No. 20-18

In The
Supreme Court of the United States

ARTHUR GREGORY LANGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

BRIEF OF SONOMA COUNTY DISTRICT ATTORNEY'S OFFICE AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF COURT-APPOINTED AMICUS CURIAE AMANDA K. RICE IN SUPPORT OF THE JUDGMENT BELOW

GREGORY D. TOTTEN
Chief Executive Officer
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
2495 Natomas Park Dr., Ste. 575
Sacramento, CA 95833
(916) 443-2017

JILL R. RAVITCH
District Attorney
SPENCER RALPH BRADY
Chief Deputy District Attorney
Counsel of Record
ROBERT A. MADDOCK
Deputy District Attorney
SONOMA COUNTY DISTRICT ATTORNEY'S OFFICE
600 Administration Drive, Room 212-J
Santa Rosa, CA 95403
(707) 565-2311
Spencer.brady@sonoma-county.org

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

The Sonoma County District Attorney is the prosecutorial authority for Sonoma County, California, where the events at issue here all occurred. The District Attorney charged Petitioner with the underlying crimes related to driving under the influence (DUI) with a prior conviction, and high blood alcohol. The office defended the motion to suppress evidence below, and two separate appeals in the Appellate Division of the Sonoma County Superior Court. The prosecution of DUI offenders, particularly repeat offenders such as Petitioner, is of vital importance to the District Attorney, and the safety of the community. Because the California Attorney General determined to support the Petitioner in regard to the question presented here, the Court invited a separate amicus curiae, Ms. Amanda Rice, to file a brief defending the judgment. The Sonoma County District Attorney's Office has a direct interest in the outcome of this case, and joins in defense of the judgment below. Further, the District Attorney has an interest in clear Fourth Amendment rules that are readily administrable.

The California District Attorneys Association (CDAA) has been in existence since 1910 and was incorporated as a non-profit corporation in 1974. It has over 2,700 members including all of California's 58 district attorneys, the Attorney General of California, city

[1] The parties consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party or other person made a monetary contribution to fund the preparation or submission of this brief.

attorneys engaged in criminal prosecutions, deputy district attorneys, deputy attorney generals, and deputy city attorneys. It is dedicated to promoting justice, education and training, effective advocacy, integrity, and compliance with constitutional and other legal mandates. CDAA presents prosecutors' views in appellate cases when it concludes that the issues raised will significantly affect the administration of criminal justice.

BACKGROUND

Petitioner Arthur Lange, already on probation for driving under the influence of alcohol, with another "out of time" prior conviction, drove along California Highway 12 in unincorporated Sonoma County, needlessly honking his horn, with music blaring. It was a Friday night, a few minutes after 10 pm. His blood alcohol level, tested later after a blood draw, was over 0.24%, more than three times the legal limit in California.

His behavior attracted the attention of California Highway Patrol (CHP) Officer Weikert, (Weikert) who entered the highway and began to catch up, without emergency lights or siren. Weikert was from the neighboring Napa County CHP unit, whose patrol jurisdiction covers eastern Sonoma County. The Napa CHP office was located some half-hour drive away in Napa.

As Weikert followed, his patrol car's video system recorded the pursuit.[2] Lange first made a right turn off the highway onto Mountain Avenue, a semi-rural lane, as Weikert followed, closing the distance between them. Lange then turned left onto a smaller street, Hillside Avenue. As the video shows, the tail lights of Lange's vehicle came into view as Weikert caught up to Lange, who slowed to nearly a full stop in the public roadway. As became evident moments later, Lange utilized modern technology—the common garage door opener—to trigger the door to open. As Lange began to move again, Weikert turned on his emergency lights, which are clearly seen illuminating the inside of Lange's vehicle, as well as in front of him. Before the officer could have the opportunity to run Lange's license plate, Petitioner made another right and drove up a driveway. As Weikert followed, his emergency lights illuminated Lange's car and the driveway. The video shows Lange drive up the driveway, enter a garage—with the flashing lights clearly visible illuminating the garage—and immediately trigger the door to shut.

Officer Weikert stopped his patrol vehicle, got out, and waved his foot under the closing door, breaking a beam of light that triggered the door to go back up. He then took a few steps into the garage, and contacted Lange, whose slurred speech was immediately

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[2] A copy of the video was admitted at the hearing as Defense Exhibit A, and referenced here in its entirety.

apparent. The officer then asked Lange to step out of the garage. Lange was subsequently arrested for DUI.

State Highway 12 is a two-lane roadway with nothing but two ribbons of yellow paint separating opposing traffic. Highway 12 connects central Sonoma County to neighboring Napa County, and is heavily traveled by commuters, locals, and tourists visiting the two famous wine regions. The speed limit in most areas is 55 miles per hour.

Dozens of wineries are accessed via the highway, and the Sonoma Valley, where Petitioner resided, is a popular destination for vacationers from the San Francisco Bay Area, and elsewhere. Hundreds of vacation homes, short-term rentals, and other tourist accommodations dot the valley and rugged hillsides.[3] Sonoma County is also a mecca for beer lovers, with several world-famous brewers located in the region, including Russian River Brewing Company, which each year releases "Pliny the Younger" in limited supplies in an event that draws thousands of beer tourists from throughout the nation, and even the world.[4] The

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[3] As of August 6, 2020, the Sonoma County reported it had 846 vacation rental homes in the just the Sonoma Valley area of the county, where Petitioner resides. Christian Kallen, *Agua Caliente Neighbors Fight Surge in Vacation Rentals*, Sonoma Index Tribute, December 21, 2020, *available at* https://www.sonomanews.com/article/news/agua-caliente-neighbors-fight-surge-in-vacation-rentals/.

