Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Warrantless Entries

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940 F.3d 1295
United States Court of Appeals, Eleventh Circuit.

Kenneth BAILEY, Plaintiff - Appellant,

v.

Shawn T. SWINDELL, in his individual capacity, Michael Ramirez, in his individual capacity, Sheriff of Santa Rosa County Florida, Defendants - Appellees, Wendell Hall, Defendant.

No. 18-13572
|
October 16, 2019

Synopsis

Background: Arrestee brought civil rights action against arresting officer for allegedly violating his Fourth Amendment rights in connection with an arrest effected inside his parents' home. The United States District Court for the Northern District of Florida, No. 3:15-cv-00390-MCR-CJK, granted officer's motion for summary judgment, and arrestee appealed.

The Court of Appeals, Newsom, Circuit Judge, held that officer violated suspect's clearly established Fourth Amendment rights, and thus was not protected by qualified immunity, in entering home in order to effect a warrantless arrest.

Reversed and remanded.

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 3:15-cv-00390-MCR-CJK

Before WILSON and NEWSOM, Circuit Judges, and PROCTOR,[*] District Judge.

Opinion

NEWSOM, Circuit Judge:

What began as a relatively low-key consensual encounter between Santa Rosa County Sheriff's Deputy Shawn Swindell and Kenneth Bailey escalated quickly into a forceful arrest. Taking the facts in the light most favorable to Bailey, as we must given the case's procedural posture, the short story goes like this: Swindell showed up at Bailey's parents' home requesting to speak with Bailey about an earlier incident involving his estranged wife. When Bailey came to the door, Swindell asked to talk to him alone, but Bailey declined. After the two argued briefly, Bailey went back inside the house. Then, presumably fed up with Bailey's unwillingness to cooperate, Swindell pursued him across the threshold and (as Bailey describes it) "tackle[d] [him] ... into the living room" and arrested him.

Bailey sued, arguing that his arrest violated the Fourth Amendment. The district court granted summary judgment in Swindell's favor, and Bailey now appeals on two grounds. First, Bailey disputes that Swindell had probable cause to arrest him in the first place. Second, Bailey contends that in any event—*i.e.*, even assuming that probable cause existed—Swindell unlawfully arrested him inside his parents' home ***1298** without a warrant. Unsurprisingly, Swindell disagrees on both counts and, further, asserts that he is entitled to qualified immunity.

Without deciding whether Bailey's arrest was supported by probable cause—or, as it goes in the qualified-immunity

context, "arguable probable cause"—we reverse. Even assuming that Swindell had probable cause, he crossed what has been called a "firm" and "bright" constitutional line, and thereby violated the Fourth Amendment, when he stepped over the doorstep of Bailey's parents' home to make a warrantless arrest.

I

A

The seeds of the confrontation between Swindell and Bailey were planted when Swindell responded to a request from police dispatch to investigate an argument between Bailey and his estranged wife, Sherri Rolinger.[1] The argument had occurred when Bailey stopped by the couple's marital home to retrieve a package. Bailey no longer lived in the home with Rolinger and their two-year-old son, as the couple was embroiled in a contentious divorce. When Bailey rang the doorbell—seemingly more than once—he woke the boy, who started to cry. Rolinger came to the door but refused to open it and told Bailey to leave. Bailey responded that he wasn't leaving without his package, and Rolinger eventually informed him that she had put it in the mailbox. Bailey retrieved the package and departed.

Rolinger went to her mother's house and called 911 to report the incident to police. In response to the call, Deputy Andrew Magdalany was dispatched to interview Rolinger, and Swindell went to talk to Bailey. At some point before Swindell reached Bailey, he called Magdalany and gathered additional details about the encounter and the surrounding circumstances. Magdalany told Swindell, for instance, that in the three months since Bailey's separation from his wife, he had visited the marital residence repeatedly, moved items around in the house, and installed cameras without his wife's knowledge. Magdalany also explained that Rolinger was "fear[ful]" and believed that her husband had "snapped." Even so, he told Swindell that he had not determined that Bailey had committed any crime.

Armed with this information, Swindell approached Bailey's parents' home—where Bailey was living—knocked on the door, and told Bailey's mother Evelyn that he wanted to speak to Bailey.[2] Bailey came to ***1299** the door and stepped out onto the porch, accompanied by his brother Jeremy. Bailey, Evelyn, and Jeremy all remained on the porch during the encounter, although only Bailey spoke with Swindell. Swindell immediately advised Bailey that he was not under arrest. Shortly thereafter, Swindell retreated off the porch to establish what he described as a "reactionary gap" between himself and Bailey—a distance that Jeremy estimated could have been as far as 13 feet. Swindell asked Bailey to speak with him privately by his patrol car, but Bailey declined, saying that he wasn't comfortable doing so. Swindell then told Evelyn and Jeremy to go back inside so that he could talk to Bailey alone, but they, too, refused. Bailey asked Swindell why he was there, but Swindell initially didn't respond; he eventually said that he was there to investigate, although he never clarified exactly what he was investigating. Frustration growing, Swindell then repeatedly demanded—at a yell—that Evelyn and Jeremy return to the house and that Bailey talk to him by his patrol car, but no one complied.

Bailey then announced that he was heading inside and turned back into the house. Without first announcing an intention to detain Bailey, Swindell charged after him and "tackle[d] [him] ... into the living room," simultaneously declaring, "I am going to tase you." Importantly for our purposes, by that time Bailey was—as he, Evelyn, and Jeremy all testified—already completely inside the house. Swindell then proceeded to arrest Bailey.

B

Bailey sued for false arrest under the Fourth Amendment, but the district court rejected his claim.[3] In particular, the court reasoned that when Bailey retreated into his house, he at least arguably obstructed Swindell in the lawful exercise of his duty, and thereby violated Fla. Stat. § 843.02, which makes resisting an officer without violence a first-degree misdemeanor. Accordingly, the court granted Swindell qualified immunity and granted summary judgment in his favor.

Significantly, the district court failed to address Bailey's argument—which he reiterates on appeal—that even assuming that probable cause existed, Swindell violated "clearly established" law when he arrested Bailey inside his parents' home without a warrant.[4] We agree and accordingly reverse.

***1300 II**

To obtain the benefit of qualified immunity, a government official "bears the initial burden of establishing that he was acting within his discretionary authority." *Huebner v. Bradshaw*, 935 F.3d 1183, 1187 (11th Cir. 2019) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002)). Where, as here, it is undisputed that this requirement is satisfied, the burden shifts to the plaintiff to "show both (1) that [he] suffered a violation of a constitutional right and (2) that the right [he] claims was 'clearly established' at the time of the alleged misconduct." *Id.*

Bailey contends that his arrest violated clearly established Fourth Amendment law for two distinct reasons. First, he asserts that Swindell lacked probable cause to arrest him. Second, he argues that, in any event, Swindell impermissibly arrested him inside his home without a warrant.

A

It is clear, of course, that "[a] warrantless arrest without probable cause violates the Constitution." *Marx v. Gumbinner*, 905 F.2d 1503, 1505 (11th Cir. 1990) (citation omitted). But if "reasonable officers in the same circumstances and possessing the same knowledge as the [d]efendant[ ] could have believed that probable cause existed," then the absence of probable cause is not "clearly established," and qualified immunity applies. *Von Stein v. Brescher*, 904 F.2d 572, 579–80 (11th Cir. 1990). In that circumstance, what we have called "arguable probable cause" suffices to trigger qualified immunity. *Skop*, 485 F.3d at 1137.[5]

Swindell contends, and the district court held, "that Deputy Swindell had arguable probable cause to arrest Bailey for violating Fla. Stat. § 843.02." We needn't decide whether the district court was correct in so holding because we ultimately conclude that Bailey's arrest was effectuated inside Bailey's home without warrant, consent, or exigent circumstances. Such an arrest violates the Fourth Amendment even if supported by probable cause. For present purposes, therefore, we will simply assume—without deciding—that Swindell had probable cause.

B

When it comes to warrantless arrests, the Supreme Court has drawn a "firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Accordingly, while police don't need a warrant to make an arrest in a public place, ***1301** the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to" arrest him. *Id.* at 576, 100 S.Ct. 1371. Swindell doesn't dispute *Payton*'s rule as a general matter, but he insists that this case is controlled by the Court's pre-*Payton* decision in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)—which, he says, holds that "standing in a doorway or on a porch is considered a public place, wherein there is no expectation of privacy or need to obtain a warrant to initiate an arrest." Br. for Appellee at 50. Although the facts of this case do bear some superficial similarity to those in *Santana*, we find ourselves constrained to reject Swindell's argument.

In *Santana*, officers who had just conducted a sting operation and arrested a heroin dealer returned to arrest the dealer's supplier. 427 U.S. at 40, 96 S.Ct. 2406. As the officers approached, they saw the suspect, Dominga Santana, in her doorway roughly 15 feet away holding a brown paper bag. *Id.* The officers "got out of their van, shouting 'police,' and displaying their identification." *Id.* Santana retreated through the door and into her house, but the officers followed and took her into custody. *Id.* at 40–41, 96 S.Ct. 2406. The Supreme Court approved the warrantless arrest because it was supported by probable cause and, importantly here, because it began in a "public place." *Id.* at 42, 96 S.Ct. 2406 (quotation marks omitted). For the Court, the fact that the arrest continued into Santana's home after beginning on the threshold presented no difficulty because the police there were engaged in a case of "true hot pursuit"—an exigent circumstance that justifies a departure from the usual warrant requirement. *Id.* at 42–43, 96 S.Ct. 2406 (quotation marks omitted).

While this case similarly involves an arrest in or around a doorway, *Santana* does not stand for the proposition that the Fourth Amendment authorizes any warrantless arrest that begins near an open door. Santana's arrest was initiated while she was standing—at least partly—outside her house, and she only subsequently retreated within it. Bailey, by contrast, was —again, taking the facts in the light most favorable to him—

completely inside his parents' home before Swindell arrested him. Swindell neither physically nor verbally, and neither explicitly nor implicitly, initiated the arrest until Bailey had retreated fully into the house. As we will explain, that means that this case is controlled by *Payton*, not *Santana*.

Payton involved two consolidated cases. In the first, officers showed up at Theodore Payton's apartment to arrest him the day after they had "assembled evidence sufficient to establish probable cause" that he had murdered a man. 445 U.S. at 576, 100 S.Ct. 1371. When Payton didn't answer his door, the officers broke in with the intention of arresting him. *Id.* Although they determined that Payton wasn't home, they discovered evidence of his crime in plain view, and Payton later turned himself in. *Id.* at 576–77, 100 S.Ct. 1371. In the second case, officers obtained the address of Obie Riddick, whose robbery victims had identified him as their assailant. *Id.* at 578, 100 S.Ct. 1371. Without obtaining a warrant, the officers knocked on Riddick's door, saw him when his young son opened it, and entered the house and arrested him on the spot. *Id.* Both Payton and Riddick were convicted based on evidence discovered in the course of the officers' warrantless entries into their homes, and the New York Court of Appeals affirmed both convictions. *Id.* at 579, 100 S.Ct. 1371. The Supreme Court reversed both, holding that "[a]bsent exigent circumstances"—and even assuming the existence of probable ***1302** cause—the threshold of the home "may not reasonably be crossed without a warrant." *Id.* at 590, 100 S.Ct. 1371.

Our precedent reconciling *Santana* and *Payton* is clear. We have expressly refused to read *Santana* "as allowing physical entry past *Payton*'s firm line ... without a warrant or an exigency." *McClish v. Nugent*, 483 F.3d 1231, 1246 (11th Cir. 2007). *Santana*'s description of "the doorway of [a] house" as a "public place," 427 U.S. at 40, 42, 96 S.Ct. 2406 (quotation marks omitted), we have said, shouldn't be misinterpreted to mean that officers have a right to enter and arrest anyone standing in an open doorway without a warrant. *McClish*, 483 F.3d at 1247. Instead, we have explained, it simply means that a person standing in a doorway is in "public" in the sense that he puts himself in the "the plain view" of any officers observing from the street. *Id.* (quoting *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004)). In so doing, the suspect "may well provide an officer with a basis for finding probable cause or an exigency," but he does not "surrender or forfeit every reasonable expectation of privacy ... including ... the right to be secure within his home from a warrantless arrest." *Id.*; *see also Moore v. Pederson*, 806 F.3d 1036, 1050 n.14 (11th Cir. 2015) (observing that "*McClish* clearly established that an officer may not execute a warrantless arrest without probable cause and either consent or exigent circumstances, even if the arrestee is standing in the doorway of his home when the officers conduct the arrest"). The bottom line, post-*Payton*: Unless a warrant is obtained or an exigency exists, "any physical invasion of the structure of the home, by even a fraction of an inch, [is] too much." *Kyllo v. United States*, 533 U.S. 27, 37, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quotation marks and citation omitted).

In order to prevail based on *Santana*, then, Swindell would have to point to some exigent circumstance, but the exigencies present in *Santana* are absent here. *Santana* primarily involved the "hot pursuit" exception to the warrant requirement, and the Court there separately alluded to the risk that evidence would be destroyed. *Id.* at 43, 121 S.Ct. 2038. Neither of those exigencies, however, can justify Bailey's arrest.[6]

In *Santana*, the suspect's arrest was "set in motion in a public place," a crucial element of the hot-pursuit exception. *Id.* at 43, 121 S.Ct. 2038. It was only after officers shouted "police" that Santana retreated fully inside her house. *Id.* at 40, 121 S.Ct. 2038. Bailey's arrest, by contrast, wasn't initiated in public, and therefore can't qualify as a "true hot pursuit." *Id.* at 42, 121 S.Ct. 2038 (quotation marks omitted). Swindell gave no indication that he intended to arrest Bailey before he threatened to tase him and simultaneously tackled him from behind. Taken in the light most favorable to Bailey, the facts demonstrate that the threat and tackle occurred only *after* Bailey had retreated entirely into the house, so "hot pursuit" provides no justification for the warrantless entry here. If *Santana* were understood to cover warrantless arrests "set in motion" *inside* a home, then the hot-pursuit exception would quite literally swallow *Payton*'s rule.

***1303** The *Santana* Court also relied in part on "a realistic expectation that any delay would result in destruction of evidence." *Id.* at 43, 121 S.Ct. 2038 (citation omitted). Swindell's counsel expressly disclaimed any reliance on this kind of exigency at oral argument—and with good reason, as the circumstances here posed no risk that any evidence would be destroyed. Indeed, with respect to the charge for which Bailey was arrested—resisting Swindell's initial effort to detain him, in violation of Fla. Stat. § 843.02—there wasn't any physical evidence; rather, all relevant evidence existed in the minds of Swindell, Bailey, Evelyn, and Jeremy.[7]

Because Swindell can point to no exigency, he violated the Fourth Amendment when he crossed the threshold to effectuate a warrantless, in-home arrest.

* * *

Of course, Swindell loses the cover of qualified immunity only if the constitutional right that he violated was "clearly established" at the time of the events in question. *McClish*, 483 F.3d at 1237. It was.

Qualified immunity "operates 'to protect officers from the sometimes hazy border[s]' " of constitutional rules. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (quotation mark omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). In so doing, it "liberates government agents from the need to constantly err on the side of caution." *Holmes v. Kucynda*, 321 F.3d 1069, 1077 (11th Cir. 2003). Here, though, Swindell crossed a constitutional line that—far from being hazy—was "not only firm but also bright." *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038. That line—no warrantless in-home arrests absent exigent circumstances—was drawn unambiguously in *Payton*, traces its roots in more ancient sources, and has been reaffirmed repeatedly since. *See, e.g.*, *Kirk v. Louisiana*, 536 U.S. 635, 636, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002); *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038; *Welsh v. Wisconsin*, 466 U.S. 740, 754, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *see also Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948). And to be clear, Swindell can't point to *Santana* as a source of uncertainty in the law. The defendant in *McClish* ruined that chance; he made the same "What about *Santana*?" argument, and we indulged it there, 483 F.3d at 1243, but in so doing we expressly rejected it on a going-forward basis, *id*. at 1243–48. Finally, to the extent that any ambiguity remained, we expressly reiterated *McClish*'s holding in *Moore*, explaining—in terms that apply here precisely—that a warrant (or exception) is *always* required for a home arrest "even if the arrestee is standing in the doorway of his home when the officers conduct the arrest." 806 F.3d at 1050 n.14.

Because Swindell violated clearly established Fourth Amendment law, he is not entitled to qualified immunity.

III

We hold that Swindell violated the Fourth Amendment's protection against unreasonable seizures when he arrested Bailey inside his home. We further hold that Bailey's right to be free from a warrantless, in-home arrest was clearly established and that no exception to the warrant ***1304** requirement even plausibly applies in this case. Accordingly, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this opinion.

All Citations

940 F.3d 1295, 28 Fla. L. Weekly Fed. C 487

Footnotes

* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

1 Because this case arises on the appeal of the district court's summary judgment for Swindell, we take and construe the facts in the light most favorable to Bailey. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007).

2 Taking the facts in the light most favorable to Bailey, the district court imputed more knowledge to Swindell than it should have. Giving Bailey the benefit of the doubt, Swindell didn't know at the time that he approached Bailey that Bailey and his wife were "embroiled in a contentious divorce," that Bailey "banged on the closed front door and screamed at Sherri Rolinger," that this disturbance was loud enough that "their two-year-son [sic] woke up crying," or that Rolinger was " 'crying' and 'very distraught.' " We must assume that Swindell learned these facts only after arresting Bailey, and that before the confrontation Swindell knew only what dispatch and Magdalany had told him. Indeed, Swindell indicated that all the relevant information he had at the time that he confronted Bailey was contained in the first full paragraph of his offense report, which we reproduce here:

> While speaking with Dep. Magdalany he advised me of the following: [a]ccording to Sherri, she and Kenneth separated approximately 3 months ago[,] and Kenneth moved out. Since this time, Kenneth has continuously harassed Sherri by showing up at their marital home unannounced while she is home and while she is not home. During the incidents where Sherri is not home Kenneth will turn pictures face down, and move things inside the home to let his presence

be known. During this time frame[,] Kenneth had cameras installed inside the home without her knowledge. Sherri also told Dep. Magdalany that Kenneth is not acting right and has "snapped". During tonight's incident, Sherri and Kenneth got into a verbal argument, but at this time Dep. Magdalany had not determined if a crime occurred and was still investigating the incident.

3 Bailey brought other claims that are not before us on appeal. The district court allowed a Fourth Amendment excessive-force claim to go to trial, and the jury returned a verdict for Swindell. Bailey doesn't challenge that verdict on appeal. Nor does Bailey challenge the dismissal of his state-law claims.

4 The district court must have rejected this argument in reaching the result that it did, because Bailey clearly raised it. In particular, Bailey contended that "[i]t would not be enough that Deputy Swindell had a good faith belief, probable cause, or arguable probable cause that a misdemeanor crime had been committed ... [as] Deputy Swindell was not free to enter Mr. Bailey's home for the purpose of either detaining him or arresting him." Continuing, Bailey argued that "it is not easy to see how the warrantless entry ... is anything but a violation of an established right to be free from unreasonable seizure ... in your own home."

5 Some of our decisions have erroneously suggested that the "arguable probable cause" standard applies at the first step of the qualified-immunity analysis, in determining whether a constitutional violation has occurred. *See, e.g.*, *Storck v. City of Coral Springs*, 354 F.3d 1307, 1317 (11th Cir. 2003) ("[V]iewing the facts in the light most favorable to Storck, she has not established a constitutional violation because, at the very least, McHugh had arguable probable cause."). Controlling case law makes clear, however, that "arguable probable cause" is a step-*two* standard. *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) ("Sellers-Sampson is entitled to qualified immunity because he had arguable probable cause to arrest Lirio. Put differently, Lirio has not shown that the law of probable cause is so clearly established that no reasonable officer, faced with the situation before Sellers-Sampson, could have believed that probable cause to arrest existed."), *modified*, 14 F.3d 583 (11th Cir. 1994); *see also Huebner*, 935 F.3d at 1190 n.6 ("Accordingly, we needn't reach the question whether McDonough had 'arguable probable cause,' which comes into play only at the second, 'clearly established' step of the qualified-immunity analysis." (citation omitted)).

6 Swindell arguably waived any argument that his warrantless arrest of Bailey was supported by exigent circumstances because he didn't raise the issue in his brief. *See United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Parties must submit all issues on appeal in their initial briefs." (citations omitted)). Read charitably, his citation of *Santana* could be understood to invoke the exigencies on which the Court in that case relied, so we will analyze those circumstances here.

7 Although Swindell didn't present any exigent-circumstances arguments in his brief, he did raise a concern about officer safety at oral argument, contending that Swindell feared that Bailey would return to the porch with a weapon. That argument is not only waived, *see Nealy*, 232 F.3d at 830, but also wholly speculative, as there was no evidence to suggest that anyone had a weapon pre-arrest.

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141 S.Ct. 1596
Supreme Court of the United States.

Edward A. CANIGLIA, Petitioner
v.
Robert F. STROM, et al.

No. 20-157
|
Argued March 24, 2021
|
Decided May 17, 2021

Synopsis

Background: Detainee, who was taken by police officers from his home to a hospital for a psychiatric evaluation, brought § 1983 action against city and the officers, alleging the officers violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The United States District Court for the District of Rhode Island, John J. McConnell, Chief Judge, 396 F.Supp.3d 227, granted summary judgment to city and officers. Detainee appealed. The United States Court of Appeals for the First Circuit, Selya, Circuit Judge, 953 F.3d 112, affirmed. Certiorari was granted.

The Supreme Court, Justice Thomas, held that police officers' community caretaking duties do not justify warrantless searches and seizures in the home.

Vacated and remanded.

Chief Justice Roberts filed a concurring opinion, in which Justice Breyer joined.

Justice Alito filed a concurring opinion.

Justice Kavanaugh filed a concurring opinion.

***1597** *Syllabus*[*]

During an argument with his wife, petitioner Edward Caniglia placed a handgun on the dining room table and asked his wife to "shoot [him] and get it over with." His wife instead left the home and spent the night at a hotel. The next morning, she was unable to reach her husband by phone, so she called the police to request a welfare check. The responding officers accompanied Caniglia's wife to the home, where they encountered Caniglia on the porch. The officers called an ambulance based on the belief that Caniglia posed a risk to himself or others. Caniglia agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. But once Caniglia left, the officers located and seized his weapons. Caniglia sued, claiming that the officers had entered his home and seized him and his firearms without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment to the officers. The First Circuit affirmed, extrapolating from the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706, a theory that the officers' removal of Caniglia and his firearms from his home was justified by a "community caretaking exception" to the warrant requirement.

Held: Neither the holding nor logic of *Cady* justifies such warrantless searches and seizures in the home. *Cady* held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. In reaching this conclusion, the Court noted that the officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. 413 U.S. at 441, 93 S.Ct. 2523. But searches of vehicles and homes are constitutionally different, as the *Cady* opinion repeatedly stressed. *Id.*, at 439, 440–442, 93 S.Ct. 2523. The very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or her home and "there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495. A recognition of the existence of "community caretaking" tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere. Pp. 1599 – 1600.

953 F.3d 112, vacated and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. ROBERTS, C. J., filed a concurring opinion, in which BREYER, J., joined. ALITO, J., and KAVANAUGH, J., filed concurring opinions.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Opinion

Justice THOMAS delivered the opinion of the Court.

***1598** Decades ago, this Court held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). In reaching this conclusion, the Court observed that police officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. *Id.*, at 441, 93 S.Ct. 2523. The question today is whether *Cady*'s acknowledgment of these "caretaking" duties creates a standalone doctrine that justifies warrantless searches and seizures in the home. It does not.

I

During an argument with his wife at their Rhode Island home, Edward Caniglia (petitioner) retrieved a handgun from the bedroom, put it on the dining room table, and asked his wife to "shoot [him] now and get it over with." She declined, and instead left to spend the night at a hotel. The next morning, when petitioner's wife discovered that she could not reach him by telephone, she called the police (respondents) to request a welfare check.

Respondents accompanied petitioner's wife to the home, where they encountered petitioner on the porch. Petitioner spoke with respondents and confirmed his wife's account of the argument, but denied that he was suicidal. Respondents, however, thought that petitioner posed a risk to himself or others. They called an ambulance, and petitioner agreed to go to the hospital for a psychiatric evaluation—but only after respondents allegedly promised not to confiscate his firearms. Once the ambulance had taken petitioner away, however, respondents seized the weapons. Guided by petitioner's wife —whom they allegedly misinformed about his wishes— respondents entered the home and took two handguns.

Petitioner sued, claiming that respondents violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The District Court granted summary judgment to respondents, and the First Circuit affirmed solely on the ground that the decision to remove petitioner and his firearms from the premises fell within a "community caretaking exception" to the warrant requirement. *Caniglia v. Strom*, 953 F.3d 112, 121–123, 131 and nn. 5, 9 (2020). Citing this Court's statement in *Cady* that police officers often have noncriminal reasons to interact with motorists on "public highways," 413 U.S. at 441, 93 S.Ct. 2523, the First Circuit extrapolated a freestanding community-caretaking exception that applies to both cars and homes. 953 F.3d at 124 ("Threats to individual and community safety are not confined to the ***1599** highways"). Accordingly, the First Circuit saw no need to consider whether anyone had consented to respondents' actions; whether these actions were justified by "exigent circumstances"; or whether any state law permitted this kind of mental-health intervention. *Id.*, at 122–123. All that mattered was that respondents' efforts to protect petitioner and those around him were "distinct from 'the normal work of criminal investigation,' " fell "within the realm of reason," and generally tracked what the court viewed to be "sound police procedure." *Id.*, at 123–128, 132–133. We granted certiorari. 592 U.S. ——, 141 S.Ct. 870, 208 L.Ed.2d 436 (2020).

II

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The " 'very core' " of this guarantee is " 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

To be sure, the Fourth Amendment does not prohibit all unwelcome intrusions "on private property," *ibid.*— only "unreasonable" ones. We have thus recognized a few permissible invasions of the home and its curtilage. Perhaps

most familiar, for example, are searches and seizures pursuant to a valid warrant. See *Collins v. Virginia*, 584 U.S. ——, —— – ——, 138 S.Ct. 1663, 1670–71, 201 L.Ed.2d 9 (2018). We have also held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to " 'render emergency assistance to an injured occupant or to protect an occupant from imminent injury.' " *Kentucky v. King*, 563 U.S. 452, 460, 470, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); see also *Brigham City v. Stuart*, 547 U.S. 398, 403–404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (listing other examples of exigent circumstances). And, of course, officers may generally take actions that " 'any private citizen might do' " without fear of liability. *E.g., Jardines*, 569 U.S. at 8, 133 S.Ct. 1409 (approaching a home and knocking on the front door).

The First Circuit's "community caretaking" rule, however, goes beyond anything this Court has recognized. The decision below assumed that respondents lacked a warrant or consent, and it expressly disclaimed the possibility that they were reacting to a crime. The court also declined to consider whether any recognized exigent circumstances were present because respondents had forfeited the point. Nor did it find that respondents' actions were akin to what a private citizen might have had authority to do if petitioner's wife had approached a neighbor for assistance instead of the police.

Neither the holding nor logic of *Cady* justified that approach. True, *Cady* also involved a warrantless search for a firearm. But the location of that search was an impounded vehicle—not a home—" 'a constitutional difference' " that the opinion repeatedly stressed. 413 U.S. at 439, 93 S.Ct. 2523; see also *id.*, at 440–442, 93 S.Ct. 2523. In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car "parked adjacent to the dwelling place of the owner." *Id.*, at 446–448, 93 S.Ct. 2523 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

Cady's unmistakable distinction between vehicles and homes also places into proper context its reference to "community caretaking." This quote comes from a portion of the opinion explaining that the "frequency ***1600** with which ... vehicle[s] can become disabled or involved in ... accident[s] on public highways" often requires police to perform noncriminal "community caretaking functions," such as providing aid to motorists. 413 U.S. at 441, 93 S.Ct. 2523. But, this recognition that police officers perform many civic tasks in modern society was just that—a recognition that these tasks exist, and not an open-ended license to perform them anywhere.

* * *

What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly "declined to expand the scope of ... exceptions to the warrant requirement to permit warrantless entry into the home." *Collins*, 584 U.S., at ——, 138 S.Ct. at 1672. We thus vacate the judgment below and remand for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice BREYER joins, concurring.

Fifteen years ago, this Court unanimously recognized that "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." *Brigham City v. Stuart*, 547 U.S. 398, 406, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). A warrant to enter a home is not required, we explained, when there is a "need to assist persons who are seriously injured or threatened with such injury." *Id.*, at 403, 126 S.Ct. 1943; see also *Michigan v. Fisher*, 558 U.S. 45, 49, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (*per curiam*) (warrantless entry justified where "there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger" (internal quotation marks omitted)). Nothing in today's opinion is to the contrary, and I join it on that basis.

Justice ALITO, concurring.

I join the opinion of the Court but write separately to explain my understanding of the Court's holding and to highlight some important questions that the Court does not decide.

1. The Court holds—and I entirely agree—that there is no special Fourth Amendment rule for a broad category of cases involving "community caretaking." As I understand the term, it describes the many police tasks that go beyond criminal law enforcement. These tasks vary widely, and there is no clear limit on how far they might extend in the future. The category potentially includes any non-law-enforcement work that a community chooses to assign, and because of the breadth of activities that may be described as community caretaking, we should not assume that the Fourth Amendment's command

of reasonableness applies in the same way to everything that might be viewed as falling into this broad category.

The Court's decision in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), did not recognize any such "freestanding" Fourth Amendment category. See *ante*, at 1598 – 1599, 1599 – 1600. The opinion merely used the phrase "community caretaking" in passing. 413 U.S. at 441, 93 S.Ct. 2523.

2. While there is no overarching "community caretaking" doctrine, it does not follow that all searches and seizures conducted for non-law-enforcement purposes must be analyzed under precisely the same Fourth Amendment rules developed in criminal cases. Those rules may or may not be appropriate for use in various non-criminal-law-enforcement contexts. We do not decide that issue today.

***1601** 3. This case falls within one important category of cases that could be viewed as involving community caretaking: conducting a search or seizure for the purpose of preventing a person from committing suicide. Assuming that petitioner did not voluntarily consent to go with the officers for a psychological assessment,[1] he was seized and thus subjected to a serious deprivation of liberty. But was this warrantless seizure "reasonable"? We have addressed the standards required by due process for involuntary commitment to a mental treatment facility, see *Addington v. Texas*, 441 U.S. 418, 427, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); see also *O'Connor v. Donaldson*, 422 U.S. 563, 574–576, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Foucha v. Louisiana*, 504 U.S. 71, 75–77, 83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), but we have not addressed Fourth Amendment restrictions on seizures like the one that we must assume occurred here, *i.e.*, a short-term seizure conducted for the purpose of ascertaining whether a person presents an imminent risk of suicide. Every State has laws allowing emergency seizures for psychiatric treatment, observation, or stabilization, but these laws vary in many respects, including the categories of persons who may request the emergency action, the reasons that can justify the action, the necessity of a judicial proceeding, and the nature of the proceeding.[2] Mentioning these laws only in passing, petitioner asked us to render a decision that could call features of these laws into question. The Court appropriately refrains from doing so.

4. This case also implicates another body of law that petitioner glossed over: the so-called "red flag" laws that some States are now enacting. These laws enable the police to seize guns pursuant to a court order to prevent their use for suicide or the infliction of harm on innocent persons. See, *e.g.,* Cal. Penal Code Ann. §§ 18125–18148 (West Cum. Supp. 2021); Fla. Stat. § 790.401(4) (Cum. Supp. 2021); Mass. Gen. Laws Ann., ch. 140, § 131T (2021). They typically specify the standard that must be met and the procedures that must be followed before firearms may be seized. Provisions of red flag laws may be challenged under the Fourth Amendment, and those cases may come before us. Our decision today does not address those issues.

5. One additional category of cases should be noted: those involving warrantless, nonconsensual searches of a home for the purpose of ascertaining whether a resident is in urgent need of medical attention and cannot summon help. At oral argument, THE CHIEF JUSTICE posed a question that highlighted this problem. He imagined a situation in which neighbors of an elderly woman call the police and express concern because the woman had agreed to come over for dinner at 6 p.m., but by 8 p.m., had not appeared or called even though she was never late for anything. The woman had not been seen leaving her home, and she was not answering the phone. Nor could the neighbors reach her relatives by phone. If the police entered the home without a warrant to see if she needed help, would that violate the Fourth Amendment? Tr. of Oral Arg. 6–8.

***1602** Petitioner's answer was that it would. Indeed, he argued, even if 24 hours went by, the police still could not lawfully enter without a warrant. If the situation remained unchanged for several days, he suggested, the police might be able to enter after obtaining "a warrant for a missing person." *Id.,* at 9.

THE CHIEF JUSTICE's question concerns an important real-world problem. Today, more than ever, many people, including many elderly persons, live alone.[3] Many elderly men and women fall in their homes,[4] or become incapacitated for other reasons, and unfortunately, there are many cases in which such persons cannot call for assistance. In those cases, the chances for a good recovery may fade with each passing hour.[5] So in THE CHIEF JUSTICE's imaginary case, if the elderly woman was seriously hurt or sick and the police heeded petitioner's suggestion about what the Fourth Amendment demands, there is a fair chance she would not be found alive. This imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony.

Our current precedents do not address situations like this. We have held that the police may enter a home without a warrant when there are "exigent circumstances." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). But circumstances are exigent only when there is not enough time to get a warrant, see *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), and warrants are not typically granted for the purpose of checking on a person's medical condition. Perhaps States should institute procedures for the issuance of such warrants, but in the meantime, courts may be required to grapple with the basic Fourth Amendment question of reasonableness.

6. The three categories of cases discussed above are simply illustrative. Searches and seizures conducted for other non-law-enforcement purposes may arise and may present their own Fourth Amendment issues. Today's decision does not settle those questions.

* * *

In sum, the Court properly rejects the broad "community caretaking" theory on which the decision below was based. The Court's decision goes no further, and on that understanding, I join the opinion in full.

Justice KAVANAUGH, concurring.

I join the Court's opinion in full. I write separately to underscore and elaborate on THE CHIEF JUSTICE's point that the Court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid. See *ante,* at 1600 (ROBERTS, C. J., concurring). For example, as I will ***1603** explain, police officers may enter a home without a warrant in circumstances where they are reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen and suffered a serious injury.

Ratified in 1791 and made applicable to the States in 1868, the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." As the constitutional text establishes, the "ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. 373, 381, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (internal quotation marks omitted). The Court has said that a warrant supported by probable cause is ordinarily required for law enforcement officers to enter a home. See U.S. Const., Amdt. 4. But drawing on common-law analogies and a commonsense appraisal of what is "reasonable," the Court has recognized various situations where a warrant is not required. For example, the exigent circumstances doctrine allows officers to enter a home without a warrant in certain situations, including: to fight a fire and investigate its cause; to prevent the imminent destruction of evidence; to engage in hot pursuit of a fleeing felon or prevent a suspect's escape; to address a threat to the safety of law enforcement officers or the general public; to render emergency assistance to an injured occupant; or to protect an occupant who is threatened with serious injury. See *Mitchell v. Wisconsin*, 588 U.S. ——, ——, 139 S.Ct. 2525, 2533, 204 L.Ed.2d 1040 (2019) (plurality opinion); *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 612, 135 S.Ct. 1765, 191 L.Ed.2d 856 (2015); *Kentucky v. King*, 563 U.S. 452, 460, 462, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *Michigan v. Fisher*, 558 U.S. 45, 47, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (*per curiam*); *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); *Michigan v. Clifford*, 464 U.S. 287, 293, and n. 4, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (plurality opinion); *Mincey v. Arizona*, 437 U.S. 385, 392–394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Michigan v. Tyler*, 436 U.S. 499, 509–510, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *United States v. Santana*, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–299, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Ker v. California*, 374 U.S. 23, 40–41, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (plurality opinion).

Over the years, many courts, like the First Circuit in this case, have relied on what they have labeled a "community caretaking" doctrine to allow warrantless entries into the home for a non-investigatory purpose, such as to prevent a suicide or to conduct a welfare check on an older individual who has been out of contact. But as the Court today explains, any such standalone community caretaking doctrine was primarily devised for searches of cars, not homes. *Ante,* at 1601 – 1602; see *Cady v. Dombrowski*, 413 U.S. 433, 447–448, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

That said, this Fourth Amendment issue is more labeling than substance. The Court's Fourth Amendment case law already recognizes the exigent circumstances doctrine, which allows an officer to enter a home without a warrant if the "exigencies of the situation make the needs of law enforcement so compelling that the warrantless search

is objectively reasonable under the Fourth Amendment." *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943 (internal quotation marks omitted); see also *ante,* at 1601 – 1602. As relevant here, one such recognized "exigency" is the "need to assist persons who are seriously ***1604** injured or threatened with such injury." *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943; see also *ante,* at 1600 (ROBERTS, C. J., concurring). The Fourth Amendment allows officers to enter a home if they have "an objectively reasonable basis for believing" that such help is needed, and if the officers' actions inside the home are reasonable under the circumstances. *Brigham City*, 547 U.S. at 406, 126 S.Ct. 1943; see also *Michigan v. Fisher*, 558 U.S. at 47–48, 130 S.Ct. 546.

This case does not require us to explore all the contours of the exigent circumstances doctrine as applied to emergency-aid situations because the officers here disclaimed reliance on that doctrine. But to avoid any confusion going forward, I think it important to briefly describe how the doctrine applies to some heartland emergency-aid situations.

As Chief Judge Livingston has cogently explained, although this doctrinal area does not draw much attention from courts or scholars, "municipal police spend a good deal of time responding to calls about missing persons, sick neighbors, and premises left open at night." Livingston, Police, Community Caretaking, and the Fourth Amendment, 1998 U. Chi. Leg. Forum 261, 263 (1998). And as she aptly noted, "the responsibility of police officers to search for missing persons, to mediate disputes, and to aid the ill or injured has never been the subject of serious debate; nor has" the "responsibility of police to provide services in an emergency." *Id.,* at 302.

Consistent with that reality, the Court's exigency precedents, as I read them, permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now. See, *e.g., Sheehan*, 575 U.S. at 612, 135 S.Ct. 1765; *Michigan v. Fisher*, 558 U.S. at 48–49, 130 S.Ct. 546; *Brigham City*, 547 U.S. at 406–407, 126 S.Ct. 1943. The officers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter.

A few (non-exhaustive) examples illustrate the point.

Suppose that a woman calls a healthcare hotline or 911 and says that she is contemplating suicide, that she has firearms in her home, and that she might as well die. The operator alerts the police, and two officers respond by driving to the woman's home. They knock on the door but do not receive a response. May the officers enter the home? Of course.

The exigent circumstances doctrine applies because the officers have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury." *Id.,* at 400, 403, 126 S.Ct. 1943; cf. *Sheehan*, 575 U.S. at 612, 135 S.Ct. 1765 (officers could enter the room of a mentally ill person who had locked herself inside with a knife). After all, a suicidal individual in such a scenario could kill herself at any moment. The Fourth Amendment does not require officers to stand idly outside as the suicide takes place.[1]

***1605** Consider another example. Suppose that an elderly man is uncharacteristically absent from Sunday church services and repeatedly fails to answer his phone throughout the day and night. A concerned relative calls the police and asks the officers to perform a wellness check. Two officers drive to the man's home. They knock but receive no response. May the officers enter the home? Of course.

Again, the officers have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury." *Brigham City*, 547 U.S. at 400, 403, 126 S.Ct. 1943. Among other possibilities, the elderly man may have fallen and hurt himself, a common cause of death or serious injury for older individuals. The Fourth Amendment does not prevent the officers from entering the home and checking on the man's well-being.[2]

To be sure, courts, police departments, and police officers alike must take care that officers' actions in those kinds of cases are reasonable under the circumstances. But both of those examples and others as well, such as cases involving unattended young children inside a home, illustrate the kinds of warrantless entries that are perfectly constitutional under the exigent circumstances doctrine, in my view.

With those observations, I join the Court's opinion in full.

All Citations

141 S.Ct. 1596, 209 L.Ed.2d 604, 21 Cal. Daily Op. Serv. 4474, 2021 Daily Journal D.A.R. 4725, 28 Fla. L. Weekly Fed. S 795

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Court of Appeals assumed petitioner's consent was not voluntary because the police allegedly promised that they would not seize his guns if he went for a psychological evaluation. 953 F.3d 112, 121 (CA1 2020). The Court does not decide whether this assumption was justified.

2 See Brief for Petitioner 38–39, n. 4 (gathering state authorities); L. Hedman et al., State Laws on Emergency Holds for Mental Health Stabilization, 67 Psychiatric Servs. 579 (2016).

3 Dept. of Commerce, Bureau of Census, The Rise of Living Alone, Fig. HH–4 (2020), https://www.census.gov/content/dam/Census/ library /visualizations /time-series /demo /families-and-households /hh-4.pdf; Ortiz-Ospina, The Rise of Living Alone (Dec. 10, 2019), https://ourworldindata.org/living-alone; Smith, Cities With the Most Adults Living Alone (May 4, 2020), https://www.self.inc/blog/adults-living-alone.

4 See B. Moreland, R. Kakara, & A. Henry, Trends in Nonfatal Falls and Fall-Related Injuries Among Adults Aged #65 Years—United States, 2012–2018, 69 Morbidity and Mortality Weekly Rep. 875 (2020).

5 See, *e.g.,* J. Gurley, N. Lum, M. Sande, B. Lo, & M. Katz, Persons Found in Their Homes Helpless or Dead, 334 New Eng. J. Med. 1710 (1996).

1 In 2019 in the United States, 47,511 people committed suicide. That number is more than double the number of annual homicides. See Dept. of Health and Human Servs., Centers for Disease Control and Prevention, D. Stone, C. Jones, & K. Mack, Changes in Suicide Rates—United States, 2018–2019, 70 Morbidity and Mortality Weekly Rep. 261, 263 (2021) (MMWR); Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Report, Crime in the United States, 2019, p. 2 (2020).

2 In 2018 in the United States, approximately 32,000 older adults died from falls. Falls are also the leading cause of injury for older adults. B. Moreland, R. Kakara, & A. Henry, Trends in Nonfatal Falls and Fall-Related Injuries Among Adults Aged # 65 Years—United States, 2012–2018, 69 MMWR 875 (2020).

133 S.Ct. 1409
Supreme Court of the United States

FLORIDA, Petitioner
v.
Joelis JARDINES.

No. 11–564.
|
Argued Oct. 31, 2012.
|
Decided March 26, 2013.

Synopsis

Background: Defendant, who was charged with trafficking in cannabis and theft of electricity, moved to suppress evidence seized pursuant to a search warrant that was obtained after a dog-sniff on front porch of defendant's home. The Florida Circuit Court, Miami–Dade County, William Thomas, J., granted the motion. State appealed. The Florida District Court of Appeal, 9 So.3d 1, reversed and certified a conflict. The Florida Supreme Court, Perry, J., 73 So.3d 34, quashed the decision of the District Court of Appeal. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

law enforcement officers' use of drug-sniffing dog on front porch of home, to investigate an unverified tip that marijuana was being grown in the home, was a trespassory invasion of the curtilage which constituted a "search" for Fourth Amendment purposes, and

officers did not have an implied license for the physical invasion of the curtilage.

Florida Supreme Court affirmed.

Justice Kagan filed a concurring opinion, in which Justices Ginsburg and Sotomayor joined.

Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Kennedy and Breyer joined.

****1411** ***1** *Syllabus* [*]

Police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis. The Supreme Court of Florida approved the trial court's decision to suppress the evidence, holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause.

****1412** *Held* : The investigation of Jardines' home was a "search" within the meaning of the Fourth Amendment. Pp. 1414 – 1418.

(a) When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones,* 565 U.S. ——, ——, n. 3, 132 S.Ct. 945, 181 L.Ed.2d 911. P. 1414.

(b) At the Fourth Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734. The area "immediately surrounding and associated with the home"—the curtilage—is "part of the home itself for Fourth Amendment purposes." *Oliver v. United States,* 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214. The officers entered the curtilage here: The front porch is the classic exemplar of an area "to which the activity of home life extends." *Id.,* at 182, n. 12, 104 S.Ct. 1735. Pp. 1414 – 1415.

***2** (c) The officers' entry was not explicitly or implicitly invited. Officers need not "shield their eyes" when passing by a home "on public thoroughfares," *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210, but "no man can set his foot upon his neighbour's close without his leave," *Entick v. Carrington,* 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817. A police officer not armed with a warrant may approach a home in hopes of speaking to its occupants, because that is "no more than any private citizen might do." *Kentucky v. King,* 563 U.S. ——, ——, 131 S.Ct. 1849, 179 L.Ed.2d 865. But the scope of a license is limited not only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search. Pp. 1415 – 1417.

(d) It is unnecessary to decide whether the officers violated Jardines' expectation of privacy under *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. Pp. 1417 – 1418.

73 So.3d 34, affirmed.

SCALIA, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. KAGAN, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and KENNEDY and BREYER, JJ., joined.

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Opinion

Justice SCALIA delivered the opinion of the Court.

***3** ****1413** We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.

I

In 2006, Detective William Pedraja of the Miami–Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived ***4** at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt had the dog on a six-foot leash, owing in part to the dog's "wild" nature, App. to Pet. for Cert. A–35, and tendency to dart around erratically while searching. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by ... tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." *Id.,* at A–33 to A–34. Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." *Id.,* at A–35. And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source. *Id.,* at A–38.

After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.

At trial, Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable ***5** search. The trial court granted the motion, and the Florida Third District Court of Appeal reversed. On a petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved

the trial court's decision to suppress, holding (as relevant here) that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search. 73 So.3d 34 (2011).

**1414 We granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment. 565 U.S. ——, 132 S.Ct. 995, 181 L.Ed.2d 726 (2012).

II

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones,* 565 U.S. ——, ——, n. 3, 132 S.Ct. 945, 950–951, n. 3, 181 L.Ed.2d 911 (2012). By reason of our decision in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), property rights "are not the sole measure of Fourth Amendment violations," *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992)—but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections "when the Government *does* engage in [a] physical intrusion of a constitutionally protected area," *United States v. Knotts,* 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (Brennan, J., concurring in the judgment).

That principle renders this case a straightforward one. The officers were gathering information in an area belonging *6 to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

A

The Fourth Amendment "indicates with some precision the places and things encompassed by its protections": persons, houses, papers, and effects. *Oliver v. United States,* 466 U.S. 170, 176, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called "open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text. *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924).

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver, supra,* at 180, 104 S.Ct. 1735. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," *Hester, supra,* at 59, 44 S.Ct. 445, so too is **1415 the identity of home and what Blackstone called the "curtilage or homestall," for the "house *7 protects and privileges all its branches and appurtenants." 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver,* 466 U.S., at 182, n. 12, 104 S.Ct. 1735. Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends." *Ibid.*

B

Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion.[1] While law enforcement officers need not "shield their eyes" when passing by the home "on public thoroughfares," *Ciraolo,* 476 U.S., at 213, 106 S.Ct. 1809, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. In permitting, for example, visual observation of the home from "public navigable airspace," we were careful to note that it was done "in a physically nonintrusive manner." *Ibid. Entick v. Carrington,* 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765), a case "undoubtedly familiar" to "every American statesman" at the time of the Founding, *Boyd v. United States,* 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886), states the general ***8** rule clearly: "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." 2 Wils. K.B., at 291, 95 Eng. Rep., at 817. As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.

"A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v. Gratz,* 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria,* 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.[2] ****1416** Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." *Kentucky v. King,* 563 U.S. ——, ——, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011).

***9** But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker.[3] To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.[4]

***10** The State points to our decisions holding that the subjective intent of the officer is irrelevant. See *Ashcroft v. al–Kidd,* 563 U.S. ——, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011); *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). But those cases merely hold that a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment. See *id.,* at 810, 813, 116 S.Ct. 1769. Here, however, the question before the court is precisely ****1417** *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

III

The State argues that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest. The State cites for authority our decisions in *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), and *Illinois v. Caballes,* 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), which held, respectively, that canine inspection of luggage in an airport,

chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the "reasonable expectation of privacy" described in *Katz*.

Just last Term, we considered an argument much like this. *Jones* held that tracking an automobile's whereabouts using a physically-mounted GPS receiver is a Fourth Amendment search. The Government argued that the *Katz* standard "show[ed] that no search occurred," as the defendant had "no 'reasonable expectation of privacy' " in his whereabouts on the public roads, ***11** *Jones,* 565 U.S., at ——, 132 S.Ct., at 950—a proposition with at least as much support in our case law as the one the State marshals here. See, *e.g., United States v. Knotts,* 460 U.S. 276, 278, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). But because the GPS receiver had been physically mounted on the defendant's automobile (thus intruding on his "effects"), we held that tracking the vehicle's movements was a search: a person's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones, supra,* at ——, 132 S.Ct., at 950. The *Katz* reasonable-expectations test "has been *added to,* not *substituted for,*" the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas. *Jones, supra,* at ——, 132 S.Ct., at 951–952.

Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.

For a related reason we find irrelevant the State's argument (echoed by the dissent) that forensic dogs have been commonly used by police for centuries. This argument is apparently directed to our holding in *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), that surveillance of the home is a search where "the Government uses a device that is not in general public use" to "explore details of the home that would previously have been unknowable *without physical intrusion*." *Id.,* at 40, 121 S.Ct. 2038 (emphasis added). But the implication of that statement (*inclusio unius est exclusio alterius*) is that when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant.

* * *

The government's use of trained police dogs to investigate the home and its immediate ****1418** surroundings is a "search" ***12** within the meaning of the Fourth Amendment. The judgment of the Supreme Court of Florida is therefore affirmed.

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG and Justice SOTOMAYOR join, concurring.

For me, a simple analogy clinches this case—and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. See *ante,* at 1416, n. 3. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? *Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Yes, of course, he has done that too.

That case is this case in every way that matters. Here, police officers came to Joelis Jardines' door with a super-sensitive instrument, which they deployed to detect things inside that they could not perceive unassisted. The equipment they used was animal, not mineral. But contra the dissent, see *post,* at 1420 (opinion of ALITO, J.) (noting the ubiquity of dogs in American households), that is of no significance in determining whether a search occurred. Detective Bartelt's dog was not your neighbor's pet, come to your porch on a leisurely stroll. As this Court discussed earlier this Term, drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information ***13** to their human partners. See *Florida v. Harris,* 568 U.S. ——, 133 S.Ct. 1050, 1053–1054, 1056–1057, 185 L.Ed.2d 61 (2013). They are to the poodle down the street as high-powered binoculars are to a piece of plain glass. Like the binoculars, a drug-detection dog is a specialized device for

discovering objects not in plain view (or plain smell). And as in the hypothetical above, that device was aimed here at a home—the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects. Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well.

The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked ... well, much like this one. It would have talked about " 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Ante,* at 1414 (quoting *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). It would have insisted on maintaining the "practical value" of that right by preventing police officers from standing in an adjacent space and "trawl[ing] for evidence with impunity." *Ante,* at 1414. It would have explained that " 'privacy expectations are most heightened' " in the home and the surrounding area. *Ante,* at 1414 – 1415 (quoting *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)). And it would have determined ****1419** that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there. See *ante,* at 1415 – 1416, and nn. 2–3.

It is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so align. The law of property "naturally enough influence[s]" our "shared social expectations" of what places should be free from governmental incursions. *Georgia v. Randolph,* 547 U.S. 103, 111, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006); see ***14** *Rakas v. Illinois,* 439 U.S. 128, 143, n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). And so the sentiment "my home is my own," while originating in property law, now also denotes a common understanding—extending even beyond that law's formal protections—about an especially private sphere. Jardines' home was his property; it was also his most intimate and familiar space. The analysis proceeding from each of those facts, as today's decision reveals, runs mostly along the same path.

I can think of only one divergence: If we had decided this case on privacy grounds, we would have realized that *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), already resolved it.[1] The *Kyllo* Court held that police officers conducted a search when they used a thermal-imaging device to detect heat emanating from a private home, even though they committed no trespass. Highlighting our intention to draw both a "firm" and a "bright" line at "the entrance to the house," *id.,* at 40, 121 S.Ct. 2038, we announced the following rule:

> "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Ibid.*

That "firm" and "bright" rule governs this case: The police officers here conducted a search because they used a "device ... not in general public use" (a trained drug-detection dog) to "explore details of the home" (the presence of certain substances) ***15** that they would not otherwise have discovered without entering the premises.

And again, the dissent's argument that the device is just a dog cannot change the equation. As *Kyllo* made clear, the "sense-enhancing" tool at issue may be "crude" or "sophisticated," may be old or new (drug-detection dogs actually go back not "12,000 years" or "centuries," *post,* at 1420, 1424, 1428, but only a few decades), may be either smaller or bigger than a breadbox; still, "at least where (as here)" the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"—an expectation "that *exists,* and that is acknowledged to be *reasonable*." 533 U.S., at 34, 36, 121 S.Ct. 2038.[2] That does not mean the device ****1420** is off-limits, as the dissent implies, see *post,* at 1425 – 1426; it just means police officers cannot use it to examine a home without a warrant or exigent circumstance. See *Brigham City v. Stuart,* 547 U.S. 398, 403–404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (describing exigencies allowing the warrantless search of a home).

***16** With these further thoughts, suggesting that a focus on Jardines' privacy interests would make an "easy cas[e] easy" twice over, *ante,* at 1417, I join the Court's opinion in full.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join, dissenting.

The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo–American jurisprudence.

The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. This license is not limited to persons who intend to speak to an occupant or who actually do so. (Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without intending to converse.) Nor is the license restricted to categories of visitors whom an occupant of the dwelling is likely to welcome; as the Court acknowledges, this license applies even to "solicitors, hawkers and peddlers of all kinds." *Ante,* at 1415 (internal quotation marks omitted). And the license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions).

According to the Court, however, the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent's house by his dog, Franky. Where is the authority evidencing such a rule? Dogs have been domesticated for about 12,000 years;[1] they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment;[2] and their acute sense of smell has ***17** been used in law enforcement for centuries.[3] Yet the Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, ****1421** trespass law provides no support for the Court's holding today.

The Court's decision is also inconsistent with the reasonable-expectations-of-privacy test that the Court adopted in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human.

For these reasons, I would hold that no search within the meaning of the Fourth Amendment took place in this case, and I would reverse the decision below.

I

The opinion of the Court may leave a reader with the mistaken impression that Detective Bartelt and Franky remained on respondent's property for a prolonged period of time and conducted a far-flung exploration of the front yard. See *ante,* at 1414 ("trawl for evidence with impunity"), 1416 ("marching his bloodhound into the garden"). But that is not what happened.

Detective Bartelt and Franky approached the front door via the driveway and a paved path—the route that any visitor would customarily use[4]—and Franky was on the kind of leash that any dog owner might employ.[5] As Franky approached ***18** the door, he started to track an airborne odor. He held his head high and began "bracketing" the area (pacing back and forth) in order to determine the strongest source of the smell. App. 95–96. Detective Bartelt knew "the minute [he] observed" this behavior that Franky had detected drugs. *Id.,* at 95. Upon locating the odor's strongest source, Franky sat at the base of the front door, and at this point, Detective Bartelt and Franky immediately returned to their patrol car. *Id.,* at 98.

A critical fact that the Court omits is that, as respondent's counsel explained at oral argument, this entire process—walking down the driveway and front path to the front door, waiting for Franky to find the strongest source of the odor, and walking back to the car—took approximately a minute or two. Tr. of Oral Arg. 57–58. Thus, the amount of time that Franky and the detective remained at the front porch was even less. The Court also fails to mention that, while Detective Bartelt apparently did not personally smell the odor of marijuana coming from the house, another officer who subsequently stood on the front porch, Detective Pedraja, did notice that smell and was able to identify it. App. 81.

II

The Court concludes that the conduct in this case was a search because Detective Bartelt exceeded the boundaries of the license to approach the house that is recognized by the law of trespass, but the Court's interpretation of the scope of that license is unfounded.

A

It is said that members of the public may lawfully proceed along a walkway leading to the front door of a house because ****1422** custom grants them a license to do so. *Breard v. Alexandria,* 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Lakin v. Ames,* 64 Mass. 198, 220

(1852); J. Bishop, Commentaries on the Non–Contract Law § 823, p. 378 (1889). This rule encompasses categories ***19** of visitors whom most homeowners almost certainly wish to allow to approach their front doors—friends, relatives, mail carriers, persons making deliveries. But it also reaches categories of visitors who are less universally welcome —"solicitors," "hawkers," "peddlers," and the like. The law might attempt to draw fine lines between categories of welcome and unwelcome visitors, distinguishing, for example, between tolerable and intolerable door-to-door peddlers (Girl Scouts selling cookies versus adults selling aluminum siding) or between police officers on agreeable and disagreeable missions (gathering information about a bothersome neighbor versus asking potentially incriminating questions). But the law of trespass has not attempted such a difficult taxonomy. See *Desnick v. American Broadcasting Cos.,* 44 F.3d 1345, 1351 (C.A.7 1995) ("[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent"); cf. *Skinner v. Ogallala Public School Dist.,* 262 Neb. 387, 402, 631 N.W.2d 510, 525 (2001) ("[I]n order to determine if a business invitation is implied, the inquiry is not a subjective assessment of why the visitor chose to visit the premises in a particular instance"); *Crown Cork & Seal Co. v. Kane,* 213 Md. 152, 159, 131 A.2d 470, 473–474 (1957) (noting that "there are many cases in which an invitation has been implied from circumstances, such as custom," and that this test is "objective in that it stresses custom and the appearance of things" as opposed to "the undisclosed intention of the visitor").

Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use. See, *e.g.,* ***20** *Robinson v. Virginia,* 47 Va.App. 533, 549–550, 625 S.E.2d 651, 659 (2006) (en banc); *United States v. Wells,* 648 F.3d 671, 679–680 (C.A.8 2011) (police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the back yard); *State v. Harris,* 919 S.W.2d 619, 624 (Tenn.Crim.App.1995) ("Any substantial and unreasonable departure from an area where the public is impliedly invited exceeds the scope of the implied invitation ..." (internal quotation marks and brackets omitted)); 1 W. LaFave, Search and Seizure § 2.3(c), p. 578 (2004) (hereinafter LaFave); *id*., § 2.3(f), at 600–603 ("[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment" (footnotes omitted)).

Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. See *State v. Cada,* 129 Idaho 224, 233, 923 P.2d 469, 478 (App.1996) ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm").

Similarly, a visitor may not linger at the front door for an extended period. See ****1423** 9 So.3d 1, 11 (Fla.App.2008) (case below) (Cope, J., concurring in part and dissenting in part) ("[T]here is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows"). The license is limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave.

