

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

RODRIGO BUSTAMANTE-MARTINEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Michael W. Patrick
100 Timberhill Place, Suite 127
Post Office Box 16848
Chapel Hill, North Carolina 27516
(919) 960-5848
Counsel for Petitioner

QUESTIONS PRESENTED

- I. DID THE DISTRICT COURT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND IN ADMITTING EVIDENCE FROM A WARRANTLESS SEARCH OF DEFENDANT'S RESIDENCE BY IMPROPERLY EXPANDING THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT RECOGNIZED IN THIS COURT'S EARLIER DECISIONS?**

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OPINION BELOW

The decision of the Fourth Circuit dismissing the appeal, rendered on September 26, 2017, is unpublished. The order is reprinted as Appendix A to this Petition. (Appendix A pp. 1, *infra*).

STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1) to review the decision rendered by the United States Court of Appeals for the Fourth Circuit on September 26, 2017.

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

“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.”

STATEMENT OF THE CASE

On April 8, 2015, Rodrigo Bustamante-Martinez was indicted by a grand jury sitting in the Eastern District of North Carolina. J.A. p.18. Mr. Bustamante-Martinez was charged with possessing firearms on April 14, 2013 as an unauthorized alien in violation of 18 U.S.C. § 922(g)(5)(A) and 924(a)(2). *Id.*

The case arose from a series of 911 calls on April 13 and 14, 2013 that led to a warrantless entry into Defendant Bustamante-Martinez' residence, the arrest of Defendant, and the subsequent seizure of firearms in a search of Defendant's residence. Prior to trial, Defendant filed a motion to suppress evidence of the firearms seized in the warrantless search and a motion to suppress statements made after his arrest and before he received any *Miranda* warnings. J.A. pp. 21 - 26.

Suppression hearing

These motions were referred to a Magistrate Judge for an evidentiary hearing that was held on March 8, 2016. J.A. p. 43. The Government presented the testimony of six witnesses: (1) Deputy Jeffrey Marshmon ("Deputy Marshmon") of the Nash County Sheriff's Office, who responded to three calls for service at Defendant's residence on the night of April 14, 2013; (2) Dispatcher Jerry Belcher ("Dispatcher Belcher") of the Nash County 911 Center, who received a 911 phone call from Defendant's daughter just after 5 a.m. on April 14, 2013; (3) Deputy Adam Gelo ("Deputy Gelo"), formerly of the Nash County Sheriff's Office, who responded to the second and third calls at Defendant's residence on April 14, 2013; (4) Lieutenant David Brake ("Lieutenant Brake") of the Nash County Sheriff's Office, who responded to the third call at Defendant's residence on April 14, 2013;

(5) Deputy George Lewis, Jr. ("Deputy Lewis"), formerly of the Nash County Sheriff's Office, who responded to the first and third calls at Defendant's residence on April 14, 2013 and spoke with Defendant in both Spanish and English; and (6) Deputy Matthew Joyner ("Deputy Joyner") of the Nash County Sheriff's Office, who responded to the third call at Defendant's residence on April 14, 2013 and collected the firearms discovered inside the residence. The Government also submitted five exhibits: a recording of the 911 call made by Defendant's daughter (Gov't Ex. 1), and photographs of the firearms that were discovered inside Defendant's residence and seized by the Nash County Sheriff's Office (Gov't Exs. 2-5). Defendant did not present evidence at the suppression hearing.

The testimony of the witnesses indicated the following concerning the events that occurred on April 14, 2013.

A. The First Call for Service

In the early morning hours of April 14, 2013, Deputies Marshmon and Lewis responded to a call reporting shots being fired in the general area of Defendant's residence. J.A. p. 48, 112. The deputies listened for gunfire, did not hear any shots being fired, and departed.

B. The Second Call for Service

Shortly after Deputies Marshmon and Lewis left the area of Mr.

