No. 19-1301

In The
Supreme Court of the United States

CLYDE S. BOVAT,

Petitioner,

v.

STATE OF VERMONT,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of Vermont**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERICA MARTHAGE
Counsel of Record
BENNINGTON COUNTY STATE'S ATTORNEY
150 Veteran's Memorial Drive
Suite 10
Bennington, VT 05201
(802) 828-2891
erica.marthage@vermont.gov

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does the Fourth Amendment require the suppression of incriminating evidence an officer observed in plain view while taking a reasonable route from the defendant's parking area to the defendant's front door?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Game wardens investigating a suspected hunting violation drove to Petitioner's home and parked on a concrete apron in front of Petitioner's two-car garage. Hearing transcript, p. 59 ("When I arrived, I slowed up and I looked in the yard and saw the game warden trucks in the yard. . . ."). This is a location where visitors might reasonably be expected to park when visiting the home. Pet. App. 38a ("Given the layout of the residence, this driveway is a semiprivate area that appears to serve as the normal access route for anyone visiting the residence. . . . Anyone visiting the residence would be required to park in the driveway. Anyone visiting the residence would be required to use the small walking path connected to the driveway that leads to the residence."). Two or three game warden trucks were on the scene. Pet. App. 65a. At least one truck was parked in close vicinity to the garage. Transcript, p. 61 ("It would be the first truck parked to the right of the big overheard [sic] door.").

Contrary to the understanding of the Amicus briefs, the term "driveway" here was used to refer to the concrete apron directly in front of the garage, not just to the stretch of pavement from the public road. Pet. App. 16a: "Both the garage, the area the game wardens observed, and *the driveway, the area from which the wardens made their observation*, are part of the curtilage of defendant's home" (dissenting opinion, Vermont Supreme Court, emphasis added); and Pet. App. 31a: " . . . Defendant's two-bay detached garage that was located at the back of Defendant's driveway" (trial

court decision). As discussed below, the officers did not walk up from the street and then away from the house, but parked on the apron in front of the garage and then walked towards the house. Nor does the opinion state, as claimed by Amicus Institute for Justice, that the officers "walked 'a significant distance' in the opposite direction of the home" to the garage. Institute for Justice brief at 14. The garage was said to be a significant distance from the house, but the evidence indicates that the officers walked from the garage towards the house, not the other way around.

The evidence in the record conflicts with respect to what the wardens did immediately upon their arrival. Petitioner's wife testified that fifteen minutes passed before the officers made contact with her, but one of the game wardens testified that the time between arriving and going to the front door "would have been very quick," as it is routine for game wardens and law enforcement officers, upon arriving at a residence, to "notify the homeowner what's going on and also to see what other people are there for officer safety reasons. So it happens relatively quick." Pet. App. 105a. The trial court's findings of fact did not resolve this inconsistency, stating merely that "at one point" the wardens looked through the window of the garage. Pet. App. 31a.

Also not a matter of record is exactly where the officers parked on the concrete apron, other than one witness's reference to one of the vehicles being parked "to the right of the big overheard [sic] door." The garage has two overhead doors of the same size. Pet. App. 53a.

The trial court did not make any findings concerning where the wardens' trucks were parked. Therefore, it is unknown whether the direct path from the officers' vehicles to the front door of the house would have taken them directly by the garage doors, or whether this would have involved a slight deviation in their route.

In any event, the officers made observations through the garage door windows which formed the basis of a search warrant. Petitioner challenged the search warrant as the result of an unlawful intrusion by the officers – their deviation from the most direct route from their vehicles to the front door of the house. As demonstrated by the exhibits, any deviation, if in fact one occurred at all, would at most have been a few feet, all within the perimeter of the concrete apron in front of the garage which serves as a parking area.

Petitioner sought to suppress the observations made through the garage window, and therefore the results of the search warrant. The Vermont Supreme Court held that the observations were made of an object in plain view from a legal vantage point – the driveway in front of the garage, which is a normal access route for anyone visiting the premises. Pet. App. 10a. Petitioner argues that this ruling creates a "categorical rule that permits officers to access so-called 'semi-private' areas within the curtilage . . . to conduct an investigation," and argues that this holding is in conflict with decisions of this Court and of federal circuit courts.

