No. 13-1227

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER J. COVEY and 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

BRIEF FOR THE FEDERAL APPELLEES

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STATEMENT OF JURISDICTION

The plaintiffs asserted a claim for money damages against Special Agent Robert L. Manchas in his individual capacity under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The district court had jurisdiction over the plaintiffs' Bivens claim under 28 U.S.C. 1331. The court entered final judgment dismissing all of the plaintiffs' claims on January 25, 2013. J.A. 85 (Judgment). The plaintiffs filed a timely notice of appeal on February 15, 2013. See 28 U.S.C. 2107(b); Rule 4(a)(1)(B), F.R.A.P. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

At the time this dispute arose, Robert L. Manchas was a Special Agent with the U.S. Drug Enforcement Administration (DEA). On October 21, 2009, he arrived at the house of the plaintiffs, Christopher and Lela Covey, together with a local law enforcement officer, after receiving a report that there might be marijuana at the house. Seeing Mr. Covey on his back yard patio, the two men entered the yard to talk to him. The officers then saw what appeared to be marijuana on the workbench where Mr. Covey stood, and, after obtaining a search warrant, arrested Mr. Covey and his wife. The question presented here is:

Whether Special Agent Manchas violated the plaintiffs' clearly established Fourth Amendment rights when he entered the back yard to talk to Mr. Covey.

STATEMENT OF THE CASE

A. Facts.

Because this case was decided on a motion to dismiss, this statement of the facts focuses on the allegations of the complaint and, as relevant, the documents attached to the complaint, the motion to dismiss, and the response to the motion to dismiss, which are also properly considered by the Court. See Kensington Vol. Fire Dep't, Inc. v. Montgomery County, 684 F.3d 462, 467 (4th Cir. 2012); Robinson v. American Honda Motor Co., 551 F.3d 218, 222-23 & n.2 (4th Cir. 2009).

1. On October 21, 2009, Roy Crews, an employee of the Ohio County, West Virginia, Assessor's Office, entered the Coveys' property to assess it for tax purposes. J.A. 67 (Op. 2). The Coveys were not home at the time. J.A. 13 (Compl. ¶ 7). During his inspection, Mr. Crews noticed what he believed was marijuana in the back patio area of the house. J.A. 67 (Op. 2).

After leaving the property, Mr. Crews called the Ohio County Sheriff, Patrick Butler, to report that he had found marijuana at the property. Id.; see J.A. 13 (Compl. ¶ 8). Sheriff Butler sent Corporal Alex Espejo to visit the Coveys' house. J.A. 67 (Op. 2). Robert Manchas, who was then a Special Agent with the U.S. Drug Enforcement Administration, accompanied Corporal Espejo. J.A. 13 (Compl. ¶ 9). (Special Agent Manchas retired from DEA in November 2013.)

At some point between Mr. Crews's visit and the arrival of Corporal Espejo

and Special Agent Manchas, Christopher Covey returned home. J.A. 13 (Compl. ¶¶ 10, 11, 13). The officers parked on the driveway, where, according to annotated photographs submitted by the Coveys in district court, they had a "view of [the] rear yard." J.A. 50 (bottom photo).

The complaint is silent about what the two officers saw, but in responding to a motion to dismiss, the Coveys attached Corporal Espejo's criminal complaint, which includes his sworn statement reciting what he saw on arriving at the Coveys' house:

> Upon arrival officers observed a white male standing under the deck near the rear basement walk out door. The male appeared to be working at a workbench. As officers approached the male he began walking toward officers. Espejo could see what appeared to be marijuana on the workbench. At this time Espejo could also smell the odor of marijuana.

J.A. 33 (Crim. Complaint). The complaint refers to this area as part of the curtilage. J.A. 13 (Compl. ¶ 12).

2. The complaint alleges that Christopher Covey "was taken by surprise" at the arrival of the officers, who were dressed in plain clothes, and that he asked whether he could help them. J.A. 13 (Compl. ¶¶ 12-13). They allegedly declined to identify themselves, handcuffed Mr. Covey, and took him to their unmarked car without reading him his Miranda rights. J.A. 13-14 (Compl. ¶ 13). The complaint alleges that the officers interrogated him about other drugs, after which Corporal

Espejo went back to the walkout basement area and conducted a search. J.A. 14 (Compl. ¶¶ 14-15).[1]

According to the complaint, Special Agent Manchas "re-entered [the] walk-out basement patio area, opened the basement doors, leaned inside and took photographs and proceeded to seize evidence." J.A. 14 (Compl. ¶ 17). Two other officers arrived to secure the area. J.A. 14 (Compl. ¶ 18). After Corporal Espejo obtained a search warrant, Special Agent Manchas allegedly directed that Christopher and his wife Lela (who had returned earlier) be arrested. The Coveys were booked and detained in jail overnight. J.A. 15 (Compl. ¶ 22).

