No. 24-1100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHNNIE E. RUSSELL,

Plaintiff-Appellant,

v.

RYAN COMSTOCK, COLIN POWELL, and DAVE WOHLGEMUTH,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Wisconsin
Case No. 2:21-cv-00151 Hon. J. P. Stadtmueller

OPENING BRIEF FOR PLAINTIFF-APPELLANT JOHNNIE E. RUSSELL

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May 15, 2024

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1100

Short Caption: Russell v. Comstock

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Johnnie Russell

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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Attorney's Signature: s/Brian Wolfman Date: 5/15/2024

Attorney's Printed Name: Brian Wolfman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: s/ Natasha R. Khan Date: 5/15/2024

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: s/ Regina Wang Date: 5/15/2024

Attorney's Printed Name: Regina Wang

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Jurisdictional Statement

Plaintiff-Appellant Johnnie E. Russell sued Defendants under 42 U.S.C. § 1983 alleging that they violated his Fourth Amendment right to be free from unreasonable searches. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331.

The district court's December 14, 2023 order, App. 127, and judgment, App. 142, granted summary judgment for Defendants and disposed of all claims of all parties. As explained in Russell's Jurisdictional Memorandum, Doc. 19 at 3-5 (¶¶ 6-9), and declaration, Doc. 19, Ex. A at 1-2 (¶¶ 3-4), Russell timely filed his notice of appeal on January 12, 2024, when he deposited it in the internal mail system of the Wisconsin Resource Center, where he is incarcerated. *See* Fed. R. App. P. 4(c)(1). This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

Police in Racine, Wisconsin suspected Plaintiff Johnnie E. Russell of assaulting a neighbor in the ground-floor hallway of their apartment building. Over an hour after officers arrived on the scene—but before obtaining a warrant—Defendant Colin Powell and other police officers searched Russell's upstairs apartment. Powell's body-worn camera recorded some of what happened after he arrived.

The district court granted summary judgment to Defendants, finding that the warrantless search did not violate the Fourth Amendment because it was a valid protective sweep.

The issues presented are:

I. Whether the district court erred in granting summary judgment to Defendants based on its own interpretation of video evidence even though the court acknowledged its uncertainty about what was said on the video.

II. Whether, even based on the facts it found, the district court erred in granting summary judgment to Defendants by concluding that Powell's entry into Russell's home was a valid protective sweep that justified dispensing with the Fourth Amendment's warrant requirement.

Statement of the Case

The Fourth Amendment presumptively prohibits warrantless entry into one's home. *United States v. Starnes*, 741 F.3d 804, 807 (7th Cir. 2013). To overcome that prohibition, police must identify a recognized exception to the warrant requirement that authorizes their warrantless search. *See id.* at 807-08. Defendants seek to justify their entry into Plaintiff Johnnie Russell's home as a valid protective sweep based on their belief that his home "harbored an individual posing a danger to those on the scene." ECF 59 at 6. But multiple witnesses told police that Russell had already left the property, and police had no information suggesting that anyone else was in Russell's home.

We first discuss the factual background giving rise to the warrantless search of Russell's home. We then review the procedural history of this case and the decision below.

I. Factual background

At 1:10 p.m. on June 25, 2020, a caller advised the Racine Police Department Dispatch of an assault at 1915 Washington Avenue in Racine. *See* App. 74. The caller told Dispatch that the person responsible "may have had a knife"—though the caller "d[id]n't know what it was [in his hand]"—and suggested places he may have gone: "back upstairs to his [apartment], possibly 105." *Id.* Officer Nicholas Coca was dispatched to respond. App. 70 (¶ 3). Dispatch advised Coca that "the suspect may have a knife." App. 70 (¶ 5). Arriving at 1:15 p.m., Coca met Willie Cannon outside the 1915 Washington apartment building. App. 70-71 (¶¶ 6, 8); *see also* App. 77.[1]

Coca, Nicholas J (9906)			
13:13:08	DI	4081	Prime Unit Dispatched: 4081, 4071
13:13:16	AC	4081	
13:15:00	NC	4081	Name CANNON, WILLIE Y; [redacted]
13:15:31	AR	4081	

Cannon had been wounded in the shoulder during an altercation with Russell. *See* App. 74. At 1:16 p.m., Coca advised Dispatch that the "[s]uspect left nb in a 90's buick gray." *Id.*

06/25/2020 13:16:52	4081	Suspect left nb in a 90's buick gray	9241

[1] Defendants filed a Computer Aided Dispatch (CAD) Activity Detail report, App. 74, which "includes information provided by the officer at the scene or by dispatchers as the information is provided." App. 72 (¶ 4). The CAD records times when officers are dispatched to a scene (notated DI), when they arrive at (AR) or leave a scene (LS), and when their involvement in a matter is finished (FI). *See* App. 72-73 (¶ 4). Some of these notations are present in the CAD screenshots reproduced in this brief. The CAD specifies officers' individual unit numbers. *See* App. 77-79. Officer Coca is unit 4081. App. 77.

Cannon was transported to the hospital. *See* App. 74, 80. Neither Coca nor any other officer initially dispatched to 1915 Washington entered Russell's second-floor apartment. *See generally* App. 74-79.

Starting around 2:30 p.m.—more than an hour after Officer Coca met Cannon—Officer Colin Powell (CAD # 2401), Sergeant Ryan Comstock (CAD # 2801), and Investigator Jody Spiegelhoff (CAD # 5609) arrived at 1915 Washington. *See* App. 78-79, 80 (¶ 5) (Spiegelhoff Am. Dec.), 88 (¶ 4) (Powell Am. Dec.), 115 (¶ 3) (Comstock Dec.). Spiegelhoff's amended summary-judgment declaration asserted that "Dispatch had previously advised officers ... that the potential suspect may have a knife and may have gone back upstairs to his apartment." App. 81 (¶ 7). But, as noted, Officer Coca had updated Dispatch's initial report, which advised Dispatch at 1:16 p.m. that Russell "left" in his car. App. 74.

Powell, Comstock, and Spiegelhoff asked building managers John Marvitz and Jerome Howe whether Russell was in his apartment, saying, "Is he in 202?" App. 123 at 14:41:12-14:41:13; *see* App. 129.[2] Howe replied, "Oh yeah, but he's not there … hasn't come back yet." App. 123 at 14:41:14-14:41:16. Spiegelhoff asked again, "So, John Russell is not here, he took off?" *Id.* at 14:41:21-14:41:23. Howe confirmed, "right, right," and Marvitz agreed, "not that I'm aware of." *Id.* at 14:41:23-14:41:24. Marvitz then stated he

[2] Citations to Powell's body-worn-camera video use the timestamp in the upper left corner of the video. The timestamps reflect a twenty-four-hour clock. For example, 14:41:12 is 2:41:12 p.m.

personally did not know whether Russell was in his apartment, but Howe reiterated what Officer Coca had told Dispatch over an hour earlier: Russell's car was gone. *Id.* at 14:41:27-14:41:40 ("His Plymouth isn't here.").

Marvitz gestured toward Cannon's first-floor apartment and indicated, "We had to make sure there was nobody in that apartment too … because the door was wide open." App. 123 at 14:42:05-14:42:08. Marvitz stated that a friend had been visiting Cannon's apartment but the friend "doesn't live here, so we asked him to go home." *Id.* at 14:42:11-14:42:18. Marvitz continued, explaining, "There's no one in [Cannon's] apartment, we made sure," and that the managers had locked its door. *Id.* at 14:42:21-14:42:24.

Regarding Russell's second-floor apartment, Investigator Spiegelhoff told the other police, "I'll be having to write a warrant for 202 upstairs. But it still needs to be secured and make sure he's not in there, make sure he's not hurt or anything." App. 123 at 14:42:31-14:42:38. Howe offered to let police into Russell's apartment, saying "you want to go up?," and Spiegelhoff nodded yes. *Id.* at 14:42:38-14:42:40.

