

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MATTHEW B. CORDER

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. When a police officer is charged under 18 U.S.C. §242 with violating a person's civil rights by making an invalid, warrantless arrest, is an instruction prejudicial if it precludes the jury from deciding whether the arrestee was standing in the doorway (a public place) of his residence or was standing in his residence when he was arrested.
- II. Whether a jury instruction defining "willfully" violates the reasonable doubt standard by allowing a police officer to be convicted under 18 U.S.C. §242 if he knew or recklessly disregarded the *possibility* that his seizure of an arrestee was constitutionally unreasonable.
- III. Whether Federal Rule of Evidence 608 allows a defendant-witness to assert his Fifth Amendment right against self-incrimination when the government seeks to cross-examine him on matters that are remote and collateral to the offenses for which he is on trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Matthew B. Corder, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The Sixth Circuit's unpublished opinion is reproduced at App.2a-25a. *See United States v. Corder*, --- F.App'x --- (6th Cir. 2018); 2018 WL 818046.

JURISDICTION

The Sixth Circuit issued its decision on February 12, 2018, (App.2a-25a) and denied petitioner's petition for rehearing on February 27, 2018. App.1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are at App. 49a.

STATEMENT OF THE CASE

On October 22, 2014, petitioner, Matthew Corder, was a deputy sheriff in Bullitt County, Kentucky. Near midnight, he and Deputy Billy Allen responded to a call about a suspicious person at a trailer park. Allen parked his patrol car in front of the trailer that was involved in the call. Petitioner parked his patrol car in front of Deric Baize's trailer which was three or four trailers down from where Allen parked. After completing their response to the call, Allen went to his car and petitioner walked back to his car which was about 50 to 60 feet away. (R.59,

Transcript (TR) Cross-Examination (CX) Corder at 355-56; R.64, TR Trial, Vol.2 at 682, 716, 727-28, 748-50, 763-64, 816-19).

Allen noticed that petitioner appeared to be talking to someone. He heard two, raised voices which he described as shouting. He could not hear what was said but one voice sounded like it was giving commands. Allen later told Deputy Chief Cottrell that petitioner was not shouting. (R.64, TR Trial, Vol.2 at 728-29, 760-61, 777). Allen saw petitioner run or walk at “a fast pace” onto the porch of a residence. Feeling that something was “probably wrong,” Allen got out of his car and walked toward petitioner’s location. He went on the porch and saw petitioner inside the doorway of the trailer trying to make an arrest. *Id.* at 730-31, 751, 764.

Deric Baize lived in the trailer with his stepsister, Tara Geary, and her fiancé, Matthew Brown. It is a residential area with trailers “fairly close” to each other. When Baize arrived home after 11:00 p.m., a patrol car was parked in front of his trailer. He went inside his trailer to get something to eat. He went back outside when he heard movement and saw petitioner get into his vehicle. He said he asked petitioner what was going on and petitioner told him to mind his own business. Baize said he asked petitioner to move his vehicle so he could park and petitioner told him he would move when he was done or had to leave. (R.59, TR CX Corder at 359; R.63, TR Trial, Vol.1 at 654, 657-59; R.64, TR Trial, Vol.2 at 676, 679-85, 688, 705-06).

Baize became irritated and argued with petitioner about the parking spot “for a little bit.” As Baize started to walk to his trailer, he told petitioner to “fuck off.” He repeated those words when petitioner asked him what he said and then walked into his trailer. Baize admitted his voice was elevated and that he cursed at petitioner. He didn’t think petitioner heard him the first time so he raised his voice to be heard the second time. Baize admitted that a person could find his language offensive. He acknowledged that the trailers had thin walls and it was “fairly easy” to hear what went on outside. (R.63, TR Trial, Vol.1 at 658-59; R.64, TR Trial, Vol.2 at 683, 686-88, 705). Deputy Allen testified that a lot of people would be offended by cursing and that occupants of the trailers were in a position to be annoyed, alarmed, or offended by such behavior. *Id.* at 766-68.

Ms. Geary was sleeping when Baize woke her and asked if she knew why a police officer was outside. She didn’t know and Baize walked out of the trailer and talked to the officer about five minutes. Baize asked the officer to move his vehicle, he declined and Baize told him to “fuck off.” Their voices were a “little bit above average” and Baize’s voice was elevated. The trailers were close together and had thin walls. She said Baize had an attitude and was rude to the officer. She heard the officer tell Baize to come down off the porch but Baize said “no” and walked into the trailer. Geary was upset that Baize engaged the officer and told

him to “fuck off.” When the officer came to the door and told Baize to come outside he refused and a scuffle ensued. (R.64, TR Trial, Vol.2 at 710-20).

After completing the original call, petitioner returned to his car. Baize was on his porch and asked if he was “going to move his fucking car.” Petitioner asked what he said and Baize repeated himself. Petitioner then told him to go in his house. Baize asked why petitioner was there and petitioner said he would have told Baize if he wanted him to know. Baize responded, “Fuck you” or “Fuck off.” Petitioner said, “Excuse me” and Baize repeated the profanity. Petitioner was concerned because Baize was shouting in the proximity of other trailers. (R.59, TR CX Corder at 356-61, 372-74; R.64, TR Trial, Vol.2 at 820-27).

Petitioner told Baize to come to him but Baize quickly turned to run off. Petitioner told him to stop but Baize went into the trailer and closed the door. Petitioner believed he had probable cause to arrest Baize for disorderly conduct because Baize was making unreasonable noise by shouting profanities late at night near other trailers and under Kentucky law there need only be a risk of disturbance. Petitioner said a light went on in one of the trailers which might indicate that someone was alarmed or disturbed by the incident. (R.59, TR CX Corder at 354, 359-65, 376-85, 400-07; R.64, TR Trial, Vol.2 at 688-89, 821-27, 834-35, 841-42).

Petitioner walked up the trailer’s porch, activated his body camera, and knocked on the trailer’s door. Baize answered the knock and appeared at the door

carrying a pizza box. Petitioner asked Baize to come outside because he had been hollering at him. Baize refused. Petitioner tried to grab him to bring him out to the trailer's deck. Baize told petitioner that he was "not allowed in here." Baize resisted by putting his hands on either side of the door. Petitioner felt he had no choice but to arrest him. Petitioner did not believe he was violating Baize's rights by putting his hand through the portal of the door to grab him. Deputy Allen aided petitioner because Baize was bracing himself against the door frame and was resisting petitioner's attempt to put him in hand restraints.¹ Baize admitted he resisted arrest and was tased when he refused to put his hands behind his back after being told multiple times to do so. Petitioner believed that the physical altercation with Baize presented a substantial risk of physical injury. (R.63, TR Trial, Vol.1 at 662-66; R.64, TR Trial, Vol.2 at 697-700, 731-35, 769-70, 791, 830-37, 843-45).

Petitioner acknowledged that he did not have Baize's consent to enter his home but he believed exigent circumstances existed and he was in hot pursuit because Baize did not stop as ordered. (R.59, TR CX Corder at 379-81, 388-91). Petitioner believed he had the right to arrest Baize in his doorway because it was a public place and he committed a crime outside his residence and ran inside to avoid him. Petitioner believed that once Baize committed a crime he could be arrested in his house. (R.65, TR Trial, Vol.3 at 884, 886).

