CASENOTES

BAILEY V. UNITED STATES: THE SUPREME COURT'S FUTILE ATTEMPT AT SETTING BOUNDARIES AROUND A BORDERLESS RULE

I. INTRODUCTION

In 1981, the Supreme Court of the United States held that individuals present at the scene during the execution of a search warrant could be detained on a categorical basis without having probable cause or reasonable suspicion and that such a detainment was reasonable under the Fourth Amendment.[1] This categorical exception to the reasonableness requirement for the detention of an individual under the Fourth Amendment became known as the "*Summers* rule."[2] While law enforcement officers need probable cause to obtain a search warrant, the *Summers* rule does not require probable cause or reasonable suspicion for officers to detain the occupants of a premises during the execution of a search warrant.[3] The *Summers* rule became a powerful tool for police officers, and questions regarding its limitations arose in the lower courts.[4] The geographical limitations of the *Summers* rule remained a question for lower courts until the Supreme Court issued its opinion in *Bailey v. United States*.[5] Although the *Bailey* Court limited the *Summers* rule to the "immediate vicinity of the premises to be searched," it appears that this limitation can be easily evaded by courts armed with *Terry v. Ohio*, its progeny, and other constitutional

1. Michigan v. Summers, 452 U.S. 692, 704-05 (1981) (holding that a "warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted").

2. Bailey v. United States, 133 S. Ct. 1031, 1038-39 (2013).

3. *Summers*, 452 U.S. at 705 n.19 (holding that the *Summers* rule does not require the officer "to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure").

4. *Bailey*, 133 S. Ct. at 1037 ("The Federal Courts of Appeals have reached differing conclusions as to whether *Michigan v. Summers* justifies the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant.").

5. *Id.*

standards.[6]

II. FACTS AND HOLDING

In *Bailey v. United States*, the Supreme Court of the United States was faced with the question of whether the *Summers* rule extended to cover occupants of the premises subject to a search warrant after those occupants had left the scene.[7] The controversy began the evening of July 28, 2005, when law enforcement officers obtained a search warrant for a .380-caliber handgun believed to be located in Chunon Bailey's New York basement apartment.[8] In obtaining the warrant, law enforcement had probable cause to believe that the gun had been used in multiple drug deals and was located on the premises to be searched.[9] This probable cause was based on a confidential informant who had informed law enforcement that he had witnessed the gun at the apartment when he had gone to purchase drugs from a "heavy set black male with short hair" known as "Polo."[10] About an hour after officers obtained the search warrant, Detectives Richard Sneider and Richard Gorbecki noticed two men leave the gated area around the apartment.[11] Both detectives believed that the two men leaving the apartment matched the description of "Polo."[12] These two individuals entered a vehicle and drove away from the scene.[13] The detectives began following the suspects, and shortly thereafter other law enforcement officers executed the search warrant at the apartment.[14] While in the process of searching the apartment, Detectives Sneider and Gorbecki pulled the suspects'

6. Bailey v. United States, 133 S. Ct. 1031, 1042 (2013).(holding that "[i]f officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause"); United States v. McGowan, No. CR 11-S-424-S, 2013 WL 3356962, at *9 (N.D. Ala. July 2, 2013) (holding that an officer's detention of an individual after a valid traffic stop did not undermine *Bailey*, and was "a constitutionally proper *Terry* detention for a reasonable period of time").

7. Bailey v. United States, 133 S. Ct. 1031, 1037 (2013).

8. *Id.* at 1036.

9. *Id.*; *see also* United States v. Bailey, 652 F.3d 197, 200, 203 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

10. Bailey v. United States, 133 S. Ct. 1031, 1036 (2013).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

vehicle over to the side of the road, and the detectives executed a pat-down search of each of the vehicle's occupants, only finding a key ring[15] on one of the suspects (later identified as Petitioner Bailey).[16] The detectives then put both men in handcuffs and escorted them back to the apartment where the search team was executing the search warrant.[17] The search team at the apartment discovered a gun and drugs inside the apartment, and charged petitioner with: (1) possession of cocaine with the intent to distribute; (2) possession of a firearm by a felon; and (3) possession of a firearm in furtherance of a drug-trafficking offense.[18]

Petitioner filed a motion to suppress the keys found during the pat-down search and the statements made to Detective Gorbecki after the detective had detained him.[19] The district court denied the motion to suppress, finding that petitioner's detention was permissible under *Michigan v. Summers* as a "detention incident to the execution of a search warrant."[20] In the alternative, the district court found that the stop and detainment of petitioner was constitutional under *Terry v. Ohio*.[21] After trial, the court convicted petitioner on all three counts.[22]

The Second Circuit Court of Appeals affirmed the district court's denial of petitioner's motion to suppress, finding that *Summers* "authorize[d] law enforcement to detain the occupant of [a] premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*."[23] The Supreme Court of the United States reversed the Second Circuit, holding that because the detention of a person pursuant to *Summers* is constitutional as a result of police safety and efficiency justifications, the detention "must be limited to the immediate vicinity of the premises to be

15. It was later discovered that one of the keys on the key ring opened the apartment door that was subject to the search warrant, thus further linking the defendant to the scene. Bailey v. United States, 133 S. Ct. 1031, 1036 (2013).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Bailey v. United States, 133 S. Ct. 1031, 1037 (2013).

21. *Id.*

22. *Id.*

23. United States v. Bailey, 652 F.3d 197, 208 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

searched."[24] The Supreme Court remanded the case back to the Second Circuit to determine whether the officers' detention of petitioner was constitutional as a valid *Terry* stop.[25]

The Supreme Court had now limited the *Summers* rule to the "immediate vicinity" of the premises subject to the search. However, the practical application of these new restraints remained untested. Lower courts have now become responsible for interpreting the limitations imposed in *Bailey*, just as past lower courts had been responsible for interpreting *Summers*. Unlike the courts interpreting *Summers*, it remains unknown whether the lower courts will unite in a consensus when applying the *Bailey* limitations, or whether the lower courts will again be split as was the case when interpreting *Summers*. Ultimately, the *Bailey* Court held that the *Summers* rule allowing the detention of occupants of a premises subject to a search warrant only applied to those occupants that were at the scene or that were still within the immediate vicinity.[26]

III. BACKGROUND

The Fourth Amendment to the United States Constitution ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[27] The general rule to the Fourth Amendment provides that a search or seizure is unreasonable if not conducted pursuant to a probable cause-based warrant.[28] In *Wolf v. Colorado*, the Supreme Court selectively incorporated the Fourth Amendment to the States through the Fourteenth Amendment, holding that the protections of the Fourth Amendment are "basic to a free society" and "implicit in the concept of ordered liberty."[29] Since *Wolf*, the Fourth Amendment jurisprudence has been eroded with exceptions to the warrant requirement.[30]

24. Bailey v. United States, 133 S. Ct. 1031, 1041-42 (2013).

25. *Id.* at 1043.

26. *Id.* at 1042.

27. U.S. CONST. amend. IV.

28. *Id.*; *Bailey*, 133 S. Ct. at 1037 (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)).

29. 338 U.S. 25, 27-28 (1949).

30. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 158-59 (1925) (holding that a search warrant is not required to search a vehicle when law enforcement officers have probable cause); Payton v. New York, 445 U.S. 573, 587 (1980) (holding that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the

With many of these exceptions, the Court aimed to provide more safety and efficiency to law enforcement.[31] One of the most notable of these exceptions came in *Terry v. Ohio*.[32] The Supreme Court has agreed that "the general rule [was] that Fourth Amendment seizures are 'reasonable' only if based on probable cause" to believe that the individual has committed a crime.[33] However, in *Terry*, the Court carved out an exception to this general rule, holding that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."[34] This stop must be "investigative" and be conducted pursuant to "reasonable suspicion" that the individual is committing a crime or about to commit a crime.[35] The Court justified this limited exception by stating that such a search served to protect the officer himself, as well as others.[36] With a litany of Fourth Amendment jurisprudence, the Supreme Court would soon analyze in *Michigan v. Summers* whether an individual could be detained categorically during the execution of a search warrant.

A. *MICHIGAN V. SUMMERS* AND ITS PROGENY

The Court carved out another important exception, and arguably a more extreme departure from the warrant requirement, in *Michigan v. Summers*. The Court established in *Terry* that an individual could be detained if law enforcement had reasonable suspicion to believe that criminal activity was "afoot";[37] however, the Court had yet to determine to what extent a person could be detained pursuant to a search warrant.

In *Summers*, law enforcement officers were about to execute a search warrant on a home when they encountered the

property with criminal activity"); Maryland v. Buie, 494 U.S. 325, 337 (1990) ("The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.").

31. *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 337 (1990).
32. Terry v. Ohio, 392 U.S. 1 (1968).
33. Dunaway v. New York, 442 U.S. 200, 213 (1979).
34. *Terry*, 392 U.S. at 22.
35. Bailey v. United States, 133 S. Ct. 1031, 1037 (2013).
36. *Terry*, 392 U.S. at 30.
37. *Id.*

defendant walking down the front steps of the residence.[38] After obtaining the defendant's assistance in gaining entry to the home, the officers detained the defendant as they conducted the search.[39] In affirming the constitutionality of the detention, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[40] Furthermore, the Court found that "the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure."[41] Thus the Supreme Court established a categorical rule allowing for the detention of the occupants of a premises subject to a search warrant, regardless of whether the officers had reasonable suspicion to detain the occupants.[42]

To establish the *Summers* rule, the Court used a balancing test to determine whether the justification for the seizure outweighed the intrusion on the individual.[43] When assessing the intrusion, the Court found that a detention in a person's home already being searched is "substantially less intrusive" than a seizure of a person in public.[44] Furthermore, the Court found that since the detention in *Summers* was inside the respondent's own home, it only added "minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station."[45] Unlike the minimal intrusiveness of the search, the Court found that the justifications for the seizure were substantial.[46] The Court found three justifications: (1) interest in "preventing flight in the event that incriminating evidence is found"; (2) interest in "minimizing the risk of harm to the officers"; and (3) the "orderly completion of the search may be facilitated if the occupants of the premises are present."[47] After weighing the interests and justifications for the *Summers* rule,

38. Michigan v. Summers, 452 U.S. 692, 693 (1981).
39. *Id.*
40. *Id.* at 705.
41. *Id.* at 705 n.19.
42. *Id.* at 704-05.
43. Michigan v. Summers, 452 U.S. 692, 700-03 (1981).
44. *Id.* at 702.
45. *Id.*
46. *Id.* at 702-03.
47. *Id.*

the Court held that all occupants of a premises subject to the execution of a search warrant for contraband could be detained, regardless of the quantum of proof justifying the detention.[48]

In 2005, the Supreme Court reaffirmed and extended its holding in *Summers*.[49] In *Muehler v. Mena*, officers detained the respondent in handcuffs for approximately three hours while executing a search warrant for deadly weapons and evidence of gang membership.[50] In holding that the detainment of respondent was reasonable under the Fourth Amendment, the Court reaffirmed the holding from *Summers* that allowed for the categorical detainment of an individual present at the premises of the execution of a search warrant.[51] Further, the Court expanded the *Summers* holding in two ways: (1) the Court affirmed the constitutionality of the detention of an occupant simply because the detained person was "an occupant of that address at the time of the search," regardless of the detainee's involvement in criminal activity;[52] and (2) the Court expanded the *Summers* rule to allow police officers to use reasonable force (such as the use of handcuffs) in executing a detainment under *Summers*.[53]

Although *Muehler* reaffirmed and strengthened the *Summers* rule, federal courts continued to struggle with how *Summers* should be limited.[54] One prominent question that continually arose in the appellate courts was whether the *Summers* rule applied to individuals located away from the premises subject to the search warrant.[55] Moreover, if the *Summers* rule did apply to these individuals, exactly how far did

48. Michigan v. Summers, 452 U.S. 692, 704-05 (1981).

49. Muehler v. Mena, 544 U.S. 93, 98-100 (2005).

50. *Id.* at 95-96, 100.

