No. _____

In The
Supreme Court of the United States

JAMES ROBERT CHRISTENSEN, JR.,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a private citizen have the right to revoke a law enforcement officer's implied license to enter property to conduct a knock-and-talk by placing a "No Trespassing" sign on their property?

LIST OF PARTIES

The parties to this proceeding include: James Robert Christensen, Jr. (hereinafter "Petitioner") and the State of Tennessee (hereinafter "the State").

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The Supreme Court of Tennessee's opinion, the subject of this petition, has now been published at 517 S.W.3d 60 (Tenn. 2017). (Appendix ("App.") ___) The Tennessee Court of Criminal Appeal's published decision at 2015 Tenn. Crim. App. LEXIS 357 (Tenn. Crim. App. Feb. 3, 2015) affirming Petitioner's conviction is reproduced in the appendix to this petition. (App. ___)

STATEMENT OF JURISDICTION

The Supreme Court of Tennessee issued its decision in the case of *State of Tennessee v. James Robert Christensen, Jr.*, No. W2014-00931-SC-R11-CD, 2017 Tenn. LEXIS 195 (Tenn. Apr. 7, 2017) on April 7, 2017. Claiborne H. Ferguson, Counsel of Record for Petitioner, filed an Application to Extend Time to File a Petition for a Writ of Certiorari with United States Supreme Court Justice Elena Kagan on June 16, 2017. Justice Kagan granted counsel's request on June 21, 2017 and extended the time to file until September 4, 2017.

The Supreme Court will have jurisdiction over this matter because 28 U.S.C. § 1257(a) gives the Court jurisdiction over an appeal of a final judgment rendered by the highest court of a State where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourth Amendment to the United States Constitution states:

> 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.

2. Article I, § VII of the Tennessee Constitution states:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted.

STATEMENT OF THE CASE

Following a jury trial in the Circuit Court of Tennessee at Covington, James Robert Christensen, Jr. (hereinafter "Petitioner") was convicted of resisting arrest in violation of T.C.A. § 39-16-602; promoting the

manufacture of methamphetamine in violation of T.C.A. § 39-17-433; initiating the manufacture of methamphetamine in violation of T.C.A. § 39-17-408; and two counts of possession of a firearm during the commission of a dangerous felony in violation of T.C.A. § 39-17-1324. The pertinent facts that form the basis for review by the Supreme Court of the United States are as follows:

On August 3, 2013, narcotics investigators of the Tipton County Sheriff's Department received orders to investigate a particular purchase of pseudoephedrine based on a tip from a confidential informant. The investigators tracked the purchase of pseudoephedrine to the girlfriend of an individual known to one of the investigators "through [his] law enforcement career." These facts led the investigators to Beaver Creek Lane in Tipton County, Tennessee. That day, the investigators arrived in an unmarked vehicle and plain clothes.

Once there, the investigators happened upon the girlfriend who purchased the pseudoephedrine and inquired about the whereabouts of her boyfriend. After the exchange, the boyfriend walked over to the investigators' location from the neighboring property and told them that he had taken the pseudoephedrine to the house from which he came. Upon gathering this information, the investigators left the first residence and proceeded to go next door. The neighboring residence is the dwelling house of Petitioner.

The record reflects that Petitioner had at least two "No Trespassing" signs and one "Private Property" sign

located in his driveway and elsewhere on his property. In fact, the driveway that the investigators drove down to reach Petitioner's house required them to drive directly past a "No Trespassing" sign. At trial, each investigator testified that they did not see the signs. However, the reliability of such testimony was attacked through Petitioner's witnesses.

The investigators then proceeded to park their vehicle and walk up the driveway in an exercise of what is known as a "knock and talk." Petitioner saw that the investigators were approaching and stepped out onto the porch. At this time, he promptly locked his front door as the investigators were already walking onto the porch. Investigators believed that they smelled an odor that they associated with the illegal manufacture of methamphetamine. The investigators then asked Petitioner for consent to enter the home but were denied. Thereafter, Petitioner demanded that the investigators leave the premises. However, the investigators believed that there were sufficient exigent circumstances to search the home. One investigator proceeded to detain Petitioner while the other kicked open the previously locked front door. Petitioner was ultimately handcuffed following a minor struggle.

Subsequently, additional deputies arrived at the scene while Petitioner was detained. Petitioner eventually stated that methamphetamine was in his freezer after investigators searched the premises for a substantial period of time. The investigators located the methamphetamine lab and promptly disposed of it. They then reinitiated the search and found additional

labs located in a separate deep freezer. The search also unveiled multiple weapons and additional items typically used in the manufacture of methamphetamine.

The investigators later admitted that they did not have probable cause to enter Petitioner's property. In fact, they did not have probable cause until they entered the property – despite several "No Trespassing" signs – mounted on the porch and believed that they smelled an odor associated with the manufacture of methamphetamine. Neither investigator attempted to procure a valid search warrant prior to this exchange.

Petitioner was subsequently indicted in the Circuit Court of Tipton County, Tennessee for the Twenty-Fifth Judicial District on November 4, 2013 on five charges including: (1) resisting arrest; (2) promotion of methamphetamine manufacture; (3) initiation of methamphetamine manufacture; and (4) possession of a firearm during commission of a dangerous felony (two counts). The federal question at issue in this case was initially raised in Petitioner's Motion to Suppress filed on February 20, 2014. Tech. R. at 20-21. Specifically, Petitioner asserted that the "No Trespassing" sign evidenced an expectation of privacy that precluded the officers from making a warrantless entry upon Petitioner's property. Oral argument on the motion was heard on March 7, 2014, after which, the court denied the Motion on the grounds that:

> The officers knew of the purchase and possession of materials used to manufacture meth and were told the materials were delivered to

> the defendant's home . . . and that an active meth lab was in progress. With this knowledge they had the authority to investigate despite the no trespassing signs. When the officers approached the trailer and smelled the strong odor of an active meth cook, that established reasonable grounds for the officers to enter the home and discontinue the meth lab's production.

Tech. R. at 43. Petitioner was ultimately found guilty of the above-referenced charges.

Petitioner submitted his Notice of Appeal to the Circuit Court on May 16, 2014. Tech. R. at 80. The appeal as of right came before the Court of Criminal Appeals of Tennessee at Jackson on February 3, 2015. Petitioner assigned error to the denial of the Motion to Suppress by the Circuit Court. The appellate court subsequently affirmed the Circuit Court's denial of the Motion concluding that "the [No Trespassing] sign in this case would not have prevented the casual visitor or the reasonably respectful citizen from approaching appellant's residence. Therefore, the sign did not revoke the implied invitation. . . . " *State v. Christensen*, 2015 Tenn. Crim. App. LEXIS 357, at *30-31 (Tenn. Crim. App. May 14, 2015).

Thereafter, Petitioner filed an Application for Permission to Appeal to the Tennessee Supreme Court on July 14, 2015, asserting that the circuit court and appellate court erred in denying its Motion to Suppress. For reasons to be discussed below, the Supreme Court

of Tennessee held for the Respondent, the State of Tennessee, and found that Petitioner's claims of a violation of Fourth Amendment protections were unwarranted. Petitioner now files this Petition for Writ of Certiorari to implore the United States Supreme Court to settle a highly convoluted area of law.

