No. _____

In The
Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

MICHAEL FREDERICK and TODD VANDOORNE,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v King*, 563 US 452, 469–70; 131 S Ct 1849; 179 LEd2d 865 (2011). Two years later, this Court noted "the unsurprising proposition that [law enforcement] officers could have lawfully approached [a] home to knock on the front door in hopes of speaking with [the occupant]." *Florida v Jardines*, 569 US 1, 8 n 1; 133 S Ct 1409; 185 LEd2d 495 (2013). In the process of holding that the police could not search the curtilage of a home with a drug-sniffing dog without a warrant or an exception to the warrant requirement, this Court noted that it was not typically hard to figure out the scope of a person's implied license to approach a home. "Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.* at 8. The questions presented are:

1. Whether the Fourth Amendment applies to knock and talk encounters.

2. If yes, whether the Michigan Supreme Court correctly held that a predawn visit constitutes a constitutional trespass in violation of the implied license to approach.

QUESTIONS PRESENTED—Continued

3. If yes, whether the Michigan Supreme Court correctly held that "any attempt to gather information," including simply asking the occupants for consent to search, combined with a constitutional trespass, constitutes a search under the Fourth Amendment.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption, with the Kent County Prosecutor's Office representing the People of the State of Michigan as petitioner, and co-defendants Michael Frederick and Todd VanDoorne as respondents.

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JURISDICTION

The Michigan Supreme Court's orders denying leave to appeal were entered on March 5, 2019 (App 106-109). Petitioner invokes this Court's jurisdiction under 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment has been incorporated to apply to actions in the several states by the Due Process Clause of the Fourteenth Amendment; see, e.g., *Bailey v United States*, 568 US 186, 192; 133 S Ct 1031; 185 LEd2d 19 (2013). The Fourteenth Amendment provides in part:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Investigation

The facts of this case were detailed by the Michigan Court of Appeals:

> On March 17, 2014, at approximately 10:15 p.m., the Kent Area Narcotics Enforcement Team (KANET) executed a search warrant at the home of Timothy and Alyssa Scherzer. While executing this warrant, the KANET officers learned that the Scherzers, acting as

caregivers, had been providing marijuana butter to corrections officers employed by the Kent County Sheriff Department (KCSD). Scherzer informed the KANET officers that he had given 14 pounds of marijuana butter to one corrections officer, Timothy Bernhardt, who acted as a middleman and distributed the butter to other corrections officers. Frederick and Van Doorne were identified as two corrections officers who received marijuana butter through Bernhardt.

Based on this information, the KANET officers contemplated whether to obtain search warrants for the homes of the additional suspects, or alternatively, to simply go to the home of each suspect, knock, and request consent to conduct a search. The officers chose the latter approach. The team, composed that night of seven officers, conducted four knock-and-talks in the early morning hours of March 18, 2014. The officers first visited Bernhardt and another corrections officer. At approximately 4:00 a.m., the officers, in four unmarked vehicles, arrived at Frederick's home. Four officers approached the front door, knocked, and waited. Within a few minutes, Frederick answered the door and spoke to the officers. The officers informed Frederick that his name had come up in a criminal investigation and asked if they could come inside and speak with him. Frederick invited the officers inside. The officers asked if they could see Frederick's marijuana butter, and he agreed. Frederick signed a form granting his consent to conduct a search. The officers also informed

> Frederick of his [*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966)] rights, and Frederick signed a card waiving those rights. Officers recovered marijuana butter from Frederick's home.
>
> The team arrived at the home of Van Doorne at approximately 5:30 a.m. . . . Van Doorne awoke and looked outside. Recognizing some of the officers standing outside his home, Van Doorne opened the door and spoke with them. As they had with Frederick, the officers explained the purpose of their visit. Van Doorne, believing that the issue could be resolved by showing the officers his medical marijuana card, invited the officers inside. However, because his dog continued to bark, Van Doorne and the officers decided to speak outside in a van. Once inside the van, Van Doorne signed forms waiving his *Miranda* rights and consenting to a search of his home. Officers recovered marijuana butter from Van Doorne's home.
>
> Frederick and Van Doorne were charged with various controlled substance offenses. (App 31-34; footnotes omitted).