[4] In 2019, tourists came from 400 cities in 42 different American states, and from 14 countries as far off as Thailand, Malaysia and New Zealand. Alyssa Pereira, *Russian River Brewing's 2019 Pliny the Younger Release Generated $4.16 Million for Sonoma*

regional alcoholic beverages industries dominate the local economy and draw visitors year round.[5]

Sonoma County is also home to a significant amount of marijuana-related businesses, both legal and illegal—or somewhere in between. Indoor and outdoor marijuana grows abound. Labs to convert marijuana into concentrated cannabis and other products—again, both legally and illegally—may be located in signed warehouses, or any garage, shed, or house. Counties further north that represent the "Emerald Triangle" funnel carloads of marijuana down U.S. Route 101, and Sonoma County serves as a hub for large-scale marijuana transactions between growers in the north and buyers from the south. All of this marijuana-related activity attracts not only those who seek to obtain marijuana legally, but criminals of all types, from the simple thief to sophisticated and well-armed gangs travelling from across the country to conduct home invasion robberies—and murders—in order to obtain the highly valuable, and generally untraceable, product. Officers often have no way of knowing if any seemingly normal residence actually harbors marijuana grows or criminal enterprises with armed defenders inside.

County, San Francisco Chronicle, March 26, 2019, *available at* https://www.sfgate.com/beer/article/Russian-River-Brewing-2019-Pliny-the-Younger-13717680.php.

[5] As of 2016, there were more than 425 wineries in Sonoma County generating over $13 billion for the local economy, according to county records.

Unfortunately, the local bounty also brings with it the increased danger of intoxicated drivers, often unfamiliar with the curving undivided roadways, who all too often cause collisions resulting in injury, death, and property damage. As a result, DUI enforcement is a top priority for local law enforcement, including the Sonoma County District Attorney's Office, which though small in size, maintains a "Vertical Driving Under the Influence" (VDUI) team, funded in part through state highway safety grants. The VDUI unit prosecutes repeat offenders, including Lange here. The VDUI unit also holds regular meetings with law enforcement partners, including the CHP, to share information, discuss trends, and identify which areas are the high priority enforcement targets. State Highway 12 is such an area.

Because traffic regularly exceeds the posted 55 miles per hour speed limit, major crashes in the area are all too frequent, and often catastrophic.[6] In 2018, local law enforcement submitted 2756 DUI cases to the Sonoma County District Attorney's Office, 188 of which as felonies. Of those, 2681 criminal cases were filed, 208 of them as felonies. In 2019, 2785 cases were

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[6] The highway is already subject to disastrous vehicle collisions all too often, even without the added danger imposed by impaired drivers. Sadly, as reported in the Santa Rosa Press Democrat, a recent example involves three individuals who were killed in two separate crashes within minutes of each other on January 4, 2021. Nashelly Chavez, Three ID'd in Pair of Fatal Crashes on Highway 12 Near Santa Rosa, The Press Democrat, *available at*: https://www.pressdemocrat.com/article/news/three-idd-in-pair-of-fatal-crashes-on-highway-12/.

submitted as DUI's, 145 as felonies; 3044 cases were filed, 179 as felonies.[7] Of the 2019 offenses, 625 of the filed cases involved repeat offenders. Ninety cases involved injuries at the hands of the DUI driver.

Sonoma County, like the majority of California's 58 counties, is largely rural. Situated on the Pacific Coast north of Marin County and the Golden Gate, and south of Mendocino County, the cities and towns generally sit in the valleys along the highway corridors—U.S. 101 and State Highway 1 running north to south, and highways 12 and 116 connecting the western and eastern portions. However, vast areas of the county are rugged coastal ranges or interior mountainous zones with very limited communications and steep and winding roadways that cannot be traversed quickly, even by first responders in emergencies. Large areas, such as the coastal zone, may have a single resident deputy available, often over an hour away from the scene of any call even at full "Code 3" speeds. Substantial areas may be out of radio and cell phone range altogether for any officer needing to summon assistance. Whatever perception people may have about the most populous state in the union based on areas like Los Angeles, the San Francisco Bay Area, or San Diego, in reality most counties in the state are rural and sparsely populated. Indeed, Sonoma County is a mini-model of the state itself—a few areas of concentrated cities and towns, and vast areas with few inhabitants. And, as relevant here,

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[7] The fact that many cases that are submitted as misdemeanors are filed as felonies underscores the difficulty officers in the filed have in determining the level of offense accurately in real time.

peace officers in such locations, so common in the county, the state, and indeed the nation as a whole, would be severely hampered in the performance of their duties if all that any offender needs to do is drive into his or her garage and then thumb their nose at the officer.

SUMMARY OF ARGUMENT

I. Existing precedent supports a categorical rule permitting hot pursuit for public offenses, whether felony or misdemeanor, if the officer has probable cause, the arrest is initiated in a public place, and the offender flees into a home. The fleeing offender has no legitimate expectation for privacy when he flees a lawful arrest and opens his home and enters in order to escape consequences for criminal activity. It is the flight and actual pursuit that are the key components to a true hot pursuit. Hot pursuits trigger important law enforcement concerns.

II. A rule dependent on statutory labels of "felony" or "misdemeanor" would create confusion and be difficult to apply in the rapidly evolving context of a pursuit. Nationally, it would create anomalies between states for the same conduct based on local laws. In California, an alternate felony/misdemeanor statutory scheme for the same conduct would lead to uncertainty in the field and endless second guessing.