REASONS FOR GRANTING PETITION

I. RECENT DECISIONS BY THE SUPREME COURT OF THE UNITED STATES HAVE HAD A PROFOUND IMPACT ON FOURTH AMENDMENT JURISPRUDENCE.

The Fourth Amendment to the United States Constitution provides, in relevant part, 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. . . ." U.S. Const. amend. IV. Similarly, Article I, § VII of the Tennessee Constitution provides that "the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures." Tenn. Const. art. I, § VII. This provision – although not a mirror image of the Fourth Amendment – is considered "identical in intent and purpose." *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968). Furthermore, "federal cases applying the Fourth Amendment should be regarded as 'particularly persuasive.'" *State v. Willis*, 496 S.W.3d 653 (Tenn. 2016) (quoting *State v. Hayes*, 188 S.W.3d 505, 511 (Tenn. 2006)).

The Fourth Amendment has been interpreted to protect homes first and foremost. *Florida v. Jardines*, 569 U.S. 1, 9 (2013) ("But when it comes to the Fourth Amendment, the home is first among equals"). However, it is well-established that "[t]he Fourth Amendment does not . . . prevent *all* investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in . . . 'open fields' – even if those fields are privately owned – because such fields are not enumerated in the Amendment's text." *Jardines*, at 9 (2013) (quoting *Hester v. United States*, 265 U.S. 57 (1924)) (emphasis added). Nonetheless, this Court has previously recognized that the "area 'immediately surrounding and associated with the home' . . . [is] 'part of the home itself for Fourth Amendment purposes.'" *Jardines*, at 8 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). This area, known as the curtilage, is the area "'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). The extent of a home's curtilage is "easily understood from our daily experience." *Id.* (quoting *Oliver*, 466 U.S. at 182).

In *Jardines*, *supra*, this Honorable Court recognized that not every entry upon curtilage is a search for Fourth Amendment purposes. Thus, the so-called "knock and talk" by law enforcement agents is permissible under the Fourth Amendment. This notion prevails because "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." *Jardines*, at 1415 (quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (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." *Id.* "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.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

Given that this Honorable Court permits knock and talks on the premise that they are licenses, the converse implication must also stand true, i.e., that a homeowner may take steps to revoke or otherwise limit these implied licenses. The United States District Court for the Middle District of Florida illustrated this principle as follows:

> [T]he license granted to enter property to knock on a person's door is not unlimited. Rather, it extends unless and until the homeowner provides "express orders" to the contrary. . . . Factors that may aid [in determining the scope of the implied license] include the appearance of the property, whether entry might cause a resident alarm, what ordinary visitors would be expected to do, and what a reasonably respectful citizen would be expected to do.

United States v. Holmes, 143 F. Supp. 3d 1252, 1259 (M.D. Fla. 2015) (internal citations omitted). This license provides a legal framework to the knock and talk strategies employed by law enforcement agencies. However, issues of first impression arise when a homeowner manifests a clear intention to wholly revoke the implied license such that the public-at-large, and especially law enforcement officials, can no longer use an implied license to enter the property in question.

II. THE SUPREME COURT OF TENNESSEE HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT OF THE UNITED STATES.

This case is about the emerging dichotomy between governmental reliance on the doctrine of implied consent to enter private property to conduct a knock and talk and a citizen's ability to revoke implied consent in an exercise of Constitutional privilege. To date, federal circuits and state courts alike are split on whether a "No Trespassing" sign is sufficient to revoke the government's implied license to enter property.

Absent Supreme Court involvement, courts are left with the onerous task of reconciling reasonable expectations of privacy in curtilage with *de facto* irrevocable licenses in the hands of government. *See United States v. Carloss*, 818 F.3d 988, 1004 (10th Cir. 2016) (Gorsuch, J., dissenting) ("A homeowner may post as many No Trespassing signs as she wishes. She might

add a wall or a medieval-style moat, too. Maybe razor wire and battlements and mantraps besides. Even *that* isn't enough to revoke the state's right to enter."). These issues are undoubtedly at the forefront of a growing tension between courts, legal scholars, and ordinary citizens alike.[1]

A. The Supreme Court of the United States' guidance is necessary to settle conflicting precedents across federal and state courts on the exceedingly important issue of whether a private citizen may revoke the public's implied license to enter privately-owned property.

The U.S. Supreme Court reiterated its recognition of an implied license in its opinion authored by the late Justice Antonin Scalia in the landmark case of *Florida v. Jardines*, 569 U.S. 1 (2013). As a general matter, the *Jardines* Court recognized that "the property of every man [is] so sacred, that no man can set his foot upon his neighbour's close without his leave." *Jardines*, 133 S. Ct. at 1415 (quoting 2 Wils. K. B., at 291, 95 Eng.

[1] The issues implicated by the instant case are strong corollaries to the issues presented by *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016). These issues are contemporary and compelling. In fact, Associate Justice Neil Gorsuch listed *Carloss* as one of the ten most significant cases over which he presided. *See* Ephrat Livni, *US Supreme Court nominee Neil Gorsuch made a list of his 10 most significant cases out of 3,000*, *available at* https://qz.com/910654/supreme-court-nominee-neil-gorsuchs-10-most-significant-cases-according-to-gorsuch/ (Feb. 18, 2017).

Rep., at 817.). However, the Court abrogated this principle when it discussed the implied license to enter onto the property of another. Specifically, the Court reasoned that a "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." *Id.* "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." *Id.* Consequently, the Court unwittingly muddled the national Constitutional landscape even more by holding that "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.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

The Supreme Court of Tennessee subsequently relied, in large part, on the *Jardines* reasoning to make its ruling in the instant case. Specifically, the Tennessee Supreme Court analyzed the issue of "whether posting 'No Trespassing' signs near an unobstructed driveway is an express order sufficient to revoke or limit the implied invitation/license such that a police officer may not legitimately approach the residence via the driveway in order to conduct a warrantless knock-and-talk encounter." *State v. Christensen*, 517 S.W.3d 60 (Tenn. 2017). The Court ultimately held that "signs admonishing 'No Trespassing,' in and of themselves, are rarely going to be sufficient to revoke the implied license allowing persons to approach a front door and knock." *Id.* at 76. Further, the court exclaimed that

despite the signage, "the Defendant has failed to demonstrate that he had a *reasonable* expectation that ordinary citizens would not occasionally enter his property by walking or driving up his drive way and approaching his front door to talk with him 'for all of the many reasons that people knock on front doors.'" *Id.* at 78 (quoting *Nieminski v. State*, 60 So. 3d 521, 528 (Fla. Dist. Ct. App. 2011). This reasoning reflects one of many approaches to the issue of whether a No Trespassing sign is sufficient to revoke an implied license to enter property. State and federal courts alike are split over the approach that they will follow. The following subsections will analyze the ever-growing split of authority among courts to show that intervention by the United States Supreme Court is duly warranted, and necessary to settle a tumultuous area of constitutional jurisprudence.