¹ R.59, TR CX Corder at 382-97; R.63, TR Trial, Vol.1 at 658-62; R.64, TR Trial, Vol.2 at 685-91, 697, 709, 824-31, 837, 844-45; R.65, TR Trial, Vol.3 at 884-86.

Baize was charged with second degree disorderly conduct, second degree fleeing or evading police, and resisting arrest. Petitioner filled out an arrest citation and completed a use of force form as required by department policy. Baize was in jail for two weeks before his \$1,500.00 bond was posted. The charges were dismissed in December 2014.² In May 2015, the Bullitt County Sheriff's Department began an internal affairs investigation on Baize's arrest and petitioner was fired in June 2015. (R.63, TR Trial, Vol.1 at 481, 511, 514, 522, 553, 669; R.64, TR Trial, Vol.2 at 791-93).

A federal grand jury charged petitioner with violating 18 U.S.C. §242 by willfully depriving Baize of his constitutional right to be free from unreasonable seizures by arresting him without probable cause and unlawfully entering his home to arrest him and the offense involved the use of a dangerous weapon and resulted in bodily injury (Count 1). Count 2 charged that petitioner violated §242 by willfully depriving Baize of his constitutional right to be free from malicious prosecution by charging him with crimes without probable cause and knowingly including false and misleading information in the charging document. A jury convicted petitioner on both counts.

² The charges were dismissed without prejudice although Baize was not in court. The order of dismissal indicates that Baize's attorney stipulated probable cause for arrest. At trial, the government, over petitioner's objection, was allowed to admit into evidence a copy of the court order on which the stipulation of probable cause was redacted. (R.64, TR Trial, Vol.2 at 792-93; R.82, Voir Dire at 1169-84, 1206-07). (Government's Exhibit (GEX) 13).

Petitioner's guideline range was 27 to 33 months (offense level 18 and criminal history category I). He was sentenced to 27 months imprisonment and a 1-year term of supervised release. App.26a-31a. The Sixth Circuit affirmed the conviction and the sentence. App.2a-25a. Rehearing was denied. App.1a.

REASONS FOR GRANTING THE WRIT

1. This case illustrates the lower courts' difficulty in reconciling *Payton v. New York*, 445 U.S. 573 (1980) and *United States v. Santana*, 427 U.S. 38 (1976) when a warrantless threshold-doorway arrest is made. Petitioner was convicted of violating Deric Baize's civil rights by making an invalid, warrantless arrest of him. The case presented a question of fact of whether Baize was in his residence (*Payton*) or in the threshold- doorway (*Santana*) when he was arrested. The district court gave a jury instruction based solely on *Payton* and denied petitioner's request for an additional instruction based on *Santana*.

There is a split of authority in applying *Payton - Santana*. Some courts consider the threshold's boundaries to be inflexible while others extend the threshold a slight distance beyond the doorway. The latter approach is based on the recognition that *Payton* is not a threshold-doorway case and applies only when an arrest is made in the interior of a residence.

Certiorari should be granted to resolve the split of authority and reconcile the tension between *Payton* and *Santana* to enable lower courts to consistently decide

where *Santana*'s arrest zone ends and *Payton*'s protective zone begins.

2. To obtain a conviction for violating a person's civil rights under 18 U.S.C. §242, it must be proved that the defendant acted willfully. This case presents an important constitutional issue because the instruction defining "willfully" violates the reasonable doubt standard by allowing a conviction if the defendant (police officer) knew or recklessly disregarded the *possibility* that his seizure of an arrestee was constitutionally unreasonable.

3. Fed.R.Evid. 608 protects a witness's Fifth Amendment rights when the cross-examination "relates only to the witness's character for truthfulness." The question here is whether a defendant/witness who asserts the Fifth Amendment can be cross-examined under Rule 608 on matters remote and collateral to the offenses being tried. The Court's decision on this issue will have a substantial impact because Rule 608 applies to civil and criminal cases in federal courts and has been adopted by a number of States.

ARGUMENTS

- I. When a police officer is charged under 18 U.S.C. §242 with violating a person's civil rights by making an invalid, warrantless arrest, an instruction is prejudicial if it precludes the jury from deciding whether the arrestee was standing in the doorway (a public place) of his residence or was standing in his residence when he was arrested.**

A. Background

As shown above (pp.2-5), there was ample probable cause for Baize's arrest.

The evidence was not limited to petitioner's testimony.³ Baize admitted: arguing with petitioner; using profanity in an elevated voice late at night; the trailers had thin walls; it was "fairly easy" to hear what went on outside; and some people would find his language offensive. Independent of that evidence, the testimony of Tara Geary and Deputy Allen established probable cause.⁴

Ms. Geary said the trailers were close together and she was inside Baize's trailer which had thin walls. She said Baize talked to petitioner about five minutes. When he declined to move his car, Baize in an elevated voice told him to "fuck off." She heard petitioner tell Baize to come down off the porch but he refused and went into the trailer.

Deputy Allen was about 50 to 60 feet from petitioner's vehicle which was parked in front of Baize's trailer. He heard two raised voices shouting. One

³ Petitioner's request that Baize come outside his trailer is consistent with officer safety because the "risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter." *Maryland v. Buie*, 494 U.S. 325, 333 (1990). An officer's presence in a doorway is fraught with danger. Indeed, "a position within the triangular area radiating from the front door [is] known as the "fatal funnel" because of the higher risk of officers being shot when standing there[.]" *United States v. Sutton*, 336 F.3d 550, 551 (7th Cir. 2003). *See also United States v. Archibald*, 589 F.3d 289, 291, n.3 (6th Cir. 2009) ("officers testified that doorways present greater safety risks and are termed 'fatal funnel[s]' because they allow for increased vulnerability to attack.").

⁴ *See Collins v. Commonwealth*, 2004 WL 315035 (Ky.Ct.App. 2004) (unpublished) (finding probable cause for disorderly conduct in a case very similar to petitioner's case. "Kentucky case law is very sparse on disorderly conduct" and thus inferences must be drawn "to determine how the Kentucky courts would apply the statute[.]" *Nails v. Riggs*, 195 F.App'x 303, 312 (6th Cir. 2006).

sounded like it was giving commands. He told another officer that petitioner was not shouting. Allen said people would be offended by cursing and trailer occupants could be annoyed, alarmed, or offended by such behavior.

“Probable cause requires only the probability of criminal activity, not some type of ‘prima facie’ showing.” *Kinlin v. Kline*, 749 F.3d 573, 578 (6th Cir. 2014) (citation omitted). Here, Baize was shouting profanities from his porch, late at night in a residential area. The noise was “unreasonable.” (“‘Reasonable’ in this context depends upon the time, place, nature and purpose of the noise.” Ky.Rev.Stat. (KRS) §525.060, Commentary. Deputy Allen heard shouting from 50 to 60 feet away and Ms. Geary heard the profanity while she was inside the trailer. Their evidence alone established probable cause for disorderly conduct.