III. While warrants may be obtained "in minutes" in limited situations like a DUI blood draw, where the

subject is already in custody and probable cause established, a constitutionally sufficient warrant in pursuit cases such as Lange's takes time. Destruction of evidence, further flight of the offender, and officer safety are all put at great risk.

IV. Even if the Court rejects a categorical rule, under these facts the judgment should be affirmed. The cost to society of exclusion far outweighs any benefit of deterrence.

ARGUMENT

I. EXISTING PRECEDENT PERMITS WARRANTLESS ENTRY INTO A HOME TO COMPLETE THE ARREST OF A FLEEING OFFENDER INITIATED IN A PUBLIC PLACE.

The question presented frames the issue in terms of the misdemeanor label attached to the offense, not the conduct itself. While the lower federal courts and numerous states have reached different conclusions, this court's precedents giving rise to the "hot pursuit"[8] exception, along with subsequent developments in the law, permit just the sort of entry into a home to apprehend a fleeing misdemeanant as occurred in this case.

[8] "Hot pursuit" can be a problematic term. "Fresh pursuit" or even just "pursuit" are sometimes used. As discussed here, the emphasis is on the immediacy of the pursuit, with an active attempt to apprehend a fleeing suspect.

A. Flight Into A Home From Lawful Arrest Delegitimizes Any Expectation Of Privacy.

Initially, Lange confuses distinct constitutional issues by blurring two definitions of the word "retreat" in order to assert that a misdemeanant has a constitutionally protected right to flee into his home and evade an otherwise lawful arrest initiated in a public place. But the Fourth Amendment was never intended to be a shield to *facilitate* crime. A "retreat" may be defined as "a private and safe place where one can go for peace and quiet" or "a place of privacy or safety; REFUGE." Black's Law Dictionary 1575 (11th ed. 2019); Merriam-Webster's Collegiate Dictionary 1065 (11th ed. 2006). This is the constitutional protected activity clearly meant by this court when, as Petitioner states "[t]he 'very core' of the Fourth Amendment is 'the right of a man to retreat into his home and there be free from unreasonable government intrusion,'" citing *Collins v. Virginia*, 138 S.Ct. 1663, 1670 (2018). Pet. Br. at 2. In contrast, this Court's precedent does not approve the meaning of "retreat" that applies in this case—the act of fleeing into the home to avoid a lawful arrest. *United States v. Santana*, 427 U.S. 38, 42 (1976) ("The only remaining question is whether act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not.").

The distinction matters. Generally, the reasonableness of the expectation of privacy in the home is undoubted. "[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on

agents of the government who seek to enter the home for purposes of search or arrest." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984). However, "[s]ince the decision in *Katz v. United States*, 389 U.S. 347 (1967), it has been the law that 'capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" *Minnesota v. Olson*, 495 U.S. 91, 95 (1990), citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "A subjective expectation of privacy is legitimate if it is '"one that society is prepared to recognize as 'reasonable[.]'"'" *Id.* at 95-96, citation omitted. As *Santana* teaches, the offender who flees a lawful arrest and exposes his home to the public sheds any legitimacy to the expectation of privacy along the way.

B. Flight, Not Level Of Offense, Triggers The Exigency In Pursuits.

While Petitioner denies the existence of a categorical rule regarding pursuit, Respondent, as well as some subsequent authorities, discuss the holding in *Santana* as applying a categorical pursuit exception to the warrant requirement for a fleeing felon. However, the analysis of the case itself did not turn on whether the offense was a felony; rather, the focus was on the flight to evade a lawful arrest initiated in a public place. See *Stanton v. Sims*, 571 U.S. 3, 9 (2013) ("nothing in [*Santana*] establishes that the seriousness of the crime is equally important *in cases of hot pursuit*") (emphasis in original). Although the offense discussed

was deemed a felony, the conduct involved was relatively minor, and did not involve any violence, an injured victim, or immediate threat of harm to another. CF *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (entry made into home to locate armed robber, soon, but not immediately, after the robbery).

The analysis in *Santana* supports a conclusion that the warrantless entry and arrest in the present matter—and other misdemeanor flight cases—is constitutionally permissible. In *Santana*, after the sale of a small amount of drugs to an informant, officers descended on the Santanas while still in their front yard, in order to arrest them. The petitioner ran inside her home, and officers followed, arrested her, and located the marked bill and more drugs. Citing *United States v. Watson*, 423 U.S. 411 (1976), the court first considered whether the warrantless arrest was initiated in a public place. The court concluded it was, even though Santana was on the stoop within the curtilage of her home, citing *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."). The court then turned to the question "whether her act of retreating into her house could thwart an otherwise proper arrest." The answer was no. *Santana* at 42. The court considered the location where the officer initiated the arrest—a public place—and the conduct of the petitioner in retreating into her home to thwart the arrest.

Although the underlying charge here is different, the rest of the facts of *Santana* are very similar. Officer

Weikert attempted a lawful detention in a public place, a public roadway. Lange was in his vehicle, with the well-recognized lesser expectation of privacy and, as he concedes in his brief "slowed to open his garage door" while still on the public roadway. Pet. Br. at 3. As he began to move again the officer turned on his emergency lights—still in the public roadway—and continued up Lange's driveway in a true hot pursuit, as in *Santana*. And, like *Santana*, the pursuit itself was very short in distance and time.

