# United States of America
# First Circuit Court of Appeals

NO. 2016-2465

**UNITED STATES OF AMERICA**
Appellee,

v.

**TODD RASBERRY**
Defendant/Appellant.

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APPEAL FROM FEDERAL DISTRICT COURT
DISTRICT OF MAINE

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REPLY BRIEF

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### I. Feel Must Be Plain to Provide Probable Cause

The Government proposes that "even if the object's identity as contraband was not 'immediately apparent' for purposes of the 'plain-feel' doctrine, its incriminating nature was sufficient to establish probable cause to arrest when considered together with the other facts known to the officers at the time." GOV'T BRF. at 29. As other facts, the government points to the officers' belief that Mr. Rasberry was a drug trafficker, the officers had seized drugs from the renter of the motel room, the renter had told officers that Rasberry was in the room with more drugs, officers had discovered indicia of drug trafficking (but no drugs) inside the room, and officers knew that some drug dealers sometimes hide drugs near their genitals. The government argues that "[t]hese facts, combined with Wolf's discovery of a tennis ball or softball-sized mass in Rasberry's underwear and Rasberry's obvious lie that the object was part of his anatomy, established ample probable cause to arrest." *Id.*

As support, the Government cites *United States v. McFarlane*, 491 F.3d 53, 56-57 (1st Cir. 2007). In *McFarlane*, the officer hearkened gunshots, observed the defendant pursuing another person running in fear, heard that person report that the defendant had shot at him, and saw the defendant put something in a trash can. The officer ordered the defendant to the ground, which the defendant claimed was an arrest lacking probable cause, while the officer went and found a gun in the trash can. This court held that there was sufficient cause to detain the defendant.

*McFarlane* stands for the unremarkable proposition that the totality of the officer's knowledge and observations can provide probable cause for an arrest. But the case does not inform the situation here. In *McFarlane*, all the officer's observations were unambiguous, and the officer knew immediately – because he heard the gunshot and witnessed the chase – that upon seeing the defendant depositing something in the trash can, that the thing deposited was likely to be an instrumentality of recent or on-going crime.

Here, however, the question is whether the officer immediately knew that the something in Mr. Rasberry's groin was likely to be contraband. As noted in the defendant's opening brief, the officer could not have had any such knowledge, and any knowledge he did gain by the feel could not have been immediate. This is because through multiple layers of knotted plastic and clothing – although he testified he knew it was not a weapon – the officer could not plausibly "immediately" know what was in the package in Mr. Rasberry's groin.

The Government proposes, in effect, a way around the plain-feel doctrine, and thus to avoid the precedents of *Michigan v. Long*, 463 U.S. 1032 (1983) and *Minnesota v. Dickerson*, 508 U.S. 366 (1993). As discussed in the defendant's opening brief, in those cases the Supreme Court allowed the plain-view and plain-feel doctrines, but only when the criminal nature of the item seized is "immediately apparent." A mere hunch that Mr. Rasberry had drugs in his crotch is not sufficient. Because there was no immediate knowledge, there was no probable cause.

Indeed, this court has already decided that the plainness of the feel must be immediately apparent in order to amount to probable cause. *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) ("During a lawful *Terry*-type search, police officers may seize an object in 'plain view' without a warrant if they have probable cause to believe it is contraband without conducting some further search of the object, i.e., if its incriminating character is 'immediately apparent.'").

Accordingly, any probable cause alternative to the plain-view doctrine should be regarded with precedential skepticism, and this court should order that the evidence was unlawfully seized.

## II. Groin Search Was a Second Search

In its brief, the Government claims that Officer Wolf, who conducted the second search – of Mr. Rasberry's groin – was justified because he regarded the first search, conducted by Officer Flynn, as merely "cursory." GOV'T BRF. at 25-26.

Officer Flynn, however, disputed the cursory nature of the first search.

The first search revealed several objects from Mr. Rasberry's pockets – a set of keys, a cell phone, and a lump that turned out to be a balled-up bandana – which had been placed on the bed. *Suppression Hearing* at 48, 71, 89.

Flynn initially testified that his first search, revealing these items, consisted of areas which Mr. Rasberry could reach while handcuffed, and was limited to Mr. Rasberry's *back* pockets. *Id.* at 89, 102. But on cross examination, Flynn admitted "[i]t's possible" that those items came from a search of Mr. Rasberry's *front* pockets. *Id.* at 104. And Flynn testified that while handcuffed, Mr. Rasberry "wouldn't have access to his front pockets." *Id.* at 103.

Thus the government conceded that the first search was greater in scope than where Mr. Rasberry could reach while handcuffed. Accordingly, it was not merely a cursory frisk, but a full fourth amendment search.

Without new cause to commence a new search, the second search lacked probable cause, and was therefore unlawful. *See United States v. Osbourne*, 326 F.3d 274 (1st Cir. 2003). Its fruits should have been suppressed, 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,

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s/

Dated: December 1, 2017

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## REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

I hereby certify that on December 1, 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 899 words, exclusive of those portions which are exempted.

s/

Dated: December 1, 2017

Joshua L. Gordon, Esq.