UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENISE PRICE, Plaintiff, v. OFFICER JOSEPH GUPTON, *et al.*, Defendants.	)	No. 19-cv-1235-APM

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

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Pursuant to Fed. R. Civ. P. 56(a), Plaintiff Denise Price moves for summary judgment as to liability on her constitutional and common law claims.

INTRODUCTION

On May 11, 2018, officers with the District's Metropolitan Police Department (MPD) searched the yards of at least six private homes based simply on the fact that a Black man in a white t-shirt was reportedly seen running through one of them. The man was not reported to be carrying a weapon and he likely resided in the house attached to the yard where he was seen. Nonetheless, officers associated him with criminality based merely on the fact that he was running and the fact that his t-shirt and skin color matched those of individuals recently suspected of displaying real or possibly "play" firearms about a half mile away. The officers jumped to the conclusion that this man was suspicious based on these facts alone, and in spite of the *absence* of numerous other details they knew about the individuals reported with the alleged firearms—the number of individuals observed (five), the fact that they were seen leaving the scene together in a vehicle, and (perhaps most important) the fact that they were armed. This case, therefore, raises a question of Fourth Amendment law with significant implications for the both the meaning of

probable cause and the experience of Black men in this city and this nation: Is a running Black man inherently suspicious?

Based on the minimal facts described, Defendant Joseph Gupton and his partner Officer David Whitehead assumed that the Black man seen running might have had a gun, that he might have dropped it, and that it might have landed in one of several yards spread across two streets. This conjecture led Defendant Gupton to trample through private property, including the yard belonging to Plaintiff Denise Price. That intrusion violated Ms. Price's core Fourth Amendment right to privacy in her own home and left her feeling targeted, violated, and uncertain when the police would next intrude on her security without cause. Exacerbating Ms. Price's distress at these events was the context in which they occurred: exactly one week before Defendant Gupton barged onto Ms. Price's property, her son Jeffery was killed by Metropolitan Police officers, and she and her family were in the yard, discussing Jeffery's funeral arrangements, at the very moment of Defendant Gupton's intrusion.

Ms. Price brings this lawsuit to vindicate her rights under the Fourth Amendment and D.C. trespass law.

STATEMENT OF FACTS

Denise Price has lived in her house in the Deanwood neighborhood for decades. Plaintiff's Statement of Material Facts about which There Can Be No Genuine Dispute (Statement of Undisputed Facts, or "SUF") ¶¶ 1, 2. She bought the home in 2001, SUF ¶ 3, raised three of her children there, SUF ¶ 5, and continues to reside there with her fifteen-year-old son and four-year-old adopted daughter, SUF ¶ 6. Before the events leading up to this lawsuit, Ms. Price saw her house as a place of refuge that she associated with family and safety. SUF ¶ 4. Located at 5313 Jay Street NE, Washington, D.C. 20019, the home shares a wall with the house next door (5315

Jay Street NE), where her daughter, Presshea Johnson, and grandson, Kevaughn Walker, reside. SUF ¶¶ 7, 8. On the opposite side of Ms. Price's house is a small, fenced-in side yard, which contains patio furniture and a grill that she and her family have used for gatherings. SUF ¶¶ 9, 10, 12, 13, 17. A small backyard directly abuts the house and is also surrounded by a fence, though some of the panels are missing on the side separating Ms. Price's yard from her daughter's. SUF ¶¶ 9, 14–16. The backyard is part of Ms. Price's property, and it too is used for family activities. SUF ¶¶ 11, 18.

On May 11, 2018, Ms. Price, her daughter Presshea, her brother, Mr. Walker, and several other family members met in her side yard for a somber purpose: planning a funeral for Ms. Price's son Jeffery. SUF ¶ 22. Seven days earlier, Jeffery Price had been killed in a collision with a Metropolitan Police Department (MPD) cruiser. SUF ¶ 20. Members of the press had interviewed the Price family about the incident and Ms. Price and her relatives had expressed outrage, demanding accountability for the officer's conduct. SUF ¶ 21.

Defendant Gupton, Officer Whitehead, and Lieutenant Ryan Small arrived on Ms. Price's block in the midst of this difficult conversation about her son's funeral and the MPD actions that led to his death. SUF ¶¶ 26, 27. Upon exiting his cruiser, Officer Whitehead shined his flashlight into Ms. Price's car and peered into its windows. SUF ¶ 28. He entered the backyard belonging to the house next door (5311 Jay Street NE), and when a member of Ms. Price's family asked him what he was looking for, he responded brusquely, saying "don't worry about it." SUF ¶¶ 30, 31. Defendant Gupton exited the cruiser around the same time Officer Whitehead did, and peered into two other cars parked near the front of Ms. Price's home. SUF ¶¶ 36–38. Then, he walked into the side yard of 5315 Jay Street NE (the home directly abutting Ms. Price's house and occupied by her daughter, Ms. Johnson) and walked through it into Ms. Johnson's backyard. SUF ¶¶ 39, 40.

Defendant Gupton did not have a warrant authorizing him to enter Ms. Price's property. SUF ¶ 127. Ms. Price told him to leave unless he had one. SUF ¶ 43. He ignored her and stepped through the gap in the fence and into her backyard. SUF ¶¶ 41, 44. Ms. Price demanded that he leave multiple times. SUF ¶ 43, 45. Ms. Price's brother joined her in the backyard and made the same demands. SUF ¶ 45.

