11TH CIR. CASE NOS 14-14673-DD
M.D. FLA. CASE NO.: 5:13-CV-113-OC-22-PRL

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMY YOUNG AND JOHN SCOTT, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ANDREW LEE SCOTT, DECEASED, AND MIRANDA MAUCK, INDIVIDUALLY,

Plaintiffs/Appellants

vs.

GARY S. BORDERS, IN HIS OFFICIAL CAPACITY AS SHERIFF OF LAKE COUNTY FLORIDA, AND RICHARD SYLVESTER, IN HIS INDIVIDUAL CAPACITY,

Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

APPELLANTS' PETITION FOR REHEARING EN BANC AND REHEARING ©2015

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[C-4] **CERTIFICATIONS OF PETITIONERS' COUNSEL**

Under Fed R. App. P. 35, 11th Cir. Rule 35-5, and I.O.P. 2, I express a belief, based on the undersigned's reasoned and studied professional judgment that the panel decision is contrary to the following decision(s) or the precedents of this Circuit and that consideration by the full Court is necessary (a) because this decision concerns an appeal involving questions of exceptional importance and (b) to secure and maintain uniformity of decisions in this Court: *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014), *Salvato v. Miley*, 2015 WL 3895455 (11th Cir. June 25, 2015), *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Hudson v. Michigan*, 547 U.S. 586 (2006),

Florida v. Jardines, 569 U.S. 1 (2013), *D.C. v. Heller*, 554 U.S. 570 (2008).

Under Rule 40, 11th Cir. Rule 40-3 and I.O.P. 2, I express a belief, based on the undersigned's reasoned and studied professional judgment that there are errors of fact and law in the Opinion that affirms the decision below, and that this case should be reheard in light of the Points discussed herein.

Respectfully submitted,

By: /s/ Dorothy F. Easley

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ANALYSIS HERE HAS OVERLOOKED OR MISAPPREHENDED THIS TWO-PRONG TEST AND ITS ANALYTICAL FRAMEWORK.

THE FIRST PRONG IS SUPPOSED TO ASK WHETHER THE SEARCH, SEIZURE, OR FORCE USED (ALL ALLEGED AND LITIGATED HERE) WAS REASONABLE IN LIGHT OF THE FACTUAL CIRCUMSTANCES CONFRONTING THE OFFICER. THE SECOND PRONG IS [ii] SUPPOSED TO ASK WHETHER THE SEARCH WAS REASONABLE UNDER GOVERNING LAW. BOTH PRONGS INVOLVE REASONABLENESS, BUT THE SUPREME COURT HOLDS THAT THEY REMAIN ANALYTICALLY DISTINCT. WHILE FACTUAL REASONABLENESS IS PART OF THE FIRST PRONG ANALYSIS, IT MUST BE CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE PARTY ASSERTING THE INJURY. COURTS DECIDING QUALIFIED IMMUNITY IN FOURTH AMENDMENT CASES ARE NOT TO CONSIDER THE FACTUAL REASONABLENESS OF THE SEARCH OR SEIZURE WHEN APPLYING THE SECOND, "CLEARLY ESTABLISHED" PRONG OF THE TEST. THAT, HOWEVER, IS THE ERROR HERE. THIS COURT'S DECISION APPROVES THE DISTRICT COURT'S ANALYSIS THAT MORPHS THE SECOND PRONG OF QUALIFIED IMMUNITY TO, THEREBY, ALLOW INJECTION OF FACTUAL REASONABLENESS INTO THE INQUIRY OF WHETHER THE RIGHT WAS CLEARLY ESTABLISHED AND TO CONSTRUE ALL FACTS IN THE LIGHT MOST FAVORABLE TO THE OFFICERS MOVING FOR SUMMARY JUDGMENT INSTEAD OF THE NON-MOVANTS ASSERTING THE INJURY. THEREFORE, SUPREME COURT AND ELEVENTH

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[1] ISSUES ASSERTED THAT MERIT REHEARING EN BANC/REHEARING[1]

POINT: THE U.S. SUPREME COURT AND THIS COURT'S PRECEDENT ESTABLISHED A TWO-PRONGED TEST FOR A GOVERNMENT OFFICIAL'S CLAIM TO QUALIFIED IMMUNITY: (I) WHETHER THE OFFICIAL VIOLATED A CONSTITUTIONAL RIGHT, AND (II) WHETHER THE RIGHT WAS CLEARLY ESTABLISHED IN THE SPECIFIC CONTEXT INVOLVED. THIS COURT'S DECISION AFFIRMING THE DISTRICT COURT'S ANALYSIS HERE HAS OVERLOOKED OR MISAPPREHENDED THIS TWO-PRONG TEST AND ITS ANALYTICAL FRAMEWORK.

