ORAL ARGUMENT SCHEDULED FOR JANUARY 12, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-7033

JERRY YOUNGBEY and RUBIN BUTLER;
Plaintiffs - Appellees,

v.

The DISTRICT OF COLUMBIA; JOSE ACOSTA; LONNIE BRUCE; TIMOTHY DUMONTT'; DUANE FOWLER; SEAN MCLAUGHLIN; THOMAS MILLER; CHRISTOPHER SMITH; DARRYL THOMPSON; CHARLES YARBAUGH; RAYMOND CHAMBERS; DARIN MARCH; and LARRY SCOTT;
Defendants - Appellants.

On Appeal from the United States District Court
for the District of Columbia
Civil Action No. 1:09-cv-00596 (JSG)

BRIEF FOR APPELLEES

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December 2, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellees Jerry YoungBey and Rubin Butler submit the following information in accordance with D.C. Cir. R. 28(a)(1).

A. Parties and Amici: Jerry YoungBey and Rubin Butler are Plaintiffs below and Appellees here.

The District of Columbia, Jose Acosta, Lonnie Bruce, Timothy Dumontt', Duane Fowler, Sean McLaughlin, Thomas Miller, Christopher Smith, Darryl Thompson, Charles Yarbaugh, Raymond Chambers, Darin March, and Larry Scott are Defendants below and Appellants here.

James McDonald, Anthony McGee, Durriyyah Habeebullah, Jaime Cullen, DeVinci Wooden, Christopher Ritchie, Justin Branson, Sinobia Brinkley, John Brown, Forian DeSantis, Gary Foster, John Henderson, Darryl Isom, Derrick Johnson, Kia Jones, Kevin O'Bryant, Kevin Pope, Paul Riggins, Hogan Samels, Peter Schumacher, Darryl Stewart, Kevin Tolson, and William Wright also were Defendants below.

No intervenors or *amici* have appeared below or in this Court.

B. Ruling Under Review: Defendants' appeal concerns some aspects of the March 1, 2011, opinion and order of the U.S. District Court for the District of Columbia (Gwin, J., sitting by designation from the Northern District of Ohio)

denying their motions for summary judgment. The opinion, ECF No. 119, is available at 2011 WL 697158 and at JA 362.

C. Related Cases: Appellees are unaware of any related cases as that term is defined by the rules of this Court.

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GLOSSARY

CSOSA.....Court Services and Offender Supervision Agency

District Br.....Brief of Appellant District of Columbia and 12 individual officers

ERT.....Emergency Response Team

MPD.....Metropolitan Police Department

WALES.....Washington Area Law Enforcement System

STATEMENT OF ISSUES FOR REVIEW

The question presented in this case is whether reasonable police officers should have known that a 4 AM home invasion – including smashed windows, a room set on fire by flash-bang grenades, and the prolonged detention at gunpoint of two citizens – was an unreasonable search in violation of the Fourth Amendment. The two specific issues raised on appeal are –

1. Whether the district court correctly held that reasonable officers should have known that it was unlawful to conduct a search at 4 AM based on a warrant that, on its face, did not authorize a nighttime search and a warrant affidavit that did not even attempt to allege any fact that could have supported issuance of a nighttime search warrant.
2. Whether the district court correctly held that reasonable officers should have known that it was unlawful to break into a home without knocking and announcing their presence, when the officers' actions before and during the search and their statements after the search reflected no heightened threat of physical violence.

STATEMENT OF FACTS

This case arises out of a home invasion search of a home conducted by 21 heavily armed District of Columbia police officers at 4 AM on the night of August 20, 2008. The warrant that did not authorize a nighttime search, and the officers failed to knock and announce their presence before breaking the windows of the home, tossing in two flash-bang grenades, and climbing through the windows. Once inside, the officers held the two residents of the house – neither of whom was suspected of any crime, both of whom cooperated fully, and one of whom was half-naked – with assault rifles trained at their heads for up to 30 minutes. In this appeal, the District of Columbia and its officers (collectively, "the District") take the position that almost all aspects of this search were reasonable, or even if not that a reasonable police officer could have believed that they were reasonable.

Because Defendants are appealing a denial of summary judgment, this Court must interpret the facts in the light most favorable to Ms. YoungBey and Mr. Butler. *See Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006).

Jerry YoungBey lives at 1312 Queen Street, N.E., in a townhouse that she owns in the Trinidad neighborhood of Washington, D.C. JA 342. At the time of the search, Ms. YoungBey worked for the District of Columbia Public Schools, where she had served for approximately 20 years as a teacher's assistant for special

education students at Cardozo High School. JA 22. She has no criminal history; indeed, she never has been arrested. JA 67.

Rubin Butler is a construction supervisor at a local construction company. JA 269. He has lived at 1312 Queen Street, N.E., for approximately 20 years, renting a basement apartment from Ms. YoungBey. *Id.*

A. The Search Warrant.

On August 13, 2008, the Metropolitan Police Department ("MPD") obtained a warrant to search 1312 Queen Street, N.E. JA 43 (search warrant). The affidavit supporting the warrant described the investigation of a July 16, 2008 homicide. JA 47 (affidavit). Detective Darin March, who submitted the affidavit, stated that Ms. YoungBey's adult son John was a suspect. *Id.* Although the District now asserts that the warrant was based on probable cause to believe that "a firearm believed to be an assault rifle" would be found at the residence, Brief of Appellants ("District Br.") at 2, the affidavit did not say anything about an assault rifle (it described a shooting, but included no information about the weapon used), JA 44-48 (affidavit), and Detective March did not discuss the weapon with the judge when he requested the warrant, JA 198, 201 (March Deposition).

The only connection between the Queen Street residence and the investigation was an assertion that John YoungBey lived there. JA 47 (affidavit). To justify that that assertion, Detective March stated that he "checked with the

Court Services and Offender Supervision Agency (CSOSA), which revealed during their last home visit John Youngbey was residing at 1312 Queen Street, Northeast" and that "[a] WALES [Washington Area Law Enforcement System] check confirmed that John Youngbey has a current address of 1312 Queen Street, Northeast." *Id.* Detective March did not know or attempt to discover whether the information from either source was fresh, and in three separate surveillance visits conducted prior to executing the warrant had never seen John YoungBey. JA 202 (March Deposition).

In fact, Detective March was mistaken: John YoungBey had not lived at 1312 Queen Street, N.E., since 2004. JA 78 (YoungBey Deposition). Mr. YoungBey did not have a key to house. JA 81 (YoungBey Deposition). Ms. YoungBey and Mr. Butler were the only residents. And Ms. YoungBey had informed CSOSA officials multiple times that her son no longer lived there. JA 82 (YoungBey Deposition) ("Each time the probation officer came to my house to check up on him, I let the probation officer know that he no longer lived there. … He was living with his girlfriend in Maryland.").

Detective March did not request a warrant authorizing a nighttime search from the judge. JA 201. His supporting affidavit did not include any reason why it would be permissible to execute the warrant at night. JA 44-48 (affidavit). It did not state that the warrant could not be executed during the daylight, that the

property the MPD was seeking likely would be removed or destroyed if it was not seized immediately, or that the property could only be found at certain times or under certain circumstances. *Id.* Nor did he tell the judge any reason why the search should be conducted at night. JA 201 (March Deposition). The standard form used for the warrant contains two possible choices for time of execution: "in the daytime" or "at any time of the day or night." JA 43 (warrant). Neither Detective March nor the District of Columbia Superior Court judge who signed the warrant marked which choice was applicable. *Id.*

Although the District now relies on the fact that "the firearm was not a mere gun, but [was] believed to be an assault rifle," District Br. at 22 (internal quotation marks omitted), neither the warrant or the affidavit mentioned any details about the firearm involved in the homicide. *See* JA 43, 45. The warrant specifically authorized a search for "holsters," JA 43, which is certainly incompatible with an assault rifle. And Detective March conceded that he had no information about who owned the firearm or where it was kept. JA 197-98 (March Deposition).

B. Planning the Search.

Five days after the warrant was issued, on August 18, 2008, Detective March contacted a member of the MPD Emergency Response Team ("ERT") and asked ERT to execute the warrant. JA 201 (March Deposition). At the direction of Defendant Lieutenant Larry Scott, four others defendants – Sergeant Chambers and

officers Fowler, Dumontt', and Bruce – prepared an operational plan for the search. JA 49-53 (operational plan); JA 212 (Scott Affidavit). The plan described the homicide under investigation and identified John YoungBey as a suspect, JA 49, but did not indicate that the officers expected to encounter Mr. YoungBey at the Queen Street residence. Indeed, the section addressing "suspect information" was left blank, JA 50, and nothing in the record indicates that the ERT members were ever informed about Mr. YoungBey's age, height, weight, and appearance. Although the plan included a contingency if dogs were encountered at the residence, JA 52, it included no contingency if the suspect was encountered. Moreover, like the warrant and the affidavit, the operational plan made no mention of an assault rifle.

