IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 91,065

JOHNNY TITUS,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, STATE OF FLORIDA, was the plaintiff in the trial court and the appellee in the district court and will be referred to herein as "Petitioner" or "State." Respondent, Johnny Titus, was the defendant in the trial court and the appellant in the district court and will be referred to herein as "Respondent" or "Defendant."

The following symbols will be used:

R = Record on appeal

T = Transcripts

A = Appendix

STATEMENT OF THE CASE AND FACTS

Defendant was charged by information with possession of cocaine and use or possession of drug paraphernalia. (R. 1 - 2). Appellant filed a motion to suppress and a hearing thereon was held on September 10, 1996. (R. 11 - 12, T. 1 - 64).

At the suppression hearing, Officer Rodney Nieves testified that on March 16, 1996, he came in contact with Appellant at a rooming house on North Ninth Street. (T. 6). Nieves had been to that rooming house approximately 10 to 20 times prior to the date in question. (T. 7). On March 16, 1996, Nieves was patrolling the area when a bystander flagged him down and told him that someone was smoking narcotics in that rooming house. (T. 7 - 8). The flagging down of police officers was a common practice in that area. (T. 8). He then stopped his vehicle and went inside the rooming house. (T. 7).

The rooming house had a series of individual rooms, which were leased by separate occupants. (T. 8). Each individual room had its own padlock. (T. 9). On the date in question, Nieves entered through the rear entrance of the rooming house, which did not have a door. (T. 12). As he entered through the rear entrance, he was able to see right out the front entrance, which again did not have a door. (T. 13). He walked up the back-porch stairs and entered

the rooming house. (T. 14). The first room immediately to his right was the kitchen. (T. 14). He saw a woman, Respondent's co-defendant, sitting with her back towards him, and he also saw Respondent standing by the stairs. (T. 15). Once inside, there was no doorway or wall obstructing the view of the kitchen. (T. 16). He saw the woman with a crack pipe in her mouth and saw Respondent place a pipe in his pocket and proceed to leave the kitchen area. (T. 17). On the table was a small film jar which contained fifteen cocaine rocks. (T. 17). A search of Respondent revealed the pipe he had placed in his pocket moments earlier. (T. 18).

Respondent called his co-defendant, Ruth Ann Hudson, to the stand. She testified that, on the day she and Respondent were arrested, she was not a tenant of the rooming house, but rather was visiting. (T. 24). The kitchen area was used by tenants only. (T. 25). But, on the date in question, there were four or five people in the kitchen that were not residents or guests. (T. 25). They just came in off of the street. (T. 26). She also testified that there was a door on the front entrance, as well as the rear entrance. (T. 32).

Respondent testified that one officer entered through the rear, and one through the front. (T. 37). The rooms inside the building were for the tenants and their guests. (T. 37).

In denying the motion to suppress, the trial court made the following findings:

> One, that the defendant, Johnny Titus, was a tenant, or lessee in the rooming house; two, that the defendant, Ruth Ann Hudson, was an invited guest in the rooming house; three, that both of them had reasonable expectations of privacy in the rooms in the rooming house that were utilized for the sole and exclusive use of the lessee for that particular room.
>
> I find that as to the kitchen area, that that was accessible from both the front door, and the back door to not only tenants, or their invited guests, but to persons who were neither tenants, nor invited guests.
>
> I find that there **was** no security on the doors, as testified to by the officer, and as I believe, corroborated by at least one of the witnesses, one of the defendants.
>
> I find that Ms. Hudson -- I recall that Ms. Hudson testified that there were persons in the kitchen, who were neither invited guests, nor tenants, and find that's further evidence that the rooming -- the kitchen was accessible to persons.
>
> I think if that statement was to be clarified it needed to be clarified by the defense, because from the prosecution's standpoint, there's no reason to clarify, it said what it said.
>
> I find, therefore, that the officers in this instance, as any other member of the public in the area, apparently could have come into the home -- or come into the rooming house into the common **areas.**
>
> Based upon that finding, the officer then -- I find the officer saw in plain view the usage of the drugs by Ms. Hudson, and the paraphernalia in the possession of Mr. Titus.
>
> I'm basing this ruling substantially on the case of the State of Florida versus

> Baptiste [sic], 524 So. 2d 481, and as that case has been read two or three different ways, I may read it a fourth way.
>
> I read the case as saying that a resident may have a reasonable expectation of privacy in common areas, such as hallways, spaces, of a locked, or otherwise secured apartment building. The case, after sort of saying maybe this Court disagrees with that, but saying they don't worry about it for purposes of that case, the Baptiste [sic] case, cites a number of cases to say that no resident of the unlocked, and unsecured premises in apartment building in the present case, could have had a reasonable expectation of privacy in those shared areas.
>
> In this case, I think that's squarely on point, in that the area was not locked, and it was unlocked, and unsecured, and, therefore, the residents, and then if the residents had no expectation, the invited guests certainly didn't have an expectation in that area.
>
> I read the part about Garcia running with a gun, and at that point, they were actually getting into an apartment. If in this case, they had gone into one of the rooms with the locks on it, as was described, that would have been a different situation. They did not, and so therefore, the motion of each of the defendants to suppress is denied.

