No. 98-308

In the Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL L. CURRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KEVIN M. SANDKUHLER
Colonel, U.S. Marine Corps
Director, Appellate Government Division

RUSSELL J.E. VERBY
Lieutenant, JAGC, U.S. Naval Reserve
Appellate Government Division
Navy-Marine Corps Appellate Review Activity
Washington, D.C. 20374
(202) 433-2230

QUESTIONS PRESENTED

1. Whether a military police officer who looked through the upper window of petitioner's Marine barracks room conducted a Fourth Amendment search interfering with petitioner's reasonable expectation of privacy.

2. Whether looking through the window, if a search, was unreasonable under the circumstances.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-308

MICHAEL L. CURRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-4a) is reported at 48 M.J. 115. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals (Pet. App. 5a-28a) is reported at 46 M.J. 733.

JURISDICTION

The United States Court of Appeals for the Armed Forces entered judgment on May 27, 1998. The petition for a writ of certiorari was filed on August 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner was convicted by a military judge, sitting as a general court-martial, of conspiracy, premeditated murder, robbery, and kidnapping, in violation of Articles 81, 118, 122, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 881, 918, 922, and 934. He was sentenced to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Pet. App. 1a-2a. That portion of the life sentence in excess of 30 years was subsequently suspended. *Id.* at 6a.

1. In the early morning hours of April 3, 1992, an anonymous phone call came into the military police station at the Marine Corps Base, Camp Lejeune, North Carolina. The soft-spoken anonymous caller, later identified as petitioner, offered information about two murders, if the military police officers (MPs) arrived at his barracks room within the next 10 to 15 minutes. The MPs at the time mistakenly understood the caller to say that murders would occur in the next 10 to 15 minutes. Pet. App. 2a, 7a; Trial Tr. 45-46.

The MPs quickly went to the barracks building and room from which the anonymous call had been made. The barracks building was a three-story structure. The room from which the call had been made was on the ground floor and was accessible from a common sidewalk. The MPs knocked repeatedly on the door but received no answer. Although curtains covered the room's adjacent window, the MPs noticed that the curtain was pulled back on a smaller window above the covered main window. One MP, standing in the interlocked fingers of another to get a higher vantage point, was able to see through the upper window. He observed petitioner on a bed lying face up and

motionless despite the MPs' repeated knocks on the door. Pet. App. 2a, 7a; Trial Tr. 34-35, 46-47.

Concerned about petitioner's failure to respond, the MPs entered the room with a pass key. Petitioner's wrists had been slashed. The MPs applied first aid and called for an ambulance. They also found a razor blade and two apparent suicide notes addressed "to whom it may concern" and "to my loving family." In the notes petitioner admitted his involvement in the murder of another Marine, Lance Corporal Rodney L. Page. Pet. App. 2a, 7a; Trial Tr. 50.

2. Petitioner was charged under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, with offenses arising from the murder of Lance Corporal Page. Before trial, petitioner moved to suppress the suicide notes as the fruits of an allegedly illegal search. The military judge ruled that looking into the room from a public sidewalk was not a search, and that the MPs lawfully entered the room and seized the notes to respond to a life-threatening emergency. Pet. App. 7a. Petitioner was subsequently convicted by a military judge of various violations of the Uniform Code of Military Justice, including premeditated murder. *Id.* at 1a-2a.

3. The United States Navy-Marine Corps Court of Criminal Appeals affirmed. Pet. App. 5a-28a. The court held that the MP's observation through the upper window of petitioner's barracks room was not a Fourth Amendment search. *Id.* at 16a-18a. The court explained that "reasonable expectations of privacy within the military society will differ from those in the civilian society." *Id.* at 16a. While not prepared "to say that there is no circumstance under which a military member would have a reasonable expectation of privacy in a military barracks room," the court concluded that peti-

tioner "had, at least, a reduced expectation of privacy in his barracks room." *Id.* at 17a. The court therefore held that "the observation by the police through the gap at the top of the curtains from a place where they had a right to be and without physical intrusion was not a search within the meaning of the Fourth Amendment." *Id.* at 18a.

The court further held that, after observing petitioner lying motionless and unresponsive notwithstanding repeated knocks on the door, the MPs reasonably entered the room with a pass key to render emergency assistance. Pet. App. 18a-19a. Finally, the court held that the MPs reasonably seized the suicide notes in plain view and read them "to obtain information that would assist in rendering immediate medical aid." *Id.* at 19a-20a.

A concurring judge agreed that petitioner's Fourth Amendment rights had not been violated. Pet. App. 23a-28a (Lucas, J., concurring). The concurring judge concluded that the observation through petitioner's window did not invade petitioner's subjective expectation of privacy, because petitioner had placed the anonymous call inviting the MPs to his barracks room.[1] *Id.* at 24a-25a. The concurring judge suggested that looking into the upper window of petitioner's barracks room would otherwise have been a Fourth Amendment search. *Id.* at 25a-27a.

