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Constitutional Law—Fourth Amendment—Warrantless Key-Test Searches in Residential Door Locks

Jacob Hill

CONSTITUTIONAL LAW—FOURTH AMENDMENT—WARRANTLESS KEY-TEST SEARCHES IN RESIDENTIAL DOOR LOCKS

I. INTRODUCTION

The Supreme Court of the United States has stated that warrantless searches and seizures of the home are presumptively unreasonable—"subject only to a few specifically established and well-delineated exceptions."[1] But how should a court apply this principle when law enforcement officers have keys to the front door? Do any of the exceptions to the Fourth Amendment's warrant requirement allow officers to seize an arrestee's keys and unlock his front door?

Consider the following real-world example: Federal law enforcement agents arrive at a multi-family residential building with an arrest warrant for a suspected drug trafficker.[2] The agents obtained the warrant after an extensive investigation, including controlled drug buys where a cooperating witness purchased drugs from the suspected drug trafficker.[3] The federal agents see the suspect walk out of the building and immediately place him under arrest in the parking lot.[4] Incident to the suspect's arrest, the police search the suspect, discovering a set of keys in his pocket.[5] At this point, the federal agents do not know which, if any, of the building's condominiums the suspect lives.[6] To determine the suspect's residence, the federal agents insert the keys taken from the suspect in three of the four condominium doors.[7] One of the suspect's keys fit the door to a condominium on the second floor of the building.[8] The police then enter the unit and conduct a "protective sweep."[9] No one else is inside the residence at the time, but while inside, the

1. Katz v. United States, 389 U.S. 347, 357 (1967).
2. United States v. Bain, 874 F.3d 1, 9–10 (1st Cir. 2017).
3. *Id.*
4. *Id.* at 10.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Bain,* 874 F.3d at 10.
9. *Id*.

agents find items belonging to the suspect.[10] Only then do the police obtain a search warrant for the apartment, resulting in the suspect being convicted.[11]

The suspect in this example is Yrvens Bain, who challenged his conviction in the First Circuit on the grounds that law enforcement violated his Fourth Amendment protections against unreasonable searches by testing his keys in the apartment door.[12] The condominium belonged to Bain's girlfriend, but the First Circuit held that he had standing to assert the claim.[13] The court stated that this key-test was an unreasonable search under the Fourth Amendment but nevertheless upheld his conviction.[14] In holding that an unreasonable search had occurred, the First Circuit created a circuit split over the reasonableness of a warrantless key-test search.[15]

The Fourth Amendment to the Constitution guarantees an individual's right to be free from unreasonable searches and seizures.[16] The Fourth Amendment provides in part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[17] Furthermore, the Supreme Court has stated that when it comes to the protections provided by the Fourth Amendment, the "home is first among equals,"[18] and "[a]t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[19] Despite this seemingly simple directive, lower courts are divided on how to apply the Fourth Amendment when law enforcement officers conduct a warrantless search of a residential door lock with keys found on individuals in police custody.[20]

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10. The federal agents conducting the protective sweep found a parking ticket issued to the suspect and a safe in the same room. *Id.* In the subsequent search warrant application, the agent stated that, in his experience, it was reasonable to expect that the suspect kept drugs, cash, and tools of crime in the place where he resided. *Id.*

11. *Id.* at 10–11. During the execution of the search warrant, the agents found several cards with the suspect's name on them, drugs, a credit-card making machine, and $7,000 in cash, including marked bills from the controlled buys. *Id.* at 11.

12. *Id.*

13. *Id.* at 13–14.

14. *Bain*, 874 F.3d at 19, 33.

15. *Compare id.* at 19 (holding that an unreasonable search occurs when law enforcement officers use keys taken off an arrestee in residential door locks of a multi-unit residential building), *with* United States v. Concepcion, 942 F.2d 1170, 1173 (7th Cir. 1991) (holding that inserting a key into an apartment door was a search, but not an unreasonable one), *and* United States v. Moses, 540 F.3d 263, 272 (4th Cir. 2008) (holding that the discrete act of inserting the key into the door lock and discovering whether or not it fit did not offend the Fourth Amendment).

16. U.S. CONST. amend. IV.

17. *Id.*

18. Florida v. Jardines, 569 U.S. 1, 6 (2013).

19. Silverman v. United States, 365 U.S. 505, 511 (1961).

20. *See* sources cited *supra* note 15.

This Note argues that an unreasonable search occurs when a government actor tests keys taken off an arrestee in a residential door lock to determine the arrestee's residence. Specifically, a residential door lock is entitled to Fourth Amendment protection, and the Fourth Amendment is violated when law enforcement inserts an arrestee's keys into the arrestee's front door, absent an exception to the warrant requirement. Part II of this Note explains how to determine when an unreasonable search occurs[21] and discusses some exceptions to the Fourth Amendment's warrant requirement.[22] Part III of the Note illustrates the circuit split regarding key-tests by law enforcement.[23] Part IV argues that warrantless residential key-tests by law enforcement violate the Fourth Amendment's protections and offers a resolution to the circuit split by adopting a rule prohibiting these unreasonable searches.[24]

II. THE FOURTH AMENDMENT

An individual's privacy rights are most fundamentally protected from government intrusion by the Fourth Amendment of the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[25]

This section explains how the Supreme Court has interpreted the amendment, including the relevant terms and phrases contained therein, to understand the amendment in its entirety. First, this section discusses what constitutes an unreasonable search.[26] Next, this section examines the various exceptions to the warrant requirement.[27]

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21. *See infra* Part II.A.
22. *See infra* Part II.B.
23. *See infra* Part III.
24. *See infra* Part IV.
25. U.S. CONST. amend. IV; *see also* Conan Becknell, Note, *Online Schools During a Pandemic: Fourth Amendment Implications When the State Requires Your Child to Turn on the Camera and Microphone Inside Your Home*, 44 U. ARK. LITTLE ROCK L. REV. 161, 164 (2021).
26. *See infra* Part II.A.
27. *See infra* Part II.B.

A. Unreasonable Searches Under the Fourth Amendment

The Fourth Amendment protects the right to be free from "unreasonable searches and seizures."[28] The text of the amendment suggests that not all police activity will trigger the protections therein.[29] Specifically, the Fourth Amendment is not implicated until actions taken by police amount to an *unreasonable* search or seizure.[30] To that end, the Supreme Court has used the reasonable expectation of privacy test,[31] the common law trespass test,[32] and the *Kyllo* sense-enhancing technology test[33] to determine whether actions taken by law enforcement are a search under the Fourth Amendment. A court will scrutinize an alleged unreasonable search by applying one or more of the tests depending on how the search was conducted, where the search occurred, and what the search revealed. Next, the following section discusses each test along with its application.

