

# TAKE THE MONEY AND RUN: DETAINMENT INCIDENT TO A SEARCH WARRANT IN *BAILEY V. UNITED STATES*

ALEXANDER HALL\*

## I. INTRODUCTION

Prior to 1968, the Fourth Amendment prohibited police officers from detaining an individual without probable cause.<sup>1</sup> However, *Terry v. Ohio*<sup>2</sup> significantly complicated Fourth Amendment jurisprudence, ruling that some searches (and later seizures) are so substantially less intrusive than arrests that they are permissible without probable cause.<sup>3</sup> *Bailey v. United States*<sup>4</sup> challenges the scope of permissible non-arrest seizures by questioning whether it is permissible under the Fourth Amendment for police officers to detain an occupant of a residence, incident to a valid search warrant for that residence, who has left the premises prior to the search.<sup>5</sup> The decision presents an opportunity for the Court to reinforce its long-held position that searches and seizures permitted without probable cause represent narrowly tailored exceptions to the probable cause requirement.<sup>6</sup> The Court will likely decide that officers may not detain an occupant who has left the premises and announce a narrow limiting principle based on geographic proximity, similar to that expounded in the recent

---

\* J.D. Candidate, 2014, Duke University School of Law.

1. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that under particular circumstances, a police officer may detain an individual and “conduct a carefully limited” search for weapons without probable cause for arrest).

2. 392 U.S. 1, 30 (1968).

3. *Id.*

4. *Bailey v. United States*, No. 11-770 (U.S. argued June 4, 2012).

5. *Id.*

6. See *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (referring to *Terry* and its progeny as “brief and narrowly circumscribed intrusions”).

Fourth Amendment case *Arizona v. Gant*.<sup>7</sup>

## II. FACTS

In July of 2005, a Suffolk County Police Department detective obtained a search warrant for a basement apartment.<sup>8</sup> The warrant specified that the target of the search was a chrome handgun and that the suspected occupant was a “heavy set black male with short hair” known as “Polo.”<sup>9</sup> Shortly before executing the warrant, detectives observed two men, both matching the description of “Polo,” exit the stairway leading to the basement apartment, enter a vehicle, and drive away.<sup>10</sup> After following the vehicle for approximately one mile, and around five minutes after the men exited the apartment, officers stopped the vehicle.<sup>11</sup>

After the stop, detectives “patted-down” the two men and, upon request, the men identified themselves as Chunon Bailey (Petitioner) and Bryant Middleton.<sup>12</sup> Despite presenting a driver’s license bearing a different address, Bailey told officers he was coming from his house, the basement apartment named in the warrant.<sup>13</sup> Middleton corroborated Bailey’s statement.<sup>14</sup> Thereafter, the men were placed in handcuffs and informed that they were being detained, not arrested, in relation to the execution of the search warrant.<sup>15</sup> Bailey and Middleton were then transported back to the basement apartment.<sup>16</sup> Upon arrival, officers informed them that a gun and drugs were discovered during the search and subsequently arrested the two men.<sup>17</sup> The period between Bailey’s stop and formal arrest was less than ten minutes.<sup>18</sup>

---

7. 556 U.S. 332 (2009); *see id.* at 351 (“Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”).

8. *United States v. Bailey*, 652 F.3d 197, 200 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 2710 (U.S. June 4, 2012) (No. 11-770).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 201.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

The government indicted Bailey based on the evidence found in his home and his statements to the detaining officers.<sup>19</sup> Bailey moved to suppress the evidence used to indict on the theory that the detention violated his rights under the Fourth Amendment.<sup>20</sup> Following an evidentiary hearing, the district court held that Bailey's detention was lawful under *Michigan v. Summers*<sup>21</sup> because it was incident to the search warrant.<sup>22</sup> In the alternative, the court stated that the detention was lawful under *Terry* as an investigative detention.<sup>23</sup> After a nine-day trial, Bailey was found guilty on all charges.<sup>24</sup> Bailey appealed the final judgment of conviction, arguing that his detainment was not lawful under either *Summers* or *Terry*.<sup>25</sup>

### III. LEGAL BACKGROUND

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . .”<sup>26</sup> Prior to the seminal decision of *Terry*, the probable cause requirement, which was considered to be absolute, ensured a reasonableness requirement for all seizures of persons.<sup>27</sup> The Supreme Court characterized the probable cause requirement as the best compromise between protecting citizens from “rash and unreasonable interferences with privacy” and allowing law enforcement sufficient latitude to protect the community.<sup>28</sup> However, in 1968, the Supreme Court departed from traditional Fourth Amendment analysis by carving out an exception to the probable cause requirement<sup>29</sup> and creating a new category of seizures to be evaluated for reasonableness under a balancing test rather than under the probable cause standard.<sup>30</sup>

---

19. *Id.*

20. *Id.*

21. 452 U.S. 692 (1981); *see id.* at 705 (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” (citations omitted)).