---

[1] The majority did not rest its decision on the fact that petitioner had made the call inviting the MPs to his barracks room, because that fact was only established through petitioner's testimony at trial. In the majority's view, there was a risk that petitioner's testimony on that point might have been induced by the need to respond to the evidence of the suicide notes, which had already been found to be admissible. Pet. App. 9a-11a.

4. The United States Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-4a. It explained that Fourth Amendment claims are reviewed *de novo* and it noted some ambiguity in the lower court's opinion on that point. *Id.* at 3a. It concluded, however, that it "need not decide whether the court below applied the correct standard or remand for clarification of the decision below, because we hold, having reviewed the military judge's decision *de novo,* that the military judge did not err." *Id.* at 3a-4a.

ARGUMENT

Petitioner does not dispute that, based on the circumstances known to them at the time they entered his barracks room, the MPs properly entered the room to offer emergency assistance. Pet. 5. He argues, however, that the entry was invalid because the prior observation through the upper window of his barracks room was an illegal Fourth Amendment search. Pet. 5-8. The courts below properly rejected that claim. Further review is not warranted.

1. a. The observation through petitioner's barracks room window was a Fourth Amendment search only if it interfered with a privacy "expectation that society is prepared to honor." *California* v. *Ciraolo*, 476 U.S. 207, 214 (1986); see generally *Katz* v. *United States*, 389 U.S. 347, 360-362 (1967) (Harlan, J., concurring). As the lower court properly concluded in this case, "reasonable expectations of privacy within the military society will differ from those in the civilian society." Pet. App. 16a.

> The expectation of privacy is different in the military than it is in civilian life. Military inspections have been traditionally accepted and are expected by soldiers. From his first day in boot camp, the soldier has come to realize that unlike his civilian

> counterpart he is subject to extensive regulation by his military superiors. The soldier cannot reasonably expect the Army barracks to be a sanctuary like his civilian home.

Committee for GI Rights v. *Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975) (citation and internal quotation marks omitted); cf. *Parker* v. *Levy*, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.") (rejecting First Amendment challenge to punishment of officer for failing to obey lawful order).

Military rules and regulations allow inspections of barracks rooms that would clearly be impermissible in the setting of civilians' private homes. See Mil. R. Evid. 313(b) (allowing administrative inspections "to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle"). Similarly, barracks rooms are specifically excluded from the military provision requiring special authority for arrests in private dwellings. Rule for Courts-Martial 302(e)(2) ("'Private dwelling' does not include the following, whether or not subdivided into individual units: living areas in military barracks."); see, *e.g.*, *United States* v. *McCarthy*, 38 M.J. 398, 400-403 (C.M.A. 1993) (upholding warrantless entry into accused's barracks room to make arrest even though Fourth Amendment ordinarily would require warrant to arrest civilian in his home) (citing *Payton* v. *New York*, 445 U.S. 573 (1980)).

The courts in this case assumed that petitioner might have some reasonable expectation of privacy in his barracks room. Pet. App. 17a; compare *Hudson* v. *Palmer*,

468 U.S. 517, 522-530 (1984) (prisoners have no Fourth Amendment privacy expectations in cells). Military rules, while allowing routine administrative searches of barracks rooms, do not allow such searches to serve as subterfuges for criminal investigation. Mil. R. Evid. 313(b) ("primary purpose" of inspection must be administrative and an "examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule"); cf. *United States* v. *Taylor*, 41 M.J. 168, 171-172 (C.M.A. 1994) ("Mil. R. Evid. 313(b), which makes a distinction between administrative inspections and inspections for prosecutorial purposes, is probably more restrictive than it need be."), cert. denied, 513 U.S. 1153 (1995). The courts below correctly concluded, however, that petitioner at best had "a reduced expectation of privacy in his barracks room." Pet. App. 17a.

b. Even if this case had involved a private residence, it would not have been a search for the MPs to look through the upper window while standing in a public place. The Fourth Amendment does "not forbid [police officers] to observe" protected areas with their naked eyes so long as they make their observations from an area outside the curtilage where members of the public reasonably might do the same. *United States* v. *Dunn*, 480 U.S. 294, 304 (1987); accord *Florida* v. *Riley*, 488 U.S. 445, 449-452 (1989) (opinion of White, J.) (observing curtilage of home from helicopters in public airspace was not Fourth Amendment search); *id.* at 454 (O'Connor, J., concurring) (relevant inquiry is "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity"); *Ciraolo*, 476 at 213-214 (naked eye observation of protected curtilage from unintrusive aerial

viewpoint not Fourth Amendment search). See also *Minnesota* v. *Carter*, No. 97-1147 (Dec. 1, 1998), slip op. 1-4 (Breyer, J., concurring) (no search where officer looked from public vantage point through gap in window blinds into garden apartment that was partly below ground).

