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APPLYING *MICHIGAN V. SUMMERS* TO OFF-PREMISES SEIZURES: THE “AS EARLY AS PRACTICABLE” STANDARD

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INTRODUCTION

Police officers are waiting outside of the house of a suspected drug dealer, preparing to execute a search warrant for drugs and firearms that the officers have probable cause to believe are in the home. Just before the police approach the premises, they observe the suspected drug dealer leave his house and head to his car. The police know that they may detain the occupant before he leaves his property, but they fear that their swift approach might cause the possibly armed suspect to retaliate, flee, or retreat to his house to destroy the drugs, or that other occupants of the home might react violently or dispose of the drugs. Instead of rushing the suspect and endangering his and their safety, the police pull him over outside of the view of his home, detain him, and bring him back to the house.

Before the police search his home, the occupant consents to a search of his person. The search of the occupant yields a gun and ten grams of methamphetamine. The officers then search his house, but find no other contraband. The occupant was apparently attempting to sell the methamphetamine, but was interrupted when the police detained him. The police are not worried, however, since the occupant’s possession of over five grams of methamphetamine carries a mandatory sentence of at least five years in prison and four years of supervised release.¹

Fortunately for the suspect, and unfortunately for his community, he goes to trial in a district court in the Tenth Circuit. The judge rules that the police illegally arrested the

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¹ 21 U.S.C. § 841(b)(1)(B)(viii) (2012).

suspect when they detained him, since he had already left his premises.² The judge acknowledges that the police could have seized the suspect while he was still on his property without violating his Fourth Amendment rights,³ but holds that the suspect's off-premises detention was impermissible.⁴ Consequently, the judge rules that the methamphetamine and gun the officers obtained from their unconstitutional seizure and search of the suspect are "fruit of the poisonous tree" and cannot be used as evidence against the suspect.⁵ If the officers had rushed to detain the suspect before he drove away from his property, risking their and the suspect's safety and chancing the destruction of the drugs, the seizure would have been reasonable and the evidence obtained from the suspect would have been admissible.⁶ Since the officers waited until the occupant left his premises before detaining him, however, the detainment is an illegal arrest,⁷ the contraband is inadmissible in evidence,⁸ and the drug dealer likely goes free.

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁹ It protects an individual's property, including his person, against a "seizure": a "meaningful interference with an individual's possessory interests in [his or her] property."¹⁰ A person is seized when an officer, "by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied."¹¹

² See, e.g., *United States v. Edwards*, 103 F.3d 90, 93–94 (10th Cir. 1996).

³ See, e.g., *Michigan v. Summers*, 452 U.S. 692, 705 (1981) ("Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." (footnote omitted)).

⁴ See, e.g., *Edwards*, 103 F.3d at 93–94.

⁵ See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (holding that evidence obtained as a direct consequence of an illegal arrest must be suppressed as "fruit of the poisonous tree").

⁶ See *Summers*, 452 U.S. at 705 (ruling that the occupant's arrest and the search incident thereto were constitutionally permissible since it was lawful for police to detain the occupant while they executed a search warrant on his property).

⁷ See, e.g., *Edwards*, 103 F.3d at 94.

⁸ See *Wong Sun*, 371 U.S. at 488.

⁹ U.S. CONST. amend. IV.

¹⁰ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

¹¹ *Brendlin v. California*, 551 U.S. 249, 254 (2007) (citations omitted) (internal quotation marks omitted).

Reasonable seizures, those supported by adequate cause, are constitutionally permissible, since officers must seize an individual “unreasonabl[y]” to violate his or her Fourth Amendment rights.¹² In the case of an arrest, which is one form of “seizure” of a person, police need “probable cause.”¹³ Where an arrest is made in a home, police usually need an arrest warrant in addition to probable cause.¹⁴

There are some situations, however, where police may seize a person incident to other circumstances with less than probable cause. For example, in *Michigan v. Summers*,¹⁵ the Supreme Court held that a warrant to search for contraband on premises carries with it the limited authority to detain the occupants of those premises while the warrant is executed.¹⁶ The Court found that the police seized the occupant by detaining him while he was on his front steps, but ruled that the seizure was reasonable and did not violate his Fourth Amendment rights.¹⁷ Since *Summers*, however, the circuits have split on whether police may detain an occupant of premises subject to a search warrant when the occupant leaves the premises immediately before the warrant is executed.¹⁸

This Note argues that the correct standard for determining whether the off-premises seizure of an occupant of property subject to a search is reasonable is whether the police detained the occupant as soon as practicable. Unlike the Eighth and Tenth Circuits, which have ruled that the *Summers* holding does not apply after the occupant leaves the premises,¹⁹ this Note contends that drawing a bright line at the residence’s curb serves no practical purpose and creates more problems than it prevents. Rather, this Note asserts that the same policies that guided the Supreme Court’s decision in *Summers* are at stake even after an occupant leaves his or her premises and that *Summers* should apply when officers detain the occupant as soon as practicable

¹² U.S. CONST. amend. IV (protecting against “unreasonable” seizures).

¹³ *Henry v. United States*, 361 U.S. 98, 102 (1959).

¹⁴ *Payton v. New York*, 445 U.S. 573, 576 (1980).

¹⁵ *Michigan v. Summers*, 452 U.S. 692 (1981).

¹⁶ *Id.* at 705.

¹⁷ *Id.* at 694, 696, 705.

¹⁸ *See, e.g., United States v. Bailey*, 652 F.3d 197, 204 (2d Cir. 2011) (discussing the circuit split), *rev’d*, 133 S. Ct. 1031 (2013).

¹⁹ *See United States v. Edwards*, 103 F.3d 90, 94 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994).

after observing the occupant leave his property. Further, this Note proposes three factors for courts to consider in evaluating whether police detained the occupant as soon as practicable: the distance the occupant traveled prior to his seizure, the time that elapsed between his departure and his detention, and evidence that police exploited the seizure.

Part I provides an overview of the Fourth Amendment's protection against unreasonable searches and seizures, first discussing general Fourth Amendment principles, then analyzing the Supreme Court's *Summers* decision. Part II addresses the circuit split over extending *Summers* where the occupant of the premises has left the property. Part II discusses the approaches taken by the four circuits that have applied, and the two circuits that have declined to apply, *Summers* to off-premises detentions. Part III argues that the circuits that have extended *Summers* where officers have detained occupants off premises are correct. It asserts that such detentions are reasonable seizures so long as the officers detained the occupants as soon as practicable after observing the occupants leave the property, and it provides guidelines for applying this test. Part III further contends that the policies underlying the Fourth Amendment and the *Summers* decision support that result. Finally, Part IV addresses the Supreme Court's recent decision rejecting the "as soon as practicable" standard and articulates why the Court's approach falls short and needs to be revisited.

I. THE FOURTH AMENDMENT'S BAN AGAINST UNREASONABLE SEARCHES AND SEIZURES

This Part discusses the Fourth Amendment's protection against unreasonable searches and seizures. Part I.A provides a brief overview of the government abuses that the Fourth Amendment was enacted to prevent and addresses how the Supreme Court has applied the Fourth Amendment in different contexts. Part II.B delves into the Supreme Court's decision in *Michigan v. Summers*, analyzing the policies and interests that guided the Court in holding that a search warrant carries with it the authority to detain the occupants of the premises being searched.

