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16-P-362

Appeals Court

COMMONWEALTH vs. JOSE L. ARIAS.

No. 16-P-362.

Essex. January 13, 2017. - November 9, 2017.

Present: Green, Trainor, Meade, Hanlon, & Desmond, JJ.<sup>1</sup>

Constitutional Law, Search and seizure, Probable cause. Search and Seizure, Probable cause, Exigent circumstances, Emergency, Multiple occupancy building, Protective sweep, Plain view. Probable Cause. Practice, Criminal, Motion to suppress, Interlocutory appeal, Appeal by Commonwealth. Evidence, Informer. Witness, Police informer. Controlled Substances.

Indictments found and returned in the Superior Court Department on April 14, 2014.

A pretrial motion to suppress evidence was heard by Mary-Lou Rup, J.

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<sup>1</sup> This case was initially heard by a panel comprised of Justices Cypher, Trainor, and Desmond. After circulation of a majority and a dissenting opinion to the other Justices of the Appeals Court, and after Justice Cypher's appointment as an Associate Justice of the Supreme Judicial Court, the panel was expanded to include Justices Green, Meade, and Hanlon. See Sciaba Constr. Corp. v. Boston, 35 Mass. App. Ct. 181, 181 n.2 (1993).

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

Ronald DeRosa, Assistant District Attorney, for the Commonwealth.

Esther J. Horwich (Stephen J. Wright also present) for the defendant.

TRAINOR, J. This case comes to us on the Commonwealth's interlocutory appeal from a Superior Court judge's allowance of the defendant, Jose Arias's, motion to suppress. The Commonwealth argues that the judge erroneously concluded that the warrantless entry into the defendant's apartment building was not supported by probable cause and exigent circumstances or, in the alternative, by the emergency aid doctrine. For the reasons discussed, we reverse the judge's order, based on the application of the emergency aid doctrine.

Background. We summarize the facts from the judge's findings, supplemented by the evidence in the record that is uncontroverted and that was implicitly credited by the judge. See Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007).

On the evening of March 5, 2014, the Lawrence police department received a 911 call from a woman who reported that as she was walking down the street, she saw two "Spanish guys" "with a gun." She stated that she heard one of the men "load the gun" before entering the apartment building at "7 Royal

Street." The woman was "really freaked out" and informed the dispatcher that she lived at "21 Royal Street." She also noted that she did not want her call to cause her any "problem[s]," considering that "one of the guys [had] looked at [her]."

The woman gave a description of the men to the 911 dispatcher, which was later broadcast, in part, to officers on route to Royal Street. The dispatcher asked the woman if she had ever seen the men before, and she stated that she had not and that she was new to the area. The woman also reported that "there's always a little movement in that building," but she was "not really sure what's going on." When the call ended, the dispatcher immediately broadcasted a request for any available detective or police officer to respond to the location of 7 Royal Street where a caller had witnessed "two Hispanic males enter[ing] a house, one in a gray jacket, [and] one in a black jacket" while one of the males was loading a gun.

During this same "time frame," the Lawrence police department was investigating "a rash of home invasions" "[a]round this area" and had "received information" that the crimes were being perpetrated by "a crew out of New York."

When the police officers responded to the call, they discovered a four-unit apartment building with the address of 5-7 Royal Street. The units shared one common entranceway at the front of the building, and were structured in the following

manner: two units were located on the first floor (apartment 5A and apartment 7A), and two units were located on the second floor (apartment 5B and apartment 7B). At the back of the building, there was a porch with two rear doors.

Sergeant Joseph Cerullo arrived at the scene and went to the rear of the building with other officers to secure a perimeter. There, he saw a "Hispanic male with facial hair" exit the left rear door of the porch area. The man, later identified as the defendant, was "wearing a black and gray sweater" and was moving "quickly and with purpose." Sergeant Cerullo shouted, "Lawrence Police," and commanded, "Show me your hands." The defendant appeared "shocked" and quickly retreated back into the building, "closing the door behind him." Sergeant Cerullo attempted to follow him, but the door was locked.