As I understand the law of trespass and the scope of the implied license, a visitor who adheres to these limitations is ***21** not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant. For example, mail carriers, persons making deliveries, and individuals distributing flyers may leave the items they are carrying and depart without making any attempt to converse. A pedestrian or motorist looking for a particular address may walk up to a front door in order to check a house number that is hard to see from the sidewalk or road. A neighbor who knows that the residents are away may approach the door to retrieve an accumulation of newspapers that might signal to a potential burglar that the house is unoccupied.

As the majority acknowledges, this implied license to approach the front door extends to the police. See *ante,* at 1415. As we recognized in *Kentucky v. King,* 563 U.S. ——, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011), police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a "knock and talk," *i.e.,* knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. See

id., at ——, 131 S.Ct., at 1862 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"). See also 1 LaFave § 2.3(e), at 592 ("It is not objectionable for an officer to come upon that part of the property which has been opened to public common use" (internal quotation marks omitted)). Even when the objective of a "knock and talk" is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point. *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares"); ***22** *Cada, supra,* at 232, 923 P.2d, at 477 (" [P]olice officers restricting their activity to [areas to which the public is impliedly invited] are permitted the same intrusion and the same level of observation as would be expected from a reasonably respectful citizen" (internal quotation marks omitted)); 1 LaFave §§ 2.2(a), 2.3(c), at 450–452, 572–577.

B

Detective Bartelt did not exceed the scope of the license to approach respondent's front door. He adhered to the customary path; he did not approach in the middle of the night; and he remained at the front door for only a very short period (less than a minute or two).

The Court concludes that Detective Bartelt went too far because he had the "*objectiv[e] ... purpose* to conduct a search." *Ante,* at 1417 (emphasis added). What ****1424** this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court's point, then a standard "knock and talk" and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a "knock and talk." The Court offers no meaningful way of distinguishing the "objective purpose" of a "knock and talk" from the "objective purpose" of Detective Bartelt's conduct here.

The Court contends that a "knock and talk" is different because it involves talking, and "all are invited" to do that. *Ante,* at 1416, n. 4 (emphasis deleted). But a police officer who approaches the front door of a house in accordance with the limitations already discussed may gather evidence by means other than talking. The officer may observe items in plain view and smell odors coming from the house. *Ciraolo, supra,* at 213, 106 S.Ct. 1809; *Cada,* 129 Idaho, at 232, 923 P.2d, at 477; 1 LaFave §§ 2.2(a), 2.3(c), at 450–452, 572–577. So the Court's "objective purpose" argument cannot stand.

***23** What the Court must fall back on, then, is the particular instrument that Detective Bartelt used to detect the odor of marijuana, namely, his dog. But in the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash. On the contrary, the common law allowed even unleashed dogs to wander on private property without committing a trespass. G. Williams, Liability for Animals 136–146 (1939); J. Ingham, A Treatise on Property in Animals Wild and Domestic and the Rights and Responsibilities Arising Therefrom 277–278 (1900). Cf. B. Markesinis & S. Deakin, Tort Law 511 (4th ed. 1999).

The Court responds that "[i]t is not the dog that is the problem, but the behavior that here involved use of the dog." *Ante,* at 1416, n. 3. But where is the support in the law of trespass for *this* proposition? Dogs' keen sense of smell has been used in law enforcement for centuries. The antiquity of this practice is evidenced by a Scottish law from 1318 that made it a crime to "disturb a tracking dog or the men coming with it for pursuing thieves or seizing malefactors." K. Brown et al., The Records of the Parliaments of Scotland to 1707, (St Andrews, 2007–2013), online at http://www.rps.ac. uk/mss/1318/9. If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 800 years. But the Court has found none.

For these reasons, the real law of trespass provides no support for the Court's holding today. While the Court claims that its reasoning has "ancient and durable roots," *ante,* at 1414, its trespass rule is really a newly struck counterfeit.

III

The concurring opinion attempts to provide an alternative ground for today's decision, namely, that Detective Bartelt's

conduct violated respondent's reasonable expectations of privacy. ***24** But we have already rejected a very similar, if not identical argument, see *Illinois v. Caballes,* 543 U.S. 405, 409–410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), and in any event I see no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand.

****1425** It is clear that the occupant of a house has no reasonable expectation of privacy with respect to odors that can be smelled by human beings who are standing in such places. See *United States v. Johns,* 469 U.S. 478, 482, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband"); *United States v. Ventresca,* 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) (scent of fermenting mash supported probable cause for warrant); *United States v. Johnston,* 497 F.2d 397, 398 (C.A.9 1974) (there is no "reasonable expectation of privacy from drug agents with inquisitive nostrils"). And I would not draw a line between odors that can be smelled by humans and those that are detectible only by dogs.

Consider the situation from the point of view of the occupant of a building in which marijuana is grown or methamphetamine is manufactured. Would such an occupant reason as follows? "I know that odors may emanate from my building and that atmospheric conditions, such as the force and direction of the wind, may affect the strength of those odors when they reach a spot where members of the public may lawfully stand. I also know that some people have a much more acute sense of smell than others,[6] and I have no idea who might be standing in one of the spots in question when ***25** the odors from my house reach that location. In addition, I know that odors coming from my building, when they reach these locations, may be strong enough to be detected by a dog. But I am confident that they will be so faint that they cannot be smelled by any human being." Such a finely tuned expectation would be entirely unrealistic, and I see no evidence that society is prepared to recognize it as reasonable.

In an attempt to show that respondent had a reasonable expectation of privacy in the odor of marijuana wafting from his house, the concurrence argues that this case is just like *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), which held that police officers conducted a search when they used a thermal imaging device to detect heat emanating from a house. *Ante,* at 1419 (opinion of KAGAN, J.). This Court, however, has already rejected the argument that the use of a drug-sniffing dog is the same as the use of a thermal imaging device. See *Caballes,* 543 U.S., at 409–410, 125 S.Ct. 834. The very argument now advanced by the concurrence appears in Justice Souter's *Caballes* dissent. See *id*., at 413, and n. 3, 125 S.Ct. 834. But the Court was not persuaded.

Contrary to the interpretation propounded by the concurrence, *Kyllo* is best understood as a decision about the use of new technology. The *Kyllo* Court focused on the fact that the thermal imaging device was a form of "sense-enhancing technology" that was "not in general public use," and it expressed concern that citizens would be "at the mercy of advancing technology" if its use was not restricted. 533 U.S., at 34–35, 121 S.Ct. 2038. A dog, however, is not a new form of "technology" or a "device." And, as noted, the use of dogs' acute sense of smell in law enforcement dates back many centuries.

****1426** The concurrence suggests that a *Kyllo*-based decision would be "much like" the actual decision of the Court, but that is simply not so. The holding of the Court is based on what the Court sees as a " 'physical intrusion of a constitutionally protected area.' " *Ante,* at 1414 (quoting ***26** *United States v. Knotts,* 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (BRENNAN, J., concurring in judgment)). As a result, it does not apply when a dog alerts while on a public sidewalk or street or in the corridor of a building to which the dog and handler have been lawfully admitted.

The concurrence's *Kyllo*-based approach would have a much wider reach. When the police used the thermal imaging device in *Kyllo,* they were on a public street, 533 U.S., at 29, 121 S.Ct. 2038, and "committed no trespass." *Ante,* at 1419. Therefore, if a dog's nose is just like a thermal imaging device for Fourth Amendment purposes, a search would occur if a dog alerted while on a public sidewalk or in the corridor of an apartment building. And the same would be true if the dog was trained to sniff, not for marijuana, but for more dangerous quarry, such as explosives or for a violent fugitive or kidnapped child. I see no ground for hampering legitimate law enforcement in this way.

IV

The conduct of the police officer in this case did not constitute a trespass and did not violate respondent's reasonable expectations of privacy. I would hold that this conduct was not a search, and I therefore respectfully dissent.

All Citations

569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495, 81 USLW 4209, 13 Cal. Daily Op. Serv. 3328, 2013 Daily Journal D.A.R. 3953, 24 Fla. L. Weekly Fed. S 117

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 At oral argument, the State and its *amicus* the Solicitor General argued that Jardines conceded in the lower courts that the officers had a right to be where they were. This misstates the record. Jardines conceded nothing more than the unsurprising proposition that the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him. Of course, that is not what they did.

2 With this much, the dissent seems to agree—it would inquire into " 'the appearance of things,' " *post,* at 1422 (opinion of ALITO, J.), what is "typica[l]" for a visitor, *ibid.,* what might cause "alarm" to a "resident of the premises," *ibid.,* what is "expected" of "ordinary visitors," *ibid.,* and what would be expected from a " 'reasonably respectful citizen,' " *post,* at 1423. These are good questions. But their answers are incompatible with the dissent's outcome, which is presumably why the dissent does not even try to argue that it would be customary, usual, reasonable, respectful, ordinary, typical, nonalarming, etc., for a stranger to explore the curtilage of the home with trained drug dogs.

3 The dissent insists that our argument must rest upon "the particular instrument that Detective Bartelt used to detect the odor of marijuana"—the dog. *Post,* at 1424. It is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it " 'a cause for great alarm' " (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule, *post,* at 1422) to find a stranger snooping about his front porch *with or without* a dog. The dissent would let the police do whatever they want by way of gathering evidence so long as they stay on the base-path, to use a baseball analogy—so long as they "stick to the path that is typically used to approach a front door, such as a paved walkway." *Ibid.* From that vantage point they can presumably peer into the house through binoculars with impunity. That is not the law, as even the State concedes. See Tr. of Oral Arg. 6.

4 The dissent argues, citing *King*, that "gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach." *Post,* at 1423. That is a false generalization. What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. The mere "purpose of discovering information," *post,* at 1424, in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.

1 The dissent claims, alternatively, that *Illinois v. Caballes,* 543 U.S. 405, 409–410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), controls this case (or nearly does). See *post,* at 1424, 1425. But *Caballes* concerned a drug-detection dog's sniff of an automobile during a traffic stop. See also *Florida v. Harris,* 568 U.S. ——, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013). And we have held, over and over again, that people's expectations of privacy are much lower in their cars than in their homes. See, *e.g., Arizona v. Gant,* 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *Wyoming v. Houghton,* 526 U.S. 295, 303, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); *New York v. Class,* 475 U.S. 106, 115, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); *Cardwell v. Lewis,* 417 U.S. 583, 590–591, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion).

2 The dissent's other principal reason for concluding that no violation of privacy occurred in this case—that police officers themselves might detect an aroma wafting from a house—works no better. If officers can smell drugs coming from a house, they can use that information; a human sniff is not a search, we can all agree. But it does not follow that a person loses his expectation of privacy in the many scents within his home that (his own nose capably tells him) are not usually detectible by humans standing outside. And indeed, *Kyllo* already decided as much. In response to an identical argument from the dissent in that case, see 533 U.S., at 43, 121 S.Ct. 2038 (Stevens, J., dissenting) (noting that humans can

sometimes detect “heat emanating from a building”), the *Kyllo* Court stated: “The dissent's comparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home ... is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.... In any event, [at the time in question,] no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging.” *Id.,* at 35, n. 2, 121 S.Ct. 2038.

1 See, *e.g.,* Sloane, Dogs in War, Police Work and on Patrol, 46 J. Crim. L., C. & P.S. 385 (1955–1956) (hereinafter Sloane).

2 M. Derr, A Dog's History of America 68–92 (2004); K. Olsen, Daily Life in 18th–Century England 32–33 (1999).

3 Sloane 388–389.

4 See App. 94; App. to Brief for Respondent 1A (depiction of respondent's home).

5 The Court notes that Franky was on a 6–foot leash, but such a leash is standard equipment for ordinary dog owners. See, *e.g.,* J. Stregowski, Four Dog Leash Varieties, http://dogs.about. com/od/toyssupplies/tp/Dog-Leashes.htm (all Internet materials as visited Mar. 21, 2013, and available in Clerk of Court's case file).

6 Some humans naturally have a much more acute sense of smell than others, and humans can be trained to detect and distinguish odors that could not be detected without such training. See E. Hancock, A Primer on Smell, http://www.jhu.edu/jhumag/996web/smell.html. Some individuals employed in the perfume and wine industries, for example, have an amazingly acute sense of smell. *Ibid.*

15 F.4th 116
United States Court of Appeals, First Circuit.

Christopher FRENCH, Plaintiff, Appellant,

v.

Daniel MERRILL, individually and in his official capacity as a Sergeant in the Police Department of the Town of Orono; Josh Ewing, individually and in his official capacity as Chief of Police of the Town of Orono; Town of Orono; Travis Morse, individually and in his official capacity; Christopher Gray, individually and in his official capacity; Nathan Drost, individually and in his official capacity, Defendants, Appellees.

No. 20-1650
|
October 1, 2021

Synopsis

Background: Arrestee brought § 1983 action against police officers alleging Fourth Amendment violations arising from two warrantless arrests. The United States District Court for the District of Maine, John C. Nivison, United States Magistrate Judge, 2020 WL 2996070, granted summary judgment for officers. Arrestee appealed.

Holdings: The Court of Appeals, Lipez, Circuit Judge, held that:

officers had probable cause to arrest for harassment with respect to first incident, but

officers lacked qualified immunity from claim arising from investigatory knock and talks involving multiple reentries onto property.

Affirmed in part, reversed in part, and remanded.

Lynch, Circuit Judge, filed opinion dissenting in part.

***119** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. John C. Nivison, U.S. Magistrate Judge]

Attorneys and Law Firms

Timothy C. Woodcock for appellant.

Kasia Soon Park, with whom Edward R. Benjamin, Jr. and Drummond Woodsum were on brief, for appellees.

Before Lynch, Lipez, and Barron, Circuit Judges.

Opinion

LIPEZ, Circuit Judge.

Appellant Christopher French claims that police officers in Orono, Maine, violated his constitutional rights during two encounters in 2016 -- one in February and one in September -- both of which resulted in his warrantless arrests on charges that were later dropped. French brought this action for damages under 42 U.S.C. § 1983 against the Town of Orono, the chief of the Orono Police Department, and four of the officers with whom he interacted during the two episodes. The district court granted summary judgment in favor of the defendants on all counts. French appeals only the district court's entry of summary judgment on Counts I and IX alleging that the individual officers violated his Fourth Amendment rights during the February and September incidents respectively.[1]

After careful review, we affirm the district court's entry of summary judgment on Count I, relating to the February incident. We reverse on Count IX, relating to the September incident, because the unconstitutional conduct of the officers violated the clearly established law of the Supreme Court as set forth in Florida v. Jardines, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

I.

We describe below each of the challenged episodes between French and the law enforcement officers. We rely on the parties' limited stipulated facts[2] and recount the remaining facts as they were presented to the district court on summary judgment in the light most favorable to French as the non-moving party. See, e.g., McKenney v. Mangino, 873 F.3d 75, 78 (1st Cir. 2017).

A. The February 2016 Incident

In February 2016, French was a student at the University of Maine and was dating a fellow student, Samantha Nardone. In the early morning hours of February 18th, French and Nardone had an argument at Nardone's residence after a night at the local bars. A neighbor called the police and reported that the couple had been fighting loudly.

***120** Officer Nathan Drost, Sergeant Daniel Merrill, and another officer from the Orono Police Department[3] responded to the neighbor's call at approximately 1:00 a.m. Upon arrival, the officers observed French and Drew White, one of Nardone's roommates, standing on the sidewalk in front of Nardone's residence. A few moments later, Nardone and her other roommate, Alicia McDonald, came outside. Drost questioned Nardone, White, and McDonald, who all confirmed that French and Nardone had been involved in a domestic dispute.

Nardone told the officers that she and French had had similar disputes in the past, but that French had never been physically violent. She also said that she did not wish to press charges, but that she did want to end her relationship with French and wanted him to leave her alone for the night. Drost directed French to go home and cautioned him that returning to Nardone's residence within 24 hours would result in a criminal trespass warning that would ban French from the premises for a year. Drost also informed French that Nardone wanted her personal property returned the following day and offered to facilitate an exchange.

French complied with Drost's directive and left Nardone's residence. During his walk to his apartment -- which was just a short distance away -- French sent Nardone several offensive text messages.[4] Nardone showed the messages to the officers, who were still present. At that point, the officers informed Nardone that they could serve French with a notice to stop harassing her and, if he continued to harass her, French could be arrested and charged with a crime.

At Nardone's request, the officers caught up with French outside of his residence and served him with a Cease Harassment Notice ("CHN"). The CHN informed French that he was "forbidden from engaging, without reasonable cause, in any course of conduct with the intent to harass, torment or threaten ... Samantha Nardone." Less than an hour after receiving the notice, French sent Nardone two more messages via Snapchat declaring their relationship over, threatening suicide, and inviting her to his forthcoming funeral.

Later that day, French sent Nardone a message via Instagram asking if she was "ok" and assuring her that "everything is fixable." Having received no response, French sent Nardone several emails approximately four hours later asking to "talk please" and explaining that he wanted to return some of her property. French maintains that he was trying to comply with Officer Drost's directive to return Nardone's property that day. Two and a half hours later, French sent Nardone another email lamenting that she refused to respond to him and insisting that he only wanted to talk to her about their argument. Forty-five minutes or so later, French sent Nardone another message inquiring about whether he could drop off Nardone's property.

At around 7:30 p.m. that evening, Officer Drost called Nardone to check in. Nardone reported that French had been calling her[5] and sending her messages via text, email, and various social media platforms throughout the day. She also told Drost ***121** that some of her friends had told her that French was looking for her on the University of Maine campus and that she had seen French during a trip to a local store with a friend and assumed French was following her. Nardone agreed to go to the Orono Police Station to complete a sworn written statement.

Nardone's statement recounted her version of the overnight dispute, described French's attempts to communicate with her throughout the day, and stated that French's conduct "terrified" her. While at the police station, Nardone received additional communications from French, which she showed to the officers. She also provided Officer Drost copies of all other messages she had received from French on February 18, 2016.[6] At 10:54 p.m., French emailed Nardone asking where she was, followed by a second email about forty-five minutes later stating "I will find u." Nardone asked the officers whether French was in trouble and they replied that he was.

Based on the overnight events, their conversations with Nardone, and French's continued attempts to contact Nardone, Officer Drost and Sergeant Merrill decided to arrest French for harassment. Nardone agreed to assist in that effort. The next time French called Nardone, at 12:30 a.m. on February 19th, she was still at the police station and answered the call on speakerphone, with the officers listening. Nardone told French that he was "not supposed" to talk to her, and neither officer corrected Nardone's apparent

misunderstanding of the CHN, which prohibited harassment but not all communication. French responded that he was concerned for Nardone's safety and was simply trying to discuss their fight with her.

Nardone agreed to meet French at her residence in the early morning hours of February 19th. Drost accompanied Nardone home and waited inside for French. Upon French's arrival, Drost promptly arrested him for harassing Nardone. The charges were eventually dropped by the state for insufficient evidence.

B. The September 2016 Incident

At 3:19 a.m. on September 14, 2016, the Orono Police Department received a report of a possible break-in at Nardone's residence. Orono Police Officers Travis Morse and Christopher Gray responded and, upon their arrival, obtained sworn statements from Nardone and her roommate, McDonald.[7]

Nardone reported that, at some point after the February incident, Nardone and French reconciled. She explained that she was not dating French, but that they had seen each other at a local bar earlier that evening. She told the officers that when she was driving away from the bar, French ran into the street toward her vehicle and accused her of drunk driving. French denies that allegation. Nardone recalled that, upon arriving home, she and her roommate locked the doors, Nardone placed her phone on her bedside table, and she went to sleep around 12:30 a.m. When she awoke at 3:00 a.m., her phone was missing. Nardone and McDonald looked around for the phone and discovered that their apartment door was unlocked. Nardone told Officers Morse and Gray that she suspected French had broken in and stolen her cell phone. She also explained that French had taken her keys the prior week and had ***122** not yet returned them. Sometime between 4:00 and 4:30 a.m., the officers left Nardone's residence and returned to the police station.

Shortly thereafter, at approximately 4:43 a.m., Officers Morse and Gray responded to a second call from Nardone reporting that she and her roommate had seen French attempting to enter their home, but that he had run off when the women screamed. As the officers approached Nardone's building, they received another report that French had just been seen running down the street toward his apartment. They then went directly to French's apartment. At some point, two additional officers, Detective Fearon and Officer Orr from the nearby Old Town Police Department, arrived on the scene.[8]

French's residence had a small front porch with a single door. Appellees describe French's residence as "more akin to an apartment building" -- presumably compared to a single-family home -- but they fail to further explain that comparison. All we can glean from the record is that the dwelling has a single front entryway, three young adult males lived in the residence, there is a single kitchen, and French had a separate bedroom. Viewed from the street, a driveway is adjacent to the residence on the right, and, on the left, a narrow strip of grass -- four or five feet wide -- separates the property from the neighbor's adjacent driveway. On the left side of French's residence, there is a cellar window at ground level and a bedroom window that is low enough for a person of average height to reach the window frame.

Upon their arrival at French's apartment, the officers sought to speak with French about his suspected criminal activity. In pursuit of that goal, the officers entered the curtilage of French's home several times to try to convince him to come outside and talk. That is, the officers knocked on the front door and French's bedroom window frame and repeatedly yelled for French to come to the front door. We recount the details of the officers' misconduct within the curtilage of French's home in Part IV.

Eventually, French reluctantly came to the door ("When I went to the door to speak to the police, I felt I had no choice."). Officer Morse asked French whether he had been at Nardone's residence. According to Morse, French's response was jumbled and did not make sense. Morse asked French about Nardone's cell phone and French responded that he did not have it. The officers pressed French further and, eventually, he said the phone was inside and he agreed to retrieve it. The officers told French he could not reenter the residence without an officer, so French, not wanting the officers to enter his home, asked his roommate, Corey Andrews, to look for the cell phone. After a few moments, Andrews returned and reported that his search was unsuccessful. French told Andrews to check the basement stairs. Shortly thereafter, Andrews returned with Nardone's phone.

French told the officers that he had visited Nardone's residence for help with a puppy that he had recently adopted, but that he had entered only the front entryway. He claimed that he found the phone on the ground outside of Nardone's

building. He insisted that he had picked it up with the intention of returning it to Nardone ***123** the following day. The officers deemed French's story not credible and arrested him for burglary at around 5:30 a.m. The state subsequently dismissed all charges because "the victim refuse[d] to cooperate and [wa]s out of state."

C. Procedural History

In May 2018, French filed a complaint against the Orono officers involved in the February and September 2016 incidents, seeking damages under 42 U.S.C. § 1983 for violations of his Fourth Amendment rights.[9] Specifically, he claimed that he was arrested without probable cause in February 2016 and that, in September 2016, the officers engaged in an unlawful and warrantless search and seizure.[10] Following discovery, the district court entered summary judgment in favor of the defendants on all counts.

Regarding the February 2016 incident, the district court concluded that the officers had probable cause to arrest French for harassment and, even if they did not, the question of probable cause was so debatable that the officers were entitled to qualified immunity. As for the September 2016 incident, the court concluded that "a fact finder could find that the officers' multiple attempts to persuade [French] to come to the door at an early morning hour, including attempts at a location other than the front door (i.e., a window of the home), [were] unreasonable and not within the permissible knock and talk exception to the Fourth Amendment warrant requirement." The court went on to conclude, however, that the officers' conduct was protected by qualified immunity because there was no clearly established law that rendered their conduct unlawful.

II.

We review a district court's grant of summary judgment de novo, viewing the record in the light most favorable to the non-moving party. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to a material fact exists if a fact that "carries with it the potential to affect the outcome of the suit" is disputed such that "a reasonable jury could resolve the point in the favor of the non-moving party." Santiago-Ramos, 217 F.3d at 52 (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)).

We begin by considering French's claim that he was improperly arrested without probable cause in February 2016 and then turn to his contentions concerning the September events.

III.

The Fourth Amendment protects an individual's right to be free from unreasonable ***124** seizure. U.S. Const. amend. IV. A warrantless arrest by a law enforcement officer is a reasonable seizure under the Fourth Amendment "where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). Probable cause exists where "at the moment of the arrest, the facts and circumstances within the [officers'] knowledge and of which they had reasonably reliable information were adequate to warrant a prudent person in believing that the object of his suspicions had perpetrated or was poised to perpetrate an offense." Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 254 (1st Cir. 1996). In asking whether probable cause existed at the time of the arrest, we look to the "totality of the circumstances." United States v. Rivera, 825 F.3d 59, 63 (1st Cir. 2016). In doing so, we recognize that "probable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Officer Drost and Sergeant Merrill arrested French for harassment. Under Maine law, an officer may arrest "[a]ny person who the officer has probable cause to believe has committed ... harassment." Me. Rev. Stat. tit. 17-A, § 15(1)(A)(12). Harassment is defined in the statute as "engag[ing] in any course of conduct with the intent to harass, torment or threaten another person, [a]fter having been notified, in writing or otherwise, not to engage in such conduct" by a law enforcement officer within one year or by a court. Id. § 506-A(1)(A)(1). The notice requirement was met when French was served with the CHN, which tracked the language of § 506-A(1)(A)(1). French does not contest notice. He claims only that the officers lacked probable cause to arrest him.

The undisputed facts show that French used several different communication platforms to call and message Nardone

repeatedly despite receiving no response from her.[11] The content of the messages ranged from pleas to talk and attempts to arrange an exchange of property to threatening suicide, inviting Nardone to his funeral, and telling Nardone that he would "find" her. Nardone provided a sworn statement to the Orono Police explaining that French's conduct terrified her. She also reported to the officers that French had been looking for her on the University of Maine campus[12] and that he had followed her to the parking lot of a local store. Those facts, considered in the totality of the circumstances, were sufficient to support a finding of probable cause to ***125** believe that French was engaging in a course of conduct with the intent to torment, threaten, or harass Nardone.

French's arguments to the contrary are unpersuasive. He first argues that the officers erroneously misunderstood the CHN as prohibiting all contact, even lawful contact, with Nardone. The record supports that claim, but it does not alter the probable cause analysis, which is based on objective factors and does not account for the "actual motive or thought process of the officer." Holder v. Town Of Sandown, 585 F.3d 500, 504 (1st Cir. 2009) (quoting Bolton v. Taylor, 367 F.3d 5, 7 (1st Cir. 2004)). The issue is whether French's cumulative communications and behavior provided a reasonable basis for the officers to conclude that he engaged in conduct criminalized by the state statute, not whether the officers also took into account some contact that -- viewed in isolation -- actually may have been lawful.

French also contends that the district court's finding of probable cause cannot stand because the court failed to compare the facts known to the officers with the elements of the statute -- including intent -- when assessing probable cause. However, probable cause is a "fluid concept," and a district court need not engage in an "excessively technical dissection" of the elements supporting probable cause. Gates, 462 U.S. at 232, 234, 103 S.Ct. 2317. Such a technical assessment confuses probable cause with the standard required to secure a criminal conviction. Id.

Here, Drost and Merrill were aware of reasonably reliable facts that demonstrated a pattern of unwanted and continued contact that ranged from innocuous to threatening, and they reasonably inferred criminal intent from that objective information. See Cox v. Hainey, 391 F.3d 25, 34 (1st Cir. 2004) ("[T]he practical restraints on police in the field are great[ ] with respect to ascertaining intent and, therefore, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great.").

French's attempt to explain away each of the many messages he sent to Nardone -- by claiming he was seeking to exchange property or expressing concern for her wellbeing -- is similarly unpersuasive. Probable cause is based on the totality of the facts and circumstances known to the officers at the time of the arrest. See United States v. Flores, 888 F.3d 537, 544 (1st Cir. 2018) ("Attempting to analyze each piece of evidence in a vacuum is inconsistent with Supreme Court case law, which makes pellucid that each item is to be considered as part of the totality of the circumstances."). Whether French had a seemingly innocent reason for sending a particular message or making a particular call is thus irrelevant. The frequency, content, and context of the messages and calls collectively, in combination with the other facts and circumstances known to the officers -- Nardone's written statement, allegations that French was looking for Nardone on campus, and his following her to a local store -- were adequate to support a finding of probable cause.

In sum, the district court did not err in concluding that the record supported a finding that the officers had probable cause to arrest French for harassing Nardone. Even if that conclusion was debatable -- and for the reasons already explained, we do not think it is -- qualified immunity would attach and French's claim would still fail. As the district court explained, it is well established that "in the case of a warrantless arrest, if the presence of probable cause is arguable or subject to legitimate question, qualified immunity will attach." Cox, 391 F.3d at 31. The ***126** district court thus properly granted summary judgment in favor of Officer Drost and Sergeant Merrill on French's Fourth Amendment claim arising out of the February 2016 arrest.

IV.

In the realm protected by the Fourth Amendment, the "home is first among equals." Jardines, 569 U.S. at 6, 133 S.Ct. 1409. To give practical effect to the protection of the home, its "curtilage" -- the area "immediately surrounding and associated with the home" -- is treated as "part of the home itself" and subject to the same heightened protection. Id. (quoting Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). French contends that Officers Morse and Gray violated his Fourth Amendment rights when,

in the early morning hours of September 14, 2016, they entered the curtilage of his home, repeatedly knocked on his front door and bedroom window, shouted his name, and urged him to answer the door, all without a warrant and in an attempt to investigate whether he had committed a crime.

The district court agreed that "a fact finder could find that the officers' multiple attempts to persuade [French] to come to the door at an early morning hour, including attempts at a location other than the front door (i.e., a window of the home)," went beyond a permissible "knock and talk" and thus violated French's Fourth Amendment rights. However, the district court concluded that the unlawfulness of the officers' actions was not "clearly established" at the time and, thus, that they were entitled to qualified immunity.

The officers do not challenge on appeal the district court's finding on the constitutional violation issue. Thus, we focus our qualified immunity analysis on whether the unlawfulness of the officers' conduct was "clearly established" at the time of the events in this case.

A violation of "clearly established" law means that the law rendering the officers' conduct unlawful was "sufficiently clear" at the time such that a "'reasonable official would understand that what he is doing' is unlawful." District of Columbia v. Wesby, —— U.S. ——, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). In other words, the unconstitutionality of the officer's conduct must be beyond debate in light of an existing principle of law "dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" Id. at 589-90 (quoting al-Kidd, 563 U.S. at 741-42, 131 S.Ct. 2074).

The existing legal principle need not be derived from a case "directly on point," but precedent must "place[ ] the statutory or constitutional question beyond debate." White v. Pauly, —— U.S. ——, 137 S. Ct. 548, 551, 196 L.Ed.2d 463 (2017) (per curiam) (quoting Mullenix v. Luna, 577 U.S. 7, 12, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015)); see also Taylor v. Riojas, —— U.S. ——, 141 S. Ct. 52, 53-54, 208 L.Ed.2d 164 (2020) (per curiam) (reversing the Fifth Circuit's conclusion that the officers were not given "fair warning" that "prisoners could not be housed in cells teeming with human waste for only six days" because, even though there was no controlling precedent directly on point, "no reasonable correctional officer could have concluded that ... it was constitutionally permissible to house [the plaintiff] in such deplorably unsanitary conditions for such an extended period of time"). To that end, general statements of the law may give " 'fair and clear warning' to officers" so long as, "in the light of the pre-existing law[,] the unlawfulness [of their conduct is] ***127** apparent." White, 137 S. Ct. at 552 (first quoting United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); then quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)); see also Hope v. Pelzer, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."). A rule is too general, however, "if the unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule] was firmly established.' " Wesby, 138 S. Ct. at 590 (quoting Anderson, 483 U.S. at 641, 107 S.Ct. 3034).

Against that backdrop, we conclude that, in light of Jardines and the nature of the conduct here, taken as whole, no reasonable officer could have thought that what the Orono police did was consistent with the Fourth Amendment. To understand why, we first review Jardines; we then turn to the facts of this case.

A. Florida v. Jardines

In Jardines, the Miami-Dade Police Department received a tip that the defendant was growing marijuana in his home. 569 U.S. at 3, 133 S.Ct. 1409. After surveilling the home for a period of time, two officers entered the curtilage with a drug-sniffing canine ("K-9"). Id. at 4, 133 S.Ct. 1409. On the defendant's front porch, the dog alerted to the presence of drugs. Id. Based on the dog's signaling, the officers applied for and secured a search warrant. Id. Upon executing the warrant, the officers discovered several marijuana plants in the defendant's home and charged the defendant with drug trafficking. Id. At trial, the defendant sought to suppress the marijuana evidence as the fruit of an unlawful search. Id. at 4-5, 133 S.Ct. 1409. The trial court granted the motion and the state appellate court reversed. Id. at 5, 133 S.Ct. 1409. The Florida Supreme Court then reversed the appellate court and the United States Supreme Court granted certiorari. Id.

Justice Scalia, writing for the majority, labeled the case as "straightforward." Id. The officers entered a constitutionally protected area -- the curtilage of the home -- without a warrant to investigate the commission of a crime and, hence, the Fourth Amendment was implicated. Id. at 6-7, 133 S.Ct. 1409. Whether the Fourth Amendment was violated, the Court explained, required an assessment of whether

the officers' investigation in a constitutionally protected area "was accomplished through an unlicensed physical intrusion." Id. at 7, 133 S.Ct. 1409. In the Court's words, "an officer's leave to gather information is sharply circumscribed when he steps off [public] thoroughfares and enters the Fourth Amendment's protected areas." Id. Because it was undisputed that the officers "had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question" for the Court was "whether [the homeowner] had given his leave (even implicitly) for [the officers] to do so." Id. at 8, 133 S.Ct. 1409.

Focusing on implicit consent, the Court recognized that a license to enter another's property may be implied "from the habits of the country." Id. (quoting McKee v. Gratz, 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922)). Indeed, "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." Id. (quoting Breard v. City of Alexandria, 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951)). That implicit license, the Court explained, "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." ***128** Id. The Court underscored the simplicity of that license, explaining that "[c]omplying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." Id. For that reason, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " Id. (quoting Kentucky v. King, 563 U.S. 452, 469, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)).

The Court went on to find that the officers exceeded the scope of the implicit social license there because they "introduc[ed] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence," and "[t]here is no customary invitation to do that." Id. at 9, 133 S.Ct. 1409. The Court explained that the license implied by societal norms that invites a visitor to the front door to knock and attempt to speak with the occupant does not extend "[a]n invitation to engage in canine forensic investigation" in the curtilage of the home. Id. The Court concluded that, although the officers in Jardines remained within the physical area covered by the license, their behavior exceeded that "which ... anyone would think he had license to do" while on the property of another. Hence, they exceeded the scope of the implicit license authorizing their entry onto the curtilage. Id. at 10, 133 S.Ct. 1409.

As Justice Scalia put it: "To find a visitor knocking on the door is routine (even if sometimes unwelcome) [but] to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to -- well, call the police." Id. at 9, 133 S.Ct. 1409. Because the officers "learned what they learned only by physically intruding on [the] property to gather evidence" without a warrant and in excess of any implied license to do so, they violated the Fourth Amendment. Id. at 11, 133 S.Ct. 1409. Again commenting on the simplicity of the rule, the Court observed that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." Id.

B. Applying Jardines

1. The Unconstitutional Conduct of the Officers

Officers Morse and Gray arrived at French's home shortly before 5:00 a.m. They observed lights on in the home and decided to conduct a "knock and talk" rather than immediately apply for a warrant. The officers entered the property, walked onto the front porch, knocked on the front door, and announced that they were police officers seeking to speak with French. No one answered and the officers left the property.[13] At this point, there was nothing constitutionally infirm about the officers' conduct, which was expressly permitted by the "knock and talk" exception to the warrant requirement. Morse and Gray initially did no more than a member of the public might be expected to do -- enter the curtilage, knock on the front door seeking to speak with an occupant, wait to be received and, receiving no response, leave. See id. at 9-10, 133 S.Ct. 1409. Because this behavior was consistent with the conduct permitted by the implied social license, the officers' initial entry onto the curtilage was lawful. Thus, we focus our clearly established law analysis on the ***129** conduct of the officers in the wake of that first lawful entry onto the curtilage, and consider it in totality. It is that conduct in the aggregate that requires the conclusion that the officers violated clearly established law.

After the initial attempted knock and talk, Officers Morse and Gray left the property. Morse went to speak with Nardone, and Gray stayed near French's home to surveil the property. While watching the property, Gray walked onto the neighbor's adjacent driveway, which provided an unobstructed view of the narrow strip of grass, the bedroom window, and the

cellar window of French's home. From there, Gray observed a young man peering out the basement window. Then, still standing on the neighbor's driveway, Gray shined his flashlight through the window, which caused the young man to cover the window and turn off the basement lights. Gray then returned to the front porch of French's building and again knocked on the front door, but no one answered. The knocking apparently caused a dog in the home "to bark frantically." At that point, Gray's incident report recounts that "still no one came to the door. More lights were quickly being turned off in the residence. Window coverings which looked like blankets were drawn over the open windows as well."[14]

Morse then returned from Nardone's apartment and, along with the two Old Town police officers (Detective Fearon and Officer Orr), joined Gray off the property but near French's building. Instead of honoring the clear signals that the occupants of the home did not wish to receive visitors, Morse walked back onto the property and, peering through a drawn window covering, saw that a light remained on in the kitchen. Morse then rejoined the other officers and told them that he would return to the station to apply for a search warrant. Fearon suggested that the officers attempt another "knock and talk," to which Morse responded that he and Officer Gray "had already knocked" and that "[he] didn't think that ... French would respond." See Affidavit of Travis Morse, Dkt. No. 35-22.

Ignoring Morse's hesitation and suggestion that the officers should apply for a search warrant, the officers persisted in their efforts to get French to come out of his home.[15] This time, Fearon and Morse went to the left side of the house, walked through the curtilage along the narrow strip of grass and located what they had reason to believe was French's bedroom window.[16] They knocked forcefully on the window frame and yelled for French to come out and talk. Fearon also shined his light into the bedroom. At the same time, Officer Gray returned to the front porch, knocked on the front door, and told French to come outside.

The simultaneous knocking apparently caused the dog inside the home to start barking loudly again. At some point, Andrews finally answered the front door and, ***130** after a brief discussion with Gray, agreed to look for French. According to French's affidavit, Andrews decided to answer the door because he was afraid that the police would break the door down, which would cause his dog to become defensive and could result in the police shooting the dog**.** A short while later, French, feeling as though he "had no choice," came to the door.

By the time French came to the door, the officers had entered his property four times. The first entry occurred when Morse and Gray initially approached French's residence by the front path, knocked on the front door, and asked French to come to the door. The second occurred when Gray, after he shined his flashlight through the basement window from the neighbor's driveway and saw a young man looking out, again approached the home by the front path, knocked on the front door, and asked French to come to the door. This second entry caused the occupants of the home to quickly turn off lights and cover windows. The third entry involved only Officer Morse when, after returning from Nardone's residence, he reentered the property, peered through a drawn window covering, and saw a light on in the kitchen. Morse then rejoined the other officers and recommended applying for a warrant, but Detective Fearon suggested that they try again. On the fourth entry, Morse and Fearon walked through the curtilage of French's home, located his bedroom window, knocked on the window frame, and asked him to come out, while Gray reentered the property by the front path, knocked on the front door, and asked French to come to the door.

2. Violating Clearly Established Law

While the officers' conduct does not involve the gathering of evidence from the curtilage of French's home with the help of a dog, it does plainly demonstrate that, if we consider their actions as a whole, they exceeded the scope of the implicit social license that authorized their presence on French's property. Despite obvious signs that the occupants of the home were aware of and did not want to receive visitors -- their refusal to answer the door upon Morse and Gray's initial knock and Gray's second knock, and their swift covering of windows and turning off lights in response to that second knock -- the police doubled down on their efforts to coax French out of the home. Any reasonable officer would have understood that their actions on the curtilage of French's property exceeded the limited scope of the customary social license to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Jardines, 569 U.S. at 8, 133 S.Ct. 1409. Indeed, Officer Morse revealed such an understanding when he observed that French was not likely to come to the door upon another attempt and that the officers should secure a warrant. Yet, the officers disregarded Morse's advice and reentered the curtilage without a warrant.

Once back in the curtilage, the officers then upped the ante in their attempts to convince French to come out of his home by, among other things, continuing to knock on his front door, locating and knocking on his bedroom window frame, and yelling for him to come out of his home. The officers could not reasonably have thought that an invitation to engage in such conduct "inhere[s] in the very act of hanging a knocker" on the front door, id. at 9, 133 S.Ct. 1409, or that their actions were "no more than [what] any private citizen might do," id. at 8, 133 S.Ct. 1409 (quoting King, 563 U.S. at 469, 131 S.Ct. 1849). There is no implicit social license to invade the curtilage repeatedly, forcefully knock on the front door and a ***131** bedroom window frame, and urge the residents to come outside, all in pursuit of a criminal investigation. As such, the officers' behavior was plainly inconsistent with Jardines, which clearly established that an implicit social license sets the boundaries of what acts officers may engage in within the curtilage of the home, absent exigent circumstances.[17] See id. at 8-10, 133 S.Ct. 1409; see also King, 563 U.S. at 469-470, 131 S.Ct. 1849 ("When law enforcement officers who are not armed with a warrant knock on a door ... the occupant has no obligation to open the door or to speak. ... And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time."); Hopkins v. Bonvicino, 573 F.3d 752, 765 (9th Cir. 2009) ("The mere fact that [the defendant] did not answer the door cannot tip the balance in the officers' favor, since nothing requires an individual to answer the door in response to a police officer's knocking." (citations omitted)).

The officers' attempts to undercut the straightforward application of Jardines to this case are unpersuasive. They first argue that Jardines could not have clearly established the unlawfulness of the officers' conduct because an officer reading Jardines should anticipate only that, "if he or she brings a trained drug-sniffing K-9 onto the porch or otherwise into the curtilage of a residence without a warrant or consent of the homeowner, then the officer may be liable for an unlawful search." Their argument reflects the untenable position that clearly established law requires cases with practically identical facts. The majority in Jardines made clear that "[i]t [was] not the dog that [was] the problem" there. 569 U.S. at 9 n.3, 133 S.Ct. 1409. The drug-sniffing K-9 was significant in Jardines because the officers used the dog to "gather[ ] information in an area belonging to Jardines and immediately surrounding his house -- in the curtilage of the house .... And they gathered that information by physically entering and occupying the area to engage in conduct [a search for evidence of a crime] not explicitly or implicitly permitted by the homeowner." Jardines, 569 U.S. at 5-6, 133 S.Ct. 1409. Indeed, the Court added, "[w]e think a typical person would find it a cause for great alarm ... to find a stranger snooping about his front porch with or without a dog." Id. at 9, 133 S.Ct. 1409 n.3 (internal quotation marks omitted).

Here, as we have explained, the conduct "not explicitly or implicitly permitted by the homeowner" was the officers' repeated reentry onto the property and the aggressive actions taken by the officers. In Jardines and here, police officers not armed with a warrant engaged in conduct in pursuit of a criminal investigation within the curtilage that was inconsistent with the implied social license pursuant to which an officer may enter the curtilage of a home. See id. at 8-9, 133 S.Ct. 1409 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' .... [T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." (quoting King, 563 U.S. at 469, 131 S.Ct. 1849)).

The officers also argue that a rule abstracted from Jardines is too general and "fails to appreciate the myriad different circumstances law enforcement officers are confronted with in the field." The officers ***132** point to conflicting cases in the wake of Jardines that involve either one or some combination of the factors present in this case. For example, the officers cite disagreement regarding (1) whether a knock and talk conducted early in the morning is inherently unlawful, see, e.g., United States v. Lundin, 817 F.3d 1151, 1159 (9th Cir. 2016) (explaining that the officers knocked "around 4:00 a.m. without evidence that [the defendant] generally accepted visitors at that hour, and without a reason for knocking that a resident would ordinarily accept as sufficiently weighty to justify the disturbance"); Young v. Borders, 850 F.3d 1274, 1286 (11th Cir. 2017) (Hull, J., concurring) (rejecting the dissent's assertion that an officer "exceeded the scope of the permissible knock and talk exception because it was 1:30 a.m., he unholstered his weapon, and he knocked so loudly"); (2) whether officers may survey the curtilage for a different entry to the home if a knock and talk at the front door is unsuccessful, see Carroll v. Carman, 574 U.S. 13, 20, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014) (per curiam) (holding that it was not beyond debate whether officers conducting a knock and talk may knock at any entrance open to visitors rather than just the front door);

(3) whether knocking for more than a few minutes violates the knock and talk rule, see United States v. Carloss, 818 F.3d 988, 998 (10th Cir. 2016) ("We decline to place a specific time limit on how long a person can knock before exceeding the scope of th[e] implied license."); (4) whether more than one knock and talk can be attempted in a limited time period, see United States v. Walker, 799 F.3d 1361, 1362-64 (11th Cir. 2015) (finding it was reasonable for officers to make a third attempt to knock and talk at 5:00 a.m. where the first two knocks had elicited no response and were conducted the prior evening -- at 9:00 p.m. and at 11:00 p.m. -- and the officers observed lights on in the home and in a car parked outside before reentering the property); and (5) whether the number of officers present matters, see United States v. White, 928 F.3d 734, 741 (8th Cir. 2019) ("[W]e fail to see why the number or type of officers in this case would render the second entry impermissible.").

Those cases do not detract from the clarity of Jardines' application in this case. We are not concerned only with the number of officers present or the hour, location, or length of the attempted knock and talks. Instead, we are focused on the legal principle at the core of Jardines -- the scope of the implied license to enter the curtilage -- and the application of that principle to the conduct of the officers in totality. Here, as in Jardines, the officers had their feet "firmly planted on the constitutionally protected extension of [the] home" and their activity was therefore limited to that which was implicitly authorized (absent explicit consent) by the homeowner. Jardines, 569 U.S. at 7, 133 S.Ct. 1409. It does not take "fine-grained legal knowledge" to understand that the officers' actions in this case exceeded the implicit authorization to enter the property of another without a warrant. See id. at 8, 133 S.Ct. 1409. Far from engaging only in conduct that a homeowner might reasonably expect from a private citizen on their property -- that is, again, approaching the door, knocking promptly, and leaving if not greeted by an occupant -- the officers reentered the property four times and took aggressive actions until French came to the door so that the officers could pursue their criminal investigation. By so doing, the officers engaged in precisely the kind of warrantless and unlicensed physical intrusion on the property of another that Jardines clearly established as a Fourth Amendment violation. Hence, the ***133** officers violated clearly established law and are not entitled to qualified immunity.

C. The Dissent

There are two major problems with the dissent. It goes to great lengths to make an exigent circumstances argument that the appellees never make. It also fails to address the principle at the heart of Jardines: the scope of the knock and talk exception to the warrant requirement is controlled by the implied license to enter the curtilage.

1. Exigent Circumstances

The dissent tries to portray this case as one involving exigent circumstances requiring the officers to act quickly "to ensure the safety of a victim or prevent the destruction of evidence." The exigent circumstances doctrine is a narrow exception to the "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Groh v. Ramirez, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (quoting Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). "[O]fficers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), or when doing so "is reasonably necessary to head off the imminent loss of evidence," United States v. Almonte-Báez, 857 F.3d 27, 33 (1st Cir. 2017). Officers must carry the heavy burden of identifying an "objectively reasonable basis" for believing that "there [wa]s such a compelling necessity for immediate action" that the delay of obtaining a warrant could not be tolerated. Id. at 32-31 (first quoting United States v. Samboy, 433 F.3d 154, 158 (1st Cir. 2005); then quoting Matalon v. Hynnes, 806 F.3d 627, 636 (1st Cir. 2015)).

The officers do not, however, argue on appeal -- and they did not argue in their summary judgment motion below -- that their actions were justified by exigent circumstances. The officers do not claim that the safety of Nardone or the risk that evidence would be destroyed was so acute that delay to seek a warrant could not be tolerated. There is a single passing reference to exigent circumstances in the appellees' briefing. It appears in a parenthetical to a case citation and serves as a mere description of the circumstances of the case cited.[18] As we have said, "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). We see no reason here to depart from the well settled rule that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."[19] Id.

***134** The dissent also seems to suggest that even if the circumstances of this case did not amount to a true emergency justifying application of the exigent circumstances exception to the warrant requirement, the nature of the exigencies involved expanded the scope of the license for the officers to enter French's property to conduct a knock and talk. That argument conflates the knock and talk and exigent circumstances exceptions. Whereas the scope of the exigent circumstances exception is case-specific and varies based on the nature of the exigency and the severity of the underlying crime, see Welsh v. Wisconsin, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), the scope of the knock and talk exception is limited to the implied social license to enter the property of another regardless of the nature of the suspected crime of interest to the officers, see Jardines, 569 U.S. at 8, 133 S.Ct. 1409 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " (quoting King, 563 U.S. at 469, 131 S.Ct. 1849)). The dissent fails to point to any case law suggesting otherwise.[20]

2. The Scope of the Implied Social License to Conduct a Knock and Talk

The dissent claims that Jardines cannot have clearly established the unlawfulness of the officers' conduct in this case because the Court's reasoning in Jardines was dependent upon the fact that the officers entered the property with a drug-sniffing dog "to gather information on the curtilage, not to speak with a resident." According to the dissent, because the officers in this case entered the property with an intent to speak to French and not to engage in a search with a drug-sniffing dog, Jardines is inapposite. The dissent's attempt to limit Jardines to its facts ignores the animating principles of Jardines[21] -- and the reason Justice Scalia labeled the case "a straightforward one." Id. at 5, 133 S.Ct. 1409. It also ignores the Court's insistence that it was not the dog that was ***135** the problem in that case.[22] See id. at 9 n.3, 133 S.Ct. 1409.

To reiterate, the constitutional violation in Jardines was the officers' "physical[ ] ent[rance] and occup[ation]" on the curtilage of Jardines' home "to engage in conduct not explicitly or implicitly permitted by the homeowner." Id. at 6, 133 S.Ct. 1409. Because there was no explicit permission by Jardines, the Court reasoned that the officers' permission to enter the property was authorized by an implicit social license -- informed by "the habits of the country" -- to enter the property of another and seek to speak with an occupant. Id. at 8, 133 S.Ct. 1409 (quoting McKee v. Gratz, 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922) (Holmes, J.)). That license, the Court explained, has both a physical and a purpose-based limitation. Id. at 9, 133 S.Ct. 1409. In other words, its scope "is limited not only to a particular area but also to a specific purpose," both of which are defined by what a homeowner might reasonably expect from a private citizen on the homeowner's curtilage. Id. at 9, 133 S.Ct. 1409. The Court concluded that the officers abided by the terms of the physical scope of the license -- their activities on the property were limited to areas that a member of the public might be expected to visit. However, the officers in Jardines exceeded the limited purpose authorized by the license through their conduct. They did so by seeking evidence of drugs with the help of a trained, drug-sniffing dog.

That the precise manner in which the officers in this case exceeded the scope of the implied license differs from that in Jardines is inconsequential. The officers in this case, like the officers in Jardines, in the absence of any license to do so, "physically intrud[ed]" on a suspect's property repeatedly and engaged in intrusive conduct that no reasonable visitor could have understood as impliedly authorized by a resident. Id. at 11, 133 S.Ct. 1409. The dissent portrays the officers' final, unlicensed entry on French's property as a mere attempt to conduct a knock and talk. That portrayal is unsupported by the record, given the contentious and invasive conduct of the officers described above.

The dissent's attempt to detract from the clarity of Jardines by invoking Carroll v. Carman, 574 U.S. 13, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014) (per curiam), and United States v. Walker, 799 F.3d 1361, 1364 (11th Cir. 2015) (per curiam), is unpersuasive. In Carroll, instead of knocking at the front door, officers traveled to the back of a home and knocked at a sliding glass door that opened onto a ground-level deck. 574 U.S. at 14, 135 S.Ct. 348. The Supreme Court held that it was not clearly established that the officers were prohibited from knocking "at an[ ] entrance that is open to visitors ... [other] than ... the front door." Id. at 20, 135 S.Ct. 348. Here, our case involves officers knocking on an occupant's bedroom window and not "an[ ] ***136** entrance" other than the front door "that is open to visitors." See id.

Walker is similarly inapposite. There, officers attempted three knock and talks over a span of about eight hours. 799 F.3d at 1362. The officers first knocked at around 9:00 p.m. and received no response. Id. They left and returned around 11:00 p.m. and noticed a car was parked outside of the home that had not been there during their first attempt. Id. The officers

knocked again but saw no indication that anyone was inside of the home. Id. The following morning, around 5:00 a.m., the officers drove by the property and noticed that some lights were on in the home and inside of the vehicle parked outside. Id. With the recognition that someone was likely now in the home, the officers approached a third time. See id. Before they could knock on the door, however, the officers noticed a man inside of the vehicle with his head resting on the steering wheel. Id. The officers knocked on the car window to determine who the man was and whether he needed medical attention. Id. Nowhere in Walker is there any suggestion that the officers engaged in the kind of aggressive conduct that we have described here.

As we have already explained, we are not concerned with isolated facts like those presented in Carroll and Walker -- i.e., the number of officers present or the hour, location, or length of the attempted knock and talks -- and whether those facts alone might have supported a finding that the officers violated clearly established law. We are concerned only with Jardines' clear prohibition on the officers' conduct in this case which, as we have explained, plainly exceeded the scope of the implied license to enter the curtilage of French's home.[23]

V.

In sum, we agree with the district court that Officers Drost and Merrill had probable cause to arrest French for harassment in February 2016 and, even if they did not, the question of probable cause was debatable such that the officers were entitled to qualified immunity. We therefore affirm that aspect of the district court's summary judgment ruling.

As to the September 2016 incident, we conclude that, viewing the summary judgment evidence in the light most favorable to French, Officers Morse and Gray violated French's Fourth Amendment rights by exceeding the lawful bounds of a warrantless "knock and talk." We further conclude that the unlawfulness of the officers' conduct was clearly established at the time by the principles of law set forth in Florida v. Jardines. Accordingly, we reverse the district court's grant of summary judgment as to Count IX and remand for further proceedings consistent with this opinion. Each party is to bear its own costs. See 1st Cir. R. 39(a)(4).

So ordered.

LYNCH, Circuit Judge, dissenting in part.

I join the majority opinion as to the affirmance of summary judgment arising from claims about the February arrest of Christopher French. I strongly dissent from the reversal of the grant of qualified immunity to Officers Gray and Morse as to the September 14 incident. In my view, the majority is wrong that ***137** Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), which concerned officers' entry onto private property for the purpose of using a drug-sniffing dog on the curtilage of the house, clearly established the purported illegality of the officers' conduct in knocking at French's home on September 14, 2016.

The doctrine of qualified immunity has sometimes been abused, but the majority's denial of qualified immunity here is flatly contrary to Supreme Court and circuit law and creates a circuit split. Moreover, this unfortunate ruling will disincentivize police from taking action after persons of any gender have credibly alleged that they have been threatened and are frightened by former romantic partners.

When they approached French's home, Officers Gray and Morse were responding to an urgent and potentially dangerous situation. French had twice that night broken into Samantha Nardone's house and had stolen her phone from her bedside table, Nardone had previously called the police for help in dealing with French's harassment of her, and Nardone told the officers that she was scared of what French might do if he accessed the contents of her phone. Given these circumstances and the state of the law in 2016, the officers' choice to knock several times at French's door and window shortly after the second break-in was reasonable. Nothing in Jardines clearly established otherwise. The officers in this case acted sensibly and with restraint, and most certainly should not be deprived of qualified immunity and sent back to face damages claims against them, as the majority holds.

I.

The following key facts of the September 14, 2016, encounter are those which would have been understood by any reasonable officer in the shoes of Officer Morse, the lead officer, and Officer Gray. These facts reveal why the majority is wrong in its reading of Jardines and its conclusion that the law was clearly established as to the implied license analysis. The facts also demonstrate why the two officers are clearly entitled to qualified immunity.

The supposed violation of French's Fourth Amendment rights occurred sometime around 5:00 or 5:30 AM on September 14, 2016. This is what the officers knew at the time.

A. The Officers' First Visit to 60 Park Street.

The victims, Samantha Nardone and her roommates, called the police department at or around 3:19 AM on September 14, 2016, to report that their residence had been broken into. Nardone also reported that her phone, which she had placed on her nightstand before she went to sleep around 12:30 AM, was missing.

Officers Morse and Gray were dispatched immediately to Nardone's residence at 60 Park Street in Orono, Maine. Both officers were familiar with the history between French and Nardone and knew that Nardone had several times in the past called the Orono Police Department because of problems with French. Morse was familiar with French because he, accompanied by Officer Barrieau, had arrested French in November 2015 for violating his conditions of release. From this prior incident, Morse knew that French lived at 13 Park Street, a nearby multi-tenant house about .2 miles from Nardone's house. He knew French did not live in a single-family house. He also knew that French's room in that house was on the first floor to the left of the front door. He had spoken with other officers about French multiple times. Gray testified at his deposition that he was familiar with French's name in September ***138** 2016 and that it was "highly likely" he had read French's previous arrest records.[24]

On the way to Nardone's house, Morse saw that lights were on at French's house at 13 Park Street. When the officers arrived, Nardone told them that she suspected French of breaking in and taking her phone. She explained that French had stolen her keys the previous week and still had them, though she had since changed the locks. When she noticed her phone was missing, she found that all of the doors she had locked before going to bed were now unlocked.

Nardone stated that she was afraid French would do something to her if he gained access to her phone and read what was on it. She later added that "if he gets in [the phone], I'm fucked." Nardone explained that she had put a passcode on her cellphone, but that the passcode she had chosen was not secure and that she thought he would be able to crack it. She thought that if French had the phone he was "obviously gonna run" from his apartment so that he would have time to look through the phone. She said she was scared he would break in again that night and wrote in her victim statement that she had reason to believe French "would do it again (now/tonight)." Nardone also told the officers she thought French might be drunk or on drugs because he was "obviously fired up."

Nardone told the police numerous good reasons for her fear, including the events of that very night, of the prior week, and from before that. Nardone explained that earlier in the night on September 13, 2016, Nardone had run into French in a chance encounter at the Roost, a local lounge. There, French came up to her and they exchanged words; the interaction made her feel uncomfortable in remaining there. So she left around 10:30 PM.

Nardone later drove over with her roommate Alicia McDonald to see a friend who lived nearby. After the visit, the two women attempted to drive home. French found them and stood in the middle of the road to force them to stop. He yelled and swore at Nardone, asking her where she had been, and accused her of drunk driving. As Nardone tried to drive away, French jumped onto her car.