Detective March and the ERT officers "agreed mutually" to conduct the search at 4 AM, because, "when we do warrants like this, we want to catch people at home, and the best time to do it is early." JA 202 (March Deposition). The operational plan specifically called for the officers to knock on the door and announce their presence before and after entering the house. JA 51 ("Breachers will knock and announce, and after waiting a reasonable amount of time, with no answer, they will breach the door."). Nothing in the operational plan reflected an objective reason why the search was more dangerous than an average search

potentially involving a firearm, nor did the plan reflect a subjective belief that knocking and announcing would be dangerous.

On the morning before the warrant was executed, Detective March and an ERT officer conducted a briefing. Detective March "described the shooting, what occurred after the shooting, and what we were looking for at the [ ] premises that we had these search warrants for." JA 203 (March Deposition).[1] The ERT officer described the operations plan and the officers' individual assignments. JA 235 (Dumontt' Deposition). One officer, Jose Acosta, testified that the briefing included a reference to a "high-powered rifle," but in the same piece of testimony Acosta misstated basic facts about the homicide, suggesting that he may have been confusing this investigation with another investigation. JA 55 (Acosta Deposition) (testifying that the homicide "was over that 15-year-old boy or in connection with that young juvenile that was killed that was from out of state"; the victim in Detective March's homicide investigation was 19 years old and from Washington, D.C.).

C. Conducting the Search.

The officers executed the search at 4 AM on August 20, 2008, seven days after obtaining the search warrant. Ms. YoungBey was asleep in her upstairs

[1] Detective March explained that search warrants had been issued for three different premises at which the police believed the murder weapon might be found. JA 203.

bedroom. JA 342 (YoungBey Declaration). Mr. Butler was asleep in his basement apartment. JA 346 (Butler Declaration). They awoke to the sound of explosions, breaking glass, and the barking of Mr. Butler's small dogs. JA 342, 346. Frantic, Ms. YoungBey called 911 and told the operator "the house was being invaded by armed robbers." JA 342; *see also* JA 91 (YoungBey Deposition).

The sound of breaking glass resulted from Defendant Officer Thomas Miller breaking windows to get into the house after the front door had jammed. JA 300-04 (Miller Deposition).

There is a dispute of fact regarding whether the officers attempted to knock on the door or announce their presence before attempting to force open the door or before breaking the windows. Calvin Murphy, Jr., a former Military Intelligence Specialist in the United States Army who holds a Top Secret security clearance, lived at 1311 Queen Street, N.E., across the street from Ms. YoungBey's house. JA 349 (Murphy, Jr. Declaration). He stood in the doorway of his house watching the search. *Id.* He stated that "[t]he officers did not knock on the door, and did not announce their presence or authority, before using a long black object to attempt to pry open the front door," "still did not make any announcements" after attempting to pry the door "for another 3-4 minutes," and "still did not make any announcements" when "[t]wo of the officers on the porch began to break open the windows." JA 350. Ms. YoungBey and Mr. Butler also stated that the officers

did not knock and announce. JA 343 (YoungBey Declaration); JA 347 (Butler Declaration).

The officers claimed that they did knock and announce, but could not provide details regarding who announced the officers' presence and purpose or how the announcement was made. *E.g.*, JA 301 (Miller Deposition) . Officer Miller did testify that the "knocking" consisted of Defendant Officer Darryl Thompson hitting a Halligan bar wedged in the front door with a ram in an attempt to force the door open. JA 300 ("the banging of the ram is part of the knock and announce"); *cf. Richards v. Wisconsin*, 520 U.S. 385, 387 (1997) ("must knock on the door and announce their identity and purpose *before* attempting forcible entry") (emphasis added). In any event, for purposes of this appeal, the District has conceded that the officers did not knock and announce. District Br. at 18.

After the officers smashed the windows, Officer Dumontt' threw two flash-bang grenades through a broken window. JA 350 (Murphy, Jr. Declaration).[2] They caused some of the living room furniture to catch fire. JA 342 (YoungBey Declaration); JA 346 (Butler Declaration). Dumontt' acknowledges throwing one flash-bang grenade, but disputes throwing the second one. JA 353. Approximately

[2] These grenades, also called stun grenades, are used by military and paramilitary forces to temporarily incapacitate people while troops enter an area; they detonate with blinding light and a deafening explosion. *See* http://en.wikipedia.org/wiki/Stun_grenade.

21 members of the ERT then jumped into the house through the broken windows. JA 342; JA 346-47.

One group of officers went up the stairs to Ms. YoungBey's bedroom. JA 343 (YoungBey Declaration). When she opened her bedroom door, she found an assault rifle pointed at her face. *Id.* Officer Acosta held Ms. YoungBey at gunpoint on the floor for five to ten minutes. *Id.* He kept a rifle trained at her for the entire period. *Id.* She was naked below the waist, wearing only a short nightshirt. *Id.* Ms. YoungBey was handcuffed, questioned in her bedroom, and led downstairs, where she was detained on the couch (which was covered with broken glass from one of the windows) until the officers finished the search at around 6 AM. *Id.*

Another group of officers detained Mr. Butler in the kitchen and held him on the floor at gunpoint for 30 minutes. JA 347 (Butler Declaration). During that time, Officer Dumontt' used a battering ram to break open the security door from inside the house, ignoring Mr. Butler's efforts to point out the location of a key. JA 351 (Murphy, Jr. Declaration)

After searching the house for approximately two hours, the officers left without seizing anything. JA 344 (YoungBey Declaration); JA 348 (Butler Declaration).

D. The Aftermath.

Following the raid, Ms. YoungBey developed Major Depressive Disorder and Post-Traumatic Stress Disorder. JA 344; *see also* District Court ECF No. 97-13 (psychiatric evaluation). She suffers from recurring nightmares and persistently re-experiences the events of the search via intrusive, distressing recollections that are triggered by external cues, such as loud sounds and seeing police officers. JA 344. As a result, Ms. YoungBey, who had been close to completing her Bachelor's degree in psychology, was forced to take a medical withdrawal from school and to take significant time off from work. JA 344-45. Her work performance suffered as well, causing her to receive an unsatisfactory evaluation at her job for the first time in her career, and ultimately to her discharge. JA 345.

SUMMARY OF THE ARGUMENT

The search of the home at 1312 Queen Street, N.E., violated the Fourth Amendment's prohibition on unreasonable searches and seizure, and because the law establishing that violation was clear at the time, the officers are not entitled to qualified immunity.

1. No reasonable officer could have believed that the warrant authorized a nighttime search. The default warrant form lists two options for time of execution: "in the daytime" or the "at any time of the day or night." Here, neither option was selected. Under clearly established law, that silence cannot be read as

approval of nighttime execution. Moreover, under D.C. law, an issuing judge can authorize a nighttime search only if the requesting officer requests one and presents facts to establish one of three narrow statutory justifications for nighttime execution. The requesting officer in this case did neither.

Likewise, no reasonable officer could have believed that a nighttime search conducted pursuant to a warrant authorizing only a daytime search was consistent with the Fourth Amendment. The constitutional warrant requirement prevents unnecessarily intrusive searches by allowing a neutral judge or magistrate to determine in advance whether a proposed search is reasonable. When a search exceeds the bounds of the warrant, the executing officers take this critical function away from the issuing judge, substituting their judgment of the reasonableness of the search for a neutral judgment. Because such a search is equivalent to a warrantless search, it is presumptively unreasonable, and there is nothing in this case to overcome the presumption.

The District skirts around this fundamental problem by discussing the general constitutionality of nighttime searches and arguing that a mere violation of state law does not create a constitutional violation. Its argument misses the point: the constitutional violation was searching a home at 4 AM without a warrant authorizing the search (or exigent circumstances). And it was clearly established that such a search is unreasonable.

2. The Fourth Amendment presumptively requires officers conducting a search to knock and announce before attempting a forcible entry, and the failure to do so in this case also violated clearly established law. The Supreme Court has recognized that knocking and announcing may not be required in circumstances indicating a serious threat of physical violence, but it squarely has held that this determination must be made based on the facts and circumstances of a specific case, not categorical rules. Generalized claims that a murder suspect, a drug dealer, or an armed robber might be violent and be at the home to be searched, or that the item sought is a firearm, are insufficient. The officers must reasonably believe that a no-knock entry is needed to protect their safety based on the particular facts.

The record here unambiguously establishes that the officers did not have, and could not have had, such a reasonable belief. If the officers reasonably had believed they might be greeted by assault rifle fire, they would have included that belief in the warrant affidavit, addressed that possibility in the search plan, and briefed that information to all officers. They did none of those things. In fact, they affirmatively planned to knock and announce their presence, and continue to maintain that they *did* knock and announce (although they agree that this Court must assume that they did not). Their only conceivable argument to justify the no-knock search is a categorical rule that knocking and announcing never is required

when searching the home of a murder suspect for a firearm. But clearly established Supreme Court law squarely rejects the possibility of such a rule.