A. *The Fourth Amendment's Varied Standards of Protection*

The framers of the Constitution adopted the Fourth Amendment, in large part, to combat the government's issuance of "writs of assistance" and "general warrants," devices that empowered law enforcement to arbitrarily search and seize people and property.²⁰ The Fourth Amendment restricts, rather than abolishes, the power of law enforcement to search and seize by condemning only "*unreasonable*" searches and seizures.²¹ The Amendment, which consists of two clauses, does not require a warrant for every search or seizure.²² Instead, it requires that warrants be issued only upon probable cause.²³ Therefore, a search or seizure may be reasonable and constitutional without a warrant, but "writs of assistance" and "general warrants" are still prohibited by the requirement that a warrant be supported by probable cause.²⁴

The extent to which the Fourth Amendment protects people and property against arbitrary searches and seizures varies depending on the circumstances. Officers must establish probable cause before a court issues a warrant: Probable cause exists when the facts and circumstances within an officer's personal knowledge are sufficient to warrant a person of reasonable caution to believe that, in the case of a search, a particularly described item subject to seizure will be found in the place to be searched, and in the case of an arrest, an offense has been committed by the person to be arrested.²⁵ However, a warrant may not be required. While the Supreme Court has interpreted the Fourth Amendment to generally require not just probable cause, but a search warrant, to validate the search of a

²⁰ See *Boyd v. United States*, 116 U.S. 616, 624–26 (1886). General warrants "authorized searches in any place, for any thing." *Id.* at 641 (Miller, J., concurring). Writs of assistance were issued on executive authority and gave extensive power to the King's agents to search at will for smuggled goods. *United States v. Chadwick*, 433 U.S. 1, 8 (1977).

²¹ *Boyd*, 116 U.S. at 641.

²² The first clause of the Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and the second declares that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

²³ *Id.*

²⁴ *Boyd*, 116 U.S. at 641.

²⁵ *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

home,²⁶ police may search an automobile with probable cause alone.²⁷ Similarly, a seizure in a home that amounts to an arrest requires an arrest warrant supported by probable cause,²⁸ while an arrest in public requires probable cause, but not an arrest warrant.²⁹

Although the official seizure of a person generally must be supported by probable cause even where no formal arrest is made,³⁰ there are also situations where police need neither a warrant nor probable cause before they may seize an individual. For instance, in *Terry v. Ohio*,³¹ the Supreme Court ruled that reasonable suspicion that an individual has committed or is about to commit a crime justifies a limited investigatory search and seizure, but not an arrest, of that individual, despite a lack of probable cause.³² "Reasonable suspicion" is a lower standard than probable cause, and requires "a minimal level of objective justification for making [a] stop."³³ Additionally, police do not need probable cause or a warrant to seize the occupant of premises that are subject to a search warrant.³⁴

B. *Michigan v. Summers: Seizures Justified by Search Warrants*

In *Michigan v. Summers*, the Supreme Court established a bright-line rule that "for Fourth Amendment purposes, . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."³⁵ In *Summers*, police officers were preparing to execute a search warrant for narcotics on the defendant's premises when the

²⁶ *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.").

²⁷ *United States v. Ross*, 456 U.S. 798, 809 (1982) (holding that a search warrant is not required for police to search an automobile where the search is based on probable cause).

²⁸ *Payton v. New York*, 445 U.S. 573, 576 (1980).

²⁹ *Henry v. United States*, 361 U.S. 98, 102 (1959).

³⁰ *Dunaway v. New York*, 442 U.S. 200, 211 n.14, 212 (1979).

³¹ 392 U.S. 1 (1968).

³² *Id.* at 20–22.

³³ *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

³⁴ *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

³⁵ *Id.* (citations omitted).

defendant started to descend his front steps.³⁶ The police requested the defendant's assistance in entering the house and detained him while they searched it.³⁷ After the officers found narcotics in the home, they arrested the defendant, searched his person, and found an additional 8.5 grams of heroin on him.³⁸ The defendant, charged with possession of the heroin found on his person, moved to suppress the heroin as a product of an illegal search in violation of his Fourth Amendment rights.³⁹ The trial court suppressed the evidence, and both the Michigan Court of Appeals and the Michigan Supreme Court affirmed.⁴⁰ The United States Supreme Court reversed, holding that it was lawful for the police to seize the defendant and require him to re-enter his home and remain there until they gathered evidence that established probable cause.⁴¹ Accordingly, once probable cause to arrest the defendant was established, his arrest and the search that followed it were constitutionally permitted.⁴²

The *Summers* Court based its decision on the limited intrusiveness of the seizure and the important law enforcement interests at stake in such a case.⁴³ The Court first addressed the seizure's limited invasiveness, concluding that the defendant's detention was "substantially less intrusive" than an arrest.⁴⁴ The Court stressed that the police had obtained a warrant to search the defendant's house for contraband.⁴⁵ A neutral and detached magistrate determined that there was probable cause to believe that a crime was being committed in the house and authorized the police to substantially invade the privacy of the people residing there.⁴⁶ The Court remarked that "[t]he detention of one of the residents while the premises were searched, although

³⁶ *Id.* at 693.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 694.

⁴⁰ *Id.*

⁴¹ *Id.* at 705–06.

⁴² *Id.*

⁴³ *Id.* at 699 (stating that some "seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity").

⁴⁴ *Id.* at 702 (quoting *Dunaway v. New York*, 442 U.S. 200, 210 (1979)).

⁴⁵ *Id.* at 701.

⁴⁶ *Id.*

admittedly a significant restraint on his liberty, was surely less intrusive than the search itself."⁴⁷ The Court further stated that most citizens would choose to remain at their homes to observe the search of their possessions unless they wished to flee to avoid arrest.⁴⁸ Additionally, the Court noted that the type of detention involved was unlikely to be exploited or excessively prolonged by police since the information that police seek would ordinarily be obtained by the search of the premises, not the seizure of the occupant.⁴⁹ Finally, the Court stated that the detention of the occupant in his home "could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station."⁵⁰

The Court next cited four substantial law enforcement interests that justify detaining an occupant during the execution of a search warrant. The first and most obvious concern is preventing the occupant's flight if incriminating evidence is discovered.⁵¹ Keeping the occupant close by could allow for an easy arrest without the need for a chase, provided that the search establishes probable cause.⁵² The second and more important interest is in minimizing the risk of harm to the occupants and the police.⁵³ The Court noted that the facts in *Summers* revealed no particular danger to the police, but stated nonetheless that police can reduce the risk of harm to all involved by "routinely exercis[ing] unquestioned command of the situation."⁵⁴ An officer's command of the situation can diminish the threat of harm especially in the case of a search for narcotics—the type of situation that is conducive to sudden violence.⁵⁵ The third interest identified by the Court concerns an occupant's panicked efforts to hide or destroy evidence;⁵⁶ detaining the occupant during the search will prevent him from concealing or destroying

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 702.

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.* at 702–03.

⁵⁴ *Id.*

⁵⁵ *Id.* at 702.

