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IN THE
SUPREME COURT OF FLORIDA

DOCKET NO.: SC15-801

STATE OF FLORIDA,

Petitioner,

vs.

CHRISTOHPER MARKUS,

Respondent.

On Discretionary Review From the
First District Court of Appeal

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, Christopher Markus, will be referred to herein by name or as "Respondent." Petitioner, State of Florida, will be referred to herein by name or as "Petitioner." References to the record on appeal will be designated by reference to the record on appeal volume (by Roman numeral) and page number, as set forth in brackets. Example: [R. I, 1].

STATEMENT OF THE CASE AND FACTS

Christopher Markus, Respondent, was charged by Information with one count of possession of a firearm by a convicted felon, one count of possession of less than 20 grams of cannabis, and one count of resisting an officer without violence to his person. [R.I, 13]. Prior to trial, Markus filed a motion to suppress, seeking to suppress evidence, including a firearm, obtained as a result of law enforcement officers' warrantless entry into his residence and resulting seizure of evidence found therein. [R.I, 137-143]. The trial court denied the motion. [R. I, 143]. Mr. Markus proceeded to trial on the possession of a firearm by a convicted felon charge, as the other charges were severed for trial. On October 24, 2013, following a jury trial, Mr. Markus was convicted of possession of a firearm by a convicted felon. [R. VII, 609]. Thereafter, he timely filed his Notice of Appeal. [R. IV, 650-51]. On appeal, the First District reversed his conviction, finding the trial court erred in denying his motion to suppress. *Markus v. State,* 160 So.3d 488, 489 (Fla. 1st DCA Feb. 27, 2015).

A. Facts

On the evening of April 18, 2010, Mr. Markus and a few of his friends were hanging out in the attached garage of an apartment where Mr. Markus lived, paid rent, and shared space with his friends. [R.I, 114, 121; R.VII, 421-422, 498]. Mr. Markus and his friends, Justin McCumbers, Eric Blair, Brandon Junk, Cassie Gurley,

and Julia Martin, socialized together in the garage of the apartment on that night. [R.VII, 422-423]. The garage contained two couches in an 'L' shape on the right hand side when viewing the garage from the driveway. [R.VII, 459]. A coffee table sat in front of the couches, [R.VII, 459], as did a pool table. [R.VII, 459]. The apartment is styled like a condominium, with a single building containing multiple units, with three garage doors, separate entrances, and living areas on top. [R.VI, 257-258]. A driveway leads from the garages to the street, and on this evening multiple cars, including a truck, were tightly parked in the driveway leading to the garage. [R.VI, 258]. Specifically, two cars were parked directly in front of the garage, leaving a small passageway between the two cars that would lead into the garage. [R.VI, 260-261].

While the friends socialized in the garage, Officer Prendergast, a patrol officer with the Jacksonville Beach Police Department, was dispatched to a noise complaint at another residence located near Mr. Markus' apartment. [R.VI, 226]. Officer Prendergast testified to observing two men in front of the building on a public road with what appeared to be alcoholic beverages, smelling the odor of marijuana in the air, and seeing Mr. Markus exhale and flick a cigarette behind a pickup truck in the driveway. [R.VI, 226-229]. Officer Prendergast walked over to Mr. Markus, identified himself, and asked Mr. Markus to stop to be detained. Mr. Markus then put his hands in the air and repeated "what did I do, what did I do?" [R.VII, 479].

Mr. Markus retreated into the garage with his hands up.[1] [R.VII, 479-480]. Mr. Markus, after entering the garage, sat on the end of a loveseat with his arms still in the air. [R.VII, 480].

Officer Prendergast and Officer Edu followed Mr. Markus into the garage. [R.VI, 327; R.VIII, 480]. When entering the garage, Officers Prendergast and Edu did not have a warrant or seek or receive consent from Mr. Markus or any of the other occupants before entering the garage. [R.VI, 270]. The two officers shouted commands at Mr. Markus to get up, however, due to his bad knees and size, Markus could not immediately comply with the request to stand up. [R. VII, 480]. The officers picked Mr. Markus up from the couch and threw him to the ground. [R.VII, 462-463, 481]. At this time, Officer Hawes arrived at the apartment and observed a struggle on the ground. [R.VI, 327]. Officer Hawes testified he observed a firearm in Mr. Markus' waistband and removed it. [R.VI, 330]. Mr. Markus was then arrested on the charges of possession of a firearm by a convicted felon, resisting an officer without violence, and possession of marijuana. [R. I, 1].

[1]While Officer Prendergast testified that Mr. Markus ran towards the garage [R. VI 226], he admitted that in preparing his report on the night of the incident, he never referenced Mr. Markus running anywhere and, indeed, noted that Mr. Markus *walked backwards* into the garage. [R.VI, 229, 264-265].

B. Motion to Suppress

Mr. Markus filed an amended motion to suppress fruits of warrantless search and seizure, arguing discovery of all evidence inside the residence violated the Fourth Amendment because law enforcement officers entered the home without a warrant, consent or any other exception to the warrant requirement, and conducted an unlawful search and seizure. [R.I, 43]. A hearing was held and Officer Prendergast and Mr. McCumbers testified. [R.I, 74-128].

The court denied Mr. Markus' amended motion to suppress, finding Officer Prendergast had probable cause to detain Appellant for possession of marijuana. [R.I, 140]. It further found: "Detective Prendergast [was] more credible than Mr. McCumbers in regard as to whether Defendant fled. Once Defendant turned and ran, Detective Prendergast and Office Edu were justified in pursuing Defendant in order to detain him." [R.I, 141]. The court concluded Mr. Markus was always in sight of the officers and pursuit was immediate and continuous, and thus held hot pursuit was a valid exception to the warrant requirement allowing the officers to enter the residence. [R.I, 141].

C. Appeal

Following his conviction for possession of a firearm by a convicted felon, Mr. Markus appealed his conviction to the First District Court of Appeal arguing, among other issues, that the trial court had erroneously denied his motion to suppress.

Markus v. State, 160 So.3d 488 (Fla. 1st DCA Feb. 27, 2015). The First District found that the state had not carried its burden of justifying the warrantless search under the totality of the circumstances. *Id.* at 494. The Court interpreted *Welsh v. Wisconsin*, 466 U.S. 740 (1984) to employ a heightened presumption of illegality because the underlying offenses which Mr. Markus was suspected of committing were only misdemeanors. *Id.* at 491–92. Further, while the First District did not categorically find that all warrantless entries into the home for misdemeanor arrests were per se unreasonable, it did hold that since there was no danger to the public, police or property, or that evidence would be destroyed, the hot pursuit exception did not apply. *Id.* at 493. Further, the First District distinguished this case from a line of cases from the Third District where fleeing misdemeanants posed a danger to the public. *Id.* at 793. Accordingly, the First District reversed Mr. Markus' conviction. *Id.* at 494.

