place that had not been
20 checked for security purposes. So, they would have to at
21 least believe that someone dangerous was in the house, and
22 the remaining place that he or she could have been would
23 have been in the basement.

24 QUESTION: After having searched the other part.

25 MR. KOPOLOW: After having searched the rest of

1 the house. But the police did not articulate on the
2 record any facts that could reasonably allow them to
3 believe that a third person was in the house. Let's begin
4 with, in fact, the two people that the Solicitor General
5 has mentioned.

6 First, the accomplice. The police did not
7 articulate any facts indicating the accomplice had ever
8 been in Mr. Buie's house. And, in fact, the two-day
9 surveillance, which apparently began at least on the same
10 day as the robbery, tends to eliminate that even as a
11 possibility.

12 The Solicitor General has also mentioned the
13 girl or female, she was described both ways, who answered
14 the phone. And what that really amounts to is sheer
15 conjecture about at some point three girls being in the
16 house. And the reason for that is that the police
17 officers testified that as they approached the house and
18 entered the house they found two girls on the front steps
19 outside. In order for them to be able to conjecture about
20 three girls, they may as well conjecture about four or
21 five, or a gang of 20 girls in the house.

22 QUESTION: Well, if there is -- I suppose if
23 they found two girls in the house, and one -- and found
24 one man, it might be more than conjecture to think that
25 there was a second man in the house.

1 (Laughter.)

2 MR. KOPOLOW: Well, I don't think that is
3 anything more than conjecture, Your Honor. I don't know
4 there is any more reason to believe that the sexes are
5 always paired one by one in every situation.

6 QUESTION: How old were the girls? Were they
7 little girls, or --

8 MR. KOPOLOW: The record doesn't show.

9 QUESTION: Of course not.

10 MR. KOPOLOW: The record only indicates as --
11 indicates that they were female, and at other points they
12 are referred to as girls. The point is that there were no
13 facts that they could point to indicating that a third
14 girl was in the house.

15 Now, I would like to turn also to the argument
16 that is put forth, the primary argument put forth by the
17 Attorney General, and that is that --

18 QUESTION: Well, before you get there, because I
19 am interested in it, the -- there were two arrest
20 warrants, both for, for both -- both were for males, were
21 they not?

22 MR. KOPOLOW: Yes, they were.

23 QUESTION: And it is reasonable to conclude that
24 robbery accomplices know each other?

25 MR. KOPOLOW: I would think that's reasonable.

1 But simply because two people know each other, I don't
2 think it is reasonable to conclude that they are
3 inseparable. And I don't think it is reasonable even to
4 conclude, especially when you have a surveillance, which
5 presumably is designed to keep track of who has gone into
6 the house and come out of the house, and when there is no
7 testimony that they saw the accomplice in the course of
8 that surveillance, I don't think it is reasonable to
9 assume that the accomplice was with Mr. Buie at the time.

10 QUESTION: Well, to search the house under the
11 arrest warrant for the accomplice they would have to have
12 probable cause to believe he was in the house.

13 MR. KOPOLOW: To search a house for the
14 accomplice, under an arrest warrant for the accomplice,
15 they would have to in fact have a search warrant for Mr.
16 Buie's house.

17 QUESTION: Oh, not really, not under Payton.
18 Not under Payton. You can go into a house with an arrest
19 warrant.

20 MR. KOPOLOW: Well, I understood you to say that
21 --

22 QUESTION: If you have probable cause to believe
23 he is there.

24 MR. KOPOLOW: I understood you to say that it
25 was a search for the accomplice.

1 QUESTION: Well, you couldn't go search this
2 house for the accomplice unless you had probable cause to
3 believe he was there, could you?

4 MR. KOPOLOW: I believe you would not only need
5 probable cause, you would need a search warrant to search
6 Mr. Buie's house for a third party. That is the holding
7 of Steagald.

8 QUESTION: Well, that is -- you mean in Buie's
9 house.

10 MR. KOPOLOW: Yes, to search Buie's house for
11 the accomplice.

12 Now, state seems to be saying that it is prudent
13 in every case, and they didn't specifically state this,
14 but they seem to be suggesting that it is routine in every
15 case. Well, on the matter of whether it is routine or
16 not, I would simply point out that if it's routine, then
17 police are routinely violating the decisions of virtually
18 every court in this country. Because all of them, as the
19 Solicitor General has pointed out, adopt at least a
20 reasonable suspicion Terry-type standard.

21 A great many of them prefer the probable cause
22 standard, which was adopted by the court below. I don't
23 think we can assume that police throughout the country are
24 routinely violating all those decisions, at least without
25 something in the record proving the contrary.