[1] Record citations are referenced as in Appellants' Briefs, with references also to the Briefs themselves to economize review. The facts are properly presented in the light most favorable to Decedent Andrew Scott and Miranda Mauck, as the summary judgment non-movants and parties asserting the injury. All emphasis is added unless otherwise noted. Because the Court's Decision expressly incorporates by reference the district court's decision, that decision is included here to aid the Court's review.

THE FIRST PRONG IS SUPPOSED TO ASK WHETHER THE SEARCH, SEIZURE, OR FORCE USED (ALL ALLEGED AND LITIGATED HERE) WAS REASONABLE IN LIGHT OF THE FACTUAL CIRCUMSTANCES CONFRONTING THE OFFICER. THE SECOND PRONG IS SUPPOSED TO ASK WHETHER THE SEARCH WAS REASONABLE UNDER GOVERNING LAW. BOTH PRONGS INVOLVE REASONABLENESS, BUT THE SUPREME COURT HOLDS THAT THEY REMAIN ANALYTICALLY DISTINCT. WHILE FACTUAL REASONABLENESS IS PART OF THE FIRST PRONG ANALYSIS, IT MUST BE CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE PARTY ASSERTING THE INJURY. COURTS DECIDING QUALIFIED IMMUNITY IN FOURTH AMENDMENT CASES ARE NOT TO CONSIDER THE FACTUAL REASONABLENESS OF THE SEARCH OR SEIZURE WHEN APPLYING THE SECOND, "CLEARLY ESTABLISHED" PRONG OF THE TEST. THAT, HOWEVER, IS THE ERROR HERE.

THIS COURT'S DECISION APPROVES THE DISTRICT COURT'S ANALYSIS THAT MORPHS THE SECOND PRONG OF QUALIFIED IMMUNITY TO, THEREBY, ALLOW INJECTION OF FACTUAL REASONABLENESS INTO THE INQUIRY OF WHETHER THE RIGHT WAS CLEARLY ESTABLISHED AND TO CONSTRUE ALL FACTS IN THE LIGHT MOST FAVORABLE TO THE OFFICERS MOVING FOR SUMMARY JUDGMENT INSTEAD OF THE NON-MOVANTS ASSERTING THE INJURY. THEREFORE, SUPREME COURT AND ELEVENTH CIRCUIT PRECEDENT WARRANT REHEARING/REHEARING EN BANC.

STATEMENT OF PROCEEDINGS, DISPOSITION, AND NECESSARY FACTS

This is a Section 1983 and Wrongful Death appeal from final summary judgment, which erroneously merged the two-prong reasonableness test and construed [2] all disputed facts in favor of the movant Officers on qualified immunity and against the nonmovant Decedent Andrew Scott and his live-in girlfriend, Miranda Mauck, in violation of *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014), *Salvato v. Miley*, 2015 WL 3895455 (11th Cir. June 25, 2015), *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Hudson v. Michigan*, 547 U.S. 586 (2006), *Florida v. Jardines*, 569 U.S. 1 (2013), and *D.C. v. Heller*, 554 U.S. 570 (2008). After oral argument, this Court affirmed and expressly referenced the district court's Order. *See* Appendix, Opinions integrated.