At this time, Sergeant Michael Simard was positioned at the front of the building. He knocked on the door of apartment 5A, but there was no answer.<sup>2</sup> He also knocked on the door of apartment 7A and spoke with the residents of that unit. The residents informed him of the "layout of the apartment [building] as far as what door leads to where." Sergeant Simard noticed that the residents appeared "very afraid." Although the

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<sup>2</sup> Officer Simard testified that he was confident that the upstairs apartments had been checked, stating, "I never went up there, but I can't say that no one went up there. I'm sure that [the] officers were very thorough in a search."

residents told him that they did not "know who lived on the first floor" other than themselves, Sergeant Simard got the impression that they knew the occupants of apartment 5A but did not tell him because "they didn't want anything to do with [his] conversation." Sergeant Simard acknowledged that the residents were probably scared because there were fifteen "police officers [present] with their guns drawn."

Sergeant Simard then telephoned the 911 caller in an effort to obtain further information. The caller explained that she had seen "three males," whom she did not recognize, "on the front step of" the apartment building. The woman stated that she "heard the very distinct sound of a rack being pulled back" on a "semi-automatic gun." When Sergeant Simard asked the caller how she knew the type of weapon, she explained, "I'm from Lawrence. I know about that stuff." She also told Sergeant Simard that she "lived very close by" and "knew of recent armed robberies in the area." The caller explained that she "thought one of the culprits or suspects had a key because they entered the front door very easily."<sup>3</sup>

The police then decided to forcibly enter apartment 5A out of concern that a home invasion was taking place and that there

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<sup>3</sup> The 911 caller would not have known whether the main entrance required a key. The police officers, however, would have realized this at the scene.

were "possible armed subjects inside, as well as victims."<sup>4</sup> Entry was made approximately five to eight minutes after the police had first arrived. When the police entered through the front door of the apartment, they found no one inside. During the protective sweep, they observed in plain view: narcotics, a scale, and "thousands" of plastic bags on the floor. Still in pursuit of any potentially armed subjects or victims, the officers went down an interior back stairway, where they found the defendant and two other men hiding in a storage area in the basement.

Discussion. "In reviewing the grant or denial of a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error, . . . and accord substantial deference to the judge's ultimate findings." Commonwealth v. Carr, 458 Mass. 295, 298 (2010) (quotation omitted). "We conduct an independent review of the judge's application of constitutional principles to the facts found." Commonwealth v. Hoose, 467 Mass. 395, 400 (2014).

1. Probable cause and exigent circumstances. The Commonwealth argues that the defendant's motion to suppress should have been denied, and that the judge erred in ruling that there was no probable cause or exigent circumstances to support

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<sup>4</sup> Sergeants Cerullo and Simard had decided against calling for the "SWAT" team, the emergency response team, because "the exigency was too much to wait for the SWAT team to come."

the warrantless entry into apartment 5A. We disagree with the judge's determinations, but do not reverse on this basis.<sup>5</sup>

"To justify a search or seizure on th[e] basis [of exigent circumstances], the Commonwealth bears 'a heavy burden' to show (1) that the search or seizure was supported by 'probable cause,' such that a warrant would have issued had one been sought, . . . and (2) that there 'exist[ed] . . . exigent circumstances' that made obtaining a warrant impracticable." Commonwealth v. White, 475 Mass. 583, 588 (2016), citing Commonwealth v. Tyree, 455 Mass. 676, 684 (2010). "[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." Commonwealth v. Stewart, 469 Mass. 257, 262 (2014), quoting from Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992). "In other words, the government must 'demonstrate[]

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<sup>5</sup> The fact that we may have reached a different conclusion on the evidence presented does not necessarily require a conclusion that the judge's decision was clearly erroneous. See Commonwealth v. Carr, 458 Mass. at 298, quoting from Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1990) ("On a motion to suppress, '[t]he determination of the weight and credibility of the testimony is the function and responsibility of the judge who saw the witnesses, and not [the appellate] court'"). See also Commonwealth v. Ware, 75 Mass. App. Ct. 220, 231 (2009), quoting from Yesilciman, supra ("Moreover, '[t]he clear error standard is a very limited form of review,' and when presented with conflicting evidence, 'a judge's resolution of such conflicting testimony invariably will be accepted'").