B. The evidentiary hearing and ruling of the trial court.

Both Respondents filed motions to suppress the evidence obtained during the searches. Each made two arguments: (1) his consent to the search was involuntary, and (2) the knock-and-talk procedure violated the Fourth

> Amendment under *Jardines*. After an extensive evidentiary hearing, the trial court denied the motions, concluding that the knock-and-talk procedures were not searches or seizures under the Fourth Amendment, and that both men voluntarily consented to the searches. Frederick and Van Doorne filed separate applications for leave to appeal in [the Michigan Court of Appeals], which [the Court of Appeals] denied. In lieu of granting leave to appeal, [the Michigan] Supreme Court remanded both cases to the Court of Appeals to determine whether the knock-and-talk procedures were constitutional in light of *Jardines* (App 34-35, footnotes omitted).

The Court of Appeals, in a consolidated opinion, held, 2-1, that the knock and talk procedures used by the police in this case did not constitute a search under the Fourth Amendment, as that term was defined in *Jardines* (App 40). The majority held:

> We read [*Jardines*] as drawing a line. The police do not violate the Fourth Amendment by approaching a home and seeking to speak with its occupants. Even if the police fully intend to acquire information or evidence as a result of this conversation, the line has not been crossed. However, if the police enter a protected area not intending to speak with the occupant, but rather, solely to conduct a search, the line has been crossed. [App 46].

The dissenting judge would have found that an unconstitutional search occurred because of "the time of night, an objective view of the officers' conduct, and

the officers' failure to advance any objectively reasonable explanation for why they could not gather their evidence during the day, or proceed with obtaining a warrant" (App 75).

Respondents sought leave to appeal in the Michigan Supreme Court, which ordered oral argument on whether to grant the application or take other action. *People v Frederick*, 499 Mich 952; 879 NW2d 649 (2016).

C. The decision of the Michigan Supreme Court

On June 1, 2016, in a consolidated opinion, the Michigan Supreme Court held that the conduct of the police violated the Fourth Amendment. The court stated: "the *Jardines* Court apparently agreed, albeit in dicta, that a nighttime visit would be outside the scope of the implied license (and thus a trespass)" (App 23). The Michigan Supreme Court found, based on this dicta, "that the implied scope of the license does not extend to these predawn approaches," and consequently held "that the police were trespassing." (App 25).

The Michigan Supreme Court recognized that a trespass alone does not constitute a Fourth Amendment violation, so it looked to whether the police had combined a trespass with the intent to obtain information (App 26). In support for its conclusion that this was the dividing line, the Michigan Supreme Court cited to a footnote from this Court's opinion in *United States v Jones*, 565 US 400, 408 n 5; 132 S Ct 945; 181

LEd2d 911 (2012): "Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information" (App 25-26). Because the officers approached the homes "to obtain information about the marijuana butter they suspected each defendant possessed[, t]his intent is sufficient to satisfy the information-gathering prong of the *Jones* test" (App 26).

In addressing Petitioner's argument that the intent of the officers was to seek consent to search rather than to conduct a search, the Michigan Supreme Court held that the fact "[t]hat the officers intended to get permission to search . . . does not alter our analysis" (App 26). It acknowledged that *Jardines* and *King* had held that "it is not a Fourth Amendment search to approach a home in order to speak to the occupant, because all are invited to do that. The mere purpose of gathering information in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment" (App 26, quoting *Jardines*, 569 US at 9 n 4). The Michigan Supreme Court, however, found that information-gathering conjoined with a trespass was a search, and the officers' intent of wanting to search if consent was given was sufficient to constitute an intent to gather information; combined with what it found to be a trespass, these actions constituted a search under the Fourth Amendment (App 27).

