UNCONSTITUTIONAL: KEY SEARCHES OF RESIDENTIAL DOORS BY LAW ENFORCEMENT ARE VIOLATIVE OF THE FOURTH AMENDMENT

Kendra A. Craft[I]

INTRODUCTION

The Fourth Amendment to the United States Constitution provides the foundation for all search and seizure issues in criminal law proceedings. In doing so, the Fourth Amendment plays two vital roles in the American legal system. First, the Fourth Amendment protects the privacy of the individual, extending to "all invasions on the part of the government and its employees on the sanctity of a man's home and the privacies of life."[2] Second, but equally important, the Fourth Amendment provides regulation for government actors. The actors who are typically the subject of Fourth Amendment inquiries are police.[3] The Fourth Amendment is the primary form of legal constraint on police. While most states have their own laws governing search and seizure issues, they are comparatively sparse and are typically skipped over in favor of the Fourth Amendment. The text of the Fourth Amendment guarantees:

> 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.[4]

As the amount of policing in the United States has increased within the past century, so have the number of alleged Fourth Amendment violations committed by law enforcement.[5] These violations have effectuated a substantial set of caselaw that continues to expand with each new issue regarding a Fourth Amendment violation.[6] While the breadth of issues regarding the Fourth Amendment is vast, the basic structure of the inquiry remains the same. Modern Fourth Amendment litigation

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[I] J.D. 2022, University of Kentucky J. David Rosenberg College of Law; B.A. in English 2018, University of Kentucky.

[2] Boyd v. United States, 116 U.S. 616 (1886).

[3] *Id.*

[4] U.S. CONST. amend IV.

[5] *See generally*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (Feb. 1967) (a report from the Johnson Administration, enacting new guidelines for policing and kick-starting the practice of active policing); Cheryl Corley, President Johnson's Crime Commission Report, 50 Years Later NPR (Oct. 6, 2017 at 7:00 AM) (https://www.npr.org/2017/10/06/542487124/president-johnson-s-crime-commission-report-50-years-later) (discussing the impacts of the 1967 act).

[6] *See generally*, Overview of the Fourth Amendment, 33 GEO. L.J. ANN. REV. CRIM. PROC. 5 (2004) (a summarized history of the Fourth Amendment).

involves a challenge to the evidence obtained during a search and seizure conducted by police. More particularly, the court examines the means by which the challenged evidence was obtained by police in the course of the investigation or in enforcement of ordinary criminal proceedings. Most often, defendants will seek to exclude, or suppress, the evidence gathered in these searches or seizures.

While certain aspects of a Fourth Amendment search and seizure seem to be well settled within the law, there are still many aspects that remain unresolved. Today, several circuit courts remain split as to whether an unreasonable search occurs within the Fourth Amendment when a law enforcement officer removes a key from an arrested person, uses that key determine whether it unlocks a door to a residence, and ultimately uses that information to obtain a search warrant for the arrestee's residence.[7]

This Note considers the conflicting judicial interpretations of statutory language and argues that an unreasonable search occurs within the Fourth Amendment when a law enforcement officer removes a key from an arrested person, uses that key to determine whether it unlocks a door to a residence, and ultimately uses that information to obtain a search warrant for the arrestee's residence. Part I provides the history of the Fourth Amendment in criminal proceedings and discusses the evolving rules and standards that are implicated by Fourth Amendment search and seizure cases. Part II examines the circuits' conflicting interpretations of the Fourth Amendment in cases that involve the use of a key to unlock an arrestee's residence. Part III explains why an unlawful search occurs when an officer removes a key from an arrested person, uses that key to determine whether it unlocks a door to a residence, and uses that information to obtain a search warrant for the residence.

I. THE HISTORY AND DEVELOPMENT OF FOURTH AMENDMENT SEARCHES AND SEIZURES

The ideals that define the Fourth Amendment, much like the common law itself, have pre-colonial roots. The Fourth Amendment, though often credited to be a result of tensions with the British that spawned the American Revolution, actually originates from British legal theory.[8] The axiom that a man's home is his castle is represented by the passionate speech of William Pitt to Parliament in 1763, where he argued that:

> The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.[9]

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[7] *See* United States v. DeBardeleben, 740 F.2d 440 (6th Cir. 1984); United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991); United States v. $109,179 in U.S. Currency, 228 F.3d 1080 (9th Cir. 2000); United States v. Moses, 540 F.3d 263 (4th Cir. 2008); United States v. Bain, 874 F.3d 1 (1st Cir. 2017).
[8] Leonard W. Levy, *Origins of the Fourth Amendment*, POLITICAL SCIENCE QUARTERLY 114, no. 1 (1999).
[9] *Id.* at 80.

