No. 19-6343

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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ARGUMENT

I. The government's argument against review is premised on a factual misunderstanding.

The government's arguments in opposition to Antoine Richmond's petition for a writ of certiorari depend on a factual inaccuracy: that Petitioner consented to police officers' entry onto his porch. BIO at 16, 17, 20, 24. From this inaccuracy, the government argues that because the officers' presence on the porch was authorized by consent—"independent of any 'implicit license' to approach the house"—the question presented by this case is fact-bound and the Seventh Circuit's majority opinion is consistent with decisions of this Court and the other circuit courts. Br. in opp. at 20.

But Petitioner did not consent to the officers' presence on his porch and he has never conceded otherwise. The officers' presence on the porch was authorized only by the generally applicable implied license to approach a home.

The sole basis for the government's claim regarding consent is a footnote in the Seventh Circuit's opinion (really, two footnotes—footnotes 2 and 3) stating that Petitioner's appellate brief (at 7, 16–17, and 19) acknowledged that he "consented to the officers' presence on the porch." BIO at 9 (citing App. at 10a n.2). But this claim, which appeared only in these footnotes, does not mean what the government thinks it means.

The reality is just as Chief Judge Wood described in her dissenting opinion: Petitioner conceded only "that the *conversation* that took place on the porch" was consensual. App. at 26a (Wood, C.J., dissenting)

(emphasis in original). In a few places in Petitioner's appellate brief, he used the phrase "consensual encounter" as a synonym for *non-confrontational* encounter, in describing the fact that Petitioner willingly and nonthreateningly responded to the couple of questions that one police officer asked him while another officer swiftly moved to search behind his front screen door. Brief of Defendant-Appellant at 7, *United States v. Richmond*, No. 18-1559, 2018 WL 2418877 (7th Cir. May 18, 2018), ("there was nothing about this consensual encounter with Richmond that demonstrated that there was a threat to the officers' safety"); *see also id.* at 16, 17.

With this language, Petitioner was abandoning an argument (made in the district court) that the officers' mere questioning of him amounted to an illegal *Terry* stop, separate from the illegal search. *Id.* at 19. In the Seventh Circuit, the government recognized this. Brief of Plaintiff-Appellee at 20, *United States v. Richmond*, No. 18-1559, 2018 WL 3602347 (7th Cir. July 18, 2018).

It is apparent why Petitioner abandoned his "*Terry* stop" argument: he had to concede that under *Florida v. Jardines*, 569 U.S. 1, 8 (2013), officers could enter the porch to talk to him pursuant to the generally applicable "implied license" to approach a home—the implied license that the government has told this Court that this case is *not* about. *See* BIO at 20; *see also* Brief of Defendant-Appellant, *supra*, *at* 8 ("Private citizens and officers alike, have a limited license "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."), *and* 9 ("Instead, law enforcement exceeded the scope of their license on Richmond's porch.").

Petitioner has always been clear that the officer's entry onto his porch was lawful only under this implied-license theory—he has never said that he "consented" to their presence on the porch. *See id.*; *see also* Oral argument, *United States v. Richmond*, No. 18-1559 (7th Cir. Sept. 24, 2018)[1]; App. at 48a (magistrate judge describing Petitioner's argument in the district court). Indeed, there would be no basis for a concession that Petitioner "consented" to officers' presence on his porch. The officers did not testify that they asked for consent to approach the porch, or that Petitioner invited them onto the porch, or any other such thing. They simply walked from their squad car onto the porch and, while one officer asked Petitioner a couple of questions, the other officer searched behind the door. *See* App. at 38a–41a, 46a–48a (findings of fact).

Furthermore, it is not at all clear that even the Seventh Circuit's panel majority thought that Petitioner actually consented to the officers' entry onto his porch.

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[1] http://media.ca7.uscourts.gov/sound/2018/sk.18-1559.18-1559_09_24_2018.mp3. At points during the oral argument, judges used the words "permission" or "consent" to refer to *Jardines*' implied-license theory. *See, e.g.,* Oral argument at 02:52–03:43 (C.J. Wood: "as I look at *Jardines* as well as *Collins*, there is a boundary on the scope of the consent to go on that porch. Um, it's okay if you're a girl scout selling cookies as the court mentions or possibly even a police officer doing a consensual knock and talk, but it does not extend to permission to search even the porch or the just inside the porch or the vestibule of the house or anything else.")

In the body of its opinion, where footnote 3 appears, is the following discussion:

> Richmond depicts his exchange with the officers as a "consensual encounter," not an investigatory stop. [Footnote 3 appears here.] In so doing, he acknowledges the officers were permitted to enter onto the porch area to ask him questions to dispel their suspicions, but contends a warrant or his consent was required to open the screen door.

App. at 11a. And to the extent that the two-judge majority did think that Richmond consented to the officers' entry onto his porch, it did not suggest that this was the basis for its decision. The majority's holding was much broader. *See* App. at 11a–23a.