The charges against Lela were ultimately dropped. Pls. Br. 47. Christopher

[1] The criminal complaint, which the Coveys attached to their response to one of the motions to dismiss, presents the following account: "Espejo identified himself as a member of the Drug Task Force. Espejo then detained the male and he identified himself as Christopher Covey. Espejo further told Covey he was not under arrest at this time. S.A. Manchas read Covey his Miranda Rights. Covey agreed to speak with officers. Covey told officers he was cutting up some mint that he had picked for his wife. Officers asked Covey where his wife was and Covey stated that she had left after they had lunch. Covey then admitted that there was marijuana on the table and he had just harvested it from a friend[']s property. Manchas asked Covey how many plants he had. Covey stated they only had two or three plants and they were located near Bethany. Espejo then walked over to the area where Covey had been working and observed several loose pieces of marijuana on the table, marijuana in a dehydrator, and marijuana buds in a plastic bin. Espejo also observed what appeared to be freshly cut marijuana in a large plastic bin next to the workbench. Espejo asked Covey if there was anything in the residence and Covey hesitated then stated there was a bong." J.A. 34 (Crim. Complaint).

Covey pleaded guilty in state court to "Manufacturing a Schedule I Controlled Substance." J.A. 43.[2]

B. Prior Proceedings.

1. The Coveys brought suit against several state and local officers and agencies, the U.S. Drug Enforcement Administration, and Special Agent Manchas. The complaint asserted a claim under 42 U.S.C. 1983 against the state and local officials; a Bivens claim against Special Agent Manchas; a negligent-training claim against the agencies; and state-law claims against the officers.[3] All of the defendants filed motions to dismiss.

2. The motions were referred to a magistrate judge, who recommended that they be granted. As relevant to the claim against Special Agent Manchas, the magistrate judge noted that after the sheriff was alerted about the possible presence of marijuana at the Coveys' house, Corporal Espejo and Special Agent Manchas were sent to the house, "presumably to conduct a 'knock and talk.'" J.A. 59 (Mag. Rep. 7). The magistrate judge explained that under this Court's precedents, the police may properly attempt to speak to a homeowner and may enter the back yard

[2] The Coveys state that Mr. Covey served a one-year sentence of home confinement, which ended in 2011. Pls. Br. 48 n.12.

[3] Under the Westfall Act, the United States was substituted for Special Agent Manchas on the state-law claims, leaving only the Bivens claim against him.

to do so, "'when circumstances indicate they might find him there.'" Id. (quoting Alvarez v. Montgomery County, 147 F.3d 354, 356 (4th Cir. 1998)). Noting that the Coveys' complaint placed Christopher Covey outside at his workbench when the officers arrived, the magistrate judge concluded that "the officers were justified in approaching Mr. Covey in the backyard since it was clear he was not in the house." Id. At that point, the officers saw marijuana in plain view and had probable cause to arrest Mr. Covey and to seek a search warrant. J.A. 59-60 (Mag. Rep. 7-8). The magistrate judge held that, because Special Agent Manchas violated no clearly established constitutional right, he was entitled to qualified immunity. J.A. 62-63 (Mag. Rep. 10-11).

3. The district court adopted the magistrate judge's report and recommendation, agreeing that Corporal Espejo and Special Agent Manchas conducted a proper "knock and talk" when they entered the Coveys' back yard and spoke to Mr. Covey. The court noted that the plaintiffs' complaint, as well as the criminal complaint against Mr. Covey, reflect that Mr. Covey was in the back yard when the officers arrived. J.A. 74 (Op. 9). The officers entered the back yard to speak to him, and, once there, saw marijuana on the workbench and the patio. J.A. 74-75 (Op. 9-10). The court held that the officers' entrance into the back yard was proper under Alvarez, J.A. 75 (Op. 10), and that the Coveys had not provided a "'clear indication'" that they "'intended to exclude uninvited visitors' from the backyard."

