CRIMINAL PROCEDURE — FOURTH AMENDMENT — SIXTH CIRCUIT HOLDS THAT APARTMENT HALLWAY WALL IS NOT CURTILAGE. — *United States v. Trice*, 966 F.3d 506 (6th Cir. 2020).

Courts have long differentiated apartment living from single-family-home living. While those who live in single-family homes enjoy expansive Fourth Amendment protections against unreasonable searches and seizures, those who live in apartments do not.[1] In *Florida v. Jardines*,[2] the Supreme Court held that a front porch was part of a single-family home's "curtilage"[3] and thus enjoys similar Fourth Amendment protections as the home itself.[4] But, like many other Supreme Court Fourth Amendment decisions, *Jardines* concerned only a single-family home.[5] Recently, in *United States v. Trice*,[6] the Sixth Circuit held that a hallway wall opposite a tenant's apartment was not curtilage and thus was not a constitutionally protected area.[7] By failing to extend the *Jardines* curtilage analysis to the apartment context, the Sixth Circuit missed an opportunity to expand Fourth Amendment protections under the curtilage doctrine and thereby contributed to the racial, ethnic, and class inequalities that result under current Fourth Amendment jurisprudence.

As part of the drug investigation of Raheim Abdullah Trice, the Kalamazoo Valley Enforcement Team (KVET) executed several controlled buys with Trice to gather evidence on his alleged drug activity and determine where he resided.[8] During one of the buys, officers observed him exiting from and returning to an apartment building at 114 Espanola Avenue in Parchment, Michigan.[9] Using evidence gathered from a car registration and police records, investigator Marcel Behnen connected Trice to Apartment B5.[10] Prior to conducting a third and final controlled buy, Behnen visited the building to confirm that Trice did in fact live there.[11] He entered the building through the front door, which he later testified "was ajar and had no lock, intercom, or doorbell."[12] After finding what he inferred to be Apartment B5 in the building's basement level, Behnen installed a motion-sensor camera on the

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1 *See* Carol A. Chase, *Cops, Canines, and Curtilage: What* Jardines *Teaches and What It Leaves Unanswered*, 52 HOUS. L. REV. 1289, 1292–93, 1303–09 (2015).

2 569 U.S. 1 (2013).

3 Curtilage is the area "immediately surrounding and associated with the home." *Id.* at 6. It is considered part of the home for Fourth Amendment purposes. *Id.*

4 *Id.* at 6–7.

5 *See* Chase, *supra* note 1, at 1303, 1310.

6 966 F.3d 506 (6th. Cir. 2020).

7 *Id.* at 515–16.

8 *Id.* at 510.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*; *see id.* at 510–12. The property manager testified to this as well. *Id.* at 511.

hallway wall opposite the unit, set to record whenever anyone entered or exited.[13] KVET then conducted a final controlled buy, after which Behnen retrieved the camera — which had been in place for about four to six hours and had captured Trice entering and exiting Apartment B5 — and used its footage to successfully obtain a search warrant for the apartment.[14] Subsequently, officers searched the apartment and seized methamphetamine, crack cocaine, powder cocaine, heroin, and other drug paraphernalia.[15] Trice was charged with several counts of possession and distribution of controlled substances.[16]

Trice moved to suppress the evidence seized from his apartment, arguing that the use of the camera was unconstitutional, and absent the video footage, the affidavit failed to establish a nexus between his alleged crime and Apartment B5.[17] The district court denied the motion.[18] Relying on Sixth Circuit precedent in *United States v. Dillard*,[19] the court reasoned that tenants do not have an objectively reasonable expectation of privacy in the common hallways of unlocked buildings.[20] Finding the facts similar to those in *Dillard*, the court concluded that Behnen could permissibly enter the apartment building because it was "unlocked [and] publicly accessible," and once inside, it was permissible for him to access the building's hallways.[21] And because he could have stood in the hallway all day to observe Trice himself, his "more practical" decision to use a camera was permissible.[22] Finally, the district court held that the hallway area in front of Trice's apartment is not akin to curtilage, noting that "the common, unlocked hallway in the low-rent apartment building does not carry the same level of protection as the doorstep in suburbia."[23] After the denial of Trice's motion, Trice agreed to a plea, conditional on appealing the ruling on the motion to suppress.[24]

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[13] *Id.* at 510.

[14] *Id.* at 510–11. Investigators also observed Trice enter and exit the building. *Id.* at 511.

[15] *Id.* at 511.

