No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

RAHEIM TRICE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a law enforcement official entering an unlocked apartment building, without permission and without a warrant, placing a "covert camera" disguised as a smoke detector in the basement hallway just outside of Petitioner's apartment, and surreptitiously recording all the activities, constituted an unlawful search in violation of the Fourth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceedings other than those listed in the caption. Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Raheim Trice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, *United States v. Trice*, 966 F.3d 506 (6th Cir. 2020), is reproduced as Appendix A. (Pet. App. 1a–12a) The Opinion and Order of the United States District Court for the Western District of Michigan denying Petitioner's suppression motion is unreported but is reproduced as Appendix B. (Pet. App. 13a–27a)

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its Opinion on July 21, 2020. Trice now timely files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

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

INTRODUCTION

Trice submits that the District Court erred in denying his suppression motion. Specifically, Trice argues the affidavit submitted to obtain the warrant to search his residence contained tainted information and evidence that itself violated his Fourth Amendment rights.

Marcel Behnen of the Kalamazoo Public Safety Department entered Trice's apartment building without permission and without a warrant, placed a "covert camera" disguised as a

smoke detector in the basement hallway just outside Trice's apartment, and surreptitiously recorded all the activities. The Sixth Circuit held this did not constitute a search, distinguishing this case from prior precedent because it involved the common hallway of an apartment building. (Pet. App. 11a) Trice maintains Investigator Behnen's actions violated his Fourth Amendment right to be free from unreasonable searches.

If this case involved a home in suburbia, there would be no question Investigator Behnen violated Trice's rights. The District Court below noted this fact, stating that "the common, unlocked hallway in the low-rent apartment building does not carry the same level of protection as the doorstep in suburbia." (Pet. App. 24a) This Court must not apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity. Trice, a black man living in a low-income apartment building, should not have fewer rights than a rich homeowner from the suburbs. The privacy of all citizens would be severely diminished if they have to accept the risk that the Government is surreptitiously watching them from smoke detectors in hallways directly outside their apartments. If placing a camera on the doorstep area of a single-family home is illegal, so then is placing it on the equivalent of an apartment owner's front doorstep area.

STATEMENT OF THE CASE

On September 12, 2018, an Indictment filed in the United States District Court for the Western District of Michigan, Southern Division, charged Trice with three counts of Distribution of Heroin and with one count of Possession with Intent to Distribute Controlled Substances, all contrary to 21 U.S.C. § 841. (R.1, Indictment, PageID#1–4) The charges stemmed from alleged conduct taking place from July 10, 2018, to July 25, 2018.

On September 19, 2018, the Government filed a notice of prior felony drug conviction. (R.8, Information and Notice of Prior Felony Drug Conviction, PageID#13–16)

On October 12, 2018, Trice filed a suppression motion, seeking to suppress evidence stemming from a search warrant obtained on July 24, 2018, to search his apartment on Espanola Avenue in Parchment, Michigan. (R.16, Defendant's Motion to Suppress Evidence, Brief in Support, and Request for Hearing, PageID#34–52) The Government filed an Opposition on November 9, 2018 (R.19, Government's Opposition to Defendant's Motion to Suppress Evidence, PageID#55–76), to which Trice filed a Reply on November 21, 2018 (R.23, Defendant's Reply to the Government's Response to Motion to Suppress Evidence, PageID#86–91). Trice also submitted supplemental citations in support of his motion on November 29, 2018. (R.25, Defendant's Supplemental Citations, PageID#93–95)

On November 29, 2018, the District Court conducted a suppression hearing. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#245–335) Trice contended that two paragraphs used to provide a nexus to his apartment should be disregarded because they were based on constitutionally improper surveillance, including a hidden camera law enforcement used for several hours inside the common hallway of the lower level apartment Trice occupied. (R.27, Opinion and Order, PageID#97) The District Court heard testimony from two witnesses, property manager Joseph Lukeman and Marcel Behnen of the Kalamazoo Public Safety Department. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#249, 271)