1. Reasonable Expectation of Privacy Test

First, under the reasonable expectation of privacy test, a search occurs whenever the government intrudes on a place where someone has a "reasonable expectation of privacy."[34] In *Katz v. United States*, the petitioner, Charles Katz, was charged with placing wagers over the telephone in violation of federal gambling laws.[35] At Katz's trial, the prosecution was permitted to introduce evidence of Katz's telephone conversation that FBI agents captured by placing an electronic listening and recording device on the outside of the telephone booth.[36] Katz and the prosecutors argued over whether the telephone booth was a "constitutionally protected area."[37] The Court, however, held that the Fourth Amendment "protects people, not places."[38] The Court focused its attention on the private nature of the phone call stating that the electronic eavesdropping "violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a

28. U.S. CONST. amend. IV; *see also* United States v. Jones, 565 U.S. 400, 419 (2012) (Alito J., concurring) (establishing that a seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property" (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984))).

29. *See* U.S. CONST. amend. IV.

30. *Id.*

31. Katz v. United States, 389 U.S. 347, 360 (1967).

32. Florida v. Jardines, 569 U.S. 1, 5 (2013); *Jones*, 565 U.S. at 406 n.3.

33. Kyllo v. United States, 533 U.S. 27, 34–35 (2001).

34. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

35. *Id.* at 348.

36. *Id.*

37. *Id.* at 351.

38. *Id.*

'search and seizure' within the meaning of the Fourth Amendment."[39] In Justice Harlan's concurring opinion, he characterized the rule as having a "two-fold requirement."[40] The first part requires that "a person have exhibited an actual (subjective) expectation of privacy."[41] The second requirement is "that the expectation be one that society is prepared to recognize as 'reasonable.'"[42]

2. Physical Trespass Test

The second test used by the Supreme Court to determine whether a search has occurred is the physical trespass test.[43] Before the Supreme Court decided *Katz*, it held that a Fourth Amendment search occurred when the government trespassed onto private property.[44] In *Olmstead v. United States*, the Court defined trespass as a "physical invasion" of someone's house or curtilage for the purpose of making a seizure.[45]

The *Katz* majority distanced itself from the property-centric view of defining a search under the Fourth Amendment, writing that the "premise that property interests control the right of the government to search and seize has been discredited."[46] However, four decades after the *Katz* decision the Court resolved the property-versus-privacy ambiguity.[47] Justice Scalia's majority opinion in *United States v. Jones* emphasized that the *Katz* reasonable expectation of privacy test added to, rather than replaced, the common law trespass test.[48] The *Jones* opinion explains that:

> Jones's Fourth Amendment rights do not rise or fall with the Katz [reasonable expectation of privacy] formulation. . . . [F]or most of our history the Fourth Amendment was understood to embody a particular con-

39. *Id.* at 353.

40. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see also* Becknell, *supra* note 25, at 165–66.

41. *Id.*; *see also* Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 922 (1997) ("The accused must establish an actual subjective expectation of privacy in the area invaded by the government action notwithstanding how reasonable or unreasonable an expectation would be. For example, a person would certainly have an expectation of privacy in a purse. However, recognizing that a purse establishes a reasonable expectation of privacy does not automatically vest that expectation in everyone.").

42. Jones, *supra* note 41, at 922.

43. Florida v. Jardines, 569 U.S. 1, 5 (2013); United States v. Jones, 565 U.S. 400, 406 n.3 (2012).

44. Olmstead v. United States, 277 U.S. 438, 466 (1928).

45. *Id.*

46. Katz v. United States, 389 U.S. at 353 (1967) (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967) (alteration in original)).

47. *See Jones*, 565 U.S. at 409.

48. *Id.*

> cern for government trespass upon the areas . . . it enumerates. Katz did not repudiate that understanding . . . Katz . . . established that "property rights are not the sole measure of Fourth Amendment violations," but did not "snuf[f] out the previously recognized protection for property."[49]

Following *Jones*, a search occurs when the government physically occupies private property for the purpose of obtaining information.[50] Shortly after that decision, in *Florida v. Jardines*, the Court found that police had engaged in a "search" when police took a drug-sniffing dog onto the defendant's front porch and the dog gave a positive alert.[51] In reaching its decision that a search occurred, the Court stated that "the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."[52] Notably, the search in *Jardines* occurred within the curtilage of the home.[53]

A home's curtilage—the area immediately surrounding one's home—is so intimately connected to the home itself that it is granted Fourth Amendment protections.[54] The Supreme Court has identified four factors, known as the *Dunn* curtilage factors, relevant to determining whether an area is curtilage.[55] The Court in *Jardines* treated unlicensed intrusions into a home's curtilage as if they were intrusions into the home itself.[56] The Supreme Court explained that whether police officers' conduct in the curtilage is permissible depends on whether the officers were acting within the implied license to enter that space.[57]

Following from this, under *Jardines*, a physical intrusion into a protected area constitutes a search where the intrusion is not permitted by a license.[58] The Court instructed that the cultural norms of a country will by implication dictate the existence and the terms of such an implied license.[59]

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49. *Id.* at 406–07 (quoting Soldal v. Cook Cnty., 506 U.S. 56, 64 (1992)).
50. *Id*. at 404–05.
51. Florida v. Jardines, 569 U.S. 1, 11–12 (2013).
52. *Id.* at 11.
53. *Id.* at 5–6.
54. United States v. Dunn, 480 U.S. 294, 301 (1987). The Supreme Court has yet to consider the extent the concept of curtilage exists outside the context of single-family dwellings. *See generally* Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 HOUS. L. REV. 1289 (2015).
55. *Dunn*, 480 U.S. at 301.
56. *Jardines*, 569 U.S. at 6.
57. *Id.* at 8.
58. *See id.* (illustrating that law enforcement does not have to shield their eyes when passing a home on a public thoroughfare, but the officer's information gathering authority is circumscribed when entering a constitutionally protected area); United States v. Bain, 874 F.3d 1, 12 (1st Cir. 2017).
59. McKee v. Gratz, 260 U.S. 127, 136 (1922) ("A license may be implied from the habits of the country.").