The Court remanded the case for the trial court to determine whether the consent given by each

Respondent was sufficiently attenuated from what it held were illegal searches (App 29).[1]

D. Post-remand proceedings

On November 21, 2017, in a consolidated opinion, the trial court granted Defendants' motion to suppress all drugs and statements made based on the Michigan Supreme Court's holding that the knock and talk was an unconstitutional search. With the drugs and statements about the drugs suppressed, Petitioner conceded that suppression of this evidence would make it impossible to proceed with a trial, and the trial court therefore ordered that the cases be dismissed (App 12).

Petitioner appealed to the Michigan Court of Appeals. Petitioner did not argue that the trial court's decision on the motion to suppress was an abuse of discretion given the Michigan Supreme Court's finding of an unconstitutional search, but rather preserved its challenge to the Michigan Supreme Court's determination that the knock and talk procedure violated the Fourth Amendment. The Court of Appeals recognized it had no authority to overturn a higher court and affirmed the decision of the trial court in a consolidated appeal (App 8).

The People filed an application for leave to appeal in the Michigan Supreme Court in each case, asking

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[1] Because the cases were remanded for further proceedings, the decision was not a final order under 28 USC § 1257 and therefore a petition for a writ of certiorari was not filed at the time.

that court to grant the application and review its earlier decision. On March 5, 2019, the court entered orders denying the application for leave to appeal as to both defendants (App 106-107, 108-109).

From these final orders of the highest state court, Petitioner files this petition.

REASONS TO GRANT THE PETITION

I. Courts are confused on the limitations, if any, placed on knock and talk encounters by the *Jardines* decision.

Prior to *Jardines*, state and federal courts applied this Court's holding in *King* and the plurality opinion in *Florida v Royer*, 460 US 491, 497–98; 103 S Ct 1319; 75 LEd2d 229 (1983), that a request to speak to a person, and potentially to seek consent to search, is not a search in and of itself, and therefore the Fourth Amendment does not apply to such a request. Whether a person's subsequent consent to search a home or to speak with the officers was valid was analyzed under a totality of the circumstances test for voluntariness under the Due Process Clause. See *Schneckloth v Bustamonte*, 412 US 218, 227; 93 S Ct 2041; 36 LEd2d 854 (1973).

As Justice White noted, it was not "disputed that where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and

voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Royer*, 460 US at 497 (plurality opinion; citations omitted). Justice White further noted:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . . The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. [*Id*. at 497-498; citations omitted.]

The basic law regarding consensual encounters was thus stated: "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." *Id*. at 498.

This Court reinforced this basic principle in *King*, and applied it specifically to knock and talks, where it held that "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak." *King*, 563 US at 469-470. Continuing to focus

on the voluntary nature of the encounter, this Court reiterated that "even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time." *Id*. at 470.

Some courts have said that in *Jardines*, this Court added a new element to the analysis of consent-based knock and talk encounters even though the case did not involve a knock and talk. In *Jardines*, Justice Scalia, writing for the majority, noted that the implied license for approaching the front door of the home to speak to a resident did not extend to searching the premises or the curtilage. "[I]ntroducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker." *Jardines*, 569 US at 9. In the process of so holding, Justice Scalia, with his well-known penchant for wit, noted that the implied license to approach a home and knock "is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id*. at 8.

Some courts have seized upon this dicta to find a Fourth Amendment violation where police operate outside of the framework of what a Girl Scout might do. In this case, the Michigan Supreme Court held that this "Girl Scout Rule" was, in fact, a new Fourth Amendment mandate for any knock and talk (App 24).

The Ninth Circuit adopted a similar framework when it held that police violated the Fourth Amendment by going to a suspect's home in the predawn hours. In *United States v Lundin*, 817 F3d 1151, 1159 (CA 9, 2016), that court held that the police violated the scope of the implied license to approach a home, in part because it was conducted at 4 a.m., and in part because the purpose of the police going to the home was to arrest the person, "a purpose that virtually no resident would willingly accept." The Ninth Circuit focused on the fact that the police approached the home with no "evidence that Lundin generally accepted visitors at that hour, and without a reason for knocking that a resident would ordinarily accept as sufficiently weighty to justify the disturbance." *Id.* Noting that typically courts evaluate only objective factors in determining the propriety of police actions, "[a]fter *Jardines*, it is clear that, like the special-needs and administrative-inspection exceptions, the 'knock and talk' exception depends at least in part on an officer's subjective intent." *Id.* at 1160. The Ninth Circuit thereby incorporated both a time element, and an analysis of the subjective intent of the police, to analyzing a knock and talk.

