No.

IN THE

Supreme Court of the United States

ANTOINE RICHMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Police officers were patrolling a residential neighborhood when they saw Petitioner walking on the sidewalk. They saw that he had something in his front pocket and suspected it might be a gun. Petitioner reached the front porch of his home as officers parked their car to speak with him. Petitioner placed the object that had been in his pocket behind the front screen door, then walked toward the officers and greeted them. One officer walked past Petitioner, opened the front screen door, and found a firearm behind it. The officers then determined that Petitioner was a felon and arrested him.

The government has always conceded that officers lacked a warrant or even probable cause to search Petitioner's home. But they have argued, and the Seventh Circuit agreed, that "reasonable suspicion" alone justified the search of the home.

The question presented is: Did law enforcement's suspicion that a firearm would be found just inside the threshold of the home justify their search?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Antoine Richmond. Respondent is the United States of America. No party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Antoine Richmond respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a–36a) is reported at 924 F.3d 404. The opinion of the district court (App., *infra*, 37a–45a) is unreported.

JURISDICTION

The Seventh Circuit issued its decision on May 13, 2019. Petitioner filed a timely petition for rehearing, which was denied on July 17, 2019. *See* App., *infra*, 56a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

INTRODUCTION

Without consent, a warrant, or probable cause, police opened the front screen door of Petitioner's home to conduct a search for a weapon. A divided panel of the Seventh Circuit upheld the search, finding that the searching officers' "suspicion that a suspect poses a danger from the presence of a weapon within [his] immediate access" permits a search of the home without a warrant or probable cause. App., *infra*, at 23a. In doing so, the majority created a new exception to the warrant requirement that conflicts with decisions of his Court, other circuit courts, and at least one state's highest court. Further, its decision has far-reaching implications because, as Chief Judge Wood's dissenting opinion explained, the majority opinion "dilute[es] the probable-cause requirement for searches of a home down to the 'reasonable-suspicion" level described in *Terry v. Ohio*, 392 U.S. 1 (1968). App., *infra*, at 24a.

STATEMENT OF THE CASE

On a fall night in 2016, two Milwaukee police officers patrolling a residential neighborhood in their squad car saw Petitioner walking toward them on a sidewalk. The officers did not recognize Petitioner, nor were they looking for him. They considered the neighborhood a high-crime area but had no information that any crime had occurred. As the officers drove past Petitioner, they saw his hand in his front "kangaroo" pocket, where there appeared to be a "medium–sized object." The officers had a hunch that the object was a gun—one officer testified that when he saw a person with a bulge in a front pocket before, "[m]any times," it turned out to be a gun.

Petitioner made eye contact with the officers as they drove past him, and he did not run or attempt to hide. He continued on his way, then cut through a front lawn quickly toward a home—*his* home. As officers parked in front of Petitioner's home and got out, Petitioner walked onto his porch, opened the screen door, and placed the object from his pocket behind the screen door. The officers saw only that it was dark-colored. They didn't know Petitioner's identity and did not know whether he had a state "concealed carry" permit or any status that prohibited his possession of a firearm.

After the officers announced themselves, Petitioner calmly walked towards them. One officer remained with Petitioner while the other walked around Petitioner, placed himself between Petitioner and the door, and searched behind the screen door where he found a gun. Officers asked Petitioner if he was a felon and when he responded affirmatively, they arrested him. Officers said the encounter took less

than 30 seconds, and that after Petitioner walked away from the door he didn't do anything to alarm them; he remained calm and cooperative.

Petitioner was charged in federal court with being a felon in possession of a firearm. He moved to suppress the firearm on the ground that officers unlawfully searched his home. The magistrate held an evidentiary hearing and recommended that the motion be denied. App., *infra*, at 46a–55a. Petitioner objected to the district court and, after another hearing, the district court denied the motion. *Id.* at 37a–45a. Petitioner entered a conditional guilty plea, preserving his right to appeal the decision.

Petitioner appealed to the Seventh Circuit Court of Appeals, and a divided panel affirmed. The majority acknowledged that officers searched Petitioner's home without a warrant or probable cause, but held that officers had reasonable suspicion to believe that Petitioner illegally possessed a firearm. *Id.* at 11a. And the majority held that pursuant to a *Terry*-style balancing of interests, the officers could search the nearby area of Petitioner's home for their protection, where they suspected he'd placed a firearm. *Id.* at 22a.

Chief Judge Wood dissented. She explained that no authority authorizes a "*Terry*-like 'frisk'...of a home or its curtilage." *Id.* at 36a (Wood, C.J., dissenting). So the search of Petitioner's home, conducted without a warrant and without probable cause was "forbidden by binding Supreme Court precedent, notably *Jardines* and *Collins*." *Id.*

Petitioner filed a timely petition for rehearing but, on July 17, 2019, it was denied. *Id.* at 56a.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's holding that officers may "frisk" a home conflicts with decisions of this Court, of circuit courts, and of one state's highest court.