1 QUESTION: Your previous argument has been
2 directed to the point that the state hasn't even shown
3 reasonable suspicion here, hasn't it?

4 MR. KOPOLOW: Yes. And now I am addressing
5 whether they can do it simply as a matter of course, the
6 bright-line per se rule.

7 QUESTION: The state's argument.

8 MR. KOPOLOW: The state's argument.

9 It, perhaps, from a subjective police point of
10 view, is prudent to check the house for possible third
11 parties in every case. But I think that particular point
12 of view ignores the other side of the equation that has to
13 be balanced, which is the privacy rights of the people
14 that inhabit the house. In fact, the Fourth Amendment in
15 general does require some degree, at least, of
16 particularized suspicion.

17 Now, in order to overcome that normal
18 requirement, the state would have to show first that there
19 is a relatively minimal intrusion here. And I think the
20 intrusion that is involved in a protective sweep is really
21 akin to the intrusion of a full-blown search of a house.
22 It involves opening up the private places of a house.
23 Perhaps, at least within the state's view of a protective
24 sweep, it's limited to the extent that the police could
25 not go into small spaces, such as drawers. But the state,

1 I believe, would concede that they can open up closet
2 doors. And I think what is inside a closet may be just as
3 private to a reasonable individual as what is inside a
4 drawer. So, I think in character the protective sweep is
5 essentially the same as a full-blown sweep, which is
6 perhaps, as far as searches of places, the most closely
7 protected kind of intrusion.

8 QUESTION: A full-blown sweep, in your view,
9 would not authorize the opening of desk drawers and that
10 sort of thing?

11 MR. KOPOLOW: No, I am -- I would define a full-
12 blown sweep -- I am sorry, a full-blown search, as one
13 which includes opening up desk drawers, and I --

14 QUESTION: Well, certainly a full-blown search
15 differs in that respect from a protective sweep. You
16 can't open drawers, and that sort of thing.

17 MR. KOPOLOW: There is perhaps a difference in
18 degree, Your Honor, between what the state is advocating
19 and a full-blown search. But I am saying that in their
20 essential character they are really the same, because they
21 allow the police to go into very private places, to open
22 up to view very private places.

23 QUESTION: But certainly many people would feel
24 that it is an even, certainly a considerable additional
25 intrusion, the opening of drawers and that sort of thing,

1 which is not allowed in this. So, there's people who
2 wouldn't agree with you; I think they would say there is a
3 difference in degree.

4 MR. KOPOLOW: I think it is only a difference in
5 degree. But I would also ask, or say, in regard to
6 whether there should be a per se rule, that there is a
7 line drawing question. There must be a reasonable line
8 drawn as to how far they can go in several respects, one
9 of which is this question of how intense, or how thorough
10 the search can be.

11 I would suggest this example. Assume that a
12 protective sweep is conducted and an individual is found
13 in the house. Under a per se rule where there is an
14 automatic right, would there then become an automatic
15 right to go into a drawer, which is proximate to that
16 particular person, to make sure that there is not a weapon
17 there that he can grab. I think if the police are, if the
18 justification for the search is wholly protective, and
19 there is an automatic per se rule, that really the
20 protective sweep should not be limited in the sense the
21 state is suggesting. It should even include that
22 particular example.

23 QUESTION: Do you know if the state's attorney
24 were at the podium, what would their answer be if I said
25 what do you do when you find this person?

1 MR. KOPOLOW: What would his answer be?

2 QUESTION: Yeah.

3 MR. KOPOLOW: Certainly that individual has,
4 himself, Fourth Amendment rights. I would think they
5 would need at least a reasonable suspicion that that
6 person poses a danger before they could even do a Terry
7 type --

8 QUESTION: Can they order the person to leave,
9 to go outside?

10 MR. KOPOLOW: If I were the state's attorney,
11 you want me to answer that question?

12 QUESTION: Yes.

13 (Laughter.)

14 QUESTION: (Inaudible) Respondent.

15 MR. KOPOLOW: Who is on the other side?

16 (Laughter.)

17 QUESTION: You can answer both ways.

18 Do the cases talk about this?

19 MR. KOPOLOW: I don't recall them talking about
20 that particular aspect of the problem, because in each
21 case that I have read anyway, they are concerned about the
22 rights of the person who was arrested.

23 QUESTION: Not in Michigan against Summers.

24 MR. KOPOLOW: Of course, the closest case I know
25 of is Ybarra v. Illinois, which involved a search pursuant

1 to a search warrant of a bar, a public establishment. And
2 in that case this Court held that there had to be
3 reasonable suspicion before a patron of the bar could be
4 frisked.

