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STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Douglas B. Shapiro, P.J., and William C. Whitbeck, Cynthia Diane Stephens JJ,

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

SC: 150906
COA: 314337
St. Joseph CC: 12-017690-FH

v

MICHAEL RADANDT,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted,

September 30, 2015

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Plaintiff-Appellee,

v

MICHAEL RADANDT,

Defendant-Appellant.

PROOF OF SERVICE

Nikki Sunlin, being duly sworn, deposes and says that she mailed the foregoing Brief on Appeal and Appendix A and Attachments 1 & 2 to opposing counsel at, by depositing the same in the United States Mail, postage prepaid, at Kalamazoo, Michigan on September 30, 2015:

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Statement of Questions Presented

Did the officers unlawfully expand a "knock and talk" procedure by entering the Mr. Radandt's back yard and walking onto a wooden deck, which was attached to the home?

Defendant-Appellant's Answer:	Yes.
Plaintiff-Appellee's Answer:	No.
Circuit Court's Answer:	No.
Court of Appeals' Answer:	No.

If a constitutional violation occurred, does the good-faith exception to the exclusionary rule apply when an illegal predicate search formed the probable cause to support a subsequent search warrant?

Defendant-Appellant's Answer:	No.
Plaintiff-Appellee's Answer:	Yes.
Circuit Court's Answer:	Did not answer.
Court of Appeals' Answer:	Did not answer.

Statement of the Basis of Jurisdiction

This Court has jurisdiction to hear Radandt's appeal pursuant to MCR 7.301 et seq. Radandt appeals from a December 4, 2014 opinion of the Court of Appeals. Appendix 194a. The Court of Appeals affirmed a circuit court opinion issued on October 25, 2012, that found the officers did not violate Radandt's Fourth Amendment rights in conducting a knock and talk on his property. Appendix 182a. This Court granted Radandt's application for leave to appeal on July 1, 2015. Appendix 201a.

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Introduction

The home has always held a special place in our society. And the law provides heighted protections to our privacy within the home. Yet, our social norms traditionally allow complete strangers to approach and knock on our door. Most of the time, our homes are equipped with an external button strangers are welcome to push to get our attention inside. We expect this to happen. And because a private citizen may approach our homes to engage in conversation, make a sale, deliver a product, or pass out political information, police are also authorized to approach homes for the purposes of speaking to its occupants.

Knock and talk procedures have been widely accepted by courts across the country on this very premise. But when police enter a suspect's private property without a warrant, constitutional issues arise.

The Unites States Supreme Court has recognized that a search occurs when the government physically intrudes one's home, including the curtilage. As a result, limits must be placed on knock and talk procedures to protect constitutional rights and guide effective law enforcement. Reasonableness is the touchstone of Fourth Amendment analysis. Appellant requests the Court find that police conduct during a knock and talk must be limited to ordinary citizen conduct, including only approaching areas in which the general public is licensed to approach, knocking, waiting to be received, and absent an invitation to remain longer, leaving. Appellant is not requesting a bright-line rule that officers must knock on the "front door" first or that they may never enter the backyard, although that certainly seems like a rare activity for an ordinary citizen to do. Put simply, officers may do no more than any private citizen may do.

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Statement of Facts

In the summer of 2011, St. Joseph County police officers received an anonymous tip of marijuana being grown, lights on at night, and complaints of high traffic at 18853 6th Avenue, located in the City of Three Rivers, the home of Mr. Radandt. Appendix 53-54a, 57a.

18853 6th Avenue – Appendix 43a

The front (west side) of the home bordered Sixth Avenue, with the back (east side) bordered by a wooded area. *Id*. at 65-66a, 102a. There was an unpaved, dirt driveway to the north of the home. *Id*. at 65a, 140a. A barn stood at the end of the driveway. *Id*. at 65a. The front, (northwest) corner of the home, had a porch with a door ("front door"). *Id*. 64-65a, 83-84a. Another door existed on the north side of the home, abutting the driveway ("middle door"). *Id*. at 68a, 84a, 100a. Approximately twenty feet from the middle door was the northeast corner of the home. *Id*. at 65a. On this east side of the home, there was a slider door ("back door"). *Id*. at 44a, 65-66a. A wooden deck and steps were attached to the back door. *Id*. at 44a, 65-66a.

In August 2011, officers McCoy and Abnet visited the property ("summer entry"). *Id*. at

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79a, 142a. Officer McCoy testified it was common for this two-man team to investigate tips because its "quicker and easier for us to go knock on the doors versus setting up a week long investigation." *Id*. at 76a. When the officers pulled in the "gravel or dirt" driveway, they found what appeared to be a "vacant home, almost." *Id*. at 97, 98a, 140a. They knocked on the door, received no answer, heard no voices, and then chose to walk around the property. 97a. The officers testified that traffic patterns were present leading to the backyard, but also admitted they traversed the south side of the home and peered into windows without any guidance the from so-called traffic patterns. *Id*. at 99a. The officers looked into the windows on all four sides of the home and received a good view of the entire interior of the lower level. *Id*. at 99-100a. The officers walked "all over the premises" and found holes near the driveway, which the officers considered to be holes left by marijuana plants. *Id*. at 79a. The officers also noted black windows covering and specifically, Officer McCoy noted this black Visqueen was sometimes present at other "indoor grows" he visited and that it was often used to conceal a marijuana grow. *Id*. at 74a. Also during this "summer entry," the officers obtained "permission" from neighboring property owners to walk their property, including "trails" that led up behind Mr. Radandt's home for the purpose of viewing Mr. Radandt's home. *Id*. at 60a. These trails were described as cleared paths through "overgrown thickets" in a wooded area. *Id*. at 117-118a. Finding no facts to show probable cause for a search warrant, the officers left. *Id*. at 82a.

In December 2011, the officers received another anonymous tip complaining of lights on upstairs and traffic at Mr. Radandt's residence. *Id*. at 61a, 140a. McCoy and Abnet again visited the property, this time pulling into the driveway and parking adjacent to the middle door, where the backyard of the home was not visible. *Id*. at 90a. Upon arrival, the officers noticed two cars in the driveway, an open barn with a light on and power tools laid out, and a dog on the property.

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Id. at 62a. Both officers bypassed the front door and knocked on the middle door. *Id*. at 65a, 84a, 115a, 145a, 152-153a. Officer McCoy testified this middle door "the entrance most commonly used" and the door where "people come in and out." *Id*. at 65a, 84a. They received no answer. *Id*. at 68a, 88-89a. Officer McCoy testified "we then walked to the east around the corner," which was estimated to be about twenty feet from the middle door. *Id*. at 68a. The officers testified they followed a "worn foot path" or "traffic pattern" or "grass [that] was beat down" running to the rear of the home where they reached the back door. *Id*. at 66a, 68a, 115-116a, 145a. The officers also circled areas immediately surrounding the home without following any "worn foot paths" or "traffic patterns" or beat down grass. *Id*. at 99a, 101a.

While the officers testified they did not have any probable cause or reasonable suspicion of criminal activity in the backyard, Detective Abnet's testimony confirms the observations from the summer entry remained on his mind. *Id*. at 158a.

It is from this vantage point in the backyard that officer McCoy first heard voices, first observed the vent on the east side of the home, and first smelled marijuana. *Id*. at 69-70a, 86a, 90a, 99a, 101-102a, 125a. McCoy did not smell marijuana until he was at the backdoor. *Id*. at 90. They knocked on the back door, but received no answer. *Id*. at 68a, 71a. While at the rear of the home, McCoy noticed the blacked out windows "the same way they were before." *Id*. at 70a. The officers then proceeded around the south side of the home to complete a full circle of the home. *Id*. at 71a. Without making contact, the officers left to obtain a search warrant. *Id*.

The officers came to the home on two dates, saw the home in two very different contexts, and acted in the exact same manner. *Id*. at 100a, 150a.[1] The officers knocked, failed to receive an answer and then "continually attempted to make contact" by knocking on the doors around the

[1] Q: And your conduct in both visits was essentially the same, you knocked on all four doors, circled the house, an searched the property, correct? Yep, pretty much." Appendix 150a.

residence, including entering the backyard and wooden deck. *Id*. at 102a. The officers did not perform an independent investigation into the anonymous tips, other than the warrantless entries described above. *Id*. at 110a. Specifically, they did not visit the property at night to confirm traffic levels confirm any signs drug trafficking. *Id*. at 110-111a, 126a, 149a.

The officers used this information to obtain a search warrant for the home. *Id*. at 71a. As a result of the executed search, Mr. Radandt was charged with, among other things, the manufacture of marijuana in violation of MCL 333.7401(2)(d)(ii). *Id*. at 1a. Mr. Radandt and companion defendant Mr. Fuller filed joint motions to suppress/dismiss, in part arguing the officers entry into the backyard was an unlawful expansion of a knock and talk. *Id*. at 11a. The trial court denied the motion to suppress/dismiss finding the Officers merely followed a path to the rear of the home and were "not looking for any contraband in the back yard, as in *Galloway*." Appendix 182-187a. Specifically, the trial court held, "I find that there was no reason for them not to go into the backyard when they believed it was a path to another door the people used to enter the building to try and gain access to talk to somebody. So that's my ruling." *Id*. On November 29, 2012, Mr. Radandt entered a conditional guilty plea to the unlawful delivery/manufacture of 5-45 kilograms of marijuana allowing him to pursue this appeal. *Id*. at 188a. On December 28, 2012, Mr. Radandt was sentenced to a six-month term of imprisonment in county jail, but this sentence was stayed pending Mr. Radandt's appeal. *Id*. at 188-191a.

On January 17, 2013, Mr. Radandt filed an application for leave to appeal to the Michigan Court of Appeals. *Id*. at 8. On March 14, 2013, the Court of Appeal denied Mr. Radandt's application. *Id*. at 192. After filing an application for leave to appeal, this Court remanded the case to the Court of Appeals for consideration, as on leave granted, to address whether the police unlawfully expanded a "knock and talk" procedure by entering Mr. Radandt's

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backyard and walking onto a wooden deck, and if a constitutional violation occurred, whether the good-faith exception to the exclusionary rule applies under these facts. *Id*. at 193a. The Court of Appeals panel affirmed trial court, with Judge Shapiro dissenting. *Id*. at 194a. On July 1, 2015, this Court granted Mr. Radandt's application for leave to appeal to address the questions presented. *Id*. at 201a.

Standard of Review

The standard of review as to questions of law is de novo. *People v Sierb*, 456 Mich 519, 522; 582 NW 2d 219 (1998). A trial court's factual findings are reviewed for clear error. *People v Miller*, 482, Mich 540, 544; 759 NW2d 850 (2008). Clear error exists if the reviewing court is left with a definite and firm conviction the trial court made a mistake. *Id*.

Argument and Authorities

I. THE FOURTH AMENDMENT'S FOUNDATIONAL PREMISE IS TO PROTECT THE CITIZENS' RIGHT TO BE FREE IN THEIR HOMES; OFFICERS VIOLATED MR. RADANDT'S CONSTITUTIONAL RIGHTS BY EXPANDING THE KNOCK AND TALK PROCEDURE BY PHYSICALLY INTRUDING AN AREA OF THE HOME TO WHICH COMMON VISITORS ARE NOT LICENSED TO ENTER.

Mr. Radandt filed a motion to dismiss/suppress in the trial court arguing the officers unlawfully expanded a knock and talk procedure contrary to his Fourth Amendment rights. Appendix 11a. Therefore, the questions presented are preserved for the Court's review.

A. Knock And Talk Procedures Are Based On Ordinary Citizen Conduct And Officers May Do Nothing More To Comply With The Fourth Amendments Protections Of The Home.

The ability for the police to knock on a door and ask questions is rooted in the concept of how an ordinary citizen would behave. See *Kentucky v King*, ___ US ____ 131 S Ct 1849, 1862, 179 L Ed 865 (2011) ("When law enforcement officers who are not armed with a warrant knock

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on a door, they may do no more than any private citizen may do."); *People v Frohriep* 247 Mich App 692; 637 NW2d 562 (2001) (holding that the police may go to a residence and engage in a conversation with a person, as this is "ordinary citizen contact").

Frohriep defined a knock and talk procedure as:

> a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items.

Id. at 697.

Knock and talk procedures have widely been approved of by courts across the country. But, when combined with other warrant exceptions, the knock and talk procedure gives police the opportunity to approach a home like a sheep and transform into a wolf. "See Craig M. Bradley, "Knock and Talk" and the Fourth Amendment, 84 IND. L.J. 1099 (2009) ("Under "knock and talk," police go to people's residences, with or without probable cause, and knock on the door to obtain plain views of the interior of the house, to question the residents, to seek consent to search, and/or to arrest without a warrant, often based on what they discover during the "knock and talk." When combined with such other exceptions to the warrant requirement as "plain view," consent, and search incident to arrest, "knock and talk" is a powerful investigative technique.) There is no doubt officers use knock and talks to see what they can find while potentially obtaining consent to search. As Detective Abnet said, "If I find it, I find it."[2] Appendix 157a. While there is nothing inherently wrong with an officers keeping their eyes

[2] And your purpose to go onto the premises on 12-12-11 was to do an investigation, correct? A: Yes. Q: And to you an investigation means gathering evidence, correct? A: Yes. Q: You want to see if there is anything in plain view that you can find that's evidence that you can go and get a warrant on, right? A: Not necessarily. Q: Is that part of an investigation? A: If I find it, I find it.

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open, there is substantial risk that the Court of Appeals, in its opinion here, expanded the knock and talk procedure by allowing police to enter Mr. Radandt's backyard, and thus backyards across the state, to wander at will. The muddy waters of what is permissible conduct during a knock and talk is nicely summarized by Detective Abnet's answer to the trial court's question about exactly how he was looking into home's windows: "I wasn't like a peeping Tom trying to I-spy in the glass. I was just trying to see if anybody was in there." Appendix 168a. This is a distinction without a difference.