22. *Bailey*, 652 F.3d at 201.

23. *Id.*

24. *Id.*

25. *Id.* at 202. Bailey also appealed on the basis of ineffective assistance of counsel. *Id.*

26. U.S. CONST. amend. IV.

27. *See Dunaway v. New York*, 442 U.S. 200, 208–09 (1979) (“*Terry* for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause.”).

28. *Id.* at 208 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

29. *Id.* at 209–10 (citing *Terry v. Ohio*, 392 U.S. 1, 22–27 (1968)).

30. *See id.* at 210 (“[*Terry*] defined a special category of Fourth Amendment ‘seizures’ so

### A. *The Creation of Non-Arrest Detainment Governed by the Fourth Amendment*

The *Terry* Court held that a police officer may temporarily detain and search an individual, without a warrant or probable cause, if the officer reasonably believes that criminal activity is afoot and the search is necessary to protect his safety or the safety of others in the area.<sup>31</sup> The decision set precedent for the proposition that the Fourth Amendment permits forms of detainment besides arrests and, as a corollary, that such detainments may be permissible with less than probable cause.<sup>32</sup>

Prior to *Terry*, “[t]he standard of probable cause represented . . . the minimum justification necessary to make the kind of intrusion involved in an arrest ‘reasonable’ under the Fourth Amendment.”<sup>33</sup> In analyzing the protections of the Fourth Amendment, “[t]he term ‘arrest’ was synonymous with those seizures governed by the Fourth Amendment.”<sup>34</sup> *Terry* muddled these “relatively simple and straightforward” basic principles<sup>35</sup> by drawing a distinction between less intrusive seizures and full-blown arrests.<sup>36</sup> This new subcategory of seizures<sup>37</sup> is not subject to the probable cause requirement,<sup>38</sup> but rather must be determined “reasonable” under a relatively amorphous balancing test<sup>39</sup> that analyzes both the government’s interests in executing the search or seizure and the harm that the search or seizure entails, on a case-by-case basis.<sup>40</sup>

substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment ‘seizures’ reasonable could be replaced by a balancing test.”).

31. *Terry v. Ohio*, 392 U.S. 1, 30 (1986).

32. See George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 856–57 (“*Terry* held that one such type of detention . . . was permissible on less than probable cause.” (citation omitted)).

33. *Dunaway*, 442 U.S. at 208.

34. *Id.*

35. *Id.*

36. See *Terry*, 392 U.S. at 10–11 (discussing “the public debate over the power of the police to ‘stop and frisk’ . . . suspicious persons”).

37. See *id.* at 16 (rejecting the notion that the use of the practice known as “stop and frisk” does not rise to the level of a “search” or “seizure”).

38. See *id.* at 20 (“If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether ‘probable cause’ existed to justify the search and seizure which took place. However, that is not the case.”).

39. See *id.* (“[T]here is ‘no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.’” (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967))).

40. See *id.* (“[A] judge . . . must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.”).

Following *Terry*, the Court applied its exception to the probable cause requirement in other cases,<sup>41</sup> though it was careful to limit the exception's scope.<sup>42</sup> The Supreme Court made clear that the probable cause requirement was still the relevant standard and that *Terry* and its progeny represent narrowly defined exceptions.<sup>43</sup> However, the Court implied that it would be willing to apply the *Terry* balancing test to seizures that are "substantially less intrusive than arrests."<sup>44</sup>

### B. Michigan v. Summers: *The Evolution of Non-Arrest Detainment*

In *Summers*, the Court again faced the threshold issue of whether to evaluate the reasonableness of a pre-arrest seizure using the traditional probable cause requirement or the balancing test seen in *Terry*.<sup>45</sup> The pre-arrest seizure in *Summers* occurred just prior to police officers executing a warrant to search a house for narcotics.<sup>46</sup> Before initiating the search, officers observed Summers descending the front steps of the residence and subsequently detained him while they searched the premises.<sup>47</sup> After discovering narcotics and determining that Summers owned the home, the police arrested him.<sup>48</sup>

The Court cited the *Terry* line of cases as recognizing that certain seizures, despite being covered by the Fourth Amendment, may be made based on less than probable cause because they constitute such a limited intrusion to the detainee and are justified by substantial law enforcement interests.<sup>49</sup> The Court's analysis traced the balancing test applied in *Terry*, weighing private and governmental interests in order

---

41. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (holding that special enforcement problems facing roving Border Patrol agents could justify vehicle stops if the agents were aware of specific facts indicating that the vehicle contained illegal aliens); *Adams v. Williams*, 407 U.S. 143, 146–47 (1972) (holding that a police officer could use force to detain a suspect based on an informant's tip that the suspect was armed and possessed narcotics).

