APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

It is ORDERED that the following applications for further appellate review be, and hereby are, DENIED:

* * *

FAR-27934 Commonwealth v Erich G. Sorenson
2019-P-1170

* * *

BY THE COURT,

Maura A. Looney

Maura A. Looney
Assistant Clerk

ENTERED: January 14, 2021

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

COMMONWEALTH *vs.* ERICH SORENSON

No. 19-P-1170

Middlesex. September 8, 2020 – November 16, 2020

Present: Green, C.J., Milkey, & Wendlandt, JJ.

Arrest. *Search and Seizure*, Curtilage, Arrest. *Constitutional Law*, Assistance of counsel, Arrest, Search and seizure. *Due Process of Law*, Assistance of counsel. *Practice*, *Criminal*, Assistance of counsel, Motion to suppress.

INDICTMENTS found and returned in the Superior Court Department on June 22, 2012.

Following review by this court, 93 Mass. App. Ct. 1108 (2018), a motion for a new trial, filed on April 8, 2019, was considered by *Robert L. Ullmann*, J., and a motion for reconsideration also was considered by him.

Sara A. Laroche for the defendant.

Kevin J. Curtin, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. In this case we consider the issue whether trial counsel provided ineffective assistance by failing to move to suppress evidence garnered during the defendant's warrantless arrest in the hallway immediately adjacent to the apartment of the multiunit, three-story apartment building in which he was living. The motion judge denied the defendant's motion for a new trial, holding that the hallway was not

a constitutionally protected area and therefore counsel's failure to file such a motion did not constitute ineffective assistance under the familiar *Saferian* test.[1, 2] Concluding that the denial of the motion for a new trial was not an abuse of discretion because the common hallway at issue did not constitute the apartment's curtilage and, therefore, there was no abuse of discretion in denying the defendant's motion for reconsideration, we affirm.

Background. The defendant was convicted of armed assault with intent to rob, G. L. c. 265, § 18(*b*); and assault and battery by means of a dangerous weapon causing serious bodily injury, G. L. c. 265, § 15A(*c*)(i), stemming from the stabbing of the victim. An eyewitness, who was familiar with the defendant, identified him to the police as the assailant and told them the street address where the defendant lived and that he lived in "an apartment on the third floor, in the back right-hand side apartment." When Lowell Police Sergeant Joseph Murray arrived at the address, he observed a "three-story building with numerous apartments on each floor."

Sergeant Murray knocked on the door of the unit. A woman answered the door, and Murray asked whether the defendant was home. At that moment, the defendant came walking toward the door from inside the apartment. Murray asked the defendant "to

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[1] *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974).

[2] The defendant also filed a timely motion for reconsideration and appeals only from the order denying it. Because the timely motion for reconsideration incorporates most of the same arguments made in the motion for a new trial, our review requires determination whether the motion for a new trial correctly was decided. The Commonwealth does not contend otherwise.

step out in the hallway." The defendant complied, and Murray proceeded to arrest him.

In his direct appeal, the defendant conceded that there was probable cause to arrest him, but argued for the first time that the fruits of his warrantless arrest[3] should have been suppressed because the arrest occurred in the curtilage of the apartment. *Commonwealth* v. *Sorenson*, 93 Mass. App. Ct. 1108 (2018). We affirmed, holding that because the defendant raised the argument for the first time on appeal, it was waived. *Id.*

In his motion for a new trial, the defendant contended that he was provided constitutionally ineffective counsel because counsel failed to make the curtilage argument. As discussed *supra*, the motion judge, who was also the trial judge, denied the motion.

Discussion. "The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). We review the denial of a motion for a new trial for an abuse of discretion. See *Commonwealth* v. *Fernandes*, 485 Mass. 172, 187 n.10 (2020). "We afford particular deference to a decision on a motion for a new trial based

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[3] As Murray was handcuffing the defendant and explaining that he was being arrested in connection with "a stabbing that occurred the other night," the defendant responded, "I was here all Saturday." Murray had not told him that the stabbing occurred on Saturday. Murray also noticed during the arrest that the defendant had a band-aid on his finger and later, after the band-aid had been removed, observed a laceration on that finger. Murray found the injury significant because "it's not uncommon when somebody is involved in a stabbing that they get cut themselves."

on claims of ineffective assistance where the motion judge was, as here, the trial judge." *Commonwealth* v. *Diaz Perez*, 484 Mass. 69, 73 (2020), quoting *Commonwealth* v. *Martin*, 467 Mass. 291, 316 (2014).