Bustamante-Martinez's residence, another call reported shots being fired at Mr. Bustamante-Martinez's actual address, so Deputy Marshmon returned with Deputy Gelo and made contact with Mr. Bustamante-Martinez at his home. J.A. p. 48, 73, 75. Deputy Marshmon noticed shell casings on the front porch from a rifle and holes in the ground consistent with a rifle being fired at close range. Mr. Bustamante-Martinez appeared to be intoxicated when he answered the door. J.A. p. 49. Similarly, Deputy Gelo noticed shell casings in the yard that were sitting on top of the grass, and ruts caused by bullets entering the ground. J.A. p. 74. The deputies informed Mr. Bustamante-Martinez that law enforcement had received calls about shots being fired, and advised Mr. Bustamante-Martinez to stop shooting for the night because he was disturbing his neighbors. J.A. p. 49, 73, 75. Mr. Bustamante-Martinez smiled and said "okay, okay, okay," before going back into his house. J.A. p. 49. When asked to stop shooting for the night, Mr. Bustamante-Martinez appeared to be frustrated but was not combative. *Id.* At that point, the deputies did not arrest Mr. Bustamante-Martinez because discharging firearms was not against the law in the county but they asked him to stop since he was disturbing his neighbors. J.A. p. 75. There was no indication that Mr. Bustamante-Martinez was acting violently or aggressively, or was a threat to anyone's safety, other than the presence of the spent shell casings and his apparent

intoxication. J.A. p. 64.

C. The 911 Call and the Third Call for Service

The third call for service occurred around 5 a.m. on April 14, 2013, when Mr. Bustamante-Martinez's daughter called 911 reporting a dispute between her parents. J.A. p. 50, 113. Dispatcher Belcher identified an audio recording of the 911 call from Mr. Bustamante-Martinez's daughter, J.A. p. 68, which was introduced as Gov't Hearing Ex. 1. J.A. p. 158. The daughter told Belcher that her father had a verbal and physical dispute with her mother and he had gone into his room with a gun. *Id.*

When Deputy Marshmon arrived at the residence, the daughter informed him that Mr. Bustamante-Martinez had locked himself in his bedroom after stating "You may as well shoot me dead" and chambering a round to his rifle. J.A. p. 50. As Deputy Marshmon arrived at the residence, he noticed Mr. Bustamante-Martinez standing at a window on the far end of the mobile home with a rifle in one hand, holding the curtain open and looking out. J.A. p. 50-51. Outside the residence, Mr. Bustamante-Martinez's daughter told officers that Mr. Bustamante-Martinez had struck his wife and either pushed her onto or pulled her off of a bed. J.A. p. 61. Deputy Marshmon moved Mr. Bustamante-Martinez's wife and the children to a safe distance from the residence. J.A. p. 50-51.

Deputy Lewis subsequently spoke with Mr. Bustamante-Martinez's wife and children in both English and Spanish. J.A. p. 113-114. Mr. Bustamante-Martinez's wife told Deputy Lewis that no one else was in the home. Either his wife or his daughter gave Deputy Lewis a phone number to contact Mr. Bustamante-Martinez. J.A. p. 114. Deputy Lewis tried several times to reach Mr. Bustamante-Martinez by phone without success. J.A. p.115.

Lieutenant Brake, the shift supervisor on patrol that evening, also responded to the third call at Mr. Bustamante-Martinez's residence. J.A. p. 94. After being briefed by the other officers, Lieutenant Brake decided to enter the residence to secure Mr. Bustamante-Martinez for the safety of himself and others. J.A. 95. At that time, Lieutenant Brake believed Mr. Bustamante-Martinez was the only person inside the residence. *Id.* None of the occupants asked the officers to enter the mobile home, and Lieutenant Brake did not seek permission from anyone to enter the home. J.A. p. 104-105.

Lieutenant Brake entered the residence, along with Deputies Gelo, Lewis, and Joyner. J.A. pp. 78, 84, 116-117,127-129. Lieutenant Brake and Deputy Gelo were responsible for securing Mr. Bustamante-Martinez, while Deputy Lewis acted as the cover officer with his weapon drawn and Deputy Joyner acted as the rear guard, standing outside of Mr. Bustamante-Martinez's bedroom while the

other three officers entered. Lieutenant Brake opened the exterior storm door and moved to the locked bedroom door. J.A. p. 95-96. Lieutenant Brake forced entry into the locked bedroom door by pushing it open, and observed Mr. Bustamante-Martinez on the bed with a rifle next to him. J.A. p. 96. As Lieutenant Brake was handcuffing Mr. Bustamante-Martinez, Brake noticed other firearms visible in the bedroom. *Id.* Deputy Lewis described seeing Mr. Bustamante-Martinez on the bed, appearing to be asleep with a long gun on the bed next to him as the officers entered the bedroom. J.A. p. 117. Deputy Lewis also remembered seeing another long gun and two handguns in Mr. Bustamante-Martinez's bedroom. J.A. p. 118.