(T. 60 - 62).

Defendant filed an appeal in the Fourth District Court of Appeal, challenging the judge's denial of his motion to suppress. The Fourth District held that there is no rooming-house exception to the warrant requirement of the Fourth Amendment to the United States Constitution, allowing police officers to enter and search

a kitchen in such a residence. (A. 1).[1] In support of its position, the district court cited to United States Supreme Court cases, as well as cases from other circuits, including, but not limited, to McDonald v. United States, 335 U.S. 451 (1948), and United States v. Carriser, 541 F. 2d 545 (6th Cir. 1976). The court found that the privacy of residential premises does not arise from the nature of the security device employed to keep unwanted intruders out. The Fourth District acknowledged conflict with the Third District's decision in State v. Batista, 524 So. 2d 481 (Fla. 3d DCA 1988), in which the court found that "no resident of the unlocked and unsecured premises and apartment building in the present case could have had such a reasonable expectation in those shared areas.*

Upon the State's Notice to Invoke Discretionary Review, this Court issued its order postponing decision on jurisdiction and setting a briefing schedule. The State's brief on the merits follows.

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[1] The State points out that this was not the precise issue raised by Respondent in the district court.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in reversing the order denying suppression and the following conviction. The trier-of-fact properly found that the evidence presented showed that Respondent did not have a reasonable expectation of privacy in the kitchen area where he was arrested for possession of cocaine and drug paraphernalia.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL IMPROPERLY REWEIGHED AND MISAPPLIED THE FACTS AND ERRONEOUSLY ANALYZED FOURTH AMENDMENT LAW WHEN IT FOUND THAT RESPONDENT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE COMMON AREA OF A ROOMING HOUSE THAT WAS UNSECURED FROM USE BY THE GENERAL PUBLIC.

On a motion to suppress, the trial court's duty, as the fact-finder, is to weigh the credibility of the witnesses, and to resolve conflicts in the evidence. E.g., Wuornos v. State, 676 So. 2d 966 (Fla. 1995). Such factual findings arrive in the appellate court cloaked with a presumption of correctness, and said court must interpret the evidence and reasonable inferences and deductions therefrom in a manner most favorable to sustaining a trial court's ruling. Owen v. State, 560 So. 2d 207, 211 (Fla.), cert. denied, 498 U.S. 855. In practice, this means that appellate courts are bound by even the trial court's *implicit* factual findings, unless clearly erroneous. Johnson v. State, 640 So. 2d 136 (Fla. 4th DCA 1994); Setzler, 667 So. 2d 343 (Fla. 1st DCA 1995). Thus, where the record supports the trial court's findings of fact, the appellate court may not substitute its judgment for that of the fact-finder. Wasko v. State, 505 so. 2d 1314, 1316 (Fla. 1987); Emanuel v. State, 601 So. 2d 1273 (Fla. 4th DCA 1992). Moreover, an appellate court must give great deference

to a trial court's ruling on a motion to suppress. Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984);

Given that standard of review, and the record in this case, the State submits that the district court not only impermissibly reweighed the facts and made factual findings unsupported by the record, but it also erroneously applied the law to those facts.

This Court should accept jurisdiction to review the conflict created by the Fourth District Court of Appeal regarding an individual's expectation of privacy in the common areas of a rooming house unsecured from the public at large. As this question will arise in other cases, the conflict needs to be resolved.

In the case at bar, the trial judge found that the Respondent did not have a reasonable expectation of privacy in the kitchen area of a rooming house where he was arrested for possession of narcotics. The trial judge based his ruling on State v. Batista, 524 So. 2d 481 (Fla. 3d DCA 1988), wherein, the court held that, although a person may have a reasonable expectation of privacy in the common areas of a locked or secured apartment building, a resident of an mocked or unsecured apartment building cannot have a reasonable expectation of privacy in the shared areas. Id. at 482. Thus, the central concept linking this case to Batista is

that the rooming house in question was not only unlocked and unsecured, but it had no doors at all. And thus Respondent had no expectation of privacy while commingling with four or five strangers off of the street.

On appeal, the Fourth District acknowledged the holding of Batista as it applied to an apartment building but seemed to distinguish between an apartment and a rooming house: "[T]he decision does seem to stand for the proposition that in an apartment building a tenant's expectation of privacy in the common areas turns on how secure the entrance to the building is. Of course, today's case involves a rooming house rather than an apartment building." Titus v. State, 22 Fla. L. Weekly 131645, 1648 (Fla. 4th DCA July 2, 1997). The State submits that this distinction is one without difference. In both circumstances, there are individual, secured rooms and areas common to the residents. Thus, the law should not allow the police to enter an unlocked or unsecured apartment building without a warrant, but not an unlocked or unsecured rooming house.

