**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**

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## REPLY BRIEF OF APPELLANTS

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## ARGUMENT

The County Defendants' brief asserts that the tax assessor may have seen marijuana "growing" in the patio area. Br. of County Defs. 2, 3.[1] That is not true. No marijuana was growing there.

We stress what has not been disputed: Since the common law, a home's curtilage has been deemed part of the home itself, which is at the core of the Fourth Amendment; Defendants breached the curtilage of the Coveys' secluded rural home when they entered the yard and patio area; and they did so without a warrant, without exigent circumstances, and without seeking the Coveys' consent.

### I. The Coveys Have Stated A Claim Against The Officers

#### A. Whether The Officers Saw Mr. Covey Before They Entered The Curtilage Has Not Been Established.

The district court's analysis hinged on its finding that the officers saw Mr. Covey before they entered the backyard, but that fact was not established on this record. On this point, the County Defendants accuse the Coveys of inconsistent pleading. But the complaint (a *pro se* pleading which must be construed liberally) nowhere asserts that Mr. Covey was outside—much less in a position visible to the officers—before they entered the backyard. Rather, the complaint speaks to the officers encountering Mr. Covey when they "enter[ed] . . . the walk-out basement

[1] We use "Br. of County Defs." to refer to the answering brief filed on behalf of the Appellees employed by the county. We use "Br. of Manchas" to refer to the brief filed on behalf of Appellee Manchas.

patio area." J.A. 13 (¶¶ 12–13). When the magistrate judge's report reasoned that the officers saw Mr. Covey before they entered, J.A. 59, the Coveys objected, contending he "was in the house at the time the officers drove up the driveway" and "came out the rear basement walk out patio door to start working at his workbench just as the officers were making their way down to the back patio area, where the officers came upon and *surprised the plaintiff* . . . ." D.E. 55, at 4 (emphasis retained).[2]

Moreover, *even if* Mr. Covey had stepped outside to his workbench when the officers parked, that would not mean he would have been *visible* to them before they entered the backyard. As Defendants argue, a small portion of the patio area—the corner sliver furthermost from the home—would have been visible from where they parked. J.A. 50 (bottom). But this is irrelevant insofar as the workbench was not located in that exposed area, but instead against the home's back wall, shielded by the perpendicular stone wall, which blocked the line of vision between the place where the officers parked and the workbench. The criminal complaint itself says the officers encountered Mr. Covey at the "workbench" "near the rear basement walk out door." J.A. 33.

[2] When the opening brief said the officers parked partially in the backyard, we meant partially on the grass, i.e., a yard. *See* J.A. 50. Whether that is deemed the back or side yard, they parked in the curtilage intending to head to the patio area.

Contrary to Defendants' argument, the criminal complaint does not establish that they saw Mr. Covey before they entered the backyard, as opposed to when they arrived at the patio area. As we noted (Opening Br. 33–34), the phrase "Upon arrival officers observed . . . ." does not resolve this issue because "upon" can mean *soon after* rather than *at the moment of*. *Webster's Third New Int'l Dictionary* 2518 (1993) ("Upon" may mean "immediately following" or "very soon after"); *Random House Webster's Unabridged Dictionary* (2d ed. 2001) (same). And so, for instance, when the Supreme Court in 2006 said, in reference to *Ex parte Quirin*, 317 U.S. 1 (1942), that "eight German saboteurs were captured *upon arrival by submarine in New York and Florida*," *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006) (emphasis added), the Court obviously did not mean they were captured at the very moment their subs surfaced off the shores of Florida and New York, but rather shortly after they landed and proceeded inland to other locations. For as *Quirin* says, the Germans arrived by submarine at Ponte Vedra Beach, Florida, and Amagansett Beach, New York, and then proceeded to Jacksonville, New York City, and other locations, before *then* being taken into custody by the FBI in Chicago and New York. 317 U.S. at 21.

Indeed, Special Agent Manchas's own example proves the point: He cites a case which says, "Upon arrival, the police knocked on the door," *United States v. Hill*, 649 F.3d 258, 261 (4th Cir. 2011), but that did not mean the police knocked at

the very moment they parked or stepped out of their car; rather, they must have knocked after parking and walking to the door of the townhouse. As that example shows, moreover, even if "upon" in Espejo's criminal complaint is read to mean "immediately at the moment of," another ambiguity arises because the phrase does not say *where* the officers had "arrived" when they observed Mr. Covey (e.g., "Upon arrival in the backyard"? "Upon arrival at the patio"?).

