RECORD NO. 13-1227

In The
United States Court of Appeals
For The Fourth Circuit

CHRISTOPHER J. COVEY; LELA G. COVEY,
Plaintiffs – Appellants,

v.

ASSESSOR OF OHIO COUNTY; KATHIE HOFFMAN, Head Assessor; ROY CREWS, Field Deputy; UNKNOWN ASSESSOR; OHIO COUNTY SHERIFF; PATRICK BUTLER, Sheriff; ALEX ESPEJO, Corporal; RON WHITE, Deputy; NELSON CROFT, Lieutenant; NICHOLE SEIFERT, Officer; HNK, Unknown Officer; DLG, Unknown Officer; DEPARTMENT OF JUSTICE - DEA; OHIO VALLEY DRUG TASK FORCE; OHIO COUNTY ANIMAL SHELTER; DOUG MCCROSKY, Supervisor; UNKNOWN DOG WARDENS (2); UNITED STATES OF AMERICA; ROBERT L. MANCHAS, S.A.,
Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT WHEELING

BRIEF OF APPELLANTS

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(name of party/amicus)

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If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
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Signature: /s/ Sean Andrussier Date: 1/13/2014

Counsel for: Appellants

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I certify that on 1/13/14 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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STATEMENT OF JURISDICTION

The Coveys filed this action raising federal claims under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), as well as state law claims. The district court had federal question jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. On January 25, 2013, the district court entered an order and judgment dismissing with prejudice the federal claims under Fed. R. Civ. P. 12(b)(6) and declining to exercise supplemental jurisdiction over the state law claims. J.A. 66, 83. On February 15, 2013, the Coveys timely filed their notice of appeal. J.A. 86. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because this is an appeal from a final judgment of the district court.

STATEMENT OF THE ISSUES

In this damages action, the district court dismissed the Coveys' Fourth Amendment claims under Rule 12(b)(6), holding that their *pro se* complaint failed to state a valid claim under the Fourth Amendment. The questions presented are:

1. Have the Coveys stated a valid claim that law enforcement officers violated the Fourth Amendment when, in response to a tip that marijuana was believed to be in the back patio area of the Coveys' home, the officers proceeded directly to the Coveys' backyard and discovered the marijuana in the patio area,

without a warrant or consent to be there?

2. The tip on which those officers acted was reported to the sheriff by a county property tax assessor. The Coveys allege that, without their knowledge or consent and while they were away from home, the tax assessor opened the door of their home, and he examined the back patio area where he observed what he believed to be marijuana. Have the Coveys stated a valid claim that the tax assessor violated the Fourth Amendment?

3. Defendant Manchas argued below that Mr. Covey's plea agreement should bar the Fourth Amendment claims under *Heck v. Humphrey*, 512 U.S. 477 (1994), a contention the district court did not address. Does Mr. Covey's plea agreement bar either Mrs. Covey or Mr. Covey from pursuing this action?

STATEMENT OF THE CASE

This case implicates the Fourth Amendment right to be free from unreasonable government searches at a secluded rural home.

I. The *Pro Se* Complaint's Allegations

The following information derives from the Coveys' *pro se* complaint and from photos of their home that they filed in the district court in opposition to a motion to dismiss, photos on which the district court relied in its order.[1]

[1] The photos were not taken on the day of the incident. The record does not reflect when the photos were taken, but they were taken after this lawsuit was filed.

Chris and Lela Covey live in rural West Virginia in a secluded home surrounded by dense trees and bushes. J.A. 49; J.A. 52 (bottom photo).[2] A long driveway, which stretches hundreds of feet, separates their home from a public road. J.A. 49 (top photo). "No Trespassing" signs are posted along the driveway. *Id.* (middle and bottom photos). While their home has a walkway leading to the front door, no such walkway exists between their driveway and their backyard. *See* J.A. 51. In their backyard, right outside their basement, is a patio area. *See id.*

On October 21, 2009, while the Coveys were at lunch, an Ohio County tax assessor, whom the Coveys believe to be Field Deputy Roy Crews, drove to the Coveys' property, passed the "No Trespassing" signs, and proceeded to their house. J.A. 13 (¶ 7); J.A. 49 (bottom two photos).[3] By regulation, a tax assessor may not inspect a home's exterior or interior if the homeowner denies permission; and "[i]f the property is posted with 'No Trespassing' signs," the assessor "is not to enter the grounds." W.V. Code R. § 189-2-3 (at J.A. 39–40). Nonetheless, Crews approached the Coveys' home. J.A. 13 (¶ 7). No one was home at the time because the Coveys were at lunch. J.A. 13 (¶ 10).

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[2] In briefing below, the Coveys explained, "The property is 10.73 acres located in an isolated, rural area . . . and approximately 35 miles outside of Wheeling, West Virginia," and "is wholly encompassed by [their] parents['] land with access granted and conveyed to Plaintiffs for access to the residence." D.E. 35, at 7.

[3] A pamphlet left at their house was signed by County Tax Assessor Kathie Hoffman, J.A. 32, so Ms. Hoffman too may have been at their house with Crews.

Without consent or a warrant, Crews opened the front door of the Coveys' home. J.A. 13 (¶ 7). He put a pamphlet inside the house. *Id.* He also walked across the backyard of the home, and discovered what he believed to be marijuana in the back patio area. *See* J.A. 13 (¶¶ 7, 8). (As the district court said, the marijuana was "in the back patio area of the home." J.A. 67. The specific location of the marijuana there, which Plaintiffs maintain was in a container, is not in the *pro se* complaint, but will be discussed below.) Crews then reported his marijuana discovery to Ohio County Sheriff Patrick Butler, who quickly contacted a member of the Ohio Valley Drug Task Force, Corporal Alex Espejo. J.A. 13 (¶¶ 8, 9). Espejo headed to the Coveys' home with Special Agent Robert Manchas of the Drug Enforcement Administration (DEA). J.A. 13 (¶ 9).

Upon arriving at the Coveys' home, Espejo and Manchas parked partially on the backyard, off the driveway. J.A. 13 (¶ 11); J.A. 50 (bottom photo).[4] Photos reveal that, from where they parked, the basement door and most of the surrounding patio area were not visible. *See* J.A. 51 (photo showing stone wall running perpendicular to the back of the home). The officers, in plain clothes with

[4] The district court's order said "the officers knocked on the front door and, receiving no answer, proceeded to the back of the home where they found Mr. Covey." J.A. 67. But the complaint does not allege, and the record does not establish, that the officers approached the front door. To the contrary, the inference is that they never approached the front door: They did not park in the visitor parking area by that door, but instead parked partially on the backyard. *See* J.A. 13 (¶ 11); J.A. 50.

guns on their hips, proceeded by foot through the backyard and went to the patio area (where, as noted, the tax assessor had reported observing what he believed to be marijuana). J.A. 13 (¶¶ 8, 12). In that area, the officers encountered Mr. Covey at his workbench. J.A. 13 (¶¶ 12–13); J.A. 51 (bottom photo); J.A. 52 (top photo). The officers "surprise[d]" Mr. Covey there. J.A. 13 (¶¶ 10, 13).

The officers handcuffed Mr. Covey. J.A. 13–14 (¶ 13). When Mr. Covey asked the officers why they were there, they responded, "You'll find out." J.A. 14 (¶ 14). After the officers interrogated Mr. Covey and searched the patio area, Espejo called for backup support and then left to get a search warrant. J.A. 14 (¶¶ 14–16). After Mr. Covey's wife Lela returned home, both were arrested, read their *Miranda* rights, and detained overnight at a jail. J.A. 14–15 (¶¶ 19–22). After Espejo obtained a search warrant, officers searched the home. J.A. 15 (¶ 23).

II. Proceedings Below

On October 20, 2011, the Coveys filed this action *pro se* in the Northern District of West Virginia. J.A. 10. The complaint named the following as Defendants in their individual and official capacities: the Assessor of Ohio County, Head Assessor Kathie Hoffman, Field Deputy Roy Crews, one unknown assessor, the Ohio County Sheriff, Sheriff Patrick Butler, Corporal Alex Espejo, Deputy Ron White, Lieutenant Nelson Croft, Officer Nicole Seifert, two unknown officers, the Ohio County Animal Shelter, Supervisor Doug McCrosky, and two unknown dog

wardens (collectively, the "County Defendants"); the Ohio Valley Drug Task Force; the DEA; and DEA Special Agent Robert Manchas. J.A. 10–11.[5]

Count III of the complaint pleaded a 42 U.S.C. § 1983 claim against Corporal Espejo, Field Deputy Crews, Sheriff Butler, and the other County Defendants, alleging an unreasonable search and seizure in violation of the Fourth Amendment. J.A. 17–18. Count IV likewise pleaded a *Bivens* claim against DEA Special Agent Manchas for violating the Fourth Amendment. J.A. 18–19. Counts I, II, V, and VI raised state law causes of action in tort and under the West Virginia Constitution. J.A. 16, 17, 19, 20. Plaintiffs seek damages.

Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), the United States was substituted for Manchas on the state law claims, leaving only the Fourth Amendment claim remaining against him. D.E. 39[6]; *see* J.A. 68–69 n.2.

Defendants filed motions to dismiss. D.E. 28, 33, 43, 44. In opposing the motions, Plaintiffs filed various items: (1) the above-mentioned photos of their home taken after the lawsuit was filed, J.A. 49–52; (2) criminal complaints that Espejo filed against them in the magistrate court on the day after the incident, J.A. 33–34; *see also* D.E. 48-2 (identical document as to Mrs. Covey); (3) the search

[5] Defendants from the Animal Shelter and dog wardens were named because the Coveys had also advanced a Fourth Amendment claim concerning the seizure of their pet raccoon from their home while the search warrant was executed. They are no longer pressing that Fourth Amendment claim.

[6] We cite the district court docket entries as D.E. followed by the entry number.

warrant and a property receipt showing items seized from their home, J.A. 35–37; and (4) provisions of the West Virginia Code of State Rules regarding tax assessment procedure, J.A. 38–42. With his motion to dismiss, Manchas filed a copy of Mr. Covey's plea agreement, showing that he pleaded guilty in state court to one count of manufacturing marijuana. J.A. 43.

A magistrate judge issued a report and recommendation that the court dismiss the Fourth Amendment claims under Fed. R. Civ. P. 12(b)(6) for failure to state a valid claim, and that the court then decline to exercise supplemental jurisdiction over the state law claims. J.A. 64. The Coveys filed objections. D.E. 55, 57. On January 25, 2013, the district court entered an order agreeing with the magistrate judge's proposed disposition: The court dismissed the Coveys' Fourth Amendment claims with prejudice under Rule 12(b)(6), holding that the Coveys failed to state a claim that a Fourth Amendment violation occurred; and the court then declined supplemental jurisdiction over the state law claims. J.A. 83–84.

Regarding the claim against the tax assessor, the court held that the assessor did not conduct a "search," reasoning that the Coveys do not "have a reasonable expectation of privacy with regard to items viewable by the naked eye from the curtilage of their home when a property tax assessor is executing the responsibilities of his employment." J.A. 72. The court added, "There is no evidence to suggest that Mr. Crews did anything beyond executing the normal

responsibilities of his employment as a tax assessor . . . ." J.A. 72. The court did not address the complaint's allegation that Crews opened the front door of the Coveys' home. Nor did the court address a point raised by the Coveys in their objection to the magistrate judge's report regarding the location of the marijuana that Crews discovered: The Coveys urged that the only marijuana that Crews could have observed was in a container in the patio area. D.E. 55, at 3.[7]

With respect to the claim against the law enforcement officers, the court held that their warrantless entry into the backyard of the home was permissible. J.A. 74–75. The court invoked the knock-and-talk doctrine. J.A. 74. The court found that the officers "were confronted with circumstances that led them to believe that they may find Mr. Covey in the backyard." J.A. 74-75. The court acknowledged that the Coveys maintained that "the officers could not have seen anyone located in the back of the house without first proceeding away from the 'parking area' and the entrance to the home," but the court "disagree[d]" and dismissed the claim under Rule 12(b)(6). *Id.*

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[7] Questions about the location of the marijuana observed by Crews (and whether it was openly visible) are discussed below in the argument. The Coveys wish to clarify a statement they made in their *pro se* brief below. *See* D.E. 55, at 3. This is not in their *pro se* complaint, but they contend, based on how things were stored while they were at lunch, that the only marijuana Crews could have observed in the patio area was inside a storage bin; and although a lid was not on that bin, the marijuana was in closed containers located inside the bin.

III. The Appeal

The Coveys filed this appeal *pro se*. During informal briefing, the County Defendants filed in this Court a copy of the search warrant exhibits, including Corporal Espejo's affidavit. *See* Fourth Circuit Docket Entry 13-2, filed Apr. 4, 2013. That document says where the tax assessor reported to have seen the marijuana in the patio area: He "had observed marijuana in a dehydrator." *Id.* at 4. The document reveals no other marijuana observation by the tax assessor. *Id.*

After informal briefing, this Court granted the Coveys' application to proceed *in forma pauperis* and appointed the undersigned counsel to represent them in this appeal.

<u>SUMMARY OF ARGUMENT</u>

I. The Coveys have stated a valid Fourth Amendment claim against the law enforcement officers by alleging that Corporal Espejo and DEA Special Agent Manchas intruded in the curtilage of the Coveys' home to conduct a warrantless search. At its core, the Fourth Amendment protects the home from unreasonable governmental intrusion. And that protection extends to the curtilage of a home. Here, officers physically intruded into the constitutionally protected curtilage of the Coveys' home—the backyard—in response to a tip that marijuana was believed to be in the back patio area, and the officers discovered marijuana there. Because

they were not lawfully present there without a warrant, consent, or exigent circumstances, their observations in that area amounted to an impermissible search.

In holding that the officers lawfully entered the Coveys' backyard, the district court relied on the "knock-and-talk" doctrine. But at the Rule 12(b)(6) stage, on this limited record, the court could not rightly hold, as a matter of law, that the officers were acting within the scope of that doctrine.

The knock-and-talk doctrine is based on an implied license that by custom permits a visitor to approach a home using routes impliedly open to public access. It is a limited license based on a theory of implied consent. The license is limited by purpose: the purpose of trying to speak to a resident rather than conducting a nonconsensual search. And the doctrine is limited spatially to customary areas of public ingress and egress. Here, members of the public—and thus Defendants herein—enjoyed no implied license to enter the backyard of the Coveys' home. Thus, the officers were not lawfully in that constitutionally protected area when they ignored the front door and proceeded back there without a warrant or consent.

The district court ruled that police officers may proceed into a backyard without a warrant "when circumstances indicate that they might find [a homeowner] there." J.A. 75. But such a rule would ignore the spatial limits of the implied license and extend to police officers a license broader than the customary license that extends to the public.

In any event, the record does not conclusively establish, as the district court found, that the officers saw Mr. Covey *before* they entered the backyard, and so a Rule 12(b)(6) dismissal was improper on that basis.

II. The Coveys have stated a claim that an agent from the county tax assessor's office conducted an unreasonable search of the Coveys' home. Without their knowledge or consent and while they were away from home, the assessor opened the door to their house, entered their backyard, and intruded in the back patio area. While there in the curtilage, he proceeded to examine a container in which he observed marijuana, which he reported to the sheriff. The tax agent's snooping around a secluded residence, without the homeowners' knowledge or consent, cuts at the Fourth Amendment right of individuals to protect the security and privacy of their homes from unnecessary and arbitrary invasions by government officials.

The district court held this was not a "search." The court reasoned that "the Coveys have [no] reasonable expectation of privacy with regard to items viewable by the naked eye from the curtilage of their home when a property tax assessor is executing the responsibilities of his employment," and that the tax assessor did not do "anything beyond executing the normal responsibilities of his employment as a tax assessor." J.A. 72. But putting aside the tax assessor's physical intrusions when he opened the home's door and when he entered the curtilage without the

Coveys' knowledge or consent, factual questions remain as to whether the tax assessor searched "effects" in the curtilage, based on the Coveys' contention that the only marijuana in the patio area was inside containers in an open storage bin.

III. The Coveys' Fourth Amendment claims are not barred by Mr. Covey's plea agreement under *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* cannot bar Mrs. Covey's action because she was never convicted and did not have habeas relief available to her. Nor does *Heck* bar Mr. Covey's claim. When a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged Fourth Amendment violation because the conviction does not rest on evidence that may have been improperly seized, but instead on his voluntary plea. Similarly, when a defendant voluntarily enters a guilty plea, he cannot obtain habeas relief to invalidate his plea simply by establishing that an antecedent constitutional violation occurred. Accordingly, a finding of a Fourth Amendment violation in this civil action would not demonstrate (much less necessarily so) the invalidity of Mr. Covey's conviction; and this case does not present the collision between § 1983 and the habeas regime that implicates *Heck*.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6). *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 179–80 (4th Cir. 2009). When ruling on a Rule 12(b)(6) motion, a court must accept as true all factual allegations in the complaint and construe them in the light most favorable to the plaintiffs. *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008). The complaint must simply contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Furthermore, "[a] document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citation omitted).