. . . a "nexus" between the crime alleged' and the article to be searched or seized." White, supra, quoting from Commonwealth v. Matias, 440 Mass. 787, 794 (2004). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities." Commonwealth v. Cast, 407 Mass. 891, 895 (1990). "While police 'need not make a showing beyond a reasonable doubt, "[s]trong reason to suspect is not adequate.'" White, supra at 589, quoting from Commonwealth v. Kaupp, 453 Mass. 102, 111 (2009).

Here, the judge concluded that the police did not have sufficient information available to them at the time of their warrantless entry into apartment 5A to support a finding of probable cause and exigent circumstances.

The judge's probable cause analysis begins with the information provided by the 911 caller. In consideration of the caller's initial 911 report and her subsequent telephone conversation with Sergeant Simard, it appears that the judge concluded that the 911 caller satisfied both the basis of knowledge and veracity prongs of the Aguilar-Spinelli test.<sup>6</sup> The judge properly attributed "great[] weight" to the caller's reliability, where the caller identified her address, the police

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<sup>6</sup> See Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

were able to trace her telephone number, and the police were able to speak with her about her observations.<sup>7,8</sup>

The judge, however, concluded that "the caller's statements provided little, if any, support for the officers' belief that they were confronting a home invasion or a 'hostage situation.'" The judge considered that mere possession of a firearm does not, by itself, warrant a basis for probable cause. See Commonwealth v. Alvarado, 423 Mass. 266, 269-271 (1996). She further reasoned that despite the 911 caller's statements and the ongoing investigations of home invasions by the Lawrence police department, when "[v]iewed objectively, the facts and

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<sup>7</sup> Although the judge permitted the caller's name to be withheld, the judge nevertheless "afforded greater weight [to the caller's reliability] than that of an anonymous informant." In the course of Sergeant Simard's testimony at the suppression hearing he asked, with respect to the 911 caller's identification, "Do I have to divulge? For the caller['s] safety, could I call that caller the 'caller?'" The judge responded, "You don't have to identify the person by name, yes." The judge ultimately found: "Even though she remained unnamed, the caller's reliability is afforded greater weight than that of an anonymous informant as the 911 call was recorded, police had the ability to trace the caller back to her telephone number, and Sergeant Simard succeeded in reaching and speaking with her."

<sup>8</sup> In our opinion, the 911 caller "provided the officer with information [of the] underlying circumstances from which a basis for [her] knowledge could be found." Commonwealth v. Santana, 403 Mass. 167, 171 (1988). Particularly, in regard to the caller's report that she heard one of the men "rack" (or load) a semiautomatic handgun before entering the building, the caller explained to Sergeant Simard the basis of how she knew that the "very distinct sound" was a semiautomatic gun, stating: "I'm from Lawrence[;] I know about that stuff."

circumstances confronting the officers" did not amount to probable cause. The judge's analysis highlighted factors including: the 911 caller's statement to Sergeant Simard that she believed one of the suspects may have had a key because they entered the building "eas[il]ly"; Sergeant Cerullo's observation of a Hispanic male at the scene, whom "he believed fit the description provided by the dispatcher," quickly walking out of the rear door of the building only to then retreat into the building and lock the door behind him; the officers' lack of observation of any other indication of forced entry into the building; and the absence of information about the occupants of apartment 5A.

In consideration of these facts and circumstances, the judge concluded that "the Commonwealth has not established the existence of probable cause . . . and the existence of an exigency that justified [the police officers'] immediate entry and intervention." In light of the stringent requirements of probable cause and the deference given to the judge's determinations of the credibility and weight of the testimony, we therefore do not conclude that the judge's finding as to the lack of probable cause and exigent circumstances was clearly erroneous. See Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1990). See also Commonwealth v. Marquez, 434 Mass. 370, 374 (2001), quoting from Commonwealth v. Forde, 367 Mass. 798, 805

(1975) ("The right of police officers to enter into a home, for whatever purpose, represents a serious governmental intrusion into one's privacy. It was just this sort of intrusion that the Fourth Amendment [and art. 14 (of the Massachusetts Declaration of Rights) were] designed to circumscribe by the general requirement of a judicial determination of probable cause").