The defendant claims entitlement to a new trial because, he contends, his counsel provided constitutionally deficient assistance. Claims of ineffective assistance of counsel require examination of counsel's performance to determine (1) "whether there has been serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer," and, if so, (2) "whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974). The defendant maintains that his counsel's performance was constitutionally deficient because counsel did not seek to suppress evidence collected during the defendant's warrantless arrest in the curtilage of his residence—an arrest, he contends, that violated his rights under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. "In order to succeed on a claim of ineffective assistance of counsel based on the failure to file a motion to suppress evidence, the defendant must show that he would have prevailed on such a motion." *Commonwealth* v. *Johnston*, 467 Mass. 674, 688 (2014). See *Commonwealth* v. *Lally*, 473 Mass. 693, 703 n.10 (2016), quoting *Commonwealth* v. *Satterfield*, 373 Mass. 109, 115 (1977) ("question is whether filing of the motion 'might have accomplished something material for the defense'"). Because the record does not support a conclusion that the hallway where the defendant was arrested constituted the curtilage of his

residence, the defendant has failed to make the necessary showing.

1. *Curtilage*.[4] In determining whether an area outside of the home constitutes the constitutionally protected curtilage of the home, "the central component of [the] inquiry [is] whether the area harbors the 'intimate activity associated with the sanctity of a [person's] home and the privacies of life'" (quotation omitted). *United States* v. *Dunn*, 480 U.S. 294, 300 (1987), quoting *Oliver* v. *United States*, 466 U.S. 170, 180 (1984). Although the concept of curtilage is to be assessed on a case-by-case basis, the Supreme Judicial Court has cautioned that it "is applied narrowly to multiunit apartment buildings." *Commonwealth* v. *Escalera*, 462 Mass. 636, 648 (2012) (locked basement area exclusively accessible by tenants of apartment within curtilage of defendant's apartment).[5]

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[4] Absent justification, the police cannot intrude upon a constitutionally protected area, including the curtilage of the home, without a warrant. See *Florida* v. *Jardines*, 569 U.S. 1, 5-6, 11 (2013). This constitutional protection of the home and its curtilage does not require a showing that the defendant has a reasonable expectation of privacy; instead, the protection is grounded in property rights. *Id.* at 11 (unnecessary to consider reasonable expectation of privacy test when government gains evidence by physically intruding on constitutionally protected areas). "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Id.*

[5] The defendant maintains that the view espoused by the court in *Escalera* no longer represents the current approach to the question of curtilage. Compare *Commonwealth* v. *Leslie*, 477 Mass. 48, 54 (2017) ("we reject the Commonwealth's argument that in cases involving a search in a multifamily home, the validity of the search turns on the defendant's exclusive control or expectation of privacy in the area searched"; "the essential question is whether the area searched is within the home or its curtilage"),

On appeal, the defendant incorrectly contends that the judge erred by applying the four factors set forth in *Dunn* to determine whether the hallway constituted curtilage.[6]

The four factors are (i) "the proximity of the area claimed to be curtilage to the home"; (ii) "whether the area is included within an enclosure surrounding the

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with *Escalera*, 462 Mass. at 648 ("The concept of curtilage is applied narrowly to multiunit apartment buildings . . . . [A multiunit] tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control" [quotation and citation omitted]). See *Commonwealth* v. *Thomas*, 358 Mass. 771, 774-775 (1971) ("In a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control"). Nothing in *Leslie*, *supra* at 57, which emphasizes the relevance of the *Dunn* factors, is inconsistent with our approach or conclusion in this case.

[6] The defendant contends that our decision in *Commonwealth* v. *Street*, 56 Mass. App. Ct. 301 (2002), abrogated in part on other grounds by *Commonwealth* v. *Tyree*, 455 Mass. 676, 697-700 (2010), is controlling. In *Street*, however, the defendant was inside his apartment or "on or at" the threshold when the arrest was effected, *id.* at 306-307, 307 n.11 (defendant opened door to his apartment and arrest occurred while police stood in hallway). In contrast, the record in the present case reveals that the defendant was in the hallway, outside of the apartment and its threshold when he was arrested. The defendant's reliance on *Commonwealth* v. *Molina*, 439 Mass. 206, 207-208, 211 (2003); *Commonwealth* v. *Marquez*, 434 Mass. 370, 375 (2001); and *United States* v. *Allen*, 813 F.3d 76, 78 (2d Cir. 2016), each of which involved an arrest effected inside the defendant's home, is similarly unavailing. See *Allen*, *supra* at 78 ("This is a liminal case, which presents a close line-drawing problem. If the officers had gone *into* [the defendant's] apartment without a warrant to effect the arrest, the arrest would violate the Constitution; if [the defendant] had come *out of* the apartment into the street and been arrested there, no warrant would be required").