J.A. 76-77 (Op. 11-12, quoting Edens v. Kennedy, 112 Fed. Appx. 870, 875 (4th Cir. 2004), cert. denied, 543 U.S. 1153 (2005)). Moreover, examining the photographs submitted by the Coveys, the court observed 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" and that there was no apparent basis for the Coveys' assertion that the officers should not have parked where they did. J.A. 76 (Op. 11).

SUMMARY OF ARGUMENT

On appeal, the only claim the Coveys pursue against Special Agent Manchas is that he allegedly violated their Fourth Amendment rights by entering their back yard to talk to Mr. Covey without first having knocked on the front door.

The district court properly applied this Court's decisions in holding that Special Agent Manchas violated no clearly established Fourth Amendment right and was thus entitled to qualified immunity. This Court has held that police may enter the back yard to talk to a homeowner "when circumstances indicate they might find him there," Alvarez v. Montgomery County, 147 F.3d 354, 356 (4th Cir. 1998), and that was exactly the case here. Special Agent Manchas and Corporal Espejo – the sheriff's officer who accompanied Special Agent Manchas to the house – entered the back yard after they saw Christopher Covey standing under the deck on the rear patio. The Coveys acknowledge that Mr. Covey was on the patio when the officers arrived. Although they argue that he could not be seen from the

driveway, that contention is at odds with the photographs that they attached to their district court filings, which confirm that at least a portion of the patio was in fact visible.

STANDARD OF REVIEW

This Court "review[s] the district court's decision to grant a motion to dismiss de novo." Braun v. Maynard, 652 F.3d 557, 559 (4th Cir. 2011). In its review, "a court may consider documents attached to the complaint or the motion to dismiss 'so long as they are integral to the complaint and authentic.'" Kensington Vol. Fire Dep't, Inc. v. Montgomery County, 684 F.3d 462, 467 (4th Cir. 2012) (quoting Philips v. Pitt County Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009)). This rule also allows consideration of documents attached to the response to the motion to dismiss. See Robinson v. American Honda Motor Co., 551 F.3d 218, 222-23 & n.2 (4th Cir. 2009).

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT SPECIAL AGENT MANCHAS DID NOT VIOLATE THE COVEYS' CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHTS.

A. To Overcome A Defense of Qualified Immunity, A Plaintiff Must Demonstrate A Violation of A Right Whose Contours Were Clearly Established at the Time of the Alleged Conduct.

Qualified immunity "is 'an entitlement not to stand trial or face the other bur-

dens of litigation.'" Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Because, as Mitchell explains, qualified immunity is "an immunity from suit rather than a mere defense to liability," 472 U.S. at 526, the Supreme Court has required the lower courts to address qualified immunity as early as possible in the proceedings. Saucier, 533 U.S. at 200.

In addressing a defense of qualified immunity, a court considers whether the plaintiff has stated a violation of a constitutional right at all and whether, in any event, the plaintiff has stated a violation of a clearly established constitutional right. A court may address these related questions in either order. Pearson v. Callahan, 555 U.S. 223 (2009).

In determining whether a plaintiff has stated a claim, a court takes the factual allegations in the light most favorable to the plaintiff, but gives no credence to conclusory allegations and legal conclusions. The court thus determines whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

Then, in determining whether the asserted constitutional right was clearly established at the time the alleged events occurred, the court's inquiry "must be undertaken in light of the specific context of the case, not as a broad general propo-

sition." Saucier, 533 U.S. at 201. See also Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) ("We have repeatedly told courts * * * not to define clearly established law at a high level of generality."). Thus, the right "must be defined at the appropriate level of specificity before a court can determine if it was clearly established." Wilson v. Layne, 526 U.S. 603, 615 (1999). In this case, therefore, it is not sufficient to argue that the Fourth Amendment clearly protects an individual against unreasonable searches. Instead, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added); see also Saucier, 533 U.S. at 202 (inquiry is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted") (emphasis added). Although it is not necessary that the precise action taken have been previously held unlawful, see Hope v. Pelzer, 536 U.S. 730, 740-41 (2002), the unlawfulness must be clear in light of the law in effect at the time the action was taken. Anderson, 483 U.S. at 640. As the Supreme Court has emphasized, "existing precedent must have placed the statutory or constitutional question beyond debate." al-Kidd, 131 S. Ct. at 2083 (emphasis added); id. at 2084 ("absent controlling authority," what is required is "a robust consensus of cases of persuasive authority") (internal quotation marks omitted).

That is to say, to defeat qualified immunity, it is not enough for a plaintiff to

show that a reasonable officer, or some reasonable officers would have understood that the conduct was unlawful; he must show that every reasonable officer would have understood that. Id. A defendant is entitled to qualified immunity unless "it is obvious that no reasonably competent officer would have concluded" that the action was lawful; "but if officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986).