ARGUMENT

I. The Coveys Have Stated A Fourth Amendment Claim By Alleging That Corporal Espejo And DEA Special Agent Manchas Intruded Into The Curtilage Of The Coveys' Home To Conduct A Warrantless Search.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Under the Fourth Amendment, "warrantless searches are presumptively unreasonable." *Horton v. California*, 496 U.S. 128, 133 (1990).

Moreover, for Fourth Amendment purposes, "the home is first among equals." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

Of course, the constitutional protections afforded to the home extend beyond the walls of the house. The Supreme Court has long held that a home's curtilage is "considered part of the home for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984); *see also United States v. Dunn*, 480 U.S. 294, 299 (1987). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986).

Although courts in the modern era came to interpret the Fourth Amendment as protecting "reasonable expectation[s] of privacy," *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), the core right has always safeguarded property interests from government trespass, *United States v. Jones*, 132 S. Ct. 945, 950 (2012). And so, an impermissible warrantless search may occur when officers physically intrude on private property, invade a homeowner's reasonable expectations of privacy, or both. *See Jardines*, 133 S. Ct. at 1417

(explaining that 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" (quoting *Jones*, 132 S. Ct. at 951–52)).

The Coveys have plausibly alleged that, without consent, Corporal Espejo and DEA Special Agent Manchas physically intruded upon the Coveys' constitutionally protected curtilage for a warrantless search, while violating reasonable expectations of privacy. The district court erred in dismissing the Coveys' Fourth Amendment claim under Rule 12(b)(6).

A. The Officers Physically Intruded Into A Constitutionally Protected Area When They Entered The Curtilage Of The Coveys' Home In Response To A Tip That Marijuana Was In The Back Patio Area.

Officers Espejo and Manchas intruded into a constitutionally protected area—the curtilage of the Coveys' home—when they proceeded to the back patio area in response to the tax assessor's tip that he believed marijuana was there.

Under the Fourth Amendment, the curtilage is an "area immediately surrounding and associated with the home" and, as noted, constitutes "part of [the] home itself for Fourth Amendment purposes." *Oliver*, 466 U.S. at 180; *see also Dunn*, 480 U.S. at 299. Thus, the curtilage "typically is 'afforded the most stringent Fourth Amendment protection.'" *United States v. Taylor*, 90 F.3d 903,

908 (4th Cir. 1996) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)). By contrast, "open fields" lying outside of a home's curtilage receive no Fourth Amendment protection. *Oliver*, 466 U.S. at 178, 180 n.11.

In determining the scope of a home's curtilage, the "primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home." *Dunn*, 480 U.S. at 301 n.4. To that end, a court looks to four factors (the *Dunn* factors): "[T]he 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." *Id.* at 301.

The Coveys' backyard—including the area outside the home's basement doors, inaccessible by any dedicated path—is curtilage because it is "intimately tied to the home itself." *Id.* Before discussing the *Dunn* factors, we make two preliminary observations.

First, backyards are classic curtilage, as are areas within them, like decks and patios. *See, e.g.*, *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013) ("[T]he parties agree that the curtilage of Cox's residence included the concrete patio behind her apartment."); *United States v. Montieth*, 662 F.3d 660, 670 n.2 (4th Cir. 2011) (concluding that shed in backyard was part of curtilage); *Hardesty*

v. Hamburg Twp., 461 F.3d 646, 652–53 (6th Cir. 2006) (concluding that "case law compels the conclusion that the Hardestys' backyard is part of the home's curtilage"); *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 601–02 (6th Cir. 1998) (holding that a home's backyard was curtilage despite evidence that neighbors could see at least a portion of the yard, and noting that "[t]he backyard and area immediately surrounding the home are really extensions of the dwelling itself," since "many of the private experiences of home life often occur outside the house" (citation omitted)). The district court below seemed to assume that the patio area was part of the curtilage. *See* J.A. 72.

Second, the case was resolved under Rule 12(b)(6). The Coveys' complaint provides no basis for concluding that the area of their yard at issue in this case extended beyond the home's curtilage. *Cf. Presley v. City of Charlottesville*, 464 F.3d 480, 484 n.3 (4th Cir. 2006) (holding that the complaint's allegations provided no basis for concluding that seized realty extended beyond the curtilage, when the district court made no findings on the extent of the curtilage and the defendants did not contend that the seized property was outside the curtilage).

The *Dunn* factors confirm that Espejo and Manchas entered the curtilage of the Coveys' rural home by trekking through their yard to the patio area. The first *Dunn* factor examines the area's proximity to the home itself. This proximity factor strongly favors a conclusion that the officers invaded the curtilage of the

Coveys' home. As noted, areas close to the back of a house—backyards and patios—are routinely deemed curtilage. And in rural areas, the extent of a home's curtilage may be particularly expansive. *See United States v. Van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981) (holding that "the curtilage embrace[d] an area 150 feet from the residence" after noting, *inter alia*, the rural location and attributes of the house); *United States v. Reilly*, 76 F.3d 1271, 1277 (2d Cir. 1996) ("The distance between the marijuana plants and the main residence in the case before us [125 feet to a copse, and 375 feet to a cottage] is admittedly large. But that is just the beginning of the inquiry. For, as the district court emphasized, curtilage may reach a larger area in a rural setting.").

The second *Dunn* factor considers whether the land lies within or outside an enclosure surrounding the home. *See Dunn*, 480 U.S. at 301. When a fence surrounds the home, the curtilage is unlikely to include areas outside the fence. *See id.* at 302; *United States v. Breza*, 308 F.3d 430, 436 (4th Cir. 2002) (noting that because the garden in which the defendant grew marijuana was outside an interior fence, this weighed against concluding the garden was within the curtilage). Put another way, internal fencing can restrict the scope of a home's curtilage by yielding an inference that areas of property beyond that fence are open fields. *Reilly*, 76 F.3d at 1278 (noting that "internal fencing [creates] a boundary that sets the curtilage apart from the open fields"). Of course, a fence is not

necessary to render an area curtilage. *See Van Dyke*, 643 F.2d at 993 n.1 ("The curtilage has been defined as 'an area of domestic use immediately surrounding a dwelling and usually *but not always* fenced in with a dwelling.'" (emphasis added) (citation omitted)). In rural areas, trees and shrubs may create natural enclosures, obviating the imperative for artificial enclosures. *See Reilly*, 76 F.3d at 1277–78; *Williams v. Garrett*, 722 F. Supp. 254, 260–61 (W.D. Va. 1989) ("The boxwood hedge and the heavy woods created a natural enclosure around the home and yard; requiring a person to expend resources and sacrifice aesthetics by building a fence in order to obtain protection from unreasonable searches is not required by the constitution."). The Coveys' yard is surrounded by such natural enclosures.

The third *Dunn* factor concerns "the nature of the uses to which the area is put," i.e., whether the area is "associated with the activities and privacies of domestic life." *Dunn*, 480 U.S. at 301, 303. No basis exists for concluding that the Coveys failed to use their yard for domestic activities.

The fourth *Dunn* factor looks at steps the homeowner took to protect the area from observation by passersby. *Id.* at 301. For this factor, courts have looked to "the layout of the area," *Reilly*, 76 F.3d at 1279, including the distance from a public road and "the plantings on the property," *id.*, as well as the existence of a long driveway and the presence of "No Trespassing" signs, *see United States v. Depew*, 8 F.3d 1424, 1428 (9th Cir. 1993), *overruled on other grounds*, *United*

States v. Johnson, 256 F.3d 895 (9th Cir. 2001) (en banc). The Coveys' property is secluded; dense trees and bushes enclose the backyard; the driveway leading up to their home is exceedingly long; and a visitor would confront "No Trespassing" signs. *Cf. Van Dyke*, 643 F.2d at 994 ("The house, screened by trees, is located in an isolated, rural area with entry provided by a dirt road posted 'no trespassing.' In such a secluded setting, it is reasonable to conclude that the curtilage embraces an area 150 feet from the residence, especially when the lawn extends virtually that far and a fence limits access.").