This Court should affirm the district court's denial of qualified immunity in all respects.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT ANY REASONABLE OFFICER WOULD HAVE KNOWN IT WAS UNREASONABLE TO CONDUCT A NIGHTTIME SEARCH BASED ON A WARRANT THAT AUTHORIZED ONLY A DAYTIME SEARCH.

The question in this case is not whether nighttime searches can be constitutional – of course they can – but whether the nighttime execution of a warrant that authorizes only a daytime search is constitutional. It is not, and that proposition was clearly established at the time of the search.

Ms. YoungBey is a 52-year-old D.C. public school employee with no criminal record. On August 20, 2008, at 4 AM., 21 heavily armed police officers broke out her front windows, threw in two flash-bang grenades, and stormed through her home. Ms. YoungBey and Mr. Butler, her basement tenant, awoke to explosions and breaking glass. Ms. YoungBey frantically dialed 911, but hung up, relieved, when the police pounded on her bedroom door and identified themselves. She opened the door to find an assault rifle pointed at her face. An officer ordered her to lay on the floor, naked from the waist down, while the police searched her

rooms. Officers handcuffed her, led her downstairs, and ordered her to sit on the couch among the shattered remnants of her front windows. Meanwhile, the police ransacked the home in an unsuccessful effort to find evidence against Ms. YoungBey's son, who had not lived at the address for more than four years.

The police did all of this without a valid warrant. Their search warrant authorized only a daytime search, and the requesting officer alleged no facts in his affidavit that would have justified a warrant authorizing a nighttime search. This search, therefore, was conducted in violation of the warrant and is unreasonable under the Fourth Amendment.

A. The Warrant in this Case Authorized Only a Daytime Search.

The District argues that failing to choose either the "in the daytime" option or the "at any time of the day or night" option on the pre-printed warrant form automatically authorizes a nighttime search. It takes that position despite the fact that there is no evidence in the record that the judge issuing the warrant intended to authorize a nighttime search and that, given the affidavit, the judge could not lawfully have issued a warrant authorizing nighttime execution. This reading upends history, ignores D.C. law, and contorts the plain language of the form.

1. The plain language of the warrant does not authorize a nighttime search.

The pre-printed D.C. warrant form allows the judge to authorize either a "daytime" search or an "any time" search. "In the daytime" means, by definition,

not at night; "at any time of the day or night" expressly includes both night and day. These two phrases are not merely "a bit redundant," as the District claims. District Br. at 46. They cannot both be true at the same time – one phrase authorizes nighttime execution, and the other explicitly does not.

Here, neither option was selected. This case, however, involves a D.C. judge issuing a warrant to a D.C. police officer, and the law in D.C. is clearly established that a warrant authorizing a nighttime search may not be issued unless the requesting officer alleges in the affidavit, or orally under oath, "that (1) it cannot be executed during the hours of daylight, (2) the property sought is likely to be removed or destroyed if not seized forthwith, or (3) the property sought is not likely to be found except at certain times or in certain circumstances." D.C. Code § 23-522(c); *see* D.C. Code § 23-521(f)(5); *In re L.J.W.*, 370 A.2d 1333, 1335 & n.4 (D.C. 1977) (holding that judge properly issued warrant authorizing nighttime execution where requesting officer orally, and under oath, alleged facts sufficient to comport with Section 23-522(c)).[3] If the requesting officer did not allege the necessary facts, the warrant simply is not valid for a nighttime search. For example, in *Spence v. United States*, 370 A.2d 1351 (D.C. 1977), the Court of

[3] The court held that, although a written record was preferable, there was no reversible error because the judge questioned the officer under oath regarding the grounds for nighttime execution before authorizing a nighttime search. *L.J.W.*, 370 A.2d at 1334-35. Furthermore, the requesting officer sought the warrant between 10:30 PM and 11:00 PM; the warrant authorized a nighttime search; and the officers executed the search immediately after receiving the warrant. *Id.* at 1334.

Appeals reversed a conviction based on evidence seized at night from a car pursuant to a warrant that actually authorized a nighttime search because the supporting affidavit did not satisfy Section 23-533(c)'s requirements. *Id.* at 1353.

Thus, for more than 30 years prior to the search in this case, it had been clearly established that the "warrant, however, must, *on its face*, authorize 'execution at any time of day or night' *where* the issuing officer has found cause for such execution under § 23-522(c)." *L.J.W.*, 370 A.2d at 1335 n.4 (quoting D.C. Code § 23-521(f)(5)) (emphasis added). Given that D.C. law requires that specific circumstances be found to justify a nighttime search, the only reasonable reading of the default warrant form is that a warrant intended to authorize a nighttime search expressly indicate that nighttime execution is allowed, *e.g.*, by crossing out "in the daytime" or circling "at any time of the day or night." Indeed, given the holding in *Spence*, where a warrant that on its face authorized a nighttime search was held invalid because the supporting affidavit did not allege facts justifying nighttime execution, it would be logically impossible to interpret the default form as allowing a nighttime search regardless of the contents of the supporting affidavit.

Numerous courts have held that a silent warrant such as this one does not allow a nighttime search. *See, e.g., Moore v. United States,* 57 F.2d 840, 843 (5th Cir. 1932) ("That search warrant did not contain the direction that it be served at

night; its execution was authorized only in the daytime. It therefore could be lawfully served only in the daytime."); *Johnson v. United States*, 46 F.2d 7, 8-9 (6th Cir. 1931) (finding that a warrant that failed to direct whether it could be served in the daytime or at any time "contain[ed] no direction or permission for service in the nighttime, [and] must be served in the daytime."); *Perez v. Borough of Berwick*, No. 4:07-CV-02291, 2009 WL 1139642, at *8 (M.D. Pa. Apr. 28, 2009) ("Although the bench warrant here was silent as to whether nighttime search was authorized, it is clear that nighttime entry was not authorized on the face of the warrant.") (footnote omitted); *United States v. Callahan*, 17 F.2d 937, 941 (M.D. Pa. 1927) ("Such an imperfect warrant [that fails to cross out either "in the daytime" or "at any time of the day or night"] should not ... be regarded as proper alternative process giving to the officer discretion to execute the same either in the daytime or nighttime ... . [T]he officer should in all cases of doubt employ the milder process."); *People v. Wittler,* 226 N.W. 685, 686 (Mich. 1929) (reasoning that a search warrant which did not expressly command search to be made in the daytime "would be legal is made at any time, *except at night*" and that a night search "*must be expressly commanded in the warrant.*") (emphasis added).

The District's reliance on two cases interpreting warrant forms in New Hampshire and Massachusetts to support a contrary argument is misplaced, and the cases are easily distinguishable. In both cases, the warrant language authorized

"an immediate search," and in each case, the officers executed the warrant shortly, if not immediately, after receiving it. *State v. Barron*, 623 A.2d 216, 216 (N.H. 1993) (warrant requested between 10 PM and 11 PM and executed at 11:20 PM); *Commonwealth v. Garcia*, 501 N.E.2d 527, 528 (Mass. App. Ct. 1986) (police received warrant for "later that day" and executed it "at approximately 6 P.M. the same day"). Finally, both courts found that the affidavits did, in fact, allege facts that warranted nighttime execution. *Garcia*, 501 N.E.2d at 528-29; *Barron*, 623 A.2d at 17-18. None of these facts exist in this case.

Thus, while the courts in New Hampshire and Massachusetts may have interpreted their jurisdictions' forms reasonably, it is wholly unreasonable to read the District's form as automatically allowing nighttime searches. Indeed, the District's reading wholly ignores the fact that both "in the daytime" and "at any time of day or night" cannot be true at the same time, thereby rendering the phrase "in the daytime" mere surplusage.[4]

[4] The District's argument that the use of "/" means "or" is self defeating. District Br. at 46. "Or" suggests two distinct options (*e.g.*, either an invoice OR a bill of lading), not that the options are identical. In the context cited by the District, having either an invoice or a bill of lading might satisfy the requirements of a contract, but a search warrant must authorize either a daytime search OR a search at any time of the day or night; it cannot authorize both at the same time.

2. Requiring the judge affirmatively to authorize nighttime execution comports with the historical aversion to nighttime searches in American law in general, and in D.C. law in particular.

Reading the D.C. warrant form as authorizing a nighttime search only if the judge affirmatively authorizes such a search is consonant with the historical concern regarding nighttime searches in American law.

Historically, searches of homes, especially nighttime searches, have been at the core of the rights protected by the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their ... houses ... against unreasonable searches and seizures," and a nighttime search without a warrant is an "extremely serious intrusion." *Coolidge v. New Hampshire,* 403 U.S. 443, 477 (1971); *see also, e.g., Payton v. New York,* 445 U.S. 573, 585 (1980) ("As the Court reiterated just a few years ago, the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'") (quoting *United States v. United States District Court,* 407 U.S. 297, 313 (1972)); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (noting that "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" is "[a]t the very core of the Fourth Amendment") (internal quotation marks omitted); *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) ("Since we hold to the centuries-old principle of respect for the privacy of the home, it is beyond dispute that the home is entitled to special protection [under the Fourth

Amendment] as the center of the private lives of our people." (citation and internal quotation marks omitted)); *Dorman v. United States,* 435 F.2d 385, 389 (D.C. Cir. 1970) (en banc) ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.").