The State sought review of the First District's decision by this Court, asserting jurisdiction on the grounds that the First District's opinion expressly and directly conflict with opinions from the Third District and that the opinion expressly construed a provision of the state and federal constitutions. This Court has accepted review.

SUMMARY OF THE ARGUMENT

The First District correctly interpreted the Fourth Amendment in accord with United States Supreme Court precedent in *Payton v. New York,* 445 U.S. 573 (1980) and *Welsh v. Wisconsin,* 466 U.S. 740 (1981). In *Welsh,* the Court found a strong presumption of unreasonableness for warrantless entries into the home when the underlying offense is a minor crime. Further, the Third District cases that ostensibly conflict with the First District's holding are distinguishable that they involved emergency circumstances sufficient to rebut the presumption of unreasonableness that attaches to such warrantless entries. Finally, to the extent that the Third District may have announced a rule that all jailable offenders may be pursued into their home, such a rule would unjustifiably erode the Fourth Amendment's warrant requirement by allowing police officers to enter private homes whenever they give chase to any suspect, regardless of whether the circumstances call for such entry.

ARGUMENT

I.

THE FIRST DISTRICT CORRECTLY INTERPRETED THE HOT PURSUT EXCEPTION AS IT APPLIES TO FLEEING MISDEMEANANTS. (RESTATED)

A. Standard of Review

Appellate courts accord a presumption of correctness to a trial court's determination of historical facts, but they must independently review mixed questions of law and fact that ultimately arise out of the Fourth Amendment. *Connor v. State,* 803 So.2d 598, 607 (Fla. 2001).

B. The First District's Opinion Correctly Construes the Fourth Amendment and the Hot Pursuit Exception to the Warrant Requirement as It Has Been Interpreted By the United States Supreme Court.

As a general rule, law enforcement officers may not enter a private residence to carry out an arrest without first obtaining a warrant. The United States Supreme Court has recognized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980).[1] Therefore, searches and seizures inside a home without a warrant

[1] Article I, § 12 of the Florida Constitution requires Florida courts construe one's right to be free from unreasonable search and seizure "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

are presumptively unreasonable. *Id.* In order to show that a warrantless search of a home is justifiable, the state carries the heavy burden of showing that the case falls within one of the judicially recognized exigent circumstances to the warrant requirement, which the Court has noted "are few in number and carefully delineated." *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

When evaluating whether an exigent circumstance justifies a warrantless entry into a private residence for a minor offense, the Court has held that the presumption of unreasonableness is particularly difficult to rebut. *See Welsh v. Wisconsin*, 466 U.S. 740, 750 (1981). *Welsh* dealt with an inebriated driver who, while driving on the highway, swerved off the road and into an open field. *Id.* at 742. A witness called in the incident to a police officer who, without obtaining any type of warrant, proceeded to enter the driver's home, found him lying naked in his bed, and arrested him for driving while under the influence of alcohol. *Id.* at 743. The Supreme Court of Wisconsin found that the search was justified under three exigent circumstances: hot pursuit, the need to prevent physical harm to the offender and the public, and the need to prevent the destruction of evidence. *Id.* at 747–48. The Supreme Court, however, concluded that the state had failed to meet its heavy burden in rebutting the presumption of illegality for warrantless entries into the home, because the defendant was suspected of the minor offense of driving while intoxicated, which

was punishable by a $300 fine for the first offense and a year imprisonment for the second offense committed within five years. *Id.* at 746, 750.

The *Welsh* Court stopped short creating an absolute ban on warrantless entry of the home for minor offenses, but it did state that if such searches were permissible, the government could only rebut the presumption in rare circumstances. *Id.* at 753. To reach this conclusion, it first noted that *Payton*'s requirements for warrantless home entries, probable cause plus an exigent circumstance, were expressly limited to felony arrests. *Id.* at 749, n.11.[2] It also noted that even the dissenting Justices in *Payton*, who sought to uphold the warrantless entry in that case, recognized the importance of the felony limitation, since it guarded against arbitrary police enforcement and ensured that invasions of the home could occur only in the case of the most serious crimes. *Id.* at 750 n. 12. The Court found that the presumption of unreasonableness was particularly strong when the offense was minor, noting that "when the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate." *Id.* at 750.

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[2] Likewise, § 901.19(1), Fla. Stat., limits a law enforcement officer's ability to enter a home to make an arrest by authorizing entry solely to situations where the officer has a warrant "or when authorized to make an arrest for a *felony* without a warrant...." (emphasis added). The statute does not authorize an officer to enter one's home to effectuate an arrest for a misdemeanor without a warrant.

The Court also found that such strong presumption of illegality attached to entries for minor offenses because while many state courts at the time had allowed entry of a home based on exigent circumstances where the underlying offense was a felony, comparatively few state courts allowed warrantless searches where the underlying crime was a misdemeanor. *Id.* at 753. The Court further explained the evils of warrantless entries for minor offenses by quoting a passage from Justice Jackson's concurrence in *McDonald v. United States*, 335 U.S. 451 (1948):

> Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. . . .I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

Id. at 751 (quoting *McDonald*, 335 U.S. at 459–60 (J. Jackson, Concurring)).

After performing this threshold analysis finding that the gravity of the offense played a crucial role in weighing the reasonableness of a warrantless entry, the Court

then applied the facts of the case to potential exigent circumstances. It found that the hot pursuit exigent circumstance was unavailing because there was no immediate pursuit of the suspect, threat to safety or possible destruction of evidence that would give rise to an emergency requiring chase. *Id.* at 754. It further noted that even if there was an immediate and continuous chase, the hot pursuit exception would not have applied due to Wisconsin's decision to classify a first offense for driving while intoxicated as a minor crime, which indicated that the state did not have a strong interest in effecting the arrest. *Id.* at 754.

In the instant case, the threshold inquiry into the seriousness of the underlying offense weighs in favor of finding the warrantless entry unlawful. Respondent was only suspected of possession of marijuana, a nonviolent misdemeanor subject to a maximum sentence of one year incarceration. § 893.13(6)(b), Fla. Stat. (2010). Further, in regard to the Court's specific discussion of the hot pursuit exception, Petitioner presents no argument that Respondent posed a danger to the community, that he would destroy any relevant evidence, or that any other circumstance existed that required his immediate apprehension. Rather, the sole justification that the Petitioner asserts to carry its heavy burden is that the officer decided to give chase when he saw Respondent in dispose of a marijuana cigarette. Indeed, simple possession of marijuana is the precise kind of "minor offense" which poses no

indicia of emergency that the *Welsh* Court found insufficient to rebut the presumption of illegality for a warrantless search of a home.