It is of no moment that the upper window was above normal eye-level and required the observing MP to be lifted up by another MP. In *Dunn*, for example, the officers secured their vantage point only after entering the defendant's property, crossing several fences, and shining a flashlight through the gates of defendant's barn, which this Court assumed, without deciding, was entitled to the same degree of constitutional protection as a residence. 480 U.S. at 297-298, 303-304. The Court nonetheless held there was no Fourth Amendment search, because the officers' observations were made from open fields without crossing into the curtilage. *Id.* at 304-305. See also *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (opinion of Rehnquist, J.) (whether officer "'changed [his] position,' and 'bent down at an angle so [he] could see what was inside'" the car, is "irrelevant to Fourth Amendment analysis"; there is no legitimate expectation of privacy in that which can be viewed from outside by "inquisitive passersby or diligent police officers").[2]

---

[2] In *McDonald* v. *United States*, 335 U.S. 451 (1948), the Court held that officers violated a defendant's Fourth Amendment rights by forcibly entering a rooming house and standing on a chair to look through the transom into the defendant's bedroom. Justice Douglas's opinion for the Court did not specify the particular act that violated the Fourth Amendment. *Id.* at 452-456. In his concurring opinion, Justice Jackson explained that, in his view, the only violation was the forcible entry: "If [officers lawfully inside the house] peeped through the keyhole or climbed on a chair or on

c. In any event, given the reduced expectation of privacy applicable to military barracks rooms, petitioner cannot claim that his reasonable expectation of privacy was invaded by the MPs' observation into his barracks room from an elevated public vantage point. The lower court in this case properly drew an analogy to this Court's decision in *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986). See Pet. App. 17a-18a. *Dow* held that the Environmental Protection Agency's use of a mapping camera to enhance aerial, naked-eye views of a commercial complex did not constitute a Fourth Amendment search. 476 U.S. at 239. The Court recognized that the area at issue "can perhaps be seen as falling somewhere between 'open fields' and curtilage, but lacking some of the critical characteristics of both" and that "actual physical entry by EPA into any enclosed area would raise significantly different quesions." *Id.* at 236-237. While the industrial complex was not unprotected by the Fourth Amendment, the lesser expectation of privacy there as compared to a home was an important factor in finding there had been no search. *Id.* at 237-238.

Thus, even assuming that an elevated view from a public vantage point into a window of a private residence might constitute a Fourth Amendment search, a different result would clearly be warranted in light of the reduced expectation of privacy applicable to military barracks rooms. The cases cited by petitioner (Pet. 7 nn. 4-5) are distinguishable because many involved views from protected curtilage rather than a public vantage point, and none involved a visual observation of a military barracks from a public place.

---

one another's shoulders to look through the transom, I should see no grounds on which the defendant could complain." *Id.* at 458.

2. Even if looking through the upper window had constituted a "search," it would not have been an "unreasonable" one violative of the Fourth Amendment. Cf. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985) ("To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. * * * [W]hat is reasonable depends on the context within which a search takes place."); cf. also *O'Connor* v. *Ortega*, 480 U.S. 709, 719 (1987) (opinion of O'Connor, J.). This Court's "cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665-666 (1989). The military setting clearly presents "special governmental needs" justifying Fourth Amendment intrusions that would not be permitted if private citizens and private homes were involved. See, *e.g.*, *Callaway*, 518 F.2d at 477; *Taylor*, 41 M.J. at 171-172; cf. *Parker*, 417 U.S. at 758.

Balancing the degree of intrusion against the justification for it, the MPs acted reasonably by looking in the barracks room window. The intrusion, assuming it was a search at all, clearly was a minimal one: "there was no physical entry into the room, and the police made their observation with the naked-eye * * * from a place, a public sidewalk, where they had a right to be." Pet. App. 17a. On the other side of the scale, there was an urgent need for action. The MPs at the time understood the caller to say that murders would occur in a specific barracks room within the next 15 minutes.

Even when petitioner's call is scrutinized with the benefit of hindsight and the luxury of replay, it is an urgent invitation to the MPs to come to petitioner's barracks room within the next 15 minutes to discuss past murders. The MPs knew that the call had come from a specific room, and they responded immediately. Yet the door was locked and no one answered their repeated knocks. It was not unreasonable for them to look in the window; to the contrary, it would have been unreasonable for them not to have done so. In fact, even if this case had involved a private residence rather than a military barracks, the MPs would have been justified in looking through the upper window to determine whether there was someone inside in need of immediate assistance. Cf. *Mincey* v. *Arizona*, 437 U.S. 385, 392 (1978) (police may enter private residence without warrant if they reasonably believe that someone inside is in need of immediate aid).[3]

[3] Petitioner suggests (Pet. 8-9 n.6) that the courts have reached divergent conclusions about the degree of probability required before the police may properly make a warrantless entry into a residence in order to give immediate aid to someone inside. Because this case arises in the unusual setting of a military barracks, and because the MPs did not enter the barracks until they had strong grounds to believe that petitioner was in need of immediate assistance, this case would not be a suitable vehicle to address any such divergence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

KEVIN M. SANDKUHLER
Colonel, U.S. Marine Corps
Director, Appellate Government Division

RUSSELL J.E. VERBY
Lieutenant, JAGC, U.S. Naval Reserve
Appellate Government Division
Navy-Marine Corps Appellate Review Activity

DECEMBER 1998