No. 23-396

In the
Supreme Court of the United States

BOWE MARVIN,
Petitioner,
v.

DAVID HOLCOMB, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals followed well established law when it rejected the Petitioner's argument that there was a material error in a jury instruction unrelated to the exigent circumstance exception to a warrantless entry and seizure for which there was more than sufficient evidence to support the jury's verdict in favor of two police officers accused of a 4th Amendment violation.

Whether the Court of Appeals followed well established law in affirming the grant of summary judgment on Petitioner's use of force claim, treating this claim separately and distinctly from the unlawful seizure claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Petitioner's statement of the issues misrepresents both the law delineated by the courts, and the evidence that resulted in a jury verdict in favor of two (2) police officers who acted under exigent circumstances to enter the home and with probable cause to arrest Petitioner. Petitioner's first stated issue fails to acknowledge the existence of exigent circumstances as an exception to the requirement to have a warrant to enter a home. Petitioner's second stated issue fails to acknowledge the well-established law that the determination of the reasonableness in use of force is separate and distinct from the determination of the lawfulness of an arrest.

This Court and every circuit which has examined the exceptions to the warrant requirement has determined that, irrespective of the privacy rights in a home, exigent circumstances are a valid exception to the warrant requirement for entering a person's home. The existence of exigent circumstances along with other instructions and the arguments made to the jury supports the conclusion by the Appeals Court that Petitioner was not prejudiced by the jury instructions given.

With respect to the second question presented, Petitioner has no support to claim that an unlawful arrest makes any use of force per se unreasonable. Instead, circuits have consistently held that a determination as to the reasonableness of the use of force requires a review of the totality of the circumstances.

STATEMENT OF THE CASE

Petitioner provided an accurate Statement of the Case within his Petition, accordingly, Defendants incorporate and adopt the same Statement of the Case herein.

REASONS FOR DENYING THE PETITION

I. Petitioner was Not Prejudiced By the Giving of the Jury Instructions

Petitioner argues that there is a conflict within the circuits regarding an individual's privacy rights in the doorway of their home, and Petitioner claims the Seventh Circuit's decision creates an exception to that right, specifically that an officer can pull an individual from the threshold of his door without a warrant and without probable cause. *See* Petition, p. 7. Petitioner's summary of the Seventh Circuit's position is incorrect. First, this Court, and every circuit including the Seventh Circuit, has held that the police cannot enter into a person's home without probable cause and without a warrant. Second, the Seventh Circuit specified that Defendants did not argue to the jury that they did not cross the threshold of the home; instead, as noted by the Seventh Circuit, defendants argued that entry into the home was supported by the presence of exigent circumstances.

Petitioner claims the jury was misled by Jury Instruction No. 8 claiming it created a false exception to the reasonable expectation of privacy in one's home. However, as outlined by the Seventh Circuit in its opinion, the Seventh Circuit was "confident that Jury

Instruction 8 was not prejudicial to Marvin," and explained:

> Holcomb and Lawson-Rulli never argued to the jury that Marvin had relinquished any expectation of privacy in his doorway- they argued that exigent circumstances justified warrantless entry through that doorway.

Petitioner's Petition, App. 9a.

Essentially, Petitioner is focusing on a jury instruction that was not even a factor in the actual trial. As such, Petitioner failed to present to the Seventh Circuit any prejudice in the giving of the jury instruction. Likewise, in the matter before this Court, Petitioner fails to demonstrate how he was prejudiced by the giving of the instruction. Instead, Petitioner attempts to claim that three other circuits' decisions conflict with the decision of the Seventh Circuit. A review of those three Circuit decisions demonstrates that the law cited within the cases is consistent with that delineated by the Seventh Circuit. The difference in the ultimate decision in each case is not related to a conflict on the law, but, instead, a set of facts that distinguishes those decisions from the set of facts present in this case.