The Tenth Circuit, on the other hand, has held, "*Jardines* left our preexisting knock-and-talk precedent undisturbed." *United States v Carloss*, 818 F3d 988, 993 (CA 10, 2016). While *Carloss* involved a different question (whether No Trespassing signs revoked an implied license to approach a home to conduct a knock and talk, *id*. at 994), the breadth of the Tenth

Circuit's pronouncements made clear that it did not believe *Jardines* had any effect on what is permissible in a knock and talk. Indeed, one of the subheadings in the opinion was: "Post-*Jardines* cases make clear that *Jardines* did not restrict knock-and-talks." *Id.*

The Eleventh Circuit took what might be described as a middle approach. Officers went to a home at 9 pm, 11 pm, and then 5 am to locate one person with an outstanding warrant at another person's home; at 5 am, they saw the defendant in the carport and initiated a conversation, with the defendant telling the police they could enter his home to look for the suspect. *United States v Walker*, 799 F3d 1361, 1362-1363 (CA 11, 2015). Once inside, the police observed counterfeit money in plain view. *Id.* at 1363. The Eleventh Circuit recognized two exceptions to the knock and talk framework: (1) when an officer's behavior "objectively reveals a purpose to conduct a search," which the Eleventh Circuit held was prohibited by *Jardines*, and (2) when the officers go to a place other than the front door or make a minor departure from that path. *Id.* The Court in *Walker* held that the objective purpose of the officers' actions was not to conduct a search but to speak to the homeowner about another person, and the slight deviation from the front door to the carport was proper under the facts. *Id.* at 1363-1364. The Eleventh Circuit believed the time of day was relevant but was not dispositive on the facts of the case before it. *Id.* at 1364.

State courts have also struggled to a2pply the holding of *Jardines* and whether and to what extent its dicta about knock and talks and an implied license

might have changed the Fourth Amendment landscape. The Alaska Court of Appeals held that troopers who drove up a defendant's driveway after midnight and smelled marijuana when they rolled down their windows violated *Jardines*. *Kelley v State*, 347 P3d 1012, 1013 1016 (Alaska Ct App, 2015). Because the troopers did not intend to conduct a knock and talk and never attempted to approach the main door, it held that cases that have upheld late night police approaches did not apply. *Id.* at 1016. While the case did not involve an officer knocking and trying to talk to the resident, the Alaska Court of Appeals discussed the propriety of the hour of the approach, though in so doing it not only mentioned *Jardines* but also an Alaska statute requiring search warrants to be served between certain times of the day unless there is good cause. *Id.*

In contrast, Georgia has held that a 10:40 pm knock and talk to verify sex offender registration compliance, which led to a consensual search of the offender's phone and the discovery of sexual images of a child on his cell phone, was not a violation of the Fourth Amendment, as the encounter began as a knock and talk. *Martinez v State*, 347 Ga App 675, 676, 679; 820 SE2d 507 (2018). The Georgia court noted the *Jardines* decision but did not discuss whether a 10:40 pm approach to the home was later than a Girl Scout or a peddler might approach. That court held that, regardless of whether the officers in that case hoped to do an analysis of the defendant's cell phone if permission was granted, "unlike *Jardines*, which was a search

from the very beginning, the officers' legitimate first-tier encounter on Martinez's porch did not constitute a Fourth Amendment search regardless of the officers' alleged subjective intent." *Id.* at 681.