Such beliefs did have supporting legal precedent, as exhibited by *Entick v. Carrington* and the series of accompanying actions against government actors that spanned across the early 1700s.[10] These actions were a result of searches and seizures carried out with general warrants, with the intentions to uncover evidence in connection with the pamphlets of John Wilkes, who criticized the King and his policies.[11] Entick, an associate of Wilkes, sued the government agents for forcibly entering his home, breaking into locked desks and boxes, and seizing evidence from the search.[12] The court agreed with Entick and declared the search, and the general warrant that permitted it, contrary to "all of the comforts of society" and "contrary to the genius of the law of England."[13] The ruling required that warrants must be issued under statute or other legal precedent in order to be considered valid under the laws of England. Entick is regarded as a "landmark of English liberty" and a guide to understanding the Framers' intentions in penning the Fourth Amendment.[14]

Though the Fourth Amendment was ratified into the United States Constitution in 1791, it remained predominantly powerless until the ruling of *Mapp v. Ohio* in 1961.[15] In 1957, police arrived at Ms. Mapp's home in response to information that she was hiding a fugitive wanted in connection with a recent bombing.[16] After Mapp refused to allow police to enter her home without a warrant, police produced a sheet of paper claimed to be a warrant.[17] An altercation ensued between Mapp and the officers as Mapp tried to read the warrant and police eventually forcibly entered the home.[18] Upon illegally searching the home, police found no evidence of a fugitive. Instead, they found "obscene papers" and Mapp was ultimately charged and convicted of possessing obscene materials.[19] The Supreme Court reversed Mapp's conviction, holding that evidence that is obtained by illegal means is to be considered inadmissible in state court; this was an extension of the pre-existing rule that prohibited illegal searches in federal court.[20]

Since the ruling of *Mapp v. Ohio*, there have been countless significant rulings that have added, and occasionally pulled, teeth from the Fourth Amendment. These rulings provide tests and factors to determine whether a search or seizure has occurred within the Fourth Amendment, whether the warrant requirement has been satisfied, and whether there is an exception to the warrant requirement that applies to the particular facts of a case. First, a search must be reasonable. A search may be subjected to the reasonable expectations test as depicted in the concurrence of *Katz*

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[10] *Id.* at 88–89.
[11] *Id.*
[12] *Id.*
[13] *Boyd*, 116 U.S. at 626.
[14] *Id.*
[15] Mapp v. Ohio, 367 U.S. 643 (1961).
[16] *Id.* at 644.
[17] *Id.*
[18] *Id.* at 644–45.
[19] *Id.* at 645.
[20] *Mapp*, 367 U.S. at 665–60; *See also*, Weeks v. United States, 232 U.S. 343 (1914) (introduced the exclusionary rule in federal courts).

v. United States.[21] The test consists of two questions: the first is whether there is an actual, subjective expectation of privacy and the second is whether that expectation is objectively reasonable.[22] A search may also be subjected to the common-law trespass test of *Florida v. Jardines*, wherein if the government "obtains information by physically intruding on persons, houses, papers, or effects," a search has "undoubtedly occurred."[23] The *Katz* test and the *Jardines* test work cohesively together, with neither one maintaining superiority over the other.[24] From *Jardines*, there is a subset of property tests. The first appears within *Jardines* itself and is a test to determine whether a physical intrusion has occurred on the curtilage of the home.[25] Under *Jardines*, a physical intrusion into a protected area that results in the acquisition of information only fails to constitute a search if that intrusion is permitted by a license such as one that is available to other, "normal," members of the public such as neighbors or solicitors.[26]

The specific test for determining exactly what areas qualify as the curtilage of the home is defined in *United States v. Dunn*, wherein the court noted that "the centrally relevant consideration" in determining the extent of a 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."[27] The court points to four specific factors, which are: "the proximity of the area claimed to be curtilage to the home;" "whether the area is included within an enclosure surrounding the home;" "the nature of the uses to which the area is put;" and "the steps taken by the resident to protect the area from observation by people passing by."[28] These property rights are not solely for those residences that are owned outright and renters of apartments are also afforded these same rights. The Fourth Amendment places extraordinary value on "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[29] As the court in *United States v. Bain* later points out, there is "no reason to expect a different answer when the home is a rented condominium."[30] While certain issues and tests regarding Fourth Amendment search and seizure seem to be well settled within the law, there are still many aspects that remain unresolved.