Indeed, "it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home." *Jones v. United States,* 357 U.S. 493, 498 (1958); *see also Gooding v. United States,* 416 U.S. 430, 462 (1974) ("In my view, there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night. The idea of the police unnecessarily forcing their way into the home in the middle of the night ... rousing the residents out of their beds, and forcing them to stand by in indignity in their night clothes while the police rummage through their belongings does indeed smack of a 'police state' ... .") (Marshall, J., dissenting).

This aversion to nighttime searches extends in an uninterrupted line directly back to the Founders. Two of Congress' earliest statutes prohibited such searches outright. *See* Act of March 3, 1791, § 29, 1 Stat. 206 (authorizing searches for goods subject to duty in houses and other buildings "in the day time only"); Act of July 31, 1789, § 24, 1 Stat. 43 (authorizing searches for distilled spirits "in the daytime" and not the nighttime). Since that time courts have repeatedly expressed

concern with nighttime searches. *See, e.g., United States v. Gibbons,* 607 F.2d 1320, 1326 (10th Cir. 1979) (collecting cases); *see also Monroe v. Pape,* 365 U.S. 167, 210 (1961) (Frankfurter, J., concurring in part and dissenting in part) ("Searches of the dwelling were the special object of this universal condemnation of official intrusion. Night-time search was the evil in its most obnoxious form.").

Even the British did not allow nighttime execution of "the odious 'writs of assistance' which outraged colonial America." *United States ex rel. Boyance v. Myers,* 398 F.2d 896, 898 (3d Cir. 1968); *accord O'Rourke v. City of Norman,* 875 F.2d 1465, 1473 (10th Cir. 1989) (noting that even under pre-revolutionary British rule, general warrants could not be executed at a home in the nighttime).

Congress had these same concerns when it enacted the statute that became D.C. Code §§ 23-521 – 23-523. The Senate Report noted "the policy generally disfavoring nighttime executions, nighttime intrusions, more characteristic of a 'police state' lacking in the respect for due process and the right of privacy dictated by the U.S. Constitution and history." S. Rep. No. 91-538 at 12 (1969). Consequently, Congress required that the issuing judge find that the requesting officer had alleged facts that justified a nighttime search.

Reading the default form as authorizing a nighttime search thus ignores history as well as plain statutory language.

3. Making a nighttime search the default would undermine the role of the neutral judge in determining the reasonableness of warrants.

The Constitution demands that the reasonableness of a search be decided "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). The need for such judicial supervision is nowhere more critical than when the police engage in a search like this one – a destructive 4 AM home invasion.

The Supreme Court has long recognized the importance of having a neutral judge make "informed and deliberate determinations" on the existence of probable cause and the limits of a reasonable search, rather than leaving such decisions to the "hurried actions" of the police executing the search. *Aguilar v. Texas*, 378 U.S. 108, 110 (1964) (quoting *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213, 230 (1983); *see also Gates*, 462 U.S. at 240 ("The essential protection of the warrant requirement of the Fourth Amendment … is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate … .'" (alteration in original) (quoting *Johnson*, 333 U.S. at 13-14)).

Indeed, in enacting D.C. Code §§ 23-521 – 23-523, Congress specifically mandated the neutral judicial officer to "effect more active, meaningful

supervision" of whether nighttime execution was warranted. S. Rep. No. 91-538, at 12 (1969).

This "meaningful supervision" is one of the principal benefits of the Constitution's warrant requirement, because it has the ability to prevent unnecessarily intrusive searches before they occur. This supervision is the primary protection for innocent people, like Ms. YoungBey and Mr. Butler, from overreaching police conduct like this search. They were not the targets of the investigation, and in cases like this the threat of excluding evidence provides no deterrence to police conduct. The only real deterrent is the requirement that the police acquire a warrant before the search.

Reading the default form as allowing a nighttime search, rather than requiring specific authorization from the neutral judge, undermines the role of the judge in supervising when a nighttime search is warranted and in preventing unnecessarily intrusive searches. As the facts of this case demonstrate, reading the default form to allow a nighttime search would allow the District's officers routinely to evade this critical review, just as they did in this case. The officer did not request nighttime execution, and his affidavit did not satisfy the requirements of § 23-522(c) or otherwise allege any facts that would justify a search at 4 AM. Indeed, despite the District's heavy reliance in its brief on the fact that an assault rifle might have been found, the officer did not even mention the assault rifle to the

judge.[5] JA 43-48. Thus, it is impossible to know what type of search the judge might have authorized if the District had allowed the judge to consider whether a nighttime search would be reasonable. *Cf. Groh v. Ramirez*, 540 U.S. 551, 561 n.4 (2004) (noting that petitioner did not notify Magistrate of warrant's defect "and we therefore cannot know whether the Magistrate was aware of the scope of the search he was authorizing"). Regardless, it is clear that the police avoided meaningful review of the nighttime execution of the search and eliminated a chance to prevent the destruction to Ms. YoungBey's home and the injuries to her and Mr. Butler. That is a firmly established violation of the Fourth Amendment.

B. Execution of This Warrant – Which Authorized Only a Daytime Search – at 4 AM Constitutes an Unreasonable Search Under the Fourth Amendment.

This search has all the characteristics of the searches so detested by the Founders: Holding a warrant that authorized only a daytime search, 21 heavily armed officers broke into a home at 4 AM without warning, held Ms. YoungBey and Mr. Butler on the floor at gunpoint and in handcuffs, and ransacked their home for several hours, finding nothing. This search was constitutionally unreasonable.

1. Because the search exceeded the bounds of the warrant, it is equivalent to a warrantless search.

"[The] Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant," *Bivens v. Six Unknown Named*

[5] Nor was it mentioned in the operational plan. JA 49-53.

Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 n.7 (1971), to assure that those "searches deemed necessary [remain] as limited as possible," *Coolidge*, 403 US at 467; *accord Horton v. California,* 496 U.S. 128, 140 (1990) ("If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more."); *Marron v. United States*, 275 U.S. 192, 196 (1927).

Executing a nighttime search with a warrant that authorizes only a daytime search is the same as executing a search without any warrant at all. *See O'Rourke,* 875 F.2d at 1474 ("To determine that a warrant limited to daytime execution authorizes the nighttime search of a home is to completely eviscerate the issuing magistrate's determination of reasonableness."); *Boyance,* 398 F.2d at 899 (holding that where the warrant authorized only a daytime search of the suspect's house, "on the issue of the reasonableness of searching an occupied home at 2:00 a.m. the searcher's case is certainly no better than it would have been if no warrant had been issued, probably worse."); *United States v. Merritt,* 293 F.2d 742, 745-46 (3d Cir. 1961) ("Since the warrant was 'legally invalid' [because it "was served at night and not during daytime as provided by its terms"] the officers' entry into the defendant's apartment was on the same plane as an entry without any warrant at all and as such was an unlawful 'invasion' within the proscription of the Fourth

Amendment."); *cf. Groh*, 540 U.S. at 558 (rejecting claim that search conducted with an invalid warrant was reasonable and functionally equivalent to a search with a warrant even though supporting affidavit contained allegations sufficient to establish probable cause).[6] Indeed, a rule allowing the executing officer to disregard the conditions on the face of the warrant would take the decision of the reasonableness of the search from the judge issuing the warrant and give it to the executing officer instead, precisely the result forbidden by *Johnson*.

2. Warrantless searches are presumptively unreasonable.

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York,* 445 U.S. 573, 586 (1980) (quoting *Coolidge*, 403 U.S. at 477). "A search conducted without a warrant is per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions," none of which apply in this case. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Groh*, 540 U.S. at 560 (noting the "well-established principle that

[6] The District's attempt to analogize warrantless nighttime execution to cases where the police did not have a warrant authorizing a no-knock entry are unavailing. District Br. at 39. The accurate analogy would be to a warrant that expressly forbade a no-knock entry, and the police executed one anyway. In any case, no-knock entries are not an appropriate comparison, as situations warranting no-knock entry can develop at the scene, if it becomes clear once the search has begun that officer safety or evidence preservation requires immediate entry. By contrast, officers choose nighttime execution long before a search begins.

'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'") (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967)); *Payton*, 445 U.S. at 587-88 ("[A]bsent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.").

3. Given the delay in executing the warrant, the officers clearly believed there were no exigent circumstances justifying violation of the warrant.

There is no claim that exigent circumstances justified the nighttime execution here. After obtaining the warrant, the police waited five days before even asking ERT to serve it, and another two days before executing it. *Compare* JA 43, 48 (warrant issued on August 13, 2008) *with* JA 49 ("Date Request Received: August 18th, 2008"). At no time during the seven days between receiving the warrant and executing it did any officer contact the judge to mention an assault rifle or any other reason that might make a nighttime search reasonable under the Fourth Amendment.