[16] *Id.*

[17] *See id.* at 511–12; United States v. Trice, No. 18-CR-192, at 7 (W.D. Mich. Dec. 10, 2018) (opinion and order denying motion to suppress).

[18] *Trice*, No. 18-CR-192, at 15.

[19] 438 F.3d 675 (6th Cir. 2006).

[20] *Trice*, No. 18-CR-192, at 9.

[21] *Id.* at 10.

[22] *Id.*

[23] *Id.* at 12; *see id.* at 12–13. The court also held that, even if there were a Fourth Amendment violation, the good faith exception to the exclusionary rule would apply, such that the seized evidence would still be admissible against Trice in court. *Id.* at 14.

[24] *Trice*, 966 F.3d at 509.

The Sixth Circuit affirmed. Writing for the panel, Judge Bush[25] first held that under the *Katz v. United States*[26] framework, Trice did not have an objectively reasonable expectation of privacy in his apartment hallway.[27] Under *Katz*, there are two requirements for an intrusion to constitute a Fourth Amendment search: (1) a person must exhibit "an actual (subjective) expectation of privacy" in the place, and (2) the expectation must be one "that society is prepared to recognize as 'reasonable.'"[28] Despite finding that Trice probably had a subjective expectation of privacy in the basement area and the hallways outside his apartment, the court held that the expectation was not objectively reasonable.[29] The court agreed with the district court that *Dillard* controlled this case. In *Dillard*, the court held that the defendant "did not have a reasonable expectation of privacy in the common hallway and stairway of his duplex that were unlocked and open to the public."[30] Finding that the hallway in *Dillard* was indistinguishable from the hallway at issue here — the building doors were unlocked and ajar, and there was no intercom or doorbell — the court held that Trice did not have a reasonable expectation of privacy in the hallway.[31]

Next, Judge Bush considered whether the camera was placed in the apartment's curtilage.[32] Citing to *Jardines*, Judge Bush explained that "the area 'immediately surrounding and associated with the home' — what [the Supreme Court] call[s] the curtilage — [is regarded] as 'part of the home itself'" for Fourth Amendment purposes.[33] Conducting a warrantless investigation by placing a camera in the curtilage would thus be a Fourth Amendment intrusion into a constitutionally protected area, because it would be either a "physical intrusion into the curtilage" or a violation of "the owner's reasonable expectation of privacy."[34] To determine whether the area was part of the home's curtilage,

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[25] Judge Bush was joined by Judges Suhrheinrich and Murphy.

[26] 389 U.S. 347 (1967).

[27] *Trice*, 966 F.3d at 513–14. The court recognized that there was another test for a Fourth Amendment search: a property-based approach. *Id.* at 512. Because Trice did not raise a property-based argument, the court considered only the reasonable expectation of privacy test. *See id.* & n.3.

[28] *Id.* at 513 (quoting United States v. May-Shaw, 955 F.3d 563, 567 (6th Cir. 2020)).

[29] *Id.* at 513–14. In assessing whether the expectation was reasonable, the Court applied four factors set out in *Dillard*: "(1) whether [Trice] was legitimately on the premises; (2) his proprietary or possessory interest in the place to be searched . . . ; (3) whether he had the right to exclude others from the place in question; and (4) whether he had taken normal precautions to maintain his privacy." *Id.* at 513 (alteration in original) (quoting United States v. Dillard, 438 F.3d 675, 682 (6th Cir. 2006)).

[30] *Id.* at 513 (quoting *Dillard*, 438 F.3d at 682).

[31] *Id.* at 513–14.

[32] *Id.* at 514. Because a curtilage analysis was not conducted in *Dillard*, that case was not dispositive. *See id.*

[33] *Id.* (alterations in original) (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).

[34] *Id.*

the court considered the four factors outlined in *United States v. Dunn*[35]: "(1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that area is used, and (4) what the owner has done to protect the area from observation from passersby."[36] Beginning with the first factor, the court found that the hallway wall on which the camera was placed was indeed in close proximity to Trice's home.[37] However, the court found that the other three factors weighed against him: the area was not an enclosure around the home; Trice made no effort to shield the area from observation; and the area was a common hallway that was used by the public, other tenants, and their guests.[38] Additionally, the fact that the camera was placed on the wall opposite his door, and thus was closer to his neighbor's door, weighed against Trice.[39] Given the balance of these factors, the court held that the camera was not placed in a constitutionally protected area.[40]

