UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2111

September Term, 2015

ERIC G. DAY

v.

STATE OF MARYLAND

Woodward,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: January 26, 2017

The Supreme Court has observed that, absent exigent circumstances, "[a]s a practical matter, officers who have probable cause and who are in the process of obtaining a warrant have no reason to enter the premises before the warrant issues." *Segura v. United States*, 468 U.S. 796, 812, 104 S. Ct. 3380, 3389 (1984). Yet that is what happened in this case, when a police officer, rather than waiting on a pending arrest warrant application, proceeded to make a warrantless and unannounced entry into a motel room occupied by Eric G. Day, appellant, then to conduct a warrantless "whole room" search for evidence and to seize a gun found in that search.

After the Circuit Court for Prince George's County denied his motion to suppress that evidence, a jury convicted Day of attempted voluntary manslaughter and associated crimes stemming from a shooting.[1] Day's appeal from those convictions returns to this Court after his successful first appeal, in which we remanded for a *de novo* suppression hearing because Day, as an overnight guest of a registered occupant of the motel room, had standing to assert a Fourth Amendment challenge. *See Eric G. Day v. State*, No. 1638, Sept. Term, 2013 (Md. App., filed Feb. 6, 2015) (unreported). On remand, the court again denied Day's motion to suppress evidence regarding the gun used in the shooting, which was seized in the motel room. The motion court ruled that the gun evidence was admissible under the exigent circumstances, plain view, and search incident

[1] Day was acquitted of attempted second degree murder and first degree assault but convicted of attempted voluntary manslaughter; reckless endangerment; destruction of property; use of a handgun in the commission of a crime of violence; and wearing, carrying, or transporting a handgun. He was sentenced to concurrent sentences with a total executed time of five years for the attempted voluntary manslaughter and handgun convictions.

to arrest exceptions to the warrant requirement of the Fourth Amendment. In light of that ruling, judgment was entered based on the previous convictions.

In this second appeal, Day again challenges the denial of his motion to suppress the evidence obtained as a result of the warrantless entry and search of his motel room. Because we conclude that such evidence should have been excluded as "poisoned fruit," tainted by that unlawful entry and search, Day's convictions must be reversed.

FACTS AND LEGAL PROCEEDINGS

In Day's first appeal, we summarized the underlying facts to provide context for our consideration of the Fourth Amendment standing issue, as follows:

> On May 18, 2012, the Prince George's County Police sought Day in connection with the shooting incident that is the basis for this prosecution. Late that evening, Day and a woman friend checked into the Cadillac Motel. Day paid for the room, but the room was registered in his friend's name.
>
> Police tracked Day to the Cadillac, and during the early morning hours on May 19, arrest warrant in hand, two officers entered the motel room. The officers recovered a handgun from the room, took Day into custody, and drove him to the station. Once there, and advised of his *Miranda* rights, Day gave a statement.
>
> As the case against him proceeded, Day filed an omnibus pre-trial motion, *see* Md. Rule 4-251, seeking, *inter alia*, to suppress his statement and the handgun that was seized in the motel room. The State's position was that Day lacked standing to challenge the seizure of the handgun from the motel room because the room had not been rented by Day. Following a hearing, the motions court refused to suppress either the handgun or the statement. With respect to the former, the court agreed with the State that Day lacked standing to challenge the seizure of the handgun from the motel room.

Day, *supra*, slip op. at 1-2 (footnote omitted).

Appealing that decision, Day argued that under federal and state precedent, he had standing to assert the protections of the Fourth Amendment against unreasonable searches and seizures, "as an overnight guest legitimately on the premises" of the motel room. *Id.*, slip op. at 3-4. *See Minnesota v. Olson*, 495 U.S. 91, 96-97, 110 S. Ct. 1684, 1688 (1990); *Torres v. State*, 95 Md. App. 126, 129 (1993). The State, conceding that point of law, joined "in urging . . . remand to the circuit court for a new hearing on Day's motion to suppress." *Day*, *supra*, slip op. at 2-3. We agreed and "remand[ed] to the circuit court pursuant to Md. Rule 8-604(d), without affirmance or reversal, for that court to conduct a new suppression hearing consistent with [that] opinion." *Id*., slip op. at 4.

On remand, the court conducted a *de novo* suppression hearing, at which the State presented two witnesses. Because this suppression record is the sole source of evidence that we consider in determining whether the gun evidence was admissible, we shall summarize it in detail. *See Lee v. State*, 418 Md. 136, 148 (2011).

In doing so, we preliminarily note that the evidence presented at the remanded suppression hearing contradicted our statement in Day's first appeal that the police entered his motel room with "arrest warrant in hand." *Id*., slip op. at 2. Instead, as detailed below, it was undisputed at the *de novo* suppression hearing that at the time police entered Day's motel room, a warrant application containing sufficient evidence to establish probable cause for Day's arrest had been submitted, but the resulting warrant was not issued until approximately 45 minutes after Day's arrest.

Prince George's County Police Detective Travis Kelly testified that on the evening of May 18, 2013, he and a partner investigated a shooting reported at 11:07 p.m. Meeting

with Detective Kelly at the Maryland State Police Barracks, the victim, Ronnie Livatt, claimed that minutes earlier, "he was shot at while he was driving in his car, by an associate of his that he knew through the Army."[2] Mr. Livatt described the incident and identified the shooter as Eric Day. Livatt's truck had multiple bullet holes on the driver's side, near the gas tank.

As Detective Kelly was transporting Mr. Livatt to a Prince George's police station to continue the investigation, Livatt's cell phone rang. Livatt said the caller was a "girl he was supposed to meet that night," whom he believed had "set him up to . . . get shot at." Detective Kelly "told him to put it on speaker phone so [he] could hear the conversation." The detective first heard a female voice and then a male voice, which Livatt identified as Mr. Day's. Day stated: "those were just warning shots mother fucker next time I won't miss." When the call concluded, Mr. Livatt advised the detective that Day "knew where his wife was living on Fort Myer" and that he "felt in fear for his wife's safety . . . because the suspect at that point was not in custody."