1. There is a split of authority among state courts on this issue.

State courts of last resort are among the most inconsistent when analyzing the issue of whether a No Trespassing sign can revoke a law enforcement officer's ability to enter the private property of another to conduct a knock and talk. This split between state courts illustrates the need for intervention from the United States Supreme Court. *See* SUP. CT. R. 10(b) (stating that the Supreme Court of the United States will grant certiorari only for compelling reasons, and that a compelling reason may be found where a state court of last resort has decided an important federal

question in a way that conflicts with the decision of another state court of last resort). The following cases are representative of the continuously developing area of Fourth Amendment jurisprudence.

In making its decision in *State v. Christensen*, 517 S.W.3d 60 (Tenn. 2017), the Tennessee Supreme Court followed a line of cases that consider the totality of the circumstances approach regarding whether an implied license has been revoked. *Christensen*, at 77 ("Accordingly, we hold that, under the totality of the circumstances, the Defendant's 'No Trespassing' signs posted near his unobstructed driveway were not sufficient to revoke the implied license referred to in *Jardines*."); *See also Powell v. State*, 120 So. 3d 577 (Fla. Ct. App. 2013). In so doing, the court reasoned that "a homeowner who posts a 'No Trespassing' sign is simply making explicit what the law already recognizes: that persons entering onto another person's land must have a legitimate reason for doing so or risk being held civilly, or perhaps even criminally, liable for trespass." *Christensen*, at 76. Moreover, the court reversed lower court decisions by finding that the defendant did not have a reasonable expectation of privacy. *Christensen*, at 77 (citing *Katz v. United States*, 389 U.S. 347 (1967)). The *Christensen* court found that:

> Even if the Defendant had an actual, subjective expectation that his signs would keep all persons from entering his property under all circumstances, a reasonable member of society would not view that expectation as reasonable and justifiable. Rather, a reasonable

> member of society would view the Defendant's "No Trespassing" signs as simply forbidding any unauthorized or illegitimate entry onto his property. In short, the Defendant has failed to demonstrate that he had a *reasonable* expectation that ordinary citizens would not occasionally enter his property by walking or driving up his driveway and approaching his front door to talk with him "for all of the many reasons that people knock on front doors."

Christensen, at 78 (internal citation omitted). This case is representative of the totality of the circumstances approach when determining whether a citizen has revoked an implied license to enter his property. *See Powell v. State*, 120 So. 3d 577 (Fla. Dist. Ct. 2013); *Jones v. State*, 943 A.2d 1 (Md. Ct. Sp. App. 2008); *State v. Kuchera*, 2002 Wash. App. LEXIS 2620 (Wash. Ct. App. Nov. 1, 2002). However, there is marked dissimilarity among courts of last resort across the country.

The Supreme Court of Louisiana had occasion to analyze similar principles in the case of *State v. Roubique*, 421 So. 2d 859 (La. 1982). In that case, the Supreme Court of Louisiana chose to follow the opposite analytical thread than that of the Supreme Court of Tennessee. In *Roubique*, the court examined, in part, whether a sign adorned with "Private Road, No Trespassing" was sufficient to revoke law enforcement's implied license. The court found that the sign, which was posted at the entrance to the defendant's driveway, was "ample evidence of [the defendant's] intent to preserve

his privacy" and the government's entry onto the defendant's property violated the Fourth Amendment of the United States Constitution. *Roubique*, at 862 (citing *Katz v. United States*, 389 U.S. 347 (1967)). This case represents a clear contrast from the reasoning of the Supreme Court of Tennessee. Specifically, the *Roubique* court, in making its holding, has determined that a simple "No Trespassing" sign, and the like, is sufficient to create a constitutionally protected reasonable expectation of privacy in property that would otherwise be accessible via an implied license. This case stands for the proposition that a No Trespassing sign, in and of itself, is sufficient to revoke the public's implied license to enter property. *See also State v. Poulos*, 942 P.2d 901 (Or. Ct. App. 1997).

The Supreme Court of North Dakota takes a more nuanced approach to whether a "No Trespassing" sign can sufficiently revoke the public's implied license to enter property. That court's approach appears to be premised, in large part, on the location of the sign at issue. The court's opinion in *State v. Kochel*, 744 N.W.2d 771 (N.D. 2008) is illustrative. In *Kochel*, the defendant resided in a mobile home with a "fully enclosed addition with its own storm door." *Kochel*, at 773. The defendant displayed a "no hunting or trespassing" sign on the "handrail next to the steps" of the addition. *Id.* Despite the appropriate signage, law enforcement officers trespassed onto the property during a routine welfare check and discovered drug paraphernalia within the protected area of the addition. *Id.* In making its holding, the court recognized the standard set

out by the United States Supreme Court in *Oliver v. United States*, 466 U.S. 170, 179 (1984). *Kochel*, at 773 ("The United States Supreme Court has determined 'no trespassing' signs in open fields cannot effectuate an increased expectation of privacy.") (internal citation omitted). However, the court placed clear significance on the location of the sign at issue. *Kochel*, at 733 ("[A] 'no trespassing' sign on a structure, particularly a residence, indicates a reasonable expectation of privacy."). Specifically, the court reasoned that

> A "no trespassing" sign posted on a residence indicates uninvited guests, including law enforcement officers lacking a warrant, are unwelcome. . . . The "no hunting or trespassing" sign alerts members of the public that [the defendant's] addition is a private area not accessible without the resident's permission. Any uncertainty that the addition is an integral part of the home where privacy is reasonably expected is removed by the presence of the sign.

Id. at 774; *but see State v. Mittleider*, 809 N.W.2d 303 (N.D. 2011)

> Here, [the defendants] posted "no trespassing" signs around their farmstead, and it is unclear from the record how closely the signs were posted to the entrance . . . any member of the public would have entered the farmstead in the same manner the officers did, and there was no evidence "that there was a 'no trespass' sign mounted on a post or immediately to the edge of the road[.]"

The Supreme Court of North Dakota's approach tends to suggest that a "No Trespassing" sign alone may constitute a sufficient revocation of the public's implied license. However, its level of emphasis on the location of the sign makes its approach relatively unique.

Courts in other jurisdictions have held that the public's implied license to enter property can be effectuated by "No Trespassing" signs *or* physical barriers. This approach is illustrated in *State v. Dixson*, 766 P.2d 1015 (Or. 1988). In *Dixson*, the Supreme Court of Oregon held that there are several alternative methods to establish a reasonable expectation of privacy in property beyond the residence's curtilage. *Dixson*, at 1024. The court had occasion to analyze this constitutional principle after law enforcement officers ignored at least three "No Hunting" signs while they investigated a confidential tip that claimed that marijuana was being grown on the defendant's property. The court expressly recognized that the public, and law enforcement officers alike, may hold an implied license to enter property of another. *Dixson*, at 1024 ("In this state, with its expanses of rough and open country, hiking, camping and the like commonly occur on land that is owned by large companies and individuals.") (internal citation omitted). However, this license can be revoked. *Id.* ("A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as

fences, *or* by posting signs.") (emphasis added). The court also reasoned that:

> [O]wners of even large tracts may, at some expense, take steps to keep out intruders. In this society, signs, such as "No Trespassing" signs, the erection of high, sturdy fences and other, similar measures are all indications that the possessor wishes to have his privacy respected. Allowing the police to intrude into private land, regardless of the steps taken by its occupant to keep it private, would be a significant limitation on the occupant's freedom from governmental scrutiny. . . . This rule will not unduly hamper law enforcement officers in their attempts to curtail the manufacture of and trafficking in illegal drugs, because it does not require investigating officers to draw any deduction other than that required of the general public: if land is fenced, posted *or* otherwise closed off, one does not enter it without permission or, in the officers' situation, permission or a warrant.

