STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v. MICHAEL CHRISTOPHER FREDERICK, Defendant-Appellee.	UNPUBLISHED October 25, 2018 No. 341741 Kent Circuit Court, LC No. 14-003216-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v. TODD RANDOLPH VAN DOORNE, Defendant-Appellee.	No. 341742 Kent Circuit Court, LC No. 14-003215-FH

AFTER REMAND

Before: BOONSTRA, P.J., and O'CONNELL and TUKEL, JJ.

PER CURIAM.

In this consolidated appeal, the prosecution appeals as of right after remand the trial court's ruling on defendants' motions to suppress evidence and to dismiss the cases against them. This case is unusual, in that appellant in its brief on appeal

> acknowledge[s] that this Court is bound by the doctrine of the law of the case and cannot overturn the decision of the Michigan Supreme Court. . . . As a result, the People expect that this Court will affirm the decision of the trial court, as the People are not arguing that the trial court's finding on the issue of attenuation was an abuse of discretion. The following arguments are offered solely to preserve the issues for further review.

Appellant correctly understands how we are constrained in this circumstance and why we are bound to affirm the decision of the trial court.

The Michigan Supreme Court summarized the facts and procedural history in this case in *People v Frederick*, 500 Mich 228, 231-234; 895 NW2d 541 (2017), as follows:

> During the predawn hours on March 18, 2014, seven officers from the Kent Area Narcotics Enforcement Team (KANET) made unscheduled visits to the defendants' homes. Both defendants were employees of the corrections division of the Kent County Sheriff Department. Their names had come up in a criminal investigation, and KANET decided to perform these early morning visits to the defendants' homes rather than waiting until daytime to speak with the defendants (or seeking search warrants). KANET knocked on defendant Michael Frederick's door around 4:00 a.m. and on defendant Todd Van Doorne's door around 5:30 a.m. Lieutenant Al Roetman, who was present at both searches,

testified that everyone appeared to be asleep at both houses.

Both defendants and their families were surprised and alarmed by the intrusions. Van Doorne considered arming himself, as did Frederick's wife. Nonetheless, both defendants answered the door after a few minutes of knocking—each thinking that there must have been some sort of emergency.

Instead, each defendant found himself confronted with a group of police officers. The officers asked each defendant about marijuana butter that they suspected the defendants possessed. After a conversation with each defendant, during which the defendants were read their *Miranda* rights, both defendants consented to a search of their homes and signed a consent form to that effect. Marijuana butter and other marijuana products were recovered from each house.

The defendants were charged with various drug offenses. Both moved to suppress evidence of the marijuana products found in their homes. The trial court denied both motions. The court concluded that KANET had not conducted a search by approaching the home and knocking, and that the subsequent consent search was a valid, voluntary search. The court distinguished *Florida v Jardines*, 569 US 1; 133 S Ct 1409, 185 L Ed 2d 495 (2013), noting that the police here did not use a drug-sniffing dog or otherwise try to search the home without knocking. Rather, because

the police approached the home and knocked, the trial court held that these were valid knock and talks.

The defendants sought interlocutory leave to appeal, which the Court of Appeals denied. The defendants then sought leave to appeal in this Court. In lieu of granting leave to appeal, we remanded the cases to the Court of Appeals for consideration as on leave granted. *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 99 [sic] (2015). We directed the Court of Appeals to address "whether the 'knock and talk' procedure conducted in [these cases] is consistent with US Const, Am IV, as articulated in *Florida v Jardines*. . . ." *Frederick*, 497 Mich 993; *Van Doorne*, 497 Mich 993.

On remand, the Court of Appeals issued a split opinion. The majority concluded that the knock and talk procedures at issue were permitted by the Fourth Amendment. *People v Frederick*, 313 Mich App 457, 461; 886 NW2d 1 (2015). The majority emphasized that the officers approached the home, knocked, and waited to be received, and "*Jardines* plainly condones such conduct." *Id.* at 469. Though the police visits here occurred during the early morning hours, the majority concluded that they were nonetheless within the scope of the implied license because homeowners would be unsurprised to find a predawn visitor delivering a newspaper or seeking emergency assistance. *Id.* at 481.

> Judge SERVITTO dissented. She concluded that the police conduct violated the defendants' Fourth Amendment rights. *Id.* at 496 (SERVITTO, J., dissenting). First, Judge Servitto noted that the *Jardines* majority and dissent had seemed to agree, in dicta, that nighttime visits would be outside the scope of the implied license. *Id.* at 487-488. Further, Judge SERVITTO reasoned that the validity of a knock and talk is premised on "the implied license a homeowner extends to the public-at-large." *Id.* at 496. Because the hours the police arrived at the defendants' homes are not times at which most homeowners expect visitors, she concluded that the visits were outside the scope of a proper knock and talk. *Id.*

The Michigan Supreme Court considered the constitutionality of the two early morning searches of defendants' homes and concluded that the police officers had not conducted permissible "knock and talks" but instead conducted unconstitutional warrantless searches. *Frederick*, 500 Mich at 231. The Court opined that "the defendants' consent to search—even if voluntary—is invalid unless it is sufficiently attenuated from the illegality." The Michigan Supreme Court, therefore, reversed this Court's decision and remanded the cases to the trial court for further proceedings. *Id.* Specifically, the Court directed the trial court to "determine whether the defendants' consent to search was attenuated from the officers' illegal search." *Id.* at 244.

On remand, the parties filed briefs explaining their positions regarding whether defendants'

respective consents to the police officers' illegal searches were attenuated under the attenuation doctrine articulated in *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), and more recently summarized and explained by the United States Supreme Court in *Utah v Strieff*, ___ US ___; 136 S Ct 2056, 2061-2062; 195 L Ed 2d 400 (2016). The attenuation doctrine provides an exception to the exclusionary rule that requires suppression of evidence obtained by an illegal search and seizure. The exception applies and the evidence may be admitted "when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence." *Id.* at 2061 (quotation marks and citation omitted). The doctrine, therefore, required that the trial court consider three factors: (1) the temporal proximity of the illegal act and the alleged consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Id.* at 2062. The trial court considered each factor and the evidence presented to the trial court and found that all three factors weighed in favor of suppression of the evidence obtained by the illegal searches and seizures in both cases. Consequently, the trial court granted defendants' motions to suppress and dismissed both cases because the prosecution requested that the cases be dismissed if defendants' motions were granted. The prosecution now appeals.

The prosecution does not contend in this appeal that the trial court erred in any manner. Rather, the prosecution argues that the Michigan Supreme Court wrongly decided *Frederick* and that the United States Supreme Court decisions on which the Michigan Supreme Court based its *Frederick* decision lack validity, requiring the United States Supreme Court to overrule its previous decisions.

The prosecution did not raise these issues before the trial court nor could the trial court take any action on remand that is inconsistent with the judgment of an appellate court. *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). This Court also lacks authority to overrule the Michigan Supreme Court's *Frederick* decision or any other decision of our Supreme Court. "The Court of Appeals is bound to follow decisions by [the Supreme] Court except where those decisions have clearly been overruled or superseded and is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016) (emphasis omitted). Therefore, while the People may ask the Supreme Court to overrule one of its prior decisions, and can preserve that argument by asking us to do so, we may not reach such a result, as the People forthrightly recognize.

Decisions of the United States Supreme Court that have decided rights under the United States Constitution are controlling, and the Michigan Supreme

Court and this Court are bound by the United States Supreme Court's decisions regarding federal constitutional rights. *People v Cross*, 30 Mich App 326, 333-334; 186 NW2d 398 (1971), aff'd 386 Mich 237 (1971). Further, the Michigan Supreme Court has long held that the United States Supreme Court is the sole authoritative interpreter of the United States Constitution and that Michigan courts must give effect to the interpretation adopted by the majority of the United States Supreme Court until it overrules itself. *People v Gonzales*, 356 Mich 247, 262-263; 97 NW2d 16 (1959).

In sum, the prosecution seeks review of the Michigan Supreme Court's *Frederick* decision and the United States Supreme Court's precedent relied upon by the *Frederick* Court. But, as the prosecution acknowledges, we are bound by those decisions and lack the authority to overrule them. Therefore, we cannot grant the relief requested.

Affirmed.

/s/ Mark T. Boonstra
/s/ Peter D. O'Connell
/s/ Jonathan Tukel

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v. MICHAEL CHRISTOPHER FREDERICK, Defendant.	CASE NO. 14-03216-FH HON. DENNIS B. LEIBER
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v. TODD RANDOLPH VAN DOORNE, Defendant. /	CASE NO. 14-03215-FH HON. DENNIS B. LEIBER OPINION AND ORDER

Having determined that the actions of the Kent County Sherriff's Department constituted an illegal search and seizure in this case, the Michigan Supreme Court specifically directed this Court to discuss the doctrine of attenuation, an exception to the exclusionary rule. The "taint" of illegal conduct can be "purged" through attenuation. *People v Maggit*, 319 Mich App 675; ___ NW2d ___ (2017); *Utah v Strieff*, ___ US ___; 136 S Ct 2056, 2059 (2016). "In some cases . . . the link between the unconstitutional conduct and the

discovery of the evidence is too attenuated to justify suppression." *Strieff*, 136 S Ct at 2060.

The United States Supreme Court has provided three factors to consider in determining whether the consent at issue in this case was sufficiently attenuated from the police misconduct: (1) the temporal proximity of the illegal act and the alleged consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Brown v Illinois*, 422 US 590, 602; 956 S Ct 2254 (1975) (collectively, the "*Brown* factors"). The Court discusses each factor seriatim.

I. Temporal Proximity

Defendant Frederick signed his consent form 12 minutes after deputies arrived while Defendant Van Doorne signed his form 13 minutes after deputies arrived. Cases interpreting the *Brown* factors have found much longer intervals to weigh in favor of suppression. See, e.g., *Brown*, 422 US at 604–05 (statement given less than two hours after illegal arrest fruit of poisonous tree); *US v Fernandez*, 18 F3d 874, 883; 62 USLW 2639 (10th Cir 1994) (listing cases). Clearly, this factor weighs in favor of Defendants. The prosecution likewise accepts that this factor weighs in Defendants' favor.

II. Intervening Circumstances

No sufficient intervening circumstances existed. The prosecution argues that because Defendants were read *Miranda* rights and signed a consent form,

intervening circumstances existed to purge the taint. However, reading of *Miranda* warnings, alone, does not constitute attenuation. See *Dunaway v New York*, 442 US 200, 218; 99 S Ct 2248 (1979). Moreover, the fact that police did not engage in "fraud" or other coercive tactics in obtaining the consent does not sufficiently attenuate it from the misconduct. *Id.* at 218–19 ("This betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in *Brown.*"). The consent obtained was not the result of an intervening circumstance; rather, it was a direct result of the illegal search. Therefore, this factor weighs in favor of suppression.

III. The Purpose and Flagrancy of the Official Misconduct

The United States Supreme Court placed particular emphasis on this factor. *Brown*, 422 US at 603–04. Defendants argue that the purpose of the home visits was to purposefully violate the Fourth Amendment. The prosecution argues that the officers were engaged in active investigation and went to the residences at an impermissible hour "to be courteous to the suspect[s]." Officers testified that it was a regular practice to continue investigating and knocking on doors late into the night.

The Court is not convinced the Kent County Sherriff's Department had some ulterior motive or purpose in unknowingly trespassing onto Defendants' property. Simply, deputies were following established practices

already implemented, even though those practices have now been determined unconstitutional. Subjectively, the officers' purpose was not to violate the Constitution.

However, the purpose behind the misconduct does not rise to the level of excuse. Deputies clearly intended to go onto the property without a warrant in the middle of the night, seeking to question Defendants about criminal conduct. No emergency circumstances existed to justify the search. See *US v Brandwein*, 796 F3d 980, 985 (2015) (officers on property in good faith that an emergency existed). Nor were they on the property pursuant to any another [sic] exception to the warrant requirement. The only basis for their entry was that it was common practice to enter onto property late at night in response to on-going investigations. Therefore, this factor weighs in favor of suppression.

Thus, the *Brown* factors weigh in favor of Defendants and of suppression.

Consequently, Defendants' Motion to Suppress is hereby GRANTED.

On request of the prosecution, this motion having been granted, these cases are hereby DISMISSED.

This is a final order that closes the cases and resolves all remaining issues.

Dated this 21st day of November, 2017 at Grand Rapids, Michigan.	**DENNIS B. LEIBER** Honorable Dennis B. Leiber

ATTEST: A TRUE COPY

NICOLE GREENBERG
Deputy Clerk

Michigan Supreme Court
Lansing, Michigan

OPINION	Chief Justice:	Justices:
	Stephen J. Markman	Brian K. Zahra
		Bridget M. McCormack
		David F. Viviano
		Richard H. Bernstein
		Joan L. Larsen
		Kurtis T. Wilder

FILED June 1, 2017

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v — No. 153115

MICHAEL CHRISTOPHER
FREDERICK,

Defendant-Appellant.

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v — No. 153117

TODD RANDOLPH VAN DOORNE,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

MCCORMACK, J.

In these consolidated cases, we consider the constitutionality of two early morning searches of the defendants' homes. We conclude that the police conduct in both cases was unconstitutional; these were not permissible "knock and talks," but rather warrantless searches. Because of these illegal searches, the defendants' consent to search – even if voluntary – is invalid unless it is sufficiently attenuated from the illegality. Accordingly, we reverse the Court of Appeals' contrary determination and remand these cases to the Kent Circuit Court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

During the predawn hours on March 18, 2014, seven officers from the Kent Area Narcotics Enforcement Team (KANET) made unscheduled visits to the defendants' homes. Both defendants were employees of the corrections division of the Kent County Sheriff Department. Their names had come up in a criminal investigation, and KANET decided to perform these early morning visits to the defendants' homes rather than waiting until daytime to speak with the defendants (or seeking search warrants). KANET knocked on defendant Michael Frederick's door around 4:00 a.m. and on defendant Todd Van Doorne's door around 5:30 a.m. Lieutenant Al Roetman, who was present at both searches, testified that everyone appeared to be asleep at both houses.