As the police report recounts, "[o]nce Nardone made it home she and McDonald locked all the doors and windows in fear that French would come to their residence." Nardone checked her phone and saw she had nine missed calls from a blocked number -- which she had reason to believe were from French -- and eleven messages from French. Nardone had blocked French on all her social media accounts and on her email and phone but was still receiving messages from French on the "First Class" University of Maine platform that she had been unable to block him on. French had previously harassed her with calls from a blocked number in the hours after being served a Cease Harassment Notice on February 18, 2016. On her roommate's advice, Nardone did not read the messages. She told Morse she was "so freaking scared" when she went to ***139** bed. Before falling asleep, she placed the phone on her nightstand. Nardone woke up around 3:00 AM and saw that her phone was missing. That was when she discovered that all the doors she had locked before going to bed were now unlocked.

As to the prior week, Nardone explained to the officers that she had broken up with French six days before, on September 8, 2016. That night, French had broken into Nardone's home and stolen her keys and laptop. The following morning, Nardone noticed that her laptop was gone, went to French's house to look for it, and saw that her laptop was open on his

bed and that he had been going through her iMessages on her laptop. The next day, on Saturday, September 10, Nardone went out with friends. Walking towards a local bar, they saw someone watching them from the kitchen window of French's house. When she returned home later, her car keys and a spare key on her windowsill had disappeared, and she had not been able to find them since. She told the officers she suspected French had taken her keys a second time, so she had changed the locks.

Nardone also told the officers that on a different, previous occasion, French had taken Nardone's keys and she had been afraid he would break in. The hardware store was closed so she could not change her locks that night, so French's roommates put sensors on French's doors and windows so that they would be alerted if French left and they could warn Nardone. Nardone was scared enough that night that she piled up furniture in front of her bedroom door to make sure French could not get in. She changed her locks the following day.

While the officers were at Nardone's apartment on September 14, her roommate Jennifer Prince found that an upstairs bathroom window had been opened and the items in the windowsill knocked to the floor, indications that the window was the entry point. Officer Morse took photographs of the window. Morse also asked dispatch to arrange a "ping" on Nardone's phone with the cellphone carrier to see if they could find out whether the phone was at 13 Park, French's residence.

The officers left Nardone's home at approximately 4:26 AM. Shortly before leaving, they asked Nardone if she would feel safe staying at the apartment. She repeated that she would not feel safe if French got into her phone. They returned to the police station to try to "ping" Nardone's phone to find its location and figure out if it was at French's apartment. Nardone had told them that she had tried to use iCloud to locate her phone, but the phone had been turned off and so she could not locate it.

B. French's Second Break-In to Nardone's House

The fears which Nardone reported about French again trying to break in that same night came true. At 4:43 AM, Nardone called the police a second time and reported that French had come back to her apartment. He entered through the front doorway, but only got to the mudroom when the screams of Nardone's roommates stopped his entry and caused him to flee.

Gray and Morse were dispatched again. While on their way, dispatch told them that French had been seen running down the road towards his home at 13 Park. They stopped at 13 Park on the way and saw that there were lights on in the house. They knocked on French's door. Nobody responded, so the officers left the porch. The officers decided that Gray should stay on the road near 13 Park while Morse went back to Nardone's residence at 60 Park to gather the account of its residents first-hand. Gray walked down the driveway ***140** to the left of 13 Park and saw a man peering out of the basement window of the building. Gray knocked a second time on French's door.

Officers James Fearon and Melissa Orr from the Old Town Maine Police Department were sent to join Morse at 60 Park. Nardone and her roommates explained that French had broken in again and that he was yelling that he needed help with his puppy. Nardone stated that French was probably waiting for the police to leave and her roommate said French would probably return "the second [the police] leave." Morse asked if there was somewhere else that they could go and encouraged them to go elsewhere for the rest of the night.

That is what the officers knew of French's criminal activities that night when they decided to return to 13 Park. Among other things, they had every reason to believe (1) French was a threat to Nardone and her roommates; (2) he had expressed his anger in many ways toward them; (3) they had to move quickly, particularly as he might read the email and messages on Nardone's phone; (4) they had to move rapidly to prevent not just harm to Nardone and her roommates, but the destruction of evidence: the cell phone, the stolen keys, and whatever else he had taken, all evidence of his break in; and (5) he had run down the street back to his room and was still awake.

C. The Officers' Second Visit to French's Apartment

Morse and Fearon returned to French's home. The officers discussed the best approach to finding and questioning French. They felt they had probable cause and discussed seeking a warrant. To obtain a warrant, the officers would have to return to the police station and prepare an application and request for a warrant. They estimated that would take at least half an hour once back at the station. They then would have to drive to a nearby town to get a judge to sign the warrant.

They discussed a further attempt at a knock and talk and, if French appeared, questioning him. They had observed that the lights which had been on were quickly turned off and the windows were covered, confirming the view that someone was up and awake. Morse explained to the other officers that he and Gray had tried a knock and talk earlier on the first trip to 13 Park and had gotten no response. Fearon, who is not a defendant (and whose actions cannot be attributed to Morse and Gray) expressed his view that they should attempt again to knock and talk.

The decision to proceed not with a warrant, but with a knock and talk, in Gray's view, was based on the fact that it was faster and easier. Gray stated that "if we believe somebody is inside of the residence and we're looking to speak with that individual and we have facts and circumstances surrounding the situation that lead us to believe that he is inside of the residence, we can knock to attempt to have that subject come out and speak with us." Gray also stated that the appropriate place to knock "depends on where the person that you're trying to contact resides within the dwelling" and that he believed it was permissible to bang on a window.

As to Morse, he stated at his deposition that he was unaware of any standards that place limits on what time of day you can knock and talk. Morse was aware that officers may enter private property in exigent circumstances, which arise where there is a risk that evidence will be destroyed, a person will be harmed, or officer safety is at risk. Morse was also aware that Maine law permits officers to arrest without a warrant "any person who the officer has probable cause to believe has ***141** committed or is committing ... [d]omestic violence assault, domestic violence criminal threatening, domestic violence terrorizing, domestic violence stalking or domestic violence reckless conduct." Me. Rev. Stat. tit. 17-A, § 15(1)(A)(5-B). While still at 60 Park, Morse had said to Officer Fearon that they had enough to "hook" French on harassment and stalking after his second break-in.

Having decided that a further knock and talk was appropriate, Morse and Fearon went to a strip of grass on the side of 13 Park. Morse stated that he did not know where the property line was, but acknowledged that he was on the curtilage of 13 Park when knocking on the window frame. In deciding to knock at the window, he factored in that it was an apartment and that French had non-relative roommates living with him. Morse's understanding was that officers can knock several times during a knock and talk, but must stop before it becomes unreasonable.

It was not the defendant officers but Fearon who then knocked on the window frame of French's bedroom window. Only after that did Morse knock on the window twice. The total time of the two different officers knocking on the window frame was almost exactly two minutes. For French to have responded to the window knocking, he would have had to come out from his bedroom and go to the front door.

Gray then knocked on the front door again and announced their presence. The knocking had two immediate effects. One was that a dog started barking. The officers said they could not tell if the dog came from 13 Park or the very nearby neighboring home. More importantly, within thirty seconds of Gray's knocking at the front door, another tenant who lived at 13 Park who identified himself as "Corey," came to the door. The officers asked if French was home. Corey was not sure and asked if Gray wanted him to look for French. Gray asked him to go look for French. Corey asked French to come to the door and French then did so.

French came outside to speak to the officers. He refused to acknowledge that he had Nardone's phone, but said that he would look for it anyways. The officers did not permit French to go alone inside to look for the phone, so French asked Corey to retrieve the phone and told him where to look. After additional questioning, Officers Morse and Gray arrested French for burglary around 5:30 AM.

II.

"The doctrine of qualified immunity shields [police officers] from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Mullenix v. Luna, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (quoting Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). To show that a rule is "clearly established," "[i]t is not enough that the rule is suggested by then-existing precedent." Dist. of Columbia v. Wesby, —— U.S. ——, 138 S. Ct. 577, 590, 199 L.Ed.2d 453 (2018). Instead, "existing precedent must ... place[ ] the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" Wesby, 138 S. Ct. at 589 (quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

The inquiry into whether a rule is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition," and "[s]uch specificity is especially important in the Fourth Amendment context." ***142** Mullenix, 577 U.S. at 12, 136 S.Ct. 305 (quoting Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam)).

French and the majority argue that Jardines itself clearly established that the officers' conduct on September 14, 2016, violated French's constitutional rights. I disagree for several reasons. First, the holding of Jardines is not applicable here because the facts are entirely distinct, and Jardines' reasoning relied on facts not present here. Second, as made clear by Supreme Court and circuit court decisions published after Jardines, Jardines' general discussion of the knock and talk exception was not adequately specific to clearly establish the purported illegality of the officers' conduct here. Finally, the majority seems to posit that the officers' actions somehow forced French to come to the door. The majority relies on a self-serving statement made by French after he instituted this litigation, but certainly not made to the officers at the time of these events. This argument by the majority suffers from at least three errors in itself. First, the facts do not support this assertion. Secondly, nothing in Jardines supports it. Thirdly, the majority's looking at qualified immunity, not from the objective point of view of the officers on the scene but from the point of view of French, is clearly error. On the facts of this case, a reasonable officer would easily understand that their actions had not forced or coerced French to come to the door. There were no threats and no overbearing of French's will.

As to the first issue, Jardines concerned the use of a drug-sniffing dog in the daytime, and its holding, stated at the end of the opinion, was that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." Jardines, 569 U.S. at 11-12, 133 S.Ct. 1409. That holding is not applicable here, where there was no police dog or any other instrumentality used.

The analysis in Jardines also depended on the fact that the officers entered the property to gather information on the curtilage, not to speak with a resident. E.g., id. at 6, 133 S.Ct. 1409 ("[The Fourth Amendment] right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity."); id. at 9, 133 S.Ct. 1409 ("The scope of a license ... is limited ... to a specific purpose. ... Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search." (emphasis added)); id. at 9 n.3, 133 S.Ct. 1409 ("What [Kentucky v.] King establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, because all are invited to do that.... But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." (second emphasis added) (citing 563 U.S. 452, 469-70, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011)); id. at 11, 133 S.Ct. 1409 ("That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." (emphasis added)). The court stated that the case turned on "whether the officers had an implied license to enter the porch, which in turn depend[ed] upon the purpose for which they entered." Id. at 10, 133 S.Ct. 1409. The officer had exceeded the scope of the implied license because his "behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do." Id. at 10, 133 S.Ct. 1409 (emphasis added). In contrast, as the Court explained "the officers could have lawfully approached [Jardines'] home to knock on the front ***143** door in hopes of speaking with him. Of course, that is not what they did." Id. at 7 n.1, 133 S.Ct. 1409.

In the instant case, it is undisputed that the officers were knocking on the door to try to speak with French, not to search the property, as in Jardines. Jardines is not about the limitations, if any, on the duration or location of a knock and talk license to contact the resident of a home, and thus could not clearly establish the purported illegality of the officers' conduct. Cf., e.g., United States v. Walker, 799 F.3d 1361, 1363 (11th Cir. 2015) (citing Jardines for the proposition that officers exceed the implicit license of the knock and talk exception when their conduct objectively reveals a purpose to conduct a search). Jardines also did not concern a situation in which the officers had to act quickly to ensure the safety of a victim or prevent the destruction of evidence. See Kentucky v. King, 563 U.S. 452, 472, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (holding that officers may enter a residence without a warrant in order to prevent the destruction of evidence). Nor did Jardines discuss how the analysis might change when officers are investigating a crime for which state law authorizes a warrantless arrest.

As to the majority's argument that the purported illegality of the officers' conduct was clearly established by the broad "legal principle at the core of Jardines" because "[i]t does not take 'fine-grained legal knowledge' to understand

that the officers' actions in this case exceeded the implicit authorization to enter the property of another without a warrant," there are several problems with this reasoning. As explained above, the argument relies on language about the scope of the knock and talk exception which is not the holding of Jardines or central to Jardines' analysis. See Garner, et al., The Law of Judicial Precedent 26, 82 (2016) (defining scope of judicial holdings). It ignores the Supreme Court's instruction that the clearly established inquiry "must be undertaken in light of the specific context of the case" and not "at a high level of generality." Mullenix, 577 U.S. at 12, 136 S.Ct. 305 (first quoting Brosseau, 543 U.S. at 198, 125 S.Ct. 596; and then quoting al-Kidd, 563 U.S. at 742, 131 S.Ct. 2074). It also ignores the language of Jardines itself, which clarifies that the implied license is only "typically" limited to walking up the front path of a home and knocking. Jardines, 569 U.S. at 8, 133 S.Ct. 1409.

Subsequent decisions from the Supreme Court and from our sister circuits make clear that the purported illegality of the officers' actions -- including knocking at the window, knocking multiple times, and knocking late at night -- was not clearly established by Jardines' general rule.

In Carrol v. Carman, the Supreme Court held that it had not been clearly established, and it would not decide, whether officers could perform a knock and talk "at any entrance that is open to visitors rather than only the front door." 574 U.S. 13, 20, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014). By refusing to decide the issue, the Court made clear that Jardines' description of the implied license -- despite specifying that "typical" knock and talk would be at the front door -- did not clearly establish that only a knock at the front door was acceptable. Since then, several circuits have held that officers may knock at various places on the property if they have reason to believe that they will find a resident. See, e.g., Covey v. Assessor of Ohio Cnty., 777 F.3d 186, 193 (4th Cir. 2015) ("An officer may also bypass the front door (or another entry point usually used by visitors) when circumstances reasonably indicate that the officer might find the homeowner elsewhere on the property"); ***144** United States v. Walker, 799 F.3d 1361, 1364 (11th Cir. 2015) (per curiam) (holding that knock on car window in carport away from front door was acceptable under knock and talk exception).

Against this background, a visitor, knowing that this was a multi-tenant unit and precisely where French's room was, could quite reasonably go to his window to knock rather than use the door. So could a neighbor who, having received no response at the front door, knock on a window to get the attention of an occupant.[25] There was absolutely no impediment to stop visitors from knocking at the window, which was adjacent to the neighbors' driveway.

The Eleventh Circuit case United States v. Walker shows even more clearly that the purported illegality of Officer Gray and Morse's actions was not clearly established. In Walker, police officers went to a home and knocked at 9:00 PM and 11:00 PM to attempt to speak with a resident. 799 F.3d at 1362. They returned shortly after 5:00 AM and saw that there were lights on in the house and in a car parked in a carport thirty feet from the house. Id. The officers went to the car and knocked on the car window. Id. The man inside the car stepped out, and in the course of his interaction with the police, the police found counterfeit currency in his home. Id. at 1362-63. The Eleventh Circuit affirmed the denial of the defendant's motion to suppress evidence discovered as a result of the third knock and talk on the car window. Id. at 1364. It first explained that the officers' actions did not exceed the implied license to knock and talk because their purpose was "to speak with the homeowner, which is conduct that falls squarely within the scope of the knock and talk exception" and not to search the property. Id. at 1363. The court then reasoned that going to the carport was a permissible "small departure from the front door ... when seeking to contact the occupants" because "the officers entered [the carport] because they had reason to believe the house's occupant was sitting in the car parked inside." Id. at 1364 (alteration in original) (quoting United States v. Taylor, 458 F.3d 1201, 1205 (11th Cir. 2006)). The Eleventh Circuit also rejected the argument that in all circumstances "going to someone's house before sunrise to knock on the door is unreasonable and exceeds the implied invitation that underlies the knock and talk exception." Id. at 1364. It explained that the officers' actions were reasonable because they had seen a light on at 5:04 AM, suggesting that someone was awake. Id.

Given that Walker was decided before the events of this case, I cannot agree that it was clearly established "beyond debate" that Morse and Gray's actions here violated the Fourth Amendment. al-Kidd, 563 U.S. at 741, 131 S.Ct. 2074. In Walker, the police approached the home to knock three distinct times, twice at his front door and once on his car window away from the front porch. 799 F.3d at 1364; see also United States v. White, 928 F.3d 734, 739-41 (8th Cir. 2019) (holding that officers had not violated the Fourth Amendment by approaching a home multiple times in one day in an effort to make contact with the property owner). Officers Morse and

Gray ***145** knocked four times. Each of the knocks in Walker was at night, and one was at 5:00 AM, essentially the same time that Morse knocked on French's window. As in Walker, Morse and Gray had reason to know that French was awake and that they might reach him by knocking somewhere other than the front door -- here a bedroom window instead of a car window on the curtilage of the home.[26]

The majority commits further errors when it relies on French's post-litigation self-serving statements that he felt he had "no choice" but to answer the door. He made no such assertion to the officers and he voluntarily answered the door. The majority attempts to imply that the officers' actions somehow coerced French into answering the door. The majority cannot squarely make this argument because Jardines says nothing about coercion -- unsurprisingly, since it is a case fundamentally about searches conducted in the curtilage of people's homes and not about the scope of the knock and talk warrant exception. Nevertheless, the majority finds that the officers "reenter[ing] the property four times and [taking] aggressive actions until French came to the door" was somehow contrary to law clearly established in Jardines. Jardines simply does not address how many attempts officers who want to knock and talk may make to get the attention of one occupant of a multi-occupant house. In finding that the law was clearly established, the majority holds without any correct citation that every reasonable officer would have known reentry onto the property and "aggressive actions" are foreclosed by Jardines. This finding is mistaken in several respects.

First, it is simply not clearly established law that repeated entries onto different locations on a property to get the attention of the person sought are unconstitutionally coercive. As stated above, in both Walker and White, courts in other circuits found no constitutional problem with repeated entries onto a defendant's property.[27] Walker, 799 F.3d at 1363-64; White, 928 F.3d at 739-41. A reasonable officer could conclude that the efforts to find French permissibly included going to his window as well as the front door to knock, and that this was efficient and hardly "aggressive." The majority rests its entire case on Jardines, which does not answer these questions.

***146** In cases from our circuit that actually discuss coercion, we make clear that the law sets a high bar. For example, in order for a confession to be said to be coerced, the person being questioned must have their will "overborne." United States v. Jackson, 608 F.3d 100, 103 (1st Cir. 2010) (citing Arizona v. Fulminante, 499 U.S. 279, 288, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)); see also United States v. Genao, 281 F.3d 305, 310 (1st Cir. 2002) (noting that police must not "apply undue or unusual pressure ..., use coercive tactics, or threaten [the defendant] with violence or retaliation if he did not confess."). Contrary to French's litigation statements made in furtherance of his efforts to obtain a damages award from these officers, there is no support for the contention that the officers' conduct overbore his will and forced him to come to the door.[28] He did not ask the officers to leave, nor did he ask his roommate to tell them to go away when his roommate answered the door.

Despite the majority's attempts to buttress its argument by focusing on French's belated statement of his subjective feelings before he came to the door, the proper focus of the qualified immunity inquiry is whether the officers would have known their actions were unconstitutional. The answer, contrary to the majority, is that a reasonable officer could have thought these actions were constitutional. In qualified immunity determinations, "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.' " Mullenix, 577 U.S. at 12, 136 S.Ct. 305 (emphasis in original) (citing al-Kidd, 563 U.S. at 742, 131 S.Ct. 2074).

The majority's entire approach to qualified immunity runs counter to both the Supreme Court's and this circuit's precedents. The "clearly established" inquiry is not supposed to entail elucidating an abstract principle from a single case and asking how a reasonable officer would have applied that principle in a given situation. Rather, it requires asking whether the constitutionality of the official's behavior was placed "beyond debate" by existing precedent. al-Kidd, 563 U.S. at 747. The inquiry requires "specificity," particularly in Fourth Amendment cases. Mullenix, 577 U.S. at 12, 136 S.Ct. 305. The majority makes clear that it is not concerned with what it views as trivial details like "the number of officers present or the hour, location, or length of the attempted knock and talks." It should be. In ignoring the specifics of the case and the very real questions left open by Jardines to reach its decision, the majority defines clearly established law at the "high level of generality" the Supreme Court has expressly foreclosed. al-Kidd, 563 U.S. at 742, 131 S.Ct. 2074.

The need for swift action also distinguishes this case from Jardines and undercuts the majority's argument that general principles of Jardines clearly established the purported illegality of the officers' conduct. There are two basic reasons

for this among many others. First, the Supreme Court has recognized that officers may enter a residence without a warrant in order to prevent the destruction of evidence. King, 563 U.S. at 472, 131 S.Ct. 1849. Here, a reasonable officer could have thought that their conduct did not violate any constitutional rights because a knock and talk could prevent French from destroying or disposing of Nardone's phone, keys, and any other evidence of the break-in. ***147** Second, there was an imminent threat to Nardone, and the officers certainly were allowed to attempt to talk to French in an effort to secure her safety. Cf. id. at 460, 131 S.Ct. 1849 (recognizing that officers may enter a home without a warrant to prevent "imminent injury").

As we have recognized, "the Supreme Court's standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present." Roy v. Inhabitants of City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994). We have also recognized that deference to officers' decisions in these circumstances is particularly warranted in domestic violence situations where "violence may be lurking and explode with little warning." Fletcher v. Town of Clinton, 196 F.3d 41, 50 (1st Cir. 1999). The officers here knew of the potential danger to Nardone, and the potential for destruction of evidence, and they also knew that getting a warrant would be a lengthy process. With these factors in mind, the officers made the considered determination that it was reasonable to attempt several knock and talks.

This circuit's recent decision in United States v. Manubolu, No. 20-1871, 13 F.4th 57, (1st Cir. Sept. 14, 2021), underscores how long wait times for warrants factor into the reasonableness determination. In the aftermath of a car crash, the court found that police did not violate the defendant's constitutional rights by conducting a blood draw to check his blood alcohol levels without a warrant where the procedure for getting a warrant was "protracted," the blood alcohol evidence in his bloodstream was dissipating, and the defendant needed medical attention. Id. at 69–72, 75–76. Under the totality of the circumstances, the court found that it was reasonable for the officer to think exigent circumstances existed to permit a warrantless blood draw. Id. at 75–76. There, the officer knew of a National Park Service regulation which prohibited warrantless blood draws absent exigent circumstances. Id. at 62–63. Here, in contrast, there was no analogous statute since no warrant was required for a knock and talk. Given the length of time it would have taken to get a warrant, the possibility that evidence would be destroyed, and the potential for harm to Nardone, the officers here made an objectively reasonable decision under the circumstances to continue to attempt to knock and talk. The officers' actions were lawful, but, even if they were not, the totality of the circumstances informing their decisions is yet another reason why adherence to the law requires that the grant of qualified immunity be affirmed.

III.

The majority's decision, in my view, disincentivizes police from acting on and taking seriously the complaints of persons of any gender who credibly seek law enforcement help when they have been threatened by former romantic partners. I cannot agree that Jardines was sufficiently analogous to place the legality of these officers' actions "beyond debate." In my view, under controlling Supreme Court precedent, the only correct result here is the affirmance of the grant of qualified immunity to these officers. The officers here acted reasonably in making repeated efforts to reach French where he was acting erratically and Nardone explained that the danger to her would increase as French was given more time to break into and read the contents of her phone. The officers knew French was awake despite the time, and it was a rational choice in a multi-tenant apartment for the officers to knock on ***148** French's bedroom window to try to speak to him. Nothing in Jardines or any other case clearly established that these actions violated the Fourth Amendment.

I dissent.

All Citations

15 F.4th 116

Footnotes

1 The remaining eleven counts alleged violations of French's Fifth Amendment, Sixth Amendment, Eighth Amendment, and procedural Due Process rights, as well as various state law tort claims, supervisory liability claims against Town of Orono Police Chief Joshua Ewing, and municipal liability claims against the Town of Orono. None of those claims are at issue on appeal.

2 The parties stipulated to the identity of the officers involved, the timing of the events, the addresses of the relevant locations, and the authenticity of video recording of the events from body cameras and police cruisers. They also stipulated to other minor facts which we will identify where relevant.

3 The third officer was not named as a defendant in this case.

4 The parties stipulated to the content and timing of all messages French sent to Nardone on February 18, 2016.

5 Several calls were from a "blocked" number. Nardone did not answer those calls, but she assumed they were from French. French appears to concede that he made at least some of the blocked calls.

6 The parties stipulated that the copies Nardone provided to Officer Drost were authentic.

7 Officer Morse wore a body camera that recorded the events of the morning. Officer Gray did not wear a body camera.

8 The record does not provide an explanation for why police officers from both Orono and Old Town responded to Nardone's 911 call. It appears that Nardone's residence was located in Orono but was close to the Old Town line. In any event, Detective Fearon, Officer Orr, and the Old Town Police Department were not named as defendants in French's complaint.

9 As we have explained, French also sued the Town of Orono and the police chief and brought a variety of other constitutional and state tort law claims against the officers, but none of those claims are at issue in this appeal. See supra note 1.

10 French labels his September 2016 Fourth Amendment claim as an unlawful seizure and explains in his reply brief that he has maintained throughout these proceedings that the officers seized him when they "effectively coerc[ed] him to come to the door against his will." Appellees correctly note, however, that the thrust of French's argument on appeal is whether the officers violated his Fourth Amendment rights when they entered his curtilage without a warrant to conduct several investigatory "knock and talks." That is an unlawful search claim. Hence, we limit our analysis to whether the conduct of the officers constituted an unlawful search.

11 French contends in his brief that "[t]here is no clear evidence that Nardone ever read [French's] messages." The stipulated facts demonstrate, however, that Nardone described the messages she received from French to Drost and provided Drost with screenshots of the messages.

12 French denies this allegation and contends that the officers could not rely on the information to establish probable cause because it was hearsay -- Nardone told the officers that she learned French was looking for her on campus from a friend. We have explained, however, that "hearsay may contribute to the existence of probable cause so long as there is a 'substantial basis' for crediting the hearsay information." United States v. Poulack, 556 F.2d 83, 87 (1st Cir. 1997). Here, the officers found Nardone credible and articulate, and reviewed corroborating messages about the incident from her phone. Hence, the officers were permitted to rely on that information to support their finding of probable cause. See Forest v. Pawtucket Police Dep't, 377 F.3d 52, 57 (1st Cir. 2004) (explaining that officers are entitled to rely upon a "credible complaint by a victim to support a finding of probable cause" without corroborating every aspect of the complaint).

13 Although Officer Morse was wearing a body camera, it did not record the initial knock and talk.

14 In his incident report, Gray states that Morse was still at French's residence when Gray noticed the young man peering out of the basement window and that Morse and Gray proceeded to knock on the front door a second time together. In his sworn affidavit submitted to the district court, however, Gray explains that Morse had already left to speak with Nardone when Gray proceeded to knock a second time. Morse's affidavit also confirms that fact.

15 Officer Orr agreed to canvass the area to see if she could locate French and did not return to French's residence until after he was arrested.

16 The officers believed that window was in French's bedroom based on a visit to the residence in November 2015 that involved French.

17 The officers do not claim that their conduct was justified by exigent circumstances and, as we shall explain, the dissent's exigent circumstances argument was not made below or on appeal.

18 In support of their argument that Jardines is ambiguous, the officers pose a series of questions they contend are unanswered by Jardines, each of which is followed by case citations allegedly showing disagreement as to the answer. It is in that context that the officers make their single ancillary reference to exigent circumstances: "How loudly may an officer knock? See Kentucky v. King, 563 U.S. 452, 468–69, 131 S. Ct. 1849, 1861, 179 L.Ed.2d 865 (2011) ('Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door.') (discussing exigent circumstances exception to warrant requirement)." Appellee's Br. at 37.

19 To be sure, the officers were justifiably concerned about Nardone's wellbeing given her credible accounts of French's conduct that evening and throughout the entirety of his relationship with her. But the officers plainly do not argue that there was such an imminent risk that French would harm Nardone or destroy evidence that they were justified in dispensing with the warrant requirement on that ground, such that they could exceed the social license recognized in Jardines. See generally Williams v. Maurer, 9 F.4th 416, 435-36 (6th Cir. 2021) (holding that a reasonable jury could find no exigent circumstances where the officers "respond[ed] to a report of a [possible domestic] disturbance, [but] when they arrived on the scene, there was no indication of a tumultuous situation in [the] home and [they] did not witness any violent behavior inside the apartment").

20 The dissent also suggests that the scope of the implied license to conduct a knock and talk might vary "when officers are investigating a crime for which state law authorizes a warrantless arrest." But that consideration is irrelevant. Probable cause to arrest a suspect, even if that is all that is required under state law, cannot overcome the protections that the Fourth Amendment affords to a person inside his or her home under federal law. See, e.g., Morse v. Cloutier, 869 F.3d 16, 23 (1st Cir. 2017) ("Arresting a suspect inside his home without a warrant violates the Fourth Amendment unless some 'well-delineated exception[ ]' shields the intrusion." (quoting United States v. Romain, 393 F.3d 63, 68 (1st Cir. 2004) (alteration in original)).

21 The dissent unconvincingly tries to dismiss Jardines' explanation of the scope of the implied social license as mere dicta. But the Court's careful consideration of the contours of the implied license, and whether the officers' conduct on Jardines' curtilage was authorized by that license, was crucial to its holding that the officers violated the Fourth Amendment.

22 The dissent also tries to disaggregate the conduct of the officers and argues that, because Detective Fearon is not a defendant in this case, his actions should not be taken into account in determining whether Morse and Gray violated French's Fourth Amendment rights. But that approach ignores the fact that Fearon, Morse, and Gray acted in concert while pursuing the investigation of French in the curtilage of the residence. It may have been Fearon who suggested that the officers attempt another knock and talk before applying for a warrant and he may have been the first one to knock on French's window, but Morse and Gray agreed with his proposal, participated in the final re-entry on French's property, and Morse joined Fearon in knocking on French's bedroom window. Hence, carving out Fearon's conduct accomplishes nothing in terms of Morse and Gray's liability in this case.

23 The dissent's notion that a neighbor -- let alone a group of strangers visiting a home at 5:00 a.m. -- may, under the implied social license, repeatedly knock on the front door, peer through a drawn window covering, shine a flashlight through windows in the home, and knock on a bedroom window frame, all while yelling for the occupant to come outside, strains credulity and is contrary to Jardines.

24 Nardone wrote in her police statement about the February incident that she had gotten in an altercation with French and he would not leave her home when she asked him to. She reported that he tried to put her in a headlock, and she pushed him away. She told him he had ten minutes to collect his items from her home before she called the police. She was concerned for her safety, so she locked herself and her roommates into one of the bedrooms. French began jiggling the lock and started using a card to pop it open. They held the knob so he could not pop it open. Moments later, Nardone heard a "huge smash downstairs," ran down, and saw "the TV was shattered face down on the floor."

25 The majority argues that this contention is "contrary to Jardines." This once again misunderstands the qualified immunity inquiry and Jardines itself. To overcome the defense of qualified immunity, it is not up to the officers to demonstrate the

constitutionality of their actions, but to French to show that no reasonable officer in these officers' positions could have thought that their actions were constitutional. The fact that a visitor who knew which bedroom was French's could knock on his window in addition to the door simply goes to the reasonableness of the officers' doing so and establishes that their actions are entitled to qualified immunity.

26 The majority does not argue that French revoked his implied license or that the officers reasonably should have understood him to have done so. Perhaps this is because French could have at any time explicitly told the officers to leave, or had his roommate do so when his roommate answered the door, but chose not to. At any rate, the determination as to when an implied license has been revoked is yet another question about the scope of the implied license left open by Jardines. See United States v. Smith, No. 16-91-01, 2017 WL 11461045, at *11 (D.N.H. Oct. 18, 2017) ("[T]he First Circuit Court of Appeals has yet to delineate the contours of revocation."). Not only is there a dearth of case law on this topic in our circuit, but courts in other circuits have indicated that the license is difficult to revoke. See United States v. Carloss, 818 F.3d 988, 996-97 (10th Cir. 2016) (posting "No Trespassing" sign in yard and "Posted Private Property Hunting, Fishing, Trapping or Trespassing for Any Purpose Is Strictly Forbidden Violators Will Be Prosecuted" sign on door did not revoke implied license for knock and talk); cf. Edens v. Kennedy, 112 Fed. App'x 870, 875 (4th Cir. 2004) (finding police could not knock and talk where house was fenced in, gate was locked, and "No Trespassing" sign posted); see also United States v. Holmes, 143 F. Supp. 3d 1252, 1262 (M.D. Fla. 2015) (noting implied license can be revoked by "express orders from the person in possession" (citation omitted)).

27 As for "aggressive actions," the majority provides no guidance for how this highly subjective term might be defined, much less any actual cases outlining its scope.

28 In fact, in his deposition, French stated "I knew I had the right to not come outside if I didn't want to." As the majority acknowledges, French had experience with the criminal justice system before this event, having been arrested previously in February 2016. In the same deposition, French stated he had already been arrested "four times."

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141 S.Ct. 2011
Supreme Court of the United States.

Arthur Gregory LANGE, Petitioner
v.
CALIFORNIA

No. 20-18
|
Argued February 24, 2021
|
Decided June 23, 2021

Synopsis

Background: Following denial by the Superior Court, Sonoma County, No. SCR699391, Marjorie L. Carter, J., of defendant's motion to suppress evidence obtained by police officer who made warrantless entry to defendant's garage after he had just parked his car there, defendant was convicted of the misdemeanor offense of driving under the influence of alcohol. Defendant appealed, and the Appellate Division affirmed. Defendant again appealed. The First District Court of Appeal, Jones, Presiding Justice, 2019 WL 5654385, affirmed. Certiorari was granted.

The Supreme Court, Justice Kagan, held that the flight of a suspected misdemeanant does not always justify a warrantless entry into a home, abrogating *City of Bismarck v. Brekhus*, 908 N.W.2d 715, *Com. v. Jewett*, 471 Mass. 624, 31 N.E.3d 1079, *People v. Wear*, 229 Ill.2d 545, 323 Ill.Dec. 359, 893 N.E.2d 631, *Middletown v. Flinchum*, 95 Ohio St.3d 43, 765 N.E.2d 330, *State v. Ricci*, 144 N. H. 241, 739 A. 2d 404.

Vacated and remanded.

Justice Kavanaugh filed a concurring opinion.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Kavanaugh joined in part.

Chief Justice Roberts filed an opinion concurring in the judgment, in which Justice Alito joined.

***2013** *Syllabus*[*]

****1** This case arises from a police officer's warrantless entry into petitioner Arthur Lange's garage. Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer began to follow Lange and soon after turned on his overhead lights to signal that Lange should pull over. Rather than stopping, Lange drove a short distance to his driveway and entered his attached garage. The officer followed Lange into the garage. He questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange's blood-alcohol content was three times the legal limit.

The State charged Lange with the misdemeanor of driving under the influence. Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The Superior Court denied Lange's motion, and its appellate division affirmed. The California Court of Appeal also affirmed. It concluded that Lange's failure to pull over when the officer flashed his lights created probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. And it stated that Lange could not defeat an arrest begun in a public place by retreating into his home. The pursuit of a suspected misdemeanant, the court held, is always permissible under the exigent-circumstances exception to the warrant requirement. The California Supreme Court denied review.

Held: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always—that is, categorically —justify a warrantless entry into a home. Pp. 2016 – 2025.

(a) The Court's Fourth Amendment precedents counsel in favor of a case-by-case assessment of exigency when deciding whether a suspected misdemeanant's flight justifies a warrantless home entry. The Fourth Amendment ordinarily requires that a law enforcement officer obtain a judicial warrant before entering a home without permission. *Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430. But an officer may make a warrantless entry when "the exigencies of the situation," considered in a case-specific way, create "a compelling need for official action and no time to secure a warrant." *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865; *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696. The Court has found that such exigencies may exist when an officer must act

to prevent imminent injury, the destruction of evidence, or a suspect's escape.

The *amicus* contends that a suspect's flight always supplies the exigency needed to justify a warrantless home entry and that the Court endorsed such a categorical approach in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300. The Court disagrees. In upholding a warrantless entry made during a "hot pursuit" of a felony suspect, the Court stated that Santana's "act of retreating into her house" could "not defeat an arrest" that had "been set in motion in a public place." *Id.*, at 42–43, 96 S.Ct. 2406. Even assuming that *Santana* treated fleeing-felon cases categorically, that statement still does not establish a flat rule permitting warrantless home entry whenever a police officer pursues a fleeing misdemeanant. *Santana* did not resolve the issue of misdemeanor pursuit; as the Court noted in a later case, "the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established" one way or the other. *Stanton v. Sims*, 571 U.S. 3, 8, 10, 134 S.Ct. 3, 187 L.Ed.2d 341.

**2 Misdemeanors run the gamut of seriousness, and they may be minor. States tend to apply the misdemeanor label to less violent and less dangerous crimes. The Court has held that when a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. See *Welsh v. Wisconsin*, 466 U.S. 740, 742–743, 104 S.Ct. 2091, 80 L.Ed.2d 732. Add a suspect's flight and the calculus changes—but not enough to justify a categorical rule. In many cases, flight creates a need for police to act swiftly. But no evidence suggests that every case of misdemeanor flight creates such a need.

The Court's Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. When the totality of circumstances shows an emergency—a need to act before it is possible to get a warrant—the police may act without waiting. Those circumstances include the flight itself. But pursuit of a misdemeanant does not trigger a categorical rule allowing a warrantless home entry. Pp. 2016 – 2022.

(b) The common law in place at the Constitution's founding similarly does not support a categorical rule allowing warrantless home entry whenever a misdemeanant flees. Like the Court's modern precedents, the common law afforded the home strong protection from government intrusion and it generally required a warrant before a government official could enter the home. There was an oft-discussed exception: An officer, according to the common-law treatises, could enter a house to pursue a felon. But in the misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home. The commentators generally agreed that the authority turned on the circumstances; none suggested a rule authorizing warrantless entry in every misdemeanor-pursuit case. In short, the common law did not have—and does not support—a categorical rule allowing warrantless home entry when a suspected misdemeanant flees. Pp. 2022 – 2025.

Vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined, and in which THOMAS, J., joined as to all but Part II–A. KAVANAUGH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which KAVANAUGH, J., joined as to Part II. ROBERTS, C. J., filed an opinion concurring in the judgment, in which ALITO, J., joined.

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Opinion

Justice KAGAN delivered the opinion of the Court.

***2016** The Fourth Amendment ordinarily requires that police officers get a warrant before entering a home without permission. But an officer may make a warrantless entry when "the exigencies of the situation" create a compelling law enforcement need. *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). The question presented here is whether the pursuit of a fleeing misdemeanor suspect always—or more legally put, categorically—qualifies as an exigent circumstance. We hold it does not. A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case.

I

This case began when petitioner Arthur Lange drove past a California highway patrol officer in Sonoma. Lange, it is fair to say, was asking for attention: He was listening to loud music with his windows down and repeatedly honking his horn. The officer began to tail Lange, and soon afterward turned on his overhead lights to signal that Lange should pull over. By that time, though, Lange was only about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange in and began questioning him. Observing signs of intoxication, the officer put Lange through field sobriety tests. Lange did not do well, and a later blood test showed that his blood-alcohol content was more than three times the legal limit.

****3** The State charged Lange with the misdemeanor of driving under the influence of alcohol, plus a (lower-level) noise infraction. Lange moved to suppress all evidence obtained after the officer entered his garage, arguing that the warrantless entry had violated the Fourth Amendment. The State contested the motion. It contended that the officer had probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. See, *e.g.*, Cal. Veh. Code Ann. § 2800(a) (West 2015) (making it a misdemeanor to "willfully fail or refuse to comply with a lawful order, signal, or direction of a peace officer"). And it argued that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry. The Superior Court denied Lange's motion, and its appellate division affirmed.

The California Court of Appeal also affirmed, accepting the State's argument in full. 2019 WL 5654385, *1 (2019). In the court's view, Lange's "fail[ure] to immediately pull over" when the officer flashed his lights created probable cause to arrest him for a misdemeanor. *Id.*, at *7. And a misdemeanor suspect, the court stated, could "not defeat an arrest which has been set in motion in a public place" by "retreat[ing] into" a house or other "private place." See *id.*, at *6–*8 (internal quotation marks omitted). Rather, an "officer's 'hot pursuit' into the house to prevent the suspect from frustrating the arrest" is always permissible under the exigent-circumstances "exception to the warrant requirement." *Id.*, at *8 (some internal quotation marks omitted). That flat rule resolved the matter: "Because the officer was in hot pursuit" of a misdemeanor suspect, "the officer's warrantless entry into [the suspect's] driveway and garage [was] lawful." ***2017** *Id.*, at *9. The California Supreme Court denied review.

Courts are divided over whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor suspect. Some courts have adopted such a categorical rule, while others have required a case-specific showing of exigency.[1] We granted certiorari, 592 U. S. ——, 141 S.Ct. 617, 208 L.Ed.2d 227 (2020), to resolve the conflict. Because California abandoned its defense of the categorical rule applied below in its response to Lange's petition, we appointed Amanda Rice as *amicus curiae* to defend the Court of Appeal's judgment. She has ably discharged her responsibilities.

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As that text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). That standard "generally requires the obtaining of a judicial warrant" before a law enforcement officer can enter a home without permission. *Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (internal quotation marks omitted). But not always: The "warrant requirement is subject to certain exceptions." *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943.

****4** One important exception is for exigent circumstances. It applies when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *King*, 563 U.S., at 460, 131 S.Ct. 1849 (internal quotation marks omitted). The exception enables law enforcement officers to handle "emergenc[ies]"—situations presenting a "compelling need for official action and no time to secure a warrant." *Riley*, 573 U.S., at 402, 134 S.Ct. 2473; *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). Over the years, this Court has identified several such exigencies. An officer, for example, may "enter a home without a warrant to render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury," or to ensure his own safety. *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943; *Riley*, 573 U.S., at 388, 134 S.Ct. 2473. So too, the police may make a warrantless entry to "prevent the imminent destruction of evidence" or to "prevent a suspect's escape." *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943; *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (internal quotation marks omitted). In those circumstances, the delay required to obtain a warrant would bring about "some real immediate and serious consequences"—and so the absence of a warrant is excused. ***2018** *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (quoting *McDonald v. United States*, 335 U.S. 451, 460, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (Jackson, J., concurring)).

Our cases have generally applied the exigent-circumstances exception on a "case-by-case basis." *Birchfield* v. *North Dakota*, 579 U. S. 438, ——, 136 S.Ct. 2160, 2174, 195 L.Ed.2d 560 (2016). The exception "requires a court to examine whether an emergency justified a warrantless search in each particular case." *Riley*, 573 U.S., at 402, 134 S.Ct. 2473. Or put more curtly, the exception is "case-specific." *Id.*, at 388, 134 S.Ct. 2473. That approach reflects the nature of emergencies. Whether a "now or never situation" actually exists—whether an officer has "no time to secure a warrant"—depends upon facts on the ground. *Id.*, at 391, 134 S.Ct. 2473 (internal quotation marks omitted); *McNeely*, 569 U.S., at 149, 133 S.Ct. 1552 (internal quotation marks omitted). So the issue, we have thought, is most naturally considered by "look[ing] to the totality of circumstances" confronting the officer as he decides to make a warrantless entry. *Id.*, at 149, 133 S.Ct. 1552.

The question here is whether to use that approach, or instead apply a categorical warrant exception, when a suspected misdemeanant flees from police into his home. Under the usual case-specific view, an officer can follow the misdemeanant when, but only when, an exigency—for example, the need to prevent destruction of evidence—allows insufficient time to get a warrant. The appointed *amicus* asks us to replace that case-by-case assessment with a flat (and sweeping) rule finding exigency in every case of misdemeanor pursuit. In her view, those "entries are categorically reasonable, regardless of whether" any risk of harm (like, again, destruction of evidence) "materializes in a particular case." Brief for Court-Appointed *Amicus Curiae* 31. The fact of flight from the officer, she says, is itself enough to justify a warrantless entry. (The principal concurrence agrees.) To assess that position, we look (as we often do in Fourth Amendment cases) both to this Court's precedents and to the common-law practices familiar to the Framers.

A

The place to start is with our often-stated view of the constitutional interest at stake: the sanctity of a person's living space. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). At the Amendment's "very core," we have said, "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Collins* v. *Virginia*, 584 U. S. ——, ——, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) (internal quotation marks omitted). Or again: "Freedom" in one's own "dwelling is the archetype of the privacy protection secured by the Fourth Amendment"; conversely, "physical entry of the home is the chief evil against which [it] is directed." *Payton v. New York*, 445 U.S. 573, 585, 587, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (internal quotation marks omitted). The Amendment thus "draw[s] a firm line at the entrance to the house." *Id.*, at 590, 100 S.Ct. 1371. What lies behind that line is of course not inviolable. An officer may always enter a home with a proper warrant. And as just described, exigent circumstances allow even warrantless intrusions. See *ibid.*; *supra*, at 2017 - 2018. But the contours of that or any other warrant exception permitting home entry are "jealously and carefully drawn," in keeping with the "centuries-old principle" that the "home is entitled to special protection." ***2019** *Georgia v. Randolph*, 547 U.S. 103, 109, 115, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (internal quotation marks omitted); see *Caniglia* v. *Strom*, 593 U. S. ——, ——, 141 S.Ct. 1596, 1600, —— L.Ed.2d —— (2021) ("[T]his Court has repeatedly declined to expand the scope" of "exceptions to

the warrant requirement to permit warrantless entry into the home"). So we are not eager—more the reverse—to print a new permission slip for entering the home without a warrant.

****5** The *amicus* argues, though, that we have already created the rule she advocates. In *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), the main case she relies on, police officers drove to Dominga Santana's house with probable cause to think that Santana was dealing drugs, a felony under the applicable law. When the officers pulled up, they saw Santana standing in her home's open doorway, some 15 feet away. As they got out of the van and yelled "police," Santana "retreated into [the house's] vestibule." *Id.*, at 40, 96 S.Ct. 2406. The officers followed her in, and discovered heroin. We upheld the warrantless entry as one involving a police "hot pursuit," even though the chase "ended almost as soon as it began." *Id.*, at 43, 96 S.Ct. 2406. Citing "a realistic expectation that any delay would result in destruction of evidence," we recognized the officers' "need to act quickly." *Id.*, at 42–43, 96 S.Ct. 2406. But we framed our holding in broader terms: Santana's "act of retreating into her house," we stated, could "not defeat an arrest" that had "been set in motion in a public place." *Ibid.* The *amicus* takes that statement to support a flat rule permitting warrantless home entry when police officers (with probable cause) are pursuing any suspect—whether a felon or a misdemeanant. See Brief for *Amicus Curiae* 11, 26. For support, she points to a number of later decisions describing *Santana* in dicta as allowing warrantless home entries when police are "in 'hot pursuit' of a fugitive" or "a fleeing suspect." *E.g.*, *Steagald v. United States*, 451 U.S. 204, 221, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *King*, 563 U.S., at 460, 131 S.Ct. 1849. The concurrence echoes her arguments.

We disagree with that broad understanding of *Santana*, as we have suggested before. In rejecting the *amicus*'s view, we see no need to consider Lange's counterargument that *Santana* did not establish *any* categorical rule—even one for fleeing felons. See Brief for Petitioner 7, 25 (contending that *Santana* is "entirely consistent" with "case-by-case exigency analysis" because the Court "carefully based [its] holding on [the] specific facts" and "circumstances"). Assuming *Santana* treated fleeing-felon cases categorically (that is, as *always* presenting exigent circumstances allowing warrantless entry), see, *e.g.*, *Stanton v. Sims*, 571 U.S. 3, 8, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*); *McNeely*, 569 U.S., at 149, 133 S.Ct. 1552; *King*, 563 U.S. at 460, 131 S.Ct. 1849, it still said nothing about fleeing misdemeanants. We said as much in *Stanton*, when we approved qualified immunity for an officer who had pursued a suspected misdemeanant into a home. Describing the same split of authority we took this case to address, we stated that "the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established" (so that the officer could not be held liable for damages). 571 U.S., at 6, 10, 134 S.Ct. 3. In other words, we found that neither *Santana* nor any other decision had resolved the matter one way or the other. And we left things in that unsettled state. See 571 U.S., at 10, 134 S.Ct. 3. *Santana*, we noted, addressed a police pursuit "involv[ing] a felony suspect," 571 U.S., at 9, 134 S.Ct. 3; whether the same approach governed a ***2020** misdemeanor chase was an issue for a future case.

Key to resolving that issue are two facts about misdemeanors: They vary widely, but they may be (in a word) "minor." *Welsh*, 466 U.S., at 750, 104 S.Ct. 2091. In California and elsewhere, misdemeanors run the gamut of seriousness. As the *amicus* notes, some involve violence. California, for example, classifies as misdemeanors various forms of assault. See Cal. Penal Code Ann. § 241 (West Cum. Supp. 2021); Brief for *Amicus Curiae* 15a–16a. And across the country, "many perpetrators of domestic violence are charged with misdemeanors," despite "the harmfulness of their conduct." *Voisine* v. *United States*, 579 U. S. 686, ——, 136 S.Ct. 2272, 2276, 195 L.Ed.2d 736 (2016). So "a 'felon' is" not always "more dangerous than a misdemeanant." *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). But calling an offense a misdemeanor usually limits prison time to one year. See 1 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 1.8(c) (4th ed. Supp. 2020). States thus tend to apply that label to less violent and less dangerous crimes. In California, it is a misdemeanor to litter on a public beach. See Cal. Penal Code Ann. § 374.7(a) (2020). And to "negligently cut" a plant "growing upon public land." § 384a(a)(2), (f). And to "willfully disturb[ ] another person by loud and unreasonable noise." § 415(2). And (last one) to "artificially color[ ] any live chicks [or] rabbits." § 599(b). In forbidding such conduct, California is no outlier. Most States count as misdemeanors such offenses as traffic violations, public intoxication, and disorderly conduct. See, *e.g.*, Tex. Transp. Code Ann. § 545.413(a), (d) (West 2011) (driving without a seatbelt); Ill. Comp. Stat., ch. 610, § 90/1 (West 2018) (drinking alcohol in a railroad car); Ark. Code Ann. § 5–71–207(a)(3), (b) (2016) (using obscene language likely to promote disorder). So the *amicus*'s (and concurrence's) rule would cover lawbreakers of every type, including quite a few hard to think alarming.

**6 This Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. In *Welsh*, officers responded to a call about a drunk driver only to discover he had abandoned his vehicle and walked home. See 466 U.S., at 742–743, 104 S.Ct. 2091. So no police pursuit was necessary, hot or otherwise. The officers just went to the driver's house, entered without a warrant, and arrested him for a "nonjailable" offense. *Ibid.* The State contended that exigent circumstances supported the entry because the driver's "blood-alcohol level might have dissipated while the police obtained a warrant." *Id.*, at 754, 104 S.Ct. 2091. We rejected that argument on the ground that the driver had been charged with only a minor offense. "[T]he gravity of the underlying offense," we reasoned, is "an important factor to be considered when determining whether any exigency exists." *Id.*, at 753, 104 S.Ct. 2091. "[W]hen only a minor offense has been committed" (again, without any flight), there is reason to question whether a compelling law enforcement need is present; so it is "particularly appropriate" to "hesitat[e] in finding exigent circumstances." *Id.*, at 750, 104 S.Ct. 2091. And we concluded: "[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense" is involved. *Id.*, at 753, 104 S.Ct. 2091.[2]

**7 *2021 Add a suspect's flight and the calculus changes —but not enough to justify the *amicus*'s categorical rule. We have no doubt that in a great many cases flight creates a need for police to act swiftly. A suspect may flee, for example, because he is intent on discarding evidence. Or his flight may show a willingness to flee yet again, while the police await a warrant. But no evidence suggests that every case of misdemeanor flight poses such dangers. Recall that misdemeanors can target minor, non-violent conduct. See *supra*, at 2019 – 2020. *Welsh* held that when that is so, officers can probably take the time to get a warrant. And at times that will be true even when a misdemeanant has forced the police to pursue him (especially given that "pursuit" may cover just a few feet of ground, see *supra*, at 2018 - 2019). Those suspected of minor offenses may flee for innocuous reasons and in non-threatening ways. Consider from the casebooks: the man with a mental disability who, in response to officers asking him about "fidgeting with [a] mailbox," retreated in "a hurried manner" to his nearby home. *Carroll v. Ellington*, 800 F.3d 154, 162 (C.A.5 2015). Or the teenager "driving without taillights" who on seeing a police signal "did not stop but drove two blocks to his parents' house, ran inside, and hid in the bathroom." *Mascorro v. Billings*, 656 F.3d 1198, 1202 (C.A.10 2011). In such a case, waiting for a warrant is unlikely to hinder a compelling law enforcement need. See *id.*, at 1207 ("The risk of flight or escape was somewhere between low and nonexistent[,] there was no evidence which could have potentially been destroyed[,] and there were no officer or public safety concerns"). Those non-emergency situations may be atypical. But they reveal the overbreadth—fatal in this context—of the *amicus*'s (and concurrence's) rule, which would treat a dangerous offender and the scared teenager the same. In misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry.

Our Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. That approach will in many, if not most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself.[3] But the need to pursue a misdemeanant *2022 does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.

B

The common law in place at the Constitution's founding leads to the same conclusion. That law, we have many times said, may be "instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable." *E.g.*, *Steagald*, 451 U.S., at 217, 101 S.Ct. 1642. And the Framers' view provides a baseline for our own day: The Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012); see *Jardines*, 569 U.S., at 5, 133 S.Ct. 1409. Sometimes, no doubt, the common law of the time is hard to figure out: The historical record does not reveal a limpid legal rule. See, *e.g.*, *Payton*, 445 U.S., at 592–597, 100 S.Ct. 1371. Here, we find it challenging to map every particular of the common law's treatment of warrantless home entries. But the evidence is clear on the question before us: The common law

did not recognize a categorical rule enabling such an entry in every case of misdemeanor pursuit.

****8** Like our modern precedents, the common law afforded the home strong protection from government intrusion. As this Court once wrote: "The zealous and frequent repetition of the adage that a 'man's house is his castle' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." *Id.*, at 596–597, 100 S.Ct. 1371 (footnote omitted); see *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1604) ("[T]he house of every one is as to him as his castle and fortress, as well for his defen[s]e against injury and violence, as for his repose" (footnote omitted)); 3 W. Blackstone, Commentaries on the Laws of England 288 (1768) ("[E]very man's house is looked upon by the law to be his castle of defen[s]e and asylum").[4] To protect that interest, "prominent law lords, the Court of Common Pleas, the Court of King's Bench, Parliament," and leading treatise writers all "c[a]me to embrace" the "understanding" that generally "a warrant ***2023** must issue" before a government official could enter a house. Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1238–1239 (2016); see Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 642–646 (1999). That did not mean the Crown got the message; its officers often asserted power to intrude into any home they pleased—thus adding to the colonists' list of grievances. See *Steagald*, 451 U.S., at 220, 101 S.Ct. 1642. But the law on the books offered a different model: "To enter a man's house" without a proper warrant, Lord Chief Justice Pratt proclaimed in 1763, is to attack "the liberty of the subject" and "destroy the liberty of the kingdom." *Huckle* v. *Money*, 2 Wils. K. B. 206, 207, 95 Eng. Rep. 768, 769 (K. B. 1763). That was the idea behind the Fourth Amendment.

There was an oft-discussed exception: An officer, according to the day's treatises, could enter a house to pursue a felon. The felony category then was a good deal narrower than now. Many modern felonies were "classified as misdemeanors" at common law, with the felony label mostly reserved for crimes "punishable by death." *Garner*, 471 U.S., at 13–14, 105 S.Ct. 1694; see 4 W. Blackstone, Commentaries on the Laws of England 98 (1791) (Blackstone). In addressing those serious crimes, the law "allow[ed of] extremities" to meet "necessity." R. Burn, The Justice of the Peace, and Parish Officer 86 (6th ed. 1758). So if a person suspected "upon probable grounds" of a felony "fly and take house," Sir Matthew Hale opined, then "the constable may break open the door, tho he have no warrant." 2 Pleas of the Crown 91–92 (1736) (Hale). Sergeant William Hawkins set out a more restrictive rule in his widely read treatise. He wrote that a constable, "with or without a warrant," could "break open doors" if "pursu[ing]" a person "known to have committed" a felony—but not if the person was only "under a probable suspicion." 2 Pleas of the Crown 138–139 (1787) (Hawkins). On the other hand, Sir William Blackstone went broader than Hale. A constable, he thought, could "break open doors"—no less than "upon a justice's warrant"—if he had "probable suspicion [to] arrest [a] felon," even absent flight or pursuit. Blackstone 292. The commentators thus differed on the scope of the felony exception to the warrant requirement. But they agreed on one thing: It was indeed a *felony* exception. All their rules applied to felonies as a class, and to no other whole class of crimes.

In the misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home.[5] Once again, some of the specifics are uncertain, and commentators did not always agree with each other. But none suggested any kind of all-misdemeanor-flight rule. Instead, their approval of entry turned on the circumstances. One set of cases involved what might be called pre-felonies. Blackstone explained that "break[ing] open doors" was allowable not only "in case of [a] felony" but also in case of "a dangerous wounding whereby [a] felony is likely to ensue." *Ibid.* In other words, the felony rule extended to crimes that would become felonies if the victims died. See Hale 94.[6] ***2024** Another set of cases involved crimes, mostly violent themselves, liable to provoke felonious acts. Often called "affrays" or "breaches of the peace," a typical example was "the fighting of two or more persons" to "the terror of his majesty's subjects." Blackstone 145, 150.[7] Because that conduct created a "danger of felony"—because when it occurred, "there is likely to be manslaughter or bloodshed committed"—"the constable may break open the doors to keep the peace." Hale 90, 95 (emphasis deleted); see Hawkins 139 (blessing a warrantless entry "where those who have made an affray in [the constable's] presence fly to a house and are immediately pursued"). Hale also approved a warrantless entry to stop a more mundane form of harm: He (though not other commentators) thought a constable could act to "suppress the disorder" associated with "drinking or noise in a house at an unseasonable time of night." Hale 95. But differences aside, all the commentators focused on the facts of cases: When a suspected misdemeanant, fleeing or otherwise, threatened no harm, the constable had to get a warrant.

**9 The common law thus does not support a categorical rule allowing warrantless home entry when a misdemeanant flees. It had a rule of that kind for felonies. But much as in *Welsh* centuries later, the common law made distinctions based on "the gravity of the underlying offense." 466 U.S., at 753, 104 S.Ct. 2091. When it came to misdemeanors, flight alone was not enough. Whether a constable could make a warrantless entry depended as well on other circumstances suggesting a potential for harm and a need to act promptly.[8] In that way, the common-law rules (even if sometimes hard to discern with precision) mostly mirror our modern caselaw. The former too demanded—and often found—a law enforcement exigency before an officer could "break open" a fleeing misdemeanant's doors. Blackstone 292.

III

The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.

Because the California Court of Appeal applied the categorical rule we reject today, *2025 we vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KAVANAUGH, concurring.

The Court holds that an officer may make a warrantless entry into a home when pursuing a fleeing misdemeanant if an exigent circumstance is also present—for example, when there is a risk of escape, destruction of evidence, or harm to others. I join the Court's opinion. I also join Part II of Justice THOMAS's concurrence regarding how the exclusionary rule should apply to hot pursuit cases.

