24-P-870 Appeals Court

COMMONWEALTH vs. BARRY A. HANSON, JR.

No. 24-P-870.

Worcester. April 10, 2025. – December 2, 2025.

Present: Hand, Grant, & Wood, JJ.

Firearms. Practice, Criminal, Motion to suppress, Warrant. Probable Cause. Constitutional Law, Search and seizure, Probable cause. Search and Seizure, Probable cause, Warrant.

Indictments found and returned in the Superior Court Department on October 31, 2023.

A pretrial motion to suppress evidence was heard by William J. Ritter, J., and a motion for reconsideration was considered by him.

An application for leave to prosecute an interlocutory appeal was allowed by Gabrielle R. Wolohojian, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by her to the Appeals Court.

Anne S. Kennedy, Assistant District Attorney, for the Commonwealth.
Charles P. McGinty for the defendant.

WOOD, J. This is the Commonwealth's interlocutory appeal from the order of a Superior Court judge allowing the

defendant's motion to suppress evidence, and the subsequent denial of the Commonwealth's motion for reconsideration. We must decide whether the police violated the particularity requirement of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights when, having learned during the execution of a search warrant for the defendant's first-floor apartment that he also rented the second-floor apartment in the same two-family home, and that he was using the two apartments as a single dwelling, they expanded their search to include the second-floor apartment without obtaining a new warrant. Concluding that this case was controlled by Commonwealth v. Hall, 366 Mass. 790, 799-800 (1975), the judge decided that the search of the second floor exceeded the scope of the search warrant approved by the clerk-magistrate and therefore allowed the motion to suppress. We agree that this case is controlled by Hall. Accordingly, we affirm the order allowing the motion to suppress as well as the denial of the Commonwealth's motion to reconsider that allowance.

Background. The judge held an evidentiary hearing at which a single witness, Lieutenant Carlos Dingui of the Southbridge police department, testified. The judge "heard and credited [Dingui's] testimony"; we summarize it here, reserving some details for later discussion. See Commonwealth v. Jones-

Pannell, 472 Mass. 429, 431 (2015), quoting Commonwealth v. Jessup, 471 Mass. 121, 127-128 (2015) (appellate court may supplement motion judge's subsidiary findings with evidence from record that is uncontroverted where judge explicitly or implicitly credited that evidence, provided supplemented facts "do not detract from the judge's ultimate findings").

In July 2023, a detective with the Southbridge police department applied for and obtained a warrant authorizing a search of the defendant's home at "30 Golf Street, 1st-floor apartment in Southbridge, MA, along with its basement, attic, storage sheds, garages, and curtilage associated with this residence. . . . [w]hich is occupied by and/[or] in the possession of: [the defendant]."[1] The building at 30 Golf Street is a two-family house comprised of two apartments, one on the first floor and the other on the second floor. In front of the house are two mailboxes, one for each apartment. Each of the apartments is accessible from the outside through a "front door." The front door to the first-floor apartment is on the front of the house. The entryway to the second-floor apartment

[1] The application for the search warrant stated that "[t]he target apartment is on the first floor." The typewritten supporting affidavit identified the defendant's residence as "30 Golf Street," with a handwritten notation, initialed by the affiant and the clerk-magistrate, specifying, "1st Floor apartment."

is on the left side of the house. It opens to a staircase which in turn leads to a front door to that apartment.

Each apartment also has a back door accessible from a two-story enclosed porch on the back of the house.[2] The two porch levels are connected by an internal stairway. There are two exterior doors on the back of the house that provide access from the backyard to the first level of the porch. One -- at the base of the staircase leading to the back door of the second-floor apartment -- was locked when the police searched the house. The other -- directly in front of the back door to the first-floor apartment -- was blocked by a bureau inside the porch.

The affidavit supporting the search warrant detailed several sales of marijuana and related paraphernalia to an undercover police officer, which took place at two locations other than the defendant's home. The nexus between the defendant's home and the illegal activity was established by police surveillance of the defendant leaving "the front door of his residence" (i.e., "the first floor of 30 Golf Street") with the plastic bags and shoe box from which he later retrieved the

[2] The back doors to each apartment could be locked, but both were standing open when the police saw them.

drugs and paraphernalia that he sold to the undercover police officer.

On July 28, 2023, Dingui and other officers went to the front door of the first-floor apartment. The defendant's girlfriend answered the door and they advised her that they had a search warrant.[3] The police entered the kitchen and saw an open door leading from the rear of the room to the first floor of the enclosed back porch. The girlfriend told the police that the defendant rented both the first- and second-floor apartments, treating them as a single unit. The girlfriend's children, of whom there were three or four, were in the home, and the girlfriend told the police that her twelve year old son (boy) was on the second floor. The boy then came into the kitchen from the back porch dressed in a towel, having just taken a shower on the second floor. The girlfriend gave the police permission to accompany the boy upstairs so he could dress.