Both defendants and their families were surprised and alarmed by the intrusions. Van Doorne considered arming himself, as did Frederick's wife. Nonetheless, both defendants answered the door after a few minutes of knocking – each thinking that there must have been some sort of emergency.

Instead, each defendant found himself confronted with a group of police officers. The officers asked each defendant about marijuana butter that they suspected the defendants possessed. After a conversation with each defendant, during which the defendants were read their *Miranda*[1] rights, both defendants consented to a search of their homes and signed a consent form to that effect. Marijuana butter and other marijuana products were recovered from each house.

The defendants were charged with various drug offenses. Both moved to suppress evidence of the marijuana products found in their homes. The trial court denied both motions. The court concluded that KANET had not conducted a search by approaching the home and knocking, and that the subsequent consent search was a valid, voluntary search. The court distinguished *Florida v Jardines*, 569 US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013), noting that the police here did not use a drug-sniffing dog or otherwise try to search the home without knocking. Rather, because the police approached the home and knocked, the trial court held that these were valid knock and talks.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The defendants sought interlocutory leave to appeal, which the Court of Appeals denied. The defendants then sought leave to appeal in this Court. In lieu of granting leave to appeal, we remanded the cases to the Court of Appeals for consideration as on leave granted. *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 993 (2015). We directed the Court of Appeals to address "whether the 'knock and talk' procedure conducted in [these cases] is consistent with US Const, Am IV, as articulated in *Florida v Jardines*. . . ." *Frederick*, 497 Mich 993; *Van Doorne*, 497 Mich 993.

On remand, the Court of Appeals issued a split opinion. The majority concluded that the knock and talk procedures at issue were permitted by the Fourth Amendment. *People v Frederick*, 313 Mich App 457, 461; 886 NW2d 1 (2015). The majority emphasized that the officers approached the home, knocked, and waited to be received, and "*Jardines* plainly condones such conduct." *Id*. at 469. Though the police visits here occurred during the early morning hours, the majority concluded that they were nonetheless within the scope of the implied license because homeowners would be unsurprised to find a predawn visitor delivering a newspaper or seeking emergency assistance. *Id*. at 481.

Judge SERVITTO dissented. She concluded that the police conduct violated the defendants' Fourth Amendment rights. *Id*. at 496 (SERVITTO, J., dissenting). First, Judge SERVITTO noted that the *Jardines* majority and dissent had seemed to agree, in dicta, that nighttime

visits would be outside the scope of the implied license. *Id*. at 487-488. Further, Judge SERVITTO reasoned that the validity of a knock and talk is premised on "the implied license a homeowner extends to the public-at-large." *Id*. at 496. Because the hours the police arrived at the defendants' homes are not times at which most homeowners expect visitors, she concluded that the visits were outside the scope of a proper knock and talk. *Id*.

II. ANALYSIS

In general, a search or seizure within a home or its curtilage without a warrant is per se an unreasonable search under the Fourth Amendment. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996); *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967). Two arguments have been presented as to why this police conduct was lawful. First, the prosecution argues that the initial approach was a knock and talk, not a search. Second, the prosecution argues that the search that followed that initial approach was a consent search.

A. KNOCK AND TALK

A "knock and talk," when performed within its proper scope, is not a search at all. *Jardines*, 569 US at ___; 133 S Ct at 1415. The proper scope of a knock and talk is determined by the "implied license" that is granted to "solicitors, hawkers, and peddlers of all

kinds." *Id*. at ___; 133 S Ct at 1415 (citation and quotation marks omitted). "Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id*. at ___; 133 S Ct at 1416, quoting *Kentucky v King*, 563 US 452, 469; 131 S Ct 1849; 179 L Ed 2d 865 (2011).

In *Jardines*, the police approached a house via the front walk with a drug dog. *Jardines*, 569 US at ___; 133 S Ct at 1413. The dog alerted, indicating that it smelled contraband, and eventually sat at the front door of the home, where the odor was strongest. *Id*. Using this information, the police obtained a warrant, and their search of the home revealed marijuana plants. *Id*.

Justice Scalia, writing for the Court, employed a property-rights framework[2] to conclude that the prewarrant conduct of the police constituted a search. The

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[2] In *Katz v United States*, 389 US 347, the Court broke with tradition by considering not whether the government had trod on the defendant's property interests, but rather whether it had violated his privacy interests. Subsequently, the Court clarified that *Katz* had not replaced the property-interests test; *Katz* merely added to it. *Alderman v United States*, 394 US 165, 180; 89 S Ct 961; 22 L Ed 2d 176 (1969) ("[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home. . . .").

The Court reaffirmed the importance of the property-rights analysis in the Fourth Amendment context in *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012). In that case, the Court held that the warrantless installation of a GPS tracking device on the exterior of a Jeep and subsequent tracking

Court distinguished the case from *King*, in which the Court had held that a knock and talk was *not* a search, because the police in *Jardines*, unlike the police in *King*, had trespassed; although the public, and thus the police, generally have an implied license to "approach the door by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave," the police in *Jardines* had not complied with the scope of that implied license. *Id*. at ___; 133 S Ct at 1415-1416. "[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*." *Id*. at ___;133 S Ct at 1416. Thus, the police had trespassed on Fourth-Amendment-protected property.[3] *Id*.

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of the defendant's movements on public roads constituted a search, despite the Court's earlier holdings that tracking of a defendant's movements on public roads was not a search. *Id*. at 404; cf. *United States v Knotts*, 460 US 276; 103 S Ct 1081; 75 L Ed 2d 55 (1983) (holding that no search occurred when law enforcement tracked on public roads the location of a beeper that had been installed in a container before the defendant's possession of the container). The *Jones* Court distinguished *Knotts* on the ground that it did not involve a trespass. *Jones*, 565 US at 409-410. The violation of Jones's property rights, combined with the subsequent information-gathering, constituted a search. *Id*. at 407-408. The Court cautioned that "[t]respass alone does not qualify, but there must be conjoined with that . . . an attempt to find something or to obtain information." *Id*. at 408 n 5.

[3] The *Jardines* Court distinguished between trespasses that implicate the Fourth Amendment and those that do not. For instance, police may trespass and search in open fields without violating the Fourth Amendment because "an open field . . . is not one of those protected areas enumerated in the Fourth Amendment." *Jones*, 565 US at 411, citing *Oliver v United States*, 466 US

Consistently with *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012), the *Jardines* Court required not only a trespass, but also some attempted information-gathering, to find that a search had occurred. *Jardines*, 569 US at ___; 133 S Ct at 1414; *Jones*, 565 US at 408 n 5 ("[P]ost-*Katz* we have explained that an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation. . . . Trespass alone does not qualify [as a search], but there must be conjoined with that . . . an attempt to find something or to obtain information.") (citations and quotation marks omitted). The *Jardines* Court concluded that the police conduct there included information-gathering, such that the behavior constituted a warrantless search of the curtilage. *Jardines*, 569 US at ___; 133 S Ct at 1417.

It is also clear from *Jones* and *Jardines* that "information-gathering" is not synonymous with a Fourth Amendment "search." Both *Jones* and *Jardines* held that conduct that would not amount to a search, standing alone, was nonetheless information-gathering. The information-gathering in *Jardines* was the use of a drug-sniffing dog – conduct that the Supreme Court of the United States has held is not a search when the police have not trespassed. *Id*. at ___; 133 S Ct at 1414; *Illinois v Caballes*, 543 US 405, 410; 125 S Ct 834; 160 L Ed 2d 842 (2005) (holding that a dog sniff conducted

170, 177; 104 S Ct 1735; 80 L Ed 2d 214 (1984). But because the curtilage is part of the home, *Oliver*, 466 US at 180, and homes are protected by the Fourth Amendment, trespassing on the curtilage implicates Fourth Amendment protections.

during a lawful traffic stop did not implicate legitimate privacy interests). Similarly, in *Jones*, the information-gathering was the tracking of the defendant's location on public streets – conduct that the Supreme Court has also held is not a search when the police have not trespassed. *Jones*, 565 US at 408 n 5; *United States v Knotts*, 460 US 276, 285; 103 S Ct 1081; 75 L Ed 2d 55 (1983) (holding that a person traveling in an automobile on public roads has no reasonable expectation of privacy in his or her location). But information-gathering that is not a search nevertheless becomes a search when it is combined with a trespass on Fourth-Amendment-protected property.[4]

In *Jardines*, the majority and dissenting opinions address in dicta one issue that is particularly relevant here. In his dissent, Justice Alito noted that, "as a general matter, . . . a visitor [may not] come to the front door in the middle of the night without an express invitation." *Jardines*, 569 US at ___; 133 S Ct at 1422 (Alito, J., dissenting). In response, the majority opinion reasoned that the dissent "quite rightly" relied on the fact that a nighttime knock would be alarming in concluding that nightime visits would be outside the scope of the implied license. *Id*. at ___; 133 S Ct at 1416 n 3 (opinion of the Court) ("We think a typical person would find it a cause for great alarm (the kind of

[4] For example, looking into the windows of a home from a sidewalk or other public area is not a search. But it *is* information-gathering, such that, if the police trespass on the home's curtilage and peer through the windows from that vantage point, they have conducted a search. The trespass converts conduct that would not otherwise constitute a search into a search.

reaction the dissent quite rightly relies upon to justify its no-night-visits rule) to find a stranger snooping about his front porch with or without a dog.") (citation, quotation marks, and emphasis omitted). Thus, 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).

We believe, as the Supreme Court suggested in *Jardines*, that the scope of the implied license to approach a house and knock is time-sensitive. *Id*. at ___; 133 S Ct at 1416 n 3; *id*. at ___; 133 S Ct at 1422 (Alito, J., dissenting). Just as there is no implied license to bring a drug-sniffing dog to someone's front porch, there is generally no implied license to knock at someone's door in the middle of the night. See *id*. at ___; 133 S Ct at 1416 (opinion of the Court) ("There is no customary invitation to do *that*."). This custom was apparent to the investigating officers in this case. KANET officers testified candidly that it would be inappropriate for Girl Scouts or other visitors to knock on the door in the middle of the night, but evidently the officers believed that they were not bound by these customs.[5] But a knock and talk is not considered a governmental intrusion precisely because its contours are defined by what *anyone* may do. *King*, 563 US at 469 ("When law enforcement officers who are not armed with a warrant

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[5] In fact, multiple KANET members testified that they performed knock and talks in the middle of the night on a regular basis. Roetman testified that "[j]ust because it hits the stroke of midnight doesn't mean our case stops and we don't keep going to people's homes, whether it's a marijuana case or an armed robbery. . . . I don't know what you're getting at."

knock on a door, they do no more than any private citizen might do."). When the officers stray beyond what any private citizen might do, they have strayed beyond the bounds of a permissible knock and talk; in other words, the officers are trespassing. That is what happened here. The reasoning that leads us to conclude that these visits were outside the scope of the implied license is not nuanced or complicated. As the *Jardines* Court aptly explained, Girl Scouts and trick-or-treaters regularly manage to abide by the terms of the implied license. *See Jardines*, 569 US at ___; 133 S Ct at 1415 ("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."). And, as any Girl Scout knows, the "background social norms that invite a visitor to the front door," *id*. at ___; 133 S Ct at 1416, typically do not extend to a visit in the middle of the night. See *United States v Lundin*, 817 F3d 1151, 1159 (CA 9, 2016) ("[U]nexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours."). Thus, we hold that the police were trespassing when they approached the defendants' homes.[6]

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[6] We need not decide precisely what time the implied license to approach begins and ends. In these cases, there were no circumstances that would lead a reasonable member of the public to believe that the occupants of the respective homes welcomed visitors at 4:00 a.m. or 5:30 a.m. Accordingly, we believe it is clear that these approaches were outside the scope of the implied license.

The Court of Appeals majority reasoned that the implied license extended to midnight visitors seeking emergency assistance or delivering the newspaper and therefore it extended, too, to the police conduct here. We find these examples unhelpful. Newspaper delivery services have express permission to be on the property; therefore, their conduct is irrelevant when considering the implied license to approach a house.[7] And the fact that a visitor may approach a home in an emergency does not mean that a visitor who is *not* in an emergency may approach. Emergencies justify conduct that would otherwise be unacceptable; they are exceptions to the rule, not the rule.[8] Because we conclude that the implied scope of the license does not extend to these predawn approaches, we hold that the police were trespassing.

Having concluded that the police conduct was a trespass on Fourth-Amendment-protected property, we next turn to whether the police were seeking "to find something or to obtain information," such that the Fourth Amendment is implicated. *Jones*, 565 US at 408

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[7] Moreover, most newspaper delivery services have permission to leave newspapers on the property, not to approach the house and knock. Most homeowners would be surprised – and likely indignant – if their newspaper delivery person rang the bell and knocked for several minutes at 5:00 a.m. rather than simply leaving the paper.

[8] See *Ploof v Putnam*, 81 Vt 471; 71 A 188, 189 (1908) ("It is clear that an entry upon the land of another may be justified by necessity. . . ."); *Vincent v Lake Erie Transp Co*, 109 Minn 456, 460; 124 NW 221 (1910) (holding that trespass onto the property of another may be justified by necessity).

n 5. A police officer walking through a neighborhood who takes a shortcut across the corner of a homeowner's lawn has trespassed. Yet that officer has not violated the Fourth Amendment because, without some information-gathering, no search has occurred. In these cases, however, the police were seeking information; therefore, their conduct implicated the Fourth Amendment. The KANET officers were not simply cutting across the defendants' lawns as a shortcut, stopping by to drop off a get-well-soon basket, or visiting the homes to regretfully inform the defendants that a loved one had been injured in an accident. The 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.