On December 10, 2018, the District Court issued an Opinion and Order denying Trice's suppression motion. (R.27, Opinion and Order, PageID#97–111; Pet. App. 13a–27a) The District Court first held that Trice "lacked an objectively reasonable expectation of privacy in the unlocked common hallway." (Pet. App. 21a) The District Court then held that "[i]t was permissible for Investigator Behnen to enter the unlocked, publicly accessible apartment building" and could place a motion-activated camera there. (Pet. App. 22a) The District Court also rejected

the argument that part of the hallway area immediately in front of Trice's front door constituted curtilage that would carry a heightened expectation of privacy. (Pet. App. 24a) Moreover, the District Court found that even if a Fourth Amendment violation occurred, the good-faith exception to the exclusionary rule applied. (Pet. App. 26a)

On December 12, 2018, Trice entered into a conditional plea agreement with the Government where he would plead guilty to Count 4 of the Indictment, Possession with Intent to Distribute 50 Grams or More of Methamphetamine contrary to 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), (B)(iii), and (C), while reserving the right to seek appeal of the District Court's decision to deny the suppression motion. (R.29, Plea Agreement, PageID#113–20) The Government also agreed to dismiss the remaining three counts. (*Id.*) Trice entered his guilty plea on December 13, 2018. (R.50, 12/13/2018 Plea Hearing Transcript, PageID#336–71)

On April 22, 2019, the District Court conducted a sentencing hearing. (R.51, 04/22/2019 Sentencing Hearing Transcript, PageID#372–400) The District Court calculated the Guideline range of 262 to 327 months based on a final offense level of 34 and a category VI criminal history. (*Id.*, PageID#376) This, however, was based on the career-offender enhancement; without said enhancement, the offense level would be 27, category V criminal history yielding a range of 120 to 150 months. (*Id.*, PageID#390–91) The Government moved to dismiss the prior felony conviction notice, which the District Court granted, meaning the statutory range was 10 years minimum to life maximum. (*Id.*, PageID#376–83) The District Court then imposed a prison sentence of 192 months. (*Id.*, PageID#396–98)

On May 2, 2019, Trice timely filed his notice of appeal. (R.46, Notice of Appeal, PageID#239) On July 21, 2020, the United States Court of Appeals for the Sixth Circuit held that Trice did not have a reasonable expectation of privacy in the unlocked common hallway of

his apartment building (Pet. App. 6a–7a); that the wall opposite Trice's apartment door did not constitute curtilage (Pet. App. 7a–8a); and that Trice did not have a reasonable expectation of privacy in activity of leaving from constitutionally protected area of his apartment to constitutionally unprotected area of common unlocked hallway that was open to the public (Pet. App. 8a–11a)

STATEMENT OF FACTS

On July 24, 2018, Marcel Behnen, an investigator with the Kalamazoo Valley Enforcement Team (KVET) requested a search warrant, seeking to search apartment B5 at 114 Espanola Avenue in Parchment, Michigan. (R.16-1, Affidavit, PageID#45–52; R.27, Opinion and Order, PageID#97; Pet. App. 13a)[1] The affidavit in support of the search warrant stated that in spring of 2018, the affiant received information from an undisclosed confidential informant (CI) that he/she could purchase heroin from "Radio," who was identified as Trice. (R.16-1, Affidavit, PageID#47) The affidavit further stated that on July 10, 2018, KVET investigators observed Trice as a passenger in a car, checked the car's license plate, and determined that the car was linked to Cradonda Domonique Trice, with an address on 114 Espanola Avenue, apartment B5, in Parchment, Michigan. (Pet. App. 16a)

The affidavit further stated that KVET twice arranged for the CI to buy heroin from Mr. Trice. (R.16-1, Affidavit, PageID#47–49) Both times, Mr. Trice was seen exiting 114 Espanola Avenue.

The affidavit noted how Investigator Behnen entered 114 Espanola Avenue and found six apartments in the building. (*Id.*, PageID#48) The affidavit cryptically stated that "KVET

[1] The copy of the affidavit appears at R.16, PageID#45–52, with the street and apartment numbers redacted. Without objection from Trice, the Government provided the District Court with an unredacted copy during the evidentiary hearing (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#307), which the District Court incorporated into its Opinion and Order.

investigators conducted surveillance of 114 Espanola Apt B5 on this day and observed Mr. Trice entering and exiting Apt B5 on several occasions." (*Id.*, PageID#49) Investigator Behnen did not disclose in the affidavit that he had actually surreptitiously recorded tenants' activity inside 114 Espanola Avenue. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#300) Investigator Behnen also did not mention installing a camera in his report. (*Id.*, PageID#301–03)