51. *Id.* at 98 ("An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" (quoting *Summers,* 452 U.S. at 705 n.19)).

52. Officers obtained a warrant to look for a particular gang member and gang paraphernalia. Mena was not engaged in gang-related activity and was asleep when law enforcement detained her. *Mena*, 544 U.S. at 95, 98.

53. "Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention," and an "officers' use of force in the form of handcuffs . . . [is] reasonable because the governmental interests outweigh the marginal intrusion." *Id.* at 98-99 (citing Graham v. Connor, 490 U.S. 386, 396-97 (1989)).

54. *See infra* Part III.B-C (comparing the majority of federal circuits which extended the *Summers* rule with the minority of circuits limiting the *Summers* rule).

55. *Id.*

the rule extend?

B. FEDERAL CIRCUIT SPLIT

Prior to *Bailey*, the federal circuits were split as to these issues.[56] The majority of the circuits felt that the *Summers* rule should apply to individuals away from the premises if the detention was "was effected as soon as reasonably practicable."[57] Several circuits disagreed and found that *Summers* did not apply outside a certain geographic proximity.[58] The subsections below explore the two sides of this split and explain how this dissention culminated in Supreme Court review.

1. THE MAJORITY OF CIRCUITS EXTENDING THE *SUMMERS* RULE

The dissention eventually resulted in the majority of the federal appellate courts extending the *Summers* rule. In 1991 the Sixth Circuit faced the question of whether the *Summers* rule applied to individuals detained away from the premises subject to the search warrant.[59] In *United States v. Cochran*, law enforcement officers detained the defendant a "very short distance" from his residence to request his assistance in executing a search warrant on his home.[60] In upholding the detainment as constitutional, the Sixth Circuit held that the *Summers* rule was not limited to a geographic proximity and instead adopted the "as soon as practicable" standard.[61] The court believed that the

56. *See infra* Part III.B-C; Bailey v. United States, 133 S. Ct. 1031, 1037 (2013).

57. *See infra* Part III.B (explaining the majority consensus which did not place a geographic limitation on the *Summers* rule). The Second Circuit joined in this majority with its decision to apply the "as soon as reasonably practicable" standard. *Bailey*, 133 S. Ct. at 1037 (citing United States v. Bailey, 652 F.3d 197, 208 (2d Cir. 2011)).

58. United States v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994) (*Summers* was not applicable three to five miles from home); United States v. Sherrill, 27 F.3d 344, 345-46 (8th Cir. 1994) (*Summers* was not applicable one block away from home, and "because [the defendant] had already exited the premises, the intrusiveness of the officers' stop and detention on the street was much greater"); United States v. Taylor, 716 F.2d 701, 707 (9th Cir. 1983) (*Summers* did not apply to defendant "not detained in or adjoining the place being searched"); United States v. Edwards, 103 F.3d 90, 94 (10th Cir. 1996) (*Summers* did not apply to a detention three blocks away from residence).

59. United States v. Cochran, 939 F.2d 337 (6th Cir. 1991).

60. *Id.* at 338-39.

61. *Id.* at 339 (stating that "*Summers* does not impose upon police a duty based on *geographic proximity* (i.e., defendant must be detained while still on his premises);

distance of the defendant from the scene should not be used to determine whether *Summers* applied. Instead, the court relied on a test based on the efficiency of law enforcement in conducting their search. The as soon as practicable standard would become the standard used in a majority of other federal appellate courts addressing this same issue.[62]

In *United States v. Sears*, the Eleventh Circuit extended the *Summers* rule just as the Sixth Circuit had done in *Cochran*.[63] In *Sears*, the defendant was driving away from his residence—the premises subject to the search warrant—when officers stopped his vehicle about 100 feet from his home.[64] In concluding that *Summers* applied, the Eleventh Circuit stated that the facts of *Sears* were "virtually indistinguishable" from the facts in *Cochran*.[65] Like in *Cochran*, the Eleventh Circuit also relied on *Summers*, holding that "the detention was proper even though it occurred a short distance from the defendant's home," and agreed that such a seizure was legal as long as the officers "detain the individual *as soon as practicable* after his departure."[66]

In addition to *Cochran* and *Sears*, four other federal appellate courts either adopted the as soon as practicable standard, refused to apply a geographical limitation to the *Summers* rule, or both.[67] Although the majority of the federal

rather, the focus is upon police performance, that is, whether the police detained defendant *as soon as practicable* after departing from his residence" (emphasis added)). Contrary to the majority, the dissent, similar to the *Bailey* decision, was "unwilling to extend the rationale of *Summers* to [situations] where the owner of [a] premises subject to a search warrant is some distance, even a 'short' distance from the premises, and is stopped, detained, or taken into custody for the purpose of assisting the police in gaining entry into the residence itself." United States v. Cochran, 939 F.2d 337, 341 (6th Cir. 1991) (Wellford, J., dissenting).

62. *See infra* note 67 and accompanying text.

63. United States v. Sears, 139 F. App'x 162, 166 (11th Cir. 2005).

64. *Id.* at 164.

65. *Id.* at 166.

66. *Id.* (emphasis added).

67. United States v. Bullock, 632 F.3d 1004, 1011, 1020 (7th Cir. 2011) (holding that officers' detainment of a visitor of the home being searched, was reasonable under the *Summers* rule because the vehicle stop was executed "as soon as reasonably practicable," despite that the detainment occurred ten to fifteen blocks from the residence); United States v. Castro-Portillo, 211 F. App'x 715, 721 (10th Cir. 2007) (in finding that the detention of the defendant two blocks from the home subject to the search warrant was constitutional, the Tenth Circuit stated that "*Summers* does not impose upon police a duty based on geographic proximity," but instead, "the focus should be on whether police detained the defendant as soon as practicable after departing the premises . . . ." (citing United States v. Cochran, 939

circuits decided to expand the *Summers* rule, this was not a unanimous decision among the circuits, and several federal appellate courts chose to limit *Summers* as opposed to expanding the rule.

2. THE MINORITY OF CIRCUITS LIMITING THE *SUMMERS* RULE

Although the majority of federal appellate courts determined the *Summers* rule applied to individuals both located at the premises subject to the search and away from the premises (using the as soon as practicable test), some circuits used a geographic proximity test to limit the rule to only those individuals present at the premises during the search.[68] One of the first of these notable decisions was *United States v. Taylor*.[69] The Ninth Circuit's opinion in *Taylor*, written only two years after the *Summers* decision, predated the Sixth Circuit's *Cochran* opinion.[70] In *Taylor*, the Ninth Circuit declined to extend the *Summers* rule to defendants located "some distance from" the premises subject to the search.[71] The Ninth Circuit held that "[u]nlike the individuals in *Summers*, [the defendant] was not detained in or adjoining the place being searched," and accordingly, the "detention of [the defendant] cannot be justified on the basis of *Michigan v. Summers*."[72]

The Eighth Circuit addressed the issue as well in two separate opinions spanning approximately one month in 1994.[73]

F.2d 337, 339 (6th Cir. 1991))); United States v. Cavazos, 288 F.3d 706, 711-12 (5th Cir. 2002) (rejecting the "geographic proximity" standard, and holding that a defendant two blocks away from the residence to be searched can be legally detained and returned to the premises under *Summers*); United States v. Montieth, 662 F.3d 660, 666-67 (4th Cir. 2011) (in holding that "officers acted reasonably when they decided to detain [the defendant] at a short distance from his home," the Fourth Circuit "decline[d] to delineate a geographic boundary at which the *Summers* holding becomes inapplicable," and instead "consider[ed] whether the police detained the [defendant] 'as soon as practicable'").

68. *See, e.g.*, United States v. Taylor, 716 F.2d 701, 707 (9th Cir. 1983); United States v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994); United States v. Edwards, 103 F.3d 90, 93, 94 & n.4 (10th Cir. 1996).

69. 716 F.2d 701 (9th Cir. 1983).

70. The dates of these decisions are as follows: *Summers* (1981); *Taylor* (1983); and *Cochran* (1991).

71. *Taylor*, 716 F.2d at 707.

72. *Id.*

73. *See* United States v. Hogan, 25 F.3d 690 (8th Cir. 1994); United States v. Sherrill, 27 F.3d 344 (8th Cir. 1994).

The first opinion was *United States v. Hogan*.[74] In *Hogan*, officers had a search warrant to search for drugs in the defendant's home and white 1990 Dodge truck.[75] The officers observed the defendant leave his home in a blue 1987 Oldsmobile Cutlass and then detained the defendant approximately three to five miles away from his home.[76] The Eighth Circuit distinguished *Hogan* from *Summers* and found that none of the three law enforcement interests present in *Summers*[77] applied, the defendant was not near his home, and thus the *Summers* rule was not applicable.[78] Less than three weeks later in *United States v. Sherrill*, the Eighth Circuit applied the same rationale to hold that *Summers* did not apply when police detained a defendant pursuant to a search warrant one block away from the premises subject to the warrant.[79]

In *United States v. Edwards* the Tenth Circuit joined in the minority of federal appellate courts refusing to extend *Summers*.[80] Like in *Sherrill*, the Tenth Circuit agreed that the detention of an individual away from the premises subject to a search was not constitutional under *Summers*.[81] Therefore, despite that a majority of the circuits expanded *Summers*, a split in the circuits materialized, leaving open the question of what the correct interpretation of *Summers* should be and how far the

74. United States v. Hogan, 25 F.3d 690 (8th Cir. 1994)

75. *Id.* at 691-92.

76. *Id.* at 692.

77. The three law enforcement interests were: (1) preventing flight in the event incriminating evidence is found; (2) minimizing the risk of harm to the officers from occupants becoming suddenly violent or frantically trying to conceal or destroy evidence; and (3) orderly completion of the search with the occupants' assistance in opening locked doors or locked containers. Michigan v. Summers, 452 U.S. 692, 702-03 (1981).

78. *Hogan*, 25 F.3d at 693.

79. In *Sherrill*, although the Eighth Circuit held that *Summers* did not apply, the court still found that the detainment was constitutional because the officers had probable cause to pull over the defendant's vehicle without the *Summers* rule. United States v. Sherrill, 27 F.3d 344, 345-47 (8th Cir. 1994); *see also* United States v. Boyd, 696 F.2d 63, 65 n.2 (8th Cir. 1982) (holding that "[t]he [Supreme] Court certainly did not sanction the search and seizure of residents who, at the time of the search, are several blocks from their home").

80. United States v. Edwards, 103 F.3d 90 (10th Cir. 1996).

81. As in the Eighth Circuit's opinion in *Sherrill*, "the police stopped the defendant one block away from his house, [therefore] 'the officers had no interest in preventing flight or minimizing the search's risk because [the defendant] had left the area of the search and was unaware of the warrant.'" *Id.* at 93, 94 & n.4 (quoting United States v. Sherrill, 27 F.3d 344, 346 (8th Cir. 1994)).

Summers rule should actually extend.