The officers argue that regardless of whether they saw Mr. Covey before they entered the backyard, they can avail themselves of the knock-and-talk exception. As explained below, they are wrong, and indeed even if they saw Mr. Covey before they entered, they nonetheless exceeded the scope of the exception.

### B. The Officers Exceeded The Scope Of The Knock-And-Talk Exception.

Defendants lose sight of context. They are invoking a limited *exception* to the rule that officers may not encroach upon a home's curtilage without a warrant or exigent circumstances. The exception is based on custom—a "customary invitation" based on "social norms" and tradition, the scope of which is "implied from the habits" of the community. *Florida v. Jardines*, 133 S. Ct. 1409, 1415–16 (2013) (internal quotation marks omitted); *see also id.* at n.2 (noting the dissent's acknowledgement that the inquiry concerns "what is 'typica[l]' for a visitor," "what might cause 'alarm' to a 'resident of the premises,'" and "what would be expected from a '"reasonably respectful citizen"'" (alteration in original; citations

omitted)). Custom means a "practice followed as a matter of course among a people," a "common tradition or usage so long established that it has the force or validity of law." *Webster's II New College Dictionary* 280 (1995). The knock-and-talk exception is grounded on a theory of implied consent, allowing access to spaces where the public is impliedly invited.

But Defendants have not come close to establishing that their entry conformed to custom based on social norms, i.e., what would be expected of a "reasonably respectful citizen," *Jardines*, 133 S. Ct. at 1416 n.2 (internal quotation marks and citation omitted), approaching a secluded rural home.[3] Defendants have not established that the Coveys impliedly consented to open their backyard and patio area to public access. The County Defendants assert that the Coveys' "patio entrance was open to uninvited visitors" and therefore the officers "enter[ed] a publicly accessible area of Appellants' property." Br. of County Defs. 14, 15. But that is unsupported and untenable. Put aside that, from the parking area, the patio-area door was at least 75 feet away and shielded by the stone wall. J.A. 50, 52. Defendants do not dispute the district court's observation that, unlike the front door, "no clear walkway exists between the plaintiffs' driveway and their backyard." J.A. 77. Moreover, and significantly, the patio door is underneath a deck and opens to the home's *basement*. We are unaware of a custom by which

[3] As we noted, from the Coveys' driveway it was obvious that the home had no accessible rear entrance into the home's main floor. Opening Br. 26.

homeowners expect to be greeted by the public at a basement. Many families use basements as bedrooms; they would not expect, indeed would be alarmed by, uninvited visitors (salespersons, pollsters, etc.) seeking to contact them there.[4]

Despite custom and a walkway leading only to the front door, the County Defendants question the front door's accessibility because of a small mesh fence in the front yard, which is only about four-feet high. This argument is ironic: The tax assessor approached the front door. And no wonder: The short mesh fence has an unlocked pedestrian gate for the front-entrance walkway; the fence obviously serves to keep the Coveys' pets from straying when they are outside, not to keep visitors from a customary approach to the front door.[5]

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[4] *See State v. Unger*, 287 P.3d 1196, 1199 (Or. Ct. App. 2012) (holding that the officer exceeded the knock-and-talk exception by knocking on the rear door, which led to a bedroom, and explaining: "Going to the back of the house is a different matter. Such an action is both less common and less acceptable in our society. There is no implied consent for a stranger to do so." (internal quotation marks and citation omitted)), *rev. allowed*, 287 P.3d 1196 (Or. Apr. 25, 2013).

[5] *See United States v. Garretson*, No. 2:13-cr-029-APG-GWF, 2013 WL 5797613 (D. Nev. Oct. 28, 2013). In *Garretson*, officers exceeded the knock-and-talk exception when they bypassed the front door and went straight to a rear patio, where they observed marijuana. *Id.* at *13. The government argued that the officers acted reasonably because approaching via the front entranceway would have required them to enter a closed pedestrian gate, which was five-feet high and ensconced within a wall, and which had a latch located inside at the top. *Id.* at *14. But the court rejected that argument: "The latch mechanism would not impede an adult person of average dexterity from opening the gate. . . . Such latch mechanisms are fairly common *and do not indicate to a reasonable visitor that he or she should not open the gate and enter*." *Id.* (emphasis added).