In the early morning hours of 2012, a Lake County Deputy named Richard Sylvester, refused to identify himself, and then shot and killed 25-year-old Andrew, a pizza delivery man [DE73 at 3-7; Initial Brief ("IB") at 1-3, 4-8 and citations therein], in what is becoming a hauntingly recurring scenario nationwide: unidentified officers confront innocent citizens having no idea who they are, triggering the citizens' display of their lawfully-owned firearms, only to learn when the officers' bullets fly that the accoster is an unannounced officer.[2] Here, at around 1:30 a.m., two young innocents

[2] "Investigation into Florida drummer Corey Jones' shooting by police could take months", CBS News (Oct. 23, 2015), website: http://www.cbsnews.com/news/investigation-into-florida-drummer-corey-jones-shooting-by-police-could-take-months/ (Florida Drummer

– Andrew and Miranda – were in their home, Apartment 114, watching TV, relaxing in their underwear. IB at 7-10 and citations therein. Unannounced officers, with guns [3] drawn, began beating outside their Apartment 114 front door so loudly that it sounded and looked to the neighbors coming out to watch the raucous that it was a SWAT raid, and it caused Andrew and Miranda to panic. *Id.*; *see also* Reply Brief ("RB") at 10-11 and citations therein. The officers poised strategically to the sides of the windows and front door (which had no peephole), and refused to identify themselves. Andrew and Miranda, not knowing who was outside, mistook them for intruders, and Andrew hastily retrieved his lawfully-owned gun. IB at xviii and citations therein. Andrew narrowly opened his front door with his gun pointed down. In a span of two seconds and without warning, Sylvester fired six bullets and killed Andrew. *Id.*; IB at 8-12.

The summary judgment order being affirmed here concluded that the operative fact was that Andrew opened his front door with a gun. Beyond legal error (*Heller* discussed *infra*), the record is more accurately that there was no ballistic or forensic evidence to conclusively show Andrew was pointing a gun at Sylvester, which *only* Sylvester claimed, at the time of Sylvester's first shot or at any time during the five shots

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Corey Jones, waiting in the early hours of Sunday morning on 1-95 for AAA tow truck to arrive and tow his van, was fatally shot 3 times and killed by a Palm Beach Gardens undercover officer driving an unmarked van, who never showed his badge or identified himself, triggering Jones to display his own lawfully owned firearm, and the officer shooting Jones dead.).

thereafter [DE36 at 5; IB at 8-11 and citations therein]. And the forensic medical evidence was that Andrew was of such a distance away at the time Sylvester fired his first shot that Sylvester's claims about seeing the rifling, discoloration and the barrel of Andrew's gun were at best "implausible". DE44 at 22-30; IB at 8-12 and citations therein. Uncontroverted is that Sylvester immediately fired six times and killed Andrew, while Andrew never fired a single shot (nor did he intend to as there was no [4] cartridge in his gun's chamber); Andrew was given no warning before Sylvester began shooting. DE50-5 at 4; *Id.*; *see* DE50-9 Eyewitness Thurman Depo at 22-23, 35; DE48 Mauck FDLE statement at 5 (her first statement).

These facts describe police behavior so egregious and reckless that one gropes for understanding: "There had to have been *something there, some* reason for the officers to do this. . . . No trained officers could show that level of gross disregard for human safety." Acting on that, Appellees intimated to this Court during oral argument that there was an exigency of some kind that justified the officers hurried search, seizure, and force and failure to first conduct an investigation; that their selecting Apartment 114 without any investigation into who lived there was vital to protect someone or something. They suggested that there was logic to the officers' sneaking into the Apartment 114 privacy fence in the dead of night and then repeatedly pounding on the innocents' door without announcing that they were officers, with their firearms drawn, in SWAT-like tactical positions by all eyewitness

accounts, while remaining hidden from view, in their self-admitted hope of inducing the person inside to answer his front door as somehow necessary to catch the owner of a motorcycle (Jonathan Brown, whose location they had not researched, asking the on-site apartment manager only *after* they killed Andrew), who was not even part of an ongoing crime investigation. Appellees further suggested during oral argument that the officers were somehow unaware that Apartment 114's front door was the one, singular point of [5] ingress/egress as there were no back door or back windows. Appellees suggested during oral argument that there was probable cause to focus on Apartment 114. And Appellees stated during oral argument there was no evidence of any officer attempt to enter Apartment 114. Appellees stated Sylvester was making his chase of one motorcycle (a motorcycle Sylvester's commanding officer had ordered him to cease pursuing, and which Sylvester had ceased pursuing) while he received a BOLO and that this was all done based on some verified threat. Appellees suggested they found Apartment 114 lights were clearly on and that they were the only lights on at the time. That they believed they were pursing someone armed and dangerous (though they maintain that this was just a "knock and talk" . . . at 1:30 in the morning . . . and no obligation to announce who they were). The above suggestions and intimations were made in error. The evidence does not support them and they are, at best, highly disputed.