Petitioner improperly attempts to narrow the Court's hot pursuit holding in *Welsh* by stating that the decision only applied to civil infractions or non-jailable offenses. While it is true that the underlying offense in *Welsh* was punishable only by a fine of $300 for the first offense, the Court's holding did not rely on any distinction between jailable and non-jailable offenses. Rather, the distinction that the Court drew was between "serious" and "minor" offenses. *Welsh*, 466 U.S. at 750. While the Court, in the part of its opinion discussing the hot pursuit exception, mentions that the fact that Wisconsin's decision to classify a first-time DUI offense as a civil infraction had a bearing on the state's interest in carrying out the arrest, it did not make a broader assertion that the line between reasonable and unreasonable warrantless entries depended on whether the offense was punishable by incarceration. Indeed, the holding of the case places more emphasis on the intrusiveness of the entry and the strong Fourth Amendment safeguards of the home rather than the non-jailable nature of the offense: "The Supreme Court of Wisconsin let stand a warrantless, nighttime entry into the petitioner's home to arrest him for a civil traffic offense. Such an arrest, however, is clearly prohibited by the special

protection afforded the individual in his home by the Fourth Amendment". *Id.* at 745.[3]

However, even if the First District's reading of *Welsh*'s hot pursuit discussion is wrong and Petitioner's is right, the First District nevertheless came to the correct conclusion by applying the first portion of the *Welsh* Court's holding: that the gravity of the underlying offense is an important concern when determining if *any* exigent circumstance applies, and that there is a strong presumption of unreasonableness for warrantless searches of the home when the underlying offense is minor. This portion, which spans five pages of the opinion in comparison to the hot pursuit discussion's three paragraphs, never even mentions non-jailable or civil infractions. *Id.* at 748–53. Indeed, there are at least three elements of the Court's discussion here that indicate it intended to draw a meaningful dividing line, as the First District did, between felonies and misdemeanors. First, the Court relied heavily on its prior decision in *Payton*, and went out of its way to note that all of the Justices in *Payton*

[3] The passage that Petitioner refers to as the Court's holding is actually not part of the Court's opinion, but rather an entry form the syllabus compiled by the Reporter of Decisions. *Welsh*, 466 U.S. at 741–42, n. a1. While the syllabus entry is not a completely inaccurate description of the Court's holding, the language does place stronger emphasis on the non-jailable nature of the underlying offense than the Court's actual holding applying the hot pursuit exception, which only mentions the fact that the offense was a civil infraction once. Given the extent to which the Petitioner's argument relies on the parsing of the quoted language, it must be noted that what Petitioner refers to as "the Court's ultimate ruling" was not, ultimately, the Court's.

were in agreement that the exigent circumstances exception must be limited to felonies in order to protect citizens against abusive police entries into the home. *Id.* at 749 n 11.

Second, the Court's survey of state law interpreting the exigent circumstances exception expressly found that most courts addressing the issue refused to permit warrantless home arrests for non-felonious crimes. *Id.* at 752 (citing, inter alia, *State v. Guertin*, 461 A.2d 963, 970 (Conn. 1983) (noting that exigent circumstances exception limited to serious crimes and misdemeanors are not included); *People v. Strelow*, 292 N.W.2d 517, 521–22 (Mich. 1980) (same); *People v. Sanders*, 374 N.E.2d 1315 (Ill. 3d DCA 1970) (burglary not grave offenses); *State v. Bennett*, 295 N.W.2d 5 (S.D. 1980) (distribution of controlled substances not grave offense)).

Third, the lengthy quotation from Justice Jackson's concurrence specifically distinguished nonviolent from violent crimes, and came from the decision in *McDonald v. United States*, 355 U.S. 451 (1948), a case which dealt with the criminal, jailable offense of running a number's lottery.[4] Given that virtually all of the precedent on which the *Welsh* Court relied included jailable offenses, the *Welsh* Court's strong presumption of illegality for minor offenses should not be limited to

[4] Indeed at the time *McDonald* was decided, running a numbers lottery was classified as a felony. *See Newyahr v. United States*, 177 F.2d 658, 658 (D.C. Cir. 1949). This indicates that Justice Jackson's interpretation of the warrant requirement would extend even beyond misdemeanor crimes when the underlying offense is nonviolent.

jailable offenses. Rather, the First District correctly concluded that the dividing line between serious and minor offenses is drawn between felonies and misdemeanors and that absent some concern for dangers to the public or destruction of evidence, officers should not be allowed to enter one's home without a warrant to arrest for a misdemeanor.

In its previous discussions of the hot pursuit exception, the Supreme Court has allowed police officers to enter a private residence while in "hot pursuit" of a fleeing suspect in only limited circumstances. *United States v. Santana*, 427 U.S. 38, 42–43 (1976). In *Santana*, undercover officers had set up a controlled buy of heroin from the defendant using $110 in marked bills. *Id.* at 39–40. During the controlled buy, which took place in a car parked outside the defendant's house, one of the defendant's associates took the marked bills, delivered them inside the defendant's house, and returned with several glassine envelopes containing heroin. *Id.* at 39. The police officer then found the defendant standing near the vestibule of the house and chased her inside, wherein he discovered more glassine envelopes filled with heroin and $70 of the marked bills inside the defendant's pocket. *Id.* at 41.

The Court found that the hot pursuit exception authorized entry into the home in *Santana*. *Id.* at 42–43. It stated that the facts were governed by the precedent set in *Warden v. Hayden*, 387 U.S. 294 (1967), which allowed police to make a warrantless entry to arrest an armed robber. *Id.* at 42. The court reasoned that the

need to act quickly in *Santana* was even greater than that in *Warden* because once the defendant saw the police, the officer had a realistic expectation that the defendant would get rid of the paper bag, which would result in the destruction of evidence tying her to the transaction. *Id.* at 43.

Here, Petitioner overemphasizes the scope of the hot pursuit exception as it was announced in *Santana.* To support *Santana's* application here, Petitioner relies on a single sentence in the opinion: "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place," without regard to the context in which the Court issued this statement. *Santana* is inapplicable to the instant case for two reasons. First, as the First District pointed out, *Santana* involved a police officer who had probable cause to effectuate an arrest for the distribution of heroin, which was occurring in the very residence that the police entered without a warrant. *Id.* at 40. Therefore, *Santana* was a factual situation that dealt with an arrest for a serious felony while Mr. Markus was only suspected of a minor misdemeanor offense. [R. VI, 226–29; R. VII, 479–80].