Even assuming *arguendo* that the officers saw Mr. Covey in his patio area before they entered the backyard, that did not somehow create implied consent to enter the curtilage. We have already explained why *Alvarez v. Montgomery Cnty.*, 147 F.3d 354, 358 (4th Cir. 1998), with its unusual facts, is not to the contrary. Suffice it to say that Defendants have identified no evidence of implied consent, no custom, no "background social norms," *Jardines*, 133 S. Ct. at 1416, by which a reasonably respectful citizen approaching a secluded home would be expected to bypass an accessible front door, enter a backyard with no walkway, and intrude in a patio area simply because someone may be there. A homeowner does not impliedly consent to waive privacy—to waive curtilage—simply by stepping out back. Defendants' logic creates an entirely new license for strangers to intrude on homeowners behind their homes (on decks, in hot tubs, at pools, etc.), and indeed to sneak up on them, as the officers did here. Homeowners would be helpless to resist nonconsensual encounters, and helpless to resist an uninvited visitor's "plain view" observations along the way, including through windows. That would make a mockery of the axiom that curtilage is an extension of the home.

That the Covey's property is posted with "No Trespassing" signs certainly is not irrelevant to the *scope* of implied consent. By custom, such signs signal a desire for privacy or exclusion and communicate the homeowners' intent to restrict access. They are not for decoration. Though the signs do not, by themselves,

revoke the customary license that lets a visitor approach a *front* entranceway, an uninvited visitor who confronts such signs could not reasonably believe that the homeowner has impliedly consented to the public venturing *beyond* the front entranceway, particularly in the absence of a pathway extending to the backyard. *See State v. Pasour*, 741 S.E.2d 323, 326 (N.C. Ct. App. 2012).

Defendants repeatedly suggest that the Coveys needed to barricade the backyard of their secluded rural home with fencing and locked gates to prevent uninvited visitors from intruding there. *See* Br. of County Defs. 1, 3, 6, 9, 12. That is absurd, particularly with a secluded rural home. "[R]equiring 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." *Williams v. Garrett*, 722 F. Supp. 254, 261 (W.D. Va. 1989). On this score, *Edens v. Kennedy*, 112 F. App'x 870 (4th Cir. 2004) (per curiam) (unpublished), is of no help to Defendants; it stands for the proposition that if a homeowner wants "an *elevated* expectation of privacy" defying custom, she must seal her property. *Id.* at 875 (emphasis added). That is, a homeowner must take special steps to revoke the implicit license that allows visitors to use those routes that custom opens to them—namely the front entrance, which is what the fight in *Edens* was about, since the front porch is where the officer found the marijuana when he approached the home and knocked at the front door. Opening Br. 26; Supplemental Br. 8.

Defendants seem to belittle the customary expectation that a visitor first proceed to an accessible front door (absent unusual circumstances such as a sign directing visitors away from the front and inviting them to the back, *see Alvarez*, *supra*, or evidence establishing that a rear entrance was a customary point of public entry for that home). But this expectation, supported by case law, is faithful to the principle of implied consent that yields the implicit license, without which there would not even be a knock-and-talk exception to the warrant requirement. This expectation safeguards the homeowner's right to reject or control encounters in the curtilage so they are consensual: She can respond to the customary approach by greeting the visitor at the front entranceway; or she can reject that encounter (with or without opening the front door) by telling the visitor to leave; and in the latter case, the visitor must leave the premises promptly. *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011); *Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir. 2001). Here, by contrast, Mr. Covey's right to reject or control an encounter evaporated when the officers bypassed the front door. Had they knocked there, he could have greeted them there or asked them to leave. Instead they cornered him in the patio area. It was never a consensual encounter.[6]

[6] To be clear, the Coveys' position is that the knock-and-talk exception, properly applied, would not have allowed the officers to enter the backyard even if they had first knocked on the front door. After all, the 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*, 133 S. Ct.

### C. Defendants Are Advancing Arguments That Were Recently Rejected By The Third Circuit, Which Held That An Officer Who Bypassed An Accessible Front Door And Instead Approached A Rear Door Could Not Avail Himself Of The Knock-And-Talk Exception And Was Not Entitled To Qualified Immunity.

Defendants are advancing arguments that the Third Circuit recently rejected in a unanimous published decision holding that homeowners were entitled to judgment as a matter of law on their Fourth Amendment claim against a trooper who bypassed their front door and approached their rear entrance. *Carman v. Carroll*, 749 F.3d 192 (3d Cir. 2014). (The decision issued after we filed our supplemental brief, and two weeks before the Appellees filed their briefs. The mandate has issued.)

In *Carman*, a July 2009 police dispatch alerted a trooper that a man had stolen two loaded handguns and a car, and that he was heading toward the Carmans' home. *Id.* at 194–95. The trooper did not know what the suspect looked like and had never been to the Carmans' home. *Id.* at 195. The house was on a corner lot with a main street running along the front and a side street at the edge. *Id.* A clearly marked path led to the front door from a stone parking area on the side of the house, but no pathway led to the backyard. *Id.*; *id.* at 200 (photos).