42. See *Dunaway v. New York*, 442 U.S. 200, 210 (1979) ("[T]his Court has been careful to maintain [*Terry's*] narrow scope.").

43. See *id.* at 214 ("[O]ur recognition of the[] dangers [of not utilizing the probable cause requirement] and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test.").

44. See *id.* at 212 ("The narrow intrusions involved in those cases were judged by a balancing test . . . only because these intrusions fell far short of the kind of intrusion associated with an arrest." (citation omitted)).

45. *Michigan v. Summers*, 452 U.S. 692, 700–01 (1981).

46. *Id.* at 693.

47. *Id.*

48. *Id.*

49. *Id.* at 696–99.

to determine which standard to apply.<sup>50</sup> The Court ultimately permitted the detention, noting numerous rationales to support the application of the balancing test, including:

- A magistrate authorized a “substantial invasion of the privacy of the persons who resided” in the premises by issuing a search warrant after finding probable cause to believe that the law was being violated.<sup>51</sup>
- The detention was less intrusive than the search itself.<sup>52</sup>
- Most citizens “would elect to remain” in the premises.<sup>53</sup>
- The form of detention used was not likely to be abused or prolonged.<sup>54</sup>
- The additional public stigma from the detention would be minimal.<sup>55</sup>
- “[P]reventing flight in the event that incriminating evidence is found.”<sup>56</sup>
- Reducing the risk of physical harm to the officers.<sup>57</sup>
- Facilitating the orderly competition of the search.<sup>58</sup>
- The search warrant “provides an objective justification for the detention.”<sup>59</sup>

---

50. *See id.* at 700–01 (“[I]n order to decide whether this case is controlled by the general [probable cause] rule, it is necessary to examine both the character of the official intrusion and its justification.”).

51. *Id.* at 701.

52. *Id.* The Court, however, admitted that the detention was itself “a significant restraint on [the occupant’s] liberty.” *Id.*

53. *Id.*

54. *Id.* (“[T]he type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention.”).

55. *Id.* at 702 (“[B]ecause the detention . . . was in respondent’s own residence, 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.”).

56. *Id.*

57. *Id.* at 702–03 (“[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence.”).

58. *Id.* at 703 (explaining that the occupants of the residence may “open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand”).

59. *Id.* at 703–04 (“The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.”).

Following the recital of these considerations, the Court announced the categorical holding that “for Fourth Amendment purposes . . . 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.”<sup>60</sup> Thus, the Court created another “narrowly defined intrusion”<sup>61</sup> not subject to the probable cause requirement.

In the wake of the decision, lower courts offered varied interpretations of the scope of *Summers*.<sup>62</sup> One key issue in dispute is whether *Summers* gives authority to “detain an occupant who *leaves* the premises during or immediately before the execution of a search warrant and is detained a few blocks away.”<sup>63</sup> Appellate courts that have considered the issue have split, with three allowing detention<sup>64</sup> and two disallowing it.<sup>65</sup> Some of the legal and policy issues dividing the courts are whether *Summers* includes an implicit bright-line rule that limits detention within a certain geographic proximity to the premises, whether police safety and efficiency rationales apply once the subject has left the premises, and whether granting authority to detain subjects that have left the premises would lead to abuse.

In the 2009 case of *Arizona v. Gant*, the Supreme Court shed some light on how it might rule on the issue dividing the lower courts. *Gant* addressed the issue of whether police officers’ search of a suspect’s car, while the suspect was handcuffed in a police car, is a permissible search.<sup>66</sup> In holding the search impermissible, the Court enumerated a geographic limiting principle, based largely on the conclusion that the rationales supporting the search of the car do not apply when the suspect is not within geographical proximity of the passenger compartment.<sup>67</sup>

---

60. *Id.* at 705.

61. *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

62. *See United States v. Bailey*, 652 F.3d 197, 204 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 2710 (U.S. June 4, 2012) (No. 11-770) (discussing the varied lower court decisions).

63. *Id.*

64. *See, e.g., United States v. Bullock*, 632 F.3d 1004, 1023 (7th Cir. 2011); *United States v. Cavazos*, 288 F.3d 706, 712 (5th Cir. 2002); *United States v. Cochran*, 939 F.2d 337, 341 (6th Cir. 1991).