home"; (iii) "the nature of the uses to which the area is put"; and (iv) "the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301. Contrary to the defendant's contention, the Supreme Judicial Court has "emphasize[d] the relevance of the *Dunn* factors for our courts in determining whether a challenged police action occurr[ed] within the boundaries of a home." *Commonwealth* v. *Leslie*, 477 Mass. 48, 57 (2017) (applying *Dunn* factors to determine whether side yard and porch of multifamily home were part of curtilage). While the factors do not constitute a "finely tuned formula" that ought to be "mechanically applied," they "are 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.* at 55, quoting *Dunn*, *supra*. Thus, the judge here did not err in analyzing the defendant's claim by application of the *Dunn* factors.

Nor did the judge err in concluding, after weighing the *Dunn* factors, that the common hallway adjacent to the defendant's residence was not curtilage. Indeed, the only *Dunn* factor that favors the defendant's position is the first—the proximity of the hallway to the defendant's home. The record shows that the hallway was physically adjacent to the apartment unit.

The remaining three factors do not support extending the concept of curtilage. Specifically, with regard to the second *Dunn* factor, the record is devoid of any information as to whether the hallway was enclosed; certainly, there is nothing in the record suggesting that it was enclosed relative to the defendant's

individual apartment. See *Commonwealth* v. *McCarthy*, 428 Mass. 871, 875 (1999) (noting second *Dunn* factor does not favor finding area curtilage where "[t]o whatever extent the parking lot is enclosed, it is an enclosure encompassing a common area utilized by all the tenants and visitors of the building").

Nor does the third *Dunn* factor—the nature of the uses of the hallway—favor the defendant's position. From the record, it appears the hallway was a common hallway used by the residents of the building (and their guests) to reach each separate unit. See *McCarthy*, 428 Mass. at 875 (lot used by tenants, guests, maintenance workers, and anyone else with business at building not curtilage).

Furthermore, nothing in the record supports a finding that any steps were taken to obscure the hallway from view—the fourth *Dunn* factor. To the contrary, it appears to have been open to residents and guests. See *McCarthy*, 428 Mass. at 875 (lot not curtilage where "freely visible" to anyone entering it). Contrast *Commonwealth* v. *Fernandez*, 458 Mass. 137, 145-146 (2010) (curtilage extended to driveway where fence separated driveway from neighboring building, other residents and their guests had no need to traverse driveway, and police did not observe driveway being used by anyone other than defendant and his guests).

In sum, the present record does not support the defendant's position that the hallway was an area that "harbors the 'intimate activity associated with the sanctity of a [person's] home and the privacies of life'" (quotation omitted). *Dunn*, 480 U.S. at 300, quoting *Oliver*, 466 U.S. at 180. In fact, the defendant cites no authority holding that the common hallway of a multiunit apartment complex is curtilage. Our own

review reveals no Massachusetts case addressing such a common hallway; indeed, cases in other jurisdictions addressing a similar claim hold that a common hallway of a multiunit apartment complex is not curtilage in contexts comparable to those present in this case. See *United States* v. *Trice*, 966 F.3d 506, 515 (6th Cir. 2020) (applying *Dunn* factors and holding "hallway in . . . a common area open to the public to be used by other apartment tenants to reach their respective units" not curtilage). See also *United States* v. *Makell*, 721 Fed. Appx. 307, 308 (4th Cir. 2018) (per curiam) ("the common hallway of the apartment building, including the area in front of [the defendant's] door, was not within the curtilage of his apartment"); *Lindsey* v. *State*, 226 Md. App. 253, 281 n.8, 127 A.3d 627 (Ct. Spec. App. 2015) (area in front of defendant's apartment door not curtilage); *State* v. *Edstrom*, 916 N.W.2d 512, 520 (Minn. 2018) ("privacies" of home life "do not extend . . . immediately outside [defendant's] apartment"); *State* v. *Nguyen*, 841 N.W.2d 676, 682 (N.D. 2013), cert. denied, 576 U.S. 1054 (2015) ("common hallway is not . . . within the curtilage of [defendant's] apartment").