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at 1415 (emphasis added); *see, e.g.*, *Rosen v. Wentworth*, No. 12-1188ADM/FLN, 2014 WL 1384084, at *2–3 (D. Minn. Apr. 9, 2014) (holding that officers exceeded license by moving to rear after knocking at front door and receiving no response); *Unger*, 287 P.3d at 1199 (same); *Pasour*, 741 S.E.2d at 325–26 (same). But the issue is not implicated here since the officers bypassed the front door.

Behind the house was a wooden deck with a rear entry door that led to the home's main floor (into the kitchen). *Id.* at 195. The "back yard was not fenced in." *Carman v. Carroll*, No. 3:10cv1013, 2012 WL 1068122, *6 (M.D. Pa. Mar. 29, 2012).

The trooper parked on the side of the house, in the parking area used by visitors. 749 F.3d at 195. But the trooper "bypassed the front door and went directly to the back of the house," entering the backyard. *Id.* at 194. He said he headed there because he saw a light on in a carport, *id.* at 195, an open structure adjacent to the rear side of the home, *id.* at 200 (photo). He ducked his head in the carport, saw no one, and then proceeded to the back deck to approach the home's rear entry door. *Id.* at 195. The plaintiffs were in the kitchen—by the rear entry door—when the trooper approached that door. *Id.* As he approached, the plaintiffs came out of the house and confronted him. *Id.* at 195–96.

The Carmans brought a § 1983 claim against the trooper based on his warrantless entry into the curtilage behind their home. *Id*. at 196. The trooper contended he did not violate the Fourth Amendment because he entered the property for a "knock and talk" to question the occupants about the armed thief he was pursuing, who was known to the plaintiffs. *See id.* The case went to trial, and the jury returned a verdict for the trooper. *Id.*

On appeal, however, the Third Circuit held that the plaintiffs were entitled to judgment as a matter of law on that Fourth Amendment claim: "Because [the trooper] proceeded directly through the back of the Carmans' property and did not begin his visit at the front door, the 'knock and talk' exception to the warrant requirement does not apply," the court held. *Id.* at 194. And the trooper was not entitled to qualified immunity because the limited nature of the knock-and-talk exception was clearly established well before July 2009. *Id.* at 199.

"For purposes of the Fourth Amendment," the court observed, "a 'knock and talk' is a brief, consensual encounter that begins at the entrance used by visitors, which in most circumstances is the front door"; that "is where police officers, like any other visitors, have an implied invitation to go." *Id.* at 198. While noting that "an officer's entry into other parts of the curtilage *after not receiving an answer at the front door* might be reasonable in limited situations," *id.* at 198–99 (emphasis in original; internal quotation marks and citation omitted), the court denounced the "sweeping proposition" that officers may go behind a home "any time they have a legitimate purpose for approaching the home in the first place," *id.* at 199 (internal quotation marks omitted). Accordingly, the trooper could not "avail himself of the 'knock and talk' exception to the warrant requirement because he entered the back of the Carmans' property without approaching the front door first." *Id.*

Additional points about the court's analysis warrant note. First, the court construed the evidence in the light most favorable to the trooper because the court was reviewing a jury verdict. *Id.* at 195 n.2. Second, the trooper testified that he bypassed the front door because he saw a light illuminated in the carport and thus believed he might find someone there, *id.* at 195, but he had no license to bypass the front door merely because the circumstances indicated he might find someone in the curtilage with whom he would like to speak. Third, as the court acknowledged, the trooper testified that he thought the rear entry door in the unfenced yard "'looked like a customary entryway.'" *Id.* (citation omitted). "However, the Carmans testified that visitors use the front entrance when they come to visit," and that was the only area to which a marked pathway extended. *Id.*; *see id.* at 200 (Ex. 21). So the trooper's self-serving testimony was not sufficient to establish an implied invitation. Finally, the court acknowledged the trooper's argument that "the back door [was] the most expedient and direct access to the house from where the troopers had to park," *id.* at 199, but this was irrelevant to the scope of the implied invitation:

> While it may have been more convenient for the troopers to cut through the backyard and knock on the back door, the Fourth Amendment is not grounded in expediency. The "knock and talk" exception requires that police officers begin their encounter at the front door, where they have an implied invitation to go . . . .