The officers' significant delay in executing this nighttime search distinguishes this case from many of the cases relied upon by the District, where the officers executed the nighttime searches shortly after receiving the warrants. *See, e.g., United States v. Searp*, 586 F.2d 1117, 1119 (6th Cir. 1978) (warrant

authorizing "immediate" search issued at 11:27 PM); *United States v. Burch*, 156 F.3d 1315, 1318 (D.C. Cir. 1998) (warrant executed after police witnessed a second controlled buy); *United States v. Bieri*, 21 F.3d 811, 814 (8th Cir. 1994) (warrant for drugs executed after controlled delivery and refusal of request for consent); *Barron*, 623 A.2d at 217-18; *Garcia*, 501 N.E.2d at 528.

4. Because the law regarding the requirements for issuing warrants authorizing nighttime searches was clearly established, the officers did not execute the search in good-faith reliance on the warrant.

Nor can the District plausibly claim that the officers acted in good faith reliance on the warrant. As discussed above, the law had been clearly established in the District for several decades prior to this search. *L.J.W.*, 370 A.2d at 1335; *Spence*, 370 A.2d at 1353. The affiant was the lead detective on the homicide case and decided with ERT that the search should be conducted at night. JA 202, 203. He knew that he had not alleged facts sufficient to justify a nighttime search – or at least any reasonable officer in his position would have known that. *See Groh*, 540 U.S. at 564 (holding that because petitioner prepared the invalid warrant in question he could not rely on the Magistrate's assurance that it was valid). Given these facts, the requesting officer cannot rely on a claim that he thought the warrant authorized nighttime execution. *See Malley v. Briggs*, 475 U.S. 335, 345-46 & n.9 (1986); *State v. DuBiel*, No. CX-02-905, 2003 Minn. App. LEXIS 388, at *8 (Minn. Ct. App. Apr. 8, 2003) ("25 years of cases consistently requiring that a

warrant application must articulate particularized reasonable suspicion to justify nighttime execution erodes any argument that officers act in good faith when they act on an unsupported nighttime execution provision."). Nor can any other Defendant who saw the warrant or the affidavit.

5. The District's claim that this search was reasonable despite the fact that the officers executed the search at night when only a daytime search was authorized by the warrant is without merit.

There are three primary flaws in the District's contention that, despite the litany of problems with the search discussed above, the search was reasonable.

First, although the District now relies heavily on the fact that the murder weapon was an assault rifle, the affidavit did not mention that, nor did the requesting officer otherwise inform the issuing judge, although he knew it at the time.[7] The District cannot claim that the assault rifle made it necessary to execute the warrant at night when the officer failed to tell the judge about it. Allowing it to do so would permit the District to evade any meaningful judicial supervision of nighttime searches simply by withholding key facts and then later using those facts to justify a nighttime search even though the warrant authorized only a daytime search. If the possible presence of the assault rifle could have justified a nighttime search, then the officers could have requested nighttime execution in the first

[7] To the contrary, the warrant mentions "firearms," but not an assault rifle, and "holsters," which are inconsistent with an assault rifle. JA 43. Detective March admitted that he knew the weapon was an assault rifle, but did not mention that fact to the judge. JA 198 (March Deposition).

instance by putting information about the weapon in the affidavit, or by informing the judge at any time in the seven days between issuance and execution.[8]

Second, the District's reasoning would create a blanket rule that nighttime searches automatically are authorized for searches for firearms in murder cases. Because the officer did not tell the judge about an assault rifle, nothing in the affidavit actually presented to the judge distinguishes this situation from any other search for a gun possessed by an alleged murder suspect. Therefore, under the District's reasoning, a nighttime search always would be authorized upon showing probable cause to search for a gun in a murder case. But that is not the law. *See Spence*, 370 A.2d at 1353.

Third, the cases on which the District relies to claim this search was reasonable under the Fourth Amendment are inapposite. As an initial matter, several of the cases involve warrants that authorized nighttime execution. *See Culp v. United States*, 624 A.2d 460, 461 (D.C. 1993) (warrant authorizing a nighttime search issued based on an affidavit alleging involvement with 12 armed robberies involving an Uzi submachine gun and a confidential informant reporting that the defendant had the Uzi in the location 24 hours before the search); *Gooding*, 416 U.S. at 439 (warrant for drugs authorized nighttime search); *United States v.*

[8] Nor is there any legitimate concern that officers will have to tell judges every possible detail or run the risk of having a warrant invalidated. Here, the omitted fact is essential to the District's only proffered defense of the position that a nighttime search could have been authorized.

Schoenheit, 856 F.2d 74, 77 (8th Cir. 1988) (same); *Searp*, 586 F.2d at 1119 (warrant authorizing "immediate" search issued at 11:27 PM and executed shortly before midnight).

Additionally, the specific circumstances of some of the cases indicated that a warrant authorizing a nighttime search was intended, which is also not the case here. For example, in *United States v. Katoa*, 379 F.3d 1203 (10th Cir. 2004), the court "recognize[d] that a nighttime search is particularly intrusive" and found that the issuing judge knew that the officer wanted an anytime warrant,[9] meant to issue an anytime warrant, and mistakenly believed he had. *Id.* at 1205. Furthermore, when the officer realized the error, he immediately called the judge, who authorized the officer to alter the warrant expressly to authorize a nighttime search. *Id.* The court in *Katoa* expressly stated that its holding was "narrow: when the face of a warrant contains a drafting defect or omission regarding a subject not specifically named in the Constitution, the warrant is made valid if the issuing judge authorizes correction of the defect or omission via telephone during the search and subsequently confirms that authorization in writing." *Id.* at 1208.

[9] Unlike Detective March's affidavit here, which neither requested a nighttime search or set forth a basis that could have supported such a request, the warrant affidavit in *Katoa* specifically asked for execution "at any time day or night because there is a reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, or altered." 239 F.3d at 1204 n.1.

Further, many of the cases involved search warrants for drugs, for which federal law (and District law) expressly requires issuing officers to authorize nighttime searches. *See* 21 U.S.C. § 879. Because drugs, unlike an assault rifle, "are notoriously easy to move and destroy," *Garcia*, 501 N.E.2d at 528-29, Congress and state legislatures – not the executing officers – determined in advance that drugs require special treatment, and the Supreme Court agreed, *see Gooding*, 416 U.S. at 439. Thus, the multitude of drug cases relied on by the District are inapposite. *See, e.g.*, *Hines v. United States*, 442 A.2d 146, 147-48 (D.C. 1982) (noting that clerk crossed out "anytime," not the issuing judge, and holding that the warrant had to authorize a nighttime search because the law said that the judge "shall insert" such authorization in drug searches); *United States v. Burch*, 156 F.3d 1315, 1326 (D.C. Cir. 1998) (finding that it was an "ministerial oversight" to fail to cross out "in the daytime" when the affidavit established probable cause that drugs would be seized; both federal and D.C. law *required* the judge to issue an "at any time" warrant for drugs; the affidavit stated that drugs were being sold at the location and that an informant had conducted a controlled buy at the location; and the warrant was executed after police witnessed a second controlled buy); *Bieri*, 21 F.3d at 814 (warrant for drugs was executed after a controlled delivery to the location and the police had requested consent to search and been refused); *United States v. Morehead*, 959 F.2d 1489, 1497 (10th Cir.

1992) (holding that "the record does not support ... that the search was conducted at night," but that the search would be reasonable in any event because it was for drugs); *United States v. Rizzi*, 434 F.3d 669, 674 (4th Cir. 2006) ("[W]hen a search warrant involves violations of drug crimes, the warrant can be served day or night so long as the warrant itself is supported by probable cause.").[10]

Finally, *Dalia v. United States*, 441 U.S. 238 (1979), also is inapposite. In *Dalia*, the Supreme Court found that a Title III wiretap warrant "unquestionably" implied that a covert entry was authorized, and the district court had said that its order had in fact implicitly authorized such an entry. *Id.* at 258. Requiring the warrant to spell out its permission for covert entry when it authorized a wiretap, the Court concluded, would be "empty formalism." *Id.* By contrast, in this case there is no indication that the warrant implicitly authorized a nighttime search.

C. District of Columbia Law Is Not Irrelevant to Whether the Search Was Constitutionally Unreasonable.

The District claims that state law is irrelevant to whether a search is unconstitutional. District Br. at 41 (citing *Virginia v. Moore*, 553 U.S. 164 (2008)). That proves too much. In *Moore*, the Supreme Court held that an arrest

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[10] In *United States v. Howard*, 532 F.3d 755 (8th Cir. 2008), it is not entirely clear whether the warrant authorized a nighttime search. The defendant claimed that the warrant violated the requirement that the judge issue a warrant for daytime execution unless satisfied that public interest required nighttime execution, but the court upheld the affidavit as providing probable cause justifying nighttime execution, noting the "significant deference owed to the issuing judge." *Id.* at 760. In any case the warrant was for drugs. *Id.*

was not unconstitutional even though Virginia law did not permit an arrest for the crime that had been committed. But that holding does not mean that state law is categorically irrelevant to the Fourth Amendment analysis of the reasonableness of a search or seizure. *See United States v. Graham*, 553 F.3d 6, 17 (1st Cir. 2009) (interpreting *Moore*). And it certainly does not mean that state law is irrelevant to the validity of a warrant, which in turn can have a controlling effect on whether a search is reasonable.