⁵⁶ *Id.*

evidence.⁵⁷ The final police interest that justifies the seizure of an individual incident to a search of his home is the facilitation of the search.⁵⁸ The police have an interest in completing the search quickly, and the occupant has an interest in preventing the destruction of his property by opening doors and containers.⁵⁹ Given the important police interests at stake and the minimal “incremental intrusion” on the occupant’s personal liberty involved, the occupant’s connection to the home subject to a search “gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.”⁶⁰

II. THE CIRCUITS’ APPLICATIONS OF *SUMMERS* TO OFF-PREMISES DETENTIONS

This Part addresses the circuit split over extending *Michigan v. Summers* to off-premises seizures. Part II.A discusses the balancing approach taken by the Eighth and Tenth Circuits in refusing to apply *Summers* where the occupant has left the premises and the benefits and drawbacks of their approach. Part II.B analyzes the “as soon as practicable” standard used by the Second, Fifth, Sixth, and Seventh Circuits in extending *Summers* to off-premises detentions. Part II.B also discusses the arguments for and against that standard.

A. *The Eighth and Tenth Circuits’ Balancing Approach*

The Eighth and Tenth Circuits have declined to extend *Michigan v. Summers*, which held that a search warrant for premises allows the police to detain the occupants of the property during a search,⁶¹ where the occupants of the premises have left the property.⁶² Those courts held that *Summers* was inapplicable because the law enforcement interests that justified the *Summers* holding are not at stake after an occupant departs from his property.⁶³ In *United States v. Edwards*, the Tenth Circuit

⁵⁷ *See id.*

⁵⁸ *Id.* at 703.

⁵⁹ *Id.*

⁶⁰ *Id.* at 703–04.

⁶¹ *Id.* at 705.

⁶² *United States v. Edwards*, 103 F.3d 90, 94 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994) (“Thus, we decline the Government’s invitation to extend *Summers* to the circumstances of this case.”).

⁶³ *Edwards*, 103 F.3d at 93–94; *Sherrill*, 27 F.3d at 346.

opined that “the police’s legitimate law enforcement interest in preventing flight in the event that incriminating evidence was found was far more attenuated than in *Summers*,”⁶⁴ and that neither the interest in minimizing the risk of harm to officers nor that of facilitating the orderly completion of the search “were served in any way by [the defendant’s] extended detention.”⁶⁵ As such, the Tenth Circuit held that the defendant’s seizure three blocks from his home was an illegal arrest.⁶⁶

Similarly, the Eighth Circuit, in *United States v. Sherrill*, held that “when the officers stopped [the defendant], the officers had no interest in preventing flight or minimizing the search’s risk.”⁶⁷ That the defendant helped the officers conduct the search, one of the interests cited by the *Summers* Court, did not persuade the *Sherrill* court to find the detention permissible.⁶⁸

The *Sherrill* court gave an additional justification for not applying *Summers*, ruling that the intrusiveness of an officer’s detention of an occupant rises dramatically after the occupant leaves the premises.⁶⁹ In *Sherrill*, immediately before they executed the search warrant, the police saw the defendant drive away from his home.⁷⁰ They stopped him just one block away, and after the police detained him, he helped the police enter and conduct the search of his home.⁷¹ The court distinguished *Summers*, stating that although the minor intrusiveness involved in detaining an occupant in his home may be outweighed by law enforcement interests, the situation changes after the occupant leaves his property.⁷² Accordingly, the Eighth Circuit held that where the occupant has departed from his premises, the combination of the greater intrusion on his rights and the reduced importance of law enforcement interests changes a would-be reasonable seizure under *Summers* to an unreasonable one.⁷³

⁶⁴ *Edwards*, 103 F.3d at 93–94.

⁶⁵ *Id.* at 94.

⁶⁶ *Id.* at 93–94.

⁶⁷ *Sherrill*, 27 F.3d at 346.

⁶⁸ *See id.*

⁶⁹ *See id.* (“Here, because *Sherrill* had already exited the premises, the intrusiveness of the officers’ stop and detention on the street was much greater.”).

⁷⁰ *Id.* at 345.

⁷¹ *Id.* at 345–46.

⁷² *See id.* at 346.

⁷³ *See id.*

The Eighth and Tenth Circuits used a balancing test in determining that the off-premises seizure of an occupant was unreasonable. The courts weighed the police interests outlined by the *Summers* Court—preventing flight, minimizing the risk of harm to officers and occupants, avoiding the concealment or destruction of evidence, and facilitating the orderly completion of the search⁷⁴—and determined that absent the occupants’ knowledge that their premises were going to be searched, the officers’ seizures of the occupants were unreasonable.⁷⁵ The courts reasoned that an occupant learns of the search and becomes a risk when police execute a warrant in the occupant’s presence, but if he is off the property, he will not know of the search and thus the situation will not implicate any law enforcement concerns.⁷⁶ The “intrusiveness of detaining a resident in his home” cannot be “outweighed by . . . law enforcement interests” if there are no law enforcement interests to balance against intrusiveness.⁷⁷ Accordingly, the balance can only be shifted where the occupant knows beforehand that his property is subject to a search warrant.⁷⁸ Because this situation is unlikely to arise,⁷⁹ the Eighth and Tenth Circuits’ approach to *Summers* detentions will effectively render *Summers* inapplicable where the occupant is detained off premises.

The balancing approach of the Eighth and Tenth Circuits carries a number of benefits. First, it gives broader Fourth Amendment protection.⁸⁰ Since the Fourth Amendment guarantees the “right of the people to be secure in their persons,

⁷⁴ *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981).

⁷⁵ *United States v. Edwards*, 103 F.3d 90, 94 (10th Cir. 1996) (“Unlike the defendant in *Summers*, who was present where the search warrant was executed, Edwards did not know—prior to being stopped—that any warrant *was* being executed. He thus had no reason to flee.”); *Sherrill*, 27 F.3d at 346 (holding that the law enforcement interests at stake in *Summers* were irrelevant in the present case “because Sherrill had left the area of the search and was unaware of the warrant”).

⁷⁶ *See Edwards*, 103 F.3d at 94; *Sherrill*, 27 F.3d at 346.

⁷⁷ *See Sherrill*, 27 F.3d at 346.

⁷⁸ *See Edwards*, 103 F.3d at 93–94; *Sherrill*, 27 F.3d at 346.

⁷⁹ *See, e.g.,* WIS. STAT. ANN. § 968.21 (West 2013) (“A search warrant shall be issued with all practicable secrecy, and the complaint, affidavit or testimony upon which it is based shall not be filed with the clerk or made public in any way until the search warrant is executed.”); *In re United States*, 10 F.3d 931, 941 (2d Cir. 1993) (noting that “those subject to an arrest or search warrant have notice at the time the intrusion occurs,” not before).

⁸⁰ *See supra* notes 75–78 and accompanying text.

houses, papers, and effects,”⁸¹ broad rights under the Amendment protect a citizen’s own interests. Second, it gives police a bright-line rule to follow. Officers would know “that the authority to detain under *Summers* always dissipates once the occupant of the residence [leaves].”⁸² Third, the balancing approach appears to comport with the reasoning of the *Summers* Court by refusing to extend *Summers* where its justifications do not seem to apply.⁸³

The Eighth and Tenth Circuits’ balancing approach has many disadvantages, however. First, if the occupant of the premises knows of the impending search, the police are unlikely to be aware of his knowledge. Where an occupant in fact knows of the warrant and is a flight risk, or will hide, destroy, or sell the evidence of his crime, police will lose the evidence if the occupant leaves the premises with it. Even where the occupant does not know of the search warrant, but he leaves his property to sell it, police would be kept from detaining the occupant and preventing the loss of the evidence.⁸⁴ Second, because the balancing test turns on whether the occupant is aware of the warrant, police might be encouraged to investigate to find whether the occupant knows of the warrant. This investigation could lead to the kind of dangers that *Summers* tried to combat, like a sudden outburst of violence by an occupant who becomes aware that he is being followed by police.⁸⁵ Third, drawing a bright line at the premises’ curb would put officers in a difficult position: When police witness an occupant “leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was

⁸¹ U.S. CONST. amend. IV.