That the officers intended to get permission to search for the marijuana butter does not alter our analysis. We agree with the prosecution that, as *King* established and *Jardines* affirmed, "it is not a Fourth Amendment search to approach the home in order to speak with 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." *Jardines*, 569 US at ___; 133 S Ct at 1416 n 4 (citations, quotation marks, and emphasis omitted), citing *King*, 563 US at 469-470. True enough; approaching a home with the purpose of gathering information is not, standing alone, a Fourth Amendment search. *King*, 563 US at 469-470. But, as noted above, when "conjoined" with a

trespass, information-gathering – which need not qualify as a search, standing alone – is all that is required to turn the trespass into a Fourth Amendment search. *Jones*, 565 US at 408 n 5. The officers here plainly approached the defendants' homes for the purpose of gathering information.[9]

The fact that the officers sought to gather their information by speaking with the homeowners rather than by peering through windows or rummaging through the bushes is irrelevant. What matters is that they sought to gather information by way of a trespass on Fourth-Amendment-protected property. That they did. The approaches of the defendants' homes were not valid knock and talks, but rather searches under the Fourth Amendment. And because the police did not have warrants or any other exception to the warrant requirement, we conclude that the approaches violated the Fourth Amendment.

B. CONSENT

This is not the end of the analysis, however. During the invalid knock and talks, each defendant consented to a search of his respective home. Consent searches, when voluntary, are an exception to the warrant requirement. *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041; 36 L Ed 2d 854 (1973). The voluntariness question turns on whether a reasonable

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[9] Detective Todd Butler, one of the KANET members who participated in the knock and talk, testified that "[t]he only reason we were there is because of the drugs."

person would, under the totality of the circumstances, feel able to choose whether to consent. *Id*. at 227.

The defendants believe that their consent, even if voluntary, is irrelevant, given the contemporaneous Fourth Amendment violation. The prosecution views the Fourth Amendment violation as irrelevant, given the subsequent consent. Neither is correct. The defendants' consent is not irrelevant – but neither is it evaluated separately from the illegal searches.

Rather, the defendants' consent – even if voluntary – is invalid unless it is sufficiently attenuated from the warrantless search. The Supreme Court has repeatedly held that evidence obtained through an illegal search or seizure is tainted by that initial illegality unless sufficiently attenuated from it. See *Wong Sun v United States*, 371 US 471, 486; 83 S Ct 407; 9 L Ed 2d 441 (1963) (holding that evidence acquired after an illegal search must be suppressed unless the government shows that its acquisition of the evidence resulted from "an intervening independent act of free will" sufficient "to purge the primary taint of the unlawful invasion"). That analysis has been applied to both consensual statements and – particularly relevant here – consensual searches. *Brown v Illinois*, 422 US 590, 602; 95 S Ct 2254; 45 L Ed 2d 416 (1975) (holding that when an inculpatory statement follows an unlawful arrest, a finding of voluntariness does not obviate the need to make a separate Fourth Amendment determination as to whether the statement was " 'sufficiently an act of free will to purge the primary taint' "), quoting *Wong Sun*, 371 US at 486; *Florida v*

Royer, 460 US 491, 507-508; 103 S Ct 1319; 75 L Ed 2d 229 (1983) ("Because we affirm the . . . conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search.").

Thus, even when consent is voluntary, if it is not attenuated from the unconstitutional search, the evidence must be suppressed. *Wong Sun*, 371 US at 486; *Brown*, 422 US at 602; *Royer*, 460 US at 507-508. The Supreme Court has identified three factors to be considered in determining whether consent is sufficiently attenuated: (1) the temporal proximity of the illegal act and the alleged consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Brown*, 422 US at 603-604.

In these cases, because the trial court determined that there was no Fourth Amendment violation, it did not consider whether the subsequent consent was attenuated from the illegality. Therefore, we remand to that court for consideration of that question in the first instance.

III. CONCLUSION

A proper application of Fourth Amendment jurisprudence requires us to reverse the Court of Appeals. Because these knock and talks were outside the scope of the implied license, the officers trespassed on Fourth-Amendment-protected property. And because the officers trespassed while seeking information, they

performed illegal searches. Finally, because of these illegal searches, the defendants' consent – even if voluntary – is nonetheless invalid unless it was sufficiently attenuated from the illegality. We therefore reverse the Court of Appeals and remand these cases to the Kent Circuit Court to determine whether the defendants' consent to search was attenuated from the officers' illegal search.

Bridget M. McCormack
Stephen J. Markman
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. MICHAEL CHRISTOPHER FREDERICK, Defendant-Appellant.	FOR PUBLICATION December 8, 2015 9:00 a.m. No. 323642 Kent Circuit Court LC No. 14-003216-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. TODD RANDOLPH VAN DOORNE, Defendant-Appellant.	No. 323643 Kent Circuit Court LC No. 14-003215-FH Advance Sheets Version

Before: TALBOT, C.J., and K. F. KELLY and SERVITTO, JJ.

TALBOT, C.J.

These consolidated cases are before us on remand from our Supreme Court.[1] On remand, our Supreme Court has directed us to consider "whether the 'knock and talk' procedure[s] conducted in th[ese] case[s are]

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[1] *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 993 (2015).

consistent with US Const, Am IV, as articulated in *Florida v Jardines*, [___ US ___;] 133 S Ct 1409[; 185 L Ed 2d 495] (2013)." For the reasons discussed, we conclude that the knock-and-talk procedures conducted with respect to both Frederick and Van Doorne were consistent with the Fourth Amendment. Accordingly, we affirm the trial court's decision.

I. FACTS

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. Both had been issued medical marijuana cards, and both identified Timothy Scherzer as their caregiver.

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,[2] conducted four knock-and-talks in the early morning hours of March 18, 2014. The officers first visited Bernhardt and another corrections officer.[3] At approximately 4:00 a.m., the officers, in four unmarked vehicles, arrived at Frederick's home. Each officer was wearing a tactical vest, and each had a handgun holstered at his or her hip. 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*[4] 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. Because ice made the front door inaccessible, four officers knocked at a side door. Van Doorne awoke and looked outside. Recognizing some of the officers standing outside his home, Van

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[2] A total of eight officers are members of KANET. However, one officer was unavailable on the night of March 17, 2014.

[3] Neither Bernhardt nor this other officer is a party to the instant appeal.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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.[5] Both men 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 this Court, which this Court denied.[6] In lieu of granting leave to appeal, our Supreme Court remanded both cases to this Court to determine whether

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[5] Frederick and Van Doorne were also placed on unpaid leave from their positions with the corrections department.

[6] *People v Frederick*, unpublished order of the Court of Appeals, issued October 15, 2014 (Docket No. 323642); *People v Van Doorne*, unpublished order of the Court of Appeals, issued October 15, 2014 (Docket No. 323643).

the knock-and-talk procedures were constitutional in light of *Jardines.*[7]

II. DISCUSSION

A. STANDARD OF REVIEW

"We review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress."[8] Whether a violation of the Fourth Amendment has occurred is an issue of constitutional law which we review de novo.[9]

B. THE SCOPE OF OUR INQUIRY

We first address the limited scope of our review of the cases before us. The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."[10] Under the plain language of the amendment, "[t]he Fourth Amendment is not a guarantee against all searches and seizures, but only against those that are unreasonable."[11] Thus,

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[7] *Frederick*, 497 Mich 993; *Van Doorne*, 497 Mich 993.

[8] *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

[9] *Id.*

[10] US Const, Am IV.

[11] *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985). See also *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386

in any given Fourth Amendment case, there are two general inquiries to be made: (1) whether a "search or seizure" of a person, area, or object protected by the amendment occurred, and (2) if so, whether that search or seizure was unreasonable.

In this case, however, our inquiry is limited to the question whether the knock-and-talk procedures used in these cases amounted to a "search" within the meaning of the Fourth Amendment. To understand the scope of our inquiry, we reiterate that our Supreme Court has directed us to consider only whether the knock-and-talk procedures conducted in these cases were consistent with the Fourth Amendment as articulated in *Jardines.* In *Jardines*, the United States Supreme Court's inquiry was "limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment."[12] The Court did not address whether, assuming a search occurred, the search was reasonable, nor did it address whether a seizure had occurred. Thus, we read our Supreme Court's order as directing us to consider a limited question: whether the knock-and-talk procedures used in these consolidated cases were "searches" within the meaning of the Fourth Amendment, as a "search" is defined by *Jardines.*[13] We answer this question in the negative.

(2005) (under the Fourth Amendment, "not all searches are constitutionally prohibited, only unreasonable searches").

[12] *Jardines*, 133 S Ct at 1414.

[13] Thus, we do not address whether the trial court erred with respect to Frederick's and Van Doorne's contentions that they did not voluntarily consent to the searches of their homes. Nor do we

C. *FLORIDA v JARDINES*

The starting point of our analysis is the United States Supreme Court's opinion in *Florida v Jardines.* In *Jardines*, two police officers, acting on a tip that a home was being used to grow marijuana, approached the home on foot.[14] The officers were accompanied by a dog trained to detect the odor of specific controlled substances.[15] The dog detected the odor of one of these substances and alerted at the base of the home's front door.[16] The officers then used this information to obtain a warrant to search the home.[17] Writing for the majority, Justice Scalia used a property-rights framework to determine whether the officers had conducted a search by approaching the home with the drug-sniffing dog.[18]

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address whether the knock-and-talk procedures became "seizures" under the Fourth Amendment, another argument rejected by the trial court. Such inquiries are outside the limited scope of our review on remand.

[14] *Jardines*, 133 S Ct at 1413.

[15] *Id.*

[16] *Id.*

[17] *Id.* When the warrant was executed, the officers found marijuana plants, resulting in charges of marijuana trafficking against Jardines. *Id.*

[18] In a concurrence joined by two other justices, Justice Kagan explained that she "could just as happily have decided [the case] by looking to Jardines' privacy interests." *Id.* at 1418 (Kagan, J., concurring). Using a privacy-interests framework, Justice Kagan would have simply held that because the officers used a " 'device . . . not in general public use' " – the drug-sniffing dog – " 'to explore details of the home' . . . that they would not otherwise

First, Justice Scalia explained that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' "[19] Justice Scalia explained that a home's front porch was a "classic exemplar of an area adjacent to the home," commonly known as the "curtilage," which is considered part of a home and, thus, is protected by the Fourth Amendment.[20] Because "the officers' investigation took place in a constitutionally protected area," the question became "whether it was accomplished through an unlicensed physical intrusion."[21] To answer this question, Justice Scalia inquired into whether Jardines "had given his leave (even implicitly) for" the officers to set foot on his property.[22] Justice Scalia then explained:

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have discovered without entering the premises[,]" a search occurred. *Id.* at 1419, quoting *Kyllo v United States*, 533 US 27, 40; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (Kagan, J., concurring).

Justice Scalia found it unnecessary to consider Jardines's privacy interests. Justice Scalia explained that the property-rights framework was the Fourth Amendment's baseline, and that the privacy-interests framework merely added to that baseline. *Id.* at 1417. Having concluded that a search occurred under the property-rights framework, Justice Scalia found it unnecessary to consider whether the same conclusion would be reached under a privacy-interests framework. *Id.*

[19] *Id.* at 1414, quoting *United States v Jones*, 565 US ___, ___ n 3; 132 S Ct 945, 950-951 n 3; 181 L Ed 2d 911 (2012).

[20] *Id.* at 1414-1415.

[21] *Id.* at 1415.

[22] *Id.*

> "A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v. Gratz*, 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria*, 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." *Kentucky v. King*, 563 U.S. [452], ___, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011).[23]

In *Jardines*, the majority concluded that the officers exceeded the scope of this implied license and, thus, conducted a search within the meaning of the Fourth Amendment. This was because while any ordinary citizen might walk up to the front door of a home and

[23] *Id.* at 1415-1416.

knock, an ordinary citizen would not do so while conducting a search of the premises using a specially trained, drug-sniffing dog.[24] As explained by Justice Scalia, "[t]he scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose. . . . [T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search."[25] Thus, Justice Scalia concluded that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."[26]

D. *JARDINES* APPLIED

Justice Scalia's implied-license framework has since been used by many courts to analyze the constitutional validity of a knock-and-talk procedure.[27] Using this framework, we conclude that the knock-and-talks conducted in these cases were not "searches" within the meaning of the Fourth Amendment. We begin with the observation that, as *Jardines* makes clear, an ordinary

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[24] *Id.* at 1416 ("But introducing 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*.").

[25] *Id.*

[26] *Id.* at 1417-1418.

[27] See, e.g., *United States v Walker*, 799 F3d 1361, 1362-1363 (CA 11, 2015); *Covey v Assessor of Ohio Co.*, 777 F3d 186, 192-193 (CA 4, 2015); *United States v Lundin*, 47 F Supp 3d 1003, 1010-1011 (ND Cal, 2014); *JK v State*, 8 NE3d 222, 231-236 (Ind Ct App, 2014).

knock-and-talk is well within the scope of the license that may be "'implied from the habits of the country[]'. . . ."[28] In general terms, *Jardines* explains that there exists "an implicit license . . . to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[29] And generally speaking, that is exactly what occurred in both cases now before us. In each instance, officers approached the home, knocked, and waited to be received. And in each instance, the officers were received by the homeowners. *Jardines* plainly condones such conduct.[30] Indeed, even "Jardines conceded . . . the unsurprising proposition that the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him."[31]

In order to find a Fourth Amendment violation then, there must be circumstances present that would transform what was otherwise a lawful entrance onto private property into an unlawful, warrantless search. In *Jardines*, such circumstances existed because when the officers set foot on a protected area, they were accompanied by a drug-sniffing dog.[32] Frederick and Van

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[28] *Jardines*, 133 S Ct at 1415, quoting *McKee*, 260 US at 136 (Holmes, J.).

[29] *Id.* at 1415.

[30] *Id.*

[31] *Id.* at 1415 n 1.

[32] *Id.* at 1415-1416 (recognizing that the police may enter private property to conduct a knock-and-talk, "[b]ut introducing 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*."). See also *id.* at 1416 n 4

Doorne argue that the time of the knock-and-talks, and the manner in which the officers approached, compel a conclusion that each knock-and-talk was a search under the Fourth Amendment.[33] For the reasons discussed, we disagree.

1. THE OFFICERS' PURPOSE

Frederick and Van Doorne argue that based on an objective view of the manner in which the officers conducted the knock-and-talks, the KANET officers' purpose in conducting the knock-and-talks exceeded the scope of the implied license discussed in *Jardines.* Frederick and Van Doorne argue that the officers did not intend to speak with them, but rather, intended to conduct a search. We disagree.