Defendant Gupton said almost nothing in response. SUF ¶¶ 44, 46. Instead, he gazed over the fence and into the yard to the west of Ms. Price's home (5311 Jay Street NE). SUF ¶ 47. He then walked back into Ms. Johnson's yard, opened a few containers, including a trash can and a cooler, and walked back to the squad car. SUF ¶¶ 47–49. Officer Whitehead, meanwhile, searched Ms. Johnson's yard, peered over its fence to look into the yard behind it, and hopped over a different fence to search the yard immediately to the east of Ms. Johnson's at 5321 Jay Street NE. SUF ¶¶ 32–34. He then returned to the squad car. SUF ¶ 35. The two officers drove off Jay Street and onto James Place NE (the next street to the south), where Officer Whitehead entered at least two more yards. SUF ¶¶ 55, 58, 59. Lieutenant Small, who also entered and remained in Ms. Johnson's side yard while Officer Whitehead and Defendant Gupton conducted their searches on Jay Street, walked to his car and exited the street as well. SUF ¶56.

Defendant Gupton's actions, as well as those of his colleagues, rested on a series of attenuated connections to events earlier that evening. At approximately 6:12 p.m. on May 11, MPD received a call from an individual who reported seeing about five young Black men displaying "two or three feet long" real or "play" firearms—the caller said that "they might have been" toys—and "pointing" them at each other at 49th and Jay Street NE, about a half mile from Ms. Price's home. SUF ¶¶ 67, 69, 70, 73. The caller stated that no one was injured, and that the young men drove away from the scene in a vehicle together ("two in the front; three in the back"). SUF ¶¶ 70,

71. Aside from the young men's race and possession of real or toy weapons, the only identifying information the caller provided concerned their shirts ("white t-shirts"), and their vehicle (a "white car" with "four door[s]"). SUF ¶¶ 69–72.

An MPD dispatcher informed field officers about the call over Sixth District radio, and the dispatcher's statements are audible from Lieutenant Small's body-worn camera footage. SUF ¶¶ 74, 75. The dispatcher reported that the call concerned "five black males, it shows five black males. It is showing a black male with a white, white t-shirt. They're, they're advising that the weapon is a little over two-to-three foot long machine gun. Our caller does not advise whether it's real or not." SUF ¶ 76. The dispatcher also stated that the suspects were "[h]eaded toward Division Avenue" from 49th and Jay Streets, and later added that they were last seen in "a white four-door vehicle." SUF ¶¶ 76, 77. The dispatcher did not provide any other identifying facts about the individuals referenced in the call. SUF ¶ 78. Defendant Gupton and Officer Whitehead heard this dispatch. SUF ¶¶ 80.

The limits of the identifying information provided by the caller quickly became apparent. One officer noted over the Sixth District channel that there were "multiple males with white shirts." SUF ¶ 79. Later, an officer asked for "a better lookout on the individual." SUF ¶ 79. As Defendant Gupton himself testified at deposition, "we didn't have a whole lot of information." SUF ¶ 81.

Once the dispatcher discerned that the suspects had driven away from the scene, police officials began to recognize that the urgency of the incident had diminished. According to the event chronology, the dispatcher originally classified the incident as a "Priority= 1" "PERSON WITH WEAPON" incident. SUF ¶ 118. But, at 6:15 pm, after it became clear that the suspects had driven away, the dispatcher "changed" the "[e]vent [t]ype" to "WEAPON-OTHER," and the priority level decreased to "Priority= 3." SUF ¶ 118. As Defendant Gupton explained at deposition, unlike a

priority 1 classification, which means "get there as fast as you can," a priority 3 code indicates that officers should "get there when you can,"—a response so comparatively slow that Defendant Gupton did not "even know why [priority 3] exists," and observed that, in his experience, officers only use priority 1 or 2. SUF ¶¶ 121, 123–24.

Neither the uselessly generic description of the suspects nor the diminished urgency of the situation deterred Defendant Gupton and Officer Whitehead from searching private yards without a warrant.

A few minutes after the dispatch, Sergeant Shavaun Ross reported additional information she thought related to the incident. SUF ¶ 84. Over 6D radio, Sgt. Ross said that she that she "[g]ot one running. 5300 block of Jay." SUF ¶ 87. She elaborated that the individual was a "Black male" wearing a "[w]hite t-shirt [and] [b]lue jeans, with some kind of ski goggles on his forehead," and stated that he was "last seen in the rear of 5315 Jay." SUF ¶ 87. She added that the individual was a "[d]ark skinned male [with a] [h]igh top fade" (a style of haircut) who had a "[s]kinny build" and was "about 5'7", 5'8"." SUF ¶ 88.

After a few minutes, Sgt. Ross switched to the TAC channel—a separate police radio channel used as a means of officer-to-officer communications, SUF ¶ 85— and stated, "Hey, I'm sure that guy will be back. But anyway, he was standing in the rear of 5315 Jay Street. He was standing to the side of a red Audi. In case you all come across him again." SUF ¶ 89. When asked if she had a possible flight path for the individual, Sgt. Ross stated, "Yeah. Directly in the rear of that location where I last saw him. He booked it somewhere in the rear of that yard." SUF ¶ 91. Defendant Gupton and Officer Whitehead heard Sgt. Ross relay her report over the TAC Channel and 6D radio. SUF ¶ 97.