Fourth Circuit

Petitioner cited to *U.S. v. McCraw*, 920 F.2d 224 (4th Cir. 1990) claiming the case supported his position. In *McCraw*, the Court explained "[a]n arrest warrant is always required for an arrest inside the arrestee's home, even when probable cause exists, **absent exigent circumstances**." 920 F.2d at 228

(citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980)) (emphasis added). In *McCraw,* an informant, McCraw, and a very large black male were to be involved in a drug-related meeting at a hotel. *McCraw*, 920 F.2d at 226. The very large black male was later identified by hotel staff as "James Mathis" and was registered to a room. *Id*. McCraw was arrested with a suitcase containing a white powdery substance, which he had received from the very large black male. *Id*. Approximately one-half hour later five or six agents went to Room 210 and knocked on the door without announcing themselves. *Id*. Mathis opened the door halfway while standing inside his room, but when he saw the officers, he attempted to close the door. *Id*. Several officers with weapons drawn forced their way inside and arrested Mathis. *Id*. Mathis later filed a suppression motion, and, the government argued there were exigent circumstances to warrant entry into the hotel room. *Id*. at 227. The trial court denied the motion and Mathis appealed. *Id*. The Fourth Circuit reversed the trial court based upon its holding that exigent circumstances did not exist and explained:

> Mathis did not know of McCraw's arrest or of the officers' presence, and his room was under constant surveillance. He had no reason to destroy evidence, and if he came out of his room he could have been promptly apprehended in the hallway, a public place. Any risk of the destruction of evidence when Mathis retreated further into his room was precipitated by the agents' themselves when they knocked on the door.

Id. at 230. While the law is consistent with that cited in the Seventh Circuit's opinion, the facts in *McCraw* are distinguishable from those in the present case.

In the present case, the officers encountered a victim who informed them that her son, the Petitioner, had struck her with a chair, cutting her lip, Petitioner was known to carry a weapon, and a welfare check was necessary due to Petitioner perhaps being suicidal. Upon arriving at the door, the officers found Petitioner inside a home with another person—the Petitioner's father—at risk of injury, and a noncooperative Petitioner. The officers, therefore, had exigent circumstances to enter the home to protect themselves and Petitioner's father in the home.

Sixth Circuit

Petitioner also relied on *Watson v. City of Burton*, 764 Fed. Appx. 539 (6th Cir. 2019), claiming *Watson* supported its position. Once again, Petitioner's analysis is incorrect because it misstates the law delineated in *Watson*. In *Watson*, the Sixth Circuit, reviewed a case in which officers received a report from a woman that a Michael Watson had sent text messages threatening to harm her and that she believed he had a gun and was prepared to carry out his threat. 764 Fed. Appx. at 540. Officers went to Mr. Watson's home, knocked on the door and when he opened the door, the officers pulled Mr. Watson from his home to arrest him without a warrant. *Id*.

In reviewing the case, the Sixth Circuit acknowledged the general rule, followed by every circuit, that "[a]bsent exigent circumstances, that

threshold may not reasonably be crossed without a warrant." *Id*. at 542 (referring to the threshold of a door). However, the Court continued:

> Despite the general rule, a warrantless seizure in the home might be reasonable if 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'

Id. (quoting *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (remaining citations omitted)). Although the government argued there were exigent circumstances present, the Court disagreed:

> Plaintiff did not pose an immediate risk of danger to the police or anyone else. . . . Defendants in this case do not suggest that Plaintiff brandished a weapon, raised his voice, or made any threatening gestures, that any potential victims were with him in his apartment, or any other reason that he might have posed an immediate risk to anyone's safety. There was, therefore, no compelling law-enforcement need to enter the home at the moment they did. **We conclude that there were no exigent circumstances justifying Defendants' warrantless intrusion into Plaintiff's home.**
>
> … [B]ecause exigent circumstances were patently lacking, we agree with the district court that the relevant Fourth Amendment law was

> clearly established at the time the arrest occurred.

Id. at 543 (emphasis added).

In the present case, however, defendants argued to the jury, based on the evidence, that exigent circumstances did exist. The jury was properly instructed on this point and the jury's defense verdict is consistent with this point.

Eleventh Circuit

For its third circuit, Petitioner cites to the Eleventh Circuit case of *McClish v. Nugent*, claiming its decision conflicts with the Seventh Circuit's decision. This is incorrect. A review of the case demonstrates the Eleventh Circuit, like the Seventh Circuit, and every other circuit, follows the same general rule laid out by *Payton* that "absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." 483 F.3d at 1240 (11th Cir. 2007) (quoting *Payton v. New York*, 445 U.S. 573, 589-90 (1980)).