In short, there is confusion on what effect, if any, this Court's decision in *Jardines* should have on knock and talk encounters, particularly since there was no knock and talk in *Jardines*. As a result, courts are left to speculate on the import of dicta from that decision, and some are creating bright line rules for the time of day or officers' subjective intent in the context of a Fourth Amendment reasonableness analysis, which this Court has been loath to impose. See *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 LEd2d 347 (1996) ("we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"). This Court should clarify if a true knock and talk, where the police approach the door, knock, and seek consent to search in a non-coercive manner, is constitutionally limited by some form of time-based restriction rather than the totality of the circumstances test.[2]

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[2] Petitioner submits that the implied license is not inherently violated by a predawn visit. While perhaps not desired, a person might approach a home for assistance at 4 am if that person had car trouble and did not have a working cell phone, for instance. Such a person should not be found liable in tort for trespass nor would the person generally be subject to criminal prosecution for trespass. If there is no trespass for such a person, a law enforcement officer looking to either confirm suspicions or quickly exonerate a person, *Schneckloth*, 412 US at 227-228, should not be found to be trespassing, either.

II. If the Fourth Amendment imposes a time-based limitation on when officers can approach a home for any purpose, the objective intent of the officers to seek permission before speaking to the occupant and to seek consent to search should preclude a finding that such a knock and talk encounter is a search.

The Michigan Supreme Court realized that what it held to be trespassing by police officers did not mean a Fourth Amendment violation had occurred, and that a search must also have occurred for the Amendment to be invoked (App 25-26). That court took the language from this Court in *Jones*, that a trespass combined with an attempt to gather information is a search, 565 US at 408 n 5, and then held that the intervening step of first seeking consent was irrelevant because the officers' intent was to get information (App 26-27). Petitioner submits that this would be a significant departure from the long-held proposition that the police may seek to obtain consent to speak with a person or get consent to search without the question itself being a search. Asking if one may look in someone's home is not the same as the person actually looking in the home.

This Court has never made it apparent from any of its decisions that it intended to change the law and hold that a request to search can sometimes be considered a search in and of itself. Such a holding would also not be consistent with the meaning of the word "search" as understood at the time the Fourth

Amendment was enacted. Obviously, if a search or seizure has not occurred, the Fourth Amendment is not implicated.[3]

As Judge Thapar of the Sixth Circuit recently discussed, the word "search" is not considered a term of art and therefore courts should look to the word's ordinary meaning. *Morgan v Fairfield Cty, Ohio*, 903 F3d 553, 568 (CA 6, 2018) (THAPAR, J., concurring in part, dissenting in part). He noted the following definitional sources:

> To search is "to look into or over carefully or thoroughly in an effort to find something." *Webster's Third New International Dictionary of the English Language* (2002); *see also* 2 Noah Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989) ('To look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.'). [*Id*.]

Judge Thapar also noted historical examples of searches that led to the enactment of the Fourth Amendment, including writs of assistance which allowed customs officials to enter any ship, home, shop, or other place and to look into any trunk or chest or any other parcel they found, *id.* at 568-569, and general warrants which let the King's agents rummage

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[3] Petitioner acknowledges there are still limits on police requesting consent to search, but those limits are through the voluntariness inquiry based on the totality of the circumstances as outlined in *Schneckloth*, not the Fourth Amendment.

through all the papers they could find in a home to look for seditious material, *id.* at 569. Judge Thapar explained:

> And after the people ratified the Fourth Amendment to protect against such abuses, early courts confirmed this understanding of a "search." Those courts found that searches had occurred where officers opened and examined sealed letters or packages, *Ex parte Jackson*, 96 US 727, 732; 24 LEd 877 (1877), looked through a man's shop and apartments for jewelry, *Larthet v Forgay*, 2 La Ann 524, 525 (La 1847), poked through a man's cellar to look for stolen barrels of flour, *Bell v Clapp*, 10 Johns 263, 265 (NY 1813) (per curiam), and entered a man's house, "turned over the beds," looked through "every hole" and "required every locked place to be opened," *Simpson v Smith*, 2 Del Cas 285, 287 (Del 1817). [*Id*. at 570.]