Detective Kelly "relayed that information to [his] peers that the suspect in [the] shooting called [the] victim from a certain phone number." He also contacted the military police "at Fort Myer to go past our victim's residence to ensure her safety." Mr. Livatt and the detective arrived at the police station at 11:30 p.m.

Detective Kelly testified that "an exigency" was requested and obtained, so that police could track Day's phone through his cellular provider, "to find out the suspect's

[2] At trial, the State presented evidence that Day was dissatisfied about a transaction with Mr. Livatt involving a vehicle.

whereabouts." The detective explained that the shooting "would qualify" as "a serious offense where someone's life can be in danger" and that "[i]t can take some time for the exigency request to come back."

Although police had Day's name and birth date, they had to confirm, through photo identification by the victim, that Eric G. Day was the individual suspected of shooting at Mr. Livatt. Detective Kelly requested a photograph, but there was some difficulty in obtaining one. At "maybe 1:00, 1:30 a.m.," a photo arrived, and Livatt, after completing his interview and written statement, made the "photo confirmation" at "approximately 2:45 a.m."

With the victim's statement and photo identification now finished, Detective Kelly "relayed that information to [his] partners" and was then able to "work on the arrest warrant[.]" "When everything was completed," Detective Sujkhjit Batth was given "a general location of the suspect's cell phone," as well as the photograph identified by Livatt, "at which point he went and attempt[ed] to locate . . . Mr. Day." Detective Batth was accompanied by Detective Harvey.

While Detectives Batth and Harvey were looking for Day, Detective Kelly was not in communication with them. Kelly completed an application for statement of charges, drove ten to fifteen minutes to the commissioner's office in Hyattsville, and submitted the application around 4:00 a.m. The review was completed at 5:03 a.m., and an arrest warrant was issued at 5:18 a.m. While Detective Kelly was returning to the police station with the warrant, he learned that Day had been apprehended. By the time he arrived, Day was at the police station.

While Detective Kelly was securing the arrest warrant, Detective Batth, having applied for and obtained "the exigency" on Day's phone in "less than an hour," had left the police station with the photograph of Day and information about his registered vehicle. Detective Batth testified at the suppression hearing that according to the cellular phone company, Day's phone "was pinging" near the intersection of Crane's Highway and Brandywine Avenue, which took the detectives 35 to 40 minutes to reach. After "canvassing the area for" Day's vehicle, they spotted it, "parked in the front parking lot of the Cadillac Motel[,]" which is "a single story motel" in a "secluded" area.

Batth requested "additional units" because Day was known "to be armed with some kind of weapon." Between 3:45 and 4:15 a.m. he and Detective Harvey "did a drive by," then "set it up like a little bit further away" so they did not "give away that the police [were] in the parking lot[.]" At 4:16 a.m., Detective Batth notified the dispatcher of their location. At 4:21 a.m., he reported the tag number of Day's vehicle.

Thereafter, "one of the units responded to the clerk's office . . . and verified with the picture" of Day that he and a woman rented a room. They also "retrieved the room key" from the motel clerk. Officers from the two units then "set up a perimeter."

Next, Detective Batth and one of the other officers, with guns drawn, "did a storm entry into the room." Detective Batth explained that the "storm entry [was] a surprise entry," using the room key, "to locate [Day] inside the room," so that he had no "chance to . . . get armed or try to run away or try to jump out of the room or anything like that." He added that "[w]e are trained in the academy not to stand in the fatal funnel which is basically the doorways."

According to Detective Batth,

> [o]nce the storm entry was made into the room, the first thing we made sure we make the room clear, the first thing I observed was a female on the bed with no clothes on and we made sure that we checked the area for the defendant, which was checked negative by me and the other officer. . . .
>
> Then I heard an officer yell from the outside that he has somebody on the ground who was trying to leave the room behind us. . . .
>
> That was the defendant, Eric Day, wearing a purple shirt. . . .
>
> We learned that the defendant was hiding behind the door. When we did a storm entry we pushed the door all the way open. There is enough room between the door and the pillar and the wall that * * * * I can stand behind the door. . . .
>
> [A]fter the defendant was apprehended we did a thorough search of the room for any kind of weapons, or any kind of evidence which was, which can be of evidentiary value for an investigation. . . .
>
> During the whole room check, we recovered a handgun behind the door. . . . on the ground, on the floor. . . .
>
> The apprehension was made at 4:32 a.m. in the morning.

On cross-examination, Detective Batth acknowledged that he knew, within "[t]wo minutes" of entering the room, that Day had been apprehended outside. During this time, the detectives "stayed in the room" because Day "was right outside the door" and the woman remained in the room. According to Detective Batth, after she was "secure[d]," "the room was checked and secured and once [they] recovered the weapon, the cell phone and . . . any other evidentiary value, [they] asked her to go ahead and dress up." Day, who was wearing only a shirt and underwear, was also allowed to get dressed and thereafter handcuffed.

Defense counsel, conceding that police "had probable cause to believe that the person in that room committed a felony," argued that suppression of the gun evidence was required because, in the absence of either an arrest warrant or a search warrant, police made a "no-knock entry" of Day's motel room at 4 a.m., then conducted a full search of the room while he was outside and seized a gun that was far beyond Day's "wingspan."[3]

The State countered that "police had probable cause to support their warrantless entry of that motel room[,]" and argued that "this is not akin to a no-knock search warrant," because "they were going there to arrest the defendant, as evidenced by . . . the fact that Detective Kelly was in the process of getting an arrest warrant for the defendant at the time." With respect to the warrantless entry, the State's position was that there were exigent circumstances because there was an attempted murder; Day was known to be armed; he had traveled from Forestville, where the shooting occurred at 11 p.m., and "here he is in Brandywine holding [sic] up in a shady motel"; and "he does in fact try to escape when the apprehension is attempted[.]" Regarding the warrantless search of the motel room, the prosecutor argued

> a couple of theories that allow the police to recover the gun at that point. One, I think it does fall into the search incident to arrest. It does not have

[3] Defense counsel did not mention the post-arrest statements made by Day, apparently conceding that the intervening issuance of the arrest warrant, which was not based on what occurred at the motel, made that evidence admissible, under the principle that "the connection between the illegal conduct of the police and the subsequent discovery of evidence 'has become so attenuated as to dissipate the taint.'" *See Brown v. State*, 124 Md. App. 183, 197 (1988) (quoting *Wong Sun v. United* States, 371 U.S. 471, 487, 83 S. Ct. 407 (1963)).