More importantly, the district court rejected Batista based on an erroneous analysis of Fourth Amendment law. Presuming as a matter of course that any lawful resident or guest has an expectation of privacy in all areas of a rooming house, the court

rejected the analysis set forth in Batista concerning unlocked or unsecured doors. Instead, it held that the police have no right to enter a rooming house without a warrant or an applicable exception to the warrant requirement. The district court's analysis, however, was based on a faulty premise and was unsupported by the law.

The district court framed the issue as follows: "Although not so framed by the parties, the real issue in this case is whether there is a rooming house exception to the warrant requirement of the Fourth Amendment to the United States Constitution for police officers to enter and search a kitchen in such a residence." Titus at 1645. The State did not frame the issue as such because it was not seeking to create a new exception to the warrant requirement. Rather, the State believes that, before a warrant is required, the subject of the search must have an expectation of privacy in the area to be searched. Thus, this issue, which escaped analysis by the Fourth District, must be resolved before any application of a warrant exception.[2] As the trial court held, and as the State submits, Respondent had no reasonable expectation of privacy in the

[2] Importantly, it is the defendant's burden to prove such an expectation of privacy. See Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Sard-Villa, 760 F. 2d 1232 (11th Cir. 1985).

kitchen area of the rooming house, which was unsecured from the population at large. To the extent the district court found otherwise, its decision was in error.

The determination of whether a party has a reasonable expectation of privacy does not turn solely on whether outsiders have the ability and authority to enter the premises, but whether the area in question is under the person's control and whether others have the ability to utilize the area.[3] See United States v. Roberts, 747 F. 2d 537, 542 (9th Cir. 1984) (holding that defendant did not have a reasonable expectation of privacy in a private road because he had no control over the five other people who lived on the area and who used the road); United States v. Eisler, 567 F. 2d 814 (8th Cir. 1977) (holding that defendant did not have reasonable expectation of privacy in the common hallways of his apartment building where hallways were available for use by other residents and their guests); Rakas at 149 (holding that expectation of privacy will be violated only if place is one that defendant has a right to keep private and subject to his exclusive control). Herein, Respondent did not have control over the kitchen area. Any of the other residents or their guests could utilize the area.

[3] Such an analysis renders moot Judge Farmer's argument that there was a fence surrounding the rooming house.

Moreover, people off of the street wandered in at will. Finally, the owner of the rooming house could have given the police consent to search the common areas. See United States v. Elliot, 50 F. 3d 180 (2d Cir. 1995); United States v. Kelly, 551 F. 2d 760 (8th Cir. 1977); United States v. Kellerman, 431 F. 2d 319 (2d Cir. 1970). Consequently, Respondent did not have a reasonable expectation of privacy in the kitchen.

The majority of other circuits have consistently held that a tenant of an apartment building or a rooming house does not have a reasonable expectation of privacy in the common areas. For example, in United States v. Anderson, 533 F. 2d 1210 (C.A.D.C. 1976), the court held that respondent did not have a reasonable expectation of privacy when the police entered the rooming house because they did not enter the defendant's private dwelling. Rather, they merely entered the common corridors, which were available to residents of the rooming house, their guests, people making deliveries, and others. Anderson's protected privacy interest began at the door to his room rather than at the door to the entire rooming house. See also United States v. Cruz Pasan, 537 F. 2d 554, 558 (1st Cir. 1976) (holding that defendant did not have reasonable expectation of privacy in parking garage of condominium where garage was common area and was well-traveled);

United States v. Holland, 755 F. 2d 253 (2d Cir. 1985) (holding that common hallways of an apartment building do not afford a person a reasonable expectation of privacy); United States v. Acosta, 965 F. 2d 1248 (3d Cir. 1992) (holding that defendants do not have a reasonable expectation of privacy in the hallways of an apartment building where the door was not locked and defendant had no way of excluding anyone from entering the hallways); United States v. Concepcion, 942 F. 2d 1170, 1172 (7th Cir. 1991) (holding that defendant had no reasonable expectation of privacy in common areas of apartment building); United States v. Luschen, 614 F. 2d 1164 (8th Cir. 1980)(holding that defendant did not have reasonable expectation of privacy in hallways and common areas of apartment building); United States v. Nohara, 3 F. 3d 1239 (9th Cir. 1993) (holding that a tenant does not have a reasonable expectation of privacy in an apartment building hallway or other common area). Contra Bryant v. United States, 599 A. 2d 1107 (C.A.D.C. 1991) (holding that defendant demonstrated a reasonable expectation of privacy in the common areas of a rooming house).