I add this brief concurrence simply to underscore that, in my view, there is almost no daylight in practice between the Court's opinion and THE CHIEF JUSTICE's opinion concurring in the judgment.

In his thoughtful opinion, THE CHIEF JUSTICE concludes that pursuit of a fleeing misdemeanant should *itself* constitute an exigent circumstance. The Court disagrees. As I see it, however, the difference between THE CHIEF JUSTICE's approach and the Court's approach will be academic in most cases. That is because cases of fleeing misdemeanants will almost always *also* involve a recognized exigent circumstance —such as a risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home. See *ante,* at 2016, 2017 - 2018, 2024 - 2025; see also, *e.g.*, *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 612, 135 S.Ct. 1765, 191 L.Ed.2d 856 (2015); *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). As Lange's able counsel forthrightly acknowledged at oral argument, the approach adopted by the Court today will still allow the police to make a warrantless entry into a home "nine times out of 10 or more" in cases involving pursuit of a fleeing misdemeanant. Tr. of Oral Arg. 34.

Importantly, moreover, the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing *felon* is itself an exigent circumstance justifying warrantless entry into a home. See *United States v. Santana*, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); cf. *Stanton v. Sims*, 571 U.S. 3, 8, 9, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*). In other words, the police may make a warrantless entry into the home of a fleeing felon regardless of whether other exigent circumstances are present.

**10 With those observations, I join the Court's opinion.

Justice THOMAS, with whom Justice KAVANAUGH joins as to Part II, concurring in part and concurring in the judgment.

I join the majority opinion, except for Part II–A, which correctly rejects the argument that suspicion that a person committed *any* crime justifies warrantless entry into a home in hot pursuit of that person. I write separately to note two things: the general case-by-case rule that the Court announces today is subject to historical, categorical exceptions; and under our precedent, the federal exclusionary rule does not apply to evidence discovered in the course of pursuing a fleeing suspect.

I

The majority sets out a general rule requiring a case-by-case inquiry when an officer enters a home without a warrant in pursuit of a person suspected of committing a misdemeanor. But history suggests ***2026** several categorical exceptions to this rule. First, warrantless entry is categorically allowed when a person is arrested and escapes. *E.g.,* J. Parker, Conductor Generalis 28–29 (1788) (constables may break into houses without a warrant "[w]herever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house"); *ante,* at 2023, n. 5. This exception is potentially very broad. See *Torres* v. *Madrid*, 592 U. S. ——, ——, 141 S.Ct. 989, 993, 209 L.Ed.2d 190 (2021) (holding that an arrest occurs whenever an officer applies physical force to the body with intent to restrain); *Genner* v. *Sparks*, 6 Mod. 173, 174, 87 Eng. Rep. 928, 929 (Q. B. 1704). Second, authorities at common law categorically allowed warrantless entry when in hot pursuit of a person who committed an affray. *Ante,* at 2024. Third, those authorities allowed the same for what the majority calls certain "pre-felonies." *Ante,* at 2023. Finally, some authorities appear to have allowed warrantless entry when in pursuit of a person who had breached the peace. See, *e.g.,* 2 M. Hale, Pleas of the Crown 95 (1736) (Hale); (Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 802–803 (1924)). What crimes amounted to "breach of peace" for purposes of warrantless entry is not immediately clear. The term sometimes was used to refer to violence, but the majority recognizes historical support for a broader definition. *Ante,* at 2024 (citing Hale 95). And cases decided before and after the Fourteenth Amendment was ratified similarly used the term "breach of peace" in a broad sense. *E.g., State v. Lafferty*, 5 Del. 491 (1854) ("blow[ing] a trumpet at night through the streets"); *Hawkins v. Lutton*, 95 Wis. 492, 494, 70 N.W. 483 (1897) ("loud, profane, and indecent" language).

I join the relevant parts of the majority on the understanding that its general case-by-case rule does not foreclose historical, categorical exceptions. Although the majority unnecessarily leads with doctrine before history, it does not disturb our regular rule that history—not court-created standards of reasonableness—dictates the outcome whenever it provides an answer. See, *e.g., Wilson v. Arkansas*, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *Virginia v. Moore*, 553 U.S. 164, 171, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008).

****11** I also join on the understanding that the majority has not sought to settle the contours of any of these historical exceptions.

II

I also write to point out that even if the state courts on remand conclude that the officer's entry here was unlawful, the federal exclusionary rule does not require suppressing any evidence.

"[O]fficers who violated the Fourth Amendment were traditionally considered trespassers." *Utah* v. *Strieff*, 579 U. S. 232, 237, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016). For that reason, "individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help." *Ibid.* But beginning in the 20th century, this Court created a new remedy: exclusion of evidence in criminal trials. *Ibid.*

Establishing a violation of the Fourth Amendment, though, does not automatically entitle a criminal defendant to exclusion of evidence. Far from it. "[T]he exclusionary rule is not an individual right." *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). It is a " 'prudential' doctrine created by this Court," *Davis v. United States*, 564 U.S. 229, 236, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (citation omitted), and there is always a "high obstacle for those urging application of the rule," ***2027** *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364–365, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). Relevant here, the rule "does not apply when the costs of exclusion outweigh its deterrent benefits." *Strieff*, 579 U. S., at 235, 136 S.Ct. 2056.

On the benefits side, "we have said time and again that the *sole*" factor courts can consider is "deter[ring] misconduct by law enforcement." *Davis*, 564 U.S., at 246, 131 S.Ct. 2419. And not just any misconduct. The exclusionary rule developed to deter "*intentional* conduct that was *patently* unconstitutional." *Herring*, 555 U.S., at 143, 129 S.Ct. 695 (emphasis added). For the past several decades, we have thus declined to exclude evidence where exclusion would not substantially deter "intentional" and "flagrant" behavior. *Id.,* at 144, 129 S.Ct. 695. For example, the exclusionary rule does not apply where "some intervening circumstance" arises between unconstitutional conduct and discovery of evidence, *Strieff*, 579 U. S., at 238, 136 S.Ct. 2056; where evidence would inevitably have been discovered, *ibid.*; or

where officers have acted in good faith, *United States v. Leon*, 468 U.S. 897, 908, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

On the other side of the ledger, we consider all "costs." *E.g., Davis*, 564 U.S., at 237, 131 S.Ct. 2419. One cost is especially salient: excluding evidence under the Fourth Amendment always obstructs the " 'truth-finding functions of judge and jury.' " *Leon*, 468 U.S., at 907, 104 S.Ct. 3405; accord, *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (recognizing "the public interest in having juries receive all probative evidence"). This interference with the purpose of the judicial system also creates a downstream risk that "some guilty defendants may go free or receive reduced sentences." *Leon*, 468 U.S., at 907, 104 S.Ct. 3405.

By itself, this high cost makes exclusion under our precedent rarely appropriate. "Suppression of evidence ... has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). When additional costs are present, the balance tips decisively against exclusion.

****12** Cases of fleeing suspects involve more than enough added costs to render the exclusionary rule inapplicable. First, our precedents make clear that the exclusionary rule does not apply when it would encourage bad conduct by criminal defendants. For example, evidence obtained during an unlawful search is still admissible to impeach a witness because exclusion would create " 'a license to use perjury.' " *United States v. Havens*, 446 U.S. 620, 626, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980). Here, exclusion is inappropriate because it would encourage suspects to flee. Second, our precedents similarly make clear that criminal defendants cannot use the exclusionary rule as "a shield against" their own bad conduct. *Walder v. United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 98 L.Ed. 503 (1954). In most—if not all—States, fleeing from police after a lawful order to stop is a crime. All the evidence that petitioner seeks to exclude is evidence that inevitably would have been discovered had he complied with the officer's order to stop. A criminal defendant should "not ... be put in a better position than [he] would have been in if no illegality had transpired." *Nix*, 467 U.S., at 443–444, 104 S.Ct. 2501.

Aware of the substantial costs created by the exclusionary rule, courts have sometimes narrowed the protections historically afforded by the Fourth Amendment to avoid having to exclude evidence. See *Collins* v. *Virginia*, 584 U. S. ——, ——, 138 S.Ct. 1663, 1668, 201 L.Ed.2d 9 (2018) (THOMAS, J., concurring); A. Amar, The Constitution and Criminal Procedure: ***2028** First Principles 30 (1997) ("Judges do not like excluding bloody knives, so they distort doctrine"). But it should be the judicially created remedy, not the Fourth Amendment, that contracts in the face of that pressure. Courts should follow the plain dictates of our precedent: Officers cannot chase a fleeing person into a home simply because that person is suspected of having committed any misdemeanor, but if the officer nonetheless does so, exclusion under the Fourth Amendment is improper. Criminal defendants must rely on other remedies.

CHIEF JUSTICE ROBERTS, with whom Justice ALITO joins, concurring in the judgment.

Suppose a police officer on patrol responds to a report of a man assaulting a teenager. Arriving at the scene, the officer sees the teenager vainly trying to ward off the assailant. The officer attempts to place the assailant under arrest, but he takes off on foot. He leads the officer on a chase over several blocks as the officer yells for him to stop. With the officer closing in, the suspect leaps over a fence and then stands on a home's front yard. He claims it's his home and tells the officer to stay away. What is the officer to do?

The Fourth Amendment and our precedent—not to mention common sense—provide a clear answer: The officer can enter the property to complete the arrest he lawfully initiated outside it. But the Court today has a different take. Holding that flight, on its own, can never justify a warrantless entry into a home (including its curtilage), the Court requires that the officer: (1) stop and consider whether the suspect —if apprehended—would be charged with a misdemeanor or a felony, and (2) tally up other "exigencies" that *might* be present or arise, *ante*, at 2025 - 2026, 2027, before (3) deciding whether he can complete the arrest or must instead seek a warrant—one that, in all likelihood, will not arrive for hours. Meanwhile, the suspect may stroll into the home and then dash out the back door. Or, for all the officer knows, get a gun and take aim from inside.

The Constitution does not demand this absurd and dangerous result. We should not impose it. As our precedent makes clear, hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. It is itself an exigent circumstance. And we have never held that whether an officer may enter a home to complete an arrest turns on what the fleeing individual was suspected of doing before he took off, let alone whether that offense would later be charged as a misdemeanor or felony. It is the flight, not the

underlying offense, that has always been understood to justify the general rule: "Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect." *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). The Court errs by departing from that well-established rule.

I

A

**13 The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." While the Amendment does not specify when a warrant must be obtained, we have typically required that officers secure one before entering a home to execute a search or seizure. *King*, 563 U.S., at 459, 131 S.Ct. 1849. We have also, however, recognized exceptions to that requirement "because the ultimate touchstone of the Fourth *2029 Amendment is 'reasonableness.' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).

In some instances the Court has determined that this question of reasonableness can be decided by application of a rule for a particular type of case. *Mitchell* v. *Wisconsin*, 588 U. S. ——, ——, n. 2, 139 S.Ct. 2525, 2534, n. 2, 204 L.Ed.2d 1040 (2019) (plurality opinion); see *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) ("[T]his Court has interpreted the Amendment as establishing rules and presumptions."). This approach reflects our recognition of the need "to provide clear guidance to law enforcement." *Riley v. California*, 573 U.S. 373, 398, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). We strive to "draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. Lago Vista*, 532 U.S. 318, 347, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

We have, for example, established general rules giving effect to the "well-recognized exception [that] applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *King*, 563 U.S., at 460, 131 S.Ct. 1849 (some alterations in original; internal quotation marks omitted). In fact, "our exigency case law is full of general rules" that provide "guidance on how police should handle [such] cases." *Mitchell*, 588 U. S., at ——, n. 3, 139 S.Ct., at 2535, n. 3) (internal quotation marks omitted). These rules allow warrantless entry into the home when necessary to "protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Carpenter* v. *United States*, 585 U. S. ——, —— – ——, 138 S.Ct. 2206, 2223, 201 L.Ed.2d 507 (2018). Or—relevant here—"to pursue a fleeing suspect." *Id.*, at ——, 138 S.Ct. 2206 (slip op., at 21).

We take a case-by-case approach in deciding whether a search or seizure was conducted in reaction to an exigent circumstance, such as whether an officer had an objective basis to "fear the imminent destruction of evidence." *Birchfield* v. *North Dakota*, 579 U. S. 438, ——, 136 S.Ct. 2160, 2173, 195 L.Ed.2d 560 (2016). But once faced with an exigency, our rule is clear: officers are "not bound to learn anything more or wait any longer before going in." *United States v. Banks*, 540 U.S. 31, 40, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003).

Today, the Court holds that hot pursuit merely sets the table for other exigencies that may emerge to justify warrantless entry, such as imminent harm. This comes as a surprise. For decades we have consistently recognized pursuit of a fleeing suspect as an exigency, one that on its own justifies warrantless entry into a home.

Almost a half century ago in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), we considered whether hot pursuit supports warrantless home entry. We held that such entry was justified when Santana "retreat[ed] into her house" after a drug transaction upon hearing law enforcement "shout[ ] 'police' " and seeing them "display[ ] their identification." *Id.*, at 40, 42, 96 S.Ct. 2406. As we explained, "a suspect may not defeat an arrest which has been set in motion in a public place ... by the expedient of escaping to a private place." *Id.*, at 43, 96 S.Ct. 2406. Our interpretation of the Fourth Amendment did not hinge on whether the offense that precipitated her withdrawal was a felony or a misdemeanor. See *Stanton v. Sims*, 571 U.S. 3, 9, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*).

**14 We have repeatedly and consistently reaffirmed that hot pursuit is itself an exigent *2030 circumstance. See, *e.g.*, *Carpenter*, 585 U. S., at —— (slip op., at 21) ("[E]xigencies include the need to pursue a fleeing suspect."); *Collins* v. *Virginia*, 584 U. S. ——, ——, 138 S.Ct. 1663, 1674, 201 L.Ed.2d 9 (2018) (distinguishing prior case approving

warrantless entry onto the curtilage as best sounding in "hot pursuit"); *Birchfield*, 579 U. S., at ——, 136 S.Ct., at 2173 (exception for exigent circumstances authorizes "the warrantless entry of private property ... when police are in hot pursuit of a fleeing suspect"); *King*, 563 U.S., at 460, 131 S.Ct. 1849 ("Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect."); *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943 ("We have held, for example, that law enforcement officers may make a warrantless entry onto private property ... to engage in 'hot pursuit' of a fleeing suspect." (citations omitted)); *Steagald v. United States*, 451 U.S. 204, 221, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) ("[W]arrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive."); see also *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2547 (SOTOMAYOR, J., dissenting) (" 'hot pursuit' of a fleeing suspect" qualifies as an exigency); *Missouri v. McNeely*, 569 U.S. 141, 176–177, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (THOMAS, J., dissenting) (same).

These cases, it bears repeating, have not viewed hot pursuit as merely the background against which *other* exigencies justifying warrantless entry might arise. See, *e.g.*, *Carpenter*, 585 U. S., at —— – —— (slip op., at 21–22) (identifying destruction of evidence, emergency aid, *and* hot pursuit as separate exigencies); *Birchfield*, 579 U. S., at ——, 136 S.Ct., at 2173-2174 (same); *McNeely*, 569 U.S., at 148–149, 133 S.Ct. 1552 (opinion of the Court) (same); *King*, 563 U.S., at 460, 131 S.Ct. 1849 (same); *Brigham City*, 547 U.S., at 403, 126 S.Ct. 1943 (same); see also *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2536 (SOTOMAYOR, J., dissenting) (same). And our decisions do not dismiss the existence of an exigency —including hot pursuit—based on the underlying offense that precipitated law enforcement action, even if known. To the contrary, until today, we have explicitly rejected invitations to do so. See *Brigham City*, 547 U.S., at 405, 126 S.Ct. 1943 (dismissing defendants' contention that offenses at issue were "not serious enough" to justify reliance on the emergency aid doctrine); *Michigan v. Fisher*, 558 U.S. 45, 47, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (*per curiam*); see also *Atwater*, 532 U.S., at 354, 121 S.Ct. 1536 (rejecting exception for "very minor criminal offense[s]" to rule allowing warrantless arrests).

The Court displays little patience for this precedent. With regard to *Santana*, the Court concedes that "we framed our holding in broad[ ] terms." *Ante*, at 2019. Yet it narrows those terms based on rationales that played no role in the decision. The Court then brushes off our slew of cases reaffirming *Santana*'s broad holding as nothing more than "dicta." *Ante*, at 2019. I would not override decades of guidance to law enforcement in favor of a new rule that provides no guidance at all.

B

A proper consideration of the interests at stake confirms the position our precedent amply supports. Pursuit implicates substantial government interests, regardless of the offense precipitating the flight. It is the flight, not the underlying offense, that justifies the entry.

At the start, every hot pursuit implicates the government interest in ensuring compliance with law enforcement. *California v. Hodari D.*, 499 U.S. 621, 627, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Flight is a ***2031** direct attempt to evade arrest and thereby frustrate our "society's interest in having its laws obeyed." *Terry v. Ohio*, 392 U.S. 1, 26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Disregarding an order to yield to law enforcement authority cannot be dismissed with a shrug of the shoulders simply because the underlying offense is regarded as "innocuous," *ante*, at 2021. As the many state courts to approve of warrantless entry in hot pursuit have reminded us, "[l]aw enforcement is not a child's game of prisoners base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot." *Commonwealth v. Jewett*, 471 Mass. 624, 634, 31 N.E.3d 1079, 1089 (2015) (quoting *State v. Ricci*, 144 N.H. 241, 245, 739 A.2d 404, 408 (1999)).

****15** Flight also always involves the "paramount" government interest in public safety. *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); see *Hodari D.*, 499 U.S., at 627, 111 S.Ct. 1547 ("Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."). A fleeing suspect "intentionally place[s] himself and the public in danger." *Scott*, 550 U.S., at 384, 127 S.Ct. 1769. Vehicular pursuits, in particular, are often catastrophic. See Dept. of Justice, Bureau of Justice Statistics, B. Reaves, Police Vehicle Pursuits, 2012–2013, p. 6 (May 2017) (average of about one death per day in the United States from vehicle pursuits from 1996 to 2015). Affording suspects the opportunity to evade arrest by winning the race rewards flight and encourages dangerous behavior.

And the problems do not end there because hot pursuit often gives rise to multiple other exigencies, such as destruction of evidence, violence, and escape. The Court acknowledges this reality, but then posits that not "*every* case of misdemeanor flight poses such dangers." *Ante*, at 2021 (emphasis added). Of course not. But we have never required such a level of certainty before crafting a general rule that law enforcement can follow. For example, in *Washington v. Chrisman*, 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982), we held that an officer may accompany an arrestee into his residence without any showing of exigency and regardless of the "nature of the offense for which the arrest was made," because there "is no way for an officer to predict reliably how a particular subject will react to arrest" and "the possibility that an arrested person will attempt to escape if not properly supervised is obvious." *Id*., at 6–7, 102 S.Ct. 812. In *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), we concluded that, although "no special danger to the police" was suggested by the evidence in the record, the execution of a search warrant merited a categorical rule allowing detention of present individuals because it was the "kind of transaction" that could give rise to other exigencies. *Id*., at 702, 101 S.Ct. 2587. And in *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), we held that the search incident to arrest exception applies to all arrests regardless "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found," because arrests require "quick *ad hoc* judgment[s]." *Id*., at 235, 94 S.Ct. 467.

Such concerns are magnified here. The act of pursuing a fleeing suspect makes simultaneously assessing which other exigencies might arise especially difficult to ascertain "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S., at 347, 121 S.Ct. 1536. The Court disputes this proposition, *ante,* at 2021 - 2022, n. 3, but the difficulty of discerning hidden weapons or drugs on a suspect running or driving away seems clear to us.

***2032** The risks to officer safety posed by the Court's suggestion that an officer simply abandon pursuit and await a warrant are severe. We are warned in this case that "attempting warrant service for an unknown suspect in an unknown home at night is flat dangerous." Brief for Sonoma County District Attorney's Office et al. as *Amici Curiae* 33. Whether at night or during the day, the officer is obviously vulnerable to those inside the home while awaiting a warrant, including danger from a suspect who has already demonstrated himself to be undeterred by police orders. See, *e.g.*, *Thompson v. Florence*, 2019 WL 3220051, *4 (ND Ala., July 17, 2019) (at fleeing suspect's urging, resident grabbed a handgun); *State v. Davis*, 2000-278, p. 5 (La. App. 5 Cir. 8/29/00), 768 So.2d 201, 206 (fleeing suspect "reached for a handgun" inside home).

Even if the area outside the home remains tranquil, the suspect inside is free to destroy evidence or continue his escape. Flight is obviously suggestive of these recognized exigencies, which could materialize promptly once the officer is compelled to abandon pursuit. The destruction of evidence can take as little as "15 or 20 seconds," *Banks*, 540 U.S., at 40, 124 S.Ct. 521; and a suspect can dash out the back door just as quickly, while the officer must wait outside. Forcing the officer to wait and predict whether such exigencies *will* occur before entry is in practice no different from forcing the officer to wait for these exigencies *to* occur.

****16** Indeed, from the perspective of the officer, many instances of flight leading to further wrongdoing are the sort of "flight alone" cases the Court deems harmless, *ante*, at 2021 - 2022, n. 3. Despite the Court's suggestion to the contrary, examples of "flight alone" generating exigencies difficult to identify in advance are not hard to find. See, *e.g. State v. Lam*, 2013-Ohio-505, 989 N.E.2d 100, 101–102 (App. 2013) (warrantless entry in hot pursuit of someone who committed turn signal violation revealed heroin on suspect and suggested attempt to flush drugs down the toilet); *State v. Mitchem*, 2014-Ohio-2366, 2014 WL 2565680, *1 (App., June 4, 2014) (suspect who committed trespass, fled from the police into private driveway, and stated to officers "[Y]ou can't touch me, I'm at my house," turned out to have a gun). (And, as we will see, it is apparently hard to decide which cases qualify as "flight alone" cases, see *infra*, at 2036 - 2037.)

If the suspect continues to flee through the house, while the officer must wait, even the quickest warrant will be far too late. Only in the best circumstances can one be obtained in under an hour, see Brief for Respondent 33, and it usually takes much longer than that, see Brief for Los Angeles County Police Chiefs' Association as *Amicus Curiae* 24–25. Even electronic warrants may involve "time-consuming formalities." *McNeely*, 569 U.S., at 155, 133 S.Ct. 1552. And some States typically require that a warrant application be in writing, see, *e.g.*, Colo. Rev. Stat. § 16–3–303 (2020), or that the applicant appear in person before a judge, see, *e.g.*, Mass. Gen. Laws, ch. 276, § 2B (2019), or permit oral applications only for certain cases, see, *e.g.*, Iowa Code § 321J.10.3 (2019). All of these factors make it very possible

that the officer will *never* be able to identify the suspect if he cannot continue the pursuit. See *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004) (recognizing identification as an "important government interest[ ]"). The Court today creates "perverse incentives" by imposing an "invitation to impunity-earned-by-recklessness." *Scott*, 550 U.S., at 385–386, 127 S.Ct. 1769.

***2033** Against these government interests we balance the suspect's privacy interest in a home to which he has voluntarily led a pursuing officer. If the residence is not his the suspect has no privacy interest to protect. *Rakas v. Illinois*, 439 U.S. 128, 141, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); see also *State v. Walker*, 2006-1045, p. 7 (La. 4/11/07), 953 So.2d 786, 790–791 (suspect fled into third person's residence where he was unwelcome); *Ulysse v. State*, 899 So.2d 1233, 1234 (Fla. 3rd DCA 2005) (suspect ran inside the home of "a complete stranger"). The police may well have no reason to know whether the suspect entered his own or someone else's home or yard. If the suspect does escape into his own home, his privacy interest is diminished because he was the one who chose to move his encounter with the police there. See *State v. Legg*, 633 N.W.2d 763, 773 (Iowa 2001) (nature of intrusion is "slight" in hot pursuit because the officer's entry "was no surprise to [the suspect]; he was following closely on her heels"); 4 W. LaFave, Search and Seizure § 9.2(d), p. 419 (6th ed. 2020) ("the suspect has only himself to blame for the fact that the encounter has been moved from a public to a private area"). In cases of hot pursuit, "[t]he offender is then not being bothered by the police unexpectedly while in domestic tranquility. He has gone to his home while fleeing solely to escape arrest." *R.* v. *Macooh*, [1993] 2 S. C. R. 802, 815. Put differently, just as arrestees have "reduced privacy interests," *Riley*, 573 U.S., at 391, 134 S.Ct. 2473, so too do those who evade arrest by leading the police on car chases into their garages.

C

"In determining what is reasonable under the Fourth Amendment, we have given great weight to the essential interest in readily administrable rules." *Virginia v. Moore*, 553 U.S. 164, 175, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (internal quotation marks omitted). This is particularly true with respect to the rules governing exceptions to the warrant requirement because of exigent circumstances. See *Mitchell*, 588 U. S., at ——, n. 3, 139 S.Ct., at 2535, n. 3. And contrary to the Court's suggestion, the home is not immune from the application of such rules consistent with the Fourth Amendment. See, *e.g.*, *Summers*, 452 U.S., at 705, 101 S.Ct. 2587; *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

****17** Like most rules, this one is not without exceptions or qualifications. The police cannot manufacture an unnecessary pursuit to enable a search of a home rather than to execute an arrest. Cf. *Fernandez v. California*, 571 U.S. 292, 302, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014) ("evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding possible objection" would be probative of the objective unreasonableness of a warrantless entry based on the consent of another occupant). Additionally, if a reasonable officer would not believe that the suspect fled into the home to "thwart an otherwise proper arrest," *Santana*, 427 U.S., at 42, 96 S.Ct. 2406, warrantless entry would not be reasonable.

Additional safeguards limit the potential for abuse. The officer must in all events effect a reasonable entry. *United States v. Ramirez*, 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998). As the lower courts have recognized, hot pursuit gives the officer authority to enter a home, but "it does not have any bearing on the constitutionality of the manner in which he enters the home." *Trent v. Wade*, 776 F.3d 368, 382 (C.A.5 2015). And his authority to search is circumscribed, limited to "those spaces where a person may be found" for "no longer than it takes to complete the arrest and depart the premises." ***2034** *Maryland v. Buie*, 494 U.S. 325, 335–336, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). Finally, arrests conducted "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests" are subject to even more stringent review. *Whren v. United States*, 517 U.S. 806, 818, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

Courts must also ascertain whether a given set of circumstances actually qualifies as hot pursuit. While the flight need not be reminiscent of the opening scene of a James Bond film, there must be "some sort of a chase." *Santana*, 427 U.S., at 43, 96 S.Ct. 2406. The pursuit must be "immediate or continuous." *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). And the suspect should have known the officer intended for him to stop. Cf. *Michigan v. Chesternut*, 486 U.S. 567, 573–574, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). Where a suspect, for example, chooses to end a voluntary conversation with law enforcement and go inside her home, that does not constitute flight. *Florida v.*

Royer, 460 U.S. 491, 497–498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion).

Because the California Court of Appeals assumed that hot pursuit categorically permits warrantless entry, I would vacate the decision below to allow consideration of whether the circumstances at issue in this case fall within an exception to the general rule of the sort outlined above. Lange would be free to argue that his is the "unusual case," *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2539 (plurality opinion), in which the general rule that hot pursuit justifies warrantless entry does not apply.

II

Now consider the regime the Court imposes. In rejecting the *amicus*' proposed categorical rule favoring warrantless home entry, the Court creates a categorical rule of its own: Flight alone can never justify warrantless entry into a home or its curtilage. Instead, flight is but one factor of unclear weight to "consider," *ante,* at 2024 - 2025, and it must be supplemented with at least one additional exigency. This is necessary, the Court explains, because people "flee for innocuous reasons," *ante*, at 2021, although the Court offers just two actual examples of "innocuous" flight, the harmlessness of which would not have been apparent to the police, see *ibid*. (citing *Carroll v. Ellington*, 800 F.3d 154, 162 (C.A.5 2015); *Mascorro v. Billings*, 656 F.3d 1198, 1202 (C.A.10 2011)).

In order to create a hot pursuit rule ostensibly specific to misdemeanors, the Court must turn to a case concerning neither misdemeanors nor hot pursuit. In *Welsh* v. *Wisconsin*, we held that the warrantless entry of a drunk driver's home to arrest him for a nonjailable offense violated the Fourth Amendment. 466 U.S., at 754, 104 S.Ct. 2091. The Court relies on *Welsh* for the proposition that "when a minor offense alone is involved ... officers can probably take the time to get a warrant" to execute an arrest. *Ante*, at 2020 – 2021. The Court's determination that *Welsh* applies to all cases involving "minor" offenses—although we never learn what qualifies as a minor offense—ignores that we have already declined to apply *Welsh* to cases involving misdemeanors because of the "significant" distinction between nonjailable offenses and misdemeanors. *McArthur*, 531 U.S., at 336, 121 S.Ct. 946. And in any event, we explicitly differentiated the circumstances at issue in *Welsh* from "immediate or continuous pursuit of [a person] from the scene of a crime." 466 U.S., at 753, 104 S.Ct. 2091; see *Brigham City*, 547 U.S., at 405, 126 S.Ct. 1943 (rejecting *Welsh*'s application to a situation involving exigent circumstance of emergency aid). Accordingly, as we have already held, "nothing in [*Welsh*] establishes ***2035** that the seriousness of the crime is equally important *in cases of hot pursuit.*" *Stanton*, 571 U.S., at 9, 134 S.Ct. 3 (emphasis in original). The Court's citation to Justice Jackson's concurrence in *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), *ante,* at 2021 - 2022, n. 3, is similarly inapt. That case involved entry for mere "follow[ ] up," not anything resembling hot pursuit. *McDonald*, 335 U.S., at 459, 69 S.Ct. 191.

****18** The Court next limits its consideration of the interests at stake to a balancing of what it perceives to be the government's interest in capturing innocuous misdemeanants against a person's privacy interest in his home. The question, however, is not whether "litter[ing]" presents risks to public safety or the potential for escape, *ante*, at 2019 - 2020, but whether *flight* does so. And flight from the police is never innocuous.

The Court ultimately decides that, when it comes to misdemeanors, States do not have as much of an interest in seeing such laws enforced. But, as the Court concedes, we have already rejected as "untenable" the "assumption that a 'felon' is more dangerous than a misdemeanant." *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). This is so because "numerous misdemeanors involve conduct more dangerous than many felonies." *Ibid.* At any rate, the fact that a suspect flees when suspected of a minor offense could well be indicative of a larger danger, given that he has voluntarily exposed himself to much higher criminal penalties in exchange for the prospect of escaping or delaying arrest. Cf. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

The Court's rule is also famously difficult to apply. The difference between the two categories of offenses is esoteric, to say the least. See *Atwater*, 532 U.S., at 350, 121 S.Ct. 1536; *Berkemer v. McCarty*, 468 U.S. 420, 431, n. 13, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[O]fficers in the field frequently have neither the time nor the competence to determine the severity of the offense for which they are considering arresting a person." (internal quotation marks omitted)). For example, driving while under the influence is a misdemeanor in many States, but becomes a felony if the suspect is a serial drunk driver. See, *e.g.*, Alaska Stat. § 28.35.030(n) (2020). Drug possession may be a misdemeanor

or a felony depending on the weight of the drugs. See, *e.g.*, Ohio Rev. Code Ann. § 2925.11(C) (Lexis 2019) (outlining 50 potential iterations of unlawful drug possession, some misdemeanors others felonies). Layer on top of this that for certain offenses the exact same conduct may be charged as a misdemeanor or felony depending on the discretionary decisions of the prosecutor and the judge (what California refers to as a "wobbler"), and we have a recipe for paralysis in the face of flight. See Cal. Penal Code Ann. §§ 486–490.1 (West Cum. Supp. 2021) (classifying theft as an infraction, misdemeanor, wobbler, or felony depending on the value of the stolen item).

The Court permits constitutional protections to vary based on how each State has chosen to classify a given offense. For example, "human trafficking" can be a misdemeanor in Maryland, Md. Crim. Law Code Ann. § 3–1102(c)(1) (2019), contra, Tex. Penal Code Ann. § 20A.02 (West 2021), and in Pennsylvania so can involuntary manslaughter, 18 Pa. Cons. Stat. § 2504(b) (2015); contra, Ohio Rev. Code Ann. § 2903.04(C). The vehicular flight at issue in this very case is classified as a felony in several States. See, *e.g.,* Fla. Stat. § 316.1935 (2014); Del. Code Ann., Tit. 21, § 4103 (2013). Law enforcement entities and state governments across the Nation ***2036** tell us that they have accordingly developed standards for warrantless entry in hot pursuit tailored to their respective legal regimes. See Brief for Los Angeles County Police Chiefs' Association as *Amicus Curiae* 14–20; Brief for State of Ohio et al. as *Amici Curiae* 25. Given the distinct nature of each State's legal code, such an approach is more appropriate than the Court's blunt constitutional reform.

****19** For all these reasons, we have not crafted constitutional rules based on the distinction between modern day misdemeanors and felonies. In *Tennessee* v. *Garner*, for example, we held that deadly force could not categorically be used to seize a fleeing felon, even though the common law supplied such a rule, because at common law the "gulf between the felonies and the minor offences was broad and deep," but today it is "minor and often arbitrary." 471 U.S., at 14, 105 S.Ct. 1694 (internal quotation marks omitted).

Similarly, in *Atwater*, we held that the general probable-cause rule for warrantless arrests applied to "even a very minor criminal offense," "without the need to balance the interests and circumstances involved in particular situations." 532 U.S., at 354, 121 S.Ct. 1536 (internal quotation marks omitted). We explained that we could not expect every police officer to automatically recall "the details of frequently complex penalty schemes," and concluded that distinguishing between "permissible and impermissible arrests for minor crimes" was a "very unsatisfactory line to require police officers to draw on a moment's notice." *Id*., at 348, 350, 121 S.Ct. 1536 (internal quotation marks and alteration omitted).

The Court's approach is hopelessly indeterminate in other respects as well. The Court admonishes law enforcement to distinguish between "dangerous offender[s]" and "scared teenager[s]," *ante,* at 2021 - 2022, as if an officer can easily tell one from the other, and as if the two categories are mutually exclusive. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Offending by Juveniles (Mar. 31, 2020) (about 16% of serious violent crimes in the United States from 2007 to 2017 were committed by juveniles). And police are instructed to wait for a warrant if there is sufficient "time," *ante*, at 2021 - 2022, but they are not told time before *what*, how many hours the Court would have them wait, and what to do if other "pressing needs" arise. See *Mitchell*, 588 U. S., at ——, 139 S.Ct., at 2535 (plurality opinion) ("[A]n officer's duty to attend to more pressing needs may leave no time to seek a warrant.").

The Court tut-tuts that we are making far too much of all this, and that our "alarmism [is] misplaced." *Ante*, at 2021 - 2022, n. 3. In fact, the Court says, its "approach will in many, if not most, cases allow a warrantless home entry." *Ante*, at 2021 - 2022. In support of that assurance, the Court lists several "exigencies above and beyond the flight itself " that would permit home entry, notably when "the fleeing misdemeanant" will "escape from the home." *Ante,* at 2021 - 2022, n. 3. If an officer "reasonably believes" such an exigency exists," the Court says, "he does not need a categorical misdemeanor-pursuit rule to justify a warrantless home entry." *Ibid*.

When a suspect flees into a dwelling there typically will be another way out, such as a back door or fire escape. See Cal. Code Regs., tit. 24, §§ 1113.2, 1114.8 (2019) (apartments, floors of high-rise buildings, and many other homes must have access to at least two means of egress). If the officer reasonably believes there are multiple exits, then surely the officer can conclude that the suspect might well "escape from the home," *ante*, at 2021 - 2022, n. 3, by running out the back, ***2037** rather than "slowing down and wiping his brow" while the officer attempts to get a warrant. *Scott*, 550 U.S., at 385, 127 S.Ct. 1769. Under the Court's rule warrantless entry into a home in hot pursuit of a fleeing misdemeanant would presumably be permissible, as long as the officer reasonably

believed the home had another exit. Question: Is that correct? Police in the field deserve to know.

**20 But the Court will not answer the question, leaving it to the officer to figure out in the midst of hot pursuit. The answer apparently depends on whether the police "believe anything harmful will happen in the time it takes to get a warrant," *ante*, at 2021 - 2022, n. 3, but again, what the police reasonably believe will happen is of course that the suspect will continue his flight and escape out the back. If that reasonable belief is an exigency, then it is present in almost every case of hot pursuit into the home. Perhaps that is why Lange's counsel admitted that "nine times out of ten or more" warrantless entry in hot pursuit of misdemeanants would be reasonable. Tr. of Oral Arg. 34.

III

Although the Fourth Amendment is not "frozen" in time, we have used the common law as a reference point for assessing the reasonableness of police activity. *Garner*, 471 U.S., at 13, 105 S.Ct. 1694. The Court errs, however, in concluding with the suggestion that history supports its novel incentive to flee.

The history is not nearly as clear as the Court suggests. The Court is forced to rely on an argument by negative implication: if common law authorities supported a categorical rule favoring warrantless entry in pursuit of felons, warrantless entry in pursuit of misdemeanants must have been prohibited. That is wrong. Countless sources support the proposition that officers could and did pursue into homes those who had committed all sorts of offenses that the Court seems to deem "minor." *Ante*, at 2019 - 2020.

For example, common law authorities describe with approval warrantless home entry in pursuit of those who had committed an affray (public fighting), 1 W. Hawkins, Pleas of the Crown 137 (1716), and "disorderly drinking," W. Simpson, The Practical Justice of the Peace and the Parish Officer 26 (1761). And the doctrine of "hue and cry" permitted townspeople to pursue those suspected of "misdemeanor[s]" if the perpetrator "escape[d] into [his] house." R. Bevill, Law of Homicide 162–163 (1799). In colonial America, the hue and cry extended to a "great diversity of crimes," including stealing livestock and revealing oneself to be a Quaker. W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 244–246 (2009).

Finally, at common law an officer could "break open Doors, in order to apprehend Offenders" whenever a person was arrested for "*any Cause*," and thereafter escaped. 2 Hawkins, Pleas of the Crown, at 86–87 (1787) (emphasis added). The Court's attempt to dispose of this awkward reality in a footnote, *ante,* at 2023, n. 5, is unconvincing. Flight and escape both present attempts to "thwart an otherwise proper arrest," *Santana*, 427 U.S., at 42, 96 S.Ct. 2406, and as noted, the common law did not differentiate among escapees based on the perceived magnitude of their underlying offense, R. Burn, The Justice of the Peace 101–103 (14th ed. 1780).

Clearly the list of offenses that historically justified warrantless home entry in hot pursuit of a fleeing suspect were as broad and varied as those found in a contemporary compilation of misdemeanors. See also *Macooh*, [1993] 2 S. C. R., at 817 (concluding after review that at common law "the right to enter in hot pursuit" was *2038 not "limited to arrest for felonies"); *Lyons* v. *R.*, [1984] 2 S. C. R. 633, 657 (recognizing "right of pursuit" as a longstanding exception to common law protection of the sanctity of the home).

In the face of this evidence, the Court fails to cite a single circumstance in which warrantless entry in hot pursuit was found to be unlawful at common law. It then acknowledges that "some of the specifics are uncertain, and commentators did not always agree with each other." *Ante,* at 2023. In *Atwater,* we declined to forbid warrantless arrests for minor offenses when we found "disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together." 532 U.S., at 332, 121 S.Ct. 1536. The historical ambiguity is at least as pervasive here.

**21 Even if the common law practice surrounding hot pursuit were unassailably clear, its treatment of the topic before us would still be incomplete. That is because the common law did not recognize the remedy Lange seeks: exclusion of evidence in a criminal case. *Collins*, 584 U. S., at ——, 138 S.Ct., at 1668-1669 (THOMAS, J., concurring). It is often difficult to conceive of how common law rights were influenced by the absence of modern remedies. And in this case we have no guidance from history as to how our doctrines surrounding the exclusionary rule, such as inevitable discovery, would map onto situations in which a person attempts to thwart a public arrest by retreating to a private place. See *Nix v. Williams*, 467 U.S. 431, 443–444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

* * *

Recall the assault we started with. The officer was closing in on the suspect when he hopped the fence and stopped in a yard. The officer starts to climb over the fence to arrest him, but wait—was the assault a misdemeanor or a felony? In Lange's State of California, it could have been either depending on the identity of the victim, the amount of force used, and whether there was a weapon involved. See Cal. Penal Code Ann. § 245 (West 2014). How much force was the man using against the teenager? Is this really the assailant's home in the first place? Pretty suspicious that he jumped the fence just as the officer was about to grab him. If it is his home, are there people inside and, if so, how many? And why would the man run from a mere fight—does he have something more serious to hide?

By this time, of course, the assailant has probably gone out the back door or down the fire escape and is blocks away, with the officer unable to give a useful description—except for how he looks from behind.

All Citations

141 S.Ct. 2011, 2021 WL 2557068, 210 L.Ed.2d 486, 21 Cal. Daily Op. Serv. 6095, 28 Fla. L. Weekly Fed. S 969

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Compare, *e.g.*, 2019 WL 5654385, *7–*8 (case below) (applying a categorical rule); *Bismarck v. Brekhus*, 2018 ND 84, ¶ 27, 908 N.W.2d 715, 719–720 (same); *Commonwealth v. Jewett*, 471 Mass. 624, 634–635, 31 N.E.3d 1079, 1089 (2015) (same); *People v. Wear*, 229 Ill.2d 545, 568, 571, 323 Ill.Dec. 359, 893 N.E.2d 631, 644–646 (2008) (same); *Middletown v. Flinchum*, 95 Ohio St.3d 43, 44–45, 765 N.E.2d 330, 332 (2002) (same); *State v. Ricci*, 144 N.H. 241, 244–245, 739 A.2d 404, 407–408 (1999) (same), with, *e.g.*, *State v. Markus*, 211 So.3d 894, 906–907 (Fla. 2017) (requiring a case-specific showing); *Mascorro v. Billings*, 656 F.3d 1198, 1207 (C.A.10 2011) (same); *Butler v. State*, 309 Ark. 211, 216–217, 829 S.W.2d 412, 415 (1992) (same); *State v. Bolte*, 115 N.J. 579, 597–598, 560 A.2d 644, 654–655 (1989) (same); see also *Stanton v. Sims*, 571 U.S. 3, 6–7, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*) (noting the split).

2 The concurrence is wrong to say that *Welsh* applies only to nonjailable offenses, and not to minor crimes that are labeled misdemeanors. See *post*, at 2034 – 2035 (ROBERTS, C. J., concurring in judgment). No less than four times, *Welsh* framed its holding as applying to "minor offenses" generally. 466 U.S., at 750, 752–753, 104 S.Ct. 2091. (By contrast, the word "nonjailable" does not appear in its legal analysis.) The decision cited lower court cases prohibiting warrantless home entries when the defendant had committed a misdemeanor. See *id.*, at 752, 104 S.Ct. 2091. And its essential rationale applies to all minor crimes, however labeled. As the Court stated (quoting an earlier Justice Jackson opinion): It would "display[ ] a shocking lack of all sense of proportion" to say that "private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it." *Id.*, at 751, 104 S.Ct. 2091 (quoting *McDonald v. United States*, 335 U.S. 451, 459, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (concurring opinion)).

3 Given that our rule allows warrantless home entry when emergencies like these exist, we think the concurrence's alarmism misplaced. See, *e.g.*, *post*, at 2028 - 2029 (opinion of ROBERTS, C. J.) (bewailing "danger[ ]" and "absurd[ity]"). The concurrence spends most of its time worrying about cases in which there are exigencies above and beyond the flight itself: when, for example, the fleeing misdemeanant will "get a gun and take aim from inside" or "flush drugs down the toilet." *Post*, at 2028 - 2029, 2032. But again: When an officer reasonably believes those exigencies exist, he does not need a categorical misdemeanor-pursuit rule to justify a warrantless home entry. (And contrary to the concurrence's under-explained suggestion, see *post*, at 2031 – 2032, assessing exigencies is no harder in this context than in any other.) The only cases in which we and the concurrence reach a different result are cases involving flight alone, without exigencies like the destruction of evidence, violence to others, or escape from the home. It is telling that—although they are our sole disagreement—the concurrence hardly talks about those "flight alone" cases. Apparently, it taxes even the concurrence to justify as an "exigency" a warrantless entry based only on a misdemeanant's prior retreat into his home—when the police officers do not reasonably believe anything harmful will happen in the time it takes to get a warrant.

4 In a 1763 Parliamentary debate, about searches made to enforce a tax, William Pitt the Elder orated as follows: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!" *Miller v. United States*, 357 U.S. 301, 307, and n. 7, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) (citing The Oxford Dictionary of Quotations 379 (2d ed. 1953); 15 T. Hansard, Parliamentary History of England, col. 1307 (1813)).

5 Note, though, that if a person had already been arrested and then escaped from custody, an officer could always search for him at home. See 2 W. Hawkins, Pleas of the Crown 87 (1721).

6 Both felonies and pre-felonies justified the common law's "hue and cry": when a constable or other person "raise[d] the power of the towne"—"with horn and with voice"—to pursue an offender. 3 E. Coke, Institutes of the Laws of England 116 (1644); Blackstone 293. Most of the common-law authorities approved warrantless home entries upon a hue and cry. But because that process was generally available only to apprehend felons and those who had "dangerously wounded any person," it did not enlarge the range of qualifying offenses. Hale 98; see Brief for Constitutional Accountability Center as *Amicus Curiae* 17–18.

7 The term "breach of the peace" can today encompass many kinds of behavior, and even in common-law times it "meant very different things in different" contexts. *Atwater v. Lago Vista*, 532 U.S. 318, 327, n. 2, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). But "[m]ore often than not, when used in reference to common-law arrest power, the term seemed to connote an element of violence." *Id.*, at 327–328, 121 S.Ct. 1536, n. 2.

8 The concurrence professes to disagree with this conclusion, see *post*, at 2037 – 2038 (opinion of ROBERTS, C. J.), but its account of the common law ends up in much the same place as ours. The concurrence recognizes a categorical rule permitting warrantless home entry in pursuit of fleeing felons. See *post*, at 2037. But for misdemeanants, the concurrence presents only discrete circumstances—mostly the same as ours—allowing home entry without a warrant. *Post*, at 2037 – 2038. Those particular instances of permissible entry do not create a categorical rule.

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835 S.W.2d 101
Court of Criminal Appeals of Texas,
En Banc.

Raymond McNAIRY, III, Appellant,

v.

The STATE of Texas, Appellee.

No. 1407–89.
|
June 19, 1991.
|
Rehearing Denied Aug. 26, 1991.

Synopsis

Defendant was convicted in the 167th Judicial District Court, Travis County, Bob Jones, J., of possession of controlled substance, and he appealed. The Austin Court of Appeals, Third Supreme Judicial District, 777 S.W.2d 570,affirmed, and defendant petitioned for discretionary review. The Court of Criminal Appeals, Campbell, J., held that exigent circumstances justified warrantless entry into trailer home from which odor of methamphetamine laboratory was emanating.

Affirmed.

Clinton and Miller, JJ., dissented.

Attorneys and Law Firms

***102** Charles O. Grigson (court appointed), Austin, for appellant.

Ronald Earle, Dist. Atty., and Robert Smith and Dayna Blazey Baird, Asst. Dist. Attys., Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

CAMPBELL, Judge.

Appellant was convicted of aggravated possession of more than 28 grams but less than 400 grams of a controlled substance, namely methamphetamine. Tex.Rev.Civ.Stat. art. 4476–15 § 4.03 (repealed and reenacted as Tex.Health & Safety Code § 481.112). After a pretrial hearing on his motion to suppress evidence, in which the ***103** trial court denied appellant's motion, appellant entered a plea of guilty and was sentenced to six years imprisonment. Appellant's plea of guilty did not waive his right to later complain of error in the trial court's ruling at the pretrial hearing. Tex.R.App.P. 41(b).

The Third Court of Appeals affirmed appellant's conviction, finding that the search of appellant's trailer home was justified because the police could reasonably believe that appellant's landlord had the apparent authority to grant access to the mobile home. *McNairy v. State,* 777 S.W.2d 570, 574 (Tex.App.—Austin 1989). Appellant filed a petition for discretionary review in this Court raising four grounds for review. We granted appellant's petition for discretionary review, pursuant to Tex.R.App.P. 200(c)(2), in order to determine (1) whether the court of appeals erred in holding that a landlord can give consent to search a tenant's premises; (2) whether the court of appeals erred in holding that appellant did not properly preserve error; (3) whether there was no probable cause for the warrantless search and seizure of appellant's home; and (4) whether the affidavit in support of the search warrant was facially invalid and whether the search pursuant to the warrant amounted to a continuation of a prior invalid search. We will affirm the judgment of the court of appeals.

In his motion to suppress evidence, appellant claimed that the search of his residence and seizure of evidence was made without probable cause, and in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, art. 1 §§ 9 and 10 of the Texas Constitution, and Tex.Crim.Proc.Code arts. 1.05, 38.22, [sic] and 38.23. At the pretrial hearing on the motion to suppress, the State called two witnesses. Appellant did not call any witnesses. We will rely on the court of appeals' statement of the facts as established at the pretrial hearing.

> On February 2, 1988, Dan Hinkle, Travis County Deputy Sheriff, assigned to the Organized Crime Unit, responded to a call from fellow officers that they had been called to a disturbance involving burning vehicles at a residence at 8104 Linden, Del Valle, and had found a quantity of drugs and paraphernalia. Upon arriving, Hinkle acquired the written voluntary consent of Rhonda Reynolds, an owner, to search the house at 8104 Linden and all outbuildings upon the 10–acre tract involved. The search at 8104 Linden

uncovered a methamphetamine lab and other drug-related items.

The officers then began to search the land in back of 8104 Linden. As Deputy Hinkle and Sgt. Gideon [Austin Police Department] walked down a well-defined path through tall weeds they came within 50 feet of one of the outbuildings, a mobile trailer house, when they both smelled the strong odor of methamphetamine emanating from the trailer. As they proceeded, Hinkle heard the back door of the trailer "thrown open" and heard people running into the nearby brush, but he could not see the individuals because of the tall weeds. Gideon went to the front of the trailer and Hinkle went to the rear where he opened the back door to see if anyone else was present. At this point he observed chemicals associated with the manufacture of methamphetamine stacked just inside the doorway. He secured the trailer and began to ask questions of Rhonda Reynolds, who was present, and learned for the first time that the trailer had been rented to appellant McNairy and an Edward Fancher and learned the address was 16202 Fagerquist. Hinkle decided at this point to secure a search warrant before proceeding further. Hinkle acquired a search warrant from a magistrate and returned to the scene. During his testimony, the written consent to search executed by Rhonda Reynolds and the search warrant and the affidavit upon which it was based were admitted into evidence without objection.

Sgt. Ruben Fuentes, Austin Police Department, was called to the scene, and waited there with Sgt. Gideon for Hinkle to obtain the search warrant, and when Hinkle arrived with the warrant he participated in the search as the "seizing ***104** officer." He listed the numerous items of methamphetamine, chemicals and equipment found in the trailer during the search pursuant to the warrant. It was this methamphetamine that was the basis of appellant's conviction. (footnote omitted)

McNairy v. State, 777 S.W.2d at 571–72.[1]

The court of appeals applied the so-called apparent authority doctrine to uphold the initial search of appellant's home and thus, affirm his conviction. The court of appeals explained that the apparent authority doctrine originated in *People v. Gorg,* 45 Cal.2d 776, 291 P.2d 469 (1955), and, simply put, states that when officers have acted in good faith upon the consent given by an owner in conducting a search, the evidence seized cannot be excluded merely because the officers made a reasonable mistake as to the extent of the owner's authority. *See also Nix v. State,* 621 P.2d 1347, 1349–50 (Alaska 1981).[2] The court of appeals then concluded that in the instant case, the police officers could have reasonably believed that appellant's landlord had authority to consent to search all of the outbuildings on the ten acre tract. The court noted that when ambiguous circumstances arose, the officers immediately stopped, made necessary inquiries, and obtained a search warrant. Furthermore, the court concluded that opening the door of appellant's trailer home after smelling the chemicals and hearing people running away did not constitute an "invalid warrantless search or taint the subsequent search." *McNairy,* 777 S.W.2d at 574.

***105** In his first ground for review, appellant asserts that the court of appeals erred in holding that appellant's landlord could give consent to search his premises. Although we agree with the ultimate result reached by the court of appeals, we find their wholesale application of the apparent authority doctrine is unnecessary to resolve the instant case.

We first note that this Court has never adopted the apparent authority doctrine. In the instant case, the apparent authority doctrine is of some value, in that we can use the doctrine to determine if Hinkle and the other officers were justified in being where they were, when they smelled the odor of the methamphetamine laboratory emanating from appellant's trailer home and heard people running away (i.e., when probable cause and exigent circumstances to conduct the initial warrantless search of the trailer might have arisen). The testimony from the pretrial hearing indicates that Hinkle, accompanied by other officers and appellant's landlord, was approximately fifty feet away from appellant's trailer home when he first smelled the suspicious odors, and only a few steps closer when he heard people exiting the trailer. Nothing in the record indicates that, at this point, Hinkle had any reason to believe that the landlord's consent to search the premises did not extend to his present location on the ground.

Under the apparent authority doctrine, an officer conducting a consent search must make reasonable inquiries when "ambiguous circumstances" arise. *See United States v. Heisman,* 503 F.2d 1284 (8th Cir.1974). Thus, when confronted with a situation that does not reasonably appear to be included within the consent obtained, the searching officer must stop and make inquiries as to the continued effectiveness of the consent. *See Nix v. State,* 621 P.2d at 1349 (The apparent authority doctrine "does not mean that the police may proceed without inquiry in ambiguous circumstances or that they may reasonably proceed based on the consenting party's assertions of authority if those assertions appear unreasonable"); *see and*

compare Illinois v. Rodriguez, supra note 2 (where neither the circumstances or the assertions of the consenting party were ambiguous).

In the instant case, Hinkle's testimony indicates he was not aware that appellant's trailer home had a separate address and was occupied as a rental unit, until after the initial warrantless search. Furthermore, nothing in the record indicates that appellant's rental arrangement covered anything more than the trailer home and its immediate environs. Thus, it appears that Hinkle and the other officers were reasonably justified in believing that the consent given by appellant's landlord was effective, at least to the point where they first smelled the odor from the laboratory and heard people running away.[3] We further conclude, however, that the court of appeals erred in holding that the officers were reasonably justified in searching appellant's residence based on the apparent authority of appellant's landlord. We adhere to the general rule that a landlord cannot normally give effective consent to allow a search of a tenant's premises. *See Chapman v. United States,* 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961).

In his third ground for review, appellant asserts that there was no probable cause and no exigent circumstances to justify the initial warrantless search and seizure of his home. Appellant argues that the mere odor of an illegal substance does not justify a warrantless search. *See Taylor v. United* ***106** *States,* 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 951 (1932); *Stewart v. State,* 681 S.W.2d 774 (Tex.App.—Houston [14th] 1984, pet. ref'd). Appellant asserts that the officers could have secured the trailer home by other means and that their entry was unwarranted under the circumstances.

The State counters that the officers' initial entry into appellant's home was a "cursory inspection and not a full blown search of the premises." State's Brief at 15. The State argues that the initial entry was justified because the officers had a reasonable belief, based on specific and articulable facts, that appellant's home harbored persons who posed a danger to the officers or could destroy evidence.

The threshold question presented is whether the initial entry into appellant's home constituted a search. Although Hinkle's testimony indicates that the initial entry into the trailer was very limited, it was nevertheless an entry into appellant's residence. An unconsented police entry into a residential unit constitutes a search under *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A person normally exhibits an actual, subjective expectation of privacy in their residence, and society is prepared to recognize this expectation as objectively reasonable. *Id.* Nothing in the record shows that appellant did not exhibit an actual expectation of privacy in the trailer home. Thus, we find that the initial entry into appellant's home was a search.

In order for a warrantless search to be justified, the State must show the existence of probable cause at the time the search was made, and the existence of exigent circumstances which made the procuring of a warrant impracticable. *Hooper v. State,* 516 S.W.2d 941 (Tex.Cr.App.1974); *Reed v. State,* 522 S.W.2d 916 (Tex.Cr.App.1975); *Washington v. State,* 660 S.W.2d 533 (Tex.Cr.App.1983); *Delgado v. State,* 718 S.W.2d 718 (Tex.Cr.App.1986). Probable cause to search exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of a crime or evidence of a crime will be found. *Washington v. State,* 660 S.W.2d 533, 535 (Tex.Cr.App.1983).

The Supreme Court has expressed the probable cause standard as follows:

> [P]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the "laminated total ..." In dealing with probable cause, ... as the very name implies, we are dealing with *probabilities*. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1948); *Woodward v. State,* 668 S.W.2d 337 (Tex.Cr.App.1982) (opinion on rehearing).

In the instant case, the facts and circumstances available to the officers prior to the initial entry included: (1) the "unmistakable" odor of a methamphetamine laboratory emanating from appellant's trailer home; (2) the sound of the back door of the trailer flying open and persons running through the brush into a nearby wooded area; and (3) the presence of another methamphetamine laboratory on the same ten acre tract. In addition, Hinkle testified that he had personally "taken down" twenty-five methamphetamine laboratories in the last two years, and participated in seizing several other manufacturing operations. Hinkle testified that the odor associated with the chemicals and processing involved in the manufacture of methamphetamine was unmistakable, and that he had received specific police training

on the process used to make methamphetamine including actually making the substance himself.

Given the sum total of the information available to Hinkle, the reasonable inferences that could be drawn from that information, and his experience in seizing similar operations, we conclude that probable cause did exist at the time of the initial entry into appellant's trailer home.

***107** If probable cause is present, the inquiry becomes whether exigent circumstances existed to obviate the need for a search warrant and justify the initial warrantless entry into appellant's trailer home. *Hooper, supra; Delgado, supra.*

A variety of such circumstances may place a police officer in situations in which a warrantless entry is viewed as a reasonable reaction by the officer. Situations creating exigent circumstances usually include factors pointing to some danger to the officer or victims, an increased likelihood of apprehending a suspect, or the possible destruction of evidence. *See e.g. Stewart v. State,* 681 S.W.2d 774 (Tex.App.—Houston [14th] 1984, pet. ref'd) (exigent circumstances justifying a warrantless entry include (1) rendering aid or assistance to persons whom the officers reasonably believe are in need of assistance; (2) preventing the destruction of evidence or contraband; and (3) protecting the officers from persons whom they reasonably believe to be present and armed and dangerous).

In the instant case Hinkle testified that he entered appellant's trailer home to see if anybody was still in the trailer. In summation, the State argued that exigent circumstances in this situation included: (1) destruction of the evidence by a person remaining in the trailer home; and (2) immediate danger to the officers from anyone still in the trailer home.