The knock and talk procedure must be limited to its moorings: ordinary citizen contact. If the police are given rights greater than ordinary citizens, the balance of law enforcement against our collective constitutional rights is tipped too far in favor of the police. As *Frohriep's* definition makes clear, police do not use knock and talks to make friendly chitchat or borrow a cup of sugar. *Frohriep*, *supra* at 697. Instead, it is investigative tool aimed at a specific *suspect*. *Id*. While ordinary citizens may certainly knock at a stranger's door, they are not looking for evidence to speed up an investigation or to make an arrest on the spot. As one commenter noted:

> The courts have taken the unexceptionable behavior that ordinary citizens might engage in and turned it into a right of police to question people at their home, which in turn gives them the authority to trespass on private areas of the curtilage, look around, and peer in the windows. What protection does the curtilage afford if it is not to guard against just this sort of thing? "Knock and talk" has become a "talisman in whose presence the Fourth Amendment fades away and disappears."

See Craig M. Bradley, "Knock and Talk" and the Fourth Amendment, 84 IND. L.J. 1099 CITE (2009) (citations omitted).

This case presents a question as to the permissible scope of a knock and talk procedure. Reversal of the Court of Appeals is necessary to restore protections in one's home and prevent officers from unilaterally entering backyards across the state based on nothing more than signs

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that someone *may be* home. As explained *infra*, Mr. Radandt requests the Court find that police conduct during a knock and talk must be limited to ordinary citizen conduct, including only approaching areas in which the general public is licensed to approach, knocking, waiting to be received, and absent an invitation to remain longer, leaving. Any action outside these boundaries cannot reasonably be considered ordinary citizen conduct. Given the inherent risks to the sanctity of one's home, police may do nothing more without a warrant.

B. The Home Is Entitled to Heighted Protection Under the Fourth Amendment

Both the United States and Michigan Constitutions guarantee the right of the people to be free from unreasonable searches and seizures. US Const, amend IV; US Const, amend XIV; Const 1963, art 1, §11. Under the Fourth Amendment, the home is the first among equals. *Florida v Jardines*, 569 US 1; 133 S Ct 1409, 1414; L Ed 2d 495 (2013). At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Id*. citing *Silverman v United States*, 365 US 505, 511, 81 S Ct 679, 5 L Ed 2d 734 (1961). This tenant dates back to the late 1800's, where the United States Supreme Court stated that the Fourth Amendment's prohibitions apply:

> [T]o all invasions on the part of the government and its employés [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence [sic]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .

Boyd v United States, 116 U.S. 616, 630 (1886).

A search conducted without a warrant is per se unreasonable unless the search falls into a specific exception with well-defined parameters. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). However, as Justice Scalia noted in *California v Acevedo*, 500 US 565, 582; 111 S Ct 1982; 114 L Ed 2d 619 (1991), "[e]ven before today's decision, the 'warrant

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requirement' [has] become so riddled with exceptions that it was basically unrecognizable." (holding that police may search container within an automobile upon probable cause to believe it holds evidence or contraband).

Despite these exceptions, the home has received a heighted form of protection. For example, in *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980), police officers, without a warrant, visited the defendant's home for the purposes of arresting him in connection with two armed robberies. *Id*. at 578. Officers knocked on the door, the defendant's young son opened the door, police saw the defendant, entered, and arrested him. *Id*. The Court held this warrantless entry into inside the defendant's home to make an arrest was unconstitutional, stating "neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditional since the origins of the Republic." *Id*. at 602. The Court expanded on its holding in *Payton* in *Welsh v Wisconsin*, 466 US 740; 104 S Ct 2091; 80 L Ed 2d 732 (1984) where the Court held exigent circumstances exception to the warrant requirement does not apply to warrantless entries into the home to arrest for minor offenses. In *United States v Karo*, 468, US 705, 715, 104 S Ct 3296; 82 L Ed 2d 530 (1984), the Court held that a beeper placed within a 5-gallon can of ether that notified the government the ether was inside a house was unconstitutional because that fact could not have been visually verified. In *Kyllo v United States*, 533 U.S. 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001) officers used a thermal imager to detect the amount of heat inside a home that was suspected of being used to grow marijuana. *Id*. at 29-30. The Court held that the detection of heat within a home, at least when detected by a "device that is not in general public use," violates the Fourth Amendment because it permitted the police to explore details of the home that would have been previously unknowable without a physical intrusion. *Id*. at 40. And as explained in

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more detail below, in *Jardines*, the Court held the use of a drug-detection dog at the front porch of a home constituted an unconstitutional physical instruction into the curtilage to perform a search. *Jardines*, supra at 1417.

These foundational tenants of our state and country's Fourth Amendment jurisprudence are directly at risk with the ever-expanding use of knock and talk procedures. The instant case presents this Court with the opportunity to examine and limit this procedure to properly balance the need for police investigations and the Citizens' right to be free in their homes.

C. The Court Of Appeals Erred by Basing An Officer's Ability to Enter Property on Whether Residents May Be Home Rather Than Whether the Officers Were Engaged in Ordinary Citizen Contact

The Court of Appeals concluded the officers' entry into Mr. Radandt's backyard was reasonable "in light of the various observable signs that the residents were present either in or around the home." Appendix 197a. With this decision, the Court of Appeals granted officers carte blanche to enter the curtilage of any Michigan residence upon the smallest indication that someone might be home. This decision is contrary to *Jardines* and sets an exceedingly low bar for an officer's warrantless entry into the backyards and curtilage of Michigan homes.

The determinative factor of whether an officer is permitted to wander around the curtilage cannot be whether there are "various observable signs" that someone is home. Simply being home is not an invitation for a visitor –police or otherwise– to enter someone's backyard. Instead, under *Jardines*, the proper analysis focuses on the specific area of the home to be entered, whether there is a license for an ordinary citizen to enter that area, and the purpose for entering that area.

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D. *Jardines* Prohibits Warrantless Physical Intrusions Into the Curtilage to Gather Evidence.

The *Jardines* Court provided valuable insight into the proper methods to test for Fourth Amendment violations using the traditional social norms we accept in welcoming strangers to our homes.

In *Jardines*, detectives received an unverified tip that marijuana was being grown in Mr. Jardines' home. *Jardines*, *supra* at 1413. Approximately one month later, officers came to the home, performed fifteen minutes of surveillance, and then approached the front porch of the home with a drug-detection dog. *Id*. The drug-detection dog gave a positive alert for the presence of drugs at the base of the front door. *Id*. Based on this evidence, the police obtained a search warrant. *Id*. The subsequent search revealed marijuana plants. *Id*. Mr. Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable search. *Id*.

The United States Supreme Court found the use of the drug-detection dog at the front porch of a home was a search in violation of the Fourth Amendment. Cite. In reaching this conclusion, the Court focused on the "physical intrusion" test of Fourth Amendment jurisprudence, explaining this was the "baseline" for Fourth Amendment analysis. *Id.* at 1414 citing *United States v Jones*, 565 US ___, ____, n.3, 132 S Ct 945, 950-951, n.3 181 L Ed 2d 911 (2012) ("When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, a 'search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"). The Court further explained the "reasonable expectation of privacy" test announced under *Katz v United State*s, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967) added to the "baseline" Fourth Amendment analysis, but it did not subtract from the Fourth Amendment protections "when the Government does engage in [a] physical intrusion of a

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constitutionally protected area."[3] *Id*. citing *United States v Knotts*, 460 US 276, 286, 103 S Ct 1081, 75 L Ed 2d 55 (1983) (Brennan, J., concurring).

The Court recognized that the front porch of a home is within the curtilage of the home and, for Fourth Amendment purposes, was treated as part of the home itself. *Id*. at 1414-15 citing *Oliver v Unites States*, 466 US 170, 176, 104 S Ct 1735, 80 L Ed 2d 214 (1984). Next, the Court looked to whether this entry into the curtilage was licensed. *Jardines*, *supra* at 1414-15. The Court examined the common license granted to visitors to our homes. These social norms and our traditional notions of civilized society that set our common expectations of how we treat each other's property:

> "A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *Mckee v Gratz*, 260 US 127, 136, 43 S Ct 16, L Ed 167 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v Alexandria*, 341 US 622, 626, 71 S Ct 920, 95 L Ed 1233 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." *Kentucky v King*, 563 US ___, ___, 131 S Ct 1849, 1862, 179 L Ed 2d 865 (2011).

Jardines, *supra* at 1415-16. Even the dissent echoed this concept of one's limited license to approach a specific area of the home. See *Jardines*, supra at 1420 (Alito, J., Dissenting) ("The law of trespass generally gives the public a license to use a walkway to approach the front door

[3] "The Katz reasonable expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas. *Jardines*, at 1417 citing *Jones*, supra at ___, 132 S.Ct. at 951-52.

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of a house and to remain there for a brief time.") In this same vein, the Court limited permissible police actions within the curtilage. The Court reasoned that entering the curtilage to "gather information,"[4] "trawl for evidence,"[5] or "gather evidence"[6] will implicate the Fourth Amendment.

In this dog-sniff case, the Court found that to determine whether the officers had an implied license to approach the front door turned on the purpose for which they entered. *Jardines*, supra at 1417. Justice Scalia, writing for the majority, concluded there was no customary invitation to bring a trained police dog to explore the curtilage in hopes of discovering incriminating evidence ("An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker."). *Jardines*, *supra* at 1416. As a result, the officers had no license to enter the curtilage and violated the Fourth Amendment.

Justices Kagan, Ginsburg, and Sotomayor concurred in the result explaining a violation of the Fourth Amendment could be found under either the "physical intrusion" theory or *Katz's* privacy interests test. Specifically, the minority stated that to give meaning to the right to retreat into one's own home and prevent unwelcome government intrusion, police cannot be permitted to trawl for evidence adjacent to the home with impunity. *Id.* at 1417 (J. Kagan, concurring).[7]

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[4] "While law enforcement officers need not 'shield their eyes' when passing by the home 'on public thoroughfares… an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Jardines*, *supra* at 1414.

[5] "[The right of a man to retreat into his own home and there be free from unreasonable government intrusion] would be of little practical value of the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." *Jardines*, supra at 1414.

[6] "That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Jardines*, *supra* at 1417.

[7] The majority agreed with this concept. "[The right of a man to retreat into his own home and there be free from unreasonable government intrusion] would be of little practical value of the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if

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E. The Officers Entrance Into Mr. Radandt's Curtilage In Excess Of An Implied License Is A Fourth Amendment Search Requiring A Warrant Based On Probable Cause Because The Officers' Entrance Into The Back Yard And Rear Deck Is An Unwelcome Government Intrusion Into A Constitutionally Protected Area.

i. The Back Yard and Rear Deck Are Within the Curtilage

The curtilage of a home is considered part of the home itself for Fourth Amendment purposes. Const 1963, art 1, §11; *Feller v Township of West Bloomfield*, 767 F Supp 2d 769, 772-73 (ED Mich 2011). "[E]very curtilage determination is distinctive and stands or falls on its own unique set of facts." *Daughenbaugh v City of Tiffin,* 150 F3d 594, 598 (CA 6 1998).

When determining what is included in the curtilage of a specific home, there are four factors to consider. These factors are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v Dunn*, 480 US 294, 301 (1987). These factors do not yield a definite answer; rather, they guide [us] in determining whether the area is "so intimately connected to the home that it should fall under the umbrella of Fourth Amendment protections." *United States v Johnson*, 256 F3d 895, 911 (CA 9 2001) (en banc).

A backyard accessible only by walking around the side of a home is a place generally recognized as "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Florida v Riley,* 488 US 445, 452, 109 S Ct 693; 102 L Ed 2d 835 (1989) (O'Connor, J., concurring) (quoting *California v Ciraolo,* 476 US 207, 213 (1986)); *Daughenbaugh at* 601–02 (concluding that an entire backyard was within the curtilage of the home). Further, the presences of space for gardening and hanging our laundry to dry has

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the police could enter a man's property to observe his repose from just outside the front window." *Jardines*, supra at 1414.

also been found to constitute curtilage. *United States v Jenkins,* 124 F3d 768, 772–73 (CA 6 1997).

Here, the sliding door at the rear of the home (back door) and the wooden deck affixed to the home more than satisfies the *Dunn* proximity factor. This back door door directly opens *into* the home. While the rear of the home is not "enclosed," the home is located in a rural area in where unannounced visitors would not come upon the rear of the home. As proof, the officers needed to obtain consent to enter the neighbor's property to view the back of Mr. Radandt's home. Appendix 117a. As a result, Mr. Radandt's backyard, and specifically the east side back door area, satisfies the *Dunn* enclosure factor. The area behind the home was used as an entrance, but in order to reach that area, visitors to the home would have to bypass two other doors. As a result, the layout of the home indicates an unannounced visitor would not simply walk into the backyard such that *Dunn's* nature of use factor is satisfied. *Jenkins, supra* at 773 (observing the placement of the back yard behind the house naturally protected it from the view of passers by on the only public road adjoining the property); *Daughenbaugh* at 600-01 (holding a home's backyard was curtilage in spite of evidence that neighbors could see at least a portion of the yard). Finally, similar to the lack of an enclosure, the protections needed to keep this area of the home private were minimal given its rural setting. Given the immediate proximity to the home and the nature of the use of the door as a point of entry to the home, the *Dunn* factors heavily weigh in favor of a finding the officers were within the curtilage of the home during both the summer and winter entries such that constitutional implications are squarely at issue.

ii. The Officers Performed a Search By Physically Intruding on Mr. Radandt's Home.

"When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment' has

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'undoubtedly occurred.'" *Jardines*, *supra* at 1414 citing *Jones*, supra at n.3. The officers' entry into Mr. Radandt's curtilage, including peering into his windows, entering the backyard, standing on the rear deck, and circling the home is a physical intrusion and constitutes a search.

iii. The Officers Did Not Engage In Ordinary Citizen Conduct By Searching By Knocking, Receiving No Answer, Then Proceeding Into the Backyard.