To get to the second floor, the police went through the kitchen on the first floor, out the open door at the back of the

[3] The apartment door opened into a living room, and a primary bedroom was to the right. Through the living room was a kitchen; from the kitchen, there were two bedrooms and a bathroom.

kitchen, and onto a landing on the enclosed porch.[4] They then took the stairs from the first-floor landing to the second-floor landing and went through an open door into the second-floor apartment.

The layout of the second-floor apartment was similar to that of the first-floor apartment, although the kitchen in the second-floor apartment was being used as an office. The boy's bedroom door opened off of the kitchen, as did two other doors. Those two doors were closed and padlocked, and the police saw wired surveillance cameras immediately beside them.[5]

The police and the boy, who had dressed, returned to the first floor. Dingui then asked the girlfriend how the defendant used the second-floor apartment; she responded that the defendant had been renting both apartments for "a couple years,"[6] and that the second-floor apartment was "just an upstairs to them." She also said that the defendant sometimes stayed on the second floor, and that the defendant and her family "generally

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[4] The enclosed porch area was cluttered with shelves, furniture, and other personal items that blocked much of the hallway and one of the exterior doors that led from the first floor of the porch to the backyard.

[5] Dingui testified that there were cameras "throughout both apartments."

[6] The police later confirmed that the defendant had a written lease for the entire building at 30 Golf Street.

[kept] [the] doors [to the enclosed porch area] open because they . . . [went] up and down throughout the day." She also told the police that the defendant was the only person with access to the padlocked rooms on the second floor. At that point, the police viewed the two apartments to be "a single-family home."

Without applying for another search warrant for the second floor, the police obtained the keys to the padlocks securing the two padlocked doors, unlocked them, and searched the rooms into which they led. During that search, the police found contraband, including firearms.[7]

Ultimately, a grand jury indicted the defendant for three counts of unlawful possession of a large capacity weapon or feeding device, in violation of G. L. c. 269, § 10 (m); four counts of unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (h), as an armed career criminal, see G. L. c. 269, § 10G (b); one count of unlawful possession of ammunition, in violation of G. L. c. 269, § 10 (h) (1), as an armed career criminal, see G. L. c. 269, § 10G (b); one count of forgery of a promissory note, in violation of G. L. c. 267, § 1;

[7] It appears that, on the first floor, the police found evidence of the sale of illegal drugs.

and one count of possession with the intent to distribute a class D substance, in violation of G. L. c. 94C, § 32C (a).[8]

After his arraignment in the Superior Court, the defendant moved to suppress the evidence found in the second-floor apartment, arguing that the search violated the particularity requirements of both the Fourth Amendment and art. 14, as well as G. L. c. 276, § 2.[9] See G. L. c. 276, § 2 ("Search warrants shall designate and describe the building, house, place, vessel or vehicle to be searched and shall particularly describe the property or articles to be searched for"). In his motion, the defendant likened the facts of this case to those in Hall, 366 Mass. at 791-792, in which (as we discuss in more detail, infra) the Supreme Judicial Court rejected the Commonwealth's argument that a warrant for a second-floor apartment in a multiunit building extended to a different, vacant apartment in the same building. See id. at 799-800. After a hearing, the judge in the present case ruled that "[r]egardless of how the defendant

[8] The defendant was also indicted for one count of witness intimidation, in violation of G. L. c. 268, § 13B.

[9] The defendant also argued that the Commonwealth could not show the existence of exigent circumstances relieving the police of the usual warrant requirements. See Commonwealth v. Arias, 481 Mass. 604, 615-617 (2019). On appeal, the Commonwealth does not make an exigency argument in connection with the search of the second-floor apartment, and we therefore need not and do not address that issue.

used the two apartments, the second-floor apartment was not 'part and parcel' or a 'contiguous part' of the first-floor apartment," Commonwealth v. Wallace, 67 Mass. App. Ct. 901, 902 (2006); concluded that Hall, supra, controlled the case; and, ultimately, concluded that the warrant did not authorize the search of the second-floor apartment.[10]

A single justice of the Supreme Judicial Court granted the Commonwealth's motion for leave to pursue in this court an interlocutory appeal of the judge's ruling. After careful consideration, we conclude that, on the facts of this case, the search of the second-floor apartment violated the applicable constitutional and statutory particularity requirements, and that the judge properly granted the defendant's motion to suppress the evidence obtained in the search of the second floor at 30 Golf Street.

Discussion. 1. Standard of review. "On appeal, we review a ruling on a motion to suppress by accepting 'the judge's subsidiary findings of fact absent clear error but conduct an independent review of [the] ultimate findings and conclusions of law.'" Commonwealth v. Cintron, 103 Mass. App. Ct. 799, 801-802 (2024), quoting Commonwealth v. Polanco, 92 Mass. App. Ct. 764,

[10] The judge did not address the Commonwealth's alternative argument that the second-floor apartment came within the curtilage of the first-floor apartment.