Powell and two other officers followed Howe and Marvitz. App. 123 at 14:42:42. Walking up the stairs, Marvitz turned back to the officers, saying "person-to-person welfare check, I mean, we all understand each other here." *Id.* at 14:42:48-14:42:51. Howe then unlocked Russell's apartment. *Id.* at 14:43:07. An officer opened the door. *Id.* at 14:43:20. Powell and the two other officers entered Russell's apartment and searched each room and closet. *Id.* at 14:43:46-14:44:25. The officers exited Russell's apartment,

leaving the door open with Powell standing guard. *Id.* at 14:44:25-14:44:30. Around this time, Spiegelhoff and Comstock entered Cannon's apartment (# 103) for what they later described as another protective sweep. App. 81 (¶ 8); App. 115 (¶ 4).

That evening, Spiegelhoff obtained a warrant to search Russell's apartment and his cars, one of which remained at 1915 Washington. App. 82-83 (¶¶ 22, 26). In her search-warrant affidavit prepared shortly after the incident, Spiegelhoff swore that she "spoke with the building manager, Johnny Marvitz, … who stated Russell left 1915 Washington Avenue and that he lives in apartment 202. Racine Police officers secured apartment 202, pending a search warrant." App. 85 (¶ 6). This contrasts with Spiegelhoff's amended declaration prepared for this litigation in which she stated, "Marvitz further indicated that Russell lived in Apartment 202 and he was uncertain if Russell had gone back to his apartment." App. 81 (¶ 6).

With the warrant, Lieutenant Dave Wohlgemuth (CAD # 5857) conducted another search of Russell's apartment, App. 83 (¶ 24), and Wohlgemuth and Comstock searched Russell's second car, App. 115-16 (¶¶ 6-8).

II. Procedural background

Russell, proceeding pro se, sued under 42 U.S.C. § 1983, alleging that Comstock, Powell, Wohlgemuth, and the Racine Sheriff's Department violated the Fourth Amendment by searching his apartment and vehicle without a warrant. App. 1-5. Applying 28 U.S.C. § 1915A, the district court

dismissed the Sheriff's Department but allowed the apartment-search claim to proceed against Powell and Wohlgemuth and the car-search claim to proceed against Wohlgemuth and Comstock. App. 24-25.

Russell and Defendants both moved for summary judgment. App. 31, 39. The district court denied the cross-motions, finding the factual record insufficiently developed to analyze the searches' lawfulness. App. 64-65.

Defendants again sought summary judgment, App. 66, based on the submission of Powell's body-worn-camera video, App. 123, and new declarations from Officers Powell, App. 88, Coca, App. 70, and Spiegelhoff, App. 80. The district court granted Defendants' renewed motion, finding that the warrantless apartment entry was a reasonable protective sweep. App. 140. It acknowledged that protective sweeps could "easily" threaten Fourth Amendment rights and that the protective-sweep doctrine typically applies only when, unlike here, police were already lawfully inside a residence. App. 133 (citation omitted). But the court found that five "specific facts" weighed toward reasonableness: (1) the alleged crime was serious; (2) it was "unclear whether Plaintiff [was] still on the property"; (3) Russell's apartment was "left unattended after the stabbing"; (4) police did not know the location of the visitor at Cannon's apartment; and (5) the search was limited. App. 133-35.

The court noted a "potential factual dispute" over whether it was unclear to police if Russell was in his apartment when they decided to search it. App. 134. The court also reviewed Powell's body-worn-camera footage and

observed that it could not say with certainty "what specific language was used by any party in the video." App. 134-35. Nevertheless, based on the video, the court "agree[d] with Defendants that it was … unclear whether [Russell was] still on the property." App. 135.

The court also found that Wohlgemuth's search of the apartment and Wohlgemuth and Comstock's search of Russell's second car occurred after a warrant was issued. App. 138. Only the warrantless-apartment-search claim against Officer Powell is pursued in this appeal.

Summary of Argument

The first officer on the scene, Nicholas Coca, reported to Racine Police Dispatch that Johnnie Russell had fled from his apartment building in his car after allegedly assaulting Willie Cannon. Over an hour later, the building manager, Jerome Howe, repeatedly confirmed to Defendant Powell that Russell and his car were still gone. Another manager, John Marvitz, likewise told Powell and other officers that Russell was not home before saying he personally did not know whether he was. Nevertheless, Powell and other officers had the managers take them upstairs to unlock Russell's apartment so they could search it without a warrant.

I. Defendants attempt to justify their warrantless search of Russell's home as a protective sweep. The district court determined the search was justified based on factual inferences impermissibly drawn in the movants' favor and factual findings at odds with the record. But—viewing the record in the light most favorable to Russell, the non-moving party, as required at summary

judgment—a reasonable jury could find that Powell's search violated clearly established law. This error alone warrants reversal.

II. Russell's claim also survives because, even on the facts impermissibly found against Russell by the district court, Powell and the other officers violated Russell's Fourth Amendment rights when they searched his apartment. The protective-sweep doctrine does not apply here because the district court did not find—and Defendants did not offer—any lawful justification for the initial entry into Russell's apartment as required by that doctrine. To the extent the district court concluded the officers were in enough danger *outside* Russell's apartment to justify entering and sweeping its *interior*, that conclusion is inconsistent with the Supreme Court's and this Court's protective-sweep doctrine. Even if the doctrine did apply, the district court erred in concluding that a protective sweep was justified. Neither the court nor the officers identify any particular, articulable facts or rational inferences that could support a reasonable belief that the apartment was occupied by anyone posing a danger to several armed police officers.

Standard of Review

The district court's grant of summary judgment is reviewed de novo. *Koch v. Village of Hartland*, 43 F.4th 747, 750 (7th Cir. 2022). This Court must draw "all reasonable inferences 'in the light most favorable to the nonmoving party,'" here Russell. *Id*. (citation omitted).

Argument

Protective sweeps are authorized only when police "possess[] a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 337 (1990).

The district court determined that Powell reasonably believed the warrantless search was a necessary protective sweep by impermissibly making factual findings at summary judgment. And even on the district court's version of the facts, the search still was not a valid protective sweep because the officers did not reasonably believe they were in danger or that the apartment was occupied. For either of these separate and independent reasons, this Court should reverse.

I. The district court misapplied the summary-judgment standard, requiring reversal.

A. The district court erred in resolving a factual dispute—by finding it was unclear whether Russell was home—instead of drawing reasonable inferences in favor of Russell, the non-movant.

In reviewing the factual record at summary judgment, the role of the trial courts is limited to determining whether material disputes of fact exist. *Gupta v. Melloh*, 19 F.4th 990, 996-97 (7th Cir. 2021). These disputes must be resolved by the fact finder, *id.*, not by a judge at summary judgment, unless a party's factual assertion is "blatantly contradicted by the record, so that no reasonable jury could believe it," *Scott v. Harris*, 550 U.S. 372, 380 (2007). And

it is a "rare case where video evidence leaves no room for interpretation by a fact finder." *Kailin v. Village of Gurnee*, 77 F.4th 476, 481 (7th Cir. 2023) (gathering cases). This case isn't one of them.

1. The district court acknowledged a "potential factual dispute of whether officers reasonably believed Plaintiff may have been in his home at the time of the search." App. 134. Russell maintained that it was clear he was gone, arguing that Officer Powell's body-worn-camera video depicted Investigator "'[S]piegelhoff verifying plaintiff is gone in his [G]rand [M]arquis silver' and ... the apartment manager 'stat[ing] that plaintiff is gone a few times.'" *Id.* (quoting App. 125) (formatting omitted). Meanwhile, Defendants cited building manager Marvitz's statement that he did not know whether Russell had returned to his apartment. *See id.* Rather than allowing a fact finder to resolve the parties' disputed interpretation of the body-worn-camera video, the district court "reviewed the … video" itself and decided it "agree[d] with Defendants" that it was "unclear whether Plaintiff [was] still on the property at the time of the protective sweep." App. 135. But "[a] court's job on summary judgment is not to … decide which party's facts are more likely true." *Gupta*, 19 F.4th at 996.