The Court's reasoning in *Jardines* regarding the permissible scope of approaching a home though the implied license cannot be ignored: **"This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."** *Jardines*, *supra* at 1415 (emphasis added). Anything more permits officers the opportunity to gain valuable evidence without a warrant under the auspices of attempting to make contact with the residents. This is not what the Fourth Amendment intended. *Id*. at 1414 ("[The right of a man to retreat into his own home and there be free from unreasonable government intrusion] would be of little practical value of the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.")

The Ninth Circuit stated that while knocking on the front door, as opposed to a different door, is not required, "once an attempt to initiate a consensual encounter with the occupants of a home fails, 'the officers should end the knock and talk and change their strategy by retreating cautiously, seeking, a search warrant, or conducting further surveillance.'" *United States v Perea-Rey*, 680 F3d 1179, 1187-88 (CA 92012) citing *United States v Troop*, 514 F3d 405, 410 (CA 5 2008) (holding that border patrol agents violated the Fourth Amendment when they conducted a

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warrantless search of the curtilage after there was no response to a knock and talk attempt). The *Perea-Rey* Court concluded:

> At most, the knock and talk exception authorizes officers to enter the curtilage initiate a consensual conversation with the residents of the home. If we were to construe the knock and talk exception to allow officers to meander around the curtilage and engage in warrantless detentions and seizures of residents, the exception would swallow the rule that curtilage is the home for Fourth Amendment purposes.

Id. at 1189.

This is consistent with the inherent risk in attempting a proper knock and talk, namely, the officers are alerting suspects of an investigation. See *Frohriep*, supra at n.4 citing Swingle & Zoellner, *"Knock and talk" consent searches: If called by a panther, don't anther,* 55 J. Mo. B. 25 (1999) ("We note that when utilizing the knock and talk procedure, the police are 'merely asking for permission to search a person's home, recognizing and risking that a refusal would not only alert the suspect that he is being watched but would quite likely leave the police empty handed.'") This is the tradeoff necessary when officer choose to forego a true investigation in hopes of obtaining incriminating evidence or admissions through a knock and talk.

Allowing the police to knock on one door, receive no answer, and meander about the property in an attempt to make contact with a suspect is not ordinary citizen conduct and is contrary to *Jardines*. This Court should hold that police conduct during a knock and talk must be limited to ordinary citizen conduct, including only approaching areas in which the general public is licensed to approach, knocking, waiting to be received, and absent an invitation to remain at the home, leaving.

Because the officers approached the middle door, knocked, received no answer, then walked into Mr. Radandt's backyard, they did not act like an ordinary citizen. Ordinary citizens would not "continually attempt[] to make contact" after a knock on the door went unanswered.

Appendix 102a. This Court should reverse the Court of Appeals and find that because strangers would not knock on one door, receive no answer, then search for another door, person, or evidence within the homeowner's curtilage, there is no implied license for the police to do the same. This is a physical intrusion into Mr. Radandt's home and violated the Fourth Amendment.

iv. The General Public Does Not Traditionally View The Backyard As An Open Invitation.

When determining what license, if any, was provided to enter Mr. Radandt's backyard, the Court must look to the traditional social expectations and social norms as to how a stranger to this home would approach, whether a salesman or police officer. *Jardines*, supra 1416 citing *King*, *supra* at 1862 ("Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do.").

The Appellee will likely to point to a number of decisions that seemingly grant officers free reign to move into a suspect's backyard. However, these cases all contained substantially different facts when evaluating whether the public used the rear entrance, thus granting the police the ability to do the same. See *United States v Thomas*, 430 F3d 274, 280 (6 CA 2006) (district court found the back door was "customarily used as the entrance to the house" and the homeowner did not argue otherwise); *United States v Titemore*, 437 F3d 251 (CA 2 2006) (sliding glass door was considered part of the principal entranceway partly because it was visible and used by the public); *United States v James*, 40 F3d 850 (CA 7 1994) vacated on other grounds 516 US 1022 (1995) (officers used a paved walkway along side of the house leading to the rear door, also rear door commonly used to enter from the adjacent alley).

But here, Mr. Radandt's home does not share common elements to *Thomas*, *Titemore*, and *James* because there are no factual findings that the rear entrance was the "primary entrance," the rear door was visible from the street, the presence of a paved path leading to the

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rear, and there was no adjacent alley. Instead, this home is a rural, wooded area.[8] There are no paved driveways or walkways. Further, the rear of the subject property is bordered by "trails" and is not visible, yet alone commonly accessed, by the public.

The trial court and Court of Appeals' relied on the lack of a "no trespassing" sign as evidence that the officers entry into Mr. Radandt's backyard was permissible. This reliance is overstated. It is hard to imagine that an individual's Constitutional protections to be free in his home are dependent upon placing a "No Trespassing" sign in his or her yard. In fact, the Sixth Circuit held this sign was of no consequence when police were conducting a pre-Jardines knock and talk in *United States. v Hopper*, 58 F App'x 619, 623 (CA 6 2003); See also *State v Christensen*, No. W2014-00931-CCA-R3-CD, Court of Criminal Appeals, Tennessee (issued May 14, 2015)[9] ("The vast majority of states that have directly address [whether "no trespassing" signs demonstrate a legitimate expectation of privacy that requires a warrant to overcome] consider signage to be but one consideration when determining whether a person has demonstrated a legitimate expectation of privacy.") (see citations therein).

And while there was no fence on the property, this must be viewed against the property as a whole. Put simply, this is not a residence in which it was necessary to install a fence to obtain privacy. The house has no rear neighbors; instead, it is bordered by "trails" within "overgrown thickets" in a wooded area. Appendix 117-118a. This must be taken into account when considering what a reasonable person would believe was necessary to maintain privacy in the home. And Mr. Radandt refuses to believe that in order to keep police from wandering on private property, every house must include a fence and no trespassing signs. That is not what the Fourth Amendment requires.

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[8] The vast majority of land in this area is agrarian. Appendix 34a.

[9] Attachment 2.tt

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The trial court and Court of Appeals relied on the presence of a "worn foot path" or "traffic patterns"[10] as a beacon to guide officers in making a reasonable attempt to establish contact with the residents. Appendix 66a, 182-186a, 194-197a. This analysis is incorrect. First, under *Jardines*, the question is whether *strangers* have a license to enter a specific area, not whether there is a path to an alternate entrance. The Court of Appeals dissent correctly answered this question:

> If an officer wishes to use the general rights of solicitor access to a residence, such as those afforded Girl Scouts, trick-or-treaters, as well as salespersons and canvassers, i.e. to knock on a stranger's front door, he may certainly do so and, if received by the resident, he may ask permission for greater access. However, we should not fool ourselves into concluding that it is routine for Girl Scouts and trick-or-treaters, or even sales persons or canvassers to walk around someone's backyard if they do not receive an answer at the front door.

See Appendix 199a.

Second, as the officers testified, they also circled the entire home in the absence of a footpath. Appendix 101a. As a result, any reliance on this path apparently leading their way is negated by their admission and objective actions that show minimal reliance on the alleged tracks.

Allowing the police to enter the curtilage to trawl for evidence is the exact harm *Jardines* prohibits. This Court should reverse the Court of Appeals and find that because strangers would not knock on one door, receive no answer, then enter the backyard to search for another door, person or evidence, there is no implied license for the police to do the same. This is a physical intrusion into Mr. Radandt's home and violated the Fourth Amendment.

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[10] Appendix 66a.

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v. The Officers Had No Implied License to Enter the Back Yard Because the Objective Facts Indicate the Officers Were Performing a Search

Pursuant to *Jardines*, a necessary aspect of determining whether a license exists to enter a specific area, the Court must examine the officer's "purpose" for entering the area. Specifically:

> [t]he scope of a license — express or implied — is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search."

Jardines, supra at 1416. In establishing this framework, the Court in *Jardines* expressly rejected the concept that an officer's subjective intent is irrelevant as stated in *Whren v United States*, 517 US 806, 116 S Ct 1769; 135 L Ed 2d 89 (1996). *Id*. at 1416-17. Specifically, while an officer's subjective intent is irrelevant in connection to an objectively reasonable search, an officer's "purpose for which they entered" a protected area is relevant to determine "*whether* the conduct was an objectively reasonable search." *Id*. (emphasis in original).

Here, the officers testified their winter entry into the backyard and rear deck was nothing more than an attempt to make contact with their suspects. Appendix 61a. However, this statement must be weighed against their actions. When approaching what appeared to be a "vacant" home in the summer, the officers knocked, received no answer, traversed the entire property, and looked in all the windows. Appendix 53-55a. But when coming upon the home in winter with "various observable signs that the residents were present," the officers did the exact same thing. Appendix 100a, 150a. As a result, the objective facts show the officers were motivated to conduct an investigation, not simply to make citizen contact. The officer's purpose in entering the backyard in the winter was to follow up on summer entry observations that clearly

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piqued their attention.[11] The objective facts show these officers were intent on entering Mr. Radandt's home, whether there were "signs of observable" life or not.

Jardines is clear that entrances into areas protected by the Fourth Amendment to "gather information",[12] "trawl for evidence,"[13] or "gather evidence"[14] are unconstitutional. And even if this Court determines the officers had an implied license to enter Mr. Radandt's backyard, no license would be permitted for anyone to enter the backyard to perform a search. As a result, this is a physical intrusion into Mr. Radandt's home and violated the Fourth Amendment.

F. The Officers Violated Mr. Radandt's Reasonable Expectation of Privacy

When considering whether a warrantless search was unreasonable, the inquiry focuses on whether an individual has "manifested a subjective expectation of privacy in the object of the challenged search,' and `society [is] willing to recognize that expectation as reasonable." *Kyllo*, *supra* at 33 quoting *Ciraolo*, *supra* at 211. Of course, privacy expectations are highest in one's home, including the right to retreat into one's home to be free from government intrusion. *Id*. at 1418 (Kagan, J. concurring). To maintain any "practical value" to these rights, police cannot be permitted to stand in an adjacent space trawling for evidence. *Id*. Justice Kagan found that the police invaded these "shared expectations" when they used trained canine assistants to reveal

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[11] Q: At the time you went to the back of the house, you didn't have any reasonable suspicion of criminal activity afoot on the premises or any probable cause to believe that criminal activity was present, isn't that right? A: No, other than what we saw there in August." 8/13 at 113.

[12] "while law enforcement officers need not 'shield their eyes' when passing by the home 'on public thoroughfares…an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Jardines*, *supra* at 1414.

[13] "[The right of a man to retreat into his own home and there be free from unreasonable government intrusion] would be of little practical value of the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." *Jardines*, supra at 1414.

[14] "That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Jardines*, *supra* at 1417.

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within the confines of the home what they could not otherwise have found there. *Id*. at 1418-1419.

Here, the officers knocked on door accessible to the public, received no answer, and walked 20 feet into the backyard. They approached a glass sliding door that opened directly into the home and for the first time, smelled marijuana. No evidence was presented that showed the smell of marijuana or vent fan could be noticed or observed from areas open to the public to visit. Instead, this information only became available to the officers by entering the backyard. By walking into this area, the police gained insight as to Mr. Radandt's personal details within the house. These aspects of Mr. Radandt's life were not broadcast to the general public. The general public does not expect the police to walk into their backyards uninvited and by doing so, they violated Mr. Radandt's reasonable expectation of privacy.

II. THE GOOD FAITH EXCEPTION DOES NOT APPLY BECAUSE THE SEARCH WARRANT AFFIDAVIT WAS SOLELY BASED ON PROBABLE CAUSE OBTAINED FROM ILLEGAL PREDICATE SEARCHES.

A. History Of The Good Faith Exception To The Exclusionary Rule.

Evidence that is seized as the result of an unconstitutional search and seizure is prohibited from being admitted in court, and this exclusion extends to the introduction of materials and testimony that are the direct or indirect result of an illegal search. *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999). The United States Supreme Court referred to this evidence as "fruit of the poisonous tree." *Wong Sun v United States*, 371 US 471, 487–488; 83 S Ct 407; 9 L Ed 2d 441 (1963). The exclusionary rule known as the "fruit of the poisonous tree" doctrine is designed to safeguard against future violations of the Fourth Amendment through the rule's deterrent effect of excluding evidence found or elicited as a result of unconstitutional activity. *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008).

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The United States Supreme Court adopted the "good faith" exception to the exclusionary rule in *United States v Leon*, 468 US 897; 104 S Ct 3430; 82 L Ed 2d 677 (1984). Here, the Court held that the exclusionary rule does not bar the admission of evidence seized in "reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id*. at 900. Michigan adopted this ruling in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004). The United States Supreme Court based this exception to the warrant requirement on a balancing test between the benefits of deterrence against the costs of exclusion. *Leon* at 906-07. And as this Court has stated, the purpose of the rule is to "deter police misconduct." *Goldston* at 480, 483. On the other hand, the costs include preventing the use in the prosecutor's case in chief of trustworthy evidence obtained in reliance on a search warrant subsequently found to be defective. *Id*. at 482.

B. Split Of Authority Regarding *Leon's* Good Faith Exception To Predicate Illegal Searches.

Leon only addressed search warrants that were technically deficient or based on affidavits that failed to establish probable cause. It did not, however, address the interplay between the good faith exception and the "fruit of the poisonous tree" doctrine established by *Wong Sun*. See *United States v Meixner*, 128 F Supp 2d 1070, 1076 (ED MI 2001). In other words, the issue left unanswered and now before this Court is whether *Leon's* good faith exception applies when officers act pursuant to search warrant that is based on an illegal predicate search. This question has created inconsistent opinions within the Sixth Circuit and a circuit split in the federal courts.

In 2012, the Sixth Circuit stated the "answer to this question is far from clear, and we have issued inconsistent opinions on the issue. *United States v Fugate*, Docket No. 11-3694 (filed

September 7, 2012)[15], citing *United States v McClain*, 444 F3d 556, 559 (CA 6 2006) and *United States v Davis*, 430 F3d 345, 385 n.4 (CA 6 2005).