A peace officer’s role includes “restoring order.” *Johnson v. City of Memphis*, 617 F.3d 864, 868 (6th Cir. 2010). Baize’s conduct warranted further investigation so petitioner could ascertain the reason for such behavior, *Vangel v. Szopko*, 672 F.App’x 543, 547 (6th Cir. 2016). Based on what petitioner saw and heard, there was probable cause to arrest Baize for disorderly conduct because Kentucky law does not require that the offender **actually** intend “to cause public inconvenience, annoyance, or alarm[.]” Ky.Rev.Stat. (KRS) §525.060(1). App.40a. The statute is violated if a person wantonly creates a **risk** of “public inconvenience,

annoyance, or alarm” by making “unreasonable noise.” KRS §525.060(1)(b).⁵ Petitioner’s actions simply reflect the “split-second” judgment that police officers are “often forced to make.” *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1775 (2015).⁶ Making unreasonable noise can create exigent circumstances that justify a warrantless entry into a residence. *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996).

Petitioner believed he was in hot pursuit of Baize who went into his trailer rather than obey his order to come to him.⁷ *Santana*, 427 U.S. at 42-43; *Kentucky v. King*, 563 U.S. 452, 460 (2011) (“Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect”); *Smith v. Stoneburner*, 716 F.3d 926, 931 (6th Cir. 2013) (citation omitted) (“Under the hot pursuit exception, an officer may chase a suspect into a private home when the criminal has fled from a public place”).⁸

⁵ An arrest is valid as long as there is probable cause for one offense. *Devenpeck v. Alford*, 543 U.S. 146, 153-55 (2004); *Cain v. Irvin*, 286 F.App’x 920, 925 (6th Cir. 2008).

⁶ Baize could be arrested without a warrant for disorderly conduct and fleeing and evading because a Kentucky peace officer is authorized to “make an arrest ... Without a warrant when a misdemeanor, as defined in KRS §431.060, has been committed in his or her presence[.]” KRS §431.005(1)(d).

⁷ As to hot-pursuit, petitioner’s proposed instruction (App.48a) is substantially similar to the court’s instruction. (App.38a).

⁸ See *Gutierrez v. Cobos*, 2015 WL 13239104 at *12 (D.N.M. 2015) affirmed, 841 F.3d 895 (10th Cir. 2016) (district court in a 42 U.S.C. §1983 case concluded that “the interpretation and reach of *Welsh* [*v. Wisconsin*, 466 U.S. 740 (1984)], *Santana*, and *Payton* was not clear, and [a deputy sheriff] could reasonably have

Petitioner's police training covered exceptions to the warrant requirement (R.63, TR Trial, Vol.1 at 586, 591-600) and included *Santana*, 427 U.S. at 39-40 in which the defendant was involved in a drug deal and was standing "in the doorway" of her home holding a brown paper bag. She "retreated into the vestibule of her house" when police approached. *Id.* at 40. The officers, who had probable cause to arrest and were in "hot pursuit," followed her through the door, and caught her in the vestibule. *Id.* at 40-43. *Santana* held that the threshold of one's dwelling is a public place where there is no expectation of privacy. *Id.* at 42. *See also United States v. Watson*, 423 U.S. 411 (1976) (warrantless arrest in a public place upon probable cause does not violate the Fourth Amendment).

Petitioner's instructor was not familiar with *Talbott v. Commonwealth*, 968 S.W.2d 76 (Ky. 1998) (which follows *Santana*) and when defense counsel proposed to show her the case the government objected. Defense counsel contended that the jury should be informed that case law supported petitioner's position that he acted within the law. (R.63, TR Trial, Vol.1 at 606-10). The district court noted there appeared to be "competing case law" and it would "hash that out" in the instructions. *Id.* at 610.

B. Petitioner's request for an instruction based on *Santana*

concluded that these cases did not proscribe warrantless entry into a home when in hot pursuit of a suspected misdemeanor." In affirming the district court, the Tenth Circuit said, "the law is unsettled even now as to whether an officer's hot pursuit of a misdemeanor suspect into a home violates the Fourth Amendment." *Id.* at 904.

Defense counsel argued that under *Santana* the jury should be instructed to decide whether Baize was standing in his home or in a public place (the doorway) when he was arrested. Denial of such an instruction foreclosed a viable defense because the jury would only be given part of the law regarding warrantless arrests. (R.65, TR Trial, Vol.3 at 898-901).

Over counsel's objection, the court instructed the jury (in relevant part):

Probable cause to arrest someone is present if an objectively reasonable police officer under the circumstances would conclude that there was a fair probability that a person had committed or was committing a crime.

If you find that the defendant arrested Deric Baize without probable cause to believe [he] had committed a crime, then you may find that the arrest at issue was unreasonable.

Arrests that occur **in someone's home** are presumed unreasonable unless one of three things are true: (1) the officer gets an arrest warrant authorized by a judge; (2) the person gives the officer consent to enter his or her home; or (3) there is an emergency situation—often referred to as exigent circumstances. Emergency situations may include a serious threat to someone's health or safety, the imminent destruction of evidence, or the hot pursuit of a fleeing suspect.

If you find that the defendant arrested Deric Baize in his home without a warrant, consent, and in the absence of an emergency situation, then you may find that the arrest at issue was unreasonable.

App. 38a, emphasis original; R. 65, TR Trial, Vol.3 at 912-17.

Defense counsel's proposed instruction provided in relevant part:

[T]he doorway of one's home is considered a "public place" where one has no reasonable expectation of privacy and is thus subject to a warrantless arrest. Even if, the arrest occurs as a result of an officer reaching farther than the doorway area, the act of retreating into a home does not thwart an otherwise legal arrest pursuant to

probable cause. If this is the case, the above restrictions relating to a police officer entering a home to make an arrest do not apply.

App. 48a. Case law including *Santana*, 427 U.S. at 42, supports an instruction that the doorway is a public place.⁹

Payton, 445 U.S. at 576, held that the Fourth Amendment “prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest” and “searches and seizures inside a home without a warrant are presumptively unreasonable.” *Id.* at 586; *Welsh v. Wisconsin*, 466 U.S. at 749. The district court explained that its instruction (App. 38a) was based on *Payton*’s holding, 445 U.S. at 590, that “the Fourth Amendment has drawn a firm line at the entrance to the house [and] [a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” (R.65, TR Trial, Vol.3 at 925-27). But without petitioner’s proposed *Santana*-based instruction the

⁹ See *United States v. Gori*, 230 F.3d 44, 54 (2d Cir. 2000). (“No one in a place opened to public view can expect privacy in that place and at that time, whether the suspect is on the threshold, in a vestibule or at the far end of an exposed interior room”); *United States v. Vaneaton*, 49 F.3d 1423, 1427 (9th Cir.1995), (defendant who opened motel room door in response to police officers’ knock “exposed himself in a public place”); *United States v. Herring*, 582 F.2d 535, 543 (10th Cir. 1978) (entrance to motel room was not a “private place”); *United States v. Botero*, 589 F.2d 430, 432 (9th Cir. 1978) (under *Santana* the doorway of residence is a public place); *United States v. Crapser*, 472 F.3d 1141, 1148 (9th Cir. 2007) (“where officers use no force, threats, or subterfuge, a suspect’s decision to open the door exposes him to a public place, and the privacy interests protected by *Payton* are not violated”); and *United States v. Thomas*, 430 F.3d 274, 275-76 (6th Cir. 2005) (defendant who answered officers’ knock on his door and was asked to come outside to talk to investigators, did not exit the house as a result of physical force or any other conspicuous show of authority by the police).

jury had to believe that *Payton*'s presumption was un rebuttable and the illegality of Baize's arrest was a *fait accompli*.