769 (2018). "A judge's finding is clearly erroneous only where there is no evidence to support it or where the reviewing court is left with the definite and firm conviction that a mistake has been committed." Commonwealth v. Wittey, 492 Mass. 161, 181 (2023), quoting Commonwealth v. Colon, 449 Mass. 207, 215, cert. denied, 552 U.S. 1079 (2007).

2. Particularity requirement. The Fourth Amendment to the United States Constitution states:

> "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" (emphasis added).

Article 14 of the Massachusetts Declaration of Rights requires similar particularity. See Commonwealth v. Walsh, 409 Mass. 642, 644-645 (1991). The purpose of this particularity requirement is "to prevent general searches." Maryland v. Garrison, 480 U.S. 79, 84 (1987). "[T]he requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Id.

This case presents a straightforward constitutional question: How does the Fourth Amendment's particularity clause apply to multiunit residential buildings? At least where the

police know, when they apply for a warrant, that the building contains multiple residential units, the warrant must state the unit(s) to be searched, thereby (a) limiting the search to the unit(s) described and (b) excluding all other units in the building from the scope of the warranted search. See Hall, 366 Mass. at 799-800; Commonwealth v. Forbes, 85 Mass. App. Ct. 168, 176 (2014). Where the police learn, after they have begun executing a warrant authorizing the search of a single unit in a multiunit building, that there is reason to extend the search to another unit within the building, this does not justify extending the scope of the warrant beyond the particular unit described, absent exigent circumstances (or some other applicable exception to the search warrant requirement).[11]

As the judge recognized, Hall articulated the controlling principle here. See Hall, 366 Mass. at 799-800. In that case, the Commonwealth obtained a search warrant for the second-floor apartment of a three-story building with one apartment on each floor. Id. at 791. During the search, police officers learned that the target owned the building and controlled the third-

[11] The Supreme Judicial Court has identified one narrow circumstance in which the area searched may be "construed more liberally" -- when execution of the warrant reveals "illegal activities spill over into a directly adjacent or contiguous area under the same control." Hall, 366 Mass. at 800 n.11. Because the Commonwealth does not argue that this exception applies, we do not consider it.

floor apartment. Id. Further, officers received information that the target stored additional drugs in the third-floor apartment. Id. Officers then searched the third-floor apartment and recovered contraband. Id. at 791-792. The Supreme Judicial Court held that the search of the third floor was unlawful, concluding that "different apartments in a single building are as distinct as separate dwelling houses, so that a separate warrant on probable cause is ordinarily needed for each." Id. at 800. The court articulated the principle behind this holding, stating, "The authority to search is limited to the place described in the warrant and does not include additional or different places" (citation omitted). Id. at 799.

In a closely analogous situation, we later held that, where officers obtained a warrant to search one apartment in a multiunit building and learned, during the execution of the warrant, that the target actually lived in a different unit, their search of that unit without a second warrant was unconstitutional. Forbes, 85 Mass. App. Ct. at 171, 176.[12]

[12] The United States Court of Appeals for the Second Circuit has echoed this application of the particularity clause. See United States v. Bershchansky, 788 F.3d 102, 111 (2d Cir. 2015) (invalidating search under particularity clause because "when the agents searched Apartment 1 rather than Apartment 2, they searched an apartment that the magistrate judge did not authorize them to search"); United States v. Voustianiouk, 685 F.3d 206, 215 (2d Cir. 2012) ("there can be no doubt that a search warrant for one apartment in a building does not permit

As the judge here recognized, this case is materially indistinguishable from Hall. See Hall, 366 Mass. at 791-792. The police officers in the instant case obtained and executed a warrant for a specific apartment in a multiunit building, the "1st-floor apartment." During the execution of the warrant, they learned that the defendant also rented the second-floor apartment. Then, without obtaining a second warrant for that second unit, the police searched it. For the same reasons the search of the third-floor apartment in Hall was not covered by the warrant obtained there, the search of the second-floor apartment here was also not covered by the warrant and therefore was unconstitutional. See id. at 799-800.[13]

The United States Court of Appeals for the Second Circuit has focused on the limiting principle in the particularity clause, stating, "In determining the permissible scope of a search that has been authorized by a search warrant, . . . we must look to the place that the magistrate judge who issued the

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the police to enter apartments other than the one specified in their warrant").