First, we clarify that even post-*Jardines*, an officer may conduct a knock-and-talk with the intent to gain the occupant's consent to a search or to otherwise acquire information from the occupant. That an officer intends to obtain information from the occupant does

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("[N]o one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.").

[33] Relying on Justice Scalia's description of the knock-and-talk procedure in *Jardines*, Frederick and Van Doorne ask us to adopt a three-part test to evaluate these consolidated cases. Under this proposed test, officers would be required to (1) approach a home by the front path, (2) with only the intent to speak with the occupants of the home (and not to conduct a search), and (3) knock promptly, wait briefly, and absent an invitation from the occupant to remain, leave the premises. We find it unnecessary to adopt such a test to decide the matters before us, and thus, we decline to adopt this proposed test.

not transform a knock-and-talk into an unconstitutional search. Before *Jardines*, this Court held that the knock-and-talk procedure was constitutional.[34] Our Court explained that one entirely acceptable purpose of a knock-and-talk is to do exactly what the officers did in these cases – obtain an occupant's consent to conduct a search:

> Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, *and request consent to search for the suspected illegality or illicit items*. . . .
>
> We decline defendant's request to hold that the knock and talk procedure is unconstitutional because defendant points to no binding precedent, nor have we found any, prohibiting the police from going to a residence and engaging in a conversation with a person. We conclude that in the context of knock and talk the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections. It is unreasonable to think that simply because one is at home that they are free from having the police

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[34] *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001).

> come to their house and initiate a conversation. *The fact that the motive for the contact is an attempt to secure permission to conduct a search does not change that reasoning.* We find nothing within a constitutional framework that would preclude the police from setting the process in motion by initiating contact and, consequently, we hold that the knock and talk tactic employed by the police in this case is constitutional.[35]

Jardines does not hold to the contrary. In his dissenting opinion in *Jardines*, Justice Alito wrote:

> As the majority acknowledges, this implied license to approach the front door extends to the police. See *ante*, at 1415. As we recognized in *Kentucky v. King*, 563 U.S. [452], 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011), police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a "knock and talk," *i.e.*, knocking on the door and seeking to speak to an occupant for the purpose of

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[35] *Id.* at 697-698 (citations omitted; emphasis added). See also *People v Galloway*, 259 Mich App 634, 640; 675 NW2d 883 (2003) ("Knock and talk, as accepted by this Court in *Frohriep*, does not implicate constitutional protections against search and seizure because it uses an ordinary citizen contact as a springboard to a consent search."). Federal courts have reached the same conclusion. *Ewolski v City of Brunswick*, 287 F3d 492, 504-505 (CA 6, 2002) ("'Federal courts have recognized the "knock and talk" strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity.'"), quoting *United States v Jones*, 239 F3d 716, 720 (CA 5, 2001).

> gathering evidence. . . . Even when the objective of a "knock and talk" is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies. In other words, gathering evidence – even damning evidence – is a lawful activity that falls within the scope of the license to approach. . . .
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> * * *
>
> The Court concludes that Detective Bartelt went too far because he had the "*objectiv*[*e*] . . . *purpose* to conduct a search." *Ante*, at 1417 (emphasis added). What this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court's point, then a standard "knock and talk" and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a "knock and talk." The Court offers no meaningful way of distinguishing the "objective purpose" of a "knock and talk" from the "objective purpose" of Detective Bartelt's conduct here.[36]

In response to Justice Alito's critique, Justice Scalia explained:

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[36] *Jardines*, 133 S Ct at 1423-1424 (Alito, J., dissenting) (third alteration in original).

> The dissent argues, citing *King*, that "gathering evidence – even damning evidence – is a lawful activity that falls within the scope of the license to approach." *Post*, at 1423. That is a false generalization. What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.* The mere "purpose of discovering information," *post*, at 1424, in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.[37]

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.[38] 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.[39] In that sense, the knock-and-talk procedure cannot be used by the police as a smokescreen. Yet even post-*Jardines*, officers may

[37] *Id.* at 1416 n 4.

[38] *Id.* ("The mere purpose of discovering information . . . in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment.") (quotation marks omitted).

[39] *Id.* ("But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.").

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.[40]

Several cases help demonstrate when the police have crossed the line from a permissible knock-and-talk to an unconstitutional search or seizure. *Jardines* is one such example. As discussed, the officers in *Jardines* exceeded the scope of the license because they never attempted to speak with anyone, and instead, approached the home while conducting a warrantless search using a drug-sniffing dog. *United States v Ferguson,*[41] a case cited by Frederick and Van Doorne, is another such example. In *Ferguson*, two police detectives traveled to a home to investigate a complaint of an illegal marijuana grow operation.[42] The detectives had not obtained a search warrant for the residence.[43] As soon as the detectives left their vehicle, "they could smell fresh marijuana and observed surveillance cameras on the garage adjacent to the residence."[44] The defendants appeared, and the detectives introduced

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[40] *Id.* See also *United States v Perea-Rey*, 680 F3d 1179, 1187-1188 (CA 9, 2012) ("[I]t remains permissible for officers to approach a home to contact the inhabitants. The constitutionality of such entries into the curtilage hinges on whether the officer's actions are consistent with an attempt to initiate consensual contact with the occupants of the home.").

[41] *United States v Ferguson*, 43 F Supp 3d 787 (WD Mich, 2014).

[42] *Id.* at 789.

[43] *Id.*

[44] *Id.*

themselves.[45] After the defendants claimed to be operating an authorized medical marijuana operation, one detective asked to see the required paperwork.[46] Without asking for consent to search, the other detective asked one defendant "how many marijuana plants he had in the garage. . . ."[47] The detectives then spent the next hour walking around the premises with the defendants, investigating buildings and a recreational vehicle.[48] At the end of this process, the detectives presented the defendants with a written consent-to-search form, which the defendants signed.[49]

The defendants filed a motion to suppress the evidence viewed by the detectives, arguing that the detectives had conducted a warrantless search of their home, and that the later-signed consent form did not remedy this constitutional violation.[50] The prosecutor argued, in part, that what transpired in the hour before the detectives obtained the defendants' written consent "qualified as a permissible 'knock and talk,' claiming that the detectives were 'not searching anything' during that first hour."[51] The trial court rejected the argument. Comparing the case to *Jardines*, the trial court concluded that by spending an hour investigating the premises, the detectives' conduct "objectively

[45] *Id.*

[46] *Id.*

[47] *Id.* at 790.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 792.

[51] *Id.*

reveal[ed] a purpose to conduct a search. . . ."[52] This was because during the hour in which the detectives were ostensibly conducting a knock-and-talk, they were unquestionably obtaining information while in areas protected by the Fourth Amendment.[53]

One federal district court has similarly concluded that the police violate the Fourth Amendment by entering private property with the sole intent to conduct a warrantless arrest of the homeowner. In *United States v Lundin*, another case relied on by Frederick and Van Doorne, officers sought to arrest a suspected kidnapper, but had not obtained a warrant for his arrest.[54] At approximately 4:00 a.m., officers approached the front door of Lundin's home.[55] The officers knocked, and heard a series of crashes from the rear of the home.[56] The officers identified themselves and ordered Lundin to put his hands in the air and slowly leave the home.[57] Lundin exited the backyard of the home and was taken into custody.[58]

In finding a Fourth Amendment violation, the district court relied on *Jardines* for the rule that "the

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[52] *Id.*

[53] *Id.* at 792-793. The trial court also concluded that the hour-long search was not conducted with either the express or implied consent of the defendants. *Id.* at 793-794.

[54] *Lundin*, 47 F Supp 3d at 1008.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

officers' purpose, as revealed by an objective examination of their behavior, is clearly at least an important factor" when evaluating whether the officers exceeded the scope of the implied license.[59] The court explained that

> the behavior of the officers here objectively reveals a purpose to locate [Lundin] so that the officers could arrest him. Deputy Aponte had put out a request that Lundin be arrested; he believed that the officers already had probable cause for such an arrest; and the officers who arrived at the home were responding to Deputy Aponte's BOLO ["be on the lookout"].[60]

The court explained that "[u]nder the circumstances of this case, it is very difficult to imagine why the officers would have been seeking to initiate a consensual conversation with Lundin to ask him questions at four o'clock in the morning."[61] Thus, "[j]ust as the officers' clear purpose in *Jardines* – to search the curtilage for evidence – could not be pursued without a warrant, so too was the officers' clear purpose in this case – to arrest a suspect within his home – a goal whose attainment requires a warrant."[62]

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[59] *Id.* at 1012.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1012-1013.

The common thread in *Jardines, Ferguson*, and *Lundin* is that in each case, the officers' conduct revealed that their intentions went far beyond conducting the type of consensual encounter that constitutes a knock-and-talk. In *Jardines*, the officers searched for evidence without ever speaking to the occupants of the home; in *Ferguson*, the detectives conducted an hour-long investigation of the property before requesting consent to do so; and in *Lundin*, the officers had no reason to set foot on the property other than to arrest its occupant. Thus, in each case, the officers crossed the line, exceeding the scope of the implied license discussed in *Jardines.* But here, the circumstances are far different. After discovering that contraband likely existed in the homes belonging to Frederick and Van Doorne, the officers made a conscious decision to ask each individual for consent to conduct a search rather than obtain a warrant. The officers went to each house, knocked, and made such a request. During the knock-and-talks, the officers did not attempt to conduct a search, as occurred in *Jardines* and *Ferguson*; they waited until obtaining the affirmative consent of each suspect. And unlike the circumstances in *Lundin*, the officers clearly had a legitimate reason to initiate a conversation with both Frederick and Van Doorne.

Frederick and Van Doorne argue that because seven armed officers "in full tactical gear" approached each house in the early morning hours to conduct the knock-and-talks, this Court should conclude that the "officers did not come to talk, but rather, came to search the home for marijuana butter they knew was

present, and they were not going to leave until they had accomplished their goal[.]" The record reveals no such intention of the officers. First, it is true that seven officers went to each location. These seven officers represented all but one member of KANET, the absent member being unavailable that night. Further, only four of the seven officers approached the homes to conduct the knock-and-talks. The record does not demonstrate that the officers used their numerosity to demand entrance or to overcome the will of Frederick or Van Doorne. Rather, the fact that seven officers traveled to each home demonstrates no more than that the entire team, working together on the investigation, traveled together as the investigation continued into the early morning hours.

Contrary to the assertions made by Frederick and Van Doorne, the KANET officers were not wearing "full tactical gear." Rather, the extent of the "tactical gear" worn by the officers were vests which bore the officers' badges and, in some cases, the KANET symbol.[63] That the officers wore these vests conveyed a message similar to the message conveyed by the uniform traditionally worn by an ordinary officer. In the same vein, it is also true that the officers were armed, but only in that each had a handgun holstered at the hip – again, the same as any ordinary police officer. These facts do not

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[63] Specifically, one officer testified that the vests were "[b]lack nylon with [a] 'Sheriff' logo on one side, [a] badge on the other side and our KANET patch."

convey a purpose to do anything other than speak with the occupants of the homes.

The time of the visits does not demonstrate that the officers intended to conduct a warrantless search without first speaking to, and obtaining the consent of, Frederick and Van Doorne. The officers explained that they proceeded at this time of day because they had only learned that Frederick and Van Doorne were recipients of marijuana butter through a search conducted a few hours before the knock-and-talks. They feared that if they did not act quickly, Frederick and Van Doorne might be informed of the investigation and destroy evidence. Nothing in the record indicates that the officers chose to proceed at this time of day in order to frighten or intimidate either man, or otherwise use the time of day to gain an advantage. That the officers proceeded in the early morning hours does not demonstrate that the officers intended to conduct a search without first obtaining consent.

Rather, the officers' intent is most clearly demonstrated by their conduct at each home. As in any ordinary knock-and-talk, the officers approached each home, knocked, and waited for a response. When Frederick and Van Doorne responded, the officers explained the purpose of their visits. Both men were informed of their *Miranda* rights and asked to voluntarily consent to a search. The officers made no attempt to search for evidence until obtaining consent to do so. That the officers proceeded in this manner clearly demonstrates that it was their intent to speak with each individual and obtain his consent before proceeding any further.

Frederick's and Van Doorne's contention that the officers would have conducted a warrantless search with or without their consent is purely speculation.[64] Thus, we conclude that the officers' purpose did not exceed the scope of the implied license as articulated in *Jardines.*

2. THE TIME OF THE VISITS

Frederick and Van Doorne next argue that the time of the visits exceeded the scope of the implied license to enter their respective properties. They argue that the habits of this country do not allow "uninvited visits" in the early morning hours, "absent some indication that the person accepts visitors at that hour or, where it is clearly observed that someone is awake in the home." We disagree.

Frederick's and Van Doorne's argument stems from Justice Alito's opinion in *Jardines.* In his dissent, Justice Alito opined that the implied license to enter

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[64] Rather, from the record before us, it appears equally likely (if not more so) that had Frederick and Van Doorne failed to respond, the officers would have retreated to their vehicles and considered other options. See *Perea-Rey*, 680 F3d at 1188 ("[O]nce an attempt to initiate a consensual encounter with the occupants of a home fails, the officers should end the knock and talk and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.") (quotation marks and citation omitted). However, because both Frederick and Van Doorne responded, there was no need for the officers to retreat.

one's property "has certain spatial and temporal limits."[65] As an example of these limits, Justice Alito stated:

> Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. See *State v. Cada*, 129 Idaho 224, 233, 923 P.2d 469, 478 (App.1996) ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm[.]").[66]

The majority indicated some approval of this statement in a footnote, writing, "We think a typical person would find it a cause for great alarm (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule, *post*, at 1422) to find a stranger snooping about his front porch *with or without* a dog."[67]

Based on Justice Scalia's reference to Justice Alito's comment, the time of a visit by police officers may be relevant when evaluating the constitutional validity of a knock-and-talk.[68] But we do not read *Jardines* as adopting any sort of bright-line rule that

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[65] *Jardines*, 133 S Ct at 1422 (Alito, J., dissenting).

[66] *Id.*

[67] *Id.* at 1416 n 3 (quotation marks).