2. This Court regularly reverses district courts when they have improperly weighed parties' competing interpretations of record evidence at summary judgment. *See Gupta*, 19 F.4th at 996. It should do the same here.

In *Gupta*, the district court erred in concluding a police officer had used "minimal" force, 19 F.4th at 1000, when "reasonable jurors could certainly

disagree about what [video of the alleged excessive-force incident] reveal[ed] about the events." *Id.* at 998; *see also Kailin*, 77 F.4th at 482. Summary judgment is inappropriate in this case because there is a similar dispute over how to interpret the interactions captured on Powell's video.

Even when parties agree about what was said (and it is not clear they do here), "[d]eciding which inference to draw from the conversation is the task of a fact finder." *Miller v. Gonzalez*, 761 F.3d 822, 828 (7th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003)). In *Miller*, this Court reversed a trial court's summary-judgment conclusion that a police officer accidentally struck an excessive-force plaintiff when a jury could also plausibly interpret the officer's statements as indicating intentional retaliation. *Id. Kodish v. Oakbrook Terrace Fire Protection District*, 604 F.3d 490, 506-08 (7th Cir. 2010), likewise reversed summary judgment when it was unclear from a supervisor's comments whether the plaintiff was fired for protected pro-union speech. As in *Miller* and *Kodish*, a fact finder here could plausibly infer that the two building managers' statements made clear that Russell was not home, requiring reversal.

3. To be sure, the district court could resolve the parties' interpretive dispute over Officer Powell's video if its contents blatantly contradicted Russell's position. *See Kailin*, 77 F.4th at 481. But the district court did not say there was blatant contradiction. *See* App. 127-140. Nor could it have, as we explain below. The district court nevertheless concluded that "[t]he video

evidence speaks for itself and, therefore, the Court does not consider this fact [that it was unclear whether Russell was present] to be in dispute." App. 135.

First of all, this holding is incompatible with the court's acknowledgment just sentences earlier that it "[could] not say with one-hundred percent certainty what specific language was used by any party on the video." App. 134-35. And the record did not blatantly contradict Russell's position because it contained considerable evidence that would enable a reasonable jury to conclude it was *clear* to Defendants that Russell was not home when Powell, Spiegelhoff, and Comstock arrived.

Before stating he did not know personally whether Russell returned, Marvitz, the building manager, responded to Spiegelhoff's question, "So, John Russell is not here, he took off?" by saying "not to my knowledge." App. 123 at 14:41:21-14:41:24. At the same time, Howe, the other building manager, was unequivocal, stating "he's not there" in his apartment, that Russell "ha[d]n't come back yet," and twice affirming Russell "took off." *Id.* at 14:41:14-14:41:24. And, just as Officer Coca had already told Dispatch, App. 74, Marvitz and Howe confirmed Russell's car was gone. App. 123 at 14:41:27-14:41:40.

On the day she spoke with managers Marvitz and Howe, Investigator Spiegelhoff swore under oath that Marvitz told her before the warrantless search that Russell had left. App. 85 (¶ 6). Defendant Powell disagreed with that interpretation in this litigation. In his amended summary-judgment declaration, Officer Powell—who heard the same conversation as

Spiegelhoff—stated that, "[t]he apartment managers were uncertain if Russell was currently in his apartment." App. 88 (¶ 6). And Spiegelhoff herself has changed her mind in this litigation, swearing in her amended summary-judgment declaration that "[Marvitz] was uncertain if Russell had gone back to his apartment." App. 81 (¶ 6). Given the interpretive dispute, it was improper for the district court to grant summary judgment.

B. Moreover, the district court made other factual findings contrary to the record.

1. The building manager did not "indicate[] that Plaintiff's residence was left unattended after the stabbing."

Defendants' reply in support of summary judgment asserted that Marvitz told police that "Plaintiff's apartment door was open and left unattended during and after the stabbing incident." ECF 74 at 1-2. The district court adopted this factual assertion, concluding "Plaintiff's residence was left unattended." App. 135. But that's unsupported by the record, and this Court should say so. *See Gant v. Hartman*, 924 F.3d 445, 450 (7th Cir. 2019).

The portion of the video cited by Defendants depicts Marvitz gesturing toward *Cannon's* first-floor apartment several times and explaining that *Cannon's* door was left open. App. 123 at 14:42:05-14:42:09.[3] As already described (at 5), Marvitz advised the officers that the managers investigated Cannon's open apartment, spoke with a visitor there, and then locked

[3] The video-player timestamp cited by Defendants (3:38), ECF 74 at 1, corresponds to 14:42:10, or 2:42:10 p.m., App. 123.

Cannon's door. *Id.* at 14:42:09-14:42:24. Neither Marvitz nor Howe indicated that Russell's apartment was left open or unattended. *See id.*

2. Cannon's visitor was not "unaccounted for."

Defendants' summary-judgment reply also noted that Marvitz told police "that there was a third person visiting the apartment at the time of the stabbing." ECF 74 at 2. The district court acknowledged that no one had alleged that the third party was injured or had any connection to the assault. App. 137. Nevertheless, the district court again concluded that "the video evidence sp[oke] for itself," App. 135 n.1, and that the visitor's "whereabouts" were "unknown," App. 137. Based on this finding, the court believed a reasonable officer could be concerned for the visitor's well-being. *See id.* It concluded that this concern justified searching Russell's apartment in case Cannon's visitor was inside and "in need of assistance." *Id.*

But the visitor's whereabouts were not unknown. Marvitz explained that the managers saw the visitor in *Cannon's* apartment when they investigated Cannon's open door and—because the visitor did not live in the building—the managers sent him home. App. 123 at 14:42:11-14:42:18. Pointing toward Cannon's apartment, Marvitz said, the "friend of his that was in there, or whatever, doesn't live here so we asked him to go home." *Id.* Marvitz confirmed that the visitor had left, advising police that "there's no one in that apartment. We made sure." *See id.* at 14:42:22-14:42:24.

At a minimum, the body-worn-camera video raises genuine disputes over these facts as found by the district court. Where a video's depiction of material facts could be interpreted multiple ways, a fact finder must resolve that dispute. *See Kailin v. Village of Gurnee*, 77 F.4th 476, 481 (7th Cir. 2023).

C. The disputed facts improperly inferred or found by the district court were material.

The district court cited five "specific facts" making Powell's warrantless search reasonable. App. 133-35. As discussed (at 11-15), the record reveals, at a minimum, factual disputes over three of them—whether it was unclear if Russell was in his apartment, whether Russell's apartment had been left open and unattended, and whether the visitor at Cannon's apartment was missing. It is undisputed that Russell had allegedly committed a serious crime and that the search lasted less than a minute. But suspicion of a serious crime alone does not justify warrantless entry or search of a residence. *See, e.g.*, *Flippo v. West Virginia*, 528 U.S. 11, 14 (1999) (per curiam); *Payton v. New York*, 445 U.S. 573, 576 (1980). And the limited duration of the search cannot itself establish the lawfulness of the initial entry. *See Maryland v. Buie*, 494 U.S. 325, 333-34 (1990). Instead—drawing the inference in Russell's favor that it should have been clear that Russell had left the building—Defendants lack a specific and articulable basis from which an officer could reasonably conclude they faced a threat from inside Russell's apartment. *See United States v. Delgado*, 701 F.3d 1161, 1164-65 (7th Cir. 2012).

D. Defendant Powell is not entitled to qualified immunity.

It is clearly established that "a warrantless search within a home violates the Fourth Amendment, even when law enforcement has probable cause to believe that a felony has been committed by the occupant," unless a specific exception applies. *United States v. Key*, 889 F.3d 910, 912 (7th Cir. 2018); *accord Katz v. United States*, 389 U.S. 347, 357 (1967). The officers here relied on the protective-sweep doctrine, which—when it applies—is a valid exception. *United States v. Henderson*, 748 F.3d 788, 791 (7th Cir. 2014). Viewing the record in the light most favorable to Russell—as is required at this stage—the protective-sweep exception does not apply, and Powell's conduct is not covered by qualified immunity.