[13] The dissent contends that Hall, 366 Mass. at 791, is distinguishable because "the claimed basis for the warrantless search [of the third-floor apartment in Hall] was new information." Post at . In fact, in this case, as in Hall, supra, the claimed basis for the warrantless search of the second-floor apartment was also new information -- the girlfriend's statement that the defendant rented the second-floor apartment.

warrant intended to be searched . . . ." United States v. Voustianiouk, 685 F.3d 206, 211 (2d Cir. 2012). In this case, the clerk-magistrate limited the search to the "1st-floor apartment," giving clear notice to the executing officers of the limitation set by the warrant, including the fact that the second-floor apartment was beyond the scope of the warrant.

Moreover, the Voustianiouk court identified the correct course of action where police discover, during the execution of a warrant in one apartment, that there is reason to search a different apartment: the officers "could have called a magistrate judge and obtained a new warrant to search the second-floor apartment. The evidence wasn't going anywhere, and neither was their suspect." Voustianiouk, 685 F.3d at 208. See United States v. Bershchansky, 788 F.3d 102, 113 (2d Cir. 2015) ("A reasonable police officer would have recognized that the warrant authorized a search only of Apartment 2, he would not have proceeded to search an unauthorized apartment, and he would have called the magistrate judge for permission to search Apartment 1"). The same observation applies here, given that the defendant was in custody at the time police learned he also rented the second-floor apartment, and the police could have secured both units while they sought a second warrant.

Relying on dicta in a footnote to the opinion in Hall, 366 Mass. at 800 n.11, the dissent argues that the place to be

searched should be construed more liberally here for four reasons, based on the evidence: (1) the police applied for and obtained a search warrant for one apartment in a two-family dwelling; (2) the police limited the warrant application to the first-floor apartment based on a mistaken belief that the defendant lived only in that apartment; (3) probable cause existed to search the second-floor apartment; and (4) when they executed the warrant, the police learned that the defendant also rented the second-floor apartment and used both as a "single dwelling." Post at . None of these facts distinguishes this case.

First, in both Hall, 366 Mass. at 791, and Forbes, 85 Mass. App. Ct. at 170, as in this case, the police applied for a warrant to search a particular apartment in a multiunit dwelling.

Second, in both Hall, supra at 791, and Forbes, supra at 172, as in this case, the police limited the warrant application to a single apartment based on a mistaken belief that the defendant resided exclusively in that apartment.

Third, although the existence of probable cause is a necessary predicate for the search of a second apartment in a multiunit building, it is not enough. See Garrison, 480 U.S. at 84 (purpose of particularity clause is to limit authorization to search to specific areas); Voustianiouk, 685 F.3d at 211 ("the

permissible scope of a search" is limited "to the place that the magistrate . . . intended to be searched"). Police officers must either obtain a second warrant, satisfying the particularity clause, see Hall, 366 Mass. at 800, or establish the existence of exigent circumstances and the impracticality of obtaining a warrant, see Commonwealth v. Tyree, 455 Mass. 676, 683-684 (2010). They did neither here.

Fourth, where police officers know that there are multiple residential units in the target building, they are obligated to identify the unit to be searched in the application to exclude other apartments from the scope of the requested warrant. See Commonwealth v. Carrasco, 405 Mass. 316, 323-324 (1989). Cf. Commonwealth v. Luna, 410 Mass. 131, 134-135 (1991) ("if the police knew or should have known that, at the time the warrant was issued, there was a completely separate downstairs apartment, they would have had to demonstrate to the magistrate probable cause to search each apartment" [emphasis added]).[14] The mere fact that police learned during the execution of a warrant that the target was using a different apartment in the

[14] The dissent cites Luna, 410 Mass. at 134-135, in support of its argument. Post at . However, Luna illustrates that when police officers are aware, before they seek a search warrant, that the target dwelling contains multiple apartments, they must make a separate showing to justify the search of each apartment. See id.

building, which had been excluded from the scope of their authorization to search, did not permit them to ignore that limitation. See Hall, 366 Mass. at 799 ("The authority to search is limited to the place described in the warrant and does not include additional or different places" [citation omitted]). They were obligated to get another warrant to search that second apartment. See Bershchansky, 788 F.3d at 113.[15]

Alternatively, the dissent suggests that two other cases -- Commonwealth v. Scala, 380 Mass. 500 (1980), and Commonwealth v. Wallace, 67 Mass. App. Ct. 901 (2006) -- support the search of the second-floor apartment. Post at . Both cases are distinguishable.

In both Scala, 380 Mass. at 501, and Wallace, 67 Mass. App. Ct. at 901, the police officers obtained a warrant to search a second-floor apartment. In each case, during the search of the apartment, the police officers discovered stairs leading to a third-floor attic, accessible only through the second-floor

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[15] The dissent contends that Forbes, Bershchansky, and Voustianiouk -- but not Hall -- are "inapplicable" because the search of the second-floor apartment here did not implicate "the privacy interests of anyone other than the occupants of the premises identified in the search warrant." Post at . The shortest response to that contention is that in Hall, the third-floor apartment was "unoccupied" when officers searched it. Hall, 366 Mass. at 791. Despite this, the Supreme Judicial Court held that the warrantless search of that apartment violated the particularity clause. Id. at 799-800.

apartment. See Scala, supra; Wallace, supra at 901-902. In each circumstance, the search of the attic did not exceed the scope of the warrant. See Scala, supra at 509; Wallace, supra at 901.