The evidentiary hearing gleaned more information about the apartment building at issue. The brick building consisted of three floors, two units on each floor. (*Id.*, PageID#250–51) One of the floors was considered a garden or basement level, half below grade. (*Id.*; R.54, Defense Exhibit F and Government Exhibits 02 & 10, PageID#439, 442, 450) The doors seen on the outside of the building led to common hallways, and the individual units were then accessible inside by separate doors. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#254–55; R.54, Defense Exhibits A & G and Government Exhibits 06 & 07, PageID#438, 440, 446–47) Mr. Trice's suspected apartment, B5, was on the basement level and was only accessible from a small, narrow hallway; it did not have a back door like some of the other units. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#260–61; R.54, Defense Exhibits A & F, PageID#438–39)

Joseph Lukeman, the property manager for 114 Espanola Avenue, testified that while the entry doors to the building were unlocked, only tenants and invited guests were allowed into the building. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#250, 253, 256–57, 265–66) Mr. Lukeman specifically mentioned not wanting any trespassers on the property that were not invited. (*Id.*, PageID#266) He further indicated the apartment building itself was older, and was located in an area where lower-income or middle-income families tended to stay. (*Id.*, PageID#264–65)

Investigator Behnen testified that on July 23, 2018, after a second controlled buy with Trice, he visited 114 Espanola Avenue, entered the front door, and went downstairs. (*Id.*, PageID#277, 279) Investigator Behnen personally did not witness Trice enter and exit apartment B5, as could be inferred from the affidavit. Instead, the "surveillance" occurred by Investigator Behnen placing a "covert camera" disguised as a smoke detector in the basement hallway. (*Id.*, PageID#278) Investigator Behnen positioned the camera to capture video of the doorway to apartment 5B and anyone entering or exiting that apartment. (*Id.*) Thus, when the door to the apartment opened, the camera recorded video of the inside of the apartment. Reviewing Defense Exhibit G, Investigator Behnen stated he placed the camera between the two doors depicted in the picture. (*Id.*, PageID#291; R.54, Defense Exhibit G, PageID#440)

Later in the evening on July 23, 2018, Investigator Behnen retrieved the camera from 114 Espanola Avenue. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#281) Investigator Behnen estimated he installed the camera between 1:00 pm and 2:00 pm, and that it remained in place until at least 7:00 pm. (*Id.*, PageID#293) Because the camera only recorded video upon detecting motion, and did not broadcast a live feed, Investigator Behnen needed to review the recordings. (*Id.*, PageID#281–82) Investigator Behnen subsequently reviewed 5 recordings purportedly showing Trice entering or exiting apartment 5B, which consequently showed the inside of Trice's apartment. (*Id.*, PageID#281–86; R.54, Government Exhibits 11A–11E, PageID#451–55) In one of the videos, Trice was doing something on his phone and clearly was unaware of a camera or anyone looking over his shoulder. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#294; R.54, Government Exhibit 11B, PageID#452)

After reviewing the videos, Investigator Behnen completed an affidavit for a search warrant for the apartment. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#286–87)

A state court official approved of the affidavit on July 24, 2018. (R.16-1, Affidavit, PageID#45–52) Officials executed the search warrant on July 25, 2018, and obtained a quantity of heroin, crystal methamphetamine, powder cocaine, and crack cocaine. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#287)

REASONS FOR GRANTING THE WRIT

GOVERNMENT AGENTS SECURED A WARRANT BY UTILIZING ILLEGALLY OBTAINED EVIDENCE OF PETITIONER ENTERING AND EXITING HIS APARTMENT IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS.

I. The Fourth Amendment mandates a warrant be approved, based on probable cause, before Government agents may enter a person's home.

The Fourth Amendment to the United States Constitution provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Constitution, Amendment IV. The fundamental purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967); *see also Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 613–14 (1989) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."). The "chief evil" deterred by the Fourth Amendment is the physical invasion of the home. *Payton v. New York*, 445 U.S. 573, 585 (1980). "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

To establish probable cause, the affidavit "must describe the relationship between the alleged criminal conduct, the property to be seized and the place to be searched." *United States v. Van Shutters*, 163 F.3d 331, 336–37 (6th Cir. 1998). The affidavit must indicate that the evidence

of illegal activity will be found in a "particular place." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004). The "critical element in a reasonable search is not that the owner of the property is suspected of crime, but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *United States v. Pinson*, 321 F.3d 558, 564 (6th Cir. 2003) (quoting *Zurcher v. Standford Daily*, 436 U.S. 547, 556 (1978)). In other words, the affidavit must establish a nexus between the place to be searched and the evidence sought. *Carpenter*, 360 F.3d at 594.