With regard to the possible destruction of evidence as an exigent circumstance, the State must show that the police could have reasonably concluded that evidence would be destroyed or removed before they could obtain a search warrant. *See United States v. Rubin,* 474 F.2d 262 (3d Cir.1973).

In *Rubin,* the Third Circuit identified five circumstances relevant to a reasonable determination by the searching officers that evidence might be destroyed or removed before they could obtain a search warrant.

> Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant ...; (2) reasonable belief that the contraband is about to be removed ...; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought ...; (4) information indicating the possessors of the contraband are aware that the police are on their trail ...; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.

Rubin, 474 F.2d at 268; *see* LaFave, Search and Seizure § 6.5(b).

In the instant case, officers on the scene could have reasonably believed that one or more suspects remained in the trailer, in spite of evidence that several persons had already fled the scene. Anyone remaining in the trailer might have posed a threat to the officers or been able to destroy evidence. The evidence at pretrial showed that anyone remaining in the trailer would have likely known that the police were on the scene. Furthermore, the record reflects that the evidence seized at the trailer apparently could have been destroyed or removed in a matter of minutes.

Based on these factors, we conclude that the officers faced a real possibility that evidence would be destroyed and thus, they were justified in entering appellant's trailer to check for suspects who might have so destroyed evidence. Since we find that the possible destruction of the evidence provided an adequate exigent circumstance, we need not address the other possible exigent circumstances that might have justified the officers' actions. Appellant's third ground for review is overruled.

In his second and fourth grounds for review, appellant argues that the court of appeals erred in finding that his claims on appeal concerning (1) the facial invalidity of the affidavit in support of the search warrant, and (2) the search of the trailer home pursuant to the search warrant being invalid as a continuation of a prior illegal search, were procedurally defaulted. We agree with the court of appeals' disposal of these claims. The record from the pretrial hearing reveals that the State introduced ***108** the affidavit and search warrant, and that appellant did not object. The record further reveals that appellant made no attempt to demonstrate the facial invalidity of the affidavit and search warrant, or to argue that the later search of appellant's trailer home was invalidated by the prior "illegal" search. Thus, we agree with the court of appeals holding, and find that the claims presented to this

Court do not comport with the arguments and objections made at pretrial. *See* note 1, *supra.* Appellant's second and fourth grounds for review are overruled.

The judgment of the court of appeals is affirmed.

CLINTON and MILLER, JJ., dissent.

BAIRD, J., not participating.

All Citations

835 S.W.2d 101

Footnotes

1 Appellant raised only one point of error in the court of appeals. The point was divided into three parts; (1) no probable cause existed for the initial warrantless search and seizure of appellant's trailer home; (2) the consent obtained from appellant's landlord did not authorize the search of appellant's home; and (3) the affidavit in support of the search warrant for appellant's home was invalid on its face, and the search warrant itself was invalid because it was a continuation of a prior illegal search. The court of appeals found that the points of error raised did not comport with the suppression motion, the objections, and arguments presented at the pre-trial hearing. *McNairy,* 777 S.W.2d at 571. *see* TEX.R.APP.P. 52(a). Nevertheless, the court found that the contentions raised on appeal that the consent given by landlord did not authorize the initial search, and that there was a lack of probable cause for the initial warrantless search, "should have been apparent to the trial court from the context presented." Thus, the court of appeals considered these two points. *Id.* at 572.

With respect to appellant's claims concerning the search warrant and probable cause affidavit, the court of appeals first noted that the argument made to the court at the pretrial hearing concerned primarily the extent and validity of the consent given by appellant's landlord, and whether Hinkle and the other officers had sufficient justification for entering the trailer to "secure" the premises. The court of appeals found that since the state had produced the search warrant and affidavit, the burden shifted to appellant to demonstrate the warrant's invalidity. *Id.* at 572 (citing *Russell v. State,* 717 S.W.2d 7 (Tex.Cr.App.1986); *Miller v. State,* 736 S.W.2d 643 (Tex.Cr.App.1987); *Rumsey v. State,* 675 S.W.2d 517 (Tex.Cr.App.1984)). Appellant failed to produce any evidence demonstrating the invalidity of the warrant or the affidavit. Since appellant failed in meeting his burden at pretrial, and since the claims advanced on appeal did not comport with the argument made at pretrial, the court of appeals found that nothing was presented for review regarding appellant's claims concerning the affidavit and search warrant. *Id.*

2 The United States Supreme Court has since adopted the apparent authority doctrine in *Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). Rodriguez was arrested in his apartment and charged with possession of illegal drugs which were seized in plain view. The arresting officers did not have an arrest or search warrant, but had gained access to the apartment through Rodriguez's former girlfriend. The girlfriend referred to the apartment as "ours," told officers that she had clothes and other possessions inside, opened the door with a key, and gave consent to search. In actuality, she no longer lived there, did not pay rent, did not enter the apartment unless Rodriguez was present, and was not authorized to have a key. The Supreme Court concluded that "[w]hether the basis for such [apparent] authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." *Id.* 110 S.Ct. at 2800. Thus, a warrantless search pursuant to a third party consent is valid if "... the facts available to the officer at the moment ... [would] 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises." *Id.* at 2801 (citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The case was remanded for a determination of whether the officers reasonably believed that the girlfriend had authority to consent to the search.

3 Hinkle's testimony further indicated that ambiguous circumstances arguably arose prior to his entry into appellant's trailer. At the time of entry Hinkle should have been aware of the possibility that the trailer might be a separate residence occupied by someone other than appellant's landlord. The trailer was approximately 75 yards from the landlord's residence, fronted a different street, and was obviously occupied by other persons immediately prior to Hinkle's entry. *See e.g. United States v. Poole,* 307 F.Supp. 1185 (E.D.La.1969) (Police should have made inquiries before searching overnight bag found in closet. The presence of a guest in the apartment combined with the presence of the overnight bag "should have suggested to a reasonable mind the possibility that the bag might belong to the guest.")

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100 S.Ct. 1371
Supreme Court of the United States

Theodore PAYTON, Applicant,

v.

NEW YORK.

Obie RIDDICK, Applicant,

v.

NEW YORK.

Nos. 78–5420, 78–5421.
|
Argued March 26, 1979.
|
Reargued Oct. 9, 1979.
|
Decided April 15, 1980.

Synopsis

Two defendants were convicted in the Courts of New York, and the convictions were affirmed by the Supreme Court, Appellate Division, First Department, 55 A.D.2d 859, 390 N.Y.S.2d 769, and by the Supreme Court, Appellate Division, Second Department, 56 A.D.2d 937, 392 N.Y.S.2d 848. The convictions were again affirmed by the Court of Appeals of New York, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395. After noting probable jurisdiction of the appeals to address a constitutional question, the Supreme Court, Mr. Justice Stevens, held that: (1) distinction between warrantless seizure in open area and such a seizure on private premises is of equal force when seizure of person is involved; (2) zone of privacy is nowhere more clearly defined than when bounded by unambiguous physical dimensions of individual's home, and at very core of Fourth Amendment stands right of man to retreat into his own home and there be free from unreasonable government intrusion, and this is true as against seizures of property and seizures of person; and (3) Fourth Amendment prohibits police from making warrantless and nonconsensual entry into suspect's home in order to make routine felony-arrest, and New York statutes which in terms authorized police officers to enter private residence without warrant and with force if necessary to make routine felony arrest were unconstitutional as inconsistent with Fourth Amendment.

Judgments reversed and cases remanded.

Mr. Justice Blackmun filed a concurring opinion.

Mr. Justice White dissented and filed opinion in which Mr. Chief Justice Burger and Mr. Justice Rehnquist joined.

Mr. Justice Rehnquist also filed a separate dissenting opinion.

****1373** *Syllabus*[*]

***573** These appeals challenge the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each of the appeals, police officers, acting with probable cause but without warrants, had gone to the appellant's residence to arrest the appellant on a felony charge and had entered the premises without the consent of any occupant. In each case, the New York trial judge held that the warrantless entry was authorized by New York statutes and refused to suppress evidence that was seized upon the entry. Treating both cases as involving routine arrests in which there was ample time to obtain a warrant, the New York Court of Appeals, in a single opinion, ultimately affirmed the convictions of both appellants.

Held : The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Pp. 1378–1388.

(a) The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Pp. 1378–1388.

(b) The reasons for upholding warrantless arrests in a public place, cf. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, do not apply to warrantless invasions of the privacy of the home. The common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places; the weight of authority as it appeared to the Framers of the ***574** Fourth Amendment was to the effect that a warrant

was required for a home arrest, or at the minimum that there were substantial risks in proceeding without one. Although a majority of the States that have taken a position on the question permit warrantless home arrests even in the absence of exigent circumstances, there is an obvious declining trend, and there is by no means the kind of virtual unanimity on this question that was present in *United States v. Watson, supra*, with regard to warrantless public arrests. And, unlike the situation in *Watson* no federal statutes have been cited to indicate any congressional determination that warrantless entries into the home are "reasonable." Pp. 1382–1388.

(c) For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. P. 1388.

****1374** 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224, reversed and remanded.

Attorneys and Law Firms

William E. Hellerstein, New York City, for appellant in both cases.

Peter L. Zimroth, New York City, for appellee in both cases.

Opinion

Mr. Justice STEVENS delivered the opinion of the Court.

These appeals challenge the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest.

The important constitutional question presented by this challenge has been expressly left open in a number of our prior opinions. In *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, we upheld a warrantless "midday public arrest," expressly noting that the case did not pose "the still unsettled question ***575** . . . 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.' " *Id.*, at 418, n. 6, 96 S.Ct., at 825, n. 6.[1] The question has been answered in different ways by other appellate courts. The Supreme Court of Florida rejected the constitutional attack,[2] as did the New York Court of Appeals, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 in this case. The courts of last resort in 10 other States, however, have held that unless special circumstances are present, warrantless arrests in the home are unconstitutional.[3] Of the seven United States Courts of Appeals that have considered the question, five have expressed the opinion that such arrests are unconstitutional.[4]

***576** Last Term we noted probable jurisdiction of these appeals in order to address that question. 439 U.S. 1044, 99 S.Ct. 718, 58 L.Ed.2d 703. After hearing oral argument, we set the case for reargument this Term. 441 U.S. 930, 99 S.Ct. 2049, 60 L.Ed.2d 658. We now reverse the New York Court of Appeals and hold that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, ****1375** *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

We first state the facts of both cases in some detail and put to one side certain related questions that are not presented by these records. We then explain why the New York statutes are not consistent with the Fourth Amendment and why the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home.

I

On January 14, 1970, after two days of intensive investigation, New York detectives had assembled evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station two days earlier. At about 7:30 a. m. on January 15, six officers went to Payton's apartment in the Bronx, intending to arrest him. They had not obtained a warrant. Although light and music emanated from the apartment, there was no response to their knock on the metal door. They summoned emergency assistance and, about 30 minutes later, used crowbars to break open the door and enter the apartment. No one was there. In plain view, however, was a .30-caliber shell casing that was ***577** seized and later admitted into evidence at Payton's murder trial.[5]

In due course Payton surrendered to the police, was indicted for murder, and moved to suppress the evidence taken from his apartment. The trial judge held that the warrantless and forcible entry was authorized by the New York Code of

Criminal Procedure,[6] and that the evidence in plain view was properly seized. He found that exigent circumstances justified the officers' failure to announce their purpose before entering the apartment as required by the statute.[7] He had no ***578** occasion, however, to decide whether those circumstances also ****1376** would have justified the failure to obtain a warrant, because he concluded that the warrantless entry was adequately supported by the statute without regard to the circumstances. The Appellate Division, First Department, summarily affirmed.[8]

On March 14, 1974, Obie Riddick was arrested for the commission of two armed robberies that had occurred in 1971. He had been identified by the victims in June 1973, and in January 1974 the police had learned his address. They did not obtain a warrant for his arrest. At about noon on March 14, a detective, accompanied by three other officers, knocked on the door of the Queens house where Riddick was living. When his young son opened the door, they could see Riddick sitting in bed covered by a sheet. They entered the house and placed him under arrest. Before permitting him to dress, they opened a chest of drawers two feet from the bed in search of weapons and found narcotics and related paraphernalia. Riddick was subsequently indicted on narcotics charges. At a suppression hearing, the trial judge held that the warrantless entry into his home was authorized by the revised New York statute,[9] and that the search of the immediate ***579** area was reasonable under *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685.[10] The Appellate Division, Second Department, affirmed the denial of the suppression motion.[11]

The New York Court of Appeals, in a single opinion, affirmed the convictions of both Payton and Riddick. 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978). The court recognized that the question whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest had not been settled either by that court or by this Court.[12] In answering that question, the majority of four judges relied primarily on its perception that there is a

> ". . . substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of ***580** making an arrest, and [a] significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." *Id.*, at 310, 408 N.Y.S.2d, at 399, 380 N.E.2d, at 228–229.[13]

***581** ****1377** The majority supported its holding by noting the "apparent historical acceptance" of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States.[14]

Three members of the New York Court of Appeals dissented on this issue because they believed that the Constitution requires the police to obtain a "warrant to enter a home in order to arrest or seize a person, unless there are exigent circumstances."[15] Starting from the premise that, except in carefully circumscribed instances, "the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant,"[16] the dissenters reasoned that an arrest of the person involves an even greater invasion of privacy and should therefore be attended with at least as ***582** great a measure of constitutional protection.[17] The dissenters noted "the existence ****1378** of statutes and the American Law Institute imprimatur codifying the common-law rule authorizing warrantless arrests in private homes" and acknowledged that "the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years," but concluded that "neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented" and "can never be a substitute for reasoned analysis."[18]

Before addressing the narrow question presented by these appeals,[19] we put to one side other related problems that are ***583** *not* presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated both *Payton's* and *Riddick's* cases as involving routine arrests in which there was ample time to obtain a warrant,[20] and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect. The police broke into Payton's apartment intending to arrest Payton, and they arrested Riddick in his own dwelling. We also note that in neither case is it argued that the police lacked probable cause to believe that the suspect was at home when they entered. Finally, in both cases we are dealing with entries into homes

made without the consent of any occupant. In *Payton*, the police used crowbars to break down the door and in *Riddick*, although his 3-year-old son answered the door, the police entered before Riddick had an opportunity either to object or to consent.

II

It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment.[21] Indeed, as originally ***584** proposed ****1379** in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures.[22] As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.[23] The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches ***585** 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."

It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment. Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment "reached farther than the concrete form" of the specific cases that gave it birth, and "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed.2d 746. Without pausing to consider whether that broad language may require some qualification, it is sufficient to note that the warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142. Cf. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660. Indeed, as Mr. Justice POWELL noted in his concurrence in *United States v. Watson*, the arrest of a person is "quintessentially a seizure." 423 U.S., at 428, 96 S.Ct., at 830.

The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ****1380** ***586** *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.[24]

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.[25] Yet it is also well settled that ***587** objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area and such a seizure on private premises was plainly stated in *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354, 97 S.Ct. 619, 629, 50 L.Ed.2d 530:

> "It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer."

As the late Judge Leventhal recognized, this distinction has equal force when the seizure of a person is involved. Writing on the constitutional issue now before us for the United States Court of Appeals for the District of Columbia Circuit sitting en banc, *Dorman v. United States*, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970), Judge Leventhal first noted the settled rule that warrantless arrests in public places are valid. He immediately recognized, however, that

> "[a] greater burden is placed ... on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy

protection secured by the Fourth Amendment." *Id.*, at 317, 435 F.2d, at 389. (Footnote omitted.)

**1381 His analysis of this question then focused on the long-settled premise that, absent exigent circumstances, a warrantless *588 entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.[26] He reasoned that the constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended.[27] Judge Leventhal concluded that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.

This reasoning has been followed in other Circuits.[28] Thus, the Second Circuit recently summarized its position:

"To be arrested in the home involves not only the invasion *589 attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present." *United States v. Reed*, 572 F.2d 412, 423 (1978), cert. denied, *sub nom. Goldsmith v. United States*, 439 U.S. 913, 99 S.Ct. 283, 58 L.Ed.2d 259.

We find this reasoning to be persuasive and in accord with this Court's Fourth Amendment decisions.

The majority of the New York Court of Appeals, however, suggested that there is a substantial difference in the relative intrusiveness of an entry to search for property and an entry to search for a person. See n. 13, *supra*. It is true that the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home. See *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest.[29]

But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's **1382 home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very *590 core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

III

Without contending that *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, decided the question presented by these appeals, New York argues that the reasons that support the *Watson* holding require a similar result here. In *Watson* the Court relied on (a) the well-settled common-law rule that a warrantless arrest in a public place is valid if the arresting officer had probable cause to believe the suspect is a felon;[30] (b) the clear consensus among the States adhering to that well-settled common-law rule;[31] and (c) the expression of the judgment of Congress that such an arrest is "reasonable."[32] We consider *591 each of these reasons as it applies to a warrantless entry into a home for the purpose of making a routine felony arrest.

A

An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive,[33] consideration **1383 of what the Framers of the Amendment might have thought to be reasonable. Initially, it should be noted that the common-law rules of arrest developed in legal contexts that substantially differ from the cases now before us. In these cases, which involve application of the exclusionary rule, the issue is whether certain *592 evidence is admissible at

trial.[34] See *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense. See, *e. g., Leach v. Money*, 19 How.St.Tr. 1001, 97 Eng.Rep. 1075 (K.B.1765). Additionally, if an officer was killed while attempting to effect an arrest, the question whether the person resisting the arrest was guilty of murder or manslaughter turned on whether the officer was acting within the bounds of his authority. See M. Foster, Crown Law 308, 312 (1762). See also *West v. Cabell*, 153 U.S. 78, 85, 14 S.Ct. 752, 753, 38 L.Ed. 643.

A study of the common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony—as distinguished from an officer's right to arrest for a crime committed in his presence—reveals a surprising lack of judicial decisions and a deep divergence among scholars.

The most cited evidence of the common-law rule consists of an equivocal dictum in a case actually involving the sheriff's authority to enter a home to effect service of civil process. In *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195–196 (K.B.1603), the Court stated:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; and that appears well by the stat. of Westm. 1. c. 17. (which it but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction ***593** or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. Execut. 252. where it is said, that the K.'s officer who comes to do execution, &c. may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 E. 3.16." (Footnotes omitted.)

This passage has been read by some as describing an entry without a warrant. The context strongly implies, however, that the court was describing the extent of authority in executing the King's writ. This reading is confirmed by the phrase "either to arrest him, or to do *other* execution of the K.'s process" and by the further point that notice was necessary because the owner may "not know of the *process*." In any event, the passage surely cannot be said unambiguously to endorse warrantless entries.

The common-law commentators disagreed sharply on the subject.[35] Three distinct views were expressed. Lord Coke, ***594** widely ****1384** recognized by the American colonists "as the greatest authority of his time on the laws of England,"[36] clearly viewed a warrantless entry for the purpose of arrest to be illegal.[37] ***595** Burn, Foster, and Hawkins agreed,[38] as did East and Russell, though the latter two qualified their opinions by stating that if an entry to arrest was made without a warrant, the officer was perhaps immune from liability for the trespass if the suspect was actually guilty.[39] Blackstone, Chitty, and Stephen took the opposite view, that entry to arrest without a warrant was legal,[40] though Stephen relied on ****1385** Blackstone who, along with Chitty, in turn relied exclusively on Hale. But Hale's view was not quite so unequivocally expressed.[41] ***596** Further, Hale appears to rely solely on a statement in an early Yearbook, quoted in *Burdett v. Abbot*, 14 East 1, 155, 104 Eng.Rep. 501, 560 (K.B.1811):[42]

> " 'that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the commonweal to take them.' "
>
> Considering the diversity of views just described, however, it is clear that the statement was never deemed authoritative. Indeed, in *Burdett*, the statement was described as an "extrajudicial opinion." *Ibid*.[43]

It is obvious that the common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places. Indeed, particularly considering the prominence of Lord Coke, the weight of authority as it appeared to the Framers was to the effect that a warrant was required, or at the minimum that there were substantial risks in proceeding without one. The common-law sources display a sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repetition of the adage that a "man's house is his castle," made it abundantly clear that both in England[44] ***597** and in the Colonies "the freedom of one's house" was one of the most vital elements of English liberty.[45]

**1386 Thus, our study of the relevant common law does not provide the same guidance that was present in *Watson*. Whereas *598 the rule concerning the validity of an arrest in a public place was supported by cases directly in point and by the unanimous views of the commentators, we have found no direct authority supporting forcible entries into a home to make a routine arrest and the weight of the scholarly opinion is somewhat to the contrary. Indeed, the absence of any 17th- or 18th-century English cases directly in point, together with the unequivocal endorsement of the tenet that "a man's house is his castle," strongly suggests that the prevailing practice was not to make such arrests except in hot pursuit or when authorized by a warrant. Cf. *Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145. In all events, the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted.

B

A majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries;[46] 15 States clearly *599 prohibit them, though 3 States do so on federal constitutional grounds alone;[47] and 11 States have apparently taken no position on the question.[48]

**1387 But these current figures reflect a significant decline during the last decade in the number of States permitting warrantless entries for arrest. Recent dicta in this Court raising questions about the practice, see n. 1, *supra*, and Federal Courts of Appeals' decisions on point, see n. 4, *supra*, have led state courts to focus on the issue. Virtually all of the state courts that have had to confront the constitutional issue directly have held warrantless entries into the home to arrest to be invalid in the absence of exigent circumstances. See nn. 2, 3, *supra*. Three state courts have relied on Fourth Amendment *600 grounds alone, while seven have squarely placed their decisions on both federal and state constitutional grounds.[49] A number of other state courts, though not having had to confront the issue directly, have recognized the serious nature of the constitutional question.[50] Apparently, only the Supreme Court of Florida and the New York Court of Appeals in this case have expressly upheld warrantless entries to arrest in the face of a constitutional challenge.[51]

A longstanding, widespread practice is not immune from constitutional scrutiny. But neither is it to be lightly brushed aside. This is particularly so when the constitutional standard is as amorphous as the word "reasonable," and when custom and contemporary norms necessarily play such a large role in the constitutional analysis. In this case, although the weight of state-law authority is clear, there is by no means the kind of virtual unanimity on this question that was present in *United States v. Watson*, with regard to warrantless arrests in public places. See 423 U.S., at 422–423, 96 S.Ct., at 827–828. Only 24 of the 50 States currently sanction warrantless entries into the home to arrest, see nn. 46–48, *supra*, and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate. Seven state courts have recently held that warrantless home arrests violate their respective *State* Constitutions. See n. 3, *supra*. That is significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this Court.[52] This heightened degree of immutability underscores the depth of the principle underlying the result.

*601 C

No congressional determination that warrantless entries into the home are "reasonable" has been called to our attention. None of the federal statutes cited in the *Watson* opinion reflects any such legislative judgment.[53] Thus, that support for the *Watson* holding finds no counterpart in this case.

Mr. Justice POWELL, concurring in *United States v. Watson, supra*, at 429, 96 S.Ct., at 830, stated:

> "But logic sometimes must defer to history and experience. The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests [in public places]."

In this case, however, neither history nor this Nation's experience requires us to disregard **1388 the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.[54]

*602 IV

The parties have argued at some length about the practical consequences of a warrant requirement as a precondition to a felony arrest in the home.[55] In the absence of any evidence that effective law enforcement has suffered in those States

that already have such a requirement, see nn. 3, 47, *supra*, we are inclined to view such arguments with skepticism. More fundamentally, however, such arguments of policy must give way to a constitutional command that we consider to be unequivocal.

Finally, we note the State's suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable ***603** to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Because no arrest warrant was obtained in either of these cases, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice BLACKMUN, concurring.

I joined the Court's opinion in *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), upholding, on probable cause, the warrantless arrest in a public place. I, of course, am still of the view that the decision in *Watson* is correct. The Court's balancing of the competing governmental and individual interests properly occasioned that result. Where, however, the warrantless arrest is in the suspect's home, that same balancing requires that, absent exigent circumstances, the result be the other way. The suspect's interest in the sanctity of his home then outweighs the governmental interests.

I therefore join the Court's opinion, firm in the conviction that the result in *Watson* and the result here, although opposite, are fully justified by history and by the Fourth Amendment.

****1389** Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, dissenting.

The Court today holds that absent exigent circumstances officers may never enter a home during the daytime to arrest for a dangerous felony unless they have first obtained a warrant. This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries, ***604** finds little or no support in the common law or in the text and history of the Fourth Amendment. I respectfully dissent.

I

As the Court notes, *ante*, at 1382–1383, the common law of searches and seizures, as evolved in England, as transported to the Colonies, and as developed among the States, is highly relevant to the present scope of the Fourth Amendment. *United States v. Watson*, 423 U.S. 411, 418–422, 96 S.Ct. 820, 825–827, 46 L.Ed.2d 598 (1976); *id.*, at 425, 429, 96 S.Ct., at 828–830 (POWELL, J., concurring); *Gerstein v. Pugh*, 420 U.S. 103, 111, 114, 95 S.Ct. 854, 861–863, 43 L.Ed.2d 54 (1975); *Carroll v. United States*, 267 U.S. 132, 149–153, 45 S.Ct. 280, 283–285, 69 L.Ed. 543 (1925); *Bad Elk v. United States*, 177 U.S. 529, 534–535, 20 S.Ct. 729, 731, 44 L.Ed. 874 (1900); *Boyd v. United States*, 116 U.S. 616, 622–630, 6 S.Ct. 524, 527–532, 29 L.Ed. 746 (1886); *Kurtz v. Moffitt*, 115 U.S. 487, 498–499, 6 S.Ct. 148, 151–152, 29 L.Ed. 459 (1885). Today's decision virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment, by proclaiming for the first time a rigid warrant requirement for all nonexigent home arrest entries.

A

As early as the 15th century the common law had limited the Crown's power to invade a private dwelling in order to arrest. A Year Book case of 1455 held that in civil cases the sheriff could not break doors to arrest for debt or trespass, for the arrest was then only in the private interests of a party. Y.B. 13 Edw. IV, 9a. To the same effect is *Semayne's Case*, 5 Co.Rep. 91a, 77 Eng.Rep. 194 (K.B.1603). The holdings of these cases were condensed in the maxim that "every man's house is his castle." H. Broom, Legal Maxims * 321–329.

However, this limitation on the Crown's power applied only to private civil actions. In cases directly involving the Crown, the rule was that "[t]he king's keys unlock all doors." Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 798, 800 (1924). The Year Book case cited above stated a different rule for criminal cases: for a felony, or suspicion of felony, one may break into the dwelling house to take the felon, for ***605** it is the common weal and to the interest of the King to take him. Likewise, *Semayne's Case* stated in dictum:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." 5 Co.Rep., at 91b, 77 Eng.Rep., at 195.

Although these cases established the Crown's power to enter a dwelling in criminal cases, they did not directly address the question of whether a constable could break doors to arrest without authorization by a warrant. At common law, the constable's office was two fold. As conservator of the peace, he possessed, *virtute officii*, a "great original and inherent authority with regard to arrests," 4 W. Blackstone, Commentaries * 292 (hereinafter Blackstone), and could "without any other warrant but from [himself] arrest felons, and those that [were] probably suspected of felonies," 2 M. Hale, Pleas of the Crown 85 (1736) (hereinafter Hale); see *United States v. Watson, supra,* 423 U.S. at 418–419, 96 S.Ct. 825. Second, as a subordinate public official, the constable performed ministerial tasks under the authorization and direction of superior officers. See 1 R. Burn, The Justice of the Peace and Parish Officer 295 (6th ed. 1758) (hereinafter Burn); 2 W. Hawkins, Pleas of ****1390** the Crown 130–132 (6th ed. 1787) (hereinafter Hawkins). It was in this capacity that the constable executed warrants issued by justices of the peace. The warrant authorized the constable to take actions beyond his inherent powers.[1] It also ensured that he actually carried out his instructions, by giving him clear notice of his duty, for the breach of which he could be punished, 4 Blackstone * 291; 1 Burn 295; 2 Hale 88, and by relieving him from civil liability even if probable cause to ***606** arrest were lacking, 4 Blackstone * 291; 1 Burn 295–296; M. Dalton, The Country Justice 579 (1727 ed.) (hereinafter Dalton); 2 Hawkins 132–133. For this reason, warrants were sometimes issued even when the act commanded was within the constable's inherent authority. Dalton 576.

As the Court notes, commentators have differed as to the scope of the constable's inherent authority, when not acting under a warrant, to break doors in order to arrest. Probably the majority of commentators would permit arrest entries on probable suspicion even if the person arrested were not in fact guilty. 4 Blackstone * 292; 1 Burn 87–88;[2] 1 J. Chitty, Criminal Law 23 (1816) (hereinafter Chitty); Dalton 426; 1 Hale 583; 2 *id.,* at 90–94. These authors, in short, would have permitted the type of home arrest entries that occurred in the present cases. The inclusion of Blackstone in this list is particularly significant in light of his profound impact on the minds of the colonists at the time of the framing of the Constitution and the ratification of the Bill of Rights.

A second school of thought, on which the Court relies, held that the constable could not break doors on mere "bare suspicion." M. Foster, Crown Law 321 (1762); 2 Hawkins 139; 1 E. East, Pleas of the Crown 321–322 (1806); 1 W. Russell, Treatise on Crimes and Misdemeanors 745 (1819) (hereinafter Russell). Cf. 4 E. Coke, Institutes * 177. Although this doctrine ***607** imposed somewhat greater limitations on the constable's inherent power, it does not support the Court's hard-and-fast rule against warrantless nonexigent home entries upon probable cause. East and Russell state explicitly what Foster and Hawkins imply: although mere "bare suspicion" will not justify breaking doors, the constable's action would be justifiable if the person arrested were *in fact* guilty of a felony. These authorities can be read as imposing a somewhat more stringent requirement of probable cause for arrests in the home than for arrests elsewhere. But they would not bar nonexigent, warrantless home arrests in all circumstances, as the Court does today. And Coke is flatly contrary to the Court's rule requiring a warrant, since he believed that even a warrant would not justify an arrest entry until the suspect had been indicted.

Finally, it bears noting that the doctrine against home entries on bare suspicion developed in a period in which the validity of *any* arrest on bare suspicion—even one occurring outside the home—was open to question. Not until Lord Mansfield's decision in *Samuel v. Payne*, 1 Doug. 359, 99 Eng.Rep. 230 (K.B.1780), was it definitively established that the constable could arrest on suspicion even if it turned out that no ****1391** felony had been committed. To the extent that the commentators relied on by the Court reasoned from any general rule against warrantless arrests based on bare suspicion, the rationale for their position did not survive *Samuel v. Payne.*

B

The history of the Fourth Amendment does not support the rule announced today. At the time that Amendment was adopted the constable possessed broad inherent powers to arrest. The limitations on those powers derived, not from a warrant "requirement," but from the generally ministerial nature of the constable's office at common law. Far from restricting the constable's arrest power, the institution of the ***608** warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.

In fact, it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers' inherent authority, that precipitated the Fourth Amendment. That Amendment grew out of colonial opposition to the infamous general warrants known as writs of assistance, which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be. *United States v. Chadwick*, 433 U.S. 1, 7–8, 97 S.Ct. 2476, 2481–2482, 53 L.Ed.2d 538 (1977); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–78 (1937) (hereinafter Lasson). The writs did not specify where searches could occur and they remained effective throughout the sovereign's lifetime. *Id.*, at 54. In effect, the writs placed complete discretion in the hands of executing officials. Customs searches of this type were beyond the inherent power of common-law officials and were the subject of court suits when performed by colonial customs agents not acting pursuant to a writ. *Id.* at 55.

The common law was the colonists' ally in their struggle against writs of assistance. Hale and Blackstone had condemned general warrants, 1 Hale 580; 4 Blackstone * 291, and fresh in the colonists' minds were decisions granting recovery to parties arrested or searched under general warrants on suspicion of seditious libel. *Entick v. Carrington*, 19 How.St.Tr. 1029, 95 Eng.Rep. 807 (K.B.1765); *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (K.B.1763); *Wilkes v. Wood*, 19 How.St.Tr. 1153, 98 Eng.Rep. 489 (K.B.1763). When James Otis, Jr., delivered his courtroom oration against writs of assistance in 1761, he looked to the common law in asserting that the writs, if not construed specially, were void as a ***609** form of general warrant. 2 Legal Papers of John Adams 139–144 (L. Wroth & H. Zobel eds. 1965).[3]

Given the colonists' high regard for the common law, it is indeed unlikely that the Framers of the Fourth Amendment intended to derogate from the constable's inherent common-law authority. Such an argument was rejected in the important early case of *Rohan v. Sawin*, 59 Mass. 281, 284–285 (1851):

> "It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make ****1392** searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers . . . to arrest without warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law."[4]

***610** That the Framers were concerned about warrants, and not about the constable's inherent power to arrest, is also evident from the text and legislative history of the Fourth Amendment. That provision first reaffirms the basic principle of common law, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Amendment does not here purport to limit or restrict the peace officer's inherent power to arrest or search, but rather assumes an existing right against actions in excess of that inherent power and ensures that it remain inviolable. As I have noted, it was not generally considered "unreasonable" at common law for officers to break doors in making warrantless felony arrests. The Amendment's second clause is directed at the actions of officers taken in their ministerial capacity pursuant to writs of assistance and other warrants. In contrast to the first Clause, the second Clause does purport to alter colonial practice: "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."
That the Fourth Amendment was directed towards safeguarding the rights at common law, and restricting the

warrant practice which gave officers vast new powers beyond their inherent authority, is evident from the legislative history of that provision. As originally drafted by James Madison, it was directed *only* at warrants; so deeply ingrained was the basic common-law premise that it was not even expressed:

> "The rights of the people to be secured in their persons[,] their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 452 (1789).

***611** The Committee of Eleven reported the provision as follows:

> "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized." *Id.*, at 783.

The present language was adopted virtually at the last moment by the Committee of Three, which had been appointed only to arrange the Amendments rather than to make substantive changes in them. Lasson 101. The Amendment passed the House; but "the House seems never to have consciously agreed to the Amendment in its present form." *Ibid*. In any event, because the sanctity of the common-law protections was assumed from the start, it is evident that the change made by the Committee of Three was a cautionary measure without substantive content.

In sum, the background, text, and legislative history of the Fourth Amendment demonstrate that the purpose was to restrict ****1393** the abuses that had developed with respect to warrants; the Amendment preserved common-law rules of arrest. Because it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless felony arrest, I do not believe that the Fourth Amendment was intended to outlaw the types of police conduct at issue in the present cases.

C

Probably because warrantless arrest entries were so firmly accepted at common law, there is apparently no recorded constitutional challenge to such entries in the 19th-century cases. Common-law authorities on both sides of the Atlantic, however, continued to endorse the validity of such arrests. *E. g.*, 1 J. Bishop, Commentaries on the Law of Criminal Procedure §§ 195–199 (2d ed. 1872); 1 Chitty 23; 1 J. Colby, A Practical Treatise upon the Criminal Law and Practice of the State ***612** of New York 73–74 (1868); F. Heard, A Practical Treatise on the Authority and Duties of Trial Justices, District, Police, and Municipal Courts, in Criminal Cases 135, 148 (1879); 1 Russell 745. Like their predecessors, these authorities conflicted as to whether the officer would be liable in damages if it were shown that the person arrested was not guilty of a felony. But all agreed that warrantless home entries would be permissible in at least some circumstances. None endorsed the rule of today's decision that a warrant is always required, absent exigent circumstances, to effect a home arrest.

Apparently the first official pronouncement on the validity of warrantless home arrests came with the adoption of state codes of criminal procedure in the latter 19th and early 20th centuries. The great majority of these codes accepted and endorsed the inherent authority of peace officers to enter dwellings in order to arrest felons. By 1931, 24 of 29 state codes authorized such warrantless arrest entries.[5] By 1975, 31 of 37 state codes authorized warrantless home felony arrests.[6] The American Law Institute included such authority in its model legislation in 1931 and again in 1975.[7]

The first direct judicial holding on the subject of warrantless home arrests seems to have been *Commonwealth v. Phelps*, 209 Mass. 396, 95 N.E. 868 (1911). The holding in this case that such entries were constitutional became the settled rule in the States for much of the rest of the century. See Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 798, 803 (1924). Opinions of this Court also assumed that such arrests were constitutional.[8]

***613** This Court apparently first questioned the reasonableness of warrantless nonexigent entries to arrest in *Jones v. United States*, 357 U.S. 493, 499–500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958), noting in dictum that such entries would pose a "grave constitutional question" if carried out at night.[9] In *Coolidge v. New Hampshire*, 403 U.S. 443, 480, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971), the Court stated, again in dictum:

> "[I]f [it] is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless

entry of a man's house for purposes of **1394 arrest, it might be wise to re-examine the assumption. Such a re-examination 'would confront us with a grave constitutional question, namely, whether the forcible nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he has committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.' *Jones v. United States*, 357 U.S., at 499–500, 78 S.Ct., at 1257."

Although *Coolidge* and *Jones* both referred to the special problem of warrantless entries during the nighttime,[10] it is not surprising that state and federal courts have tended to read those dicta as suggesting a broader infirmity applying to daytime entries also, and that the majority of recent decisions have been against the constitutionality of all types of warrantless, nonexigent home arrest entries. As the Court concedes,however, *614 even despite *Coolidge* and *Jones* it remains the case that

"[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries; 15 States clearly prohibited them, though 3 States do so on federal constitutional grounds alone; and 11 States have apparently taken no position on the question." *Ante*, at 1386 (footnotes omitted).

This consensus, in the face of seemingly contrary dicta from this Court, is entitled to more deference than the Court today provides. Cf. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

D

In the present cases, as in *Watson*, the applicable federal statutes are relevant to the reasonableness of the type of arrest in question. Under 18 U.S.C. § 3052, specified federal agents may "make arrests without warrants for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States, if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." On its face this provision authorizes federal agents to make warrantless arrests anywhere, including the home. Particularly in light of the accepted rule at common law and among the States permitting warrantless home arrests, the absence of any explicit exception for the home from § 3052 is persuasive evidence that Congress intended to authorize warrantless arrests there as well as elsewhere.

Further, Congress has not been unaware of the special problems involved in police entries into the home. In 18 U.S.C. § 3109, it provided that

"[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything *615 therein, to execute a search warrant, if, after notice of its authority and purpose, he is refused admittance . . . ."

See *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). In explicitly providing authority to enter when executing a search warrant, Congress surely did not intend to derogate from the officers' power to effect an arrest entry either with or without a warrant. Rather, Congress apparently assumed that this power was so firmly established either at common law or by statute that no explicit grant of arrest authority was required in § 3109. In short, although the Court purports to find no guidance in the relevant federal statutes, I believe that fairly read they authorize the type of police conduct at issue in these cases.

II

A

Today's decision rests, in large measure, on the premise that warrantless arrest entries constitute a particularly severe invasion of personal privacy. I do not dispute **1395 that the home is generally a very private area or that the common law displayed a special "reverence . . . for the individual's right of privacy in his house." *Miller v. United States, supra*, at 313, 78 S.Ct., at 1198. However, the Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere. Cf. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); *Boyd v. United States*, 116 U.S., at 630, 6 S.Ct., at 532. It is necessary in each case to assess realistically the actual extent of invasion of constitutionally protected privacy. Further, as Mr. Justice POWELL observed in *United States v. Watson, supra*, at 428, 96 S.Ct., at 830 (concurring opinion), all arrests involve serious intrusions into an individual's privacy and dignity. Yet we settled in *Watson* that the intrusiveness of a public arrest is not enough to mandate the obtaining of a warrant. The inquiry in the

present case, therefore, is whether the incremental ***616** intrusiveness that results from an arrest's being made *in the dwelling* is enough to support an inflexible constitutional rule requiring warrants for such arrests whenever exigent circumstances are not present.

Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, absent exigent circumstances, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors.[11] Further, it seems generally accepted that entries could be made only during daylight hours.[12] And, in my view, the officer entering to arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of the entry.[13]

These four restrictions on home arrests—felony, knock and announce, daytime, and stringent probable cause—constitute powerful and complementary protections for the privacy interests associated with the home. The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most ***617** serious crimes. The knock-and-announce and daytime requirements protect individuals against the fear, humiliation, and embarrassment of being aroused from their beds in states of partial or complete undress. And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling. The stringent probable-cause requirement would help ensure against the possibility that the police would enter when the suspect was not home, and, in searching for him, frighten members of the family or ransack parts of the house, seizing items in plain view. In short, these requirements, taken together, permit an individual suspected of a serious crime to surrender at the front door of his dwelling and thereby avoid most of the ****1396** humiliation and indignity that the Court seems to believe necessarily accompany a house arrest entry. Such a front-door arrest, in my view, is no more intrusive on personal privacy than the public warrantless arrests which we found to pass constitutional muster in *Watson*.[14]

All of these limitations on warrantless arrest entries are satisfied on the facts of the present cases. The arrests here were for serious felonies—murder and armed robbery—and both occurred during daylight hours. The authorizing statutes required that the police announce their business and demand entry; neither Payton nor Riddick makes any contention that these statutory requirements were not fulfilled. And it is not argued that the police had no probable cause to believe that both Payton and Riddick were in their dwellings at the time of the entries. Today's decision, therefore, sweeps away any possibility that warrantless home entries might be permitted in some limited situations other than those in which ***618** exigent circumstances are present. The Court substitutes, in one sweeping decision, a rigid constitutional rule in place of the common-law approach, evolved over hundreds of years, which achieved a flexible accommodation between the demands of personal privacy and the legitimate needs of law enforcement.

A rule permitting warrantless arrest entries would not pose a danger that officers would use their entry power as a pretext to justify an otherwise invalid warrantless search. A search pursuant to a warrantless arrest entry will rarely, if ever, be as complete as one under authority of a search warrant. If the suspect surrenders at the door, the officers may not enter other rooms. Of course, the suspect may flee or hide, or may not be at home, but the officers cannot anticipate the first two of these possibilities and the last is unlikely given the requirement of probable cause to believe that the suspect is at home. Even when officers are justified in searching other rooms, they may seize only items within the arrestee's position or immediate control or items in plain view discovered during the course of a search reasonably directed at discovering a hiding suspect. Hence a warrantless home entry is likely to uncover far less evidence than a search conducted under authority of a search warrant. Furthermore, an arrest entry will inevitably tip off the suspects and likely result in destruction or removal of evidence not uncovered during the arrest. I therefore cannot believe that the police would take the risk of losing valuable evidence through a pretextual arrest entry rather than applying to a magistrate for a search warrant.

B

While exaggerating the invasion of personal privacy involved in home arrests, the Court fails to account for the danger that its rule will "severely hamper effective law enforcement," *United States v. Watson*, 423 U.S., at 431, 96 S.Ct., at 831 (POWELL, J., concurring); *Gerstein v. Pugh*, 420 U.S., at 113, 95 S.Ct., at 862. The policeman ***619** on his beat must

now make subtle discriminations that perplex even judges in their chambers. As Mr. Justice POWELL noted, concurring in *United States v. Watson, supra*, police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.

Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. ****1397** This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

The uncertainty inherent in the exigent-circumstances determination burdens the judicial system as well. In the case of searches, exigent circumstances are sufficiently unusual that this Court has determined that the benefits of a warrant outweigh the burdens imposed, including the burdens on the judicial system. In contrast, arrests recurringly involve exigent circumstances, and this Court has heretofore held that a warrant can be dispensed with without undue sacrifice in Fourth Amendment values. The situation should be no dif ferent ***620** with respect to arrests in the home. Under today's decision, whenever the police have made a warrantless home arrest there will be the possibility of "endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like," *United States v. Watson, supra*, at 423–424, 96 S.Ct., at 828.

Our cases establish that the ultimate test under the Fourth Amendment is one of "reasonableness." *Marshall v. Barlow's, Inc*., 436 U.S. 307, 315–316, 98 S.Ct. 1816, 1822, 56 L.Ed.2d 305 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 539, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967). I cannot join the Court in declaring unreasonable a practice which has been thought entirely reasonable by so many for so long. It would be far preferable to adopt a clear and simple rule: after knocking and announcing their presence, police may enter the home to make a daytime arrest without a warrant when there is probable cause to believe that the person to be arrested committed a felony and is present in the house. This rule would best comport with the common-law background, with the traditional practice in the States, and with the history and policies of the Fourth Amendment. Accordingly, I respectfully dissent.

Mr. Justice REHNQUIST, dissenting.

The Court today refers to both *Payton* and *Riddick* as involving "routine felony arrests." I have no reason to dispute the Court's characterization of these arrests, but cannot refrain from commenting on the social implications of the result reached by the Court. Payton was arrested for the murder of the manager of a gas station; Riddick was arrested for two armed robberies. If these are indeed "routine felony arrests," which culminated in convictions after trial upheld by the state courts on appeal, surely something is amiss in the process of the administration of criminal justice whereby these convictions are now set aside by this Court under the exclusionary rule which we have imposed upon the States under ***621** the Fourth and Fourteenth Amendments to the United States Constitution.

I fully concur in and join the dissenting opinion of Mr. Justice WHITE. There is significant historical evidence that we have over the years misread the history of the Fourth Amendment in connection with searches, elevating the warrant requirement over the necessity for probable cause in a way which the Framers of that Amendment did not intend. See T. Taylor, Two Studies in Constitutional Interpretation 38–50 (1969). But one may accept all of that as *stare decisis*, and still feel deeply troubled by the transposition of these same errors into the area of actual arrests of felons within their houses with respect to ****1398** whom there is probable cause to suspect guilt of the offense in question.

All Citations

445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See also *United States v. Watson*, 423 U.S., at 433, 96 S.Ct., at 832 (STEWART, J., concurring); *id.*, at 432–433, 96 S.Ct., at 832 (POWELL, J., concurring); *Gerstein v. Pugh*, 420 U.S. 103, 113, n. 13, 95 S.Ct. 854, 863 n. 13, 43 L.Ed.2d 54; *Coolidge v. New Hampshire*, 403 U.S. 443, 474–481, 91 S.Ct. 2022, 2042–2045, 29 L.Ed.2d 564; *Jones v. United States*, 357 U.S. 493, 499–500, 78 S.Ct. 1253, 1257–1258, 2 L.Ed.2d 1514. Cf. *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300.

2 See *State v. Perez*, 277 So.2d 778 (1973), cert. denied, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 468.

3 See *State v. Cook*, 115 Ariz. 188, 564 P.2d 877 (1977) (resting on both state and federal constitutional provisions); *People v. Ramey*, 16 Cal.3d 263, 545 P.2d 1333 (1976), cert. denied, 429 U.S. 929, 97 S.Ct. 335, 50 L.Ed.2d 299 (state and federal); *People v. Moreno*, 176 Colo. 488, 491 P.2d 575 (1971) (federal only); *State v. Jones*, 274 N.W.2d 273 (Iowa 1979) (state and federal); *State v. Platten*, 225 Kan. 764, 594 P.2d 201 (1979) (state and federal); *Commonwealth v. Forde*, 367 Mass. 798, 329 N.E.2d 717 (1975) (federal only); *State v. Olson*, 287 Or. 157, 598 P.2d 670 (1979) (state and federal); *Commonwealth v. Williams*, 483 Pa. 293, 396 A.2d 1177 (1978) (federal only); *State v. McNeal*, 251 S.E.2d 484 (W.Va.1978) (state and federal); *Laasch v. State*, 84 Wis.2d 587, 267 N.W.2d 278 (1978) (state and federal).

4 Compare *United States v. Reed*, 572 F.2d 412 (CA2 1978), cert. denied, *sub nom. Goldsmith v. United States*, 439 U.S. 913, 99 S.Ct. 283, 58 L.Ed.2d 259; *United States v. Killebrew*, 560 F.2d 729 (CA6 1977); *United States v. Shye*, 492 F.2d 886 (CA6 1974); *United States v. Houle*, 603 F.2d 1297 (CA8 1979); *United States v. Prescott*, 581 F.2d 1343 (CA9 1978); *Dorman v. United States*, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970), with *United States v. Williams*, 573 F.2d 348 (CA5 1978); *United States ex rel. Wright v. Woods*, 432 F.2d 1143 (CA7 1970), cert. denied, 401 U.S. 966, 91 S.Ct. 983, 28 L.Ed.2d 248. Three other Circuits have assumed without deciding that warrantless home arrests are unconstitutional. *United States v. Bradley*, 455 F.2d 1181 (CA1 1972); *United States v. Davis*, 461 F.2d 1026 (CA3 1972); *Vance v. North Carolina*, 432 F.2d 984 (CA4 1970). And one Circuit has upheld such an arrest without discussing the constitutional issue. *Michael v. United States*, 393 F.2d 22 (CA10 1968).

5 A thorough search of the apartment resulted in the seizure of additional evidence tending to prove Payton's guilt, but the prosecutor stipulated that the officers' warrantless search of the apartment was illegal and that all the seized evidence except the shell casing should be suppressed.

> "MR. JACOBS: There's no question that the evidence that was found in bureau drawers and in the closet was illegally obtained. I'm perfectly willing to concede that, and I do so in my memorandum of law. There's no question about that." App. 4.

6 "At the time in question, January 15, 1970, the law applicable to the police conduct related above was governed by the Code of Criminal Procedure. Section 177 of the Code of Criminal Procedure as applicable to this case recited: 'A peace officer may, without a warrant, arrest a person, . . . 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.' Section 178 of the Code of Criminal Procedure provided: 'To make an arrest, as provided in the last section [177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.' " 84 Misc.2d 973, 974–975, 376 N.Y.S.2d 779, 780 (Sup.Ct., Trial Term, N.Y. County, 1974).

7 "Although Detective Malfer knocked on the defendant's door, it is not established that at this time he announced that his purpose was to arrest the defendant. Such a declaration of purpose is unnecessary when exigent circumstances are present (*People v. Wojciechowski*, 31 A.D.2d 658, 296 N.Y.S.2d 524; *People v. McIlwain*, 28 A.D.2d 711, 281 N.Y.S.2d 218).

> " 'Case law has made exceptions from the statute or common-law rules for exigent circumstances which may allow dispensation with the notice . . . It has also been held or suggested that notice is not required if there is reason to believe

that it will allow an escape or increase unreasonably the physical risk to the police or to innocent persons.' (*People v. Floyd*, 26 N.Y.2d 558, 562, 312 N.Y.S.2d 193, 260 N.E.2d 815.)

"The facts of this matter indicate that a grave offense had been committed; that the suspect was reasonably believed to be armed and could be a danger to the community; that a clear showing of probable cause existed and that there was strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended. From this fact the court finds that exigent circumstances existed to justify noncompliance with section 178. The court holds, therefore, that the entry into defendant's apartment was valid." *Id.*, at 975, 376 N.Y.S.2d, at 780–781.

8 55 A.D.2d 859, 390 N.Y.S.2d 769 (1976).

9 New York Crim.Proc.Law § 140.15(4) (McKinney 1971) provides, with respect to arrest without a warrant:

"In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

Section 120.80, governing execution of arrest warrants, provides in relevant part:

"4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

"(a) Result in the defendant escaping or attempting to escape; or

"(b) Endanger the life or safety of the officer or another person; or

"(c) Result in the destruction, damaging or secretion of material evidence.

"5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary."

10 App. 63–66.

11 56 A.D.2d 937, 392 N.Y.S.2d 848 (1977). One justice dissented on the ground that the officers' failure to announce their authority and purpose before entering the house made the arrest illegal as a matter of state law.

12 45 N.Y.2d, at 309–310, 408 N.Y.S.2d, at 399, 380 N.E.2d, at 228.

13 The majority continued:

"In the case of the search, unless appropriately limited by the terms of a warrant, the incursion on the householder's domain normally will be both more extensive and more intensive and the resulting invasion of his privacy of greater magnitude than what might be expected to occur on an entry made for the purpose of effecting his arrest. A search by its nature contemplates a possibly thorough rummaging through possessions, with concurrent upheaval of the owner's chosen or random placement of goods and articles and disclosure to the searchers of a myriad of personal items and details which he would expect to be free from scrutiny by uninvited eyes. The householder by the entry and search of his residence is stripped bare, in greater or lesser degree, of the privacy which normally surrounds him in his daily living, and, if he should be absent, to an extent of which he will be unaware.

"Entry for the purpose of arrest may be expected to be quite different. While the taking into custody of the person of the householder is unquestionably of grave import, there is no accompanying prying into the area of expected privacy attending his possessions and affairs. That personal seizure alone does not require a warrant was established by *United States v. Watson* (423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, *supra*), which upheld a warrantless arrest made in a public place. In view of the minimal intrusion on the elements of privacy of the home which results from entry on

the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence. To the extent that an arrest will always be distasteful or offensive, there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable.

"At least as important, and perhaps even more so, in concluding that entries to make arrests are not 'unreasonable'—the substantive test under the constitutional proscriptions—is the objective for which they are made, viz., the arrest of one reasonably believed to have committed a felony, with resultant protection to the community. The 'reasonableness' of any governmental intrusion is to be judged from two perspectives—that of the defendant, considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action. The community's interest in the apprehension of criminal suspects is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow nonrecovery." *Id.*, at 310–311, 408 N.Y.S.2d, at 399, 380 N.E.2d, at 229.

14 "The apparent historical acceptance in the English common law of warrantless entries to make felony arrests (2 Hale, Historia Placitorum Coronae, History of Pleas of Crown [1st Amer. ed., 1847], p. 92; Chitty, Criminal Law [3d Amer., from 2d London ed., 1836] 22–23), and the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881 argue against a holding of unconstitutionality and substantiate the reasonableness of such procedure. . . .

"Nor do we ignore the fact that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest. The American Law Institute's Model Code of Pre-Arraignment Procedure makes similar provision in section 120.6, with suggested special restrictions only as to nighttime entries." *Id.*, at 311–312, 408 N.Y.S.2d, at 400, 380 N.E.2d, at 229–230 (footnotes omitted).

15 *Id.*, at 315, 408 N.Y.S.2d, at 403, 380 N.E.2d, at 232 (Wachtler, J., dissenting).

16 *Id.*, at 319–320, 408 N.Y.S.2d, at 406, 380 N.E.2d, at 235 (Cooke, J., dissenting).

17 "Although the point has not been squarely adjudicated since *Coolidge* [*v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564,] (see *United States v. Watson*, 423 U.S. 411, 418, n. 6, 96 S.Ct. 820 [825 n. 6], 46 L.Ed.2d 598), its proper resolution, it is submitted, is manifest. At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed (see, *e. g., Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524 [532,] 29 L.Ed. 746; *Camara v. Municipal Ct.*, 387 U.S. 523, 528, 87 S.Ct. 1727 [, 1730,] 18 L.Ed.2d 930). To achieve that end, the framers of the amendment interposed the warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field, but rather with a detached and disinterested Magistrate (*McDonald v. United States*, 335 U.S. 451, 455–456, 69 S.Ct. 191, [193,] 93 L.Ed. 153; *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, [368–369,] 92 L.Ed. 436). Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control any contemplated entry, regardless of the purpose for which that entry is sought. By definition, arrest entries must be included within the scope of the amendment, for while such entries are for persons, not things, they are, nonetheless, violations of privacy, the chief evil that the Fourth Amendment was designed to deter (*Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, [682,] 5 L.Ed.2d 734)." *Id.*, at 320–321, 408 N.Y.S.2d, at 406, 380 N.E.2d, at 235–236 (Cooke, J., dissenting).

18 *Id.*, at 324, 408 N.Y.S.2d, at 409, 380 N.E.2d, at 238 (Cooke, J., dissenting).

19 Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court. See *Raley v. Ohio*, 360 U.S. 423, 436, 79 S.Ct. 1257, 1265, 3 L.Ed.2d 1344.

20 45 N.Y.2d, at 308, 408 N.Y.S.2d, at 398, 380 N.E.2d, at 228. Judge Wachtler in dissent, however, would have upheld the warrantless entry in *Payton's* case on exigency grounds, and therefore agreed with the majority's refusal to suppress the shell casing. See *id.*, at 315, 408 N.Y.S.2d, at 403, 380 N.E.2d, at 232.

21 "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." ' *Boyd v. United States*, 116 U.S. 616, 625, 6 S.Ct. 524, 529, 29 L.Ed. 746." *Stanford v. Texas*, 379 U.S. 476, 481–482, 85 S.Ct. 506, 510, 13 L.Ed.2d 431.

See also J. Landynski, Search and Seizure and the Supreme Court 19–48 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13–78 (1937); T. Taylor, Two Studies in Constitutional Interpretation 19–44 (1969).

22 " 'The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.' Annals of Cong., 1st Cong., 1st sess., p. 452." Lasson, *supra*, at 100, n. 77.

23 "The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." Lasson, *supra*, at 103. (Footnote omitted.)

24 As Mr. Justice Jackson so cogently observed in *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 369, 92 L.Ed. 436:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (Footnotes omitted.)

25 As the Court stated in *Coolidge v. New Hampshire* :

"Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'

—

"It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' " 403 U.S., at 474–475, 477–478, 91 S.Ct., at 2042, 2044.

Although Mr. Justice Harlan joined this portion of the Court's opinion, he expressly disclaimed any position on the issue now before us. *Id.*, at 492, 91 S.Ct., at 2051 (concurring opinion).

26 As Mr. Justice Harlan wrote for the Court:

"It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145; *Taylor v. United States*, 286 U.S. 1, 6, 52 S.Ct. 466, 467, 76 L.Ed. 951. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, *e. g., Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436; *McDonald v. United States*, 335 U.S. 451, 455, 69 S.Ct. 191, 193, 93 L.Ed. 153; cf. *Giordenello v. United States*, [357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503]. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant. Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Jones v. United States*, 357 U.S., at 497–498, 78 S.Ct., at 1256 (footnote omitted).

27 See generally Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St.L.J. 56 (1974).

28 See n. 4, *supra*.

29 See, *e. g.*, the facts in *Payton's* case, n. 5, *supra*.

30 "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest. 10 Halsbury's Laws of England 344–345 (3d ed. 1955); 4 W. Blackstone, Commentaries * 292; 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Pleas of the Crown * 72–74; Wilgus, Arrests Without a Warrant, 22 Mich.L.Rev. 541, 547–550, 686–688 (1924); *Samuel v. Payne* 1 Doug. 359, 99 Eng.Rep. 230 (K.B.1780); *Beckwith v. Philby*, 6 Barn. & Cress. 635, 108 Eng.Rep. 585 (K.B.1827)." 423 U.S., at 418–419, 96 S.Ct., at 825.

31 "The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization." *Id.*, at 421–422, 96 S.Ct., at 826.

32 "This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against conditioning warrantless arrest power on proof of exigent circumstances." *Id.*, at 423, 96 S.Ct., at 827.