2. Emergency aid doctrine. The judge also found that the officers' warrantless entry into apartment 5A was not supported by the emergency aid doctrine. We disagree.

The emergency aid exception to the warrant requirement "applies when the purpose of the police entry is not to gather evidence of criminal activity but rather, because of an emergency, to respond to an immediate need for assistance for the protection of life or property." Commonwealth v. Snell, 428 Mass. 766, 774, cert. denied, 527 U.S. 1010 (1999), quoting from Commonwealth v. Bates, 28 Mass. App. Ct. 217, 219 (1990). This exception requires (1) the presence of "objectively reasonable grounds to believe that an emergency exists" and (2) that "the conduct of the police following the entry [is] reasonable under the circumstances, which here means that the protective sweep must be limited in scope to its purpose -- a search for victims or suspects." Commonwealth v. Peters, 453 Mass. 818, 823 (2009). While our case law refers to the emergency aid doctrine as an exception to the warrant

requirement, the doctrine does not require probable cause and exigent circumstances. No probable cause is required because the purpose of the entry is not to investigate criminal activity. See Commonwealth v. Entwistle, 463 Mass. 205, 214 (2012). As a result, where the emergency aid doctrine is properly invoked, neither the Fourth Amendment nor art. 14 is implicated. See Commonwealth v. Duncan, 467 Mass. 746, 750-751 (2014). See also Snell, supra at 774-775.

Here, the judge concluded that there appeared "to be no serious issue as to the second requirement [of the emergency aid doctrine]." The judge found that, in regard to the second requirement (the reasonableness of the scope of the search), "credible evidence showed that the police conducted only a limited protective sweep of apartment 5A." We agree. Thus, our divergence from the judge's decision lies with her application of the first requirement.

Whether an emergency exists is dependent upon an evaluation of the circumstances as they appear, at the time, to the police. See Commonwealth v. Townsend, 453 Mass. 413, 425-426 (2009). Whether the police officers' response to their evaluation of the circumstances was reasonable and, therefore, lawful, are matters that "must be 'evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured

retrospective analysis.'" Ibid., quoting from Commonwealth v. Young, 382 Mass. 448, 456 (1981).

The judge conceded in her findings "that the officers had reason for concern that an armed man was present in the apartment building," and that "Sergeant Cerullo witnessed a man who generally fit the 911 caller's description leaving through the rear door and then retreat back into the apartment when he saw the officers approaching." The judge, however, concluded that this was not enough.

The judge's analysis makes much of the fact that there was no evidence of prior threats or acts of violence at apartment 5A, that there were no expressions of concern from family members or friends, and that there were no cries for help from persons injured or in danger at the scene. Compare Snell, 428 Mass. at 773; Entwistle, 463 Mass. at 215-219. Such observations, however, are fact-specific to, and in the context of, only the cases cited. Courts usually note the absence of such indicators in cases that lack any other evidence of an emergency situation, unlike here. Nowhere in our case law have we required the presence of such indicators to apply the emergency aid exception to the warrant requirement, and other jurisdictions specifically hold to the contrary. See United States v. Brown, 64 F.3d 1083, 1086 (7th Cir. 1995) ("We do not think that the police must stand outside an apartment, despite

legitimate concerns about the welfare of the occupant, unless they can hear screams. Doubtless outcries would justify entry, . . . but they are not essential" [emphasis supplied]); United States v. Lenoir, 318 F.3d 725, 730 (7th Cir. 2003) ("[P]olice need not wait for screams from within in order to fear for the safety of occupants or themselves"). See also Commonwealth v. Carlton, 549 Pa. 174, 195 (1997), quoting from Commonwealth v. Stanley, 498 Pa. 326, 334 (1982) ("Rather than cowering beneath a crib, appellant may have been preparing an ambush. Consequently, to have delayed any further would have been risky and foolhardy on the part of the police" [emphasis supplied]).