C. THE HISTORY OF *BAILEY*: THE SECOND CIRCUIT JOINS THE MAJORITY

In 2006, the United States District Court for the Eastern District of New York was faced with the same issue that many other federal circuits had to decide: Does *Summers* apply to defendants who leave the premises prior to the execution of a search warrant?[82] In *United States v. Bailey*, the New York district court sided with the majority of the federal circuits when it denied the defendant's motion to suppress, holding that the *Summers* rule still applied after a defendant left the premises.[83] The district court compared *Bailey* with *Summers* and *United States v. Fullwood*.[84] In *Fullwood* the Second Circuit held that a defendant who was outside the residence and entering his vehicle could be detained pursuant to *Summers*.[85] The fact that the defendants in *Fullwood* and *Summers* were both immediately outside the home[86] subject to the search, as opposed to *Bailey* where the defendant was approximately one mile away, did not persuade the court to distinguish these cases.[87] The district court found that these factual distinctions had no constitutional significance, so the holding in *Fullwood* controlled.[88] Furthermore, the district court found that two of the three law enforcement interests in *Summers* were also present in *Bailey*: "prevention of flight should incriminating evidence be found during the search"; and "minimizing the risk of harm to the officers."[89] The court also found that:

> [D]rawing a 'bright line' test under *Summers* at the residence's curb . . . would require police officers . . . to effectuate the detention in open view outside the residence that was about to be searched, thereby subjecting them to additional dangers during the execution of the search, and

82. United States v. Bailey, 468 F. Supp. 2d 373, 378 (E.D.N.Y. 2006).

83. *Id.* at 382, 393.

84. *Id.* at 379-82.

85. United States v. Fullwood, 86 F.3d 27, 29-30 (2d Cir. 1996).

86. The facts in *Fullwood* and *Summers* differ from *Bailey* in that the defendant in *Bailey* was approximately one mile away when police detained him. Bailey v. United States, 133 S. Ct. 1031, 1036 (2013).

87. United States v. Bailey, 468 F. Supp. 2d 373, 379 (E.D.N.Y. 2006).

88. *Id.*

89. *Id.*

> potentially frustrating the whole purpose of the search due to destruction of evidence in the residence.[90]

Like many of the federal appellate courts prior to the court's opinion in *Bailey*, the district court also relied on the earliest practicable location standard.[91]

However, unlike other previous federal court cases involving this issue, the United States District Court for the Eastern District of New York did not solely rely on *Summers* to justify the detention of the defendant in *Bailey*.[92] The district court went further than *Summers* and held that, in the alternative, the detention of Mr. Bailey was justified as a valid *Terry* stop.[93] For a stop to be valid under *Terry*, the officer must have reasonable suspicion based on an articulable set of facts that the individual is committing a crime or about to commit a crime.[94] In finding that the detainment was valid under *Terry*, the court looked at two important facts: (1) the defendant was exiting the location subject to the search warrant; and (2) the defendant matched the description of the perpetrator given by the confidential informant.[95] Armed with these two facts, the court held that regardless of whether the *Summers* rule applied in *Bailey*, the officers "had specific and articulable facts that supported the investigative stop and brief detention during the execution of the search at the residence," and therefore the seizure was constitutional under *Terry*.[96]

On appeal, the Second Circuit joined the majority of federal appellate courts that extended *Summers*.[97] The Second Circuit reviewed the *Bailey* case as a matter of first impression, finding that *Fullwood* did not control because the holding in *Fullwood*

90. United States v. Bailey, 468 F. Supp. 2d 373, 379-380 (E.D.N.Y. 2006).

91. The court held that Bailey's detention was constitutional because it "took place at the earliest practicable location that was consistent with the safety and security of the officers and the public." *Id.* at 380

92. *Id.* at 382-85.

93. *Id.*

94. *Id.* at 383; *see also* United States v. Sokolow, 490 U.S. 1, 7 (1989) (finding that a *Terry* stop may be conducted if officers have "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if they lack probable cause" (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968))).

95. United States v. Bailey, 468 F. Supp. 2d 373, 382 (E.D.N.Y. 2006).

96. *Id.* at 383.

97. United States v. Bailey, 652 F.3d 197, 205-07 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

applied the *Summers* rule to individuals detained in their driveway attempting to enter a vehicle, not individuals detained away from the premise subject to a warrant.[98] In holding that *Summers* was controlling, the Second Circuit essentially adopted the district court's reasoning.[99] The court held, as did the district court, that the *Summers* rule applied equally to individuals leaving the premises because two of the three law enforcement interests from *Summers* existed.[100] In adopting the district court's holding, the Second Circuit adopted the as soon as practicable test used by the majority of federal circuits.[101]

The table was set and, in 2012, the long-awaited answer to the question of whether individuals who were away from the premises subject to a search warrant could be detained under *Summers* had finally garnered enough attention to warrant Supreme Court review.[102] The Supreme Court would finally decide the answer to a question that had split the federal appellate courts and remained unsolved since the *Summers* decision in 1981.

IV. THE COURT'S DECISION

In *Bailey*, the Supreme Court was tasked with settling the circuit split to determine the limitations of the *Summers* rule.[103] The majority began by laying out the general rule that "'Fourth Amendment seizures are 'reasonable' only if based on probable cause' to believe that an individual has committed a crime."[104] The Court then noted that the *Summers* rule is a categorical exception to the Fourth Amendment's general rule, giving law

98. United States v. Bailey, 652 F.3d 197, 204 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

99. *Id.* at 205-06.

100. *Id.* at 206 & n.6.

101. *Id.* at 206 ("*Summers* imposes upon police a duty based on both geographic and temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search.").

102. Bailey v. United States, 132 S. Ct. 2710 (2012).

103. Bailey v. United States, 133 S. Ct. 1031, 1038 (2013) (finding the issue in *Bailey* to be "whether the reasoning in *Summers* can justify detentions beyond the immediate vicinity of the premises being searched"). Justice Kennedy authored the 6–3 majority opinion, joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Sotomayor, and Kagan. Justice Scalia authored a concurring opinion, in which Justices Ginsburg and Kagan joined. Justice Breyer authored a dissenting opinion, in which Justices Thomas and Alito joined.

104. *Id.* at 1037 (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)).

enforcement officers a powerful enforcement tool authorizing the detention of individuals with no requisite suspicion or quantum of evidence.[105] In determining the limitations of such a tool, the Court felt it necessary to conduct a balancing test, as was done in *Summers*, to measure law enforcement justifications against the intrusiveness of detainment away from the premises covered by the search warrant.[106]

A. LAW ENFORCEMENT INTERESTS

The Court looked to three different law enforcement justifications to determine whether the justifications outweighed the intrusiveness of detainment. These three interests were: (1) the "interest in minimizing the risk of harm to the officers";[107] (2) whether "the orderly completion of the search may be facilitated if the occupants of the premises are present";[108] and (3) the "interest in preventing flight in the event that incriminating evidence [was] found."[109]

1. INTEREST IN MINIMIZING THE RISK OF HARM TO THE OFFICERS

The first interest analyzed by the *Bailey* Court was "the interest in minimizing the risk of harm to the officers."[110] The Court found it important for officers to be able to take "unquestioned command of the situation" when executing a search warrant.[111] However, the Court distinguished the facts in *Summers* from those in *Bailey*.[112] In *Summers*, the detainee was on the steps of his home where he could pose a threat to the officers.[113] But in *Bailey* the detainee was already almost a mile

105. Bailey v. United States, 133 S. Ct. 1031, 1037-1038 (2013) (stating that the "rule in *Summers* extends farther than some earlier exceptions because it does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers" (citing Muehler v. Mena, 544 U.S. 93 (2005))).

106. *Id.* at 1038.

107. *Id.* (quoting Michigan v. Summers, 452 U.S. 692, 702 (1981)).

108. Bailey v. United States, 133 S. Ct. 1031, 1040 (2013) (quoting *Summers*, 452 U.S. at 703).

109. *Id.* (quoting *Summers*, 452 U.S. at 702).

110. *Id.* at 1038 (quoting *Summers*, 452 U.S. at 702).

111. *Id.* (quoting *Summers*, 452 U.S. at 702-03).

112. *Id.*

113. Michigan v. Summers, 452 U.S. 692, 693 (1981).

away when detained.[114] The Court found that the same safety considerations were no longer present when the detainee was not located on the premises being searched.[115] In making this determination, the Court reasoned that individuals no longer in the immediate vicinity posed little threat to officers and rejected the idea that these individuals could be dangerous if they returned to the scene.[116]

The Court found that law enforcement officers could easily establish methods to prevent returning occupants from becoming dangerous by either posting officers on the perimeter of the premises, or by simply erecting barricades around the premises.[117] The Court also rejected the Second Circuit's idea that it would create an "officer dilemma" if it failed to extend the *Summers* rule.[118] The Court astutely found the "officer dilemma" to be based on a false premise, and that officers were not *required* to detain the individual as he was leaving.[119] If the officer felt that it would be too dangerous to detain the individual at that moment, he could simply let the individual leave, erect barricades, and secure the scene to guard against returning occupants.[120]

Lastly, the Court rejected the Second Circuit's rationale that the *Summers* rule needed to be extended to prevent occupants leaving the scene from alerting other occupants that may have remained.[121] The Court found this rationale to be insufficient and stated that "[i]f extended in this way the rationale would justify detaining anyone in the neighborhood who could alert occupants that the police are outside . . . ."[122] Accordingly, the Court determined that the risk of harm posed to officers when the occupants of the search location are no longer within the vicinity

114. Bailey v. United States, 133 S. Ct. 1031, 1036, 1038 (2013).

115. *Id.* at 1039.

116. *Id.* at 1036, 1039.

117. *Id.*

118. The Second Circuit concluded that by limiting the *Summers* rule, officers "would have to choose between detaining an individual immediately (and risk alerting occupants still inside) or allowing the individual to leave (and risk not being able to arrest him later if incriminating evidence were discovered)." *Id.*

119. Bailey v. United States, 133 S. Ct. 1031, 1039 (2013).

120. *Id.*

121. *Id.* at 1039-40.

122. *Id.* at 1040.

of the premises is minimal.[123] Although this first interest was considered "minimal," the Court still needed to address the other two interests used to support the *Summers* rule and its subsequent expansion.

2. FACILITATION OF AN ORDERLY COMPLETION OF THE SEARCH

The second interest the Court considered was whether "the orderly completion of the search may be facilitated if the occupants of the premises are present."[124] The Court found this interest did not exist when the detainee was no longer in the immediate vicinity of the premises.[125] This interest has two components: (1) the assistance a detainee can give officers in unlocking doors and preventing unnecessary damage; and (2) preventing the individual from disrupting the search.[126] The Court held that the potential for interference in the officers' search is no longer present when the occupant is away from the scene.[127] Furthermore, just as the individual could not assist in the execution of the warrant, he also could not disrupt the execution of the warrant if he is not present.[128] Simply put, the Court found that an individual can neither assist in the execution of a search warrant, nor can they disrupt the execution of the warrant, if they are not present when the warrant is being executed.[129] Therefore, the Court held that this second interest of facilitation of an orderly completion of the search was not present when a person was detained away from the immediate vicinity of the premises.[130]

3. INTEREST IN PREVENTING FLIGHT

The last interest the Court looked at was the "interest in preventing flight in the event that incriminating evidence is found."[131] At first, it appeared that this interest may in fact be

123. *See* Bailey v. United States, 133 S. Ct. 1031, 1039-40 (2013).
124. *Id.* at 1040 (quoting Michigan v. Summers, 452 U.S. 692, 703 (1981)).
125. *Id.*
126. Bailey v. United States, 133 S. Ct. 1031, 1040 (2013).
127. *Id.*
128. *Id.*
129. *Id.*
130. Bailey v. United States, 133 S. Ct. 1031, 1040 (2013).
131. *Id.* (quoting *Summers*, 452 U.S. at 702).

present when detaining an individual away from the immediate vicinity.[132] However, the Court found that:

> The proper interpretation of this language . . . is that the police can prohibit an occupant from *leaving the scene* of the search. . . . The concern over flight *is not because of the danger of flight itself* but because of the damage that potential flight can cause to the integrity of the search.[133]

When read in context with *Summers*, the Court interpreted this interest to be aimed at preventing rushed, careless searches caused when officers are worried that an individual may flee, which can lead to a less-than-thorough investigation and unnecessary damage to property.[134] The *Bailey* Court took precautions to make sure this interest was limited to its context because if not circumscribed, "the rationale of preventing flight would justify . . . detaining a suspect who is 10 miles away, ready to board a plane."[135] When read in context with *Summers*, the Supreme Court interpreted this interest to only relate to the additional burden officers would have if presented with the extra worries of on-scene individuals fleeing; a justification which is not present when the individuals are already away from the "immediate vicinity" of the premises subject to the search.[136]

The three interests discussed in *Summers* that justify the detention of an individual in the immediate vicinity essentially vanish when the individual leaves this area and is no longer near the home. The Court in *Bailey* minimized all three of these interests, and found that if present at all, they were not present to the extent seen in *Summers*.[137] However, the Court had not completed its analysis; it now had to weigh these minimal law enforcement interests with the severity of the intrusion of the person being detained.