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[21] Katz v. United States, 389 U.S. 347, 360–61 (1967) (J. Harlan, concurring) (conception of the "reasonable expectations" test that is now cited as controlling in modern caselaw).
[22] *Id.*
[23] Florida v. Jardines, 569 U.S. 1 (2013).
[24] United States v. Jones, 565 U.S. 400, 409 (2012).
[25] *Jardines*, 569 U.S. at 3–4 (defining the curtilage as the area immediately surrounding and associated with the home).
[26] *Id.* at 6 (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)).
[27] United States v. Dunn, 480 U.S. 294, 295 (1987) (defining the test for curtilage).
[28] *Id.*
[29] *Jardines*, 569 U.S. at 4 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).
[30] United States v. Bain, 874 F.3d 1 (1st Cir. 2017) (citing generally to Chapman v. United States, 365 U.S. 610, 615 (1961) (rented premises); Johnson v. United States, 333 U.S. 10, 17 (1948) (hotel rooms).

II. THE ISSUE OF KEY SEARCHES AND A CIRCUIT SPLIT

While certain aspects of Fourth Amendment search and seizure seem to be well settled within the law, there are still many particulars that remain unresolved. One of these particulars is the issue of key searches. A key search occurs when an agent of the government, often a law enforcement officer, removes a key from an arrested person, uses that key to determine whether it unlocks a door to a residence, and ultimately uses that information to obtain a search warrant for the arrestee's residence.[31] Today, several circuit courts remain split as to whether these events constitute an unreasonable search within the bounds of the Fourth Amendment.[32]

A. United States v. Moses and United States v. Concepcion: Restricting Constitutional Protections to Key Searches of Residential Doors

The Fourth Circuit in *United States v. Moses* held that an officer's key search was reasonable based on the Fourth Amendment.[33] In 2006, a Tactical Special Enforcement Team began investigating a local street gang known as the "Goodfellas" in connection with drug trafficking and violent crimes.[34] One month later, the team apprehended the leader of the gang, Carl Kotay Graham, who provided officers with information naming Covonti Kwa Moses as a member of the gang.[35] Graham told the officers that Moses had guns and cocaine, amongst other gang-related items, stashed at a "cream-colored duplex" on "Cedar Street."[36] After arresting Moses for driving with a suspended license and for possession of marijuana, an officer brought Moses back to Cedar Street, where officers used the keys obtained from a search to determine whether one of them unlocked unit A.[37] The key opened unit A and officers conducted a protective sweep of the unit and discovered, in plain view, crack cocaine and marijuana residue.[38]

While still at the scene, another tip was received that Moses was selling crack cocaine from another residence; police also used Moses' keys to unlock this residence and found more evidence of crack cocaine.[39] Using this information, officers obtained a search warrant and discovered evidence used to charge Moses with possession of a firearm and possession with intent to distribute crack cocaine.[40]

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[31] Courts have also considered the Constitutionality of key searches in regard to automobiles and storage units, seeming to settle that neither violate the Fourth Amendment. *See United States v. $109,179 in U.S. Currency*, 228 F.3d 1080 (9th Cir. 2000); *United States v. Lyons*, 898 F.2d 210 (1st Cir. 1990); *United States v. DeBardeleben*, 740 F.2d 440 (6th Cir. 1984).

[32] *See* United States v. DeBardeleben, 740 F.2d 440 (6th Cir. 1984); United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991); United States v. $109,179 in U.S. Currency, 228 F.3d 1080 (9th Cir. 2000); United States v. Moses, 540 F.3d 263 (4th Cir. 2008); United States v. Bain, 874 F.3d 1 (1st Cir. 2017) (examples of key search cases on both car doors and residential doors).

[33] U.S. v. Moses, 540 F.3d 263 (4th Cir. 2008).

[34] *Id.* at 265.

[35] *Id.*

[36] *Id.*

[37] *Id* at 266.

[38] *Id.* at 266–67.

[39] *Id*. at 267.

[40] *Id*. at 267–268.