The Fourth Amendment draws a "firm line" around the home. *Payton v. New York*, 445 U.S. 573, 590 (1980). This Court has repeatedly said that at the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013), in turn, quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Warrantless searches of a home are "presumptively unreasonable." *Id.* This presumption is overcome only by proving that there was consent or that there was both probable cause and exigency. *See, e.g., id.* at 1672; *Payton*, at 587–90; *see also Kentucky v. King*, 563 U.S. 452, 460 (2011) (collecting cases addressing different exigencies).

With a home, the degree of intrusion is irrelevant—"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 (2001) (quoting *Silverman*, 365 U.S. at 512). An officer without a warrant, or probable cause and exigency, can't even "crack[] open the front door" to see what's inside because in the home "*all* details are intimate details" and "the entire area is held safe from prying government eyes." *Id.* (emphasis in original). Further, the Fourth Amendment's protection of the home encompasses the area immediately surrounding and

associated with the home, i.e. the "curtilage." *Collins*, 138 U.S. at 1670; *Jardines*, 569 U.S. at 6. This area is "part of the home itself for Fourth Amendment purposes." *Id.* at 6.

In cases that do not involve the home, this Court has instructed courts to determine the reasonableness of the search on a case-by-case basis, using a balancing of interests, as in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Michigan v. Long*, 463 U.S. 1032 (1983). But this balancing approach is applicable to places where expectations of privacy are necessarily reduced. *United States v. Winsor*, 846 F.2d 1569, 1578 (9th Cir. 1988) (collecting cases). The only exception involves the homes of suspects who enjoy conditional liberty (e.g. probation, parole), because they have diminished expectations of privacy. *See United States v. Knights*, 534 U.S. 112, 114 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 870–71 (1987). For everyone else, a search of the home is only reasonable when conducted pursuant to a warrant, consent, or probable cause and exigency. If not, the search is unreasonable and unlawful. *See Collins*, 138 S. Ct. at 1670; *see also Riley v. California*, 573 U.S. 373, 382 (2014) ("A search is reasonable only it falls within a specific exception to the warrant requirement.")

As Chief Judge Wood noted in her dissent in this case, this Court recently said that it "already has declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home." App., *infra*, at 29a. (Wood, C.J., dissenting) (quoting *Collins*, 138 U.S. at 1672).

Yet the Seventh Circuit majority here held that it sees "no difference between the safety concerns which

justified the searches in *Buie*, *Terry*, or *Long*, and those articulated" by officers here. App., infra, at 22a. But there are significant differences. First, *Terry* and *Long* do not involve the search of a home, which has heightened protections. And *Buie* did not create an additional exception to the warrant rule, allowing police to *enter* a home for a "protective sweep." *See Maryland v. Buie*, 494 U.S. 325, 330 (1990) (citing *Payton*, 445 U.S. at 602–03). The Court in *Buie* merely authorized a protective sweep when police are already lawfully inside the home pursuant to an arrest warrant, for officer safety. *Id.* at 333–35. And significantly, Petitioner's calm and cooperative conduct and demeanor was a stark contrast to the dangers described in *Long*, *Terry*, and *Buie*.

"Any kind of search of the home or curtilage on less than probable cause (supported by a warrant, normally), or without one of the recognized exceptions such as hot pursuit, is forbidden by binding Supreme Court precedent, notably *Jardines* and *Collins*." App., infra, at 36a (Judge Wood, C.J. dissenting). As Judge Wood stressed, to search Petitioner's home police needed his consent, or a warrant, or a recognized exception to the warrant requirement.

Because there were none of these, the majority's opinion in this case conflicts with a long line of decisions of this Court, described above, holding that these are the only circumstances justifying a search of a home.

In addition, the Seventh Circuit decision in this case conflicts with circuit precedent. The Seventh Circuit itself has previously explained that this Court's precedent does not permit a *Terry*-style frisk

of a home. In *United States v. Johnson*, that court said:

> No decision of the Supreme Court...has ever held that police may conduct a *Terry* "frisk" of a house or an apartment—that is, approach it on nothing but a suspicion that something is amiss and conduct a brief warrantless search.

170 F.3d 708, 714 (7th Cir. 1999). Yet that is precisely what that Court held in this case: police may conduct "a *Terry*-like 'frisk' not of a person, but of a home." App., infra, at 36a (Wood, C.J., dissenting).