SUMMARY OF ARGUMENT

The Petition should be denied because Petitioner has not shown any conflict between federal circuits or state courts of last resort on this question, and because the factual development in this case is insufficient to determine whether the law enforcement officers here actually deviated from the most direct route to Petitioner's front door.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among The Circuits Or State Courts Of Last Resort.

Petitioner argues that there is a conflict among lower courts on the issue decided in this case. But the cases he cites do not support this claim. While there may be a conflict among lower courts on the question whether an officer may "only approach the home's main entrance in order to speak to the residents," or whether an officer "may approach other parts of the property, but only if there is a reasonable indication he will be able to find and speak to the residents there," Pet. 12, the case here involves a different question, and the Vermont Supreme Court did not discuss the issue now raised by Petitioner. In this case, the game wardens approached only the main entrance, and did not attempt to locate a resident on another part of the property. On their way to the main entrance, the wardens may or may not have deviated from the most

direct approach, but that is not the issue discussed in the cases cited by Petitioner.

The dissenting opinion does characterize the ruling as allowing officers to freely wander and observe on driveways without reference to the particular circumstances. But the majority ruling is not so broad. The majority recognized that any entry into the curtilage must be for "legitimate police business," and that such entry is restricted to "normal access routes for anyone visiting the premises." Pet. 10a. While there may be a difference of opinion concerning whether the facts here show that the wardens remained on "normal access routes for anyone visiting the premises," the majority opinion does not permit officers to enter semi-private areas and wander freely without any restraint tied to their legitimate police business.

What the officers did here, at most (and the record is unclear on this point, as discussed below), was to deviate slightly from the most direct route from their vehicle to the front door of the home. Jurisprudence on this question is sparse. The very few courts that have discussed this issue have recognized that respectful members of the public do not necessarily make a strict beeline between their vehicle and the front door of the residence they are visiting. Slight deviations from the shortest route between the two points are not uncommon and are not of constitutional significance:

> The only act that seems open to challenge is that the officer appears to have strayed slightly from the most absolutely direct route

> between the two doors. It would be unreasonable to require, in every case, that police officers walk a tightrope while on private property engaging in legitimate police business.

State v. Seagull, 95 Wash. 2d 898, 905, 632 P.2d 44, 49 (1981). See also, *State v. Jackman*, No. 48742-0-II, 2018 WL 286809, at *6 (Wash. Ct. App. Jan. 4, 2018), *review denied*, 190 Wash. 2d 1017, 416 P.3d 1250 (2018) (officer "minimally departed from the normal path to the residence," and "strayed slightly from the most direct route, by walking up the side of the vehicle before going straight to the door"; this was not a "'substantial and unreasonable departure'" from the path that a reasonably respectful citizen would take."); *State v. Clark*, 124 Idaho 308, 316, 859 P.2d 344, 352 (Ct. App. 1993) ("[P]olice officers are not required to adhere to only the most direct route possible. They are permitted the same range of deviation that could reasonably be expected of other respectful citizens approaching the residence."); *Arizona v. James Edward Earley II*, No. 2 CA-CR 2019-0069, 2020 WL 1870111, at *2 (Ariz. Ct. App. Apr. 14, 2020) ("an officer may not deviate from a reasonable path to the front door"); *United States v. Bissonette*, No. 5:14-CR-50055-JLV, 2016 WL 11407825, at *8 (D.S.D. May 2, 2016), *report and recommendation adopted*, No. CR. 14-50055-JLV, 2016 WL 4617072 (D.S.D. Sept. 6, 2016) ("The only question remaining is whether by circling around the pickup truck or not taking the most direct path while on the driveway, Officer Jack ran afoul of the Fourth Amendment. . . . [T]he court is unable to locate case law which stands for the proposition that when walking up the driveway to

perform a knock and talk, law enforcement must take the most direct path while on the driveway."); *People v. Thompson*, 221 Cal. App. 3d 923, 945, 270 Cal. Rptr. 863, 875 (Ct. App. 1990) ("we cannot say the limited deviation, within the open area, that occurred in this case was so unreasonable as to be an intrusion upon a privacy expectation deserving of Fourth Amendment protection."); *State v. Chute*, 908 N.W.2d 578, 587 (Minn.), *cert. denied*, 139 S.Ct. 413 (2018) (mem.) (finding Fourth Amendment violation where officer's route "deviate[d] substantially" from route that would take him to entrance).[1]

Since there is no conflict among lower court cases on the actual question presented by this case, the Petition should be denied.