Second, and perhaps more importantly, the Court's rationale that the hot pursuit was justified is completely inapplicable to this case. While the Court in *Santana* recognized that "some element of chase will usually be involved in a hot pursuit case," it did not make the broader assertion that Petitioner relies on, that any time an officer gives chase with the intention to make an arrest, the situation

automatically becomes a hot pursuit. Indeed, in *Santana* the Court adopted the district court's findings of fact emphasizing the "extreme emergency conditions" that were present during the chase. *Id.* at 41–42. In *Santana*, the sole evidence connecting the defendant to the controlled buy were the marked bills inside the bag that the officer saw the defendant holding. *Id.* at 41. Had the officer not given chase when the defendant spotted him, the defendant would have quickly disposed of the bag containing the marked bills, leaving the police without crucial evidence, which may have been necessary to even obtain an arrest warrant. In *Santana*, as the Court's holding suggested, the defendant's retreat into a private place would have literally defeated the suspect's arrest.

In the instant case, by contrast, the extreme emergency conditions present in *Santana* were completely absent. There was no threat of destruction of evidence, since Markus flicked the cigarette that the officer believed to be marijuana onto the ground before the officers approached. [R. VI, 226–29]. All of the evidence that the officers needed to obtain a warrant and effectuate an arrest for possession of marijuana was available to them without the need to enter the residence. Furthermore, Petitioner has not offered any justification as to why entry into the house was necessary, such as danger to the occupants of the home or likelihood of escape, other than the possible administrative inconvenience involved in obtaining a warrant. Indeed, escape was virtually impossible given officers' presence on the

scene. [R. VII, 480]. Here, failing to enter Markus' home would not have *defeated* the arrest for possession of marijuana, as it would have under the facts of *Santana.* Rather, failing to enter the residence would have merely *delayed* petitioner's arrest while the officers either obtained a warrant, or waited for Markus to exit the residence.

Finally, to the extent that the opinion in *Santana* might have intended a broader application of the hot pursuit exception, that holding would be expressly limited by the Court's decision in *Welsh*, which was decided after *Santana*.[5] While the *Welsh* Court found that hot pursuit was not present, in part, because there was no immediate and continuous chase, it nevertheless expressly contemplated the hot pursuit exception in its decision, citing *Santana. Welsh,* 466 U.S. at 749. Had the *Welsh* Court intended to treat the hot pursuit exception differently from other exigent circumstances involving minor offenses, certainly it would have explicitly stated such in its hot pursuit discussion. However, the Court instead made a broad

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[5] A court may overrule a prior decision where there has been a significant change or development in constitutional law. *See Asostini v. Felton,* 521 U.S. 203, 235 (1997). Further, where a rule in a later case merely applies precedent to a new and different factual situation, the rule of the later case applies to the earlier case. *United States v. Johnson,* 457 U.S. 537, 549 (2002). Therefore, *Welsh* can be read as applying a different rule than *Santana* or merely applying the rule from *Santana* to a different set of facts. In either case, *Welsh's* presumption significantly limited *Santana's* application to minor offenses.

determination that the presumption of unreasonableness was particularly strong for minor offenses, even in the face of *all* exigent circumstances.

Petitioner also attempts to strengthen its interpretation of *Welsh* by relying on a per curium opinion by the Supreme Court in *Stanton v. Simms*, 134 S. Ct. 3 (2013), which it alleges discredits the First District's opinion. However, *Stanton* is both factually and legally inapposite to the present case. *Stanton* was a civil rights case involving a group of police officers who were called to investigate a public disturbance in an area "known for violence and associated with area gangs". *Id.* at 3. When they arrived, they witnessed two men run toward a nearby apartment complex, one of whom was carrying a baseball bat. *Id.* The officer ordered the suspect to stop, but the subject refused. *Id.* The officer specifically testified that while he did not see the baseball bat, he "feared for his safety" because his view of the fleeing suspect was obstructed by a six-foot fence and made a "split-second decision" to kick open the gate in pursuit of the suspect. At this point the officer slammed open the gate to the residence, which happened to belong to the plaintiff, and struck the plaintiff in the forehead, causing injuries. *Id.* The plaintiff brought suit under §1983, alleging an illegal entry of her residence. *Id.* The Court held that, while the crime that the suspect had committed, obstructing a peace officer, was only a misdemeanor, the officer was nevertheless entitled to qualified immunity. *Id.* at 7.

However, the holding of the Court in *Stanton* was based upon the Court's analysis of "qualified immunity" law, unique to civil rights actions. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The standard of review for such an inquiry is extremely deferential to the police officer, allowing "mistaken judgments" and prohibiting all but the "plainly incompetent" or those who "knowingly violate the law." *Ashcroft v. al-Kidd,* 131 S.Ct.1 2074, 2085 (2011).

Indeed, the Court's limited holding on the officer's defense of qualified immunity in a civil rights action fails to address the issue presented here. The *Stanton* court specifically observed it was not reaching the Fourth Amendment issue: "[w]e do not express any view on whether Officer Blanton's entry into Simms' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not beyond debate. Stanton may have been mistaken in believing his actions were justified, but he was not 'plainly incompetent.'" *Stanton,* 134 S.Ct. at 7 (citations omitted) (emphasis added). In reaching its holding, the Court cited to a number of conflicting decisions regarding officers' pursuit of fleeing misdemeanants into residences to show the law in the

area is not "clearly established." *Id.* Therefore, *Stanton*'s utility is extremely limited in interpreting *Welsh*, since the Court's analysis never reached the constitutional merits of the plaintiff's claim. Rather, it only reached the merits of the officer's affirmative defense of "qualified immunity."

Furthermore, *Stanton* is not readily applicable to the instant case because the justification for the search involved a police officer who gave pursuit because he feared for his safety and could not see if the suspect was retreating or perhaps planning to return from behind the fence with greater numbers behind him. *Id.* at 4. By contrast, here the officers never alleged that they were afraid for their safety. Indeed, Respondent in this case "retreated" from the police by putting his hands up and running into an area where he was still in full view of the officers on the scene. [R. VII, 480]. For this reason, even if the *Stanton* decision was legally applicable to the instant case, the facts of *Stanton* alone distinguish it.

Given that *Stanton* fails to confront the Fourth Amendment issue presented, the last word from the Supreme Court on the exigent circumstances exception as applied to minor offenses lies with *Welsh*. *Welsh* held that where "minor offenses" are at issue, the government could only rarely rebut the presumption of illegality for warrantless searches. The First District applied this presumption to the hot pursuit exception and found that the state could not carry its burden because it could not show that there were threats to the safety of the public, property, or police which

required immediate action by officers with no time to obtain a warrant. *Markus*, 160 So.3d at 492. Consistent with controlling precedent, the First District did not create any categorical ban on warrantless entries for misdemeanors, but instead applied *Welsh's* heightened presumption of unreasonableness for minor offenses and found the facts here wanting. *Markus*, 160 So.3d at 492. Thus, the First District properly interpreted the decisions of the United States Supreme Court and correctly applied the Fourth Amendment of the United States Constitution in conformity with Art. I, §12 of the Florida Constitution.