*Id.*

*Carman* is faithful to the principles of implied consent and customary invitation yielding the knock-and-talk exception. Defendants' position here is not.[7]

### D. Defendants Rely On Cases That Bolster The Coveys' Argument.

The County Defendants' reliance on language from *United States v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2012), is bewildering. As explained below, that court's analysis and holding undercut Defendants' argument. The court held that the knock-and-talk exception did *not* apply and that the officer violated the Fourth Amendment when he bypassed the front door and entered the curtilage. By seizing on the court's statement that a visitor need not approach "a specific door if there are multiple doors *accessible to the public*," *id.* at 1188 (emphasis added), the County Defendants misunderstand the highlighted phrase. "Accessible to the public" in this context means the public has an invitation to be there by custom, not merely that a visitor can walk to that space.

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[7] *See also, e.g.*, *United States v. Perea-Rey*, 680 F.3d 1179, 1188-89 (9th Cir. 2012) (holding that "[i]t was not objectively reasonable as part of a knock and talk for [the officer] to bypass the front door"); *United States v. Wells*, 648 F.3d 671, 679 (8th Cir. 2011) ("To the extent that the 'knock and talk' rule is grounded in the homeowner's implied consent, we have never found such consent where officers made no attempt to reach the home owner at the front door."); *Pritchard v. Hamilton Twp. Bd. of Trustees*, 424 F. App'x 492, 499 (6th Cir. 2011) (unpublished) ("[W]e have previously held that a permissible knock and talk can take place in the backyard if knocking on the front door is unsuccessful, and there are indications that someone is in or around the house."); *Garretson*, 2013 WL 5797613, at *13 ("It is not permissible . . . for officers to simply ignore an accessible front entrance to a house and proceed to the back door.").

In *Perea-Rey*, a border patrol officer was pursuing an undocumented immigrant. *Id.* at 1182. The officer saw the immigrant go to Perea-Rey's home and knock on the front door, at which point Perea-Rey directed the immigrant to go to the adjacent, exposed carport connected to the house; Perea-Rey then moved from inside his home to his adjacent carport to greet the immigrant there, using the entry door that opened from the house to the carport. *Id.* at 1182–83; *see id.* at 1190 (appendix photo). After witnessing this activity, the officer "bypass[ed] the front door and walk[ed] around the side of the house into the carport," encountering Perea-Rey and the immigrant there. *Id.* at 1188. The carport was deemed part of the home's curtilage. *Id.* at 1184–85.

As the Ninth Circuit observed, an officer initiating a knock-and-talk encounter may approach "where *uninvited visitors could be expected*." *Id.* at 1188 (emphasis added; internal quotation marks omitted). But Perea-Rey's exposed carport was not such an area, even though it was the location of the home's side entrance. Hence the problem: "It was *not objectively reasonable* as part of a knock and talk for [the officer] to *bypass the front door*, which he had seen Perea-Rey open in response to a knock by [the immigrant], and *intrude into an area of the curtilage* [the carport] *where uninvited visitors would not be expected to appear*." *Id.* (emphasis added). "Perea-Rey never had an opportunity to simply ignore a knock on the door to his home by police." *Id.* Accordingly, the court held "that

the warrantless incursion into the curtilage of Perea-Rey's home by [the officer] and the resulting searches and seizures violated Perea-Rey's Fourth Amendment rights." *Id.* at 1189.

Just as the presence of a side entry door did not excuse the officer's bypassing the front door, the fact that the Coveys' patio area has a rear basement door did not authorize the officers to bypass the Coveys' front door, because the patio area is "where uninvited visitors would not be expected to appear." *See id.* at 1188. Moreover, in *Perea-Rey* the circumstances indicated that the officer might find in the curtilage persons whom he wanted to question (the officer saw Perea-Rey direct the immigrant to the carport), and indeed the officer encountered them there, yet their presence in the curtilage did not give the officer a license to bypass the front door. Like Perea-Rey, Mr. Covey "never had an opportunity to simply ignore a knock on the door to his home by police." *Id.*

For his part, Special Agent Manchas relies on a district court case from Virginia, *United States v. Jones*, No. 4:13cr00011-003, 2013 WL 4678229 (W.D. Va. Aug. 30, 2013) (unpublished). But whatever the merits of that decision, its reasoning underscores the evidentiary problem that Defendants face here. Indeed, their all-doors-are-fair-game approach is at odds with the judge's recognition in *Jones* that "the knock-and-talk rule does not provide blanket protection to officers who seek access to a home through any and all doors." *Id.* at *6.