Having established that Trice had no reasonable expectation of privacy in the hallway, the court upheld the use of the camera. Likening the camera to one placed on a utility pole by police to surveil the surrounding area, Judge Bush recognized that the Fourth Amendment does not stop an officer from making "observations from a public vantage where he has the right to be."[41] Thus, since Trice's apartment door was readily visible from the unlocked hallway — a place in which Trice had no reasonable expectation of privacy — law enforcement could have observed for themselves what the camera captured.[42] Finally, while recognizing that collecting "detailed records" with a "retrospective quality" would be unconstitutional, the court explained that this camera was used for the "singular and narrow purpose" of identifying Trice's apartment unit and thus did not implicate a constitutional issue.[43]

Trice failed to extend the Fourth Amendment's reverence for the home to the apartment context, exacerbating unequal Fourth Amendment protections. By taking an expansive view of curtilage, the Supreme Court's holdings in *Jardines* and *Collins v. Virginia*[44] provided

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[35] 480 U.S. 294 (1987).

[36] *Trice*, 966 F.3d at 514 (citing Morgan v. Fairfield County, 903 F.3d 553, 561 (6th Cir. 2018)).

[37] *Id.* at 515.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 516 (quoting United States v. Houston, 813 F.3d 282, 288 (6th Cir. 2016)).

[42] *Id.* at 517.

[43] *Id.* at 518. Unlike the technology used in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which allowed officers to use cell-tower data to recreate a record of the defendant's location over a four-month period, *id.* at 2212, 2214, the camera at issue here was not a technology "that provided law enforcement with information that was 'otherwise unknowable,'" *Trice*, 966 F.3d at 519 (quoting *Carpenter*, 138 S. Ct. at 2218).

[44] 138 S. Ct. 1663 (2018).

the doctrinal backing for lower courts to extend more robust Fourth Amendment protections to apartments. The application of a curtilage analysis in the apartment context is unsettled,[45] and the *Trice* court had an opportunity to expand it. By conducting a rigid curtilage analysis, the *Trice* court held apartment hallways to untenable standards and exacerbated racial, ethnic, and class disparities in Fourth Amendment jurisprudence.

In *Florida v. Jardines*, the Supreme Court reinvigorated the curtilage doctrine.[46] Before *Jardines*, courts mostly applied the *Katz* reasonable expectation of privacy test to determine whether a search violated the Fourth Amendment.[47] *Jardines*, on the other hand, endorsed a property-based doctrine through a curtilage analysis, recognizing that certain areas surrounding the home are equivalent to the home itself for Fourth Amendment purposes.[48] Under *Jardines*, "[c]onducting a warrantless investigation . . . in [a] *constitutionally protected area* would . . . be unlawful, either because it [would] *work a physical intrusion into the curtilage* or because it would *violate the owner's reasonable expectation of privacy*."[49] In *Jardines*, the Court held that police officers violated the homeowner's Fourth Amendment rights when they brought a drug-sniffing dog onto the porch of the home.[50] Since the porch was the "classic exemplar" of where "the activity of home life extend[ed]," the Court found the case to be an easy one.[51] The police officers intruded on the curtilage of the defendant's home.[52] The Court has continued to find curtilage in "easy case[s],"[53] most recently in *Collins*,

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[45] *See* Eric Connon, Comment, *Growing* Jardines*: Expanding Protections Against Warrantless Dog Sniffs to Multiunit Dwellings*, 67 CASE W. RSRV. L. REV. 309, 311 (2016).

[46] *See* Chase, *supra* note 1, at 1300; Connon, *supra* note 45, at 310; Jackie McCaffrey, Note, *Fourth Amendment Protections in Common Areas of Apartment Buildings: How the* Whitaker *Holding Contributes to the Circuit Split*, 2018 U. ILL. L. REV. 1147, 1155–56; Alexander Porro, Comment, *Dwelling in Doubt: Do Tenants Have a Reasonable Expectation of Privacy in the Common Areas of Their Apartment Buildings?*, 2018 U. CHI. LEGAL F. 333, 351.

[47] *See* Chase, *supra* note 1, at 1292–93, 1302.

[48] *See* Florida v. Jardines, 569 U.S. 1, 11 (2013); *see also* Recent Case, United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016)*, 130 HARV. L. REV. 1040, 1044 (2017).

[49] *Trice*, 966 F.3d at 514 (emphasis added) (citations omitted) (citing, inter alia, *Jardines*, 569 U.S. at 9–10; *id.* at 12–13 (Kagan, J., concurring)). Because the *Trice* court found that the area was not curtilage, it did not specify if use of the camera would have been unconstitutional as a physical intrusion or as a violation of Trice's reasonable expectation of privacy. *See id.* at 516.