> to be within his control in terms of his immediate ability to . . . get the gun, but as the case law . . . said that it is . . . the area of immediate control . . . which . . . is determined by the potentiality for harm and not by actual physical control by the arrestee at the time the search is conducted. . . .
>
> In addition, Your Honor, the State argues that it was in plain view. . . . behind the door . . . .
>
> And finally, Your Honor, I think at the end of the day you know this is an inevitable discovery of all of these. We know that an arrest warrant would have been obtained, because it was about 45 minutes after the defendant was arrested. An arrest warrant would allow them in the room, obviously, and then search incident to arrest would have recovered whatever was in that room within his immediate control which we know the gun was in that room.
>
> And ultimately, Your Honor, the police would have had sufficient basis probable cause [sic] to get [a] . . . search warrant for that room had they done it that way. They would have had the probable cause . . . and they could have executed it and found what was in that room. . . .

In rebuttal, defense counsel argued that there was no exigency because the State presented no evidence that Day was a flight risk. In counsel's view, the police "needed to knock, they didn't knock and they had no arrest warrant." Moreover, "once [Day] was outside, [and] they pull the woman out[,] that place has got be closed just like a home."

The motion court, finding both detectives credible, concluded that their testimony established "probable cause to believe that the defendant had engaged in a felony and that he was armed and dangerous[.]" The court ruled that "the fact that they did not have an arrest warrant" when they entered the motel room was not significant "because they had probable cause to believe that he had committed a crime and it was a felony." As to "whether they acted properly in going into the motel room" without knocking or waiting for a warrant, the court held that "they were acting under exigent circumstances," based

on the serious nature of the shooting; the probable cause to believe that Day was the shooter, that he was still armed, and that he was in the room; and the officers' "reasonable belief" that Day "would escape." With respect to seizing the gun inside the room, the court concluded that it was recovered during a search incident to arrest in that they testified that he was behind the door when this occurred and just because when they seized the item it was not directly or specifically on his person, I don't think that's a bar to search incident to arrest and secondly, when they just pull the door back and see the item, it's in plain view. He did nothing more than pull the door back and saw it. The motion court did not address the State's inevitable discovery theory for admitting the gun evidence.

DISCUSSION

In this second appeal, after a *de novo* suppression hearing, Day contends that the motion court erred in denying his motion to suppress the gun found behind the door of his motel room, because police entered, searched, and seized without a warrant, in violation of the Fourth Amendment. In his view, neither the record nor the case law supports a ruling that the gun was seized under the recognized Fourth Amendment exceptions for warrantless entries made in exigent circumstances or for evidence found in plain view, seized during a search incident to arrest, or subject to the inevitable discovery doctrine. The State counters that "the warrantless entry was justified by the exigent need to prevent a suspect from escaping," and that, in any event, "the handgun would have been inevitably discovered[.]" After reviewing the standards governing suppression of

evidence under Fourth Amendment jurisprudence, we shall consider – and reject – each of the proffered theories of admissibility.

I. Standards Governing Fourth Amendment Suppression

In reviewing the denial of a motion to suppress evidence under the Fourth Amendment, we consider only the record from the suppression hearing. *Grant v. State*, 449 Md. 1, 14-15 (2016); *Williams v. State*, 372 Md. 386, 401 (2002). We accept the factual findings of the motion court unless clearly erroneous. *Grant*, 449 Md. at 15. Viewing the evidence, and all reasonable inferences that may be drawn therefrom, in the light most favorable to the State, as the party who prevailed on the motion, "[w]e undertake our own constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case." *Williams*, 372 Md. at 401.

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2060-61 (2016). "It is a basic principle of Fourth Amendment law . . . that searches and seizures inside a home without a warrant are presumptively unreasonable[,]" *Kentucky v. King*, 563 U.S. 452, 459, 131 S. Ct. 1849, 1856 (2011) (quotation marks and citations omitted), because "the Fourth Amendment has drawn a firm line at the entrance to the house[.]" *Payton v. New York*, 445 U.S. 573, 586, 590, 100 S. Ct. 1371, 1380, 1382 (1980). *See Williams*, 372 Md. at 402. A citizen may have the same "reasonable expectation of privacy," which is the interest protected by the Fourth Amendment, in a motel room as in a home. *See Bordley v. State*, 205 Md. App. 692, 709 (2012).

"[P]olice misconduct with 'a quality of purposefulness' will weigh in favor of exclusion of the resulting evidence." *Cox v. State*, 421 Md. 630, 655 (2011) (quoting *Brown v. Illinois*, 422 U.S. 590, 605, 95 S. Ct. 2251, 2262 (1975)). "[T]he principal judicial remedy to deter Fourth Amendment violations" is the exclusionary rule, which "requires trial courts to exclude unlawfully seized evidence in a criminal trial[.]" *Strieff*, 136 S. Ct. at 2061. The rule "encompasses both the 'primary evidence obtained as a direct result of and illegal search or search' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'" *Id*. (citation omitted).

Because the Supreme Court has recognized that "the significant costs of this rule" make it "applicable only . . . where its deterrence benefits outweigh its substantial social costs[,]'" it has held that "[s]uppression of evidence . . . has always been our last resort, not our first impulse.'" *Id*. (quoting *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 2164 (2006)). Moreover, Fourth Amendment jurisprudence has "recognized several exceptions to the [exclusionary] rule." *Id*. *See Williams*, 372 Md. at 402. Subject to these "few specifically established and well-delineated exceptions, a warrantless search or seizure that infringes upon the protected interests of an individual is presumptively unreasonable." *Grant*, 449 Md. at 16-17. "The government has the burden of overcoming that presumption." *Id*.