Despite Lange's unsupported assertion that he did not know the officer was behind him (apparently based on his own slurred self-serving hearsay response to Weikert about whether he saw the officer behind him), it is not reasonably possible that Lange did not notice that the interior of his car, the driveway before him, and garage were brightly illuminated by emergency lights. He would have had to be blind not to notice them. Instead, it is clear that Lange readied his attempted escape by slowing to open the garage door while still in the roadway, and then immediately triggered it to close as soon as he got into the garage, as seen in the video. Lange had obviously become aware of the officer behind him—the only other vehicle on the road and rapidly catching up. He knew he was on DUI probation, knew that he had terms that required him to submit to a warrantless test for alcohol in his system, knew he was well over the legal limit, and knew he would go to jail if he got caught. His clear attempt to escape from a lawful police order to stop stripped him of any privacy expectations that "society is

prepared to recognize as reasonable." *Olson*, 495 U.S. 91, 96. The law is replete with doctrines that deny wrongdoers from using positive law as a tool to shield their misconduct, from "unclean hands" to disgorgement, and the loss of the right to claim self-defense to the initial aggressor. See CALCRIM 3471 & 3472 (California criminal jury instructions limiting self-defense for mutual combat and initial aggressors), available generally. The concept was well understood at common law in England. As Lord Mansfield explained in *Holman v. Johnson* shortly before the Founding, in a contract case:

> The principle of public policy is this; *ex dolo malo non oritur actio* ["no action arises from deceit"]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* ["from an immoral cause"], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

Holman v. Johnson, 1 Cowp. 341 (1775).

Further, when Lange drove into his garage, which was then wide open as the officer followed, he exposed the interior to the world. He cannot expect Fourth Amendment protection in so doing. *Katz*, *supra*, 389 U.S. 347, 351. Officer Weikert defeated Lange's "act of

retreating into [his] house [to] thwart an otherwise proper arrest" by the simple act of waiving his foot under the closing door, using the same technology Lange employed in his attempt to thwart the lawful warrantless arrest for a misdemeanor committed in his presence, in a public place.

C. A True Hot Pursuit Case Involves Actual Pursuit.

The immediacy of the chase—actual pursuit—and the flight of the offender from a lawful arrest are the key components to *Santana's* rule. Other cases cited by the parties lack those concerns. *Payton v. New York*, 445 U.S. 573 (1980) involved statutes that permitted warrantless entry into a home to make an arrest based on probable cause that the subject had committed a felony. But the entry and arrest could be made at any time. The statutes at issue did not require any need for immediate apprehension of the suspect in order to make the warrantless entry into a home. In *Steagald v. United States*, 451 U.S. 204 (1981) the Drug Enforcement Agents had an arrest warrant, but it was not for Steagald, the resident of the home, yet they made warrantless entry anyway. At issue was Steagald's expectation of privacy, not that of the subject of the arrest warrant. In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), the DUI driver had left the scene of a crash prior to any officer attempting to arrest him. He was home in bed when the officers went to arrest him without a warrant. There was no pursuit and no flight from arrest at issue. All of these cases lack the three fundamental

issues found here, that were equally present in *Santana*: a lawful arrest initiated in a public place; the intended arrestee fleeing into the home in order to thwart the arrest; and the officer in actual pursuit and taking immediate action to prevent that escape.

D. All Hot Pursuits Trigger Significant Law Enforcement Concerns.

Petitioner's argument that "low level offenses" should not suffice to trigger an exception to the warrant requirement ignores key issues. What he ignores is that while the initial offense may be minor, in every case in which an officer has probable cause to arrest, but the arrestee instead flees, it is the suspect who has elevated the crime to a more serious offense. It is very much a compelling governmental interest to maintain adherence to lawful police orders. Those who flee a lawful arrest often set in motion much greater danger to the public and risk to the pursuing police.[9] Of course, as Petitioner acknowledges, the failure to obey lawful commands exposes the offender to greater consequences—but only if identified and caught. Pet. Br. at 37.

Further, any experienced officer knows that in most cases, the flight is for a secondary reason, as here. The driver who flees a minor traffic stop generally does so because he or she has an outstanding warrant (often

[9] In 2019, 37 "evading" cases were submitted, and 34 filed by the Sonoma County District Attorney's Office. Cal. Veh. Code §§ 2800.1, 2800.2, 2800.3.

felony), weapons or contraband in the vehicle, evidence of other crimes (stolen property—including the vehicle itself—or even a domestic violence victim as a passenger), or, just as this case illustrates, the driver is intoxicated and knows he will get arrested and go to jail. Therefore, in almost all cases flight stems from additional criminal activity the offender wishes to conceal, and as *Santana* comments, any delay in apprehension "would result in destruction of evidence." *Santana* at 43.

Although the *Santana* analysis started with the lawfulness of the arrest initiated in a public place under the rule from *Watson*, which involved a felony arrest in a public place, this Court would clarify that the rule extended to misdemeanors in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), discussed further below. *Atwater* made clear that the level of the offense did not matter, whether there was a "breach of the peace" or more innocuous conduct. Instead, the lawfulness turned on probable cause. While the parties attempt to interpose the home's protected-place status into *Santana*'s analysis for misdemeanors, they miss the point that the flight from lawful arrest and opening of the home eliminate those concerns.

The parties' arguments are much the same as those rejected in *Atwater*. Such a rule would be very difficult to apply and would lead to endless litigation and second guessing. Instead, like *Atwater*, a clear rule that probable cause to arrest in a public place is sufficient to justify entry into a home to apprehend a fleeing offender is easily enforceable. It serves the critical

governmental interest of maintaining order and respect for the law.

Rejecting historical-based arguments that the offense must involve a "breach of the peace,' the *Atwater* court listed a wide variety of "minor offenses" for which the commentators approved warrantless arrest, when committed in the presence of the constable—as was the case here. Such offenses ranged from "negligent carriage drivers" to "persons playing 'unlawful games' like bowling, tennis, dice, and cards." See *Atwater*, 334-35. "Not long after the framing of the Fourth Amendment, East characterized peace officers' common-law arrest power in much the same way: 'A constable or other known conservator of the peace may lawfully interpose upon his own view to prevent a breach of the peace, or to quiet an affray. . . .' " *Atwater* at 330, citing 1 E. East, Pleas of the Crown § 71, p. 303 (1803).