C. The First District's Opinion Correctly Adheres to Florida Courts' Prior Interpretation of the Fourth Amendment and is Distinguishable from Third District Case Law Interpreting the Hot Pursuit Exception.

Petitioner alleges that the First District's opinion contradicts Florida law by impermissibly limiting the holding of *Santana* or impermissibly expanding the holding of *Welsh*. However, this Court has long employed the same presumption of unreasonableness to warrantless searches of the home that the First District dutifully applied here. Under Florida law, exigent circumstances may only justify the warrantless entry into a home where there is a "some emergency" that makes warrantless search "imperative to the safety of the police and the community." *Riggs v. State*, 918 So.2d 274, 278 (Fla. 2005). A search is considered imperative when the government can show a compelling need for official action without time to secure a warrant. *Id.* Furthermore, this Court has also noted that the kinds of exigencies or

emergencies that may support a warrantless entry include those "relating to the safety of persons or property, as well as the safety of police." *Id.* (quoting *Rolling v. State*, 695 So.2d 278, 293 (Fla. 1997)). The First District employed this rule from *Riggs*, to the instant case to find that the emergency circumstances necessary to justify a warrantless entry were not present. While *Riggs* dealt with the medical emergency exigent circumstance, its statements requiring emergency circumstances prior to any warrantless entry were in a preliminary discussion of the Court's opinion that applied to all exigent circumstances. *Id.* at 278–79.

While this Court has never addressed the application of these principles to hot pursuit of misdemeanants, the First District's opinion in the instant case was not the first Florida court to apply the *Welsh* presumption in that context. In *Rodriguez v. State*, 964 So.2d 833, 837 (Fla. 2d DCA 2007), for example, the court found that the hot pursuit exception did not justify a warrantless entry into a fleeing misdemeanant's yard. In that case, a police officer observed a suspect leave the scene of a traffic accident in a store parking lot. *Id.* at 835. The officer attempted to apprehend the suspect while the suspect ran into his yard and began to lock the gate. *Id.* The Second District held that while the officer had been in continuous pursuit of the suspect, the hot pursuit exigent circumstance did not apply because the crimes he was suspected of committing were only punishable as misdemeanors. *Id.* at 837. The court noted that even if the officer had communicated an intent to detain the

suspect, the entry would have been illegal since an arrest for a misdemeanor could not justify entry into the suspect's home. *Id. See also Johnson v. State*, 395 So.2d 594, 596 (Fla. 2d DCA 1981) (finding that misdemeanor arrest violated knock and announce statute, but also that entry would violate constitutional principles under *Payton*).

The facts of the instant case resemble more closely those in the Second District's decision in *Rodriguez* than any of the Third District's cases that Petitioner alleges conflict with the First District's opinion. As in *Rodriguez*, the only crimes which the officers suspected Markus of committing were non-violent misdemeanors. Further, as in *Rodriguez,* there were no circumstances showing a specific need for immediate apprehension of the suspect; the officers in both cases had already witnessed the alleged crime take place and already had acquired all of the evidence they needed to obtain a warrant or press charges against the suspect. While the officer in *Rodriguez* did not communicate an intent to detain the suspect, as the officers did here, the *Rodriguez* court explicitly stated that such communication would be fruitless since the underlying offense was a misdemeanor. Indeed, the Second District's opinion is a more extreme step toward *Welsh* than the First District's opinion here, since it provides for a categorical prohibition for warrantless entries of the home for misdemeanor crimes, whereas the First District left open the

possibility that some rare grave emergencies, posing a threat to the safety of the public, police, or property, could justify such entries.

Petitioner contends that the First District's opinion was in error, in part, because it conflicted with a line of cases interpreting the hot pursuit exception from the Third District. However, each of the cases that Petitioner relies on to demonstrate such a conflict are easily distinguishable on their facts from the present case. For example, in *Dyer v. State*, 680 So.2d 612 (Fla. 3d DCA 1996), the Third District allowed entry into a defendant's yard while under hot pursuit for suspected of possession of cannabis and resisting arrest without violence. *Id.* at 613. While the court in *Dyer* recognized that possession of marijuana was classified as a more serious offense than the civil infraction in *Welsh*, the court also noted that the facts of the case made the offense more serious than a simple misdemeanor. *Id.* It pointed to the fact that the suspect had hopped over a fence during the pursuit, which the officers could have reasonably believed was an act of trespass, and thus the defendant was guilty of the felony offense of burglary. *Id.*

In the instant case, the State imparts great significance on the fact that the officer in *Dyer* did not know whether the residence that the defendant entered during the pursuit belonged to him or someone else. Specifically, Petitioner contends that this case is somehow similar to *Dyer*, by claiming that the officers here also could not tell whether Respondent was trespassing when he entered the garage. This

tortured attempt to harmonize the instant case to *Dyer* is unconvincing because the State cites no evidence in the record to show that the police officers believed that Markus was trespassing when he entered the garage. Furthermore, even if they did suspect Markus of trespass, that suspicion would be entirely unreasonable given that the police found him standing with individuals directly outside the open garage door that he eventually crossed through. [R. VI, 226]. The situation here where Respondent enters through an open garage door is a far cry from the situation in *Dyer* where the defendant hopped over a fence during a frantic foot chase.

The other Third District cases on which Petitioner relies are equally unpersuasive for similar reasons. *Gasset v. State*, 490 So.2d 97, 98 (Fla. 3d DCA 1986) involved a suspect who led the police on an eighty-mile an hour car chase through a residential neighborhood before pulling into his garage. The court found that despite the holding in *Welsh*, the defendant had waived his expectation of privacy by leading the police on the dangerous chase. *Id.* at 98–99. In *Gasset*, unlike here, the court's finding that defendant had waived his Fourth Amendment rights was predicated on the fact that defendant had endangered the lives of the entire residential neighborhood in his reckless attempt to reach a constitutionally protected area. *Id.* at 98–99.