Florida and federal courts have held that the issue of a reasonable expectation of privacy turns on two requirements: "[T]he subjective expectation of privacy and most importantly whether the expectation is one that society is prepared to recognize as

reasonable." Cleveland v. State, 557 So. 2d 959 (Fla. 4th DCA 1990); see also Katz v. United States, 389 U.S. 347, 360 (1967); United States v. McBean, 861 F. 2d 1570 (11th Cir. 1988). Since there was no testimony from the Respondent regarding his expectation of privacy, he failed to prove the first prong. See Rakas at 134. Even if he had testified to an expectation of privacy in the kitchen, such an expectation is unreasonable under the circumstances of this case. There were no doors on either entrance, and there were people in the kitchen who were just off the street.[4]

The cases relied on by the Fourth District Court of Appeal to reject Batista are readily distinguishable. In MacDonald v United States, 335 U.S. 451 (1948), a police officer forcibly entered a window in the landlady's bedroom in a boarding house, unlocked the front door to let other officers in, searched the rooms on the first floor, and then proceeded to the second floor where he stood on a chair in the hallway and peered into the transom into the defendant's room where he saw gambling paraphernalia. The facts in MacDonald are far beyond the facts of this case where there were no

[4] The district court rejected the trial court's reliance on this fact, but Hudson's testimony was uncontroverted. The district court had no authority to reweigh the evidence. Wasko v. State, 505 So. 2d 1314, 1316 (Fla. 1987).

doors on the residence and Respondent was in a common area. No forced entry was needed.

Similarly, in United States v. Carriaer, 541 F. 2d 545 (6th Cir. 1976), the police officer used artifice to enter an apartment building by holding a **locked** door open after some workmen left the premises. In other words, the officer used deceptive means to gain entry into a building which was otherwise unaccessible. Here on the other hand, the common areas were freely accessible, as there were no doors, much less a locked door.

The remaining cases cited by the district court are not on point as they involve entry into a private, single-family residences, as opposed to a boarding house or apartment building. Furthermore, none of the residences had doorless entryways, **as was** involved herein.

The case at bar involves a common area in a rooming house, which is transiently used by both tenants and outsiders off of the street. Thus, the State contends that the owner/resident of such **a** rooming house has no reasonable expectation of privacy in the common areas. This is especially true herein because there was no door, much less a lock, on the front or back entrances. As a result thereof, people who did not reside there, and who were not invited, frequently utilized the kitchen. The district court erred

in rejecting Batista and reversing the trial court's order denying suppression and the conviction that followed. This Court should accept jurisdiction to review the conflict created by the Fourth District, as it erroneously analyzed the concept of expectation of privacy in the common areas of an unsecured rooming house.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, the State respectfully requests that this Honorable Court reverse the Fourth DCA's holding in Titus v. State, 22 Fla. L. Weekly D1645 (Fla. 4th DCA July 2, 1997) and reinstate the order denying Respondent's motion to suppress, as well as his conviction.

Respectfully submitted,
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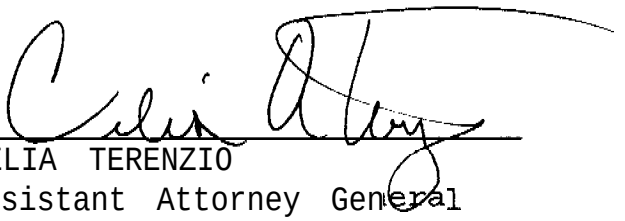

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by Courier to: LOUIS G. CARRES, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 25th day of August 1997.

Barbra A. Wilson
Of Counsel

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1997

JOHNNY TITUS,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-3259

Opinion filed July 2. 1997

Appeal from the Circuit Court for the Nineteenth Judicial Circuit. St. Lucie County; Ben L. Bryan, Jr. (for order denying suppression). and Larry Schack (for plea and sentencing), Judges: L.T. Case No. 96-728 CFB.

Richard L. Jorandby, Public Defender, and Louis G. Carrcs. Assistant Public Defender. West Palm Beach, for appellant.

Robert A. Butterworth. Attorney General. Tallahassee. and Barbra Amron Weisbcrg, Assistant Attorney General. West Palm Beach, for appellee.

FARMER. J.

Although not so framed by the parties. the real issue in this case is whether there is a "rooming house" exception to the warrant requirement of the Fourth Amendment to the United States Constitution for police officers to enter and search a kitchen in such a residence. We think not and rcvcrsc the conviction in this case.

The facts arc starkly simple. An officer on routine patrol in a residential section of the city was stopped by a citizen who told him that someone was smoking narcotics in a nearby home. The officer. who was familiar with the home from previous visits. walked in the back door without any prior announcement or permission and proceeded to the kitchen on the first floor. There he saw defendant placing a pipe into his pocket and the other person smoking crack cocaine in a similar pipe. He immediately arrested both.

Defendant moved to suppress the evidence. The officer and both persons arrested—defendant and a Ms. Hudson-testified al the evidentjary hearing. Both of the persons arrested testified that they were or had been residents of the rooming house.[1] The testimony showed that it was a two-story house surrounded by a fcncc, with entrances from the street on the side and in the back. Ms. Hudson testified that the back door has both a screen door and wooden outer door which are left open during the day. but the officer testified that on the day in question there were no doors on the back entrance. only empty hinges.

Both floors are bisected by a corridor with rooms on each side. The officer testified that one can stand at either the front or rear entrance and see through the opposite entrance of the building. The kitchen is located at the back end on the ground floor on one side of the corridor. The testimony was that the interior of the kitchen could not be seen from the threshold or outside the rooming house, but it could be seen from the corridor. The residents testified that the house is. effectually. private for the tenants and their guests. and that the kitchen is available for use only by the tenants. In fact. some of the tenants store personal belongings in the kitchen.

