

No. _____

**In The
Supreme Court of the United States**

ZULEYKA COLON-RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari To The United
States Court of Appeal for the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On February 24, 2016, law enforcement agents dismantled La Compania, a heroin-trafficking organization based in Orlando, Florida. Agents served multiple arrest warrants on the known members of La Compania that morning. Law enforcement suspected Ms. Colon-Rivera was involved in La Compania, and she had previously sold heroin to an undercover agent. The agents, who surveilled her residence for three hours that morning, also searched and arrested a confederate who emerged from her house after ten minutes carrying thirteen baggies of heroin. Yet, instead of getting a search warrant, law enforcement gained entry into Ms. Colon-Rivera's residence by way of a "knock and talk." While inside, law enforcement discovered incriminating evidence that led to Ms. Colon-Rivera's conviction.

Ms. Colon-Rivera moved to suppress that evidence, arguing that the knock and talk violated the Fourth Amendment because the purpose of entering her curtilage was to investigate her, arrest her, and search her residence. *See Florida v. Jardines*, 133 S. Ct. 1409, 1416 n.4 (2013). During her suppression hearing, the officers testified that the purpose of conducting the knock and talk was two-fold: (1) to positively identify her as the individual who sold heroin to the undercover officer; and (2) to confront her with evidence that she sold that heroin and discuss the encounter with her.

The district court denied the motion to suppress. Notwithstanding the circumstances described above, on appeal, the Eleventh Circuit affirmed that ruling.

QUESTION PRESENTED: Does the Fourth Amendment permit law enforcement to approach a residence under the guise of a knock and talk where the purpose of the encounter is to confront the resident with evidence of criminality and positively identify her as the perpetrator of a crime?

PARTIES TO THE PROCEEDING

Petitioner Zulyeka Colon-Rivera was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondent, the United States, was the appellee in the Eleventh Circuit.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	v
DECISIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION.....	11
 APPENDIX	
APPENDIX A Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit (February 16, 2018).....	App. 1
APPENDIX B Transcript of an Oral Order on Motion to Suppress in the United States District Court, Middle District of Florida, Orlando Division (October 12, 2016)	App. 5

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Florida v. Jardines</i> , 133 S. Ct. 1409 (2013)	<i>passim</i>
<i>Maryland v. Buie</i> , 494 U.S. 325 (1990)	9
<i>Payton v. New York</i> , 445 U.S. 573 (1980)	10
<i>United States v. Carloss</i> , 818 F. 3d 988 (10th Cir. 2016)	7
<i>United States v. Lundin</i> , 817 F.3d 1151 (9th Cir. 2016)	7, 10
 CONSTITUTION AND STATUTES	
18 U.S.C. § 2.....	4
18 U.S.C. § 3231.....	1
21 U.S.C. § 841(b)(1)(A)(i)	4
21 U.S.C. § 841(b)(1)(C)	4
28 U.S.C. § 1254.....	1
U.S. Const. amend. IV	<i>passim</i>

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Zulyeka Colon-Rivera, respectfully petitions the Court for a writ of certiorari to review the Opinion of the Eleventh Circuit Court of Appeal.

DECISIONS BELOW

The United States District Court for the Middle District of Florida orally denied Ms. Colon-Rivera's motion to suppress on October 12, 2016. App. 12.

The Eleventh Circuit issued an unpublished opinion affirming her judgment and sentence. That opinion is reproduced in the appendix at App. 1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The Eleventh Circuit issued its Opinion on February 16, 2018. App. 1. This timely petition for writ of certiorari follows. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

On February 24, 2016, the federal Drug Enforcement Administration (“DEA”) carried out a carefully orchestrated raid of a large heroin-trafficking organization known as La Compania after investigating the Orlando-based organization for some three years. During the raid, DEA agents executed arrest warrants and rounded up all of its known members. App. 8.

