



## ***LGIT'S ROLL CALL REPORTER*** **JUNE 2006**

### **THE ODOR OF BURNING MARIJUANA MAY JUSTIFY WARRANTLESS ENTRY INTO A RESIDENCE**

**QUESTION:** Did exigent circumstances allowing a warrantless entry into a residence exist where a police officer, who was accompanying a witness to her apartment, detected the odor of burning marijuana when the apartment door was opened?

**ANSWER:** Yes. In circumstances where the officer was at the apartment for a legitimate reason unrelated to marijuana possession, and the resident who opened the door was immediately aware that the officer had detected the odor of burning marijuana, exigent circumstances justified the warrantless entry. Such circumstances included the fact that, since the marijuana could easily have been destroyed, the officer had no time to obtain a search warrant. Thus, his warrantless entry was reasonable under the Fourth Amendment.

**CASE:** *Gorman v. State*, No. 1282, September Term, 2004  
Maryland Court of Special Appeals, Decided April 26, 2006

In *Gorman v. State*, the Court of Special Appeals considered whether the odor of burning marijuana emanating from inside an apartment provided the exigent circumstances necessary to justify a warrantless entry. Under the totality of the circumstances presented, the court found that exigent circumstances were present and that the warrantless entry was justified.

The facts in *Gorman* established that, on July 9, 2002, at about 10:00 p.m., Sergeant Steven Nalewajkl of the Baltimore City Police Department was called to investigate a shooting in the Brooklyn neighborhood of the City. When he arrived at the scene, Sgt. Nalewajkl observed a man, later identified as Christopher Gorman, who had suffered a gunshot wound, as well as Gorman's girlfriend, Leslie Harmon. Sgt. Nalewajkl wanted to question Harmon about the shooting, however, Harmon, who was barefoot, first needed to return home to retrieve her shoes. Sgt. Nalewajkl and another officer escorted Harmon to her apartment in an unmarked police car. Harmon shared this apartment, which was about five blocks away, with Gorman and her brother, Curtis Painter. When they arrived at the building, Sgt. Nalewajkl accompanied Harmon to the second floor apartment. He did so because "possible witnesses to shootings disappear on you."

Harmon attempted to open the door to the apartment, but it was locked. She tugged on the door handle and then knocked. From inside the apartment, a man asked her to identify herself. Harmon identified herself, and, after a minute or two, Painter opened the door. According to Sgt. Nalewajkl, Painter appeared very nervous. Sgt. Nalewajkl also "smelled the odor of burnt marijuana emanating from the apartment." Sgt. Nalewajkl asked Painter what he was so nervous

about, and Painter answered that he “had two bags of weed.” Sgt. Nalewajkl then entered the apartment and placed Painter under arrest. Both Harmon and Painter disputed the officer’s version of the events, testifying that Sgt. Nalewajkl simply followed Harmon into the apartment and began questioning Painter. Both testified that they never invited Sgt. Nalewajkl into the apartment.

After he placed Painter under arrest, Sgt. Nalewajkl summoned the other officer, who was still in the unmarked car, and directed him to handcuff Painter. Then, in preparation for making application for a search warrant, the sergeant secured the apartment by looking for other occupants and determining if there was other contraband evidence that could easily be destroyed. While searching a bedroom closet, Sgt. Nalewajkl found a handgun. A search warrant was obtained, pursuant to which police seized cocaine, various firearms, walkie-talkie radios, digital scales, and assorted drug paraphernalia. As a result of the seizures, Gorman was named in two separate indictments, totaling 26 counts for various narcotic and firearm possession offenses.

Prior to his trial, Gorman moved to suppress the evidence. He claimed that the evidence had been obtained pursuant to a warrantless entry that violated the Fourth Amendment. The circuit court denied his motion on grounds that the warrantless entry was justified by exigent circumstances. A jury convicted Gorman of four firearm possession charges, and he was sentenced to ten years in prison. Gorman appealed to the Court of Special Appeals, claiming that there were no exigent circumstances justifying the search, and that, even if there were, warrantless entries to arrest for marijuana possession were presumptively unreasonable because that crime is a “minor offense”.