5 QUESTION: Well, what about Michigan against
6 Summers? Are you familiar with Michigan against Summers?

7 MR. KOPOLOW: Yes, I am. I think that's a quite
8 different situation, because --

9 QUESTION: But the persons attained there, there
10 was no suspicion against them.

11 MR. KOPOLOW: But the court said that there was
12 -- that the very circumstances amounted to individualized
13 and articulable suspicion. The fact of the search warrant
14 for the house indicated there was probable cause to
15 believe that criminal activity was taking place in the
16 house, and that automatically translated into at least
17 individualized and articulable suspicion with respect to
18 any occupant of the house. And that -- that's what
19 justified a brief detention.

20 I would also point out that I believe the
21 intrusion in this case is a much more severe intrusion
22 than a brief detention.

23 QUESTION: But is it not true that the intrusion
24 is precisely the intrusion that is permissible if they
25 don't find the arrestee right away? If they have to

1 search, they can search the whole house and the areas that
2 you are concerned about until they find him.

3 MR. KOPOLOW: Well, that may be true, but to
4 answer your question with an example, that would be the
5 same as saying -- let's say the -- there is a search
6 warrant to search a house for a --

7 QUESTION: You have to discontinue the search
8 when you find what you are looking for.

9 MR. KOPOLOW: Yes, to be a particular --

10 QUESTION: And that is why I was suggesting -- I
11 don't know whether you draw a distinction or not, between
12 the portion of the sweep that is continued after the
13 arrest is made and that which is conducted while you are
14 looking for the person and while you are not sure that you
15 have him under -- in custody.

16 MR. KOPOLOW: Well, I think, isn't that a
17 question, Your Honor, of what authority the police are
18 given under an arrest warrant? And I think the answer to
19 that question is that their authority to act pursuant to
20 the arrest warrant ends as soon as the arrest is made.

21 Now, there may be circumstances which would
22 permit a further search, but that depends on the
23 particular circumstances. If the police can demonstrate
24 on the record a need for an additional search --

25 QUESTION: Well, for example, in this very case

1 they didn't find him in the basement right away. They
2 immediately went upstairs to different floors, as I
3 remember the facts. I don't think -- of course, they
4 didn't find anything upstairs. But you don't -- or do you
5 -- do you challenge the validity of the portion of the
6 sweep that took place before they knew he was in the
7 basement?

8 MR. KOPOLOW: We do not challenge the validity
9 of the portion of that sweep.

10 QUESTION: Before they found him.

11 MR. KOPOLOW: Before they found him. But our
12 contention is that once the arrest is accomplished, their
13 authority to act pursuant to the arrest warrant ends, and
14 they must point to additional circumstances.

15 That leads to a point that Justice Scalia was
16 making about whether they in fact took reasonable action
17 once they had made the arrest.

18 Now, of course, the cases do not require the
19 police to take the less intrusive alternative when two
20 alternatives are both reasonable. But I think on the
21 facts of this case, what Justice Scalia was suggesting
22 indicates that the action that they did take was
23 unreasonable. On the one hand, the action that they did
24 take was that an officer, purporting to fear somebody down
25 in the basement, went down there with no apparent

1 precautions taken, apparently not even his gun drawn, and
2 in fact was setting himself up as easy prey for an
3 ambusher.

4 On the other hand, what they could have done,
5 which is what at least they began to do, which is they
6 whisked Mr. Buie out of the house, and then an unintrusive
7 additional action, which to me is perfectly sensible,
8 would have been simply to station somebody in the hallway
9 of the house in a protected position, so that if there was
10 a chance of somebody coming up out of the basement they
11 would have the drop on that individual, rather than vice
12 versa. So this is a situation where I think the failure
13 to take the less intrusive alternative in fact makes the
14 alternative that they did take unreasonable.

15 QUESTION: What is your submission as to what
16 level of -- what would be required to authorize a sweep in
17 connection with an arrest?

18 MR. KOPOLOW: We believe the Court of Appeals of
19 Maryland was correct, and --

20 QUESTION: Probable cause?

21 MR. KOPOLOW: -- probable cause is required.
22 And the reason is that, as the opinions of this Court have
23 shown, that in residential situations danger to the police
24 is not enough to compromise the probable cause standard.
25 And perhaps the clearest example of that is the hot

1 pursuit situation, where, if the police are in hot pursuit
2 of an armed robber and he enters a residence, they can go
3 in, if they have probable cause, they can go in to arrest
4 him and to search for weapons. If they have only
5 articulable suspicion, they can't do so, even though there
6 is, as the Court has pointed out in Warden v. Hayden, a
7 great risk to the police officers.