In *Jones*, the court relied on "evidence" establishing "custom and practice," *id.* at *8, in concluding that "[t]he facts apparent to the police . . . support the reasonable conclusion that the back yard *was a commonly used entrance to the home*," *id.* at *7 (emphasis added). Specifically, testimony showed that it was "the custom of residents in the county [Patrick County, Virginia] *to use the back door* of the house *rather than the front door* for entry and exit from the house." *Id.* (emphasis added). In fact, "the evidence established that it is the custom and practice of the community to use the back door as the *primary* means of entrance into the home." *Id.* at *8 (emphasis added). Moreover, and corroborating that custom, a path around the side of the house invited visitors to the back. *Id.*

Given that evidence, the *Jones* court deemed the matter to be controlled by *United States v. Roberts*, 467 F. App'x 187 (4th Cir. 2012) (per curiam) (unpublished), which held that officers permissibly approached the rear door of a townhouse for a knock-and-talk because custom-like evidence known to the officers showed that it was the primary entrance: "[A]ll guests approached and entered the townhouse through the rear entrance," by way of "paved sidewalk" which "connected to an adjoining parking lot," making it "reasonable for members of the public to approach the townhouse through the rear entryway." *Id.* at 188–89. Analogizing to *Roberts*, the district judge in *Jones* relied on two items of evidence:

> In the present case, *the evidence established that it is the custom and practice of the community* to use the back door as

> the primary means of entrance to the home. This fact, standing alone, will not justify extending a "knock-and-talk" to the back door. When coupled with the presence of the worn path around the side of the home, however, the circumstances were appropriate for the officers to enter briefly into Jones's back yard to attempt to speak with the home's owner.

2013 WL 4678229, at *8 (emphasis added).

Here, by contrast, the record contains no such evidence of implied consent and custom inviting the public to the Coveys' basement door underneath the deck behind their secluded rural home.

### E. The Officers Are Not Entitled To Qualified Immunity.

Every reasonable officer would have known that a "knock and talk" is a limited *exception* to the warrant requirement, one grounded on implied consent—an implicit license to approach a home by sticking to those routes that visitors are by custom expected to use for a consensual encounter. In the rare circumstances where this Court has allowed officers to avail themselves of this exception when they bypassed a front door—e.g., when a posted sign diverted visitors from the front entrance and invited them to the backyard, *see Alvarez*, *supra*, or when evidence of custom or usage known to the officers showed that all visitors used a rear entrance via a dedicated walkway, *see Roberts*, *supra*—there was evidence of implied consent for access. Under Defendants' approach, however, this Court's analysis of the circumstances in each of those cases was superfluous; the mere presence of rear doors would have resolved those cases.

Defendants are seeking to expand this limited exception beyond its logical breaking point. They invoke not a license based on custom, but instead a right of access for law-enforcement convenience. But "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment," which "reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Qualified immunity should be denied.

## II. The Coveys Have Stated A Claim Against The Tax Assessor.

When Field Deputy Crews initially intruded into the curtilage of the Coveys' home, his purpose was to perform an inspection to gather information (evidence) about the home for the government to use in assessing tax liability. This intrusion was an unreasonable invasion of privacy and property interests. And any reasonable government officer would know that the Constitution does not permit him to open a home's door or to inspect a homeowner's personal effects in the curtilage without the homeowner's knowledge or consent. As this Court has warned, "[t]he Fourth Amendment delimits the presence of public authority on private premises, for the simple reason that uncautioned authority is open to abuse." *Turner v. Dammon*, 848 F.2d 440, 445 (4th Cir. 1988), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995).

Crews argues that he should not be held to Fourth Amendment standards applicable to other government agents. But, again, it is well established that the Fourth Amendment's restrictions are not limited to the police or criminal investigations, Opening Br. 36–37; Supplemental Br. 12–13, and nowhere is this more obvious than at a home, where constitutional protection is at its zenith. *See Michigan v. Tyler*, 436 U.S. 499, 504, 506 (1978).

Tax agents are not exempt. In fact, decades ago, in a civil damages action against revenue agents, the Supreme Court held that the agents violated the Fourth Amendment when, in aid of tax collection, they entered the business office of a delinquent corporate taxpayer, gathering information in the hope of identifying or locating assets subject to levy (they took books and records, which they later returned). *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 345–46 (1977). The Court emphasized that "one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance." *Id.* at 355. The Court rejected the revenue agents' argument that "the warrant protections of the Fourth Amendment do not apply to invasions of privacy in furtherance of tax collection," *id.* at 356, and held that the agents' "intrusion . . . [was] governed by the normal Fourth Amendment rule that 'except in certain carefully defined classes of cases, a search of private property without proper

consent is "unreasonable" unless it has been authorized by a valid search warrant,'" *id.* at 358 (quoting *Camara v. Municipal Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 528–29 (1967)).