The Court added in a footnote:

"Until 1951, 18 U.S.C. § 3052 conditioned the warrantless arrest powers of the agents of the Federal Bureau of Investigation on there being reasonable grounds to believe that the person would escape before a warrant could be obtained. The Act of Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239, eliminated this condition." *Id.*, at 423, n. 13, 96 S.Ct., at 827.

33 There are important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions. For example, whereas the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime, see *Gouled v. United States*, 255 U.S. 298, 309, 41 S.Ct. 261, 265, 65 L.Ed. 647, the category of property that may be seized, consistent with the Fourth Amendment, has been expanded to include mere evidence.

Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. Also, the prohibitions of the Amendment have been extended to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, even though the earlier law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects. See *Olmstead v. United States*, 277 U.S. 438, 466, 48 S.Ct. 564, 72 L.Ed.2d 944. Thus, this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.

34 The issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal. See *United States v. Crews*, 445 U.S. 463, at 474, 100 S.Ct. 1244, at 1251, 63 L.Ed.2d 537.

35 Those modern commentators who have carefully studied the early works agree with that assessment. See ALI, A Model Prop. Off. Draft Code of Pre-Arraignment Procedure 308 (1975) (hereinafter ALI Code); Blakey, The Rule of Announcement and Unlawful Entry: *Miller v. United States* and *Ker v. California*, 112 U.Pa.L.Rev. 499, 502 (1964); Comment, Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle, 82 Dick.L.Rev. 167, 168, n. 5 (1977); Note, The Constitutionality of Warrantless Home Arrests, 78 Colum.L.Rev. 1550, 1553 (1978) ("the major common-law commentators appear to be equally divided on the requirement of a warrant for a home arrest") (hereinafter Columbia Note); Recent Development, Warrantless Arrests by Police Survive a Constitutional Challenge—*United States v. Watson*, 14 Am.Crim.L.Rev. 193, 210–211 (1976). Accord, *Miller v. United States*, 357 U.S. 301, 307–308, 78 S.Ct. 1190, 1194–1195, 2 L.Ed.2d 1332; *Accarino v. United States*, 85 U.S.App.D.C. 394, 402, 179 F.2d 456, 464 (1949).

36 "Foremost among the titles to be found in private libraries of the time were the works of Coke, the great expounder of Magna Carta, and similar books on English liberties. The inventory of the library of Arthur Spicer, who died in Richmond County, Virginia, in 1699, included Coke's *Institutes*, another work on Magna Carta, and a 'Table to Cooks Reports.' The library of Colonel Daniel McCarty, a wealthy planter and member of the Virginia House of Burgesses who died in Westmoreland County in 1724, included Coke's *Reports*, an abridgment of Coke's *Reports, Coke on Littleton*, and 'Rights of the Comons of England.' Captain Charles Colston, who died in Richmond County, Virginia, in 1724, and Captain Christopher Cocke, who died in Princess Anne County, Virginia, in 1716, each had copies of Coke's *Institutes*. That these libraries were typical is suggested by a study of the contents of approximately one hundred private libraries in colonial Virginia, which revealed that the most common law title found in these libraries was Coke's *Reports*. They were typical of other colonies, too. Another study, of the inventories of forty-seven libraries throughout the colonies between 1652 and 1791, found that of all the books on either law or politics in these libraries the most common was Coke's *Institutes* (found in 27 of the 47 libraries). The second most common title was a poor second; it was Grotius' *War and Peace*, found in 16 of the libraries (even Locke's *Two Treatises on Government* appeared in only 13 of the libraries).

> "The popularity of Coke in the colonies is of no small significance. Coke himself had been at the eye of the storm in the clashes between King and Parliament in the early seventeenth century which did so much to shape the English Constitution. He rose to high office at the instance of the Crown—he was Speaker of the House of Commons and Attorney General under Queen Elizabeth, and James I made Coke first his Chief Justice of Common Pleas and then his Chief Justice of King's Bench. During this time Coke gained an unchallenged position as the greatest authority of his time on the laws of England, frequently burying an opponent with learned citations from early Year Books. Having been a champion of the Crown's interests, Coke (in a change of role that recalls the metamorphosis of Thomas à Becket) became instead the defender of the common law." A. Howard, The Road From Runnymede 118–119 (1968). (Footnotes omitted.)

37 "[N]either the Constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony. . . . " 4 E. Coke, Institutes * 177. Coke also was of the opinion that only a King's indictment could justify the breaking of doors to effect an arrest founded on suspicion, and that not even a warrant issued by a justice of the peace was sufficient authority. *Ibid.* He was apparently alone in that view, however.

38 1 R. Burn, The Justice of the Peace and Parish Officer 87 (6th ed. 1758) ("where one lies under probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. *Hawkins* says) that no one can justify the breaking open doors in order to apprehend him . . . "); M. Foster, Crown Law 321 (1762); 2 W. Hawkins, Pleas of the Crown 139 (6th ed. 1787): "But where one lies under a probable suspicion only, and is not indicted, it seems the better (*d*) opinion at

this day, That no one can justify the breaking open doors in order to apprehend him." The contrary opinion of Hale, see n. 41, *infra*, is acknowledged among the authorities cited in the footnote (*d*).

39 1 E. East, Pleas of the Crown 322 (1806) ("[Y]et a bare suspicion of guilt against the party will not warrant a proceeding to this extremity [the breaking of doors], unless the officer be armed with a magistrate's warrant grounded on such suspicion. It will at least be at the peril of proving that the party so taken on suspicion was guilty."); 1 W. Russell, A Treatise on Crimes and Misdemeanors 745 (1819) (similar rule).

40 4 W. Blackstone, Commentaries * 292; 1 J. Chitty, A Practical Treatise on the Criminal Law 23 (1816); 4 H. Stephen, New Commentaries on the Laws of England 359 (1845).

41 1 M. Hale, Pleas of the Crown 583 (1736); 2 *id.*, at 90–95. At page 92 of the latter volume, Hale writes that in the case where the constable suspects a person of a felony, "if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break the door, tho he have no warrant. 13 *E.* 4. 9. *a*." Although it would appear that Hale might have meant to limit warrantless home arrests to cases of hot pursuit, the quoted passage has not typically been read that way.

42 Apparently, the Yearbook in which the statement appears has never been fully translated into English.

43 That assessment is consistent with the description by this Court of the holding of that Yearbook case in *Miller v. United States*, 357 U.S., at 307, 78 S.Ct., at 1194:

> "As early as the 13th Yearbook of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party."

44 Thus, in *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (K.B.1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortun*', without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3. Coron. 303, & 305. & 26 Ass. pl. 23. So it is held in 21 H. 7. 39. every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium*." (Footnotes omitted.)

> In the report of that case it is noted that although the sheriff may break open the door of a barn without warning to effect service of a writ, a demand and refusal must precede entry into a dwelling house. *Id.*, at 91b, n. (c), 77 Eng.Rep., at 196, n. (c): "And this privilege is confined to a man's dwelling-house, or out-house adjoining thereto, for the sheriff on a *fieri facias* may break open the door of a barn standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close. *Penton v. Brown*, 2 Keb. 698, S.C. 1 Sid. 186."

45 "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege." 2 Legal Papers of John Adams 142 (L. Wroth & H. Zobel eds. 1965).

> We have long recognized the relevance of the common law's special regard for the home to the development of Fourth Amendment jurisprudence. See, *e. g., Weeks v. United States*, 232 U.S. 383, 390, 34 S.Ct. 341, 343, 58 L.Ed. 652:
>
> "Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution, said: 'The maxim that "every man's house is his castle," is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.' 'Accordingly,' says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, 'no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases

of felony, and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon."

Although the quote from Lieber concerning warrantless arrests in the home is on point for today's cases, it was dictum in *Weeks*. For that case involved a warrantless arrest in a public place, and a warrantless search of Week's home in his absence.

46 Twenty-three States authorize such entries by statute. See Ala.Code § 15–10–4 (1975); Alaska Stat.Ann. § 12.25.100 (1972); Ark.Stat.Ann. § 43–414 (1977); Fla.Stat. § 901.19 (1979); Haw.Rev.Stat. § 803–11 (1977); Idaho Code § 19–611 (1979); Ill.Rev.Stat., ch. 38, § 107—5(d) (1971); La.Code Crim.Proc.Ann., Art. 224 (West 1967); Mich.Comp.Laws § 764.21 (1970); Minn.Stat. § 629.34 (1978); Miss.Code Ann. § 99–3–11 (1973); Mo.Rev.Stat. § 544.200 (1978); Neb.Rev.Stat. § 29–411 (1975); Nev.Rev.Stat. § 171.138 (1977); N.Y.Crim.Proc.Law §§ 140.15(4), 120.80(4), (5) (McKinney 1971); N.C.Gen.Stat. § 15A–401(e) (1978); N.D.Cent.Code § 29–06–14 (1974); Ohio Rev.Code Ann. § 2935.12 (1975); Okla.Stat., Tit. 22, § 197 (1971); S.D.Comp.Laws Ann. § 23A–3–5 (1979); Tenn.Code Ann. § 40–807 (1975); Utah Code Ann. § 77–13–12 (Repl.1978); Wash.Rev.Code § 10.31.040 (1976). One State has authorized warrantless arrest entries by judicial decision. See *Shanks v. Commonwealth*, 463 S.W.2d 312, 315 (Ky.App.1971).

A number of courts in these States, though not directly deciding the issue, have recognized that the constitutionality of such entries is open to question. See *People v. Wolgemuth*, 69 Ill.2d 154, 13 Ill.Dec. 40, 370 N.E.2d 1067 (1977), cert. denied, 436 U.S. 908, 98 S.Ct. 2243, 56 L.Ed.2d 408; *State v. Ranker*, 343 So.2d 189 (La.1977) (citing both State and Federal Constitutions); *State v. Lasley*, 306 Minn. 224, 236 N.W.2d 604 (1975), cert. denied, 429 U.S. 1077, 97 S.Ct. 820, 50 L.Ed.2d 796; *State v. Novak*, 428 S.W.2d 585 (Mo.1968); *State v. Page*, 277 N.W.2d 112 (N.D.1979); *State v. Max*, 263 N.W.2d 685 (S.D.1978).

47 Four States prohibit warrantless arrests in the home by statute, see Ga.Code §§ 27–205, 27–207 (1978) (also prohibits warrantless arrests outside the home absent exigency); Ind.Code §§ 35–1–19–4, 35–1–19–6 (1976); Mont.Code Ann. § 46–6–401 (1979) (same as Georgia); S.C.Code § 23–15–60 (1976); 1 by state common law, see *United States v. Hall*, 468 F.Supp. 123, 131, n. 16 (E.D.Tex.1979); *Moore v. State*, 149 Tex.Crim. 229, 235–236, 193 S.W.2d 204, 207 (1946); and 10 on constitutional grounds, see n. 3, *supra*.

48 Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Virginia and Wyoming. The courts of three of the above-listed States have recognized that the constitutionality of warrantless home arrest is subject to question. See *State v. Anonymous*, 34 Conn.Supp. 531, 375 A.2d 417 (Sup.Ct., App.Sess.1977); *Nilson v. State*, 272 Md. 179, 321 A.2d 301 (1974); *Palmigiano v. Mullen*, 119 R.I. 363, 377 A.2d 242 (1977).

49 See cases cited in n. 3, *supra*.

50 See cases cited in nn. 46, 48, *supra*.

51 See n. 2, *supra*.

52 See, *e. g., Herb v. Pitcairn*, 324 U.S. 117, 125–126, 65 S.Ct. 459, 462–463, 89 L.Ed. 789. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977).

53 The statute referred to in n. 32, *supra*, provides:

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. § 3052.

It says nothing either way about executing warrantless arrests in the home. See also ALI Code at 308; Columbia Note 1554–1555, n. 26.

54 There can be no doubt that Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the Colonies:

> " 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement! ' " *Miller v. United States*, 357 U.S., at 307, 78 S.Ct., at 1195.

55 The State of New York argues that the warrant requirement will pressure police to seek warrants and make arrests too hurriedly, thus increasing the likelihood of arresting innocent people; that it will divert scarce resources thereby interfering with the police's ability to do thorough investigations; that it will penalize the police for deliberate planning; and that it will lead to more injuries. Appellants counter that careful planning is possible and that the police need not rush to get a warrant, because if an exigency arises necessitating immediate arrest in the course of an orderly investigation, arrest without a warrant is permissible; that the warrant procedure will decrease the likelihood that an innocent person will be arrested; that the inconvenience of obtaining a warrant and the potential for diversion of resources is exaggerated by the State; and that there is no basis for the assertion that the time required to obtain a warrant would create peril.

1 For example, a constable could arrest for breaches of the peace committed outside his presence only under authority of a warrant. *Bad Elk v. United States*, 177 U.S. 529, 534–535, 20 S.Ct. 729, 731, 44 L.Ed. 874 (1900); 1 Burn 294; 2 Hale 90; 2 Hawkins 130.

2 The Court cites Burn for the proposition that home arrests on mere suspicion are invalid. *Ante*, at 1384, n. 38. In fact, Burn appears to be of the opposite view. Burn contrasts the case of arrests by private citizens, which cannot be justified unless the person arrested was actually guilty of felony, with that of arrests by constables:

> "But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint." 1 Burn 87–88 (emphasis in original).

Burn apparently refers to a constable's duty to act without a warrant on complaint of a citizen.

3 The Court cites Pitt's March 1763 oration in the House of Commons as indicating an "overriding respect for the sanctity of the home." *Ante*, at 1388, and n. 54. But this speech was in opposition to a proposed excise tax on cider. 15 Parliamentary History of England 1307 (1813). Nothing in it remotely suggests that Pitt objected to the constable's traditional power of warrantless entry into dwellings to arrest for felony.

4 See also *North v. People*, 139 Ill. 81, 105, 28 N.E. 966, 972 (1891) (Warrant Clause "does not abridge the right to arrest without warrant, in cases where such arrest could be lawfully made at common law before the adoption of the present constitution"); *Wakely v. Hart*, 6 Binn. 316, 319 (Pa.1814) (rules permitting arrest without a warrant are "principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an affirmance of the common law . . . ").

5 American Law Institute, Code of Criminal Procedure 254–255 (Off.Draft 1931) (hereinafter Code).

6 American Law Institute, A Model Code of Pre-Arraignment Procedure App. XI (Prop.Off.Draft 1975) (hereinafter Model Code).

7 Code §§ 21, 28; Model Code § 120.6(1).

8 See *Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948) (stating in dictum that officers could have entered hotel room without a warrant in order to make an arrest "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty") (footnote omitted); *Ker v. California*, 374 U.S. 23, 38, 83 S.Ct. 1623, 1632, 10 L.Ed.2d 726 (1963) (plurality opinion); *Sabbath v. United States*, 391 U.S. 585, 588, 88 S.Ct. 1755, 1757, 20 L.Ed.2d 828 (1968).

9 One Court of Appeals had previously held such entries unconstitutional. *Accarino v. United States*, 85 U.S.App.D.C. 394, 179 F.2d 456 (1949).

10 As I discuss *infra*, there may well be greater constitutional problems with nighttime entries.

11 *Miller v. United States*, 357 U.S. 301, 308, 78 S.Ct. 1190, 1195, 2 L.Ed.2d 1332 (1958); *Semayne's Case*, 5 Co.Rep. 91a, 77 Eng.Rep. 194 (K.B.1603); Dalton 427; 2 Hale 90; 2 Hawkins 138.

12 Model Code § 120.6(3). Cf. *Jones v. United States*, 357 U.S. 493, 499–500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443, 480, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971).

13 I do not necessarily disagree with the Court's discussion of the quantum of probable cause necessary to make a valid home arrest. The Court indicates that only an arrest warrant, and not a search warrant, is required. *Ante*, at 1388. To obtain the warrant, therefore, the officers need only show probable cause that a crime has been committed and that the suspect committed it. However, under today's decision, the officers apparently need an extra increment of probable cause when executing the arrest warrant, namely, grounds to believe that the suspect is within the dwelling. *Ibid*.

14 If the suspect flees or hides, of course, the intrusiveness of the entry will be somewhat greater; but the policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel.

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New York Official Reports

39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246

The People of the State of New York, Respondent,

v.

James Mitchell, Appellant.

Court of Appeals of New York
Argued February 11, 1976;

decided April 6, 1976

CITE TITLE AS: People v Mitchell

HEADNOTES

Crimes

warrantless search--"emergency" doctrine--hotel maid disappeared and, after her partially eaten lunch was found on sixth floor, floor on ***174** which she had last been seen, residents of hotel searched for her, shouting her name, and one then telephoned police, who checked vacant rooms, knocked on doors, inquiring as to whether occupants had seen her, conducted investigation of public areas of hotel, and then commenced room-by-room search, entering defendant's room, last to be searched on sixth floor, with passkey provided by management, and finding maid's body and hatchet in his room--motion by him to suppress evidence seized in room was properly denied--search of it was justified under "emergency" doctrine, which affords to law enforcement officials limited privilege to make warrantless search of protected area, provided they have reasonable grounds to believe there is emergency at hand and immediate need for their assistance for protection of life or property; that search is not primarily motivated by intent to arrest and seize evidence, and that there is some reasonable basis, approximating probable cause, to associate emergency with area to be searched.

(1) A hotel maid disappeared shortly after reporting for work one morning and, after her partially eaten lunch was found on the sixth floor of the hotel, the floor on which she had last been seen, several residents of the hotel searched for her, shouting her name to no avail, and one of them then telephoned the police for assistance in locating her. The police checked vacant rooms, knocked on doors, making inquiries as to whether the occupants had seen her and receiving negative responses, conducted a thorough investigation of the public areas of the hotel, and then commenced a room-by- room search. The last room to be searched on the sixth floor was that of defendant, and a detective entered it with a passkey provided by the management, noticed reddish brown stains, opened a closet door, observed feet protruding from a laundry basket, and found the maid's body and a hatchet in the basket. A motion by defendant to suppress the evidence seized in his hotel room was properly denied. The search of his room was justified under the "emergency" doctrine, which affords to law enforcement officials a limited privilege to make a warrantless search of a protected area, provided that they have reasonable grounds to believe there is an emergency at hand and an immediate need for their assistance for the protection of life or property; that the search is not primarily motivated by intent to arrest and seize evidence, and that there is some reasonable basis, approximating probable cause, to associate the emergency with the area to be searched.

People v Mitchell, 47 AD2d 1003, affirmed.

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 15, 1975, which affirmed a judgment of the Supreme Court (Joseph R. Marro, J.), rendered in New York County upon a verdict convicting defendant of murder.

POINTS OF COUNSEL

Allen S. Stim for appellant.

I. The lower courts erred in denying appellant's pretrial motion to suppress physical evidence obtained by means of an unlawful search and seizure and in affirming said denial. *(Stoner v California,* 376 US 483; *McDonald v United States,* 335 US 451; *Ker v California,* 374 US 23.) II. The lower courts erred in denying and by affirming the denial of appellant's pretrial motion to suppress the use in evidence of statements made by him to Detective O'Neill as ***175** being involuntarily made within the purview of CPL 60:45. *(People v Rodriquez,* 11 NY2d 279; *People v Siegel,* 30 AD2d 706; *Mapp v Ohio,* 367 US 643; *People v Zimmer,* 68 Misc 2d 1067,

40 AD2d 955.) III. The legal evidence adduced at the trial was not sufficient to support the verdict finding appellant guilty of the crime of murder and the judgment based thereon. IV. Reversible error was committed by the trial court in rulings concerning the admissibility of evidence. *(People v Pobliner,* 32 NY2d 356; *People v Webster,* 139 NY 73; *People v Rial,* 25 AD2d 28.)

Robert M. Morgenthau, District Attorney (Paula Van Meter, Peter L. Zimroth and *Robert M. Pitler* of counsel), for respondent.

I. Mitchell's guilt was proven beyond a reasonable doubt. II. The court properly denied Mitchell's motion to suppress the evidence seized from his hotel room. *(Wyman v James,* 400 US 309; *Camara v Municipal Ct.,* 387 US 523; *People v Sullivan,* 29 NY2d 69; *Warden v Hayden,* 387 US 294; *McDonald v United States,* 335 US 451; *United States v Barone,* 330 F2d 543; *People v Somas,* 68 Misc 2d 450; *Wayne v United States,* 318 F2d 205; *Miller v United States,* 357 US 301; *People v Gallmon,* 19 NY2d 389.) III. The court below properly denied Mitchell's motion to suppress statements made after his arrest. *(Miranda v Arizona,* 384 US 436; *People v Kaye,* 25 NY2d 139; *People v Torres,* 21 NY2d 49; *People v Cromarte,* 34 NY2d 889; *People v Gianni,* 33 NY2d 547; *People v Coons,* 31 NY2d 800; *People v Bunk,* 63 Misc 2d 645; *People v Elfe,* 37 AD2d 208; *People v Gray,* 37 AD2d 900; *People v Mirenda,* 23 NY2d 439.) IV. Photographs of the deceased, defendant's fingernail scrapings and testimony concerning the scrapings were properly admitted into evidence. *(People v Pobliner,* 32 NY2d 356; *People v De Tore,* 34 NY2d 199; *People v Ebbs,* 28 NY2d 504; *People v Lewis,* 7 AD2d 732; *Chimel v California,* 395 US 752; *Cupp v Murphy,* 412 US 291.)

OPINION OF THE COURT

Gabrielli, J.

In the late afternoon of December 30, 1972 the battered and hacked body of Saroj Bardhanabedya was found in appellant's room on the sixth floor of the Warrington Hotel in New York City. The deceased was a chambermaid in the hotel and had disappeared shortly after reporting for work at about 9:00 A.M. on the morning of her brutal demise. At that time she was observed leaving the elevator on the sixth floor of the hotel, where she had been assigned to clean vacated rooms, but was not seen alive thereafter. Mrs. Peck, a ***176** resident of the hotel, began looking for the deceased since the latter had failed to deliver some clean linens to her room as promised. She found Saroj's street clothes and partially eaten lunch on the sixth floor. Upon reporting to the desk clerk that she could not locate the maid, several residents began searching for her, shouting her name on each floor of the hotel to no avail. Another resident, one Mr. Morrsion, telephoned the police for assistance in locating the maid. Two patrolmen arrived at the hotel and agreed to assist the management in a search for the maid throughout the hotel. Initially, they checked the vacant rooms and then proceeded to knock on doors and inquire of the hotel residents whether they had seen the maid. Eventually, the two patrolmen and Mr. Morrsion reached the room occupied by the defendant. In response to their questions, he stated that he had not seen the missing maid and permitted the police officers to step into his room. After a cursory glance at the surroundings, the officers departed.

At 1:15 P.M. Detective O'Neill of the homicide squad, responding to a missing persons report, arrived at the hotel to assist in the search for Saroj. A thorough but futile investigation was conducted of the hotel basement, roof, air ducts, alleyways and an adjoining restaurant. Then, a room-by-room search of the hotel was commenced. The last room to be searched on the sixth floor was that of the defendant. Detective O'Neill entered the room with a passkey provided by the management and, looking more carefully than his fellow officers had previously, noticed reddish brown stains on the bedding, rug and bathroom wall. Finally, a closet door was opened and two human feet were observed protruding from a laundry basket. Removal of blood soaked linens which had been stuffed into the basket revealed a hatchet and the corpse of the unfortunate chambermaid.

Following the denial of his motion to suppress evidence seized in his hotel room and statements made to the police after his arrest, defendant was convicted of murder and his conviction was unanimously affirmed by the Appellate Division. On this appeal, he claims that the evidence seized in his room should be suppressed because the entry into his room violated the Fourth Amendment of the United States Constitution, having been effected without a warrant and without probable cause that he had committed a crime. Additionally, ***177** he argues that the inculpatory statements made to the police should be suppressed, even though voluntarily made after valid preinterrogation admonitions because they were the "poisoned fruits" of the illegal search of his hotel room (cf. *People v Martinez,* 37 NY2d 662).

The search of defendant's room was not interdicted by the Fourth Amendment because it was triggered in response to an emergency situation and was not motivated by the intent to apprehend and arrest him or to seize evidence.

We have recognized the general obligation of police officers to assist persons whom they reasonably believe to be in distress *(People v Gallmon,* 19 NY2d 389, 394). Furthermore, State and Federal courts have sanctioned "the right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest" as "inherent in the very nature of their duties as peace officers" *(United States v Barone,* 330 F2d 543, 545, cert den 377 US 1004; see, also, *Root v Gauper,* 438 F2d 361, 364; *Wayne v United States,* 318 F2d 205, 211-212, cert den 375 US 860; *United States v Goldenstein,* 456 F2d 1006, 1010; *State v Hardin,* 90 Nev 10; *Patrick v State,* 227 A2d 486 [Del]; *People v Roberts,* 47 Cal 2d 374; *Davis v State,* 236 Md 389; ALI Model Code of Prearraignment Procedure, 1975 Proposed Official Draft, § 260.5, pp 164- 165).

Appraising a particular situation to determine whether exigent circumstances justified a warrantless intrusion into a protected area presents difficult problems of evaluation and judgment. This difficulty is highlighted by the fact that Judges, detached from the tension and drama of the moment, must engage in reflection and hindsight in balancing the exigencies of the situation against the rights of the accused. Thus, we think it necessary to articulate some guidelines for the application of the "emergency" doctrine. The basic elements of the exception may be summarized in the following manner:

(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.

(2) The search must not be primarily motivated by intent to arrest and seize evidence.

(3) There must be some reasonable basis, approximating ***178** probable cause, to associate the emergency with the area or place to be searched.[*]

The first requisite is that the police have valid reasons for the belief that an emergency exists, a belief which must be grounded in empirical facts rather than subjective feelings (see *Root v Gauper,* 438 F2d 361, supra.; *; People v Smith,* 7 Cal 3d 282, 287). In the instant case, the maid had not been seen for hours and she had not responded when summoned. It was highly probable that she was somewhere in the hotel and obviously all of the circumstances led to the conclusion that some grave misfortune of an indeterminable nature had befallen the maid.

The second requirement is related to the first in that the protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding. Of course, the possibility that criminal agency could account for the danger may be present. Thus, one commentator has stated that the emergency doctrine includes the right to "promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property *** provided *** they [the police] do not enter with an accompanying intent to either arrest or search" (Mascolo, The Emergency Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buffalo L Rev 419, 426). Detective O'Neill testified at the suppression hearing that he had no reason to believe a crime was being committed in defendant's room when he entered; the police report of the hotel's call for assistance stated that a possible kidnapping had taken place. The Judge at the suppression hearing made the express factual finding, affirmed by the Appellate Division that "[a]t the time entry was made into defendant's room, it was more for the purpose of rendering aid to a possibly ill person than to look for evidence of a crime." This factual finding is binding upon this court (see *People v Robles,* 27 NY2d 155, 157; *People v Leonti,* 18 NY2d 384, 389). The maid's disappearance was a mystery and it was not known whether she had been stricken with some illness, suffered an accident or possibly fallen victim to a crime. Each of these three alternatives was possible. However, the primary ***179** intent in entering defendant's room and the other rooms in the hotel was to locate the maid and render assistance to her. No criminal investigation had been launched against any individual because it was not known whether a crime had in fact taken place. The primary concern was the health and safety of the maid. Therefore, even if the possibility of the involvement of criminal agency was present in the minds of the searching officers, this contingency was not the primary motivation for the search of appellant's room.

Finally, the limited privilege afforded to law enforcement officials by the emergency exception does not give them carte blanche to rummage for evidence if they believe a crime has been committed. There must be a direct relationship between the area to be searched and the emergency. In *United States v Goldenstein* (456 F2d 1006, supra.;), the police validly entered defendant's hotel room in search of him under emergency circumstances and upon not finding him there proceeded to search through his belongings. The court suppressed evidence obtained in one of the defendant's

suitcases. In some cases, there are obvious signs which connect the place to be searched with the emergency, for example, screams *(United States v Barone,* 330 F2d 543, supra.;*),* or the odor of a decaying corpse *(People v Brooks,* 7 Ill App 3d 767). In the instant case, no such apparent clues were found. Rather, an exhaustive search of the public areas of the hotel revealed nothing and pointed to the probability that the maid was in one of the rooms. Furthermore, defendant's room was the last room on the sixth floor to be searched, the very floor on which the maid was last seen and where her partially eaten lunch was found. If the police were to properly discharge their duty in locating the maid, a search of his room was imperative in light of these facts.

The conclusion is inescapable that the entry and search of defendant's room were not violative of the Fourth Amendment. We hasten to admonish, however, that this limited privilege to investigate emergencies without a search warrant is subject to judicial scrutiny. In another context, we remarked that reasonableness is the benchmark of the Fourth Amendment proscription against warrantless searches and seizures *(People v Martinez,* 37 NY2d 662, 670, supra.;). The reasonableness of police activity must always pass judicial muster according to objective, empirical criteria before the court. We have previously indicated that "[t]he trial courts are ***180** familiar with police practices and should be able to determine when an entry is in truth only for investigative purposes based on privileged grounds without any intention to make an arrest" *(People v Gallmon,* 19 NY2d 389, 394-395, supra.;).

Constitutional guarantees of privacy and sanctions against their transgression do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life (see *Wayne v United States,* 318 F2d 205, 214, supra.; [opn per Burger, J., concurring]; *Patrick v State,* 227 A2d 486, 489, supra.; [Del]). The United States Supreme Court has stated that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others" *(Warden v Hayden,* 387 US 294, 298-299).

The People have amply sustained their burden of justifying the warrantless search of defendant's room *(McDonald v United States,* 335 US 451, 456; *Root v Gauper,* 438 F2d 361). Therefore, the evidence obtained was properly admissible at his trial for murder, and, consequently, the defendant's inculpatory statements were also admissible because they were not the "fruits" of an illegal search. We see no merit to the other contentions advanced.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Breitel and Judges Jasen, Jones, Wachtler, Fuchsberg and Cooke concur.
Order affirmed.

Footnotes

* (See, e.g., Mascolo, The Emergency Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buffalo L Rev 419, 425- 429; Note, The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment, 43 Ford L Rev 571, 581-583.)

867 S.W.2d 338
Court of Criminal Appeals of Tennessee,
at Nashville.

STATE of Tennessee, Appellant,

v.

David D. BOWLING, Appellee.

Jan. 21, 1993.
|
No Permission to Appeal Applied
for to the Supreme Court.

Synopsis

In prosecution respecting hit and run accident resulting in death of victim, defendant moved to suppress evidence. The Criminal Court, Davidson County, Walter C. Kurtz, J., granted motion. State appealed. The Court of Criminal Appeals, Peay, J., held that: (1) officer's actions, of getting on his hands and knees with his head almost touching ground and looking into garage through partially raised garage door, was unconstitutional warrantless "search"; (2) inaccuracies in search warrant affidavit did not render search warrant invalid; and (3) search warrant affidavit, absent information obtained from unconstitutional search of garage, was insufficient to support probable cause for search respecting vehicle suspected to be involved in hit and run accident.

Affirmed.

Attorneys and Law Firms

***339** Charles W. Burson, Atty. Gen. and Reporter, Kathy M. Principe, Asst. Atty. Gen., Victor S. Johnson, III, Dist. Atty. Gen., James Walsh, Asst. Dist. Atty. Gen., Nashville, for appellant.

David E. High, Nashville, for appellee.

OPINION

PEAY, Judge.

This case is an appeal by the State of Tennessee pursuant to T.R.A.P. 3(c)(1) from an order granting the defendant's motion to suppress certain evidence.

Essentially four questions are raised on appeal. First, whether Officer Poteete's actions of getting down on his hands and knees with his head very near to the ground, and looking into the garage violated the defendant's reasonable expectation of privacy, constituting a warrantless search in violation of the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution; second, whether the search warrant affidavit contained reckless misrepresentations of material facts; third, whether the search warrant affidavit, absent the information attained from the contested search, would be sufficient on its face to render probable cause; and fourth, whether the appeal in this case was timely filed and, therefore, should not be dismissed. Having reviewed these matters, we conclude that the appeal should not be dismissed, and we affirm the lower court's action.

To best analyze and understand the matters raised, we must first lay a factual foundation. On March 16, 1990, Officer Lloyd Poteete, a hit and run accident investigator for the Metropolitan Nashville Police Department, responded to a hit and run fatality on Murfreesboro Road in Nashville, Tennessee. The victim was walking on the shoulder of the road when she was struck from behind and killed by a vehicle which fled the scene. At the scene of the incident, several pieces of plastic and debris common to the type used on the front of vehicles and automobile grills were recovered. One of the recovered pieces was a Ford logo. A witness at the scene also indicated that the vehicle involved in the incident was a tan or light brown colored vehicle. After further investigation Officer Poteete ascertained that the recovered pieces were from the grill of a 1983 to 1986 Ford truck or Bronco.

Other than this information, there was little with which to proceed. However, on March 19, 1990, an anonymous individual telephoned the Nashville Police Department and stated that the defendant had been involved in the incident which had occurred on March 16, 1990. The informant added that the defendant had come home late at night driving a dark tan or brown Ford Bronco truck which had front end damage on it and that the truck was pulled behind a house on Springmont Drive. Officer Poteete followed up on this information, learning that the defendant had received a traffic ticket while driving the 1984 Ford truck and that the defendant's address was listed as 325 Overhill Drive in Old Hickory, Wilson County, Tennessee. Overhill Drive is located in a subdivision named "Springmont".

Pursuant to such information Officer Poteete, Metro Officer Ron Anderson, and Wilson ***340** County Deputy Ricky Knight proceeded to 325 Overhill Drive in the Springmont Subdivision. At this address they found a split-level house with a two car garage directly under the main living floor. A large driveway proceeded along the right side of the house and ended at two solid garage doors on this side of the house. Around the back of the home, a door with a window led into the garage. Also on the back of the house was a patio porch with another door which led into the house.

Upon arrival Officer Poteete knocked on the front door of the home while Officers Anderson and Knight went around to the back door. Officer Poteete continued to knock on the front door and received no response while Officer Knight knocked on the back door and also received no response. Officer Anderson, making his way back to the front of the house, stopped and knocked on the door leading into the garage. As Officer Anderson knocked, he glanced through the window in the door and noticed a brown Bronco truck on the far side of the garage. Although he could not see the front end of the truck, he could see that the hood was slightly buckled, which indicated to him that there might be some damage to the front of the Bronco.

Officer Poteete walked away from the front door and was making his way around the side of the house towards the back when Officer Anderson notified him that he had observed a brown-colored Bronco in the garage. For some reason, however, Officer Anderson did not mention to Officer Poteete that he had observed the hood's being slightly buckled. At this time the officers were standing in the driveway in front of the two solid garage doors. While the garage doors have no windows, the door closest to the back yard and farthest from the truck had been left open approximately one and a half feet allegedly for the purpose of allowing the dog to come and go from the garage. Officer Poteete then got down on his hands and knees with his head very near to the ground and looked into the garage. From this position, he was able to see that the Ford Bronco had sustained front end damage.

Subsequently, a search warrant was obtained based upon an affidavit, the pertinent parts of which include:

> Affiant [Officer Poteete] is an officer of the Metropolitan Nashville, Tennessee, Police Department, and is currently assigned to the Traffic Division as a Hit & Run investigator. ... On Friday, March 16, 1990, affiant responded to the scene of a fatal hit and run accident which occurred at 1132 Murfreesboro Road, in Nashville, Davidson County, Tennessee, at approximately 1:30 A.M. ... On Monday, March 19, 1990, Officer Earl Watson of the Metropolitan Nashville Police Department, received an anonymous telephone call advising him of the location of a vehicle possibly involved in the fatal accident. From information received, Officer Watson advised affiant that a "David Bowling" had returned to his residence, located on "*Springmont,*" at approximately 2:00 a.m. on the morning of the accident, and parked his vehicle, described as being possibly a brown Ford Bronco, in the *garage* of the residence, where it had not been moved again since that time. Further, the caller indicated that the vehicle appeared to have sustained damage to the grill area. Through his investigation, affiant determined that a "Springmont" street was located in the Springmont subdivision of Old Hickory, Wilson County Tennessee. After responding to the area with officers of the Wilson County Sheriff's Department, affiant received additional information from Officer Watson that a subject name "David Bowling" ... had *received* a parking ticket on a 1984 Ford truck ... on March 16, 1990 Affiant responded to that location, and while attempting to locate any one living at said residence, observed a brown Ford truck backed into a bay of the house's garage. (emphasis added)

While examining the first issue concerning Officer Poteete's action in looking into the defendant's garage, we note that the Constitution of the State of Tennessee guarantees "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures ...". Tenn. Const. Art. I, § 7. This same guarantee is embodied in the Fourth ***341** Amendment of the United States Constitution. The touchstone of unreasonable search and seizure analysis is "whether a person has a 'constitutionally protected reasonable expectation of privacy' ". *California v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986); *see Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

Through *Katz* and its progeny, the United States Supreme Court has pronounced a two-part inquiry in determining an individual's constitutionally protected reasonable expectation of privacy. First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? *Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986); *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); *Katz,* 389 U.S.

347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576. Such analysis has been applied in this state. *See State v. Roode,* 643 S.W.2d 651, 652–3 (Tenn.1982).

In determining whether the defendant manifested a subjective expectation of privacy, we are aware that neither the Fourth Amendment nor Article I, Section 7 protects what a citizen "knowingly exposes to the public". *See Katz,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576; *State v. Marcus Ellis,* No. 01–C–01–9001–CR–00021, 1990 WL 198876 Robertson County (Tenn.Crim.App. filed December 12, 1990, at Nashville). That which a citizen knowingly exposes to the public is that in which he or she has not manifested subjective expectation of privacy.

However, in the instant case it is apparent that the defendant did not knowingly expose the truck to the public. His truck was behind a solid, completely closed garage door. While the only other garage door was open, it had been raised a mere one and a half feet to allegedly enable the dog to come and go from the garage. Therefore, the defendant clearly manifested a subjective expectation of privacy.

The issue hence becomes whether society is prepared to recognize as reasonable the defendant's expectation of privacy when he left the garage door open one and a half feet. "In pursuing this inquiry, we must keep in mind that '[t]he test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ciraolo,* 476 U.S. 207, 212, 106 S.Ct. 1809, 1812, 90 L.Ed.2d 210 (quoting *Oliver v. United States,* 466 U.S. 170, 182–83, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984)). Society has recognized that the resident of a home usually has a reasonable expectation of privacy in a garage. *See Taylor v. United States,* 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 951 (1932). Therefore, in such areas where a reasonable expectation of privacy is usually accorded, "[a]n officer is permitted the same license to intrude as a reasonably respectful citizen". *State v. Seagull,* 95 Wash.2d 898, 632 P.2d 44, 47 (1981).

While the factual situation makes this a case of first impression in Tennessee, support exists for our conclusion in the decisions of our sister states. *See e.g. State v. Cloutier,* 544 A.2d 1277 (Me.1988). (Since officer did not bend over or move any object in order to improve his view, his observation of the marijuana while simply passing by the open window was not a search for purposes of Fourth Amendment); *State v. Adams,* 378 So.2d 72 (Fla.App.1979) (Officer's standing on chair and peering into window was held to violate occupants' reasonable expectation of privacy); *People v. Cagle,* 98 Cal.Rptr. 348, 351, 21 Cal.App.3d 57, 66 (1971) (Officer strayed from "normal access routes" when he peered into a bathroom window. His action was an unreasonable invasion of privacy).

It is the determination of this Court that Officer Poteete's actions of getting on his hands and knees with his head very near to the ground and looking into the garage are not those actions which society would permit of a reasonably respectful citizen. In making such a judgment, this Court has attempted to strike a balance between the individual's reasonable ***342** expectation of privacy and the permissible actions of an officer of the law.

We take great caution in rendering impermissible the actions of an officer employing only his or her bare physical faculties. However, Officer Poteete did not just sway to one side or the other to observe something. He did not even merely bend over slightly to observe something. He got down on his hands and knees with his head almost touching the ground and looked into the garage. We, therefore, conclude that the officer's actions constituted a warrantless search which violated the personal and societal values protected by the Fourth Amendment and Article I, Section 7.

While the State brought this appeal, the defendant raised three additional matters. The second issue before us is whether the search warrant contained reckless misrepresentations of material facts. It is true that Officer Poteete reported in the search warrant affidavit certain information which later was discovered to be incorrect. He stated that the anonymous informer had told the police that the car would be parked in the garage. The informant had actually told the officers that the truck would be parked behind the house. In addition, the officer reported that the defendant had received a parking ticket on the very same day of the accident, March 16, 1990. Actually, the defendant had received a parking ticket on February 28, 1990, and had paid for that ticket on March 16, 1990. Faced with these facts, the trial court determined that these incorrect statements were made with a "reckless disregard for the truth". The record supports this finding.

The Tennessee Supreme Court has set forth two circumstances which authorize impeachment of a search warrant affidavit: (1) when "a false statement [is] made with intent to deceive the Court, whether material or immaterial

to the issue of probable cause, and (2) [when] a false statement, essential to the establishment of probable cause, [is] recklessly made". *State v. Little,* 560 S.W.2d 403, 407 (Tenn.1978). The trial court concluded that neither of these circumstances was present in the instant case. We agree with that conclusion.

At the evidentiary hearing the officers simply had no explanation for the mistakes in the affidavit. Although the trial court expressed concern that the facts reported by the informant may have been somehow changed to fit what was actually found, the trial court did not conclude that there was an intent to deceive the court. Having reviewed the entire situation as reflected in the record, we agree with the trial court's determination.

We further determine that the trial court appropriately dismissed the second circumstance also. Although the inaccuracies were reckless misrepresentations, they were not reckless misrepresentations of material fact. The information regarding where the vehicle was parked and when a parking ticket was received were not essential to the assessment of whether the affidavit stated probable cause. Essential facts were, for example, that the informant reported the defendant coming in late on the night of the accident; that the informant mentioned that the vehicle was a Ford Bronco; and that the informant stated the vehicle had sustained front end damage. Unlike the information regarding the parking ticket and the place where the vehicle was parked, these facts greatly aided the magistrate in determining whether the affidavit stated probable cause. As such, this contention provides no basis for invalidating the search warrant.

The third issue raised on appeal is whether the search warrant affidavit, absent the information attained from the contested search, would be sufficient to support probable cause. We concluded above that the contested search was a warrantless search in violation of the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution, and consequently, the information attained therefrom was tainted and inadmissible. The trial court held and the State concedes that if the information attained from the contested search was inadmissible, the search warrant affidavit would be insufficient to support a finding of probable cause. We affirm this determination.

In *State v. Jacumin,* 778 S.W.2d 430 (Tenn.1989), our Supreme Court rejected the totality of circumstances test, which the United States Supreme Court expounded in ***343** *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Our Supreme Court instead reaffirmed the two-prong *Aguilar–Spinelli* test as the standard to be applied to a search warrant based upon an unknown or unidentified citizen informant. *Jacumin,* 778 S.W.2d 430, 436. The latter test requires that the affidavit establish: (1) the informant's "basis of knowledge" and (2) the informant's "veracity". *Jacumin,* 778 S.W.2d 430, 432; *see Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Essentially, the first prong "inquire [s] as to how the informant concluded the criminal activity [had taken] place: 'How does he [or she] know that?' The second 'prong' inquire[s] into the informant's veracity: 'Why do I believe him [or her]?' " Raybin, *Criminal Practice and Procedure,* § 18.58, p. 584.

The affidavit entirely fails to indicate the basis of the informant's knowledge as it makes no mention of how the informant obtained the information. Since the first prong was clearly not established, there is no need to analyze whether the second prong was proven. We conclude that the trial court correctly found the information in the affidavit, excluding the evidence from the contested search, insufficient to support probable cause.

The fourth and final issue before us is whether the appeal in this case was timely filed and, therefore, should not be dismissed. This Court examined this issue when the defendant filed a Motion to Dismiss Appeal and Memorandum in Support Thereof on January 17, 1992. On February 5, 1992, this Court denied the motion, declaring that justice required the appeal to proceed. We reaffirm that determination today. Consequently, this issue is without merit.

Having examined each contention raised, it is the determination of this Court that the trial court's order suppressing certain evidence be affirmed.

WADE and TIPTON, JJ., concur.

All Citations

867 S.W.2d 338

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222 N.J. 453
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Appellant,
v.
Dontae HATHAWAY, Defendant–Respondent.

A-69 September Term 2013, 073770
|
Argued Feb. 2, 2015.
|
Decided Aug. 4, 2015.

Synopsis

Background: Defendant charged with second-degree unlawful possession of a weapon moved to suppress the gun. After a hearing, the Superior Court, Law Division, Atlantic County, James P. McClain, J., suppressed the weapon. Defendant appealed. The Superior Court, Appellate Division, 2013 WL 6223364, affirmed. Defendant appealed.

Holdings: The Supreme Court, Albin, J., held that:

hotel patron who reported armed robbery could be relied upon by police officer as credible source of information in determination to make warrantless search of hotel room;

police officer had reasonable belief that a victim or gunman was in hotel room as required to justify the search under emergency-aid exception to warrant requirement; and

seizure of handgun in plain view was lawful.

Reversed and remanded.

Attorneys and Law Firms

****158** Frank Muroski, Deputy Attorney General, argued the cause for appellant (John J. Hoffman, Acting Attorney General of New Jersey, attorney).

Melissa Rosenblum–Pisetzner, Atlantic City, argued the cause for respondent (Law Offices of Joseph A. Levin, attorney).

Opinion

Justice ALBIN delivered the opinion of the Court.

***459** In this appeal, we must determine whether the warrantless search of a room in a casino hotel, where the police reasonably believed an armed robbery had recently occurred, violated the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution. Fearing that another victim or victims might be injured or held hostage in the room, and that time was of the essence, heavily armed police entered the room when no one answered the door. After entry, the police observed in plain view a gun inside an open duffel bag. The room was empty, and the weapon was secured as evidence. The hotel room was registered to defendant Dontae Hathaway, who later was charged with second-degree unlawful possession of a weapon, contrary to *N.J.S.A.* 2C:39–5(b).

Defendant moved to suppress the gun, claiming that its discovery was the product of an unconstitutional search. After a hearing, the trial court suppressed the weapon, finding that the police did not possess probable cause or exigent circumstances to justify a warrantless entry and search of the hotel room. The Appellate Division affirmed.

We now reverse. Responding to an armed robbery at a hotel, the police faced a potentially volatile and dangerous situation —a suspected gunman on the loose who may have injured or was ***460** presently threatening other patrons or staff. The ****159** officers did not have time for a fact-gathering process suitable to a trial or for sustained reflection or deliberation. The perilous and exigent circumstances required prompt action based on the credible information at hand.

We conclude that the trial court erred by viewing the events through the distorting lens of hindsight rather than viewing those events as they appeared to an objectively reasonable police officer who had to make immediate decisions in the face of a credible threat to the safety and lives of others. Based on the evidence presented at the suppression hearing, the police acted within the scope of the emergency-aid exception to the warrant requirement. Accordingly, the gun should not have been suppressed based on the evidence presented by the State.

We remand to the trial court for further proceedings. Because the trial court determined that the State had not sustained its burden after its presentation, the defense was not given the

opportunity to call subpoenaed witnesses. At a new hearing, the trial court must consider all evidence presented in deciding the merits of the suppression motion.

I.

A.

Defendant was charged in an indictment with second-degree unlawful possession of a firearm, *N.J.S.A.* 2C:39–5(b).

At the suppression hearing, the State called one witness, Officer James Armstrong, a seventeen-year veteran of the Atlantic City Police Department. In the early morning of March 28, 2012, Officer Armstrong was working "a special employment detail" in the Taj Mahal Hotel and Casino.[1] The record before us consists ***461** of his testimony, videotape surveillance taken by hotel security cameras, and a photograph of the gun inside a duffel bag.

Around 4:00 a.m. on March 28, a casino security officer radioed Officer Armstrong, requesting that he come to the "security podium" in the casino. There, Armstrong met with several security officers, including supervisor Angel Ramos. Officer Armstrong was told that "a white male" approached the security podium and reported that he had been robbed of $400 in cash at gunpoint by two black males in dark clothing in a room on the hotel's 70th floor. The hotel patron also said that he was forced to undress during the robbery. Forcing a victim to undress, explained Armstrong, is a tactic that allows robbers to facilitate their getaway.

The security officers described the victim as "animated" and "upset" and told Officer Armstrong that they found him credible based on their experiences with other victims "robbed at gunpoint." However, several minutes after reporting the crime, the victim departed. In Officer Armstrong's experience, it was not uncommon for a victim to leave after reporting a crime, particularly if the victim was involved in some embarrassing (if not illicit) activity, such as prostitution. The victim's name was never discovered, although his identity was recorded by multiple surveillance cameras.

Based on the information provided to him, Officer Armstrong asked the security team to contact the hotel's surveillance department to review the video footage to confirm the details of the victim's report. Security Officer Ramos radioed the surveillance room and gave directions to guide the review of the video footage. While ****160** waiting to hear from the surveillance department, Officer Armstrong called for the Atlantic City Police Department's special weapons and tactics (SWAT) team. Because he feared that an armed gunman might be on the 70th floor, Officer Armstrong believed he did not have time to walk ten to fifteen minutes to the building housing the surveillance department and personally review the video footage.

***462** About five minutes after Armstrong's call for backup, a four-member SWAT team arrived at the Taj Mahal. Immediately before the team's arrival, casino security personnel relayed to Officer Armstrong that the surveillance footage confirmed that the victim, who reported the robbery at the security podium, was observed on an elevator with a white male, a black male, and two females that stopped on the 70th floor.[2] Officer Armstrong was told that the five individuals then proceeded to Room 7023, and sometime afterwards, the victim left the room quickly in what appeared to be a panic. When the victim reached the elevator, he frantically looked over his shoulder toward the hotel room as though "something had happened" and pushed the elevator buttons. Based on the surveillance department's five-minute review of the video footage, security conveyed to Officer Armstrong that perhaps two or more people remained in the room.[3] The surveillance department could not account for all those who entered the room.

Officer Armstrong believed that he was "working against time." He did not know whether there was an armed gunman roaming the casino or a hotel floor, or "barricaded" in the room on the 70th floor. He did not know if there was a hostage in the room or a victim "tied up and gagged" or possibly shot.

Officer Armstrong and the four-member SWAT team, along with Ramos and other casino security officers, proceeded to the 70th floor and set themselves up outside of Room 7023. Security then telephoned inside the room several times, but no one answered. As the officers drew closer to Room 7023, they realized that the door was "slightly cracked" open, "as if someone had left ***463** in a hurry." A light was on in the room, but the officers could not see inside. Officer Armstrong called into the room, but there was no response. He was uncertain whether someone inside might be tied up, wounded, or unconscious and whether a gunman might possibly be there.

The officers then jammed the door open and called into the room, again with no response. From their vantage point, they could see partially into the room, catching sight of two beds. But they could not observe the room's far-right corner or inside the bathroom or closet. The officers entered the room with guns drawn. They checked the room for victims or a gunman but found no one there. They did observe, however, on a cabinet by a bed, a "wide open" duffel bag containing an automatic black Beretta handgun. The handgun was readily visible. Also inside the bag were a municipal court subpoena and a medical bill issued to defendant Dontae Hathaway.

Taj Mahal security determined that the room was registered to defendant. Around noon that same day, defendant ****161** was arrested when he returned to the room.

The State rested after Officer Armstrong's testimony. The trial court reviewed relevant surveillance video from the Taj Mahal and a photograph of the duffel bag. The video has a playing time of approximately one hour and thirteen minutes and consists of footage from a number of surveillance cameras that recorded events at the security podium, inside the elevator, and on the 70th floor. Thirty-five minutes of surveillance footage covers the period between the time the victim entered the elevator on his way to the 70th floor until the police entered Room 7023.

B.

Defense counsel subpoenaed security personnel from the Taj Mahal and officers from the Atlantic City Police Department, but none of the subpoenaed witnesses appeared at the hearing. However, based on the State's presentation alone, the trial court determined that the State failed to meet its burden of establishing ***464** probable cause or exigent circumstances to justify the warrantless entry and search of the hotel room. The court, therefore, granted the defense motion to suppress, making the missing defense witnesses a non-issue.

The court gave its reasons for granting the suppression motion: (1) the report from the purported victim was unreliable because he refused to identify himself; (2) Officer Armstrong relied on hearsay—the victim's report of the robbery and the surveillance department's review of the video footage—filtered through untrained security personnel; and (3) Officer Armstrong should have walked over to the surveillance department and reviewed the video himself before taking action. According to the court, its independent review of the hour-long surveillance video, consisting of more than 100 individual clips, revealed inconsistencies between the video footage and information conveyed to Officer Armstrong. For example, the court's review of the video disclosed that three males left Room 7023 together, including the victim who was smoking a cigarette and who did not appear to be in a panic. The court also rejected, on "common sense" grounds, Officer Armstrong's conclusion that a gunman or hostages might have been in Room 7023, given that the door was not locked and the surveillance tape showed no persons in the hallway. By the court's reasoning, the police should have suspected that the person who left the door ajar went on some errand, such as "to get a bucket of ice," and "was about ready to come back."

The court determined that the police officers did not have "probable cause" or "a reasonable suspicion or articulable belief" to conclude that there was an ongoing crime or victims in the room. Additionally, the court found that no exigency excused the failure of the officers to apply for a search warrant. The court believed that "a telephonic search warrant could have been obtained within maybe half an hour, more than enough time for the police to secure the room." Accordingly, the court suppressed the gun.

The State filed an interlocutory appeal.

***465** C.

The Appellate Division granted the State's motion for leave to appeal and, in an unpublished opinion, affirmed the trial court's suppression of the gun. The appellate panel found that the "unverified information reported by the alleged victim [was] not ... sufficient to establish probable cause to support the warrantless search" of the hotel room. The panel emphasized that the "credibility and reliability" ****162** of the victim reporting the robbery was "completely unknown" and that Officer Armstrong failed to corroborate the tip. The panel pointed out that "Armstrong did not personally review the videotape, but instead relied on a description of its contents by casino hotel surveillance personnel, who in turn relayed their version to the security guard." It also determined that "the actual events depicted on the videotape ultimately prove the surveillance department's account to be less than accurate" and "even that version failed to verify any criminal wrongdoing."

The panel also upheld the trial court's finding that the State did not "demonstrate exigent circumstances justifying the warrantless entry into the hotel room." The panel determined that "the police had no reliable information that a gun was probably located in Room 7023"; that "it was likely that the room was empty," given that "the door was ajar [and] no one responded to any of the officers' calls"; and the police could have "secured the hotel room while making an application for a telephonic warrant, given the extant circumstances and the number of police present."

The panel concluded that "[a]bsent both probable cause and exigent circumstances, the search of the hotel room was constitutionally impermissible."

We granted the State's motion for leave to appeal. *State v. Hathaway,* 217 *N.J.* 289, 88 *A.*3d 187 (2014).

II.

A.

The State urges this Court to reverse the Appellate Division and to find that "the police entry of the hotel room was reasonable ***466** under either the emergency-aid doctrine or a straightforward application of the exigent-circumstances test." The State argues that the panel's decision has cast doubt on police practices that are supported by well-established precedent. According to the State, the panel erred (1) in dismissing "the victim-eyewitness report, which was relayed in person, as nothing more than an anonymous tip"; (2) in placing "undue weight on the absence of criminal activity on the video without giving any weight to the significant [video] corroboration ... of the victim's presence and demeanor"; (3) in faulting Officer Armstrong for relying on casino security officers, who relayed to him the victim's report of the armed robbery, and the surveillance department's review of the video footage; (4) in downplaying the fact that Officer Armstrong was responding to an ongoing emergency of "armed criminals in the hotel"; and (5) in accepting both the trial court's "unsupported estimate that a telephonic warrant could have been obtained within a half-hour" and its assumption that waiting such a period would not have endangered patrons, staff, or helpless victims. The State's main contention is that, under the emergency-aid doctrine, the police officers had an objectively reasonable basis to believe that their immediate entry into the hotel room was necessary to protect life or prevent serious bodily injury.

B.

Defendant argues that the police possessed "no evidence that any criminal activity" had occurred or was ongoing at the Taj Mahal, and on that basis the trial court and Appellate Division properly concluded that the police lacked not only probable cause or reasonable suspicion, but also exigent circumstances to enter and search the hotel room without a warrant. More specifically, defendant contends that the warrantless entry and search violated the Federal and State Constitutions because (1) ****163** "information from an unknown individual is not different than the police receiving information from an anonymous tip"; (2) the "third hand information" conveyed to Officer Armstrong merely confirmed that the ***467** unknown complainant was on the 70th floor with two other males and two females; (3) the State presented "no evidence that the hotel security officers and surveillance department received any training in investigating crimes"; (4) the police did not "view the [surveillance] video and attempt to corroborate any information received from the third-party hotel security"; and (5) the State presented "no evidence of an immediate and/or ongoing threat to public safety." Defendant maintains that this Court should decline to consider the emergency-aid doctrine, which was raised for the first time by the State in the appeal to this Court. On the merits, defendant claims that the doctrine is inapplicable because there was not an objectively reasonable basis to believe that an emergency required the warrantless entry into the hotel room.

III.

A.

We must determine whether the search of defendant's hotel room comported with the dictates of both the Federal and State Constitutions. Essential to that determination are two intertwined issues: whether the trial court applied the proper legal principles governing our search-and-seizure jurisprudence and whether its findings of fact are supported by the record.

In resolving those issues, we begin with our standard of review. We owe no deference to a trial or appellate court's interpretation of the law, and therefore our review of legal matters is de novo. *State v. Vargas,* 213 *N.J.* 301, 327, 63

*A.*3d 175 (2013). In contrast, a trial court's factual findings are entitled to deference. *State v. Elders,* 192 *N.J.* 224, 244, 927 *A.*2d 1250 (2007). We must uphold a trial court's factual findings at a motion-to-suppress hearing when they are supported by sufficient credible evidence in the record. *Ibid.* However, deference is not required when factual findings are clearly mistaken. *Ibid.*

With those canons in mind, we begin with a review of the constitutional principles that apply to this case.