⁸² *United States v. Bailey*, 468 F. Supp. 2d 373, 379 (E.D.N.Y. 2006), *aff’d*, 652 F.3d 197 (2d Cir. 2011), *rev’d*, 133 S. Ct. 1031 (2013).

⁸³ *Edwards*, 103 F.3d at 94; *Sherrill*, 27 F.3d at 346; see James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 444 (1993) (suggesting that the dangers warned of in *Summers* may be “hypothetical and unrealistic” in some cases); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 271 (1984).

⁸⁴ See, e.g., *Sherrill*, 27 F.3d at 345–46 (“When the police conducted a search of Sherrill at the station, they discovered 92.71 grams of crack in his underwear and \$740 on his person.”).

⁸⁵ *Michigan v. Summers*, 452 U.S. 692, 702 (1981).

discovered).”⁸⁶ Fourth, requiring police to rush to detain the occupant on the premises, even where police have reason to believe that other occupants within the premises pose a risk of destroying the evidence, would place any evidence that is still on the property at risk.⁸⁷ Finally, the *Summers* Court itself held that although not all four of the law enforcement interests that it cited were present in *Summers*, the importance of those interests, even if they did not arise in the facts of a particular case, justified the Court’s holding.⁸⁸ According to the Court’s decision, it should not matter whether the occupants are actually aware of the search warrant.⁸⁹

B. The Second, Fifth, Sixth, and Seventh Circuits’ “As Soon As Practicable” Standard

The Second, Fifth, Sixth, and Seventh Circuits use an “as soon as practicable” standard in extending *Summers* to off-premises detentions.⁹⁰ The standard, as stated by the Second Circuit, is that “*Summers* imposes upon police a duty based on both geographic and temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search.”⁹¹ There is no balancing of the *Summers* interests under

⁸⁶ *United States v. Bailey*, 652 F.3d 197, 205 (2d Cir. 2011).

⁸⁷ *See United States v. Gori*, 230 F.3d 44, 55 (2d Cir. 2000) (“The police could assume that once alerted, the occupants might have disposed of the contraband by the window or the toilet . . .”).

⁸⁸ *See Summers*, 452 U.S. at 702 (“Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence.”); *Adams*, *supra* note 83.

⁸⁹ *See Summers*, 452 U.S. at 702 (noting the interests of preventing flight and “minimizing the risk of harm to the officers”).

⁹⁰ *See Bailey*, 652 F.3d at 206 (applying *Summers* where police detained the defendant “as soon as practicable”); *United States v. Bullock*, 632 F.3d 1004, 1011 (7th Cir. 2011) (holding that police “had the authority to detain Bullock during execution of the search warrant; he was the subject of the officers’ investigation, had just left the premises, [and] was pulled over as soon as reasonably practicable”); *United States v. Cavazos*, 288 F.3d 706, 712 (5th Cir. 2002) (applying *Summers* to an off-premises seizure and holding that “[t]he proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, but it is by no means controlling”); *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991) (ruling that the focus under *Summers* “is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence”).

⁹¹ *Bailey*, 652 F.3d at 206.

this test because the courts assume that those interests are what permit the seizure of the occupant.⁹² Instead, if police see the occupant leaving his premises, they may detain him so long as they do so as early as practicable.⁹³

In each case within this group, the courts held that the off-premises seizure of an occupant was reasonable where the police had a search warrant for the occupant's premises and the police witnessed the occupant leave the premises.⁹⁴ The officers stopped each occupant as early as practicable.⁹⁵ In *United States v. Bailey*, for example, police were outside the defendant's home, preparing to execute a search warrant that they had obtained just over an hour earlier.⁹⁶ The police watched the defendant get into a car, but decided not to confront the defendant "within view or earshot of the apartment."⁹⁷ Instead, the officers followed the defendant's car and pulled him over approximately one mile away from his home.⁹⁸ The officers explained that they did not seize the defendant immediately because of "safety concerns, particularly the desire to avoid alerting other individuals who may have been in the apartment to the presence of law enforcement."⁹⁹ Additionally, the officers stated that they waited until the defendant drove about a mile before stopping him to prevent other occupants or neighbors from seeing the stop and to conduct the stop past an intersection and off of a crowded street.¹⁰⁰ The court held that the defendant's seizure one mile from his home was constitutional under *Summers*.¹⁰¹

Similarly, in *United States v. Cochran*, the Sixth Circuit held that the police's seizure of the defendant after the defendant had driven a short distance away from his house was reasonable.¹⁰²

⁹² See, e.g., *id.* at 205.

⁹³ See, e.g., *id.* at 206.

⁹⁴ See *id.* at 205; *Bullock*, 632 F.3d at 1007–08; *Cavazos*, 288 F.3d at 711; *Cochran*, 939 F.2d at 339.

⁹⁵ *Bailey*, 652 F.3d at 207; *Bullock*, 632 F.3d at 1011; *Cavazos*, 288 F.3d at 711; *Cochran*, 939 F.2d at 339.

⁹⁶ *Bailey*, 652 F.3d at 200. The police obtained a search warrant at 8:45 PM on July 28, 2005, went to the premises, watched the defendant leave the property at about 9:56 that same evening, and stopped him approximately five minutes later. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 200 n.3.

⁹⁹ *Id.* at 200 n.2.

¹⁰⁰ *Id.* at 200 n.3.

¹⁰¹ *Id.* at 199.

¹⁰² *United States v. Cochran*, 939 F.2d 337, 338 (6th Cir. 1991).

The court held that “police performance” was the relevant inquiry, not whether the defendant was on or off his premises at the time the police detained him.¹⁰³ However, the court stated that “this performance-based duty will normally, but not necessarily, result in detention of an individual in close proximity to his residence.”¹⁰⁴

In *United States v. Bullock*, the Seventh Circuit stressed the policies behind the *Summers* decision in ruling that the police’s stop of the defendant, an occupant of the house to be searched along with the defendant’s children ten to fifteen blocks from the residence, was reasonable since the car was “pulled over as soon as reasonably practicable.”¹⁰⁵ The court ruled that when the officers informed the defendant of the warrant, he became a flight risk and a threat to the police’s safety in executing the warrant.¹⁰⁶ “The detention of [the] occupant [was] warranted ‘because the character of the additional intrusion caused by detention [was] slight and because the justifications for detention [were] substantial.’”¹⁰⁷

Finally, the Fifth Circuit, in *United States v. Cavazos*, stated that the defendant’s seizure two blocks away from his residence was permissible because his “behavior immediately before the detention and his connection to the house—as either occupant or resident—provided the agents with ample justification to detain him during the search.”¹⁰⁸ Prior to the police executing the search warrant, the defendant left the house in a truck, drove toward the officers watching the residence, and peered inside the officers’ vehicle.¹⁰⁹ The police attempted to follow the defendant, but the defendant turned his truck around so that “the two vehicles were approaching” one another.¹¹⁰ Then, the truck “crossed over into the officers’ lane, creating a sort of stand off,” and the officers exited with guns drawn and detained the

¹⁰³ *Id.* at 339 (holding that defendant’s attempt to distinguish *Summers* because police stopped the *Summers* defendant while he was coming down his front steps, while officers detained Cochran after he had left his property, was without merit).