Similarly, in *Ulysse v. State*, 899 So.2d 1233, 134 (Fla. 3d DCA 2005) the hot pursuit involved a passenger exiting a vehicle and fleeing into the home of a

complete stranger. Further, the court found that the officer had probable cause to believe that the suspect had participated in the theft of a car. *Id.* Likewise, in *State v. Williams*, 128 So.3d 30, 33 (Fla. 3d DCA 2012) the officer witnessed the suspect take out a concealed firearm and throw it into the bushes before entering a residence. The court properly applied *Santana*, rather than *Welsh*, because *Welsh* does not apply to dangerous felonies like carrying a concealed firearm without a license. *See*, §790.01(2), Fla. Stat. (classifying unlicensed possession of concealed firearms as third degree felony). Petitioner's reliance on *State v. Brown*, 36 So.3d 770, 773 (Fla. 3d DCA 2010), *rev'd on other grounds, State v. Cable,* 51 So.3d 434 (Fla. 2010), is similarly misplaced because the suspect in that case was carrying a rifle and refusing to cooperate with the police.

Furthermore, the Third District's cases analyzing hot pursuit are far from harmonious. In *Ortiz v. State,* 600 So.2d 530 (Fla. 3d DCA 1992), officers chased Ortiz into his apartment after he dropped a "nickel bag" of marijuana. Ortiz filed a motion to suppress challenging the officers' warrantless entry into the apartment as violative of Florida's "knock and announce" statute, § 901.19(1), Fla. Stat., limiting entry into one's home to arrest without a warrant to solely felonies. *Id.* at 531. The State argued that because the officers were in "hot pursuit," they could enter irrespective of the type of crime, misdemeanor or felony, without having to comply with the statute. *Id.* On appeal, the Third District's reversed finding the officers did

not have the authority to enter to effectuate an arrest under §901.19(1), Fla. Stat., as the officers only suspected Ortiz of committing a misdemeanor offense, despite the State's claim of "hot pursuit." *Id.* at 531-32.[6] The trial court denied the motion, ruling that fresh pursuit applies to any type of crime and the officers could enter although Ortiz was only suspected of committing a misdemeanor. *Id.*

Petitioner's Third District cases and the First District's opinion here are easily reconcilable as different applications of the this Court's statement of the law in *Riggs v. State*, 918 So.2d 274, 278 (Fla. 2005): that warrantless entry into home, particularly for misdemeanors, are only justifiable upon showing of danger to the public, property or the police. In each of the Third District cases, the police pursued suspects engaged in violent or recklessly dangerous conduct that arguably rebutted the presumption of illegality for warrantless entries into the home. By contrast, here, Respondent's conduct posed no emergency or threat to the public, property, or the police. Rather, Respondent's crime was a non-violent misdemeanor and his "flight" was nothing more than retreating into the open threshold of a private residence. Therefore, the First District correctly applied the Fourth Amendment as interpreted by Florida courts.

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[6] It should be noted that Markus also moved to suppress evidence claiming the officers here violated § 901.19(1), Fla. Stat., [R. I, 43-45], and raised such issue in the First District. However, the First District found § 901.19(1), Fla. Stat., did not apply to the facts of this case. *Markus,* 160 So.3d at 490 n.2.

D. Applying the Hot Pursuit Exception to All Jailable Misdemeanors Would Unjustifiably Erode the Fourth Amendment's Warrant Requirement.

Assuming, for the sake of argument, that Petitioner is correct and the Third District allows warrantless entry into a private residence when police officers are in pursuit of any misdemeanant, then the Fourth Amendment demands that this Court resolve the conflict in favor of the First District's interpretation of *Welsh*. Petitioner's interpretation of the exigent circumstances exception would completely disregard the precedent set by the United States Supreme Court in *Welsh* and this Court in *Riggs* because it fails to take into account the presence of some emergency or the gravity of the underlying offense beyond whether it is punishable by incarceration. Warrantless entries into the home are presumed to be illegal, and when government's interest is only to arrest for a minor offense, the presumption of reasonableness and difficult to rebut, and a warrant should usually be required. *Welsh*, 466 U.S. at 750.

Furthermore, the Supreme Court has noted that when considering exigent circumstances outside of established parameters, it "has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home." *Illinois v. Rodriguez*, 497 U.S. 177, 192 (1990). Therefore, to the extent that the United States Supreme Court has not already rejected the hot pursuit exigency's general application to misdemeanors, it is the state's heavy

burden to show that the hot pursuit exigency extends to misdemeanors, not Markus' burden to show that it is limited to felonies. Given the absolute paucity of evidence showing an emergency or public need to pursue Markus in this case, the State has failed to meet that burden.

Article 1, § 12 of the Florida Constitution requires Florida courts to interpret search and seizure issues consistent with the United States Supreme Court's interpretation of the Fourth Amendment. However, absent such precedent, state courts may look to the decisions of other states or federal courts for guidance. *See D.P. v. State*, 65 So.3d 123, 129, n 6 (Fla. 3d DCA 2011). Although the United States Supreme Court may have not ruled on the precise questions presented, other jurisdictions have adopted similar rules consistent with the holding of the First District. Virginia, for example, is one of several states that imposes a categorical ban on warrantless entries where the underlying offense is a misdemeanor. *See Comm. v. Curry*, 26 Va. Cir. 179, *3 (Va. Cir. Ct. 1992). In *Curry* the court found that a warrantless entry violated the constitution for entering a home after pursuing a misdemeanant for a DUI. *Id.* at *1. The court interpreted *Welsh*'s dichotomy between serious and minor offenses and logically equated minor crimes to misdemeanors and serious crimes to felonies. *Id.* at *3. The court noted that a more subjective inquiry would be unworkable in the context of a high speed chase, because police officers would be forced to make split second subjective decisions

that would often lead to constitutional violations. *Id.* Therefore, the court found that it needed a bright line rule that would be easy to apply for police officers during a chase, and decided to draw that line between felony and misdemeanor crimes. *Id.* Several other jurisdictions apply the same categorical prohibition as *Curry* on warrantless entries into a private residence for misdemeanor crimes. *See, e.g., State v. Guertin*, 461 A.2d 963, 970 (Conn. 1982) (noting that exigent circumstances cannot support a warrantless entry for misdemeanors.); *People v. Strelow*, 292 N.W.2d 517, 521 (Mich. App. 1980) (holding that warrantless entry for misdemeanors was unlawful under statutory exception to the warrant requirement); *People v. Cruz*, 981 N.Y.S. 3d 637, *4 (N.Y. Crim Ct. Bronx Cnty 2013) (discussing the hot pursuit exception where defendant had thrown an object at a police officer and stating) "this exception to the warrant requirement applies to police pursuit into a resident for felony charges"); *City of Seattle v. Altschuler*, 766 P.2d 518, 520 (Wash. App. 1989) (noting that hot pursuit exception only applies to fleeing felons); *State v. Sorenson*, 590 P.2d 136, 139 (Mont. 1979), *overruled on other grounds by, State v. Loh*, 914 P.2d 592 (Mont. 1996) (noting that the hot pursuit doctrine is unavailable until a felony has been committed and the suspect is fleeing).