***468** B.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in nearly identical language, guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ... and no Warrants shall issue, but upon probable cause." *U.S. Const.* amend. IV; *see also N.J. Const.* art. I, ¶ 7. Under our constitutional jurisprudence, when it is practicable to do so, the police are generally required to secure a warrant before conducting a search of certain places, *State v. Pena–Flores,* 198 *N.J.* 6, 23, 965 *A.*2d 114 (2009), such as a hotel room, *Stoner v. California,* 376 *U.S.* 483, 486, 84 *S.Ct.* 889, 891, 11 *L.Ed.*2d 856, 859 (1964). Indeed, "[a] search conducted without a warrant is presumptively invalid." *State v. Frankel,* 179 *N.J.* 586, 598, 847 *A.*2d 561, *cert. denied,* 543 *U.S.* 876, 125 *S.Ct.* 108, 160 *L.Ed.*2d 128 (2004). For that reason, "the burden falls on the State to demonstrate that [a warrantless] search is justified by one of the 'few specifically established and well-delineated exceptions' to the warrant requirement." *Ibid.* (quoting *Mincey v. Arizona,* 437 *U.S.* 385, 390, 98 *S.Ct.* 2408, 2412, 57 *L.Ed.*2d 290, 298–99 (1978)). One such exception to the warrant requirement is the exigent-circumstances ****164** doctrine, *State v. Cassidy,* 179 *N.J.* 150, 160, 843 *A.*2d 1132 (2004), and another is the emergency-aid doctrine, *Frankel, supra,* 179 *N.J.* at 598, 847 *A.*2d 561.

Both the trial court and Appellate Division directed their attention to the exigent-circumstances exception to the warrant requirement, as did the parties. " '[E]xigent circumstances are present when law enforcement officers do not have sufficient time to obtain any form of warrant' " because of the immediate and urgent circumstances confronting them. *Pena–Flores, supra,* 198 *N.J.* at 30, 965 *A.*2d 114 (quoting *State v. Johnson,* 193 *N.J.* 528, 556 n. 7, 940 *A.*2d 1185 (2008)).

Before this Court, the State has refined its argument, claiming that the emergency-aid doctrine provides a fitting constitutional template for addressing the facts of this case. We agree. The ***469** emergency-aid doctrine is a "species of exigent circumstances," *United States v. Martins,* 413 *F.*3d 139, 147 (1st Cir.2005), and, in our view, the lens through which we should judge the conduct of the police in this case.[4]

"The emergency aid doctrine is derived from the commonsense understanding that *exigent circumstances* may require public safety officials, such as the police, firefighters, or paramedics, to enter a dwelling without a warrant for the purpose of protecting or preserving life, or preventing serious injury." *Frankel, supra,* 179 *N.J.* at 598, 847 *A.*2d 561 (emphasis added). The primary rationale for the doctrine is that neither the Fourth Amendment nor Article I, Paragraph 7 of our State Constitution requires "that public safety officials stand by in the face of an imminent danger and delay potential lifesaving measures while critical and precious time is expended obtaining a warrant." *Id.* at 599, 847 *A.*2d 561. For that reason, " '[a] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person.' " *Id.* at 600, 847 *A.*2d 561 (quoting *Wayne v. United States,* 318 *F.*2d 205, 212 (D.C.Cir.), *cert. denied,* 375 *U.S.* 860, 84 *S.Ct.* 125, 11 *L.Ed.*2d 86 (1963)).

When viewing the circumstances of each case, a court must avoid "the distorted prism of hindsight" and recognize "that those who must act in the heat of the moment do so without the luxury of time for calm reflection or sustained deliberation." *Id.* at 599, 847 *A.*2d 561. A court must "examine the conduct of those officials in light of what was reasonable under the fast-breaking and potentially life-threatening circumstances that were faced at the time." *Ibid.*

***470** To justify a warrantless search under the emergency-aid doctrine, the State must satisfy a two-prong test. *State v. Edmonds,* 211 *N.J.* 117, 132, 47 *A.*3d 737 (2012). The State has the burden to show that "(1) the officer had an objectively reasonable basis to believe that an emergency require[d] that he provide immediate assistance to protect or preserve life, or to prevent serious injury and (2) there was a reasonable nexus between the emergency and the area or places to be searched." *Ibid.* (internal quotation marks omitted). "The emergency aid doctrine only requires that public safety officials ****165** possess an objectively reasonable basis to believe—not certitude—that there is a

danger and need for prompt action." *Frankel, supra,* 179 *N.J.* at 599, 847 *A.*2d 561. The reasonableness of a decision to act in response to a perceived danger in real time does not depend on whether it is later determined that the danger actually existed. *Ibid.*

"The scope of the search under the emergency aid exception is limited to the reasons and objectives that prompted the search in the first place." *Ibid.* Therefore, police officers looking for an injured person may not extend their search to small compartments such as "drawers, cupboards, or wastepaper baskets." *Ibid.* If, however, contraband is "observed in plain view by a public safety official who is lawfully on the premises and is not exceeding the scope of the search," that evidence will be admissible. *Id.* at 599–600, 847 *A.*2d 561.

C.

The applicability of the emergency-aid doctrine in this case in large part depends on whether Officer Armstrong had a reasonable basis to credit a Taj Mahal patron's report of an armed robbery made to a casino security official, even though the patron was no longer present when Armstrong arrived on the scene.

Police officers oftentimes must rely on information provided by others in assessing whether there is probable cause to ***471** believe a crime has been committed or whether there is an objectively reasonable basis to believe an ongoing emergency threatens public safety. *See, e.g., State v. Brown,* 170 *N.J.* 138, 157, 784 *A.*2d 1244 (2001) (noting that "an informant's hearsay statements can be used to determine whether probable cause exists in the Fourth Amendment context"). Crimes are reported by citizens unafraid to identify themselves, confidential informants, and citizens who do not give their names. In all three of those scenarios, the information related to the police, when offered in court, is hearsay, although the quality of the information may depend on the source. When the source of the information is not inherently trustworthy, then some degree of corroboration will be required to justify a police action. *State v. Rodriguez,* 172 *N.J.* 117, 127–28, 796 *A.*2d 857 (2002). Thus, typically, "the reliability of anonymous informers ... must be established." *State v. Davis,* 104 *N.J.* 490, 506, 517 *A.*2d 859 (1986). On the other hand, the police may assume that an "ordinary citizen" reporting a crime does not have suspect motives. *Ibid.* An ordinary citizen "may be regarded as trustworthy and information imparted by him to a policeman concerning a criminal event would not especially entail further exploration or verification of his personal credibility or reliability before appropriate police action is taken." *Ibid.* (internal quotation marks omitted).

"Thus, an objectively reasonable police officer may assume that an ordinary citizen reporting a crime, which the citizen purports to have observed, is providing reliable information." *State v. Basil,* 202 *N.J.* 570, 586, 998 *A.*2d 472 (2010); *see also State v. Stovall,* 170 *N.J.* 346, 362, 788 *A.*2d 746 (2002) (noting that when citizen is informant "veracity is assumed"). One reason a face-to-face encounter with a citizen is considered more reliable than a purely anonymous tipster is that "an in-person informant risks losing anonymity and being held accountable for a false tip." *Ibid.* (internal quotation marks omitted).

Private-citizen information does not lose its reliability merely because it is passed from one law enforcement officer to ***472** another for police action. ****166** *United States v. De Cesaro,* 502 *F.*2d 604, 607 n. 6 (7th Cir.1974) (noting that "policemen are presumed to be reliable, and that an affiant policeman need not give additional reasons for believing the report of another policeman"). Another factor to be considered is that the greater the threat to public safety, the greater the need may be for prompt action, and thus allowances must be made for the fact that perfect knowledge is often not attainable at the moment the police must act. *See State v. Golotta,* 178 *N.J.* 205, 221–22, 837 *A.*2d 359 (2003); *see also Florida v. J.L.,* 529 *U.S.* 266, 273, 120 *S.Ct.* 1375, 1380, 146 *L.Ed.*2d 254, 262 (2000) (suggesting that "the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability"). The ultimate test is whether, under the totality of circumstances, the officer's actions were objectively reasonable given the nature of information at hand. Several examples will illustrate this point.

In *Edmonds, supra,* a person dialing from a pay telephone called the Roselle Park Police Department 9–1–1 line, identified himself as "John Smith," and stated that he believed that his sister's boyfriend was beating her and was armed with a gun. 211 *N.J.* at 137, 47 *A.*3d 737. The caller gave a Carteret address where the purported domestic violence was occurring and the name of his sister, but he left no contact information and his identity was unverifiable. *Id.* at 123, 137, 47 *A.*3d 737. The Carteret police met the alleged victim outside her apartment. *Id.* at 138, 47 *A.*3d 737. She showed no sign of

injuries, denied the domestic violence allegation, and refused to permit the officers entry to her home, even though her young son was inside. *Id.* at 138, 47 *A.*3d 737. Nevertheless, pursuant to the emergency-aid doctrine, we held that the police had a right to enter the apartment to ensure that the son was not in jeopardy.[5] *Id.* at 140, 47 *A.*3d 737.

***473** In *Golotta, supra,* a police officer received a dispatch that a 9–1–1 call described a car on a public roadway as " 'weaving back and forth,' " and " 'out of control.' " 178 *N.J.* at 209, 837 *A.*2d 359. The 9–1–1 caller only wanted to report the erratic driving and " 'did not want to file a charge' " or become further involved. *Id.* at 209–10, 837 *A.*2d 359. The police officer stopped a vehicle fitting the 9–1–1 caller's description without waiting to make observations of the operator's driving pattern because doing so might have endangered other motorists or the driver himself. *Id.* at 226, 837 *A.*2d 359. We found that the police officer had an objectively reasonable basis to make the stop "to protect [the driver] and the public from a threat of death or serious injury occasioned by defendant's suspected condition." *Id.* at 228, 837 *A.*2d 359.

In *Basil, supra,* an eyewitness told police that a man pointed a shotgun at her and then hid the weapon under a nearby vehicle. 202 *N.J.* at 587, 998 *A.*2d 472. The witness refused to identify herself to police "out of an expressed fear for her safety" and left the scene. *Ibid.* The Court explained that the woman's report "was a face-to-face encounter that allowed the officer to make an on-the-spot credibility assessment of the citizen informant." *Ibid.* The Court noted that at the time the witness gave the information to police, she could not have known that she would not be taken into custody as a witness or later ****167** sought out to become involved in the case. *Ibid.* The Court held that the woman's failure to identify herself did "little to diminish the reliability of the information when it was given." *Ibid.; see also Golotta, supra,* 178 *N.J.* at 219, 837 *A.*2d 359 (concluding that 9–1–1 callers who fail to identify themselves "are not truly anonymous" and "that a 9–1–1 call carries a fair degree of reliability inasmuch as it is hard to conceive that a person would place himself or herself at risk of a criminal charge by making such a call" (internal quotation marks omitted)).

***474** Thus, our jurisprudence makes clear that police officers may rely on reliable information—even when classified as hearsay in court—in determining whether exigent circumstances dictate that time does not allow for securing a warrant when prompt action is required.

IV.

We now turn to whether, in light of the totality of the circumstances, Officer Armstrong and his fellow officers had a right to enter Room 7023 under the emergency-aid exception to the warrant requirement. We begin with a discussion of the nature and quality of the information provided to Officer Armstrong before he conducted the warrantless search of the hotel room.

A.

Here, a patron reported to security personnel at the Taj Mahal that he was a victim of an armed robbery on the 70th floor of the hotel. The patron did not attempt to hide his identity, which was recorded on the hotel and casino's surveillance monitors. He did not identify the specific room where the robbery occurred or give a singularly precise description of the suspect, lessening the possibility that the patron was a malicious prankster intent on falsely incriminating a particular person. *See United States v. Wheat,* 278 *F.*3d 722, 735 (8th Cir.2001) (noting that "risk of false tips is slight compared to the risk of not allowing the police immediately to conduct an investigatory stop" of person reported to be carrying concealed weapons), *cert. denied,* 537 *U.S.* 850, 123 *S.Ct.* 194, 154 *L.Ed.*2d 81 (2002). Although he eventually walked away after giving his armed-robbery report, the hotel patron in this case—as was true of the witness in *Basil*—could not have known that he would not be required to give his name or held as a material witness.

Officer Armstrong undoubtedly had frequent contact with Taj Mahal security personnel as part of his special employment detail at the casino and had a firsthand basis to gauge their reliability in ***475** conveying information. *See State v. K.V.,* 821 *So.*2d 1127, 1128 (Fla.Dist.Ct.App.2002) (considering "the security guard tipster as a highly reliable citizen informant" (internal quotation marks omitted)); *State v. Luke,* 995 *S.W.*2d 630, 637 (Tenn.Crim.App.1998) (noting that security guard's tip is "presumed reliable"). Specialized training, moreover, is not necessarily required to repeat what another person has said. In *Davis, supra,* we recognized the high degree of reliability that is afforded to information conveyed by a first-aid-squad member. 104 *N.J.* at 506–07, 517 *A.*2d 859. The Court explained that "the informer is more than the ordinary citizen—he is a member of the

Springfield First Aid Squad, an individual who, while not part of the government, is more involved and presumably more public spirited than the average citizen." *Id.* at 506, 517 *A.*2d 859. As sources of reliable information, we see no meaningful distinction between first-aid-squad members and casino-security personnel who are acting in a quasi-law enforcement capacity.

****168** We conclude that the hotel patron in this case is more akin to an eyewitness citizen informant than an anonymous tipster. The patron reported an armed robbery in a face-to-face conversation with casino personnel under the watchful eye of surveillance cameras, a point probably not lost on the patron. The patron's facial and other physical characteristics were known to the casino's security personnel, providing the possibility of his later identification. Further, the patron's account of the armed robbery did not give security personnel any reason to suspect he falsely reported the crime with the intent to embarrass or harass some innocent person. *Cf. J.L., supra,* 529 *U.S.* at 272, 120 *S.Ct.* at 1379–80, 146 *L.Ed.*2d at 261 (recognizing that anonymous tips may enable tipster to "harass another" through "intrusive [and] embarrassing police search of the targeted person").

Security personnel told Officer Armstrong that based on their experiences dealing with robbery victims, the patron appeared credible. Moreover, the patron's report was not taken at face value. Officer Armstrong directed security personnel to call the ***476** surveillance department to corroborate the patron's report. Within the five or less minutes that the surveillance department had to review reams of video footage, casino security advised Officer Armstrong that the patron was observed with four other individuals on an elevator that went to the 70th floor and later was observed leaving Room 7023 alone, in a hurry and a seemingly panicked state.

Given the information available, and within the time constraints pressed on him by the report of a gunman on the loose in the Taj Mahal, Officer Armstrong had no objectively reasonable basis to doubt the patron's veracity or the report of an armed robbery.

B.

We next apply the two-prong test of the emergency-aid exception to the warrant requirement.

Under our emergency-aid jurisprudence, the first inquiry is whether Officer Armstrong "had an objectively reasonable basis to believe that an emergency require[d] that he provide immediate assistance to protect or preserve life, or to prevent serious injury." *See Edmonds, supra,* 211 *N.J.* at 132, 47 *A.*3d 737 (internal quotation marks omitted). The events in this case must be viewed as they were unfolding—in real time—and as the dangers appeared to a reasonable police officer. "The touchstone of the Fourth Amendment and Article I, [P]aragraph 7 of the New Jersey Constitution is reasonableness." *State v. Judge,* 275 *N.J.Super.* 194, 200, 645 *A.*2d 1224 (App.Div.1994); *see also United States v. Knights,* 534 *U.S.* 112, 118, 122 *S.Ct.* 587, 591, 151 *L.Ed.*2d 497, 505 (2001).

Officer Armstrong was called to the security podium of the Taj Mahal casino around 4:00 a.m. based on a patron's report of an armed robbery. The trial court—as a matter of law—erred in dismissing as unreliable the patron's report merely because the patron did not wait for the police to arrive. *See* ***477** *Basil, supra,* 202 *N.J.* at 587–89, 998 *A.*2d 472. Nothing in the record supports the trial court's finding that the patron refused to give his name.

Officer Armstrong could not just ignore the report of an armed robbery because the patron was not available for questioning. Police officers in the field must act on dispatches based on 9–1–1 calls without access to the informants. Officer Armstrong was facing a high-risk, public-safety danger: the prospect of a gunman on the premises. He could not possibly know at ****169** that moment whether there were other victims or whether patrons and staff were in peril.

The trial court erred by viewing the events through "the distorted prism of hindsight" rather than through the eyes of a reasonable police officer facing "fast-breaking and potentially life-threatening circumstances." *See Frankel, supra,* 179 *N.J.* at 599, 847 *A.*2d 561. Officer Armstrong made the decision that exigent circumstances did not permit him to spend ten to fifteen minutes walking to the surveillance department to review reams of video footage while a gunman might be holed up in Room 7023 or loose on the premises. He remained at his post, arranging for the SWAT team's assistance and for casino security to have the surveillance department corroborate, if it could, the patron's account. Critical events—the arrival of the SWAT team and the video-footage review—occurred within a five-minute period. The surveillance department had but minutes to run through scores of individual clips and relay essential information corroborating the patron's account to

Officer Armstrong. Armstrong was told that the patron took an elevator to the 70th floor with two males and two females and later abruptly left Room 7023.

The trial court had the luxury of reviewing more than an hour's worth of video footage. No doubt, the trial court had more information from the video footage at the hearing than Officer Armstrong had around 4:00 a.m., in an emergent situation, in the casino's lobby. An extended time to review the footage may support the trial court's view, as one reasonable interpretation, that the patron did not look panicked when he departed from ***478** Room 7023. But the question is whether, in the heat of the moment, based on seemingly reliable information, not certitude, Officer Armstrong acted in an objectively reasonable manner while facing a grave danger to public safety. Viewed from that perspective, and given the totality of the circumstances at the time based on the evidence before us, the answer is yes.

The second question posed by the emergency-aid doctrine is whether "there was a reasonable nexus between the emergency" and the search of Room 7023. Officer Armstrong and the SWAT team proceeded to the room where the patron claimed he had been robbed. Although the patron did not identify the room number, the surveillance cameras tracked him leaving Room 7023. The police officers took measured steps before entering the room. They placed telephone calls to the room and verbally called inside—all without a response. The trial court found that one could reasonably conclude from the unlocked room door that a hotel guest would be returning shortly, perhaps after filling an ice bucket. But that was not the only reasonable inference to be drawn, and no one was seen in the hallway returning from a trip to the vending machines. Given the totality of the circumstances, another reasonable inference was that a victim might have been incapacitated or a gunman might have been hiding in the room.

A warrant is not required to rescue a victim who may be injured or whose life may be in jeopardy. *Frankel, supra,* 179 *N.J.* at 600, 847 *A.*2d 561. The trial court found, on one hand, that the police should have applied for a telephonic warrant and, on the other hand, that the police did not have probable cause to secure one. The emergency confronting the officers relieved them of the need to obtain a warrant for the purpose of entering the room for the limited mission of assuring that neither a victim nor a gunman was there.

Indeed, the scope of the search of the room was confined to looking for possible victims and the gunman. The police discovered ****170** the handgun in plain view, in a wide-open duffel bag sitting on a counter by the bed. *See* ***479** *State v. Bruzzese,* 94 *N.J.* 210, 236, 463 *A.*2d 320 (1983) (holding that plain view warrant exception requires officer to "be lawfully in the viewing area," and that items be discovered "inadvertently" and "immediately apparent" as evidence of crime). Accordingly, the seizure of the weapon was lawful.

The trial court's misapplication of the law governing exigent circumstances led to a number of clearly mistaken factual findings. Therefore, the Appellate Division's affirmance of the trial court's suppression of the handgun must be reversed.

V.

In summary, we reverse the judgment of the Appellate Division and remand to the trial court for a new suppression hearing. We note that the trial court judge who presided at the suppression hearing has since retired. At the suppression hearing, the trial court made its decision to suppress the handgun based on the State's presentation alone, relieving the defense of the need to call any of its subpoenaed witnesses.

Defendant has a right to call witnesses to show that the State did not meet its burden of proving the emergency-aid exception to the warrant requirement. For instance, the defense could present witnesses who might possibly undermine the testimony of Officer Armstrong. Our judgment is limited to the record before us. At a new hearing, the trial court must make factual findings based on all the credible evidence. Nothing stated in this opinion restricts the trial court in performing that task.

For reversal and remandment—Chief Justice RABNER and Justices LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ–VINA, SOLOMON and Judge CUFF(temporarily assigned)—7.

Opposed—None.

All Citations

222 N.J. 453, 120 A.3d 155

Footnotes

1 The casino hires police officers to provide additional security on the premises. The officers hired for such purposes are deemed to be on "a special employment detail."

2 Officer Armstrong corrected his initial testimony that security told him that there were two black males and a white female on the elevator.

3 At the hearing, some confusion arose from the fact that, at some later point, Officer Armstrong reviewed the surveillance footage. The testimony presented in the narrative is based on the information that Armstrong knew at the time of the incident.

4 It is well-recognized that the emergency-aid doctrine is a subset of exigent circumstances. *United States v. Holloway,* 290 *F.*3d 1331, 1337 (11th Cir.2002), *cert. denied,* 537 *U.S.* 1161, 123 *S.Ct.* 966, 154 *L.Ed.*2d 897 (2003); *United States v. Richardson,* 208 *F.*3d 626, 630 (7th Cir.), *cert. denied,* 531 *U.S.* 910, 121 *S.Ct.* 259, 148 *L.Ed.*2d 188 (2000). Accordingly, there should be no surprise about our more focused analysis.

5 We ultimately held that the police unconstitutionally exceeded the permissible scope of the emergency-aid doctrine by searching a room after entry revealed no signs of domestic violence. *Edmonds, supra,* 211 *N.J.* at 138–40, 47 *A.*3d 737. Therefore, the discovery of a gun under a pillow was suppressed. *Id.* at 139–41, 47 *A.*3d 737.

222 N.J. 154
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Respondent and Cross–Appellant,
v.
Evan REECE, Defendant–Appellant and Cross–Respondent.

A-79 September Term 201, A-80
September Term 2013, O73284
|
Argued April 14, 2015.
|
Decided July 20, 2015.

Synopsis

Background: Defendant was convicted after a bench trial in the Municipal Court of simple assault, resisting arrest, and obstruction. On de novo review, the Superior Court, Law Division, Burlington County, affirmed defendant's convictions for resisting arrest and obstruction, but reversed the assault conviction. Defendant appealed. The Superior Court, Appellate Division, 2013 WL 4525600, affirmed in part and reversed in part. defendant appealed, and state petitioned for certification.

Holdings: The Supreme Court, Solomon, J., held that:

officers' warrantless entry into defendant's home was justified under emergency aid doctrine;

defendant could be convicted for obstruction;

defendant used physical force creating substantial risk of injury, as element of resisting; and

officers did not use excessive force.

Affirmed in part and reversed in part.

Attorneys and Law Firms

****1237** Justin T. Loughry, Moorestown, argued the cause for appellant and cross-respondent (Loughry and Lindsay, attorneys).

Daniel I. Bornstein, Deputy Attorney General, argued the cause for respondent and cross-appellant (John J. Hoffman, Acting Attorney General of New Jersey, attorney).

Opinion

Justice SOLOMON delivered the opinion of the Court.

***157** Officers responded to defendant's home to investigate a dropped 9–1–1 call. When the officers announced their intention to enter ***158** defendant's home without a warrant, defendant attempted to block their entry and a struggle ensued. After being subdued, defendant was arrested and charged with two counts of simple assault, *N.J.S.A.* 2C:12–1(a)(1); one count of resisting arrest, *N.J.S.A.* 2C:29–2(a); and one count of obstruction, *N.J.S.A.* 2C:29–1(a).

Following trial, the municipal court judge found defendant guilty of one count each of simple assault, resisting arrest, and obstruction. Defendant appealed de novo to the Superior Court, Law Division. The Law Division found defendant guilty of resisting arrest and obstruction, but not guilty of simple assault. A divided Appellate Division panel affirmed defendant's conviction for resisting arrest, and reversed defendant's conviction for obstruction.

In this appeal, we are called upon to resolve two issues: first, whether the officers' warrantless entry into defendant's home was justified under the emergency-aid doctrine; and second, whether the elements of obstruction were established by the evidence presented. We conclude that the emergency-aid doctrine justified the officers' warrantless entry into defendant's home. Furthermore, because the credibility and factual findings of the municipal court and Law Division were supported by substantial evidence, we affirm defendant's conviction for resisting arrest and reinstate defendant's obstruction conviction.

I.

The State presented the following proofs at trial. At dusk on January 7, 2009, Pemberton Police Department Sergeant Peter Delagarza responded to a dropped 9–1–

1 call originating from defendant's home.[1] Upon arrival, Delagarza, who was in uniform, walked around the property and observed three vehicles in the driveway. Moments later, Delagarza knocked on the front door. ***159** Defendant opened the door, and Delagarza asked if defendant made a 9–1–1 call. Defendant denied making any such call and, when asked, insisted that that he was alone in the home.

In an effort to show that no call had been made, defendant asked if he could retrieve his cordless home phone to show Delagarza. Delagarza assented, and defendant walked back into the residence, leaving the front door ajar. Delagarza peered into the home through the open door but saw nothing unusual or suspicious. Nevertheless, Delagarza radioed for backup.

When defendant returned with the phone, he displayed the phone's screen to Delagarza and scrolled through the caller identification. Finding no 9–1–1 call in the phone's memory, defendant handed ****1238** the phone to Delagarza, who then radioed dispatch to confirm that the 9–1–1 call originated from defendant's residence. Defendant stood next to Delagarza as the dispatcher repeated the originating number of the call, which defendant confirmed was his home phone number.

During this exchange, Delagarza noticed that defendant had a small abrasion on his right hand. At trial, Delagarza testified on direct examination that the abrasion was "somewhere around the knuckle area of the hand," and similar to "an abrasion that you would receive from punching something." After noticing the abrasion, Delagarza asked defendant whether he was married. According to Delagarza, defendant responded, "I don't see what business it is of yours anyway, but I'm married." Delagarza testified that after he asked this question defendant's demeanor began to change, and "it seemed like he was starting to get frustrated with the fact that I was there and that I was starting to ask these questions."

Delagarza then asked if he could enter the house and look around, but defendant refused consent. Delagarza called for assistance. Officers Hall and Gant, who had responded to Delagarza's call for backup and were seated in marked cars parked in front of the house, joined Delagarza at the doorway. Delagarza told defendant that he and the officers needed to check the house, ***160** at which point defendant slammed the door closed. While defendant attempted to lock the door, the officers pushed the door open. Delagarza announced that defendant was under arrest, and the officers entered defendant's residence.

Delagarza testified that, when he moved to place the defendant under arrest, defendant "immediately started to physically resist" by pulling his hand away. At this point, Officers Hall and Gant also "grabbed" defendant and all four men "immediately ... fell to the ground on the floor." During the struggle on the floor, Delagarza was pinned beneath defendant, causing Officers Hall and Gant to fear for Delagarza's safety. Hall and Gant each reacted by striking defendant once in the face with a closed fist. After securing defendant, Delagarza and Gant checked the interior of the house and found nothing amiss.

Defendant disputes the State's factual assertions in four significant respects. First, he said the officers did not announce their intention to arrest him.[2] Second, he claims he did not resist arrest by pulling his hands away from the officers. Rather, after the officers grabbed him he executed a "controlled fall" similar to a maneuver learned in parachute training[3] by simply "let[ting] [his] legs go" because he feared "get [ting] hurt otherwise," and as a result of this controlled fall, he and the three officers tumbled to the floor. Third, defendant stated that Delagarza mischaracterized the abrasion on his hand. Finally, defendant asserted the officers did not limit themselves to one blow each, rather they struck defendant "in volleys of two to three, probably three to four total times."

After the incident, defendant was charged with resisting arrest, *N.J.S.A.* 2C:29–2(a); obstructing the administration of law, ***161** *N.J.S.A.* 2C:29–1(a); and simple assault upon Delagarza and Hall, *N.J.S.A.* 2C:12–1(a)(1). Trial occurred in Pemberton municipal court on four separate dates between June 14, 2010, and March 14, 2011.[4]

****1239** At the conclusion of the trial, the municipal court judge made specific credibility findings. The judge found defendant "less than credible" because the judge "found [defendant] to be a bit too glib, to have too many ready explanations for obvious[ly] inappropriate behavior." The judge supported that conclusion by noting several instances where defendant's credibility was undermined by attempts to craft an explanation for his conduct.

For example, defendant asserted that when the incident first began, he questioned whether Delagarza was indeed a police officer, despite Delagarza's conspicuous uniform

and badge. Defendant testified that he suspected Delagarza was not an officer because defendant was alone in the home and had not placed the 9–1–1 call. However, during direct examination, defendant suggested that the dropped 9–1–1 call may have occurred as the result of a phone malfunction caused by the inclement weather. Finally, the judge characterized defendant's purported "controlled fall" as a "convenient explanation."

The municipal court judge found that defendant further undermined his credibility by giving a lengthy and detailed explanation of what he was wearing during the incident, and why he had chosen to wear each article of clothing. In the judge's opinion, this testimony was an attempt to explain away inappropriate conduct—defendant contended that the wool socks he was wearing caused him to slide and lose his footing on the freshly polished hardwood floors.

By contrast, while acknowledging minor discrepancies in the officers' testimony, the judge found the officers credible. The judge reasoned that, although the officers were sequestered during ***162** trial and were thus incapable of hearing each other's testimony, the officers' accounts were "very similar." He characterized the testimony of Delagarza and Hall as "good, open, honest, and credible," because both officers limited their testimony to "that which they had seen and recalled from the incident." The judge specifically credited Delagarza's explanation that he did not report that Hall and Gant struck defendant because Delagarza was underneath defendant and did not see it happen. The judge also credited Hall's statement that he punched defendant once out of concern for Delagarza's safety, and Gant's testimony that he struck defendant in the face to end the encounter quickly after sensing Delagarza was on the floor underneath defendant.

Ultimately, the municipal court made the following findings: (1) the officers announced their intention to arrest, (2) defendant was aware that the officers were in fact police officers, and (3) Officers Hall and Gant each punched the defendant once in the face because they perceived a threat to Delagarza. The judge then found defendant guilty of simple assault upon Officer Hall, resisting arrest, and obstruction, but acquitted defendant of simple assault upon Delagarza.

In finding defendant guilty of resisting arrest, the judge stated:

> I think it is clear that the testimony presented indicated that [defendant] was advised that he was under arrest on more than one occasion.... [I]t is abundantly clear to anyone and certainly to [defendant] that if you're being told to stop resisting, that you should in fact stop resisting and allow yourself to be placed under arrest.

The judge also held that the officers were entitled to enter the home based upon the emergency-aid doctrine, as described in *State v. Frankel,* 179 *N.J.* 586, 847 *A.*2d 561, *cert. denied.,* 543 *U.S.* 876, 125 *S.Ct.* 108, 160 *L.Ed.*2d 128 (2004). The judge reasoned that, because the officers "had the right to enter the home," defendant's ****1240** attempt to deny them entry constituted obstruction of justice.

On de novo review, the Law Division affirmed defendant's convictions for resisting arrest and obstruction. The Law Division held that, "upon these facts, [Delagarza] and his colleagues were ***163** justified in doing what was needed to insure that no one in that house was in need of emergent aid. They had the duty to enter to confirm or dispel an emergency situation." The Law Division added that defendant's testimony did not appear credible.

> [I]f [defendant] had "gone limp" or "did nothing" as he suggests, the whole matter would have been completed within a very short period as opposed to a several minute physical struggle on the floor with defendant's face being struck and bruised. The testimony of the defendant is simply not worthy of belief.

Additionally, the Law Division determined that "defendant, by all the circumstances presented to him, knew that Delagarza and his officers were police and why they were there at his door."

The Appellate Division, in a split decision, affirmed defendant's resisting arrest conviction but reversed defendant's conviction for obstruction. Judge Alvarez, writing for the majority, found that the emergency-aid doctrine did not apply because Delagarza "simply lacked sufficient information from which to conclude someone in the home was at risk of immediate danger." Judge Alvarez explained

> [i]n the absence of facts triggering the emergency aid doctrine, which would make police entry lawful, defendant's refusal to allow Delagarza to enter his home was not an act of obstructing. He was entitled to refuse to cooperate. We do not suggest, however, that Delagarza's concern was unwarranted, only that the circumstances did not justify a forced entry. If the entry was unlawful, defendant's conduct in refusing to admit the officers is not an act of "obstructing."

Regarding the resisting arrest conviction, the majority, quoting *N.J.S.A.* 2C:29–2(a), held that because the arrest was made under "color of ... official authority" and was

announced, defendant was not entitled to resist arrest, even if the arrest was unjustified.

In a concurring opinion, Judge Waugh concluded that, "although the police officers had lawful reason to enter [defendant]'s residence without a warrant or consent, [defendant]'s refusal of their request that he consent to a warrantless search was not a violation of [the obstruction statute]."

Judge Fisher, dissenting in part, disagreed with the majority's affirmance of defendant's conviction for resisting arrest. In Judge Fisher's view, his colleagues' conclusion "oversimplifie[d] the troubling issues raised by th[e] case, namely, the clear disregard of ***164** defendant's Fourth Amendment rights." The dissent added that "[i]t is the fact that this event occurred in the home and not elsewhere that prompts my dissent," asserting that defendant was not guilty of resisting arrest because the unlawful intrusion into defendant's home and the officers' use of excessive force permitted defendant to protect himself.

The dissent disagreed with the Law Division's factual findings, asserting that those findings should have been rejected because the Law Division failed to consider the discrepancy between Delagarza's testimony that he saw an abrasion on defendant's knuckle and the photographs admitted into evidence which showed an abrasion at the base of his thumb. The dissent also rejected the factual findings of the municipal court and the Law Division because they did not consider that Delagarza's police report made no mention of the other officers striking defendant in the ****1241** face. Thus, the dissent posited, the Law Division's findings were "so plainly unwarranted that the interests of justice demand intervention and correction."

Defendant appealed his conviction as of right. *R.* 2:2–1(a). Subsequently, this Court granted the State's petition for certification regarding the dismissal of the obstruction charge. *State v. Reece,* 217 *N.J.* 296, 88 *A.*3d 192 (2014).

II.

Defendant argues that, to obtain a conviction for resisting arrest, the State must show that the arresting officers announced their intention to arrest prior to any resistance, the officers were acting under color of their authority, and the "police [did] not use unlawful force in effecting the unlawful arrest." *N.J.S.A.* 2C:29–2(a); *N.J.S.A.* 2C:3–4(b)(1)(a); *State v. Mulvihill,* 57 *N.J.* 151, 157–58, 270 *A.*2d 277 (1970). Defendant contends that the officers failed to announce their intentions to arrest prior to defendant's resistance and used excessive force in restraining him. Thus, defendant argues, the majority erred in affirming his resisting arrest conviction.

***165** Defendant maintains that, in this case, the police used unlawful force by "physically set[ting] upon [defendant] with overpowering force when he never so much as attempted a punch, kick or push." Defendant argues that the Appellate Division majority, when considering the resisting-arrest charge, ignored the officers' unlawful force. Defendant also maintains that, given the reversal of his obstruction conviction, the Appellate Division impliedly concluded that "the police entered forcibly and illegally, without any justification," and the officers' "very presence inside the house and the measures by which they accomplished that presence were unlawful and constituted in and of themselves unlawful force."

Defendant emphasizes that, contrary to *State v. Williams,* 192 *N.J.* 1, 926 *A.*2d 340 (2007), and *State v. Crawley,* 187 *N.J.* 440, 901 *A.*2d 924, *cert. denied,* 549 *U.S.* 1078, 127 *S.Ct.* 740, 166 *L.Ed.*2d 563 (2006), both of which dealt with police-citizen encounters on the street, the police in this case unconstitutionally invaded his home. He urges this Court to consider the resisting arrest charge "in the context of this sacrosanct constitutional right of privacy and security and right to be left alone in the home, free of official intrusion."

Defendant asserts that the majority failed to reverse the resisting arrest conviction based on plainly unwarranted, unsupported factual findings and credibility determinations. Specifically, defendant maintains as follows: Delagarza's testimony that he saw an abrasion on defendant's knuckle was "conclusively refuted" by photographs; Delagarza lacked candor because his report made no mention that defendant was punched in the face; and Hall testified he did not hear Delagarza say defendant was under arrest, which supports defendant's claim that the officers did not announce defendant was under arrest. Finally, defendant asserts that "[t]he record does not permit a rational conclusion of guilt beyond a reasonable doubt for 'resistance' to an unlawful arrest."

The State argues that the officers' entry into the home was justified by the emergency-aid doctrine because a dropped 9–1–1 call had been made from defendant's residence, defendant denied ***166** making the 9–1–1 call but claimed

no one else was home, Delagarza observed a fresh abrasion on defendant's hand, and defendant became suspiciously defensive and hostile when asked if he was married. The State asserts that the facts here are "materially indistinguishable" from *Frankel,* and therefore the result should be the same. ****1242** Additionally, the State argues that, under *Crawley,* regardless of the constitutionality of the officers' decision to enter defendant's residence under the emergency-aid doctrine, defendant "still had no right to physically resist their efforts to enter the house, and when he did so, he was guilty of obstruction."

III.

We begin our review with the well-settled proposition that appellate courts should give deference to the factual findings of the trial court. *State v. Locurto,* 157 *N.J.* 463, 470–71, 724 *A.*2d 234 (1999). Those findings must be upheld, provided they " 'could reasonably have been reached on sufficient credible evidence present in the record.' " *Id.* at 471, 724 *A.*2d 234 (quoting *State v. Johnson,* 42 *N.J.* 146, 162, 199 *A.*2d 809 (1964)). Deference is warranted because the " 'findings of the trial judge ... are substantially influenced by his opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.' " *Ibid.* (quoting *Johnson, supra,* 42 *N.J.* at 161, 199 *A.*2d 809).

In *Locurto,* the defendant appealed a municipal court conviction to the Law Division. *Id.* at 467, 724 *A.*2d 234. As with the instant case, the Law Division's factual findings in *Locurto* were predicated upon the credibility findings of the municipal court, and we noted that

> the rule of deference is more compelling where ... two lower courts have entered concurrent judgments on purely factual issues. Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error.
>
> [*Id.* at 474, 724 *A.*2d 234.]

***167** Therefore, appellate review of the factual and credibility findings of the municipal court and the Law Division "is exceedingly narrow." *Id.* at 470, 724 *A.*2d 234.

However, to the extent the Law Division or municipal court makes a legal determination, that determination is reviewed de novo. *See State v. Handy,* 206 *N.J.* 39, 45, 18 *A.*3d 179 (2011) (stating "appellate review of legal determinations is plenary"). Thus, we must defer to the factual findings of the municipal court and the Law Division so long as they are supported by sufficient credible evidence, but we review the legal conclusion that the emergency-aid doctrine applies here de novo.

IV.

A.

With those standards in mind, we must first consider whether warrantless entry of defendant's home was justified by the emergency-aid doctrine.

Article I, Section 7 of the New Jersey Constitution assures "[t]he 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 warrant shall issue except upon probable cause...." Thus, as a general matter, "police officers must obtain a warrant from a neutral judicial officer before searching a person's property." *State v. DeLuca,* 168 *N.J.* 626, 631, 775 *A.*2d 1284 (2001).

In recognition of our strong policy against warrantless searches and seizures, the burden falls upon the State to prove a warrantless search was justified by one of the " 'specifically established and well-delineated exceptions' " to the warrant requirement. *Frankel, supra,* 179 *N.J.* at 598, 847 *A.*2d 561 (quoting *Mincey* ****1243** *v. Arizona,* 437 *U.S.* 385, 390, 98 *S.Ct.* 2408, 2412, 57 *L.Ed.* 290, 298–99 (1978)). Therefore, police officers are entitled to conduct a warrantless search when the search is supported by "a ***168** known exception to the warrant requirement." *State v. Eckel,* 185 *N.J.* 523, 539, 888 *A.*2d 1266 (2006).

The exception to the warrant requirement at issue here is the emergency aid doctrine, an exception "derived from the commonsense understanding that exigent circumstances may require public safety officials, such as the police, firefighters, or paramedics, to enter a dwelling without a warrant for the purpose of protecting or preserving life, or preventing serious injury." *Frankel, supra,* 179 *N.J.* at 598, 847 *A.*2d 561. Under those circumstances, our constitution does not "demand that public safety officials stand by in the face of an imminent danger and delay potential lifesaving measures while critical

and precious time is expended obtaining a warrant." *Id.* at 599, 847 *A.*2d 561.

In determining whether the emergency-aid doctrine justifies a warrantless search, we follow federal jurisprudence and apply "the objective reasonableness test." Kevin G. Byrnes, *Current N.J. Arrest, Search & Seizure,* § 11:2, at 226 (2014–15). In *Frankel, supra,* we adopted a "three-prong test to determine whether a warrantless search by a public safety official is justified." 179 *N.J.* at 600, 847 *A.*2d 561. Under *Frankel,*

> the public safety officer must have an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or prevent serious injury; his primary motivation for entry into the home must be to render assistance, not to find and seize evidence; and there must be a reasonable nexus between the emergency and the area or places to be searched.
>
> [*Ibid.*]

In *State v. Edmonds,* 211 *N.J.* 117, 132, 47 *A.*3d 737 (2012), we revisited the test articulated in *Frankel* and concluded that the subjective motivations of a public safety official were "no longer consonant with Fourth Amendment jurisprudence." *Id.* at 131–32, 47 *A.*3d 737. Consequently, *Edmonds* framed a two-part test to be applied in determining whether the emergency-aid doctrine justifies a warrantless search:

> 1) the officer had 'an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury' and
>
> ***169** 2) there was a 'reasonable nexus between the emergency and the area or places to be searched.'
>
> [*Ibid.* (quoting *Frankel, supra,* 179 *N.J.* at 600, 847 *A.*2d 561).]

In this case, the nexus between the perceived emergency and the scope of the officers' search is not challenged. Therefore, the issue here concerns only the first prong of the analysis.

In *Frankel, supra,* we explained that the first prong asks "whether [the officer] was 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[s]' his entry into defendant's home under the emergency aid doctrine." 179 *N.J.* at 610, 847 *A.*2d 561 (quoting *Terry v. Ohio,* 392 *U.S.* 1, 21, 88 *S.Ct.* 1868, 1880, 20 *L.Ed.*2d 889, 906 (1968)). Applying that principle, we held that a dropped 9–1–1 call from a residence creates "a presumptive emergency, requiring an immediate response," because such a call suggests "a person whose life is endangered but [is] unable to speak" made the call. *Id.* at 604, 847 *A.*2d 561.

****1244** However, the presumption that an emergency exists when there is a dropped 9–1–1 call "may be dispelled by any number of simple explanations given by the homeowner to the responding officer." *Ibid.* For instance, a parent "may explain that her child, who appears at the door with her, impishly dialed the number"; or "[a] resident, who otherwise raises no suspicions, may state that he intended to call 4–1–1 but pushed the wrong digit." *Id.* at 604–05, 847 *A.*2d 561. Courts applying this presumptive emergency "must weigh the competing values at stake, the privacy interests of the home versus the interest in acting promptly to render potentially life-saving assistance to a person who may be incapacitated." *Id.* at 605, 847 *A.*2d 561. This is a fact-sensitive inquiry. *Id.* at 606, 847 *A.*2d 561.

The facts in *Frankel* inform our inquiry here. In *Frankel,* a police officer responded to a dropped 9–1–1 call originating from the home of the defendant. *Id.* at 593, 847 *A.*2d 561. The officer knocked on the front door, and the defendant answered, but the officer could not see into the home because his view was obscured ***170** by a white sheet hanging behind the front door. *Ibid.* The defendant denied placing a 9–1–1 call and claimed that he was alone in the home. *Id.* at 593–94, 847 *A.*2d 561. The officer, noting the defendant's increasing nervousness, began to fear for his safety and asked the defendant to come out from behind the sheet. *Id.* at 594, 847 *A.*2d 561. Once the defendant complied, the officer frisked him for weapons. *Ibid.* The officer then asked for permission to enter the home. *Ibid.* However, because the officer did not have a warrant, the defendant refused entry. *Ibid.* The officer then called for backup. *Ibid.*

The officer and the defendant continued their conversation on the porch. *Ibid.* The officer confirmed with the police dispatcher that the 9–1–1 call originated from the defendant's phone, and a follow-up call to that number elicited a busy signal. *Id.* at 594–95, 847 *A.*2d 561. While the defendant retrieved his cordless phone, the officer entered the foyer with the defendant's consent and noticed a lawn chair propped against a sliding glass door which he believed may have been intended to impede entry. *Id.* at 594–95, 847 *A.*2d 561. When backup arrived, the officer entered the home and conducted a search limited to places where a body could

be concealed. *Ibid.* No one else was found, but the search revealed marijuana plants, ultraviolet lights and an elaborate watering system. *Id.* at 596, 847 *A.*2d 561. The defendant was charged with fourth-degree possession of marijuana, *N.J.S.A.* 2C:35–10a (3), and first-degree operation of a marijuana manufacturing facility, *N.J.S.A.* 2C:35–4. *Id.* at 596, 847 *A.*2d 561.

On those facts, we held that the totality of the circumstances justified the officer's warrantless search under the emergency-aid doctrine because the dropped 9–1–1 call created "a duty to presume there was an emergency." *Id.* at 609, 847 *A.*2d 561. Moreover, the defendant's nervous demeanor and the dispatcher's confirmation that the 9–1–1 call came from the defendant's phone reinforced the officer's suspicion that there was an incapacitated person in the home. *Ibid.*

***171** Similarly, the dropped 9–1–1 call in this case permitted Delagarza to presume that there was an emergency. In light of that presumption, and based upon his observations—defendant denied making the 9–1–1 call while also claiming no one else was home, there were three cars in the driveway, there was an abrasion on defendant's hand, and defendant became agitated when asked if he was married—Delagarza had "an objectively reasonable basis to believe that an emergency require[d] that he provide immediate assistance to ****1245** protect or preserve life, or to prevent serious injury." *Frankel, supra,* 179 *N.J.* at 600, 847 *A.*2d 561.

The facts presented here are strikingly similar to those present in *Frankel.* Accordingly, we conclude that the emergency-aid exception to the warrant requirement justified the police officers' intrusion into defendant's home. Having determined that the officers' warrantless entry was justified under the emergency-aid doctrine, we now turn to the specific charges against defendant.

B.

1.

A person is guilty of obstructing the administration of law or other governmental function when he or she

> purposely obstructs, impairs or perverts the administration of law or other governmental function or *prevents or attempts to prevent a public servant from lawfully performing an official function* by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.
>
> [*N.J.S.A.* 2C:29–1(a) (emphasis added).]

We have "construe[d] 'lawfully performing an official function' to mean a police officer acting in objective good faith, under color of law in the execution of his duties." *Crawley, supra,* 187 *N.J.* at 460–61, 901 *A.*2d 924. In *Crawley,* we stated

> A police officer who *reasonably* relies on information from headquarters in responding to an emergency or public safety threat may be said to be acting in good faith under the statute. However, a police officer who without any basis arbitrarily detains a person on the street would not be acting in good faith.
>
> [*Id.* at 461 n. 8, 901 *A.*2d 924.]

***172** A suspect is required to cooperate with the investigating officer even when the legal underpinning of the police-citizen encounter is questionable. *See Williams, supra,* 192 *N.J.* at 10, 926 *A.*2d 340 ("[D]efendant was obliged to submit to the investigatory stop, regardless of its constitutionality."); *Crawley, supra,* 187 *N.J.* at 459–60, 901 *A.*2d 924 (holding defendant committed obstruction by impeding stop, despite officer's lack of reasonable suspicion).

When Delagarza announced his intention to enter the house, he was doing so in order to lawfully perform an official function under the emergency-aid doctrine. Defendant's attempt to close the door on the officers constituted an attempt to prevent the officers from performing their official function. Defendant's interference is not excused by his suspicions about the officers' intentions. *Crawley, supra,* 187 *N.J.* at 459–60, 901 *A.*2d 924, and *Williams, supra,* 192 *N.J.* at 10, 926 *A.*2d 340, establish that once an officer makes his investigatory intentions clear, and he is acting under the color of law, the validity of the underlying police action is inconsequential. We hereby confirm that, whether on the street or at a residence, a person who "prevents or attempts to prevent a public servant from lawfully performing an official function by means of ... physical interference or obstacle" is guilty of obstruction. *N.J.S.A.* 2C:29–1(a). Because the emergency-aid doctrine justified the officers' warrantless intrusion into defendant's home, and because defendant hampered their entry by slamming the door, defendant's obstruction conviction should have been upheld.

2.

A person is guilty of third-degree resisting arrest when he or she:

(a) Uses or threatens to use physical force or violence against the law enforcement officer or another; or

**1246 (b) Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

[*N.J.S.A.* 2C:29–2(a)(3).]

***173** "It is not a defense to a prosecution [for resisting arrest] that the law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance." *N.J.S.A.* 2C:29–2(a); *see also Mulvihill, supra,* 57 *N.J.* at 155–56, 270 *A.*2d 277 ("[I]n our State when an officer makes an arrest, legal or illegal, it is the duty of the citizen to submit and, in the event the seizure is illegal, to seek recourse in the courts for the invasion of his right of freedom."). "By the express terms of the [resisting arrest] statute, a person has no right to resist arrest by flight or any other means, even if the arrest constitutes an unreasonable seizure under the constitution." *Crawley, supra,* 187 *N.J.* at 453, 901 *A.*2d 924; *see also State v. Herrerra,* 211 *N.J.* 308, 334–35, 48 *A.*3d 1009 (2012) ("It is well-settled that defendants have 'no right' to resist arrest, elude or obstruct the police, or escape 'in response to an unconstitutional stop or detention.' " (quoting *Crawley, supra,* 187 *N.J.* at 455, 901 *A.*2d 924)). Because defendant pulled his hands away from the officers after Delagarza announced defendant was under arrest, and in doing so dragged the officers to the floor, the Appellate Division was correct to affirm defendant's resisting arrest conviction.

3.

Defendant contends that his obstruction and resisting arrest convictions should not stand because his actions were justified by the officers' use of excessive force. We acknowledge that a person's use of force against a law enforcement officer may be justified when the officer "employs unlawful force to effect [an] arrest." *N.J.S.A.* 2C:3–4(b)(1)(a). However, a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer engaged in the performance of his duties. *Mulvihill, supra,* 57 *N.J.* at 155–56, 270 *A.*2d 277.

As we said previously, the record below supports the findings of the municipal court and Law Division, that the officers announced ***174** their intention to arrest, defendant was aware that the officers were in fact police officers, and Officers Hall and Gant each punched the defendant once in the face because they perceived a threat to Delagarza. Under these circumstances, defendant had a duty to yield to the commands of the officers who were engaged in the performance of their duties. *Ibid.* Therefore, defendant's failure to yield to the officers' legitimate authority resulted in an altercation during which the officers were entitled to use the force the municipal court and Law Division found necessary to subdue defendant.

V.

The judgment of the Appellate Division is affirmed in part and reversed in part. Defendant's conviction for resisting arrest is affirmed, and defendant's obstruction conviction is reinstated.

For affirmance in part; reversal in part—Chief Justice RABNER and Justices LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ–VINA, SOLOMON and Judge CUFF (temporarily assigned)—7.

Opposed—None.

All Citations

222 N.J. 154, 117 A.3d 1235

Footnotes

1 A dropped 9–1–1 call is an emergency call received by the communication center of a law enforcement agency from an identified location where the caller disconnects before information can be received.

2 The trial transcript reveals that, upon entering the home, Hall and Gant heard the announcement that defendant was under arrest. Delagarza testified that he made the statement, and Gant identified Delagarza as the one who did so. However, Hall could not recall which officer made the announcement.

3 Defendant was a Captain in the United States Air Force.

4 The procedures used by the municipal court are not challenged in this appeal.

888 F.3d 628
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Robert ALEXANDER, Defendant-Appellant.

No. 16-3708-cr
|
August Term, 2017
|
Argued: October 30, 2017
|
Decided: May 1, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of New York, Carol Bagley Amon, J., of being a felon in possession of a firearm, after his motion to suppress firearms obtained from warrantless search was denied. Defendant appealed.

The Court of Appeals, Gerard E. Lynch, Circuit Judge, held that area in front of shed that was just few steps from back door of defendant's residence was curtilage, protected against search by government without warrant or suspicion.

Conviction vacated, denial of suppression motion reversed, and remanded.

Alvin K. Hellerstein, filed concurring opinion.

***629** Appeal from the United States District Court for the Eastern District of New York

Attorneys and Law Firms

Amy Busa, Assistant United States Attorney (Ryan C. Harris, Assistant United States Attorney, on the brief) for Bridget M. Rohde, Acting United States Attorney for the Eastern District of New York, Brooklyn, New York, for Appellee.

Allegra Glashausser, Federal Defenders of New York, Inc., Appeals Bureau, New York, New York, for Defendant-Appellant.

Before: Lynch and Carney, Circuit Judges, and Hellerstein, District Judge.[*]

Opinion

Judge Hellerstein concurs in the judgment in a separate opinion.

Gerard E. Lynch, Circuit Judge:

Defendant-Appellant Robert Alexander was convicted of being a felon in possession of a firearm after police, without a warrant or probable cause, searched a portion of his property and discovered two guns inside a bag. The United States District Court for the Eastern District of New York (Carol Bagley Amon, *J.*) denied Alexander's motion to suppress the guns before trial. Alexander now seeks to vacate his conviction on the ground that the district court's suppression ruling was in error. His appeal presents the narrow question of whether the area where police discovered the guns formed part of the "curtilage" of Alexander's home and was thus entitled to Fourth Amendment protection that the district court determined was not due. For the reasons that follow, we VACATE Alexander's conviction, REVERSE the denial ***630** of the suppression motion as to the guns, and REMAND for further proceedings.

BACKGROUND

The following facts, which are drawn from the record of the suppression hearing, are largely undisputed.

Alexander lived in a narrow house on Staten Island. The front of the house faced the street, and a short set of stairs led directly from the sidewalk to the front door. The property also included an 84-foot-long driveway that ran perpendicular to the street and alongside the home. The driveway extended past the back of the house, and at the end of the driveway, in the backyard, was a shed. Alexander used the part of the driveway in front of the shed for parking, barbeques, and relaxation. There was fencing on three sides of the property, though not on the side facing the street.

One night, Alexander was standing with a woman in his front yard, a bottle of vodka in hand. A few feet away, another man and woman sat in a car that was idling in the street, blocking Alexander's driveway.

Sometime between 3:00 and 3:30 a.m., two plainclothes police officers, Genaro Barreiro and Daniel Golat, approached the group. As they neared, the officers observed the man in the passenger seat of the car attempt to put in his pants what appeared to be a baggie of drugs. The police quickly removed the two passengers from the vehicle and discovered a plastic bag containing a substance resembling cocaine in the man's hand.

The man apparently confessed that there was more cocaine in the back seat of the car, prompting Golat to search that area for additional drugs. While Golat was doing so, Alexander announced that he was "just going to put [the liquor bottle] in the back." A. 58. (He later told Golat that he wanted to put the bottle away "out of respect" for the police officers. A. 171.) Alexander then walked down the driveway toward the backyard, stopping along the way to pick up a bag that had been left next to the house. Alexander was out of view for less than a minute before returning to the officers. When he did, he had neither the bottle nor the bag with him.

After an additional police officer arrived on scene, Officer Barreiro decided to look for the items that Alexander had moved. Barreiro testified that his "suspicion level [was] high," A. 65, but it is undisputed that he had no probable cause to search Alexander's property. Nevertheless, Barreiro proceeded to walk down the driveway and eventually found the liquor bottle around the back corner of the house, next to the home's back door. Barreiro did not see the bag at that time and returned to the front yard to frisk Alexander. Barreiro then walked down the driveway once again and "into the backyard" in order to continue searching for the bag. A. 69.

Once in the backyard, Barreiro used his flashlight to scan the area and spotted the bag resting on a plastic chair by the front corner of the shed closest to the house. The chair was roughly four feet from where he had found the bottle. Barreiro walked up to the bag and saw the butt of a gun sticking out of it. Inspecting the bag more closely, he realized that there were actually two guns inside.

Alexander was arrested and charged with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and one count of possessing a defaced firearm in violation of 18 U.S.C. § 922(k).

Before trial, Alexander moved to suppress both the guns and the vodka bottle, arguing that Officer Barreiro violated the ***631** Fourth Amendment by searching the curtilage of Alexander's home without a warrant or probable cause. The district court held a hearing at which the officers and Alexander's sister, who lived with Alexander, testified. In an oral ruling, the court granted the motion as to the bottle, and denied it as to the guns, holding that only the former was found on the curtilage of the house.

The guns were thus admitted at trial, and the jury convicted Alexander of one count of being a felon in possession of a firearm. He was sentenced principally to 51 months' imprisonment and three years' supervised release. This appeal followed.

DISCUSSION

At the "very core" of the Fourth Amendment "stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). The curtilage—that is, the "area adjacent to the home and to which the activity of home life extends"—is considered part of a person's home and enjoys the same protection against unreasonable searches as the home itself. *Florida v. Jardines*, 569 U.S. 1, 7, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (internal quotation marks omitted). As a result, a search of the curtilage that occurs without a warrant based on probable cause or an exception to the warrant requirement violates the Fourth Amendment. *Harris v. O'Hare*, 770 F.3d 224, 234, 240 (2d Cir. 2014). By contrast, that portion of private property that extends outside a home's curtilage—what the caselaw terms an "open field"—is beyond the purview of the Fourth Amendment, and can be warrantlessly and suspicionlessly searched without constitutional impediment. *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409.

In this case, we must decide whether the area where Officer Barreiro found the guns was part of the curtilage of Alexander's home. If it was, it is undisputed that the guns should have been suppressed, and Alexander's conviction for possessing those guns must be vacated.

In reviewing a district court's denial of a motion to suppress, "factual determinations are reviewed for clear error and conclusions of law are reviewed *de novo*." *United States v. Hayes*, 551 F.3d 138, 143 (2d Cir. 2008), citing *Ornelas v. United States*, 517 U.S. 690, 698–99, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The same standard applies to a

decision about curtilage. *Id.* Factual determinations about use, privacy, and the physical characteristics of a property are "reviewable for clear error only," whereas such "factual findings are themselves subject to a legal framework which is ... reviewable in a plenary fashion." *United States v. Reilly*, 76 F.3d 1271, 1275 (2d Cir.), aff'd on reh'g, 91 F.3d 331 (2d Cir. 1996). Mixed questions of law and fact—that is, whether the "admitted or established" facts satisfy the "relevant statutory or constitutional standard"—are subject to *de novo* review as well. *Ornelas*, 517 U.S. at 696–97, 116 S.Ct. 1657 (brackets omitted).

The relevant facts here are undisputed, and the framework that we must apply to them is principally informed by two Supreme Court decisions.