If the power to make a warrantless arrest in public does not depend on the level of offense, logic dictates that flight from that arrest should be treated equally as well.

II. CALIFORNIA LAW DEMONSTRATES THAT A RULE DEPENDENT OF STATUTORY LABELS OF "FELONY" OR "MISDEMEANOR" WILL BE DIFFICULT FOR OFFICERS TO APPLY.

A rule which would categorically limit the hot pursuit exigency exception to the warrant requirement to offenses defined by local laws as felonies, but exclude

misdemeanors, is fraught with complications. On a national level, it would deem an officer's pursuit into a home "reasonable" under the Fourth Amendment in one state yet "unreasonable" in another state for similar conduct, merely because the former state imposes harsher punishment for that conduct. It would encourage misdemeanants to flee into their homes, or even curtilage[10]—or someone else's—and essentially thumb their noses at the officers who attempted a lawful arrest in a public place. And, as so frequently discussed in this Court's prior decisions, officers in the field reacting to rapidly unfolding situations will have difficulty determining the level of the offense while actively trying to enforce the law.

A. The California Statutory Scheme Demonstrates The Difficulty Imposed On Officers In Hot Pursuit Situations.

Applying a hard-and-fast rule limiting the hot pursuit doctrine to crimes statutorily defined as "felonies" poses significant problems because the same conduct may constitute a felony in some cases, or a misdemeanor in others. Officers dealing with rapidly evolving situations in the field often cannot be certain what level of crime it will be—even very serious conduct. For example, California law defines many crimes in such a way that the same conduct may be charged as a misdemeanor or felony for a number of reasons.

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[10] Entry into the curtilage is generally treated the same as the home, further complicating application of the rule. See *Collins v. Virginia*, *supra*, 138 S.Ct. 1663, 1670.

These include the discretionary charging decisions of the prosecutor, subsequent reduction at the discretion of a judge, jury determinations, and negotiated dispositions. These charges, known as "wobblers" in California, are defined in the statutory language as punishable either by a prison term (felony), or a jail term (misdemeanor). Cal. Pen. Code 17. The charge may also wobble or even be charged under an altogether different statute based on additional factors such as the amount of loss, prior convictions, age of victims, level of injury, and other factors.

Atwater rejected the same arguments raised by the parties here, that the punishment for the offense should draw the line between lawful and unlawful warrantless arrests in a public place. In rejecting a rule with a line drawn between "jailable" and "fine-only" offenses, the Court explained:

> The trouble with this distinction, of course, is that an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, see *Berkemer v. McCarty*, 468 U.S. 420, 431, n. 13, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) ("Officers in the field frequently 'have neither the time nor the competence to determine' the severity of the offense for which they are considering arresting a person"), but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the

> weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on.

Atwater, 532 U.S. 318, 348-49.

A rule requiring an officer in the field to accurately determine the level of offense in real time renders the rule impractical to apply. As *Atwater* teaches, "we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id.* at 346.

California, where approximately one eighth of the population of the United States resides, illustrates the difficulty in applying the rule due to its statutory scheme. The statutory "wobblers" in California come in a great variety of offenses, conduct, and consequences. For example, assault with a deadly weapon (Penal Code § 245(a)(1)) is a "wobbler." If a defendant is convicted of the offense as a felony, it becomes a "strike" under the California Three Strikes Law paradigm. If subsequently convicted of a new felony offense, and the Penal Code § 245(a)(1) prior conviction is proved, the defendant is ineligible for a grant of probation, unless the strike is dismissed. Certainly, this demonstrates the government's view of the seriousness of the conduct and need to curtail it.

However, the same offense (and conduct) may be made a misdemeanor at various stages of the underlying case. A prosecutor may review the case for charging, and consider a variety of factors in whether to charge the offense as a misdemeanor or a felony. These factors an officer in the field would likely not know at the time of the hot pursuit, such as the criminal history of the defendant, the level of assaultive conduct, the type of deadly weapon used, the behavior and history of the victim (and potential self-defense/mutual combat claims), the victims cooperation, and any other mitigating considerations.

Further, even if charged as a felony, at the preliminary hearing on the complaint, the defense may move, or the court may decide on its own, to reduce the charge to a misdemeanor pursuant to Penal Code § 17(b)(5)—and then it becomes "a misdemeanor for all purposes." Even if charged as a felony on the information or indictment (if initiated by way of grand jury), it may later be reduced to a misdemeanor. A plea agreement may include reduction to a misdemeanor at the time of sentencing, or after successful completion of all or a designated portion of a probationary period. Finally, under California law, generally the defendant may move for an expungement and reduction of a felony wobbler to a misdemeanor after completing the sentence. Cal. Pen. Code § 1203.4. The underlying conduct itself may have been on the more egregious side, but the "carrot" of later reduction serves as the "stick" over defendants to motivate rehabilitation and compliance with terms of probation.