Here, by contrast, the police officers were aware that there was a second-floor apartment when they applied for the search warrant. Unlike the attic spaces in Scala and Wallace, that second-floor apartment had both its own mailing address and separate entrance. Accordingly, when the search warrant application and the warrant specified that the search would be limited to the "1st-floor apartment," they necessarily excluded the second-floor apartment.[16]

Finally, the Commonwealth argues that the second-floor apartment was within the curtilage of the first-floor apartment and therefore was within the scope of the warrant. We disagree.[17]

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[16] The dissent also cites United States v. Evans, 320 F.2d 482, 483 (6th Cir. 1963), in support of reversal. In Hall, the Supreme Judicial Court cited Evans, supra, as an example of a situation where "illegal activities spill over into a directly adjacent or contiguous area." Hall, 366 Mass. at 800 n.11. Putting aside the different facts in Evans, supra at 483 & n.2, we all agree that this case does not present an instance of "illegal activities spill[ing] over." Hall, supra. Post at .

[17] We note that while the Commonwealth raised this issue in the trial court, the judge did not explicitly address it.

First, after an evidentiary hearing, the judge found that "the police were acutely aware that the building housed two separate apartments" and that "[r]egardless of how the defendant used the two apartments, the second-floor apartment was not 'part and parcel' or a 'contiguous part' of the first-floor apartment," quoting Wallace, 67 Mass. App. Ct. at 902. These findings were well supported by the record and inconsistent with a finding that the second-floor apartment was within the curtilage of the first-floor apartment.

Second, in Commonwealth v. McCarthy, 428 Mass. 871, 871-872 (1999), the Supreme Judicial Court held that a visitor's parking space at an apartment complex was not within the curtilage of a tenant's apartment and, thus, that a search warrant issued for the apartment did not encompass that parking space. In support of this holding, the court observed that "the area of curtilage appurtenant to an apartment is very limited." Id. at 875, citing Hall, 366 Mass. at 794.

Third, as noted above, the warrant permitted police to search "30 Golf Street, 1st-floor apartment in Southbridge, MA, along with its basement, attic, storage sheds, garages, and curtilage associated with this residence. . . . [w]hich is occupied by and/[or] in the possession of: [the defendant]" (emphasis added). The magistrate's limitation of the warrant to the "1st-floor apartment" and its "curtilage" necessarily

excluded the second-floor apartment from the first-floor apartment's curtilage.

For all of these reasons, we think that the concept of curtilage at issue here is not expansive enough to include different apartments in a multiapartment building. This is especially so where a warrant, as in this case, authorizes police to search a particular apartment, and thereby excludes other apartments from its scope. Indeed, to define "curtilage" in this context as extending to the second-floor apartment would ignore the reasoning of Hall. See Hall, 366 Mass. at 800 ("different apartments in a single building are as distinct as separate dwelling houses, so that a separate warrant on probable cause is ordinarily needed for each").[18]

In sum, when police extended their search to the second-floor apartment without obtaining a second warrant, they conducted an unconstitutional search. Therefore, the judge

[18] Accordingly, it is unsurprising that there is no Massachusetts precedent supporting the notion that a second apartment in a multiapartment building might be considered curtilage of the apartment police are authorized to search by warrant. Rather, this concept of curtilage has been applied exclusively to areas other than apartments. See, e.g., Commonwealth v. Sanchez, 89 Mass. App. Ct. 249, 251-252 (2016) (shed in backyard of multiunit building); Commonwealth v. Pierre, 71 Mass. App. Ct. 58, 61-63 (2008) (basement and storage locker in basement of multiapartment building).

correctly concluded that the fruits of that search should be suppressed.

The order allowing the motion to suppress is affirmed. The order denying the motion to reconsider is affirmed.

So ordered.

GRANT, J. (concurring). I concur in the result. On these facts, applying Commonwealth v. Hall, 366 Mass. 790, 799-800 (1975), the motion judge could permissibly rule that police should have obtained another search warrant for the second-floor apartment. If the motion judge had ruled that the description of the premises could be "construed more liberally," id. at 800 n.11, and denied the motion to suppress, I also would have voted to uphold that ruling.