B. SEVERITY OF THE INTRUSION ON THE DETAINEE'S PERSONAL LIBERTY

After finding the law enforcement interests to be negligible,

132. After all, the occupant is already leaving the scene subject to a search warrant.

133. Bailey v. United States, 133 S. Ct. 1031, 1040-41 (2013) (emphasis added).

134. *Id.* at 1040.

135. *Id.* at 1041.

136. *Id.* at 1040-41.

137. *Id.* at 1041.

the Court then moved on to the second component of its balancing test: the severity of the intrusion on the detainee's personal liberty.[138] In doing so, the Court weighed the severity of the intrusion against the law enforcement interests to determine whether *Summers* would be extended to individuals away from the "immediate vicinity."[139] In *Summers*, the Court found that the intrusion on a person detained at the doorstep of the home was minimal.[140] The *Summers* Court recognized that an intrusion occurred when police detained an occupant pursuant to a search warrant, but when compared with the intrusion of the search itself the detainment of the individual was "surely less intrusive."[141] Contrary to *Summers*, the Court in *Bailey* found that a detainment away from the "immediate vicinity" of the premises was much more intrusive.[142] For instance, in *Bailey* the police stopped the defendant's vehicle on a public road, handcuffed the defendant, and then escorted him back to his home in a marked police cruiser.[143] This form of detainment can appear to be an arrest to members of the general public viewing from afar.[144] Furthermore, the inherent benefits associated with being detained in one's own home[145] are not present in the highly intrusive detainment of an individual outside the immediate vicinity of the residence subject to the search.[146] The Court found the heightened level of intrusiveness to be a critical point in its

138. Bailey v. United States, 133 S. Ct. 1031, 1041 (2013).

139. *Id.* at 1041-43.

140. Michigan v. Summers, 452 U.S. 692, 693, 701-02 (1981).

141. *Id.* at 701; *Bailey*, 133 S. Ct. at 1041 (stating that "[b]ecause the detention [in *Summers*] occur[ed] in the individual's own home, 'it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station'" (quoting *Summers*, 452 U.S. at 702)); *see also* Muehler v. Mena, 544 U.S. 93, 98-100 (2005) (holding that the detainment of an individual in her home with the use of handcuffs may have been a greater intrusion than that seen in *Summers*, however, the intrusion was still only "marginal").

142. *Bailey*, 133 S. Ct. at 1041. The Court held that "[w]here officers arrest an individual away from his home . . . there is an additional level of intrusiveness . . . [because the detainment] will resemble a full-fledged arrest." *Id.*

143. *Id.* at 1036.

144. *Id.* at 1041.

145. An occupant detained in their own home has the benefit of: (1) being in the comfort of their own home; (2) being less inconvenienced; and (3) having the ability to oversee the search and assist in the prevention of unnecessary damage. *Summers*, 452 U.S. at 701.

146. *Bailey*, 133 S. Ct. at 1041; *see also Summers*, 452 U.S. at 701 (stating that some individuals may actually prefer to remain in their own home "to observe the search of their possessions").

analysis, so it outweighed the minimal interests of law enforcement officers to detain individuals outside the "immediate vicinity."[147] Therefore, unlike in *Summers*, the Court found the heightened level of intrusion that accompanies a detainment away from the "immediate vicinity" of the search, outweighed the minimal interests and justifications of law enforcement officers in detaining recent occupants of the premises.[148]

C. CIRCUMSCRIBING THE *SUMMERS* RULE AND ESTABLISHING THE "IMMEDIATE VICINITY" STANDARD

The Supreme Court recognized the power the *Summers* rule gives to law enforcement and also realized the need to limit its extension.[149] In circumscribing the *Summers* rule, the Court in *Bailey* established a spatial constraint, restricting law enforcement officers' authority to detain incident to a search warrant.[150] This spatial constraint limits application of *Summers* to the immediate vicinity of the premises to be searched.[151]

The Court's intent in deriving this rule was to maintain the law enforcement interests established in *Summers* but to also limit the intrusiveness that occurs as a result of a broad interpretation of the *Summers* rule.[152] Thus, by limiting the *Summers* rule to the "immediate vicinity of the premises to be searched," *Bailey* prevents application of the rule in instances where "law enforcement interests are diminished and the intrusiveness of the detention is more severe."[153] However, the limitations imposed by the *Bailey* Court are not free from

147. Bailey v. United States, 133 S. Ct. 1031, 1042 (2013).

148. *Id.* at 1042-43 ("Once an individual has left the immediate vicinity of a premises to be searched, however, detentions must be justified by some other rationale" because the "limited intrusion on personal liberty is [no longer] outweighed by the special law enforcement interests at stake.").

149. Bailey v. United States, 133 S. Ct. 1031, 1042 (2013) ("Because this exception grants substantial authority to police officers . . . it must be circumscribed."); *see also id.* at 1040 ("If extended . . . the rationale would justify detaining anyone in the neighborhood who could alert occupants that the police are outside, all without individualized suspicion of criminal activity or connection to the residence to be searched."); *id.* at 1041 ("If not circumscribed, the rationale of preventing flight would justify . . . detaining a suspect who is 10 miles away, ready to board a plane.").

150. Bailey v. United States, 133 S. Ct. 1031, 1042 (2013).

151. "A spatial constraint defined by the *immediate vicinity* of the premises to be searched is therefore required for detentions incident to the execution of a search warrant." *Id.* at 1042 (emphasis added).

152. *Id.*

153. *Id.*

criticism.[154] The Court failed to explicitly define what constitutes the "immediate vicinity"[155] and only offered a couple of factors for lower courts to use in making this determination.[156] To assist lower courts in determining whether an individual was in the "immediate vicinity" the Supreme Court listed the following factors: (1) "the lawful limits of the premises"; (2) "whether the occupant was within the line of sight of his dwelling"; (3) "the ease of reentry from the occupant's location"; and (4) "other relevant factors."[157] Lower federal and state courts have begun to use these factors in determining whether *Summers* applies,[158] but, as one would expect, the lack of a clear rule from the Court may cause confusion for lower courts in the future.

D. THE BROAD EXCEPTION TO *BAILEY*'S LIMITATIONS

Despite the Court's failure to define "immediate vicinity," the Court did successfully settle the circuit split that had arisen over the past thirty years. However, settling this circuit split may not put an end to the questions surrounding the *Summers* rule. After limiting *Summers*, establishing the "immediate vicinity" standard, and listing factors to help determine "immediate vicinity," the Court concluded that the *Summers* rule did not apply to the defendant in *Bailey*.[159] However, instead of ruling in favor of the defendant, the Court left the door open for lower courts to decide similar cases on any other constitutionally appropriate basis, including detainment based on reasonable suspicion under *Terry v. Ohio*.[160] The Court concluded its opinion by remanding the case to the lower courts to determine whether

154. Bailey v. United States, 133 S. Ct. 1031, 1047 (2013) (Breyer, J., dissenting) (finding that "[t]he majority's [immediate vicinity] line invites case-by-case litigation although . . . it offers no clear case-by-case guidance").

155. The majority found that the defendant in *Bailey* was clearly outside the "immediate vicinity," and thus the *Bailey* case "presents neither the necessity nor the occasion to further define the meaning . . . ." *Id.* at 1042 (majority opinion).

156. *Id.*

157. *Id.*

158. *See, e.g.*, United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049, at *7 (W.D.N.Y. Apr. 19, 2013); Shed v. State, No. 02-12-00229-CR, 2013 WL 3064554, at *4 (Tex. App. June 20, 2013).

159. Bailey v. United States, 133 S. Ct. 1031, 1042-43 (2013).

160. *Id.* at 1042 ("If officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause.").

the defendant's seizure was constitutional as a valid *Terry* stop.[161] The Court expressly refused to offer any opinion as to whether the detention of the defendant in *Bailey* was a valid *Terry* stop and remanded the case back to the Second Circuit to make this determination.[162] The Court's decision to remand the case to the Second Circuit asking it to perform a *Terry* analysis creates a built-in exception by enabling lower courts to side-step the bulk of the *Bailey* opinion under the guise of a constitutional *Terry* stop. It is this conclusion that could ultimately render the Supreme Court's decision meaningless.

E. THE CONCURRING OPINION

Justice Scalia, along with Justices Ginsburg and Kagan, concurred with the majority's holding, but wrote separately to emphasize that *Summers* was a categorical *exception* to the Fourth Amendment's general rule that a search or seizure is unreasonable unless there is a search warrant based on probable cause.[163] Justice Scalia found that there was only one question that needed to be asked: "Was the person seized within 'the immediate vicinity of the premises to be searched?'"[164] If the answer was yes, then the categorical *Summers* rule should apply, and the occupants could be reasonably detained.[165] If the answer was no, however, the *Summers* exception would not apply.[166] Justice Scalia found that the determination of whether *Summers* applied, should not be determined based on an *ad hoc* balancing test.[167] Rather, the *Summers* exception was black and white, and only applied within the "immediate vicinity."[168] If the *Summers* exception was not present, other methods of determining the reasonableness of the seizure should be controlling.[169] Therefore,

161. Bailey v. United States, 133 S. Ct. 1031, 1043 (2013).

162. *Id.* at 1042-43.

163. Bailey v. United States, 133 S. Ct. 1031, 1043-44 (2013) (Scalia, J., concurring).

164. *Id.*

165. *See id.* at 1044-45.

166. *See id.*

167. *Id.* at 1043, 1045.

168. "*Summers* embodies a categorical judgment that *in one narrow circumstance*—the presence of occupants during the execution of a search warrant—seizures are reasonable despite the absence of probable cause." Bailey v. United States, 133 S. Ct. 1031, 1044 (2013) (Scalia, J., concurring).