Sgt. Ross offered no additional facts about the individual she spotted. She did not assert that he possessed a firearm, SUF ¶ 94, and did not mention the white car or the other individuals referenced in the call, SUF ¶¶ 93, 95. The most unusual fact she mentioned about the individual she spotted was his ski goggles, an accessory that was *not* mentioned in the call. SUF ¶¶ 87, 99, 100. Thus, the sole bases for her suspicion were the individual's skin color, shirt color, location (about a half mile from the site of the incident), and the fact that he was running. SUF ¶¶ 87–96. Sgt. Ross did not indicate whether he ran in response to her presence. SUF ¶ 92. Nor did she specify the direction the man ran after going behind 5315 Jay Street, or mention Ms. Price's home at 5313 Jay Street at any point. SUF ¶¶ 96, 113.

The officers arrived on Ms. Price's block about thirteen minutes after the initial call to the police. SUF ¶ 108. Concluding that they had "lost" the suspect, SUF ¶ 65, Defendant Gupton and Officer Whitehead searched the yards on Jay Street and James Place, *including Ms. Price's*, for the sole purpose of locating "[a] gun," SUF ¶ 63–64, 66. Defendant Gupton pursued that goal "to investigate potential criminal conduct or gather evidence related to" the call. SUF ¶¶ 61–62.

In believing that he might find a gun in Ms. Price's yard, Defendant Gupton relied on the facts relayed by the dispatcher, the information transmitted by Sgt. Ross, the location and time Sgt. Ross's report, and the fact that, in his experience, suspects often discard firearms. SUF ¶¶ 114, 117. He did not rely on any visual observations. SUF ¶ 115. Nor did he investigate the situation further by questioning anyone. SUF ¶ 116. Indeed, in Ms. Johnson's yard, Defendant Gupton quite literally bumped into Ms. Price's grandson, Mr. Walker, a skinny Black man with a high-top fade wearing a white t-shirt and ski goggles—in other words, closely resembling the person described by Sgt. Ross—however, Defendant Gupton did not ask Mr. Walker, or any other member of the Price family, any questions. SUF ¶¶ 23–25, 50–53.

Based only on the threadbare facts stated above, Defendant Gupton and Officer Whitehead entered at least six distinct yards on Jay Street NE and James Place NE. SUF ¶ 60. Officer Whitehead leaned over a fence to peer into a seventh, SUF ¶ 47, and the two officers shined their flashlights into the windows of three separate cars. SUF ¶¶ 28, 37–38. Neither Defendant Gupton nor Officer Whitehead found any firearms, contraband, or evidence in Ms. Price's yard, any of the yards searched, or the cars into which they shined their flashlights. SUF ¶¶ 131–35.

Although Defendant Gupton's search was of no use to his investigation, it had a grave impact on Ms. Price. The intrusion into her yard "violated [her] sense of privacy and made [her] feel targeted." SUF ¶ 139. Since the incident, Ms. Price has found herself "paranoid" that officers will enter her property, or detain her, for no reason. SUF ¶ 140. She regularly wakes up at night to check her locks, out of fear that officers might enter her home. SUF ¶ 141. Ms. Price's hands often sweat when she passes officers, SUF ¶ 142, and she has sought mental health services for her symptoms, SUF ¶ 143.

LEGAL STANDARD

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Here, no material facts regarding liability are in genuine dispute and well-settled Fourth Amendment and District of Columbia law entitle Plaintiff to partial summary judgment as to liability on both her constitutional and common-law claims.

ARGUMENT

I. Defendant Gupton Violated Ms. Price's Fourth Amendment Rights by Entering Her Yard Without a Warrant or Probable Cause and Exigent Circumstances.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). This status extends to "the area immediately surrounding and associated with the home—what our cases call the curtilage—[which is regarded] as part of the home itself for Fourth Amendment purposes." *Id.* at 6 (internal quotation marks and citations omitted). Accordingly, "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018); *see also Jardines*, 569 U.S. at 11 (holding that search occurred where officers "physically intrud[ed]" on curtilage "to gather evidence"). For such an intrusion to be lawful, an officer must have "a warrant or probable cause plus exigent circumstances." *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *Harris v. O'Hare*, 770 F.3d 224, 238 (2d Cir. 2014) (applying same rule to search of backyard); *accord United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (same).

Defendant Gupton physically intruded upon Ms. Price's yard "to investigate potential criminal conduct or gather evidence related to" the tipster's call. SUF ¶ 61. Because, as explained below, Ms. Price's yard qualified as curtilage, that intrusion was a search. *See Jardines*, 569 U.S. at 11. Defendant Gupton did not have a warrant. SUF ¶ 127. He did not have Ms. Price's consent. SUF ¶ 42. As a result, he could enter lawfully only if he had probable cause and an exception to the warrant requirement applied. Failure on either condition gives rise to liability. *See, e.g.*, *Harris*, 770 F.3d at 231. Here, Defendant Gupton flunked both by a wide margin.

A. The Small Fenced-in Yard Directly Abutting Ms. Price's Home Falls Within Its Curtilage.

The Supreme Court has established a four-factor test for determining the boundaries of a home's curtilage, which turns on "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301 (1987). These "factors are not to be applied mechanically," and "often" give way to "commonsense analysis because the concept is 'familiar enough that it is easily understood from our daily experience.'" *Morgan v. Fairfield Cty.*, 903 F.3d 553, 561 (6th Cir. 2018) (quoting *Jardines*, 569 U.S. at 7)).