I write separately to say that the primary author goes too far in interpreting constitutional particularity requirements, as applied to a search warrant for a multiunit building, to require the warrant to specify the "unit(s) to be searched" and to "exclud[e] all other units in the building." Ante at . The Fourth Amendment to the United States Constitution requires that a search warrant "particularly describ[e] the place to be searched." Article 14 of the Massachusetts Declaration of Rights requires that a warrant "to make search in suspected places" include "a special designation of the persons or objects of search." See also G. L. c. 276, § 2 ("Search warrants shall designate and describe the building, house, place, vessel or vehicle to be searched"). Those authorities do not require specification of a unit number, nor do they require that the description exclude any part of a building. In my view, on these facts, the police could have obtained two search warrants

and executed them simultaneously: one for the defendant's person seeking keys to any locks at 30 Golf Street, and another identifying the place to be searched as any apartment, room, or locked container at 30 Golf Street to which those keys provided access. A description in the latter search warrant of the premises to be searched as any locked area within 30 Golf Street to which the defendant's keys provided access would, in my view, have satisfied constitutional and statutory particularity requirements.

HAND, J. (dissenting). In Commonwealth v. Hall, 366 Mass. 790, 800 (1975), the Supreme Judicial Court held that, because "different apartments in a single building are as distinct as separate dwelling houses, . . . a separate warrant on probable cause is ordinarily needed for each [apartment]," as was needed in that case (emphasis added). In dicta, however, the court was explicit that its decision "[was] not intended to lay down a rule that the description in a warrant of the location and area to be searched may never be construed more liberally than in [Hall]," and provided an example in which "a liberalized reading of the warrant may be proper," that is, where "the evidence when the warrant is executed . . . show[s] that the [defendant's] illegal activities spill over into a directly adjacent or contiguous area under the same control." Id. at 800 n.11. Although "spillover" of criminal activity is not an issue here, I think this case -- where the evidence shows that (1) the police applied for and obtained a search warrant for one apartment in a two-family dwelling, (2) the warrant was limited to a single apartment only because of the warrant applicant's mistaken belief that the defendant lived only in that apartment, (3) probable cause existed to search the entirety of the defendant's home, and (4) when the warrant was executed, police learned that the occupant of the subject apartment also had exclusive control over the other apartment in the same building,

and used both as undifferentiated parts of a single dwelling -- presents an instance in which a search warrant should be read with the degree of liberality for which the Hall court left room. See id. Because, on that basis, I would reverse the order allowing the motion to suppress, I respectfully dissent.

Here, the police applied for a warrant for the defendant's home, which they mistakenly believed was limited to the first-floor apartment of 30 Golf Street. It was only after they entered the home that they learned that the two apartments comprising 30 Golf Street were in fact being used as one home -- a point made explicit by the defendant's girlfriend, who lived in the home and permitted the police to go up to the second floor,[1] and underscored by her son's movement between the two floors of the home as he showered and dressed.[2] The affidavit

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[1] At the suppression hearing, the Commonwealth made clear that it was not arguing that the girlfriend had the authority to consent to the police search of the locked rooms to which only the defendant had access.

[2] To the extent the judge found "that the second-floor apartment door was 'open' at the time of the search [only because] [i]t was July, the back porch landings are enclosed, and a twelve year old boy recently showered in the second-floor apartment before walking down to the first-floor apartment," I agree with the Commonwealth that the finding was clearly erroneous, and I do not consider it. See Commonwealth v. Wittey, 492 Mass. 161, 181 (2023) (defining clear error); Commonwealth v. Castillo, 89 Mass. App. Ct. 779, 781 (2016), quoting Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 558-559 (1994) ("We take the facts from the judge's findings following a hearing on the motion to suppress, adding those that are not in dispute, and eliminating those that, from our reading

supporting the search warrant application tied the defendant's home to his sale of drugs and drug paraphernalia to an undercover police officer. It did so by describing the defendant leaving 30 Golf Street via the door on the first floor of the building while carrying the containers from which he shortly thereafter retrieved the items that he sold to that undercover officer.[3] This evidence provided probable cause to justify a search of the defendant's home. See, e.g., Commonwealth v. Young, 77 Mass. App. Ct. 381, 386-387 (2010) (adequate nexus to search defendant's apartment where police saw

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of the transcript, are clearly erroneous"). Lieutenant Carlos Dingui of the Southbridge police department testified that the defendant's girlfriend, who lived with her children and the defendant in the apartment, said that the defendant and the rest of the family used both the first-floor apartment and the second-floor apartment "as one residence," and "generally ke[pt] [the] doors [of both apartments to the enclosed porch and stairway] open because they . . . go up and down throughout the day." None of the other evidence at the hearing called that testimony into question.