In upholding the district court's ruling, the Sixth Circuit stated (App. 11a):

Defendant's body camera shows Baize open his inner door, leaving the screen door shut. Defendant was unable to cross the threshold and touch Baize without opening the screen door himself (which he did), and all the while Baize remained several feet removed from his threshold, inside of his home. Baize was not exposed to the same degree of public view, speech, hearing, and touch as though he was on his porch. And we have presumed that a person who is near, but interior to, his doorway is entitled to the benefit of *Payton*'s 'threshold' rule.

But *Payton* does not articulate a "threshold rule" because it does not involve a doorway or threshold arrest. *Payton* involves a warrantless entry into the *interior* of a home and does not involve exigent circumstances. *Id.* 445 U.S. at 583. Moreover, the Sixth Circuit's presumption about *Payton*'s "threshold rule" not only nullifies *Santana* but it also highlights the difficulty of reconciling *Payton* and *Santana* which inevitably leads to inconsistent results.

C. The lower courts improperly made findings of fact

Courts citing *Santana*, use the words "threshold" and "doorway" interchangeably.¹⁰ Here, the district court considered the threshold and doorway to

¹⁰ See e.g., *State v. Shellenbarger*, 140 Idaho 185, 188, 90 P.3d 935, 938 (Ct.App. 2004); (defendant "was standing in the open doorway of the motel" *i.e.*, "a public place"); *State v. Anderson*, 163 Wis.2d 1093, 474 N.W.2d 529, n.1 (Ct.App. 1991) (Table – unpublished) (defendant arrested in doorway of his apartment); *Talbott v. Commonwealth*, 968 S.W.2d at 81 (when defendant was arrested she "was standing

be different locations and concluded that a “reasonable jury” would not find that Baize was “in the doorway versus the house.” (R.65, TR Trial Vol.3 at 930-31). Such fact-finding, however, is within the exclusive province of the jury and the district court precluded the jury from deciding the factual issue of whether Baize was standing in his home (*Payton*) or in a public place (the doorway-*Santana*) when he was arrested. The Sixth Circuit’s presumption regarding *Payton*’s “threshold rule” is no less an improper finding of fact and unjustifiably extends *Payton*’s reach. Petitioner’s proposed instruction (App.48a) would have allowed the jury to resolve the factual issue of whether *Payton* or *Santana* governed.

D. Split of Authority – Difficulty in Reconciling *Payton* and *Santana*

[C]ourts across the country have had difficulty reconciling *Santana* and *Payton* with respect to warrantless doorway arrests and ... some courts have held that the police may effect a warrantless arrest when an individual voluntarily opens his door in response to a police officer’s knock.

Smith v. State, 72 Md.App. 450, 466, 531 A.2d 302, 310 (1987) (citations omitted).

See also Sparing v. Village of Olympia Fields, 266 F.3d 684, 689 (7th Cir. 2001)

(“The Supreme Court has already considered the question of dividing outside from

in the doorway of her home, a public place where she had no reasonable expectation of privacy”); *Lawson v. State*, 299 Ga.App. 865, 870, 684 S.E.2d 1, 5 (2009) (“one who is in the threshold of his dwelling is in a public place and not within the dwelling”); *Vaneaton, supra*, 49 F.3d at 1425.

inside when the home is involved, although not completely resolving the question in [*Santana*”).¹¹ The Eleventh Circuit has said that no cases from this Court

have resolved the question whether *Payton* or *Santana* applies to the arrest of a person who, while standing firmly inside the house, opens the door in response to a knock from the police and is then pulled outside the unambiguous physical dimensions of the home.

McClish v. Nugent, 483 F.3d 1231, 1249 (11th Cir. 2007). *See also People v. Garvin*, 30 N.Y.3d 174, 188, 88 N.E.3d 319, 346, 66 N.Y.S.3d 161, 210 (2017) (Wilson, J. dissenting) (emphasis added) (noting *Payton*’s “failure to grapple squarely with the legacy of” *Santana* and that one “of the most vexing questions” on this issue is “***where is the threshold***”). That “vexing question” is at the root of the courts’ difficulty in reconciling *Payton* and *Santana*. *See e.g., State v. Mikkalson*, 2008 WL 5215866, at *3 (Minn.Ct.App. 2008) (unpublished) (citations omitted) (emphasis added). “Although ‘threshold’ is not explicitly defined, the facts in [Minnesota Supreme Court] cases following *Santana* indicate that ***the ‘threshold’ extends from the frame of the door to a short distance inside the house.***” *See also Vaneaton*, 49 F.3d at 1430, n.9 (Tashima, J., dissenting).

¹¹ “[A] number of issues were left unanswered by the *Payton* court, including (a) its effect on cases which, relying on *United States v. Santana*, [citation omitted] upheld nonexigent warrantless arrests initiated at the threshold when a suspect voluntarily opens the door to the police[.]” *Watts v. State*, 305 N.W.2d 860, 862 fn.1 (Minn. 1981) (citation omitted). “*Payton* and *Welsh* involved circumstances where a resident of a home voluntarily opened the door, and yet the Supreme Court did not weigh this as a factor in determining the lawfulness of the warrantless entries in those cases.” *Strutz v. Hall*, 308 F.Supp.2d 767, 783 (E.D. Mich. 2004).

Qualified immunity cases illustrate the difficulty in reconciling *Santana* and *Payton*. See e.g., *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (collecting cases) (“federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.”). To overcome a qualified immunity defense, “a plaintiff must show that ...(1) the defendant deprived him of a constitutionally protected right, and (2) the right was ‘clearly established’ at the time of the violation.” *Gradisher v. City of Akron*, 794 F.3d 574, 583 (6th Cir. 2015) (citation omitted). See also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Vangel v. Szopko*, 672 F.App'x at 545.

In *Brenay v. Schartow*, 709 F.App'x 331, 333 (6th Cir. 2017), police officers were granted summary judgment on a qualified immunity defense in a §1983 case. The police went to Brenay’s home in response to Brenay, Jr.’s alleged violation of a protective order. Brenay, Sr. answered the door when the police rang the bell and agreed to get his son. When they returned, Brenay, Sr. opened the glass storm door but remained inside the residence. Brenay, Jr. “stood behind his father, six inches from the door, a foot from the outside, and a ‘few feet’ from Officer Sierras.” *Id.* at 332. Since Brenay, Jr. declined to go outside, the officers questioned him “through the doorway.” *Id.* Brenay Sr. became frustrated with Sierras’s attitude and let go of the storm door. As the door swung shut, Brenay, Jr. “retreated back into the

house[.]” *Id.* at 332. Sierras “lunged” through the doorway and grabbed Brenay, Jr. by the wrist. Sierras continued into the hallway. Brenay, Jr. began to struggle and was eventually subdued and handcuffed by the officers. *Id.*

Whether the officers were entitled to qualified immunity depended on whether the Brenays’ constitutional right against unlawful entry was “clearly established.” *Brenay*, 709 F.App’x at 333.¹² Only the “hot pursuit” exception to the warrant requirement was viable in *Brenay* and whether it applied

depends on whether Brenay, Jr. was standing in a public place when Officer Sierras told him that he was under arrest. We know that Brenay, Jr. was standing in the foyer, six inches from the open doorway, for most of his interaction with the officers.