"[I]n the Fourth Amendment [qualified-immunity] context, an officer will have to determine 'how the relevant legal doctrine … will apply to the factual situation the officer confronts.'" *Gupta v. Melloh*, 19 F.4th 990, 1000 (7th Cir. 2021) (quoting *Kisela v. Hughes*, 584 U.S. 100, 104 (2018)). That is, whether it was clearly established that Powell's warrantless search violated Russell's Fourth Amendment right turns exclusively on whether it was reasonable for Powell to believe a protective sweep was necessary. *See id.* at 1001. Disputes exist over at least whether it was unclear to police if Russell was in his apartment, whether Russell's apartment was left open and unattended, and whether Cannon's visitor was missing. *See supra* at 10-16. If the fact finder resolves these disputes in Russell's favor, "[t]he mere fact that [he] was generally at large is not enough for a reasonable officer to

specifically believe that he was in the apartment," and Powell's conduct violated clearly established law. *United States v. Delgado*, 701 F.3d 1161, 1164-65 (7th Cir. 2012); *see also United States v. Pichany*, 687 F.2d 204, 207-08 (7th Cir. 1982) (finding warrantless search of warehouse near reported burglary unconstitutional when nothing "appeared to require some police action to protect them from danger").

Russell's case must proceed to trial to decide the factual disputes improperly (and erroneously) resolved by the district court. This Court should reverse on that ground alone.

II. Even under the facts (improperly) found by the district court, the warrantless search was not a valid protective sweep.

This Court can also reverse because of the district court's erroneous application of the protective-sweep doctrine. The protective-sweep doctrine does not apply here because the officers were not lawfully in Russell's apartment. Moreover, the search was not justified by a reasonable belief that Russell's apartment harbored anyone who posed a danger. And because it is clearly established that a lawful protective sweep requires that reasonable belief, Powell is not protected by qualified immunity.

A. The protective-sweep doctrine does not apply to Powell's search because he did not lawfully enter Russell's apartment.

"The underlying rationale for the protective sweep doctrine is the principle that police officers should be able to ensure their safety when they lawfully enter a private dwelling." *Leaf v. Shelnutt*, 400 F.3d 1070, 1087 (7th

Cir. 2005); *see Maryland v. Buie*, 494 U.S. 325, 334-35 (1990). "*Buie* assumes that the police already are lawfully present in the home" they are sweeping. *United States v. Arch*, 7 F.3d 1300, 1303 (7th Cir. 1993); *see also United States v. Johnson*, 170 F.3d 708, 716 (7th Cir. 1999) (refusing to "significant[ly] expan[d] … *Buie*" by permitting a protective sweep incident to an unlawful seizure). Accordingly, officers must either identify some lawful reason for them to be in a dwelling in the first place—such as an arrest, *e.g.*, *Buie*, 494 U.S. at 334, or a reasonable belief that a crime is in progress, *e.g.*, *Leaf*, 400 F.3d at 1081—or show that a reasonable officer would feel "as much at risk from an unexpected assault on the defendant's doorstep as they might be inside," thereby justifying the entry. *Arch*, 7 F.3d at 1303.

Here, the officers do neither. In moving for summary judgment, they relied exclusively on the protective-sweep doctrine—not any other lawful reason—to justify their entry into the apartment, and the district court therefore considered only whether the initial entry was necessary to protect those on the scene. App. 132. That initial entry was not within the scope of a permissible protective sweep even under the officers' version of the facts, as this Court's precedent and the officers' own actions demonstrate.

Because permissible protective sweeps are limited to the scope needed to ensure officers are not in danger, *Buie*, 494 U.S. at 335-36, they justify an initial entry into a home only when officers reasonably believe that an individual inside poses a threat to officers outside the home. *Arch*, 7 F.3d at 1303-04 (collecting cases). This threat almost invariably involves suspicion

that the person inside possesses a weapon that can harm officers from a distance, such as a gun: "A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another." *United States v. Burrows*, 48 F.3d 1011, 1016 (7th Cir. 1995) (citation omitted); *see, e.g.*, *United States v. Starnes*, 741 F.3d 804, 808 (7th Cir. 2013) (entering apartment justified when "a shooting had occurred on the premises just a few hours prior"); *United States v. Thompson*, 842 F.3d 1002, 1009 (7th Cir. 2016) (entering apartment justified because suspect believed to be drug trafficker and "guns are known tools of the drug trade").

Here, by contrast, a reasonable officer would have no basis to suspect Russell had any means to harm the officers while they stood outside his apartment. Unlike the scenario envisioned in *Burrows*, 48 F.3d at 1016, Russell's apartment has no windows or openings through which he could reach the officers other than his locked door. *See* App. 123 at 14:43:09. Furthermore, Russell was suspected of a stabbing, and there is no indication in either the officers' summary-judgment briefing or the district court's opinion that he might have had a gun.

This case is therefore fundamentally different from *United States v. Henderson*, 748 F.3d 788 (7th Cir. 2014), on which the district court relied most heavily. App. 135-37. There, the officers relied on a hostage's warning that Henderson had a gun and that Henderson and the hostage came out of his house unarmed to conclude that there may still have been a gun in the house, and thus that anybody remaining inside could pose a danger to officers

standing outside. 748 F.3d at 791-92. The district court observed that both *Henderson* and this case involved "a dangerous situation with a weapon unaccounted for," App. 136, but this general assertion ignores the key difference between the two cases. Unlike the specific warning in *Henderson*, there is no suggestion here that Russell had a gun or any other weapon that would pose a danger to officers from inside his apartment.

At most, the officers could have reasonably suspected Russell had a knife, yet neither the officers nor the district court explain how a knife could pose a threat to officers outside of Russell's apartment. In fact, the only way Russell could have harmed officers with a knife was by unlocking and opening his door while they stood in the hallway outside it. This situation did not involve a threat of an "ambush in a confined setting of unknown configuration" that justifies protective sweeps when officers enter a suspect's home, *Buie*, 494 U.S. at 333, because the armed officers could clearly see the locked door and would have advance notice if Russell tried to unlock and open it.

This Court's ambush cases, like *United States v. Starnes*, 741 F.3d at 809, and *United States v. Tapia*, 610 F.3d 505, 510-11 (7th Cir. 2010), further show how the sweep of Russell's apartment is different. In both cases, officers were already inside the suspects' dwellings for independent, lawful reasons—to execute warrants—so the protective-sweep doctrine did not permit the officers to enter a home absent some other constitutionally sufficient justification. *Starnes*, 741 F.3d at 806-07, 809; *Tapia*, 610 F.3d at 507,

510; *cf. Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."). And in both cases, the officers had reasons to believe guns were present, which could have posed a risk even through a closed door. *Starnes*, 741 F.3d at 806, 809; *Tapia*, 610 F.3d at 511. The officers here, by contrast, had no reason to think—and have never suggested—that any guns were present, and they were therefore not at risk from a surprise attack unless the door was opened.

The officers' actions—searching the apartment over an hour after the incident, *see* App. 89 (¶ 11); App. 128-29, and allowing the building managers to accompany them to, unlock, and stand directly in front of the door, App. 123 at 14:43:09—further show the officers did not reasonably believe they were in danger. These actions mirror the search found not to be a protective sweep in *United States v. Groce*, 255 F.Supp.2d 936 (E.D. Wis. 2003). *Groce* observed that "if the officers truly feared for their safety from someone on the second floor, they would have conducted the sweep immediately after arresting defendant and would not have chatted with [another resident] for ten minutes in the kitchen before going upstairs," and noted that the officers' allowing the resident to accompany them upstairs further "undermine[d] the notion that officers believed that a danger lurked" there. *Id.* at 941-42. Likewise, here, "the conduct of [Powell and the other officers] clearly revealed that their action was not really a protective sweep at all." *Id.* at 941.