65. *See e.g., United States v. Edwards*, 103 F.3d 90, 95 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 347 (8th Cir. 1994).

66. *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

67. *See id.* at 351 (“Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”).

## IV. HOLDING

The Court of Appeals for the Second Circuit stated that the issue in *Bailey* was “decid[ing] whether the same authority pursuant to which police officers may detain an occupant *at* the premises during the execution of a search warrant permits them to detain an occupant who *leaves* the premises during or immediately before the execution of a search warrant and is detained a few blocks away.”<sup>68</sup> In addressing an issue of first impression in the circuit,<sup>69</sup> the court considered five other circuits’ holdings in cases bearing on essentially the same issue and comprised of similar facts.<sup>70</sup> After reviewing the decisions, the court unanimously concluded that *Summers* permits officers to detain an occupant who leaves the premises, provided that the officers identify the subject “in the process of leaving the premises subject to the search” and detain the subject “as soon as practicable.”<sup>71</sup>

The Second Circuit cited several of the justifications enumerated by the Seventh, Sixth, and Fifth Circuits in favor of extending *Summers*.<sup>72</sup> These rationales, essentially the same as those offered in *Summers*, focus on police performance and safety,<sup>73</sup> as well as on the existence of an identifiable justification for the detention.<sup>74</sup> The cases that do not extend *Summers* discuss the same rationales, but emphasize that these rationales do not apply once a subject has left the premises.<sup>75</sup> The *Bailey* Court vehemently disagreed with the latter

68. *Bailey*, 652 F.3d at 204.

69. *Id.*

70. *Id.* at 204–06.

71. *Id.* at 206.

72. *Id.* at 204–05.

73. *United States v. Bullock*, 632 F.3d 1004, 1020 (7th Cir. 2011) (noting that once the defendant became aware of the warrant he “became a flight risk and a potential risk to the officers’ safety in executing the warrant given his suspected illegal association with the residence”); *United States v. Cavazos*, 288 F.3d 706, 711 (5th Cir. 2002) (observing that the defendant’s conduct “warranted the belief that [the defendant] would have fled or alerted the other occupants of the residence about the agents nearby if he were released immediately after the stop and frisk”); *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991) (“*Summers* does not impose upon police a duty based on geographic proximity (i.e., defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence.”).

74. *Bailey*, 652 F.3d at 204 (“[T]he nexus between the defendant and the residence [gives] officers an ‘easily identifiable and certain basis for determining that suspicion of criminal activity justify[es] a detention of that occupant.’” (quoting *Cavazos*, 288 F.3d at 711)).

75. *Id.* at 205 (citing *United States v. Edwards*, 103 F.3d 90, 94 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994)) (“[O]nce an occupant leaves . . . without knowledge of the warrant, *Summers* is inapplicable because he ceases to (1) be a threat to the officers’ safety, (2) be in a position to destroy evidence, or (3) be able to help facilitate the search . . .”).



set of cases, concluding “that it is the very interests at stake in *Summers* that permit detention of an occupant nearby, but outside of, the premises.”<sup>76</sup> The court noted that officers believed that drugs were being sold from the premises and that the suspected resident was armed, and therefore “it was reasonable for the officers to assume that detaining Bailey outside the house might lead to the destruction of evidence or unnecessarily risk the safety of the officers” by alerting potential occupants of an imminent search.<sup>77</sup> Furthermore, because Bailey’s ten-minute detention was not unreasonably prolonged and officers did not “exploit the detention by trying to obtain additional evidence from Bailey,” the detention did not violate his Fourth Amendment rights.<sup>78</sup>

## V. ARGUMENTS

### A. *The Government’s Arguments*

The Government’s argument rests primarily on the claim that Bailey’s detention is justified by the same rationales underlying the *Summers* rule.<sup>79</sup> It asserts that officers should be able to detain an occupant who has just left the premises because an occupant who learns of a search<sup>80</sup> might flee the jurisdiction or return to the premises to disrupt the investigation.<sup>81</sup> Detaining an occupant immediately is “far safer for officers” than letting an occupant leave and then detaining him upon his potential return.<sup>82</sup> Further, the Government suggests that the occupant’s presence will help in the “orderly completion of the search” regardless of where the occupant was originally detained.<sup>83</sup> Ultimately, the Government posits that the proper inquiry under *Summers* should be whether the detainment

---

76. *Id.*

77. *Id.* at 206.

78. *Id.* at 206–07.