The Court in *McClish* continued: "Warrantless entry into the home is therefore unreasonable, subject only to a few 'jealously and carefully drawn' exceptions." *McClish*, 483 F.3d at 1240 (*quoting Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1520 (2006) (which quoted *Jones v. United States*, 357 U.S. 493, 499 (1958)). In discussing the exceptions to the warrant requirement, the Court explained:

> A second exception to the warrant requirement is made for 'exigent circumstances,' or situations in which 'the inevitable delay incident to

> obtaining a warrant must give way to an urgent need for immediate action.

Id. at 1240 (*United States v. Burgos*, 720 F.2d 1520, 1526 (11th Cir. 1983)). As such, the Eleventh Circuit recognizes the general exception of privacy in one's home, but also the exception of exigent circumstances. Ultimately, the Court, in *McClish*, determined exigent circumstances were not present in the case "as conceded and amply demonstrated by the fact that many hours passed between the initial contact and the arrest." *Id*. at 1241. But in the case at hand, evidence of exigent circumstances supports the jury verdict.

Other Circuits

In addition to the above circuits, this Court, and every other circuit, has accepted the general principle that a warrantless entry, absent exigent circumstances, is presumptively unreasonable. *Payton*, 445 U.S. at 586; *U.S. v. Samboy*, 433 F.3d 154, 158 (1st Cir. 2005) ("It is a well-established principle of Fourth Amendment law that warrantless searches inside a home are presumptively unreasonable.); *U.S. v. Simmons*, 661 F.3d 151, 156–57 (2d Cir. 2011) ("The core premise underlying the Fourth Amendment is that warrantless searches of a home are presumptively unreasonable."); *U.S. v. Anderson*, 644 F. App'x 192, 194–95 (3d Cir. 2016) ("A warrantless search or arrest made within a home is presumptively unreasonable."); *U.S. v. Aguirre*, 664 F.3d 606, 610 (5th Cir. 2011) ("Under the Fourth Amendment, a warrantless search of a person's home is presumptively unreasonable, and it is the government's burden to bring the search within an exception to the warrant requirement.");

United States v. Quarterman, 877 F.3d 794, 797 (8th Cir. 2017) ("Warrantless searches inside a home are 'presumptively unreasonable…."); *Sandoval v. Las Vegas Metropolitan Police Dept.*, 756 F.3d 1154, 1161 (9th Cir. 2014) ("Warrantless searches of the home or the curtilage surrounding the home are 'presumptively unreasonable.'"); and *U.S. v. Layman*, 244 Fed. Appx. 206, 210 (10th Cir. 2007) ("Warrantless searches and seizures inside a home are presumptively unreasonable.").

However, all these courts have also agreed that if exigent circumstances exist, then the police may enter a person's home without a warrant. *King*, 563 U.S. at 460; *Samboy*, 433 F.3d at 158 ("Nevertheless, a warrantless entry into a person's dwelling may be permitted if "exigent circumstances" arise."); *Simmons*, 661 F.3d at 157 ("An exception to the warrant requirement applies when the exigencies of [a] situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable."); *Anderson*, 644 F. App'x at 195 ("Nonetheless, a warrantless search or seizure occurring within a home may be sustained where probable cause and exigent circumstances exist."); *Aguirre*, 664 F.3d at 610 ("Exigent circumstances is such an exception. It is available only on a showing by the government that the officers' entry into the home was supported by probable cause and justified by an exigent circumstance."); *Quarterman*, 877 F.3d at 797 ("Warrantless searches inside a home are 'presumptively unreasonable,' but not if 'the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively

reasonable under the Fourth Amendment.'"); *Sandoval*, 756 F.3d at 1161 ("To make a lawful entry into a home in the absence of a warrant, officers must have either probable cause and exigent circumstances or an emergency sufficient to justify the entry."); and *Layman*, 244 Fed. Appx. at 210 ("We have previously recognized the exigent circumstances exception to a warrantless entry 'when the circumstances posed a significant risk to the safety of a police officer or a third party.'") (quoting *United States v. Najar*, 451 F.3d 710, 717 (10th Cir. 2006)).

Consequently, while there may be a question on whether the jury instruction provided by the District Court was as clear as it could have been on one's right to privacy within his own home, Petitioner was not ultimately prejudiced by the giving of the instruction since the Defendants did not make any argument that Petitioner did not have a right to privacy. Instead, Defendants relied upon the exigent circumstances in entering the home to protect themselves and the third party in the home.