Similarly, certain factual determinations may specify whether specific conduct rises to the felony level—information that rarely could be determined during a hot pursuit. Vandalism is a misdemeanor under California law if the value of the damage was less than $400, but may be charged as a felony wobbler if $400 or more. Penal Code § 591. The cost of damage can be difficult to assess in the field—even without the exigency of a chase—and may often be more or less than appeared originally. Retail theft is defined as a misdemeanor "shoplifting" if the theft occurs during the regular business hours and the value of the stolen property is less than $950, but as a felony "commercial burglary" if $950 or more. Cal. Pen. Code §§ 459.5, 459. A police officer chasing a fleeing thief from a business will rarely be able to determine the value of stolen property during the chase. Indecent exposure is a misdemeanor for a first offense, but a felony wobbler thereafter. Penal Code § 314.1. Even vehicular manslaughter may be a misdemeanor under certain situations, but a very serious felony in others. Cal. Pen. Code §§ 191.5, 192, 192.5, 193.

As here, where a subject flees in a vehicle, that very flight may rise to the level of a felony through factual determinations that may be very difficult to discern in an active chase, particularly where more than one officer is involved. The simple act of failing to comply with a lawful "order, signal, or direction of a peace office," as did Petitioner, is a misdemeanor, punishable by fine and up to six months in jail. Cal. Veh. Code § 2800. Flight from an officer with intent to evade,

willfully flee, or attempt to elude a pursuing officer is a misdemeanor punishable by up to one year, if, and *only if*, 1) the officer's vehicle displayed a red light the person sees or reasonably should have seen; 2) the officer's vehicle sounded a siren "as may be reasonably necessary"; 3) the officer's vehicle was distinctively marked; and 4) the vehicle is operated by an officer wearing a distinctive uniform. Cal. Pen. Code § 2800.1.

However, if under the same facts the fleeing offender does certain qualifying acts, that evasion becomes a felony. If the person violates Section 2800.1 with willful or wanton disregard for the safety of persons or property, the offense becomes a felony wobbler. Cal. Veh. Code § 2800.2. "Willful or wanton disregard" while fleeing may be found by either three or more violations that are assigned a traffic violation point, or damage to property occurs. *Id.* A "traffic violation point" is assigned to some offenses, such as speeding, failure to yield at a stop sign, and driving on a suspended or revoked license. Cal. Veh. Code §§ 22350, 22450(a), 14601. In real time, it may be very difficult for officers involved in a chase to know what conduct would qualify for a point, and how many the fleeing driver had accumulated.

Further, if all the factors required for a violation of Section 2800.1 are met and the fleeing offender "drives that vehicle on a highway in a direction opposite to that in which the traffic lawfully moves upon that highway," the offense is also a wobbler, punishable by a minimum six months in jail, or state prison for up to three years. Cal. Veh. Code § 2800.4.

As can be seen, a few factual differences in Petitioner's flight would have made important differences in punishment. Had Officer Weikert merely sounded his siren when he turned on his lights, the maximum punishment would have gone from six months to a full year of jail. Had the officer activated lights and siren while still on highway 12, and Petitioner failed to yield, the distinctions between felony and misdemeanor conduct instantly would have been much more difficult to discern in real time. A single act of crossing over the double yellow line would have rendered the offense a felony for driving in the opposite direction of opposing traffic under Section 2800.4. If Petitioner exceeded the speed limit, failed to fully stop at a stop sign, and also was driving on a suspended license, he would have accumulated the three points necessary to render the conduct felonious. Even if the rest of the facts were the same—slowing to open the garage door, pulling in, and attempting to close it automatically, a few factual differences would determine whether Officer Weikert's act of moving his foot under the garage door to trigger it to open, and then taking a few steps into the garage to contact Petitioner, would render the warrantless entry and arrest lawful under the parties' proposed rule.

Some conduct may constitute a felony, rather than a misdemeanor, based on particular charging allegations that, once again, an officer in the field dealing with pursuit in real time would rarely have the opportunity to know. The present case is a perfect example. Petitioner had two prior convictions for driving under the influence of alcohol (DUI). In California, a simple

first DUI offense is a misdemeanor. Cal. Veh. Code § 23152. However, if the driver has qualifying prior offenses, the same conduct would be felonious. If the driver has three separate convictions for DUI within a ten-year period, the People may charge him with a felony. Cal. Veh. Code § 23550. Some prior conduct may result in life-time exposure to felony charging, such as if the person had a prior vehicular manslaughter conviction. Cal. Veh. Code § 23550.5. Here, the petitioner had one "in time" prior (within ten years), and one "out of time" prior (more than ten years earlier). Had he three prior in-time convictions, the same conduct would have been felonious. If an officer does not have that information, the fleeing felon might get away.

B. Application Of A Felony-Only Hot Pursuit Rule Would Create Legal Uncertainty And Increased Litigation.

All of these issues with California statutes that permit the same conduct to be labeled as felonious or misdemeanant raise substantial concerns with application of the rule the parties urge. If a categorical rule places the line at what label attaches to the certain conduct, at what point in the timeline would the label attach? The officer's real-time probable cause determination that the defendant had committed a felony—and not a misdemeanor—would be subject to endless second guessing. Would it be a valid felony hot pursuit because the conduct *is* charged as a felony, or *could* be charged as a felony, or was *at some point* a felony charge? Or, would the opposite rule apply—if it *could*

be a misdemeanor, or *later* was reduced to a misdemeanor, would the search or arrest become invalid? Officers in the field would be left to make quick decisions in rapidly unfolding situations, and subject to endless second guessing. For instance, under California law, the defense may bring a motion to suppress concurrently with the preliminary hearing, where a magistrate holds a hearing to determine whether the People have sufficient evidence to hold the defendant to answer for any or all charges. If so, the matter proceeds to be trial. If the judge finds sufficient evidence to sustain the charge but decides to reduce a wobbler offense to a misdemeanor, either by motion of the defense or the court's own act of discretion, the offense is rendered a misdemeanor. The concurrent motion to suppress evidence on an otherwise justifiable hot pursuit entry into the home could then hinge on the magistrate's ruling on the level of the charge.