79. Brief for the United States in Opposition at 8, *Bailey v. United States*, No. 11-770 (U.S. May 3, 2012) [hereinafter Brief in Opposition] (“[D]etention of an occupant of a place about to be searched . . . only marginally intrudes upon the occupant’s privacy interests, while such detention advances substantial law enforcement interests such as ‘preventing flight,’ ‘minimizing the risk of harm to the officers,’ and ‘orderly completion of the search.’” (quoting *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981))).

80. *Id.* at 11 (“[A]nyone on the premises or nearby could readily alert a departing occupant to the search by placing a call to his cell phone or sending him a text message.”).

81. *Id.* at 9.

82. *See id.* at 11 (finding that the occupant may return to obstruct the search, possibly armed and with the assistance of others).

83. *See id.* at 9 (“[T]he occupant can assist in opening any locked doors or containers.”).

occurred “as soon as practicable.”<sup>84</sup> In support of its position, the Government points out that *Summers* itself noted that “the fact that respondent was leaving his house when the officers arrived” was not constitutionally significant.<sup>85</sup>

### B. *Bailey’s Arguments*

Bailey makes four distinct arguments in support of his plea for relief. First, the officers’ actions do not fall within the narrow exception to the probable cause requirement set out in *Summers*.<sup>86</sup> Second, the rationales that support *Summers* are not applicable once the occupant leaves the premises.<sup>87</sup> Third, the detention of a departed occupant is more intrusive and poses a greater risk of abuse than the form of detention seen in *Summers*.<sup>88</sup> Finally, the expansion of *Summers* would not be consistent with the Fourth Amendment and existing case law.<sup>89</sup>

#### 1. Bailey’s Detention Falls Outside the Scope of the *Summers* Rule

Bailey asserts that *Summers* announced a categorical rule that permits the detainment of those who “presently occupy[] the premises” but does not permit detainment of “persons who have formerly occupied [the premises] and since departed.”<sup>90</sup> Bailey posits that in the Court’s previous invocations of *Summers*, its analysis affirmed the proposition that the *Summers* exception governs only detentions that occur at the premises to be searched.<sup>91</sup> Further, Bailey dismisses the fact that, in *Summers*, the individual was seized on the front steps of the home, rather than inside, as insignificant to the decision.<sup>92</sup> Proceeding on the aforementioned analysis, Bailey emphasizes that the detention in the case at hand “differs in kind

84. *Id.* at 9–10 (quoting *Summers*, 452 U.S. at 702 n.16).

85. *Id.*

86. Brief for the Petitioner at 9, *Bailey v. United States*, No. 11-770 (U.S. Oct. 15, 2012).

87. *Id.* at 21.

88. *Id.* at 31, 33–34.

89. *Id.* at 37.

90. *Id.* at 18–19 (citing Amir Hatem Ali, Note, *Following the Bright Line of Michigan v. Summers: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules*, HARV. C.R.–C.L. L. REV. 483, 500 (2010)).

91. *Id.* at 19 (citing *Muehler v. Mena*, 544 U.S. 93, 98 (2005); *Wilson v. Layne*, 526 U.S. 603, 611 (1999); *Kolendar v. Lawson*, 461 U.S. 352, 364 n.2 (1983) (Brennan, J., concurring)).

92. See *id.* at 20 (“[The Court] appears to have applied the principle of *de minimis non curat lex*, concluding that the rationales supporting a detention when it occurs entirely inside the premises operated with similar force when the initial seizure occurs on the doorstep.”).

from the detention in *Summers*” for two reasons: the geographic proximity of the detainment to the residence and the greater indignity of Bailey’s more public initial detainment.<sup>93</sup> Thus, Bailey concludes that the detention is not justifiable under *Summers* and that the circuit court erred in expanding the *Summers* rule.<sup>94</sup>

## 2. The Rationales that Support *Summers* Do Not Support Extending the Rule to This Factual Scenario

Upon concluding that Bailey’s detention was not permitted under a facial reading of *Summers*, Bailey argues that none of the rationales undergirding *Summers* support extending the rule to allow “the detention of a former occupant who leaves the immediate vicinity of the premises to be searched.”<sup>95</sup> Bailey notes that although three of the rationales cited by the *Summers* Court—minimizing the risk of harm to officers, facilitating the orderly completion of the search, and preventing flight in the event that incriminating evidence is found—may seem to be applicable to the case at hand, the need to bolster these objectives is not so acute, in the present context, as to override Fourth Amendment protections.<sup>96</sup> Bailey addresses each rationale in turn.