The duty of the magistrate judge "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983). The task of the reviewing court "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id.* "The belief that the items sought will be found at the location to be searched must be supported by less than prima facie proof but more than mere suspicion." *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008) (citations and internal quotations omitted).

Absent an exception, if there is no probable cause and a warrant, the evidence seized is a result of an unreasonable search and must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961). Additionally, evidence obtained as a result of a particular Fourth Amendment violation will be excluded. *Wong Sun v. United States*, 371 U.S. 471 (1963). These rules discourage lawless police conduct, unless the police act by clear authority of law. *Terry v. Ohio*, 392 U.S. 1, 9, 12 (1968).

Here, there was no substantial basis upon which the state court official could have concluded that evidence of drug trafficking would be found in Trice's apartment. Investigator

Behen illegally obtained evidence of Trice entering and exiting his apartment, and this information cannot be used in a probable cause analysis. Without the illegally obtained evidence, the warrant affidavit failed to connect the apartment with alleged criminal activity.

II. Government agents illegally obtained evidence of Petitioner entering and exiting his apartment in violation of Appellant's Fourth Amendment rights.

In order to determine which one of six apartments Trice resided in and thus should be searched, Investigator Behnen entered 114 Espanola Avenue without permission and without a warrant, placed a "covert camera" disguised as a smoke detector in the basement hallway just outside Trice's apartment, and surreptitiously recorded all the activities. This violated Trice's Fourth Amendment right to be free from unreasonable searches.

The "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." *Rakas v. Illinois***,** 439 U.S. 128, 143 (1978). A person has an expectation of privacy if he has a subjective expectation of privacy, and if society is prepared to recognize that expectation as objectively reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In analyzing whether a subjective expectation of privacy is objectively reasonable, this court considers a number of factors: (1) whether the defendant was legitimately on the premises; (2) his proprietary or possessory interest in the place to be searched or the item to be seized; (3) whether he had the right to exclude others from the place in question; and (4) whether he had taken normal precautions to maintain his privacy. *See United States v. King*, 227 F.3d 732, 744 (6th Cir. 2000).

Here, Trice unquestionably, as a tenant, had a possessory interest in his apartment, the common hallway, and the stairway of the building. He also possessed the right generally to exclude anyone who was not a tenant. Again, the property manager clearly stated that only

tenants and invited guests were allowed into the building; trespassers such as Investigator Behnen were not invited. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#250, 253, 256-57, 265-66) "Trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy." *United States v. Carriger*, 541 F.2d 545, 549 (6th Cir. 1976). Further, "a tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers." *Id.* at 551. The issue remains, therefore, the expectation of privacy in the common hallway and stairway.

In *Carriger*, a police officer followed a drug dealer who entered an apartment building where the officer suspected the dealer was going to get drugs from his supplier. The door of the building was locked and the officer slipped inside when a worker was leaving. He proceeded to the third floor where he observed suspected drug activity. The trial court denied a motion to suppress, but this Court reversed, holding that a tenant has a reasonable expectation of privacy in a locked common area of an apartment building, and police officer's entry without warrant violated the tenant's Fourth Amendment rights. *Carriger*, 541 F.2d at 551.

The Sixth Circuit reaffirmed *Carriger* in *United States v. Heath*, 259 F.3d 522 (6th Cir. 2001), holding that "any entry into a locked apartment building without permission, exigency or a warrant is prohibited [by the Fourth Amendment]." *Heath*, 259 F.3d at 534. The Sixth Circuit later expanded *Carriger* to hold that a tenant has an expectation of privacy in a basement area of a two-family dwelling. *King*, 227 F.3d at 732.

However, in *United States v. Dillard*, 438 F.3d 675 (6th Cir. 2006), the Sixth Circuit distinguished *Carriger*, holding that a tenant does not have an objectively reasonable expectation of privacy in the unlocked and open common area of a duplex, where both doors were not only

unlocked, but were ajar, so there was no Fourth Amendment violation when officers entered the duplex and walked to the second floor. *Dillard*, 438 F.3d at 682.