Id. at 334. Citing *Santana*’s holding 427 U.S. at 42, that a person who stands in the doorway is in a public place, the Sixth Circuit explained,

this circuit has not addressed whether a person who opens his door voluntarily to talk to police loses his reasonable expectation of privacy within the meaning of *Santana*. Our sister circuits are split on the issue. *See* Wayne LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* §6.1(e) (5th ed. 2016). And how the analysis might change when the person is standing six inches back from the doorway is even less settled.

¹² “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). “[F]or a constitutional right to be clearly established ... the question is whether the defendant[] had ‘fair warning’ that [his] actions were unconstitutional.” *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005). *See also United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

Brenay, 709 F.App'x at 334. “[H]ow *Santana* would apply to this case is hardly ‘beyond debate.’ That the officers violated the Brenays’ constitutional rights when they entered the Brenays’ home would not be clearly established.” *Id.* at 334-35. *See also Vaneaton*, 49 F.3d at 1425 (upheld warrantless arrest of defendant who answered police knock on motel room door and “was standing at the doorway but just inside the threshold”) and *United States v. Mason*, 661 F.2d 45, 47 (5th Cir. 1981) citing *Santana* (defendant “was arrested at the door of his home,” *i.e.*, a “public place” in which he “had no protectable expectation of privacy”).

In *Hameline v. Wright*, 2008 WL 2696920, *2 (W.D.Mich. 2008) (unpublished) Hameline’s vehicle was found in a ditch. Deputy Wright went to Hameline’s home to investigate. Wright opened the glass storm door and knocked on the structural door, which opened into the house. Hameline opened the structural door and Wright, who smelled intoxicants, put his foot inside the door to prevent it from being closed. Wright questioned Hameline who declined to come out of the house and tried to close the door which “bounced off” Wright’s foot. As Hameline “attempted to back-away from the door,” Wright grabbed his wrist and “was drawn further into the house” as Hameline “moved away from the door.” Hameline was handcuffed and charged with “operating while intoxicated.”

In concluding that Wright was “entitled to qualified immunity with regard to the entry[,]” the court noted that “the holdings of *Vaneaton* and particularly *Mason*

would suggest to a reasonable person that Deputy Wright did not violate the Fourth Amendment when he reached into [Hameline's] house to grab [his] wrist.” *Hameline*, *Id.* at *9. See also *Lawrence v. Bloomfield Township*, 313 F.App'x 743, 748 (6th Cir. 2008) (no violation of constitutional rights where arrestee was “physically and belligerently denying [police] access” to home and police pulled him from doorway).

Brenay, *Mikkalson*, *Hameline*, and *Vaneaton* show that the boundaries of a threshold are not absolute for purposes of a warrantless arrest and that doorway arrest cases present a jury with a question of fact whether *Payton* or *Santana* governs. Thus, it cannot be found that petitioner's conduct violated “clearly established law” when he seized Baize in the doorway of the trailer. Baize's location presented a question of fact for a jury because reasonable people can view the videotape from petitioner's body camera (GEX 3A) and decide whether Baize is standing in *Santana*'s arrest zone or in *Payton*'s protective zone. (GEX 3A, 00:21-01:05). That factual issue could have been properly resolved if petitioner's proposed *Santana* instruction had been given. App.47a-48a.

McClish v. Nugent, *supra*, offers an insightful analysis of the *Payton* – *Santana* conflict and it underscores the difficulty courts have in reconciling those cases because the Eleventh Circuit notes that “the law of other circuits might have permitted an arrest under facts similar to those presented here.” *McClish*, 483 F.3d

at 1249 citing *Vaneaton*, *supra*, 49 F.3d at 1426–27 and *United States v. Carrion*, 809 F.2d 1120, 1127–28 (5th Cir. 1987) (defendant’s “arrest occurred as he stood in the doorway of his hotel room” where he “had no protectable expectation of privacy”).¹³ Indeed, the Ninth Circuit noted in *United States v. Quaempts*, 411 F.3d 1046, 1048 (9th Cir. 2005) that “[i]n *Vaneaton*, we extended” *Santana* and the *Vaneaton* majority “concluded that when a person opens the door in response to a police knock, and thereby stands on the threshold of the home, that person is no longer in a private place.” “The critical fact in both *Santana* and *Vaneaton* was that the defendant was not in the house, but in the doorway and hence in a public, not a private place.” *Quaempts*, *Id.*

The Florida Supreme Court has noted there is

a line of cases which have held ... that an arrest at or in the threshold of a residence does not involve an entry and, therefore, does not implicate *Payton* considerations. These cases have characterized the threshold area as a public place wherein a warrant is not required to effectuate a valid arrest.

Byrd v. State, 481 So.2d 468, 472 (Fla. 1985) (collecting cases). Thus, there are not only unresolved issues in applying *Santana* and *Payton* but there is also a split of authority on their resolution.

¹³ See also *United States v. Whitten*, 706 F.2d 1000, 1015-16 (9th Cir. 1983) overruled on other grounds, see *United States v. Rodriguez-Rodriguez*, 441 F.3d 767, 771 n.2 (9th Cir. 2006) (defendant, who answered police officer’s knock on door and was arrested in doorway of hotel room was in a public place).

In *McClish*, sheriff's deputies went to McClish's trailer to arrest him. Deputy Terry knocked on the door and McClish said when he opened the door, Terry "reached into the house, grabbed him, and forcibly pulled him out onto the porch." 483 F.3d at 1235-36. McClish claimed under §1983 that he was subjected to an illegal warrantless arrest. *Id.* at 1236-37. Although the arrest was held to be unlawful because "Terry crossed *Payton*'s firm line and physically hauled McClish out of his home" *id.* at 1248, Terry was still entitled to qualified immunity, *id.* at 1249, because "[i]n light of *Santana* ... and since McClish was standing within arm's reach of an officer at the front door, we cannot say that the illegality of McClish's arrest was clearly established at the time of the arrest." *McClish*, 483 F.3d at 1248-49. The court concluded that:

in light of the apparent tension between *Santana* and *Payton*, we have no basis upon which to conclude that a reasonable law enforcement officer fairly would have *known* that the arrest alleged by McClish, within the house yet within reach of an officer standing outside, was unlawful.

Id. at 1249 (emphasis original).¹⁴

In a concurring opinion, Judge Anderson explained that *Payton* and *Santana* are fundamentally different. *Payton*'s "narrow" issue was "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." *McClish*, 483 F.3d at 1254 (Anderson, J., concurring) quoting *Payton*, 445 U.S. at

¹⁴ "[A] reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious." *Kisela v. Hughes*, 584 U.S. ___, ___, 138 S.Ct. 1148, 1154 (2018).

575. *Payton* “was not a doorway case” because it “involved officers penetrating well into the interior of a suspect’s home, not simply reaching through an opened door.” *Id. Santana*, however,

was a doorway arrest case, and is the Supreme Court’s last and only word on the Fourth Amendment rule at the opened door. It ***explicitly rejected a test at the threshold that would depend on the plane of the door.***

McClish, 483 F.3d at 1254 (Anderson, J., concurring) (emphasis added). Although the Court “specifically used the word ‘threshold’” in *Santana*, 427 U.S. at 42, it

declined to accord that concept any significance in defining the scope of the warrant requirement; and, even though *Santana*’s body was partially inside that property-law threshold, adopted an expectation-of-privacy test and held that the arrest would have been constitutional... *Santana* therefore states the proper test at the voluntarily opened doorway.