[50] *Jardines*, 569 U.S. at 3, 10–12.

[51] *Id.* at 7 (quoting Oliver v. United States, 466 U.S. 170, 182 n.12 (1984)).

[52] *Id.* at 11. In its application of the curtilage doctrine, *Jardines* employed a two-part test, asking (1) whether the information was obtained in a "constitutionally protected area," *id.* at 7, and (2) whether the officer was explicitly or implicitly licensed to be in the area, *id.* at 6–10. The Court held that the porch was a protected area and that the officers exceeded their license to "knock and talk" when they brought dogs onto the porch for an inspection. *Id.* at 8–10. This comment focuses on the first prong of this test, as did the *Trice* court. *See Trice*, 966 F.3d at 514.

[53] Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018).

where it held that a partially enclosed driveway next to a single-family home was considered curtilage.[54]

Jardines generated scholarly enthusiasm for applying the property-based curtilage doctrine to the apartment context.[55] Though most courts have held that, under *Katz*, apartment dwellers do not have a reasonable expectation of privacy in common spaces of apartments,[56] those same spaces — immediately surrounding one's apartment unit — could be construed as curtilage under a *Jardines*-like analysis and thus subject to heightened constitutional protections. Like the porch in *Jardines*, an apartment hallway is the area "immediately surrounding and associated with" the tenant's home and is thus also an extension of the home.[57] Further, just because a tenant does not have an *absolute* expectation of privacy in common areas of apartment buildings does not mean that the tenant should not have a constitutionally recognized level of privacy in such areas.[58] After all, although the apartment building was unlocked, Trice's property manager testified that the residents expect that only tenants and their invited guests are allowed on the property and would call the police if someone was loitering in the building.[59] Therefore, apartment dwellers still associate these common areas with their homes.

Despite this favorable doctrinal backdrop provided by *Jardines* and *Collins*, the *Trice* court declined to hold that Trice's apartment hallway area constituted curtilage. While the court cited to both *Jardines* and *Collins*, it relied most heavily on a four-factor test from *Dunn*.[60] The court found that certain attributes of Trice's apartment building and hallway area — including that the building was unlocked, that the hallway was not an enclosure, that it was open to observation, and that it was "used by other apartment tenants to reach their respective units" — weighed against finding the hallway wall was curtilage.[61] However, similar features were not considered to be dispositive in *Jardines* and *Collins*. In both cases, the Court found that spaces similarly observable, accessible, and only partially enclosed amounted to curtilage.[62] These

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[54] *Id.* at 1670–71.

[55] *See* Porro, *supra* note 46, at 342–46 (analyzing relevant case law on the issue).

[56] *See id.* at 342, 344.

[57] *Jardines*, 569 U.S. at 6; *see* People v. Burns, 50 N.E.3d 610, 635 (Ill. 2016) (Garman, C.J., concurring) ("[D]efendant's [apartment] front door and landing appear indistinct from Jardines's front door and porch.").

[58] *See* McDonald v. United States, 335 U.S. 451, 458 (1948) (Jackson, J., concurring); 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, 304 (2002).

[59] *See Trice*, 966 F.3d at 511.

[60] *See id.* at 514 (citing *Collins* but relying on the *Dunn* factors).

[61] *Id.* at 515.

[62] *See* Collins v. Virginia, 138 S. Ct. 1663, 1670–71 (2018); *Jardines*, 569 U.S. at 6–7.

attributes amounted to "easy cases" in the context of single-family homes.[63]

The Sixth Circuit should have seized the Supreme Court's expansive language and reasoned that the apartment hallway area was curtilage. By instead transposing the *Dunn* test into the apartment context, the *Trice* court turned a blind eye to the unique nature of apartments. The *Dunn* factors the Sixth Circuit applied — developed in the context of single-family homes — are not mandatory, and neither *Jardines* nor *Collins* relied on them.[64] Instead of rigidly applying this framework, the Sixth Circuit should have accommodated the attributes of apartment living rather than dismissing them. Indeed, apartment buildings are distinct from single-family homes because they are shared spaces and thus accessible by other tenants and their guests. Nevertheless, apartment hallway areas are in close proximity to tenants' units and often serve as the sole passageway to the home. Hallway areas may not be the "classic exemplar"[65] of curtilage like the idyllic porches of suburbia, but they are no less worthy of heightened constitutional protection; failing to recognize this holds apartments to an untenable standard relative to single-family homes. *Trice* did not conduct a full property-based test, but its conclusion that an apartment hallway area is not curtilage has implications for a property-based analysis: it cuts off a potential avenue for extending Fourth Amendment protections in the apartment context.