So again, footnotes 2 and 3 do not seem to mean what the government thinks they mean. And regardless of what the panel majority *meant* to say, Petitioner did not consent to anything and has never conceded otherwise. Police officers were allowed to enter his porch to speak with him, but nothing more, under an implied-license theory. And that's the problem here: if police can use their license to speak to someone within curtilage to justify a search of that curtilage, this would quickly swallow the rule of *Jardines* and also *United States v. Collins*, __ U.S. __, 138 S. Ct. 1663 (2018). *Cf. United States v. Perea-Rey*, 680 F.3d 1179, 1189 (9th Cir. 2012) ("If 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.").

II. The Seventh Circuit's majority opinion conflicts with other circuits' opinions.

The government's argument against Petitioner's claim that the Seventh Circuit's majority opinion conflicts with other circuit cases is based on the government's notion that Petitioner consented to police officers' presence on his porch. Br. in opp. at 24–25. Once this factual matter is corrected, it is apparent that the Seventh Circuit opinion conflicts not only with several circuit opinions but also at least one state supreme court opinion. *See* Pet. at 14–15.

III. This case presents an issue of utmost importance, which is appropriate for this Court's review.

If Petitioner had given consent to enter the porch, this would be a different case. As it turns out, it might still present a question worthy of this Court's review, since there is a circuit split on whether a *Buie*[2]-style "protective sweep" can only occur when officers are lawfully present in a home pursuant to an arrest warrant or whether it can also occur when officers are lawfully present in a home based on consent or exigent circumstances. *United States v. Hassock*, 631 F.3d 79, 86–89 (2d Cir. 2011) (discussing this split, collecting cases, and ultimately holding that *Buie* applies only where law enforcement are lawfully present in a home pursuant to an arrest warrant or other official process). Indeed, this case presents this Court with an opportunity to provide some insight on this question.

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[2] *Maryland v. Buie*, 494 U.S. 325 (1990)

But this case allows this Court to give *additional* guidance, by clarifying the interaction of *Jardines* and *Collins* with *Terry*,[3] *Buie*, and related cases. People are frequently present within their home's curtilage, and law enforcement has the same implied license as anyone else to approach a person who is on a porch, or in a driveway or open garage, to initiate a conversation. *Jardines*, 569 U.S. at 7–8. This implied license does not permit law enforcement to search that area any more than it permits any other person to snoop around. *Id.* at 9 & n.3. But if officers who choose to use the implied license to enter curtilage are then permitted to search the surrounding area whenever they reasonably suspect that a person within the curtilage could pose a danger, it would dramatically undermine *Jardines*. *See also Collins*, 138 S. Ct. at 1672 (referring to "the sanctity of the curtilage"). And it would have deeply troubling implications for police contacts occurring in high-crime neighborhoods, where patrolling officers might testify that when a person is holding a medium-sized object in their pocket, it is "typically" a firearm. *See* App. at 2a.

The government's brief focuses on the rationale of *Buie*: even inside the home, an officer performing official duties is permitted to take reasonable steps to protect his safety. BIO at 22–24.

In *Buie*, this Court held that when officers lawfully enter a home to execute an arrest warrant, if they reasonably suspect that there could be a danger inside the home (*e.g.,* hidden persons or weapons), they may conduct a limited search of the home in order to dispel that danger. 494 U.S. at 333–37. As noted, several circuits have extended *Buie* to situations in which law enforcement is lawfully present inside a home based on

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[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

something other than an arrest warrant (consent, exigency), although this is the subject of a circuit split. *See Hassock*, 631 F.3d at 86–89.

But *Buie*'s rationale cannot casually be applied to curtilage. With the non-curtilage portion of the home, the requirement that there be a lawful basis for entry is a significant, critical limitation on any protective search—even assuming that the lawful basis is not limited to an arrest-warrant situation. There is no circumstance in which a police officer can simply stroll into a home to chat with residents (without a warrant, consent, probable cause, or exigency). But with the curtilage portion of the home, officers may do just that.

Imagine if the facts of *Collins* had been different: the officer investigating whether a motorcycle was stolen found Mr. Collins in his driveway, standing next to the motorcycle.[4] The officer suspected he might be armed based on the high-crime neighborhood, the time of night, and Mr. Collins's criminal history. Could the officer have frisked Mr. Collins in his own driveway before speaking with him? Could he have pulled the tarp off the motorcycle to check for weapons (and perhaps looked at the license plate while he was at it)?

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[4] *See Collins*, 138 S. Ct. at 1668 ("Officer Rhodes, who did not have a warrant . . . walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. . . . [He] pulled off the tarp, revealing a motorcycle. . . . He then ran a search of the license plate and vehicle identification numbers, which confirmed that the motorcycle was stolen.").

Under the Seventh Circuit decision in this case, the answer is undoubtedly yes. Thus, it does not take much imagination to see how that decision is incompatible with the notion that at the very core of the Fourth Amendment is the right of citizens to be "free from unreasonable governmental intrusion" in their homes, including the curtilage of their homes. *Collins*, 138 S. Ct. at 1670 (quoting *Jardines*, 569 U.S. at 6).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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