If the officers' actions here could be justified, it would significantly expand *Buie*'s protective-sweep exception. Officers could sweep the home of anybody suspected of a violent crime merely by walking up to the front door and, regardless of whether they had reason to think the suspect had a gun, claiming they were at risk of ambush.

B. Even under the protective-sweep doctrine, the warrantless search was not justified because Powell would not have reasonably believed that Russell's apartment was occupied by anyone posing a danger.

As explained (at 10-16), summary judgment was improper because the district court erroneously resolved a factual dispute over whether Russell had left and found, contrary to the record, that Cannon's visitor was unaccounted for. Moreover, as just shown (at 18-23), the protective-sweep doctrine cannot apply to the officers' actions because the officers were not lawfully inside Russell's home. But assuming the facts as the district court found them and that the protective-sweep doctrine could apply to Powell's conduct, the search was not justified. That is, even if the locations of Russell and Cannon's visitor were unknown, that is not enough for officers to reasonably believe that there was someone in Russell's apartment who posed a danger.

A protective sweep beyond the immediate area of an arrest must be justified by "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to

those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334 (1990); *see also United States v. Schmitt*, 770 F.3d 524, 531 (7th Cir. 2014). This reasonable belief requires more than a "mere inchoate [or] unparticularized suspicion or hunch." *United States v. Tapia*, 610 F.3d 505, 510 (7th Cir. 2010) (quoting *Buie*, 494 U.S. at 332). True, the reasonable-suspicion standard requires less than the probable cause needed to obtain a warrant because the protective-sweep exception authorizes only a cursory search. *See United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995). But a warrantless sweep is not "a *de minimus* intrusion that may be disregarded." *Buie*, 494 U.S. at 333-34.

A protective sweep is unjustified when officers simply do not know where an individual is—articulable facts and rational inferences need to support a reasonable belief that the individual is in the particular area to be searched. *United States v. Delgado*, 701 F.3d 1161, 1164-65 (7th Cir. 2012) ("The mere fact that the shooter was generally at large is not enough for a reasonable officer to specifically believe that he was in the apartment."). These facts may include officers hearing a person in the area swept, *United States v. Contreras*, 820 F.3d 255, 269 (7th Cir. 2016), or observing people enter the residence, *Schmitt*, 770 F.3d at 531.

In *United States v. Delgado*, 701 F.3d at 1164-65, this Court found that a search was not justified where officers responded to a report of gunshots, learned that a shooting victim was hiding in Delgado's apartment, and searched that apartment without a warrant or consent. When officers went to the apartment to locate the victim, they found him with Delgado, and both

left with the officers without indicating that anyone else was present. *Id.* at 1163. The officers then searched the apartment without a warrant, and the government argued that the officers could have reasonably believed that the shooter was hiding in the apartment with Delgado and the victim. *Id.* at 1163-64. This Court rejected that argument because no one on the scene indicated that the shooter was in Delgado's apartment, and the government would have to "point to something that would lead a reasonable officer to think that this improbable scenario actually transpired." *Id.* at 1164-65 (emphasis omitted). The fact that the shooter's location was unknown did not lead to a reasonable belief that he was in Delgado's apartment. *Id.*

The protective sweep in *United States v. Wallace*, 2023 WL 4899883, at *3 (S.D. Ill. Aug. 1, 2023), *appeal dismissed*, 2023 WL 9510111 (7th Cir. Aug. 24, 2023), was similarly not justified when the officers lacked information that the area to be swept harbored individuals who posed a danger. From the facts that "there were no extra cars in the parking lot, no noises from afar once officers were inside, and the arrestee confirmed that no one else was there[,] … it was not reasonable to infer that a person posing a threat remained on the premises." *Id.*

Even if it was unclear to the officers whether Russell was on the property, as the district court (improperly) found, that uncertainty would not justify a protective sweep of his home. The only indication that Russell may have been in his apartment came from the 911 caller, who thought he "went back upstairs to his [apartment], possibly 105." App. 74. Though the caller raised

the possibility that Russell was in his second-floor apartment (in addition to the possibility that he was in apartment 105), Coca arrived at the scene and communicated to Dispatch that the "[s]uspect left" after the incident. *Id.* Powell, Spiegelhoff, and Comstock arrived over an hour later, and the building managers informed them that Russell "ha[d]n't come back yet." App. 123 at 14:41:14-14:41:16. When Spiegelhoff went on to confirm that Russell was not home, one of the managers noted that he personally did not know whether Russell was in his apartment while the other repeated that Russell's car was gone. *Id.* at 14:41:27-14:41:40. Even if it remained unclear whether Russell was on the property at the time of the search, the information available to the officers did not support a reasonable belief that Russell was in his apartment.

Defendants would need to—and cannot—point to facts and rational inferences that support a reasonable belief that Russell was in his apartment and posed a danger to justify the warrantless search under the protective-sweep doctrine. Instead, the officers here were informed that Russell had fled after the altercation with Cannon and were told and could see that Russell's car was still gone. Defendants did not see or hear anything to suggest he had returned and was actually in his apartment. Further, Defendants cannot establish a reasonable belief that someone in Russell's second-floor apartment would pose a danger to officers on the scene. *See supra* at 19-22.

The district court also (improperly) found that Cannon's guest was unaccounted for. App. 137. But there are no facts to support a reasonable belief that the guest was in Russell's apartment and posed a danger. The building managers told the officers that they spoke with Cannon's guest after the incident and "asked him to go home." App. 123 at 14:42:11-14:42:18. There was nothing to suggest that he did not go home—and certainly no reason to think that he was in Russell's apartment. The improbability of that scenario would require the officers to affirmatively point to something to support it, and they cannot.

C. Powell does not have qualified immunity because he was on notice that a protective sweep absent a reasonable belief of danger violates the Fourth Amendment.

Qualified immunity does not apply when a search's illegality is "clearly established," such that a reasonable officer is "on notice that his conduct would be clearly unlawful." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). That is the case for warrantless searches when "no exception to the warrant requirement is apparent from the facts," because permitting warrantless searches outside of an established exception "ignores virtually all Fourth Amendment law" and "would give officers carte blanche to conduct searches and seizures within a home." *Perry v. Sheahan*, 222 F.3d 309, 316 (7th Cir. 2000). Thus, when the exception to the warrant requirement that a defendant officer relies on fails, and he "does not argue that" any other exception applies, Fourth Amendment doctrine is "well settled, which

precludes a defense of qualified immunity." *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004).

It is clearly established that protective sweeps are strictly limited to those "necessary to dispel [a] reasonable suspicion of danger." *Maryland v. Buie*, 494 U.S. 325, 335-36 (1990). Officers operating in this Circuit are on notice that if they are not already lawfully in a home, they cannot enter it solely to conduct a protective sweep unless they are "as much at risk from an unexpected assault on the defendant's doorstep as they might be inside." *United States v. Arch*, 7 F.3d 1300, 1303 (7th Cir. 1993). Moreover, it has long been established that the protective-sweep exception justifies a cursory search beyond the immediate area of an arrest only when there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Buie*, 494 U.S. at 334.

As discussed above (at 20-21), a reasonable officer in Powell's position would not have any basis to suspect Russell had a weapon that could harm officers standing outside, and thus would not face the same risk outside as they might have standing inside the apartment. Further, as also discussed (at 11-15), a reasonable officer would not have believed that Russell's apartment harbored an individual that posed a danger to those on the scene—neither Russell nor Cannon's guest. Witnesses indicated that both

had left. Therefore, Powell was on notice that his warrantless search of Russell's apartment was clearly unlawful.

Though the Supreme Court has recognized exceptions to the warrant requirement, "it has never deviated from the rule that generalized suspicion alone is not enough to justify a warrantless search of a home." *United States v. Johnson*, 170 F.3d 708, 710 (7th Cir. 1999). Powell flatly violated that constitutional principle when he conducted an unjustified warrantless search of Russell's home.

Conclusion

This Court should reverse and remand for a trial on the merits of Russell's claim that the warrantless search of his apartment was an unreasonable search that violated the Fourth Amendment.