Whether applying the *Dunn* factors or common sense, Ms. Price's backyard indisputably constitutes curtilage. Ms. Price's backyard is small and directly abuts her home. SUF ¶¶ 9, 11. That fact alone likely qualifies it as curtilage. *Collins*, 138 S. Ct. at 1671 (holding "partially enclosed" driveway that "abuts house" constitutes curtilage); *Morgan*, 903 F.3d at 562 (6th Cir. 2018) (holding that unenclosed "backyard abutting the home constitutes curtilage" (internal quotation marks and citations omitted)). Additionally, a fence surrounding the backyard encloses the home within it. SUF ¶¶ 17. The family uses the backyard for activities such as barbequing, SUF ¶ 18, thereby extending "the activity of home life" therein, *Jardines*, 569 U.S. at 6 (internal quotation mark and citation omitted). *See United States v. Alexander*, 888 F.3d 628, 633 (2d Cir. 2018) (emphasizing "occasional[]" use of driveway for "recreation[] such as hosting barbeques" in analyzing third *Dunn* factor (internal quotation marks omitted)). And the yard's location behind her home shields much of it from public view. SUF ¶ 19.

Unsurprisingly, courts have invariably held that yards like Ms. Price's qualify as curtilage. *See, e.g.*, *Struckman*, 603 F.3d at 739 (holding that an individual's "backyard—a small, enclosed yard adjacent to a home in a residential neighborhood—is unquestionably . . . curtilage"); *Harris*,

770 F.3d at 240 (holding that "a fenced-in side or backyard directly abutting a single-family house," as Ms. Price's does, "constitutes curtilage"); *United States v. Sweeney*, 821 F.3d 893, 901 (7th Cir. 2016) ("A porch, a small fenced-in yard, a gated walkway along the side of a house—all are obviously part of the curtilage").

Defendant Gupton "had no reason to think that [Ms. Price's yard] was put to any uses other than those associated with a home." *Harris*, 770 F.3d at 240. Indeed, the fact that the "backyard [was] accessible only by walking around the side of a home" should have dispelled any doubts. *United States v. Wells*, 648 F.3d 671, 677 (8th Cir. 2011). Consequently, when Defendant Gupton walked into the yard, he entered Ms. Price's curtilage, an act that clearly qualified as a search under the Fourth Amendment. *Jardines*, 569 U.S. at 11.

B. Defendant Gupton Lacked Probable Cause to Believe a Firearm Was in Ms. Price's Yard.

"[P]robable cause to search . . . exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (internal citations omitted). The test requires more than an "inchoate and unparticularized suspicion or hunch," which will not even suffice to establish reasonable suspicion, a standard of certainty lower than probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (internal citations and quotation marks omitted).

In this case, Defendant Gupton entered Ms. Price's yard after hearing Sgt. Ross report that a Black man in a white t-shirt ran through the yard next door. SUF ¶¶ 83, 87–88. He did not supplement that information by questioning witnesses on the scene or by learning anything else from visual observation. SUF ¶¶ 115–16. Rather, the only facts he knew tying Ms. Price's property to the tipster's call were the ones Sgt. Ross provided. SUF ¶ 114.

To conclude, based on this information, that a firearm would be in Ms. Price's yard, Defendant Gupton had to make two inferences: first, that the man Sgt. Ross saw was one of the men who possessed a real or "play" firearm at 49th and Jay Streets, about a half a mile away; and second, that this individual abandoned the firearm in Ms. Price's yard. The failure of either one of these inferences would make Defendant Gupton's theory untenable. If the Black man Sgt. Ross assumed was a suspect was, instead, just a person playing or exercising, then Defendant Gupton would have no basis to conclude that he had a gun to abandon. And if the individual did not drop a gun in Ms. Price's yard, then Defendant Gupton would have no reason to think her property contained evidence of a crime. Under D.C. Circuit precedent, the facts known by Defendant Gupton supported *neither* of these assumptions, and certainly not to the degree required to establish probable cause. Consequently, the justification for Defendant Gupton's search fell woefully and obviously short of the justification that the Constitution required.

First, Defendant Gupton did not have probable cause to believe that the person Sgt. Ross spotted was one of the suspects identified in the call. The facts Sgt. Ross relayed—that she saw a Black man wearing a white t-shirt running in the area, SUF ¶¶ 87–96—did not supply nearly enough information to meet that standard. The common physical traits of race and shirt color could "fit[] many young people in that area of Washington," *United States v. Short*, 570 F.2d 1051, 1053–54 (D.C. Cir. 1978); indeed, an officer acknowledged that he saw "multiple males with white shirts" in the area. SUF ¶ 79. For this reason, the D.C. Circuit has held that, even if an individual is spotted near a reported crime scene not too long after it occurred, shared race and shirt color provide too superficial a match to justify an arrest. *See Short*, 570 F.2d at 1051, 1053, 1054 (holding no probable cause to arrest individual found near crime scene shortly after the crime

happened where the color of his jacket and pants, as well as his race and hairstyle, matched those of the suspect).