For example, a front door knocker invites visitors to approach the home, knock, wait briefly, and if no one answers, leave.[60] Therefore, if police do not have a warrant, they may approach a home and knock because that is "no more than any private citizen might do."[61] The act of hanging a door knocker does not grant permission to law enforcement to go beyond the customary invitation in hopes of discovering incriminating evidence.[62]

3. Kyllo Sense-Enhancing Technology Test

Third, a search can also occur when the government uses "sense-enhancing technology" that is "not in general public use" to gather information about "the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area.'"[63] In *Kyllo v. United States*, law enforcement officers suspected that Danny Kyllo was growing marijuana inside his home.[64] High-intensity lamps are required to grow marijuana indoors, so agents with the Department of Interior used a thermal imager to scan Kyllo's home in anticipation of detecting such lamps.[65] The agents, who were parked across the street, noticed that Kyllo's home was relatively hot compared to that of the neighbors.[66]

Using this information, along with utility bills and tips from informants, law enforcement secured a warrant, searched Kyllo's home, and found over one hundred marijuana plants.[67] Consequently, Danny Kyllo was indicted for manufacturing marijuana.[68] Kyllo subsequently challenged the constitutionality of the thermal scan.[69] The Court held that using sense-enhancing technology that is not in general public use to retrieve information regarding the interior of the home, that could not have otherwise been obtained without physical intrusion, constitutes a search.[70] Applying

60. *Jardines*, 569 U.S. at 8.

61. *Id.* (quoting Kentucky v. King, 563 U.S. 452, 469 (2011)).

62. *Id.* The police in *Jardines* brought a trained police dog to investigate around the home in hopes of discovering evidence that the homeowner was growing marijuana on the property. *Id.* at 3–4. The Court went on to note that a stranger simply knocking on the door is routine, but someone marching a bloodhound around would startle the average person. *Id.* at 8–9.

63. Kyllo v. United States, 533 U.S. 27, 34 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)); *see also* Becknell, *supra* note 25, at 166–67.

64. *Kyllo*, 533 U.S. at 29.

65. *Id.*

66. *Id.* at 30.

67. *Id.*; *see also* Becknell, *supra* note 25, at 166–67.

68. *Kyllo*, 533 U.S. at 30.

69. *Id.* at 30–31.

70. *Id.* at 40; *see also* Becknell, *supra* note 25, at 166–67; *see also* Adam W. Brill, *Kyllo v. United States: Is the Court's Bright-Line Rule on Thermal Imaging Written in Disappear-*

this holding to the traditional sanctity of the home, the Court further held that this kind of search was presumptively unreasonable.[71]

B. The Warrant Requirement and Its Exceptions

The Fourth Amendment only prohibits "unreasonable searches."[72] After a court finds that a search has occurred, it must determine whether that search was unreasonable.[73] Specifically, a warrantless search is presumptively unreasonable.[74] Nevertheless, this presumption of unreasonableness is surmountable.[75]

First, this section will briefly discuss the warrant requirement of the Fourth Amendment.[76] Next, this section describes the relevant exceptions to the warrant requirement that arise before,[77] during,[78] and after an arrest.[79]

1. The Warrant Requirement

The Fourth Amendment provides, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[80] The Supreme Court has stated that probable cause exists when "the facts and circumstances before the officer are such to warrant a man of prudence and caution in believing that the offence has been committed."[81] Furthermore, by definition a "search warrant" means a judicial warrant issued by a common law judge.[82]

The requirement that a warrant only be issued by a magistrate judge is essential as the magistrate is theoretically neutral to the outcome of the case—his or her only duty is to uphold the requirements of the Fourth

ing Ink?, 56 ARK. L. REV. 431, 453–54 (2003) (arguing that *Kyllo*'s holding may be illusory as it relies on the courts to define and redefine sense-enhancing devices and what is considered general public use).

71. *Kyllo*, 533 U.S. at 40.
72. U.S. CONST. amend. IV.
73. United States v. Bain, 874 F.3d 1, 16 (1st Cir, 2017).
74. *See* Arizona v. Hicks, 480 U.S. 321, 326–27 (1987).
75. *King*, 563 U.S. at 459 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).
76. *See infra* Part II.B.1.
77. *See infra* Part II.B.2.
78. *Id.*
79. *Id.*
80. U.S. CONST. amend. IV; *see also* Becknell, *supra* note 25, at 168–69.
81. Stacey v. Emery, 97 U.S. 642, 645 (1878).
82. *Search Warrant*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* Johnson v. United States, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.").

Amendment.[83] To that end, the Supreme Court has stated that the enterprise of law enforcement is competitive, and an officer "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home."[84] Hence, the neutral magistrate serves as a checkpoint between the government and the individual.[85]

2. Exigent Circumstances

Although warrantless searches are presumptively unreasonable, there are exceptions to the Fourth Amendment's warrant requirement. One of the exceptions to the Fourth Amendment's Warrant Clause is the doctrine of exigent circumstances.[86] This doctrine is rooted in the premise that when there is an emergency it is "unrealistic to obtain a warrant under the circumstances."[87] Three common exigent circumstances scenarios are hot pursuit, destruction of evidence, and protection of the police or public.[88] The first, hot pursuit, occurs when police are chasing a "fleeing suspect."[89] The second exigent circumstances scenario requires that law enforcement be in a situation to either act "now or never" to prevent the destruction of evidence.[90] The last common exigent circumstance scenario permits officers to enter a home when they have a reasonable basis for believing a person is seriously injured or imminently threatened with a serious injury.[91]

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83. *See Johnson*, 333 U.S. at 14.

84. Steagald v. United States, 451 U.S. 204, 212 (1981) (citing McDonald v. United States, 335 U.S. 451, 455–56 (1948)).

85. *Id.*

86. *Id.* at 211–12.

87. Becknell, *supra* note 25, at 174.

88. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990) ("The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that 'a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.'") (citations omitted); *see also* Vale v. Louisiana, 399 U.S. 30, 35 (1970) (citing Warden v. Hayden, 387 U.S. 294, 298–99 (1967)).

89. *See* Kentucky v. King, 563 U.S. 452, 460 (2011) ("Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect."); *Hayden*, 387 U.S. at 298 ("The police were informed that an armed robbery had taken place, and that the suspect had entered [the home] less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them.").