Judge Thapar also quoted a scholar who noted that "'[f]amous search and seizure cases leading up to the Fourth Amendment involved physical entries into homes [and] violent rummaging for incriminating items once inside. . . .'" *Id.* at 569, quoting Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup Ct Rev 67, 72 (2012).[4]

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[4] Professor Kerr's article is particularly notable because it was written in response to the *Jones* decision and this Court's citation in *Jones* to one of Professor Kerr's other articles as support for a claim that pre-*Katz v United States*, 389 US 347; 88 S Ct 507; 19 LEd2d 576 (1967), courts used a trespass test for analyzing searches. 2012 Sup Ct Rev at 68 (noting Orin S. Kerr,

Asking to look around a person's home, fully understanding that if consent is not granted a search cannot proceed, is not comparable to the sort of entry into a person's home or effects and rummaging through documents or containers that the Fourth Amendment is aimed at limiting. If the police in *Jones* had trespassed upon the defendant's property and asked him if they could attach a GPS device to his car, it would not be logical to say that they had conducted a search by making the request. The Michigan Supreme Court's definition of search is contrary to a long line of cases from this Court finding that it is generally permissible for the police to speak to a person, even without reasonable suspicion, and ask them potentially incriminating questions. See *Florida v Bostick*, 501 US 429,

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The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich L Rev 801, 816 (2004) (cited in *Jones*, 565 US at 405) (where he stated that "early courts interpreted the Fourth Amendment as a claim against government interference with property rights, and in particular, rights against trespass."). In his 2012 article, Professor Kerr noted that he had only discussed the common wisdom of the time in his earlier article, but he was prompted to evaluate the issue more seriously after *Jones* made the history of the Fourth Amendment doctrinally significant; he came to the realization that "[n]either the original understanding nor Supreme Court doctrine equated searches with trespass. *Jones* purports to revive a test that did not actually exist. In short, the common wisdom is false." *Id.* Whether and to what extent this Court should reevaluate its trespass-based jurisprudence that it created and/or resurrected in *Jones* would be useful to the bench and bar. If, however, this Court decides that under the doctrine of *stare decisis* such decisions should not be reviewed at this time, the Michigan Supreme Court's error in defining a search as including asking to search remains the same under any analysis.

439; 111 S Ct 2382; 115 LEd2d 389 (1991) (listing cases, although those cases focused on whether a seizure occurred prior to consent being obtained, rather than whether the request for consent was itself a search).

The language used by the Michigan Supreme Court also potentially invalidates law enforcement practices that have never been seen as constitutional violations, such as canvassing a neighborhood after a crime. For example, asking a person if they heard or saw anything shortly after a shooting, or break-ins of nearby cars, or an assault that happened in the street, is obviously an attempt to "obtain information" (App 26), and if done in predawn hours at a person's home, would constitute a constitutional violation under the Michigan Supreme Court's holding (App 24 n 6, 27). Thus, this decision could create liability for police agencies under 42 USC § 1983 for a constitutional violation by simply asking people in the neighborhood for assistance, if that request is made during the predawn hours at their homes.

It appears that the Michigan Supreme Court attempted to limit its holding when it stated that "[t]he officers approached each house to obtain information about the marijuana butter they suspected each defendant possessed. This intent is sufficient to satisfy the information-gathering prong of the *Jones* test" (App 26). This, however, is also contrary to this Court's repeated admonition that the subjective intent of a police officer is irrelevant in Fourth Amendment analysis. As this Court recently held on May 28, 2019, in the

Fourth Amendment context, "we have almost uniformly rejected invitations to probe subjective intent." *Nieves v Bartlett*, No. 17-1174, 2019 WL 2257157, at *7 (May 28, 2019; internal quotation marks and citation omitted). This Court affirmed language from *King*: "'Legal tests based on reasonableness are generally objective, and this Court has long taken the view that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Id.*, quoting *King*, 563 US at 464 (internal quotation marks omitted). "A particular officer's state of mind is simply 'irrelevant,' and it provides 'no basis for invalidating an arrest.'" *Id.*, quoting *Devenpeck v Alford*, 543 US 146, 153, 155; 125 S Ct 588; 160 LEd2d 537 (2004).