Accordingly, we hold that the judge did not abuse his discretion in concluding that trial counsel's assistance was not ineffective by not bringing a motion to suppress on this basis. *Johnston*, 467 Mass. at 688 (performance of counsel not ineffective where motion to suppress would not have succeeded).[7]

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[7] The defendant argues alternatively that he had a reasonable expectation of privacy in the common hallway. See *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The cases relied on by the defendant are readily distinguished. See *Commonwealth* v. *Porter P.*, 456 Mass. 254, 259-261 (2010)

2. *Seizure*. The defendant also asserts, in the alternative, that he was seized inside his residence at the moment Murray knocked on the door and asked the defendant to step out into the hallway. The failure to raise such an argument, the defendant apparently claims, rendered trial counsel's performance constitutionally deficient.

A seizure occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Commonwealth* v. *Barros*, 435 Mass. 171, 173-174 (2001), quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980). See *Commonwealth* v. *Matta*, 483 Mass. 357, 362 (2019) ("the . . . pertinent question is whether an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay"). "[T]he police do not effectuate a seizure merely by asking questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe that he was not free to turn his back on his interrogator and walk away." *Barros*, *supra* at 174. Police officers "may make inquiry of anyone they wish and knock on any door, so long as they do not implicitly or explicitly assert that the person inquired

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(discussing juvenile's reasonable expectation of privacy inside his locked room at transitional shelter where he kept his personal belongings); *Commonwealth* v. *Hall*, 366 Mass. 790, 794-795 (1975) (tenant who was also owner of apartment building had reasonable expectation of privacy in hallway solely used and controlled by owner and accessed by locked door and buzzer system controlled by owner). Nothing in the record—such as exclusive or even restricted use, control, or access—supports an inference that the defendant harbored any reasonable expectation of privacy in the common hallway at issue.

of is not free to ignore their inquiries." *Id.*, quoting *Commonwealth* v. *Murdough*, 428 Mass. 760, 763 (1999). Contrast *Johnson* v. *United States*, 333 U.S. 10, 13-15 (1948) (officer's entry into defendant's living quarters without exigency cannot be justified as incident to arrest).

Here, Murray knocked on the defendant's door and asked him to step into the hallway. Without more, the record does not support the defendant's contention that the request constituted a seizure. *Barros*, 435 Mass. at 174. Accordingly, counsel's assistance was not ineffective in failing to raise this alternative ground. *Johnston*, 467 Mass. at 688.[8] Thus, the motion for a new trial and the motion for reconsideration properly were denied.

Order denying motion for reconsideration affirmed.

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[8] To the extent the defendant's other arguments have not been explicitly addressed, they "have not been overlooked. We find nothing in them that requires discussion." *Commonwealth* v. *Brown*, 479 Mass. 163, 168 n.3 (2018), quoting *Commonwealth* v. *Domanski*, 332 Mass. 66, 78 (1954).

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CRIMINAL ACTION
No. 1281CR0669

COMMONWEALTH

vs.

ERICH GORDON SORENSON

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

Defendant Erich Gordon Sorenson ("Sorenson") moves for a new trial under Mass. R. Crim. P. 30(b), following his conviction on October 5, 2015 on charges of armed assault with intent to rob and assault & battery by means of a dangerous weapon causing serious bodily injury. The charges arose out of a severe, life-threatening stabbing. Police obtained significant evidence against Sorenson immediately after his arrest.

Sorenson argues that his trial counsel provided ineffective assistance by failing to argue at a suppression hearing that his warrantless arrest was unlawful because it was made on the curtilage of his residence, his girlfriend's apartment. For the below reasons, Sorenson's motion is **DENIED**.

DISCUSSION

For purposes of this ruling, the Court assumes that Sorenson's girlfriend's apartment was Sorenson's residence at the time of his arrest. The Court further assumes that the evidence obtained by police immediately after Sorenson's arrest, i.e., Sorenson's statement showing knowledge of when the stabbing

occurred and a cut on his hand, was important in the case against him. However, this Court need not reach the issue of whether trial counsel's alleged deficient performance caused prejudice, because trial counsel's performance was not deficient. An argument by trial counsel that police made an unlawful warrantless arrest on the curtilage of Sorenson's residence would have failed, because the arrest occurred in a location that was not curtilage of the apartment.

A. The Legal Standards

1. Ineffective assistance of counsel

To establish ineffective assistance of counsel, the defendant must prove "behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer," which "likely deprived [him] of an otherwise available, substantial ground of defense." *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). Massachusetts law follows the two-prong standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the defendant to prove (1) deficient performance and (2) resulting prejudice, i.e. a reasonable probability that effective assistance would have led to a different outcome.