In conclusion, the Coveys' backyard is part of their home's curtilage, an extension of their home. Without a warrant, Espejo and Manchas entered that constitutionally protected area and discovered the marijuana. Because they were not lawfully present in the curtilage without a warrant, consent, or exigent circumstances, their observations in that area amounted to an impermissible search.

B. The Officers Did Not Establish As A Matter Of Law That They Had An Implied License To Enter The Backyard.

In holding that the officers lawfully entered the Coveys' backyard, the district court relied on the "knock-and-talk" doctrine. J.A. 74. But at the Rule 12(b)(6) stage, on this record, the court could not rightly hold as a matter of law that the officers were acting within the scope of that doctrine. And insofar as the court's opinion was influenced by its belief that the officers first approached the front door and received no answer there, *see* J.A. 67, that is not pleaded in the

complaint or supported by the record. To the contrary, the inference is that the officers failed to try the front door and instead went directly to the backyard: They did not park in the visitor parking area by the front door, and instead parked partially on the backyard. *See* J.A. 50.

1. The knock-and-talk doctrine is based on a customary license to enter areas that are impliedly open to public access.

The "knock-and-talk" doctrine is based on a theory of implied consent—an "implicit license." *See Jardines*, 133 S. Ct. at 1415. The doctrine presumes that members of the public—invited and uninvited—customarily have a license to approach a home's front door in the hope of initiating a consensual encounter with the homeowner or resident. *See id.* at n.1. As the Supreme Court has said, "'the knocker on the front door is treated as an invitation or license'" for "'solicitors, hawkers and peddlers of all kinds.'" *Id.* at 1415 (quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)).

Police officers have the same implied license. *Id.* at 1416. "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.* (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)); *Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir. 2001). A resident may refuse to open the door. *See King*, 131 S. Ct. at 1862 (observing that whether the knock is by a "police officer or a private citizen, the occupant has no obligation to open the door or to speak"). Or a resident can

answer the door and politely ask the officer to leave; at that point, the officer must leave, absent some exception to the warrant requirement, such as exigent circumstances. *See Rogers*, 249 F.3d at 288 (holding that when the homeowner, while standing in the driveway at the front of his home, asked the officers to leave, any knock-and-talk license terminated, and so the officers would have no license to enter the curtilage behind the home).

This customary license is, by nature, a "limited license." *Id.* at 294. First, the license is limited to "a specific purpose"—namely, the purpose of speaking with the home's occupants, rather than conducting a nonconsensual search. *Jardines*, 133 S. Ct. at 1416. Second, "[t]he scope of a license . . . is limited . . . to a particular area," *id.*, namely the area where the public would by custom have an invitation to go.

With respect to area, the "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." *Id.*at 1415; *see also id.* at 1421–22 (Alito, J., dissenting) ("It is said that members of the public may lawfully proceed along a walkway leading to the front door of a house because custom grants them a license to do so."); *id.* at 1422 ("A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway."); *id.* at 1423 ("[T]his implied license to approach the front door extends to the police.").

In *Jardines*—which held that officers acted for an impermissible purpose beyond the scope of the knock-and-talk license by using a drug-sniffing dog—even Justice Alito's dissenting opinion recognized that the implied license has "spatial . . . limits," measured by access routes normally used by the public:

> A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor could customarily use.

Id. at 1422 (Alito, J., dissenting). For support, Justice Alito cited, *inter alia*, the Eighth Circuit's decision in *United States v. Wells*, 648 F.3d 671 (8th Cir. 2011), for the proposition that "police exceeded [the] scope of their implied license when they bypassed the front door and proceeded directly to the back yard." *Jardines*, 133 S. Ct. at 1422. The *Wells* court noted that "'no Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways.'" *Wells*, 648 F.3d at 679 (citation omitted). But in *Wells*, officers bypassed the front door and went where an uninvited visitor had no license to be: on an unpaved driveway next to the paved driveway, at the southeast corner of the home. *Id.* at 673. Only from that vantage point in the curtilage could the officers see the "outbuilding" located in the home's backyard and the light on inside, giving them reason to suspect someone was inside and leading them to

approach through the backyard. *Id.* The court held that unlike a paved driveway, which members of the public could be expected to approach, the homeowner "could reasonably expect that members of the public would not traipse down the [unpaved] drive[way] to the back corner of his home, from where they could freely observe his entire backyard." *Id.* at 678. The officers' entry into the curtilage could not be justified under the knock-and-talk license. *Id.* at 679–80.[8]

Custom may be expanded by a homeowner's particular practice. Thus, if a rear entrance is shown to be a normal point of visitor access, a member of the public, and thus an officer, may have an implied license to approach that entrance. *See United States v. Roberts*, 467 F. App'x 187, 188–89 (4th Cir. 2012) (per curiam) (unpublished) (holding that officers permissibly approached the rear door of a townhouse for a knock-and-talk because evidence known to officers showed that "all guests approached and entered the townhouse through the rear entrance,"

[8] In *United States v. Bradshaw*, 490 F.2d 1097 (4th Cir. 1974), officers were outside the defendant's property investigating an abandoned vehicle when the defendant drove by them to his house; fearing that the "defendant, alerted to their presence, might remove . . . contraband or evidence" of illegal activity regarding the abandoned vehicle, the officers approached the home to question him. *Id.* at 1099. After knocking on the front door and receiving no answer, the officers decided to try the back door, based on evidence that the defendant was home (since they saw him drive home). *Id.* at 1099. Although the Court said this was not impermissible since the officers had a legitimate law enforcement purpose, *id.* at 1100, the Court did not address how or whether the back door was publicly accessible, but it did not matter because the Court held that the officers nonetheless violated the Fourth Amendment before arriving at the back door: They exceeded the knock-and-talk license and conducted a warrantless search by looking through a crack between the doors of a parked truck. *Id.* at 1100–01.

by way of a "rear patio connected to an adjoining parking lot along a paved sidewalk," making it "reasonable for members of the public [and the officers] to approach the townhouse through the rear entryway"). But without evidence that a home's backyard is an established area of public ingress or egress or that the homeowner otherwise has invited public access there, the customary license would not justify a visitor heading directly to the back of a home.[9]

In conclusion, the knock-and-talk license is a "limited license to do what any citizen may do." *Rogers*, 249 F.3d at 294.

2. Members of the public—and thus Defendants here—enjoyed no implied license to enter the backyard of the Coveys' home.

The Coveys' home has a walkway leading to their *front* door, but "no clear walkway exists between the plaintiffs' driveway and their backyard." J.A. 77 (district court opinion). Without a walkway, members of the public could not reasonably believe they have a license to enter the Coveys' backyard. Such a belief would be particularly unreasonable since anyone approaching the Coveys' secluded rural residence—located at the end of an exceedingly long driveway, and

[9] *See, e.g.*, *Wells*, 648 F.3d at 680 (holding that officers' entry onto unpaved driveway at rear corner of house was not justified under knock-and-talk rule, and observing that there was no reason for the officers "to think that Wells generally would receive 'visitors' there"); *Rosen v. Wentworth*, No. 12-1188, 2013 WL 5567447, at *6–7 (D. Minn. Oct. 9, 2013) (holding that knock-and-talk rule did not support approaching door of back porch, which was part of the curtilage, because, *inter alia*, "[t]here was no paved path leading to the rear porch," in contrast to the "paved sidewalk [that] led to the front door"; "that the officers could view the porch from the driveway was no justification for bypassing the front door").

surrounded by dense trees and shrubbery—would confront "No Trespassing" signs, a clear signal that uninvited visitors are not welcome. In these circumstances, the public would enjoy no customary implied license to trek into the Coveys' backyard.[10]

Moreover, it appears that, from the driveway, a visitor would have known that the home's main floor could not be accessed from the backyard: The main floor opened to an elevated deck that, because it was unfinished, lacked stairs or rails. *See* J.A. 50 (bottom photo); J.A. 51 (bottom photo). As for the basement door—which, as noted, photos indicate was not visible from where the officers parked—the record reveals no custom or practice of public ingress and egress

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[10] The district court's reliance on this Court's unpublished opinion in *Edens v. Kennedy*, 112 F. App'x 870 (4th Cir. 2004) (per curiam), was misplaced. *Edens* discussed how homeowners can withdraw the implied customary invitation that otherwise exists to approach their homes. In *Edens*, an officer approached the front door to speak to the homeowner, at which point the officer saw a flowerpot containing marijuana, which he seized. *Id.* at 873. The homeowner argued that, because of a gated fence at the front of the home, the officer had no license to step foot on the property at all. *Id.* at 874. The Court concluded that the officer may have violated the Fourth Amendment when he entered the front yard. *Id.* at 875. The Court said a homeowner can forbid entry altogether—and thus foreclose *any* approach for a knock-and-talk—by "sealing the property," i.e., if the owner "encloses the curtilage with a fence, locks the gate, and posts 'No Trespassing' signs." *Id*. Absent such measures, "a homeowner is likely to receive visits from pollsters, door-to-door salespeople, and trick-or-treaters, among others." *Id.* In other words, absent such measures, the scope of the license is resolved by looking to custom. Here, the issue is not whether the public had an implied license to approach the *front* door. This case concerns officers who went straight to the backyard, where an implied license never extended in the first place. *Edens* does not address the scope of an implied license to do that.

through the home's basement, and the Coveys' property lacks a dedicated walkway linking that area to the driveway for public access.