By exacerbating the distinctions between the Fourth Amendment protections afforded to residents of single-family homes and apartments, *Trice* creates serious policy implications. In *United States v. Whitaker*,[66] the Seventh Circuit acknowledged the inequity that results in strictly distinguishing between apartments and single-family homes: making such a distinction "would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity."[67] Even the Supreme Court has noted the inequity that could result from unequal Fourth Amendment protections, noting in *Collins* that differentiating between a garage and partially enclosed driveway would "grant constitutional rights to those persons with the financial means to afford" the former.[68] The unequal application of Fourth Amendment law in the apartment context is especially significant given the number of people

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[63] *See Jardines*, 569 U.S. at 11. Some courts have taken advantage of the *Jardines* holding in the apartment context. *See, e.g.*, United States v. Hopkins, 824 F.3d 726, 729, 731–32 (8th Cir. 2016); People v. Burns, 50 N.E.3d 610, 620–21 (Ill. 2016).

[64] United States v. Dunn, 480 U.S. 294, 301 (1987); McCaffrey, *supra* note 46, at 1171. Nowhere in *Jardines* was *Dunn* cited. *See Jardines*, 569 U.S. 1. *Dunn* was cited once in *Collins*. *See Collins*, 138 S. Ct. at 1681.

[65] *Jardines*, 569 U.S. at 7.

[66] 820 F.3d 849 (7th Cir. 2016).

[67] *Id.* at 854.

[68] *Collins*, 138 S. Ct. at 1675.

who live in apartments. As of 2019, about one in four New Yorkers and about one in six Californians live in apartments.[69] There are also considerable racial, ethnic, and class differences between apartment dwellers and those who live in single-family homes. As of 2017, the median household income for apartment tenants was about $39,000, compared to about $78,000 for homeowners.[70] As of 2019, about 72% of white households occupied a single-unit dwelling, compared to about 55% of Black households and about 59% of Hispanic households.[71] Hispanic households are also more likely to occupy multiunit households compared to their non-Hispanic counterparts.[72] The racial, class, and ethnic disparities between those who live in the typical American home — single-family homes — and those who live in multiunit dwellings further highlight how dangerous this growing distinction between single-family homes and apartments is.[73]

While the Sixth Circuit had an opportunity to expand Fourth Amendment protections in the apartment context, its rigid curtilage analysis all but foreclosed the possibility. *Trice* perpetuated distinctions that allocate Fourth Amendment protections on the basis of class, race, and ethnicity. As some have noted, the Framers certainly could not have foreseen that Fourth Amendment rights would be distributed in this manner.[74] The Sixth Circuit had the policy and doctrinal backing to begin to remedy this inequity, yet it failed to do so.

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[69] *Share of Population Living in Apartments in the United States in 2019, by State*, STATISTA, https://www.statista.com/statistics/798113/share-of-population-living-apartments-by-state-usa [https://perma.cc/62NH-AR43].

[70] *Household Incomes*, NAT'L MULTIFAMILY HOUS. COUNCIL, https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-incomes [https://perma.cc/G7HW-THSC] (scroll to "Median Household Income (2018 Dollars)"). The highest income cluster for single-family dwellers was for those making over $120,000, whereas most multiunit dwellers had a household income below $39,999. *See American Housing Survey (AHS) Table Creator*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2019&s_tablename=TABLE1&s_bygroup1=1&s_bygroup2=1&s_filtergroup1=1&s_filtergroup2=1 [https://perma.cc/5NDQ-9XHL] (enter "Household Income" in Variable 1).

[71] *See American Housing Survey (AHS) Table Creator*, *supra* note 70 (for data on white and Black households, enter "Race of Householder" in Variable 1, and for the data on Hispanic households, enter "Hispanic Origin of Householder" in Variable 1). Additionally, as of 2020, 75% of white people owned their homes, while only 44% of Black people owned their homes. *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2020*, U.S. CENSUS BUREAU, https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/2PUQ-4DBY].

[72] *See American Housing Survey (AHS) Table Creator*, *supra* note 70 (enter "Hispanic Origin of Householder" in Variable 1).

[73] In line with the argument made here, Professor William Stuntz has argued that Fourth Amendment privacy has a bias, which disparately protects those who can afford to buy more privacy. *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270, 1273 (1999). Stuntz argues that, in order to do away with privacy's bias, the law must change how it understands privacy. *Id.* at 1273.

[74] Lewis, *supra* note 58, at 304–05; *see* Chase, *supra* note 1, at 1312.