90. Roaden v. Kentucky, 413 U.S. 496, 505 (1973); *see also* United States v. Moses, 540 F.3d 263, 271 (4th Cir. 2008).

91. *See* Brigham City v. Stuart, 547 U.S. 398, 403–07 (2006). Police officers observed, through a window, a fight occurring in the kitchen of a home. *Id.* at 401. They entered the

3. Search Incident to Arrest

Police may conduct a warrantless search of a person and areas within his immediate control incident to a lawful arrest.[92] This type of search is justified to prevent the arrestee from gaining access to a weapon or destroying evidence.[93] There is, however, no comparable justification for law enforcement officers to extend their search into areas outside the immediate control of the arrestee, such as other rooms of the house.[94] For example, in *Chimel v. California*, the Court indicated that searching an entire house is no more "reasonable" than if the arrestee was arrested in the front yard or down the street.[95]

4. Search and Exploration After Arrest

Chimel v. California does not entirely bar law enforcement from ever searching beyond an arrestee's area of immediate control.[96] In *Maryland v. Buie*, the Supreme Court held that in some circumstances, law enforcement may conduct "protective sweeps" to root out safety threats in the house.[97] While balancing an individual's Fourth Amendment interests against the legitimate law enforcement interests of the government, *Buie* rejected a probable cause requirement and instead adopted a lesser reasonable suspicion standard.[98] The *Buie* Court explained that to justify a protective sweep, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[99]

III. CIRCUIT SPLIT REGARDING KEY-TEST SEARCHES

This section details the current circuit split on whether an unreasonable search occurs when law enforcement test keys taken off an arrestee in a res-

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home to break up the fracas. *Id.* The Supreme Court of the United States held that the officers' actions were "plainly reasonable." *Id.* at 406–07; *see also* Becknell, *supra* note 25, 174.

92. Chimel v. California, 395 U.S. 752, 763 (1969).

93. *Id.*

94. *Id.*

95. *Id.* at 765. After Chimel was arrested in his living room, the arresting officers searched the entire house looking for evidence of the charged crime. *Id.* at 753–54.

96. *See* Maryland v. Buie, 494 U.S. 325, 327–28 (1990).

97. *Id.*

98. *Id.* at 334; *see also infra* Part IV.D (discussing the balancing of the legitimate law enforcement interests).

99. *Id.*

idential door lock.[100] One side of the split has held that residential door locks are in the home's curtilage, if not in the home itself, and, therefore, are protected from unreasonable searches by law enforcement.[101] The other side of the circuit split has held that key-tests are searches but are so minimally intrusive that they are not unreasonable searches.[102]

A. The Circuit Holding Key-Tests Violate the Fourth Amendment

In 2017, the First Circuit held that an unreasonable search occurs when police test an arrestee's keys in a residential door lock to establish the arrestee's residence.[103] Yrvens Bain was arrested outside of his apartment building for drug-related offenses.[104] The arresting officers conducted a search incident to arrest of Bain's person and seized a set of keys.[105] The officers then tested those keys in three of the four apartment doors in the building.[106] The keys fit the third unit located on the second floor of the building.[107] The officers entered the apartment and conducted a protective sweep.[108] Inside the apartment, the officers found a parking ticket with Bain's name on it.[109] Only after did the officers obtain a search warrant for the apartment.[110] Bain filed a motion to suppress the evidence found during the protective sweep and the subsequent search pursuant to the search warrant.[111] Bain's motion to suppress was denied, and he appealed, arguing that the officers conducted an unlawful search by testing his keys in the lock of his apartment.[112]

The court in *Bain* began its analysis by stating that the appellant did have a sufficient connection in the condominium unit to assert a Fourth Amendment violation claim.[113] Applying the *Dunn* curtilage factors, the court held that the lock on the condominium was within the home's curtilage, if not within the condominium itself.[114] The court noted that a search occurs when there is a physical intrusion into the curtilage to obtain infor-

100. *See* United States v. Bain, 874 F.3d 1 (1st Cir. 2017); United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991).
101. *Bain*, 874 F.3d at 19.
102. *Concepcion*, 942 F.2d at 1172–73.
103. *Bain*, 874 F.3d at 19.
104. *Id.* at 10.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Bain*, 874 F.3d at 10.
110. *Id.* at 10.
111. *Id.* at 11.
112. *Id.*
113. *Id.* at 13–14.
114. *Id.* at 14–15.

mation unless there was an implicit license to be there.[115] Drawing from this, the court stated that there was no difference between inserting the keys into the lock or bringing a trained police dog to conduct a sniff around the door, like that in *Jardines*.[116] Furthermore, social norms that invite members of the public to knock on the front door do not invite them to conduct a search.[117] The court concluded that a search occurred under the common law trespass test.[118]

After determining that a search had occurred, the court focused its analysis on whether the search was reasonable.[119] The court noted that when a warrantless search is not *per se* unreasonable, it may then balance the privacy related interests against the law enforcement interests involved.[120] After Bain's arrest, no exigent circumstances would have justified the warrantless search of his apartment.[121] Therefore, the court concluded that the law enforcement interests, in this case, were insufficient to make this warrantless search reasonable.[122]

B. Circuits Holding Key-Tests Do Not Violate the Fourth Amendment

In *United States v. Concepcion*, the Seventh Circuit held that the use of a key in the lock of an apartment was a search but that the search was reasonable despite it being executed without a warrant.[123] Agents of the Drug Enforcement Agency arrested Gamalier Concepcion in the parking lot of his apartment building.[124] The agents seized Concepcion's keys, used them to enter the outer door to his apartment building, and led him to his apartment door.[125] The agents used the keys to unlock Concepcion's front door but immediately closed it.[126] The agents then requested consent to search the apartment from Concepcion, who relented and allowed the agents to search his apartment.[127] Concepcion pled guilty to drug possession with intent to distribute.[128]

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115. *Bain*, 874 F.3d at 12 (citing Florida. v. Jardines, 569 U.S. 1, 8 (2013)).
116. *Id.* at 15.
117. *See id.*; *see also Jardines*, 569 U.S. at 8.
118. *Bain*, 874 F.3d at 14–16.
119. *Id.* at 16.
120. *Id.* at 17; *see also* Illinois v. McArthur, 531 U.S. 326, 331 (2001).
121. *Bain*, 874 F.3d at 19.
122. *Id.* at 19.
123. United States v. Concepcion, 942 F.2d 1170,1172–73 (7th Cir. 1991).
124. *Id.* at 1171.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

Concepcion subsequently challenged his conviction arguing that the agents conducted an unreasonable search by inserting his keys into the door lock of his apartment.[129] The court's reasonableness analysis focused on the minimal intrusiveness of the search because the information obtained through the key-test was readily available through other means.[130] Ultimately, the court concluded that the key-test was a search but was reasonable and therefore did not violate the Fourth Amendment.[131]

Likewise, the Fourth Circuit reached a similar conclusion in *United States v. Moses*.[132] Covonti Kwa Moses was arrested outside of his apartment complex for his alleged involvement in gang activity and drug trafficking.[133] The arresting officers took a set of keys off Moses and used them in the door of an apartment believed to be Moses's residence.[134] The officers conducted a protective sweep and found residue that field tested as crack cocaine.[135] The officers then used this information to obtain a search warrant.[136] Moses challenged the denial of his motion to suppress evidence found during the protective sweep.[137] The Fourth Circuit stated that the discrete act of inserting a key into a lock to determine if it fits did not offend the Fourth Amendment but provided no analysis for its conclusion.[138]

IV. POST-ARREST KEY-TEST SEARCHES ARE UNREASONABLE AND UNNECESSARY

Applying the Fourth Amendment principles above, this section explains that key-test searches are unreasonable. This section applies the *Dunn* curtilage factors to door locks to show that a residential door lock is clearly within the home's curtilage, if not within the home itself. [139] Next, this section explains how law enforcement violates the Fourth Amendment when conducting a key-test. Finally, this section describes why key-tests are un-

129. *Concepcion*, 942 F.2d at 1171.