In contending that he was "legally allowed to be on Appellants' patio," Br. of County Defs. 24, Crews relies on the knock-and-talk exception. But Crews had no customary license to enter the Coveys' patio area (much less to open their front door or to manipulate and inspect effects in their bin in the curtilage). Indeed, insofar as Crews first knocked at the front door and realized nobody was home (after all, he opened the door), and *then* proceeded to the back, the knock-and-talk exception clearly was inapplicable. *See Pena v. Porter*, 316 F. App'x. 303, 314 (4th Cir. 2009) (unpublished) (holding that officers exceeded knock-and-talk exception when they went behind residential trailer after receiving no answer at front door; they "had no reason to expect that knocking on a backdoor would produce a different result").

In addition, Crews cannot plausibly claim he had a license to enter the curtilage to gather information for assessing tax liability because, again, West Virginia law declares that a tax assessor "is not to enter the grounds" of a property posted with No Trespassing signs. W.Va. Code R. § 189-2-3.5. The code thereby revoked any license that a tax assessor could claim to enter and examine the

Coveys' property without their knowledge or consent. Given the code, Crews's contention that he was "legally allowed to be on Appellants' patio" is nonsense.

Contrary to Crews's argument, we are not arguing that his violation of the West Virginia code equates to a constitutional violation. Rather, the code negates any claim of a license to enter the curtilage. And the code confirms that, contrary to the district court's holding, the Coveys' expectation of privacy from a tax inspection without their knowledge or consent was *reasonable*.

Crews cites *Ehlers v. Bogue*, 626 F.2d 1314 (5th Cir. 1980), and a case on which *Ehlers* relied, *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). But as both cases made clear, they involved observations of commercial properties from "open fields," and so they are plainly inapposite. Crews also cites *Widgren v. Maple Grove Twp.*, 429 F.3d 575 (6th Cir. 2005), which we addressed extensively. Opening Br. 43–45.

Moreover, Crews did more than intrude into the curtilage. He opened the home's front door, presumably with eyes open. And the Coveys allege he manipulated personal effects in a bin where he viewed the marijuana. On the latter point, Crews says the Coveys did not argue this below in opposing his motion to dismiss. But the brief submitted below on behalf of Crews presented no argument—none—on the merits of the Fourth Amendment search claim. D.E. 28. Manchas's brief below addressed the search claim *against him*, not Crews.

And then came the magistrate judge's report, which asserted, inexplicably and without support, that "Crews saw marijuana plants *growing in plain view* on the outdoor back patio of Plaintiff's home." J.A. 54 (emphasis added). To that finding, the Coveys objected. D.E. 55, at 2–3. While their *pro se* brief said that anyone would have to "'peer' down into" a "*closed* container" to see marijuana, D.E. 55, at 3 (emphasis added), they added that "[t]he only marijuana, in fact, witnessed by the assessors . . . was in a . . . *non-transparent closed* container," *id*. (emphasis added). This called into question whether the marijuana was in plain view. The Coveys maintain that the marijuana was inside closed containers in an open bin, including inside a closed dehydrator at the bin's bottom, underneath another closed container. Opening Br. 42.

In any event, for Crews to nit-pick the Coveys' argument below is misplaced for a different reason: That Crews had claimed to see marijuana in the dehydrator was unknown to the Coveys until well after their briefing deadline below; it did not surface until the County Defendants filed Espejo's search warrant affidavit, which the Coveys had not seen before this lawsuit. The County Defendants first filed that affidavit in this case during this appeal, as an exhibit to their informal appellee brief, and so the Coveys never had a chance to address the affidavit below.[8] We

[8] To be sure, the County Defendants filed the affidavit in the district court in a related case—a removed action raising the same claims against them—but they filed it one day before the district court issued its judgment of dismissal, *see Covey*

are at the Rule 12(b)(6) stage; the motion cannot rightly be resolved on the assumption that the marijuana was "'clearly visible'" to Crews's "plain sight." Br. of County Defs. 24 (citation omitted).

As for qualified immunity, Crews seeks refuge in the lack of a case "holding an assessor civilly liable for an alleged Fourth Amendment violation." *Id.* at 25. But "a prior holding in 'identical circumstances' is not necessary for the law to have been clearly established." *Turner*, 848 F.2d at 446 (citation omitted); *see* Supplemental Br. 2.

## III. Mr. Covey's Guilty Plea Does Not Bar The Claims.

The County Defendants contend that the Coveys' claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), an argument they never raised below.

1. Regarding Ms. Covey, the County Defendants offer no persuasive argument for how *Heck* could bar her claim when she had no conviction. *See Bishop v. Cnty. of Macon*, 484 F. App'x 753, 756 (4th Cir. 2012) (per curiam) (unpublished).