169. *Id.* at 1045 ("Beyond *Summers*' spatial bounds, seizures must comport with ordinary Fourth Amendment principles.").

the concurring justices generally agreed with the majority's view, but felt it necessary to emphasize that *Summers* was a categorical rule and that beyond these spatial bounds "seizures must comport with ordinary Fourth Amendment principles."[170]

F. THE DISSENTING OPINION

Justice Breyer, along with Justice Thomas and Justice Alito, dissented from the majority's opinion by endorsing the Second Circuit's analysis and determination.[171] The dissent based its determination on whether "the police act[ed] reasonably when they followed . . . and then detained, two men who left a basement apartment as the police were about to enter to execute a search warrant for a gun."[172] In doing so, the dissenters, unlike the majority and concurring Justices, felt the line of demarcation for *Summers* should not be drawn at the "immediate vicinity" of the house, but instead should be drawn on the basis of what is "reasonably practicable."[173] The dissenting opinion focused its analysis on a disapproval of the "immediate vicinity" standard and failed to notice that the detention of recent occupants would most likely still be allowed based on other constitutional standards such as *Terry*.[174] The dissent noted that "*Summers* explained that detention incident to a search is permissible because, once police have obtained a search warrant, they 'have an articulable basis for suspecting criminal activity.'"[175] In other words, the dissent appeared to acknowledge that if police obtained a proper search warrant, there was at least reasonable suspicion that criminal activity is present.[176] Although the dissent made note of this, it failed to address the most significant aspect of this statement: *Terry* will still allow for detention of the recent occupants past the "immediate vicinity" because the officers will have "an articulable basis for suspecting criminal activity."[177] Although both the majority opinion and dissenting

170. Bailey v. United States, 133 S. Ct. 1031, 1045 (2013) (Scalia, J., concurring).

171. Bailey v. United States, 133 S. Ct. 1031, 1045 (2013) (Breyer, J., dissenting).

172. *Id.*

173. *Id.* at 1046.

174. The dissent only briefly mentions any "other standards" when it opines that *Terry* "is irrelevant where the risks at issue are those of flight, destruction of evidence, or harm caused by those inside the house shooting at police or passersby." Bailey v. United States, 133 S. Ct. 1031, 1048 (2013) (Breyer, J., dissenting).

175. *Id.* at 1049 (quoting Michigan v. Summers, 452 U.S. 692, 699 (1981)).

176. *Id.*

177. *Id.*

opinions appear to recognize this exception, neither appear to truly acknowledge the significance it will have on lower courts' interpretations of the *Bailey* opinion.

V. ANALYSIS

The Supreme Court clearly felt the need to limit the *Summers* rule with its decision in *Bailey*.[178] In the wake of federal appellate courts expanding *Summers* to include recent occupants away from the immediate vicinity, the Supreme Court recognized that lower courts were not adequately circumscribing such a powerful tool on their own. However, now with Supreme Court precedent limiting the *Summers* rule, a new question emerges: Did the Supreme Court do too little too late? It appears that the Supreme Court limited the *Summers* rule but at the same time acknowledged a remarkably broad exception to its own limitation—the *Terry* stop—which could allow for lower courts to sidestep the *Bailey* decision altogether. In essence, the *Bailey* decision created both a necessary restriction on the *Summers* rule and a built-in exception that could prevent the application of the limitations the decision was meant to create.

A. HOW LOWER COURTS SHOULD USE AND INTERPRET *BAILEY*

Although the Supreme Court in *Bailey* attempted to limit the *Summers* rule, the Court effectively rendered its own decision meaningless when it provided an exception to its own limitation of *Summers*. The Court created this exception when it remanded *Bailey* back to the Second Circuit and stated that "[i]f officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the *lawfulness of detention is controlled by other standards*, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause."[179] No longer having the black-and-white *Summers* rule at their disposal, courts can still use these "other standards" to justify detainments of recent occupants. Lower courts are only slightly more burdened in *Bailey* situations and now must merely conduct a fact-specific inquiry to determine whether the detainment of the suspect was constitutional based on "other standards," including a

178. Bailey v. United States, 133 S. Ct. 1031, 1040-42 (2013).

179. *Id.* at 1042-43 (emphasis added).

constitutionally valid *Terry* stop.[180]

As noted above, *Terry* allows an officer to detain an individual if the officer has "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause."[181] Officers can even conduct a *Terry* stop if the officer has reasonable suspicion that a suspect has been involved in past criminal activity.[182] With these general guidelines of a legal *Terry* stop, one can now analyze the validity of *Bailey* situations under a *Terry*-style analysis. In all *Bailey* situations, law enforcement officers will have already obtained a search warrant for the premises.[183] Assuming the magistrate does not err in his probable cause analysis when he issues the search warrant, courts should assume that probable cause exists at the residence subject to the warrant. Because a probable cause determination has already been made by a neutral magistrate, the detectives in *Bailey* situations must, at minimum, also already have "reasonable suspicion" that the occupants of the residence are involved in criminal activity.[184] In other words, in almost every situation where a search warrant has been issued based on probable cause for a residence, there must also be reasonable suspicion as to the occupants of the premises subject to that warrant.[185] Consequently, when law enforcement officers witness a defendant leaving the premises (making him a recent occupant) the officers will almost always have at least reasonable suspicion to believe the defendant was engaged in, or connected

180. Bailey v. United States, 133 S. Ct. 1031, 1042 (2013).

181. United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).

182. United States v. Hensley, 469 U.S. 221, 227-29 (1985) (holding that "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion"); *see also* United States v. Cortez, 449 U.S. 411, 417 n.2 (1981) (stating that "an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct").

183. *E.g.*, Bailey v. United States, 133 S. Ct. 1031, 1036 (2013).

184. "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." Alabama v. White, 496 U.S. 325, 330 (1990).

185. *See id.*

to, criminal activity.[186] Because officers will have reasonable suspicion in almost every circumstance, the detainment of a suspect pursuant to *Terry* should be constitutional despite the fact that the detainment occurred away from the premises subject to the search.

A look back at the original district court order in *Bailey* reveals that the district court considered *Terry* when it originally denied Mr. Bailey's motion to suppress.[187] Although the Second Circuit failed to opine on this matter, the district court held that the detainment of the defendant was not only constitutional under *Summers*[188] but that the detainment also constituted a valid *Terry* stop.[189] Therefore, in direct correlation with the above proposition that *Bailey* includes a broad exception to its own rule, the district court already determined that, despite *Summers*, the detainment of the defendant was constitutional under the reasonable suspicion standard set forth in *Terry*.[190]

The question then arises as to whether this broad exception is present and can be legitimately used by law enforcement and the lower courts in every similar situation.[191] Although the district court in *Bailey* used two facts[192] to find reasonable

186. Michigan v. Summers, 452 U.S. 692, 703-04 (1981) ("The connection of an occupant to [a] home [subject to a search warrant] gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.").

187. United States v. Bailey, 468 F. Supp. 2d 373, 382 (E.D.N.Y. 2006) ("Even if there was no authority for the detention under *Summers*, the Court finds that the stop of the defendant's car and brief detention during the search were supported by reasonable suspicion and were lawful under Terry.").

188. *Id.*

189. *Id.* The district court cited two reasons that gave the officers reasonable suspicion to detain the defendant: (1) the defendant "left the basement apartment which was about to be searched"; and (2) the defendant "matched the general description . . . of the individual whom the confidential informant had identified as the drug trafficker." *Id.* at 383. The district court relied on these facts in holding that "the stop of the defendant's car and brief detention during the search were supported by reasonable suspicion and were lawful under *Terry*." *Id.* at 382-85.

190. "[E]ven assuming the detention was not authorized under *Summers*, the Court concludes that these facts were sufficient under *Terry* to provide a specific and articulable suspicion justifying Bailey's stop and brief detention . . . ." *Id.* at 385.

191. *See infra* Parts V.B-C (finding that lower courts have, and can continue to use Bailey to find constitutional detainments based on *Terry* in almost every situation where a recent occupant is detained away from the immediate vicinity of the premises subject to a search warrant).

192. These two facts being: (1) the defendant left the premises subject to the search; and (2) the defendant matched the confidential informant's description of the

suspicion, the idea that *Bailey* contains its own exception is not diminished. Despite listing two relevant facts leading to reasonable suspicion, when analyzed with the *Summers* decision itself, the district court essentially only needed the first fact: The defendant was leaving the premises subject to a search warrant.

In *Summers*, the Court held that "[t]he connection of an occupant to [a] home [subject to a search warrant] gives the police officer an easily identifiable and *certain basis for determining that suspicion of criminal activity* justifies a detention of that occupant."[193] In other words, the Supreme Court in *Summers* recognized that when *Summers* is applicable, there is also a "*certain* basis for . . . suspicion of criminal activity."[194] The above quote from *Summers* straightjackets the *Bailey* limitations by finding that "suspicion of criminal activity" will almost always be present in any circumstance where *Bailey* can be applied. Thus, it is nearly impossible for an officer limited by *Bailey* to not simultaneously have a *Terry*-based justification for detaining the individual connected with the scene of the search. Therefore, if Fourth Amendment jurisprudence is appropriately applied in conjunction with *Bailey*, law enforcement officers that should be limited by *Bailey* will still be able to detain an individual away from the "immediate vicinity" of the premises via a constitutional *Terry* stop.

This argument—whether an occupant leaving the premises subject to a search warrant is *certain* basis for detainment—was the subject of both Supreme Court oral arguments in *Bailey*, as well as briefs on remand to the Second Circuit.[195] In Bailey's Supplemental Brief to the Second Circuit, Bailey argues that "the Court's apparent conclusion [is] that an observed connection with a location to be searched does not give rise to reasonable suspicion. . . ."[196] Whether the Supreme Court actually came to this conclusion is highly debatable. However, even if it is determined that this was the Supreme Court's finding, the

suspect. United States v. Bailey, 468 F. Supp. 2d 373, 383 (E.D.N.Y. 2006).

193. Michigan v. Summers, 452 U.S. 692, 703-04 (1981) (emphasis added).

194. *Id.* at 704 (emphasis added).

195. Supplemental Brief of Defendant-Appellant at 14, United States v. Bailey, 743 F.3d 322 (2d Cir. 2014) (Nos. 10-398-cr, 07-3719-cr), 2013 WL 1721729, at *14; *see also* Transcript of Oral Argument at 40-53, Bailey v. United States, 133 S. Ct. 1031 (2013) (No. 11-770), 2012 WL 5363543, at *40-*53.

196. Supplemental Brief of Defendant-Appellant at 14, United States v. Bailey, 743 F.3d 322 (2d Cir. 2014) (Nos. 10-398-cr, 07-3719-cr), 2013 WL 1721729, at *14.

analysis is not changed. No one claims that *Bailey* carves out an *absolute* exception to its own rule. In most instances, the connection of an occupant to the premises will be enough for a valid *Terry* stop. However, there may be a few limited instances where *Terry* may not apply, but these instances should be viewed as the exception and not the norm. For instance, if officers viewed a mail carrier delivering the mail or a Girl Scout delivering cookies to a residence subject to a search warrant, one would be hard-pressed to argue that there would be reasonable suspicion for officers to make a *Terry*-based detainment of the mail carrier or Girl Scout after either left the residence.[197]

With *Terry*, *Summers*, and *Bailey* in mind, one can easily see how *Bailey* should be applied in a practical sense. Using the facts of *Bailey* to illustrate the practicality of the Supreme Court's decision, it becomes clear how the *Bailey* opinion should be applied. The officers in *Bailey* were preparing to execute a search for weapons at a residence,[198] which triggered the *Summers* rule, when the defendant emerged from the residence and departed in his vehicle,[199] which then triggered the *Bailey* limitations. The officers then proceeded to conduct a vehicle stop of the

197. Bailey argued in his Supplemental Briefs to the Second Circuit on remand that at Supreme Court oral arguments "the Court rejected the government's repeated contention that, where officers have a warrant to search a particular location for contraband, it necessarily follows that they have reasonable suspicion as to any individual with an observed connection with that location . . . ." Supplemental Brief of Defendant-Appellant at 8, United States v. Bailey, 743 F.3d 322 (2d Cir. 2014) (Nos. 10-398-cr, 07-3719-cr), 2013 WL 1721729, at *8. However, this contention is also questionable. Although the Supreme Court seemed resistant to the argument, the Court did not expressly reject it. Justice Kagan stated "But what you're now saying is: Well, there's another class of people, they're going to work in the morning. And we've—there's—there is no indication that they've seen the police officers; they're going to work. But we get to detain them, too, just because we have a warrant to search the house. And the question is why?" Transcript of Oral Argument at 40-41, Bailey v. United States, 133 S. Ct. 1031 (2013) (No. 11-770), 2012 WL 5363543, at *40-*41. Justice Scalia later followed up on the topic stating: "[W]hat you're arguing for is a special rule which says once you have a warrant that this place can be searched, you can seize anybody—you can seize not only anybody there in order to protect the police, but anybody connected with the—with the place. And that—that is so contrary to what seems to me the theory of—of the Fourth Amendment that I am very reluctant to—to extend our cases any further than they already exist." *Id.* at 53. Assuming, *arguendo*, that the Court did reject this contention in oral arguments, there is still no actual binding authority for lower courts to hang their hat on, and the argument that *Terry* will still apply in almost all cases has not been weakened.