Respectfully submitted,

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May 15, 2024

Certificate of Compliance

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 7,147 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016, set in Palatino Linotype in 14-point type.

/s/ Brian Wolfman
Brian Wolfman

Attached Appendix

Certificate of Compliance with Circuit Rule 30

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a) and that the separately submitted appendix contains all of the materials required by Circuit Rule 30(b).

/s/ Brian Wolfman
Brian Wolfman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHNNIE E. RUSSELL,

Plaintiff,

v.

SGT. COMSTOCK, COLIN POWELL, and LT. WOHLGEMUTH,

Defendants.

Case No. 21-CV-151-JPS

ORDER

Plaintiff Johnnie E. Russell ("Plaintiff"), who is incarcerated at the Wisconsin Resource Center, proceeds in this matter pro se. On October 6, 2021, the Court screened Plaintiff's complaint and allowed Plaintiff to proceed on the following two claims: (1) unreasonable search of Plaintiff's apartment, in violation of the Fourth Amendment, by Defendants Powell and Wohlgemuth on June 25, 2020; and (2) unreasonable search of Plaintiff's car, in violation of the Fourth Amendment, by Defendants Wohlgemuth and Comstock on June 25, 2020. ECF No. 11 at 8. On August 15, 2022, the Court issued a scheduling order with summary judgment motions due on or before February 28, 2023. ECF No. 32.

On February 28, 2023, Defendants filed a motion for summary judgment. ECF No. 43. On August 23, 2023, the Court denied Defendants' motion for summary judgment, without prejudice, and allowed the parties the opportunity to filed renewed motions. ECF No. 57. On October 5, 2023, Defendants filed an amended motion for summary judgment. ECF No. 58. On October 6, 2023, Plaintiff filed a declaration opposing the revised joint statement of material facts. ECF No. 70. On October 17, 2023, Plaintiff filed an opposition to the motion for summary judgment. ECF No. 73. On October 20, 2023, Defendants filed a reply brief. ECF No. 74. As such,

Defendants' motion for summary judgment is fully briefed and ready for disposition. As discussed in detail below, the Court grants Defendants' amended motion for summary judgment in full and will accordingly dismiss this case with prejudice.

1. LEGAL STANDARD — SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016). A fact is "material" if it "might affect the outcome of the suit" under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The Court construes all facts and reasonable inferences in a light most favorable to the nonmovant. *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 360 (7th Cir. 2016). In assessing the parties' proposed facts, the Court must not weigh the evidence or determine witness credibility; the Seventh Circuit instructs that "we leave those tasks to factfinders." *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 691 (7th Cir. 2010).

2. FACTUAL BACKGROUND

In compliance with the Court's scheduling order, Defendants submitted a statement of joint proposed material facts. ECF No. 65. As such, the following facts are taken directly from the parties' joint statement of material facts with only minor grammatical editing. Defendants also included a list of separate disputed facts, ECF No. 66, which the Court will address separately below.

On June 25, 2020, at approximately 1:10 p.m., Racine Police Department Officers were dispatched to 1915 Washington Avenue, Racine,

Wisconsin for an assault complaint. On that date, Plaintiff resided at 1915 Washington Avenue, Apt. 202. Willie Cannon also resided at 1915 Washington Avenue in Apt. 103. At the time, Plaintiff owned two vehicles, a silver 1994 Cadillac Sedan and a silver 2001 Mercury Grand Marquis. Upon arrival at 1915 Washington Avenue, officers learned Willie Cannon had been stabbed in the chest, and he identified Johnnie Russell, Plaintiff, as the suspect who had stabbed him. Cannon required medical attention and was transported via rescue to Ascension hospital. Plaintiff had actually left the building in his Mercury immediately after Cannon was stabbed.

Investigator Jody Spiegelhoff arrived on scene and met with the building manager, Johnny Marvitz, who stated Plaintiff parked his two vehicles a silver Cadillac and a silver Mercury— along the east side of the building. Marvitz further indicated that Plaintiff lived in Apartment 202 and he was uncertain if Plaintiff had gone back to his apartment. Investigator Spiegelhoff and Sergeant Ryan Comstock secured Cannon's apartment (#103) by doing a protective sweep to make sure there was nobody inside injured related to the case. Property Manager, Jerome Howe unlocked the door of apartment (#202) and Officer Colin Powell entered Plaintiff's apartment (#202) and cleared it—without a warrant. Officer Powell was then assigned to guard Plaintiff's apartment pending a search warrant. Investigator Spiegelhoff then drafted a search warrant application.

On June 25, 2020, at 5:23 p.m., a search warrant for 1915 Washington Avenue, Apartment 202, was authorized by the Honorable Faye M. Flancher allowing a search of any persons in and around the premises, basement storage, vehicles, and other outbuildings associated with the property. Lieutenant Wohlgemuth attempted to get the trunk of the Cadillac open, however, the trunk was not opening and after trying a few different options to open the trunk, Sergeant Comstock arrived and was

able to breach the trunk with a pry bar. Defendants' use of the pry bar caused damage to the Cadillac.

As a result of the June 25, 2020 incident, Plaintiff was charged with 2nd Degree Reckless Injury and Aggravated Battery – Intent to Cause Bodily Harm, and on January 27, 2021, Plaintiff was found guilty of 2nd Degree Reckless Injury and Aggravated Battery.

Defendants provide additional proposed findings of fact, ECF No. 66, that Plaintiff purportedly disputes, *see* ECF No. 70. Plaintiff states that he does not agree with specific times of certain officers and generally that the facts "do not tell the truth as [Plaintiff] know[s] it." *Id.* Plaintiff does not, however, provide any factual support for his dispute of Defendants' additional facts. Nor could he; the parties agree that Plaintiff left the building immediately after the victim was stabbed, ECF No. 65 at 1, and Plaintiff has provided no factual basis, such as witness statements or other evidence, to support his generalized factual disputes. As such, the Court deems Defendants' additional proposed findings of fact, ECF No. 66, as undisputed for the purposes of this motion. *See* Fed. R. Civ. P. 56(e)(2). The Court therefore considers the following additional facts.

Officer Coca arrived on the scene at 1:15 p.m. Dispatch informed the officers that there was an assault in progress involving a suspect that may have a knife and that the victim was bleeding. Dispatch also informed the officers that the suspect may have returned to his apartment. Upon arrival at the scene, Willie Cannon did not have a knife. Officer Powell arrived at the scene at around 2:31 p.m. Investigator Spiegelhoff arrived at the scene at around 2:40 p.m. The protective sweep was performed based upon information provided by the building manager, Mr. Marvitz, and Racine Dispatch, who were uncertain of Plaintiff's location, and noted Russell's apartment was left unattended after the

stabbing. From the officers' perspective, the purpose of the protective sweep was to make sure there was nobody inside who could pose a danger to individuals, officers, or bystanders, on scene or injured while waiting on a search warrant; they were not looking for evidence. Lieutenant Wohlgemuth participated in the search of Plaintiff's apartment after a valid warrant for the search of the apartment had been signed. Before Lt. Wohlgemuth and Sgt. Comstock opened the trunk of Plaintiff' vehicle, a valid warrant for the search of the vehicle had been signed. Officer Powell's "clearing" of Plaintiff's apartment was limited to a cursory inspection of spaces where a person may be found and lasted approximately thirty-seven seconds, occurring from 2:43:46 p.m. to 2:44:23 p.m.

3. ANALYSIS

Defendants' motion for summary judgment seeks dismissal of all claims in the case. First, Defendants argue that they are entitled to summary judgment on the warrantless search of Plaintiff's home claim because Defendant Powell's entry into the home was reasonable under the "protective sweep" doctrine. ECF No. 59 at 3. Second, Defendants argue that Defendant Wohlgemuth and Comstock's searches of Plaintiff's residence and car were lawfully conducted pursuant to a valid search warrant. *Id.* at 6–7. As discussed below in detail, the Court grants summary judgment on all claims and will dismiss this case with prejudice.