Moreover, in this case, there was significantly more evidence than that mentioned by the judge, that supplied objectively reasonable grounds for the police to believe that a home invasion was in progress, or that some type of safety risk was posed to potential victims inside the apartment. The urgent nature of the officers' concern was demonstrated by the 911 caller's report that one of the three men "rack[ed]" (i.e., loaded) a "semiautomatic" weapon<sup>9,10</sup> outside of a multifamily

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<sup>9</sup> "Racking consists of pulling the slide back on [a semi]automatic handgun to load a bullet into the chamber." Commonwealth v. Rosado, 59 Mass. App. Ct. 913, 913 n.1 (2003). The act of "racking" or loading a semiautomatic weapon makes "a very distinctive sound and it carries very well." Messer v.

residential building before entering, the caller's knowledge and fear of the "rash" of recent armed robberies (home invasions) in the area,<sup>11</sup> and the officers' observation of the defendant, who matched the caller's description, as well as the defendant's "shocked" expression and hasty reentry into the building, locking the door behind him after the police shouted, "Lawrence Police" and "[s]how me your hands." In these circumstances, the defendant's flight was appropriately considered to be inculpatory by the police,<sup>12</sup> and the Lawrence police department's recent investigation of a "rash" of home invasions within the same "area" and "time frame" as the 911 call further provided objectively reasonable grounds for the police to believe that a

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Indiana State Police, 586 F. Supp. 2d 1044, 1051 (N.D. Ind. 2008).

<sup>10</sup> The judge seems to acknowledge that the sound of a gun being "racked" was the sound of a semiautomatic gun being loaded, as she uses the caller's initial description of "load[ing]" and secondary report of "rack[ing]" interchangeably throughout her decision.

<sup>11</sup> As previously stated, the judge gave "great[] weight" to the 911 caller's reliability, where the caller identified her address to police and the police were able to trace her telephone number and call her for additional information.

<sup>12</sup> Compare Commonwealth v. Meneus, 476 Mass. 231, 240 (2017) ("[T]he seizure occurred when [the officer] . . . began to pursue the defendant to prevent his avoidance of [a] patfrisk . . . , not later in the encounter when the police commanded the defendant to stop. Therefore, the issue of flight as a factor in reasonable suspicion is focused on [the] defendant's action in backing away to avoid a patfrisk to which he did not consent"). Notably, the defendant here retreated back into the apartment building after Officer Cerullo commanded, "Show me your hands."

home invasion was in progress.<sup>13,14</sup> See Commonwealth v. Samuel, 80 Mass. App. Ct. 560, 562-563 (2011). See also Entwistle, 463 Mass. at 214, quoting from Michigan v. Fisher, 558 U.S. 45, 49 (2009) ("'Officers do not need ironclad proof of "a likely serious, life-threatening" injury to invoke the emergency aid exception.' . . . It suffices that there are objectively reasonable grounds to believe that emergency aid might be needed"). Cf. Commonwealth v. Whitehead, 85 Mass. App. Ct. 134, 141 (2014).<sup>15</sup>

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<sup>13</sup> The judge also credited the officers' concern that there was insufficient time to determine whether a licensed gun owner resided in apartment 5A.

<sup>14</sup> Indeed, the judge acknowledged and specifically credited testimony that during this time period the Lawrence police department was actively investigating a "rash" of home invasions in Lawrence and had information that a "crew" from New York was committing the offenses. The judge, however, determined "that evidence before the court did not indicate how recently or where these home invasions occurred or if any occurred in the immediate vicinity or neighbor[hood] of Royal Street." Contrary to the judge's conclusion, Officer Cerullo specifically testified that "[a]round this area [and] around this time frame, [the Lawrence police department] had received and had some ongoing investigations with home invasions" (emphasis supplied). He explained that the police had "received information from [the] Crime Analysis Unit that a crew out of New York was doing many home invasions in the city of Lawrence" and that the Lawrence police department "also had a rash of home invasions around this time frame, so we treated [the scene at Royal Street] at that time as a home invasion with the knowledge that we had and the information."