In *United States v. Dunn*, the Court considered whether a barn located 50 yards from a fence surrounding a ranch house was part of the home's curtilage. 480 U.S. 294, 297, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). The barn itself was surrounded by a separate fence, as was the entirety of the 198-acre property. *Id.* The Court held that the barn was not part of the curtilage. *Id.* at 301, 107 S.Ct. 1134. It reached its ***632** decision by applying a four-factor test, which it instructed "should" be used to resolve curtilage questions. *Id.* The factors were: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.*

The Court was careful to warn, however, that "combining th[ose] factors [does not] produce[ ] a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." *Id.* Instead, the factors were "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

The Supreme Court did not hear another curtilage case until decades later. In *Jardines v. Florida*, the Court was faced with a search that occurred on the front porch of a home. 569 U.S. at 7, 133 S.Ct. 1409. Without reference to the *Dunn* factors, the Court held that the porch was part of the home's curtilage. *Id.* It described curtilage as the "area around the home [that] is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened," and suggested that a "home's porch or side garden" fell easily within that definition. *Id.* at 6–7, 133 S.Ct. 1409 (internal quotation marks omitted). The Court went on to recognize that the public, law enforcement included, had an implicit license to approach the front door of a home in order to "knock promptly" and "wait briefly to be received." *Id.* at 8, 133 S.Ct. 1409. But, in bringing a drug-sniffing dog onto the porch, the police exceeded the scope of that implicit license, and their search was thus unconstitutional. *Id.* at 9, 133 S.Ct. 1409.

That *Jardines* did not reference *Dunn* does not mean that the earlier case is no longer relevant. Indeed, in our first curtilage case post *Jardines*, we relied on the *Dunn* factors in holding that, for qualified immunity purposes, it was "clearly established that a fenced-in side or backyard directly abutting a single-family house constitutes curtilage." *Harris*, 770 F.3d at 240.

At the same time, the *Dunn* factors have never been the exclusive curtilage considerations, and are relevant only insofar as they help answer the "central" question of whether the area in question "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *Dunn,* 480 U.S. at 300, 107 S.Ct. 1134 (internal quotation marks omitted). *Jardines* confirms that and, further, is instructive as to the weight certain factors should receive when courts seek to answer that ultimate question. The front porch in *Jardines* was neither hidden from public view nor closed off to the public by a fence; in fact, the porch was open to the public in such a way that the public had an implicit license to enter the area. None of those facts gave the *Jardines* Court any pause in declaring the porch curtilage, suggesting that the lack of fencing (relevant to the second *Dunn* factor) and the lack of steps taken to protect an area from public observation (relevant to the fourth) may be of limited significance, at least in certain residential settings. For these reasons, and as discussed below, *Jardines* undercuts certain of this Court's precedents that suggest that public visibility or public access may definitively take an area out of the curtilage.

With these principles in mind, we turn to the case at hand. We begin with the *Dunn* factors.

***633** The first *Dunn* factor—proximity of the area to the home—weighs strongly in Alexander's favor. Unlike the barn in *Dunn*, which was 50 yards from the fence around the home, the area in front of the shed was just a few steps

from Alexander's back door, and the area " 'immediately surrounding and associated with the home' " is the very definition of curtilage. *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409, quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The government does not disagree.

The second *Dunn* factor—whether the area is included within an enclosure surrounding the home—is neutral. As explained in *Dunn*, this factor seeks to account for the divisions that a property owner herself has created with her property, and is premised on the notion that "for most homes, the boundaries of the curtilage will be clearly marked." 480 U.S. at 302, 107 S.Ct. 1134 (internal quotation marks omitted). A "fence surrounding [a] residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house," whereas an area outside a fence surrounding a home "stands out as a distinct portion" of the property, "quite separate from the residence." *Id.* In *Dunn*, that distinction made sense. A perimeter fence encircled the respondent's 198-acre property, and a much smaller fence encircled the home; that the area in question was 50 yards beyond that interior fence supported the Court's determination that the physical layout of the property itself distinguished the area from the respondent's home and, thus, the curtilage. *Id.* at 297, 302, 107 S.Ct. 1134.

It is unlikely that a property as small as Alexander's would be subdivided like the property in *Dunn*, making the second *Dunn* factor a less useful concept in this particular residential setting. In any event, Alexander neither fully enclosed any part of his property with fencing, nor separated the area in front of the shed from the home by running a fence between them. The fencing that did exist, however, enclosed, on three sides, both the shed and the home, marking off the home and modest yard and driveway areas from adjoining properties—a fact that, if anything, supports Alexander. *See Reilly*, 76 F.3d at 1277–78.

To the extent the second *Dunn* factor relates more broadly to whether fencing prevented public access to the area in question, *see Hayes*, 551 F.3d at 148, our assessment of the factor doesn't change. Although there was no fencing on the street-facing side of the property, there was fencing on the other three sides, and the area in front of the shed was more than 80 feet from the street. That physical layout certainly did not invite visitors to traverse the length of Alexander's property in order to enter his backyard, and the fencing that was in place certainly would discourage such intrusions.

The third *Dunn* factor—the nature of the uses of the area—weighs at least slightly in Alexander's favor. Although the district court found that the top of the driveway's "primary use" was for parking cars, it was used "at least occasionally for recreation" such as hosting barbeques, and was continuous with the backyard area behind the house, which the district court concluded was within the curtilage of the home. A. 271–72. Thus, it is an area "to which the activity of home life extends." *Jardines*, 569 U.S. at 7, 133 S.Ct. 1409 (internal quotation marks omitted). In *Reilly*, we concluded that a pond located 300 feet from the defendant's home was a part of the curtilage, and observed that "[o]n a large parcel of land, a pond 300 feet away from a dwelling may be as intimately connected to the residence as is the backyard ***634** grill of the bloke next door." 76 F.3d at 1277. Alexander is more or less that "bloke," and the area in question, an order of magnitude closer to his house than the pond in *Reilly*, is where he sometimes uses his grill.

Finally, the fourth *Dunn* factor—steps taken to protect the area from public observation—weighs somewhat against a finding of curtilage. Although the area in question was set back from the street, nothing prevented the public from viewing the area from the sidewalk in front of the property, nor did the chain link fence stop neighbors in adjacent properties from observing Alexander's backyard.

Mindful that we need not mechanically apply these factors, we hold that the area from which the guns were recovered was part of the curtilage of Alexander's home. Only the fourth *Dunn* factor weighs against Alexander, and that factor is not dispositive, particularly where, as here, the search took place just steps from the home in an area partially used for intimate activities.

As suggested above, *Jardines* strongly reinforces our conclusion and our weighing of the *Dunn* factors. In that case, the Supreme Court observed that a property owner's Fourth Amendment rights would be "of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409. A porch, like the area in front of the shed, abuts the home itself, and thus, here as in *Jardines*, the first *Dunn* factor of "proximity" strongly favors a finding of curtilage. A porch is not necessarily within a closed area, and, like the driveway in this case, is even sometimes subject to a limited license for visitors approaching the home in order to seek entry. Therefore, here as in *Jardines*, the absence of

a fence marking off one part of the property as more private than the rest does not preclude a finding of curtilage. Next, both a porch and the immediate back or side yard area abutting a house, especially on a small property like Alexander's, are commonly used for family activities, even though they may also be accessible, to a limited degree and for particular purposes, to visitors, including strangers such as salespersons or indeed police officers. The area here is thus comparable to the porch in *Jardines* with respect to the third *Dunn* factor. And a porch, like Alexander's driveway, is typically open to observation from passing pedestrians, even ones with no legitimate occasion to enter it. The fourth *Dunn* factor, then, though it weighs against a finding of curtilage, carries no more weight here than in *Jardines*.

Accordingly, although there is, as *Dunn* explained, no mechanical formula for balancing the factors relevant to the curtilage inquiry, the *Dunn* factors in this case line up closely with the same factors as applied to the property in *Jardines*, which the Court found to be a paradigmatic example of curtilage.

Jardines also helps illustrate a further distinction that is relevant to the significance of the fourth *Dunn* factor. The government places some emphasis on the fact that the area in question was visible from the street, which, we agree, weighs against a curtilage finding. But whether the general area was visible from the public sidewalk, the evidence that was seized, and even the bag that the police searched for, were not. We would have a very different case if the officer had observed the guns or other incriminating evidence from the sidewalk—just as *Jardines* would have been different if the officers had observed marijuana plants in plain view on the porch. Such an observation would give the officers probable cause to obtain a search warrant, and, depending on the circumstances, ***635** an exigency of some kind might permit a warrantless entry onto the curtilage and seizure of the evidence. But absent such cause, the officers in *Jardines* were not permitted to enter onto the porch for the purpose of conducting a search, even though the porch itself was visible from the street.

We do not suggest that nothing can be said on the other side of this argument. Alexander certainly could have taken steps —placing a fence at the front of his property, erecting walls to prevent public observation of the area in front of the shed —that would have resolved the curtilage question even more clearly in his favor. But it is not necessary to turn a residential property into a fortress in order to prevent the police from "trawl[ing]" one's yard, *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409, unencumbered by the Constitution.

For that indeed would be the consequence of the government's position in this case. The government does not argue that there was probable cause, or even reasonable suspicion, to justify the search. Rather, it contends that the area in question falls into the category of open fields that may be investigated without a warrant or exigency, without probable cause or articulated basis for suspicion, whenever an officer decides to have a look around. As *Jardines* shows, the mere fact that a part of Alexander's modest homestead was not fully surrounded by a fence and was visible from the street does not make that area, which directly abutted the house, which was used for recreation, and which sat more than 80 feet from the sidewalk, fair game for warrantless and suspicionless police inspection or patrol.

In urging the opposite conclusion, the government argues that "this Court has repeatedly held ... that driveways do not constitute curtilage entitled to protection under the Fourth Amendment where, as here, they are unenclosed, unshielded, and visible and accessible from a public street." Gov't Br. 19. The three cases of ours that the government cites in support of that proposition, however, do not persuade us that the area in front of Alexander's shed should be considered an open field. All of them preceded *Jardines* and, even on their own terms, they do not sweep as broadly as the government contends.

The first of the cases, *Krause v. Penny*, 837 F.2d 595 (2d Cir. 1988), did not even attempt to distinguish between curtilage and an open field, but rather considered whether the defendant officer was entitled to qualified immunity for an arrest allegedly made in violation of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), which prohibits police from entering a suspect's home without consent and making a routine arrest without a warrant. We described the Supreme Court's jurisprudence at the time as having "not yet delineated 'the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself.' " *Krause,* 837 F.2d at 596–97, quoting *Oliver*, 466 U.S. at 180 n.11, 104 S.Ct. 1735. We noted, in addition, that a number of lower courts had determined that "areas such as driveways that are readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants' houses." *Id.* at 597. For those reasons, among others, we held that the plaintiff's warrantless arrest on his driveway did not violate clearly established law

and, therefore, the arresting officer was entitled to qualified immunity. *Id.*

Neither that holding nor the analysis that got us there compels the conclusion that the whole of Alexander's driveway constitutes an open field. In fact, *Krause* seems to proceed on the assumption that ***636** the arrest took place on, and thus the driveway there formed part of, the curtilage: were the driveway considered to fall outside the curtilage, the Fourth Amendment would have no relevance at all, and our discussion of the "degree of Fourth Amendment protection" owed to curtilage as compared to the house itself would have been unnecessary. *Id.* Moreover, the case was decided on qualified immunity grounds, and held at most that there was no clearly established law at the time determining whether the officer had violated the Constitution. *Id.* at 596. Even if we were to read *Krause*, as the government does, as implying that "areas such as driveways that are readily accessible to visitors" must be considered open fields, *id.* at 597, that interpretation would be impossible to square with *Jardines*, where the front porch was deemed curtilage notwithstanding visitors' "implicit license" to enter the area. *Jardines*, 569 U.S. at 8, 133 S.Ct. 1409.

The government fares no better with its next case. In *United States v. Reyes,* the defendant Reyes sought to suppress marijuana plants that his probation officer discovered while walking on a gravel driveway on the side of Reyes's home. 283 F.3d 446, 450 (2d. Cir. 2002). The district court denied the suppression motion, and we affirmed. *Id.* at 470. We held that, as a convicted felon on supervised release, Reyes had "a severely diminished expectation of privacy with respect to any home visit by a probation officer," and that the probation officer required neither probable cause nor reasonable suspicion to search his property. *Id.* at 461–62. Whether the driveway was curtilage thus had no bearing on the resolution of Reyes's appeal.

We nevertheless went on to consider in the alternative—and in dicta, for present purposes—whether the search could have been justified even if Reyes had not been on supervised release. *Id.* at 465–68. We said that it could, reasoning that the driveway, which had "access for pedestrian traffic" and was not used "for activities of an intimate nature," fell outside the curtilage of the home. *Id.* at 466–67. That reasoning highlights the factual differences between *Reyes* and the present case, as the area in front of Alexander's shed was not an area that visitors ever needed to access, and the area *was* used for intimate activities.

More importantly, however, our analysis in *Reyes* rested on the principle, untenable after *Jardines*, that "[t]he route which any visitor to a residence would use is not private in the Fourth Amendment sense." *Id.* at 465 (internal quotation marks omitted, alteration in original). The public may have an implicit—but limited—license to enter an area commonly traversed by visitors, such as a driveway or a porch. But *Jardines* stands for the proposition that the existence of such a license exists is not a reason to declare the area an open field; it means only that certain police intrusions onto the curtilage may be justified, assuming the police acted within the scope of the implicit license. The government does not contend that such a license permitted the officer's nighttime search in the present case, and the dicta in *Reyes* does not persuade us that the back portion of Alexander's driveway, which was not necessary to cross in order to seek entry to the home, was outside the curtilage.

The government's final case, *United States v. Hayes*, is similarly distinguishable. There, the defendant Hayes sought to suppress a bag of narcotics that a police dog had recovered from scrub brush on the border of Hayes's property. *Hayes*, 551 F.3d at 140. The principal issue on appeal was whether the brush, located 65 feet from the home, was curtilage—a question we answered in the negative. ***637** *Id.* at 145. That conclusion is of marginal relevance here.

The portion of the opinion on which the government relies addressed a different issue. Hayes also sought suppression on the ground that, even if the dog both detected and recovered the narcotics from outside the curtilage, the dog still passed over the curtilage en route to the bag. *Id.* at 146–47. We ultimately determined that it didn't matter whether the dog passed over the curtilage because "such a transient trespass does not implicate the Fourth Amendment where the incriminating evidence is discovered outside the curtilage." *Id.* at 147. In the passage the government cites, we nonetheless expressed our agreement with the district court's conclusion that the dog had not invaded the curtilage, quoting the district court as having determined that the route "along the driveway, ... which was in full view of the street for its entire length, was plainly outside of the curtilage." *Id.* We did not explain the basis for our agreement, or even describe the district court's reasoning. Yet, in our general discussion of curtilage, we once again suggested that areas used as a "normal route of access for anyone visiting the premises" may not be protected by the Fourth Amendment. *Id.* at 146. Although such access is not necessarily irrelevant

to a curtilage determination, or may justify police access on an implied-license theory, *Jardines* makes clear that limited visitor access is not dispositive. In light of *Jardines*, the dicta in *Hayes* cannot persuade us to affirm.

In short, the broad principles the government seeks to glean from our precedents are either taken out of context or untenable after *Jardines*, or both. The police do not have unlimited authority to search driveways for incriminating evidence, even if the particular driveway is visible from the street, even if a fence does not block pedestrian access, and even if the public is implicitly licensed to traverse a portion of the driveway in order to seek entry into the home. Here, the portion of the driveway in front of Alexander's shed formed part of the curtilage, and the search of that area ran afoul of the Fourth Amendment.

In his concurring opinion, Judge Hellerstein suggests a provocative and novel approach to determining the constitutionality of police searches of private property other than homes or other buildings. We express no view on the desirability of revising existing Fourth Amendment law along the lines he suggests. We need not address that issue for two reasons: First, as Judge Hellerstein explicitly acknowledges, because the government does not argue that the police had reasonable suspicion that evidence of crime would be found in the area searched, let alone that reasonable suspicion could justify the warrantless intrusion of Alexander's curtilage, the approach proposed in the concurrence is not properly before us. Second, as the concurrence implicitly recognizes, the notion that reasonable suspicion might permit intrusions into curtilage that would not be justified inside the home is foreclosed by governing precedent, *see, e.g.*, *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409 ("[W]e have held [that the curtilage of the house] enjoys protection as part of the home itself."); *Harris*, 770 F.3d at 238–40 (refusing to grant qualified immunity for warrantless search of curtilage in absence of exigency, despite the fact that officers had probable cause), and has no basis in existing Supreme Court law regarding property searches. We leave it to the Supreme Court, should Judge Hellerstein's theory ever be presented to it, to decide whether its existing approach to curtilage and open fields should be revised. Under existing law, however, the evidence used to convict ***638** Alexander was illegally seized and must be suppressed.

CONCLUSION

For the foregoing reasons, we VACATE Alexander's conviction, REVERSE the denial of the suppression motion as to the guns, and REMAND the case for further proceedings.

Alvin K. Hellerstein, concurring:

I write separately because I believe that the majority's view of curtilage is too absolute, and because it does not give a police officer's reasonable suspicion any sway in the definition of curtilage.

It was 3:00 a.m., on a street in Staten Island. The police had stopped two men \with drugs from driving away, and arrested them. The defendant, a cousin of one of the two and the owner of the house, walked up a driveway to hide what appeared to be an opened bottle of alcohol from which he had been drinking, and to move another package from one place in his backyard to another. Officer Barreiro, tracing defendant's path up the driveway and seeing what defendant was doing, moved to the hiding spot, in the curtilage of defendant's house. Looking out, he scanned the backyard, performing a radius search of the back part of the backyard, away from defendant's residence. He spied another package, adjacent to a shack at the end of the driveway—a package that on further inspection revealed what appeared to be a gun sticking out. Another gun was inside the bag. Is that spot, adjacent to the driveway and away from the defendant's house, curtilage? The majority holds that it is, and excludes the package of guns from being admitted into evidence. In order to suppress the evidence, the majority reverses the careful factual findings of the district judge, applying the four factors for finding curtilage set out in the controlling case of *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), as understood by the Supreme Court's most recent curtilage decision in *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

First, the government based its appeal, not on the ground of Officer Barreiro's reasonable suspicion, but on the district court's definition of curtilage. Had the government not made that concession, the result might have been different. I believe it is important, in defining curtilage, whether a police officer's reasonable suspicion could justify the search, and whether the protected curtilage is away from the house.

A constitutional search typically must be premised on a judicially authorized warrant based on probable cause. However, an officer may, in limited circumstances, temporarily detain and conduct a limited search on an individual's person based on the officer's reasonable

suspicion. *See* *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Singletary*, 798 F.3d 55, 59 (2d Cir. 2015) ("In *Terry v. Ohio*, the Supreme Court 'expressly recognized that government interests in effective crime prevention and detection, as well as in officer and public safety while pursuing criminal investigations, could make it constitutionally reasonable in appropriate circumstances and in an appropriate manner temporarily to detain a person' to investigate possible criminality even in the absence of a warrant or probable cause for arrest." (quoting *United States v. Bailey*, 743 F.3d 322, 331–32 (2d Cir. 2014))).

True, the Supreme Court has held that "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409. But the Fourth Amendment itself makes no distinction between persons and homes, *see* U.S. Const. Amend. IV, and the Supreme ***639** Court has described the right to be secure in one's person as an "inestimable right of personal security" that "belongs as much to the citizen on the streets of our citizens as to the homeowner closeted in his study," *Terry*, 392 U.S. at 8–9, 88 S.Ct. 1868. If a reasonable suspicion can justify a limited search of one's person, I believe that the Constitution could permit a similar approach in the grey area of curtilage.[1]

Second and relatedly, I question whether the full perimeter of protected curtilage is an absolute proposition, or one that varies based on the factors laid out in *United States v. Dunn*. *Dunn* instructs courts to consider such factors as "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134. I believe that these factors are more amenable to a sliding scale analysis, one that recognizes that a police officer, who had reasonable suspicion to follow defendant and could be subject to criticism if he had not, and who reasonably believed that the contraband would have disappeared if he had sought a warrant from a court, did not violate the Constitution.

I agree with the majority that defendant's backyard might be curtilage. It is bounded on three sides, and it is used by defendant for recreational and entertainment purposes. But it also is open to the neighbor, and anyone else who walks up the driveway, particularly a police officer who walked up the driveway because he reasonably suspected that defendant was hiding evidence of criminal conduct. No case holds that curtilage is absolute.[2] If it is an area next to a home, and allows entry into the home, whether physically or by sight or smell, it surely is curtilage, and so the Supreme Court holds. *See* ***640** *Jardines*, 569 U.S. at 7, 133 S.Ct. 1409 (calling the front porch "the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends' " (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984))). But if the area is far enough away not to threaten privacy within the home, it has elements both of "open field" and curtilage. If a police officer invades such an area without reasonable suspicion, he is invading the home owner's Fourth Amendment privacy. But if the officer enters because of reasonable suspicion that the backyard harbors crime, and if the circumstances do not allow time to obtain a warrant, the officer should not be held to have violated the owner's Fourth Amendment rights.

In sum, I do not believe that the binary choice between "open field" and curtilage, with no reference to the reasonable suspicion held by the officer, is the appropriate way to resolve these questions. But because the government stipulated away the issue of reasonable suspicion on appeal, I concur with the decision of the majority.

All Citations

888 F.3d 628

Footnotes

* Judge Alvin K. Hellerstein, of the United States District Court for the Southern District of New York, sitting by designation.

1 Support for a more flexible approach to curtilage determinations, based on the area in question and the exercise of an officer's reason and judgment, has received some treatment in the academic literature. *See, e.g.*, Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 Cornell L. Rev. 905, 948–50 (2010) (arguing that "[a]reas of curtilage less likely to be implicated in intimate life, such as storage outbuildings, garages, and garbage within the curtilage could be subject to a reduced standard of reasonable suspicion" and recognizing that such reform "may be quietly beginning" based on "[t]he narrowing of curtilage protection" in the lower courts).

2 Our discussion of this issue in *Krause v. Penny*, 837 F.2d 595 (2d Cir. 1988), is instructive. In *Krause*, which was decided after *Dunn* and addressed the scope of curtilage in the context of qualified immunity, the plaintiff was arrested while standing in his driveway after a neighbor complained of harassment. *Id.* at 596. After the trial court instructed the jury that the arrest was unlawful based on the area's proximity to the home, we reversed, holding that the officer was entitled to qualified immunity. *Id.* at 596–97. As the majority explains, *Krause* proceeded on the assumption that the driveway was within the curtilage, but we noted in *Krause* that the Supreme Court "ha[d] not yet delineated 'the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself.' " *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 n.11, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). Recognizing that there was "substantial lower court authority for the proposition that areas such as driveways that are readily accessible to visitors are not entitled to the *same degree* of Fourth Amendment protection as are the interiors of defendants' houses," we held that the officer was entitled to qualified immunity. *Id.* at 597 (emphasis added).

I agree with the majority that *Krause* does not dictate the outcome of this case, for it concerned a more accessible area on the driveway and addressed only the officer's entitlement to qualified immunity. But *Krause* does stand for the proposition that the scope of Fourth Amendment protection in areas just within the boundary of curtilage may be more flexible than within the home itself.

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474 F.2d 262
United States Court of Appeals,
Third Circuit.

UNITED STATES of America, Appellant,
v.
Paul Gary RUBIN et al. UNITED STATES of America, Appellant,
v.
Louis Martin AGNES a/k/a Louis Martin.

Nos. 72-1689, 72-1690.
|
Argued Dec. 15, 1972.
|
Decided Feb. 13, 1973.

Synopsis

Proceeding on defendants' motion to suppress evidence which had been seized during warrantless search of dwelling. The United States District Court for the Eastern District of Pennsylvania, A. Leon Higginbotham, J., 343 F.Supp. 625, entered order granting the motion, and the Government appealed. The Court of Appeals, Rosenn, Circuit Judge, held that customs agents had reasonable grounds to conclude that, in light of emergency, it was necessary to enter premises without awaiting search warrant.

Order vacated, and case remanded.

Attorneys and Law Firms

***263** Jeffrey M. Miller, Asst. U. S. Atty., Philadelphia, Pa., for appellant.

Jonathan W. Miller, Defender Assoc. of Philadelphia Federal Court Division, Philadelphia, Pa., and Robert F. Simone, Philadelphia, Pa., for appellee.

Before SEITZ, Chief Judge, and ALDISERT and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

This appeal deals with the nettlesome question of whether there were exceptional circumstances present to justify a warrantless search of a dwelling.

United States Customs agents entered a house and garage in Philadelphia without a warrant on July 28, 1971, and seized 90 pounds of hashish. Appellees Agnes and Agran, indicted for various offenses connected with importation of the hashish, successfully moved to suppress the seized evidence in the District Court for the Eastern District of Pennsylvania. The Government has appealed the suppression pursuant to 18 U.S.C. § 3731. We vacate the order and remand.

***264** The facts surrounding the warrantless search are set out in the district court opinion:[1]

Sometime during the month of July, 1971, federal customs agents received reliable information that a bronze statue containing a large shipment of illicit drugs, from a point somewhere in Europe, would be shipped to a hospital in this area. As a result of this information, agents or 'look-outs' were posted at the Philadelphia International Airport and the waterfront. On or about July 26, 1971, a crate, answering the general description given to the agents by the informant, was delivered to the Airport. Thereafter, Federal customs agents inspected the crate and statue; they then removed a small sample of the contents for chemical analysis. This sample was confirmed to be 'hashish', a controlled substance under Title 21, United States Code, Section 841(a)(1). The statue contained approximately ninety (90) pounds of 'hashish'; it was addressed to Dr. Daniel Sill of the Board [sic] Street Hospital; Dr. Sill is not a co-defendant to this action. Thereafter, the crate was resealed and placed under constant surveillance. Subsequently, and as expected, a pickup was made on July 28, 1971, at approximately 4:00 p. m., by two men, one of whom was identified as Louis Martin Agnes (A/K/A Louis Martin), a defendant herein. The crate was taken from the Airport by defendant Louis Agnes, by car, to 1819 S. 9th Street in Philadelphia, where it was unloaded at about 5:00 P.M.[*] Shortly

thereafter, a custom's agent was dispatched at approximately 5:10 P.M. on July 28, 1971, to prepare and procure a search warrant. Subsequently, defendant Agnes left the South Ninth Street address at about 6:00 P.M., without the crate, but in his car. He was, of course, placed under surveillance. During this surveillance, Agent Bergin testified that 'it appeared to us that the vehicle [Agnes' car] was becoming evasive and aware we were behind it, and we stopped it and took the operator

in custody.' The actual arrest occurred at a gasoline station (some six blocks from Agnes' home), between 6:20 and 6:30 p. m. As he was being taken into custody, Agnes yelled to the gas station attendants and spectators, 'Call my brother'. The agents testified that at this point they reasonably believed that there existed the 'threat of destruction' to the 'hashish', which had been delivered to defendant Agnes' home. Thus, the agents proceeded to enter defendant's home in order to preserve the evidence contained therein. Once inside, the officers found the co-defendants, Earl Melvin Agran, Paul Gary Rubin, and Jan Massaar, in the process of packing the 'hashish' for possible distribution; all were arrested and the 'hashish' seized. Of course, the search was made without a warrant, and subsequent to the arrest of defendant Agnes. Upon the arrest of Agnes, Agent Moss abandoned his efforts to procure a search warrant.

The district court rejected the Government's argument that the warrantless search of 1819 South 9th Street was permissible because of the so-called "emergency doctrine." The court, apparently construing a long line of Supreme Court opinions to require that Government officials have knowledge that evidence is actually being removed or destroyed, ordered the seized evidence suppressed.

On appeal, the Government argues that the district court applied too severe a standard in reviewing the warrantless search and that the evidence should be ***265** admissible because the agents had a reasonable belief that the hashish they knew was in the residence was about to be destroyed or removed.

Appellees Agnes and Agran maintain that the strict standard applied by the district court was correct. Agnes argues further that he was arrested without a warrant or probable cause, and that this fact also necessitates suppression of the seized evidence. Agran also argues that the evidence must be suppressed because entry first into the front door of 1819 South 9th Street and then into the rear garage door was made without announcement of purpose, in violation of 18 U.S.C. § 3109. Although this issue was not ruled on by the district court, Agran and Agnes had raised it as part of their original suppression motions.

The fourth amendment protects the right of the people to be secure in their homes by providing that search warrants shall not issue "but upon probable cause, supported by Oath or affirmation." Although inferences may be drawn to support the need for a reasonable search, the amendment's protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). Despite the clear preference of the law for searches authorized by warrants, the Supreme Court has recognized several "exceptional circumstances"
in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with.

Johnson v. United States, 333 U.S. at 14-15, 68 S.Ct. at 369. The Court noted that it might consider "exceptional circumstances" by stating that the circumstances in that case were different from one in which "evidence or contraband was threatened with removal or destruction."[2] 333 U.S. at 15, 68 S.Ct. at 369.

Subsequent to *Johnson*, the Supreme Court has in at least two cases noted that belief that evidence is being destroyed or removed might create an exceptional circumstance justifying a warrantless search. In each, the Court, nonetheless, suppressed the evidence after finding no such circumstances. McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951). In neither case did the Court find any surrounding circumstances indicating to police officers that the evidence was "likely to be destroyed," McDonald v. United States, 335 U.S. at 455, 69 S.Ct. 191, or faced "imminent destruction, removal, or concealment," United States v. Jeffers, 342 U.S. at 52, 72 S.Ct. 93.

The three recent Supreme Court cases which have sustained use of evidence obtained through warrantless searches offer little guidance as to the exact parameters of the emergency exception. Both Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), setting guidelines for permissible "stop and frisk" procedures, and Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), involving search of the premises into which a felon under "hot pursuit" had fled, were premised on the "exceptional circumstance" that police officers must be able to protect themselves from bodily harm, rather than any Government claim that evidence ***266** would be removed or destroyed. Only Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), involved the removal or destruction exception. The Court approved in *Schmerber* a warrantless blood test

performed on an automobile driver who had been in an accident and was suspected of drinking. Although the Court found the administration of a blood test was within the area of privacy intrusions protected by the fourth amendment, it said a search warrant was not required because:

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.

384 U.S. at 770, 86 S.Ct. at 1835. Although, if scientific knowledge were imputed to the officer in *Schmerber*, it could be said he had knowledge that evidence was actually being destroyed, the Court spoke of "threatened" destruction. It would seem unwise to put undue emphasis on use of the word "threatened" in *Schmerber*. At the same time, however, it cannot be said that the Court was requiring the officer have knowledge evidence *was* in the process of destruction before any warrantless search could be approved.

The district court relied on three recent Supreme Court opinions, Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970), and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in suggesting that actual knowledge that evidence was being destroyed or removed was required under the emergency exception. Although we recognize that each of these cases speaks of the high standards of exigency which must be present to justify warrantless searches, we cannot agree with the district court that these case allow "emergency" justification only when the searching officers have knowledge that evidence is actually being removed or destroyed.

Three police officers arrived at petitioner's home in *Chimel*, armed with an arrest warrant based on the burglary of a coin shop. Chimel was arrested when he returned from work, and, despite his objection, the officers conducted an extensive search through the house seeking the stolen coins. In finding this search incident to an arrest unjustified, the Court said:

The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. . . . The scope of the search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand.

395 U.S. at 768, 89 S.Ct. at 2043.

Chimel's wife was present at the time of the arrest and search. Dissenting, Justice White therefore argued that exigent circumstances justifying a warrantless search existed because of the combined facts of an arrest and the risk that evidence could be destroyed by the wife before a search warrant could be procured. In light of the dissent, it may perhaps be argued that *Chimel* can be read to reject the contention that warrantless searches are justified to prevent a *threatened* destruction or removal of evidence. Such a reading, however, would misconstrue both the facts present in, and the rationale behind, the majority decision of *Chimel*. In *Chimel* the police had had time to obtain an arrest warrant. There was no showing that it would have been "unduly burdensome" for the police to have also obtained a search warrant. 395 U.S. at 768 n. 16, 89 S.Ct. 2034. No emergency had occurred ***267** during the arrest to indicate to the officers that removal or destruction of evidence was imminent or threatened. The Court recognized the exceptions allowing warrantless searches, but found that none of them applied. 395 U.S. at 763 n. 8, 763 n. 9, 89 S.Ct. 2034. The thrust of *Chimel* was that the arrest of a man at home could not justify a search of his entire house. Nowhere in the majority opinion does the Court suggest that the emergency exception for the *threatened* destruction of evidence was not still recognized as sound law.

A search warrant was found invalid by the Court in *Coolidge*. The Court thus measured the validity of three searches of an automobile, which had been parked in defendant's driveway and was then towed to the police station, by the standards for warrantless searches. One of the state's theories for upholding the validity of the search was that an automobile may be searched without a warrant anytime there is probable cause, because of the danger that it will be removed. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The Court rejected this contention because the facts made it clear that there was no reason to believe the automobile would be moved before a warrant could be obtained. Coolidge v. New Hampshire, 403 U.S. at 460-464, 91 S.Ct. 2022. The defendant was in custody; his wife, the only other adult occupant of his home, was not at home, and was, in fact, in the company of two policemen until after the time when the car was towed away. The Court was careful to note that under different facts, a warrantless search might have been justified:

Of course, if there is a criminal suspect close enough to the automobile so that he might get a weapon from it or destroy evidence within it, the police may make a search of

appropriately limited scope. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685.

403 U.S. at 461 n. 18, 91 S.Ct. at 2035. The holding in *Coolidge* therefore was that when there is not even a reasonable threat that evidence could be destroyed, a warrantless search cannot be justified. There is, however, no requirement that officers have knowledge of destruction taking place to justify a warrantless search.

The district court relies most heavily on Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970), in suggesting that knowledge of the actual destruction or removal of evidence is required to sustain a warrantless search.[3] Although the Court had always spoken of "threatened" destruction or removal of evidence in previous cases involving the emergency exception, in *Vale*, 399 U.S. at 35, 90 S.Ct. 1969, it spoke for the first time of goods "in the process of destruction." Although the language might suggest that the emergency exception must be construed to require knowledge that the evidence is actually being removed or destroyed, the omission of a single word should not be given such significance, especially in light of the facts in *Vale*. Officers with two warrants for Vale's arrest were watching his house when they saw him perform various acts that appeared to the officers to involve sales of narcotics. They arrested Vale on his front steps and proceeded to search his house. The Louisiana Supreme Court had found the seized narcotics admissible evidence because such evidence is so easily removed or destroyed. The United States Supreme Court rejected this reasoning, stating:

[B]y their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises.

399 U.S. at 34, 90 S.Ct. at 1972. The facts did not support a belief by the arresting officers that there was even a "threatened" destruction or removal of the narcotics. No exigent circumstances justifying the search existed. Further ***268** supporting suppression of the evidence in *Vale* was the lack of any evidence suggesting that "it was impracticable for them [the officers] to obtain a search warrant as well" as the arrest warrants which they did obtain. 399 U.S. at 35, 90 S.Ct. at 1972.

We have extensively reviewed the Supreme Court cases dealing with the emergency circumstances exception allowing warrantless searches to prevent removal or destruction of evidence. We find no requirement that officers must know of the removal or destruction in order to make the search. We are nonetheless obliged to explore the standard by which warrantless searches under emergency circumstances should be judged.

The fourth amendment does not forbid all searches and seizures but only such as are unreasonable. The Supreme Court in *Schmerber* observed that the fourth amendment's proper function is "to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." 384 U.S. at 768, 86 S.Ct. at 1834. Thus, judging the legality of warrantless searches involves, as emphasized in *Johnson*, a delicate question of balancing the rights of the individual to be secure in his home against the interest of society in preventing the disappearance of evidence necessary to convict criminals. The strong individual interest has demanded there be "only . . . a few specifically established and well delineated exceptions" to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. at 455, 91 S.Ct. at 2032. The emergency circumstances exception is "established," but it has not been "well delineated." The Supreme Court has never spoken in a case such as this one where the searching officers know there is in fact a large quantity of contraband narcotics in a dwelling, and they are apprehensive that it may be removed or destroyed.

Many lower federal courts have, however, grappled with the problem of whether warrantless searches were justified by emergency circumstances. From their rulings, a framework within which to evaluate the circumstances in the present case can be established. Probable cause to believe contraband is present is necessary to justify a warrantless search, but it alone is not sufficient. Probable cause must exist to support *any* search; the role of the warrant-issuing magistrate is to determine whether probable cause exists. Mere probable cause does not provide the exigent circumstances necessary to justify a search without a warrant.

When Government agents, however, have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified. The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant, *compare* United States v. Pino, 431 F.2d 1043, 1045 (2d Cir. 1970), *with* Niro v. United States, 388 F.2d 535

(1st Cir. 1968); (2) reasonable belief that the contraband is about to be removed, United States v. Davis, 461 F.2d 1026, 1029-1030 (3d Cir. 1972); Hailes v. United States, 267 A.2d 363 (D.C.C.A.1970); (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought, United States v. Pino, 431 F.2d at 1045; (4) information indicating the possessors of the contraband are aware that the police are on their trail, United States v. Doyle, 456 F.2d 1246 (5th Cir. 1972); and (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and ***269** to escape are characteristic behavior of persons engaged in the narcotics traffic," United States v. Manning, 448 F.2d 992, 998-999 (2d Cir. 1971); United States v. Davis, 461 F.2d at 1031-1032. In most cases where warrantless searches were not suppressed, a warrantless arrest was also involved. The present case is unique because the customs agents had no intention of making arrests when they entered the Agnes house, and the Government does not attempt to justify the search as incident to an arrest. The relevant criteria in determining whether the entry was constitutional, however, are similar.

A review of the facts surrounding the entry into the house and garage at 1819 South 9th Street convinces us that the customs agents "might reasonably have believed that [they were] confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Schmerber v. California, 384 U.S. at 770, 86 S.Ct. at 1835. The agents possessed more than enough information to establish probable cause that hashish was on the premises. Their inspection at the airport revealed hashish in the life-sized bronze bust statue, and the close trailing of the statue from the airport to the garage attached to Agnes' home established its presence there. The agents also possessed information that the statue had been broken open by the time of the search, as "kief," a form of hashish, was found all over Agnes' clothes when he was arrested. They therefore could reasonably conclude that distribution of the hashish was in progress.

Although the agents conducting surveillance of the Agnes house had no information connecting the subsequently arrested defendants found in the garage with the narcotics trade, the agents were aware that men were in the Agnes household at the time the decision to search was made. At least one of them had been seen with Agnes at the time he backed his automobile into his garage with the crated statue in the trunk. The agents therefore could reasonably conclude that at least this person was involved in the narcotics operation.

Agnes intentionally pulled into a gasoline station a half dozen blocks from the searched premises, where it appeared to the agents he was known to some of the persons present. When arrested, he yelled, "Call my brother." It was not unreasonable for agents to believe that this might well be a signal to alert persons still at 1819 South 9th Street of Agnes' arrest and of imminent police intervention into their activities, even though the agents did not see a telephone call made and had no knowledge of the existence of any brother of Agnes. The nature of the narcotics business necessitates rapid distribution of goods in order to prevent apprehension. Hashish is easily destroyed. Agnes was apprehended in the neighborhood of his home and apparently in the presence of people whom he knew. Earlier in the day other individuals had been observed entering and leaving his home. The delivery at the airport of the bronze bust filled with hashish had all the characteristics of a sophisticated operation. Although the agents had been watching both doors of the Agnes home, they could not be certain of how quickly the contraband could be destroyed or what surreptitious means might be available for its removal. The agents had reasonable grounds to conclude that in light of the emergency, it was necessary to enter the premises without awaiting the search warrant.

Appellees argue that the search was unreasonable because the agents at the house did not find out from Agent Moss, who had been sent to obtain a warrant, how soon he would accomplish his task. When Agnes was arrested about an hour later, Agent Moss had not yet returned. Appellees argue that Moss could have returned with a warrant within a short time, thus preventing the need for a warrantless search. Considering all the circumstances, however, the agents could reasonably have concluded that even a short wait might ***270** have been too long. An urgent emergency had arisen due to Agnes' arrest and apparent signal. Warrantless searches have been struck down when the police have without justification not used the time available to seek a warrant. That was not the case here. When the crate was picked up at the airport, the agents were uncertain as to its destination. As soon as it did reach 1819 South 9th Street, they began the process of seeking a warrant. Only because exigent circumstances developed about an hour later did it seem necessary to act without awaiting the delivery of the warrant.[4]

We do not minimize the historic and essential importance of the fourth amendment's protection in shielding the citizen from unwarranted intrusions into his privacy. The strong preference of the Constitution for searches pursuant to warrants is clear. Only the emergency circumstances here

justified the entry into Agnes' house. These circumstances were sufficiently compelling in tipping the delicate balance in favor of protecting societal interests. Our vigilance in protecting the privacy of the individual in his home must not absolutely preclude officers of the law, when they are confronted with exigent circumstances, from effective criminal investigation and law enforcement in curbing illegal narcotics traffic. We therefore vacate the district court's holding that the evidence seized at 1819 South 9th Street must be suppressed because of an unconstitutional search.

Although we vacate the district court's order, we cannot finally dispose of appellees' contentions. Both in the district court and here, appellees have also claimed that the entry into both house and garage were illegal because of the failure of the agents to announce their purpose and because of their forcible entry without a prior refusal of entry by the occupants, in violation of 18 U.S.C. § 3109.[5] The district court, however, did not rule on this issue; and the Government has not briefed the issue on appeal. We therefore remand the case to the district court for a ruling on this issue and its effect on the admissibility of the seized evidence. Appellee Agnes' further claim that his warrantless arrest was made without probable cause is without merit.

The order of the district court will be vacated and the case remanded for further disposition consistent with this opinion.

All Citations

474 F.2d 262

Footnotes

1 The opinion is reported at 343 F.Supp. 625 (E.D.Pa.1972). Our statement of facts omits the district court's references to the notes of testimony page numbers.

* It should be noted at this juncture that the agents involved had prior to the pick-up of the statue identified Louis Martin Agnes as a possible suspect and had placed the house under complete surveillance on the date in question, at approximately 10:30 A.M., some 5 hours before the statue arrived at the South Ninth Street address. [District court's footnote 2.]

2 In *Johnson* police had smelled opium fumes outside a hotel room door. The Court noted that they might disappear, but stated such disappearance would be insignificant:

> But they [the fumes] were not capable at any time of being reduced to possession . . . The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

333 U.S. at 15, 68 S.Ct. at 369.

3 *Vale* is read the same way in Note, Police Practices and the Threatened Destruction of Tangible Evidence, 84 Harv.L.Rev. 1465, 1468 (1971).

4 It might be noted that the agents could have seized the contraband and arrested Agnes at the airport, when he picked up the statue. No warrant would have been necessary at that time.

5 18 U.S.C. § 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

96 S.Ct. 2406
Supreme Court of the United States

UNITED STATES, Petitioner,

v.

Dominga SANTANA and William Alejandro.

No. 75-19.
|
Argued April 27, 1976.
|
Decided June 24, 1976.

Synopsis

After being indicted for possessing heroin with intent to distribute, defendants moved to suppress heroin and marked money seized by the police at the time of the arrests. The United States Court of Appeals for the Third Circuit affirmed a district court order granting the suppression motion, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that while standing in doorway of her house, defendant was in a "public place" for purposes of the Fourth Amendment; that when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to make a warrantless arrest in a public place upon probable cause and did not violate the Fourth Amendment; that by retreating into a private place, her house, defendant could not thwart an otherwise proper arrest that had been set in motion in a public place, the threshold of her house; and that since there was a need for the police to act quickly to prevent the destruction of narcotics evidence, there was a true "hot pursuit," and therefore the warrantless entry by the police into the house to make the arrest was justified, as was the ensuing search incident thereto.

Reversed.

Mr. Justice White filed a concurring opinion.

Mr. Justice Stevens filed a concurring opinion in which Mr. Justice Stewart joined.

Mr. Justice Marshall filed a dissenting opinion in which Mr. Justice Brennan joined.

****2407** Syllabus[*]

***38** On the basis of information that respondent Santana had in her possession marked money used to make a heroin "buy" arranged by an undercover agent, police officers went to Santana's house where she was standing in the doorway holding a paper bag, but as the officers approached she retreated into the vestibule of her house where they caught her. When she tried to escape, envelopes containing what was later determined to be heroin fell to the floor from the paper bag, and she was found to have been carrying some of the marked money on her person. Respondent Alejandro, who had been sitting on the front steps, was caught when he tried to make off with the dropped envelopes of heroin. After their indictment for possessing heroin with intent to distribute, respondents moved to suppress the heroin and marked money. The District Court granted the motion on the ground that although the officers had probable cause to make the arrests, Santana's retreat into the vestibule did not justify a warrantless entry into the house on the ground of "hot pursuit." The Court of Appeals affirmed. Held:

****2408** 1. Santana, while standing in the doorway of her house, was in a "public place" for purposes of the Fourth Amendment, since she was not in an area where she had any expectation of privacy and was not merely visible to the public but was exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to make a warrantless arrest in a public place upon probable cause and did not violate the Fourth Amendment. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598. P. 2409.

2. By retreating into a private place, Santana could not defeat an otherwise proper arrest that had been set in motion in a public place. Since there was a need to act quickly to prevent destruction of evidence, there was a true "hot pursuit," which need not be an extended hue and cry "in and about (the) public streets," and thus a warrantless entry to make the arrest was ***39** justified, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782, as was the search incident to that arrest. Pp. 2409-2410.

Reversed.

Attorneys and Law Firms

Frank H. Easterbrook, Washington, D. C., for petitioner, pro hac vice, by special leave of Court.

Dennis H. Eisman, Philadelphia, Pa., for respondent Santana.

Mr. Justice REHNQUIST delivered the opinion of the Court.

I

On August 16, 1974, Michael Gilletti, an undercover officer with the Philadelphia Narcotics Squad arranged a heroin "buy" with one Patricia McCafferty (from whom he had purchased narcotics before). McCafferty told him it would cost $115 "and we will go down to Mom Santana's for the dope."

Gilletti notified his superiors of the impending transaction, recorded the serial numbers of $110 (Sic) in marked bills, and went to meet McCafferty at a prearranged location. She got in his car and directed him to drive to 2311 North Fifth Street, which, as she had ***40** previously informed him, was respondent Santana's residence.

McCafferty took the money and went inside the house, stopping briefly to speak to respondent Alejandro who was sitting on the front steps. She came out shortly afterwards and got into the car. Gilletti asked for the heroin; she thereupon extracted from her bra several glassine envelopes containing a brownish-white powder and gave them to him.

Gilletti then stopped the car, displayed his badge, and placed McCafferty under arrest. He told her that the police were going back to 2311 North Fifth Street and that he wanted to know where the money was. She said, "Mom has the money." At this point Sergeant Pruitt and other officers came up to the car. Gilletti showed them the envelope and said "Mom Santana has the money." Gilletti then took McCafferty to the police station.

Pruitt and the others then drove approximately two blocks back to 2311 North Fifth Street. They saw Santana standing in the doorway of the house[1] with a brown paper bag in her hand. They pulled up to within 15 feet of Santana and got out of their van, shouting "police," and displaying their identification. As the officers approached, Santana retreated into the vestibule of her house.

The officers followed through the open door, catching her in the vestibule. As she tried to pull away, the bag tilted and "two bundles of glazed paper packets with a white powder" fell to the floor. Respondent ****2409** ***41** Alejandro tried to make off with the dropped envelopes but was forcibly restrained. When Santana was told to empty her pockets she produced $135, $70 of which could be identified as Gilletti's marked money. The white powder in the bag was later determined to be heroin.

An indictment was filed in the United States District Court for the Eastern District of Pennsylvania charging McCafferty with distribution of heroin, in violation of 21 U.S.C. s 841, and respondents with possession of heroin with intent to distribute in violation of the same section. McCafferty pleaded guilty. Santana and Alejandro moved to suppress the heroin and money found during and after their arrests.

The District Court granted respondents' motion.[2] In an oral opinion the court found that "(t)here was strong probable cause that Defendant Santana had participated in the transaction with Defendant McCafferty." However, the court continued:
"One of the police officers . . . testified that the mission was to arrest Defendant Santana. Another police officer testified that the mission was to recover the bait money. Either one would require a warrant, one a warrant of arrest under ordinary circumstances and one a search warrant."

The court further held that Santana's "reentry from the doorway into the house" did not support allowing the police to make a warrantless entry into the house on the grounds of "hot pursuit," because it took "hot pursuit" to mean "a chase in and about public streets." The court did find, however, that the police ***42** acted under "extreme emergency" conditions. The Court of Appeals affirmed this decision without opinion.

II

In United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), we held that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment. Thus the first question we must decide is whether, when the police first sought to arrest Santana, she was in a public place.
While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the

cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Hester v. United states, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in Watson.

The only remaining question is whether her act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not. In Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), we recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons. This case, involving a true "hot pursuit,"[3] is clearly governed by *Warden* ; ****2410** the need to act quickly here is even greater than in that case while the intrusion is much less. The District Court was correct in concluding that "hot ***43** pursuit" means some sort of a chase, but it need not be an extended hue and cry "in and about (the) public streets." The fact that the pursuit here ended almost as soon as it began did not render it any the less a "hot pursuit" sufficient to justify the warrantless entry into Santana's house. Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence. See Vale v. Louisiana, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970). Once she had been arrested the search, incident to that arrest, which produced the drugs and money was clearly justified. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Chimel v. California, 395 U.S. 752, 762-763, 89 S.Ct. 2034, 2039, 23 L.Ed.2d 685 (1969).

We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping to a private place. The judgment of the Court of Appeals is

Reversed.

Mr. Justice WHITE, concurring.

It is not disputed here that the officers had probable cause to arrest Santana and to believe that she was in the house. In these circumstances, a warrant was not required to enter the house to make the arrest, at least ***44** where entry by force was not required. This has been the longstanding statutory or judicial rule in the majority of jurisdictions in the United States, see ALI, A Model Code of Pre-arraignment Procedure 306-314, 696-697 (197, and has been deemed consistent with state constitutions, as well as the Fourth Amendment. It is also the Institute's recommended rule. Id., s 120.6. I agree with the Court that the arrest here did not violate the Fourth Amendment.

My Brother MARSHALL, Post, p. 2410, and United States v. Watson, 423 U.S. 411, 433, 96 S.Ct. 820, 832, 46 L.Ed.2d 598 (1976) (dissenting opinion), would reinterpret the Fourth Amendment to sweep aside this widely held rule and to establish a constitutional standard requiring warrants for arrests except where exigent circumstances clearly exist. The states are, of course, free to limit warrantless arrests, as is Congress; but I would not impose his suggested nationwide edict, founded as it is on a belief in the superior wisdom of the Members of this Court and their power to divine that the country's practice to this date with respect to arrests is unreasonable within the meaning of the Fourth Amendment.

Mr. Justice STEVENS, with whom Mr. Justice STEWART joins, concurring.

When Officer Gilletti placed McCafferty under arrest, the police had sufficient information to obtain a warrant for the arrest of Santana in her home. It is therefore important to note that their failure to obtain a warrant at that juncture was both (a) a justifiable police decision, and (b) even if not justifiable, harmless.

The decision was justified by the significant risk that the marked money would no longer be in Santana's possession if the police waited until a warrant could be obtained. The failure to seek a warrant was harmless ***45** because it would have been proper to keep the Santana residence under surveillance while the warrant was being sought; since she ventured into plain view, a warrantless arrest would have been justified before the warrant could have been procured.

I therefore join the opinion of the Court.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

Earlier this Term, I expressed the view that, in the absence of exigent circumstances, **2411 the police may not arrest a suspect without a warrant. United States v. Watson, 423 U.S. 411, 433, 96 S.Ct. 820, 832, 46 L.Ed.2d 598 (1976) (dissenting opinion). For this reason, I cannot join either the opinion of the Court or that of Mr. Justice WHITE, each of which disregards whether exigency justified the police decision to approach Santana's home without a warrant for the purpose of arresting her. Nor can I accept Mr. Justice STEVENS' approach, for while acknowledging that some notion of exigency must be asserted to justify the police conduct in this case, Mr. Justice STEVENS fails to consider that the exigency present in this case was produced solely by police conduct. I would remand the case to allow the District Court to determine whether that police conduct was justifiable or was solely an attempt to circumvent the warrant requirement.

The Court declines today to settle the oft-reserved question of whether and under what circumstances a police officer may enter the home of a suspect in order to make a warrantless arrest. United States v. Watson, supra, 423 U.S., at 418 n. 6, 96 S.Ct., at 825; Gerstein v. Pugh, 420 U.S. 103, 113 n. 13, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 480-481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971); Jones v. United States, 357 U.S. 493, 499-500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958). Seizing upon the fortuity that Santana was standing in her doorway when the police *46 approached her home for the purpose of entering and arresting her, the Court ignores Mr. Justice WHITE's repeated advocacy of the common-law rule on warrantless entries, Ante, p. 2410; Coolidge v. New Hampshire, supra[1], 403 U.S., at 511-512, n. 1, 91 S.Ct. at 2061 (White, J., concurring and dissenting), and treats this case as a simple application of Watson.

It is somewhat more than that, for the Court takes the opportunity to refine the contours of that decision. Thus, if I correctly read the Court's citation to the "open fields" doctrine of Hester v. United States, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924), the Court holds that the police may enter upon private property to make warrantless arrests of persons who are in plain view and outdoors; and the Court applies that doctrine today to persons who are arguably within their homes but who are "as exposed" to the public as if they were outside. But the Court's encroachment upon the reserved question is limited. *47 Thus, the Court's citation of *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967), does not suggest that a plain view of a suspect is alone sufficient to justify warrantless entry and seizure in the home. Indeed, the Court's rejection of sight alone as a basis for warrantless entry and arrest is made patent, in Mr. Justice STEWART's phrase, by negative implication from the Court's need to elaborate a hot pursuit justification for the police following Santana into her home. Cf. Coolidge v. New Hampshire, supra, 403 U.S., at 480-481, 91 S.Ct., at 2045. Presumably, if plain view were the touchstone, Santana would have been just as liable to warrantless **2412 arrest as she retreated several feet inside her open door as she was when standing in the doorway.

The Court's doctrine, then, appears Sui generis, useful only in arresting persons who are "as exposed to public view, speech, hearing, and touch," Ante, at 2409, as though in the unprotected outdoors. Narrow though it may be, however, the Court's approach does not depend on whether exigency justifies an arrest on private property, and thus I cannot join it.

Mr. Justice STEVENS focuses on what I believe to be the right question in this case whether there were exigent circumstances and reaches an affirmative answer because he finds a "significant risk that the marked money would no longer be in Santana's possession if the police waited until a warrant could be obtained." Ante, at 2410. I agree that there were exigent circumstances in this case. McCafferty was arrested a block and a half down the street from Santana's home. Although the arresting officers did not see anyone in Santana's home watching the arrest, App. 16, one officer testified: "We were a block and a half from her home when the arrest was made. I am sure that the word would have been back within a matter of seconds or minutes." Id., at 51. That is undoubtedly a reasonable conclusion to draw *48 from the facts of the arrest; and the danger that the evidence would be destroyed and the suspects gone before a warrant could be obtained would ordinarily justify the police's quick return to Santana's home and the warrantless entry and arrest. If that is the basis of the "significant risk" to which Mr. Justice STEVENS refers, I have no difference with him on that score.[2]

I do not believe, however, that these exigent circumstances automatically validate Santana's arrest. The exigency that justified the entry and arrest was solely a product of police conduct. Had Officer Gilletti driven McCafferty to a more remote location before arresting her, it appears that no exigency would have been created by the arrest; in such an event a warrant would have been necessary, in my view, before Santana could have been arrested. United States v. Watson, 423 U.S., at 433, 96 S.Ct., at 832 (Marshall, J.,

dissenting). It is not apparent on this record why Officer Gilletti arrested McCafferty so close to Santana's home when the arresting officers were clearly aware that such a nearby arrest would necessitate the prompt arrest of Santana. App. 51. While a police decision that the time is right to arrest a suspect should properly be given great deference, cf. Hoffa v. United States, 385 U.S. 293, 310, 87 S.Ct. 408, 417, 17 L.Ed.2d 374 (1966), the power to arrest is an awesome one and is subject to abuse. An arrest may permit a search of premises incident to the arrest, a search that otherwise could be carried out only upon probable cause and pursuant to a search warrant. Likewise, an arrest in circumstances such as those presented here may create exigency that may justify a search ***49** or another arrest. When an arrest is so timed that it is no more than an attempt to circumvent the warrant requirement, I would hold the subsequent arrest or search unlawful. See *Coolidge v. New Hampshire*, 403 U.S., at 469-471, 91 S.Ct., at 2040; *Vale v. Louisiana*, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970); *Chimel v. California*, 395 U.S. 752, 767, 89 S.Ct. 2034, 2042, 23 L.Ed.2d 685 (1969); Abel v. United States, 362 U.S. 217, 226 and 230, 80 S.Ct. 683, 690 and 692, 4 L.Ed.2d 668 (1960); United States v. Rabinowitz, 339 U.S. 56, 82, 70 S.Ct. 430, 442, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting); United States v. Lefkowitz[3] , 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed. 877 (1932). Accordingly, I would remand this case for consideration of whether the police decision to ****2413** arrest McCafferty a block and a half from Santana's home was for the sole purpose of creating the exigent circumstances that otherwise would justify Santana's subsequent arrest.

All Citations

427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 An Officer Strohm testified that he recognized Santana, whom he had seen before. He also indicated that she was standing directly in the doorway one step forward would have put her outside, one step backward would have put her in the vestibule of her residence.

2 It is not apparent on what grounds respondent Alejandro had standing to protest the seizures. However, the Government did not raise this issue below and consequently we do not reach it.

3 Warden was based upon the "exigencies of the situation," 387 U.S., at 298, 87 S.Ct., at 1645, and did not use the term "hot pursuit" or even involve a "hot pursuit" in the sense that that term would normally be understood. That phrase first appears in Johnson v. United States, 333 U.S. 10, 16 n. 7, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948), where it was recognized that some element of a chase will usually be involved in a "hot pursuit" case.

1 Mr. Justice WHITE would have us bequeath our duty to interpret the Constitution to the States and Congress. As I said in response to a similar argument in Watson:

"(T)he doctrine of deference that the Court invokes is contrary to the principles of constitutional analysis practiced since Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) . . . . (I)t is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice. '(N)o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.' Walz v. Tax Comm'n, 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970). See also Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Our function in constitutional cases is weightier than the Court today suggests: where reasoned analysis shows a practice to be constitutionally deficient, our obligation is to the Constitution, not the Congress." 423 U.S., at 443, 96 S.Ct., at 837 (dissenting opinion) (footnote omitted).

2 I assume that Mr. Justice STEVENS is not suggesting that exigent circumstances justifying a warrantless search or arrest are always present regardless of whether the suspect is aware the police are on his trail whenever police have probable

cause to believe the suspect is in possession of evidence. Cf. Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

3 Because I cannot agree that police may arrest a suspect in a public place solely upon probable cause, I cannot agree with Mr. Justice STEVENS that any police error in deciding to return to Santana's home for the purpose of entering and arresting her was harmless.

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