130. *See id.* at 1173–74 ("Where Gamalier Concepcion lived was something the agents could have ascertained in many other ways. They could have looked him up in the telephone book or conducted a computer search of drivers' licenses. If they did not find him . . . , they could have visited the landlord and asked who lived in apartment 1C. Instead of asking the landlord who lived there, they could have shown the landlord the key in their possession and asked the landlord to compare it with the key issued to the tenant. So too the agents could have followed Concepcion around to learn his residence . . . .").

131. *Id.* at 1173.

132. United States v. Moses, 540 F.3d 263, 272 (4th Cir. 2008).

133. *Id.* at 265–66.

134. *Id.* at 266.

135. *Id.* at 267.

136. *Id.*

137. *Id.* at 268.

138. *Moses*, 540 F.3d at 272.

139. United States v. Dunn, 480 U.S. 294, 301 (1987).

necessary to maintain the government's interest in prosecuting criminal activity and the need for a resolution to the circuit split to uphold an individual's right to privacy.

A. Door Locks Are in the Home's Curtilage

"[T]he centrally relevant consideration" in determining the scope of the home's curtilage is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."[140] As stated earlier, the *Dunn* court established the following factors to aid in answering that question: (1) proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by.[141] Applying these factors to the context of key-tests, police invade the home's curtilage when the arrestee's keys are inserted into the lock on the front door of the home.[142]

The first factor of proximity is met as very few things are more proximate to the interior of a home than the lock on the front door.[143] The Court in *Jardines* held that the front porch was in the home's curtilage, stating, "The front porch is the classic exemplar of an area 'to which the activity of home life extends.'"[144] Door locks are closer to the inside of the home than front porches and should be given the same amount of protection or more under the Fourth Amendment.

The second factor, within an enclosure surrounding the home, is satisfied as a lock's interior that contains the crucial information police seek during key-tests is enclosed in the door itself.[145] In most curtilage cases, this factor looks for whether the searched area was inside of a fence.[146] However, the *Dunn* Court did not limit the application of this factor to only areas enclosed by fences. The Court has stated, "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience."[147]

140. *Id.*
141. *Id.*
142. United States v. Bain, 874 F.3d 1, 14–15 (1st Cir. 2017).
143. *Id.* at 14.
144. Florida. v. Jardines, 569 U.S. 1, 7 (2013) (quoting Oliver v. United States, 466 U.S. 170, 182 n.12 (1984)).
145. *Bain*, 874 F.3d at 14–15.
146. *See Dunn*, 480 U.S. at 302 ("It is also significant that respondent's barn did not lie within the area surrounding the house that was enclosed by a fence.").
147. *Oliver*, 466 U.S. at 182 n.12.

Door locks are intended to keep people from gaining access to the inside.[148] The fact that the lock is enclosed within the door itself suggests that it is part of the home's curtilage.

The third factor, examining the area's use, weighs in favor of finding that door locks are within the home's curtilage because door locks are intended to prevent unwelcome entry and invasion of privacy.[149] Inserting a key into a door lock reveals who can access the space beyond.[150] Key-tests may seem like only minor incursions on privacy, but the Court has held, "any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much."[151]

Lastly, a lock's design is intended to prevent inspection of its interior.[152] "In the home . . . all details are intimate details, because the entire area is held safe from prying government eyes."[153] The only way to test if a key fits a particular door lock is to insert it into the lock's tumbler. Unlike the cattle fences in *Dunn*, door locks are designed to "prevent persons from observing what lay inside the enclosed areas."[154] Most courts have determined that tenants of a multi-unit residential building do not have a reasonable expectation of privacy in the common areas of their buildings.[155] The courts that have addressed key-test searches, however, agree that homeowners have a privacy interest in their door locks.[156] Since all four *Dunn* curtilage factors

148. *See* Kathryn E. Fifield, *Let This Jardines Grow: The Case for Curtilage Protection in Common Spaces*, 2017 WIS. L. REV. 147, 148 (2017) ("For the average American, a lock not only stands as the physical barrier that keeps their possessions, homes, and persons secure from interference by outsiders, the lock symbolizes a social compact - the understanding that when a space is locked, those who do not possess a key are not permitted to invade it.").

149. *Bain*, 874 F.3d at 14–15.

150. United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991).

151. Kyllo v. United States, 533 U.S. 27, 37 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

152. *Bain*, 874 F.3d at 15.

153. *Kyllo*, 533 U.S. at 37.

154. United States v. Dunn, 480 U.S. 294, 303 (1987).

155. *See, e.g.*, United States v. Hawkins, 139 F.3d 29, 32–33 (1st Cir. 1998) (holding that the defendant tenant did not have a reasonable expectation of privacy in the common areas of their apartment building); United States v. Correa, 653 F.3d 187, 188 (3d Cir. 2011); Harney v. City of Chicago, 702 F.3d 916, 925 (7th Cir. 2012); United States v. Brooks, 645 F.3d 971, 976 (8th Cir. 2011); United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993). *But see* Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have A Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 MICH. L. REV. 273, 307 (2002) (arguing that the Constitution should be interpreted to protect the privacy interests of individuals living in multi-unit dwellings in locked common areas).

156. *See Concepcion*, 942 F.2d at 1173 ("Although the owner of a lock has a privacy interest in a keyhole--enough to make the inspection of that lock a 'search'—the privacy interest is so small that the officers do not need probable cause to inspect it."); *Bain*, 874 F.3d at 14–15 ("All in all, we have no difficulty finding that the inside of the lock on the door of a

weigh in favor of finding that door locks are within the home's curtilage, if not within the home itself, door locks should be given the same protections as the home under the Fourth Amendment.