<sup>15</sup> The fact, not mentioned by the judge, that the police responded with such force indicates that they believed that the 911 caller's observation involved an active home invasion. There were apparently fifteen officers, with guns drawn, at the

Furthermore, there was no indication that the perceived emergency was used in any way as a pretext to search the premises. The police completed the protective sweep of the apartment, observed evidence of criminal activity in plain view, arrested the three men after discovering them in the basement of the building with the assistance of the canine unit, recovered a weapon in the basement, secured the apartment, and applied for a warrant to search and seize the evidence.<sup>16</sup>

Ultimately, our determination is confined to the question whether the police reasonably believed that an emergency existed at that time and at that place, not our analysis of the situation weeks or months later. Here, there were objectively reasonable grounds for the police to believe that a home invasion was in progress, or that some type of safety risk was posed to potential victims inside the apartment. The reasonableness of the officers' concern was demonstrated by the 911 caller's report that three men had "rack[ed]" a "semiautomatic" weapon before entering a multifamily residential

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front of the building in addition to some number of officers at the rear of the building, also with guns drawn.

<sup>16</sup> Compare Commonwealth v. Tuschall, 476 Mass. 581 (2017), where the court determined that "there was no objectively reasonable basis upon which to conclude that residents of the building faced an imminent threat of death or serious injury." Id. at 585 (quotation omitted). Unlike here, the entry into the apartment in Tuschall appeared to be purely investigatory in nature, and therefore required a warrant. See id. at 585-589.

building, the officers' observation of the defendant matching the description provided by the caller, the defendant's retreat from the police into the building, locking the door behind him, and the Lawrence police department's recent investigation of several home invasions within this same "area" and "time frame."

Therefore, based on the application of the emergency aid doctrine, the judge's allowance of the motion to suppress cannot stand.

Order allowing motion to  
suppress reversed.

DESMOND, J. (dissenting, with whom Green, J., joins). The majority relies on the emergency aid exception to conclude that the defendant's motion to suppress was improperly allowed. I respectfully disagree with that conclusion, and remain convinced that there is no justification for reversing the order allowing the motion to suppress.

The emergency aid exception to the warrant requirement justifies a warrantless entry into a dwelling if there is a reasonable basis to believe that "a person within the dwelling is in need of immediate assistance because of an imminent threat of death or serious injury, or that prompt intervention is necessary to prevent a threatened fire, explosion, or other destructive accident." Commonwealth v. DiGeronimo, 38 Mass. App. Ct. 714, 722-723 (1995). "This exception applies to a narrow class of circumstances; '[t]he injury sought to be avoided must be immediate and serious, and the mere existence of a potentially harmful circumstance is not sufficient.'" Commonwealth v. Lindsey, 72 Mass. App. Ct. 485, 488 (2008), cert. denied, 556 U.S. 1183 (2009), quoting from Commonwealth v. Kirschner, 67 Mass. App. Ct. 836, 841-842 (2006). Only in such limited circumstances are the police excused from the need to obtain a search warrant, see Commonwealth v. Bates, 28 Mass. App. Ct. 217, 219-220 (1990), or to demonstrate probable cause. See Commonwealth

v. Entwistle, 463 Mass. 205, 214 (2012). To apply this exception, the Commonwealth bears the burden of showing "that the warrantless entry falls within the exception and that there were reasonable grounds for the . . . police to believe (an objective standard) that an emergency existed." Bates, supra at 220.

Our inquiry here, therefore, is whether there was an objectively reasonable basis for police to believe there was an immediate need for their entry to protect life or property. Like the thoughtful motion judge, I believe the answer is no.