2. Arrests on the curtilage of a residence

It is settled law that, absent probable cause and exigent circumstances, police cannot arrest a person inside his residence or on the curtilage of his residence. *Florida v. Jardines*, 569 U.S. 1, 10 (2013); *Commonwealth v. Leslie*, 477 Mass. 48, 54-55 (2017). In the absence of controlling precedent on the specific type of space presented, the Court must apply the four-factor test established in *United States v. Dunn*, 480 U.S.

294 (1987) to resolve the ultimate question of whether the space is "intimately tied" to the home:

> In *Dunn*, the Supreme Court introduced a four-factor test to determine whether an area searched was within the home's curtilage: (i) "the proximity of the area claimed to be curtilage to the home"; (ii) "whether the area is included within an enclosure surrounding the home"; (iii) "the nature of the uses to which the area is put"; and (iv) "the steps taken by the resident to protect the area from observation by people passing by." *Id.* The Court cautioned, however, that "combining these factors [does not] producef] a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." *Id.* Instead, "these factors are 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."

Leslie, 477 Mass. at 55.

B. <u>Application of the Legal Standards</u>

It is undisputed that police placed Sorenson under arrest after he had stepped outside his girlfriend's apartment, where he was living at the time, into the common hallway area immediately outside his girlfriend's apartment. Therefore, the dispositive issue in this case is the legal issue of whether common hallway area immediately outside the front door to an apartment constitutes curtilage of the apartment.

Counsel have cited no case, and this Court has found no case, addressing this specific question. However, it seems evident from Supreme Judicial Court precedent that common hallways in a multi-unit apartment building are not curtilage:

> The concept of curtilage is applied narrowly to multiunit apartment buildings. Curtilage in an apartment building is "very limited," *Commonwealth v. McCarthy, supra* at 875; "a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control." *Commonwealth v. Thomas,* 358 Mass. 771, 775 (1971).

Commonwealth v. Escalera, 462 Mass. 636, 648 (2012). Because the common hallway area immediately outside Sorenson's girlfriend's apartment was not under the exclusive control of Sorenson's girlfriend or Sorenson, *Escalera* would appear to resolve the issue. However, this Court will consider the four *Dunn* factors.

Only the first *Dunn* factor, proximity to the home, clearly supports Sorenson's argument. The second factor, whether a multiunit apartment house's common hallways are "within an enclosure surrounding the home," is a matter of interpretation. However, the third and fourth factors, 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," overwhelmingly support the Commonwealth's argument. There is no evidence that the common hallway at issue here had any use other than to allow residents and their guests to get to all of the apartments on that floor. And, obviously, no steps had been taken to protect the common hallway area from

observation by people passing by to other apartments on that floor. Compare *Leslie,* 477 Mass. at 55-56 (porch and yard were curtilage based on evidence that they were "physically connected to the home," "enclosed with a chain link fence . . . and large wooden fence," "obstructed . . . from the street" and used as an "extension of [the] home").

Sorenson's reliance on *Commonwealth v. Marquez,* 434 Mass. 370 (2001) is unavailing. *Marquez* is distinguishable from this case in a dispositive way, i.e., the defendant in *Marquez* was arrested inside his apartment, 434 Mass. at 376, whereas Sorenson was arrested in the common hallway area outside his apartment.

In his reply brief, Sorenson argues briefly for the first time that effectively he was under arrest before stepping out of his apartment because he could not ignore officer Murray's request that he step outside. See Def. Reply Br. at 3. To the extent that this argument is not waived, see, e.g., *Commonwealth v. Johnson,* 470 Mass. 300, 318-319 (2014), it fails based on its dubious assumption that, if Sorenson had opted not to enter the common hallway, Sergeant Murray, the same officer whose warrantless entry into a residence resulted in suppression of evidence in *Marquez,* would have again made an unconstitutional warrantless arrest of Sorenson inside the apartment instead of obtaining an arrest warrant. Trial counsel's failure to make this factually unsupported and counterintuitive argument surely does not amount to ineffective assistance of counsel.

Relying on dicta in *United States v. Allen,* 813 F.3d 76, 85-86 (2d Cir. 2016), Sorenson also argues that it would be "perverse" for the outcome to depend upon

whether he had "simply closed the door and retreated deeper into his home" instead of coming into the hallway. Def. Reply Br. at 3. However, this is precisely the line that the court in *Allen* recognized must be drawn. As the court stated:

> This a liminal case, which presents a close line-drawing problem. If the officers had gone *into* Allen's apartment without a warrant to effect the arrest, the arrest would violate the Constitution; if Allen had come *out of* the apartment into the street and been arrested there, no warrant would be required. We conclude that the protections of *Payton* are primarily triggered by the *arrested person's* location and do not depend on the location or conduct of the arresting officers.