3.1 Warrantless Search of Plaintiff's Home

The parties agree that Defendant Powell initially searched Plaintiff's home without a warrant. The parties disagree, however, on the legal issue of whether the search violated the Fourth Amendment. "Warrantless searches are *per se* unreasonable under the Fourth Amendment, unless an exception applies." *United States v. Smith*, 989 F.3d 575, 581 (7th Cir. 2021).

However, warrantless searches are constitutionally permissible "under certain narrowly proscribed exceptions." *United States v. Huddleston*, 593 F.3d 596, 600 (7th Cir. 2010). Defendants argue that the search in this instance was reasonable as a protective sweep under *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

In *Buie,* the Supreme Court first identified the "protective sweep" as an exception to the warrant requirement of the Fourth Amendment. *Id.* at 334. Specifically, the Court described two circumstances where the police, to ensure their own safety without unnecessarily intruding on the Fourth Amendment rights of a criminal defendant, could engage in a "quick and limited" "visual inspection of those places in which a person might be hiding" in a premises. *Id.* at 327. First, officers, "as an incident to the arrest" and "as a precautionary matter and without probable cause or reasonable suspicion," are permitted to "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. Second, where "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger," the search may extend beyond the parameters of the first type of protective sweep. *Id.* Such a sweep must not last "longer than is necessary to dispel the reasonable suspicion of danger." *Id.* at 335–36. In this case, it is undisputed that the search performed by the police falls under the second set of circumstances provided by *Buie,* as the police were not performing their search incident to any arrest.

The inquiry as to the reasonableness and validity of a protective sweep is necessarily fact-specific. *United States v. Burrows*, 48 F.3d 1011, 1016 (7th Cir. 1995). "A protective sweep is not justified where there is a 'mere inchoate and unparticularized suspicion or hunch' of danger." *United States*

v. Tapia, 610 F.3d 505, 510 (7th Cir. 2010) (internal citations omitted). "The less intrusive a search, the less justification is required." *United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995). "The question posed by the fourth amendment is not whether it would have been reasonable to get a warrant, but whether the search itself was reasonable." *Id.* (citing *United States v. Edwards*, 415 U.S. 800, 807 (1974)).

Generally, when officers perform a protective sweep, they are already lawfully in the residence. *See, e.g.*, *Buie*, 494 U.S. at 336–37. However, the Court of Appeals for the Seventh Circuit has also interpreted the protective sweep doctrine as authorizing officers to enter homes in certain instances. *See United States v. Henderson*, 748 F.3d 788, 791 (7th Cir. 2014); *see also Burrows*, 48 F.3d at 1016 ("We have also recognized that officers may be at as much risk while in the area immediately outside the arrestee's dwelling as they are within it. 'A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another.'" (quoting *United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989)); *United States v. Duncan*, No. 20-CR-169-PP, 2021 WL 4892291, at *12 (E.D. Wis. Oct. 20, 2021) ("[T]he court concludes that they were justified in *entering* the home to conduct a protective sweep.") (emphasis added).

Applying these principles to the case at hand, the Court finds that Defendants have shown articulable facts that would have warranted a reasonably prudent officer in believing that a protective sweep of Plaintiff's residence was necessary. The Court acknowledges that this is a close case and is mindful that protective sweeps must be carefully scrutinized in order to protect Fourth Amendment principles. *See Burrows*, 48 F.3d at 1017 ("We must also recognize, however, that the sweep is a device that can easily be perverted to achieve ends other than those acknowledged as legitimate in *Buie.*"). However, in looking at the over-arching question of whether the

search was reasonable, the Court finds that it was reasonable based on the specific facts present in this case.

First, the officers were dispatched to the property to investigate a serious crime. Dispatch informed officers that there was an assault in progress involving a suspect that may have a knife and that the victim was bleeding. Upon arrival to the scene of the crime, officers learned from the victim that he had been stabbed in the chest by Plaintiff and the victim was not in possession of the knife. The stabbing was of a serious nature and required the victim's transport to a hospital via rescue.

Second, Plaintiff's whereabouts were unknown at the time of the search. Although it is undisputed that Plaintiff was *not* present or anywhere near his home during the search, a reasonable officer could have reasonably believed that Plaintiff was located in his apartment at the time of the search. Prior to their arrival, Dispatch had informed the officers that the suspect may have returned to his apartment. Upon arrival, officers learned from the apartment manager that Plaintiff lived in Apartment 202 and that he was uncertain if Plaintiff had gone back to his apartment following the stabbing. The Court pauses here momentarily to address the potential factual dispute of whether officers reasonably believed Plaintiff may have been in his home at the time of the search. The parties' undisputed facts state that the apartment manager indicated that he was uncertain if Plaintiff had gone back to his apartment. ECF No. 65 at 2. In Plaintiff's opposition, however, Plaintiff maintains that the video "clearly shows the investigator [spieglehoff] verifying plaintiff is gone in his grand marquis silver" and that the apartment manager "states that plaintiff is gone a few times in the video." ECF No. 73 at 2. The Court notes that neither party provided a transcript for the body camera video provided in the record, so the Court cannot say with one-hundred percent certainty what specific language was

used by any party on the video. However, the Court has carefully reviewed the body camera video and agrees with Defendants that it was, at the very least, unclear whether Plaintiff still on the property at the time of the protective sweep search. The video evidence speaks for itself and, therefore, the Court does not consider this fact to be in dispute for the purposes of this Order. Based on the facts available to the officers at the time of the search, the Court finds that a reasonable officer could have believed Plaintiff was in the apartment at the time of the search and could be a danger to the officers or the public based on his recent knife attack.

Third, the apartment manager indicated that Plaintiff's residence was left unattended after the stabbing. Fourth, the apartment manager told the officers that a third, unknown and unaccounted for person, was visiting at the time of the stabbing.[1] And fifth, the undisputed video evidence shows that the search was extremely limited, lasting only thirty-seven seconds, and was limited to a cursory inspection of spaces where a person could be found.

The Court likens this case to *United States v. Henderson*, 748 F.3d 788, 791–92 (7th Cir. 2014), where the Seventh Circuit found a protective sweep of a house was reasonable *after* the alleged abuser and the victim were both detained outside the house. *Id.* at 791-92. There, the court found the following record "replete with specific and articulable facts" for the officers to reasonably conclude that the officers or others faced a dangerous

[1]The Court acknowledges that Defendants did not include any facts about the potential presence of a third party in their initial filings and instead only addressed it in their reply brief. *Compare* ECF Nos. 65, 66 *with* ECF No. 74. However, while the Court *need* only consider the cited materials, it *may* consider other materials in the record. *See* Fed. R. Civ. P. 56(c)(3). Defendants provided the body camera footage along with their initial submissions. *See* ECF No. 63-1. The Court finds the video evidence speaks for itself and therefore considers it in the analysis of what the officers knew at the time of the search.

situation without a protective sweep of the house. *Id.* at 791. The court relied on the following facts:

> The SWAT team received a report of a hostage situation, validated by text messages on [a third party's] phone and the officers' sighting of movement within the house. The text messages from [the victim] said that she was being held by [Henderson] with a gun. The officers called over the PA loudspeaker for over an hour demanding for the occupants of the house to come out, but instead of cooperating, the occupants remained locked in the house. The officers did not know how many occupants or what the occupants were doing inside the house during the standoff. [The victim] appeared to be frightened when she exited. When [the victim] and Henderson exited the house, neither were armed. All of the doors were locked and the house was two stories; large enough for others to hide and ambush the officers or bystanders. The SWAT team had information that Henderson possessed a gun but no weapons were found on his person when he was arrested.

Id. at 792. The search lasted five minutes or less and was performed approximately five to ten minutes after Henderson was arrested. *Id.* at 789–90. Based on these facts, the court found that it was reasonable to infer that an armed and dangerous person remained in the house, and that a "'bevy of facts support[ed] the conclusion that such a sweep was reasonable and prudent.'" *Id.* at 792 (quoting *United States v. Starnes*, 741 F.3d 804, 810 (7th Cir. 2013).