[3] The defendant does not challenge the existence of probable cause to search the second-floor apartment. At the motion hearing, defense counsel seems to have conceded both the existence of probable cause to search the second-floor apartment and the fact that it stemmed from the same evidence that established probable cause to search the first-floor apartment, stating,

> "I certainly would not argue with the fact that [the police] had probable cause to seek a . . . warrant to search that second floor based on . . . the information they've gathered . . . as preparation [for] the affidavit for the first floor. But they did not seek that search warrant."

defendant leave front entrance of his apartment building after arranging drug transaction with confidential informant, then walk directly to point of sale). Where that probable cause to search was tied to the defendant's dwelling (which, at the time the police applied for the search warrant, they believed to be limited to the first-floor apartment), and not tied specifically to the first floor of the building, I see no basis on which the probable cause was limited to any particular location within the home.[4] See Commonwealth v. Clagon, 465 Mass. 1004, 1006 (2013)

[4] To the extent the defendant relies on Keiningham v. United States, 287 F.2d 126 (D.C. Cir. 1960), a case cited with approval by the Supreme Judicial Court in Hall, 366 Mass. at 799, for the proposition that a defendant's use of two apartments "as a single unit" does not authorize the police to search both addresses comprising that "unit" based on a warrant for one address, that case is factually distinguishable from this one. In Keiningham, police investigating an illegal gambling operation obtained a warrant for a row house at 1106 Eighteenth Street, N.W. (1106), but, during its execution, they discovered that a makeshift door had been cut through a partition between 1106 and the second-floor rear porch of the adjoining row house (1108). Keiningham, supra at 128. The police passed through the cutout and, from the porch of 1108, looked into a window of 1108 where they identified the defendants "busily conducting a numbers operation." Id. at 128-129. Construing the warrant in question "strictly," the Court of Appeals for the District of Columbia Circuit concluded that "[t]he authority to search is limited to the place described in the warrant and does not include additional or different places," and that, as a consequence, the fact that the defendants used the 1106 and 1108 row houses "as a single unit" did not excuse the police from their obligation to obtain a warrant for each row house they wished to search. Id. This outcome is not required under Hall given the Supreme Judicial Court's dicta, see Hall, 366 Mass. at 800 n.11, nor is it required on the facts of this case. The use of one row house to provide access to another for the purposes of hiding a gambling

("A warrant application need not establish to a certainty that the items to be seized will be found in the specified location, nor exclude any and all possibility that the items might be found elsewhere. The test is probable cause, not certainty" [quotation and citation omitted]).

The fact that the defendant exclusively occupied both apartments at 30 Golf Street, such that he used the entire building as a single-family home, distinguishes this case from Hall, 366 Mass. at 791, and the cases cited by my colleagues, Commonwealth v. Forbes, 85 Mass. App. Ct. 168 (2014); United States v. Bershchansky, 788 F.3d 102 (2d Cir. 2015); and United States v. Voustianiouk, 685 F.3d 206 (2d Cir. 2012). See ante at . In Hall, the defendant owned the entire three-family building but lived in only the target apartment; the third-floor apartment that the police searched without obtaining a new warrant was "unoccupied." Hall, 366 Mass. at 791. Moreover, in Hall (unlike in this case), it appears that the claimed basis for the warrantless search was new information about the presence of contraband in the unoccupied apartment, different from the information in the affidavit supporting the warrant

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operation is not, in my view, comparable to the use of two apartments to create a single home, and the "strictness" with which the warrants should be read in these contexts is correspondingly different.

that authorized the search of the apartment in which the defendant lived.[5] See id.

In Forbes, 85 Mass. App. Ct. at 171-172, and Bershchansky, 788 F.3d at 107, the warrantless searches at issue were the results of mistakes in identifying which apartment in a given multiunit building the defendant actually occupied; in neither case did the warrant the police had authorize a search of the place where the target of the warrant actually lived. Additionally, in Voustianiouk, the court declined to address "whether a warrant that authorizes the search of a particular person's apartment, but mistakenly lists an incorrect apartment number, would satisfy the particularity requirement of the Fourth Amendment [to the United States Constitution]," but concluded that a search warrant for the first-floor apartment where the target did not live did not authorize the search of the target's second-floor apartment, where the warrant did not mention the target's name. Voustianiouk, 685 F.3d at 211-212. These cases did focus on the particularity clause, see ante at

[5] Specifically, in Hall, the search of the target apartment was premised on "a tip, surveillance of premises, and overheard conversations" described in the search warrant affidavit; the basis of the warrantless search of the third-floor apartment was information the police received during the search of the defendant's apartment when "[o]ne of the officers was called to the street and received information that there was a larger quantity of drugs in the third-floor apartment." Hall, 366 Mass. at 791.

, but they did so in ways inapplicable to the case at hand. Importantly, here, nothing in the record suggests that the search of the second floor implicated the privacy interests of anyone other than the occupants of the premises identified in the search warrant. See United States v. Vaughan, 875 F. Supp. 36, 43-44 (D. Mass. 1994) (search warrant for "multiunit structure at 37 Waverly Street occupied by and/or in the possession of [person A]" permitted search of "the area occupied by and/or in the possession of [person A]," despite warrant's failure to specify unit number, but would not permit search of person A's relative's separate apartment in same building).