813 F.3d at 77 (emphasis in original). Indeed, *Allen* supports the Commonwealth's argument by noting that "if Allen had come *out of* the apartment into the street and been arrested there, no warrant would be required." *Id.* (emphasis in original).

In sum, because the common hallway area immediately outside Sorenson's girlfriend's apartment where he was arrested was not curtilage of the apartment, trial counsel's failure to make the argument at a suppression hearing does not constitute ineffective assistance of counsel.

C. Denial of Sorenson's Motion for an Evidentiary Hearing

Sorenson's counsel has made a significant argument in the sense that there appears to be no controlling Supreme Judicial Court or Appeals Court decision directly on point. However, this Court interprets Rule 30(c)(3) to require a hearing only if there is a material

factual dispute. See *Commonwealth v. Stewart,* 383 Mass. 253, 260 (1981) ("The primary purpose of [rule 30 (c) (3)] is to encourage the disposition of post-conviction motions upon affidavit") (quoting Mass. R. Crim. P. 30, Reporter's Notes, 1979). Because there is no factual dispute as to where Sorenson's arrest occurred, there is no need for an evidentiary hearing.[1]

CONCLUSION AND ORDER

For the above reasons, Erich Sorenson's Motion for New Trial Pursuant to Mass. R. Crim. P. 30 is **DENIED.**

Dated: June 11th, 2019 *Robert L. Ullmann*
Robert L. Ullmann
Justice of the Superior Court

[1] There is no need for an evidentiary hearing as to whether Sorenson was under arrest before stepping into the common hallway area, because trial counsel's failure to make this argument was not ineffective assistance. See *supra* at 4-5.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

COMMONWEALTH *vs.* ERICH SORENSON

No. 17-P-909

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court, the defendant, Erich Sorenson, was convicted of armed assault with intent to rob, and assault and battery by means of a dangerous weapon causing serious bodily injury. On appeal, the defendant claims that the judge erred in denying his motion to suppress. We affirm.

Background. On April 14, 2012, the defendant stabbed the victim during an attempted robbery. The victim sustained serious injury and was hospitalized for more than six weeks. Two days after the incident, an eyewitness to the stabbing identified the defendant as the assailant and told the police where he lived. Lowell police entered the residence, which was described as a three-story building with numerous apartments on each floor. Sergeant Joseph Murray knocked on the door of one of the units, and after speaking with a female, the defendant came to the door. Murray asked the defendant to step out into the hallway and, after he complied, Murray arrested him.

The defendant filed a motion to suppress both the statements that he made to the police subsequent to his arrest as well as Murray's observation of a cut on the defendant's finger. The defendant claimed that the police did not have probable cause for a warrant-

less arrest. After an evidentiary hearing, the judge denied the motion, finding that the police had probable cause to arrest the defendant.

Motion to suppress.[1] The defendant filed a motion to suppress claiming that the police lacked sufficient evidence identifying him as the assailant. He claimed that the eyewitness identification of him and the victim's identification of him from a photographic array were insufficient to establish probable cause for a warrantless arrest.

"In reviewing a decision on a motion to suppress, 'we accept the judge's subsidiary findings of fact absent clear error "but conduct an independent review of [her] ultimate findings and conclusions of law."'" *Commonwealth* v. *Keefner*, 461 Mass. 507, 515 (2012), quoting from *Commonwealth* v. *Scott*, 440 Mass. 642, 646 (2004). "We make an independent determination of the correctness of the judge's application of constitutional principles." *Commonwealth* v. *Cassino*, 474 Mass. 85, 88 (2016) (quotation omitted).

Notably, the defendant does not argue that the judge's findings are clearly erroneous. Indeed, at oral argument, he conceded that the police had probable cause and, having reviewed the record, we agree. Probable cause to arrest "exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." *Commonwealth* v. *Franco*, 419 Mass. 635, 639 (1995),

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[1] We rely solely on the testimony at the suppression hearing, notwithstanding the defendant's citation to trial testimony.

quoting from *Commonwealth* v. *Santaliz*, 413 Mass. 238, 241 (1992).