Moreover, several other circuit courts have held that *Terry*'s authorization to conduct investigative detentions and/or limited searches does not apply to the home. *Moore v. Pederson*, 806 F.3d 1036, 1039 (11th Cir. 2015) (police may not conduct a *Terry* stop in a home); *United States v. Struckman*, 603 F.3d 731 (9th Cir. 2010) (*Terry* "does not apply to in-home searches and seizures"); *United States v. Reeves*, 524 F.3d 1161, 1166 (10th Cir. 2008) (*Payton*, not *Terry*, governs in-home seizures); *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988) (en banc) (finding that a "limited" search of the curtilage pursuant to a *Terry* stop was unlawful, and adhering to the "bright-line rule" that "[t]he Fourth Amendment prohibits searches of dwellings without probable cause"). The Seventh Circuit majority attempted to distinguish many these cases on their facts. App., *infra*, at 9a n.2. But as a legal matter, its holding conflicts with these cases because it goes against the legal proposition that *Terry*'s balancing test does not apply to in-home searches and seizures.

Finally, the Seventh Circuit decision in this case conflicts with at least one decision of a state's highest court in a case with similar facts. In *Commonwealth v. Leslie*, officers patrolling a high-crime neighborhood spotted men walking down the street who appeared nervous as they entered the front yard of a duplex. 76 N.E.3d 978, 981–82 (2017). They testified that one of the men crouched down and appeared to manipulate something under the porch, "consistent with an individual who illegally possessed a firearm." *Id.* Officers suspected that the man had a gun under the porch. *Id.* The officers walked up to the house, and while one officer engaged the men in conversation, another looked under the porch and found a gun. *Id.* Relying principally on *Jardines*, Massachusetts' highest court held that the search was unlawful. *Id.* at 986–87.

Therefore, this Court should grant review of the Seventh Circuit's decision in this case because the decision is in conflict with opinions of this Court, other circuit courts, and at least one state's highest court.

II. The Seventh Circuit's holding opens the door to intrusive searches in derogation of the Fourth Amendment's protection of the sanctity of the home.

The Seventh Circuit majority suggested that its decision in this case would have limited application, noting that the outcome would be different if the gun was located behind a closed front door or if it involved contraband other than a gun. App., infra, at 22a–23a. But there is no principled way to limit the majority's holding to the circumstances of this case.

The majority said that its decision would not permit a search behind a "closed front door" (the one behind the screen door) but its holding would clearly apply if a front door is open and officers suspect that someone placed a firearm just beyond it. *Id.* at 19a–20a, 22a. Indeed, with an open front door, if officers suspect that someone placed a firearm in a mudroom bench just inside, or a coat closet, or under a hallway rug, the majority's holding would permit officers to conduct a "minimally invasive search" of those places if the suspect is within its reach. *Id.* If police were conducting a "knock and talk" and someone were to partly open their door, where police suspect that a gun could be within the suspect's reach, this decision would allow police to enter the home to search for "officer safety." And although officers in this case did indeed find a gun, the majority's holding would permit these searches just the same if they ultimately uncovered a bag of marijuana, a video game, or a bottle of soda.

Further, the decision in this case might be read to extend *Buie*'s "protective search" doctrine to the

home's curtilage, where officers' presence on the curtilage is justified only based on the public's generally applicable implied license to enter curtilage in order to seek conversation with a resident. This has profound, troubling implications, given that officers are always permitted to be present on a home's curtilage just the same as the public. *Jardines*, 569 U.S. at 9 n.4, 22. Extending *Buie* to this situation nullifies *Collins* and *Jardines*—officers could approach a home based on the general public's implied license to be on the porch but then search the area for weapons (and find whatever they find), for their own protection.

In an opinion that presaged *Jardines*, the Ninth Circuit explained that "[i]f we were to construe the knock and talk exception to allow officers to meander around the curtilage and engage in warrantless detentions and seizures of residents, the exception would swallow the rule that the curtilage is the home for Fourth Amendment purposes." *United States v. Perea-Rey*, 680 F.3d 1179, 1189 (9th Cir. 2012). Just the same, here, the Seventh Circuit's approval of officers using their implied license to enter a porch to justify a warrantless search of the porch for their protection—which search is, circularly, justified by the officers' presence on the porch—threatens to "swallow the rule that the curtilage is the home for Fourth Amendment purposes." *Id.*

Therefore, this Court should also grant review of the Seventh Circuit's decision in this case because that decision threatens to have a significant, negative impact on citizens' Fourth Amendment rights in their homes.

III. This case is an excellent vehicle for considering this important issue.

The legal issue presented here—whether police officers may search a home in the absence of a warrant or probable cause for officer protection—was fully litigated in the district court and on appeal to the Seventh Circuit, which decided the issue on the merits. Moreover, this fully litigated suppression issue is case dispositive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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