For these reasons, the public, and thus Defendants herein, had no implied license to enter the Coveys' backyard. Thus, they were not lawfully in that constitutionally protected area without a warrant or consent.

The district court, however, ruled that "police may proceed into a person's backyard without a warrant 'to speak with the homeowner . . . when circumstances indicate that they might find him there.'" J.A. 75 (ellipses in district court opinion) (quoting *Alvarez v. Montgomery Cnty.*, 147 F.3d 354, 356 (4th Cir. 1998)). But the district court lifted that line out of context from *Alvarez* (and misquoted: *Alvarez* used the past tense of the verb "indicate" to formulate a conclusion based on the unique facts of that case, *see* 147 F.3d at 359). Below we discuss *Alvarez*—an unusual case in which the homeowner expressly invited visitors to proceed directly to the backyard. We then explain that, even under the impermissibly broad rule framed by the district court, a Rule 12(b)(6) dismissal nonetheless was improper because the complaint does not plead, and this record does not conclusively establish, that the officers had reason to believe that Mr. Covey was in the backyard *before* they entered the backyard. *See* part I.B.3, *infra.*

In *Alvarez*, officers were responding to a 911 call about a party with underage drinking; they approached the Alvarez home "simply to notify the

homeowner or the party's host about the complaint and to ask that no one drive while intoxicated." 147 F.3d at 356–58. To that end, an officer approached the front door and reached the front stoop; once there, he became aware of the homeowner's sign affixed to a lamppost which read: "Party in Back," with an arrow pointing to the backyard. *Id.* at 357. So, based on the homeowner's sign, the officer moved away from the front door and went to the backyard. *Id.* The Court held that the officers reasonably proceeded to the backyard. *Id.* at 359. And they had a "'legitimate reason'" for going there "'unconnected with a search of the premises'"—to give the aforementioned notice and warning. *Id.* at 358 (quoting *Bradshaw*, 490 F.2d at 1100). And so, "[i]t was not unreasonable . . . for officers responding to a 911 call to enter the backyard when circumstances indicated they might find the homeowner there." *Id.* at 359.

Naturally, because the Alvarezes' sign served as a consensual invitation for visitors to proceed directly to the backyard, the police officers had the same license to enter the area. As the officers argued in *Alvarez*, "once [the Alvarezes] posted the sign directing visitors to the backyard," the Alvarezes granted "public accessibility" to the yard through the "express direction of the sign," and so they "gave up their reasonable expectation of privacy in their backyard, at least to the extent that a visitor sought to contact them there." *Alvarez v. Montgomery Cnty.*, Br. of Appellees at 16–17, No. 97-1648 (4th Cir. Nov. 4, 1997). And "no one

entered the house through the front door; all persons went around the side of the house to the backyard"; thus, "the officers acted no differently than the other people arriving at the house once the sign was posted." *Id.* at 17.

In concluding on those unique facts that the Fourth Amendment did not "invariably forbid" the officers from going to the backyard in lieu of knocking on the front door, 147 F.3d at 358, *Alvarez* did not purport to expand the knock-and-talk doctrine to permit warrantless backyard intrusions whenever officers have reason to believe they may find a person there whom they might like to talk to. Given the Alvarezes' posted invitation to the backyard, the case cannot reasonably be read to announce such a broad rule for warrantless, nonconsensual entry.

Such a rule would defy the justification for the knock-and-talk doctrine, by giving police officers a license more expansive than the implied customary license that extends to the public at large. No such license extends to door-to-door salespersons and pollsters. *They* have no customary license to enter backyards, decks, patios, sheds, hot tubs, and other areas of a home's rear curtilage, simply because they have reason to believe that someone is there whom they would like to talk to—sunbathing on her back deck or relaxing in a hot tub, for example. That would not be a spatially limited license tied to customary routes of public access, but instead a roving and intrusive license that would strip homeowners of privacy whenever they step outside their homes. It would permit warrantless officers to

sneak up on folks in their curtilage without notice and consent, and then claim a right to act on any plain-view observations of incriminating activity (by smell, sight, etc.). That would undermine the status of curtilage as constitutionally protected space.

To be sure, that the circumstances in *Alvarez* indicated that the homeowner was in the backyard was relevant to whether the officers had a *legitimate purpose* for going there *unconnected with a search*. But simply because a homeowner may be on a back patio does not mean that the customary implied license extends to that area. As with the dog-sniff in *Jardines*, such an invitation "assuredly does not inhere in the very act of hanging a knocker." *See Jardines*, 133 S. Ct. at 1416.

For these reasons, the district court erred in holding that the knock-and-talk doctrine justified the officers' warrantless entry into an area of curtilage where uninvited visitors had no license to go.

3. In any event, the record does not establish that the officers saw Mr. Covey *before* they entered the backyard, and so a Rule 12(b)(6) dismissal was improper on that basis.

Even under the impermissibly broad rule framed by the district court—allowing warrantless access anywhere in the curtilage where officers see or believe they might find someone they would like to question—a Rule 12(b)(6) dismissal was improper here. As explained below, this limited record does not conclusively establish that the officers had reason to believe that Mr. Covey was home and at

his workbench in the patio area *before they entered the backyard*—i.e., before they decided to ignore the front door and trek directly to the area of curtilage where they were told by the sheriff (based on the tax assessor's tip) that they might find marijuana. And so the court could not rightly dismiss the action on the basis that the officers entered the curtilage for a reason unconnected to a search.

As the complaint reveals, the tax assessor knew nobody was home at the Covey residence (the Coveys were away at lunch) when he reported to Sheriff Butler. *See* J.A. 13 (¶¶ 7–10). Presumably the tax assessor conveyed to Sheriff Butler that the Coveys were not home. Upon receiving the tip, Sheriff Butler caused law enforcement officers to be dispatched to the Coveys' home. *See* J.A. 13 (¶ 9). Upon arriving at the home, the officers not only failed to park in the driveway area by the front door, J.A. 12 (¶ 12), they parked partially in the backyard itself, J.A. 50 (bottom photo). The officers then proceeded by foot to the patio area, and according to the complaint, it was *at that time* when they encountered Mr. Covey at his workbench and surprised him. J.A. 13 (¶¶ 12–13).

As the Coveys explained in their objections to the magistrate judge's report, after returning home from lunch with his wife, Mr. Covey went inside the house, and he was "in the house at the time the officers drove up the driveway"; otherwise he would have gone to the driveway to see them, rather than standing at his workbench with marijuana. D.E. 55, at 4. Mr. Covey thus maintained that the

officers must have parked and begun heading to the patio area before Mr. Covey stepped outside the basement doors and stood at his workbench, "where the officers came upon and *surprised the plaintiff*." *Id.* (emphasis in original).

The Coveys also explained that, based on the layout of the property, "[t]he officers could not have observed anyone standing at the workbench located just left of the rear basement walk out door *unless* they were *already* in a place where they were not legal to be [sic]—the plaintiff's private backyard area." *Id.* (emphasis added). This is supported by the photos. From where the officers parked, it appears they could not have seen the workbench (which, the Coveys maintained, was positioned to the left of the basement door). The officers' line of vision would have been obstructed by a stone wall that connected on a perpendicular line to the back of the home, to the left of the basement door; that wall screened the workbench from the parking area. *See* J.A. 50 (bottom photo); J.A. 51 (bottom photo). To see him at his workbench, the officers would have had to already have been well into the curtilage. This gives rise to an inference that they entered the backyard to look for the reported marijuana, and that once there they encountered and surprised Mr. Covey.