Here, like *Henderson*, the officers were confronted with a dangerous situation with a weapon unaccounted for and, in this case, the weapon had already been used to seriously injure at least one person. In *Henderson*, the alleged hostage-taker *and* victim were secured by officers outside prior to the search of the house; here, only the victim was located, and officers had specific reason to believe that Plaintiff may have returned to his apartment. In *Henderson*, there was no specific indication that any third parties were involved whereas here, the apartment manager indicated a third-party was

present during the stabbing. The Court acknowledges that the facts surrounding the presence of a possible third party in this case are extremely limited, and there was no specific allegation that the third party had either been injured or taken part in the knife-attack. Despite this fact, the Court nonetheless finds that a reasonable officer faced with these specific facts could have been concerned for the well-being of a possible third party given Plaintiff's recent violent attack and his unknown whereabouts.

One may argue that a search of Plaintiff's residence was not needed to prevent any potential attack from Plaintiff because the officers could have instead simply waited outside the apartment door until a warrant was secured. However, to begin, this line of argument would ignore the possibility that a third party was in the apartment and possibly in need of assistance. Moreover, where "police have good grounds to believe that potentially dangerous individuals could be in [a location], a protective sweep into that area is reasonable regardless of whether there might be a 'less intrusive investigatory technique' for securing that area." *United States v. Tapia*, 610 F.3d 505, 511 (7th Cir. 2010), *as amended on denial of reh'g* (Aug. 16, 2010) (quoting *United States v. Winston*, 444 F.3d 115, 120 (1st Cir. 2006)). Here, following the protective sweep, Defendant Powell was assigned to guard Plaintiff's apartment pending a search warrant. Based on the information the officers had from both Dispatch and the apartment manager, the officers had an articulable and reasonable belief that Plaintiff may have been inside his apartment with a knife he had already used to seriously injure someone. Although a less intrusive investigatory technique could have been used to secure Plaintiff's apartment, the Court finds the officers reasonably believed a protective sweep was necessary to ensure Plaintiff would not launch an attack from his apartment while officers secured a search warrant.

Finally, the Court strongly emphasizes the importance the limited nature of the search (in both duration and scope) plays in its decision today. *See Brown*, 64 F.3d at 1086 ("The less intrusive a search, the less justification is required."). Unlike *Henderson*, where the search lasted up to five minutes, the search here lasted a mere thirty-seven seconds. The officers limited the scope of the search to places only where a person could be located. The intrusion into Plaintiff's home was extremely limited. The undisputed record shows that Defendant Powell swept the apartment only for as long was needed to determine whether another person was located inside the residence. Following the protective sweep, and discussed below, the officers properly sought a warrant before performing a full search of the apartment to search for evidence of the crime.

In sum, the Court finds that articulable facts, which taken together with the rational inferences form those facts, would warrant a reasonably prudent officer to believe that a protective sweep of Plaintiff's apartment was necessary. While the Court recognizes the importance of protecting the sanctity of the home, the Court finds that based on the totality of the circumstances known to officers when they made the decision to enter Plaintiff's apartment, the search on these specific facts was reasonable. As such, the Court will grant Defendants' motion for summary judgment as to Defendant Powell's warrantless search of Plaintiff's home.

3.2 Wohlgemuth and Comstock Searches

Finally, the Court finds that Defendant Wohlgemuth's search of Plaintiff's residence and Defendant Wohlgemuth's and Defendant Comstock's search of Plaintiff's car did not violate the Fourth Amendment because the undisputed facts show that the searches were conducted pursuant to a valid search warrant. Searches undertaken pursuant to valid search warrants are presumptively valid. *Archer v. Chisholm*, 870 F.3d 603,

613 (7th Cir. 2017) (citing *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978)). The parties agree that a search warrant for 1915 Washington Avenue, Apartment 202, was authorized by the Honorable Faye M. Flancher on February 25, 2020, at 5:23 p.m., allowing a search of any persons in and around the premises, basement storage, vehicles, and other outbuildings associated with the property. ECF No. 65 at 1. The parties dispute, however, whether the searches occurred before or after the warrant issued.

Defendants provide evidence that Defendant Wohlegemuth participated in the search of Plaintiff's residence only *after* a valid warrant for the search of Plaintiff's residence had been signed. ECF No. 66 at 2. (citing Wohlgemuth Decl. ¶¶ 4, 6, 7, 13; Am. Spiegelhoff Decl. ¶¶ 22, 23, 24; Garcia Decl. ¶¶ 3, 4; Garcia Ex. A). Defendants also provide evidence to show that the search of Plaintiff's car occurred *after* a valid search warrant for the search of the vehicle had been signed. *Id.* (citing Wohlgemuth Decl. ¶¶ 8-11, 13; Comstock Decl. ¶¶5-9; Am. Spiegelhoff Decl. ¶¶ 22, 28, 29; Garcia Decl. ¶¶ 3, 4; Garcia Ex. A). Plaintiff provides no admissible evidence to dispute these facts. The parties agree that Plaintiff left the building in his Mercury immediately after the victim was stabbed. ECF No. 65 at 1. Plaintiff generally asserts that there was no warrant prior to the invasion of his residence, ECF No. 73 at 2; however, Plaintiff does not explain any basis for his belief that Defendant Wohlegemuth's search of Plaintiff's residence or the search of Plaintiff's car occurred prior to the signing of the warrant. Plaintiff provides no witness statements, surveillance footage, or anything at all to dispute Defendants' assertion. As Defendants aptly point out, speculation alone is insufficient to defeat summary judgment. *SportFuel, Inc. v. PepsiCo, Inc.*, 932 F.3d 589, 601 (7th Cir. 2019); *see also Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001)

("It is well-settled that speculation may not be used to manufacture a genuine issue of fact."). As such, the Court finds that the undisputed facts show that these searches occurred pursuant to a valid search warrant, and the searches were therefore presumptively valid. The Court will accordingly grant Defendants' motion for summary judgment as to Defendant Wohlegemuth's search of Plaintiff's residence and as to Defendant Wohlgemuth's and Defendant Comstock's search of Plaintiff's car.

4. CONCLUSION

For the reasons explained above, the Court finds that Defendants' three separate searches in this case were reasonable, and will therefore grant Defendants' motion for summary judgment as to all claims. The Court will accordingly dismiss this case with prejudice.

Accordingly,

IT IS ORDERED that Defendants' amended motion for summary judgment, ECF No. 58, be and the same is hereby **GRANTED** as provided in this Order; and

IT IS FURTHER ORDERED that this action be and the same is hereby **DISMISSED with prejudice**.

The Clerk of the Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 14th day of December, 2023.

BY THE COURT:

J. P. Stadtmueller
U.S. District Judge

This Order and the judgment to follow are final. A dissatisfied party may appeal this Court's decision to the Court of Appeals for the Seventh Circuit by filing in this Court a notice of appeal within **thirty (30)** days of the entry of judgment. See Fed. R. App. P. 3, 4. This Court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the thirty-day deadline. *See* Fed. R. App. P. 4(a)(5)(A). Moreover, under certain circumstances, a party may ask this Court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within **twenty-eight (28)** days of the entry of judgment. The Court cannot extend this deadline. *See* Fed. R. Civ. P. 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The Court cannot extend this deadline. *See id.* A party is expected to closely review all applicable rules and determine what, if any, further action is appropriate in a case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHNNIE E. RUSSELL,

Plaintiff,

v.

SGT. COMSTOCK, COLIN POWELL, and LT. WOHLGEMUTH,

Defendants.

Case No. 21-CV-151-JPS

JUDGMENT

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' amended motion for summary judgment, ECF No. 58, be and the same is hereby **GRANTED**; and

IT IS FURTHER ORDERED AND ADJUDGED that this action be and the same is hereby **DISMISSED with prejudice**.

APPROVED:

J.P. Stadtmueller
U.S. District Judge

GINA M. COLLETTI
Clerk of Court

December 14, 2023
Date

s/ Jodi L. Malek
By: Deputy Clerk