B. Key-Tests are "Searches" Under the Fourth Amendment

If a front-door lock is in the home's curtilage as shown above, this entitles it to Fourth Amendment protection; thus, police key-tests are searches in violation of the Fourth Amendment under the common law trespass test.[157] Under *Florida v. Jardines*, a physical intrusion into the home's curtilage to collect information is a search unless it is within the "implicit license" extended to the public.[158] *Jardines* held that unless police are armed with a warrant, they may only approach the home and knock because that is "no more than any private citizen might do."[159] Searches by law enforcement, such as using keys in a door lock or using a trained police dog to sniff for evidence, are not justified by an implied license because social norms do not welcome police searches.[160] As mentioned above,[161] two of the three circuit courts that have addressed the constitutional validity of key-test searches agree that key-tests are searches under the Fourth Amendment.[162]

Applying the physical intrusion requirement of *Jardines* to key-tests is simple.[163] First, Police physically intrude on the home's curtilage by inserting the key into the lock.[164] Next, the key-test searches are used to collect information[165] when police insert the arrestee's keys in several door locks to locate which unit in the apartment complex belongs to the arrestee.[166] As-

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home 'should be placed under the home's "umbrella" of Fourth Amendment protection.'" (quoting *Dunn*, 480 U.S. at 301)).

157. *See also* Florida v. Jardines, 569 U.S. 1, 5 (2013) ("When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" (quoting United States v. Jones, 565 U.S. 400, 406–407 n.3 (2012))).

158. *Id.* at 8.

159. *Id.* (quoting Kentucky v. King, 563 U.S. 452, 469 (2011)).

160. *Id.* at 9.

161. *See supra* Section III.

162. *See* United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991) (holding that inserting a key into an apartment door was a search, but not an unreasonable one); *Bain*, 874 F.3d at 15 (holding that an unreasonable search occurs when law enforcement officers use keys taken off an arrestee in residential door locks of a multi-unit residential building).

163. *Id.*

164. *Bain*, 874 F.3d at 15.

165. *See id.* at 10 ("Armed with the information that the keys seized from Bain opened the main door to 131 Laurel Street and the door to unit D, the officers sought a warrant to search unit D."); *Concepcion*, 942 F.2d at 1172 ("A keyhole contains *information* -- information about who has access to the space beyond." (emphasis in original)).

166. *See id.* at 1171.

suming the arrestee would not have keys to homes other than his own, police use this information—the arrestee's address and unit number—to obtain a search warrant.[167] Additionally, a door lock does not extend an "implicit license" like the door knocker example in *Jardines*.[168] Consequently, following from the reasoning of *Jardines*, key tests fit the understood definition of a search.

C. Warrantless Key-Test Searches are Presumptively Unreasonable

The first hurdle that key-test searches must overcome is showing they are unreasonable in violation of the Fourth Amendment.[169] To this end, warrantless searches of the home are presumptively unreasonable.[170] Further, this presumption also applies to searches within the home's curtilage.[171] Yet, this presumption may be overcome because "[t]he ultimate touchstone of the Fourth Amendment is reasonableness."[172] However, the following sections address why some exceptions to the warrant requirement may not apply to key-test searches.

1. Search and Exploration After Arrest

After a custodial arrest, law enforcement may search the person of an arrestee and the area within the arrestee's reach.[173] Law enforcement officers, however, are not allowed to conduct searches of the entire home.[174] In the scenario mapped out in the introduction,[175] police officers cannot justify the subsequent key-test search as being a search incident to arrest.[176] The primary purposes of a search incident to arrest is to ensure officer safety and to prevent the destruction of evidence.[177] As discussed above,[178] the primary purpose of a key-test search is to establish the arrestee's residence and has

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167. *Id.*
168. *Bain*, 874 F.3d at 15.
169. *See* U.S. CONST. amend. IV; *see also King*, 563 U.S. at 459 ("[A]ll searches and seizures must be reasonable.").
170. *King*, 563 U.S. at 459 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).
171. *Bain*, 874 F.3d at 16.
172. *King*, 563 U.S. at 459 (quoting *Stuart*, 547 U.S. at 403).
173. *See* Chimel v. California, 395 U.S. 752, 763 (1969); *see also* United States v. Robinson, 414 U.S. 218, 234–35 (1973). At the time of *Chimel*, the phrase "custodial arrest" was not yet being used by the Supreme Court; it was later used to describe the type of arrest which would allow an automatic search of the person. *See Robinson*, 414 U.S. at 234–35.
174. *Chimel*, 395 U.S. at 763.
175. *See supra* Part I.
176. *Id.*
177. *Id.*
178. *See supra* Part III.

nothing to do with officer safety or the destruction of evidence.[179] Furthermore, in *Bain* and *Concepcion*, the arrestees were so far outside the home that no part of the residence was in their "immediate control."[180] Nevertheless, in some circumstances officers may search the rest of the arrestee's home to root out threats to officer safety.

2. Protective Sweeps

Another category of permissible warrantless searches is "protective sweeps."[181] The Supreme Court has held that in some circumstances, law enforcement may conduct "protective sweeps" to root out safety threats in the house.[182] The underlying justification of protective sweeps is officer safety during the arrest.[183] Typically, protective sweeps are justified if police lawfully enter the home to execute an arrest.[184] In *Bain* and *Concepcion*, the underlying arrests occurred outside of the home.[185] Notably, the arresting officers in both cases were unaware of exactly which unit belonged to the arrestees.[186] If the arrests occurred in the home, there would be no need to conduct a key-test to determine residency.[187] Since the underlying arrests in these key-test scenarios are made outside of the home, looking for other people inside the home is not necessary for officer safety.[188] In some situations, however, the "potentiality for danger surrounding the arrest"[189] may be so high that entry of premises to make a "protective sweep" will be per-

179. *See* United States v. Bain, 874 F.3d 1, 10 (1st Cir. 2017); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir.1991).

180. *See Bain*, 874 F.3d at 10 ("[The agents] saw Bain emerge through the front door of 131 Laurel Street, walk to his car around the corner on Webster Street, and get inside. . . . Agents removed him from the car, placed him under arrest, conducted a search incident to arrest, and seized credit cards and a set of keys from his person."); United States v. Concepcion, 742 F. Supp. 503, 504 (N.D. Ill. 1990), *aff'd*, 942 F.2d 1170, 1173 (7th Cir. 1991) ("Concepcion was apprehended while in an automobile in a parking lot in front of the premises . . . .").

181. Maryland v. Buie, 494 U.S. 325, 327–28 (1990).

182. *Id.*

183. *Id.*

184. *See id.* at 334 ("We also hold that as an incident to the arrest the officers could . . . look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.").

185. *Bain*, 874 F.3d at 10; *Concepcion*, 742 F. Supp. at 504.