In short, from the Coveys' complaint, a court could not find that the officers knew anyone was home when they approached, much less that they saw Mr. Covey at his workbench *before* they proceeded into the curtilage.

The district court, however, found otherwise. After noting that the Coveys maintained "that the officers could not have seen anyone located in the back of the house without first proceeding away from the 'parking area' and the entrance of the home," the district court "disagree[d]." J.A. 75. The court said it was "clear" that the officers "[r]ealiz[ed] that Mr. Covey was not inside the house," but instead "was on the back patio at a workbench," and so "proceeded to the backyard in order to speak with him there." J.A. 74. But it is not clear at all that the officers saw him *before* they were in the backyard. The district court referenced the photos, finding they "make clear that the view of the backyard patio area is not impeded from the vantage point of the parking area near the garage of the home." J.A. 76. But, as just explained, the opposite is true: The photos show the stone wall extending on a perpendicular line to the home's back; that wall screened the workbench and most of the patio area from the officers' parking area. Presumably these officers could not see through a stone wall.

The district court also cited the criminal complaint that Espejo completed the following day, J.A. 76, but on this issue, the document is ambiguous. Regarding the officers' approach, the criminal complaint simply says this:

> [The tax assessor] observed what [he] believed to be marijuana. DEA S.A. Manchas and Cpl. Espejo traveled to the above address. Upon arrival officers observed a white male standing under the deck near the rear basement walkout door. The male appeared to be working at a workbench. . . .

J.A. 33. Even assuming that passage to be true, "upon arrival" might mean "when they arrived" or "after their arrival," and so the passage does not conclusively establish that the officers observed Mr. Covey before they entered the backyard. It does not conclusively establish their location when they observed him standing by the basement door.

In the end, this case was resolved under Rule 12(b)(6), not after a bench trial. Plaintiffs filed their complaint *pro se*, and thus it must be liberally construed. *Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010). Even under the broad knock-and-talk rule announced by the district court—one that permits an officer's direct entry into a backyard beyond the scope of the implied license that justifies the doctrine—a remand would be required to determine, on an evidentiary record, whether the officers went directly into the backyard *before* they saw Mr. Covey. Only then could a court determine whether the officers entered the curtilage for a legitimate purpose "'unconnected with a search.'" *See Alvarez*, 147 F.3d at 358 (citation omitted).

II. The Coveys Have Stated A Claim That The Tax Assessor Violated The Fourth Amendment.

An employee from the tax assessor's office, whom the Coveys believe to be Field Deputy Crews, conducted an unreasonable search of the Coveys' home when, without their knowledge or consent and without a warrant, he opened the door to their house, entered their backyard, and intruded on the patio area which the district court acknowledged to be curtilage. *See* J.A. 72. While there, as discussed below, he proceeded to examine a container in which he observed what he believed to be marijuana, which he reported to the sheriff. The tax agent's snooping around a secluded residence, without the homeowners' knowledge or consent, cuts at the Fourth Amendment right of individuals to protect the security and privacy of their homes from unnecessary and arbitrary invasions by government officials. The Coveys have stated a valid Fourth Amendment claim.

Unquestionably Crews is a state actor subject to the Fourth Amendment. That he is not a police officer is of no moment; what matters is that Crews is a governmental agent who went to the home to perform an inspection for the government. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) ("But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority.'" (citation omitted)).

Likewise, the Fourth Amendment's protections apply even though Crews did not approach the Coveys' homestead to investigate criminal activity: "It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2627 (2010). "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to whether the government actor is investigating crime or performing another function." *Id.* (citation and internal quotation marks omitted); *see also Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 530 (1967) (observing that it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior").

Accordingly, inspections of private residences by administrative officers implicate the Fourth Amendment, and when a homeowner refuses consent, an administrative search generally requires a warrant (an inspection warrant), albeit one that does not require the probable-cause showing required of a warrant for a criminal investigation. *Id*. at 540; *Michigan v. Clifford*, 464 U.S. 287, 291 (1984) (plurality opinion); *United States v. Bradley*, 571 F.2d 787, 789 (4th Cir. 1978) ("[W]arrants are required prior to conducting administrative searches."). An administrative search is a search conducted by government officials—e.g., building

inspectors—who often perform "routine systematized inspection of . . . physical structures." *Camara*, 387 U.S. at 533; *see also id.* at 540 (holding that a homeowner "had a constitutional right to insist that [housing inspectors] obtain a warrant to search" the home); *Michigan v. Tyler*, 436 U.S. 499, 504 (1978) ("The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection.").

Residential inspections by tax inspectors pose no less of a threat to the security and privacy interests safeguarded by the Fourth Amendment than other government inspections. Indeed, given the relationship between the assessor and law enforcement in West Virginia's tax assessment-and-collection regime, the threat posed by tax inspectors is pronounced. By law, the sheriff is not only the chief county law enforcement officer, he is also the county treasurer and charged with collecting property taxes. *See* W. Va. Code § 7-5-1 (sheriff as treasurer); *id.* § 11A-1-4 (sheriff collects taxes); *id.* § 7-6-8 (sheriff disburses public funds). The website of Ohio County, where this incident occurred, explains that "the Sheriff also serves as the Treasurer of the county and collects all taxes levied by the county," and that it is his duty to "[m]aintain all tax records" and "[e]nforce payment of delinquent taxes." *County Sheriff*, Ohio Cnty., W.V., www.ohiocounty.wv.gov/countygovernmentagencies/Pages/sheriff.aspx (last

visited Dec. 27, 2013). Evidently tax assessors report the amount of taxes owed, so the sheriffs can carry out their duty to prepare tax statements. *See* www.ohiocounty.wv.gov/countygovernmentagencies/Pages/assessor.aspx (last visited Dec. 27, 2013). Although the tax assessor and sheriff are in separate agencies, the functional relationship between the county's assessor and chief law enforcement officer should highlight a concern about a tax agent intruding in constitutionally protected areas of a private residence without a homeowner's knowledge or consent. In fact, in this case, the tax assessor immediately reported to the sheriff after observing what the assessor believed to be marijuana at the Coveys' home, causing law enforcement officers to mobilize to the Coveys' home fairly quickly. J.A. 13.

Although Crews physically intruded into constitutionally protected space without the Coveys' knowledge or consent, the district court held this was not a "search." J.A. 72. The court reasoned that "the Coveys have [no] reasonable expectation of privacy with regard to items viewable by the naked eye from the curtilage of their home when a property tax assessor is executing the responsibilities of his employment," and that Crews did not do "anything beyond executing the normal responsibilities of his employment as a tax assessor," J.A. 72. The Coveys disagree.

To begin with, Crews opened the front door to the Coveys' home and left a notice inside. J.A. 13 (¶ 7). At this stage, the Coveys cannot know whether Crews also walked inside the home upon opening the door—after all, the Coveys were away at lunch; Mr. Covey returned to find the assessor's notice inside the house. Nevertheless, "there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo v. United States*, 533 U.S. 27, 37 (2001); *cf. Sabbath v. United States*, 391 U.S. 585, 588–90 (1968) (holding that the federal statute that restricts an officer from "break[ing] open" a door to execute a search warrant does not require force; it includes opening a closed but unlocked door, in part because of an "individual's right of privacy in his house"). The core protection the Fourth Amendment affords to the interior of the home would surely be undermined if government officials could open the door, stand at the threshold, and visually inspect intimate details in the interior of the home without any constitutional ramifications.

Moreover, Crews physically intruded into the curtilage of the Coveys' home: the backyard and patio area. *See* part I.A, *supra* (explaining why the area is part of the curtilage). Again, curtilage is a constitutionally protected area in which privacy expectations are most heightened; it constitutes "part of the home itself for

Fourth Amendment purposes" and is afforded the same "Fourth Amendment protections that attach to the home." *Oliver*, 466 U.S. at 180; *see Dunn*, 480 U.S. at 301 (recognizing that the curtilage is "placed under the home's 'umbrella' of Fourth Amendment protection"). The Coveys' home contains no access routes inviting public access into their backyard. *See* part I.B.2, *supra.*

The district court reasoned, however, that society is not willing to accept as reasonable the expectation that tax agents will refrain from entering the curtilage of such a secluded rural property without the homeowners' knowledge and consent. J.A. 72. But the reasonableness of this expectation should be self-evident. Indeed, it is reflected in West Virginia law: A tax assessor does not enjoy unregulated access to residential property; the law qualifies an assessor's authority to inspect a home's interior or exterior without homeowner consent. *See* W.V. Code R. § 189-2-3 (at J.A. 39–40). The regulation provides that a tax assessor may *not* conduct an inspection of the exterior or interior if the homeowner denies permission, *id.* at ¶¶ 3.2-3.2.1 (at J.A. 39–40), and that "[i]f the property is posted with 'No Trespassing' signs," the assessor "is not to enter the grounds," *id.* ¶ 3.5 (at J.A. 40). These regulations confirm the reasonableness of the Coveys' expectation that a tax agent would not enter their home or backyard without notice and consent. Crews was in a place he should not have been.