Another set of jurisdictions apply a similar rule to the holding of the First District by taking into account the seriousness of the underlying offense and the emergency circumstances that created the exigency. These jurisdictions often follow

the example of a six factor-test laid out by *Dorman v. United States*, 435 F.3d 385, 392 (DC. Cir. 1970) to determine whether exigent circumstances justify a warrantless entry. These factors include: (1) whether a grave offense is involved, particularly a crime of violence; (2) whether the suspect is reasonably believed to be armed; (3) whether there is a clear showing of probable cause beyond the minimum necessary to obtain a warrant; (4) whether the police have a strong reason to believe that the suspect is in the premises being entered; (5) the likelihood that the suspect would escape if not swiftly apprehended; and (6) whether the entry is made peaceably. *Id.* at 392–93. This six factor test was cited favorably by the Court in *Welsh* even though it stopped short of expressly adopting the test. *Welsh,* 466 U.S. at 752-53. Nevertheless, the first factor of the *Dorman* test strongly influenced the Court's determination that warrantless entries are rarely justified for minor offenses. *Id.*

The *Dorman* test, or permutations of it, appears to be the most common rule adopted by other jurisdictions. *See e.g.*, *United States v. Reed*, 572 F.2d 412, 424 (2d Cir. 1978) (applying *Dorman*, and noting that merely being arrested is an "awesome and frightening experience" and that an arrest carried out in the home is more substantial because it violates the sanctity of that constitutionally protected area); *State v. Curl*, 869 P.2d 224, 226 (Idaho 1993) (noting that the dispositive factor in determining whether the *Welsh* exception applies is whether the offense is violent or

non-violent); *Butler v. State*, 820 S.W. 2d 412, 515 (Ark. 1992) (holding hot pursuit does not apply to the crime of disorderly conduct because the crime is only a minor offense); *State v. Bolte*, 115 N.J. 579, 597 (N.J. 1989) (holding that hot pursuit did not apply where offense was minor and the fleeing suspect did not pose a threat to public safety); *State v. Dugan*, 276 P.3d 819, 832–33 (Kan. App. 2012) (rejecting hot pursuit doctrine's application to leaving the scene of an accident, a jailable misdemeanor, under seven factor test that considers the gravity of the offense, and noting that nonviolent misdemeanors likely would not justify warrantless entry under hot pursuit exception); *State v. Siftsoff*, 229 P.3d 214, 216 (Alaska Ct. App. 2010) (holding that hot pursuit exception did not apply to misdemeanor charges of DUI, reckless driving, and resisting arrest since they were minor offenses); *Comm. v. Lee*, 972. A.2d 1, 3–4 (Pa. Super. Ct. 2009) (noting that exigent circumstances were not present for DUI arrest under seven factor test that considered the gravity of offense, and noting that the "hot pursuit of fleeing felon" exception did not apply because there was no need for prompt police action); *State v. Johnson*, 800 N.E.2d 111, 115–16 (Ohio App. 3d 2007) (noting that while Ohio has extended the hot pursuit exception to misdemeanors, the exception did not apply to possession of marijuana, which was a minor misdemeanor that did not support probable cause to make an arrest); *People v. Eden*, 615 N.E.2d 1224, 1229 (Ill. 4th DCA 1993) (finding hot pursuit exception did not apply to offense of contributing to delinquency of a

minor because it was not grave offense, and distinguishing the case from Illinois cases allowing entry where officer witnesses the commission of a felony); *People v. Sanders*, 374 N.E. 2d 1315 (Ill.3d DCA 1978) (finding that exigent circumstances exception did not apply to unarmed burglary under a seven-factor reasonableness test because it was not a grave offense); *cf*, *State v. Hess*, 680 N.W.3d 314, 326 (S.D. 2004) (distinguishing entries justified by exigent circumstances where police discovered methamphetamine from marijuana offenses, which are usually considered misdemeanors and considered minor offenses under *Welsh*).

Additionally, some other jurisdictions require that hot pursuit must be accompanied by another exigent circumstance in order to justify a warrantless entry into a home. *State v. Wren*, 768 P.2d 1351, 1357 (Idaho Ct. App. 1989), for example, found that when determining whether exigent circumstances were present, the correct inquiry was whether dispensing with the warrant was necessary. The court in *Wren* noted that in every exigent circumstances case that the Supreme Court had decided, including hot pursuit, there was some risk of imminent harm to a person, or threat that evidence would be destroyed, or that the suspect would flee before the police had obtained a warrant. *Id.* Turning to the hot pursuit doctrine, the court noted that "a hot pursuit by itself creates no necessity for dispensing with a warrant." *Id.* at 1358. It found that while it might seem convenient for police officers pursuing a fleeing suspect to enter that suspect's home, administrative convenience was not the

purpose of the Fourth Amendment's warrant requirement. *Id.* Considering these factors, the court held that hot pursuit absent some other exigent circumstance, was not enough to justify a warrantless entry into the home. *Id. See also State v. Elderts*, 617 P.2d 89, 92 (Haw. 1980) ("we are not persuaded that 'hot pursuit' constitutes another well-defined exception to the warrant requirement. We view 'hot pursuit' as merely a criterion to be considered in determining if, given probable cause, exigency exists to justify a warrantless search"); *State v. Foster*, 392 S.W.3d 576, 580 (Mo. Ct. App. 2013) (noting that hot pursuit standing alone cannot justify entry into a home).

While these jurisdictions apply slightly different rationales for limiting the scope of the hot pursuit exception, all of them are bound by two common threads. First, the gravity of the underlying offense is a crucial factor in determining whether the police have actually engaged in a hot pursuit. Second, pursuit alone is not sufficient to overcome the Fourth Amendment's warrant requirement without some kind of ongoing emergency or necessity to dispense with obtaining a warrant. The First District's opinion embraced both of these principles in applying a strong presumption of illegality in entering one's home to make an arrest for misdemeanor crimes and requiring the state to show an immediate threat to the safety of the public, property or the police before making a warrantless entry.

Indeed, each of the aforementioned jurisdictions would undoubtedly find the search in the instant case illegal under their respective tests. First, Respondent was suspected only of a misdemeanor crime rather than a felony. Second, the search here completely fails most of the *Dorman* factors: (1) Respondent was only suspected of a minor offense, (2) the officers had no reason to believe he was armed, (3) the only probable cause they had was seeing Respondent flick a cigarette onto the ground while the odor of marijuana was in the air; and (4) Respondent had no way of escaping, since he was cornered in the garage in full view of the police. Third, the State has not articulated any other exigent circumstances beyond hot pursuit to justify the need to dispense with the warrant requirement here.