In *McClain*, an officer responded to a dispatch call regarding "suspicious activity" at a home believed to be vacant. *McClain* at 559-60. The officer circled the home and found nothing out of the ordinary until he reached the front door, which was slightly ajar. *Id*. He entered the home suspecting a burglary was in process. *Id*. While in the basement, he found evidence that a marijuana grow operation was being planned, although he did not find any marijuana. *Id*. The officer left the home. *Id*. A supervisory officer began investigating the home and over several weeks of investigation, determined the occupants were setting up a marijuana grow operation at this residence and others. *McClain* at 559-60. The supervisory officer obtained search warrants for the house and five other locations he linked through his investigation. *Id*. The affidavit relied, in part, on the evidence obtained during the warrantless entry into the home and explicitly described the circumstances of that search. *Id*. Execution of the search warrants revealed a large number of marijuana plants. *Id*. McClain moved to suppress and the lower court found the warrantless entry and search required the suppression of the evidence and that the good faith exception did not apply. *Id*. at 561.

On appeal, the Sixth Circuit found the warrantless entry of the home was not supported by probable cause, but reversed based on the good faith exception. *Id*. at 564-66. The Court wrestled with the conflicting opinions from other circuits, but determined "this was one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation." *Id*. at 565-66. In coming to this decision, the Court largely relied on two points: 1) an Eighth Circuit opinion that based its determination on whether the exclusionary rule should apply on the how close the infringing officer's conduct was "to the line of validity" (*United States v White*, 890 F2d 1413, 1419 (CA 8 Cir 1989)) and 2) and, in the words of the Sixth Circuit, more

[15] Attachment 2.

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important than the Eight Circuit's opinion, the officers who sought and executed the search warrants were *not* the same officers who performed the initial warrantless search and the affidavit, prepared by the officer that did not make the illegal entry, fully disclosed to a neutral magistrate the circumstances surrounding the initial search. *Id*. at 566.

On the other hand, the Sixth Circuit reached an opposite conclusion in *Davis*. Here, officers performed a traffic stop on an individual thought be trafficking narcotics. *Davis* at 349. Roughly thirty minutes later, a drug-sniffing dog was brought to the stop, but failed to alert for drugs. *Id*. at 350. Subsequently, a DEA agent arrived and ordered another drug dog to the scene. *Id*. Roughly an hour later, the second dog returned a positive alert, which then led to a search warrant and the recovery of a large amount of cash. *Id*. Davis moved to suppress the search, but the lower court denied the motion finding reasonable suspicion to justify the continued detention of Davis. *Id*.

On appeal, the Court reversed finding that once the drug-sniffing dog failed to alert positively to the presence of drugs, the officer's suspicions that Davis was in possession of narcotics was dispelled. *Id*. at 356. As a result, the officers had no reason to continue to detain Davis to permit a second examination. *Id*. The next question for the court was whether the warrant cured the constitutional defect. The Court found it did not, mainly because the warrant, after the information obtained in violation of the Fourth Amended was removed, failed to provide probable cause to support its execution. *Id*. at 358. While the prosecution did not rely on the good faith exception, the Sixth Circuit announced its decision on whether *Leon* would apply:

> Moreover, we agree with the numerous other circuits that have held that the *Leon* good faith exception is inapplicable where a warrant was secured in part on the basis of an illegal search or seizure. See *United States v Reilly*, 76 F3d 1271, 1281 (2nd Cir 1996) (collecting cases); *United States v Bishop*, 264 F3d 919, 924 n.2 (9th Cir. 2001).

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C. This Court Should Follow the Circuit Precedent Holding the *Leon* Good Faith Exception Does Not Cure the Constitutional Violation At Issue

In this issue of first impression, Defendant requests this Court adopt the standard referred to in *Davis* and as accepted by the Second Circuit,[16] Ninth Circuit,[17] Tenth Circuit,[18] District Court of New Jersey,[19] and four state Supreme Courts[20]: **that the *Leon* good faith exception is inapplicable where a warrant was secured in part on the basis of an illegal search or seizure.**

Put simply, when the officers' own wrongful conduct produces the probable cause to support a warrant, the *Leon* exception is not applicable because it does not fit within the *Leon's* rationale. Here, it is the officer, not the magistrate, making the constitutional error. There is no reason, under *Leon*, to excuse that error. *People v Machupa*, 872 P2d 114, 122 (Cal 1994) ("Because the exclusionary rule will not deter the 'objectively reasonable' conduct of a police search made in reliance on a warrant previously issued by neutral and detached magistrate, it should not be applied in such cases. That rationale, however, is absent where the initial Fourth Amendment violation is the product of police rather than magisterial conduct."). In this case, the officers wrongful conduct lead them to the probable cause to support the search warrant, being the smell of marijuana at the rear of Mr. Radandt's home. Because the officers were not acting in reliance on a search warrant when they entered this area, *Leon* does not ratify their actions.

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[16] *United States v Reilly*, 76 F3d 1271, 1281 (CA 2 1996).

[17] *United States v Bishop*, 264 F3d 919, 924 n.2 (CA 9 2001).

[18] *United States v Scales*, 903 F2d 765, 768 (CA 10 1990).

[19] *United States v Villard*, 678 F Supp 483, 490-93 (D NJ 1988).

[20] *State v DeWitt*, 901 P2d 9, 15 (Ariz 1996); *State v Reno*, 918 P2d 1235, 1243 (Kan 1996); *People v Machupa*, 872 P2d 114, 124 (Cal 1994); *State v Carter*, 630 NE2d 355, 364 (Ohio 1994).

CONCLUSION

WHEREFORE, Defendant-Appellant Radandt respectfully requests this Court REVERSE the Court of Appeals.

Respectfully submitted,

Dated: September 30, 2015

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Attachment 1

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STATE OF TENNESSEE,

v.

JAMES ROBERT CHRISTENSEN, JR.

No. W2014-00931-CCA-R3-CD.

Court of Criminal Appeals of Tennessee, at Jackson.

February 3, 2015 Session.
Filed May 14, 2015.

Charles A. Brasfield (at trial and on appeal) and Amber Griffin Shaw (at trial), Covington, Tennessee, for the appellant, James Robert **Christensen**, Jr.,

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; D. Michael Dunavant, District Attorney General; and James Walter Freeland, Jr., Assistant District Attorney General, for the appellee, **State** of Tennessee.

ROGER A. PAGE, J., delivered the opinion of the court. JOHN EVERETT WILLIAMS, J., filed a concurring and dissenting opinion. CAMILLE R. McMULLEN, J., concurred in results only.

ROGER A. PAGE, J.

Heard at University of Memphis Cecil C. Humphreys School of Law[1]

Appellant, James Robert **Christensen**, Jr., stands convicted of resisting arrest, a Class B misdemeanor; promotion of methamphetamine manufacture, a Class D felony; initiation of methamphetamine manufacture, a Class B felony; and two counts of possession of a firearm during the commission of a dangerous felony, Class D felonies. He received an effective sentence of three years' incarceration followed by eight years suspended to supervised probation. On appeal, appellant contends that the trial court erred by denying his motion to suppress evidence and that the evidence was insufficient to sustain his convictions for two counts of possession of a firearm during the commission of a dangerous felony. Following our careful review, we affirm the judgments of the trial court.

I. Facts

On August 3, 2013, investigators with the Tipton County Sheriff's Office discovered an active methamphetamine lab, multiple firearms, materials used in the manufacture of methamphetamine, and several inactive methamphetamine labs in appellant's residence. As a result of these findings and appellant's conduct when officers attempted to detain him, appellant was indicted for resisting arrest, promotion of methamphetamine manufacture, initiation of methamphetamine manufacture, and two counts of possession of a firearm during the commission of a dangerous felony.

A. Motion to Suppress

Prior to trial, appellant moved to suppress the evidence against him, arguing that because appellant had posted "no trespassing" signs on his property, the officers' actions in entering his property were subject to the warrant requirement.

At the suppression hearing, Investigator Michael Green testified that the sheriff's office had received information that Mariah Davis had purchased pseudoephedrine. Investigators were aware that she was associated with Cody Gatlin, whom Investigator Green knew through his law enforcement experience. Investigator Green and Investigator Brent Chunn went to

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Mr. Gatlin's home, which was next door to appellant's residence. They spoke first to Ms. Davis, who called Mr. Gatlin to come home. Mr. Gatlin reported to the investigators that he had taken the pseudoephedrine to appellant and that appellant was in the process of making methamphetamine. The investigators then went to appellant's residence. Investigator Green recalled that the grass around appellant's driveway was very tall, that a "no spraying" sign was posted near the road, and that the driveway was sixty to seventy yards long. There were two trailers at the end of the driveway. The investigators parked in the driveway and proceeded directly to the front door of appellant's trailer. Investigator Green testified that he smelled the odor commonly associated with the active manufacturing of methamphetamine as he approached the residence. Appellant exited the front door and closed it behind him. The investigators asked for appellant's consent to search his residence, but appellant refused. Investigator Green testified that methamphetamine labs were "very volatile" and could "catch fire real quick," so he and Investigator Chunn decided that they needed to locate the active lab for safety reasons. Investigator Chunn entered appellant's residence while Investigator Green attempted to detain appellant. He placed a handcuff on appellant's right wrist, but thereafter appellant began to fight him. Appellant yelled for "Bear," later determined to be a dog, to come and for his mother, who lived in an adjacent trailer, to call 1-800-THE-FIRM.[2] When Investigator Chunn returned, the investigators were able to handcuff appellant. Investigator Green testified that he then entered the residence and saw a "bolt action 410 pistol right at the door, [and] a 410 shotgun and a rifle on the couch." Investigator Chunn located the active lab, and they found "remnants of . . . older cooks, several cans of empty Coleman fuel, and then [they] located the ten separate one-pot labs in the freezer." The investigators took turns letting pressure off the active lab to make it safe. Investigator Green testified that the fire department decontaminated appellant and transported him to the hospital because "his heart rate or blood pressure was really, really elevated."

On cross-examination, Investigator Green testified that Ms. Davis told them that she had purchased the pseudoephedrine for appellant. Investigator Green said that after speaking with Ms. Davis and Mr. Gatlin, he did not believe that he had probable cause to obtain a search warrant nor exigent circumstances to search appellant's residence without a search warrant. He felt that he had exigent circumstances to enter appellant's residence after appellant exited his residence. Investigator Green testified that he did not see the "no trespassing" sign posted by appellant's driveway, but he recalled seeing a handwritten sign stating, "organic farm, do not spray," or words to that effect. He stated that he did not see any "private property" signs or other similar signage. He said that he asked for consent to search appellant's residence despite believing that he had exigent circumstances because he wanted to develop a rapport with appellant. He recalled appellant's telling the investigators to leave his property but stated that he had already smelled the methamphetamine at that point. Investigator Green further recalled appellant's saying that he had an injury that would prevent his being handcuffed but because "[h]e showed [Investigator Green] shortly thereafter that those injuries didn't apply to fighting," Investigator Green believed that "handcuffs would have been okay." Investigator Green testified that appellant told the investigators where to find the active lab after he had been handcuffed.

On re-direct examination, Investigator Green testified that when a methamphetamine lab catches fire, it is "just like a flame thrower." He further testified, "I've seen one that actually was in a trailer like this, that it actually blew the walls away from the flooring, and the guy that was in there had a tattoo up here [by his shoulder], and it was down here [by his wrist]. It just melted, just ran down his skin."

Investigator Brent Chunn testified that he did not believe that Cody Gatlin's information (that he had taken the pseudoephedrine to appellant and that appellant was in the process of making methamphetamine) was enough for probable cause to search appellant's residence or to obtain a search warrant. He characterized their approach of appellant as a "follow up investigation" rather than a "knock and talk" because they would have been more cautious if they had been conducting a "knock and talk." Investigator Chunn did not recall seeing any "no trespassing" signs on appellant's property or any other signs. Investigator Chunn testified that he first smelled methamphetamine when he was approximately fifteen feet away from appellant. He recalled that appellant first asked them whether he could help them. After appellant would not consent to a search of his residence, Investigator Chunn "[f]orced the door open." He went through the residence to make sure no one else was inside. He testified that he saw a pistol "right inside the door." When he exited, he saw Investigator Green and appellant "wrestling on the ground." Investigator Chunn testified that he later found the active methamphetamine lab in the freezer of appellant's refrigerator. Investigator Green found the inactive labs in a separate deep freezer. Investigator Chunn commented that placing labs in freezers was not a common practice.

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Tammy Atkins testified that she knew appellant through her church. She said that on July 13, 2013, she was visiting people on appellant's road for her church and noticed "no trespassing" signs on his property. She testified that there were several "no trespassing" or "private property" signs and identified three such signs in a photograph of appellant's property. Ms. Atkins said, "[W]e're not supposed to go to houses that have `no trespassing' signs." She testified that she had been on appellant's road several times since July 13 and always saw the "no trespassing" signs.

The trial court took the matter under advisement and later issued an order denying appellant's motion to suppress. In its order, the trial court stated that the investigators "had reasonable suspicion of illegal activity based on substantiated facts" and that the "no trespassing" sign "was not a bar from the officers[`] investigating an ongoing dangerous highly combustible activity." The trial court further stated that the investigators had "reasonable grounds" to search appellant's residence after smelling methamphetamine because "[t]hey knew that the lab must be bled or it might burst into flames or explode."

B. Trial

At trial, Investigator Green testified consistently with his testimony at the suppression hearing. In addition, he testified that appellant's trailer was forty to fifty feet from Cody Gatlin's residence, "as the crow flies." Investigator Green also listed all of the items seized from appellant's residence: one pound of non-liquid drain opener; thirty-two ounces of liquid drain opener; four empty Coleman fuel cans; two jars of Coleman fuel; nine inactive labs; eight empty HCL generators; a bag of Epsom salts; an empty box of Sudafed; and "miscellaneous lab trash." All of these items were destroyed because they were contaminated with methamphetamine. Investigator Green said that he collected from just inside the front door a loaded, sawed-off 410 shotgun[3] with a homemade magazine made from duct tape. He also collected a loaded 410 shotgun with a laser sight and an unloaded .22 rifle from the residence's couch.