According to Lieutenant Brake, the officers then brought Mr. Bustamante-Martinez outside, and as they were walking through the living room to the front door, they discovered two other small children inside the residence. J.A. p. 96. Deputy Gelo placed Mr. Bustamante-Martinez in the front seat of a patrol car outside of the residence. J.A. pp. 79-80. Lieutenant Brake testified that after discovering the children, he instructed the officers to perform a “protective sweep” to ensure there were no additional people or weapons inside the residence. J.A. p. 96. According to Deputies Gelo and Lewis, however, the children were discovered during the course of carrying out the protective sweep, while the officers were making sure that no one else was in the residence and all weapons had been

recovered. J.A. p. 89, 119-120.

When the “protective” sweep was completed and the officers were preparing to leave, Deputy Lewis spoke with Mr. Bustamante-Martinez while he was seated, hand-cuffed, in the patrol vehicle. J.A. p. 120. Deputy Lewis did not advise Mr. Bustamante-Martinez of his Miranda rights. *Id.* He asked Mr. Bustamante-Martinez how many firearms he owned. J.A. p. 120-121. In response, Mr. Bustamante-Martinez said he owned four firearms. *Id.* Deputy Lewis also asked Mr. Bustamante-Martinez about his immigration status, and Mr. Bustamante-Martinez admitted that he was not a legal citizen. *Id.* After the conversation with Deputy Lewis, Mr. Bustamante-Martinez was transported to the Magistrate's Office. J.A. p. 100.

After the hearing, the Magistrate Judge entered a Memorandum and Recommendation that the motions to suppress be denied. J.A. p. 178. Defendant filed timely objections to the recommendation. J.A. p. 199. The District Court on July 15, 2016, entered an order adopting the Magistrate Judge's Memorandum and Recommendation and denying the Defendant's motions to suppress. J.A. p. 209. In so ruling, the District Court concluded that the warrantless entry into the residence which lead to the arrest of Mr. Bustamante-Martinez and the seizure of four firearms was justified by the “emergency aid exception” to the warrant

requirement. The District Court also concluded that although no resident of the home expressly consented to the entry and search of the residence, that family members “impliedly” consented to the entry and search by making the 911 call. J.A. p. 217.

The District Court further concluded that seizure of the firearms in the residence was justified by the need to protect the children in the home despite the fact that their mother was present, and under the plain view doctrine as evidence relevant to the domestic assault charge on which they were arresting Mr. Bustamante-Martinez. On the question of suppressing the Mr. Bustamante-Martinez’ response to an officer’s question of whether he owned only four firearms that was made after his arrest and before any Miranda warning were given, the District Court concluded that the question was justified by the need to secure the residence for the safety of the children. J.A. p. 222. The District Court’s ruling on the motion to suppress Mr. Bustamante-Martinez’ statements was rendered moot when the Government did not seek to introduce Mr. Bustamante-Martinez’ statements at the trial.

Trial

The trial of Defendant Bustamante-Martinez before a jury began on October 17, 2016. At the outset of the trial, Mr. Bustamante-Martinez renewed his

objections to the suppression rulings and the court again denied the motions. J.A. p. 279.

The Government called Deputy Marshmon who testified about his response to the three 911 calls on April 14, 2013. His testimony was consistent with his suppression hearing testimony detailed above. J.A. pp. 315 to 325. Jerry Belcher, former employee of the Nash County 911 center, testified that he had received a 911 on April 14, 2013 concerning a 9820 Pace Road disturbance and identified a recording of that call, a redacted version of which was played to the jury. He also identified a transcript of the call he had prepared. J.A. pp. 327 to 339.

Former deputy Adam Gelo testified about responding to two calls at 9820 Pace Road on April 14, 2013 in testimony consistent with his suppression hearing testimony detailed above. J.A. pp. 340 to 357. Lieutenant Brake of the Nash County Sheriff's Department also testified consistent with his suppression hearing testimony detailed above. J.A. pp. 375 to 390. Nash County Deputy Matthew Joyner testified about the seizure of firearms at Mr. Bustamante-Martinez's residence after his arrest on April 14, 2013. J.A. pp. 391 to 403. ATF Agent John Griffin testified that the four firearms seized from Mr. Bustamante-Martinez's home were operational, and that they were not manufactured in North Carolina. J.A. pp. 404 to 418.