In this case, the Sixth Circuit determined "[t]he common hallway in *Dilliard* is indistinguishable from the hallway at issue here." (Pet. App. 7a) However, an apartment building does not need to resemble Fort Knox to allow its tenants to feel secure. The door to the apartment complex is there for a reason. The property manager testified trespassers or people loitering, standing there 6 to 7 hours would result in the police being called. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#266) The tenants can and should expect that unless you are a tenant or a guest of the tenant, you are not free to roam the halls of the building they call home or insert cameras wherever you want in the building. In this case, Trice possessed definite expectations about who was welcome in various parts of the building he called home, and he certainly did not expect someone would trespass into the building and install a "covert camera." Moreover, even though 114 Espanola Avenue was not locked, for several reasons and based on specific facts of this case, Mr. Trice's Fourth Amendment rights were violated when the police placed a "covert camera" right outside his door and recorded every movement in the hallway.

First, a hallway where the officers concealed the camera was not just a common area far from Mr. Trice's apartment door. The area the officers invaded was adjacent to Mr. Trice's apartment, just outside his door. (R.54, Defense Exhibits A & G, PageID#438, 440) Being so close to his home, it should enjoy a greater protection from Government intrusion than a truly public place, such as a bank or a street.

Home and the area surrounding it have always enjoyed special protections. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). This Court has demonstrated a strong commitment to protect the privacy of not only

a person's home, but also the area around it. For example, this Court has held that curtilage, the area surrounding and associated with the home, enjoys the same constitutional protections as the home itself. *Oliver v. United States*, 466 U.S. 170, 180 (1984). The Court has also held that police may not bring a dog to sniff around the porch of a suspect's house. *Jardines*, 569 U.S. at 8–9 ("To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."). Further, this Court has held that the automobile exception that allows officers to search a vehicle based on reasonable suspicion, does not apply to an automobile parked in the driveway of a home, and officers would need a warrant to search it. *Collins v. Virginia*, __ U.S. __, 138 S. Ct. 1663, 1670–75 (2018). And this Court has also held that the use of a thermal imaging device to gather information about the heat emanating from a home was found to violate the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 35 (2001).

The Sixth Circuit determined that "that the wall opposite [Trice's] apartment door" did not constitute curtilage in part because "[t]he area was not in an enclosure around the home, but instead in a common unlocked hallway." (Pet. App. 7a–8a) However, the apartment at issue could only be accessed from the hallway; it did not have a back door like some of the other units in the building because it was located on the basement level. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#260–61; R.54, Defense Exhibits A & F, PageID#438–39) If the apartment door faced outside, there would be no debate that the area amounted to curtilage. Why should it matter that the front door faced a hallway? The fact that the door from the hallway

constituted the only entrance to the apartment actually supports Trice's position that this area constituted a space more private than the main lobby of an apartment building, a street, a bank, or other similar public place, and it should enjoy greater protection from the Government's intrusion.

In similarly rejecting Trice's argument that the part of the hallway area immediately in front of his front door amounted to curtilage, and thus a heightened expectation of privacy, the District Court wrote:

> And in some ways, the front door of a dwelling serves as an important threshold to the private home regardless of whether that is a single-family home in the suburbs, or a low-rent apartment in the city. But under current law, as just reviewed, the common, unlocked hallway in the low-rent apartment building does not carry the same level of protection as the doorstep in suburbia.

(Pet. App. 24a) In other words, because Trice is poor and could not afford a house, he does not have the same rights as a rich homeowner from the suburbs. To state this proposition is to recognize its absurdity. Even if Trice's apartment had more security measures, it likely meant it would cost more to rent. One should not deserve less constitutional protection because they cannot afford a more expensive apartment, but that is exactly the effect of the Sixth Circuit's and the District Court's decisions. This should prompt this Court to consider whether the current case law reflects adequately the new realities of property ownership and privacy in urban settings.