Moses appealed these pleadings, arguing that the officers entered the two residences without a warrant. Amongst other arguments, Moses argued that the district court was not entitled to rely on the evidence that the keys in his possession unlocked the doors "because the use of the key was part of the illegal entry into a residence" and the use of the key was the "beginning of an illegal search."[41] The Fourth Circuit, with very little rationale other than following the lead of other circuits, upheld the conviction, arguing that the "discrete" act of inserting the key into the lock to determine whether it fit did not "offend the Fourth Amendment."[42]

The Seventh Circuit in *United States v. Concepcion* held that an officer's key search was reasonable based on the Fourth Amendment.[43] Gamalier Concepcion consented to a search of his apartment wherein DEA agents found evidence of cocaine.[44] This evidence was used to secure a guilty plea of possession of cocaine with intent to distribute that landed Concepcion with over three years imprisonment; however, Concepcion reversed for appeal an objection as to the validity of his consent to the search of his apartment.[45] Concepcion, in his appeal to the Seventh Circuit argued that his consent was "fruit of two unlawful searches."[46] After arresting and searching Concepcion, the DEA agents seized his keys and began searching for his apartment. After locating a mailbox with the nameplate "Concepcion," police inserted one of the keys found on Concepcion to open the exterior door to the apartment.[47] After entering the apartment's common area, agents used another key to unlock Concepcion's individual bedspace.[48] After unlocking the door, agents opened the door an inch, closed the door, then locked the door again without looking inside. Concepcion initially denied knowing anything about the apartment, but later relented and signed a consent form for the search of the bedspace.[49] The district court's opinion held neither the entry into the common area of the apartment nor the insertion of the key into the lock to be an unreasonable search.[50] The district court held, and the Seventh Circuit agreed, that a search is the invasion of a sphere in which society recognizes reasonable expectations of privacy.[51]

The Seventh Circuit, however, differentiated the entry of the key into the lock as being a much more complicated issue. A keyhole, as explained by the court, is a "potentially protected zone," as it "contains *information*—information about who has access to the space beyond."[52] After acknowledging the already-growing circuit split between the Sixth and First Circuits and the Ninth Circuit, the Seventh Circuit held that because the DEA agents were obtaining information from the inside of the lock, which "is both used frequently by the owner and not open to public view," the

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[41] *Moses*, 540 F.3d 263 at 272.
[42] *Id.*
[43] United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991).
[44] *Id.*
[45] *Id.* at 1171.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1171–72.
[50] United States v. Concepcion, 742 F. Supp. 503 (N.D.III. 1990).
[51] *Concepcion*, 942 F.2d at 1172 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).
[52] *Id.* at 1172.

insertion of the key must be considered a search under the Fourth Amendment.[53] The Seventh Circuit then qualified the search as reasonable based on a slippery slope analysis. The court reasoned that because Concepcion was properly arrested and searched without a warrant, there should not be a warrant requirement to "learn whether the keys in Concepcion's possession operate a lock."[54] The Seventh Circuit concluded by affirming the conviction with the confident assumption that, while an owner of a lock has a privacy interest in the keyhole, that interest is "so small" as to be deemed insignificant.[55]

B. United States v. Bain: Extending Constitutional Protections to Key Searches of Residential Doors

More recently, the First Circuit in *United States v. Bain* has taken a confident step towards the future of the Fourth Amendment.[56] Yrvens Bain was arrested after he emerged from a multi-family unit apartment building. After Bain was searched, police found a set of keys in his possession and subsequently used these keys to open the front door of the building and attempted to open three apartments within the building. After trying and failing to open one apartment on the first floor and another apartment on the second floor, the key finally succeeded in opening a door on the second floor. Police used this information to apply for and secure a warrant to search the apartment; this search produced a firearm and drug paraphernalia.[57] Bain attempted to suppress the evidence, arguing that the officers conducted an unlawful search by turning the key in the locks to identify the unit and that there was no probable cause absent that identification. The district court denied this motion and Bain was convicted. The First Circuit found that the turning of a key in a lock is unreasonable and a warrantless search unsupported by "any clear precedent" and that "without the information obtained by turning the key, there was no probable cause to issue a warrant."[58]