Ms. Colon-Rivera was no stranger to the DEA. At her suppression hearing, Agent Mark Lee admitted that he believed Ms. Colon-Rivera, who used the alias “Mia,” had previously sold 200 bags of heroin to an undercover officer, Agent Ashley Scott. Lee testified, however, that there was some confusion as to whether “Mia” was Ms. Colon-Rivera or another individual. This was “evidenced by some sort of warrant being recalled after it was issued for the wrong person.” App. 7.

According to law enforcement, one purpose for visiting her home was to positively identify Ms. Colon-Rivera as the “Mia” who sold the heroin to Agent Scott. App. 2, 7. Agent Lee testified, however, that they also intended to confront Ms. Colon-Rivera with the fact that she had sold heroin to an undercover officer and hoped that she would discuss the encounter with them.

On the morning of the raid, three agents, Agents Lee and Scott, and another agent, Daniel Tilton, began surveilling the residence of Ms. Colon-Rivera at 6:00 a.m. They observed her admit a visitor at 9:20 a.m. and saw the visitor leave ten minutes later. That individual, co-defendant Domingo Perez-Lamboy, consented to

a search of his person. DEA agents discovered he was carrying thirteen bags of a substance they believed to be heroin. App. 2-3, 8-9.

Although Agent Scott previously purchased the heroin from Ms. Colon-Rivera and was the officer who could identify her, Scott stayed behind with Mr. Perez-Lamboy, while agents Lee and Tilton initiated the knock and talk. App. 9. The two agents identified themselves as law enforcement officers and sought her permission to enter the residence. App. 9. Although Ms. Colon-Rivera claimed that she denied their request to enter, the officers testified that she consented to their entry. App. 9. The district court credited the officers' version of events. App. 9.

Once inside, the officers conducted a protective sweep of the residence. App. 9. Thereafter, they advised Ms. Colon-Rivera of her *Miranda* rights, and proceeded to ask her questions about her alleged sale of 200 bags of heroin to Agent Scott in July of 2015. App. 10. Ms. Colon-Rivera denied participating in the transaction and denied any involvement in La Compania. App. 10. Near the close of the questioning Agent Scott entered the residence. Her presence precipitated Ms. Colon-Rivera to utter the name "Ashley," the name Agent Scott used during the controlled heroin sale. App. 10.

According to Agent Lee, Ms. Colon-Rivera then consented to a search of her residence. App. 10. During the ensuing search, Agent Lee found a large amount of U.S. currency, approximately 200 individually packaged baggies of what he suspected was heroin, and several empty gun boxes that included firearm magazines. App. 11. Ms. Colon-Rivera was then arrested and charged with one

count of conspiring to distribute heroin and for three counts of distributing and possessing with intent to distribute heroin in violation of 21 U.S.C. § 841(b)(1)(A)(i), (b)(1)(C) and 18 U.S.C. § 2. App. 2, 11.

Ms. Colon-Rivera moved to suppress all evidence obtained pursuant to the knock and talk. She argued that the knock and talk was undertaken for the impermissible purpose of searching her residence. She denied having given law enforcement consent to enter her residence and claimed that they simply barged in, took a seat at her dinner table, and began to question her. Unlike the DEA agents, who claimed that the protective sweep took only one minute, Ms. Colon-Rivera asserted that they spent ten minutes snooping around her house. She also asserted that they refused to let her leave to change out of her nightshirt and into something less revealing.

Ms. Colon-Rivera averred that the agents confronted her with the fact that: (1) she had sold bags of heroin to an undercover DEA agent, Agent Ashley Scott; (2) a man outside her residence had just been arrested with heroin on him; (3) others had been arrested; and (4) “all fingers pointed at her.” Ms. Colon-Rivera maintained that the DEA agents repeatedly asked her whether she knew certain people or sold drugs herself. Ms. Colon-Rivera claimed that she told them that she wanted a lawyer, but the agents still pressed her to tell them “what’s going on.” On her version of the events, when the DEA agents ultimately asked her whether they could search her residence, she refused, but the agents searched her house all the same.