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. Bullock*, 632 F.3d 1004, 1009, 1011 (7th Cir. 2011).

¹⁰⁶ *Id.* at 1020.

¹⁰⁷ *Id.* at 1018 (quoting *Muehler v. Mena*, 544 U.S. 93, 98 (2005)).

¹⁰⁸ *United States v. Cavazos*, 288 F.3d 706, 711 (5th Cir. 2002).

¹⁰⁹ *Id.* at 708.

¹¹⁰ *Id.*

defendant.¹¹¹ The court noted that the proximity of the occupant to his residence may be relevant, but it is not controlling.¹¹² Seizing the occupant of the premises to be searched as early as practicable and bringing him back to the residence does not violate the occupant's Fourth Amendment rights.¹¹³

The "as soon as practicable" standard of the Second, Fifth, Sixth, and Seventh Circuits has numerous advantages in protecting the interests, outlined in *Summers*, of preventing the occupant's flight, minimizing the risk of harm to officers and occupants, avoiding the destruction of evidence, and facilitating an orderly search.¹¹⁴ First, this approach prevents the loss of evidence by allowing the police to detain occupants who do or do not exhibit any knowledge of a warrant, but nonetheless have evidence on them that may be sold or discarded absent police detaining the occupant.¹¹⁵ Second, because officers may detain the occupant even though the occupant is initially unaware of the warrant, officers will not feel inclined to investigate the occupant before detaining him and thereby risk arousing suspicion.¹¹⁶ Avoiding alerting the occupant to the search or surveillance can allow the police to keep the situation from turning violent,¹¹⁷ reduce the chance of the occupant fleeing,¹¹⁸ and prevent the destruction of evidence. Third, allowing the police to detain the occupant off premises prevents other occupants from seeing the police.¹¹⁹ Alerting other occupants to law enforcement presence again raises the risks of police safety, flight, and destruction or

¹¹¹ *Id.*

¹¹² *Id.* at 712.

¹¹³ *See id.* at 711.

¹¹⁴ *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981).

¹¹⁵ *See, e.g., United States v. Bullock*, 632 F.3d 1004, 1007 (7th Cir. 2011). After police arrested the defendant based on probable cause established during the search of his premises, they searched the defendant's person and found an additional "sixteen individually wrapped baggies of crack cocaine." *Id.* at 1010. Had police not detained the defendant off-premises pursuant to the search, the defendant may have sold the drugs. *See id.*

¹¹⁶ *See, e.g., Cavazos*, 288 F.3d at 708. The defendant appeared to be aware that police were conducting surveillance on him or his home, which led to a tense situation where the officers and the defendant had a "stand off" and the officers drew their weapons. *Id.*

¹¹⁷ *See, e.g., id.*

¹¹⁸ *See Alschuler, supra* note 83, at 270.

¹¹⁹ *See, e.g., United States v. Bailey*, 652 F.3d 197, 200 n.2 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

concealment of evidence.¹²⁰ Fourth, the “as soon as practicable” standard provides police an opportunity to wait until they can carry out the seizure of an occupant with minimal safety risks.¹²¹ Fifth, allowing the police to detain the occupant even after he leaves the premises will facilitate the orderly completion of the search and prevent unnecessary property damage.¹²² Sixth, the occupant’s presence during the search, whether he was initially seized on or off the premises, can protect the police from unknown dangers like guard dogs that police would encounter while conducting their search.¹²³ Finally, given the *Summers* Court’s holding that the facts in each case do not have to implicate every law enforcement interest for the detainment of an occupant of premises to be reasonable,¹²⁴ these courts’ approach of not investigating whether every interest was in fact at stake is consistent with *Summers*.¹²⁵

There are, however, disadvantages to the “as soon as practicable” standard. For one, allowing police to detain the occupant of premises subject to a search warrant after the occupant leaves the premises seems to be more intrusive on Fourth Amendment rights than an on-premises detainment.¹²⁶ Second, there is the possibility that police will “manipulate[] the circumstances surrounding the execution of the search warrant for defendant’s residence in order to create an opportunity to search” the defendant or his vehicle.¹²⁷ Finally, if the interests

¹²⁰ See *United States v. Gori*, 230 F.3d 44, 55 (2d Cir. 2000) (“The police could assume that once alerted, the occupants might have disposed of the contraband by the window or the toilet, or might have precipitated violence.”).

¹²¹ See *Bailey*, 652 F.3d at 200 nn.2–3. The court found that “[t]he officers’ decision to wait until Bailey had driven out of view of the house to detain him out of concern for their own safety . . . was, in the circumstances presented, reasonable and prudent.” *Id.* at 206.

¹²² See *Michigan v. Summers*, 452 U.S. 692, 703 (1981). Even the Eighth Circuit, which declined to extend *Summers* to off-premises detentions, acknowledged that such seizures can help officers conduct a search. See, e.g., *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994).

¹²³ See *United States v. Cochran*, 939 F.2d 337, 338 (6th Cir. 1991).

¹²⁴ See *Summers*, 452 U.S. at 702 (finding the detention of the occupant reasonable “[a]lthough no special danger to the police [was] suggested by the evidence in [the] record”).

¹²⁵ See *Bailey*, 652 F.3d at 205.

¹²⁶ *Sherrill*, 27 F.3d at 346.

¹²⁷ See *Cochran*, 939 F.2d at 338. The Cochran court, however, found that the police did not manipulate the search warrant for the defendant’s home to create an opportunity to search the defendant’s car. *Id.* at 339.

justifying the *Summers* decision are truly irrelevant in a particular case, any detention under *Summers* would be unjust.¹²⁸

III. EXTENDING *SUMMERS* TO OFF-PREMISES DETENTIONS

This Part asserts that the Second, Fifth, Sixth, and Seventh Circuits' "as soon as practicable" standard, which extends *Summers* where police detain an occupant as soon as practicable after his departure from the premises, is the proper test, but proposes more explicit guidance in applying it. Part III.A suggests three factors that courts should look to in determining whether police seized the occupant as early as practicable. Part III.B contends that the policies underlying the Fourth Amendment support extending *Summers* to off-premises seizures. Part III.C asserts that the *Summers* holding and rationale justify the "as soon as practicable" standard. Part III.C.1 argues that an off-premises seizure, like the on-premises seizure in *Summers*, is limited in its intrusiveness, and Part III.C.2 maintains that the police interests cited by the *Summers* Court are equally applicable to off-premises detentions.

A. *Factors in the "As Soon As Practicable" Evaluation*

The circuit courts that applied the "as soon as practicable" standard used the correct test for determining whether an off-premises *Summers* detention is constitutionally permissible, but failed to adequately advise police and trial courts of what to look for in evaluating the propriety of such a seizure. The courts could have better ensured that off-premises detentions would be minimally intrusive by explicitly declaring factors that would weigh for or against a finding that police detained an occupant as soon as practicable. These factors, implicit in the courts' opinions, include the distance the occupant traveled before police seized him, the time that elapsed before officers detained him, and evidence that police manipulated the circumstances to exploit the seizure.