On cross-examination, Investigator Green testified that he first learned about methamphetamine possibly being manufactured on August 3 from his lieutenant, whose source was Kyle Wolfe. The specific information was that Mariah Davis would be purchasing pseudoephedrine for the purpose of manufacturing methamphetamine. Investigator Green said that when he talked to Cody Gatlin, Mr. Gatlin had just come from appellant's house. He stated that he saw Mr. Gatlin in appellant's yard and assumed that he had come from inside the house. Mr. Gatlin told the investigators that there "was an active cook going on." He agreed that it would have been possible for Mr. Gatlin to have been the person actually manufacturing.

Investigator Chunn testified next. He narrated the video from a patrol car driven by Corporal Jeff Thompson that was recorded when Corporal Thompson responded to appellant's address on August 3. Investigator Chunn said that he did not see a "standard `no trespassing' sign[]" in the video. The remainder of Investigator Chunn's testimony was consistent with his suppression hearing testimony and Investigator Green's testimony. Notably for purposes of this case, he affirmed that he saw the three guns previously mentioned when he was conducting his first sweep of appellant's residence.

On cross-examination, Investigator Chunn identified a still-shot photograph taken from the patrol car video. He confirmed that the photograph depicted signs on a post but that the photograph was too blurry to read the signs.

The **State** rested its case after Investigator Chunn's testimony. For the defense, Kyle Wolfe testified that he had been to appellant's house once. He recalled watching appellant and Cody Gatlin shooting guns in the yard. The three men also smoked marijuana that day. Mr. Wolfe testified that he told law enforcement that Mr. Gatlin was going to "cook" methamphetamine on August 3. He knew this information because Mr. Gatlin had asked him to purchase a box of pseudoephedrine. He refused to do so.

Cody Gatlin testified that appellant was his father's next-door neighbor. Mr. Gatlin said that he did not know anything about the guns in appellant's house but recalled hearing appellant shooting on his property. Mr. Gatlin recalled that on August 3, he took "sinus medication" to appellant and that appellant had asked Ms. Davis to purchase the medication for him. He said that appellant promised to give Ms. Davis money and drugs for the medication. Mr. Gatlin testified that he did not see any money exchange, however. He also testified that he had been on his way back from appellant's house when Ms. Davis called him about the investigators being at his father's house. Mr. Gatlin said that he was not going to help anyone

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manufacture methamphetamine and that he did not know how methamphetamine was manufactured.

Appellant testified that he had four or five "no trespassing" signs on his property and identified a photograph of the one that was at the beginning of his driveway, which read, "no trespassing[,] hunting[,] or fishing." Appellant said that he started using methamphetamine when he suffered depression due to an unfortunate medical diagnosis. He stopped using drugs for a time period but resumed using drugs when he allowed Cody Gatlin to begin manufacturing methamphetamine in his house. He said that Mr. Gatlin purchased all the supplies for manufacturing and explained that he only left his home a few times a year because he did not have a driver's license or a car. Appellant said that his agreement with Mr. Gatlin was that Mr. Gatlin would give him half of the drugs made in exchange for the use of his house. Appellant testified that on August 2, 2013, he practiced target shooting in his backyard. He would normally have cleaned his guns after practicing but did not do so that day. On August 3, he was about to clean his guns when Mr. Gatlin came over and began making methamphetamine. Mr. Gatlin received a telephone call from Ms. Davis about the police being at his father's house, so Mr. Gatlin placed the methamphetamine lab in the freezer and left. Appellant testified that he shut and locked his front door (for which he did not have a key), exited his back door, and walked to his front porch to await the officers. He said that he was not armed at that time and did not have access to his guns. Appellant testified that when the officers approached him, he told them, "Could I help you? I don't know if you've noticed this or not, but you passed `no trespassing' signs to get here. If you don't have a search warrant, you need to leave my property. What you're doing is unconstitutional." Appellant said that Investigator Green told him that he was going to detain him. Appellant responded that because of previous injuries, they would have to break his arm to handcuff him. He said that Investigator Chunn stated, "`Oh, we're breaking your arm.'" When Investigator Green did not contradict Investigator Chunn, appellant said that he pulled his arm back and told them to leave his property. Instead, he said that "[t]hey started punching [him] and kicking [him] and choking [him]."

On cross-examination, appellant testified that the loaded handgun on the floor by the front door was there because he had been interrupted before he could clean it. He said that he set it on top of his television when he went to answer the door and that it must have fallen when the door was kicked in. Appellant said that during the struggle with the police, his elbow and shoulder were dislocated but that he did not receive medical treatment for the dislocation. Rather, the joints "come back in place [sic]" approximately a week later.

After the close of proof and deliberations, the jury convicted appellant as charged. The trial court held a sentencing hearing and imposed an effective sentence of three years' incarceration followed by eight years suspended to supervised probation. Appellant's motion for new trial was subsequently heard and denied, and he now appeals the judgments of the trial court.

II. Analysis

A. Motion to Suppress

Appellant argues that the trial court erred by denying his motion to suppress, in which he contended that the evidence seized should be suppressed due to an illegal search of his residence. On appeal, he maintains that the "no trespassing" signs on his property meant that the investigators could not legally enter his property to conduct a "knock and talk" investigation. Instead, appellant asserts that the investigators either needed a warrant or exigent circumstances to approach his residence, and he further asserts that there was no exigency until the investigators were already at appellant's front door. Appellant also contends that any exigency had expired after the initial sweep of appellant's residence and that consequently the investigators should have obtained a warrant before re-entering the residence.

In reviewing the trial court's decision on a motion to suppress, we review the trial court's legal conclusions de novo. ***State** v. Northern,* 262 S.W.3d 741, 747 (**Tenn**. 2008). In doing so, we give deference to the trial judge's findings of fact unless the evidence preponderates otherwise. *Id.*; *see **State** v. Ross,* 49 S.W.3d 833, 839 (**Tenn**. 2001); ***State** v. Odom,* 928 S.W.2d 18, 23 (**Tenn**. 1996). "`[C]redibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.'" *Northern,* 262 S.W.3d at 747-48 (quoting *Odom,* 928 S.W.2d at 23). In reviewing the findings of fact, evidence presented at trial may "`be considered by an

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appellate court in deciding the propriety of the trial court's ruling on the motion to suppress.'" ***State** v. Garcia*, 123 S.W.3d 335, 343 (**Tenn**. 2003) (quoting ***State** v. Walton*, 41 S.W.3d 75, 81 (**Tenn**. 2001)). The prevailing party on the motion to suppress is afforded the "`strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *Northern*, 262 S.W.3d at 748 (quoting ***State** v. Keith*, 978 S.W.2d 861, 864 (**Tenn**. 1998)); *see **State** v. Daniel*, 12 S.W.3d 420, 423 (**Tenn**. 2000); *Odom*, 928 S.W.2d at 23.

At a hearing on a motion to suppress evidence recovered as a result of a warrantless search, the **State** must prove that the search was reasonable. ***State** v. Coulter*, 67 S.W.3d 3, 41 (**Tenn**. Crim. App. 2001). To carry its burden, the **State** must prove that law enforcement conducted the warrantless search or seizure pursuant to one of the narrowly-defined exceptions to the warrant requirement. ***State** v. Binette*, 33 S.W.3d 215, 218 (**Tenn**. 2000). Our supreme court has held:

> [U]nder both the federal constitution and our **state** constitution, a search without a warrant is presumptively unreasonable, and any evidence obtained pursuant to such a search is subject to suppression unless the [S]tate demonstrates that the search was conducted under one of the narrowly defined exceptions to the warrant requirement. Moreover, Tennessee has approved of and adopted exceptions to the requirement of obtaining a valid search warrant, including search incident to arrest, plain view, stop and frisk, hot pursuit, search under exigent circumstances, and others.

***State** v. Cox*, 171 S.W.3d 174, 179 (**Tenn**. 2005) (citations omitted); *see **State** v. Echols*, 382 S.W.3d 266, 277 (**Tenn**. 2012). Pursuant to the exigent circumstances exception, a warrantless search may be conducted where there are exigent circumstances and probable cause. *Fuqua v. Armour*, 543 S.W.2d 64, 68 (**Tenn**. 1976); ***State** v. Adams*, 238 S.W.3d 313, 321 (**Tenn**. Crim. App. 2005). "Exigent circumstances are limited to three situations: (1) when officers are in `hot pursuit' of a fleeing suspect; (2) when the suspect presents an immediate threat to the arresting officers or the public; or (3) when immediate police action is necessary to prevent the destruction of vital evidence or thwart the escape of known criminals." *Adams*, 238 S.W.3d at 321 (quoting ***State** v. Steven Lloyd Givens*, No. M2001-00021-CCA-R3-CD, 2001 WL 1517033 (**Tenn**. Crim. App. Nov. 29, 2001)) (internal quotation marks omitted). "Given the importance of the warrant requirement in safeguarding against unreasonable searches and seizures, a circumstance will be sufficiently exigent only where the **State** has shown that the search is imperative." ***State** v. Meeks*, 262 S.W.3d 710, 723 (**Tenn**. 2008) (citations omitted). "No amount of probable cause can justify a warrantless search or seizure, absent `exigent circumstances.'" *Fuqua*, 543 S.W.2d at 68 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971)) (internal quotation marks omitted).

However, "[i]t is well settled that the Fourth Amendment's procedural safeguards do not apply to police investigative activities unless those activities constitute a `search' within the meaning of the Fourth Amendment." ***State** v. Bell*, 832 S.W.2d 583, 589 (**Tenn**. Crim. App. 1991). "In consequence, `an investigation by governmental authorities which is not a search as defined by the Supreme Court may be conducted without probable cause, reasonable suspicion or a search warrant.'" ***State** v. Talley*, 307 S.W.3d 723, 730 (**Tenn**. 2010) (quoting *Bell*, 832 S.W.2d at 589-90). Under both the federal and **state** constitutions,[4] we must inquire "(1) whether the individual had an actual, subjective expectation of privacy and (2) whether society is willing to view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances." ***State** v. Munn*, 56 S.W.3d 486, 494 (**Tenn**. 2001). A government intrusion without a warrant or without an applicable exception to the warrant requirement is illegal when an individual has a justifiable expectation of privacy. *See Bell*, 832 S.W.2d at 589; *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.). The United States Supreme Court has also presented an alternative definition of a search as an "unlicensed physical intrusion" into a constitutionally protected area. *Florida v. Jardines*, ___ U.S. ___, ___, 133 S. Ct. 1409, 1415, 185 L. Ed. 2d 495 (2013). For purposes of our opinion, we will apply both the reasonable expectation of privacy test and the *Jardines* test for a search in our analysis.

In this case, there are three separate government actions to consider when determining whether the evidence seized as a result of the warrantless search of appellant's residence should have been suppressed. First, the investigators entered appellant's property to conduct a "follow-up investigation" despite appellant's "no trespassing" signs, which the officers did not see. Second, after smelling methamphetamine, Investigator Chunn forced entry into appellant's residence and conducted a brief sweep, during which he saw the firearms and some of the components for making methamphetamine but did not see the active or inactive labs. Third, after appellant told the officers that the lab was in the freezer, the investigators

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re-entered appellant's residence and collected the active lab from the refrigerator freezer and the inactive labs from the deep freezer. Investigators also collected the firearms and manufacturing components.

Thus, we must first inquire whether the investigators were legally on appellant's property when they drove down appellant's driveway and approached his front door to contact him about the information they received from Mr. Gatlin and Ms. Davis. "As with all Fourth Amendment questions, the touchstone of the analysis is reasonableness." ***State** v. Moats,* 403 S.W.3d 170, 194 (**Tenn**. 2013). Our courts have recognized the validity of the so-called "knock and talk" police procedure, whereby police officers approach a residence for purposes of furthering an investigation by asking questions of the inhabitants or asking for consent to search the residence. ***State** v. Cothran,* 115 S.W.3d 513, 521-23 (**Tenn**. Crim. App. 2003). The reasoning behind the validity of the "knock and talk" procedure is that any private citizen, by a "license . . . implied from the habits of the country," may "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines,* 133 S. Ct. at 1415. "Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is `no more than any private citizen might do.'" *Id.* at 1416 (quoting *Kentucky v. King,* 563 U.S. ___, ___, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011)). In addition, our supreme court has reasoned that "[a] person does not have an expectation of privacy in the area in front of his or her residence leading from the public way to the front door." ***State** v. Carter,* 160 S.W.3d 526, 533 (**Tenn**. 2005).

Appellant contends that unreported cases from this court have held that a "no trespassing" sign invalidated the "knock and talk" procedure by revoking the implied invitation of the front door. *See **State** v. Monty Blackwell,* No. E2009-00043-CCA-R3-CD, 2010 WL 454864, at *7 (**Tenn**. Crim. App. Feb. 10, 2010) (stating in dicta that "no trespassing" signs revoked the implied invitation of the front door); *see also **State** v. Rebecca Draper and J.C. Draper,* No. E2011-01047-CCA-R3-CD, 2012 WL 1895869, at *6 (**Tenn**. Crim. App. May 24, 2012) (quoting *Monty Blackwell,* 2010 WL 454864, at *7), ***State** v. Scotty Wayne Henry,* No. W2005-02890-CCA-R3-CD, 2007 WL 1094146, at *5 (**Tenn**. Crim. App. Apr. 11, 2007) (stating in dicta, "The only issue presented that would have made the `knock and talk' unacceptable would have been the presence of the `No Trespassing' signs."). It is upon these cases that appellant relies, essentially arguing that these cases present a bright-line rule that this court should follow. However, unreported cases are persuasive authority, not controlling. *See* **Tenn**. R. Sup. Ct. 4G. Furthermore, our supreme court has eschewed the creation of bright-line rules for purposes of Fourth Amendment analysis. *See Talley,* 307 S.W.3d at 734 ("[W]e reject any bright-line rule and maintain our view that the totality of the circumstances test is best-suited for determining the reasonableness of an expectation of privacy."). Likewise, the United States Supreme Court has stated that "[i]n applying this [reasonableness] test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette,* 519 U.S. 33, 34 (1996). In addition, the cases relied upon by appellant are distinguishable from the case sub judice; therefore, we conclude that no bright-line rule has been established by this court. Thus, we will examine the totality of the circumstances in this case to determine whether appellant revoked the implied invitation of the front door.