Id. (emphasis added). The approach of the Supreme Court of Oregon reflects an "either or" approach to the issue at hand. *See People v. Scott*, 593 N.E.2d 1328 (N.Y. 1992); *Cooksey v. State*, 350 S.W.3d 177 (Tex. Ct. App. 2011); *State v. Hubbel*, 951 P.2d 971 (Mont. 1997). This approach is distinct from the aforementioned cases, and thus, is further representative of the split of authority among state courts on this issue.

The cases discussed above are representative of the different approaches to which state courts adhere

when examining the crossroad between the public's (and government's) ability to utilize an implied license to enter private property. These cases reflect an inconsistent split between the state courts. This variation among state courts demonstrates the necessity of intervention by the Supreme Court of the United States. Absent such intervention, the constitutional landscape at issue will be further muddied across jurisdictions. Accordingly, Petitioner prays to this Honorable Court to grant its Petition for Writ of Certiorari on this basis in accordance with Supreme Court Rule 10(b).

2. There is a split of authority among federal circuits on this issue.

Federal circuits are fraught with inconsistences similar to state courts with regard to whether an individual can effectively revoke the government's implied license to traverse onto private property. This split of authority among the circuits demonstrates the need for the Supreme Court of the United States to provide overdue guidance on the issue at hand. *See* SUP. CT. R. 10(a) (stating that the Supreme Court of the United States will grant certiorari only for compelling reasons, and that a compelling reason may be found where a United States court of appeals has decided an important federal question that conflicts with a decision by a state court of last resort); SUP. CT. R. 10(c) (stating that the Supreme Court of the United States will grant certiorari only for compelling reasons, and that a compelling reason may be found where a United States court of appeals has decided an important question of

federal law that has not been, but should be, settled by this Court). The following cases will demonstrate why this Honorable Court should grant this Petition for Writ of Certiorari.

The United States Court of Appeals for the Tenth Circuit had occasion to analyze the instant issue in the case of *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016). This case is swiftly becoming one of the preeminent cases in this area of the law, in large part, because of the poignant dissent authored by Supreme Court Justice Neil Gorsuch. *See generally Carloss*, at 1015 (" . . . I just do not see the case for struggling so mightily to save the government's cause with arguments of our own devise – especially when what arguments we are able to muster suffer so many problems of their own and the benefits of exposing them to at least a modest encounter with the adversarial process seem too obvious.") (Gorsuch, J., dissenting). The analysis of this case is substantially similar to the underlying case that serves as the basis for this Petition.

In *Carloss*, law enforcement agents received a tip that the defendant was in possession of a weapon and selling methamphetamine out of his home. *Carloss*, at 990. Upon receiving this information, the officers went to the defendant's home to conduct a routine knock and talk. *Id.* When the officers arrived, "[t]here was no evidence of any fence or other enclosure around the house or yard, but there were several 'No Trespassing' signs placed in the yard and on the front door." *Carloss*, at 990; Compare *State v. Christensen*, 517 S.W.3d at 67 ("The Defendant stated that the property was posted

with four or five [No Trespassing] signs"). The officers then ignored the signs and approached the residence to conduct the above-referenced knock and talk. *Carloss*, at 990. The defendant eventually met the officers, and allowed them into the residence. *Id.* at 991. While inside, the officers observed drug paraphernalia within the house, and returned later to execute a search warrant. *Id*. The defendant ultimately entered a conditional guilty plea which led to the appeal heard by the Tenth Circuit. *Id.*

The issue on appeal became whether "the search of his home . . . was illegal because the officers got the warrant based on information that they obtained in violation of the Fourth Amendment when they trespassed onto the curtilage of his home – the front porch – to knock on the front door, seeking to speak with him." *Carloss*, at 992; Compare *State v. Christensen*, 517 S.W.3d at 65. In response, the court in *Carloss* found that "the presence of a 'No Trespassing' sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock. Such signs, by themselves, do not have the talismanic quality [the defendant] attributes to them." *Carloss*, at 995 (citing *Davis v. City of Milwaukee*, No. 13-CV-982-JPS, 2015 U.S. Dist. LEXIS 111054, at *13 (E.D. Wis. Aug. 21, 2015)). The Tenth Circuit reasoned that the signs "would not have conveyed to an objective officer, or member of the public, that he could not walk up to the porch and knock on the front door and attempt to contact the occupants." *Id.*

This reasoning was called into question by Justice Gorsuch in his dissent. *Carloss*, at 1010 (Gorsuch, J.) ("[S]everal courts have already specifically held (in conflict with our decision today) that No Trespassing signs like those at issue here *can* revoke the implied license to enter the curtilage when it comes to lay visitors and police officers alike."). Nonetheless, the majority opinion controls and stands for the proposition that a No Trespassing sign will not revoke the implied license to encroach upon property.

District courts in the Ninth Circuit take the contrasting approach.[2] Specifically, the United States District Court for the Southern District of California held that the presence of No Trespassing signs, in and of themselves, are sufficient to revoke the public's implied license to enter property. *Bush v. Cnty. of San Diego*, 2016 U.S. Dist. LEXIS 143517 (S.D. Cal. 2016). In that case, the plaintiff sued the defendant under a five-count complaint that included claims for unreasonable searches, seizures, and trespass. The disputed facts showed that the defendants (law enforcement officers) entered onto the plaintiff's curtilage to conduct

[2] The United States Court of Appeals for the Ninth Circuit has held that "express orders from the person in possession [of property] against any possible trespass" will defeat the knock and talk exception. *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964). The rule of law promulgated in this case is directly on point with the issues of the instant Petition. However, the case will not be analyzed in depth because it lacks the specific presence of a "No Trespassing" sign. Nonetheless, a "No Trespassing" sign is consistent with any express order contemplated by the court, which would tend to invalidate warrantless knock and talks.

a knock and talk despite the presence of a No Trespassing sign, a "Beware of Dog" sign, and a chain link fence with barbed wire at the top. *Bush*, at *2-3. The issue arose when the officers opened the closed gate, approached the home, and knocked on the front window. *Id.* The officers' actions culminated in the killing of the plaintiff's dog, and the above-referenced lawsuit. In its ensuing Opinion, the court recognized that, as a general matter, "features of a property can give rise to an implied license to allow a visitor (whether law enforcement or not) to enter the curtilage." *Id.* at *11. However,

> No reasonable person could have stood at the front gate, in plain view of such signage, and concluded they had an implied invitation to enter. The "NO TRESPASSING" sign *alone* explicitly communicates that no such invitation exists. The knock and talk exception therefore cannot justify the deputies' entry upon the property.