B. The District Court Correctly Held That Special Agent Manchas Did Not Violate The Fourth Amendment When He Entered The Coveys' Back Yard To Talk To Mr. Covey.

The district court correctly held that Special Agent Manchas did not violate the Fourth Amendment when he and Corporal Espejo entered the Coveys' back yard to talk to Christopher Covey.[4]

1. This Court has repeatedly recognized "the right to 'knock and talk,' that is, to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants." Rogers v. Pendleton, 249 F.3d 279, 289 (4th Cir. 2001). See also United States v. Ward, 166 F.3d 336 (Table), 1998 WL 879541, at *1 n.1 (4th Cir. 1998) (per curiam) (referring to "knock and talk" as "an investi-

[4] This is the only remaining issue involving Special Agent Manchas. The Coveys have stated that their claim is limited to "conduct that occurred before the search warrant issued," and that they are "no longer pursuing a claim based on the scope of the warrant." Pls. Supp. Br. 1 n.1.

gative police procedure in which officers knock on a door, introduce themselves as police officers, and based on the observable reaction of the subject, the officers may seek permission to search the residence"). The Fourth Amendment does not require probable cause or reasonable suspicion, let alone a search warrant, to conduct a "knock and talk." Instead, officers may conduct a "knock and talk" by simply going to the door and asking to talk to the people there. Talking to the officers is voluntary. 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.'" Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013) (quoting Kentucky v. King, 131 S. Ct. 1849, 1862 (2011)).

While officers ordinarily go to the front door for their "knock and talk," the case law is quite clear that they may enter the back yard "when circumstances indicate they might find [the homeowner] there." Alvarez v. Montgomery County, 147 F.3d 354, 356 (4th Cir. 1998). Indeed, officers may proceed to the rear of the residence for any of a variety of reasons: (a) No one answers the front door after a knock, United States v. Bradshaw, 490 F.2d 1097, 1100 (4th Cir.), cert. denied, 419 U.S. 895 (1974); see Edens v. Kennedy, 112 Fed. Appx. 870, 874 (4th Cir. 2004), cert. denied, 543 U.S. 1153 (2005); (b) A sign indicates that the homeowner is likely in the rear of the house, Alvarez, 147 F.3d at 357; (c) There is a path leading to the back, United States v. Jones, 2013 WL 4678229, at *7 (W.D. Va.

2013); (d) Officers observe people entering the house from the back door, United States v. Roberts, 467 Fed. Appx. 187, 188 (4th Cir.), cert. denied, 133 S. Ct. 47 (2012); (e) The custom in the particular community is to enter and leave through the rear door, United States v. Jones, 2013 WL 4678229, at *7.

2. As the district court explained, the record reflects that Christopher Covey was in the back yard at the patio when the officers arrived. J.A. 74 (Op. 9). Because Special Agent Manchas and Corporal Espejo saw Mr. Covey at the back yard patio, they did not have to knock on the front door first. See Alvarez, 147 F.3d at 357 (officer was planning to knock on front door, but other officer noticed sign reading "Party In Back" and the first officer, "[w]ithout knocking, * * * walked away from the front door" and "entered the backyard with the other officers"). As the magistrate judge put it, "it was clear [Mr. Covey] was not in the house." J.A. 59 (Mag. Rep. 7).

This conclusion is confirmed by Corporal Espejo's sworn statement in support of the state criminal charge against Mr. Covey, J.A. 33-34, and by a series of photographs of the rear of the Coveys' house. J.A. 50-52. All of this evidence was submitted by the Coveys themselves in their response to the different defendants' motions to dismiss or for summary judgment. Corporal Espejo's affidavit states, in part:

> 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 walk out door.

J.A. 33. A photo submitted by the Coveys purports to show the view to the patio from where Special Agent Manchas and Corporal Espejo parked. The Coveys' annotation reads: "MANCHAS/Espejo PARK on grass with view of rear yard. 75 ft to patio door." J.A. 50. There are four additional photographs on the following two pages of the joint appendix showing the view to the patio from increasingly close locations. J.A. 51-52.