Moreover, the complaint does not establish that the marijuana was openly visible to Crews in the patio area. The complaint alleges that Crews did a "search" of the patio area. J.A. 13 (¶ 7). As noted, in their objections to the magistrate judge's report, Mr. Covey emphasized that the only marijuana that the tax assessor could have seen in the patio area was inside a container there. D.E. 55, at 3; *see* note 7, *supra*. Specifically, the Coveys maintain that Crews would have had to have seen marijuana in a container inside a storage bin in the patio area. *See* note 7, *supra.* The Coveys thus maintain that Crews must have been snooping in the patio area to discover the marijuana he reported to the sheriff.

A document filed by the County Defendants in this Court during informal briefing raises more questions. When the Coveys filed this lawsuit, they believed that the search warrant contained no attachments (and thus did not describe the items to be seized with particularity) because the officers failed to leave those attachments at the Coveys' home with the search warrant and property receipt. Given the Coveys' contention that the warrant lacked attachments, the County Defendants filed in this Court, during informal briefing, the search warrant attachments.[11] The search warrant affidavit (labeled Attachment B) says that

[11] *See* Docket Entry 13-2 in this appeal, filed April 4, 2013. The relevant page is p. 4 of 7, which is Exhibit B to the warrant. The County Defendants also filed this document in the district court, albeit in a separately docketed case, just one day before the court issued its dismissal order below. The separately docketed case arose because, on the same day the Coveys filed this suit, the Coveys filed a

before the officers went to the home and observed the evidence they relied on for the warrant affidavit, the assessor "had observed marijuana in a dehydrator." That is the only marijuana observation by the assessor reported in that document.

If indeed Crews saw marijuana in the dehydrator, the question arises where the dehydrator was when the Coveys were at lunch, when Crews was in the back patio area. If need be, the Coveys should be permitted to amend their complaint on this issue. The Coveys would allege as follows: that when they went to lunch (i.e., when Crews entered the curtilage), the only marijuana in the patio area was inside containers (including inside the closed dehydrator) that were inside a lidless storage bin located a few feet to the side of the basement door (things changed after lunch, when Mr. Covey returned and had marijuana on his workbench); the dehydrator was closed and located at the bottom of the bin, underneath another container; to see inside the dehydrator, one would have had to go to the bin, bend over, and remove the container on top of it; and even then, one may not have been able to make out precisely what was inside the dehydrator without removing its lid because, the Coveys contend, the dehydrator was not made out of clear plastic.

Insofar as Crews was inspecting the contents of the bin and manipulating items inside in an attempt to find something, he was searching the Coveys'

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duplicative *pro se* complaint in state court, which the County Defendants removed to federal court. The removal action, also styled *Covey v. Assessor of Ohio County*, was docketed as No. 5:12-cv-00037-FPS-JES and dismissed for the same reasons this case was dismissed, in the same week this case was dismissed.

"effects" in the curtilage of their home. Even if Crews did not open any containers—we cannot be sure at this stage; his opening the front door of the home hardly inspires confidence—a homeowner has a reasonable expectation of privacy in his personal effects located in the curtilage of his home. And Crews exceeded any purportedly legitimate reason he had to be on the property. *Cf. Jardines*, 133 S. Ct. at 1414 (observing that the Fourth Amendment "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity").

For these reasons, the district court erred in holding that the Coveys failed to state a Fourth Amendment claim against the tax assessor.

The district court relied on a Sixth Circuit case that rejected a Fourth Amendment claim against a tax assessor: *Widgren v. Maple Grove Twp.*, 429 F.3d 575 (6th Cir. 2005). In that case, which was resolved on summary judgment, not at the pleading stage, the tax assessor entered the home's curtilage to estimate the length of the exterior of a house for tax purposes, despite no one appearing to be home and "No Trespassing" signs. *Id.* at 581. The assessor "went no closer than four to six feet from the house and did not look into or enter the house." *Id.* The court found his entry into the curtilage to be an "unsettling intrusion," but concluded that it was not a "search." *Id.* at 585.

The court emphasized that "'the plainly visible attributes and dimensions of the exterior of their home'" (e.g., siding and length) were visible from a neighboring property, warranting diminished privacy protection in them. *Id.* at 582–83. The court then proceeded to analyze the degree of intrusion. *Id.* The court said the assessor's methods were not unduly intrusive because his naked-eye observations did not require him "to contort his body unnaturally to survey the house, but instead merely counted the foundation cement blocks in plain view"; "[h]e did not touch, enter, or look into the house"; and he did not "stray beyond areas reasonably necessary to aid his inspection." *Id.* at 585. The court explicitly limited its holding: "We, therefore, hold that, under the facts of this case, a property assessor does not conduct a Fourth Amendment search by entering the curtilage for the tax purpose of naked-eye observations of the house's plainly visible exterior attributes and dimensions—all without touching, entering or looking into the house." *Id.* at 585–86.

Although we disagree with *Widgren*'s analysis and holding given the physical invasion of the curtilage that occurred there, the case is distinguishable. The Coveys' curtilage—and, more significantly, the marijuana in the storage bin in the patio area underneath the unfinished deck—was not plainly visible from a neighbor's home. And unlike the tax assessor in *Widgren*, here, as noted, a state regulation restricts an assessor's authority to inspect the exterior or interior of a

home and contemplates inspections based on notice and consent. Moreover, the Coveys maintain that Crews engaged in intrusive methods of investigation. Unlike the tax assessor in *Widgren*, Crews opened the front door of the home and presumably looked inside (again, whether he walked inside cannot be known at this point). And, as noted, the Coveys contend that Crews would have had to move and inspect the contents of the storage bin to see marijuana inside.

In conclusion, the Coveys have stated a valid Fourth Amendment claim against the tax assessor.

III. The Coveys' Fourth Amendment Claims Are Not Barred By Mr. Covey's Plea Agreement.

In the district court, Mr. Manchas invoked *Heck v. Humphrey*, 512 U.S. 477 (1994), arguing that this action should be barred because Mr. Covey pleaded guilty in state court to a marijuana crime. *See* J.A. 43 (plea agreement). We explain why *Heck* does not apply.

Heck involved a § 1983 claim by an incarcerated state prisoner who sued officials alleging that their unlawful conduct produced his conviction. *Id.* at 479. He was in custody and "challenging the legality of his conviction." *Id.* at 480 n.2. Accordingly, his case sat "at the intersection" of—and posed a potential conflict between—the habeas corpus statute and § 1983. *Id.* at 480. To "prevent inmates from . . . challeng[ing] the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute," *Nelson v. Campbell*,

541 U.S. 637, 647 (2004), the Court recognized an "implicit habeas exception" from § 1983's coverage, *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). Invoking the "principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," the Court held that unless his conviction has been invalidated, a plaintiff cannot use a § 1983 action to obtain a judgment that would "necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 486–87. "But if . . . the plaintiff's [§ 1983] action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* at 487 (emphasis in original). In other words, "habeas remedies do not displace § 1983 actions when success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement." *Dotson*, 544 U.S. at 81.

This Court later clarified the scope of *Heck* in a case involving a former prisoner's claim for wrongful imprisonment, holding that *Heck* does not bar a plaintiff from vindicating his rights under § 1983 when the plaintiff "could not, as a practical matter, seek habeas relief." *Wilson v. Johnson*, 535 F.3d 262, 268 (4th Cir. 2008) (involving plaintiff who filed a habeas petition when he was in custody, but had a window of only four months before he was released from prison).

a. To begin with, *Heck* cannot bar Mrs. Covey's action because she was never convicted. *See Heck*, 512 U.S. at 487 (framing the rule in terms of whether a favorable § 1983 judgment for a plaintiff would impact the validity of "his" conviction). Although Espejo filed a criminal complaint against her in magistrate court the day after the search (after she spent one night in jail), that complaint was dismissed about seven weeks later (in late 2010), and the State did not pursue charges against her. Thus, her § 1983 action poses no conflict with the habeas statute. She has no conviction that could be implicated by this action. Moreover, habeas relief was practically unavailable to her because she was in custody for such a short duration. *See Wilson*, 535 F.3d at 268 (holding that *Heck* poses no bar if the plaintiff "could not, as a practical matter, seek habeas relief"). Therefore, her civil claim does not implicate the implicit habeas exception to § 1983 that the Court recognized in *Heck*.