Pertinent to this appeal are the exceptions examined below, for warrantless searches and seizures conducted in exigent circumstances, for evidence discovered in

plain view, for evidence seized incident to a lawful arrest, and for evidence that inevitably would have been discovered without a warrantless search or seizure.

II. Exigent Circumstances

One of the "well-recognized exceptions" to the warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 1856 (2011). *See Minnesota v. Olson*, 495 U.S. 91, 100–01, 110 S. Ct. 1684, 1690 (1990). "To determine the reasonableness of a warrantless search or seizure based on exigent circumstances, we consider the facts as they appeared to the officers at the time of the entry." *Williams v. State*, 372 Md. 386, 403 (2002). In doing so we are mindful that "'[w]hen an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.'" *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S. Ct. 2091, 2098 (1984) (citation omitted).

The State bears the "heavy burden" of establishing that there was a substantial risk of harm if the seizure or search were to be delayed until after a warrant is obtained. *Williams*, 372 Md. at 407. The situation must present an immediate and compelling need for police action, rather than the mere possibility of future need. *Id.*

Among the factors we examine are "the gravity of the underlying offense, the risk of danger to police and the community, the ready destructibility of the evidence, and the reasonable belief that contraband is about to be removed." *Williams*, 372 Md. at 403. *See Briscoe v. State*, 422 Md. 384, 400 (2011); *Peters v. State*, 224 Md. App. 306, 326-

27, *cert. denied*, 445 Md. 127 (2015). An exigency may arise, for example, from the potential destruction of evidence inside a residence before a warrant is issued or if there is a significant risk that, while police are waiting for a warrant, the suspect may escape from the residence or poses a threat to officers or others while still inside. *See Olson*, 495 U.S. at 100, 110 S. Ct. 1684. Circumstances that have been held to "give rise to an exigency sufficient to justify a warrantless search" include "law enforcement's need to provide emergency assistance to an occupant of a home," to engage in "hot pursuit" of a fleeing suspect, to put out a fire, and "to prevent the imminent destruction of evidence." *Missouri v. Kennedy*, __ U.S. __, 133 S. Ct. 1552, 1558-59 (2013).

Bellamy v. State, 111 Md. App. 529 (1996), presents a classic instance of an exigency arising while police were preparing a warrant application. In that case, two hours after a confidential informant supplied probable cause to believe that the subject apartment contained cocaine and an assault rifle armed with rounds that could penetrate protective vests, the informant advised police that a suspect was preparing to move the drugs and weapon out of the apartment. *Id*. at 538. Police entered the apartment, handcuffed occupants, and moved them to another location until a search warrant was issued, less than two hours later. *Id*. at 538-39.

This Court affirmed a finding of exigent circumstances because "the police acted reasonably in entering the apartment and securing it until the search warrant was obtained." *Id*. at 539. In particular, it was not sufficient for police to "simply surround[] the apartment building and confront[] [the suspect] as he left" with the contraband, because the layout of the building made it "'next to impossible to . . . secure" and "could

'create a very dangerous situation' on the street." *Id*. Nevertheless, we warned that "we do not suggest that the mere presence in a home of a dangerous weapon . . . or drugs, always constitutes an exigent circumstance to justify a warrantless entry into the home by police." *Id*.

Olson provides an instructive lesson on the limits of the exigent circumstances exception when police decide not to wait for a warrant. In that case, the Supreme Court held that there were no exigent circumstances justifying a warrantless entry to arrest an armed suspect, explaining:

> The [Minnesota] court pointed out that although a grave crime was involved, respondent "was known not to be the murderer but thought to be the driver of the getaway car," and that the police had already recovered the murder weapon. "The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday . . . . **It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended."** We do not disturb the state court's judgment that these facts do not add up to exigent circumstances.

Olson, 495 U.S. at 100–01, 110 S. Ct. 1684, 1690 (emphasis added).

Day also urges us to consider *Rhode Island v. Gonzalez*, 136 A.3d 1131 (R.I. 2016), which he argues is a "remarkably similar" case supporting his contention that police should have waited for the warrant before entering his motel room. In that case, less than two hours after a fatal midnight shooting, witnesses had identified Gonzalez as the shooter. Police, "afraid of destruction of evidence" and "that he might be a threat to others" because he fled with the gun and always carried a weapon, went in search of Gonzalez, eventually locating him at his residence. By 7 a.m., they had set up a

perimeter. When police knocked on the door, Gonzalez's mother opened it, and armed officers entered, arrested Gonzalez, searched the home, and seized evidence.

The Rhode Island Supreme Court excluded the poisoned fruit of that warrantless entry and search, rejecting the government's argument that "it could not reasonably be argued that, in an ongoing manhunt, the police should have interrupted their investigation in the field to attempt to obtain a warrant early on a Sunday morning." *Id*. at 1151-55. The court explained that although "[p]olice officers are often confronted with rapidly unfolding and often dangerous situations that must be evaluated in context and not with the eyes of the proverbial Monday morning quarterback[,]" the officers in this case "clearly knew the identity of the person who they believed was the shooter—Mr. Gonzalez—from almost the very beginning of their investigation," and should have sought an arrest warrant during the ensuing seven hours. *Id*. at 1151-53. Noting that an arrest warrant does not require police to identify the suspect's location, the court concluded that "[a]t any time after defendant became the sole suspect, which was very shortly after the shooting, a single officer could have been dispatched to seek a warrant while the other officers continued their quest for Mr. Gonzalez." *Id*. at 1154.