These photographs confirm that the officers were able to see the patio from where the Coveys claim they parked. See Scott v. Harris, 550 U.S. 372, 378 (2007) (relying on videotape that contradicted the plaintiff's version of facts); Smith v. Ozmint, 578 F.3d 246, 254 (4th Cir. 2009) (same). Because Special Agent Manchas and Corporal Espejo could see Mr. Covey in the rear on the patio, it was permissible under the Fourth Amendment for them to conduct their "knock and talk" by walking directly toward him instead of going first to the front door.

3.a. The Coveys contend that Special Agent Manchas and Corporal Espejo should not have entered the back yard, because there was no walkway into the yard that would indicate a license to enter. Pls. Br. 25-26. But that is irrelevant in a case in which the officers actually saw the homeowner in the back. This Court's decision in Alvarez, permits entry into the back yard "when circumstances indicate [police] might find [the homeowner] there." 147 F.3d at 356. Here, it was not

even a question of "might"; the officers did find the homeowner there. See also Edens, 112 Fed. Appx. at 874 ("the police may circle to the back of the home under appropriate circumstances").[5]

The Coveys also claim that the "No Trespassing" signs posted along their driveway showed that uninvited guests were unwelcome. Pls. Br. 26. But as this Court made clear in Edens, the homeowner may defeat the implied license for the public and the police to enter only if the property is both posted and locked. 112 Fed. Appx. at 876 ("if a fence within or around the curtilage is locked and posted with signs in order to prevent access, this 'manifest[s] an objective intent that the area be preserved as private'") (quoting State v. Brocuglio, 64 Conn. App. 93, 779 A.2d 793, 800 (2001)). "In the absence of a fence with a locked gate, a home-owner is likely to receive visits from pollsters, door-to-door salespeople, and trick-or-treaters, among others." Id. at 875; see United States v. Jones, 2013 WL 4678229, at *9 ("Contrary to Jones's protestations, the existence and volume of 'No Trespassing' signs is not dispositive of this point.").

[5] The Coveys cite an Eighth Circuit case, United States v. Wells, 648 F.3d 671 (8th Cir. 2011), for the proposition that officers may not bypass the front door. Pls. Br. 23-24. But Wells was entirely different from this case: "[I]t was 4:00 a.m. Other than perhaps their suspicion of drug manufacturing, there was no reason for the officers to think that Wells would be found in the backyard at that time, nor was there any reason for them to think that Wells generally would receive 'visitors' there." 648 F.3d at 680.

b. The Coveys are on no firmer ground in urging that the officers could not, in fact, see Mr. Covey when they arrived, an assertion that is at odds with the photographs that they submitted in support of this contention. The photos confirm that at least a portion of the patio where Christopher was located was visible from where Special Agent Manchas and Corporal Espejo supposedly parked. J.A. 50 (bottom photo); J.A. 51 (top and middle photos). Indeed, they admit as much on appeal. Pls. Br. 4 ("most" of the patio was not visible); id. at 33 ("most" of the patio was screened from view).

Although part of the patio was admittedly visible from the officers' vantage point, the Coveys suggest that Mr. Covey and his workbench might have been concealed behind a stone wall that blocks a portion of the patio from view. Pls. Br. 32 ("it appears" the officers "could not have seen the workbench"); id. at 33. Their photographs offer no support for this assertion, which was made for the first time in their objections to the magistrate judge's report and recommendation. Docket Entry 55, at 4. The photograph of the entire patio shows no workbench, J.A. 52 (top photo); it is not surprising that the workbench is also absent from the partial view.

In any event, it is irrelevant whether the workbench was located behind the stone wall. The location of the workbench would not suggest that Mr. Covey himself was hidden from view and that the officers were unaware of his presence

when they entered the backyard.

c. The Coveys' remaining arguments are equally unavailing. They urge, for example, that the officers would not have expected Mr. Covey to be home, Pls. Br. 31, that the officers parked "partially in the backyard itself," id. (citing J.A. 50, bottom photo), and that the officers therefore must have intended to wander the property looking for marijuana. The photo demonstrates that the officers did not park in the back yard, and the Coveys themselves annotated the photo to say that the officers parked "on [the] grass" with a "view of [the] rear yard," not that they parked in the rear yard, partially or otherwise.[6]

The Coveys also assert that "Christopher was taken by surprise" when the officers appeared at the patio, Pls. Br. 32; see J.A. 13 (Compl. ¶ 13), and that the officers must therefore have been similarly surprised to see Mr. Covey when they reached the patio. Mr. Covey was engaged at his workbench, and his sudden awareness of the officers' presence does not indicate that the officers did not see him from the driveway. The Coveys' alternative speculations are no more fruitful. They suggest, for instance, that Mr. Covey might not even have been at his work-