Even if Petitioner's statement of the question presented were correct, the ruling here does not involve a conflict between the two lines of cases he describes. In fact, Petitioner asserts that the Vermont Supreme Court "departed from both of these rules." Pet. 18. The Petition asserts that "only the Vermont Supreme Court allows officers to nose around along any path a person might hypothetically take when visiting the home to conduct an investigation, rather than to contact a resident." Pet. 3. If the Vermont Supreme Court is the "only" court to so hold, then there is no significant conflict among the federal circuits or state courts of last

[1] Even the base-path rule referred to in *Florida v. Jarvines*, 569 U.S. 1, 9 n. 3 (2013), allows a divergence of three feet. Official MLB Playing Rules, Rule 7.08(a)(1).

resort to resolve, and therefore the Petition should be denied.

Nor does this case, as argued by Amici, contravene *Florida v. Jarvines*, 569 U.S. 1 (2013). That case concerned officers who remained on the route to the front door and used a sense-enhancing method; this case involves officers who may or may not have deviated from the direct route to the front door, who used only their unassisted eyesight.

II. The Factual Issues In This Case Are Insufficiently Developed To Present The Issue Argued By Petitioner.

Petitioner asserts that the Vermont Supreme Court has held that officers may "nose around" any path a person might hypothetically take when visiting the home to conduct an investigation, rather than to contact a resident. Pet. 3. But it is far from clear that that is in fact what happened here. If the officers here parked their vehicle and proceeded directly from the driveway to the path to the house, their route may or may not have taken them by the garage, through the windows of which they made their observations leading to the grant of a search warrant. If they parked their vehicle in such a location that a direct path from their vehicle to the house would take them past the garage, then even by Petitioner's view of the controlling law, the observations through the garage window were lawful. *Florida v. Jardines*, 569 U.S. at 8 ("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)."); Pet. 11, citing *Jardines* on this point. 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." *Jardines*, 569 U.S. at 21 (dissenting opinion, citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). The dissenting opinion in this case acknowledged that under these circumstances, the observations would have been lawful:

> "[I]f police utilize normal means of access to and egress from the house for some legitimate purpose, such as to make inquiries of the occupant, . . . it is not a Fourth Amendment search for the police to see . . . from that vantage point what is happening inside the dwelling."

Pet. App. 19a, quoting LaFave, Search and Seizure sec. 3.2(c).

Although Petitioner quotes his wife's testimony that the officers were on the premises for fifteen minutes before contacting her, Pet. 5-6, the testimony on this point was contradictory. Warden Joyal testified that the period of time between arriving and going to the front door "would have been very quick," as it is routine for game wardens and law enforcement officers, upon arriving at a residence, to "notify the homeowner what's going on and also to see what other people are there for officer safety reasons. So it

happens relatively quick." Pet. App. 105a. The trial court did not attempt to resolve this inconsistency. Therefore, although Petitioner asked this Court to "resolve the disagreement over whether an officer exceeds the scope of the implied knock-and-talk license if he does not immediately approach the primary entrance to the home after entering the property," Pet. 10, it is unknown whether the officers in this case did or did not "immediately approach the primary entrance to the home after entering the property."