Bailey begins by offering several reasons why an occupant who has left the premises poses a minimal safety risk. First, an individual that is not physically present poses no immediate threat of violence.<sup>97</sup> Second, because police will not want to disclose their presence prior to executing a search warrant, an occupant will typically have no reason to believe a search is imminent and therefore have no reason to communicate with other potential occupants that may subsequently threaten officers’ safety.<sup>98</sup>

Bailey dismisses the Government’s argument that an occupant that leaves the scene may be alerted to the search by cell phone and then could “suddenly return—possibly armed and with the assistance of others—to obstruct the search.”<sup>99</sup> Bailey argues that the use of SWAT teams and other precautions when serving high-risk warrants

---

93. *Id.* at 20–21. Bailey also notes that the officers potentially manipulated the timing of the search to justify the detention. *Id.*

94. *Id.* at 21.

95. *Id.*

96. *Id.* at 16–17.

97. *Id.* at 22.

98. *Id.* at 22–23.

99. *Id.* at 23 (citing Brief in Opposition, *supra* note 79, at 11–12).

makes it unlikely that the occupant will return to disrupt the search.<sup>100</sup> Furthermore, Bailey suggests that accepting the Government's argument would justify the detention of anyone associated with the premises, regardless of their location, because they may be alerted and return to disrupt the search as easily as an occupant that has just left the residence.<sup>101</sup> Bailey also argues that allowing officers to conduct detentions away from the residence presents risks comparable to those involved in the execution of a search warrant, thus offering no additional safety incentive.<sup>102</sup>

Finally, Bailey addresses the arresting officers' and circuit court's concern that "conducting the detention right outside would have alerted others who may still have been inside . . . potentially compromising the safety of the searching officers."<sup>103</sup> The weakness in this argument, Bailey asserts, is that it fails to consider that a detention need not take place.<sup>104</sup> Rather, the individual may be allowed to leave the premises, thus preserving the officers' safety.<sup>105</sup>

Bailey goes on to argue that detaining an individual away from the premises does not help facilitate the orderly completion of the search. He notes that as a matter of common sense, an individual who is not present cannot interfere with the execution of a search.<sup>106</sup> Bailey also argues that detaining an occupant away from the scene and returning him to the residence detracts from the search because it diverts human resources, crowds the site of the search, and potentially creates a distraction.<sup>107</sup> Bailey dismisses as insignificant the Government's argument that a returning individual may facilitate the search by opening locked doors or containers: such assistance is not always needed and cannot be compelled.<sup>108</sup>

Moreover, Bailey states that preventing flight is not a valid rationale for permitting detainment because an individual who is not present will ordinarily be unaware of an imminent search and thus

---

100. *Id.* at 24 (citing Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 270 (1984)).

101. *Id.* at 25.

102. *Id.* at 26.

103. *Id.*

104. *Id.* at 27.

105. *Id.*

106. *Id.* at 28.

107. *Id.*

108. *Id.*

have no reason to flee.<sup>109</sup> Bailey goes on to address the Government's argument that detainment is justified because a third party could alert the occupant who has left the residence, prompting an occupant to flee.<sup>110</sup> He claims that this argument could be used to justify the detention of anyone associated with the premises, regardless of his location, because the incentive to flee would be identical regardless of his proximity to the premises.<sup>111</sup> Bailey also points out that officers have alternative means of preventing flight or locating a suspect in the event of flight that mitigate the Government's prevention of flight concerns.<sup>112</sup>

### 3. The Detention of an Occupant Who Has Left the Premises Is More Intrusive and More Prone to Abuse

Bailey states that a detainment away from the immediate vicinity of the residence "produce[s] all the indignity of an arrest in full view of the public."<sup>113</sup> This additional indignity is caused by a prolonged public detainment that involves being placed in handcuffs and being transported in a police car.<sup>114</sup> Moreover, Bailey states that because a detention away from the residence must be conducted by a team of officers, separate from the team preoccupied with conducting the search, there is greater opportunity for the detaining officers to conduct questioning that would not ordinarily be permissible without individualized suspicion.<sup>115</sup> This allegedly creates a perverse incentive for officers to detain individuals outside the premises in order to facilitate otherwise impermissible questioning.<sup>116</sup>

---

109. *Id.* at 29.

110. *Id.*

111. *Id.* at 30.

112. *See id.* ("Officers can follow an individual who has left the scene and then detain him in the event that incriminating evidence is [found] . . . [T]hey can readily gather identifying information that will help track down the individual.")

113. *Id.* at 32 (citing *Commonwealth v. Charros*, 824 N.E.2d 809, 816 (Mass. 2005), *cert. denied*, 546 U.S. 870 (2005)).