198. Bailey v. United States, 133 S. Ct. 1031, 1036 (2013).

199. *Id.*

defendant,[200] which triggered *Terry*. Therefore, despite that officers will no longer be able to detain recent occupants under the *Bailey* limitations,[201] the officers will still have a "*certain* basis for . . . suspicion of criminal activity."[202] Thus, despite *Bailey*'s circumscription of the *Summers* rule, *Terry* would allow for detainment pursuant to *Bailey*'s exception.[203] If lower courts appropriately apply the Supreme Court's precedent in *Terry*, *Summers*, and *Bailey*, they should find that the detainment of recent occupants is constitutional in almost every situation. Most importantly, it appears the Supreme Court has rendered its own decision in *Bailey* virtually meaningless, allowing officers to continue to detain individuals away from the "immediate vicinity." The Supreme Court has simply changed the authority that officers must use when detaining individuals outside the "immediate vicinity" of the premises subject to the search warrant: the detainment will no longer be allowed under *Summers*, but instead will almost always be allowed under *Terry*. This proposition was only strengthened when the Second Circuit issued its opinion on remand.

B. THE SECOND CIRCUIT'S RULING ON REMAND BASED ON "OTHER STANDARDS"

On February 21, 2014, the Second Circuit issued its subsequent ruling on *Bailey*.[204] In its opinion on remand, the Second Circuit held that Bailey's initial detention was reasonable under *Terry*, and upheld the defendant's conviction.[205] In doing so, the Second Circuit enumerated four factors which contributed to its determination that Bailey's detention was reasonable: (1) Law enforcement officers already had probable cause to think that the apartment was the site of criminal activity;[206] (2) Officers witnessed Bailey leave the apartment that was subject to the

200. Bailey v. United States, 133 S. Ct. 1031, 1036 (2013).

201. *Id.* at 1042 ("[T]he decision to detain must be acted upon at the scene of the search . . . .").

202. Michigan v. Summers, 452 U.S. 692, 704 (1981).

203. "If officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including . . . a brief stop for questioning based on reasonable suspicion under *Terry* . . . ." Bailey v. United States, 133 S. Ct. 1031, 1042 (2013).

204. United States v. Bailey, 743 F.3d 322 (2d Cir. 2014).

205. *Id.* at 326, 332, 346.

206. *Id.* at 333.

search warrant;[207] (3) the two men that were seen leaving the apartment both fit the general description of "Polo";[208] and (4) the firearm believed to be in the premises subject to the warrant was easily transportable.[209] The court found that these four factors established a "totality of circumstances" sufficient to support "a reasonable suspicion to think that the men may have been engaged in criminal activity and were armed, thus making a stop and subsequent patdown constitutionally reasonable under *Terry*."[210] Though the Second Circuit ruled that Bailey's detention was constitutional under *Terry*,[211] it appears that it was slightly reluctant to apply the Supreme Court's exception in as fervent of a manner as it could have done.

Though the Supreme Court's ruling in *Bailey* could be used by lower courts to find almost all detentions of recent occupants constitutional under *Terry*, the Second Circuit attempted to limit this application and restore some meaningfulness to the Supreme Court's decision. The Supreme Court has never held that recent occupants of residences subject to a search warrant are inherently subject to detainment under *Terry*, and the Second Circuit followed suit by also refusing to expressly acknowledge this proposition.[212] In fact, the Second Circuit held otherwise, stating that "ownership or occupancy of searched premises is [not] necessarily enough to provide the reasonable suspicion necessary for a *Terry* stop while the search is conducted."[213] However, by affirming Bailey's conviction with diluted factors and placing a great emphasis on the "recent occupancy" factor, the Second Circuit actually strengthens the argument that detainment of recent occupants will *almost* always be constitutional under *Terry*.

When one takes a closer look at the four factors listed by the Second Circuit—(1) probable cause; (2) witnesses individual leaving scene subject to search warrant; (3) matching description of suspect; and (4) easily transportable evidence—it becomes clear that three of these factors are "all variations on the same theme—

207. United States v. Bailey, 743 F.3d 322, 333 (2d Cir. 2014).
208. *Id.*
209. *Id.* at 334.
210. *Id.* at 335.
211. *Id.*
212. United States v. Bailey, 743 F.3d 322, 334 (2d Cir. 2014).
213. *Id.*

i.e., that Bailey and Middleton were seen leaving 103 Lake Drive, and because of this, the police had reasonable suspicion to stop them."[214] Factors one, two, and four above all fall under the comprehensive theme that law enforcement officers saw the defendant leave a residence subject to a search warrant.[215] Hence, if one were to reassemble factors one, two, and four, the Second Circuit essentially used the same two factors that were used by the district court in its determination that the defendant's detainment was a constitutional *Terry* stop.[216]

By recognizing that the Second Circuit dismantled one factor into three separate factors, it shows how much emphasis the courts can place on the fact that an officer witnessed a recent occupant leave a premises subject to a search warrant. Although it appears the Second Circuit attempted to revitalize the Supreme Court's *Bailey* decision by stating that "ownership or occupancy of searched premises is [not] necessarily enough to provide the [requisite] reasonable suspicion," it appears that it also had a difficult time avoiding the vestigial Supreme Court decision.[217] By breaking the one factor into three separate factors, the Second Circuit may have actually made it easier to sidestep *Bailey*. Instead of a court stating there is only one factor—that suspects were seen leaving a premises subject to a search warrant—a

214. United States v. Bailey, 743 F.3d 322, 348 (2d Cir. 2014) (Pooler, J., concurring in part and dissenting in part).

215. Factor four states that the handgun was easily transportable. However, an easily transportable piece of evidence will be present in almost all situations involving search warrants. For example, if officers had a search warrant for drugs, the subject of the warrant—the drugs—would fall under the description of easily transportable. It is hard to imagine an instance where the subject of a search warrant was not easily transportable. In other words, factor four is inherently subsumed by factors one and two because when there is a probable-cause-based search warrant there will most likely also be some form of easily transportable evidence. Furthermore, this conclusion is not weakened by the fact that the evidence in this situation was a gun. The fact that the evidence sought in connection with the *Bailey* warrant was a gun only appears to be essential to the constitutionality of the officer's patdown of Bailey and *not essential* to the constitutionality of the initial detainment itself. *Id.* at 334 (majority opinion) (stating that this factor "made it reasonable to suspect that one . . . of the men . . . might be armed with the targeted weapon"). Unlike a patdown search, which requires reasonable suspicion that an individual is armed and dangerous, the detainment of an individual does not require this heightened suspicion and only requires reasonable suspicion to believe that criminal activity was "afoot." *See* United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)); Arizona v. Johnson, 555 U.S. 323, 330 (2009).

216. *See supra* note 192 and accompanying text.

217. United States v. Bailey, 743 F.3d 322, 334 (2d Cir. 2014).

court can now separate this into three distinct factors,[218] thus making a much better case for a "totality of circumstances."[219] In actuality, the Second Circuit simply calls one factor—a factor which it states is not "necessarily enough" on its own to support reasonable suspicion—by three different names to satisfy the "totality of circumstances" needed for reasonable suspicion.[220]

Besides these "three" factors, the Second Circuit also relied on the fact that the two men seen leaving the apartment fit the general description given by an informant.[221] However, despite the fact that the general description was extremely vague,[222] the Second Circuit did not give any suggestions as to how much weight this factor received. Consequently, it appears that once law enforcement officers have seen a recent occupant depart from a premises subject to a search warrant, only a minutia of additional circumstances is required to satisfy the requirements for reasonable suspicion.[223] Therefore, if not satisfactory on its own, the factor of law enforcement observing a suspect leaving a premises subject to a search warrant can be combined with almost any other seemingly trivial factor to satisfy detainment under *Terry*.[224] Considering that some of these factors are oftentimes inherently present when an individual leaves a premises subject to a search warrant—i.e., nervousness and being in a high crime area—a *Terry* stop will almost always be

218. These factors being: (1) Police had obtained a search warrant; (2) Suspects were seen leaving the premises subject to the search warrant; and (3) There was potentially easily-transportable evidence located at that premises. United States v. Bailey, 743 F.3d 322, 333-34 (2d Cir. 2014).

219. *Id.* at 335.

220. *Id.* at 334.

221. *Id.* at 333.

222. The fact that the defendants were detained in a part of Long Island where "approximately 78 percent of the population . . . was black" and that "approximately two thirds of American adults [are] overweight" does not seem to convey a high threshold for a description to constitute "reasonable suspicion of involvement in criminal activity." United States v. Bailey, 743 F.3d 322, 349 (2d Cir. 2014) (Pooler, J., concurring in part and dissenting in part).

223. *Cf.* Illinois v. Wardlow, 528 U.S. 119, 124-26 (2000). Although unprovoked flight by itself is not enough to satisfy *Terry*, it is "certainly suggestive" of criminal activity. *Id.* at 124. This factor is highly probative and not much more is needed to justify a *Terry* stop. *Id.* Even minimal factors such as being in a "high crime" neighborhood or acting nervous is enough to justify a *Terry* stop when coupled with unprovoked flight. *Id.* (citing Adams v. Williams, 407 U.S. 143, 144, 147-148 (1972)).

224. Such factors can include: (1) being in a high crime area; (2) matching a general description of a suspect; or even (3) nervousness. *See id.* at 124-26; *see also* United States v. Bailey, 743 F.3d 322, 333 (2d Cir. 2014).

constitutionally valid in factual scenarios similar to *Bailey*.

While Judge Pooler recognized the above issues with the majority's opinion, she dissented from the majority, finding that the police unconstitutionally detained the defendant under *Terry*.[225] Judge Pooler seemed to rely in part on *Ybarra v. Illinois*, where the Supreme Court found that the *Terry* exception is not satisfied by itself when a "person happens to be on [a] premises where an authorized . . . search is taking place."[226] However, Judge Pooler seemed to downplay the significance of the location in *Ybarra* versus the location involved in *Bailey*.[227] In *Ybarra*, the Court found that reasonable suspicion did not exist to search patrons of a public tavern, whereas in *Bailey*, the police were executing the search warrant on a private residence.[228] Judge Pooler interpreted the *Ybarra* holding to mean that "mere presence at the site of the execution of a search warrant does not create individualized, reasonable suspicion."[229] Jude Pooler reasoned that this holding should be "applicable more broadly" and encompass a private residence.[230] However, Judge Pooler downplayed the significance of the location being subjected to the search. Despite that the *Ybarra* holding should also apply to private residences, the *Ybarra* holding must be applied in a distinct manner to distinguish the two scenarios. First, unlike the public tavern in *Ybarra* where customers and patrons generally enter at will and without the need of an invitation, a residence is subject to much more privacy.[231] Generally, visitors of a home cannot enter without invitation and usually knock and are invited into the home. This distinction is critical when applying *Ybarra* to *Bailey* scenarios. Unlike in *Ybarra*, the occupants of a residence will satisfy individualized suspicion more easily because they are invited into the home and

225. United States v. Bailey, 743 F.3d 322, 346 (Pooler, J., concurring in part and dissenting in part).

226. *Id.* at 347; *see also* Ybarra v. Illinois, 444 U.S. 85, 94 (1979).