¹²⁸ See, e.g., *United States v. Edwards*, 103 F.3d 90, 93-94 (10th Cir. 1996); *Adams*, *supra* note 83; *Alschuler*, *supra* note 83.

Courts should look to the distance the occupant traveled prior to her detention.¹²⁹ The nearer an occupant is to his home when police detain him, the more likely a court will find that police detained him as soon as practicable.¹³⁰ While a few blocks is acceptable,¹³¹ and a mile is permissible when police are concerned about public safety,¹³² it is unlikely that a court would find police detaining an occupant twenty miles from her home constitutionally tolerable.¹³³

Courts should also consider the time that passed between the occupant leaving his premises and the police seizing him.¹³⁴ A court will be more willing to hold that officers seized the occupant as soon as practicable when they do not excessively delay his detention.¹³⁵ Police waiting five minutes before pulling over the occupant is reasonable,¹³⁶ but delaying an hour will almost certainly be impermissible.¹³⁷

Finally, courts should determine whether officers manipulated the circumstances surrounding the seizure to exploit it for illegitimate purposes.¹³⁸ A court will more likely find that police detained an occupant as soon as practicable if there is no evidence that the officers exploited the detention.¹³⁹ For instance, a detention will probably violate the Fourth Amendment if police delay detaining the occupant only so they can use the seizure as a springboard to search the defendant and

¹²⁹ See *Bailey*, 652 F.3d at 206; *Cochran*, 939 F.2d at 339; 1 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 3:8 (3d ed. 2011).

¹³⁰ See *Cochran*, 939 F.2d at 339 (noting that detaining an occupant as soon as practicable “will normally, but not necessarily, result in detention of an individual in close proximity to his residence”); JOHN M. BURKOFF, SEARCH WARRANT LAW DESKBOOK § 13:2 (2012).

¹³¹ See, e.g., *United States v. Cavazos*, 288 F.3d 706, 711 (5th Cir. 2002).

¹³² See *Bailey*, 652 F.3d at 200 n.3.

¹³³ See *Cochran*, 939 F.2d at 339.

¹³⁴ See *Bailey*, 652 F.3d at 206.

¹³⁵ See *id.* (stating that “*Summers* imposes upon police a duty based on . . . temporal proximity”).

¹³⁶ See *id.* at 200.

¹³⁷ See *id.* at 206 (noting that police have a “duty based on . . . temporal proximity” and must detain occupants “as soon as practicable”).

¹³⁸ See *Cochran*, 939 F.2d at 338–40 (analyzing whether it was the defendant’s actions or the police’s actions that led to defendant’s detention).

¹³⁹ See *id.* at 339.

his car.¹⁴⁰ Additionally, a seizure will likely be unreasonable when officers attempt to embarrass the occupant by detaining him only after he comes into wide public view.¹⁴¹

B. *Fourth Amendment Policies*

The extension of *Summers* to allow an off-premises seizure of an occupant whose premises are subject to search does not raise the concern of the Fourth Amendment's ban on "general warrants." A "general warrant, in which the name of the person to be arrested was left blank . . . perpetuated the oppressive practice of allowing the police to arrest . . . on suspicion."¹⁴² In *Summers*, the Supreme Court held that the detainment of an occupant of premises that are being searched is constitutional in part because of the existence of a search warrant, founded on probable cause, for the premises.¹⁴³ The Court found that because the determination of probable cause to search is made by a neutral and detached magistrate, "[t]he connection of an occupant to [the home to be searched] gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant."¹⁴⁴ Therefore, a proper *Summers* detainment, in which the police detain the occupant of premises subject to a valid search warrant, does not raise the dangers of "general warrants." Officers are not given unlimited discretion to arrest who they please, based on mere suspicion, but are given the "limited authority" to detain the occupant of the premises while they conduct a search.¹⁴⁵ Whether the occupant of the premises is detained on or off the premises while the search is conducted is irrelevant, because it is his "connection" to the premises for which there is probable cause to search that allows the police to detain him.¹⁴⁶ Accordingly, the police detaining an occupant as soon as practicable after they witness him leaving his property does not implicate the issue of the Fourth Amendment's

¹⁴⁰ *See id.*

¹⁴¹ *See Michigan v. Summers*, 452 U.S. 692, 702 (1981) (citing the seizure's minimal "public stigma" as support that its intrusiveness is limited).

¹⁴² *Henry v. United States*, 361 U.S. 98, 100 (1959).

¹⁴³ *Summers*, 452 U.S. at 703.

¹⁴⁴ *Id.* at 703-04.

¹⁴⁵ *Id.* at 705.

¹⁴⁶ *See id.* at 703-04; COOK, *supra* note 129.

protection against “general warrants” since the police are still basing their seizure of the occupant on his connection to his premises.¹⁴⁷

C. Summers’ Policies

1. The Seizure’s Limited Intrusiveness

Of key importance to the *Summers* Court was the limited intrusiveness of the seizure involved in detaining an occupant of premises that are being searched.¹⁴⁸ The Court stated that the seizure was “surely less intrusive than the search itself.”¹⁴⁹ This reasoning applies equally when the defendant has already departed the premises.¹⁵⁰ The *Summers* Court ruled that the fact that the defendant was leaving his premises when he was detained was not of constitutional significance.¹⁵¹ “The seizure of respondent on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside.”¹⁵² The Court found that the location of the occupant at the time of seizure does not matter since the invasiveness of the search will still outweigh that of the seizure.¹⁵³ Therefore, the intrusion on an occupant’s liberty when he is detained off premises is still less than the invasion involved in the search itself.¹⁵⁴

Additionally, the *Summers* Court stated that, in contrast to a custodial interrogation and arrest, the seizure of an occupant of premises during a police search is “‘substantially less intrusive.’”¹⁵⁵ Such a seizure, whether on the premises or off, is the same—police detain the occupant on his premises while they

¹⁴⁷ See *United States v. Bullock*, 632 F.3d 1004, 1019 (7th Cir. 2011); BURKOFF, *supra* note 130.

¹⁴⁸ See *Summers*, 452 U.S. at 701–02.

¹⁴⁹ *Id.* at 701.

¹⁵⁰ *United States v. Bailey*, 652 F.3d 197, 205 (2d Cir. 2011), *rev’d*, 133 S. Ct. 1031 (2013) (“The guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence.”).

¹⁵¹ *Summers*, 452 U.S. at 702 n.16.

¹⁵² *Id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ *Id.* at 702 (citing *Dunaway v. New York*, 442 U.S. 200, 210 (1979)).

conduct their search.¹⁵⁶ Accordingly, the same reasoning applies to on-premises and off-premises seizures. Like the on-premises seizure in *Summers*, an off-premises seizure is not likely to be exploited or prolonged since the information that police seek will probably be obtained through the search of the premises and not the seizure of the occupant.¹⁵⁷ Police are still forbidden from searching the occupant until independent probable cause is established.¹⁵⁸ Further, no matter where the initial seizure takes place, because the detention is in the occupant's own home, "it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station."¹⁵⁹ Additionally, evidence that police exploited the off-premises detention would weigh against a court finding that police detained the occupant as early as practicable, and the seizure would likely be invalid for failing the "as soon as practicable" standard.¹⁶⁰ The intrusiveness of a valid off-premises *Summers* detention is still far less than that of an arrest and custodial interrogation.