Indeed, some courts have been reluctant to adopt ironclad rules regarding common spaces. In *Reardon v. Wroan*, 811 F.2d 1025, 1027 n.2 (7th Cir. 1987), the Seventh Circuit noted that the hallways of a fraternity house were protected, reasoning that a fraternity is "an exclusive living arrangement with the goal of maximizing the privacy of its affairs" and that fraternity members are, practically speaking, "roommates in the same house" rather than "co-tenants sharing certain common areas." *See also State v. Titus*, 707 So.2d 706, 708 (Fla.1998) ("The mere fact that

certain rooms traditionally associated with a home are shared by rooming house residents does not render the structure any less a home to those residents."); *People v. Garriga*, 189 A.D.2d 236, 596 N.Y.S.2d 25, 28 (N.Y.App.Div.1993) ("[E]xisting precedent, although sparse, supports the conclusion that the internal hallway area of this rooming house was part of the defendant's home for Fourth Amendment purposes."). In *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016), the Seventh Circuit acknowledged explicitly that there is a "middle ground between traditional apartment buildings and single-family houses," and recognized that "a strict apartment versus single-family home distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity."

Such is the case here as the District Court explicitly noted. (Pet. App. 24a) However, this Court's precedent does not require ignoring the social and economic realities of property ownership. In *United States v. Dunn*, 480 U.S. 294 (1987), Court identified four factors that we should consider when determining the scope of curtilage: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, 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." *Id.* at 301. However, this Court emphasized that this factor-based analysis is not a "finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." *Id.* This caution suggests the inquiry should be a fact-intensive consideration of "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.*

This Court must avoid apportioning "Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." *Whitaker*, 820 F.3d at 854. While a hallway of a low-

income apartment building is not exactly the same as the curtilage of a home in suburbia, in this case, it is still an area immediately adjacent to Trice's home.

The Sixth Circuit previously applied a "commonsense approach" to find an area five-to-seven feet from a home (i.e., within arm's length) within the home's curtilage. *Morgan v. Fairfield Co.*, 903 F.3d 553, 561 (6th Cir. 2018). This Court considers this area a "classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Jardines*, 569 U.S. at 6 (citation omitted). The right to be free of unwarranted search and seizure "would be of little practical value if the State's agents could stand in a . . . side garden and trawl for evidence with impunity." *Id.* Why should the same, "commonsense approach," not apply to a low-income apartment? The right to privacy of the home "at the very core of the Fourth Amendment" vanished here when Investigator Behnen, unable to enter Trice's apartment, entered 114 Espanola, placed a "covert camera" mere feet from Trice's apartment, and observed Trice's most intimate and private moments via video. *See Morgan*, 903 F.3d at 561.

Moreover, it appears that from a vantage point of the "covert camera," the Government was not just monitoring activity in the hallway, but could peek inside Trice's home when the door opened. This is different from the situation in *Dillard* because the officers were invading substantially more private space, both inside the apartment and right outside of it. Trice had definite expectations about who is welcome in various parts of the building he called home. He certainly did not expect that someone would trespass into the building and install a "covert camera" to surreptitiously monitor him and his apartment for six to seven hours.

Second, the Government agents here did not simply walk in as in *Dillard*, but they placed a "covert camera" disguised as a smoke detector in the hallway. The type and degree of the Government's intrusion should also matter for the purpose of the Fourth Amendment. "Privacy is

not a discrete commodity, possessed absolutely or not at all." *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting). This Court typically considers the type and degree of the Government intrusion in the Fourth Amendment context. For example, this Court held that, while a passenger has no expectation of privacy in luggage he placed in an overhead bin on a public bus, an officer's manipulation of the luggage to feel what is inside violated the passenger's Fourth Amendment. *Bond v. United States*, 529 U.S. 334, 335 (2000).

Similarly, while a person has no reasonable expectation of privacy in his movements on public streets, placing a GPS on a person's car to monitor his movement on public streets was held unconstitutional. *United States v. Jones*, 565 U.S. 400, 404 (2012). This Court has also held that a person has a legitimate expectation of privacy in his cell phone data that shows his movements in public, so that the Government's acquisition of cell-site records from a cellphone company is a Fourth Amendment search. *Carpenter v. United States*, __ U.S. __, 138 S. Ct. 2206, 2216–19 (2018).

These cases illustrate that the degree of the Government intrusion matters for the Fourth Amendment. Therefore, even if a tenant's expectation of privacy is limited, it is not nonexistent, leaving the tenants exposed to any type of governmental intrusion. While a tenant expects that he might run into other tenants or guests in the common area of the apartment building, he certainly does not expect that there is a "covert camera" right outside his door, and that the Government is watching his every move, even peeking into his apartment when the door is open to view his most private moments. *See Carringer*, 541 F.2d at 551.