The First Circuit reached this conclusion by citing to *United States v. Dunn* and holding that, even if the lock on the apartment door is not within the home itself, it is at minimum a part of the curtilage of the home.[59] The court used the *Dunn* factors to conclude that the lock on a door is sufficiently proximate to the interior of the home, is included within or adjacent to the door's outer face, is intended by nature to bar unwelcome entry and the invasion of privacy, and that the "very design" of a lock hides its interior from being examined.[60] The court also cited to *Jardines*, arguing that a physical intrusion into the curtilage to obtain information is a search, unless it is within the "implicit license" which "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received,

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[53] *Id.*
[54] *Id.*
[55] *Id.* at 1173.
[56] United States v. Bain, 874 F.3d 1 (1st Cir. 2017).
[57] *Id.* at 9–10.
[58] *Id.* at 11.
[59] *See* United States v. Dunn, 480 U.S. 294, 295 (1987) (defining the test for curtilage).
[60] *Bain*, 874 F.3d at 15.

and then (absent invitation to linger longer) leave."[61] As the behavior of police was not considered to be within social norms, a search occurred under the Fourth Amendment. While the government referenced *United States v. Lyons* and *United States v. Hawkins* to bolster its argument that key searches are reasonable under the Fourth Amendment, the court disagreed based upon the specific facts of these cases.[62]

The First Circuit dismissed the government's citation to other circuit court opinions, like those discussed in previous paragraphs. The court distinguished key searches of car doors from key searches of residential doors, arguing that the Constitutional protections of automobiles are much less strong than that of residences.[63] The court also took aim at the *Moses* decision for containing no real analysis of the issue.[64] Finally, the court addressed the Seventh Circuits holding in Concepcion, questioning "the logic of justifying a search of this type" by way of the plain view doctrine.[65] The First Circuit referenced the ease by which the government could have obtained other identifying information and questions why it would be necessary to invade the curtilage of the home, rather than using those less invasive means. Conclusively, the court pointed to the fact that the officers invaded the curtilage of Bain's home for the sole purpose of gaining evidence to use against him in a criminal action and argued that there is "no reason to conclude that the law enforcement-related concerns sufficiently outweighed the privacy-related convers to render this search reasonable."[66] While the court ultimately falls back on a good-faith exception to the warrant requirement, their initial holding that key searches are violative of the Fourth Amendment has created a circuit split amongst the courts. This split remains unresolved.

III. KEY SEARCHES OF RESIDENTIAL DOORS ARE A VIOLATION OF THE FOURTH AMENDMENT

As indicated by the plain text and purpose of the Fourth Amendment and the judicial history surrounding the application of the Fourth Amendment to the home, an officer removing a key from an arrested person, using that key to determine whether it unlocks the door of a residence, and using that information to obtain a search warrant for the residence *is* a violation of the Fourth Amendment. These arguments will be considered below.

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[61] *Id.*
[62] *Id.* (distinguishing the facts of the current case to the facts of United States v. Lyons, 898 F.2d 210 (1st Cir. 1990) and United States v. Hawkins, F.3d 29 (1st Cir. 1998), which applied to locks on storage containers, rather than residential locks)).
[63] *Id.*
[64] *Id.* (distinguishing from Moses).
[65] *Bain*, 874 F.3d at 18 (distinguishing from Concepcion).
[66] *Id.* at 19.

A. The Distinction Between Residential and Non-Residential Key Searches

Before an argument for extending the Fourth Amendment to key searches of residential can be made, the distinction between residential and non-residential key searches must be clarified. While the issue of key searches certainly has not been brought up so frequently as to lend itself to a comprehensive solution, it does seem that the circuits have agreed that Fourth Amendment protections will not extend to key searches on car doors or storage units. This decision likely has roots in the automobile exception and the ideals behind it. The automobile exception was first introduced in *Carroll v. United States*.[67] In *Carroll*, federal prohibition agents encountered a car on the highway that they had reason to believe was being driven by bootleggers.[68] The agents stopped the car, searched it without a warrant, and discovered bottles of whiskey and gin hidden within the car's upholstery.[69] In upholding the search, the court created the automobile exception, which permitted searches and seizures of cars stopped alongside the road if obtaining a warrant would not be "reasonably practicable" and the agent has reasonable or probable cause to believe that the automobile has contraband liquor that is being transported.[70] While the specific restrictions of prohibition have long since ended, the automobile exception has not only remained, but has expanded. Courts have extended the automobile exception to allow agents to move and search a vehicle.[71] Courts have also extended the automobile exception to apply to containers within a vehicle, whether owned by the owner of the vehicle or by a passenger.[72] The Supreme Court, in *California v. Carney*, went so far as to extend the automobile exception to a mobile home.[73] The majority in *Carney* holds that it is too difficult to draw distinctions between residential and non-residential moveable vehicles and claims that such a task will be "impossible" for officers.[74] Justice Stevens' dissent, joined by Justice Brennan and Justice Marshall, pushes back on this assumption and argues that, by looking at the exterior of the mobile home, officers should be able to pick up on "clues" as to whether the mobile home is being used as a residence.[75] Given the Supreme Court's historical hesitancy to extend stringent Fourth Amendment protections to automobiles and typically non-residential spaces, it is unsurprising to see the circuits follow this line of reasoning to reject, seemingly unanimously, any argument regarding key searches on car doors and storage units.