227. *See Bailey*, 743 F.3d at 347 (Pooler, J., concurring in part and dissenting in part).

228. *Id.*

229. *Id.* (citing *Ybarra*, 444 U.S. at 93).

230. *Id.*

231. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970) (stating that "'a man's home is his castle' into which 'not even the king may enter'"); *see also* Donovan v. Dewey, 452 U.S. 594, 598-99 (1981) ("The expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home.").

thus show some form of intimate connection with the owner of the premises. Therefore, the occupants of a residence actually convey a more personal connection with the premises subject to the search as opposed to the tavern patrons seen in *Ybarra*. Unlike in *Ybarra* where the tavern patrons were merely present in the tavern, in scenarios similar to *Bailey* there is an inherent intimate connection between the visitors of a residence and the premises subject to the warrant. Therefore, a court should have a much easier time finding individualized suspicion of occupants in *Bailey*-like scenarios as opposed to instances where police execute the search warrant on a public business.

Although the Second Circuit seemingly attempted to lessen the significance of the Supreme Court's built-in exception to the *Bailey* limitations, its own holding appears to confirm the existence of this broad exception. By separating the most important factor in *Bailey* into three separate factors, the Second Circuit helped to show just how much weight lower courts can give to the fact that witnesses or police saw a recent occupant leaving a residence subject to a search warrant.[232] Despite that the Second Circuit expressly stated that presence at the premises subject to the warrant was not enough by itself to support reasonable suspicion, the rationale in its holding suggests otherwise.[233] Moreover, if presence by itself is not enough to support reasonable suspicion, the Second Circuit seems to imply that very little more is needed.[234] An analysis of other post-*Bailey* lower court decisions points to this conclusion as well.

C. LOWER COURT DECISIONS POST-*BAILEY*

Besides the Second Circuit, many other state and federal courts have begun to rely on *Bailey* since its publication.[235] Eight of these opinions stand out as relying most heavily on the *Bailey* decision.[236] Of these eight decisions, five support the proposition

232. *See* United States v. Bailey, 743 F.3d 322, 347 (2d Cir. 2014) (Pooler, J., concurring in part and dissenting in part).

233. *Id.* at 334 (majority opinion).

234. *See id.*; *see also id.* at 347 (Pooler, J., concurring in part and dissenting in part).

235. *E.g.*, United States v. Dixon, No. 11-10218-JLT, 2013 WL 1821613, at *4 (D. Mass Apr. 29, 2013); United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692, at *10, *11 (W.D. Tex. Mar. 18, 2013); United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960, at *1 (E.D. Wis. July 3, 2013); State v. Donald, 2013-0018 (La. 5/3/13); 115 So. 3d 1138, 1139 (per curiam).

236. *See* United States v. Wade, 956 F. Supp. 2d 638 (W.D. Pa. 2013); United

that *Bailey* was a virtually meaningless opinion;[237] whereas the other three opinions lend support to the idea that *Bailey* may have adequately limited the *Summers* rule.[238]

In all five of the post-*Bailey* decisions that support the above proposition that *Bailey* was a virtually meaningless opinion, law enforcement officers had obtained a search warrant, or were in the process of doing so, and the defendant was either arrested or detained away from the premises subject to that warrant.[239] Furthermore, each of the respective courts found that the detainment or arrest of the individual was constitutional; however, the arrests were "controlled by other standards"[240] rather than the *Summers* rule.[241] Moreover, two of these five

States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960 (E.D. Wis. July 3, 2013); United States v. McGowan, No. CR 11-S-424-S, 2013 WL 3356962 (N.D. Ala. July 2, 2013); United States v. Dixon, No. 11-10218-JLT, 2013 WL 1821613 (D. Mass. Apr. 29, 2013); United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049 (W.D.N.Y. Apr. 19, 2013); United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692 (W.D. Tex. Mar. 18, 2013); State v. Cruz, No. 98264, 2013 WL 1932845 (Ohio Ct. App. May 9, 2013); State v. Donald, 2013-0018 (La. 5/3/13); 115 So. 3d 1138 (per curiam).

237. United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960, at *1 (E.D. Wis. July 3, 2013); United States v. McGowan, No. CR 11-S-424-S, 2013 WL 3356962, at *9 & n.4 (N.D. Ala. July 2, 2013); United States v. Dixon, No. 11-10218-JLT, 2013 WL 1821613, at *4 (D. Mass. Apr. 29, 2013); United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692, at *11 (W.D. Tex. Mar. 18, 2013); State v. Donald, 2013-0018 (La. 5/3/13); 115 So. 3d 1138, 1139 (per curiam).

238. United States v. Wade, 956 F. Supp. 2d 638, 652 (W.D. Pa. 2013); United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049, at *7 (W.D.N.Y. Apr. 19, 2013); State v. Cruz, No. 98264, 2013 WL 1932845, at *11 (Ohio Ct. App. May 9, 2013).

239. *Skiljevic*, 2013 WL 3353960, at *1 (police stopped defendants a short distance away from the premises); *McGowan*, 2013 WL 3356962, at *8 (police stopped the vehicle approximately one mile from the premises that was about to be searched); *Dixon*, 2013 WL 1821613, at *2 (police stopped defendant in his car less than one mile from the residence subject to the search warrant); *Calzada*, 2013 WL 1136692, at *1 (police stopped the defendant's vehicle after leaving the residence subject to the search warrant); *Donald*, 115 So. 3d at 1139 (stating that police stopped the defendants one block away from the residence subject to the search warrant).

240. Bailey v United States, 133 S. Ct. 1031, 1042 (2013).

241. *See, e.g.*, *McGowan*, 2013 WL 3356962, at *9 & n.4 (holding that the initial stop of the defendant for speeding was a valid *Terry* stop and "[b]ecause the officers had probable cause to arrest, [the] [d]efendant's detention was lawful"); *Dixon*, 2013 WL 1821613, at *4 (holding that the court "need not consider whether [the] [d]efendant's detention was justified as incident to execution of a search warrant because the officers had probable cause to arrest [the] [d]efendant"); *Donald*, 115 So. 3d at 1139 (holding that a controlled buy of drugs provided officers with "probable cause to detain [the] defendant approximately one block away" and thus the limitations in *Bailey* did not control).

decisions stand apart as being more significant than the others, and these federal district court interpretations of *Bailey* seem to insinuate that Bailey may be even more meaningless than one may have originally thought.[242]

The opinions in *United States v. Calzada* and *United States v. Skiljevic* have similar fact patterns regarding the two defendants' detainments.[243] In both *Calzada* and *Skiljevic*, the police stopped the defendants while they were in a vehicle and away from the premises subject to the warrant.[244] However, what makes these two decisions stand apart from the rest is that both opinions, either impliedly or expressly, find that *Bailey* is not applicable when there is reasonable suspicion or probable cause for the defendant's detainment.[245] In *Calzada*, the Government argued that *Bailey* "is limited to cases in which there is no probable cause or reasonable suspicion to arrest or detain."[246] Although it is unclear whether the court unequivocally agrees with this argument, the court does state that it "*agrees* that *Bailey* is not applicable in this case."[247] *Skiljevic*, on the other hand, makes this finding and does so unequivocally.[248] The United States District Court for the Eastern District of Wisconsin declared the stop of the defendant as constitutional in an order issued prior to the Supreme Court's decision in *Bailey*.[249] More importantly, the district court found that the Supreme Court's

242. United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960 (E.D. Wis. July 3, 2013); United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692 (W.D. Tex. Mar. 18, 2013).

243. United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960, at *1 (E.D. Wis. July 3, 2013) (police stopped defendant's vehicle "a short distance away" from the premises); United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692, at *10 (W.D. Tex. Mar. 18, 2013) (police stopped defendant's vehicle four miles from the premises).

244. *Skiljevic*, 2013 WL 3353960, at *1; *Calzada*, 2013 WL 1136692, at *10.

245. In *Calzada*, law enforcement obtained a probable cause-based search warrant when detectives received information that the defendant's residence was being used for marijuana growth, detectives observed bright fluorescent lights coming from the residence, detectives smelled marijuana, and detectives witnessed the defendant enter the premises and leave only an hour later. *Calzada*, 2013 WL 1136692, at *1. In *Skiljevic*, the court stated that the information obtained in preparation of a search warrant application sufficed to establish probable cause to stop the defendant's vehicle, regardless of the Supreme Court's ruling in *Bailey*. *Skiljevic*, 2013 WL 3353960, at *1.

246. *Calzada*, 2013 WL 1136692, at *11.

247. *Id.* (emphasis added).

248. *Skiljevic*, 2013 WL 3353960, at *1.

249. *Id.*

determination in *Bailey* was inconsequential to the case, and would not change the analysis of its holding.[250] When asked to reconsider the constitutionality of the detainment of the defendant after the *Bailey* decision, the court in *Skiljevic* found that the *Bailey* decision was meaningless and held that the "defendant's stop was nevertheless supported by probable cause."[251] In addition, the Court found that "[i]t was not the search warrant itself that provided probable cause for the stop but rather the information the agents had obtained, which was set forth in the warrant application" that was the probable cause basis for the constitutional stop.[252]

Calzada and *Skiljevic* establish two principles that, if followed by other courts, would render the Bailey decision virtually meaningless: (1) *Bailey* is inapplicable in situations where either reasonable suspicion or probable cause already exist to detain an individual;[253] and (2) the information obtained for the application of a valid search warrant is enough by itself to warrant probable cause, or at minimum reasonable suspicion to detain an individual.[254] It should be further noted that neither of these district court decisions felt the need to cite to the important dicta in *Summers*, which stated: "[t]he connection of an occupant to [a] home [subject to a search warrant] gives the police officer an easily identifiable and *certain basis for determining that suspicion of criminal activity* justifies a detention of that occupant."[255] When taken as a whole, it appears that the information used in obtaining a valid search warrant requiring probable cause, which is inherently required for *Bailey* to be triggered, by itself renders *Bailey* inapplicable. In other words, *Bailey* requires a search warrant based on probable cause; however, if probable cause exists, which it must, then the limitations in *Bailey* cannot be applied. Therefore, if lower courts trend in the direction of *Calzada* and *Skiljevic*, the limitations in *Bailey* can almost never be applied, and the *Bailey* decision would

250. United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960, at *1 (E.D. Wis. July 3, 2013).

251. *Id.*

252. *Id.*

253. United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692, at *11 (W.D. Tex. Mar. 18, 2013).

254. *Skiljevic*, 2013 WL 3353960, at *1; *Calzada*, 2013 WL 1136692, at *11 ("[T]he same set of facts that supported the probable cause determination for the search of the house" also gave the officers probable cause to arrest).

255. Michigan v. Summers, 452 U.S. 692, 703-04 (1981) (emphasis added).

be rendered meaningless.