Although police were appropriately concerned about destruction of evidence and risk to officers and others because the suspect always carried a gun, the *Gonzalez* Court was not persuaded there was an exigency justifying the decision to forgo a warrant, explaining:

> Detective Digregorio testified that there "wasn't time" to obtain a warrant; it was his testimony that, "[t]o sit down at a desk and type out a warrant at that point in time to me was a waste of resources, in my

opinion." But, in our judgment, attempting to procure a warrant during an approximately seven hour investigation would definitely not have constituted a waste of resources. A court considering a defendant's rights under the Fourth Amendment should not be concerned with efficiency: **"[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. * * * The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."** ***Mincey v. Arizona,*** **437 U.S. 385, 393, 98 S. Ct. 2408 (1978) . . . .**

The state argues that the instant case involved an ongoing manhunt in the field which could not be interrupted to obtain a warrant. It is true that we have stated that "[a]s a result of an ongoing investigation in the field" when police located a suspect they deemed to be armed and dangerous and in a "highly emotional state" less than one hour after he committed a shooting, warrantless entry into an apartment to effectuate his arrest was not a violation of the Fourth Amendment. However, in that case we articulated a distinction between "emergency situations," which require prompt police action where the Court focuses on the "practicability" of obtaining a warrant, and "'planned' arrests," which do not stem from "an ongoing investigation in the field;" and we then held that that case fell into the first category. The instant case did not involve an emergency situation. In [the emergency case] *Gonsalves*, the arrest took place less than an hour after the shooting, and the suspect was known to be in a highly emotional state. In the instant case, by contrast, approximately seven hours had elapsed after the shooting before the arrest was effectuated. **The current situation is much more comparable to a planned arrest.** After determining defendant's location, some of the Providence and Warwick police officers involved met in Providence, waited for the remaining Warwick detectives to arrive, and . . . . subsequently set up a perimeter around the apartment in which defendant resided. In addition to it clearly having been possible for the police to at least have attempted to procure an arrest warrant during the seven hours in which the police knew for whom they were searching, **when the police actually located defendant and surrounded his home, they could at that point have simply maintained a perimeter and waited for him to step outside or for a warrant to be procured.**

Id. at 1154 (emphasis added; some citations omitted).

Here, as in *Olson* and *Gonzalez*, this manhunt was focused from the start on a single, identified suspect, who was arrested after a planned but warrantless entry conducted hours later. In commendable contrast to *Olson* and *Gonzalez*, Prince George's County police officers did apply for an arrest warrant while simultaneously locating and surrounding Day. What they failed to do, however, was wait for the outcome of that independent judicial review. As in *Olson* and *Gonzalez*, we are not persuaded that such a deliberate decision to enter and search Day's motel room before securing a warrant may be justified by a claim of exigent circumstances.

Although the burden was on the State to explain why police did not wait for the warrant, the prosecutor never asked Detective Batth why, given his knowledge that Detective Kelly was in the process of obtaining an arrest warrant, he did not simply maintain watch until he either received word that the warrant had been issued or Day exited the room. The detective's testimony simply does not answer that constitutionally critical question. Indeed, the suppression record is remarkably sparse when it comes to why police proceeded without the warrant they were in the process of obtaining.

The evidence in this suppression record raises no concern that while still in the room, Day was a continuing threat to Livatt or others. Although the officers at the scene understandably proceeded on the premise that Day was still armed, the State did not present evidence that he was seen with a gun or that he was known to be armed typically.

Nor was there an expressed concern that, if Day still had the gun he used to shoot Livatt's truck, he could or would dispose of it while police waited on the warrant. Indeed, there was no indication that Day was aware police were looking for him, much

less that they were seeking an arrest warrant, tracking him to that motel, and waiting outside to apprehend him. *Cf. Dunnuck v. State*, 367 Md. 198, 214 (2001) ("Never did [the State] offer evidence as to why, when the suspect is unaware of the investigation or that the police ha[d] probable cause to search her premises, the securing of the premises predominated over securing the warrant."). And in material contrast to *Bellamy*, the prosecution presented no evidence from which we could reasonably infer that Day was getting ready to leave his room.

Although the State maintains that the warrantless entry was reasonably necessary to prevent Day from escaping, echoing the motion court's finding that officers had a "reasonable belief" that Day would escape if they waited for the warrant, it presented no evidence at the suppression hearing and presents no argument to this Court that might explain how Day could possibly escape while the motel was surrounded by police who were watching both Day's room and his vehicle. Despite pointing out that Day did try to escape as police entered his room, the State ignores that he got no farther than the doorway, where he was apprehended by waiting officers.

On this record, we conclude that, as in *Olson*, "[i]t was evident the suspect was going nowhere" and that even if he did attempt to leave, he could be "promptly apprehended." *Olson*, 495 U.S. at 100–01, 110 S. Ct. at 1690. Viewed in the light most favorable to the State, the suppression record merely establishes that at 4:30 a.m., when

police conducted this warrantless, no-knock entry,[4] search, and seizure, they considered Day dangerous because more than five hours earlier, he had shot at the victim and threatened to do so again. That evidence does not add up to exigent circumstances. *See id.*

We agree with Day that a contrary conclusion would effectively permit any police officer to enter a residence or motel room without a warrant whenever there is probable cause to make a felony arrest of its occupant for a crime of violence involving a gun or other dangerous weapon. Because the State failed to satisfy its heavy burden of explaining why, after locating the suspect and surrounding his residence, police did not "simply maintain[] a perimeter and wait[] for him to step outside or for a warrant to be procured," *Gonzalez*, 136 A.3d at 1154, the motion court erred in admitting the gun evidence under the exigent circumstances exception. *See Williams*, 372 Md. at 407.

III. Plain View

As an alternative basis for admitting the gun evidence, the motion court ruled that the gun was properly seized under the Fourth Amendment exception for evidence found in plain view. Day argues that this was error because the plain view doctrine applies only if the police are lawfully on the premises when they observe the evidence in plain view.

[4] Even if this entry had been supported by an arrest warrant, defense counsel correctly argued below that there was no exigency justifying the failure to knock and announce before entering Day's motel room. Although Day's appellate brief does not reassert this contention, we must consider the failure to knock or announce in addressing the State's alternative argument that Day's motion to suppress may be denied under the inevitable discovery doctrine. See *infra*, Part V.B. *See generally Lee v. State*, 374 Md. 275, 278, 316 (2003) (evidence seized in violation of the knock and announce rule cannot be legitimized under the inevitable discovery doctrine).