2. Regarding Mr. Covey as a claimant, we are not advancing an additional "exception" to *Heck*. Rather, *Heck* is not implicated in the first instance. *Heck* is implicated if, and only if, a § 1983 claim, by its nature, necessarily implies

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*v. Assessor of Ohio Cnty.*, No. 5:12-cv-00037, D.E. 22 (N.D. W.Va. Jan. 24, 2013), and because it was served by mail, *id.*, the Coveys did not receive it until after the judgment of dismissal.

the invalidity of the plaintiff's conviction; this is not such a case. Opening Br. 45–52. The County Defendants do not persuasively explain how a judgment on Mr. Covey's unlawful search claims—arising from invasions of privacy—would imply, much less "necessarily" imply, the invalidity of his conviction, which is based on his admitted guilt for growing pot, an admission not inconsistent with Defendants' unlawful entry into his curtilage. *See Haring v. Prosise*, 462 U.S. 306 (1983).

It bears reminding that *Heck* did not involve an unlawful search claim or the Fourth Amendment. The case did not call into question the irrelevance of an unlawful search to the validity of a conviction by guilty plea. *Heck* involved a prisoner seeking damages for his allegedly unlawful confinement, claiming the defendants destroyed exculpatory evidence that could have proved his innocence. 512 U.S. at 479. He was in custody "challenging the legality of his conviction," *id.* at 480 n.2, and so his case sat "at the intersection" of the habeas statute and § 1983, a conflict that had to be reconciled. *Id.* at 480. No such collision exists here. "*Heck* does not automatically bar a § 1983 claim simply because the processes of the criminal justice system did not end up in the plaintiff's favor. A plaintiff need not prove that *any* conviction stemming from an incident with the police has been invalidated, only a conviction that could not be reconciled with the claims of his civil action." *VanGilder v. Baker*, 435 F.3d 689, 692 (7th Cir. 2006) (emphasis retained; internal quotation marks and alterations omitted).

The County Defendants offer up two cases, but neither involved an unlawful search claim. In *Domotor v. Wennet*, 630 F. Supp. 2d 1368, 1380 (S.D. Fla. 2009), *aff'd*, 356 F. App'x 316 (11th Cir. 2009) (per curiam) (unpublished), the plaintiff was literally using § 1983 to attack her convictions and indeed she was asking the court to "remove any and all criminal charges." 630 F. Supp. 2d at 1379–80. As for *Lewis v. City of Clarksburg*, No. 1:11CV192, 2013 WL 529954 (N.D. W. Va. Feb. 11, 2013), the claims were in the nature of wrongful-conviction claims: The plaintiffs challenged the investigation, prosecution, and judicial proceedings that resulted in their convictions; they alleged, for instance, that they were prosecuted without probable cause and that the defendants destroyed or withheld exculpatory evidence. *Id.* at *5. The plaintiffs apparently were contending that they were innocent of the crime for which they were indicted, and that the defendants orchestrated a wrongful prosecution, unfair trial, and mistrial, ultimately causing the plaintiffs to plead guilty to a lesser-included offense. Thus, regardless of whether the judge in *Lewis* correctly applied *Heck* to those claims, *but cf. Poventud v. City of N.Y.*, -- F.3d --, 2014 WL 182313 (2d Cir. Jan. 16, 2014) (en banc) (holding that *Heck* did not bar claim for *Brady* violation even though the plaintiff pleaded guilty to a lesser-included offense), this case involves fundamentally different claims. *See Parks v. N.Y. City Police Dep't*, No. 00-CV-2564, 2000 WL 1469574, *2 (E.D.N.Y. Aug. 24, 2000) (holding that some of the plaintiff's claims

were barred by *Heck*, but not the Fourth Amendment search claim since the plaintiff had pleaded guilty).

Unlike the County Defendants' brief, our brief cited circuit court cases that dealt with our scenario and held that *Heck* does not bar an unlawful search claim by a plaintiff who pleaded guilty. Opening Br. 53. *Heck* poses no bar here.

## CONCLUSION

The judgment dismissing the warrantless-search claims should be reversed.

June 13, 2014

Respectfully submitted,

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**WORD COUNT AND CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT**

Pursuant to Fed. R. Ap. P. 32(A)(7):

I certify that this brief contains 6,969 words.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), because it has been prepared in a proportionally spaced, typeface, 14-point Times New Roman, using Microsoft Word.

/s/ Sean E. Andrussier
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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of June, 2014, I caused this Reply Brief of Appellants 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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