Other courts have reached similar conclusions. *See, e.g.*, *United States v. Soza*, 686 F. App'x. 564, 565–66, 568 (10th Cir. 2017) (holding probable cause lacking where defendant was found near the crime scene around the time of the incident, and matched the suspect description of "Hispanic male who was wearing a baseball cap and grey" shirt); *In re S.B.*, 44 A.3d 948, 950–51 956–57 (D.C. 2012) (holding reasonable suspicion absent when officers stopped a young "black male wearing white pants" in a park approximately six minutes after receiving a tip asserting that a young man matching that description was in the park with a firearm); *see also United States v. Fisher*, 702 F.2d 372, 379 (2d Cir. 1983) (holding arrest unlawful when based on facts "equally applicable to a number of individuals likely to be in the area").

The fact that the man Sgt. Ross spotted was "running" does not disturb this conclusion. Even in the context of reasonable suspicion, observation of an individual's flight or furtive gestures "can be part of the totality of the circumstances" analysis only if the officer provides evidence supporting the inference that the individual "knew of the[] [police] presence and was acting in response to it." *United States v. Castle*, 825 F.3d 625, 636, 638 (D.C. Cir. 2016). Absent such evidence, the justification for treating running as flight, and flight as "probative of wrong doing" dissipates, *id.* at 637 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000)), and the inference that the running related to criminal activity no longer qualifies "as the sort of 'specific reasonable inference[] which [an officer is] entitled to draw . . . but rather amount[s] to no more than [an] 'inchoate and unparticularized suspicion' or 'hunch.'" *Castle*, 825 F.3d at 638 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

Sgt. Ross's statements over the radio did not provide the necessary link between running and flight. In describing the man's actions, Sgt. Ross stated that she "[g]ot one running," that he "ran in the rear of 5315 Jay," and that he "booked it somewhere in the rear of that yard." SUF ¶¶ 87–88, 91. These statements offered no basis to conclude that the man saw her, let alone that he reacted in response to her presence. The D.C. Circuit has offered a roadmap for the type of evidence that could satisfy this burden, noting that officers could observe, among other things, that the suspect "turned his head toward [the vehicle] or pointed or gestured at it," or that the individual's "pace or gait changed as [the officer] turned onto and drove down the street." *Castle*, 825 F.3d at 639. Sgt. Ross's radio transmission offered nothing approaching these types of observations. SUF ¶¶ 87–96. Although Defendant Gupton testified that Sgt. Ross reported a man "running from" her, Ex. E (Gupton Dep.) ¶ 17:21, he made that assertion eighteen months after the incident, and, in any event the recording of Sgt. Ross's broadcast refutes it. The conflict between Defendant Gupton's recollection and the recording does not create a genuine dispute of fact on this point, because, as the Supreme Court has instructed, when a recording discredits a nonmovant's recollection, courts should accept the facts established by the recording. *See Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

Mr. Walker's presence near Ms. Price's property further unravels the connection between Sgt. Ross's report and any inference of criminal activity. At the time of the incident, Mr. Walker, who is a Black male with a skinny build, wore blue jeans, a white t-shirt, ski goggles on his forehead, and a high-top fade hairstyle, SUF ¶¶ 24–25—in other words, he completely matched the lookout provided by Sgt. Ross. Far from attempting to evade the officers, Mr. Walker engaged them: asking Lt. Small why he was in the yard, recording the officers' actions, and questioning Defendant Gupton and Officer Whitehead about their conduct after the search ended. SUF ¶¶ 57,

148. Reasonable police officers would have recognized that these actions are completely incompatible with an intent to flee and would have adjusted their suspicions accordingly. *See United States v. Massenburg*, 654 F.3d 480, 490 (4th Cir. 2011) (distinguishing attempts to voluntarily converse with police from evasive behavior). Perhaps they would have ceased their investigation of the yards on Jay Street; perhaps they would have questioned Mr. Walker. But Defendant Gupton did neither. Indeed, he appeared not even to notice the match between Mr. Walker and Sgt. Ross's lookout, declining to ask him any questions despite literally bumping into him. SUF ¶ 50, 51.

This analysis demonstrates that Defendant Gupton lacked probable cause—or anything close to it—to believe that the individual Sgt. Ross saw was a suspect, let alone that he discarded a firearm in Plaintiff's backyard. The only information he had was what Sgt. Ross provided. SUF ¶ 114. Yet her description, even when combined with its temporal and geographic proximity to the call for service, was far too generic to establish probable cause on its own, *see Short*, 570 F.2d at 1054, and it was not even very proximate in time or location to the tipster's call. Moreover, Sgt. Ross did not provide the necessary factual predicates for her observation of the man running (*e.g.*, that he was running in response to having seen her) to "be part of the totality of the circumstances" analysis for a reasonable suspicion inquiry, let alone an inquiry of probable cause. *See Castle*, 825 F.3d at 636. Although courts must assess probable cause by "consider[ing] the whole picture" rather than assessing "each fact in isolation," *Wesby v. District of Columbia*, 138 S. Ct. 577, 588 (2018) (internal citations and quotation marks omitted), zero plus zero equals zero.

The analysis could end there: applying binding D.C. Circuit case law, it is clear that officers cannot establish anything close to probable cause by spotting a person running not too far from a police officer who matches a suspect in terms of race and a commonplace article of clothing.