Ms. Colon-Rivera argued that the knock and talk exceeded its permissible scope because the objective purpose of the encounter was to conduct a search. She also argued that the entry into her home without consent or exigent circumstances violated her rights under the Fourth Amendment, and thus she requested that the district court exclude the evidence seized from her home and any statements made during her interrogation.

After conducting an evidentiary hearing, the district court denied Ms. Colon-Rivera's motion to suppress. App. 12. It found that the knock and talk was not subterfuge for an unlawful search, as evidenced by the officers arriving without a search warrant, rights advisement forms, or search authorization forms. App. 12. The district court also found that "the officers' explanation that they were there to confirm defendant's identity in light of the prior recalled warrant is both reasonable and credible." App. 12. Finally, the district court found that the protective sweep was consensual, Ms. Colon-Rivera was properly Mirandized, and the eventual search was consensual. App. 12.

The Eleventh Circuit affirmed. It ruled that the district court was entitled to credit the explanation of the agents' explanation for their visit, and that the Fourth Amendment was not implicated by entry upon private land to knock on a citizen's door for "legitimate police purposes unconnected with a search of the premises." App. 2. Hence, the Eleventh Circuit concluded that conducting a knock and talk to (1) positively identify Ms. Colon-Rivera as the seller of heroin to an undercover agent; and (2) confront her with evidence of her wrongdoing constituted a

permissible intrusion under the Fourth Amendment to the United States Constitution. Ms. Colon-Rivera respectfully requests certiorari review of that decision.

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the Eleventh Circuit and clarify the permissible scope of the knock and talk exception to the Fourth Amendment. In *Jardines*, this Court opined that the “scope of a license — express or implied — is limited not only to a particular area but also to a specific purpose.” *Jardines*, 133 S. Ct. at 1416. The “social norms that invite a visitor to the front door do not invite him there to conduct a search.” *Id.*

The Court rejected as a “false generalization” the statement in the dissent that “gathering evidence — even damning evidence — is a lawful activity that falls within the scope of the license to approach.” *Jardines*, 133 S. Ct. at 1416 at n.4. In doing so, the *Jardines* Court identified two polestars to guide the lower courts: (1) “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*”; nevertheless, (2) “no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.” *Jardines*, 133 S. Ct. at 1416 at n.4 (emphasis in original).

This case appears closer to the latter than the former. By their own admission, the law enforcement officers had more in mind than merely speaking with Ms. Colon-Rivera. They sought to glimpse her in order to positively identify her as the perpetrator of a crime. In addition, they sought to confront her with

Agent Scott, which they hoped would elicit a confession to her involvement in the sale of contraband.

Applying a property-based approach, as did the majority in *Jardines*, it would appear that the officers exceeded the scope of their implied license when they entered the curtilage of Ms. Colon-Rivera's residence because their purpose was to investigate her commission of a crime. It is undeniable after *Jardines* that the *purpose* of conducting the knock and talk matters. *See, e.g., United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016) (knock and talk deemed unconstitutional where officers intended to locate and arrest suspect and not merely to talk to suspect). "An officer approaching your home to return your lost dog or to solicit for charity may not be conducting a 'search' within the meaning of the Fourth Amendment. But one calling to investigate a crime surely is." *United States v. Carloss*, 818 F. 3d 988, 1004 (10th Cir. 2016) (Gorsuch, J., dissenting).

As in *Jardines*, law enforcement entered her curtilage in order to investigate Ms. Colon-Rivera and obtain evidence (including her visage) that they could later use in her prosecution. *See id.* at 1413, 1416-18. This was, moreover, no isolated occurrence: on the morning of the knock and talk DEA agents were raiding the residences of other members of La Compania and effectuating multiple arrest warrants. DEA agents also conducted surveillance of Ms. Colon-Rivera's residence for more than three hours prior to the knock and talk.

What is more, DEA agents conducted a search of the person of Domingo Perez-Lamboy directly outside her residence right after seeing him exit it. During

the search, they uncovered heroin in his pocket that he presumably obtained from Ms. Colon-Rivera.