I focus my analysis on the facts recited by the majority,<sup>1</sup> summarizing those facts relevant to the police officers' decision that an emergency requiring immediate aid existed. On the evening of March 5, 2014, a 911 call was received from a woman who witnessed either two or three Hispanic men peaceably entering an apartment building while hearing what she believed to be the racking of a gun -- a sound she said she recognized

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<sup>1</sup> With respect to the description of the findings as to a gun being present, I note the following. The 911 caller did not actually see a gun; she only heard what she believed to be the racking of a gun. And, although Sergeant Simard testified that he "believe[d] they found a gun" in the basement, neither the defendant nor the codefendant was charged with a firearms offense. As to the 911 caller's description of the men outside the apartment building, the judge found: "It bears noting the caller and dispatcher provided very general descriptions of two Hispanic men -- one wearing a gray jacket and one wearing a black jacket -- and did not describe either as wearing a grey and black sweater."

because she was "from Lawrence." There was one Hispanic male outside apartment 5A at 7 Royal Street who reentered the building with a shocked look on his face upon seeing the back yard filled with armed police officers. There had been a recent "rash" of home invasions in Lawrence believed to be perpetrated by a "crew out of New York."<sup>2</sup>

In assessing the totality of the circumstances, the judge considered the absence of other evidence that would clearly trigger the emergency aid exception: there were no cries for help, no evidence of forced entry or property damage, no commotion from the apartment, and no information or observations from others in the building or neighborhood sparking concern.

While I recognize the particularly difficult position police are in when faced with a factual situation such as that presented here, I am equally concerned with protecting "the sanctity of the home" from unreasonable entry. Commonwealth v. Gentile, 466 Mass. 817, 830 (2014). With this in mind, the police officers' determination that there was a sufficient emergency to justify their forced entry into apartment 5A was unreasonable. The majority is correct that there is no requirement of screams for help or other overt indicia of emergency to justify the use of the emergency aid exception.

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<sup>2</sup> There was no evidence presented to connect the defendant and the other men in the apartment building to the "crew" of which the Lawrence police were aware.

That notwithstanding, the circumstances of the present case, I suggest, are insufficient to trigger the exception. While it is true that there is no need for "ironclad proof of 'a likely serious, life-threatening' injury to invoke [the exception]," Entwistle, 463 Mass. at 214, there still must be more than "the mere existence of a potentially harmful circumstance." Lindsey, 72 Mass. App. Ct. at 488.<sup>3</sup> In my view, the evidence relied on by the majority, when taken as a whole, does not create reasonable grounds to believe that a home invasion or a hostage situation requiring immediate police intervention was at hand. In this instance, absent additional evidence such as signs of forced entry or any articulable indication that there were others held in the apartment against their will, I agree with the judge that there was insufficient support for the warrantless entry.

Instead, we are left with a largely uncorroborated 911 call, a man -- vaguely matching the 911 caller's description of the men she had seen -- being confronted by officers with guns drawn and reentering the apartment,<sup>4</sup> and police knowledge of a recent "rash of home invasions" in Lawrence being perpetrated by

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<sup>3</sup> See Commonwealth v. Cordero, 477 Mass. 237, 244 (2017) ("[T]he trooper's opinion that Holyoke was a 'major drug source city' and that a 'good percentage of the drugs coming into Berkshire County' came from there did not give rise to reasonable suspicion").

<sup>4</sup> See Commonwealth v. Warren, 475 Mass. 530, 538-539 (2016).

a "crew out of New York." Armed with this limited information, police entered the apartment "within minutes of their arrival" to address their concerns about an ongoing hostage situation or armed home invasion. To allow such facts to justify a warrantless entry would be unreasonable and would circumvent the rule against unreasonable searches, placing us on a slippery slope where the exception tends to swallow the rule.

Compare Commonwealth v. Tuschall, 476 Mass. 581, 586 (2017)

(warrantless entry into apartment not supported by emergency aid exception when a neighbor reported a "smell like drugs" two days earlier where, despite risk of explosion from methamphetamine production, there was no reasonable basis to believe the apartment contained a methamphetamine laboratory),

with Commonwealth v. Townsend, 453 Mass. 413, 426 (2009) (entry into defendant's apartment to search for victim justified by emergency aid exception when victim had not been heard from in days, her car was seen outside, she had missed appointments, and police were aware of a history of domestic violence between victim and defendant). For that reason I respectfully dissent, and maintain that the judge's allowance of the defendant's motion to suppress should not be disturbed.