See Coolidge v. New Hampshire, 403 U.S. 443, 465-67, 91 S. Ct. 2022, 2037-38 (1971); *Grant v. State*, 449 Md. 1, 18 n.4 (2016). The State, tacitly conceding this point, does not defend the motion court's rationale. We agree with Day that the court erred in admitting the gun evidence under the plain view exception.

IV. Search Incident to Arrest

"Well before the Nation's founding, it was recognized that officers carrying out a lawful arrest had the authority to make a warrantless search of the arrestee's person." *Birchfield v. North Dakota*, __ U.S. __, 136 S. Ct. 2160, 2174 (2016). A "search incident to a lawful arrest" may extend to the area surrounding the arrestee, where he or she can reach to grab a weapon or evidence. *See Chimel v. California*, 395 U.S. 752, 768, 89 S. Ct. 2034, 2043 (1969); *Feaster v. State*, 206 Md. App. 202, 231 (2012).

Day challenges the motion court's alternative ruling that the gun was properly seized during a search incident to arrest, on the grounds that his arrest was illegal as a result of the warrantless, no-knock entry of his motel room, *Feaster*, 206 Md. App. at 228 ("There is no such animal as a reasonable search incident to an unlawful arrest."), and that it occurred outside the room, while the gun remained inside the room, well out of the "wingspan" range that restricts the scope of a search incident to arrest to "that area within the lunge, within the reach, within the grasp of the arrestee," which "may fairly be deemed to be an extension of his person" because he "might grab for weapons or destroy evidence." *Id*. at 231. Again, the State wisely does not defend this basis for the motion court's ruling. We agree with Day that because the warrantless entry was unlawful and

the ensuing search exceeded the scope of Day's reach, the motion court erred in admitting the challenged evidence under the search incident to arrest exception.

V. Inevitable Discovery

We turn, finally, to the State's argument that even if there were no exigent circumstances, the warrantless entry and search of Day's motel room may be legitimized under the inevitable discovery doctrine. This doctrine is one of three Fourth Amendment exceptions stemming from the lack of a "causal relationship between the unconstitutional act and the discovery of the evidence."[5] *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2061 (2016). It "allows for the admission of evidence that would have been discovered even without the unconstitutional source[,]" *id.*, based on the premise that if the illegal search or seizure played no part in discovery of challenged evidence, then exclusion "adds nothing to either the integrity or fairness of a criminal trial." *Id.*; *Nix v. Williams*, 467 U.S. 431, 444-46, 104 S. Ct. 2501, 2509-10 (1984); *United States v. Whitehorn*, 813 F.2d 646, 650 n.4 (4th Cir. 1987); *United States v. Pollins*, 145 F. Supp.3d 525, 539 (D. Md. 2015).

To establish inevitable discovery, "the State has the burden of proving, by a preponderance of evidence, that the evidence in question inevitably would have been found through lawful means." *Williams v. State*, 372 Md. 386, 417 (2002). "This

[5] The other two are the independent source doctrine, which "allows for the admission of evidence that would have been discovered even without the unconstitutional source[,]" and the attenuation doctrine, which makes evidence admissible "when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance[.]" *Strieff*, 136 S. Ct. at 2061.

standard embodies two ideas – that there was a lawful method for acquiring the evidence and that the evidence inevit[ably] *would* have been discovered." *Id*. The doctrine "necessarily involves an analysis of what would have happened if a lawful investigation had proceeded, not what actually happened." *Id*. Such an inquiry "should focus on historical facts capable of easy verification, not on speculation." *Id*. at 418.

Williams is instructive here. In that case, police were actively pursuing a search warrant before they entered two adjoining hotel rooms, from which they suspected drugs were being distributed. *Id*. In anticipation of a warrant being issued, police entered and secured both rooms and their occupants, then waited until after the warrant issued to conduct arrests and searches. *Id*. Before the warrant was obtained, cocaine was recovered on the person of an occupant wearing pajamas, and a small amount of marijuana was recovered in plain view on a bed. *Id.*

The Court of Appeals held that, although there was probable cause to support the search warrant, the prior warrantless entry of the hotel rooms violated the Fourth Amendment and tainted the ensuing search incident to arrest and seizure of the cocaine and marijuana. *Id.* at 423-28. The Court concluded that the State failed to prove that the cocaine and marijuana "inevitably would have been in the motel rooms when the police executed the search warrant." *Id*. at 421, 426. Because the "sparse" evidentiary record was "insufficient to establish, by a preponderance of the evidence, that the" drugs would have been found even if police had waited for the search warrant before entering the hotel rooms, the Court held that the State failed to satisfy its burden of proof under the inevitable discovery doctrine. *Id*. at 426, 428.

In doing so, the *Williams* Court adopted oft-repeated language from the Seventh Circuit, cautioning that

> "[s]peculation and assumption do not satisfy the dictates of *Nix* . . . . Inevitable discovery is not an exception to be invoked casually, and if it is to be prevented from swallowing the Fourth Amendment and the exclusionary rule, courts must take care to hold the government to its burden of proof."

Id. at 428 (quoting *United States v. Jones*, 72 F.3d 1324, 1334 (7th Cir. 1995)).

Williams is also pertinent here because the Court of Appeals recognized that in evaluating Fourth Amendment claims, exigency and inevitable discovery theories of admissibility are "seemingly contradictory," in that the former posits that the seized evidence was likely to be lost if the warrantless entry had not been made, whereas the latter posits that the same evidence would have been recovered without the warrantless entry. *See id.* at 424 & n.13. Thus, "[a]n argument that the evidence inevitably would have been found in . . . motel rooms during a search pursuant to a search warrant undermines the exigency arguments and the reasonableness of the initial warrantless entry[.]" *Id*.