As noted by the Court of Appeals of Oregon,

> A person in a [common area of a] public restroom anticipates that another person might enter and see what is going on. What a person does not anticipate is that his activity will be seen by concealed officers or recorded by concealed cameras. That police surveillance, which allows no ready means for the person to

> determine that he is being watched, significantly impairs the people's freedom from scrutiny.

State v. Owczarzak, 766 P.2d 399, 401 (Or. Ct. App. 1988). Similarly, a tenant might accept an infringement on his privacy from a person whose presence he is aware of, but he does not assume the risk that he is subjected to an unknown invasion by surreptitious surveillance. Indeed, in one of the recorded videos, Trice was doing something on his phone and clearly was unaware of a camera or anyone looking over his shoulder. (R.49, 11/29/2018 Suppression Hearing Transcript, PageID#294) He harbored a legitimate expectation of privacy in that hallway unless he could see or hear another person approaching.

This Court has also stressed that whether a person assumes the risk of government intrusion is an important factor. In holding that a cellphone user has a privacy interest in his cell-phone data, this Court emphasized that although the phone-user is aware that a phone company collects data from his phone, he does not "voluntarily 'assume[ ] the risk'" that the data will be shared with the government. *Carpenter*, 138 S. Ct. at 2220. This Court recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements, and allowing law enforcement access to cell-site records contravenes that expectation. *Id.* at 2216-19. This Court determined that the cell-phone data presented even greater privacy concerns than GPS monitoring because the records give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts. *Id.* at 2218.

Here, Trice did not and could not voluntarily assume the risk that the Government was watching him from a "covert camera" disguised as a smoke detector, right outside the door of his home. Moreover, the recordings gave the Government the ability to travel back in time to retrace Trice's whereabouts.

The District Court and the Sixth Circuit relied upon the Sixth Circuit's decision in *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016). (Pet. App. 8a–9a, 22a) In *Houston*, Government agents placed a camera at the top of a public utility pole and recorded footage of a farm in rural Tennessee for ten weeks. This Court found that this did not violate any expectations of privacy "because the camera recorded the same view of the farm as that enjoyed by passerby on public roads." *Houston*, 813 F.3d at 285.

Both the Sixth Circuit and the District Court's mistakenly relied upon *Houston*. It is one thing to place a camera on a utility pole in a truly public space where passerby are expected. It is quite another thing to trespass into an apartment building and place a "covert camera" disguised as a smoke detector outside Trice's apartment directed to view activities at the door and inside the apartment. As succinctly stated by Justice Jackson,

> Doubtless a tenant's quarters in a rooming or apartment house are legally as well as practically exposed to lawful approach by a good many persons without his consent or control. Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger, they could then spy or eavesdrop on others without being trespassers. If they peeped through the keyhole or climbed on a chair or on one another's shoulders to look through the transom, I should see no grounds on which the defendant could complain. If in this manner they, or any private citizen, saw a crime in the course of commission, an arrest would be permissible.
>
> But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry.

McDonald v. United States, 335 U.S. 451, 458 (1948) (Jackson, J., concurring). Here, while Trice could not quibble if Investigator Behnen first obtained permission from the property manager to enter the building, Investigator Behnen failed to do so. He was a criminal, trespassing

in the building. Thus, Trice had a constitutionally protected interest in the integrity of his home being free from trespassers like Investigator Behnen.

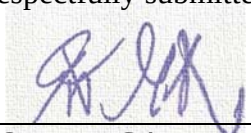
In sum, the Sixth Circuit found that the use of the camera did not violate Trice's reasonable expectation of privacy, meaning the use of the camera did not constitute a search. (Pet. App. 11a) Trice maintains that surreptitiously concealing a camera in the hallway right outside his door, and recording all the activities, violated his Fourth Amendment rights. If this were a house in suburbia, there would be no question that the Government violated Trice's rights. Why should there be a lower expectation of privacy with low-income apartments? Therefore, the information in the affidavit, that Trice was seen entering and exiting apartment B5 should have been excluded from the affidavit. *United States v. Davis*, 430 F.3d 345, 357–58 (6th Cir. 2005).[2]

[2] The Sixth Circuit did not address whether, apart from the illegally-obtained evidence, the search warrant affidavit sufficiently established a nexus between the place to be search and the evidence sought, nor did the Sixth Circuit address the good-faith exception. Accordingly, Mr. Trice will limit his arguments to whether the Government's actions here constituted a search.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,



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