[68] See, e.g., *Kelley*, 347 P3d at 1014-1016. This, however, is not necessarily a new requirement found in *Jardines.* Several cases predating *Jardines* have discussed the relevance of the time a knock-and-talk is conducted when evaluating the circumstances of a particular case. See *id.* at 1015, 1015 n 14.

prohibits officers from entering an area protected by the Fourth Amendment at certain times of day. Rather, the basis for finding that the time of a visit is relevant to the scope of the implied license was articulated by the *Jardines* majority when it stated, "a typical person would find it a cause for great alarm (*the kind of reaction* the dissent quite rightly relies upon to justify its no-night-visits rule, *post*, 1422) to find a stranger snooping about his front porch *with or without* a dog."[69] Thus, it is not simply the presence of an individual at a particular time, but rather, the reaction that a typical person would have to that individual's presence, that determines whether the scope of the implied license has been exceeded. How a typical person would react depends on more than the time of day. For example, the implied license at issue here might not extend to a midnight visitor looking through garbage bins[70] or peeking in windows. But it may well extend to a midnight visitor seeking emergency assistance,[71] or to a predawn visitor delivering the newspaper. Similarly, while a typical person may well find the presence of uniformed police officers on his or her doorstep in the early hours of the morning "unwelcome," we cannot conclude that

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[69] *Jardines*, 133 S Ct at 1416 n 3 (quotation marks; first emphasis added).

[70] See *Commonwealth v Ousley*, 393 SW3d 15 (Ky, 2013).

[71] See *id.* at 19, 31 ("Absent an emergency, such as the need to use a phone to dial 911, no reasonable person would expect the public at his door" at the time an officer searched the defendant's trash cans on private property, 11:30 p.m. and 12:30 a.m.).

it is, without more, the type of circumstance that would lead an average person "to – well, call the police."[72]

The case relied on by Justice Alito when stating his "no-night-visits" rule provides an example of when officers conducting an early-morning visit to private property did exceed the scope of the implied license. In *Cada*:

> At about 1 a.m. on June 10, 1993, Agent Thornton returned to the Cada property with Agent Landers. The two walked from the county road up Cada's driveway. While on the driveway both agents smelled growing or freshly cultivated marijuana. The odor appeared to be coming from a garage located about 110 feet from the house. The agents continued on the driveway to an area between the garage and the house. They then set up a thermal imaging device and directed it at the garage. The device is a passive, non-intrusive system that detects the surface temperature of an object. The agents concluded that heat coming from the garage was consistent with the amount of heat which would be necessary to grow marijuana. The agents were on the property approximately ten to fifteen minutes during this entry.
>
> The agents returned to the Cada property on June 21, 1993, at approximately 4 a.m. One or both of them wore camouflage clothing. Landers again smelled marijuana coming from the garage. On this visit the agents heard a

[72] *Jardines*, 133 S Ct at 1416.

> noise coming from the back of the garage that sounded like an exhaust fan. Agent Thornton testified that in his experience indoor marijuana cultivation operations often have an exhaust system. Thornton set up a motion-activated low light infrared video camera and two infrared sensors in a position hidden among bushes across the driveway from the garage. The camera was focused on the garage. This intrusion onto Cada's property lasted about 45 minutes.[73]

The agents then used the information gleaned from these nighttime intrusions to obtain a warrant.[74] In concluding that this conduct exceeded the open-view doctrine, the court explained:

> Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm. As compared to open daytime approaches, surreptitious searches under cover of darkness create a greater risk of armed response – with potentially tragic results – from fearful residents who may mistake the police officers for criminal intruders.
>
> For the foregoing reasons, we conclude that the timing and manner of the two nighttime searches involved in this case place them outside the scope of the open view doctrine articulated in [*State v*]*Rigoulot*[, 123

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[73] *Cada*, 129 Idaho at 227.

[74] *Id.*

> Idaho 267; 846 P2d 918 (1992),] and [*State v*]*Clark*[, 124 Idaho 308; 859 P2d 344 (1993)]. In those cases, the breadth of permissible police activity was tied to that which would be expected of "ordinary visitors," *Rigoulot*, 123 Idaho at 272, 846 P.2d at 923, and "reasonably respectful citizens." *Clark*, 124 Idaho at 313, 859 P.2d at 349. The clandestine intrusion of Agents Thornton and Landers onto Cada's driveway under cover of darkness in the dead of night exceeded the scope of any implied invitation to ordinary visitors and was not conduct to be expected of a reasonably respectful citizen.[75]

Thus, in *Cada*, it was not simply that the officers entered the premises in the early hours of the morning that created the constitutional problem. Rather, it was that the officers used the "cover of darkness" to conduct a "clandestine intrusion" of the property that caused them to exceed "the scope of any implied invitation to ordinary visitors. . . ."[76] This type of "furtive intrusion late at night or in the predawn hours" is not the type of "conduct that is expected from ordinary visitors[,]" and thus, could lead to "potentially tragic results. . . ."[77]

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[75] *Id.* at 233.

[76] *Id.*

[77] *Id.* Other cases have similarly concluded that *clandestine* entries into areas protected by the Fourth Amendment are unconstitutional. See *State v Ross*, 141 Wash 2d 304; 4 P3d 130 (2000) (without attempting to contact a home's occupants, the police entered the property shortly after midnight in plain clothes to check for the odor of marijuana emanating from a garage); *State*

In nearly every relevant way, the conduct that occurred in this case is the exact opposite of what occurred in *Cada*. Officers did not furtively approach either home; the officers walked directly to the homes and knocked. There was nothing clandestine about their behavior. And rather than refuse to come to the door or call the police, both Frederick and Van Doorne answered the door and spoke with the officers. What occurred in the cases before us was not a " '[f]urtive intrusion late at night or in the predawn hours' " that " 'if observed by a resident of the premises . . . could be a cause for great alarm[.]' "[78] Thus, although the officers visited the homes in the early hours of the morning, that fact does not render the knock-and-talks unconstitutional under the circumstances of these cases.

3. "COMMUNITY STANDARDS"

Finally, Frederick and Van Doorne argue that the officers "failed to follow community standards" by "incessantly" pounding on each door until the officers received an answer. The record simply does not support these factual assertions. As found by the trial court, the officers knocked on each door and waited a few minutes for someone to respond. This factual conclusion was supported by the testimony of several officers,

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v Johnson, 75 Wash App 692, 879 P.2d 984 (1994) (the police entered private property via a state park shortly after 1:00 a.m., past signs that said "Private Property" and "No Trespassing," and then used a thermal imaging device to investigate a barn).

[78] *Jardines*, 133 S Ct at 1422 (Alito, J., dissenting), quoting *Cada*, 129 Idaho at 233.

all of whom testified to knocking on each door and waiting a matter of minutes for a response. Frederick's and Van Doorne's argument lacks merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly

SERVITTO, J. (*dissenting*).

I respectfully dissent.

On remand, our Supreme Court directed us to address "whether the 'knock and talk' procedure conducted in [these cases] is consistent with US Const, Am IV, as articulated in *Florida v. Jardines*, [___ US ___;] 133 S Ct 1409[; 185 L Ed 2d 495] (2013)." The majority interprets this directive to mean that our inquiry is strictly limited to the question whether the knock-and-talk procedure used in these cases amounts to a "search" within the meaning of the Fourth Amendment, indicating its belief that the United States Supreme Court's inquiry in *Jardines* was firmly limited to the question whether the officers' behavior was a search within the meaning of the Fourth Amendment. I disagree that our Supreme Court's directive was so restrictive or narrow, or that the *Jardines* Court's inquiry was so limited.

In *Jardines*, the United States Supreme Court began by stating the basic principle that a search within the meaning of the Fourth Amendment occurs when

the government obtains information by physically intruding on persons or houses. *Id.* at 1414. According to *Jardines*:

> That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner. [*Id.* at 1414.]

The United States Supreme Court then went on, however, to engage in a lengthy analysis of whether Jardines had "given his leave" for the police and the dog to be on his front porch. Thus, the case focused on the scope of an implicit license and the objective reasonableness of what the Court deemed to be an obvious search, and not, as the majority asserts, whether a search had occurred at all. This focus makes sense because the Fourth Amendment protects against unreasonable searches and seizures, not simply searches and seizures. The *Jardines* Court stated that

> the question before the court is precisely *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. [*Id.* at 1416-1417.]

According to the *Jardines* Court:

> A license may be implied from the habits of the country, notwithstanding the strict rule of the English common law as to entry upon a close. We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. *Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.* [*Id.* at 1415-1416 (quotation marks and citations omitted; emphasis added).]

The United States Supreme Court further stated that the scope of the license was limited to a particular area *and* to a specific purpose. *Id.* at 1416. Thus, though it cannot be denied that the final holding of *Jardines* was that a search occurred, the answer to that question required an expansive inquiry into, and analysis of, several factors, including the context of the procedure employed and the reasonableness of the officers' actions.

A knock-and-talk represents one tactic employed by police officers that does not generally contravene the Fourth Amendment. See, e.g., *People v Frohriep*, 247 Mich App 692, 698; 637 NW2d 562 (2001) ("We conclude that in the context of knock and talk the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections."). The *Frohriep* Court also recognized, however, that the knock-and-talk procedure is not entirely without constitutional implications. "Anytime the police initiate a procedure, whether by search warrant or otherwise, the particular circumstances are subject to judicial review to ensure compliance with general constitutional protections. Accordingly, what happens within the context of a knock and talk contact and any resulting search is certainly subject to judicial review." *Id.* at 698.

The majority opinion in *Jardines* did not expressly discuss any spatial or temporal limitations on the implied license to approach a home. The dissent, however, did. See *Jardines*, 133 S Ct at 1422-1423 (Alito, J., dissenting). Specifically, the dissent found that the implied license contained the following limitations: (1) "[A] visitor must stick to the path that is typically used to approach a front door, such as a paved walkway"; (2) a visitor may not "come to the front door in the middle of the night without an express invitation"; and (3) "a visitor may not linger at the front door for an extended period." *Id.* at 1422. Though the majority opinion did not specifically impose any temporal limits, it favorably referred to the dissent's "no-night-rule" in

a footnote. See *id.* at 1416 n 3. In that footnote, the majority indicated that a "typical person" would find the use of a drug-sniffing dog "a cause for great alarm," which, it stated, was "the kind of reaction the dissent quite rightly relie[d] upon to justify its no-night-visits rule[.]" *Id.* at 1416 n 3. The majority also stated that the dissent presented "good questions" regarding the scope of the implied license, which included a consideration of "the appearance of things," "what is typical for a visitor," "what might cause alarm to a resident of the premises," "what is expected of ordinary visitors," and "what would be expected from a reasonably respectful citizen[.]" *Id.* at 1415 n 2 (quotation marks omitted).

Recently, in *United States v Walker*, 799 F3d 1361 (CA 11, 2015), the United States Court of Appeals for the Eleventh Circuit determined that the scope of a knock-and-talk is limited in two respects. First, citing *Jardines*, 133 S Ct at 1416-1417, the court indicated that this exception to the warrant requirement "ceases where an officer's behavior 'objectively reveals a purpose to conduct a search.'" The second limitation is that "the exception is geographically limited to the front door or a 'minor departure' from it." *Walker*, 799 F3d at 1363.

Based on *Jardines* and our Supreme Court's directive, I would interpret the instant case as presenting the specific question of whether a knock-and-talk procedure conducted at a private residence in the middle of the night (the "predawn hours"), without evidence that the occupant of the residence extended an

explicit or implicit invitation to strangers to visit during those hours, is an unconstitutional search in violation of the Fourth Amendment. Michigan courts have yet to address possible constitutional limitations on the knock-and-talk procedure. See *People v Gillam*, 479 Mich 253, 276 n 13; 734 NW2d 585 (2007) (KELLY, J., dissenting) ("This Court has not yet discussed the constitutionality of, or limits to, traditional knock-and-talk encounters."). Other jurisdictions have, however, addressed the limitations of an implicit license with respect to police officers' warrantless approach to homes.

In *Kelley v State*, 347 P3d 1012, 1013 (Alas [sic] Ct App, 2015), two Alaska state troopers, acting on an anonymous tip, drove up a defendant's driveway shortly after midnight. The defendant's home was in a rural area and set back from the road a considerable distance. *Id.* The troopers remained in their car for several minutes and rolled down the windows, sniffing the air. *Id.* Detecting an odor of marijuana in the air, the troopers left and obtained a warrant to search the defendant's home, which revealed evidence of a marijuana grow operation. *Id.* The trial court denied the defendant's motion to suppress the evidence seized in the search, reasoning "that the driveway to [the defendant]'s house was impliedly open to public use because it provided public ingress to and egress from her property. . . ." *Id.* The Alaska Court of Appeals directed the parties to brief the recently decided case of *Jardines* with respect to the defendant's appeal of her conviction. *Id.*

The *Kelley* court recognized *Jardines*'s holding "that a police officer has an implicit license to approach a home without a warrant and knock on the front door because this is 'no more than any private citizen might do.'" *Id.* at 1014. It also pointed out, however, that in *Jardines*, the United States Supreme Court recognized that the scope of the "implicit license [wa]s limited not only to the normal paths of ingress and egress, but also by the manner of the visit." *Id.* The *Kelley* court quoted *Jardines*'s statement that "'[t]o find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to – well, call the police.'" *Id.*, quoting *Jardines*, 133 S Ct at 1416. The *Kelley* Court thus found that the *manner* of the visit was of paramount importance in the *Jardines* decision.

In *Kelley*, the court determined that the search there was *more* intrusive than was the search in *Jardines* because it took place after midnight. *Kelley*, 347 P3d at 1014. In making this determination, *Kelley* referred to Justice Alito's dissent in *Jardines* in which he indicated that a visitor could not come to a home in the middle of the night without express invitation. *Id.* The *Kelley* court further stated that the *Jardines* majority "referred approvingly to the dissent's 'no-night-visits rule.'" *Id.* at 1014-1015. Ultimately, the *Kelley* court found that the officers' conduct constituted an illegal search, that the warrant obtained was tainted by

the illegal search, and that any evidence obtained under the warrant must be suppressed. *Id.* at 1016.