This Court, in *Smith v. State*, 72 Md. App. 450, 466, 468-69 (1987), rejected an inevitable discovery theory for admitting clothing seized from the accused's apartment without a warrant, because police entered the residence as Smith opened the door, even though there was "ample opportunity" to have obtained a warrant. We agreed that application of the inevitable discovery doctrine in those circumstances "'would . . . read out of the Constitution the requirement that the police follow certain protective procedures, in this case, the warrant requirement of the Fourth Amendment[,]' thus

rendering 'every warrantless nonexigent [arrest] automatically . . . legitimized by assuming the hypothetical alternative that a warrant had been obtained.'" *Id*. at 468 (citations omitted). In doing so, we warned that

> "[b]ecause one purpose of the exclusionary rule is to deter [unconstitutional] shortcuts, the 'inevitable discovery' rule should be applied only when it is clear that "the police officers have not acted in bad faith to accelerate the discovery" of the evidence in question. If the rule were applied when such a shortcut was intentionally taken, the effect would be to read out of the Fourth Amendment the requirement that other, more elaborate and protective procedures be followed."

Id. at 469 (quoting 4 W. LaFave, *Search and Seizure*, § 11.4(a), 382 (2nd ed. 1987)).

During Day's suppression hearing, the State, pointing to the arrest warrant issued approximately 45 minutes after police entered Day's motel room, argued that the gun inevitably would have been discovered during a search incident to a lawful entry of Day's motel room pursuant to that warrant. Nevertheless, the trial court did not adopt that rationale or otherwise mention inevitable discovery in its ruling.

In this Court, Day similarly argues that the inevitable discovery doctrine should not be applied in these circumstances because it would negate the Fourth Amendment by "rendering every warrantless nonexigent arrest admissible when a warrant is later issued." (Ant.23) He maintains the State's warrantless entry, search, and seizure of the gun is the type of intentional action, taken "to accelerate the discovery" of evidence, that this Court has expressly disapproved as an impermissible shortcut that "read[s] out of the Fourth Amendment the requirement that other, more elaborate protective procedures be followed." *See id.*

The State counters that

> [t]he record nowhere establishes subjective and intentional conduct by the police to act without a warrant. If there is a Fourth Amendment violation here, it subsists at best in the officers' misapprehension of the extent of exigency. Under these circumstances, where the warrant was already in the offing, the law does not require suppression.

After addressing the initial hurdle presented by the motion court's failure to rule on the State's inevitable discovery theory of admissibility, we shall explain why the law precludes its application in this case.

A. Lack of Inevitable Discovery Ruling by the Motion Court

In *Elliott v. State*, 417 Md. 413 (2010), the Court of Appeals disapproved the *sua sponte* use of inevitable discovery to affirm the denial of a motion to suppress evidence challenged under the Fourth Amendment. In that case, a motion court relied on grounds other than inevitable discovery in refusing to suppress evidence. On appeal, this Court held that ruling was erroneous and "that Elliott was illegally arrested without probable cause," but then concluded, *sua sponte*, that the challenged evidence was admissible under the inevitable discovery doctrine. *Id*. at 434. The Court of Appeals reversed, explaining that "absent evidence relating to inevitable discovery, the doctrine should not be applied *sua sponte* because an appellate court's determination of the issue would be based on speculation rather than 'historical facts that can be verified or impeached.'" *Id*. at 437-38 (citation omitted). Among the cited cases was *Williams*, about which Judge Greene, writing for the Court, observed that "the police could have waited for the pending search warrant to be processed before making the arrest, rather than preemptively arresting Williams and searching him without a warrant." *Id*. at 441-42.

Despite holding that this Court "erred in raising the issue of inevitable discovery *sua sponte*," the *Elliott* Court ultimately affirmed denial of the motion to suppress based on its own constitutional appraisal of other material facts. *See id.* at 443. Specifically, the Court concluded that police had probable cause to search after a DEA agent smelled marijuana and a K-9 dog alerted. *Id*. at 444. Because "the police called for the K-9 unit" before Elliott was apprehended, the Court reasoned, "the premature arrest of [Elliott] was not [necessarily] causally related to the discovery of the marijuana and the motion to suppress was properly denied." *Id*. *Cf. Reid v. State*, 428 Md. 289, 310 (2012) (Where motion court made no finding regarding whether gun taken from accused would have been found inevitably through lawful means, fact-finding by appellate court in effort to apply inevitable discovery doctrine "would be running afoul of" *Elliott* decision).

In this case, although the State argued inevitable discovery as one of several alternative theories of admissibility, the motion court relied only on the exigency, plain view, and search incident to arrest exceptions that, for reasons explained above, do not support the denial of Day's motion to suppress. Even if, under *Elliott*, we could affirm the denial of Day's motion to suppress on inevitable discovery grounds not decided by the motion court, for the reasons explained next, that doctrine is inapplicable to this non-exigent, "no-knock," and warrantless entry.

B. Inapplicability of Inevitable Discovery Doctrine

In *State v. Lee*, 374 Md. 275, 278, 316 (2003), the Court of Appeals has held that, absent exigent circumstances, evidence seized pursuant to a valid search warrant, "executed without knocking and announcing the police presence before forcing the door

to the premises," may not be admitted under the inevitable discovery doctrine. Writing for the Court, Chief Judge Bell affirmed Judge Sonner's reasoning for this Court, that by applying the inevitable discovery doctrine to a case in which police executing a search warrant in non-exigent circumstances failed to knock or announce, "would read the knock and announce requirement of the Fourth Amendment out of the Constitution, and, thus, permit forcible and unannounced entry in every search pursuant to a valid warrant, whether exigent circumstances exist or not[.]" *Id*. at 316. Later, after the Supreme Court declined to apply the Fourth Amendment exclusionary rule to knock and announce violations, in *Hudson v. Michigan*, 547 U.S. 586, 599, 126 S. Ct. 2159, 2168 (2006), our Court of Appeals affirmed that the knock and announce requirement, if not mandated by Fourth Amendment jurisprudence, is an established matter of Maryland law and remains a relevant, though not dispositive, consideration in evaluating reasonableness under the Fourth Amendment. *See Parker v. State*, 402 Md. 372, 399-401 (2007).