However, three lower courts have held contrary to *Calzada* and *Skiljevic*, and have applied *Bailey* the way the Supreme Court seemingly envisioned. In *United States v. Gildersleeve* and *United States v. Wade*, officers had search warrants to search the defendants' residences, and police detained both defendants away from the premises.[256] In *Gildersleeve*, officers detained the defendant about 100-200 feet outside of his home prior to the search.[257] The district court held that *Bailey* applied because police detained the defendant away from the premises subject to the search, and that the defendant was not in an area where he "pose[d] a real threat to the safe and efficient execution of [the] search warrant."[258] In *Wade*, the police detained the defendant about 1.3 miles from the residence being searched.[259] Like in *Gildersleeve*, the district court found the detainment to be unconstitutional.[260] In making this determination, the court found that "the strict 'spatial constraint' imposed in [*Bailey* was] sufficient to render the . . . stop of [the defendant] illegal."[261]

Although these two cases show how district courts may interpret *Bailey* favorably for defendants, both of these decisions can easily be considered as misapplications of *Bailey* for multiple reasons. In *Gildersleeve*, the district court misapplied the *Bailey* decision by: (1) relying too heavily on the Government's failure to assert that the police detained the defendant to effectuate a search pursuant to the search warrant on the defendant's person (as opposed to the search warrant on his residence);[262] (2) failing to address the Supreme Court's finding in *Bailey* that "[i]f officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards . . . .";[263] (3) ignoring

256. United States v. Wade, 956 F. Supp. 2d 638, 644, 647 (W.D. Pa. 2013); United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049, at *1, *6 (W.D.N.Y. Apr. 19, 2013).

257. *Gildersleeve*, 2013 WL 1908049, at *6.

258. *Id.* at *7.

259. United States v. Wade, 956 F. Supp. 2d 638, 647 (W.D. Pa. 2013).

260. *Wade*, 956 F. Supp. 2d at 653.

261. *Id.* at 652-53.

262. United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049, at *8 (W.D.N.Y. Apr. 19, 2013) (holding that "[b]ased upon th[e] record, the Court cannot conclude that [the defendant] was detained pursuant to the search warrant authorizing the search of his person").

263. Bailey v. United States, 133 S. Ct. 1031, 1042 (2013).

ample information provided to support probable cause in issuing a search warrant of the defendant's residence;[264] and (4) failing to address that the district court upheld the magistrate's probable cause determination, thus the court should have also found there was probable cause that the defendant was involved in ongoing criminal activity or past criminal activity, subjecting the defendant to a valid *Terry* stop. In finding that probable cause existed to render the search warrant valid, the court in *Gildersleeve* had already determined that:

> [T]he search warrant application provide[d] information from a confidential informant that had proven reliable in the past, to the effect that [the defendant] was selling drugs out of [his residence] and that the informant had personally observed the defendant in possession of drugs and guns. The application also contain[ed] information that the informant participated in a controlled purchase of drugs from [the defendant] inside [his residence] and observed [the defendant] in possession of large quantities of drugs in April of 2011, less than one month prior to the search warrant application.[265]

Despite finding these facts "sufficient to establish probable cause for the issuance of the search warrant," the court inexplicably did not find that this same set of facts entitled the officers to conduct a valid *Terry* stop.[266] Although the Supreme Court stated in *Bailey* that stops such as this should be "controlled by other standards" such as *Terry*,[267] the district court in *Gildersleeve* ignored this guidance and simply found the detention illegal under *Bailey* because it was outside "the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant."[268] One should find it difficult to argue that had the court properly analyzed the case under *Bailey*

264. United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049, at *5 (W.D.N.Y. Apr. 19, 2013).

265. *Id.*

266. *Id.* at *5, *7. The court stated that it "cannot conclude that the seizure of Gildersleeve comports with the Supreme Court's admonishment to limit 'the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant.'" *Id.* at *7 (quoting Bailey v. United States, 133 S. Ct. 1031, 1042 (2013)). However, the court failed to consider whether the defendant's detention was constitutional under *Terry v. Ohio*. *Id.*

267. *Bailey*, 133 S. Ct. at 1042.

268. United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049, at *7 (W.D.N.Y. Apr. 19, 2013).

and *Terry*, the detention of the defendant should have been considered legal.[269]

Just as in *Gildersleeve*, the district court's analysis in *Wade* was also erroneous; however, the misapplication in *Wade* should be attributed more to the Government's handling of the case as opposed to the court's inaccurate interpretation.[270] In fact, the Government in *Wade* actually conceded that "the strict 'spatial constraint' imposed in [*Bailey* was] sufficient to render the initial fifteen-minute stop of [the defendant] illegal."[271] Furthermore, the Government assumed that "in light of *Bailey*, the traffic stop on [the defendant] may have been an illegal seizure."[272] Thus, the Government never adequately argued the question of whether the detainment of the defendant in *Wade* was legal.[273] Instead of relying on *Bailey* and making an argument centered on a valid *Terry* stop, the Government instead argued that despite the "illegal" detainment, the exclusionary rule did not apply.[274] Thus, although the Court ultimately found that the *Bailey* decision rendered the detainment of the defendant illegal, the court did not focus its decision on this issue and explained that the Government did not even attempt to refute this argument.[275] If the Government had argued more passionately that the detainment was valid under *Bailey* and its exception, it would

269. The facts establishing the requisite probable cause for both the search warrant of the defendant's home and person was surely enough to warrant a valid *Terry* stop. In *United States v. Hensley*, the Supreme Court held that "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion." 469 U.S. 221, 229 (1985). Several facts in this case surely support the reasonable suspicion standard that the defendant was involved in or was wanted in connection with a completed felony, including: (1) a confidential informant had seen the defendant in possession of drugs and guns; (2) the informant had participated in a controlled purchase of drugs from the defendant inside his residence; and (3) the informant had observed the defendant in possession of large quantities of drugs a mere one month prior to the search warrant application. United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049, at *4 (W.D.N.Y. Apr. 19, 2013).

270. *See* United States v. Wade, 956 F. Supp. 2d 638, 652-53 (W.D. Pa. 2013).

271. *Id.*

272. *Id.* at 653.

273. *Id.*

274. The Government argued that the exclusionary rule does not apply when law enforcement officers reasonably rely on binding appellate court precedent. United States v. Wade, 956 F. Supp. 2d 638, 653 & n.9 (W.D. Pa. 2013).

275. *Id.* at 652-53.

probably have been successful.[276]

The post-*Bailey* case that shows most vividly the two possible ways a court can interpret *Bailey* is *State v. Cruz*.[277] In *Cruz*, the Ohio state court ruled with the federal district courts, applying *Bailey* consistent with what the Supreme Court assumedly envisioned.[278] The police detained the defendant in *Cruz* pursuant to a search warrant after he had driven away from the residence subject to the search.[279] Without much detail, the appellate court, like the federal district courts in *Gildersleeve* and *Wade*, found the detainment of the defendant illegal under *Bailey* because the defendant was "detained and arrested a substantial distance from the property to be searched."[280]

However, *Cruz* is somewhat different than *Gildersleeve* and *Wade* because the state appellate court in *Cruz* was not unanimous.[281] One judge wrote a separate opinion concurring in judgment only, which directly supports the argument that *Bailey* is virtually meaningless.[282] In unison with *Calzada* and *Skiljevic*, the dissenting judge in *Cruz* argued against the majority opinion that was misapplying *Bailey*.[283]

In her concurring opinion, Judge Gallagher stated that "the exception to the warrant requirement established in *Summers* and at issue in *Bailey* [does not apply] in this case *where police had reasonable suspicion* to stop [the defendant] under *Terry v. Ohio*."[284] Thus, consistent with many of the other federal court decisions,[285] the concurrence in *Cruz* argued that the issue of

276. Since the officers witnessed the defendant sell crack cocaine to a confidential informant the officers surely had reasonable suspicion (and perhaps probable cause) to detain the defendant under *Terry*. *See* United States v. Wade, 956 F. Supp. 2d 638, 644 (W.D. Pa. 2013); *see also* United States v. Dixon, No. 11-10218-JLT, 2013 WL 1821613, at *3 n.10 (D. Mass. Apr. 29, 2013) (finding that one controlled buy is sufficient to establish probable cause (citing United States v. Materas, 483 F.3d 27, 32 (1st Cir. 2007))).

277. State v. Cruz, No. 98264, 2013 WL 1932845 (Ohio Ct. App. May 9, 2013).

278. *Id.* at *7.

279. *See id.* at *2, *7.

280. *Id.* at *7.

281. State v. Cruz, No. 98264, 2013 WL 1932845, at *10 (Ohio Ct. App. May 9, 2013) (Gallagher, J., concurring in judgment only).

282. *Id.* at *10, *11.

283. *Id.*

284. *Id.* at *10 (emphasis added).

285. *See, e.g.*, United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960, at *1 (E.D. Wis. July 3, 2013); United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL

whether the defendant was in the immediate vicinity is immaterial.[286] Because the officer had reasonable suspicion that a crime was "afoot," the law enforcement officers should be able to sidestep *Bailey* by conducting a search pursuant to *Terry v. Ohio*.[287]

A majority of lower courts applying *Bailey* are doing so in a manner consistent with the proposition that *Bailey*'s limitations are virtually meaningless.[288] Despite this majority, a few lower courts have strictly interpreted *Bailey*'s spatial limitations.[289] However, it appears that these courts taking the minority view have done so as a result of a misapplication of *Bailey*[290] or as a result of ineffective arguments by counsel.[291] The proposition that *Bailey*'s spatial limitations are virtually meaningless is either unaffected or strengthened by these lower court decisions.

VI. CONCLUSION

The *Summers* rule creating a categorical exception to the Fourth Amendment's warrant requirement is a powerful tool used by courts and law enforcement agencies across the nation. However, because law enforcement and lower courts began expanding this tool, the Supreme Court in *Bailey* felt the need to circumscribe the rule. Unfortunately, it appears the Court may have done too little too late, and it may have trouble limiting this powerful tool. Coupled with the fact that *Bailey* provides a broad exception to the very limitations it presents, the Supreme Court's delay in limiting *Summers* may provide law enforcement with the ability to continue detaining recent occupants, causing *Bailey* to eventually become the vestigial appendix in the *Summers*

1136692, at *11 (W.D. Tex. Mar. 18, 2013).

286. State v. Cruz, No. 98264, 2013 WL 1932845, at *10, *11 (Ohio Ct. App. May 9, 2013) (Gallagher, J., concurring in judgment only).

287. *Id.*

288. United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960 (E.D. Wis. July 3, 2013); United States v. McGowan, No. CR 11-S-424-S, 2013 WL 3356962 (N.D. Ala. July 2, 2013); United States v. Dixon, No. 11-10218-JLT, 2013 WL 1821613 (D. Mass. Apr. 29, 2013); United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692 (W.D. Tex. Mar. 18, 2013); State v. Donald, 2013-0018 (La. 5/3/13); 115 So. 3d 1138.

289. United States v. Wade, 956 F. Supp. 2d 638 (W.D. Pa. 2013); United States v. Gildersleeve, No. 11CR211A, 2013 WL 1908049 (W.D.N.Y. Apr. 19, 2013); State v. Cruz, No. 98264, 2013 WL 1932845 (Ohio Ct. App. May 9, 2013).

290. *E.g.*, *Gildersleeve*, 2013 WL 1908049, at *7, *8.

291. *E.g.*, *Wade*, 956 F. Supp. 2d at 652-53.

progeny. This trend appears to have already begun[292] and may continue until the Court addresses the problem in a later case.

Justin Swaim

292. *See* United States v. Calzada, No. SA-12-CR-642-XR, 2013 WL 1136692 (W.D. Tex. Mar. 18, 2013); United States v. Skiljevic, No. 11-CR-72, 2013 WL 3353960 (E.D. Wis. July 3, 2013).