We recognize that the *Kelley* majority, in addressing the dissent's position, specifically stated that "the legal principles that govern a 'knock and talk' do not apply here, because the State never asserted, and the record does not show, that the troopers approached Kelley's residence to engage in a knock and talk." *Id.* However, *Kelley* also pointed out that all the knock-and-talk cases relied on by the dissent considered the lateness of the hour as an important factor to consider "in assessing the overall coerciveness and lawfulness of a knock and talk." *Id.*

In *United States v Lundin*, 47 F Supp 3d 1003, 1007-1008 (ND Cal, 2014), after interviewing a kidnapping victim at a hospital in the early morning hours, a police officer contacted dispatch and requested a BOLO ("be on the lookout") for the kidnapper, Lundin. The officer also requested that Lundin be arrested on several charges. *Id.* at 1008. In response to the BOLO, another officer drove to Lundin's home, saw Lundin's car and light on inside the home, and called for backup. *Id.* At approximately 4:00 a.m. the officers knocked on Lundin's front door. *Id.* The officers heard loud crashing from the back of the home, and they ordered whoever was in the backyard to come out with hands up, at which point Lundin exited the backyard and was taken into custody. *Id.* Officers then searched Lundin's home and backyard, finding two firearms. *Id.* at 1009.

In determining the reasonableness of the search conducted at Lundin's home, the United States District Court for the Northern District of California pronounced that "it is 'a firmly-rooted notion in Fourth Amendment jurisprudence' that a resident's expectation of privacy is not violated, at least in many circumstances, when an officer intrudes briefly on a front porch to knock on a door in a non-coercive manner to ask questions of a resident." *Id.* at 1011. As in *Jardines*, the *Lundin* court noted that the rationale for this is that residents of a home typically extend an implicit license to strangers to approach the home by the front path, to knock, to linger briefly to be received, and absent invitation to stay longer, to leave. *Id.* at 1011. In *Lundin*, two factors indicated that the officers' conduct exceeded the scope of the recognized implied license: (1) their purpose was to locate Lundin and to arrest him, not to talk to him, and (2) the approach took place at 4:00 a.m. *Id.*

In contemplating the purpose of the officers' visit, the *Lundin* court indicated that whether the officers' conduct constituted an objectively reasonable search depended on whether the officers had an implied license to approach Lundin's home, which depended, in part, on their purpose for doing so. *Id.* at 1012. The court did not hold that the officers' purpose was a dispositive factor in analyzing whether the officers' visit fell within the scope of a lawful knock-and-talk, but that it was at least a significant factor. *Id.* at 1013. The time of the visit, 4:00 a.m., was the other significant factor, it being "a time at which most residents do not

extend an implied license for strangers to visit." *Id.* The *Lundin* court concluded that "[b]y entering onto Lundin's curtilage at four in the morning for the purpose of locating him to arrest him, the officers engaged not in a lawful 'knock and talk' but rather in a presumptively unreasonable search." *Id.* at 1014.

While not presented with a situation in which an officer attempted to contact the homeowner,[1] the Kentucky Supreme Court, to determine the reasonableness of such a visit, nonetheless found it necessary to address the time of day an officer visited a home. *Commonwealth v Ousley*, 393 SW3d 15 (Ky, 2013). The *Ousley* court stated, "Surely there is no reasonable basis for consent to ordinary public access, presumed or otherwise, for the public to enter one's property at midnight absent business with the homeowner. Girl Scouts, pollsters, mail carriers, door-to-door salesmen just do not knock on one's door at midnight. . . ." *Id.* at 30. The court also noted that the time limitation appears in several curtilage cases and that

> [o]ne of the earliest knock-and-talk cases laid out the rule like this:
>
> > Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right

[1] An officer removed trash from the curtilage of a home in the late night/early morning hours in order to investigate tips that the homeowner was engaged in illegal drug sales from the home.

> of privacy, for anyone openly and peaceably, *at high noon*, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof – whether the questioner be a pollster, a salesman, or an officer of the law. *Davis v. United States*, 327 F.2d 301, 303 (9th Cir.1964), *impliedly overruled on other grounds as suggested in United States v. Perea-Rey*, 680 F.3d 1179, 1187 (9th Cir.2012) (emphasis added).
>
> As *Davis* went on to note, "The time of day, coupled with the openness of the officers' approach to defendant's doorway, rules out the possible dangers to their persons which might have resulted from a similar unannounced call in the dead of night." *Id.* at 304. Numerous other cases mention time of the invasion as a factor in whether the Fourth Amendment is violated. [*Ousley*, 393 SW3d at 30-31.]

Ousley thus concluded that, "just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so." *Id.* at 31.

In a pre-*Jardines* case involving observations made by the police from a defendant's driveway during 1:00 a.m. and 4:00 a.m. visits, an Idaho appellate court indicated that the time of day and openness of the officer's approach have been found to be significant factors in determining whether the scope of the

implied invitation to enter areas of a private home's curtilage was exceeded. *State v Cada*, 129 Idaho 224; 923 P2d 469 (1996). "Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors." *Id.* at 233.

In sum, the time of a knock-and-talk visit, while perhaps not the *only* deciding factor in determining whether an unconstitutional (unreasonable) search occurred, is at least a *significant* factor among those to be considered along with the totality of the circumstances surrounding the knock-and-talk. In these consolidated cases, the totality of the circumstances leads me to conclude that both knock-and-talk occurrences constituted unconstitutional searches.

On the night of March 17, 2014, seven officers appeared for the knock-and-talks at defendants' (corrections officers with Kent County) homes. The officers arrived at each house in four unmarked vehicles. Each officer wore a tactical vest with a firearm on his or her hip, but the officers were not in full uniform. The officers went to Frederick's home at approximately 4:14 a.m., and then went to Van Doorne's home at approximately 5:30 a.m. Each defendant was asleep when the officers arrived, and the officers pounded on a door to each home before making contact with each defendant. The officers pounded on Frederick's front door, but had to knock on a door next to the garage at Van Doorne's because icy conditions prevented the officers from approaching Van Doorne's front door.

Considering the circumstances of these cases, it is very difficult to imagine why the officers tried to initiate consensual conversations with Frederick and Van Doorne between 4:00 a.m. and 5:30 a.m. to simply ask questions of each of them. Just as the behavior of the officers in *Jardines* "objectively reveals a purpose to conduct a search," *Jardines*, 133 S Ct at 1417, the behavior of the officers in this case objectively reveals a purpose to conduct a warrantless search of these defendants' homes to obtain evidence.

Significantly, at least two of the officers testified that they had enough probable cause to obtain search warrants for the homes but did not do so, instead electing to go to defendants' homes in the early morning hours as a matter of "courtesy" because defendants were officers employed by the same sheriff department. Van Doorne testified that one of the officers told him that they chose to not seek a warrant because the department did not want a public record of the situation at that time. The highest-ranking officer on the scene admitted that at some point, he told Van Doorne that the decision was made to not get a warrant because if a warrant was obtained, the media would get hold of it right away. The testimony supports the conclusion that the primary purpose of conducting the knock-and-talks was to obtain – without a warrant – the evidence that one officer had earlier delivered to defendants. The officers claimed they did not get a warrant because they wished to avoid publicity focused on the Kent County Sheriff's Department. Objectively, according to the testimony, the officers that appeared at

defendants' homes in the early morning hours did not seek to ask defendants questions, but rather, they sought to search defendants' homes to obtain perishable evidence before it "disappeared," and to avoid publicity.

The time of day that the officers appeared at defendants' homes also lends support for finding that their conduct violated the Fourth Amendment. As previously indicated, the knock-and-talk exception to the warrant requirement is premised, at its most basic level, on the fact that the police are acting consistently with the implied license a homeowner extends to the public-at-large. *Jardines*, 133 S Ct at 1415. There is no evidence that either Frederick or Van Doorne extended an invitation to the public to come to their homes between the hours of 4:00 a.m. and 5:30 a.m. Absent evidence that Frederick or Van Doorne regularly expected or accepted visitors or public company at those hours, the officers cannot rely on the implied consent exception for the knock-and-talks they conducted at 4:00 a.m. and 5:30 a.m., because those are not times "at which most residents extend an implied license for strangers to visit." *Lundin*, 47 F Supp 3d at 1013. Moreover, several of the involved officers, including the lead officer, testified that they could have waited and spoken to defendants several hours later, during daylight hours.

Yet another factor worthy of consideration is the sheer number of officers who appeared at defendants' homes in the early morning hours. By all accounts, seven officers came to defendants' homes, armed and

wearing their tactical gear, to, according to the officers, conduct knock-and-talks. It is difficult to conceive of a reason why it would be necessary for seven officers to come to the home of another officer at 4:00 a.m. or 5:30 a.m. to simply ask questions.

I reach my conclusion that the officers' conduct violated the Fourth Amendment on the basis of *all* of the circumstances of this case, including 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. As a result, I would reverse the trial court's order in each case and remand to the trial court for entry of an order granting defendants' motions to suppress the evidence. I reach this conclusion despite the fact that after the officers spoke to defendants, defendants consented to searches of their homes.

"A search preceded by a Fourth Amendment violation remains valid if the consent to search was voluntary in fact under the totality of the circumstances." *United States v Fernandez*, 18 F3d 874, 881 (CA 10, 1994).

> When there has been such a violation, the government bears the heavy burden of showing that the primary taint of that violation was purged. To satisfy this burden, the government must prove, from the totality of the circumstances, a sufficient attenuation or break in the causal connection between the illegal [action] and the consent. No single fact is

> dispositive, but the so-called "Brown factors" (from *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)) are especially important: (1) the temporal proximity of the illegal [action] and consent, (2) any intervening circumstances, and (3) the purpose and flagrancy of any official misconduct. [*United States v Reyes-Montes*, 233 F Supp 2d 1326, 1331 (D Kan, 2002) (quotation marks and citations omitted; alterations in original).]

In these consolidated cases, as in *Reyes-Montes*, 233 F Supp 2d at 1331, I cannot conclude that there was a sufficient attenuation between the unlawful entries and the defendants' consents. The consent of each defendant came within a few minutes of the officers' entries. *Id.* There were no intervening circumstances present to "break the causal connection" or eliminate the coercive effects of the unlawful entry. *Id.* With regard to the purpose and flagrancy of the misconduct, "the officers' conduct here may have been well-intentioned, but . . . a warrantless entry into a house is presumptively unreasonable, and the physical entry of the house is the chief evil against which the Fourth Amendment is directed." *Id.* The defendants' purported consent to search directly flowed from the officers' unlawful entry, and thus I cannot find that the searches were permissible under the Fourth Amendment.

Even if the knock-and-talks were viewed as permissible, "[a] knock and talk becomes a seizure requiring reasonable suspicion where a law enforcement

officer, 'through coercion, "physical force[,] or a show of authority, in some way restricts the liberty of a person."'" *United States v Crapser*, 472 F3d 1141, 1150 (CA 9, 2007) (Reinhardt, J., dissenting); see *United States v Chan-Jimenez*, 125 F3d 1324, 1326 (CA 9, 1997). "[F]actors, such as a display of weapons, physical intimidation or threats by the police, multiple police officers questioning the individual, or an unusual place or time for questioning may transform a consensual encounter between a citizen and a police officer into a seizure." *United States v Ponce Munoz*, 150 F Supp 2d 1125, 1133 (D Kan, 2001).

Again, in these cases, seven officers appeared in the very early morning hours at the fellow officers' homes, purportedly to ask them questions. The officers who approached the door, at least two of whom were higher in rank than defendants, knocked for several minutes, aware that no one was awake in the homes. While neither Frederick nor Van Doorne felt "threatened" by the officers, both were in a unique situation – both defendants were employed by the same department as the officers at their homes. Understandably, Frederick and Van Doorne testified that because members of their own department were at their doors asking to talk to them about an investigation, they felt that they were not free to say no, and that they would be risking their employment if they failed to comply with a departmental request. Seven officers appearing at the home of a fellow officer in the wee hours of the morning, armed and in tactical gear, advising each

defendant that his name had come up in a criminal investigation, could be viewed as a show of authority designed to assure that the defendants would not deny their "request" to enter each defendant's home to talk, and/or for permission to search the defendants' homes. "The ordinary remedy in a criminal case for violation of the Fourth Amendment is the suppression of any evidence obtained during the illegal police conduct," *United States v Perez-Partida*, 773 F Supp 2d 1054, 1059 (D NM, 2011), and I would find it to be the appropriate remedy in these cases.

/s/ Deborah A. Servitto

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v MICHAEL FREDERICK, Defendant. /	CASE NO. 14-03216-FH HON. DENNIS B. LEIBER OPINION AND ORDER

Defendant Michael Frederick filed a Motion to Suppress, seeking to suppress statements he made to investigators, as well as physical evidence seized during a search of his home. The Court held an evidentiary hearing on June 30, July 2, July 14, and July 23, 2014.

I. FINDINGS OF FACT

Based on the testimony of the witnesses, the facts of this case are largely uncontroverted. Mr. Frederick is employed as a corrections officer with the Kent County Sheriff's Department ("KCSD") and works at the Kent County Correctional Facility.

On the night of March 17, 2014, members of the Kent Area Narcotics Enforcement Team ("KANET") executed a search warrant at the home of Tim and Alyssa Scherzer. The Scherzers, who are medical marijuana caregivers, told investigators that they had supplied several pounds of marijuana butter to their

patients, including Mr. Frederick and three other employees who also work at the Kent County Correctional Facility.

After learning that KCSD employees were involved in the investigation, detectives went through the chain of command to contact Sheriff Lawrence Stelma. Sheriff Stelma instructed them to handle the matter like any other and not to give special treatment to the KCSD employees.

The KANET team decided to go to the corrections officers' homes immediately to question them about the marijuana butter and request consent to search their homes instead of getting search warrants. This procedure is known as a "knock and talk." Lieutenant Alan Roetman testified that this was intended as a courtesy to the KCSD employees because obtaining search warrants would have made the matter one of public record. Members of the KANET team testified that it is not uncommon to use this "knock and talk" tactic in the early morning hours.