More accurately, the record is undisputed that these officers never announced their presence to Andrew and Miranda either before or while pounding on their Apartment 114 door, in the dark, so loudly that neighbors in the complex came out and concluded it was a raid. DE43 at 108; DE50-3 at 75, 77; DE50-11 at 58-59; DE50-7 at 4-5. It is undisputed the officers or their own expert conceded (1) there was *no ongoing crime* at the time the officers approached Apartment 114; (2) there was *no probable cause* to focus on Apartment 114, (3) that there was *no exigency*, (4) that *these officers, all familiar with this Apartment Complex, knew* ***full well*** *that there was only one point* [6] *of ingress and egress* of Apartment 114 – the front door that they had completely surrounded – and that (5) the officers and Sheriff Borders knew ***full well*** *that it was reasonable for them to expect*, as they had encountered previously, that *homeowners answer their doors with their lawfully-owned firearms and their Constitutional right to use them*, (6) Miranda testified the Andrew *opened his front door narrowly, with his firearm pointed down*, and (7) there was *no forensic evidence to argue that Andrew had his firearm pointed at any officer* when Andrew opened the door. IB at xviii, 28, 33-34 and citations therein; DE37 Sheriff Borders Depo at 33-38; DE50-2 Sylvester Depo at 147-48. Those are the facts and inferences for Appellants.

Also more accurately, (1) Andrew and Miranda were not suspected of any crime, (2) Sylvester did not know whether the Leesburg motorcycle incident (a different incident) was the same motorcycle the officers

located in open parking (that they knew was open parking) at the Blueberry Hills Apartments, where Andrew and Miranda happened to live, and (3) Andrew and Miranda were completely innocent in this entire debacle. DE38 Brocato Depo at 36; DE50-2 Sylvester Depo at 114, 134, 147-48. Also more accurately, *why* the officers were banging on Apartment 114's door was highly disputed, and Sylvester even testified that the real purpose for being at Apartment 114 was because the officers believed, despite no investigation with the Leesburg police, that a suspect of different, Leesburg motorcycle incident (Andrew and Miranda did not even own a motorcycle) could be inside Apartment 114. Sylvester Depo at 86-87; [7] DE46 at 120; DE50-2 at 86-87. Officer Brocato testified he too believed, with no investigation, that a suspect of a motorcycle incident was inside Apartment 114 and was armed. Brocato Depo at 62-63, 46, 66; DE38 at 66-67, 48, 68. Officer Dorrier testified they had no idea who lived in Apartment 114 or even where the suspect of that different motorcycle incident (the Leesburg incident) lived. Dorrier Depo at 37-411 DE39 at 3942.

The evidence viewed in the Appellants' favor was that their purpose was to search and seize the inhabitant of Apartment 114 to effect a constructive entry to arrest without the required warrant, without any investigation or preparation, and to thereafter call it a consensual "knock and talk" to get around their constitutional violations. Sylvester Depo at 87-89, 101; DE50-1 at 3; Eyewitness Kavetsky Depo at 26; DE51

at 28; DE47 Eyewitness Thurman Depo at 20, 22; DE48 Mauck Depo at 4-5.

Also of record, while Appellees insisted during oral argument the lights in Apartment 114 were clearly the only lights on, to justify their selection of it, Sylvester stated in his FDLE statement that he could not see lights on in Apartment 114 because the blinds were drawn, and that he had to walk through Apartment 114's privacy fence (invading the curtilage) and look *inside the window* from the left side of the front door to see *inside* (textbook search). DE49 Sylvester FDLE statement at 12. While Appellees intimated that this was a well-lit area and all Andrew and Miranda had to do was look out their window when the officers knocked, Eyewitness Kavesky (a neighbor [8] watching the whole event) stated the area around Apartment 114 was dark and the officers were, themselves, *using flashlights* to see. DE50-7 Kavesky Depo at 70-71. The front doors had no peephole and the officers positioned themselves alongside the doors and windows and behind fences, such that Andrew and Miranda could not have seen them even had they looked out the window and even had it not been dark. *See* IB at 24-45 and citations therein.