Id. (emphasis added). The holding in this case is in stark contrast with that of the Tenth Circuit Court of Appeals. This case stands for the proposition that a "No Trespassing" sign, in and of itself, is sufficient to revoke the implied license.

The United States Court of Appeals for the Sixth Circuit had an opportunity to analyze this issue in *United States v. Hopper*, 58 Fed. Appx. 619 (6th Cir. 2003). Specifically, the court affirmed the appellant's drug trafficking convictions over objections premised, in part, on the police's illegal trespass. *Hopper*, at 621.

The facts of *Hopper* showed, in relevant part, that the officers drove past three No Trespassing signs to conduct a knock and talk. *Id.* This investigation ultimately culminated in the discovery of drug paraphernalia used in cultivating marijuana, and the appellants eventual conviction for multiple drug offenses. The *Hopper* court reached its conclusion because "the police did not violate Appellant's Fourth Amendment rights with respect to his curtilage." *Hopper*, at 623. The court reasoned that:

> The "No Trespassing" signs . . . were within visual distance of the [Appellant's] home. Appellants home, however, *was not enclosed*. Further, Appellant makes no argument that the area where the "No Trespassing" signs were posted was put to any special use. Fourth and finally, Appellant took no special measures to protect the area from open observation.

Id. at 624 (emphasis added). Accordingly, whether the property was enclosed seems to be the dispositive issue for the Sixth Circuit. In making its ruling, the Court held that knock and talks are constitutionally permissible despite several "No Trespassing" signs near the driveway of the property.

The several approaches to this issue referenced above evidence the need for the United States Supreme Court to settle this longstanding and nuanced issue. Accordingly, Petitioner prays to this Honorable Court to grant its Petition for Writ of Certiorari on this basis pursuant to Supreme Court Rule 10(a) & (c).

III. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO SETTLE A FRACTURED AND INCONSISTENT AREA OF CONSTITUTIONAL JURISPRUDENCE.

The instant case presents this Honorable Court with an opportunity to settle an increasingly variant area of law that is gaining traction at national[3] and local[4] levels alike. The federal question at issue is properly summarized as whether a private citizen can revoke a law enforcement officer's implied license to enter onto private property to conduct a colloquially termed knock and talk. The answer to this oft-recurring inquiry can only be answered by two anticlimactic responses: "maybe" or "it depends." The aforementioned split of authority between state and federal courts renders these non-committal responses as the only appropriate answers, which, unsurprisingly, turn on the jurisdiction in question. *Christensen* provides the court with an ideal vehicle to reconcile a complex and disjointed area of law. The analyses provided by Chief Justice Jeffrey Bivins, authoring the majority

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[3] Orin Kerr, *The Fourth Amendment and "no trespassing" signs*, The Washington Post, *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/12/the-fourth-amendment-and-no-trespassing-signs/?utm_term=.ce09e15f0760 (Apr. 12, 2017).

[4] Stephen Elliot, *The Tennessee Supreme Court Keeps Reversing Itself, and Criminal Defense Attorneys Are Worried*, The Nashville Scene, *available at* http://www.nashvillescene.com/news/features/article/20857900/the-tennessee-supreme-court-keeps-reversing-itself-and-criminal-defense-attorneys-are-worried (Apr. 13, 2017).

opinion, and Justice Sharon Lee, authoring the dissenting opinion, are a microcosm of the growing tension between numerous jurisdictions. The record of the case is well-developed and the issues are compelling.

In the instant case, Petitioner takes a position in line with several state and federal courts, i.e., that a "No Trespassing" sign should be sufficient to revoke the public's implied license to enter property. Therefore, the law enforcement officers in the case-at-bar violated Petitioner's reasonable expectation of privacy by entering onto his property and curtilage after ignoring multiple posted No Trespassing signs. Petitioner relies on several of the above-referenced cases in support of this contention. Additionally, the artful words of dissenting Justice Sharon Lee strike particular accord with Petitioner's argument:

> Today, the Court holds that the posting of multiple "No Trespassing" signs is not enough to protect our constitutional rights against a warrantless search and that it may take "a fence and a closed gate that physically block access to the front door of a house" to revoke the implied license to enter the land around a residence.
>
> I disagree that we must barricade our homes with a fence and a closed gate, and perhaps even a locked gate, to protect our constitutional rights against warrantless searches. *This option is rarely convenient, affordable, practical, or even possible.* Revocation of implied consent to enter one's property should be available to all – not just to those citizens who

> can afford to erect a fence and a gate and live in an area where this form of barricade is possible. . . . By ignoring that "No Trespassing" signs, the officers physically intruded into [Petitioner's] constitutionally protected area and violated his reasonable expectation of privacy.

Christensen, at 79 (emphasis added). This language is of particular interest because it takes the approach Petitioner advances, and it is analogous to the opinions of relevant state and federal courts on this issue.

In the instant case, it is undisputed that Petitioner is a man of modest means. Moreover, his property consists of more than three acres of land. The Majority's insistence that it may take "a fence and a closed gate that physically block access to the front door of a house" cannot comport with protections of the Fourth Amendment, which were intended to apply to individuals regardless of wealth. In effect, this holding stands as its own figurative barrier to Fourth Amendment protection when an individual cannot afford their own physical barriers. Absent Supreme Court involvement, this holding leads to the exploitation of poor citizens and stands for the proposition that some Americans, regardless of their intent, do not deserve to be protected by the Fourth Amendment.

Additionally, the Majority in *Christensen* asserts that a "No Trespassing" sign, in plain view to all entrants, is insufficient to unambiguously convey to a reasonable person that entry onto his property is forbidden. *See Christensen*, at 78.

> Even if the Defendant had an actual, subjective expectation that his signs would keep all persons from entering his property under all circumstances, a reasonable member of society would not view that expectation as reasonable and justifiable. Rather, a reasonable member of society would view the Defendant's "No Trespassing" signs as simply forbidding any unauthorized or illegitimate entry onto his property.

To this point, Petitioner argues that the Majority has misunderstood what society – and indeed other jurisdictions – recognize as a self-evident truth, i.e., that a simple "No Trespassing" sign is sufficient to create a reasonable expectation of privacy on an individual's property. *See Carloss*, at 1011 ("[Y]ou can't help but wonder if millions of homeowners (and solicitors) might be surprised to learn that even a long line of clearly posted No Trespassing signs are insufficient to revoke the implied license to enter a home's curtilage – that No Trespassing signs have become little more than lawn art.") (Gorsuch, J., dissenting). Petitioner also contends that the "No Trespassing" signs at issue are not as ambiguous as the Majority contemplates. *See Christensen*, at 80 ("A person need not have a law degree or an understanding of the various legal nuances of 'trespass' discussed by the Court to know that these signs meant visitors were not welcome."). These arguments, taken together, reflect the profound concerns that proliferate contemporary court systems at both federal and state levels. The arguments advanced by each party are analogous to arguments advanced by

parties across this nation. Direction from the United States Supreme Court is overdue and clearly warranted. For these reasons, Petitioner prays to this Honorable Court to grant certiorari to settle such a fractured area of law.