Given that the evidence supported an exception for exigent circumstances and that Petitioner fails show how he was prejudiced in light of the exigent circumstances, there is no reason to overturn the decision of the Seventh Circuit on this point.

II. The Use of Force With Petitioner Was Reasonable and With Probable Cause

Petitioner's second question before the court is an inquiry into whether the lawfulness of the arrest should be considered when determining the

reasonableness of the use of force. Petitioner further contends, against the weight of the evidence, that probable cause did not exist. *See* Petition, p. 12.

First, the officers had probable cause to arrest Petitioner. Second, there is no confusion in the circuits that an unlawful arrest does not render the use of force *per se* unreasonable. Instead, the lawfulness of the arrest is a part of the consideration of the totality of the circumstances when reviewing use of force.

Again, Petitioner cites to certain cases alleging they support his position. Notably, Petitioner does not cite to any actual Circuit case, but instead relies upon two district court cases within the Third Circuit, and one district court case in the Fourth Circuit. However, the district court decisions are inconsistent with their respective circuit's holdings.

Third Circuit

The Third Circuit has rejected the argument made by Petitioner. In *Snell v. City of York, Pennsylvania*, the Third Circuit explained:

> Hence, Snell contends that the force applied was excessive solely because probable cause was lacking for his arrest. We have rejected similar efforts to bootstrap excessive force claims and probable cause challenges. *Robinson v. Fetterman*, 378 F.Supp.2d 534, 544 (E.D. Pa. 2005) (citing *Bodine v. Warwick*, 72 F.3d 393, 400 & n. 10 (3d Cir. 1995) (rejecting conflation of claims for false arrest and excessive force, noting that 'merely because a person has been falsely arrested does not mean that excessive force has

> been used.'); *see Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004) (citing *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-22 (9th Cir. 2001) ("Because the excessive force and false arrest factual inquiries are distinct, establishing a lack of probable cause to make an arrest does not establish an excessive force claim, and vice-versa."))

564 F.3d 659, 672-73 (3d Cir. 2009). In a case decided later in the same year, the Third Circuit again rejected the same argument:

> The District Court properly rejected Timothy McKenna's argument that it should have instructed the jury, which rejected plaintiffs' excessive force claims, that any amount of force used to effect an arrest without probable cause is *per se* excessive. Timothy's statement of the law is unsupported by citation, and, moreover, is wrong. As the Court correctly concluded, the jury was required to review any excessive force claims under a totality of the circumstances test, as enunciated in *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989), to determine whether the forced used was reasonable.

McKenna v. City of Philadelphia, 582 F.3d 447, 460 (3d Cir. 2009) (citing *Jones v. Parmley*, 465 F.3d 46, 62 (2d Cir. 2006)).

Notwithstanding the foregoing precedence in the Third Circuit, Petitioner erroneously relies on *Wilder v. Vill. of Amityville*, 288 F.Supp.2d 341 (E.D.N.Y.

2003) and *Tate v. W. Norriton Twp.*, 545 F.Supp.2d 480 (E.D. Pa. 2008). This reliance is of no moment as these two district court decisions do not override the Third Circuit's which rejects the argument made by the Petitioner based on these two cases.

Fourth Circuit

The only other case cited by Petitioner is within the Fourth Circuit, in *Souter v. Irby*, 593 F. Supp. 3d 270 (E.D. Va. 2022). However, Petitioner ignores the Fourth Circuit's actual position on the matter, which was explained in *Hupp v. Cook*:

> We first dispense with Hupp's argument that because she was unlawfully arrested, the use of *any* force was necessarily unconstitutional. Certainly, we may consider any lack of probable cause for the arrest as we evaluate the reasonableness of the force used. But we consider the crime that is alleged to have been committed in connection with our overall analysis of *all* of the circumstances surrounding the use of force.

931 F.3d 307, 322 (4th Cir. 2019) (citing *Graham*, 490 U.S. at 396; *Jones v. Buchanan*, 325 F.3d 520, 528–31 (4th Cir. 2003) (explaining that the lack of any crime committed by plaintiff weighed heavily in favor of plaintiff's excessive force claim but nonetheless evaluating remaining *Graham* factors)).