8 QUESTION: Do you think that the state's
9 submission and the Solicitor General's submission, either
10 one of them or both, are contrary to Chimel?

11 MR. KOPOLOW: I think they certainly put Chimel
12 in great danger. Chimel indicated that in order to do a
13 search past the time of the arrest, a search other than
14 the area into which the arrestee may reach, there would
15 need to be probable cause and a warrant.

16 QUESTION: Well, not only that, but Chimel said
17 you needed a warrant.

18 MR. KOPOLOW: Probable cause and a search
19 warrant.

20 QUESTION: Even if you had probable cause you
21 needed a -- probable cause wasn't enough.

22 MR. KOPOLOW: That is my reading of Chimel as
23 well.

24 QUESTION: Because the -- I was in that case,
25 and I said they shouldn't have restricted the search if

1 there was probable cause. And the majority said no, you
2 need a search warrant.

3 MR. KOPOLOW: And if I remember your opinion
4 correctly, you even pointed out, in your opinion, that the
5 man's wife was there would could have presented some risk
6 at least to the evidence. Yet, notwithstanding that, the
7 search was very limited.

8 QUESTION: Let me ask you a question, if I may,
9 Mr. Kopolow. In some of these hypotheses we have been
10 talking about, you know, which was the sensible thing for
11 the police to do, et cetera, do you think some latitude
12 has to be given to the judgment of the people who have
13 been -- the police who have been through these things? Do
14 you think lawyers and judges can apprehend just as well
15 from a record what the real dangers of the situation were,
16 than the police?

17 MR. KOPOLOW: I think some latitude has to be
18 given, if they are able to articulate the reasons for
19 their actions on the record. In this case what we have is
20 the police officer being asked flat out did you have any
21 reason to believe anybody other than Mr. Buie was in the
22 house. His answer was I didn't know who lived there. In
23 other words, he did not have any reason to believe --

24 QUESTION: Well, but that isn't saying, that
25 isn't a negative answer to that question. It may, it is

1 not a positive answer. It may be an evasive answer, but
2 it is not a negative answer.

3 MR. KOPOLOW: Well, I think it is certainly an
4 invitation for him to state, to articulate his reasons,
5 which is at least what the Terry standard requires. He
6 didn't -- he declined the invitation to do that.

7 QUESTION: Well, supposing a police officer can
8 state enough about the situation as he apprehended it,
9 which someone else would find reasonable, to lead someone
10 else to say, you know, this is the basis on which a search
11 could have been conducted. Does all the reasoning have to
12 have come from the police officer?

13 MR. KOPOLOW: I think there at least have to be
14 reasonable inferences drawable from what the police
15 officer said.

16 QUESTION: But must he be the one that --
17 supposing that -- a court feels it can draw reasonable
18 inferences from what has been testified to by a police
19 officer. Is that enough, even though the police officer
20 may not have himself, in testimony, drawn them?

21 MR. KOPOLOW: I would say that on this record
22 that even those facts, that would permit a reasonable
23 court to draw the inferences, are lacking. If you are
24 asking me does the police officer have to articulate
25 reasons with the precision that presumably lawyers and

1 judges might do so, no, I wouldn't make that expectation
2 of a police officer. But he does have to at least give
3 reasons, in this case, that would support a belief that
4 somebody else was in the house, somebody else dangerous.
5 And that is simply lacking.

6 QUESTION: Mr. Kopolow, I am not sure I would
7 like to conduct an arrest on those -- on those terms. I
8 mean, when my life is at stake, why should I assume,
9 unless I have reason to believe otherwise, that there is
10 nobody else in the house. Why -- wouldn't a careful
11 person, dealing with an armed robber, assume, unless he
12 has reason to believe otherwise, that there is somebody
13 else in the house? You're dealing with violent people.
14 Isn't that an unreasonable thing to ask the police to
15 assume, just assume that there is nobody else, unless you
16 have good reason to believe there is?

17 MR. KOPOLOW: I think what Your Honor is doing
18 is saying -- is really presuming the reasonableness of the
19 search based on the fact that the basement was entered.
20 But the law says that the search is presumed to be
21 unreasonable unless the police can sustain the burden of
22 articulating facts, particularized to the particular place
23 that they are searching. And the reason for that, and
24 perhaps I am repeating myself, is that -- what my
25 understanding of the attitude that you are expressing is

1 that perhaps in some subjective sense it is reasonable for
2 the police to act that way. But that is not taking into
3 consideration the countervailing interests of privacy, and
4 the Fourth Amendment, as interpreted by this Court, has
5 always required the police to articulate specific facts.