CONCLUSION

This Petition for Writ of Certiorari to the Supreme Court of the United States should be granted for the foregoing reasons.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
June 2, 2016 Session Heard at Nashville

STATE OF TENNESSEE v.
JAMES ROBERT CHRISTENSEN, JR.

Appeal by Permission from the Court of Criminal Appeals, Circuit Court for Tipton County
No. 7799 Joseph H. Walker III, Judge

No. W2014-00931-SC-R11-CD – Filed April 7, 2017

James Robert Christensen, Jr., ("the Defendant") was convicted by a jury of resisting arrest, promoting the manufacture of methamphetamine, initiating the manufacture of methamphetamine, and two counts of possession of a firearm during the commission of a dangerous felony. Prior to trial, the Defendant moved to suppress evidence obtained through what he claimed was an illegal search. The trial court denied the Defendant's motion and also denied the Defendant's motion seeking an interlocutory appeal. On direct appeal following trial, the Court of Criminal Appeals affirmed the trial court's judgments, including the trial court's ruling on the suppression issue. We granted the Defendant's application for permission to appeal in order to address the legality of the police officers' warrantless entry onto the curtilage of the Defendant's residence. We hold that the officers' entry onto the Defendant's property was constitutionally

permissible in spite of the posted "No Trespassing" signs near the Defendant's unobstructed driveway. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Criminal Appeals Affirmed

JEFFREY S. BIVINS, C.J., delivered the opinion of the Court, in which CORNELIA A. CLARK and HOLLY KIRBY, JJ., joined. SHARON G. LEE, J., filed a dissenting opinion. ROGER A. PAGE, J., not participating.

Charles A. Brasfield (at trial and on appeal) and Amber G. Shaw (at trial), Covington, Tennessee, for the appellant, James Robert Christensen, Jr.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; Rachel E. Willis, Senior Counsel; Caitlin Smith, Assistant Attorney General; D. Michael Dunavant, District Attorney General; and James Walter Freeland, Jr., Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

Factual and Procedural Background

In August 2013, two law enforcement officers drove down the Defendant's unobstructed driveway, parked near his residence, and walked up to the Defendant's front porch. The Defendant opened his front

door, stepped onto his porch, and closed and locked the front door behind him. After the Defendant opened his door, the officers smelled the odor of methamphetamine being manufactured. They asked the Defendant for consent to enter his residence, but the Defendant refused to give consent. One of the officers then forced open the front door, while the other officer detained the Defendant. Inside the residence, the entering officer discovered an active methamphetamine lab, along with several inactive labs, various items commonly associated with the manufacture of methamphetamine, and several guns. The Defendant subsequently was indicted on one count each of resisting arrest, promoting the manufacture of methamphetamine, and initiating the manufacture of methamphetamine, and two counts of possession of a firearm during the commission of a dangerous felony.

Prior to trial, the Defendant filed a motion to suppress evidence, claiming that the evidence had been seized as the result of an unlawful search because he had posted "No Trespassing" signs near his driveway. The Defendant asserted that the officers' entry onto his property without a warrant violated both the United States and Tennessee Constitutions. After a hearing, the trial court denied the motion. The Defendant then filed a motion for interlocutory appeal, which the trial court also denied. Accordingly, the Defendant proceeded to a jury trial, and he was convicted as charged. The Court of Criminal Appeals affirmed the Defendant's convictions and sentences. *State v.*

Christensen, No. W2014-00931-CCA-R3-CD, 2015 WL 2330185, at *11 (Tenn. Crim. App. May 14, 2015).[1]

Before this Court, the Defendant challenges only the denial of his motion to suppress. We summarize below the relevant proof adduced at the suppression hearing and the trial.[2]

On August 3, 2013, Investigators Michael Green and Brent Chunn, narcotics investigators for the Tipton County Sheriff's Office, went to a residence on Beaver Creek Lane in Tipton County after receiving information regarding a pseudoephedrine purchase at a Kroger by Mariah Davis. They also received information from an informant named Kyle Wolfe regarding an individual named Cody Gatlin, who was in a relationship with Ms. Davis. Investigator Green was familiar with Mr. Gatlin "through [his] law enforcement career."

At this residence, the investigators spoke with Ms. Davis, Mr. Gatlin, and John Harkness.[3] The investigators first spoke with Ms. Davis and questioned her

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[1] Judge John Everett Williams filed a separate opinion, concurring in part and dissenting in part. *See Christensen*, 2015 WL 2330185, at *11 (Williams, J., concurring in part and dissenting in part).

[2] Because the Court of Criminal Appeals also evaluated the sufficiency of the evidence underlying the Defendant's firearms convictions, that court's opinion contains a more detailed summary of the proof adduced at trial. *See Christensen*, 2015 WL 2330185, at *1-4.

[3] Mr. Harkness, the owner of the residence and Mr. Gatlin's father, was deceased by the time of the suppression hearing.

about her pseudoephedrine purchase. Initially, she told the investigators that she had taken the medicine to her grandmother's house in Mason. The investigators then asked if Mr. Gatlin was home. While Mr. Gatlin was not initially present, he eventually walked over from the Defendant's residence next door, about forty to fifty feet away. During this time, Investigator Green observed the Defendant, over at his residence, looking "out [his] screen door over to where [they] were."

When the investigators asked Mr. Gatlin about the pseudoephedrine purchase, he replied that he had taken the pills next door to the Defendant, who was in the process of using them to make methamphetamine. At that point, the investigators backed down Mr. Harkness' driveway and drove thirty to forty feet to the Defendant's driveway next door. The investigators then drove down the Defendant's driveway and parked near the Defendant's trailer home.

Investigator Green described the Defendant's driveway as being gravel and approximately sixty to seventy yards long, with a sign near the roadway that said "no spraying." He did not recall, however, seeing a "No Trespassing" sign. Investigator Chunn did not recall seeing any posted signs when they entered the Defendant's property. Because it was summertime, the grass was very tall. Investigator Green estimated that the grass "would come up probably to my chin, and I'm six three."

As the officers walked up to the Defendant's front porch, the Defendant, holding a cane, opened the door

and walked out to meet them. As soon as the Defendant opened the door, both investigators smelled an overwhelming odor associated with the manufacture of methamphetamine, even though the Defendant was several feet from the investigators at the time. Investigator Green explained that the smell differed from methamphetamine in its finished product state, in that

> [w]hen the chemical reaction is actually taking place, your smells are louder, you know. And at the finished product you've basically just got a powder there that maybe if you open a bag you'll get a hit [sic] of starter fluid or something, but nothing like it is when it's being manufactured.

From his training with methamphetamine, Investigator Green knew that methamphetamine labs were "very volatile," in that they could catch on fire quickly.