We must determine for this case what effect, if any, the "no trespassing" sign had on appellant's expectation of privacy and the validity of the law enforcement action in this case. In so doing, we have reviewed numerous cases from this and other jurisdictions. Our court, in the case that first recognized the validity of the "knock and talk" procedure, quoted a Ninth Circuit case that stated a "knock and talk" was acceptable "[a]bsent express orders from the person in possession against any possible trespass. . . ." *Cothran,* 115 S.W.3d at 521 (quoting *United **State** v. Cormier,* 220 F.3d 1103, 1109 (9th Cir. 2000)). The Ninth Circuit has repeatedly held that "no trespassing" signs alone did not invalidate "knock and talk" procedures. *See United States v. Hammett,* 236 F.3d 1054, 1060 (9th Cir. 2001) (holding that "no trespassing" signs posted at entry of driveway did not invalidate "knock and talk" when officers approached home from helicopter's landing site and did not see the signs); *United States v. Robert,* 747 F.2d 537, 541-43 (9th Cir. 1984) (holding that it was acceptable for troopers to approach house after having accessed house by means of a private road posted with "no trespassing" signs). Thus, for the Ninth Circuit, "no trespassing" signs alone do not rise to the level of "express orders . . . against any possible trespass."

Notably, the federal district court in the Eastern District of Tennessee recently ruled that a "no trespassing" sign did not prevent officers from conducting a "knock and talk." *United States v. Denim,* No. 2:13-CR-63, 2013 WL 4591469, at *4 (E.D. **Tenn**. Aug. 28, 2013). The *Denim* court reasoned as follows:

> As sacred as the home is, including its curtilage, society is not willing to accept as reasonable an

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> expectation that a police officer may not come within the curtilage to question a resident of a dwelling to ascertain if that resident has information regarding the commission of a criminal offense. Even in the face of No Trespassing signs, it is not unreasonable for a police officer to intrude upon private property to ask if the resident has any information that will aid in the investigation of a crime.

Id. The Sixth Circuit has also held that a "no trespassing" sign was of no consequence when the police were conducting a "knock and talk." *See United States v. Hopper,* 58 F. App'x 619, 623 (6th Cir. 2003). The Sixth Circuit reasoned that "no trespassing" signs did not extend the curtilage of the defendant's residence and that even if the signs had extended the curtilage, "the actions of the police in this case would not have violated the Fourth Amendment because law enforcement officials may encroach upon the curtilage of a home for the purpose of asking questions of the occupants." *Id.* We find the reasoning in these cases to be persuasive. *See Sneed v. **State**,* 423 S.W.2d 857, 860 (**Tenn**. 1968) (holding that federal search and seizure cases should be considered persuasive authority in Tennessee).

We have also examined cases from other federal circuits and states. Some states have held that "no trespassing" signs demonstrate a legitimate expectation of privacy that requires a warrant to overcome. *See **State** v. Roubique,* 421 So. 2d 859, 862 (La. 1982); ***State** v. Bullock*, 901 P.2d 61, 75-76 (Mont. 1995); *People v. Scott,* 593 N.E.2d 1328, 1338 (N.Y. 1992). The vast majority of states that have directly addressed the issue, however, consider signage to be but one consideration when determining whether a person has demonstrated a legitimate expectation of privacy. *See, e.g., Michel v. **State**,* 961 P.2d 436, 437-38 (Alaska Ct. App. 1998) (holding that "[p]ersons visiting the residence for social or commercial purposes" would not construe "no trespassing" signs along driveway "as meant to prohibit their entry"); *Burdyshaw v. **State**,* 10 S.W.3d 918, 921 (Ark. Ct. App. 2000) ("[E]ven though the property was posted, the gates were open, the driveway was not blocked, and entry onto the property was not an intrusion prohibited by the Fourth Amendment."); *Burkholder v. Superior Court,* 96 Cal. App. 3d 421, 428 (Cal. Ct. App. 1979) (holding that expectation of privacy was objectively reasonable when "[e]ntry to the property was openly restricted by posted signs along, and locked gates across[] the rural access road signif[ied] an intention to deny access to the public in general, including government agents"); *Brown v. **State**,* 152 So.3d 619, 624 (Fla. Dist. Ct. App. 2014) ("While this Court has found that a policeman may enter the curtilage surrounding a home in the same way as a salesman or visitor could, no such person would reasonably go through both a gated four-foot fence and a gated six-foot fence, surrounded by several `No Trespassing' signs in order to conduct business with the residents."); *Wysong v. **State**,* 614 So.2d 670, 671 (Fla. Dist. Ct. App. 1993) (holding that officers did not illegally enter yard to knock on door despite "no trespassing" sign); ***State** v. Rigoulot,* 846 P.2d 918, 923 (Idaho Ct. App. 1992) ("Posting `No Trespassing' signs may indicate a desire to restrict unwanted visitors. . . . However, such signs cannot reasonably be interpreted to exclude normal, legitimate, inquiries or visits by mail carriers, newspaper deliverers, census takers, [etc.] who restrict their movements to the areas of one's property normally used to approach the home." (citations omitted)); *Mundy v. **State**,* 21 N.E.3d 114, 118-19 (Ind. Ct. App. 2014) (holding that it was unreasonable for officers to enter property when it was posted, there was a chain across the driveway, and a security camera was on a tree near the chain); ***State** v. Fisher,* 154 P.3d 455, 470-75 (Kan. 2007) (ruling that deputy was legally on property to conduct "knock and talk" but could not seize evidence from curtilage; presence of "no trespassing" signs was part of curtilage analysis); *Jones v. **State**,* 943 A.2d 1, 12 (Md. 2008) ("For Fourth Amendment purposes, appellant could not have had a reasonable expectation that the `No Trespassing' sign would or should prevent visitors with a legitimate purpose from walking to the front door, including police officers in furtherance of an investigation."); ***State** v. Kruse,* 306 S.W.3d 603, 611-12 (Mo. Ct. App. 2010) (stating that signage is one consideration when determining whether police intrusion into backyard was reasonable); ***State** v. Pasour,* 741 S.E.2d 323, 326 (N.C. Ct. App. 2012) ("[W]hile not dispositive, a homeowner's intent to keep others out and thus evidence of his or her expectation of privacy in an area may be demonstrated by the presence of `no trespassing' signs."); ***State** v. Mittleider,* 809 N.W.2d 303, 307-08 (N.D. 2011) (holding that "no trespassing" signs on farm did not create reasonable expectation of privacy in entrance to the farm but leaving open the question of whether such signs could ever create a reasonable expectation of privacy); ***State** v. Morgan,* No. 13-CA-30, 2014 WL 1836015, at *3-4 (Ohio Ct. App. May 1, 2014) (holding that initial "knock and talk" was "unobjectionable"—despite "no trespassing" signs in front of house but entry into backyard was unreasonable, partly because of the signage), *no perm. app. filed*; ***State** v. Roper,* 294 P.3d 517, 520 (Or. Ct. App. 2012) (holding that fence plus signage "objectively manifested intent to exclude the public"); ***State** v. Gabbard,* 877 P.2d 1217, 1221 (Or. Ct. App. 1994) (concluding that "no trespassing" sign on boundary fence, without more, would not have served to exclude the

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"reasonable visitor . . . who desired to contact the residents" and that, therefore, officers could rightfully use driveway to approach house); *Robinson v. Commonwealth,* 639 S.E.2d 217, 222 (Va. 2007) ("Implied consent can be negated by obvious indicia of restricted access, such as posted `no trespassing' signs, gates, or other means that deny access to uninvited persons."); ***State** v. Johnson,* 879 P.2d 984, 992 (Wash. Ct. App. 1994) (holding that the defendants manifested "their subjective intent to close their property by fencing it, erecting a gate, and placing signs near the gate saying `No Trespassing' and `Private Property.'").

In addition, we note that the United States Supreme Court in *Oliver v. United States,* when determining whether "no trespassing" signs created a legitimate expectation of privacy in open fields when there would otherwise be no expectation of privacy stated, "Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post `No Trespassing' signs." *Oliver,* 466 U.S. at 183 n.13. Even under the *Jardines* search test, which focuses more on trespass law than on expectation of privacy, the officers' actions in merely conducting a "knock and talk" would not be proscribed as a warrantless search. *See Jardines,* 1415-18 (ruling that bringing a drug-sniffing canine into defendant's curtilage objectively demonstrated that the police were intruding upon a constitutionally protected area to search, not merely conducting a "knock and talk"). "The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time." *Id.* at 1420 (Alito, J., dissenting). Consequently, if the officers' actions were not a search, then the Fourth Amendment protections would not apply.

Taking all of these cases into consideration, the emerging rule appears to be that the implied invitation of the front door can be revoked but that the revocation must be obvious to the casual visitor who wishes only to contact the residents of a property. *See **State** v. Grice,* 767 S.E.2d 312, 319 (N.C. 2015) ("The implicit license enjoyed by law enforcement and citizens alike to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners and is already limited by our social customs."). Thus, in this case, we must determine whether a small sign reading "no trespassing[,] hunting[,] or fishing," posted in a field next to appellant's driveway that is difficult to see when driving down the driveway, as evidenced by the "dashcam" video presented in this case, is sufficient to revoke the implied invitation.[5] Several courts when ruling on this issue have noted that such a sign, especially on a rural property, is generally intended to prevent people from unauthorized use of the property, not to prevent a casual visitor from approaching the residence. *See, e.g., U.S. v. Ventling,* 678 F.2d 63, 66 (8th Cir. 1982); *Michel,* 961 P.2d at 438. The *Ventling* court quoted with approval the magistrate's opinion in that case:

> The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to contact the occupants for a lawful request and if the request is refused to leave by the same way. The presence of "no trespassing" signs in this country without a locked or closed gate make the entry along the driveway for the purposes above described not a trespass and therefore does not constitute an intrusion prohibited by the Fourth Amendment.

Ventling, 678 F.2d at 66. The *Michel* court likewise reasoned that the "no trespassing" signs were not intended to forestall casual visitors from using the driveway to reach the residence:

> The Michels live in rural Alaska, and their residence lies some distance off the main highway, connected by a long driveway. Under these circumstances, a visitor to the Michels' residence would reasonably conclude that the "No Trespassing" signs posted along the driveway were intended to deter people who might be tempted to leave the highway and use the Michels' driveway as an access route for their own purposes (e.g., hunting, camping, hiking, or the like). Persons visiting the residence for social or commercial purposes would not construe those signs as meant to prohibit their entry.

Michel, 961 P.2d at 438. Likewise, we conclude that the sign in this case would not have prevented the casual visitor or the reasonably respectful citizen from approaching appellant's residence. Therefore, the sign did not revoke the implied invitation of the front door, and Investigators Green and Chunn lawfully entered appellant's property when they drove up his driveway and approached his front door. Such conduct was not a search under Fourth Amendment jurisprudence.

However, the warrantless entry into appellant's home for the purpose of discovering active methamphetamine labs was

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unquestionably a search; therefore, we must consider whether exigent circumstances justified the warrantless entry into appellant's residence. The investigators testified that they smelled the methamphetamine as they approached the residence. There is no question that an active methamphetamine lab was present in appellant's residence. The investigators stated that an active lab has a distinctive odor apart from the general odor of methamphetamine. They also testified about the dangers of unattended active labs. Investigator Green in particular gave a graphic description of the aftermath of a methamphetamine explosion. Our supreme court has held that exigent circumstances existed to justify law enforcement's warrantless entry into a hotel room when an active methamphetamine lab was present:

> The undisputed facts clearly establish the sort of exigent circumstances that justified the officers' decision to enter Room 110 of the Park Motel without first obtaining a search warrant. They knew that an actively operating methamphetamine laboratory posed a serious danger not only to the persons in the room itself but also to all persons in the immediate vicinity. The distinct odor surrounding Room 110, the intensity and strength of the odor, the fumes emanating from Room 110, and the effects of the odor and fumes on the inhabitants of Room 109 provided the officers with enough facts to believe that the persons in Room 110 were actively manufacturing methamphetamine. This conclusion provided the officers with an objectively reasonable basis for concluding that there was an immediate need to act to protect themselves and others from serious harm. The fact that the officers overlooked clearing the adjoining rooms before they entered Room 110 does not undermine the reasonableness of their decision to enter Room 110 without waiting for a search warrant. Accordingly, the officers' warrantless entry into and search of Room 110 was not an unreasonable search under either the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Constitution of Tennessee.

***State** v. Meeks,* 262 S.W.3d 710, 726-27 (**Tenn**. 2008) (footnote omitted). While appellant's residence was in a more rural area, there was a trailer immediately adjacent to his own, and neighbors were located within fifty feet. Moreover, appellant himself and the investigators were in immediate danger had the active lab exploded. Therefore, we conclude that exigent circumstances not only existed to justify the initial warrantless entry into the residence but that the exigency continued until the active lab was deactivated and no other active labs were found.[6]

Finally, we must determine whether evidence other than the active lab was properly seized. The **State** argues that the plain view doctrine operates to justify the seizure of the evidence in this case. This court has stated that the plain view exception applies when: (1) the objects seized were in plain view; (2) the viewer had a right to be in position to view the seized object; and (3) the incriminating nature of the object was immediately apparent. *Cothran,* 115 S.W.3d at 524-25 (**Tenn**. Crim. App. 2003) (citing ***State** v. Hawkins,* 969 S.W.2d 936, 938 (**Tenn**. Crim. App. 1997)). In this case, the pictures of appellant's residence show that the majority of the seized evidence was in plain view. The exception is that the inactive labs were concealed in a freezer; however, the necessity of finding any and all active labs, especially when appellant mentioned a freezer in particular, means that the exigent circumstances encompassed the search of the deep freezer. We have already concluded that the investigators were rightfully in position to view all of the objects seized. Based on the investigators' experience with methamphetamine manufacturing, the incriminating nature of the evidence seized was apparent to them. Therefore, we conclude that none of the evidence seized in this case was subject to suppression. Appellant is therefore without relief as to this issue.