If the label applied to the same conduct determines the outcome, this would place pressure on the State to charge, and maintain, offenses as felonies.

To further complicate matters, under California law, any statutory reduction in punishment or level of offense applies retroactively to all non-final judgments. Known as the *Estrada* rule, its application can change a felony to a misdemeanor for all purposes based on changes in the law that may came well after the initial case is filed, sometimes many years later. See *In re Estrada*, 63 Cal.2d 740 (1965). California has seen wholesale changes to its criminal statutory scheme in the last decade, with whole classes of offenses reduced

from felonies to misdemeanors, including many drug offenses, and theft related offenses—crimes where flight from a lawful arrest tend to occur more often. The parties' proposed rule would trigger endless litigation when the *Estrada* rule later reduces an offense, and interfere with the great societal interest in finality of judgments.

III. TIME LOST OBTAINING A WARRANT IN A PURSUIT CASE INCREASES RISK TO OFFICERS AND LIKELIHOOD OF LOSS OF EVIDENCE OR FURTHER ESCAPE OF THE OFFENDER.

A. Situations In Which Warrants Can Be Obtained "In Minutes" Are Very Limited.

The parties suggests obtaining a warrant these days is a simple matter that may quickly be done telephonically or electronically—"in minutes." While it may be theoretically possible under ideal circumstances to obtain a warrant within five minutes, that is exactly what the result would be—a five-minute warrant. It is true that in limited situations, a search warrant may be obtained quickly, but such situations are few, such as a blood draw warrant where a DUI offender is already known, in custody, and an investigation that establishes probable cause is already done. Under those circumstances, meeting the constitutional warrant requirements is relatively simple and straight forward. The item to be seized, the subject's blood, is the known, and the place to be searched is the defendant's body. Local agencies have pre-made templates

in which they merely need to insert the probable cause statement, and it can be ready to go. In rejecting a categorical rule for warrantless blood draws in DUI cases in *Missouri v. McNeely*, 569 U.S. 141 (2013), the Court addressed advances in telecommunications and statutes in many states that permit telephonic or electronic warrant applications. But the circumstances of a DUI blood draw lend themselves to faster warrants, and there may not be a compelling exigency with the suspect already in custody and probable cause already fully developed. However, preparing a search warrant for an unknown suspect who has entered a home is an altogether different story.

B. Legally Sufficient Warrants Take Time As Shown by Local Warrant Procedure; In Pursuit Cases That Time Risks Loss of Evidence, Further Escape of the Offender, And Danger to The Officers.

Given recent events in the United States, condoning hastily prepared and reviewed warrants to enter a home at night seems to be an ill-advised course to set as an alternative to allowing a law enforcement officer, with probable cause to arrest a suspect for an offense that occurred in a public place, to take quick action to prevent the suspect from escaping into a home. Once inside, the suspect is likely to destroy incriminating evidence, try to escape or hide, or, as is so common in DUI cases, manufacture a defense commonly referred to as "drinking after driving." A home with multiple persons inside will create identification issues, as this case

illustrates, because the officer had not identified the driver in any way, and hadn't even had time to run the driver's license plate. Officer Weikert didn't even know whose home it was, so a mere arrest warrant wouldn't do.

The risk of loss of evidence, and rewarding criminals for refusing lawful orders from police, is especially costly when balanced with the relatively minimal intrusion a "doorway apprehension" of a fleeing suspect such as here, where the mere waiving of a foot under an automatic garage door closer quickly and safely resolves the issue. The Fourth Amendment demands that the place to be searched and items to be seized be described with particularity. How would an officer, alone in a patrol vehicle, at night, outside a home where for which he has no information other than location, prepare such a warrant?

In reality, preparation and review of a search warrant that will pass Fourth Amendment muster requires more. Much more. In Sonoma County, in order to protect both the individual rights of persons as well as the integrity of criminal investigations, generally all search warrants must go through a multi-step process for preparation, review, submission, and approval by a judge. Although the local procedure *itself* may not be required by the Fourth Amendment, the procedure demonstrates what it takes to make sure the *warrant* meets the requirements of the Fourth Amendment—that the place to be searched and item to be seized are

described with the necessary particularity.[11] In order to describe a residence with sufficient particularity, researching the property is important to determine if there is more than meets the eye from the street, such as secondary buildings and size of the lot. Like an iceberg, a view from the street may only reveal a small portion of the property. Generally, these tasks must be completed back at the office, on a computer with access to the internet and law enforcement databases.

In order to assure the warrant is legally sufficient, in most cases it must be approved by a supervisor and a deputy district attorney (DDA) before submission to the magistrate. At night, such as in the present case, this requires contacting (and often waking) the on-call DDA, and then the magistrate, which adds time to the process. Only then may the warrant be executed.

Under the facts here, in a real-world context of an officer in the field, even in the extremely unlikely event that a night-service warrant could be obtained,[12] the following steps would be required. First, assuming Weikert stopped as the garage door closed, he would have been in front of a home, in the dark, alone, in a semi-rural area. He would need to obtain descriptive information about the home—the appearance, address,

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[11] It is also highly relevant to a case-by-case analysis, as discussed post.

[12] As Respondent concedes, it would have been unlikely to get an arrest warrant before morning. See Resp. Br. 34 n.26 (citing Cal. Pen. Code § 840(4)). Further, the ability to get search warrants for misdemeanor offenses is limited by statute. Cal. Pen. Code 1542.

type of home, etc. He would either need to drive back to his office—a half hour drive each way if no traffic—or contact dispatch and get assistance from another officer at the station—*if* one is available. The officer would need to investigate the property itself via public and police records—is it a single-family residence? Is it a vacation rental? For officer safety he would want to know if any parolees or probationers, or guns, were known to be in the home, which may require more backup, and more time.