114. *Id.*

115. *See id.* at 33–34 (noting that in a detainment in or around the immediate vicinity of the residence, the officers "will likely be too preoccupied with effectuating the search to take unfair advantage of the individual").

116. *Id.* at 34.

#### 4. Extending *Summers* Would Be Inconsistent with the Text of the Fourth Amendment and the Supreme Court's Relevant Jurisprudence

Bailey asserts that extending *Summers* is incongruent with other Fourth Amendment categorical rules.<sup>117</sup> Rules governing searches incident to arrests, which Bailey equates to seizures incident to searches, typically come with spatial and temporal limitations.<sup>118</sup> Bailey suggests that the proper reading of *Summers* contains just such a spatial limitation and that to disregard any of the typical limiting principles of Fourth Amendment jurisprudence would be inconsistent with the Court's rulemaking in other cases.<sup>119</sup>

Finally, Bailey argues that any extension of *Summers* is inconsistent with an originalist interpretation of the Fourth Amendment.<sup>120</sup> After briefly examining the motivations behind the Fourth Amendment,<sup>121</sup> Bailey concludes that extending *Summers* would "create a freestanding right to seize persons" that falls outside the original intent of the Framers to limit seizures to cases with probable cause.<sup>122</sup>

### VI. ANALYSIS AND DISPOSITION

In announcing the *Summers* categorical rule 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,"<sup>123</sup> the Supreme Court failed to specify explicitly whether the rule carried with it any geographical restrictions. As a result, what should have been a bright-line rule<sup>124</sup> contained sufficient elasticity to be extended in a manner inconsistent with its underlying rationales, and consequently, with its Fourth

117. *Id.* at 36.

118. *Id.* (citing Wayne R. LaFave, *Being Frank About the Fourth*, 85 MICH. L. REV. 427, 455, 457 (1986)).

119. *Id.* at 36–37 (citing *Maryland v. Buie*, 494 U.S. 325 (1990); *Chimel v. California*, 395 U.S. 752 (1969)).

120. *Id.* at 37.

121. *See id.* (noting that the Fourth Amendment was adopted largely because of the Framers' dislike of the use of general warrants (citing *Chimel*, 395 U.S. at 761; *Henry v. United States*, 361 U.S. 98, 100–01 (1959))).

122. *Id.* at 37–39.

123. *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

124. *See generally* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) (describing *Summers* as a bright-line rule).

Amendment restraints.<sup>125</sup>

The Court in *Bailey* will likely put articulable limits on officer discretion in applying *Summers*, much like it did in *Arizona v. Gant*, in order to avoid regular constitutional violations.<sup>126</sup> In reaching a conclusion, the Court will likely consider two primary questions: did the officers' conduct result in an intrusion equivalent to an arrest, and if not, was the conduct reasonable in light of the conflicting interests at stake?

First, the Court will likely hold that the officers' conduct did not result in an intrusion equivalent to an arrest. The factual circumstances of Bailey's detainment differ from the detention in *Summers*; Bailey was handcuffed and driven a short distance back to his residence in a police car while Summers was detained just outside of his home. While being handcuffed and escorted in a police car are certainly indicia of a typical arrest, the *Summers* Court accorded low weight to the public nature of that detainment,<sup>127</sup> suggesting that it is unlikely that the Court will view the public stigma associated with a short ride in a police car as raising the level of intrusion to the point at which probable cause is required.<sup>128</sup>

Second, the Court will likely engage in a "reasonableness" balancing test to determine whether an extension of the *Summers* rule would be constitutionally permissible.<sup>129</sup> After weighing the relevant factors, the Court will likely decline to extend the *Summers* rule and instead implement a geographic-proximity limiting principle similar

---

125. Amir Hatem Ali, Note, *Following the Bright Line of Michigan v. Summers: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules*, 45 HARV. C.R.-C.L. L. REV. 483, 512 (2010) ("When courts do not strictly adhere to the policies underlying the bright-line rule that they apply, they risk extending that rule beyond its rationale, and, in the Fourth Amendment context, beyond constitutionality.").

126. *Arizona v. Gant*, 556 U.S. 332, 344–48 (2009) (holding that a supposed bright-line rule permitting searches of vehicles upon custodial arrests was being interpreted and applied in a way that resulted in regular constitutional violations).

127. *Summers*, 452 U.S. at 702 n.16 ("We do not view the fact that [the defendant] was leaving his house when the officers arrived to be of constitutional significance. The seizure of [the defendant] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside.").

128. *But see* *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994) (noting, while discussing *Summers*, that "[b]ecause Sherrill had already exited the premises, the intrusiveness of the officers' stop and detention on the street was much greater").