But the case gets even worse for the police. Further weakening the case for probable cause are the facts that Sgt. Ross did *not* observe. Over 6D radio, the station to which Defendant Gupton was listening, SUF ¶¶ 80, 97, the dispatcher reported that the suspects drove off in a white car, that they travelled in a pack of five, and that they possessed a two-to-three-foot long machine gun. SUF ¶¶ 76–78. Sgt. Ross made no mention of the vehicle, other suspects, or a firearm. SUF ¶¶ 93–95. Moreover, the identifying facts that Sgt. Ross did relay—the individual's high-top fade and ski goggles, SUF ¶¶ 87, 88—had no relationship to anything that the dispatcher or the original caller mentioned. SUF ¶¶ 99, 100. Thus, the only facts Sgt. Ross mentioned that *matched* the suspects were of the most generic kind—a Black man, a white shirt, and a common mode of exercise—while the only idiosyncratic facts that Sgt. Ross identified did not in any way connect the person she saw with the suspects from the 911 tip.

Based on what little he knew about the running man and about the suspects, Defendant Gupton clearly lacked probable cause to believe that the man Sgt. Ross saw had engaged in a crime. And, if he could not reach that conclusion, then he necessarily lacked probable cause to infer that the man possessed an illegal firearm or discarded that firearm in a yard that he may or may not ever have entered.

Second, even if Sgt. Ross had spotted a suspect near Ms. Price's yard, Defendant Gupton still would have lacked probable cause to conclude that the suspect discarded a firearm on her property. Officers may enter a home, or its curtilage, only if they have facts that specifically connect the object of their search to the home, not simply the surrounding area. *See United States v. Dorsey*, 591 F.2d 922, 928 (D.C. Cir. 1978) ("A single warrant cannot describe an entire building when cause is shown for searching only one apartment." (internal citation omitted)), *superseded by statute on other grounds, see United States v. Fennell*, 53 F.3d 1296, 1300–01 (D.C. Cir. 1995).

This reasoning guided the D.C. Court of Appeals in *In re K.H.*, 14 A.3d 1087 (D.C. 2011). There, an officer saw a suspect run into an apartment building with four units. *Id.* at 1088. Officers entered one of the units, but, because the officers had no information about which unit, if any, the suspect entered, the court held the search unlawful. *Id.* at 1091–92. The court explained that the Fourth Amendment demanded evidence "linking the robbery suspect to [the] apartment" that the officers searched, *id.*, a conclusion that federal appellate courts nationwide have endorsed. *See, e.g.*, *United States v. Shamaeizadeh*, 80 F.3d 1131, 1137 (6th Cir. 1996) ("[W]hen the structure under suspicion is divided into more than one occupancy unit, probable cause must exist for each unit to be searched." (internal quotation marks and citations omitted)); *United States v. White*, 416 F.3d 634, 637 (7th Cir. 2005); *Greenstreet v. Cty. of San Bernardino*, 41 F.3d 1306, 1309 (9th Cir. 1994).

These cases make clear that when Defendant Gupton learned that a man ran behind *5315* Jay Street NE, he did not have a basis to conclude he would find a firearm behind *5313* Jay Street NE. Sgt. Ross did not specify the direction that the man ran after she saw him head into the yard at 5315 Jay Street. SUF ¶ 96. Accordingly, while it is possible that the man entered Ms. Price's yard, he also could have hopped the small fence separating that Ms. Johnson's yard from the one immediately to the west of it, and not ever have entered Ms. Price's yard, which is immediately to the east. *See* SUF ¶¶ 7, 34 (noting relationship between houses in terms of cardinal directions). Alternatively, the individual could have run through Ms. Price's yard and then jumped the fence dividing it from 5311 Jay Street, and discarded the firearm there. *See* SUF ¶ 47. The suspect could also have entered, and discarded the gun in, one of the yards behind Ms. Price's, on James Place. Defendant Gupton and Officer Whitehead recognized that any of these alternatives was possible,

because they collectively entered and searched five yards in addition to Ms. Price's, and peered into three vehicles parked nearby. SUF ¶ 28, 37–38, 60.

Information that casts suspicion on the curtilages of six private houses (and three cars) cannot establish probable cause to search any one of them. If it did, innocent people would be forced to endure searches whenever there was a minor chance (such as 1 in 6, or even less), that a suspect wandered near their home. That approach is exactly what the D.C. Court of Appeals rejected in *K.H.*, where the likelihood of finding the suspect in any of the units in the apartment building was 1 in 4. *See* 14 A.3d at 1088, 1092. Likewise, in *Matalon v. O'Neill*, No. CIV.A. 13-10001-LTS, 2015 WL 1137808 (D. Mass. Mar. 13, 2015), *aff'd sub nom. Matalon v. Hynnes*, 806 F.3d 627 (1st Cir. 2015), the court held that where officers received a report that a robbery suspect ran between two homes, they violated the Constitution by opening the door and entering one of the houses. *Id.* at *2, *5. As the court explained, "[i]nformation that a suspect was fleeing through a yard in a dense residential neighborhood, without more, is not a sufficient basis to ground an entry and search of the interior of a home sitting adjacent to a known flight path." *Id.* at *5; *see also United States v. Flores*, 679 F.2d 173, 175 (9th Cir. 1982) (holding officers lacked probable cause to search residence because "[s]tanding alone, a suspect's mere presence or arrest at a residence is too insignificant a connection with that residence to establish that" contraband exists there). This same reasoning applies here, as Defendant Gupton searched Ms. Price's curtilage, which the Fourth Amendment treats as equivalent to the home. *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