186. *Bain*, 874 F.3d at 10; *Concepcion*, 742 F. Supp. at 504.

187. *See Bain*, 874 F.3d at 10; United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991).

188. *See also* United States v. Kinney, 638 F.2d 941, 944 (6th Cir. 1981) ("[N]o objective facts support a reasoned fear on the part of the FBI agents at the defendant's apartment. . . . No weapons were brandished by anyone in the house. . . . An opposite holding would permit government agents to infer danger from any occupied dwelling.").

189. McGeehan v. Wainwright, 526 F.2d 397, 399 (5th Cir. 1976).

missible even though the arrest occurred outside the home.[190] In *Bain* and *Concepcion*, no such danger existed at the time of the arrests; therefore, the "protective sweep" doctrine could not justify the otherwise unreasonable key-test searches in those cases.[191] This conclusion does not bar the application of the "protective sweep" doctrine in new key-test cases where such dangerous circumstances do exist.[192]

3. Exigent Circumstances

Police do not violate the Fourth Amendment when they must act now or never to avoid the destruction of evidence.[193] There are some instances where key-test searches may be utilized to prevent the destruction of evidence.[194] Officers often use the exigent circumstances doctrine to justify warrantless searches for evidence of drug-related offenses.[195] Although the key-tests in *Bain* and *Concepcion* resulted from arrests for drug-related offenses, key-test searches should not be permitted in every situation simply because a family member or friend might act on the arrestee's behalf and attempt to destroy evidence.[196] Notably, only the Fourth Circuit in *Moses* held that exigent circumstances existed to justify the warrantless search of

190. United States v. Williams, 871 F.3d 1197, 1202 (11th Cir. 2017). The defendant's street address encompassed two structures, a "main residence" and an "outbuilding" 20 feet away that appeared to be a guest house. *Id.* at 1200. The court, after upholding simultaneous entry of both to arrest Williams, then held the search of the qualified outbuilding was "a protective sweep" once the defendant "was being arrested in the main residence" since multiple cars in the driveway suggested more people were present. *Id.* at 1200–02.

191. *See Bain*, 874 F.3d at 10; United States v. Concepcion, 742 F. Supp. 503, 504 (N.D. Ill. 1990), *aff'd*, 942 F.2d 1170 (7th Cir. 1991).

192. *See, e.g.*, United States v. Hoyos, 892 F.2d 1387, 1397 (9th Cir. 1989) ("If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does not affect the reasonableness of the officer's conduct. A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another.") *overruled by* United States v. Ruiz, 257 F.3d 1030, 1031 (9th Cir. 2001).

193. *See* Roaden v. Kentucky, 413 U.S. 496, 505 (1973); *see also* United States v. Moses, 540 F.3d 263, 271 (4th Cir. 2008).

194. *Moses*, 540 F.3d at 270. Exigent circumstances existed when the suspect was arrested in close proximity to his house, the suspect made a call to a family member in an adjacent apartment, and police learned through an informant that the apartment was being used as a stash house for money, drugs, and guns. *Id.* at 270–71.

195. *See generally* Kentucky v. King, 563 U.S. 452, 461 (2011).

196. United States v. Davis, 423 F.2d 974, 979 (5th Cir.1970). Similarly, in his *Chimel* dissent, Justice White asserted that "there must almost always be a strong possibility that confederates of the arrested man will . . . remove the items for which the police have probable cause to search." *Chimel*, 395 U.S. at 774 (White, J., dissenting). *See also Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1473 (1971) ("[W]arrantless searches of a home should not be allowed every time evidence is merely 'threatened with destruction.'").

the defendant's apartment.[197] As applied in *Moses*, when police officers genuinely believe that evidence will be destroyed before a search warrant is obtained, a key-test search may be used to establish the arrestee's residence.[198] When exigent circumstances exist, the key-test search might help avoid the unnecessary destruction of property belonging to others living inside a multi-unit building while, simultaneously, police seek to preserve evidence of the charged offense.[199] With these principles in mind, resolving the circuit split over key-test searches is simple.

D. Resolving the Circuit Split

Residential door locks are within the home's curtilage and key-tests are searches under the Fourth Amendment.[200] The ultimate touchstone of the Fourth Amendment, however, is reasonableness.[201] Absent one of the exceptions to the warrant requirement, assessing the reasonableness of a search is necessary by balancing the government's legitimate interests against the intrusion on the individual's Fourth Amendment rights.[202] In regard to key-test searches, the government's need to establish residency for a search warrant application does not outweigh the individual's right to privacy.[203]

Concepcion held that, although the key-test was a "search," it was a minimally intrusive search and therefore not unreasonable.[204] The court based its decision partly on the fact that using the arrestee's keys in an apartment door bearing his name revealed little information.[205] The court stated that the police had multiple avenues of ascertaining where the arrestee, Gamalier Concepcion, lived.[206] The police could have looked him up

197. *Moses*, 540 F.3d at 270–71.

198. *Id.* at 270.

199. *See King*, 563 U.S. at 456. A police officer believed evidence was being destroyed inside an apartment, and no one answered the officer's request to open the door. *Id.* The police officer proceeded to kick in the door. *Id.* at 456–57. The arresting officers did not know which unit the suspect lived in, so the officer tried the arrestee's keys in multiple doors in the building. *Id.*

200. *See supr*a Part IV.A.

201. *King*, 563 U.S. at 459 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

202. Illinois v. McArthur, 531 U.S. 326, 331 (2001).

203. *Compare Bain*, 874 F.3d at 19 ("In short, we see no reason to conclude that the law enforcement-related concerns sufficiently outweighed the privacy-related concerns to render this search reasonable."), *with* United States v. Concepcion, 942 F.2d 1170, 1173 (7th Cir. 1991) ("Although the owner of a lock has a privacy interest in a keyhole -- enough to make the inspection of that lock a 'search' -- the privacy interest is so small that the officers do not need probable cause to inspect it.").

204. *Concepcion*, 942 F.2d at 1173.