[6] Although the Coveys insist that it was improper to park there, J.A. 13 (Compl. ¶ 11) ("an area not normally used for visitor parking"); Pls. Br. 21, 31, they do not claim there were any signs to that effect, and the district court pointed out that there were not. J.A. 76 (Op. 11) ("no indication of a specified area for visitor parking to the exclusion of other areas").

bench at all when the officers first entered the yard. Pls. Br. 31-32. But as the Coveys themselves explained, the patio was only about 75 feet from where the officers parked, J.A. 50 (bottom photo annotation), and at 3 miles per hour, a slow walking pace, it would have taken only about 17 seconds to walk those 75 feet.

Finally, the Coveys argue that Corporal Espejo's sworn statement is ambiguous, theorizing that his reference to "'upon arrival' might mean 'when they arrived' or 'after their arrival.'" Pls. Br. 34. But there is no ambiguity here: "Upon arrival" means "when they arrived." See, e.g., United States v. Hill, 649 F.3d 258, 261 (4th Cir. 2011) ("Upon arrival, the police knocked on the door.").

C. In Any Event, Special Agent Manchas Is Entitled To Qualified Immunity, Because It Was Not Clearly Established That His "Knock And Talk" Entry Into The Back Yard To Speak To Mr. Covey Violated The Fourth Amendment.

1. Even if this Court were to hold for the first time that officers arriving for a "knock and talk" must first approach the front door even when they see the homeowner in the back yard, Special Agent Manchas would be entitled to qualified immunity, because, at a minimum, it was not clearly established that the officers were required to knock on the front door in these circumstances.

To the contrary, under this Court's precedents reasonable officers could have believed that, if they saw the homeowner in the back yard, they did not have to check at the front door first. See Alvarez, 147 F.3d at 356 (entry into back yard

permissible "when circumstances indicate [police] might find [the homeowner] there"); Edens, 112 Fed. Appx. at 874 ("the police may circle to the back of the home under appropriate circumstances").

The Coveys misstate the relevant question when they pose the qualified immunity inquiry as "whether a reasonable person" would have understood that he could "ignore an accessible front door" and enter the back yard when "circumstances indicate[d] that [he] might find a homeowner there." Pls. Supp. Br. 7. In fact, the question on qualified immunity is whether "every" reasonable officer in the position of the defendant would have realized that the officer's conduct, in not going first to the front door when he saw the homeowner in the rear, was unlawful. al-Kidd, 131 S. Ct. at 2083; see Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012). Unless "every" reasonable officer would have known that, the defendant is entitled to qualified immunity.

Moreover, the Coveys acknowledge that Alvarez does not require an officer to knock at the front door first, Pls. Supp. Br. 9, at least when there is a "reasonable basis to believe that the homeowner received visitors [in the back yard]." Id. at 10. In fact, Alvarez does not require that there be a reasonable basis to believe that the homeowner "received visitors" in the back; the sign in front of the house that this Court held was sufficient to justify the officers' visit to the back yard without knocking at the front door was directed to invited party guests, not the general

public. The officers were comparable to the general public, not to invited guests. Thus, the Court's holding in Alvarez was that the license to invited guests was sufficient to allow officers to enter the back yard without first knocking at the front door, whether or not there was an implied license to the general public.

Because it was not clearly established that it was unlawful to enter the Coveys' back yard when Special Agent Manchas and Corporal Espejo saw him standing at the patio, Special Agent Manchas is entitled to qualified immunity.[7]

CONCLUSION

For the foregoing reasons, the judgment should be affirmed as to Special Agent Manchas.

[7] The Coveys argue that their claims are not barred by Heck v. Humphrey, 512 U.S. 477 (1994). Pls. Br. 45-52. We argued below that they were barred, but neither the magistrate judge nor the district court addressed Heck. Therefore, we have focused on the basis for the ruling below and the issue of qualified immunity, as this Court has requested, and will not address Heck in this brief.

Respectfully submitted,

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MAY 2014

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count under Microsoft Word 2010, this brief contains 5,045 words, excluding the tables, certificates, and addenda.

/s/ Edward Himmelfarb

_____

Edward Himmelfarb
Attorney for the Federal Appellees

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2014, I filed the foregoing with the Court by causing a copy to be electronically filed via the appellate CM/ECF system and by causing eight paper copies to be sent to the Court by FedEx. I further certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Edward Himmelfarb

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Edward Himmelfarb
Attorney for the Federal Appellees