At the most basic level, state law can define what constitutes a crime. A D.C. police officer could not reasonably arrest someone in D.C. for an act that took place in D.C. but that was not a crime in D.C., even if that act would be a crime in Maryland. Similarly, arresting a person for a purely civil offense violates the Fourth Amendment. *Doe v. Metro. Police Dep't of D.C.*, 445 F.3d 460, 469 (D.C. Cir. 2006) (reversing dismissal of § 1983 case against officers for arresting plaintiffs for civil infractions); *Davis v. Rodriguez*, 364 F.3d 424, 433 (2d Cir. 2004) ("In analyzing § 1983 claims for unconstitutional false arrest, we have generally looked to the law of the state in which the arrest occurred."); *Bostic v. Rodriguez*, 667 F. Supp. 2d 591, 608 n.6 (E.D.N.C. 2009) ("The court does not read *Atwater* and *Moore* to undermine the more basic principle that an officer cannot arrest an individual when the officer lacks probable cause to believe that a crime has occurred and that state law determines whether a particular act

constitutes a crime.") (*citing Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979)). So does arresting a person for violating a crime that has been held unconstitutional. *Amore v. Novarro*, 624 F.3d 522, 531 (2d Cir. 2010) ("We assume here, not without reason, that when Novarro arrested Amore he violated a constitutional right of Amore not to be arrested for activity made criminal by section 240.35(3), which had been held unconstitutional by the New York Court of Appeals."). By the same reasoning, D.C. police cannot constitutionally seize as contraband an item that is legal to possess in D.C., even if the possession of that item would be unlawful in Maryland.

Similarly, state law governs the process by which a warrant issues. "A state is allowed to determine when a person is authorized to approve warrants, where the person has authority to approve warrants, and what type of warrants that person is allowed to approve." *United States v. Master*, 614 F.3d 236, 241 (6th Cir. 2010). If an officer receives a "warrant" from someone other than those authorized under state law to issue warrants, that document simply is not a warrant, and any search based upon it would be unreasonable. *Id.* (holding that Fourth Amendment violated when judge exceeds statutory authority by issuing search warrant for premises outside his county); *United States v. Scott*, 260 F.3d 512 (6th Cir. 2001) (holding Fourth Amendment violated because retired judge issued search warrant

when regular judge was available, and statute specified that retired judges may act only when regular judges unavailable).

It follows that, if state law limits when a neutral magistrate may issue a warrant authorizing nighttime searches, and the magistrate issues a warrant that does *not* authorize a nighttime search, then a search executed at night is not authorized by that warrant. A police officer must either follow the commands of the warrant – in turn determined by state law – or demonstrate that the search was constitutionally reasonable without a warrant; he cannot have it both ways.

Requiring officers to obey the terms of warrants issued pursuant to state law does not cause Fourth Amendment protections to "vary from place to place and from time to time." District Br. at 42 (quotation marks and citation omitted), any more than requiring officers to obey state law regarding what is a crime or what is contraband does. The warrant authorizes the search. If the warrant authorizes only a daytime search, and the search would be unreasonable without a warrant, executing the search at night is unreasonable.[11] That rule is the same rule in every jurisdiction.

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[11] The cases on which the District relies do not go to the process of issuing the warrant or what the warrant authorizes; they are, therefore, inapposite. *See, e.g.*, *United States v. Noster*, 590 F.3d 624, 632-33 (9th Cir. 2009) (having wrong person sign stolen vehicle report under state law did not vitiate probable cause that vehicle was stolen), cert. denied, 130 S. Ct. 2362 (2010); *Holder v. Town of Sandown*, 585 F.3d 500, 504-05 (1st Cir. 2009) (holding that state-law limitations on arrests did not render arrest unconstitutional because officer had probable cause

D. Because It Was Clearly Established That This Warrant Could Not Be Executed At Night, The Officers Are Not Entitled To Qualified Immunity.

Qualified immunity shields government officials from liability for their unconstitutional acts only "'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)). "Prior decisional law need not have supplied a 'precise formulation' of the applicable constitutional standard in order to overcome an official's qualified immunity, but the 'relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Barham v. Ramsey*, 434 F.3d 565, 572 (D.C. Cir. 2006) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

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to arrest the defendant for simple assault); *Walker v. Prince George's Cnty.*, 575 F.3d 426, 430 (4th Cir. 2009) (holding that county ordinance did not require officer to establish whether owner had permit for wolf before seizing it and even if the ordinance did, the officer still had probable cause justifying the immediate seizure); *Bowling v. Rector*, 584 F.3d 956, 966 (10th Cir. 2009) (holding that lack of state authority to seek search warrant did not render unconstitutional a search conducted pursuant to valid warrant based on probable cause that search would uncover evidence of a crime); *United States v. Novak*, 531 F.3d 99, 102 (1st Cir. 2008) (holding that client's consent to record conversations with attorney rendered recordings constitutional under the Fourth Amendment despite violation of state laws prohibiting such recordings).

Because D.C. law has been clear for more than thirty years that a requesting officer must allege specific facts warranting nighttime execution before a judge can authorize a nighttime search, no reasonable D.C. officer who was aware of the affidavit could have understood the warrant to authorize a nighttime search. Detective March, the requesting officer, knew that he had not alleged any of the facts required by D.C. Code § 23-522(c), as did the other officers who reviewed the affidavit; it is therefore not objectively reasonable for them to have believed that the warrant authorized a nighttime search.

Similarly, it is clearly established that warrantless nighttime searches of homes are presumptively unreasonable absent exigent circumstances, good faith reliance on a warrant, or consent, none of which apply in this case. *Groh*, 540 U.S. at 564 (holding that no reasonable officer could presume the warrant to be valid). The Supreme Court has made clear that "a warrant may be so facially deficient ... that the executing officers cannot reasonably presume it be valid." *United States v. Leon*, 468 U.S. 897, 923 (1984). A warrant authorizing only a daytime search plainly is "facially deficient" as applied to a nighttime execution.

The Defendant officers are therefore not entitled to qualified immunity for executing this search at night.

II. THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT OFFICERS QUALIFIED IMMUNITY FOR THEIR FAILURE TO COMPLY WITH THE FOURTH AMENDMENT'S KNOCK-AND-ANNOUNCE REQUIREMENT.

The Fourth Amendment's protection against unreasonable searches and seizures incorporates the "commonlaw requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry." *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997). The knock-and-announce requirement derives from both the obligation under the Fourth Amendment to respect the individual's right to privacy and the practical consideration that knocking and announcing typically protects the safety of not only residents but also the police, "who might be mistaken upon an unannounced intrusion into a home for someone with no right to be there" – as happened in this case. *Kornegay v. Cottingham*, 120 F.3d 392, 396 (3d Cir. 1997).

The District concedes that, at this stage in proceedings, the Court must assume that the officers did not knock and announce. *See* District Br. at 18. Although the knock-and-announce requirement is not absolute, the Supreme Court has recognized only three types of exigent circumstances in which it may yield: "circumstances presenting a threat of physical violence," "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," and where knocking and announcing would be futile. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995). The clearly established rule articulated in

Richards and *Wilson* precludes Defendants from entitlement to qualified immunity on this claim unless they can show that their contact plausibly fell within one of these recognized exceptions. They cannot do so.

The District does not argue that the officers here had any basis to think that evidence might be destroyed or that knocking and announcing would be futile, nor does the record reveal such a basis. That leaves only the argument that the officers faced "circumstances presenting a threat of physical violence." The burden of proof on this point lies with the District. *United States v. Bates*, 84 F.3d 790, 795-96 (6th Cir. 1996) ("It [is] the solemn duty of the judicial system to ensure the right of each citizen to be free from unreasonable searches by forcing the government to prove the existence of exigent circumstances before excusing the knock and announce requirement.").

The exception to the knock-and-announce requirement for threatening circumstances "applies only when the law enforcement officers held an objectively reasonable belief that an emergency situation existed." *United States v. Moore*, 91 F.3d 96, 98 (10th Cir. 1996) (internal quotation marks omitted). Where the "government presented no evidence that the officers were particularly concerned for their safety," the exception necessarily does not apply. *Id.*; *accord United States v. Crippen*, 371 F.3d 842, 846 (D.C. Cir. 2004) (relying on a detailed record

indicating that officers had serious concerns about, and planned for, the possible presence of a rocket launcher to conclude that no-knock search was reasonable).