Even though Mrs. Covey was not convicted, Mr. Manchas argued below that *Heck* should bar her action, and for support he cited *North Carolina ex rel. Bishop v. Cnty. of Macon*, 809 F. Supp. 2d. 438, 444 (W.D.N.C. 2011). But this Court later vacated that ruling in *Bishop. Bishop v. Cnty. of Macon*, 484 F. App'x 753, 756 (4th Cir. 2012) (per curiam) (unpublished). *Bishop* involved § 1983 claims by a mother and son for the search of their home. 809 F. Supp. 2d at 442. The mother had been arrested, but the state had dismissed the charges against her. *Id.* at 443.

Nonetheless, the district court applied *Heck* to the mother's claim, ruling that her action would implicate the validity of her son's conviction. *Id.* at 446–47. But this Court held that *Heck* was inapplicable to the mother because "she was never in custody and therefore was unable to obtain a favorable termination of the charges through a habeas petition." 484 F. App'x at 756 (citing *Wilson*, 535 F.3d at 268). The same is true here with respect to Mrs. Covey.

b. Nor does *Heck* bar Mr. Covey's claim, since he voluntarily entered a counseled guilty plea.[12] As shown below, "when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged Fourth Amendment violation because the conviction does not rest in any way on evidence that may have been improperly seized." *Haring v. Prosise*, 462 U.S. 306, 321 (1983). And, similarly, when a defendant voluntarily enters a guilty plea, he cannot obtain habeas relief to invalidate his plea simply by establishing that an antecedent constitutional violation occurred. *See Tollett v. Henderson*, 411 U.S. 258, 266–68 (1973). Accordingly, as a matter of law, because Mr. Covey voluntarily pleaded guilty, a finding of a Fourth Amendment violation in this civil action would not demonstrate (much less "necessarily" so) the invalidity of Mr. Covey's conviction; and this case does not present the

[12] Not that it matters for the argument below, but Mr. Covey has informed the undersigned counsel that he served a one-year sentence of home confinement that terminated in 2011.

collision between § 1983 and the habeas regime that implicates *Heck*. Therefore, *Heck* cannot bar his § 1983 action.[13]

It is well established that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process"—including any antecedent constitutional violations—because a defendant who pleads guilty "admit[s] in open court that he is in fact guilty of the offense with which he is charged." *Tollett*, 411 U.S. at 267. A guilty plea is simply a confession that the defendant in fact committed a crime, i.e., factual guilt. *See Haring*, 462 U.S. at 316. Because a confession of factual guilt need not be supported by evidence admissible in a trial, a voluntary guilty plea is valid *irrespective* of whether it is based on evidence derived from a Fourth Amendment violation. *See id.* ("Neither state nor federal law requires that a guilty plea in state court be supported by legally admissible evidence where the accused's valid waiver of his right to stand trial is accompanied by a confession of guilt."); *id.* ("[A] determination that the county police officers engaged in no illegal police conduct would not have been essential to the trial court's acceptance of [the § 1983 plaintiff's] guilty plea."); *id.* at 322 n.11 ("When a court accepts a defendant's guilty plea, there is no adjudication whatsoever of

[13] This Court recently left this issue open because it had not been properly preserved. *See Ballenger v. Owens*, 515 F. App'x 192, 194–95 (4th Cir. 2013) (per curiam). But the Coveys raised this argument below. *See* D.E. 48, at 3–10. Insofar as this Court has applied *Heck* in the context of a guilty plea (e.g., the unpublished *Bishop* case, *supra*), this issue of whether *Heck* bars a Fourth Amendment claim in the context of a guilty plea was not raised or addressed.

any issues that may subsequently be the basis of a § 1983 claim.”). A defendant of course has many reasons to accept a plea bargain even with an antecedent constitutional violation. *See id.* at 318–19; *Tollett*, 411 U.S. at 263.

Accordingly, because “a determination that a search . . . was illegal [is] *entirely irrelevant* in the context of the guilty plea proceeding,” *Haring*, 462 U.S. at 316 (emphasis added), it is a “simple fact that [a Fourth Amendment] *claim is irrelevant to the constitutional validity of the conviction*,” *id.* at 321 (emphasis added). Logically, then, “the validity of that conviction cannot be affected by an alleged Fourth Amendment violation because the conviction does not rest in any way on evidence that may have been improperly seized.” *Id.*[14]

For these reasons, because a Fourth Amendment violation is irrelevant to the validity of a guilty-plea conviction, the Supreme Court has held that when a defendant pleads guilty, doctrines of waiver and preclusion do not bar a later § 1983 action challenging the legality of the evidence-producing search. *See id.* at 316–22. And, in the same vein, the Supreme Court has held that when a defendant

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[14] In *Haring*, the plaintiff had pleaded guilty in state court to manufacturing a controlled substance, and then he brought a § 1983 action alleging that police officers had violated the Fourth Amendment by unlawfully searching his residence. 462 U.S. at 308–09. Without the evidence seized from his residence, the state most likely would have been unable to obtain a conviction. *See id.* at 318. Nonetheless, the Court held that his plea did not foreclose his § 1983 action under doctrines of waiver or preclusion because his damages “claim [wa]s irrelevant to the constitutional validity of the conviction.” *Id.* at 321. While the holding went to waiver and preclusion, the Court’s reasoning fully applies here.

voluntarily pleads guilty, he cannot obtain habeas relief by establishing that an antecedent constitutional violation occurred. *See Tollett*, 411 U.S. at 266–67.

Given the foregoing principles, *Heck* logically does not bar Mr. Covey's Fourth Amendment claim, because he voluntarily pleaded guilty to the marijuana charge. "The only question . . . determined by [Covey's] guilty plea . . . was whether [he] unlawfully engaged in the manufacture of a controlled substance. This question is simply irrelevant to the legality of the search under the Fourth Amendment or to [his] right to compensation from state officials under § 1983." *Haring*, 462 U.S. at 316. Because "a determination that the county police officers engaged in no illegal police conduct would not have been essential to the trial court's acceptance of [his] guilty plea," *id.*, a finding of a Fourth Amendment violation logically would not "necessarily" imply that his conviction was invalid, as is required for the *Heck* bar to apply. *See Lockett v. Ericson*, 656 F.3d 892, 896–97 (9th Cir. 2011) (holding that *Heck* did not bar § 1983 claim for invalid search because the convictions resulted from guilty pleas, and therefore the validity of the convictions could not depend on whether the inculpatory evidence was obtained in violation of the Fourth Amendment) (citing *Ove v. Gwinn*, 264 F.3d 817, 823 (9th Cir. 2001) (same)); *Easterling v. Moeller*, 334 F. App'x 22, 24 (7th Cir. 2009) (unpublished) (concluding, based on *Haring*, that *Heck* would not bar a Fourth Amendment claim because the plaintiff pleaded guilty).

These principles also show that Mr. Covey's § 1983 action does not implicate the core concern underlying *Heck*: a conflict between § 1983 and the habeas statute warranting recognition of the implicit habeas exception to § 1983. Having voluntarily entered a counseled guilty plea, Mr. Covey could not have obtained habeas relief (i.e., could not have invalidated his voluntary guilty plea) simply by establishing an antecedent Fourth Amendment violation. *See Tollett*, 411 U.S. at 266–67; *see also McMann v. Richardson*, 397 U.S. 759, 770–71 (1970) (holding that because the defendant pleaded guilty, he could not use a habeas action to collaterally attack his plea "on the ground that counsel may have misjudged the admissibility of the defendant's confession"). In short, "he raise[s] no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck*'s favorable termination requirement [i]s inapplicable." *Muhammad v. Close*, 540 U.S. 749, 755 (2004) (per curiam).

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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<u>CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS</u>

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I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 13,480 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of January, 2014, I caused this Brief of Appellants and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users,who are counsel for all the Appellees:

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I further certify that on this 13th day of January, 2014, I caused the required copies of the Brief of Appellants and Joint Appendix to be hand filed with the Clerk of the Court.

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