ARGUMENT: ISSUES MERITING REHEARING/REHEARING EN BANC

POINT: **THE U.S. SUPREME COURT AND THIS COURT'S PRECEDENT HAVE ESTABLISHED A TWO-PRONGED TEST FOR A GOVERNMENT OFFICIAL'S CLAIM TO QUALIFIED IMMUNITY: (I) WHETHER THE OFFICIAL VIOLATED A CONSTITUTIONAL RIGHT, AND (II) WHETHER THE RIGHT WAS CLEARLY ESTABLISHED IN THE SPECIFIC CONTEXT INVOLVED. THIS COURT'S DECISION AFFIRMING THE DISTRICT COURT'S ANALYSIS HERE HAS OVERLOOKED OR MISAPPREHENDED THIS TWO-PRONG TEST AND ITS ANALYTICAL FRAMEWORK.**

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THIS COURT'S DECISION APPROVES THE DISTRICT COURT'S ANALYSIS THAT MORPHS THE SECOND PRONG OF QUALIFIED IMMUNITY TO, THEREBY, ALLOW INJECTION OF FACTUAL REASONABLENESS INTO THE INQUIRY OF WHETHER THE RIGHT WAS CLEARLY ESTABLISHED AND TO CONSTRUE ALL FACTS IN THE LIGHT MOST FAVORABLE TO THE OFFICERS MOVING FOR SUMMARY JUDGMENT INSTEAD OF THE NON-MOVANTS ASSERTING THE INJURY. THEREFORE, SUPREME COURT AND ELEVENTH CIRCUIT PRECEDENT WARRANT REHEARING/REHEARING EN BANC.

[9] The lower court concluded that Officer Sylvester acted reasonably and was therefore entitled to qualified immunity in light of the facts of the situation – facts that are greatly disputed, and conducted virtually no analysis of the two-prong test and only textual analysis of the summary judgment standard required here. DE73 at 38-40. By affirming, the Decision overlooks/misapprehends that in resolving questions of qualified immunity at summary judgment, courts must engage in that two-pronged inquiry, *Pearson v. Callahan*, 555 U.S. 223 (2009), which is whether the facts, "[t]aken in the light *most favorable to the party asserting the injury*, . . . show the officer's conduct violated a constitutional right[.]"[3] The second prong is

[3] *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated on other grounds in Pearson v. Callahan*, 555 U.S. 223 (2009). The order can be reversed as well.); *Rioux v. City of Atlanta*, 520 F.3d 1269, 1282 (11th Cir. 2008) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). And officers are not automatically shielded even in novel situations.[4] We can all agree that innocent homeowners have a constitutional right to not be accosted by the government invading their curtilage in the dead of night, to have their homes searched with no exigency and no warrant, and then shot in their homes for lawfully exercising their Second Amendment rights to own, bear, and use firearms to protect themselves. *See* IB at 19-21; *D.C. v. Heller*, 554 U.S. 570 (2008) (the Second [10] Amendment confers an individual right to keep, bear, and use arms and any prohibitions against rendering any lawful firearm in the home operable for purpose of immediate self-defense violate the Second Amendment.).

The Court's Decision recognizes that this was a tragic event, but affirms the district court analysis that disregards the disputed facts, disregards their reasonable inferences, credits only the Appellees' facts, and merges the two-prong analysis into one. *See* attached Appendix A, Decisions. Accordingly, the Decision conflicts with *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014), and *Salvato v. Miley*, 2015 WL 3895455 (11th Cir. June 25, 2015), both of which recognized that courts must apply the two-prong analysis, must view the facts on summary judgment in the light most favorable to the non-moving party asserting the Section

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[4] *Hope*, 536 U.S. at 731, 736, 739 (finding the Eleventh Circuit erred in requiring that the facts of previous cases be "materially similar").

1983 injuries, and followed *Tolan*'s mandate that "courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." 134 S. Ct. at 1866. *Tolan* disapproved the same summary judgment analysis the district court applied and was affirmed here: "***the inescapable conclusion [is] that the court below credited the evidence of the party seeking summary judgment.***" *Id.* at 1867; *see also* RB at 1-6.