The District asserts that it can meet its burden simply by asserting that the warrant was "to search a murder suspect's home for firearms … ." District Br. at 19. The Supreme Court, however, had rejected such a categorical approach. *Richards*, 520 U.S. at 394. And without the benefit of such a blanket rule, the District cannot possibly meet its burden. The facts about what the officers knew and did before and during the search – especially when viewed in the light most favorable to Ms. YoungBey and Mr. Butler, as they must be – indicate that the officers neither perceived nor had reason to perceive a particularized threat of violence. Indeed, their own operational plan called for the "[b]reachers" – Officers Miller and Thompson – to "knock and announce," and to enter only "after waiting a reasonable amount of time, with no answer." JA 51. The District's litigation position is a *post hoc* rationalization divorced from the evidence of what the officers thought at the time.

Because the rejection of categorical authorizations for no-knock searches was clearly established when the search at issue took place, and because no reasonable officer could have concluded that the failure to knock and announce here was reasonable except by attempting to invoke a categorical authorization, the officers are not entitled to qualified immunity.

A. The Supreme Court Unambiguously Had Rejected Reliance on Categorical Exceptions to the Knock-and-Announce Requirement.

The District takes the position that a search for a gun in a murder suspect's home *always* justifies a no-knock entry. District Br. at 22. Indeed, at times, the District goes far as to suggest that the mere suspected presence of an assault rifle, with nothing more, would justify the failure to knock and announce. *See* District Br. at 21. It is impossible to square that position with controlling Supreme Court precedent.

Over a decade before the search at issue, the Supreme Court held that, "in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of a particular entry justified dispensing with the knock-and-announce requirement." *Richards*, 520 U.S. at 394 (1997). Categorical rules, which would "remove from the neutral scrutiny of a reviewing courts the reasonableness of the police decision not to knock and announce in a particular case," are prohibited. *Id.* Indeed, "[i]f a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id.*

In *Richards*, the government advocated a blanket exception for narcotics investigations. Because drug dealers are often dangerous and carry weapons, the

government argued, police "do not need specific information about dangerousness ... in order to dispense with the knock-and-announce requirement in felony drug cases." *Id.* at 390. The Supreme Court accepted the premise that felony drug investigations may frequently involve the threat of physical violence, but held that to allow such generalizations to overcome the knock-and-announce requirement would allows the exceptions to swallow the rule: "the reasons for creating an exception in one category can, relatively easily, be applied others." *Id.* at 393-94. "Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty." *Id.* at 394. This general likelihood, however, is not enough; the Fourth Amendment demands an individualized determination of risk in a particular case.

Applying the prohibition against categorical rules to cases involving weapons, it is clearly established in this jurisdiction that the presence of a firearm alone cannot justify a departure from the constitutional presumption in favor of knocking and announcing. Officers must demonstrate that, given the particular circumstances, the presence of weapons creates or increases a risk that an occupant will use the weapon against an officer. *Poole v. United States*, 630 A.2d 1109, 1118 (D.C. 1993) (requiring a showing that "the police had concrete, particularized evidence that reasonably led them to believe that (1) there were weapons on the premises and (2) there was a realistic possibility that the occupant or occupants

would use the weapons against them"); *accord United States v. Moore*, 91 F.3d at 98 ("The government must … demonstrate that the presence of firearms raised a concern for the officers' safety"); *Bates*, 84 F.3d at 795 ("The presence of a weapon creates an exigent circumstance, provided the government is able to prove they possessed information that the suspect was armed and likely to use a weapon or become violent."); *United States v. Marts*, 986 F.2d 1216, 1218 (8th Cir. 1993) (finding that "the reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient" to create an exigent circumstance); *see also United States v. Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001) (finding no-knock entry reasonable when officers had "specific knowledge" than an occupant "kept a firearm to protect against intruders and therefore might be quick to use it"). "Evidence of firearms within the residence, by itself, is not sufficient to create an exigency to officers when executing a search warrant." *Bates*, 84 F.3d at 795.

In this case, the District's argument that searching the home of an alleged murder suspect for a gun poses a threat is no more narrowly tailored than the arguments about armed bank robbers and drug dealers that the *Richards* Court rejected out of hand. The District asserts that murder suspects are likely to carry weapons and, in the event of search, can be expected "to use a firearm to avoid

arrest and a potential life sentence for the murder."[12] District Br. at 22. But the Supreme Court recognized that drug dealers and armed robbers also are likely to carry weapons, and they often face prison terms just as long as or longer than the 13-year sentence John YoungBey ultimately received for the homicide under investigation.[13] Indeed, most homicide suspects are not likely to present a danger to police. *See* Carl. T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALBANY GOV'T L. REV. 440 (2008). The District's generalizations, like the generalizations about drug cases that the government presented in *Richards*, cannot support the proposed categorical rule that searching a murder suspect's home for a gun always justifies a no-knock entry.

Indeed, the Third Circuit rejected a similar argument and denied qualified immunity on very similar facts. In *Kornegay v. Cottingham*, 120 F.3d 392 (3d Cir. 1997), a murder suspect occasionally listed his aunt's address as his own. *Id.* at 394. Based on this and other investigative work, police incorrectly concluded that the murder suspect resided at her house and obtained a search warrant for that address seeking the murder weapon. *Id.* SWAT officers used a battering ram to break down the front door of the house without first knocking and announcing. *Id.*

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[12] Notably, the police conducted the search did not seek or obtain an arrest warrant for John YoungBey in addition to the search warrant. *See* JA 43 (warrant); JA 44 (affidavit).

[13] *See, e.g., United States v. Jones*, 615 F.3d 544, 546 (D.C. Cir. 2010) (life imprisonment for drug dealing).

They chose to use a no-knock forced entry because the warrant "was for a first degree murder suspect who was a known drug dealer with previous arrests for felony drug offenses involving the use of a weapon, and the gun used in the murder had not been recovered." *Id.* at 398 (internal quotation marks omitted). In the residents' Section 1983 suit, the court, relying on *Richards*, held that "the risks generally surrounding murder investigations did not necessarily create an exigent circumstance in this case," because although the search targeted the murder weapon, nothing in the record suggested that the suspect "regularly carried a weapon or kept weapons in his home." *Id.* at 399 ("The officers merely knew that [he] was a 'known drug dealer with previous arrests for felonies including Robbery First Degree and Possession of a Deadly Weapon During the Commission of a Felony.'" (quoting warrant affidavit)). The court reversed the trial court's summary judgment for the defendants based on qualified immunity, finding that "a reasonable jury could conclude that the officer's concern that [the suspect] was armed and dangerous was unreasonable or *that the officers employed a generalized procedure that was unreasonable as applied to Kornegay's home*." *Id.* at 398 (emphasis added).

The District attempts to distinguish *Kornegay* on the ground that the murder suspect was an "accomplice" and not the actual shooter, apparently suggesting that he had a lower propensity to react violently to a police search than John

YoungBey. District Br. at 25-26. But in *Kornegay*, the police believed that the suspect had told another individual to shoot the victim, had threatened a witness after the incident, and might be in possession of the murder weapon. 120 F.3d at 397. Moreover, the suspect had a prior record for drug dealing and violent crimes. *Id.* at 398. Thus, police could draw the same inferences from that suspect's past as from Mr. YoungBey's.

The key lesson of *Kornegay* is that "the ordinary risks that surround a general category of criminal behavior are insufficient by themselves to create an exigent circumstance." *Id.* at 398. The "considerable – albeit hypothetical – risk of danger to officers" associated with a search of a murder suspect's house for firearms cannot justify the District's desired categorical rules. *Richards*, 520 U.S. at 394.

The District attempts to rely on *Crippen*, 371 F.3d 842, and *Geraldo*, 271 F.3d 1112, but neither of those cases casts doubt on the clear Supreme Court precedent condemning categorical rules. In both cases, this Court relied on specific evidence in the record showing a particularized concern regarding a threat to the searching officers' safety if they knocked and announced during the search.

In *Crippen*, as an initial matter, the resident was believed to possess a *rocket launcher*, not an ordinary firearm or even an "assault rifle." *Id.* at 846 ("A rocket launcher (a/k/a bazooka) is a high-powered weapon designed for use against

hardened targets – such as armored tanks … – with which the MPD presumably has little, if any, experience."). The officers executing the warrant "had been told that if the rocket launcher were fired at an officer 'standing in the doorway … it would go right through [him].'" *Id.* In concluding that a no-knock search was justified in light of all of the circumstances, the Court relied heavily on "[t]he unconventional nature of the weapon and the speed with which it could be loaded." *Id.* Even assuming that the officers here reasonably believed that they might encounter an assault rifle (an assumption which, as discussed below, is belied by the officers' actions before and during the search), such a firearm simply is not in the same class of weapon as a rocket launcher. The District's reliance on *Crippen* to excuse their no-knock entry here is like relying on the fact that an elephant can crush a car to prove that a dog can crush a car; after all, both have four legs and a tail.