6 QUESTION: The specific reason is I am arresting
7 a violent felon, and I don't know for sure that there is
8 nobody -- nobody else in there other than this violent
9 felon, who is going to hurt me while I am arresting them.
10 Now, you know, I agree with your point of view that that
11 doesn't open the whole house up, you can be very limited
12 in the search. But if I were arresting a particularly
13 violent person, I would not adopt the assumption that
14 there is nobody else in the house. I would adopt the
15 assumption that there was somebody else.

16 MR. KOPOLOW: Well, the problem with that is, is
17 Fourth Amendment intrusions really based not on the
18 information the police have, it's based on the lack of
19 information the police have. The only information that I
20 believe you have articulated just now is that this was a
21 violent crime. But the fact that this is a violent crime
22 doesn't say anything about who else may be in the house.
23 That is simply a non sequitur.

24 QUESTION: Well, it says something about the
25 possible characteristics of another person in the house,

1 if they might be there.

2 MR. KOPOLOW: It depends, perhaps, on who the
3 person is. I assume you are thinking of the accomplice.

4 QUESTION: Yeah, but you know, we can't reduce
5 every one of these things to a strictly logical
6 proposition governed by Marquis of Queensbury rules.
7 There has got to be some play in the joints. And there
8 are cases that have said that.

9 MR. KOPOLOW: Well, I think what Your Honor is
10 coming down -- is coming back to, is a per se rule, that
11 in every case the police should be able to sweep through
12 the house. And I don't think it can be limited, really,
13 to the boundaries -- it can be rationally limited to the
14 boundaries of the house. For instance, as was suggested
15 in the earlier arguments, might not the police sense
16 danger from a neighboring apartment, if it involves the
17 sweep of an apartment?

18 QUESTION: But police procedures, police
19 training, don't require them to assume that the best
20 possible circumstances prevail when they make an arrest.
21 It requires them to assume that the worst possible
22 circumstances may prevail. Everybody's handcuffed when
23 they go into the police car. Everybody -- every stopped
24 car is approached at night with the same degree of
25 caution. And police are trained this way. And it seems

1 to me rather difficult for you to ask us to make the
2 assumption that safety conditions will generally prevail,
3 or that a safe condition would generally prevail when they
4 enter into a home.

5 MR. KOPOLOW: In the context of a Terry stop,
6 the police cannot assume that the suspect is armed and
7 dangerous. Yet that is a possibility in every case. The
8 police officer has to point to some -- some particular
9 facts. That is my understanding of how the Fourth
10 Amendment cases have been developing. To translate that
11 particular holding into this case, the police cannot
12 assume that someone else, someone else dangerous, is in
13 the basement. They have to --

14 QUESTION: Of course, of course in that case,
15 articulated suspicion suffices. And you would say
16 articulated suspicion suffices in this case. That is
17 short of probable cause.

18 MR. KOPOLOW: Well, I am assuming that we are
19 talking about the Terry standard. I don't want to be
20 interpreted as espousing the Terry standard. I still
21 believe, for the reasons I stated earlier, that probable
22 cause --

23 QUESTION: Well, but we have held in Terry that
24 you need, you do not need probable cause to protect the
25 safety of the officer when he has some articulated

1 suspicion to believe that crime is afoot.

2 MR. KOPOLOW: If he has articulated suspicion
3 that crime is afoot he can make the stop. He cannot go
4 any further unless he has articulated suspicion that the
5 person he has stopped is armed and dangerous. And
6 translated into this case, he has to have articulated
7 suspicion that somebody who is dangerous is in the
8 basement.

9 QUESTION: I think some of our more recent cases
10 have allowed the person -- an officer to go further than
11 just the frisk in connection with a Terry stop. I think
12 Michigan against Long did, and I think another case has.

13 MR. KOPOLOW: Well, there again, once the stop -
14 - in Michigan v. Long, once the stop is lawfully made,
15 there cannot be an automatic search of the car, the
16 passenger compartment of the car, for weapons. There has
17 to be articulated suspicion that there may be weapons in
18 the car and that the person stopped is dangerous. I think
19 that is the clear holding of Michigan v. Long.

20 Well, unless Your Honors have further questions,
21 thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Kopolow.

24 The case is submitted.

25 (Whereupon, at 2:45 p.m., the case in the above-

1 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 88-1369 - MARYLAND, Petitioner V. JEROME EDWARD BUIE

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BY *Leona M. May*
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