B. Sufficiency of the Evidence

For his second issue, appellant contends that the evidence was insufficient to prove that he possessed firearms with the intent to go armed during the commission of a dangerous felony. He does not contest his other convictions. The **State** responds that the jury had ample evidence from which it could have determined that appellant was guilty of the two firearm offenses.

The standard for appellate review of a claim challenging the sufficiency of the **State's** evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406

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U.S. 356, 362 (1972)); *see* **Tenn**. R. App. P. 13(e); ***State** v. Davis,* 354 S.W.3d 718, 729 (**Tenn**. 2011). To obtain relief on a claim of insufficient evidence, appellant must demonstrate that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson,* 443 U.S. at 319. This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both. ***State** v. Dorantes,* 331 S.W.3d 370, 379 (**Tenn**. 2011); ***State** v. Brown,* 551 S.W.2d 329, 331 (**Tenn**. 1977).

On appellate review, "`we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.'" *Davis,* 354 S.W.3d at 729 (quoting ***State** v. Majors,* 318 S.W.3d 850, 857 (**Tenn**. 2010)); ***State** v. Williams,* 657 S.W.2d 405, 410 (**Tenn**. 1983); ***State** v. Cabbage,* 571 S.W.2d 832, 835 (**Tenn**. 1978). In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as trier of fact. ***State** v. Bland,* 958 S.W.2d 651, 659 (**Tenn**. 1997); ***State** v. Pruett,* 788 S.W.2d 559, 561 (**Tenn**. 1990). This court presumes that the jury has afforded the **State** all reasonable inferences from the evidence and resolved all conflicts in the testimony in favor of the **State**; as such, we will not substitute our own inferences drawn from the evidence for those drawn by the jury, nor will we re-weigh or re-evaluate the evidence. *Dorantes,* 331 S.W.3d at 379; *Cabbage,* 571 S.W.2d at 835; *see* ***State** v. Sheffield,* 676 S.W.2d 542, 547 (**Tenn**. 1984). Because a jury conviction removes the presumption of innocence that appellant enjoyed at trial and replaces it with one of guilt at the appellate level, the burden of proof shifts from the **State** to the convicted appellant, who must demonstrate to this court that the evidence is insufficient to support the jury's findings. *Davis,* 354 S.W.3d at 729 (citing ***State** v. Sisk,* 343 S.W.3d 60, 65 (**Tenn**. 2011)).

In this **state**, "[i]t is an offense to possess a firearm with the intent to go armed during the commission of . . . a dangerous felony." **Tenn**. Code Ann. § 39-17-1324(a). Initiating the process to manufacture methamphetamine is listed in section 39-17-1324(i)(1)(K) as a dangerous felony. As appellant stands convicted of initiation of the process to manufacture methamphetamine, that element of the offense has clearly been met. Appellant claims, however, that the **State** failed to prove that he intended to go armed. This court has previously ruled that "[t]he fact that the firearm was holstered, loaded, and within the immediate proximity of the contraband established the defendant's intent to go armed and demonstrated a nexus between the firearm and the drugs." ***State** v. Ronnie Paul Trusty,* No. W2012-02445-CCA-R3CD, 2013 WL 3488150, at *4 (**Tenn**. Crim. App. July 11, 2013) (citing ***State** v. Yarbro,* 618 S.W.2d 521, 524-25 (**Tenn**. Crim. App. 1981)), *no perm. app. filed*; ***State** v. Victor Armando Martinez,* No. M2010-01820-CCA-R3-CD, 2012 WL 5992148, at *9 (**Tenn**. Crim. App. Dec. 3, 2012)). In this case, appellant had loaded firearms within reach and/or actually in his hands as the methamphetamine lab was processing in the same small mobile home. From this information, the jury was within its prerogative to find appellant guilty of two counts of possessing a firearm with the intent to go armed during the commission of a dangerous felony. Therefore, we affirm appellant's convictions for this offense.

CONCLUSION

Following our careful review of the record, the arguments of the parties, and the applicable law, we affirm the judgments of the trial court.

JOHN EVERETT WILLIAMS, J., concurring in part and dissenting in part.

I agree that in this case, there are three separate **state** actions to consider when determining whether the evidence seized, as a result of the warrantless search of the defendant's residence, should have been suppressed. First, the investigators entered the defendant's property to conduct a "follow-up investigation," without a search warrant, despite the defendant's "no trespassing" signs. Second, after smelling methamphetamine, Investigator Chunn forcibly entered the defendant's residence and conducted a brief sweep, during which he saw the firearms and some of the components for making methamphetamine, but did not see the active nor inactive labs. Third, after the defendant told officers that the lab was in the freezer, the investigators re-entered the defendant's residence and collected the active lab from the refrigerator and the inactive lab from the deep freezer. I believe the majority has correctly analyzed actions two and three. My disagreement with the majority only relates to the **State's** first action. My review of the record leads me to conclude that this defendant had clearly revoked any implied consent for the officers to come upon his property without a search warrant. Without

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lawfully being upon the premises, the second and third actions are void and the fruit of the poisonous tree.

I begin my analysis at the same point as the majority. A search without a warrant is presumptively unreasonable, and any evidence obtained pursuant to such a search is subject to suppression unless the **State** demonstrates that the search was conducted under one of the narrowly defined exceptions to the warrant requirement. ***State** v. Talley*, 307 S.W.3d 723, 729-30 (**Tenn**. 2010). I also agree with the majority that the totality of the circumstances in this case should be examined to determine whether the defendant revoked the implied consent invitation to his front door. This case does not involve a search incident to a lawful arrest, the plain view doctrine, stop and frisk, hot pursuit, or a search under exigent circumstances.[1] The language used in this case would suggest that this search is incident to a "follow-up investigation." Being unaware of any such named exception to the requirement for a search warrant, I believe the majority correct when they review this action as being akin to a "knock and talk" situation.

This record is devoid of any attempt to obtain, or mention of obtaining, a search warrant to access and discover any illegal activity regarding methamphetamine manufacturing upon the property of the defendant. It is difficult to determine the reasonableness of officers' actions when they do not attempt to convey why they chose not to get a search warrant but instead relied upon an exception to the requirement for a search warrant. Upon this record, we do not know if it saved them 30 minutes, an hour, two hours or longer. Given that the burden is on the **State** to prove the reasonableness of the warrantless search, I would have expected some testimony to explain why the officers wished to abandon a tried and true and safe practice of acquiring a search warrant to enter the residence in favor of risking the entire suppression of any evidence. I fear that the investigators are operating under an erroneous assumption that they have a right to enter any person's property simply to speak with them. Their assumption is valid in perhaps 98% of the cases that they investigate, as it is not "`illegal per se, or a condemned invasion of a person's right to privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's `castle' with the honest intent of asking questions of the occupant thereof[.]" ***State** v. Cothran,* 115 S.W.3d 513, 521 (**Tenn**. Crim. App. 2003) (quoting *United States v. Cormier,* 220 F.3d 1103, 1109 (9th Cir. 2000)). However, this procedure is only permissible "`[*a*]*bsent express orders from the person in possession against any possible trespass*[.]'" *Id.* (emphasis added). Thus, when someone, such as this defendant, revokes any implied consent to enter their property, officers are obliged to get a search warrant. Today, with training and technology, officers can obtain search warrants in a more timely fashion than in the past. I submit that had the officers been impeded by a locked gate, a search warrant is exactly what they would have obtained. I submit that had the investigators met this defendant coming out of his one lane driveway as they were coming in and he demanded that they leave his property, they would not have gone further upon his property without a search warrant.

I would like to address this issue by attempting to answer the question, what must a private citizen do in order to revoke the so-called implied consent invitation to the front door. The federal government can put up a single "No Trespassing" sign on a fence at a nuclear facility or an abandoned munitions facility, and a trespass there upon is a trespass. The **state** government can put one "No Trespassing" sign upon a **state** facility, and a trespass is a trespass. When entering a penal institution a sign may inform a citizen that they are giving up their Fourth Amendment right against unreasonable searches and seizures by merely entering the premises. Often, a citizen is informed that he or she is subject to greater punishment for bringing contraband into a penal institution than a school room or a church. If governments can use a single sign so effectively against citizens, why then can not citizens use a sign equally against governments? Whether the words are used by the government or a citizen, "No Trespassing" means no trespassing. The government or the private citizen may prohibit the other from entering upon the other's property without permission.

The record in this case reveals that the defendant lives in a mobile home. There are clearly nine signs upon the property.[2] Two signs appear to be at the edge of the defendant's property. They appear to have been purchased, and they have white lettering with a black background. They read "PRIVATE PROPERTY" in large letters and "NO TRESPASSING" in smaller letters. These two signs are close to the roadway and are easily visible to passersby. There is a third sign approximately two car lengths off of the main road, and this is the sign that was visible on the investigators' dash camera. It is located approximately in the middle of the property. It is very close to the driver's side of a vehicle that would be traveling along the driveway leading to the defendant's home. Atop the sign are the numbers "342," in white letters and a black background, arranged vertically and appearing as 911 numbers. Below the numbers is a sign with red letters on a white background, which reads "NO TRESPASSING, HUNTING OR FISHING, VIOLATORS PROSECUTED, UNDER PENALTY OF LAW,"

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along with what appears to be a telephone number. Below that sign is another sign with blue letters on a white background that appears to be homemade. It reads "ORGANIC FARM, DO NOT SPRAY, NO ROCIAR, ZOMA ORGANICA." Below that sign is another like the one above, which reads "WATER LINES, SEPTIC LINES, SMALL TREES, PLANT SEEDLINGS" and is in the middle of two arrows pointing down the word "SO." Below that sign is a purchased sign with white letters and a black background reading "KEEP OFF THE GRASS." There is another sign appearing somewhat in the middle of the property and closest to the road, which has red letters and a white background at the top and bottom with white letters in red background in the middle. It appears to be a purchased sign and reads like the first sign above with blue letters on a white background. There is yet one more sign located on a tree with red letters and a white background that cannot be read on this record.

As the majority has noted, there are cases that can be cited that stand for the proposition that a "no trespassing" sign demonstrates a legitimate expectation of privacy that requires a warrant to legally enter the property, and there are cases that **state** that one sign is insufficient to create a legitimate expectation of privacy. As to the cases cited by the majority that do not believe a single trespassing sign demonstrates a legitimate expectation of privacy, I find them unpersuasive. A wall; a gate, perhaps locked; a guard tower, perhaps a manned guard tower; the installation of cameras or other surveillance devices; or more ominous warnings on the signs would more unmistakably convey that the person behind those walls revoked any implied consent for others to come upon their property. However, the problem with requiring such additional barriers to revoke the implied right of consent is that it extends a privilege to the wealthy while trampling the rights of the poor, who deserve equal protection from the intrusion of government. An individual should not be stripped of their right to exclude others from their property simply because they cannot afford to install a gate or other security items. A simple sign, whether purchased or homemade, is a clear expression of one's intention to exclude others. The sign operates to speak to all those who see it as if the owner himself were there speaking. For years, citizens, living in the city or the country, that have wanted to avoid contact with others and wanted others not to intrude upon their property have done so by posting the simple and easy to understand "No Trespassing" sign. Giving these signs great weight is consistent with living in a free society.

Here, the investigators had enough information to obtain a search warrant for the defendant's premises. For reasons unclear to me, the officers chose to enter the defendant's property without such a warrant, instead relying on an exception to the warrant requirement. The lesson here is simple: the easiest way is not always the best way. Because there is not an applicable exception to the warrant requirement to justify the entry onto the defendant's property, the search was unreasonable. Therefore, all of the evidence resulting from the search should be suppressed.

In all other regards, I agree with the majority opinion. I would remand this case to the trial court to sentence the defendant for the class B misdemeanor of resisting arrest. Because I concluded that the evidence obtained was a result of an unlawful search, I would reverse and dismiss all other convictions.

[1] This case was heard on the campus of the University of Memphis Cecil C. Humphreys School of Law as a special project of the Tennessee Court of Criminal Appeals in furtherance of the educational process of students and faculty.

[2] We have determined that 1-800-THE-FIRM is the number for the Cochran Firm, established by the late Johnnie Cochran.

[3] Apparently this weapon was short enough that the trial participants also referred to it as a handgun.

[4] We note that our **state** supreme court has held that Article 1, section 7 of the **state** constitution "`is identical in intent and purpose with the Fourth Amendment'" but that under the **state** constitution, the **state** supreme court may extend greater privacy protections than the federal constitution when necessary. ***State** v. Randolph,* 74 S.W.3d 330, 334 (**Tenn**. 2002) (quoting *Sneed v. **State**,* 423 S.W.2d 857, 860 (**Tenn**. 1968)).

[5] We note that Ms. Atkins testified that there were other signs on the property, but because the "dashcam" video does not show those signs, we conclude that they are not visible to someone approaching the house using the driveway, as the officers did in this case.