205. *Id.*

206. *Id.*

in the phone book or searched a database for his driver's license.[207] If that failed, the police could have asked the landlord to confirm who lived in the apartment or compared Concepcion's key to the landlord's copy.[208] *Bain* pointed out the flaw in the *Concepcion* court's logic, holding that the ease of obtaining information elsewhere undercuts the police's need to access the home more than it minimizes the nature of the intrusive search.[209] *Concepcion* contrasted the difference between the key-test and the unreasonable search in *Arizona v. Hicks*.[210]

In *Hicks*, police officers who were lawfully present in an apartment investigating gunfire noticed an expensive piece of stereo equipment.[211] One of the officers then moved the turntable to record its serial number, which was later determined to have been stolen.[212] The Court held that moving the turntable was a search even if it uncovered nothing of personal value to the apartment's owner.[213] *Concepcion* held that the key-test was materially less intrusive than moving the stereo because the information obtained by moving the stereo could not have been retrieved in any other way.[214] However, the Seventh Circuit's reasoning appears to clash with the Supreme Court's holding in *Hicks*.[215] *Hicks* stated, "It matters not that the search uncovered nothing of any great personal value to respondent . . . A search is a search, even if it happens to disclose nothing but the bottom of a turntable."[216] Of course, one might say that the officers who perform key-tests are simply attempting to identify which apartment belongs to the arrestee.[217] One could equally say that the officers in *Hicks* were merely trying to identify the turntable.[218] Regardless, as the First Circuit points out, the main point is that when conducting key-tests, police intrude without a license into the curtilage of one's "home" for the sole purpose of gathering information to be used against the arrestee in his criminal prosecution.[219]

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207. *Id.*
208. *Id.*
209. United States v. Bain, 874 F.3d 1, 18 (1st Cir. 2017).
210. *Concepcion*, 942 F.2d at 1173.
211. Arizona v. Hicks, 480 U.S. 321, 323–24 (1987).
212. *Id.*
213. *Id.* at 324–25.
214. *Concepcion*, 942 F.2d at 1173.
215. *See Bain*, 874 F.3d at 18 ("We question the logic of justifying a search of this type by reasoning that the information gathered by the search could have been easily obtained otherwise. After all, there are likely many pieces of information within a home that might be obtained from other sources without searching the home.").
216. *Hicks*, 480 U.S. at 325.
217. *See* United States v. DeBardeleben, 740 F.2d 440, 445 (6th Cir. 1984) (holding that there was a legitimate reason to insert keys into a car to see whether they fit in order to identify that automobile as belonging to the defendant for purposes of obtaining a search warrant).
218. *Id.*
219. *Bain*, 874 F.3d at 19.

While the circuit courts remain split on reasonableness, it is generally accepted that a key-test is a search.[220] Resolving the circuit split is simple. The protection of the Fourth Amendment extends beyond the inside of the home.[221] Police officers violate the Fourth Amendment when they physically intrude on the protected curtilage surrounding the home.[222] In future key-test cases, courts should follow the First Circuit's holding in *Bain* as it best aligns with the Supreme Court's precedent.[223] The holding in *Hicks* suggests that the Court would find that a key-test violates the Fourth Amendment even though the actions taken by police only intrude on the arrestee's privacy by a "few inches."[224] *Concepcion's* rationale could create a slippery slope requiring law enforcement officers to make an on-the-spot determination whether there exists sufficient legal alternatives to obtaining otherwise inadmissible evidence.[225] *Bain* followed the Supreme Court's precedent by holding that warrantless key-test searches are unreasonable.[226]

Therefore, *Bain* best serves as the guidepost for future key-test cases.[227] The *Bain* court applied the *Dunn* curtilage factors and concluded that the front door lock was within the home's curtilage.[228] Next, the court noted that key-test was a search under *Jardines*, as the police physically intruded into the curtilage to obtain information without an implicit license to be on the premises.[229] Finally, the court scrutinized the reasonableness of the warrantless key-test search.[230] It noted that searches without a warrant are presumptively unreasonable under *King* and that there were no exigent circumstances to justify the key-test search.[231] In short, the key-test in *Bain* was an unreasonable search.[232]

V. CONCLUSION

The Supreme Court of the United States has yet to weigh in on whether law enforcement officers violate the Fourth Amendment when they insert an

220. *Id.* at 16; United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991).
221. *See* United States v. Dunn, 480 U.S. 294, 301–04 (1987).
222. *Id.*
223. *See* Arizona v. Hicks, 480 U.S. 321, 325 (1987); *Dunn*, 480 U.S. at 301–04 (establishing factors to determine whether an area should be considered "curtilage"); Florida. v. Jardines, 569 U.S. 1, 7–8 (2013) (holding that using a drug-sniffing dog in the curtilage of a home was a search).
224. *Hicks*, 480 U.S. at 325.
225. *See Concepcion*, 942 F.2d at 1172–73.
226. United States v. Bain, 874 F.3d 1, 18–19 (1st Cir. 2017).
227. *See id.* at 14–19.
228. *Id.* at 14–15.
229. *Id.* at 15.
230. *Id.* at 16.
231. *Id.* at 16–19.
232. *Bain*, 874 F.3d at 19.

arrestee's keys into the arrestee's front door lock. Until this issue reaches the Supreme Court, the United States Circuit Courts of Appeals remain divided on the constitutional validity of key-test searches.[233] On one side, the First Circuit has held that warrantless key-test searches are unreasonable absent an exception to the warrant requirement.[234] On the other side, the Seventh Circuit has held that key-tests are searches but not unreasonable searches and, therefore, do not violate the Fourth Amendment.[235] Furthermore, the Fourth Circuit has held that key-tests do not implicate the Fourth Amendment in the first place.[236]

In conclusion, future key-test cases should follow the First Circuit's holding in *Bain* as it best aligns with Supreme Court precedent.[237] Absent a valid warrant or an exception to the warrant requirement, an unreasonable search occurs when law enforcement test keys taken off an arrestee in a residential door lock to establish the arrestee's residence.[238]

**Jacob Hill*

233. *See id.* (holding that an unreasonable search occurs when law enforcement officers use keys taken off an arrestee in residential door locks of a multi-unit residential building); *see also* United States v. Concepcion, 942 F.2d 1170, 1173 (7th Cir. 1991) (holding that inserting a key into an apartment door was a search, but not an unreasonable one); United States v. Moses, 540 F.3d 263, 272 (4th Cir. 2008) (holding that the discrete act of inserting the key into the door lock and discovering whether or not it fit did not offend the Fourth Amendment).

234. *Bain*, 874 F.3d at 14–19.

235. *Concepcion*, 942 F.2d at 1173.

236. *Moses*, 540 F.3d at 272.

237. *See Bain*, 874 F.3d at 14–19.

238. *Id.*

* J.D. Candidate, The University of Arkansas at Little Rock, William H. Bowen School of Law, 2023; B.B.A. in Economics and B.B.A. in Finance, The University of Arkansas at Little Rock, 2019. I would like to thank my advisor, Professor Terrence Cain, for his honesty, expertise, and guidance; my parents, Brian and Cheri, for their endless support and encouragement; and the members of the UA Little Rock Law Review, for their time spent editing and publishing this Note.