The KANET team consisted of Lt. Roetman, Sgt. Nick Kaechele, Det. Todd Butler, Det. John Tuinhoff, Dep. Dennis Albert, Ofc. Tiffany MacKellar-Elliott, and Det. Christine Merryweather. They arrived at Mr. Frederick's home at approximately 4 a.m. on March 18, 2014. Lt. Roetman and Sgt. Kaechele approached the door and knocked for a few minutes before Mr. Frederick answered. Mr. Frederick recently had shoulder surgery, and his arm was in a sling, so it took him a few

minutes to get out of the recliner he was sleeping in and over to the door.

Lt. Roetman testified that when Mr. Frederick answered the door, he and Sgt. Kaechele explained that Mr. Frederick's name came up in a criminal investigation and asked if they could come inside and speak with him about it. Mr. Frederick testified that Sgt. Kaechele only asked if they could "come inside and talk." However, even according to Mr. Frederick's version of events, he learned that they wanted to talk with him about his medical marijuana card and the marijuana butter as they walked into the foyer.

Once inside, Lt. Roetman asked if they could see Mr. Frederick's marijuana butter. Mr. Frederick agreed and also signed a Consent to Search form. Det. Tuinhoff and Det. Butler spoke with Mr. Frederick at his kitchen table so that he would be more comfortable, due to his recent surgery. Det. Tuinhoff advised Mr. Frederick of his *Miranda* rights, and Mr. Frederick signed a card waiving those rights. See *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Mr. Frederick testified that he did not believe he had broken the law and did not think he had anything to hide.

Mr. Frederick claims that he was "confused" during this entire encounter and did not fully comprehend

what was happening.[1] However, KANET members testified that Mr. Frederick appeared lucid and responded appropriately to their questions.

No member of the KANET team ever told or implied to Mr. Frederick that this was part of an internal affairs investigation. The KANET members also never told Mr. Frederick that he was required to sign anything or used any other type of force, threat, or coercion to get him to cooperate with the investigation.

Mr. Frederick claims that he felt compelled to allow the search and to answer any questions asked by the detectives because he thought he might lose his job if he lied or interfered with an investigation. However, again, the KANET members never mentioned Mr. Frederick's employment status when requesting consent to search or speak with him, and there were no threats made against his job.

Further, KANET members never read or provided Mr. Frederick with his *Garrity* rights, or suggested that he may want to have a union representative present, during this encounter. See *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967). Lt. Ron Gates, who works for internal affairs at KCSD, did

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[1] Mr. Frederick filed a Motion to Allow Expert Testimony, seeking to have an expert witness testify regarding "sleep disruption brought about by a stressful situation and how it affects a person's cognitive and decision-making ability." The Court denied the Motion, determining that it would cause undue delay and be a waste of time under MRE 403. The Court takes judicial notice that people are sometimes groggy when they wake up and are not always completely alert.

inform Mr. Frederick of his *Garrity* rights at an interview on March 21, 2014 (three days later), at the Sheriff's Department.

Mr. Frederick testified that, as a former union representative, he was aware of how internal affairs investigations are conducted. He had been present when *Garrity* rights were read to other KCSD employees. Mr. Frederick stated that, in his experience, *Garrity* interviews are always conducted at the Sheriff's Department while an employee is working, and he had not heard of those interviews ever taking place at 4 a.m. or at someone's home. Mr. Frederick had also read and was familiar with the union contract, which specifies what happens when an internal affairs investigation overlaps a criminal investigation. Mr. Frederick testified that he knew of KCSD employees being fired for lying but did not know of anyone losing their job for exercising their constitutional rights.

Additionally, during the encounter at Mr. Frederick's home on March 18, 2014, members of the KANET team asked his wife, Melissa Frederick, who is also an employee with KCSD's corrections division, to come outside to a van and speak with them. The detectives read Mrs. Frederick her *Miranda* rights in the van, and she signed a form waiving those rights. The detectives did not inform Mrs. Frederick of her *Garrity* rights.

Three months after the encounter, on May 20, 2014, Mrs. Frederick received a letter from KCSD stating, "On March 17, 2014, you were interviewed in conjunction with an internal affairs investigation." Then

on May 28, 2014, Mr. Frederick received a letter stating, "You were subject to a criminal investigation that led to felony charges."[2]

II. CONCLUSIONS OF LAW

Mr. Frederick argues that suppression should be granted on two separate grounds. First, he claims that this was an unreasonable search and seizure based on the circumstances surrounding the "knock and talk." Alternatively, he argues that he did not give the consent to search or waiver of his 5th Amendment/ *Miranda* rights freely and voluntarily. The Court will address both of these issues in turn.

A. "Knock and Talk"

The Michigan Court of Appeals has held that a "knock and talk" does not generally violate constitutional protections because the tactic itself does not involve either a search or a seizure. *People v Frohriep*,

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[2] Mr. Frederick discussed these letters in his Proposed Findings of Fact but did not reference them in his Proposed Conclusions of Law. These letters are irrelevant to the current analysis. When examining whether the consent to search and waiver of *Miranda* rights were freely and voluntarily given, the Court must focus on the circumstances as they existed at the time of the incident. How KCSD later chose to use the information gathered – a criminal investigation of Mr. Frederick and an internal affairs investigation of his wife – has no bearing on the consent and waiver issues since Mr. Frederick was advised of his rights and was fully aware that any statements he made or any evidence obtained during the search could be used against him in a criminal investigation.

247 Mich App 692, 698-701; 637 NW2d 562 (2001). Accordingly, logic and common sense dictate that before police conduct can evoke "constitutional search and seizure implications, a search or seizure must have taken place." *Id.* at 699. By simply walking to the door, knocking, and asking Mr. Frederick if they could come in and speak with him, the KANET team clearly did not conduct a search. However, Mr. Frederick's Proposed Conclusions of Law contends that the "knock and talk" must be considered a search, based solely on the time of day of the encounter. This is a misstatement of the law.

In support of his contention that the "knock and talk" was a search, Mr. Frederick relies primarily on *Florida v Jardines*, ___ US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013).[3] However, *Jardines* does not involve a "knock and talk"; it deals with a completely different issue. Additionally, *Jardines* has glaring factual differences from the present case that make it easily distinguishable. I will explain these differences.

In *Jardines*, the U.S. Supreme Court addressed a situation where officers entered a suspect's porch with a drug-sniffing dog to determine whether the suspect was growing marijuana in his home. The Supreme Court held that this was a search because the officers did not have license to enter the suspect's porch to

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[3] Mr. Frederick also cites *United States v Lundlin* [sic], ___ F Supp 2d ___ (ND Cal); 2014 WL 2918102, in support of this argument. However, since *Lundlin* [sic] is not binding on this Court, and the Court finds it unpersuasive, the Court does not address *Lundlin* [sic] in its analysis.

gather evidence there. *Jardines*, 133 S Ct at 1415-16. Factually, unlike *Jardines*, the KANET team did not have a drug-sniffing dog or any other type of detection device on Mr. Frederick's porch. They were not peering through the windows trying to catch a glimpse of the marijuana butter they believed to be in his home. They simply knocked on the door and asked if they could come in and speak with him.

Admittedly, while the *Jardines* Court was only determining whether the officers' actions in that particular scenario were a search, in its analysis, the Supreme Court did discuss the implied license to walk up to someone's door, knock, and ask to speak with them. *Id.* at 1415-16. In fact, the Supreme Court stated, "[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " *Id.* at 1416, quoting *Kentucky v King*, ___ US ___, 131 S Ct 1849, 1862, 179 L Ed 2d 865 (2011). The Supreme Court went on to say, "What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.*" *Jardines*, 133 S Ct at 1416 n 4 (emphasis in original).

Mr. Frederick's Proposed Conclusions of Law appears to imply that in *Jardines* the Supreme Court held that an implied license to enter someone's porch and knock on their door does not extend to nighttime hours. See *Jardines*, 133 S Ct at 1416 n 3. While the

dissent in *Jardines* may argue that conclusion, the majority opinion does not support it. *Id.* at 1422-23.[4]

In sum, *Jardines* involved a much different factual scenario than this case. Further, the Supreme Court was addressing a different issue in that case. Based on this, *Jardines* is not on point, and the Court determines that the KANET team's actions at Mr. Frederick's front door did not constitute a search.

The next question is whether it amounted to a seizure. In order for a seizure to occur, a reasonable person must believe, when considering the totality of the circumstances, that he or she is not "free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 436; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Mr. Frederick's Proposed Conclusions of Law maintains that the factors suggesting that this was a seizure include the time of the incident (4 a.m.), the number of officers who approached his home (seven), the length of time Lt. Roetman and Sgt. Kaechele knocked on the door (a few minutes), and Mr. Frederick's contention that he did not believe that he could disobey the requests of the higher-ranking officers (Lt. Roetman and Sgt. Kaechele). However, Mr.

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[4] The Michigan Court of Appeals directly addressed how the time of day affects the constitutionality of a "knock and talk." In *People v Sweet*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 239511), the Court of Appeals held that while the sole issue concerning the time of day is a consideration, the time of day alone is not dispositive.

Frederick's testimony does not fully support these claims.

Despite his conclusory assertions, Mr. Frederick's testimony gave no indication that he felt threatened or intimidated in any way by the number of officers who approached his home or the length of time that Lt. Roetman and Sgt. Kaechele knocked on the door. While Mr. Frederick stated that he felt confused during the encounter, he knew who the people were and why they were at his home. None of these claims demonstrate coercion.

Mr. Frederick's final argument – that he felt he had to comply with the higher-ranking officers' requests – carries no weight because the KANET team did not order him to let them into his home or to speak with them. They simply asked if they could come in and talk, and they did nothing to try to intimidate or mislead him, which is consistent with Lt. Roetman's testimony that they handled the investigation in this manner as a courtesy to Mr. Frederick.

Viewing the totality of the circumstances presented during the hearing, no factor supports the notion that this was a seizure. On the contrary, a number of factors convincingly demonstrate this was not a seizure. For example, Mr. Frederick was dealing with his co-workers at the KCSD in this situation. He was not an ordinary citizen who found himself in the middle of a police encounter. He was familiar with these people and he was familiar with their procedures. While it is true that as a corrections officer, Mr. Frederick would

have less experience with investigations than a patrol officer, he did receive training in investigative interviewing techniques as recently as March 2011. Accordingly, Mr. Frederick had more reason to be aware and experienced in this situation than an average citizen would.

For these reasons, the Court determines that a reasonable person in Mr. Frederick's shoes would have felt free to decline the KANET team's requests. The law is clear. The answer is plain. The Court determines that the KANET team's actions when approaching and entering Mr. Frederick's home were a proper "knock and talk" that did not implicate constitutional protections.

B. Consent to Search & Waiver of *Miranda* Rights

The next issue is whether the consent to search and waiver of *Miranda* rights were valid. Both of these require a somewhat similar analysis. A court must determine whether each was given freely and voluntarily based on the totality of the circumstances. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003); *People v Ryan*, 295 Mich App 388, 397; 819 NW2d 55 (2012). The "freely and voluntarily" requirement demands that the consent or waiver was not a result of intimidation, coercion, or deception. *Ryan* at 397. Additionally, a valid waiver of *Miranda* rights also requires that it was given knowingly and intelligently. *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89

L Ed 2d 410 (1986). To be given knowingly and intelligently, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

Mr. Frederick maintains that he did not give either the consent to search his home or the waiver of his *Miranda* rights freely and voluntarily. In support of this, he cites the same factors addressed in the seizure analysis above, claiming they had a coercive effect. Additionally, Mr. Frederick contends that the statements he made to the KANET team should be suppressed under *Garrity*.

As stated above, Mr. Frederick's testimony shows that he was not intimidated or coerced by the number of officers at his home or the amount of knocking by Lt. Roetman and Sgt. Kaechele. Further, even though this encounter happened at 4 a.m., Mr. Frederick's testimony establishes that his primary motivations for granting the consent and waiver were that he feared possible employment ramifications if he refused and that he did not believe he had broken the law and, therefore, had nothing to hide.

Again, the KANET members did not state or imply that Mr. Frederick was required to sign the consent or waiver. They also made no indication that Mr. Frederick's decision might affect his employment status. The KANET members gave Mr. Frederick the Consent to Search form and provided him with adequate time to review and consider it before he signed it.

The KANET members also either read Mr. Frederick his *Miranda* rights, or gave him a card that stated those rights, and provided him with adequate time to review the card and consider his options before signing it. Mr. Frederick was lucid during this time and participating appropriately in his conversation with the KANET members. For this reason, the Court concludes that there was no indication of coercion, intimidation, or deception and that Mr. Frederick gave both the consent and waiver freely, voluntarily, knowingly, and intelligently.

Mr. Frederick's final claim that the statements he made to KANET members should be suppressed under *Garrity* lacks merit. In *People v Coutu*, 235 Mich App 695, 704; 599 NW2d 556 (1999), the Michigan Court of Appeals held that if there is "no overt threat of employment termination in the event that defendants chose to remain silent instead of answering questions as part of the investigation, *Garrity* . . . does not apply."

When viewing the totality of the circumstances in this case, it is clear that neither the KANET members nor anyone else made any overt threats against Mr. Frederick's job if he refused to answer their questions. Further, there is not even an indication of an implied threat. Based on this, it is clear that *Garrity* does not apply, and suppression is not warranted.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Suppress is DENIED.

Dated this 26th day of August, 2014
at Grand Rapids, Michigan.

DENNIS B. LEIBER
Honorable Dennis B. Leiber

ATTEST: A TRUE COPY

/s/ Nicole Greenberg
Deputy County Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v TODD VAN DOORNE, Defendant. /	CASE NO. 14-03215-FH HON. DENNIS B. LEIBER OPINION AND ORDER

Defendant Todd Van Doorne filed a Motion to Suppress, seeking to suppress statements he made to investigators, as well as physical evidence seized during a search of his home. The Court held an evidentiary hearing on June 30, July 2, July 14, and July 23, 2014.

I. FINDINGS OF FACT

Based on the testimony of the witnesses, the facts of this case are largely uncontroverted. Mr. Van Doorne is employed as a corrections officer with the Kent County Sheriff's Department ("KCSD") and works at the Kent County Correctional Facility.