[6] In appellant's reply brief and at oral argument, he argued that appellant's statement to investigators that the laboratory was in the freezer did not create additional exigent circumstances. However, our ruling that the exigency continued from the time that investigators smelled methamphetamine until the active lab was disabled encompasses both Investigator Chunn's initial entry, when he did not find an active lab, and his second entry, when he found an active lab based on appellant's statement; thus, appellant's argument regarding his statement is inapposite. Moreover, any argument that appellant's statement was not voluntary or was taken in contravention of his

constitutional rights is waived for failure to address it in the trial court. *See* **Tenn**. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

[1] I wish to make it clear that I do not believe that exigent circumstances existed to allow the initial entry onto the defendant's property. Good information about an active methamphetamine lab under these circumstances is simply not enough to invoke the exception to the search warrant requirement known as exigent circumstances. These investigators knew that no one else was in the house, except the defendant. They could easily monitor who came in and out. They gave no explanation as to why they did not call for backup or other assistance. The **State** argued during the suppression hearing that with the information the officers had obtained, they had a duty to act. The **State** contended that the officers would be sued if they did not act and something happened to the defendant. I do not agree with the assertion that had the defendant been injured while the investigators were doing their duty by securing a search warrant to enter upon his premises that Tipton County was subject to civil liability.

[2] I acknowledge that the descriptions of these signs are based off of a photograph of the defendant's property that was taken several months after his arrest. It was made an exhibit and the proof showed the signs were present on the day of the search.

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Attachment 2

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FILED
Sep 07, 2012
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Plaintiff - Appellant,	)	
	)	
v.	)	
	)	
MICKEY FUGATE,	)	**OPINION**
	)	
Defendant - Appellee.	)	

Before: SILER and WHITE, Circuit Judges; REEVES, District Judge.*

PER CURIAM. The government appeals the district court's order granting Defendant-Appellee Mickey Fugate's motion to suppress evidence under the Fourth Amendment. We **AFFIRM** in part and **REMAND** in part.

I.

On November 14, 2009, at approximately 3:40 p.m., a lone gunman wearing a dark hoodie and green ski-mask entered the Kwik-N-Kold convenience store on Wyoming Avenue in Dayton, Ohio, robbed it at gunpoint, and shot and wounded a clerk. Observing a masked man with a gun and money in his hands leave the store, two citizens called the police and followed the man for several miles. The citizens informed the police dispatcher that the man was driving a black Cadillac without license plates and appeared to be circling

*The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

an area of about a half-mile radius. The police dispatcher, in turn, relayed information about the robbery and chase to officers on patrol. The citizens lost the vehicle when they were forced to abandon the chase because the person in the Cadillac shot at them.

Officer Michael Saylors responded to the call and began searching the vicinity for the Cadillac. Saylors testified that, based on his experience, the gunman may have been circling to try to get to a nearby house. About ten or fifteen minutes after the car was lost, as Saylors was driving up an alleyway just outside the area the gunman had been circling, he spotted the top of a black vehicle in the backyard of the residence located at 140 Drummer Avenue. The vehicle was parked between the house and an above-ground pool, so that only the top twelve to eighteen inches of the car was visible from the alleyway. Officer Jon Zimmerman, another officer who arrived at the scene, testified that he did not see the vehicle at first and could "barely see a little bit of the top of the car."

Knowing that the backyard was private property, and without a search warrant, Saylors entered the backyard – without having to open a fence or gate to gain entry – and discovered that the vehicle was a black Cadillac without a license plate. Upon further inspection, he found money inside the car and a cash-register drawer on the ground near the car. Saylors called for back-up, which arrived within seconds. Saylors went to the front of the house and asked a group of people nearby if they had seen any activity at 140 Drummer; they had not. The officers also knocked on two doors to the house, announced themselves

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as police, and confirmed that the doors were locked. After walking around the house, Saylors noticed that a back window was open.[1]

Saylors and Zimmerman testified they believed there might be hostages inside the house, so Zimmerman and another officer, Officer Lynott, entered the house through the open window. Once inside, the officers encountered Defendant Fugate and instructed him to walk backwards towards them with his hands in the air. The officers handcuffed Fugate and assisted him out through the open window. They then conducted a protective sweep of the house and noticed a dark blue hooded sweatshirt on top of the washer and dryer and an access to the attic that was slightly ajar. Just inside the attic, the officers saw a green piece of fabric. They secured the house until they could obtain a search warrant.

Based upon the information the officers discovered, including Saylors's discovery of the black Cadillac, money, and hooded sweatshirt, Detective Sean Copley obtained a search warrant for the residence at 140 Drummer. During the execution of the warrant, the officers discovered further incriminating evidence, including a 9-millimeter handgun and money located in a pillowcase and in-between mattresses. Saylors did not participate in executing the search warrant.

Fugate was charged with one count of interfering with commerce by the threat or actual use of physical violation, 18 U.S.C. §1951(a); one count of using a firearm in relation to a crime of violence, 18 U.S.C. §924(c)(1))(A)(iii); and one count of felon-in-possession

[1]Additionally, a K9 arrived and tracked the money from the Cadillac to the front of the house. Nothing in the record indicates that the dog alerted on the open window.

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of a firearm, 18 U.S.C. §§922(g)(1) & 924(a)(2). He moved to suppress all evidence against him, arguing that Saylors's initial entry into the backyard of 140 Drummer violated the Fourth Amendment and, therefore, the search warrant obtained on the basis of information acquired from the search was invalid. After an evidentiary hearing and post-hearing briefing, the district court granted Fugate's motion. The government timely appealed.

II.

When considering a district court's decision on a motion to suppress, we review factual findings for clear error and legal conclusions de novo, taking the evidence "in the light most likely to support the district court's decision." *United States v. Braggs*, 23 F.3d 1047, 1049 (6th Cir. 1994); *see also United States v. Adams*, 583 F.3d 457, 463 (6th Cir. 2009).

III.

We begin by considering whether the government has waived any arguments that Saylors's warrantless search of the backyard of 140 Drummer violated the Fourth Amendment. In the district court, the government advanced two arguments. First, the government argued that the plain-view exception to the warrant requirement justified Saylors's warrantless entry into the backyard and that his conduct, therefore, did not violate the Fourth Amendment. *See United States v. Galaviz*, 645 F.3d 347, 354 (6th Cir. 2011). Second, the government argued that exigent circumstances and probable cause – based on Officer Saylors's discovery of the black Cadillac without a license plate and the cash register drawer – justified the warrantless entry of the *house* itself rather than the backyard. *See*

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United States v. Bass, 315 F.3d 561, 564 (6th Cir. 2002). The government did not contend that the officers' conduct fell within the good-faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897 (1984).

In this appeal, the government abandons its argument that the warrantless entry of the backyard falls within the plain-view exception. Instead, the government analogizes the facts here to a series of cases in which police officers employ an investigative technique known as a "knock and talk." *See, e.g., Hardesty v. Hamburg Twp.*, 461 F.3d 646, 654 (6th Cir. 2006); *United States v. Thomas*, 430 F.3d 274, 276 (6th Cir. 2005); *Estate of Smith v. Marasco*, 430 F.3d 140, 157 (3d Cir. 2005); *Alvarez v. Montgomery Cnty.*, 147 F.3d 354, 358 (4th Cir. 1998). Second, the government argues that Saylors's entry into the *backyard* falls within the exigent-circumstances exception to the warrant requirement.[2] Relatedly, the government contends the burden of justifying a warrantless search of a home's curtilage is lower than for the home itself and that the exigent-circumstances inquiry involves a balancing approach. The government also argues in favor of the good-faith exception in this appeal.

There are essentially two cases involved here: the one the government made to the district court and the one the government makes in this appeal. Given that the government

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[2]The district court found, and the government does not dispute, that the backyard was part of the curtilage of 140 Drummer. *See generally United States v. Dunn*, 480 U.S. 294, 301 (1987) (explaining four-factor test for determining extent of home's curtilage); *Jacob v. Twp. of W. Bloomfield*, 531 F.3d 385, 389-90 (6th Cir. 2008) (holding backyard of residence as part of the curtilage); *accord United States v. Wells*, 648 F.3d 671, 677 (8th Cir. 2011).

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advanced two perfunctory (and erroneous) arguments below and entirely omitted necessary steps for a full analysis of the complicated Fourth-Amendment issues presented, we cannot fault the district court for the way it addressed the issues in this case. Although we can abandon the general rule that we do not consider arguments presented for the first time on appeal, this is not such an exceptional case. *United States v. Ellison*, 462 F.3d 557, 560-61 (6th Cir. 2006). Under these circumstances, we will not disturb the district court's analysis and conclusion that Saylors's entry into the backyard of 140 Drummer violated Fugate's Fourth Amendment rights.

IV.

We now turn to the question whether the good-faith exception to the exclusionary rule applies in this case. The government contends that even if Saylors's initial warrantless entry violated the Fourth Amendment, the exclusionary rule is nevertheless inapplicable on the facts of this case. Although the government did not raise the good-faith issue below, the district court *sua sponte* addressed it, finding that the *Leon* good-faith exception did not apply. Hence, the government can challenge the ruling on appeal. *United States v. Clariot*, 655 F.3d 550, 556 (6th Cir. 2011) ("[T]here can be no forfeiture where the district court [despite a party's failure to press an argument,] addressed the merits of the issue."). This court reviews de novo the district court's determination that the good-faith exception does not apply. *United States v. Van Shutters*, 163 F.3d 331, 336 (6th Cir. 1998) (citation omitted).

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The sole purpose of the exclusionary rule – a judicially created remedy that bars the government from introducing evidence obtained through illegal searches and seizures – is to deter future law enforcement officers from violating the Fourth Amendment. *Davis v. United States*, 564 U.S. — , 131 S. Ct. 2419, 2426 (2011).[3] But the exclusionary rule is not absolute. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("Suppression of evidence, . . . has always been our last resort, not our first impulse."). In *Leon*, the Supreme Court created the good-faith exception to the exclusionary rule, "which allows admission of evidence 'seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.'" *United States v. Evers*, 669 F.3d 645, 654 (6th Cir. 2012) (citation omitted).

This case presents a situation in which a defendant seeks to suppress evidence obtained pursuant to a search warrant containing information discovered in a warrantless search that has been held to violate the Fourth Amendment. The question is whether the *Leon* good-faith exception applies when officers act pursuant to a search warrant that is based on an illegal predicate search. The answer to this question is far from clear, and we have issued inconsistent opinions on the issue. *Compare United States v. McClain*, 444 F.3d 556, 559 (6th Cir. 2006) *with United States v. Davis*, 430 F.3d 345, 358 n.4 (6th Cir. 2005). Likewise, the circuits are split.[4]

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[3]We also note that the district court did not have the benefit of *Davis* because the Supreme Court issued it after the district court ruled on Fugate's motion to suppress.

[4]*See, e.g.*, *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989) ("We believe the Fourth Amendment was violated, but we also believe the facts of this case are close enough to the line of validity to make the officers' belief in the validity of the warrant

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Relying primarily on a line of cases arising in the Eighth Circuit, the *McClain* panel concluded that the good-faith exception applies, even if a warrant is based on an illegal predicate search, where "the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable." 444 F.3d at 566. We are bound by *McClain*.[5] *United States v. Humphrey*, 287 F.3d 422, 452 (6th Cir. 2002) ("It is axiomatic that a court of appeals must follow the precedent of prior panels within its own circuit.").

Since *McClain*, the Supreme Court elaborated on the scope of the exclusionary rule. *Davis v. United States*, 564 U.S. , 131 S. Ct. 2419, 2426, 180 L. Ed. 2d 285 (2011); *Herring v. United States*, 555 U.S. 135 (2009). In *Herring*, the Supreme Court reiterated that "suppression is not an automatic consequence of a Fourth Amendment violation." U.S. at 137; *see also United States v. Master*, 614 F.3d 236, 242 (6th Cir. 2010) (discussing *Herring*

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objectively reasonable."); *United States v. Wanless*, 882 F.2d 1459, 1466 (9th Cir. 1989) ("[T]he good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search."); *see also* Hadar Aviram, Jeremy Seymour, and Richard Leo, *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing*, 37 Fordham Urb. L.J. 709 (noting the circuit split and explaining that *United States v. Herring* does not squarely answer the question).

[5]We reach this conclusion because *McClain* represents our most recent published decision and contains an exhaustive discussion of the issue. In contrast, the *Davis* panel's conflicting conclusion is dicta in a footnote based in part on a Second Circuit case that expressly declined to answer the operative question. *See United States v. Reilly*, 76 F.3d 1271, 1280-81 (2d Cir. 1996) ("[W]e do not hold that the fruit of illegal searches can never be the basis for a search warrant that the police can subsequently use in good faith. We do not need to reach that question."). Finally, the defendant in *McClain* petitioned for rehearing en banc, which the court declined over a strong dissent. *United States v. McClain*, 444 F.3d 537 (6th Cir. 2006).

and noting "the decision to exclude evidence is divorced from whether a Fourth Amendment violation occurred"). In doing so, the Court discussed *Leon* extensively, concluding:

> When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance 'good faith.'"

Herring, 555 U.S. at 142. Thus, even assuming a Fourth Amendment violation:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 144. *Herring* also makes clear that in analyzing the applicability of the good-faith exception, "we must consider the actions of all the police officers involved," *id.* at 140 (quoting *Leon*, 468 U.S. at 923 n.24), including, in this case, Saylors.

Here, the district court did not have the benefit of the parties' briefing and argument on this issue. Likewise, the Supreme Court issued *Davis* after the district court granted Fugate's motion to suppress. As we explained in *Master*, "the Supreme Court has effectively created a balancing test by requiring that in order for a court to suppress evidence following the finding of a Fourth Amendment violation, the benefits of deterrence must outweigh the costs." In *Master*, we remanded to allow the district court to consider whether the officers' conduct was deliberate, reckless, or grossly negligent. 614 F.3d at 243 (citation and alterations omitted). As in *Master*, the district court has not had this opportunity, and we therefore remand the case for further proceedings not inconsistent with this opinion.

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V.

For these reasons, we **AFFIRM** the district court's decision in part and **REMAND** in part.

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HELENE N. WHITE, Circuit Judge, dissenting. The district court addressed the good-faith exception—which had not been asserted by the government—only in passing, as a side observation. I would hold the issue was waived and affirm the district court's judgment.

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