129. *See* *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("[T]here is no ready test for determining reasonableness other than balancing the need to search (or seize) against the invasion which the search (or seizure) entails." (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967)) (internal quotation marks omitted)).

to the “within reaching distance” standard announced in *Gant*.<sup>130</sup> The *Summers* Court noted that a detention incident to a search warrant is a “significant restraint on . . . liberty.”<sup>131</sup> Consequently, the Court is unlikely to impose such a restraint without the full force of law enforcement interests counterbalancing the restraint on liberty.

Thus, the factor that lends greatest support to the aforementioned outcome is that the “law enforcement interests” presented in support of the holding in *Summers* dissipate when the occupant is no longer on the premises.<sup>132</sup> The Court agreed with an almost identical argument in *Gant*, refusing to find that a suspect poses a danger to officers when the suspect is not within reaching distance of his vehicle.<sup>133</sup> The logic of the *Gant* Court can be summarized as the common-sense notion that an individual, who, due to his physical location, is incapable of harming officers, poses little risk. In translating that logic to the case at hand, the Court will surely note that there is a difference in the risk posed by a suspect in police custody who is out of reach of any dangerous items, as in *Gant*, and an occupant of the premises to be searched who has left the area. Nevertheless, the Court is also likely to observe that the distinction in the respective risk to officers only materializes in the event that the occupant returns to the premises during the course of the search—an unlikely assumption. Moreover, the risk posed by an occupant who is not present during a search is decidedly lower than even the risk posed by a detained suspect. Thus, because the Supreme Court was persuaded that the lack of physical proximity limits the risk of officer harm in an analogous case,<sup>134</sup> the Court is unlikely to sacrifice Fourth Amendment protections as a result of the relatively minor differences between two similarly situated groups: suspects who pose minimal danger because of their distance from potentially dangerous objects, and occupants who pose minimal danger because of their distance

130. *Gant*, 556 U.S. at 351.

131. *Summers*, 452 U.S. at 701 (“The detention of one of the residents while the premises were searched [was] admittedly a significant restraint on his liberty . . .”).

132. See *Sherrill*, 27 F.3d at 346 (“[W]hen the officers stopped Sherrill, the officers had no interest in preventing flight or minimizing the search’s risk because Sherrill had left the area of the search and was unaware of the warrant. Thus, we decline the Government’s invitation to extend *Summers* to the circumstances of this case.” (citation omitted)).

133. *Gant*, 556 U.S. at 351.

134. *Id.* at 347 (declining to extend *New York v. Belton*, 453 U.S. 454 (1981), because the Court was “unpersuaded by the State’s arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals’ privacy”).



from the premises.

In implementing a limit on officer discretion, the Court will likely utilize a geographic-proximity restriction, similar to that seen in *Gant*, that stems from the same principles elucidated by Eighth and Tenth Circuit decisions.<sup>135</sup> While the circuit court in *Bailey* stated that imposing bright-line geographic restrictions on the *Summers* rule would present officers with a Hobson's choice,<sup>136</sup> the Supreme Court is likely to disagree with that assessment.<sup>137</sup> It would be hyperbolic to characterize officers' options as a binary choice between detaining the occupant as he leaves the premises or losing the occupant forever.<sup>138</sup> More likely, the Court will apply a spatial restriction in order to protect personal liberty interests while imposing only an inconvenience to law enforcement officials.<sup>139</sup>

---

135. See *Sherrill*, 27 F.3d at 346 (declining to apply *Summers* because “the officers had no interest in preventing flight or minimizing the search’s risk because Sherrill had left the area of the search”); see also *United States v. Edwards*, 103 F.3d 90, 93–94 (10th Cir. 1996) (explaining that because the defendant was not present at the location of the search, the rationales underlying *Summers* did not justify the detention).

136. *United States v. Bailey*, 652 F.3d 197, 205–06 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 2710 (U.S. June 4, 2012) (No. 11-770) (noting that extending *Summers* would leave officers with the choice of either immediately detaining an occupant observed leaving the premises or permitting the occupant to leave).

137. See *Thornton v. United States*, 541 U.S. 615, 627 (Scalia, J., concurring) (“The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government’s right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful.”).

138. See *United States v. Edwards*, 103 F.3d at 93–94 (noting that the police’s interest in preventing flight was reduced because “Edwards did not know that any warrant was being executed. He thus had no reason to flee. The police knew the address of Edwards’s . . . residence, and had no reason to believe that he would not return to it . . .”).

139. See *Gant*, 556 U.S. at 347 (“Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis.”).