The evidence, and not just from Miranda, is Sylvester forcefully pounded on the door [DE18 at 4-7. DE50-1 at 3; DE50-2 at 106-08], while Appellees contend Sylvester merely knocked. AB at 7. Eyewitness testimony is Andrew narrowly opened the door slowly with his gun down to his side [DE50-13 at 18; DE50-3 at 80-81; DE48 [11] at 15-19], while Sylvester testified the door flung open, there was a gun pointed at his face, and he was "looking down the barrel of a pistol." DE50-2 at 107-15. The officers' assumption of tactical positions with weapons drawn, inside the curtilage, in search of a suspect, shows that this was no consensual "knock-and-talk"; it was a warrantless search, seizure, and entry with no announcement and beyond-excessive force, no matter what they term it after the fact. *See* IB at 24-45 and citations therein.

An officer fired six bullets within a two-second period into a young, innocent citizen who was lawfully answering his front door with his lawfully-owned firearm at his side in response to what could only be understood as a potential home invasion because the officers refused to identify themselves or employ any

means to make their authority known to obtain consent and compliance (there were no flashing blue lights outside, the pounding at the door was highly aggressive and threatening, and the hour was very, very late). And this Court noted during oral argument that nothing about this was consensual and that no one could, nor could these Appellees, locate a single reported decision where this kind of police excess was ever deemed by any court to be a "knock-and-talk."[5]

[12] The Decision affirming the district court's order raises issues of exceptional importance and conflicts with *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Hudson v. Michigan*, 547 U.S. 586 (2006), and *Florida v. Jardines*, 569 U.S. 1 (2013), on the announcement requirements, thus warranting rehearing/rehearing en banc. The single most important fact is that the police refused to announce themselves, despite *Wilson* and *Hudson* requiring it and despite the Supreme Court foretelling this species of tragedy and expressly referencing Section 1983 actions, not the exclusionary rule, as the appropriate penalty for knock-and-announce rule violations. The Decision accepts a rule that

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[5] In *U.S. v. Saari*, 272 F.3d 804, 807 (6th Cir. 2001), the Sixth Circuit Court of Appeals rejected the officers' contentions they were merely attempting to conduct an interview in furtherance of an investigation and acted reasonably in protecting themselves by having their guns drawn. These officers approached in the dead of night, off the path of a regular citizen, in search of a hoped-for *suspect* they had been told was not there, and repeatedly pounded on the door without announcing. The dissent in *Jardines*, agreed with by the majority, underscored the lateness of the hour went against a routine knock-and-talk. *Jardines*, 133 S. Ct. at 1416 n.3, 1422; *see also* IB at 27-30, RB at 5-12.

officers can invade the home's curtilage in the dead of night not "as any citizen may" as *Florida v. Jardines* requires, invade the curtilage of homes of those suspected of no crime, for no reason, and no exigency here, and innocents get no warning at all.

But these decisions read together mean that officers in the early morning hours, and with no exigency exception, have only limited invitations to approach homes through ordinary routes of ingress and egress, as any citizen might, by knocking during normal, expected daytime hours – not pounding in the dead of night. *Jardines*, 133 S. Ct. at 1415-16. *Jardines* instructs that police are subject to limits to their implied license to enter a homeowner's curtilage to conduct an inquiry and that their implied license, no different from a mail carrier or seller of Girl Scout cookies in the daytime hours, dissipates when they appear at a private citizen's home in the early morning [13] morning hours, in the dark of night, and/or for the purpose of conducting a search and a constructive entry to force an arrest; that is, the scope, time, and purpose have changed.[6] *Jardines* instructs that *when police conduct*

[6] *Jardines*, 133 S. Ct. at 1416-17. That is precisely the conduct of the British soldiers that the Colonists objected to and that plus the Quartering Act were some of the core reasons for the Fourth Amendment, which also go back to England and were recognized in *Semayne's Case* of 1604. *See Semayne's Case*, 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604); Samuel Adams, *The Rights of the Colonists and a List of Infringements and Violations of Rights* (Nov. 20, 1772), the drafting of which Samuel Adams took the lead; 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 199, 205-06 (1971); William Pitt in Parliament in 1763: "The poorest man may in his cottage bid defiance to all the

goes beyond a routine knock-and-talk that takes place on a person's curtilage, that is textbook search or seizure.[7] A Fourth Amendment Search occurs where the government, to obtain information, trespasses on a person's property, or where the government violates a person's subjective expectation of privacy exceeding what is reasonable to collect information. *See* IB at 25-27.