As the investigators explained to the Defendant why they were there, the Defendant denied any illegal activity. The investigators asked for consent to enter the residence because the Defendant initially seemed cooperative, and, according to Investigator Green, he "would much rather have consent than . . . just have to kick a door in." When the Defendant denied consent, however, the investigators decided to enter the trailer "[d]ue to . . . exigent circumstances." According to Investigator Green, there was no time to obtain a search warrant because

> Methamphetamine is basically, it's starter fluid, ammonium nitrate. It's a bomb in a bottle. It builds up pressure in a bottle. If you're

> not there to release that pressure, it's going to blow out, blow up, whatever you want to call it. So exigent circumstances, it's I don't have time to go get a search warrant. I've got to get in that house and make it safe right now. If I wait, it's going to blow up on us.

Investigator Chunn forced open the locked front door to the residence and entered to "make sure no one else was inside," while Investigator Green attempted to detain the Defendant. Investigator Green and the Defendant engaged in a struggle, and Investigator Chunn, after "clear[ing] the residence," stepped back outside to assist in apprehending the Defendant. While Investigator Green struggled to handcuff the Defendant, the Defendant called for "Bear," which Investigator Green later learned was a dog. The Defendant also screamed for his mother, who was in the other trailer on the property, to call 1-800-THE-FIRM.[4]

Investigator Green confirmed that the Defendant probably told him at some point to get off his property but stated that it was after Investigator Green attempted to detain him. Investigator Chunn recalled that, when they arrived on the Defendant's property, the Defendant asked the officers some type of question as to why they were there, but he did not recall the Defendant telling them to get off his property at that point.

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[4] As the Court of Criminal Appeals noted, "1-800-THE-FIRM is the number for the Cochran Firm, established by the late Johnnie Cochran." *Christensen*, 2015 WL 2330185, at *1.

At approximately the same time they had detained the Defendant, the patrol deputies arrived, and Investigator Green had the Defendant sit down and provided him some water. At that time, the Defendant said, "It's in the freezer. It's in the freezer." Investigator Green then yelled to Investigator Chunn, who was inside the residence with the other officers, that the lab was located in the freezer. Investigator Chunn brought the active lab outside, and at some point, the officers had to relieve pressure in the bottle.

Upon entering the Defendant's residence, Investigator Green found the house to be "very unkept." Additionally, he observed the following:

> When I entered I noticed there was a bolt action 410 pistol right at the door, a 410 shotgun and a rifle on the couch. . . . And there was – Investigator Chunn had located the active meth lab and took it out, and then we saw remnants of, you know, older cooks, several cans of empty Coleman fuel, and then we located the ten separate one-pot labs in the freezer.

Investigator Green clarified at trial that the pistol at the door actually was a 410 shotgun that had been sawed off. The sawed-off shotgun was loaded with two or three rounds. The other 410 shotgun had a laser on the barrel. Investigator Green believed the Defendant "intended to go armed" even though the guns were inside the locked residence.

Investigator Chunn confirmed that the active methamphetamine lab was found in the refrigerator freezer. He noted that it was uncommon to find an active lab in the freezer but that the Defendant told them later in a statement that he placed the lab in the freezer "to stop the reaction process so he would be able to restart the lab at a later date or sometime later." Investigator Chunn estimated that it takes approximately one to four hours to manufacture methamphetamine using the "shake and bake" method. He could not say, however, how close the active lab was to completing the manufacturing process when they found it at the Defendant's residence.

The officers found ten "already cooked off" labs located in a deep freezer inside the residence. The officers also found:

> one pound of drain opener or lye; a 32-ounce bottle of drain opener liquid; four empty Coleman cans; one-half gallon of Coleman; two jars with Coleman fuel; . . . eight [hydrochloric acid] generators; a bag of live trash; a bag of Epsom salt; and the empty box of pseudoephedrine, the box itself that had just been purchased.

Investigator Chunn identified a picture of the bathtub in the master bathroom, which contained "a bag of dog food with empty, numerous empty bottles that were previous methamphetamine labs."

The officers wanted to leave the Defendant's residence as quickly as possible because of its condition.

They requested a methamphetamine task force clean-up truck, which arrived at the scene and "dismantled [the active lab] and took away all the hazardous materials." Investigator Chunn confirmed that the Defendant's residence was quarantined, meaning that it was considered unsuitable for habitation given that it had been contaminated with methamphetamine.

Tammy Atkins testified that she knew the Defendant through her church. She regularly traveled through the local neighborhoods "witnessing" and kept a journal of her experiences. On July 13, 2013, Ms. Atkins was on Beaver Creek Road but was not supposed to go on properties with "No Trespassing" signs. She observed that the Defendant's property had several "No Trespassing" signs posted, despite the high grass. Ms. Atkins identified several of the Defendant's "No Trespassing" and "Private Property" signs in photographs that were admitted into evidence.

The Defendant testified that he now lived in his mother's residence, which is on the same property and next door to the residence where he was living on August 3, 2013. The Defendant identified a photograph of a "No Trespassing" sign which he stated was at the beginning of the driveway onto the property, and this photograph was admitted into evidence. The Defendant stated that the property was posted with four or five such signs.

The Defendant testified that, when he looked outside and saw the officers at Mr. Gatlin's father's residence, he shut and locked his front door and "exited out

the back door, walked around and stood on the front porch." He explained that he locked his front door from the inside, so when he was standing on the front porch, he had no immediate access to get inside the front door.

The Defendant testified that the following occurred when the officers arrived on his property:

> Well, I saw them get out of the vehicle and come walking up to me. And I asked them, Could I help you? I don't know if you've noticed this or not, but you passed "no trespassing" signs to get here. If you don't have a search warrant, you need to leave my property. What you're doing is unconstitutional.

The officers asked for permission to enter his residence, which he denied and told them to leave the property. At that time, Investigator Green told the Defendant that he was going to detain the Defendant. The Defendant placed his arms out but asked that he not be handcuffed behind his back because of his left arm being dislocated and broken so many times. According to the Defendant, Investigator Chunn said, "oh we're breaking your arm. We're handcuffing you behind your back." When the Defendant resisted, "[t]hey started punching [him] and kicking [him] and choking [him]." He denied that he "freaked out" during the struggle due to being under the influence of methamphetamine. Rather, he asserted that he was scared of the pain the officers were going to inflict by breaking his arm.

A video recording made by the "dash cam" of one of the reporting patrol cars was admitted into evidence and established that the Defendant's driveway was not blocked by any gates or other physical obstructions.

At the conclusion of the proof at trial, the jury deliberated and convicted the Defendant of all charged offenses. The trial court subsequently sentenced the Defendant to an effective sentence of three years' incarceration, followed by eight years suspended to supervised probation. On direct appeal, the Defendant argued that the trial court erred in denying his motion to suppress and that there was insufficient evidence to support his firearms convictions. The Court of Criminal Appeals affirmed the Defendant's convictions and sentences. *Christensen*, 2015 WL 2330185, at *11. Judge John Everett Williams filed a separate opinion, concluding that, by posting "No Trespassing" signs, the Defendant had revoked any implied consent for the officers to enter his property without a warrant. *Id.* at *11 (Williams, J., concurring in part and dissenting in part). We subsequently granted the Defendant's application for permission to appeal on the suppression issue. In our Order granting the application, we noted our particular interest in "(1) the effect, if any, of the 'unlicensed physical intrusion' definition of a search as articulated in *Florida v. Jardines*, 133 S. Ct. 1409 (2013); and (2) if the officers' entry into the curtilage of [the Defendant's] home constituted a search, whether it was supported by probable cause and the existence of exigent circumstances."