2. The Law Enforcement Interests' Continuing Relevance

The four substantial law enforcement interests that justified the *Summers* Court's holding—preventing flight in the event that police find incriminating evidence, minimizing the risk of harm to police and occupants, averting the hiding or destruction of evidence, and enabling the efficient completion of the search¹⁶¹—remain important regardless of where the occupant is first seized.¹⁶² "While the Eighth and Tenth circuits apparently concluded that once an occupant leaves a premises subject to search without knowledge of the warrant, *Summers* is

¹⁵⁶ See, e.g., *id.* at 701; *United States v. Bullock*, 632 F.3d 1004, 1019 (7th Cir. 2011) (holding that because the defendant "was detained for thirty or forty minutes at a residence he had just left and had visited on multiple occasions," the police's "interests in detaining him during the search were not outweighed by [the] rather limited intrusion on his freedom").

¹⁵⁷ See *Summers*, 452 U.S. at 701; COOK, *supra* note 129 (stating that courts have disapproved of interrogations conducted during *Summers* detentions).

¹⁵⁸ See *Summers*, 452 U.S. at 705.

¹⁵⁹ *Id.* at 702.

¹⁶⁰ See *supra* notes 139–41 and accompanying text.

¹⁶¹ *Summers*, 452 U.S. at 702–03.

¹⁶² See, e.g., *United States v. Bailey*, 652 F.3d 197, 205 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

inapplicable because” the law enforcement interests no longer apply; “it is the very interests at stake in *Summers* that permit detention of an occupant nearby, but outside, of the premises.”¹⁶³ The Eighth and Tenth Circuits’ balancing approach to off-premises detentions would force police into a Hobson’s choice of electing to either rush in to detain the occupant before he leaves the premises, endangering the officers’ safety and risking the destruction of the evidence, or allow the occupant to leave the scene, forfeiting the ability to detain the occupant if incriminating evidence is found.¹⁶⁴ Allowing officers to detain the occupant “as soon as practicable” provides them with the ability to “exercise unquestioned command of the situation” at the moment when the *Summers* Court recognizes that “they most need it.”¹⁶⁵

The “as soon as practicable” approach furthers the first law enforcement interest stated by the *Summers* Court: preventing flight in the event that incriminating evidence is found.¹⁶⁶ The “as soon as practicable” standard, unlike the Eighth and Tenth Circuits’ balancing approach, does not require that the occupant have knowledge of the warrant before police may constitutionally seize him.¹⁶⁷ Therefore, courts applying the “as soon as practicable” standard avoid the risk of alerting the occupant that he is being followed or investigated because police may detain the occupant without having to discover whether he knows of the warrant.¹⁶⁸ Police are permitted to detain the occupant before they arouse his suspicions, preventing him from becoming a flight risk.¹⁶⁹

The “as soon as practicable” standard protects the *Summers* Court’s second policy interest underlying its holding: minimizing the risk of harm to officers and occupants.¹⁷⁰ First, because police do not have to explore whether the occupant has knowledge of the warrant and do not risk alerting the occupant of their

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 205–06.

¹⁶⁵ *See id.* (quoting *Summers*, 452 U.S. at 703); BURKOFF, *supra* note 130.

¹⁶⁶ *Summers*, 452 U.S. at 702.

¹⁶⁷ *See Bailey*, 652 F.3d at 205.

¹⁶⁸ *See id.*

¹⁶⁹ *See United States v. Bullock*, 632 F.3d 1004, 1014 (7th Cir. 2011) (stating that the government has a “strong interest in detaining Bullock to prevent flight while they conducted their search”); ALSCHULER, *supra* note 83, at 270.

¹⁷⁰ *Summers*, 452 U.S. at 702–03.

presence,¹⁷¹ officers are less likely to cause the occupant to erupt violently.¹⁷² Second, officers can avoid alerting other occupants of their presence by detaining the occupant away from the premises.¹⁷³ It is reasonable to assume that seizing an occupant outside of his home might risk the officers' safety.¹⁷⁴ Similarly, the police's ability to wait until it is practicable before detaining the occupant allows them to better protect the public from harm by stopping and seizing the occupant in a low-traffic area.¹⁷⁵ Finally, police detaining and bringing back the occupant before conducting the search shields the police from unknown dangers, such as guard dogs.¹⁷⁶

The "as soon as practicable" standard aids police in preventing the concealment, loss, or destruction of evidence, the third interest cited by the *Summers* Court.¹⁷⁷ Unlike under the balancing approach, police may prevent the loss of evidence by detaining occupants who do or do not demonstrate awareness of a warrant, but who are carrying evidence that they can sell or discard.¹⁷⁸ The police are better able to prevent the loss of evidence by detaining the occupant before he is able to dispose of it in some way.¹⁷⁹ Similarly, since police may detain the occupant after he leaves the premises, they can avoid alerting other occupants of the residence that police have an interest in the premises.¹⁸⁰ This protects law enforcement interests by preventing the other occupants' destruction or concealment of the evidence.¹⁸¹

The "as early as practicable" approach advances the final law enforcement interest identified by the *Summers* Court: facilitating the orderly completion of the search of the

¹⁷¹ See *Bailey*, 652 F.3d at 205.

¹⁷² See *Summers*, 452 U.S. at 702 (stating that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence").

¹⁷³ *Bailey*, 652 F.3d at 200 n.2.

¹⁷⁴ *Id.* at 206; see *United States v. Gori*, 230 F.3d 44, 55 (2d Cir. 2000).

¹⁷⁵ See *Bailey*, 652 F.3d at 200 n.3.

¹⁷⁶ See *United States v. Cochran*, 939 F.2d 337, 338 (6th Cir. 1991).

¹⁷⁷ *Summers*, 452 U.S. at 702.

¹⁷⁸ See, e.g., *United States v. Bullock*, 632 F.3d 1004, 1007–08, 1011 (7th Cir. 2011).

¹⁷⁹ See *Summers*, 452 U.S. at 702; BURKOFF, *supra* note 130.

¹⁸⁰ *Bailey*, 652 F.3d at 200 n.2.

¹⁸¹ See *id.* at 206; *United States v. Gori*, 230 F.3d 44, 55 (2d Cir. 2000).

premises.¹⁸² Officers detaining the occupant and returning him to his home will help police complete the search smoothly and efficiently, minimizing the unnecessary destruction of property.¹⁸³ The occupant has a self-interest in opening locked doors and containers.¹⁸⁴ This holds true regardless of where the occupant is first seized.¹⁸⁵

VI. THE SUPREME COURT'S INADEQUATE SOLUTION IN *BAILEY V. UNITED STATES*

This Part addresses the Supreme Court's recent decision in *Bailey v. United States*.¹⁸⁶ Part IV.A discusses the Court's rejection of the "as soon as practicable" standard in favor of a rule grounded in the "immediate vicinity" of the premises being searched. Part IV.B asserts that the Supreme Court's new standard is flawed and proposes that the issue be revisited.

A. *The Bailey v. United States Holding*

In early 2013, the Supreme Court, in a six to three decision, rejected the Second Circuit's application of the "as soon as practicable" standard.¹⁸⁷ The Court instead adopted a test that permits *Summers* detentions only when they occur within the "immediate vicinity" of the property being searched.¹⁸⁸ The Court discussed several factors to decide whether police detained an occupant within the "immediate vicinity" of his home, "including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."¹⁸⁹

The Supreme Court declined to extend *Summers* to off-premises seizures because it found that such seizures do not implicate the law enforcement interests underlying the *Summers*

¹⁸² *Summers*, 452 U.S. at 702–03.