This case involves an entry that was both warrantless, as in *Williams*, and unannounced, as in *Lee*. The *Williams* Court refused to apply the inevitable discovery doctrine to legitimize a limited search after a warrantless entry into hotel rooms, even though police later obtained a search warrant that would have authorized a comprehensive search of those rooms. Here, the State seeks to apply the inevitable discovery doctrine to legitimize a comprehensive "whole room" search after a warrantless entry, even though police later obtained only an *arrest* warrant that would *not* have authorized the broader search that turned up the gun. Moreover, the *Lee* Court prohibited the use of inevitable discovery to legitimize a non-exigent no-knock entry that

was conducted with a valid warrant, whereas, here, the State seeks to apply the inevitable discovery doctrine to legitimize a non-exigent no-knock entry that was conducted *without* a warrant.

What happened here cannot be reconciled with either *Williams* or *Lee*. Applying lessons from those cases, we conclude that the State's warrantless and unannounced entry into Day's motel room cannot be affirmed under the inevitable discovery doctrine. Even if violating the knock and announce principle does not trigger the exclusionary rule,[6] it bars application of the inevitable discovery doctrine in these circumstances, where admitting evidence on the premise that it inevitably would have been recovered if police had waited for the arrest warrant would not only eliminate any reason for them to do so, it also would require us to presume facts that are not in this record. Specifically, we would

[6] Whether the failure to knock and announce requires suppression of the gun evidence challenged by Day is not before us. Because we are not asked to decide whether, by itself, the no-knock entry of Day's motel room requires exclusion of the evidence found therein, our holding is limited to applying the ruling in *Lee*, as explicated by *Parker*, and the precedent in *Williams.*

We acknowledge that, after *Parker* expressly declined to decide whether, under Maryland law, a violation of the knock and announce requirement necessarily triggers the exclusionary rule, this Court observed that

> under Maryland common law, police, even if armed with a search warrant, are (with certain exceptions) not allowed to enter a person's home without first announcing their presence and demanding admission. *See, e.g., Henson v. State*, 236 Md. 518, 522–24 (1964). But it is one thing to prohibit certain actions by the police, and quite another to say that under Maryland common law the sanction in criminal cases for such police misbehavior is suppression of the evidence seized by the police after their entry.

Ford v. State, 184 Md. App. 535, 562–63 (2009).

have to find that if police had waited for the arrest warrant, and executed it in accordance with the knock and announce rule, they inevitably would have discovered the gun without conducting a comprehensive "whole room" search, so that the weapon would have been lawfully recovered, whether on Day's person, within his wingspan, or in plain view. There simply is no evidence in this suppression record to support such a speculative finding. *Cf. Reid*, 426 Md. at 312 (State's inevitable discovery argument "must fail because of our unwillingness to do appellate fact finding on a record devoid of evidence of what *would* have occurred rather than what *could* have occurred").

VI. Conclusion

Because the gun was seized as a direct result of the warrantless entry and search of Day's motel room, and the State failed to establish exigent circumstances or any other Fourth Amendment exception, Day's motion to suppress the gun evidence should have been granted. As defense counsel correctly asserted during the suppression hearing, police "needed to knock, they didn't knock and they had no arrest warrant[.] . . . And there needs to be a viable exception and I don't think the facts support that nor does the case law." In the absence of an exigency justifying the decision to proceed without checking on the pending arrest warrant application, officers had "no reason to enter the premises before the warrant issue[d]." *See Segura*, 468 U.S. at 812, 104 S. Ct. at 3389. Nor did they have a constitutionally valid reason to immediately conduct a warrantless

"whole room" search for "any kind of . . . evidentiary value for an investigation," which is when the gun was discovered and seized.[7]

Contrary to the State's contention, the decision not to wait for a warrant, either before or after entering Day's motel room, constituted "subjective and intentional conduct by the police to act without a warrant" in order to "accelerate the discovery' of the evidence in question." *See Smith*, 72 Md. App. at 469 (citation omitted). Allowing police to "enter and search now, then pick up a warrant later" would effectively invite officers to treat the warrant requirement of the Fourth Amendment as a matter of *post hoc* paperwork, rather than a mandate for independent judicial review before they may cross a residential threshold to make an arrest or conduct a search. The exclusionary rule operates to deter such unconstitutional shortcuts, by protecting the core right to be free from warrantless searches and seizures when, as in this case, one is locked in for the night with a reasonable expectation of privacy, whether at home or a motel. *See id.*

[7] If police, after entering without a warrant, had secured Day and his companion, then closed up the room until it could be searched pursuant to a valid search warrant, as defense counsel also suggested during the suppression hearing, the independent source doctrine might have been available to purge the taint of the unlawful warrantless entry. *Cf., e.g., Segura v. United States*, 468 U.S. 796, 813-14, 104 S. Ct. 3380, 3390-91 (1984) (exclusionary rule prohibited admission of evidence that was discovered upon warrantless entry made to secure premises pending application for a search warrant, but evidence not seized until police executed valid search warrant was sufficiently purged of taint to be admitted under independent source doctrine); *Kamara v. State*, 205 Md. App. 607, 631 (2012) (where police made warrantless entry of home, then secured premises until a search warrant was obtained, marijuana that was observed in plain view during protective sweep, but not seized until the warrant search was conducted, was admissible under independent source doctrine, because decision to seek the warrant was not prompted by discovery of the marijuana and warrant application contained sufficient probable cause without observations made during protective sweep).

Although we must reverse Day's convictions, there is sufficient evidence to obtain convictions without the gun evidence.[8] Accordingly, we shall remand for proceedings consistent with this opinion, including a new trial.

JUDGMENT REVERSED, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

[8] Day may be tried again because the State presented sufficient evidence, apart from the suppressed evidence, to convict him of attempted voluntary manslaughter and associated handgun offenses. *See generally Benton v. State*, 224 Md. App. 612, 629 (2015) ("where this Court reverses a conviction, and a criminal defendant raises the sufficiency of the evidence on appeal, . . . a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place"). In particular, the gun was not essential to the State's case because Mr. Livatt testified that Day was the person who shot at his vehicle, then called to claim responsibility and threaten murder. Livatt's testimony was corroborated, *inter alia*, by the bullet holes in his vehicle, the testimony of Detective Kelly, and phone and computer records. Based on such evidence, a jury again could find Day guilty of these crimes.