McClish, 483 F.3d at 1254 (Anderson, J., concurring).¹⁵ *Payton* said “nothing specific about arrests at the opened doorway” and “did not overrule *Santana*.” *Id.* at 1255, 1256. Moreover, *Payton*’s language about “entrance” and “threshold” was “used rhetorically to refer to ‘the home.’” *Id.* at 1258. “*Payton* therefore cannot be read to establish a disfavored bright-line rule at the plane of the opened doorway, especially in light of *Santana*’s countervailing holding that is directly on point.” *Id.*

¹⁵ A threshold is “the plank, stone, or piece of timber that lies under a door” or “the place or point of entering or beginning.” <https://www.merriam-webster.com/dictionary>. A doorway can also be described as “the place or point of entering” and petitioner’s case shows the spatial boundary of a threshold is broader than the definition suggests.

Payton simply did not speak to the doorway arrest scenario, and the rhetorical use of the word ‘threshold’ should not be relied upon as having decided the question of the appropriate test at the opened doorway. *Payton* nowhere opined about whether a plane-of-the-door or an expectation-of-privacy test governs at the opened doorway. The ***Payton holding is thus essentially neutral with respect to the proper rule for doorway arrests.*** *Santana* ... explicitly rejected a property law, plane-of-the-door rule, and said that a warrantless arrest is proper so long as the suspect has no expectation of privacy. It therefore contains the controlling principle of law in the doorway arrest situation.

McClish, 483 F.3d at 1255 (Anderson, J., concurring). Judge Anderson also noted that “most courts considering the doorway arrest situation have followed the *Santana* rule.” *Id.* at 1262 (citing cases). Although *Santana* permitted a warrantless arrest at the threshold, “***common sense tells us that an officer conducting an arrest at the literal threshold would necessarily cross the plane of the door in a great many threshold arrests.***” *Id.* at 1256, n.5 (Anderson, J., concurring) (emphasis added). *Santana* authorizes such an arrest. See *Mikkalson*, *Brenay*, *Hameline*, and *Vaneaton*, all *supra*. See *State v. Shellenbarger*, 90 P.3d at 938 n.1.

Shellenbarger claims that he was two to three feet inside the motel room. However, the record as to his position within the doorway is unclear. The officers testified that they were outside the door, two to three feet from Shellenbarger. If the officers were standing two feet from the threshold, Shellenbarger would have been either on the threshold or within a foot of the threshold. The arresting officer testified that he took one step into the doorway, placing him into the doorway a distance equal to half the length of the door. Regardless of whether Shellenbarger was on the threshold or two to three feet from the threshold, he was in the open doorway and, under *Santana*, was in a public place.

Petitioner has shown that in criminal cases, like qualified immunity cases, the law regarding warrantless threshold-doorway arrests is not “clearly established.” Thus, it cannot be found that Baize’s arrest violated his constitutional rights. In qualified immunity cases civil liability cannot be predicated on conduct that does not violate “clearly established” law. It follows that in criminal cases, where guilt must be proved beyond a reasonable doubt, a conviction cannot be based on conduct which does not violate “clearly established” law.

Whether an arrest violates a “clearly established” constitutional right is a question of fact. But here, the jury was precluded from deciding the factual issue of whether Baize was in *Santana*’s arrest zone or *Payton*’s protective zone because the district court’s instruction (App.38a-39a) was based solely on *Payton* despite evidence that supported petitioner’s proposed *Santana* instruction. App.47a-48a.

Certiorari should be granted because petitioner’s case will allow the Court to resolve the split of authority and the difficulty in reconciling *Santana* and *Payton*. The Court’s guidance will ensure consistency in lower court rulings on warrantless threshold–doorway arrests and will assist law enforcement officers who often have to make a split-second judgment whether such an arrest is justified.

II. A jury instruction defining “willfully” violates the reasonable doubt standard by allowing a police officer to be convicted under 18 U.S.C. §242 if he knew or recklessly disregarded the *possibility* that his seizure of an arrestee was constitutionally unreasonable.

A. Background

“[W]illfulness is an element of an offense under 18 U.S.C. §242.” *United States v. Sease*, 659 F.3d 519, 525 (6th Cir. 2011). The jury was instructed that:

A person acts willfully if he acts voluntarily and intentionally, with the specific intent to do something the law forbids. You may find that the defendant acted willfully if you find that he acted in open defiance or reckless disregard of Deric Baize’s right to be free from unreasonable seizure. In other words, the defendant acted willfully if he seized Deric Baize knowing or recklessly disregarding the *possibility* that the seizure was constitutionally unreasonable.

App. 42a (emphasis added). Defense counsel proposed the following instruction defining “willfully.” App. 44a.

The word ‘willfully’ as that term is used in the indictment or in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

The court’s instruction is flawed because: 1) an act cannot be intentional *and* reckless; and 2) it relieved the government of proving guilt beyond a reasonable doubt because petitioner could be convicted if he knew or recklessly disregarded the *possibility* that his seizure of Baize was constitutionally unreasonable.

The Sixth Circuit held that the error was not preserved for review because “defense counsel made a blanket, general objection to *any* instruction on willfulness that did not mirror the one he proposed.” App. 15a (emphasis

original).¹⁶ The objection, however, was coupled with a specific instruction that was substantially different from the court's instruction. (R.65, TR Trial Vol.3 at 923-24). Thus, Fed.R.Crim.Proc. 30(d)'s objective was met because the district court was aware of the objection and the proposed instruction.

B. Acting in open defiance or reckless disregard

“Whoever under color of any law...willfully subjects any person...to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States” violates 18 U.S.C. §242. App.49a.

A person acts ‘willfully’ for purposes of section 242 when he acts with ‘a specific intent to deprive a person of a federal right made definite by decision or other rule of law,’ or ‘in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.’

United States v. House, 684 F.3d 1173, 1199–1200 (11th Cir. 2012) quoting *Screws v. United States*, 325 U.S. 91, 103, 105 (1945).¹⁷ Although “willful” may be construed to mean “reckless disregard,” *see House, supra*, those circuits that have instructions defining “willfully” or instructions on §242 do not use the word

¹⁶ Fed.R.Crim.Proc. 30(d) provides in relevant part, A party “must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate.”

¹⁷ Acting willfully requires a defendant to have the purpose of depriving a person of a specific, constitutional right. *United States v. Shafer*, 384 F.Supp. 496, 500 (N.D. Ohio 1974) citing *Screws*, 325 U.S. at 101. “Typically, a §242 defendant has pre-existing malice toward his victim...” *Shafer, Id.* The government has not shown that to be the case here.

“reckless” in those instructions. *See* Fifth Circuit Pattern Jury Instructions, Criminal, §1.38 (2015):

[W]illfully... means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

In defining “willfully” as an element of a §242 violation, the Fifth Circuit’s Pattern Instructions inform the jury:

[]That the defendant acted willfully, that is, that the defendant committed such act or acts with a bad purpose or evil motive to disobey or disregard the law, specifically intending to deprive the person of that right...