The Court of Special Appeals disagreed with Gorman and affirmed his convictions. In doing so, the Court first repeated the statement of the Supreme Court in *Payton v. N.Y.* that, “the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” The Court also acknowledged that the exception to the warrant requirement for exigent circumstances is narrow, and “[a] heavy burden falls on the government to demonstrate exigent circumstances that overcome the presumptive unreasonableness of warrantless home entries.” “Exigent circumstances exist when a substantial risk of harm to the law enforcement officials involved, to the law enforcement process itself, or to others would arise if the police were to delay until a warrant could be issued.” *Williams v. State*, 372 Md. 386 (2002). The factors that must be considered in determining whether exigent circumstances exist include: (1) the gravity of the underlying offense; (2) the risk of danger to police and the community; (3) the ready destructibility of the evidence; and (4) the reasonable belief that contraband is about to be removed. *Id.* Also relevant to the determination is the opportunity of the police to have obtained a warrant.

In light of these factors, the Court of Special Appeals determined that Sgt. Nalewajkl was at Gorman’s apartment for the “legitimate and uncontrived reason” of accompanying a potential shooting witness to retrieve some shoes. He had no reason to suspect that there was marijuana inside the apartment until he smelled it when Painter opened the door. Further, once Painter finally opened the door and saw that a police officer, who now had knowledge of his marijuana possession, was standing in front of him, Sgt. Nalewajkl had no time to obtain a warrant. In fact, Harmon could have remained inside the apartment to destroy the evidence, as the sergeant had no basis to detain her.

The remaining issue was whether marijuana possession was a “minor offense” such that a warrantless entry could not be justified by exigency. The Court concluded that it was not because marijuana possession is subject to a \$1000 fine and up to one year in prison. The Court also determined that this particular warrantless entry was “less intrusive” than if the officer had been alone, knocked on the door, and demanded entry, or forcibly entered after Painter or Harmon refused him entry. On the basis of these factors, the Court concluded that this was simply not a case in which Painter’s right to be secure in his home, relative to the offense he was suspected of committing, displayed “a shocking lack of all sense of proportion.” Thus, the Court affirmed the trial court’s finding that Sgt. Nalewajkl’s warrantless entry into the apartment was reasonable under the circumstances.

**NOTE:** In *Gorman*, the Court gave examples of other cases where officers were justified by exigent circumstances in making warrantless entries into residences. As in *Gorman*, the officers in these cases did not have advance knowledge that a crime was occurring inside the residence prior to their arrival. The officers had arrived at the residences for purposes unrelated to the occupants’ marijuana possession, and had inadvertently discovered evidence of this crime. Also, in each of the cases discussed, the residents had knowledge of the police presence and, presumably, that the police had detected the odor of marijuana. These factors were significant in demonstrating exigent circumstances because they established that the officers had no time to obtain a search warrant. If, however, the circumstances in these cases, or in *Gorman*, had shown that the police, through delay or otherwise, created the exigency upon which they relied to justify entry, the outcome would have been different. For example, in *Dunnuck v. State*, 367 Md. 198 (2001), officers received an anonymous tip that there was marijuana in a house. When they went to the residence, they spotted marijuana through a window while no one was home. Instead of applying for a warrant, the officers decided to sit outside the residence for over an hour waiting for the defendant to return home. They then made a warrantless entry and seizure. In ordering the suppression of the seized marijuana, the Court of Appeals concluded that “the police had created the exigency that they rel[ied] upon to justify the warrantless entry . . . and to excuse their failure to obtain a search warrant.” Since Sgt. Nalewajkl did not create the exigency in *Gorman*, the Court upheld his warrantless entry.

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