Moreover, apart from my reliance on the dicta in Hall, 366 Mass. at 800 n.11, the defendant's treatment of the first- and second-floor apartments as a single unit invites a use-based analysis, like that our courts have applied in cases such as Commonwealth v. Scala, 380 Mass. 500, 509 (1980); Commonwealth v. Wallace, 67 Mass. App. Ct. 901, 902-903 (2006); and United States v. Evans, 320 F.2d 482, 483 (6th Cir. 1963) (a case also cited in Hall), to extend the scope of the warrant here to include the second-floor apartment.

In Scala, the police obtained a search warrant for "the entire apartment located on the second floor" of 340 Broadway, Malden. Scala, 380 Mass. at 501. During the search of the second-floor apartment, the police "discovered stairs leading to

an attic"; those stairs were the only way to access the attic. Id. The court acknowledged that "the Fourth Amendment requires particularity in warrants, which 'are to be read without poetic license,'" id. at 508, quoting Hall, 366 Mass. at 799, but noted that "the proscription of poetic license is not also a proscription of common sense," Scala, supra. Where the evidence "reasonably indicate[d] that the third floor attic was part and parcel of the second floor apartment," the warrant for the entire second floor also authorized the search of the attic on the third floor. Id. at 509.

In Wallace, the police obtained a warrant to search the apartment "occup[ying] the entire second floor" of a two-and-a-half story, two-family home at 801 Worthington Street, Springfield. Wallace, 67 Mass. App. Ct. at 901. The police also searched "the padlocked, unfinished attic area located one-half floor above the apartment." Id. The attic was "immediately adjacent to the second-floor apartment rear door, which was ajar when the police executed the search," and the evidence "indicate[d] that . . . neither the public nor other tenants [had] access to the . . . padlocked attic space." (Quotation omitted.) Id. at 901-902. Concluding that "the attic [was] functionally part of the second-floor apartment," and citing to Scala, 380 Mass. at 508-509, this court held that

the search did not exceed the scope of the warrant. Wallace, supra at 901.

Finally, in Evans, 320 F.2d at 483, as the Hall court summarized,

> "a search under a warrant for 1000 Baldwin Street revealed that a common wall between its attic and the attic of the adjacent building 1004 had been broken through, the connection of the 1004 attic with the lower floors of that building sealed, and the two attic areas used as one."

Hall, 366 Mass. at 800 n.11. In Evans, the United States Court of Appeals for the Sixth Circuit ruled that the trial judge correctly concluded that the attic of 1004 "was a part of the premises described as 1000 Baldwin," and affirmed the judge's ruling that the warrant for 1000 covered the attic of 1004. Evans, supra.

Because the evidence in the instant case established that the first- and second-floor apartments were, for all practical purposes, a single home and in no sense separate apartments, I conclude that the second-floor apartment was "part and parcel" of the same dwelling identified in the search warrant as "30 Golf Street, 1st-floor apartment." See Scala, 380 Mass. at 509; Commonwealth v. Pallotta, 36 Mass. App. Ct. 669, 671 (1994) (search of two rooms on second floor was proper, notwithstanding fact that police had warrant for only first-floor apartment, where "[second-floor] rooms were integral to, [and] in a practical view part of, the first-floor apartment"). Cf.

Commonwealth v. Luna, 410 Mass. 131, 134-135 (1991) ("if the police knew or should have known that, at the time the warrant was issued, there was a completely separate downstairs apartment, they would have had to demonstrate to the magistrate probable cause to search each apartment" [emphasis added]).

To be clear, I do not endorse the police action in this case as a best practice -- at the time the police learned that the defendant occupied the entirety of 30 Golf Street, they had probable cause to apply for a separate search warrant and, had they done so, this appeal would likely have been unnecessary. See ante at . Nonetheless, I do not think that in the circumstances here, the search violated the particularity requirements of the Fourth Amendment to the United States Constitution or art. 14 of the Massachusetts Declaration of Rights. Notwithstanding the presence of two mailboxes in front of the building, the second-floor apartment at 30 Golf Street was part of the dwelling for which the police had a search warrant, see Scala, 380 Mass. at 509, and was "integral to, [and] . . . part of, the first-floor apartment," Pallotta, 36 Mass. App. Ct. at 671.[6] Because, on this record and on these particular facts, I believe that the search the police conducted

[6] Given my conclusion, it is unnecessary for me to decide whether the second-floor apartment was also within the curtilage of the first-floor apartment, and I do not reach that question.

of the second-floor apartment was within constitutional bounds, I respectfully dissent.