Ms. Hudson testified that there were "4 or 5 people just off the street" in the kitchen area that day who were neither tenants nor guests. Neither she nor anyone else testified that the house or kitchen is open to the public generally, or that the general public is permitted to enter the premises without restraint. Both the officer and one of the

[1] Ms. I ludson testified that she was a visitor to the rooming house on the Jay in question hut that she had formerly lived there and knew the owner.

residents testified that the tenants keep locks on the entrance to their individual rooms, but no one testified that the absence of locked doors at the entrances was intended as an invitation to the public to enter at will. The state stipulated that the officer did not have probable cause to enter the premises.

During closing argument the court commented to the prosecutor as follows:

> "All right, now if he had no reason to go in the house, then it seems to me that the only way the search can bc sustained is to determine that a police officer has the right . . . any time a police officer is riding down Ninth Street and wants to go in the rooming house and look around, they can."

To this. the prosecutor responded that "under this fact situation. I think that an officer any lime of the day or night could walk through this open area, walk through the back. and leave." He then added,

> "But just to distinguish the types of areas, my position is he could walk through the common areas of the building-it doesn't have a locked door on either side."

In refusing to suppress the evidence, the court made the following findings of fact:

> "One, that the defendant Johnny Titus was a tenant or lessee in the rooming house; two that [Ms.] Hudson was an invited guest in the rooming house; three that both of them had reasonable expectations of privacy in the rooms in the rooming house that were utilized for the sole and exclusive use of the lessee for that particular room. I find that. as to the kitchen area, that it was accessible from both the front door and the back door to not only the tenants or their invited guests but to the persons who were neither tenants nor invited guests. I find that there was no security on the doors, as testified to by the officer, and as I believe corroborated by at least one of the witnesses, one of the defendants. I find that Ms. Hudson-I recall that Ms. Hudson testified there were persons in the kitchen who were neither invited guests nor tenants, and I find that's further evidence that the rooming-the kitchen—was accessible to persons. . I find, therefore, that the officers in this instance. as any other member of the public in the area, apparently could have come into the home, or come into the rooming house into the common areas."

The court thereupon found the paraphernalia in plain view. The trial judge further explained that he read *State v. Batista*, 524 So. 2d 48 1 (Fla. 3d DCA 1988), cited by the prosecutor. to hold that no resident of an unlocked, unsecured common or shared area in an apartment building has a reasonable expectation of privacy in such areas.

We begin with the principle that "[w]ithout question. the home is accorded the full range of Fourth Amendment protections." *Lewis v. United States*, 385 U.S. 206.2 10 (1967). As, the Supreme Court also once explained:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Silverman v. United States, 365 U.S. 505, 51 l (1 961).[2] The history of the home as a Fourth Amendment object of punctilious protection was thoroughly justified in the following:

> "Resistance to these practices" had established the principle which was enacted into the fundamental law in the *4th* Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers. . . 'The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen. . . [N]o man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony: and then the sheriff must be furnished with a

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[2] Justice Harlan also succinctly said: "[t]hus a man's home is, for most purposes, a place where he expects privacy. ." *Katz v. United States*, 389 U.S. 347, 361 (1 967) (I Iarlan, J., concurring).

[3] "The [Fourth] Amendment was in large part a reaction to the general warrants und warrantless searches that had so alienated the colonists and had helped speed the movement for independence." *Chimel* v. *California*, 395 U.S. 752,761 (1969).

warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon. . . .'

". . . It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.-it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. . .' The effect of the 4th Amendment is to put the courts of the United States and Federal officials. in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses. papers, and effects, against all unreasonable searches and seizures under the guise of law."

Weeks ***v. United States, 232*** U.S. 383, 389-392 (1913).[4] Moreover. as the Court reemphasized in *Chimel v. California*, 395 U.S. 752 (1969):

"Even in the Agnello case the Court relied upon the rule the '[b]elief, howevet well founded, that an article sought is concealed in a dwelling house, fiiishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.' 269 U.S., at 33, 46 S.Ct., at 6. Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with. and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . .'"

395 U.S. at 762 [citing ***Agnello v. United*** States, 269 U.S. 20, 33 (1925): and ***United States v. Jeffers***, 342 U.S. 48, 51 (1951)]. We note that in the present case the state made no attempt to show any need for the officer to make an immediate entry because of some particular circumstance inside the house. Rather, the sole basis for proceeding without a warrant or seeking consent to go in seems to have been the absence of doors or locks preventing the officer's entry.