In any case, the *Crippen* Court explicitly declined to adopt a categorical rule. *Id.*; *see also id.* at 849 (Rogers, J., concurring) (describing the analysis in both the majority and the concurrence as focused on "the totality of circumstances"). Instead, the Court relied on evidence in the record justifying a particularized concern in that instance: the officers had been briefed on the special dangers of the rocket launcher prior to the search, and the officers showed clear contemporaneous concern about the extreme danger the rocket launcher posed. *Id.* at 846 (majority

opinion). Furthermore, the resident's "suspected recent acquisition of a tool of war" supported a contextual determination that he was "disposed to harbor violent anti-government tendencies and therefore to us a firearm" – or the rocket launcher – "to resist the search." *Id.* at 849 (Rogers, J., concurring).

Likewise, in *Geraldo*, the Court did not rely on a categorical rule: it pointed to "specific knowledge" that an occupant "kept a firearm to protect against intruders and therefore might be quick to use it." *Id.* at 1116 (noting that the residence at issue "had been robbed months earlier and that one man residing there ... had been seen wearing a revolver, allegedly to protect the residence from additional robberies").

Thus, neither case provides any support for the District's reliance on generalized claims about type of firearm or a type of crime. To the contrary, the cases confirm the need for a particularized analysis in light of *Richards*. And as discussed below, such a particularized analysis here does not support a finding of danger that might justify a no-knock search.

B. The Record Amply Demonstrates that the Officers Did Not Have an Objectively Reasonable Belief that an Emergency Situation Existed.

The District expends considerable effort unsuccessfully attempting to evade the Supreme Court's prohibition on categorical exceptions to the knock-and-announce requirement because it cannot defend the failure to knock and announce here *without* a categorical rule. Nothing in the record shows that the officers

believed an occupant of 1312 Queen Street, N.E., would use a firearm against them if they knocked and announced. Indeed, although the officers may have had probable cause to search the home for a weapon or other evidence based on an erroneous belief that John YoungBey lived there, the officers did not have any particular intelligence that YoungBey or the weapon was at the house. What the evidence in the records shows – especially when viewed in the light most favorable to the non-moving plaintiffs – is that the officers did not focus on any perceived danger from John YoungBey or an assault rifle and planned to knock and announce their presence and purpose at the outset of the search. Thus, as in *United States v. Moore*, the District cannot demonstrate that the officers "held an objectively reasonable belief that an emergency situation existed." 91 F.3d at 98.

The contemporaneous evidence unambiguously indicates that the officers were *not* particularly concerned about the possible presence of an assault rifle, and the District's claims otherwise are nothing more than a *post hoc* rationalization of the search. Although Detective March testified that he knew at the time that the murder weapon was an assault rifle, *see* JA 201-02 (March Deposition), he did not note the type of gun, its characteristics, or any special danger in the affidavit filed in support the search warrant, JA 44-48 (affidavit). The warrant itself listed "firearms" and "holsters" as items to be seized, but did not describe any particular firearm or note anything unusual about the firearm connected to the murder

investigation. JA 43 (warrant). The officers' operational plan included a synopsis of the murder investigation, detailed tactical plans, and even a contingency plan to deal with dogs – but included no mention of an assault rifle or any other source of danger beyond the fact that the investigation involved a violent crime. JA 49-53 (operational plan). To the contrary, the operational plan indicated that the "[b]reachers will knock and announce, and after waiting a reasonable amount of time, with no answer, they will breach the door." JA 51. In other words, the only evidence from the time of that search that speaks to whether knocking and announcing would endanger the officers is the judgment of the officers themselves that they *should* knock and announce.[14]

The officers' after-the-fact testimony likewise fails to reveal a particularized concern about the firearm involved in the homicide. Lieutenant Larry Scott, who reviewed and approved both the warrant application and the operations plan, submitted a declaration that never mentioned an assault rifle or any particular danger relating to the firearm. JA 212-13. Detective March testified that the officers chose to search at night "to catch people at home," not because of a safety concern. JA 202. Of the nine officers who were deposed or submitted

[14] The District does not argue that any unexpected changes in circumstances justified a departure from the plan to knock and announce, and the record does not reveal any changes that might have provided such a justification. Indeed, the officers claim that they *did* knock and announce; that is a disputed issue of fact for future resolution.

declarations, the only officer who testified that the type of firearm involved was discussed in the pre-search briefing was Officer Acosta, who in response to the same deposition question misstated basic facts about the homicide, suggesting that he was confusing this investigation with another. JA 55 (Acosta Deposition) (testifying that the homicide "was over that 15-year-old boy or in connection with that young juvenile that was killed that was from out of state"; the victim in Detective March's homicide investigation was 19 years old and from Washington, D.C.). Indeed, nowhere in the record is there a description of the particular firearm, including its type or characteristics, that would allow the Court to determine that it could possibly pose a special danger. The District, which bears the burden to prove exigent circumstances excusing a no-knock entry, *see Bates*, 84 F.3d at 795-96, cannot prevail in the face of this lack of relevant evidence.

The documentary evidence and testimony in record all suggest that the officers executing the search warrant did not actually expect to encounter a dangerous John YoungBey at 1312 Queen Street, N.E., much less that they "could reasonably expect him to use a firearm to avoid arrest and a potential life sentence for the murder." District Br. at 34. A police search team that believed they would be greeted with assault rifle fire would have included that belief in its operational plan, briefed that information to all officers, and instructed officers to enter without first announcing their presence. Yet the police took none of those steps. The

search plan here did not even include John YoungBey under the heading "Suspect Information." JA 50 (operations plan). Indeed, Mr. YoungBey was named in the search plan only once, as one of two persons "involved in the shooting" under investigation, but the plan does not describe his relationship to the residence. JA 49 (operations plan). The pre-search briefing did little more. The ERT leaders "went over their own surveillance of the three locations that we wanted to enter. That was pretty much it." JA 207 (March Deposition). Detective March "gave a brief background of [his] own investigation," including "the shooting, what led up to the shooting, what occurred after the shooting, and what we were looking for at the three premises that we had these search warrants for." *Id.* Notably, the briefing apparently did not include a warning that Detective March or the ERT leaders believed the occupants of the house would react violently to the search, or any other information to suggest that the search of 1312 Queen Street, N.E., was any more dangerous than the other two searches the officers were to conduct that night. Nor is there any indication in the record that the ERT members received a description of Mr. YoungBey's age, height, weight, and appearance. Indeed, Officer Fowler, when asked about the briefing, acknowledged that "there was nothing really out of the ordinary with it, besides it was a search warrant in reference to a homicide." JA 255 (Fowler Deposition) ("There was nothing that would spark a nerve and say, 'Yeah, I remember this or that.'").

Indeed, although Detective March and the ERT each made multiple surveillance trips to the home prior to the search, no one ever saw John YoungBey at the home, and there is no evidence that Mr. YoungBey was ever at the house that summer. Further, the officers had no specific information that an assault rifle or any other weapons were at the home, and in fact obtained search warrants for two other premises to look for the same murder weapon. JA 201-02 (March Deposition). Detective March did not even know who owned the gun. JA 197-98.

In sum, the record lacks any sign that the officers reasonably perceived either the potential presence of an assault rifle or the potential presence of John YoungBey as an unusual threat in this search. Drawing all inferences in favor of Ms. YoungBey and Mr. Butler, it simply is not possible to conclude that the officers failed to knock and announce because of an actual, or a reasonable, perception that the situation was too dangerous.

C. Because the Prohibition on Categorical Rules Was Clearly Established and the Record Does Not Support a Particularized Finding of Danger, the Officers Cannot Receive Qualified Immunity.

Since at least the Supreme Court's 1997 decision in *Richards*, it has been clearly established that no-knock entry requires a particularized determination of danger. 520 U.S. at 394. As the Court recognized, "[i]f a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence, the

knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id.* No reasonable officer could have thought that the Constitution permitted a no-knock search based on the District's proposed categorical rule regarding searches involving firearms and murder suspects.

Nor could any reasonable officer, without relying on an improper categorical rule, have believed that an emergency situation existed in this case. Supreme Court precedent was and is crystal clear that the failure to knock and announce based on threatening circumstances is unreasonable absent a particularized belief of danger. *See Richards*, 520 U.S. at 393-94. The officers here lacked such a belief. Indeed, the contemporaneous factual record reflects that the officers did not view this search as particularly dangerous. *E.g.,* JA 255 (Fowler Deposition) ("[T]here was nothing really out of the ordinary with it, besides it was a search warrant in reference to a homicide."); *see also Winder v. Erste*, 566 F.3d 209, 213 (D.C. Cir. 2009) (requiring court to "draw[] all reasonable inferences in the nonmovant's favor").

Thus, at the time of the search, it should have been clear to a reasonable officer that the failure to knock and announce "was unlawful in the situation he confronted." *Barham*, 434 F.3d at 572 (internal quotation marks and citations omitted). The officers are not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 2, 2011, a copy of the Brief of Appellees was electronically filed with the Clerk of the Court using the Court's Electronic Case Filing system, which will send a notice of electronic filing to counsel for Defendants-Appellants:

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

The foregoing Brief of Appellees complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains a total of 13,939 words, including footnotes, as counted by Microsoft Word, and excluding those materials exempted from the word-count limitation.

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