The First District's limitation on warrantless entries for misdemeanor arrests strikes an appropriate balance between the necessity of apprehending fleeing suspects and the privacy of citizens within the confines of their home. By contrast, Petitioner's proposed rule allowing warrantless entries for the pursuit of a suspect for any jailable offense would give rise to several troubling policy implications.[7] First, allowing officers to pursue those suspected of minor crimes into their homes

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[7] Under the State's interpretation of the hot pursuit exception, law enforcement officers in the jurisdiction where this incident occurred would be allowed to enter the residence of an individual suspected of only an ordinance code violation to effect an arrest as such violations generally carry a penalty of up to ninety (90) days imprisonment. *See* Code of Ordinances, City of Jacksonville Beach, Florida, Sec. 1-11(a). Indeed, just about any offense, be it an ordinance code violation, misdemeanor or felony, is a "jailable" offense.

without a warrant would encourage police officers to escalate the danger of otherwise minor crimes. Indeed, a police chase in and of itself can often far outweigh the danger to the public posed by minor crimes like possession of marijuana or a traffic violation. *Cf, City of Pinellas Park v. Brown*, 604 So.2d 1222, 1224 (Fla. 1992) (chastising police officers for initiating lengthy high-speed chase across 34 intersections for minor violation of running a red light). The danger present to law enforcement officers as well as the occupants of residences is reduced by requiring a law enforcement officer to obtain a warrant before entering a residence to apprehend a suspect of a minor offense.

Second, the speed at which police officers can obtain a warrant given modern technology strongly vitiates any argument that pursuit into the home is necessary for the effective administration of justice. In the context of other exigent circumstances, the United States Supreme Court has recently found that technological advances in processing warrant applications plays a crucial role in evaluating the emergency circumstances of each case. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1561–62 (2013) (applying emergency circumstances analysis to destruction of evidence in DUI case). In *McNeely*, the Court was persuaded, in part, by the fact that the Federal Rules of Criminal Procedure now allow magistrates to issue warrants based on sworn telephonic testimony. *Id.* The Court further noted that states have innovated by allowing warrants through telephone, radio and e-mail communication. *Id.* The

Court concluded that the speed at which officers could obtain a warrant was relevant to assessing whether an exigent circumstance applied. *Id.* at 1562. In the case of misdemeanors where a suspect flees into a house, particularly a case like this one where the suspect is cornered inside an open garage by two police officers, the technology is readily available for officers to obtain the authorization of a neutral and detached magistrate without ever leaving the scene or losing visual contact with the suspect.

Third, allowing pursuit of those suspected of minor offenses into the home where emergency circumstances are not present endangers innocent third parties who may also occupy the residence. Few houses in modern America are occupied by a single person at any given time. A suspect with an expectation of privacy in a home may live with others, have house guests, or be an overnight guest of the house himself. Further, a police chase is rarely a calm, nonviolent affair. In this case, Markus himself suffered injuries during his apprehension even though he offered little resistance. Even in *Stanton v. Simms*, 134 S. Ct. 3, 3 (2013), the police injured an innocent bystander during their pursuit. While some collateral damage may be unavoidable when police give chase into a residence to respond to a true emergency, innocent bystanders should not, as a matter of course, be subject to a cavalcade of police officers bursting through the thresholds of their homes and trampling down their hallways, unless emergency circumstances demand it.

In an attempt to discredit the First District's holding, the State proposes a number of hyperbolic consequences that would supposedly flow from adopting its rule. First, Petitioner contends that requiring a warrant to enter the home of those suspected of minor offenses, will produce an unworkable hardship on police officers because they will be unable to discern whether the residence belongs to the suspect or a third party and, thus, cannot tell if the fleeing suspect intends to do harm to that third party. However, to the extent that these hardships exist at all, the First District's holding would have no effect on them. Where officers have probable cause to suspect a fleeing suspect has trespassed on private property, that suspect has, by definition, committed the felony of burglary and entry into the home is authorized under *Payton*. Indeed, in most cases where a suspect flees into a private residence, the suspect will need to enter through some act of force such as breaking through a window or hopping over a fence. Very rarely, if ever, would a fleeing suspect be able to trespass into a home by walking into an open door, as Respondent did here, without the property's true owner close at hand to apprise the police of the situation.

Second, Petitioner's argument that police officers who have reasonable suspicion that a misdemeanor has occurred must be allowed to enter the home of a fleeing suspect to determine if more serious crimes might be also be occurring inside is equally unavailing. Petitioner argues that flight, in and of itself is indicative of a serious crime. It quotes language from *Illinois v. Wardlow*, 528 U.S. 119 (2000)

regarding the inherent suspiciousness of headlong flight. However, *Wardlow* only found that flight was sufficient to support a finding of reasonable suspicion that a crime had taken place, a standard much lower than probable cause and certainly not one that excuses the warrant requirement prior to entry into one's home. *See Moore v. Pederson,* 2015 WL 5438845, *5-6 (11th Cir. Sept. 16, 2015) (finding that law enforcement officer could not conduct *Terry* stop inside home absent exigent circumstances or consent to enter).

Finally, the State contends that the First District's holding would incentivize flight by allowing suspects to retreat inside their residences with impunity. This argument is unavailing because Florida law already provides disincentives for flight from officers by criminalizing resisting arrest without violence. § 843.02, Fla. Stat. Further, even outside of the hot pursuit exception, courts have already recognized other exigencies for suspects whose escape is imminent or believed to destroy evidence. Therefore, even without the hot pursuit exception, suspects may not defeat an arrest by retreating into the home, but at the most, merely delay that arrest with further criminal charges added for their efforts.

The First District's holding strikes a proper balance between the need to effectively administer justice and the Fourth Amendment's protection of the home because it applies *Welsh*'s presumption of illegality for minor crimes while also recognizing that entry might be warranted for grave emergency where the public,

property or the police may be in danger. A rule which allows entry into a suspect's home merely because a police officer gives chase would be completely divorced from the Fourth Amendment's protection of the home. While a police officer may be inconvenienced by having to stop his pursuit to obtain a warrant when a misdemeanant enters a home, the Fourth Amendment does not yield to convenience. It yields only to necessity. For this reason the First District's decision should be affirmed.

CONCLUSION

Based on the foregoing reasons, Respondent respectfully requests this Court affirm the First District Court of Appeal's decision in *Markus*, and, to the extent that any conflict between the districts exist, resolve that conflict in favor of the First District's application of *Welsh*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Lauren L. Gonzalez, Esquire,** Assistant Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32399-1050, by Electronic Mail, this 29th day of September, 2015.

ATTORNEY

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the size and style of type used in this brief is 14 point Times Roman.

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