In the present case. we deal with a rooming house.[5] Traditionally, that is a residence is which tenants have individual rooms and share some common spaces-whether a bath. a dining room or as here a kitchen. The Supreme Court has directly confronted a warrantless search of a rooming house in *McDonald* ***v. United States, 335*** U.S. 451 (1948). There a police officer climbed into a window in the landlady's bedroom in a rooming house and proceeded to the second floor. From the hallway, the officer stood on a chair and peered into the transom above the door to defendant's room and saw gambling paraphernalia. As a result, the officer entered the room and arrested the defendant. In finding the resulting arrest illegal, as without a prior warrant. the court said:

"We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the

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'Judge Frank summed up the core Fourth Amendment protection for the home thus:

"I believe that, under the [Fourth] Amendment, the 'sanctity of a man's house and the privacies of life' still remain protected from the uninvited intrusion. A man can still control a small part of his environment, his house: he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place-which is a man's castle."

United States v. On Lee, 193 F. 2d 306, 3 15–3 16 (2nd Cir 1954), *cert. granted*, 342 U.S. 94 I (1952), (Frank, J., dissenting).

[5] The state argues that the legislature treats rooming houses differently for purposes of search warrants. Section 933. 18(8), Florida Statutes (1995) (search warrant may not be issued to search private, occupied dwelling unless dwelling is used in part for business purpose such as "hotel. or boardinghouse. or lodginghouse" [e.s.]). We can assume that the rooming house in question fits within the statutory terms "boardinghouse or lodginghouse." By its clear terms, however, the statute applies only to search warrants, and the lack of a warrant is essentially the issue in the present case. Indeed so far as the statute might conceivably be applicable to the present case, it suggests that without the warrant police entry onto the premises is unauthorized.

Fourlh Amcndmcnt has interposed a magistratc bctwccn thc citizcn and the police. This was done not to shield criminals nor to makc thc home a safe havcn for illegal activities. It was donc so that an objcctivc mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too prccious to cntrust to the discretion of thosc whosc job is the detection of crimc and thc arrest of criminals. And so the Constitution requires a magistratc to pass on the desires of the police bcforc they violate the privacy of the home. Wc cannot be true to that constitutional requirement and excuse the absence of a scarch warrant without a showing by those who scck exemption from the constitutional mandate that lhc exigencies of the siluation madc that course imperativc."

335 U.S. at 455–456. The *McDonald* court was careful not to invalidate thc arrest simply bccause the officcr brokc into thc landlady's room without any consent or invitation to do so. The Court also placcd no wcight on the fact that the officer was in a "common area". the hallway, when he spied into thc transom and first saw cvidence of a crime.

Justice Jackson added a further explanation in a concurring opinion in *McDonald*:

> "the officcr in chargc of the investigation took the matter into his own hands. He neither had nor sought a search warrant or warrant of arrest; he did not then havc knowlcdgc of a crime sufficient, even in his own opinion. lo justify arrest, and he did not cvcn know that thc suspect. McDonald. was in the rooming house at the timc. Nevertheless. he forced open the window of thc landlady's bedroom and climbed in. He apparently was in plain clothes but showed his badge to the frightened woman. brushcd her aside and then unlocked doors and admitted two other officers. They then wenl to the hall outside thc room rented and occupicd by dcfendant. The officer in chargc climbed on a chair and looked through a transom. Seeing the defendant McDonald cngaged in activity which he considcrcd to be part of thc lottery procedurc, hc arrcstcd him and scarchcd thc quarters. The Governmcnt argucd, and thc court below held. that sincc thc forccd entry into thc building was through the landlady's window, in a room in which the defendant as a tenant had no rights, no objection lo this modc of entry or lo the search that followcd was available to him.
>
> "Doubtless a tenant's quarters in a rooming or apartment house arc legally as well as practically exposed to lawful approach by a good many persons without his consent or control. Had the policc been admitted as guests of another tenant or had thc approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger, they could then spy or eavesdrop on others without being trespassers. If they peeped through the keyhole or climbed on a chair or on one another's shoulders to look through the transom, I should see no grounds on which thc dcfendant could complain. If in this manner they, or any privatc citizcn, saw a crime in the course of commission, and arrest would be permissible.
>
> "But it seems to me that each tenant of a building, while hc has no right to exclude from the common hallways those who enter lawfully, does havc a pcrsonal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry." [e.s.]

335 U.S. 45 I, 457458 (Jackson, J. concurring).

We glean from ***McDonald*** and the foregoing decisions an inflexible rule that, unless the case involves a recognized exception to the warrant requirement. thc Fourth Amendment bars a police officer from simply walking into a home and searching for evidencc of criminal conduct by its inhabitants. Recurring to thc Court's explanation in *Chimel*, the mere fact that an officer is given information by another citizcn,[6] "however well

[6] Our recent decision in *State* v. *Evans*, 692 So. 2d 2 16 (Fla. 4th DCA 1997), is inapplicable. That case involved the reliability of a tip from a citizen-informant as a basis for an investigatory stop which led to an arrest for drunk driving at a drive-in restaurant. In the absence of exceptional circumstances to dispense with the necessity of a search warrant, the inherent reliability of citizen–informants provides no justification to dispense with the necessity of a warrant to search a house, any more than probable cause does.

founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant." 395 U.S. al 762. In other words. even with probable cause to believe that a residence contains evidence of a crime. the rule is that a warrant is required before the police may enter without conscnl.