Instead, on appeal, the defendant claims for the first time that the arrest was made at the curtilage of the apartment and therefore a warrant was required. The defendant also claims that all he need do is file a motion to suppress citing as the basis the mere fact that he was arrested without a warrant. We disagree on both claims.

Pursuant to Mass.R.Crim.P. 13(a)(2), as appearing in 442 Mass. 1516 (2004), a motion to suppress "shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity." This requirement "alerts the judge and the Commonwealth to the suppression theories at issue, and allows the Commonwealth to limit its evidence to these theories." *Commonwealth* v. *Silva*, 440 Mass. 772, 781 (2004). Unsurprisingly, the judge's findings are devoid of any discussion of this claim as it was not raised in the motion to suppress. Judges cannot be expected to rule on theories that are not presented to them. "Our system is premised on appellate review of that which was presented and argued below." *Commonwealth* v. *Bettencourt*, 447 Mass. 631, 634 (2006). This claim is waived. See Mass.R.Crim.P. 13(a)(2) ("Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived . . ."). The question of curtilage is not new and could have been raised in the motion. See *Commonwealth* v. *Murphy*, 353 Mass. 433, 436-437 (1968).

As the defendant details, a curtilage analysis is a fact specific one. See *Commonwealth* v. *Leslie*, 477

Mass. 48, 55 (2017). Here, the Commonwealth was not on notice of the defendant's theory that he was arrested without a warrant in the curtilage of the apartment. As a result, the evidence presented on the details of the apartment building, the apartment in question, and the hallway in front of it was de minimus. In *United States* v. *Dunn*, 480 U.S. 294,301 (1987), the United States Supreme Court set out four factors to be used to determine whether the area in question falls within the protection of the Fourth Amendment to the United States Constitution. Such an analysis must be decided on a case-by-case basis. See *Commonwealth* v. *Fernandez*, 458 Mass. 137, 143 (2010). By failing to raise this issue below, the Commonwealth was not afforded the opportunity to present evidence on the Dunn factors; the judge was not asked to make such findings; and this panel cannot review the theory, raised for the first time on appeal.

Judgments affirmed.

By the Court (Meade, Hanlon & Blake, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: April 30, 2018.

[2] The panelists are listed in order of seniority.

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CRIMINAL ACTION
No. 2012-00669

COMMONWEALTH

vs.

ERICH SORENSON

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

INTRODUCTION

Defendant Erich Sorenson ("Sorenson") is charged with one count of assault and battery with a dangerous weapon, under G. L. c. 265, § 15 A; and one count of armed assault with intent to rob or murder, under G. L. c. 265, § 18(b). Sorenson asserts that officers of the Lowell Police Department ("LPD") did not have probable cause for his warrantless arrest on the evening of April 16, 2012. He therefore moves to suppress all evidence seized during the search incident to that arrest, along with all fruits thereof. After an evidentiary hearing and careful examination of the parties' submissions, the motion is **DENIED** for the following reasons.

FINDINGS OF FACT

Based on the evidence presented at the hearing, for the purposes of this Order, the Court finds the following facts.[1] On the evening of April 14, 2012, LPD

[1] Evidence presented at the hearing includes the testimony of Sergeant Joseph Murray of the Lowell Police Department

officers responded to a reported stabbing incident in Lowell, Massachusetts. The victim, Jose Ramos Ortiz ("Ortiz"), appears to have been a drug dealer and was in Lowell for the purpose of selling drugs. The sale that preceded the stabbing was arranged by a regular customer, later identified as Nancy DeMarco, with whom Ortiz was personally acquainted. Ortiz arrived at the designated location in a car, accompanied by two passengers, Emily Jimenez ("Jimenez") and Marta Lebron ("Lebron"), both of whom were adult women. DeMarco was already waiting, and was observed by Jimenez and Lebron, who remained in Ortiz's car while he got out of the car to make the sale.

Ortiz returned to the car a few minutes later in great distress. He said he had been stabbed. They drove to Saints Medical Center, where Ortiz was treated for severe stabbing injuries. LPD officers responded to Saints Medical Center and interviewed Ortiz, who did not know his assailant but was able to provide a general description: a tall, skinny, white-skinned male wearing a t-shirt.[2] LPD officers also interviewed Jimenez and Lebron, who said that the customer, Nancy DeMarco, was present at the scene of the drug purchase. Ortiz's phone records also showed communication between Ortiz and DeMarco's cellular telephone.

("LPD"), along with six exhibits. The exhibits include the statements of Emily Jimenez, Marta Lebron, and Nancy DeMarco: photo arrays shown to Jimenez, Lebron, and DeMarco; and the booking sheet created after Sorenson's arrest.