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Based on the facts known to Defendant Gupton, he plainly did not have probable cause to believe he would find a firearm in Ms. Price's yard. Even Defendant Gupton himself may not have

believed he had probable cause: at deposition, he testified that officers only need "reasonable suspicion" to enter a private backyard for purposes of conducting "a brief, cursory search." SUF ¶ 137. Although Defendant Gupton's subjective perceptions of the law are generally irrelevant to Fourth Amendment analysis, *see Whren v. United States*, 517 U.S. 806, 813 (1996), his incorrect synopsis of the law is telling, perhaps explaining why he entered Ms. Price's yard with such minimal justification. Whatever reasonable suspicion might allow, the law demands more of officers seeking to enter the curtilage of a private home. Tolerating searches of the sort that occurred here would allow officers to "traipse through the garden, meander into the backyard, or take other circuitous detours" onto individuals' property, *Morgan v. Fairfield Cty.*, 903 F.3d 553, 563 (6th Cir. 2018) (quoting *Jardines*, 569 U.S. at 19 (Alito, J., dissenting)), eviscerating core Fourth Amendment protections.

C. Exigent Circumstances Did Not Justify Defendant Gupton's Entry into the Yard.

The absence of probable cause alone dooms the search of the Price yard; independently, it fails for lack of exigency, as both are required in the absence of a warrant. *See United States v. Dawkins*, 17 F.3d 399, 404–05 (D.C. Cir.), *amended*, 327 F.3d 1198 (Mem) (D.C. Cir. 1994).

Warrantless searches of a home are presumptively unreasonable; they are lawful only when one of the "few specifically established and well-delineated exceptions" to the warrant requirement applies. *Corrigan v. District of Columbia*, 841 F.3d 1022, 1029–30 (D.C. Cir. 2016) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Accordingly, in defending the constitutionality of a search in a subsequent § 1983 suit, "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify [a] warrantless search." *Id.* at 1030 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 749–50 (1984)); *see also Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970) ("Terms like 'exigent circumstances' or 'urgent need' are useful in underscoring the heavy

burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant. . . .").

One exception to the warrant requirement exists for exigent circumstances, permitting warrantless searches when there is "a *compelling need* for official action and *no time* to secure a warrant." *Corrigan*, 841 F.3d at 1030 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)) (emphasis original to *Corrigan*). Among the compelling needs capable of justifying a warrantless search is prevention of "the imminent destruction of evidence." *Kentucky v. King*, 563 U.S. 452, 460 (2011). Defendant Gupton made clear at deposition that this concern served as his primary subjective motivation for entering Ms. Price's yard without a warrant, SUF ¶ 128; however, his fears were not sufficiently objectively grounded to justify his actions.

Officers invoking the exigent circumstances exception on the basis of potentially lost evidence "must have an objectively reasonable basis for concluding that the destruction of evidence is imminent." *Dawkins*, 17 F.3d 399 at 405 (internal citation omitted)); *see also United States v. Goree*, 365 F.3d 1086, 1090 (D.C. Cir. 2004) (stating that officers must have a "reasonable belief" that the exigency exists at the time of the search). In general, reaching such a conclusion requires "(1) a reasonable belief that other persons are inside the [place to be searched]; and (2) a reasonable belief that these persons are likely to destroy evidence of a crime." *United States v. Elkins*, 300 F.3d 638, 656 (6th Cir. 2002). The D.C. Circuit affirmed this principle in *Dawkins*, holding that officers could not establish exigent circumstances to justify entry into an apartment to search for drugs and firearms unless they reasonably believed that either the suspect was in the apartment or that his "comrades in the narcotics trade may have been within [the apartment] threatening the imminent destruction of evidence." 17 F.3d at 405–06. This approach is commonsensical: if officers cannot conclude that someone is in the place to be searched and has

a motive to dismantle evidence, then they cannot reasonably fear that such destruction is imminent. *Cf. United States v. Timberlake*, 896 F.2d 592, 596 (D.C. Cir. 1990) (holding exigent circumstances absent where officers were in plain clothes, and therefore, apartment occupants had no reason to destroy evidence because they did not know the individuals in their hall were police).

The evidence available to Defendant Gupton did not support an inference that evidence was about to be destroyed. Sgt. Ross reported that she saw *one* individual enter a yard near Ms. Price's yard, and then "book[] it" out of the yard. SUF ¶ 91. That information strongly suggested that the suspect was not in the area when Defendant Gupton went to search it and therefore not present to dispose of the gun Defendant Gupton thought might be there. Nor did Defendant Gupton gather any evidence indicating that any *other* individuals present had a motive to destroy evidence supposedly in Ms. Price's yard. Defendant Gupton did not question any people on Ms. Price's block, including the several Black men in white t-shirts who were standing there. SUF ¶ 52, 116. He did not rely on visual observations, SUF ¶ 115, and to the extent that he looked around the block before entering the yard at all, he failed to identify any "individuals who[m] [he] thought could be involved in the conduct giving rise to call for service," SUF ¶ 130. Indeed, Defendant Gupton testified at deposition that, by time he reached the area near Ms. Price's home, he thought he had "lost" the suspects. SUF ¶ 65. If, based on the evidence known to him, Defendant Gupton was himself unconvinced that a suspect or confederate hid in Ms. Price's yard, a reasonable juror certainly could not credit such an inference.