In view of these circumstances, the objective purpose of conducting the knock and talk was to obtain incriminating evidence against Ms. Colon-Rivera and search her residence, and not simply to approach her home to speak with her. The district court and the Eleventh Circuit credited the testimony of the DEA agents who claimed that they arrived at her residence with the purpose of confirming that she was the same “Mia” that sold heroin to Agent Scott, but this rationale clashes with the facts of the case.

If the DEA agents only wanted to confirm Ms. Colon-Rivera’s identity, then Agent Scott would have approached the residence because it was Agent Scott that previously purchased heroin from her. Neither Agent Lee nor Agent Tilton could confirm her identity because they had no prior interaction with her. This suggests that the agents had more ambitious goals than simply confirming Ms. Colon-Rivera’s identity. Agent Lee admitted as much when he stated that the purpose of belatedly revealing Agent Scott’s identity as a law enforcement officer was to elicit some incriminating response from Ms. Colon-Rivera.

It also makes sense that they would want to search her residence immediately, because she was on the cusp of learning of the arrest of many of her co-conspirators. Yet, instead of obtaining a warrant in advance as they had done for other members of La Compania, the officers decided to circumvent the strictures of the Fourth Amendment and conduct a knock and talk for an impermissible purpose.

The agents additionally testified that they advised her of her *Miranda* rights just after the protective sweep, which is additional evidence that this was more than just a simple request to speak with Ms. Colon-Rivera. That is not all. Once the DEA agents obtained entry to her residence, an agent performed a protective sweep, which is typically justified only where officers intend to make an arrest.

In *Maryland v. Buie*, 494 U.S. 325 (1990), this Court held that a protective sweep is only permissible under the Fourth Amendment only “when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those *on the arrest scene*.” *Id.* at 337 (emphasis added). The Court in *Buie* permitted police officers to undertake protective sweeps in these instances because of the compelling “interest of the officers in taking steps to assure themselves that the house *in which a suspect is being, or has just been, arrested* is not harboring other persons who are dangerous and who could unexpectedly launch an attack.” *Id.* at 333 (emphasis added). That Agent Tilton immediately conducted a protective sweep is further evidence that law enforcement wanted to search her house and knew an arrest was in the offing.

In sum, this case represents a confluence of two factors that can render a knock and talk investigation constitutionally infirm. First, the facts suggest that the purpose of the knock and talk was to search Ms. Colon-Rivera’s residence, as evidenced by the decision not to bring Agent Scott to identify her. *Jardines*, 133 S. Ct. at 1416 n.4 (knock and talk exception does not apply where the purpose of the officer’s behavior is “to do nothing but conduct a search”).

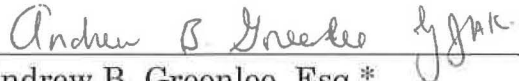
Second, the knock and talk appears to have been little more than a prologue to effectuating a warrantless arrest of Ms. Colon-Rivera inside of her residence, as evidenced by the protective sweep that was conducted immediately upon the entry into her house. *Payton v. New York*, 445 U.S. 573, 575, 590 (1980) (the Fourth Amendment “prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest”). *Lundin*, 817 F.3d at 1159-60 (“knock and talk” deemed unlawful where the officers intended to locate and arrest suspect).

Rather than looking to the objective purpose of the officers, as manifested by the totality of the circumstances, the district court and the Eleventh Circuit accepted the rationale offered by the officers during the suppression hearing—that the knock and talk was needed to confirm the identity of Ms. Colon-Rivera so as to prosecute her. Even on its own terms, the stated purpose did not justify the intrusion onto her curtilage because the entire point of the encounter was to gather incriminating evidence. That is constitutionally impermissible under *Jardines*. Accordingly, given the growing prominence of the knock and talk as a law enforcement technique and in light of its grave potential for abuse, Ms. Colon-Rivera respectfully requests certiorari review of the decision below.

CONCLUSION

Petitioner Zuleyka Colon-Rivera respectfully requests that this Court grant this petition for a writ of certiorari, and review the proceedings below.

Respectfully submitted on this 16th day of May, 2018.



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