Other Circuits

Other Circuits have followed the same totality of the circumstances rule established in *Graham*. In

Jones v. Parmley, the Second Circuit, addressed the same claim made by Petitioner and explained:

> There was accordingly no need for this Court in *Atkins* to reach the question of whether any force used in an arrest lacking probable cause is *per se* excessive. Such a construction would read the highly fact-specific situation in which *Atkins* arose too broadly because it would appear to suggest that any force employed by a police officer would be unlawful so long as probable cause did not exist, even if the detainee had threatened the officer with significant harm. We are further mindful that the Supreme Court held in *Graham* that *"all* claims that law enforcement officers have used excessive force ... should be analyzed under the ... 'reasonableness' standard" of the Fourth Amendment, thereby establishing a general requirement. The *Atkins* court clearly did not intend to create or substitute a new standard for arrests lacking probable cause, and the reasonableness test established in *Graham* remains the applicable test for determining when excessive force has been used, including those cases where officers allegedly lack probable cause to arrest.

465 F.3d at 62 (internal citations omitted).

The Ninth Circuit followed the same logic when it held "[b]ecause the excessive force and false arrest factual inquiries are distinct, establishing a lack of probable cause to make a arrest does not establish an excessive force claim, and vice-versa." *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004) (citing

Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 921-22 (9th Cir. 2001) (use of force may be reasonable even in the absence of probable cause)).

In *Cortez v. McCauley*, the Tenth Circuit, again followed the standard set out in *Graham* and held:

> Thus, the excessive force inquiry evaluates the force used in a given arrest or detention against the force reasonably necessary to effect a lawful arrest or detention under the circumstances of the case. Thus, in a case where police effect an arrest without probable cause or a detention without reasonable suspicion, but use no more force than would have been reasonably necessary if the arrest or the detention were warranted, the plaintiff has a claim for unlawful arrest or detention but not an additional claim for excessive force.

478 F.3d 1108, 1126 (10th Cir. 2007). The Tenth Circuit continued:

> Initially, we reject the idea contained in the panel opinion that a plaintiff's right to recover on an excessive force claim is dependent upon the outcome of an unlawful seizure claim. Relying on Eleventh Circuit cases, the panel opinion held that "a plaintiff may not recover on an independent excessive force claim merely because force was applied during an unlawful seizure." Thus, were a plaintiff to prevail on an unlawful arrest claim, the plaintiff would not be allowed to recover on an excessive force claim arising out of the arrest. Properly applied, such

a rule might control where a plaintiff's excessive force claim is dependent *solely* on the absence of the power to arrest or detain. We need not decide that issue, however, because Rick and Tina Cortez have made broader allegations concerning the circumstances of their seizures that might suggest excessive force.

Even under the Eleventh Circuit's rule, "[w]hen properly stated, an excessive force claim presents a discrete constitutional violation relating to the manner in which an arrest was carried out, and is independent of whether law enforcement had the power to arrest." A contrary interpretation would conflict with the Supreme Court's direction that courts engage in careful balancing and examine excessive force claims under a Fourth Amendment reasonableness standard as discussed above. Moreover, a contrary interpretation risks imposing artificial limits on constitutional claims without any basis other than a fear that such a distinction might be too fine for a jury (a fear we do not agree with).

We hold that in cases involving claims of both unlawful arrest and excessive force arising from a single encounter, it is necessary to consider both the justification the officers had for the arrest and the degree of force they used to effect it. If the plaintiff can prove that the officers lacked probable cause, he is entitled to damages for the unlawful arrest, which includes damages resulting from any force reasonably employed in

> effecting the arrest. If the plaintiff can prove that the officers used greater force than would have been reasonably necessary to effect a lawful arrest, he is entitled to damages resulting from that excessive force. These two inquiries are separate and independent, though the evidence may overlap. The plaintiff might succeed in proving the unlawful arrest claim, the excessive force claim, both, or neither.

Cortez, 478 F.3d at 1127 (internal citations and footnotes omitted).

Based upon the above case law, it is clear that the District Court's analysis and decision, and the Seventh Circuit's affirmation of that decision were proper. More importantly, the above case law demonstrates there is no divide between the circuits on the matter, or any need for further clarification of the standard first established by *Graham v. Connor*.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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