The Decision affirms a rule that officers have construed in error: that officers never need to identify themselves, even when they exceed a knock-and-talk so long as [14] later self-serving testimony is that they didn't mean to enter and so long as they were not holding a warrant. That conflicts with *Wilson v. Arkansas*, 514 U.S. 927, 932-33 (1995), which recognized (quoting

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force of the crown. It may be frail . . . but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement." *See also Entick v. Carrington*, 19 Howell's State Trials 1029, 95 Eng. 807 (1705) (one of a series of civil actions against state officers who, pursuant to general warrants, had raided many homes and other places in search of materials connected with John Wilkes' polemical pamphlets attacking governmental policies and the King himself); *Wilkes v. Wood*, 98 Eng. 489 (C.P. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763), *aff'd* 19 *Howell's State Trials* 1002, 1028; 97 Eng. Rep. 1075 (K.B. 1765) (similar); QUINCY'S MASSACHUSETTS REPORTS, 1761-1772, App. I, at 395-540; 2 LEGAL PAPERS OF JOHN ADAMS 106-47 (Wroth & Zobel eds., 1965); Dickerson, *Writs of Assistance as a Cause of the American Revolution*, in THE ERA OF THE AMERICAN REVOLUTION: STUDIES INSCRIBED TO EVARTS BOUTELL GREENE 40 (R. Morris, ed., 1939).

[7] *See Jardines*, 133 S. Ct. at 1414-15. The canine sniff in *Jardines* is but one example of police conduct that invades a person's curtilage without a warrant. *Id.*

treatises from the 1700s) that the knock-and-announce requirement was part of the common law when the Fourth Amendment was ratified, "was woven quickly into the fabric of early American law" and, thus, the Fourth Amendment requires the government "first signify to those in the house the cause of his coming, and request them to give him admittance" – meaning, *announce.* And it conflicts with *Hudson v. Michigan*, 547 U.S. 586, 593-94 (2006), which explained that we require the knock-and-announce rule for reasons that include precluding accidental injuries to officers and occupants, limiting property damage, and protecting occupants' privacy and dignity. *Wilson* and *Hudson* must be read together. They were not saying that the government must *only* announce when it has a warrant. That makes no sense in Fourth Amendment history and context. *Wilson* and *Hudson* were saying that you need to announce *unless* there is an exception to the warrant requirement, and that when the government has a warrant to enter, the government *still* needs to announce unless there is an exception.

The Decision overlooks/misapprehends that the announcement requirement has been in place for hundreds of years to protect homeowners and officers alike from armed confrontations with unsuspecting homeowners who foreseeably exercise their Second Amendment rights to own, bear and *use* arms as their rights to protect [15] themselves and their families from intruders. Thus, this Decision affirms a rule that places the Second and Fourth Amendments in direct conflict, and elevates officer immunity to place homeowners in

a foreseeable zone of risk that the officers, themselves, created in the first place, above the citizens' Second Amendment constitutional rights to own, bear, and use arms to protect themselves.[8] "I frankly doubt . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity."[9] This Decision's approval of the district court's narrow construction of *Wilson* and *Hudson*'s announce requirement means that those suspected of a crime (and the subject of the requisite probable cause for a warrant to issue) have more Fourth Amendment rights – the right of announcement – than those completely innocent and suspected of no crime, who would have no rights – not Fourth or Second Amendment rights – at all. It misapprehends the obligation of officers to announce their presence when presented with the risk of the species of deadly confrontations of which *Wilson* and *Hudson* warned. We move for rehearing/rehearing en banc for these reasons.

[8] *Wallace v. Dean*, 3 So.3d 1035, 1042 (Fla. 2009) (recognizing sheriff and his deputies have a common law duty to protect a citizen when their conduct places citizen in foreseeable zone of risk).

[9] *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (Scalia, J., concurring).

CONCLUSION

REHEARING EN BANC/REHEARING IS REQUESTED as to all issues on appeal.

[16] Respectfully submitted,

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