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[67] *See* Carroll v. U.S., 267 U.S. 132 (1924).
[68] *Id.* at 135.
[69] *Id.* at 136.
[70] *Id.* at 156.
[71] See Chambers v. Maroney, 399 U.S. 42 (1970) (upholding the decision to move a suspect's car from the road to the police station for a search).
[72] See California v. Acevedo, 500 U.S. 565 (1991) (holding that the automobile exception applies to containers within the vehicle if probable cause is present); Wyoming v. Houghton, 526 U.S. 295 (1999) (holding that the automobile exception applies to passengers within a vehicle, as passengers should also have a deceased expectation of privacy).
[73] California v. Carney, 471 U.S. 386 (1984).
[74] *Id.* at 386 (quoting South Dakota v. Opperman, 428 U.S. 364, 387 (1976)).
[75] *Carney*, 471 U.S. at 406 (Stevens J., dissenting).

B. Plain Text and Purpose of the Fourth Amendment

The plain text and the purpose of the Fourth Amendment supports the argument that an officer removing a key from an arrested person, using that key to determine whether it unlocks the door of a residence, and using that information to obtain a search warrant for the residence is a violation of the Fourth Amendment. The text of the Fourth Amendment guarantees:

> 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.[76]

As shown above, the plain text of the Fourth Amendment requires all searches to be reasonable. Even as conceded by many of the courts in previous paragraphs, key searches are typically unreasonable and invade the sense of privacy and security that people value in their homes and, to a lesser extent, in their automobiles. The plain text of the Fourth Amendment fails to lend itself to the assertion that residential key searches are reasonable. Further, the apparent purpose of the Fourth Amendment, as introduced by the Framers of the United States Constitution, was not to allow government to overstep into the lives of its citizens. Looking back to the case of *Entick v. Carrington*, where the court declared a search, and the general warrant that permitted it, contrary to "all of the comforts of society" and "contrary to the genius of the law of England."[77] The ruling *of Entick*, and others like it, which the Framers used as the foundation for the Fourth Amendment, place fervent value on the principles of privacy, freedom, and liberty of the individual. Allowing government actors to circumvent these rights by removing keys from an arrestee, using those keys to determine whether they unlock a door to a residence, and using this information to secure a warrant against the arrestee certainly seems to work against the values secured within the Fourth Amendment. Thus, the plain text and the mere purpose of the Fourth Amendment support the argument that an officer removing a key from an arrested person, using that key to determine whether it unlocks the door of a residence, and using that information to obtain a search warrant for the residence is a violation of the Fourth Amendment.

C. Judicial History of the Fourth Amendment: The Trend Towards More Stringent Fourth Amendment Protections

The judicial history of the Fourth Amendment also supports the argument that an officer removing a key from an arrested person, using that key to determine whether it unlocks the door of a residence, and using that information to obtain a search

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[76] U.S. CONST. amend IV.
[77] United States v. Boyd, 116 U.S. 616, 626 (1886).