Homeland Security Resident Agent Thomas O'Connell testified as an expert witness about immigration processes and procedures. He identified an application for cancellation of removal (EOIR-42B form) that Mr. Bustamante-Martinez had signed and identified certain exhibits as Mexican identity documents of Defendant Bustamante-Martinez. He testified that the Government had no record of Mr. Bustamante-Martinez legally entering the country. He also gave opinion testimony that Mr. Bustamante-Martinez was not in the United States with permission in 2013 or at the time of trial. J.A. pp. 477 to 569, 573.

At the conclusion of the Government's evidence Defendant's Motion for Judgment of Acquittal under Rule 29 motion was denied. J.A. p. 576. The Defendant offered no witnesses and his renewed Rule 29 motion was denied. J.A. p. 604.

On October 19, 2016, the jury returned a unanimous verdict convicting the Defendant. The Court denied the renewed Rule 29 motion. J.A. p. 683-684, 691.

Sentencing

Sentencing was January 4, 2017. The Court sentenced Defendant Bustamante-Martinez to a term of imprisonment of 12 months and one day and three years of supervised release. J.A. p. 15. Judgment was entered January 4, 2016. J.A. p. 715. Notice of appeal was filed on January 12, 2017. J.A. p. 723.

After oral argument, the Court of Appeals affirmed the conviction on the ground that the emergency aid exception justified the warrantless entry and search. App. p. 4.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF THE EMERGENCY AID DOCTRINE IN THE FOURTH CIRCUIT’S OPINION WEAKENS THE PROTECTIONS OF THE FOURTH AMENDMENT BY EXPANDING THE SCOPE OF THE EMERGENCY AID EXCEPTION TO THE FOURTH AMENDMENT RECOGNIZED BY THIS COURT’S PRIOR DECISIONS.

The Fourth Amendment to the United States constitution has drawn a firm line at the entrance to the home. The police need both probable cause to either arrest or search and exigent circumstances to justify a nonconsensual warrantless intrusion into private premises. In *Payton v. New York*, 445 U.S. 573, 590 (1980), the Supreme Court held that “[a]bsent exigent circumstances,” the “firm line at the entrance to the house ... may not reasonably be crossed without a warrant.” In *Kirk v. Louisiana*, 536 U.S. 635 (2002), the Supreme Court reaffirmed that police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) and *Michigan v. Fisher*, 558 U.S. 45 (2009) the establish the scope of the Emergency Aid

Exception to the Warrant requirement. In *Brigham City*, the Supreme Court once again reiterated that

It is a “ ‘basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.’ ” *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (quoting *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)).

In *Brigham City*, the Court concluded that the emergency aid exception justified entry on the facts of that case but the court re-emphasized that whether circumstances exist to justify warrantless entry into a residence are determined by what is known to the officers objectively, not from their subjective beliefs or motivations.

“Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Brigham City, Utah*, 547 at 403. In *Brigham City*, officers “saw through a screen door and windows an altercation in the kitchen between four adults and a juvenile, who punched one of the adults, causing him to spit blood in a sink” *Brigham City, Utah*, 547 U.S. at 398. The *Brigham City* court concluded that “the officers were confronted with ongoing violence occurring within the home” *Id.* at 399 and that “the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence was just

beginning.” *Id.*

In *Michigan v. Fisher*, officers “found a household in considerable chaos: a pickup truck in the driveway with the front smashed, damaged fence posts along the side of the property, and three broken house windows, the glass still on the ground outside.” *Fisher*, 588 U.S. at 45-46. “The officers also noticed blood on the hood of the pickup and the clothes inside of it, as well as on one of the doors to the house.” *Id.* at 46 “Through a window, the officers could see the respondent, Jeremy Fisher, inside the house, screaming and throwing things.” *Id.* The *Fisher* court concluded that officers “found signs of a recent injury, perhaps from a car accident” and that officers could see [Fisher’s] violent behavior inside” *Id.* at 48. The *Fisher* court justified officers’ otherwise unconstitutional warrantless entry into Fisher’s home because “it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt or had already hurt someone else.” *Id.* at 49.