Id. at §2.12.¹⁸

The absence of the word “reckless” in the pattern instructions suggests that a willful act cannot be a reckless act. Moreover, Instruction 15 (App. 42a) includes multiple mental states (willfully, intentionally, knowing, and recklessly) that are likely to cause confusion and raise a question whether there was unanimous

¹⁸ *See also* Third Circuit Model Jury Instructions, Criminal, §5.05 (2009) defining “willfully;” Eighth Circuit Model Jury Instructions, Criminal, Instruction 7.02 (2014) – defining “willfully;” Tenth Circuit Pattern Jury Instructions, Criminal, Instruction 2.17 – Violation of 18 U.S.C. §242 (2011); and Eleventh Circuit Pattern Jury Instructions, Criminal, Instruction O8 – Violation of 18 U.S.C. §242 (2016). Notwithstanding *House’s* reference to *Screws*, *both supra*, in defining “willfully,” the Eleventh Circuit Pattern Jury Instructions, Criminal, Instruction B9.1A (2016) states in relevant part, “The word ‘willfully’ means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law.” The Sixth Circuit’s Pattern Jury Instructions (Chap. 2.05) do “not recommend any general instruction defining the term ‘willfully,’” Committee Commentary 2.05.

agreement (Fed.R.Crim.Proc. 31(a)) or even a majority agreement on the mental state? *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). The need for clarity could explain why circuits that have instructions defining “willfully” or have §242 instructions do not use the word “reckless.”

Kentucky law illustrates the point because acting intentionally requires a conscious objective to achieve a result; while one who acts knowingly is aware of the nature of his conduct. *See* KRS §501.020(1)(a) and (b). A person acts recklessly, however, when he fails to perceive the risk that a certain result will occur. *See* KRS §501.020(3). Thus, an intentional or knowing act cannot be a reckless act and Instruction 15 is prejudicial because it allows a conviction on inherently contradictory mental states. The contradiction will persist as long as *Screws*, 325 U.S. at 105, is read to allow a §242 conviction to be based on “reckless disregard.” *Screws*, 325 U.S. at 105. Thus, *Screws* should be revisited. But there is a more fundamental, constitutional problem with Instruction 15.

C. The *possibility* that the seizure was constitutionally unreasonable

The Due Process Clause requires that “[g]uilt in a criminal case must be proved beyond a reasonable doubt[.]” *Brinegar v. United States*, 338 U.S. 160, 174 (1949); *In re Winship*, 397 U.S. 358, 364 (1970). Instruction 15 is unconstitutional because it allowed petitioner to be convicted if he seized Baize “knowing or recklessly disregarding the *possibility* that the seizure was constitutionally

unreasonable.” App. 42a (emphasis added). The government was thereby relieved of its burden of proving guilt beyond a reasonable doubt because a guilty verdict could be returned on the *possibility* that the arrest was unconstitutional.

Petitioner’s proposed instruction defining “willfully” (App. 44a) should have been given because it was “substantively correct” and was “not substantially covered in the charge given to the jury.” *United States v. Bennett*, 874 F.3d 236, 242–43 (5th Cir. 2017) (citations and internal quotation marks omitted). The failure to give the proposed instruction “seriously impair[ed] the [petitioner’s] ability to present effectively a particular defense” because he had to defend himself against the *possibility* that he committed a crime. *Bennett, Id.*

Instruction 15 precludes a law enforcement officer from acting legally because there is always a possibility that a court or legislative body could change the law. (See n.14 on p.23 of this petition). The instruction is prejudicial because it is not the “*possibility*” that the seizure was constitutionally unreasonable. Rather, the seizure must *actually* be unconstitutional and the instruction must clearly convey that point to the jury because the defendant must act with “an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.” *Screws*, 325 U.S. at 104; *House*, 684 F.3d at 1202; *United States v. Hayes*, 589 F.2d 811, 820 (5th Cir. 1979). To act “willfully” the defendant must in fact

violate a constitutional right that is “specific and definite.”¹⁹ That cannot be the case where, as here, petitioner’s conduct does not violate a “clearly established” constitutional right.²⁰

The Sixth Circuit cited the district court’s Instruction 12 to reject petitioner’s argument. App.16a. That instruction states in pertinent part that the government had to prove petitioner deprived Baize of his right

to be free from unreasonable seizures, which includes the right not to be arrested without probable cause, the right to be free from warrantless arrest in one’s home absent consent or exigent circumstances, and the right to be free from malicious prosecution.

App. 38a. According to the Sixth Circuit, Instruction 12 required the jury “to specifically find that Baize’s rights were actually violated, which they did.” App.16a. But, “[a] jury is presumed to follow its instructions,” *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012) (citation omitted); *Evans v. Michigan*, 568 U.S. 313, 328 (2013). So which instruction did the jury follow? If it were Instruction 15, petitioner could have been convicted if he seized Baize “knowing or

¹⁹ See *United States v. Figueroa*, 729 F.3d 267, 277-78 (3d Cir. 2013); *United States v. Bradley*, 196 F.3d 762, 769 (7th Cir. 1999); *United States v. Brugman*, 364 F.3d 613, 616 (5th Cir. 2004); and *United States v. Mohr*, 318 F.3d 613, 619 (4th Cir. 2003).

²⁰ The scarcity of Kentucky law on disorderly conduct (*Nails, supra*.) and doubt that petitioner’s conduct violated “clearly established” law (Payton - *Santana*) militate against a finding that he acted willfully. Activating his body camera likewise refutes the notion that for purposes of §242 he acted willfully or with a “pre-existing malice” toward Baize. *Shafer*, 384 F.Supp. at 500.

recklessly disregarding the *possibility* that the seizure was constitutionally unreasonable.” App. 42a (emphasis added).

The contradiction between Instructions 12 and 15 undermines the integrity of the verdict and violates the constitutional requirement that guilt must be proved beyond a reasonable doubt. Instruction 15 is plainly erroneous because it conflicts with a fundamental, constitutional right; affected petitioner’s substantial rights; and “seriously affected the fairness, integrity or public reputation of judicial proceedings.” *United States v. Olano*, 507 U.S. 725, 732 (1993); *Puckett v. United States*, 556 U.S. 129, 135 (2009).

The issue here implicates a core principle of constitutional law that is likely to recur in §242 prosecutions. This case also shows the need for the Court to decide whether “reckless disregard” remains an appropriate mental state on which to base a §242 conviction. Certiorari should therefore be granted.

III. Fed.R.Evid. 608 allows a defendant-witness to assert his Fifth Amendment right against self-incrimination when the government seeks to cross-examine him on matters that are remote and collateral to the offenses for which he is on trial.

A. Background

In 2009, petitioner sought employment with the Audubon Park Police. He indicated on a pre-employment questionnaire that he lied twice (in 1991 and 1998) to internal affairs (IA) investigators when he was a Louisville police officer. When the government sought to cross-examine petitioner on that matter, he contended

that under Fed.R.Evid. 608(b) he did not waive his Fifth Amendment right by testifying. He also argued that his statements to the IA investigators were inadmissible because they involved remote and collateral matters; were not relevant to his direct testimony; and should be excluded under Fed.R.Evid. 403. (R.59, TR CX Corder at 408, 413-18; R.64, TR Trial, Vol.2 at 852-55; R.65, TR Trial, Vol.3 at 871-99).