¹⁸³ *Id.* at 703; see COOK, *supra* note 129.

¹⁸⁴ *Summers*, 452 U.S. at 703.

¹⁸⁵ See, e.g., *United States v. Bullock*, 632 F.3d 1004, 1009 (7th Cir. 2011); *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994).

¹⁸⁶ 133 S. Ct. 1031 (2013).

¹⁸⁷ *Id.* at 1042.

¹⁸⁸ *Id.* at 1041 ("The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched.").

¹⁸⁹ *Id.* at 1042.

decision.¹⁹⁰ First, the Court stated that the concern of minimizing the risk of harm to the officers conducting the search is not triggered because the occupant ceases to pose a risk when he leaves the property.¹⁹¹ Second, the Court dismissed the interest in the suspect facilitating the search since, under the facts of the case, the suspect was unwilling to cooperate and the search had been completed by the time he was brought back to his apartment.¹⁹² Third, the Court stated that the law enforcement interest in preventing flight when police find incriminating evidence is not raised by off-premises suspects because these suspects do not jeopardize the “integrity of the search.”¹⁹³ In sum, the Court refused to apply *Summers* because it found the justifications underpinning the rule lacking in off-premises detentions.¹⁹⁴

B. *Bailey v. United States Should Be Revisited*

The “immediate vicinity” rule that the Supreme Court articulated in *Bailey* invites uncertainty into *Summers* detention cases. Additionally, the Court’s rationale fails to account for serious law enforcement concerns. Accordingly, the Court should revisit its *Bailey* holding.

In *Bailey*, the Court attempted to establish a simple rule that defines when *Summers* detentions are permissible: Seizures are tolerable if they occur within the “immediate vicinity” of the property to be searched.¹⁹⁵ However, the factors delineated by the Court—“the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, [and] the ease of reentry from the occupant’s location”¹⁹⁶—will not consistently provide a logical answer to whether a seizure was permissible. For instance, if a suspect whose home is about to be searched steps off of his property and reaches the street before being seized, will the detention be valid? The answer would seem

¹⁹⁰ *Id.* at 1041 (“In sum, of the three law enforcement interests identified to justify the detention in *Summers*, none applies with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched.”).

¹⁹¹ *Id.* at 1038–39.

¹⁹² *Id.* at 1040.

¹⁹³ *Id.* at 1040–41.

¹⁹⁴ *Id.* at 1041.

¹⁹⁵ *See id.* at 1042.

¹⁹⁶ *Id.*

to be yes, even though the occupant left his property, because he likely still has a line of sight to the property and could easily reenter it. On the other hand, what about a suspect who lives in an apartment building and enters the stairwell next to his room before police seize him? Even though he would probably be closer to the premises than the other suspect and would therefore pose a greater danger to police, his seizure would likely be found impermissible; he was off of his property and did not have a line of sight to it.

The three-prong “as soon as practicable” standard that this Note proposes¹⁹⁷ would not carry the same shortfall of illogical application. Under this Note’s test, both of the seizures described above would be permissible, provided that police witnessed the suspect leaving the premises. Both detentions would satisfy the prongs of the “as soon as practicable” standard: The occupants were seized (1) near their property, (2) shortly after their detention, and (3) the circumstances surrounding the seizures were not manipulated by the police.¹⁹⁸ Rather than treating similar circumstances differently, as the Court’s new *Bailey* analysis would, this Note’s approach would yield consistent results across parallel circumstances.

In addition to the “immediate vicinity” rule’s problems, the *Bailey* Court unduly downplayed the significance of the *Summers* interests for off-premises seizures.¹⁹⁹ First, the interest in minimizing the risk of harm to police does not disappear when the occupant leaves the premises. For example, “the police do not know whether an emerging individual has seen an officer. If he has, . . . those inside may learn of imminent police entry and fire the gun.”²⁰⁰ Second, the concern of facilitating the orderly completion of the search is the same regardless of where police detain the occupant.²⁰¹ Third, the interest in preventing flight “will be present in all *Summers* detentions” since “any occupant departing a residence containing contraband will have incentive to flee once he encounters police.”²⁰² It is naïve to contend that

¹⁹⁷ See *supra* Part III.A.

¹⁹⁸ See *supra* Part III.A.

¹⁹⁹ *Bailey*, 133 S. Ct. at 1046–47 (Breyer, J., dissenting); see *supra* Part III.C.2.

²⁰⁰ *Bailey*, 133 S. Ct. at 1048; see *supra* Part III.C.2.

²⁰¹ *Bailey*, 133 S. Ct. at 1047; see *supra* Part III.C.2.

²⁰² *Bailey*, 133 S. Ct. at 1046–47; see *supra* Part III.C.2.

the law enforcement interests supporting the *Summers* doctrine dissipate when the suspect leaves the immediate vicinity of his home. As Justice Breyer forcefully reasoned:

Consider *why* the officers here waited until the occupants had left the block to stop them: They did so because the occupants might have been armed.

Indeed, even if those emerging occupants were not armed (and even if the police knew it), those emerging occupants might have seen the officers outside the house. And they might have alerted others inside the house where, as we now know (and the officers had probable cause to believe), there was a gun lying on the floor in plain view. Suppose those inside the house, once alerted, had tried to flee with the evidence. Suppose they had destroyed the evidence. Suppose that one of them had picked up the gun and fired when the officers entered. Suppose that an individual inside the house (perhaps under the influence of drugs) had grabbed the gun and begun to fire through the window, endangering police, neighbors, or families passing by.²⁰³

Because of the dangers to the community that the Court's test invites, *Bailey* will likely not be the end of this story.

CONCLUSION

Rather than using a balancing approach in determining whether the seizure of the occupant of premises subject to a search warrant is reasonable after the occupant leaves the premises, the *Michigan v. Summers* holding should be extended so long as police detained the occupant "as early as practicable" after seeing the occupant leave the premises. Factors courts should look to in applying the "as early as practicable" standard are the proximity between the occupant's home and his place of seizure, the amount of time that elapsed between the occupant's departure and his detention, and whether police exploited the seizure. Off-premises, compared to on-premises, detentions of occupants pose no substantial additional intrusion on their Fourth Amendment rights. Additionally, the law enforcement interests underlying the *Summers* holding of preventing flight, protecting police safety, avoiding the concealment or destruction of evidence, and facilitating the search justify the application of *Summers* where an occupant has left the premises and the police

²⁰³ *Bailey*, 133 S. Ct. at 1047–48 (citations omitted).

detained him as early as practicable. Police detention of an occupant during the execution of a search warrant is surely justified where the defendant is “the subject of the officers’ investigation, ha[s] just left the premises, [is] pulled over as soon as reasonably practicable, and . . . [is] a flight risk and pose[s] a potential danger to the officers conducting the search.”²⁰⁴ The defendant’s detention is “warranted because the additional intrusion caused by detention [is] slight and the justifications [are] substantial.”²⁰⁵

²⁰⁴ United States v. Bullock, 632 F.3d 1004, 1011 (2011).

²⁰⁵ *Id.*