Under these facts, Officer Weikert would have had to sit outside the home alone, at night, monitoring the home while another officer prepared the warrant at the office, or he would have had to leave the scene for several hours to go prepare the warrant himself. The wait would give the opportunity for the unknown subject to destroy evidence or flee out the back door. Assuming the CHP vehicle had a computer terminal in the car, and also had sufficient cell or radio communications, he would be distracted with his work, and unable to watch the home, and very vulnerable to an attack.

If, assuming the officer only sought an arrest warrant, rather than a full search warrant, the time would have been shorter because the District Attorney does not review those. Nevertheless, it would still take time and incur the same risks above. Petitioner minimizes that the driver had not been identified. However, there is no evidence the officer had any idea of the age, general description, or even the gender of the suspect. Had he later entered a home with multiple people inside,

how could he identify the proper suspect? Of course, if the office did not know whose home it was, or knew it was not the suspect's home, an arrest warrant alone would not do, as required by *Steagald v. United States*, *supra*, 451 U.S. 204.

Further, attempting warrant service for an unknown suspect in an unknown home at night is flat dangerous. No officer in today's age should be expected to place his life at risk by attempting warrant service alone, with no backup for miles. An officer in Weikert's position, alone at night, would be exposing himself to extreme danger, whether an attack was launched against him by those in the home, or by trying to take control and arrest a suspect who has already fled once. This is no "minor inconvenience."

Finally, Respondent makes the surprising argument that once a DUI driver such as Lange has arrived home, the threat of public danger is over. This ignores mountains of data regarding the number of times DUI drivers commit the crime without getting caught. Lange himself was on his third DUI. Had he escaped this time, history tells us he would have been out on the roads again, endangering lives. The need to arrest and hold accountable repeat DUI drivers is undoubtedly a very compelling governmental interest.

IV. EVEN IF THE COURT REJECTS A CATEGORICAL RULE, UNDER THE FACTS AND CIRCUMSTANCES HERE, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respondent asserts that vacatur is appropriate here. We disagree. First, the facts and circumstances that this officer faced required prompt action to prevent Lange's escape. The minimal intrusion of breaking a beam of light to trigger the garage door to go back up, then taking a few steps into the garage to contact him were reasonable under the totality of the circumstance. Additionally, under longstanding California precedent, *People v. Lloyd*, 216 Cal.App.3d. 1425 (1989), and absent any clear rule from this Court categorically barring hot pursuit entry into a home for misdemeanors, the officer's actions were clearly in good faith.

The cost of exclusion of evidence must always be weighed against the benefit of any deterrent effect such exclusion would have. Under these facts, exclusion of evidence is unwarranted. "Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Herring v. United States*, 555 U.S. 135, 137 (2009). Not every Fourth Amendment violation results in exclusion of the evidence obtained as a result of an improper search or seizure. See *id*. at 140-41; *People v. Robinson*, 47 Cal.4th 1104, 1124 (2010). "[T]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands."

Arizona v. Evans, 514 U.S. 1, 10 (1995). Rather, exclusion of evidence is "a judicially created rule . . . 'designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" (*Herring*, *supra*, 555 U.S. at 139-40, quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974). "Indeed, exclusion has always been our last resort, not our first impulse, and [Supreme Court] precedents establish important principles that constrain application of the exclusionary rule." *Id.* at p. 140, internal citations and quotation marks omitted. As a judicially-created remedy, the exclusionary rule applies only where "its remedial objectives are thought most efficaciously served." *Evans*, *supra*, 514 U.S. at p. 11.

The exclusionary rule is not an individual right, but it "applies only where it 'results in appreciable deterrence.'" *Herring*, 555 U.S. at p. 141, quoting *United States v. Leon*, 468 U.S. 897, 909 (1984), emphasis added, and some internal marks omitted; see also *Penn. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 368 (1998) ["We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence"]; see *Robinson*, at 1126 [absent deliberate, reckless, or grossly negligent conduct, or systemic negligence, the exclusionary rule normally does not apply]. The Court also balances the benefits of deterrence against the costs of excluding the evidence, particularly the social costs of "letting guilty and possibly dangerous defendants go free-something that 'offends basic concepts of

the criminal justice system.'" *Herring*, 555 U.S. at 141, quoting *Leon*, 468 U.S. at 908.

Here, Officer Weikert acted in good faith, based on long-existing California precedent. His intrusion into Lange's home was kept to the minimum necessary to accomplish the arrest. Indeed, he took no more than a few steps into the garage, and then removed Lange to the driveway. Nothing about his actions was egregious, and it all flowed from Lange's wrongful act of fleeing a lawful traffic stop when he knew he was going to be arrested for another DUI and a probation violation. Lange's wrongdoing should not be rewarded with a get-out-of-jail free card merely because he managed to get his garage door to open from a distance so he could drive straight in. The cost to society of letting this repeated DUI offender get away with it due to his flight from a lawful traffic stop is too high, and would encourage others to do the same.

CONCLUSION

The judgement below should be affirmed.

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Respectfully submitted,

JILL R. RAVITCH
District Attorney,
COUNTY OF SONOMA COUNTY
SPENCER RALPH BRADY
Chief Deputy District Attorney
Counsel of Record
ROBERT A. MADDOCK
Deputy District Attorney

GREGORY D. TOTTEN
Chief Executive Officer
CALIFORNIA DISTRICT
ATTORNEYS ASSOCIATION