Furthermore, it is not in evidence where on the driveway the wardens parked, other than that one vehicle was to the right of one of the garages, and therefore it is unknown whether their path to the front door of the house was on a direct line from their vehicle in the driveway or whether they, in fact, as Petitioner claims, freely wandered about to make their observations. Pet. 2. As the Petition itself acknowledges, the record is silent "on how the wardens came to be looking in the garage-door window or whether that spot was part of the public's access route to the house." Pet. 24. If the record is silent on this point, then the record is silent on the very factual issue which Petitioner argues is determinative. See, *United States v. Bissonette*, No. 5:14-CR-50055-JLV, 2016 WL 11407825, at *8 (D.S.D. May 2, 2016), *report and recommendation adopted*, No. CR. 14-50055-JLV, 2016 WL 4617072 (D.S.D. Sept. 6, 2016) ("the record contains scant evidence regarding the location of the pickup truck on the driveway, the paths taken by law enforcement, and whether the officers failed to restrict their movements to those areas

made accessible to visitors. 'Because the defendant "bears the burden of proving a Fourth Amendment violation," it is he "who shoulders the consequences of an insufficiently developed record."'"). The dissenting opinion in this case recognized the paucity of the evidence on this key issue:

> The findings . . . are silent on how the wardens came to be looking in the garage-door window or whether that spot was part of the public's access route to the house. . . . The photograph suggests that if the wardens parked in the driveway, or anywhere in the parking area other than directly in front of the garage-door window, they would have had to walk away from the normal access route to the house in order to get close to the garage door window.

Pet. App. 26a. Yet the evidence suggests that the wardens did park "directly in front of the garage-door window" ("It would be the first truck parked to the right of the big overheard [sic] door."), and thus the wardens would not have had to walk away from the normal access route to the house in order to get close to the garage door window.

Nor should the question of whether the Fourth Amendment has been violated depend upon the happenstance of where, in a relatively small parking area, the officers happened to have parked their vehicle. Petitioner's view of this case would find a constitutional violation if the officers happened to park their vehicle towards the front of the apron, but no constitutional

violation if the officers happened to park their vehicle directly in front of the garage doors (for example, where the truck is parked in the photographs at Pet. App. 53a). Violations of the Fourth Amendment should not turn on such insignificant factors as where on the apron the officers parked, or whether they parked with the driver's side or the passenger's side towards the garage doors, or whether the officers walked around the front or the back of their vehicle after exiting.

The extent to which the police may deviate from the most direct path to the entry way might be an issue of interest to the Court, but it is respectfully suggested that resolution of this question should await a case in which it is known whether the police did deviate, and if so, by how much.

III. The Case Was Decided Correctly Below.

Petitioner also requests in the alternative that the decision be summarily reversed. The Court should decline to do so because the case was correctly decided.

As the dissent in the case notes,

> The findings . . . are silent on how the wardens came to be looking in the garage-door window or whether that spot was part of the public's access route to the house. . . . The photograph suggests that if the wardens parked in the driveway, or anywhere in the parking area other than directly in front of the garage-door window, they would have had to walk away from the normal access route to the

> house in order to get close to the garage door window.

Pet. App. 26a.

In other words, the evidence is not conclusive one way or the other whether the officers took a route past the garage windows that was part of the public's access route to the house. Since in a motion to suppress the defendant bears the burden of proving a Fourth Amendment violation, and since here Petitioner failed to do so, the decision of the Vermont Supreme Court was correct – the motion to suppress was correctly denied. See, *United States v. Bissonette*, No. 5:14-CR-50055-JLV, 2016 WL 11407825, at *8 (D.S.D. May 2, 2016), *report and recommendation adopted*, No. CR. 14-50055-JLV, 2016 WL 4617072 (D.S.D. Sept. 6, 2016), quoting *United States v. Long*, 30 F.Supp. 835, 849 (D.S.D. 2014), quoting, in turn, *United States v. Esquivel-Rios*, 725 F.3d 1231, 1239 (10th Cir. 2013):

> [T]he record contains scant evidence regarding the location of the pickup truck on the driveway, the paths taken by law enforcement, and whether the officers failed to restrict their movements to those areas made accessible to visitors. 'Because the defendant "bears the burden of proving a Fourth Amendment violation," it is he "who shoulders the consequences of an insufficiently developed record."'

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ERICA MARTHAGE
Counsel of Record
BENNINGTON COUNTY STATE'S ATTORNEY
150 Veteran's Memorial Drive
Suite 10
Bennington, VT 05201
(802) 828-2891
erica.marthage@vermont.gov