It is important to note that the state does not assert, and there is no evidence to suggest, any established exception to the warrant requirement. This is not a case involving motor vehicles. *Chambers v. Maroney*, **399** U.S. 42 (1970) (warrant not required for search of movable vehicle). Nor do we confront exigent circumstances such as. for example, the imminent and likely destruction of evidence of a crime in progress. *Warden, Md. Penitentiary v.* ***Hayden. 387*** U.S. 294 (1967) (where police were informed that armed robbery had taken place and that suspect had entered certain house less than five minutes before they reached it, officers acted reasonably when they entered house and began to search for man whose description they had been given and for weapons which he had used in robbery or might use against them and neither entry without warrant to search for robber nor search for him without warrant was invalid). Moreover, this is not a case of a search incident to a lawful arrest. *See Vale v.* ***Louisiana,*** 399 US. 30 (1970) (search of house incident to lawful arrest not valid where arrest took place outside house on steps before defendant could enter). Finally, there is no suggestion of immediate peril or harm to persons within. *See* ***generally 3*** Wayne R. LaFave, SEARCH AND SEIZURE, (3rd ed.) § 6.5(d).

Since *McDonald*, several courts have addressed the question whether there is Fourth Amendment protection for the tenants of a rooming house when the officer enters common areas without the consent of a resident. In ***United States v. Carriger, 54*** I F. 2d 545 (6th Cir. 1976), where the officer slipped into the building by holding a locked door open after some workmen left the premises, the court invalidated the arrest. saying:

> "WC cannot agree with the district court that *McDonald* may be distinguished upon the basis that it proscribed a forcible entry into an apartment building while the entry here was peaceable. Whether the officer entered forcibly through a landlady's window or by guile through a normally locked entrance door, there can be no difference in the tenant's subjective expectation of privacy. and no difference in the degree of privacy that the Fourth Amendment protects. A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not except trespassers."

54 I F. 2d at 551. A number of appellate courts have agreed with the rationale of ***McDonald*** and *Carriger*. *See*, ***e.g.,*** *Reardon v. Wroan*, ***8 I*** 1 F. 2d 1025 (7th Cir. 1987); *United States v.* ***Booth,*** 455 A. 2d 135 I (D.C.App.1983); ***People v.*** *Trull*, ***64*** Ill. App. 3rd 385 380 N. E. 2d 1 169 (1978); *State* ***v.*** *Di Bartolo*, ***276 So.*** 2d ***29 1*** (La. ***1973):*** *Garrison* v. *State*, 28 Md. App. 257. 345 A. 2d 86 (1975): *People* ***v.*** *Beachman*, 98 Mich. App. 544.296 N. W. 3d 305 (1980). On the other hand. the weight of authority among the federal appellate courts has rejected the *Carriger* analysis of ***McDonald. See.*** *United States* ***v.*** *Nohara*, ***3*** F. 3rd 1239 (9th Cir. ***1993):*** *United States* ***v.*** *Barrios-Moriera*, ***872*** F. 2d ***12*** (2nd Cir. ***1989). cert. denied, 493 U.S.*** 953 ***(1989):*** *United* ***States v.*** *Holland*, ***755*** F. 2d 253 (2nd Cir. 1985). ***cert. denied, 47*** 1 U.S. 1125 (1985); *United* ***States v.*** *Luschen*, 614 F. 2d 1164 (8th Cir. 1980), ***cert. denied, 446 US. 939*** (1980); *United States* ***v.*** *Eisler*, ***567*** F. 2d 8 14 (8th Cir, 1977): see *also* I Wayne R. LaFave, SEARCH AND SEIZURE (3rd ed.) § 2.3(b) at 477-478.

Our state constitution requires that the right to be free from unreasonable searches and seizures be construed:

> "in conformity with the 4th Amendment to the United States Constitution. as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."

Art. I. § 12, Fla. Const. (as amended 1982). Moreover, a Florida District Court of Appeal takes

its direction on matters of federal constitutional law first from the United States Supreme Court and. in the absence of definitive precedent from that Court. from the Florida Supreme Court. *See State v. Dwyer*, 332 So. 2d 333 (Fla. 1976) (the only federal decisions binding upon the Florida state courts are those of the United States Supreme Court); *Board of County Cbmm 'rs v. Dexterhouse*, 348 So. 2d 916 (Fla. 2nd DCA 1977) (same); *Brown* v. *Jacksonville*, 236 So. 2d 141 (Fla. 1st DCA 1970) ("A decision of a Federal District Court, while persuasive if well reasoned, is not by any means binding on the courts of a state. The Supreme Court of Florida is the apex of the judicial system of the State of Florida, and its decisions are binding upon this court.").

Our supreme court has been no less assiduous in protecting the home from warrantless entry by police. In *Dickens v. State*, *SK So.* 2d 775 (Fla. 1952), our court flatly held:

> "When an arresting officer enters one's back door for the purpose of searching the premises and to make an arrest without a search warrant he is little more than a trespasser..'