warrant for the residence is a violation of the Fourth Amendment. As explained by the court in *Bain*, the only precedential case to thoroughly address the issue of a residential key search was the Seventh Circuit in *Concepcion*. The holding in *Concepcion* had no constitutional argument or evidence to support its conclusion that residential key searches are per se reasonable. Rather, *Concepcion* relied on an extension of the plain view doctrine from *Arizona v. Hicks*, wherein police lawfully entered and searched an apartment and noticed stolen stereo equipment.[78] As the court in *Hicks* itself notes, warrantless searches and seizures are presumptively unreasonable and there is no reason why an exception to the warrant requirement should require a lesser standard of cause than that needed to obtain an actual warrant. Further, though not mentioned by the court in *Concepcion* or the court in *Bain*, the facts of the *Hicks* seem similar in a different way. In *Hicks*, the court ultimately holds that, while the plain view doctrine is certainly valid, the officer's action of physically touching and manipulating the stereo system in order to observe and record the serial number oversteps the bounds of the exception to the warrant requirement and is thus unconstitutional.[79] This excessiveness seems rather comparable to an officer removing a key from an arrested person, transporting the key to a residential door, and inserting and manipulating the key in order to unlock and often open the door. As conceded by many of the circuit opinions within this line of cases, the information needed to obtain a search warrant could possibly be found by other, less intrusive means. If this is true, as *Bain* hints at, there should be no reason for an officer to take the extra, invasive steps in order to trespass on the curtilage of an arrestee's home to secure a warrant.

Further, it does not seem to run afoul of any of the relevant constitutional tests to consider residential key searches violative of the Fourth Amendment. As noted by the Court in *Kentucky v. King*, it is the "basic principle of Fourth Amendment law… that searches and seizures inside a home without a warrant are presumptively unreasonable."[80] As further identified by *Florida v. Jardines*, a search may also be subjected to the common-law trespass test. In this case, it seems as if the area of the home impacted by a key search falls within the curtilage of the home as defined by *Florida v. Jardines* and *United States v. Dunn*. As the *Katz* test and the *Jardines* test work cohesively together, with neither one maintaining superiority over the other, we must also assure that the *Katz* test is satisfied. The test consists of two questions: the first is whether there is an actual, subjective expectation of privacy and the second is whether that expectation is objectively reasonable.[81] It would certainly be difficult to argue that an individual did not have a reasonable expectation of privacy in the lock on their front door. Under *Jardines*, a physical intrusion into a protected area that results in the acquisition of information only fails to constitute a search if that intrusion is permitted by a license such as one that is available to other, 'normal' members of the public. As normal members of the public, such as neighbors and solicitors, certainly do not have the license to remove a key from an arrestee or use

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[78] Arizona v. Hicks, 480 U.S. 321 (1987).
[79] *Id.*
[80] Kentucky v. King, 563 U.S. 1, 5 (quoting Bingham City v. Stuart, 547 U.S. 398, 403 (2006)).
[81] United States v. Jones, 565 U.S. 400, 409 (2012).

that key to determine whether it unlocks the door of a residence, we can conclude that the police do not have the license to do so. Thus, the judicial history of the Fourth Amendment also supports the argument that an officer removing a key from an arrested person, using that key to determine whether it unlocks the door of a residence, and using that information to obtain a search warrant for the residence is a violation of the Fourth Amendment.

D. Existing Doctrines Provide Sufficient Exceptions for Law Enforcement

Fourth Amendment protections have been continuously evolving since *United States v. Mapp*. While the Fourth Amendment is no longer the toothless doctrine it once was, there are still multiple exceptions to the prohibition on unreasonable searches and seizures. An underlying concern that seems to be coursing through the opinions of many circuit courts is that of police efficiency. This concern is certainly not a new or novel one. As such, there are numerous exceptions that have been carved out by the courts over the past century. One of the chief exceptions is known as the exigent circumstances doctrine. The exigent circumstances doctrine, along with numerous other exceptions, such as the plain view doctrine, the automobile exception, hot pursuit, and the good faith exception, provide a plethora of protections for efficiency in police administration. Each of these doctrines protect police at the disadvantage of the individual. These doctrines provide sufficient exceptions for law enforcement when conducting otherwise unlawful searches and seizures; the remaining circuits should follow the lead of the First Circuit in finding key searches on residential doors to be unlawful, absent a warrant or exigent circumstances.

IV. CONCLUSION

As indicated by the plain text and purpose of the Fourth Amendment and the judicial history surrounding the application of the Fourth Amendment to the home, an officer removing a key from an arrested person, using that key to determine whether it unlocks the door of a residence, and using that information to obtain a search warrant for the residence *is* a violation of the Fourth Amendment. Other circuits should follow the lead of the First Circuit in analyzing future key search cases in order to better protect the constitutional rights of criminal defendants, weighing efficiency needs and other exceptions as required, on an individual case basis.