The circumstances where an officer could deem loss of evidence imminent, despite lacking information about the occupants of the location to be searched, were not remotely present here. Defendant Gupton did not, for instance, make oral or visual observations indicating that evidence was being destroyed. SUF ¶¶ 115, 116, 128–29. *See United States v. Andino*, 768 F.3d 94, 101 (2d

Cir. 2014) (holding exigent circumstances justified warrantless entry when officers heard "sounds indicating destruction of evidence"). Nor did he receive a reliable tip that the suspect would imminently return. The only information he received that came close was Sgt. Ross's off-handed statement that "I'm sure that guy [the suspect] will be back." SUF ¶ 89. Sgt. Ross offered no facts supporting that assertion, SUF ¶ 90, making it little more than a hunch; further, she did not even speculate, must less provide information to support, the supposition that the suspect had dropped a gun in the area and was also on his way back to dispose of it. SUF ¶¶ 87–96. Thus, the information known to Defendant Gupton could not carry the burden officers must meet to demonstrate an exigency. *See United States v. Roark*, 36 F.3d 14, 17 (6th Cir. 1994) (holding that "unsubstantiated suspicions of an officer" do not provide exigent circumstances). Put simply, the complete absence of facts indicating an imminent risk of evidence loss makes exigent circumstances an untenable defense here.

The actions of Defendant Gupton and his colleagues both on the scene and away from it further demonstrate the absence of exigency. Body-Worn Camera footage shows Defendant Gupton and Officer Whitehead moving slowing around cars and through yards. SUF ¶ 54. None of the officers warned the Price family about the risk of a firearm in their yard, even though young children were present. SUF ¶¶ 23, 53. Nor did any ask questions of the Black men in white t-shirts present on the scene. SUF ¶ 52. Additionally, the dispatcher, upon learning that the suspects had driven away, changed the priority level for the "person with gun call" from 1 to 3, a priority level that, according to Defendant Gupton, indicated that officers only needed to "get there when you can," and required such little urgency that he did not know why it existed. SUF ¶ 118, 123, 124.

Defendant Gupton's explanations for his actions do not justify them. At deposition, he testified that he decided against pursuing a warrant because he did not have "a visual of the area,"

a concern that was "a big thing, I mean, because the preservation of evidence and the fact that I don't know what's happening back there, I don't know whether someone has access to whatever we're going for." SUF ¶ 128. These fears may have been sincerely felt, but they were not enough. The Constitution does not permit officers to enter yards without warrants based on "speculation about what may or might have happened." *United States v. Howard*, 828 F.2d 552, 555 (9th Cir. 1987) (internal quotation marks and citation omitted). What Defendant Gupton needed was what he lacked: "specific and articulable facts which, taken together with rational inferences . . . support the warrantless intrusion." *Id.* (internal citations and quotation marks omitted).

These principles do not give way simply because officers had concerns about a gun. The D.C. Circuit has held that the presence of a gun in a private home, on its own, cannot create an exigent circumstance. *See Dawkins*, 17 F.3d at 406. Courts nationwide agree. *Harris v. O'Hare*, 770 F.3d 224, 236 (2d Cir. 2014) (holding, in case involving search of a yard, that "mere suspicion or probable cause for belief of the presence of a firearm does not, on its own, create urgency"); *see also United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994) ("The mere presence of firearms does not create exigent circumstances."); *United States v. Murphy*, 69 F.3d 237, 243 (8th Cir. 1995) (same).

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In sum, to enter Ms. Price's yard without a warrant, Defendant Gupton needed both probable cause and exigent circumstances. He possessed neither. Consequently, his search was unlawful.

II. Defendant Gupton Committed a Trespass by Entering Ms. Price's Yard.

"The tort of trespass is defined as 'an unauthorized entry onto property that results in interference with property owners' possessory interest therein.'" *Greenpeace, Inc. v. Dow Chem.*

Co., 97 A.3d 1053, 1060 (D.C. 2014) (quoting *Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 490 (D.C. 2005)) (italics removed). As the owner of her home, Ms. Price unquestionably has a possessory interest in her yard. *See* SUF ¶¶ 2, 11. Equally beyond dispute is the fact that Defendant Gupton interfered with Ms. Price's interest in the property by "intentionally" entering the yard without her consent. *See Robinson v. Farley*, 264 F. Supp. 3d 154, 164 (D.D.C. 2017) (holding that even a momentary entry onto property constitutes interference with possessory interests). The sole question concerning liability, then, is whether Defendant Gupton's entry was "unauthorized." The Fourth Amendment analysis above resolves that issue. *See Garay v. Liriano*, 943 F. Supp. 2d 1, 26 (D.D.C. 2013) (denying motion to dismiss trespass claim against an officer because officer's search violated the Constitution). Because Defendant Gupton committed this tort within the scope of his employment, SUF ¶ 138, the District bears liability for his conduct under the doctrine of *respondeat superior*. *Blair v. District of Columbia*, 190 A.3d 212, 225 (D.C. 2018).

Conclusion

For the reasons stated, Ms. Price is entitled to summary judgment with respect to liability on her constitutional and common law claims.

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Respectfully submitted,

/s/ Michael Perloff

Michael Perloff (D.C. Bar # 1601047)
Scott Michelman (D.C. Bar # 1006945)
Arthur B. Spitzer (D.C. Bar # 235960)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
Tel. 202-457-0800
mperloff@acludc.org