Just a few years later. in *Benefield v. State*, 160 So. 2d 706 (Fla. 1964). Justice Terrell explained why the constitution bars police officers from simply walking into a person's home and searching for evidence of a crime:

> "Entering one's home without legal authority and neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial. It was condemned by the yearbooks of Edward IV, before the discovery of this country by Columbus. . . William Pitt categorized a man's home as his castle. Paraphrasing one of his speeches in which he apostrophixed the home, it was said in about this fashion: The poorest pioneer in his log cabin may bid defiance to the forces of the crown. It may bc located so far in the backwoods that the sun rises this side of it: it may be unsteady; the roof may leak: the wind may blow through it; the cold may penetrate it and his dog may sleep beneath the front steps, but it is his castle that the king may not enter and his men dare not cross the threshold without his permission.
>
> "This sentiment has mouldcd our concept of the home as one's castle as well as the law to protect it. The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door. giving his name and the purpose of his call. There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly. The law so interpreted is nothing more than another expression of the moral emphasis placed on liberty and the sanctity of the home in a free country. Liberty without virtue is much like a spirited horse. apt to go berserk on slight provocation if not restrained by a severe bit."

160 So. 2d at 708–709. We read these state cases to be entirely harmonious with the United States Supreme Court decisions discussed.

Applying these principles to the present case, especially as applied in *McDonald,* we hold that the officer's entry into the back entrance and corridor of this rooming house was improper in the absence of either a search warrant or consent by one of the occupants. The absence of locks or even doors on the entrances does not change the character of the building from a residcncc. Nor does the fact that several unrelated people had their residences in one building weaken its status as a house or dwelling. The privacy of residential premises does not arise from the nature of the security devices employed to keep unwanted intruders out. Rather, it derives from the very nature of the use as a rcsidcnce-whether the occupants be one or many. related or unrelated. The security of locks and doors may be vital in a society where thugs and thieves prey on the unwitting and unable, but the importance of such security devices for personal safety hardly makes them a constitutional necessity for purposes of search and seizure. Locks may undeniably evidence an expectation of privacy in another place where the expectation of privacy may fairly and reasonably be open to question, but their lack does not erode the high protection our Constitution affords to those special places in which people reside.

Nor does the prescncc of visitors in the kitchen change lhc character of the building from a residence into a public building. In the latter part of the 20th century. kitchens have become places to gather and converse with friends, neighbors and acquaintances. That WC may allow some neighbors to wander in and out of our kitchens. howcvcr, does not turn them into public areas open to police. Nor does the fact that this company was described as being "from off the street" convert the kitchen into a 19th century village commons. A gathering place in one's home is just that: a place *within* a home. and it is entitled to the same protection as the home itself. Pcoplc may suffer some of their neighbors into the kitchens within their homes without connoting thereby any general invitation to the police.

It is also indisputable that, even if this rooming house lacked doors and locks. it was clearly surrounded by a fence. That some people were allowed to come inside the fence and into the kitchen does not eliminate the fact of the fence. The evidence was uncontradicted that the house was for the tenants only and those guests they either invited or suffered. No consent for the state to enter at will can bc drawn from the mere fact that the residents or owners were too poor to afford secure doors and locks on the entrances. or from the fact that the officer could see through one entrance down the corridor and out the other. The winds of subtropical Florida may course through this home-which is apparently as a matter of comfort or necessity open to the air-but that scarcely means that the police can do so as well.

For that reason. we think the trial judge read too much into the testimony of Ms. Hudson regarding the presence of the visitors on the day in question. We repeat: Ms. Hudson did not testify that none of the other tenants-or even the owner-had given any of them permission to bc there at that time. The fact that the premises were operated as a rooming house does not justify a conclusion. from the mere presence of this company who did not establish explicit consent to be there. that the premises were therefore open to the public. In other words, the inference drawn by the finder of fact was impermissible because it was not reasonably suggested by the proven fact from which the inference was drawn.

The trial judge said that he read *State v. Batista,* 524 So. 2d 48 1 (Fla. 3d DCA 1988), to hold that "no resident of the unlocked, and unsecured premises in [an] apartment building in the present case could have had a reasonable expectation [of privacy] in those shared areas." *Batista* did not explain how the officers came to enter into the apartment building except as follows:

> "Contrary to the trial court's view. it is legally inconsequential-although perhaps emotionally provocative-that the seizing police officers entered the grounds of the thirty-unit apartment building by scaling a six-foot high wall at the rear of the property, since it plainly appears from a fair reading of the record that the general public had unimpeded access to the building through the front entrance to the property."

524 So. 2d at 482. We can probably safely assume, however. that when the officers entered the building they did not have probable cause. In any event. the decision does seem to stand for the proposition that in an apartment building a tenant's expectation of privacy in the common areas turns on how secure the entrance to the building is. Of course, today's case involves a rooming house rather than an apartment building. To the extent, however, that our decision conflicts with *Batista*, we certify conflict.

WC reverse the order denying suppression and the following conviction for proceedings consistent with our disposition.

REVERSED.

GLICKSTEIN and GROSS, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.