To maintain the objective standard this Court has called for, the question in a knock and talk case should be whether the officers went to the appropriate door, knocked, waited for an answer, and then spoke to the occupant who arrived. If so, what occurred was not a search. If an officer, such as occurred in *Jardines*, without consent and without regard to whether the officer ever approached the door to knock, investigated the home and/or its curtilage, then the objective purpose was to conduct a search. As the Michigan Court of Appeals noted in its original opinion:

> We read Justice Scalia's response to the dissent as drawing a line. The police do not violate the Fourth Amendment by approaching a home and seeking to speak with its occupant.

> Even if the police fully intend to acquire information or evidence as a result of this conversation, the line has not been crossed. However, if the police enter a protected area not intending to speak with the occupant, but rather, solely to conduct a search, the line has been crossed. In that sense, the knock-and-talk procedure cannot be used by the police as a smokescreen. Yet even post-*Jardines*, officers may still approach a home, knock, and if an occupant answers, speak to that occupant. The officers may then ask the occupant for information or for consent to conduct a search. [App 46-47; footnotes omitted.]

Petitioner submits that this analysis more faithfully encapsulates this Court's jurisprudence on analyzing the objective purpose of an officer. The Michigan Supreme Court's holding that the act of asking for consent to search can itself be a search is so contrary to this Court's holdings that this Court should consider peremptory reversal.

Petitioner argues that this Court's jurisprudence on the voluntariness of consent is sufficient to protect the people of this country from unduly coercive knock and talk encounters, and the Michigan Supreme Court's decision imposing a new categorical rule on the time of day of an approach combined with an evaluation of the subjective intent of the officers is wrongly decided. Certiorari is warranted.

III. This case cleanly lays out the issue for the Court to decide.

The factual setting of this case makes it an ideal one for the Court to decide the issue of what effect, if any, the time of a knock and talk has on its validity under the Fourth Amendment, and what effect the subjective intent of the officers has on the analysis. The Michigan Supreme Court did not analyze the case under Michigan's Constitution, but solely based on the Fourth Amendment.[5]

The factual findings of the trial court after the evidentiary hearing included findings that the defendants appeared lucid and responded appropriately to the questions of the officers, that they were never told that they were required to sign anything, and that no other type of force, threat, or coercion occurred to get them to cooperate in the investigation (App 82, 96). But for the Michigan Supreme Court's finding of a constitutional violation, the trial court found that both defendants freely, voluntarily, knowingly, and intelligently consented to a search of their homes and waived their *Miranda* rights, despite the hour of the day (App 91, 104).

This case does not include extraneous issues that could muddy the waters. For example, some other cases

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[5] Michigan jurisprudence requires that Michigan's search and seizure provision "be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation." *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).

have also dealt with whether an officer went to the appropriate door, *State v Stanley*, 817 SE2d 107, 112 (NC Ct App, 2018); whether the presence of "No Trespassing" signs might revoke the implied license to approach *Carloss*, 818 F3d at 994-997, whether the conduct of the officers was so coercive as to constitute a de facto seizure or constructive entry, *United States v Mills*, 372 FSupp3d 517 (ED Mich, 2019), or whether observations made by the police prior to getting consent were justified, *United States v Ferguson*, 43 FSupp3d 787, 790 (WD Mich, 2014). In this case, there is no dispute that the officers went to a door of the home expected to be used by visitors to knock, there was no claim made that "No Trespassing" or other signage existed, the trial court found that the police did not engage in coercive behavior, and the police obtained no evidence from the defendants or their homes prior to obtaining consent. The People are also not disputing that the doors the police went to were part of the curtilage of each Defendant's home.

Thus, the only issues for this Court are whether a knock and talk at 4 am or 5:30 am violates the implied license to approach to create a constitutional trespass, and, if so, whether asking for consent to search is a search in this context.

CONCLUSION

The petition for writ of certiorari should be granted to address the dicta-driven uncertainty in knock and talk jurisprudence related to time limitations and intent of the officer, or this Court should summarily reverse based on the Michigan Supreme Court's flawed holding that a request to search is a search.

Respectfully submitted,

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