[2] At the hearing, Sorenson argued that this description was the "sparest imaginable." The court disagrees. While this description may not be highly detailed, it contains sufficient identifying information to form the basis of further investigation.

Subsequently, an LPD officer interviewed DeMarco, though the interview was not conducted in an interrogation room and was not recorded. DeMarco volunteered information about herself and the stabbing. DeMarco said she was addicted to heroin and regularly used other drugs, including Xanax and Wellbutrin.[3] She identified Ortiz (whom she knew as "Carlos") as her drug dealer for more than three years, and said that she had arranged to purchase drugs from him that evening. She also said that Sorenson, whom she knew by name prior to the stabbing incident, learned about this drug purchase after it was arranged and planned to rob Ortiz. DeMarco apparently knew about Sorenson's planned robbery before it occurred, but said that she did not expect any violence and urged Sorenson to show restraint.

At some point after DeMarco revealed her prior knowledge of the robbery, the LPD officer interrupted her to read her the Miranda warnings. DeMarco said that she understood her rights, waived them, and was willing to continue giving her statement. DeMarco was not arrested. The LPD officer did not offer DeMarco any special treatment in exchange for her statement, nor did the officers threaten any punitive treatment if she refused to talk to them.

DeMarco identified Sorenson as Oritz's assailant by picking him out of a photo array. DeMarco also corroborated Ortiz's description of Sorenson's attire during the stabbing. DeMarco then directed LPD officers

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[3] Sgt. Murray testified that DeMarco appeared competent and lucid while giving her statement.

to Sorenson's residence,[4] whereupon he was arrested for armed assault with intent to murder.

RULINGS OF LAW

"Probable cause [to arrest] exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense . . . . The officers must have entertained rationally more than a suspicion of criminal involvement, something definite and substantial, but not a prima facie case of the commission of a crime, let alone a case beyond a reasonable doubt." Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992) (internal quotations and citations omitted). This is true even without a warrant. See, e.g., Commonwealth v. Hason, 387 Mass. 169, 173 (1982) (internal citation omitted) ("[i]t has long been the law of this Commonwealth that an officer may arrest a person without a warrant if he has reasonable grounds for believing that that person has committed a felony").

Sorenson argues that the police lacked probable cause to arrest him because, at the time of his arrest, they lacked sufficient evidence specifically identifying him as the assailant.[5] Sorenson claims that DeMarco did not come forward on her own and that, when the police interviewed her, they failed to record her statement. Sorenson also claims that DeMarco's statement suggests that she had prior knowledge of the robbery and was potentially an accomplice, therefore

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[4] It appears that Sorenson lived at his girlfriend's apartment, which is where DeMarco directed LPD officers.

[5] Sorenson does not object to LPD procedure for the photo arrays.

damaging her credibility. Finally, Sorenson claims that neither Ortiz nor his two female companions could identify Sorenson by name, which means that the only identification of Sorenson was an unreliable one from DeMarco. The court does not agree for the following reasons.

At the time of the arrest, LPD officers knew that Ortiz had been seriously injured during an apparent drug-sale-turned-robbery. LPD officers interviewed all available witnesses and reviewed cellular telephone data. Relying upon a combination of witness statements, identifications, and telephone records, LPD officers ultimately identified Sorenson as a suspect who matched Ortiz's general description, and was identified, by name, by DeMarco, the only other eyewitness. The totality of this information is ample probable cause for Sorenson's arrest under the standards set out above in Santaliz and Hason.[6] The Commonwealth's evidence at the hearing in this matter was sufficient for this court to conclude that, at the time of the arrest, the LPD had probable cause to believe that Sorenson had committed the crimes at issue. Sorenson's motion to suppress is therefore denied.

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[6] Even assuming that DeMarco's statement was treated as accomplice testimony, Ortiz's description is sufficient corroboration for a reasonable fact-finder to credit DeMarco's statement. See Commonwealth v. Asmeron. 70 Mass. App. Ct. 667, 671-672 (2007) (internal citations and quotations omitted) ("evidence corroborating accomplice testimony need not prove the commission of the crime, all that is necessary is that the evidence satisfies the jury that the accomplice is telling the truth").

ORDER

For the reasons stated above, defendant Erich Sorenson's motion to suppress is **DENIED**.

SO ORDERED

Heidi E. Brieger
Heidi E. Brieger
Justice of the Superior Court

Dated this 1st day of April, 2014.