The factual circumstances in the present case are markedly different and did not indicate that an emergency existed to justify a warrantless entry into Mr. Bustamante-Martinez’s residence. In this case, there was no evidence that anyone in the Mr. Bustamante-Martinez’s home was injured or required medical

assistance before the officers entered it. Before entry the officers believed they had removed Mr. Bustamante-Martinez's family to a safe location and that the Mr. Bustamante-Martinez was the only person in the home. The officers observed no hostile or threatening behavior from the Defendant. No objective evidence suggested that the Mr. Bustamante-Martinez was actually injured. There was no objective evidence that Mr. Bustamante-Martinez was seriously threatening to harm himself. There was no evidence that Mr. Bustamante-Martinez had threatened himself or others in the past. The only objective evidence was (1) some hours earlier Mr. Bustamante-Martinez had been intoxicated while firing rifles outside his home into the ground, an activity that was not unlawful, (2) that his daughter had reported that Mr. Bustamante-Martinez had been in a physical altercation with his wife before locking himself into his bedroom with a gun, an altercation that did not involve a firearm, (3) that before he locked himself into his bedroom, Mr. Bustamante-Martinez had made an ambiguous comment that he would be better off if someone shot him, and (4) that in his prior contacts with officers Mr. Bustamante-Martinez had be non-threatening, pleasant and non-hostile. These circumstances show no need to render emergency assistance to an injured occupant, or that anyone was in imminent danger. They did not justify use of the emergency aid exception in the present case.

Nevertheless, the District Court excused the warrantless entry into Mr. Bustamante-Martinez's residence on the emergency aid exception. In doing so, the District Court did not analyze the situation in light of this court's case law that discusses when police are justified, without a warrant, in seizing a person who may be a danger to themselves or others.

In the present case, the police had received an 911 call about an altercation and spoken with Mr. Bustamante-Martinez' daughter about the altercation who told them of a statement by the Mr. Bustamante-Martinez that might be interpreted as suicidal or simply as a dramatic statement that life wasn't much fun at the moment. The police had independent knowledge that Mr. Bustamante-Martinez was intoxicated and he possessed a least one firearm. In the officer's contacts with Mr. Bustamante-Martinez, he had been non-belligerent, non-combative and even friendly. The officers had no information that he had ever attempted or even threatened suicide in the past or that he had ever threatened any person with a firearm. These facts establish suggests that the police in the present case lacked probable cause to seize Mr. Bustamante-Martinez for his own protection or the protection of others. There was simply no objective evidence that Mr Bustamante-Martinez was an imminent danger to himself or others.

The District Court should have granted the motion to suppress evidence and

should not admitted evidence seized after the illegal entry into the residence without a warrant. On appeal, the Court of Appeals for the Fourth Circuit with limited discussion affirmed on the basis of the emergency aid exception. App. at pp. 3 - 4.

The Court of Appeals' decision marks an expansion of the limited emergency aid exception established in this Court's prior decision. In both the *Brigham City* and *Michigan* cases, the police were confronted by an ongoing scene of violence when they entered the residences. In *Brigham City* police saw ongoing violence with the home and an injured person. In *Michigan*, the police saw evidence of property destruction, blood, and a violent occupant of the residence. In the present case, when sheriff's deputies arrived after the third call, no one was injured in the residence and there was no ongoing violence in the residence. Instead they were met with quiet after the earlier tumultuous behaviors. This expansion of the emergency aid exception diminishes the protections granted by the Fourth Amendment. This Court should grant review of the decision to preserve these important protections.

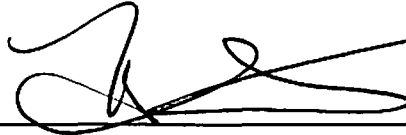
CONCLUSION

Petitioner respectfully requests that the Supreme Court grants is petition to permit review this case in order to correct the unwarranted expansion of the

emergency aid doctrine.

LAW OFFICE OF MICHAEL W. PATRICK

By: _____

A handwritten signature in black ink, appearing to be 'Michael W. Patrick', written over a horizontal line.

Michael W. Patrick
N.C. State Bar #7956
Attorney for Rodrigo Bustamante-Martinez
100 Timberhill Court, Suite 127
Post Office Box 16848
Chapel Hill, North Carolina 27516
(919) 960-5848 (919) 869-1348 - fax
E-mail: mpatrick@ncproductslaw.com