The government argued that petitioner had no Fifth Amendment rights because he could only be held accountable for a misdemeanor under Kentucky law and the one-year statute of limitations had expired.²¹ But the government failed to show that petitioner's criminal exposure was limited to a misdemeanor because it neither identified the offense to which it referred nor showed the nature or substance of his lies. Since petitioner's criminal exposure was unknown, he argued he had a viable Fifth Amendment right. (R.59, TR CX Corder at 416-17).

The district court citing *Brown v. United States*, 356 U.S. 148 (1958) ruled that petitioner waived his Fifth Amendment right by testifying and that his credibility was relevant to his testimony and the issues that were to be submitted to the jury. Thus, petitioner testified that when he was a Louisville police officer he

²¹ KRS §500.050(2) states: "Except as otherwise expressly provided, the prosecution of an offense other than a felony must be commenced within one (1) year after it is committed."

lied on two occasions to IA investigators. (R.59, TR CX Corder at 413, 418-19, 423-24; R.65, TR Trial, Vol.3 at 871, 883-84, 889).

The Sixth Circuit upheld the district court's ruling. App. 22a. It viewed "the chief issue" as petitioner's belief in the veracity of the charges that he brought against Baize, "and he voluntarily took the stand to vouch for that belief." *Id.* The court reasoned that petitioner's "willingness to lie to other police departments to protect himself from allegations of misconduct is relevant to, and probative of, whether he would lie" to the Bullitt County Sheriff's Department when it investigated the propriety of Baize's arrest. *Id.* at 22a-23a.

B. The Sixth Circuit misapplied Fed.R.Evid. 608(b) and thereby violated petitioner's Fifth Amendment rights.

If the defendant in a criminal case takes the stand and "testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness ..." *Brown*, 356 U.S. at 154. *See also Mitchell v. United States*, 526 U.S. 314, 321 (1999) (citation omitted) ("[A] witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details."). However, "the breadth of [the Fifth Amendment] waiver is determined by the scope of relevant cross-examination," *Brown*, 356 U.S. at 154-55, and, according to the Advisory Committee Notes for Rule 608(b) merely by testifying a witness does not waive "his right to foreclose inquiry on cross-examination into criminal activities for the

purpose of attacking his credibility.” Moreover, Rule 608(b) limits *Brown’s* scope and any purported Fifth Amendment waiver. The rule provides in relevant part:

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness ...

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness’s character for truthfulness.

That last sentence “constitutes a rejection of the doctrine... that any past criminal act relevant to credibility may be inquired into on cross-examination,” Fed.R.Evid. 608(b), Advisory Committee Notes; *United States v. McClurge*, 311 F.3d 866, 874 (7th Cir. 2002), and it protects petitioner’s Fifth Amendment rights regarding his statements to the IA investigators because his trial testimony was about another matter, *i.e.*, whether he deprived Mr. Baize of his constitutional rights. Thus, any testimony about petitioner’s statements to IA investigators “relates only to [his] character for truthfulness.”²²

To demonstrate that petitioner vouched for his credibility and was properly cross-examined about the prior statements, the Sixth Circuit pointed to his direct

²² “In 2003, Rule 608(b) was amended by substituting ‘character for truthfulness’ in place of ‘credibility.’ The amendment intended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness’ character for truthfulness.” *United States v. Epstein*, 426 F.3d 431, 439, n.4 (1st Cir. 2005) citing *United States v. Abel*, 469 U.S. 45 (1984).

examination in which he denied lying on the arrest citation. Petitioner stated, “What I wrote down was exactly what I observed.” He denied there was anything false in the citation and said it described “exactly what [Baize] did.” App.21a; R.65; (TR Trial, Vol.2 at 841). Petitioner was not vouching for his credibility, he was simply stating the facts he recounted. The Sixth Circuit’s view effectively nullifies the Fifth Amendment protection embedded in Rule 608(b). Since “the possibilities of abuse are substantial” when dealing with Rule 608(b) evidence, courts must consider the remoteness of the evidence and the danger of unfair prejudice under Fed.R.Evid. 403. Advisory Committee Notes, Rule 608(b). *See also United States v. Beltran-Garcia*, 338 F.App’x 765, 770–71 (10th Cir. 2009); *United States v. Rosario Fuentes*, 231 F.3d 700, 705 (10th Cir. 2000).

Petitioner’s case shows more than a possibility of abuse because any testimony about lies to Louisville Police IA investigators in 1991 and 1998 “relate[d] only to [petitioner’s] character for truthfulness” and he still had a viable Fifth Amendment right because the nature and substance of those lies was never made known by the government. Thus, it was not shown that the prior untruthfulness bore any similarity to the current charges and that petitioner was subjected to “relevant cross-examination.” *Brown*, 356 U.S. at 155.

Remoteness is a relevant factor in assessing the probative value of evidence sought to be admitted under Rule 608(b). *United States v. Jackson*, 882 F.2d 1444,

1448 (9th Cir. 1989); *United States v. Holden*, 557 F.3d 698, 703 (6th Cir. 2009) (evidence of 9 year old events was inadmissible); *United States v. Davis*, 524 F.App'x 835, 840 (3d Cir. 2013) (10 year old criminal charge held too remote); *Johnson v. Elk Lake School District*, 283 F.3d 138, 145, n.2 (3d Cir. 2002) (remoteness of 9 year old incident “substantially diminished its probative value.”).

The Sixth Circuit here said that “temporal remoteness reduces the value of the evidence” offered under Rule 608(b) but the “probative value is bolstered by the similarities the older evidence has with the instant case.” App. 23a. Those similarities are unknown because the government failed to show the nature and substance of the statements petitioner made to the IA investigators. Thus, it cannot be found that statements made 18 and 25 years before petitioner’s trial had any probative value. Remoteness warranted exclusion of that evidence. And even if the evidence had any probative value, it was substantially outweighed by the danger of unfair prejudice not only because it is inherently prejudicial but also the jury could not properly assess its weight and credibility since the nature and substance of those remote statements were unknown.

Petitioner’s case shows the need for guidance on “the breadth” of a Fifth Amendment waiver and “the scope of relevant cross-examination” under Rule 608(b). *Brown*, 356 U.S. at 154-55. The issue is important to the administration of

justice because the application of a rule of evidence adopted by many states as well as federal courts undermines the exercise of a fundamental, constitutional right.²³

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

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²³ See e.g., AR R.Evid. 608; AZ R.Evid. 608; CO R.Evid. 608; DE R.Evid. 608; HI Rev.Stat. §626-1, Rule 608; IA I.C.A. Rule 5.608; ID R.Evid. 608; KY R.Evid. 608; MD Rules, Rule 5-608; ME R.Evid. 608; MI R.Evid. 608; 50 MN St. Ann. R.Evid 608; MT R.Evid. 608; NE Neb.Rev.St. §27-608; NH R.Evid. 608; NC G.S. §8C-1, Rule 608; ND R.Evid. 608; NM R.Evid 11-608; OH Evid.R. 608; 12 OK.St. Ann. §2608; RI R.Evid. 608; SC R.Evid. 608; TN R.Evid. 608; VT R.Evid. 608; UT R.Evid. 608; WI (W.S.A.) 906.08; WV R.Evid. 608; WY R.Evid. 608.