On the night of March 17, 2014, members of the Kent Area Narcotics Enforcement Team ("KANET") executed a search warrant at the home of Tim and Alyssa Scherzer. The Scherzers, who are medical marijuana caregivers, told investigators that they had supplied several pounds of marijuana butter to their

patients, including Mr. Van Doorne and three other employees who also work at the Kent County Correctional Facility.

After learning that KCSD employees were involved in the investigation, detectives went through the chain of command to contact Sheriff Lawrence Stelma. Sheriff Stelma instructed them to handle the matter like any other and not to give special treatment to the KCSD employees.

The KANET team decided to go to the corrections officers' homes immediately to question them about the marijuana butter and request consent to search their homes instead of getting search warrants. This procedure is known as a "knock and talk." Lieutenant Alan Roetman testified that this was intended as a courtesy to the KCSD employees because obtaining search warrants would have made the matter one of public record. Members of the KANET team testified that it is not uncommon to use this "knock and talk" tactic in the early morning hours.

The KANET team consisted of Lt. Roetman, Sgt. Nick Kaechele, Det. Todd Butler, Det. John Tuinhoff, Dep. Dennis Albert, Ofc. Tiffany MacKellar-Elliott, and Det. Christine Merryweather. They arrived at Mr. Van Doorne's home at approximately 5:30 a.m. on March 18, 2014. Lt. Roetman and Sgt. Kaechele approached the door and knocked for a few minutes before Mr. Van Doorne answered. Mr. Van Doorne normally gets up for work around 5:45 a.m., but he and his family were sick with the flu. So he had called in sick to work around 4

a.m. and was still sleeping when the KANET team arrived.

Mr. Van Doorne testified that his dog was barking loudly when he woke up, due to the knocking, and that he was alarmed and panicked when he went to the door. Mr. Van Doorne looked out the window and saw that it was employees from KCSD, so he opened the door. Lt. Roetman explained that they were there to discuss the marijuana butter and asked if they could come in and talk. Lt. Roetman testified that at this point he also told Mr. Van Doorne that this was part of a criminal investigation. Mr. Van Doorne did not deny Roetman's testimony but claimed he did not remember any KANET members mentioning that it was a criminal matter when they first arrived.

Mr. Van Doorne testified that he was concerned this may be an issue concerning some illegal activity by his medical marijuana caregiver, so he invited the KANET members into his home to show them his medical marijuana card and, hopefully, clear this up. Mr. Van Doorne's dog continued to bark loudly, so he asked if they could go outside and talk. Mr. Van Doorne then followed the KANET members out to their van where they read him his *Miranda* rights and asked him to sign a *Miranda* waiver, as well as a Consent to Search form. See *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Mr. Van Doorne reviewed and signed both forms. He testified that he did not believe he had broken the law and did not think he had anything to hide.

Mr. Van Doorne stated that he knew the KANET team was there to discuss the marijuana butter but claims that he was "confused" during the encounter and did not fully comprehend what was happening.[1] However, the Court finds that Mr. Van Doorne was aware of the severity of the situation because he testified that during the encounter he "hoped" this would just be an internal affairs investigation and would not be a criminal matter. KANET members testified that Mr. Van Doorne appeared lucid throughout the encounter and responded appropriately to their questions.

No member of the KANET team ever told or implied to Mr. Van Doorne that this was part of an internal affairs investigation. The KANET members also never told Mr. Van Doorne that he was required to sign anything or used any other type of force, threat, or coercion to get him to cooperate with the investigation.

Mr. Van Doorne claims that he felt compelled to allow the search and to answer any questions asked by the detectives because he thought he might lose his job if he lied or interfered with an investigation. However, again, the KANET members never mentioned Mr. Van Doorne's employment status when requesting consent

[1] Mr. Van Doorne filed a Motion to Allow Expert Testimony, seeking to have an expert witness testify regarding "sleep disruption brought about by a stressful situation and how it affects a person's cognitive and decision-making ability." The Court denied the Motion, determining that it would cause undue delay and be a waste of time under MRE 403. The Court takes judicial notice that people are sometimes groggy when they wake up and are not always completely alert.

to search or speak with him, and there were no threats made against his job.

Further, KANET members never read or provided Mr. Van Doorne with his *Garrity* rights, or suggested that he may want to have a union representative present, during this encounter. See *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967). Lt. Ron Gates, who works for internal affairs at KCSD, did inform Mr. Van Doorne of his *Garrity* rights at an interview on March 21, 2014 (three days later), at the Sheriff's Department.

II. CONCLUSIONS OF LAW

Mr. Van Doorne argues that suppression should be granted on two separate grounds. First, he claims that this was an unreasonable search and seizure based on the circumstances surrounding the "knock and talk." Alternatively, he argues that he did not give the consent to search or waiver of his 5th Amendment/ *Miranda* rights freely and voluntarily. The Court will address both of these issues in turn.

A. "Knock and Talk"

The Michigan Court of Appeals has held that a "knock and talk" does not generally violate constitutional protections because the tactic itself does not involve either a search or a seizure. *People v Frohriep*, 247 Mich App 692, 698-701; 637 NW2d 562 (2001). Accordingly, logic and common sense dictate that before

police conduct can evoke "constitutional search and seizure implications, a search or seizure must have taken place." *Id.* at 699. By simply walking to the door, knocking, and asking Mr. Van Doorne if they could come in and speak with him, the KANET team clearly did not conduct a search. However, Mr. Van Doorne's Proposed Conclusions of Law contends that the "knock and talk" must be considered a search, based solely on the time of day of the encounter. This is a misstatement of the law.

In support of his contention that the "knock and talk" was a search, Mr. Van Doorne relies primarily on *Florida v Jardines*, ___ US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013).[2] However, *Jardines* does not involve a "knock and talk"; it deals with a completely different issue. Additionally, *Jardines* has glaring factual differences from the present case that make it easily distinguishable. I will explain these differences.

In *Jardines*, the U.S. Supreme Court addressed a situation where officers entered a suspect's porch with a drug-sniffing dog to determine whether the suspect was growing marijuana in his home. The Supreme Court held that this was a search because the officers did not have license to enter the suspect's porch to gather evidence there. *Jardines*, 133 S Ct at 1415-16. Factually, unlike *Jardines*, the KANET team did not

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[2] Mr. Van Doorne also cites *United States v Lundlin* [sic], ___ F Supp 2d ___ (ND Cal); 2014 WL 2918102, in support of this argument. However, since *Lundlin* [sic] is not binding on this Court, and the Court finds it unpersuasive, the Court does not address *Lundlin* [sic] in its analysis.

have a drug-sniffing dog or any other type of detection device on Mr. Van Doorne's porch. They were not peering through the windows trying to catch a glimpse of the marijuana butter they believed to be in his home. They simply knocked on the door and asked if they could come in and speak with him.

Admittedly, while the *Jardines* Court was only determining whether the officers' actions in that particular scenario were a search, in its analysis, the Supreme Court did discuss the implied license to walk up to someone's door, knock, and ask to speak with them. *Id.* at 1415-16. In fact, the Supreme Court stated, "[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id.* at 1416, quoting *Kentucky v King*, ___ US ___, 131 S Ct 1849, 1862, 179 L Ed 2d 865 (2011). The Supreme Court went on to say, "What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*." *Jardines*, 133 S Ct at 1416 n 4 (emphasis in original).

Mr. Van Doorne's Proposed Conclusions of Law appears to imply that in *Jardines* the Supreme Court held that an implied license to enter someone's porch and knock on their door does not extend to nighttime hours. See *Jardines*, 133 S Ct at 1416 n 3. While the

dissent in *Jardines* may argue that conclusion, the majority opinion does not support it. *Id.* at 1422-23.[3]

In sum, *Jardines* involved a much different factual scenario than this case. Further, the Supreme Court was addressing a different issue in that case. Based on this, *Jardines* is not on point, and the Court determines that the KANET team's actions at Mr. Van Doorne's front door did not constitute a search.

The next question is whether it amounted to a seizure. In order for a seizure to occur, a reasonable person must believe, when considering the totality of the circumstances, that he or she is not "free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 436; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Mr. Van Doorne's Proposed Conclusions of Law maintains that the factors suggesting that this was a seizure include the time of the incident (5:30 a.m.), the number of officers who approached his home (seven), the length of time Lt. Roetman and Sgt. Kaechele knocked on the door (a few minutes), and Mr. Van Doorne's contention that he did not believe that he could disobey the requests of the higher-ranking officers (Lt. Roetman and Sgt.

[3] The Michigan Court of Appeals directly addressed how the time of day affects the constitutionality of a "knock and talk." In *People v Sweet*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 239511), the Court of Appeals held that while the sole issue concerning the time of day is a consideration, the time of day alone is not dispositive.

Kaechele). However, Mr. Van Doorne's testimony does not fully support these claims.

Despite his conclusory assertions, Mr. Van Doorne's testimony gave no indication that he felt threatened or intimidated in any way by the number of officers who approached his home or the length of time that Lt. Roetman and Sgt. Kaechele knocked on the door. While Mr. Van Doorne stated that he felt confused during the encounter, he knew who the people were and why they were at his home. None of these claims demonstrate coercion.

Mr. Van Doorne's final argument – that he felt he had to comply with the higher-ranking officers' requests – carries no weight because the KANET team did not order him to let them into his home or to speak with them. They simply asked if they could come in and talk, and they did nothing to try to intimidate or mislead him, which is consistent with Lt. Roetman's testimony that they handled the investigation in this manner as a courtesy to Mr. Van Doorne.

Viewing the totality of circumstances presented during the hearing, no factor supports the notion that this was a seizure. On the contrary, a number of factors convincingly demonstrate this was not a seizure. For example, Mr. Van Doorne was dealing with his co-workers at the KCSD in this situation. He was not an ordinary citizen who found himself in the middle of a police encounter. He was familiar with these people and he was familiar with their procedures. While it is true that as a corrections officer, Mr. Van Doorne would

have less experience with investigations than a patrol officer, he did receive training in investigative interviewing techniques as recently as March 2011. Accordingly, Mr. Van Doorne had more reason to be aware and experienced in this situation than an average citizen would.

For these reasons, the Court determines that a reasonable person in Mr. Van Doorne's shoes would have felt free to decline the KANET team's requests. The law is clear. The answer is plain. The Court determines that the KANET team's actions when approaching and entering Mr. Van Doorne's home were a proper "knock and talk" that did not implicate constitutional protections.

B. Consent to Search & Waiver of *Miranda* Rights

The next issue is whether the consent to search and waiver of *Miranda* rights were valid. Both of these require a somewhat similar analysis. A court must determine whether each was given freely and voluntarily based on the totality of the circumstances. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003); *People v Ryan*, 295 Mich App 388, 397; 819 NW2d 55 (2012). The "freely and voluntarily" requirement demands that the consent or waiver was not a result of intimidation, coercion, or deception. *Ryan* at 397. Additionally, a valid waiver of *Miranda* rights also requires that it was given knowingly and intelligently. *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89

L Ed 2d 410 (1986). To be given knowingly and intelligently, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

Mr. Van Doorne maintains that he did not give either the consent to search his home or the waiver of his *Miranda* rights freely and voluntarily. In support of this, he cites the same factors addressed in the seizure analysis above, claiming they had a coercive effect. Additionally, Mr. Van Doorne contends that the statements he made to the KANET team should be suppressed under *Garrity.*

As stated above, Mr. Van Doorne's testimony shows that he was not intimidated or coerced by the number of officers at his home or the amount of knocking by Lt. Roetman and Sgt. Kaechele. Further, even though this encounter happened at 5:30 a.m., Mr. Van Doorne's testimony establishes that his primary motivations for granting the consent and waiver were that he feared possible employment ramifications if he refused and that he did not believe he had broken the law and, therefore, had nothing to hide.

Again, the KANET members did not state or imply that Mr. Van Doorne was required to sign the consent or waiver. They also made no indication that Mr. Van Doorne's decision might affect his employment status. The KANET members gave Mr. Van Doorne the Consent to Search form and provided him with adequate time to review and consider it before he signed it. The

KANET members also read Mr. Van Doorne his *Miranda* rights, gave him a card that stated those rights, and provided him with adequate time to review the card and consider his options before signing it. Mr. Van Doorne was lucid during this time and participating appropriately in his conversation with the KANET members. For this reason, the Court concludes that there was no indication of coercion, intimidation, or deception and that Mr. Van Doorne gave both the consent and waiver freely, voluntarily, knowingly, and intelligently.

Mr. Van Doorne's final claim that the statements he made to KANET members should be suppressed under *Garrity* also lacks merit. In *People v Coutu*, 235 Mich App 695, 704; 599 NW2d 556 (1999), the Michigan Court of Appeals held that if there is "no overt threat of employment termination in the event that defendants chose to remain silent instead of answering questions as part of the investigation, *Garrity* . . . does not apply."

When viewing the totality of the circumstances in this case, it is clear that neither the KANET members nor anyone else made any overt threats against Mr. Van Doorne's job if he refused to answer their questions. Further, there is not even an indication of an implied threat. Based on this, it is clear that *Garrity* does not apply, and suppression is not warranted.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Suppress is DENIED.

Dated this 26th day of August, 2014
at Grand Rapids, Michigan.

DENNIS B. LEIBER
Honorable Dennis B. Leiber

ATTEST: A TRUE COPY

/s/ Nicole Greenberg
Deputy County Clerk

Order

Michigan Supreme Court
Lansing, Michigan

March 5, 2019

158870

Bridget M. McCormack,
Chief Justice

David F. Viviano
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

MICHAEL CHRISTOPHER FREDERICK,
Defendant-Appellee.
/

SC: 158870
COA: 341741
Kent CC: 14-003216-FH

On order of the Court, the application for leave to appeal the October 25, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL] I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 5, 2019 /s/ Larry Royster

Clerk

Order | **Michigan Supreme Court**
Lansing, Michigan

March 5, 2019

158871

Bridget M. McCormack,
Chief Justice

David F. Viviano
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

TODD RANDOLPH VAN DOORNE,
Defendant-Appellee.

SC: 158871
COA: 341742
Kent CC: 14-003215-FH

______________________________/

On order of the Court, the application for leave to appeal the October 25, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL] I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 5, 2019 /s/ Larry Royster
Clerk