Standard of Review

In evaluating whether the trial court's ruling on a suppression motion was correct, we consider the proof adduced at both the suppression hearing and at trial. *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998). Questions regarding the witnesses' credibility, "the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, we will uphold the trial court's factual findings unless the preponderance of the evidence is otherwise. *Id.* However, where the trial court has applied the law to the facts, we will conduct a de novo review. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Because the State is the prevailing party, it is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Odom*, 928 S.W.2d at 23.

Analysis

The Fourth Amendment to 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, and no Warrants shall issue, but upon probable cause. . . ." U.S. Const. amend. IV. "The purpose of the prohibition against unreasonable searches and seizures under the Fourth Amendment is to 'safeguard the privacy and security of individuals against

arbitrary invasions [by] government[al] officials.'" *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

Likewise, Article I, section 7 of the Tennessee Constitution provides that "the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures" and that general warrants lacking particularity or evidentiary support "ought not to be granted." Tenn. Const. art. I, § 7. This Court has stated that the Tennessee Constitution's search and seizure provision is "identical in intent and purpose with the Fourth Amendment." *Sneed v. State*, 423 S.W.2d 857, 860 (1968); *see also*, *e.g.*, *State v. Scarborough*, 201 S.W.3d 607, 622 (Tenn. 2006). Accordingly, "under both the federal and state constitutions, a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Yeargan*, 958 S.W.2d at 629.

Jardines

The issue before us is whether Investigators Green and Chunn engaged in an unconstitutional intrusion onto the Defendant's property when they drove down the Defendant's unobstructed driveway near which were posted "No Trespassing" signs. This is an issue of first impression before this Court.

The text of both the Fourth Amendment and Article I, section 7 refers to "houses." Therefore, when a police officer obtains information by physically intruding into someone's house, "a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *Jardines*, 133 S. Ct. at 1414 (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)) (internal quotation marks omitted); *see also Lester v. State*, 393 S.W.2d 288, 289-90 (Tenn. 1965) (stating that a search within the meaning of the Tennessee Constitution occurs when the police examine "a man's home . . . with a view to the discovery of . . . some evidence of guilt"). Additionally, the curtilage, or the area immediately surrounding and associated with a particular house, also is protected by our constitutions. *See Jardines*, 133 S. Ct. at 1414-15; *State v. Talley*, 307 S.W.3d 723, 729 (Tenn. 2010) (stating that Article 1, section 7 of the Tennessee Constitution "protect[s] the curtilage, which is defined as any area adjacent to a residence in which an individual can reasonably expect privacy"); *State v. Prier*, 725 S.W.2d 667, 671 (Tenn. 1987) ("To make explicit what is unmistakably implicit in our cases and the federal cases, the curtilage is entitled to the same constitutional protection against ground entry and seizure as the home.").

There is no bright-line rule delineating the inclusion or exclusion of a given driveway within a house's curtilage for Fourth Amendment purposes. *See* Vanessa Rownaghi, Comment, *Driving Into Unreasonableness: The Driveway, The Curtilage, and Reasonable Expectations of Privacy*, 11 Am. U. J. Gender Soc. Pol'y

& L. 1165, 1165-67 (2003). Because the inclusion of the Defendant's driveway within the curtilage of the Defendant's residence does not impact our resolution of the issues before us, we will assume, without deciding, that the driveway was part of the curtilage.[5]

Although a home's curtilage is constitutionally protected against unreasonable searches by the government, not every entry upon a curtilage is a search. Rather, as the Supreme Court in *Jardines* recently explained,

> "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 (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. . . . 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, 469 (2011).

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[5] Property outside of a residence's curtilage is considered "open fields," and a resident is not entitled to Fourth Amendment protections as to evidence collected from open fields. *See Oliver v. United States*, 466 U.S. 170, 181 (1984) (holding that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers").

Jardines, 133 S. Ct. at 1415-16 (parallel citations omitted). As expressed by the United States Court of Appeals for the Ninth Circuit more than fifty years ago,

> 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 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)[6]; *see also*, *e.g.*, *Nieminski v. State*, 60 So. 3d 521, 526 (Fla. Dist. Ct. App. 2011) (noting that "a citizen's encounter, including a knock and talk, is not regarded as a search or seizure" but is, rather, "a purely consensual encounter, which officers may initiate without any objective level of suspicion") (citations and internal quotation marks omitted).

Our Court of Criminal Appeals has recognized that a so-called "knock-and-talk" by police officers is not prohibited by either the federal or state constitutions. *See, e.g.*, *State v. Cothran*, 115 S.W.3d 513, 522

[6] Prior to *Jardines*, the United States Court of Appeals for the Ninth Circuit recognized that the "honest intent" language of *Davis* was somewhat problematic in light of the United States Supreme Court's "rejection of good faith, subjective intent tests to gauge Fourth Amendment violations." *United States v. Perea-Rey*, 680 F.3d 1179, 1187 (9th Cir. 2012).

(Tenn. Crim. App. 2003) (holding that a police officer may approach the front door of a house in order to investigate a complaint or to conduct other official business because "[a] sidewalk or pathway leading from a public street to the front door of a residence represents an 'implied invitation' to the public to use a pathway" and recognizing that "[p]olice officers, who are conducting official police business, are considered members of the general public") (citing *State v. Harris*, 919 S.W.2d 619, 623 (Tenn. Crim. App. 1995)). In short,

> [w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.

Kentucky v. King, 563 U.S. 452, 469-70 (2011). Indeed, "even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time." *Id.* at 470.

Thus, a so-called "knock-and-talk" is not a "search" as that term is understood within the context of the Fourth Amendment, at least if the intrusion is conducted within the scope of the implicit license recognized by the Supreme Court in *Jardines*. Rather, only if an officer's conduct in approaching a front door "objectively reveals a purpose to conduct a search," such as by bringing a drug-sniffing dog onto the front porch,

will his approach offend the Fourth Amendment. *Jardines*, 133 S. Ct. at 1417-18; *see also People v. Frederick*, 886 N.W.2d 1, 9 (Mich. Ct. App. 2015) (stating that, under *Jardines*, officers "do not violate the Fourth Amendment by approaching a home and seeking to speak with its occupant. . . . However, if police enter a protected area not intending to speak with the occupant, but rather, solely to conduct a search, the line has been crossed"). Indeed, the United States Court of Appeals for the Tenth Circuit has noted that its sister courts in the Fourth and Eleventh Circuits have upheld knock-and-talk encounters after *Jardines* and that "[t]here does not appear to be any circuit that has concluded, after *Jardines*, that a knock-and-talk is invalid." *United States v. Carloss*, 818 F.3d 988, 994 n.4 (10th Cir. 2016) (citing *Covey v. Assessor of Ohio Cnty.*, 777 F.3d 186, 192-93 (4th Cir. 2015); *United States v. Walker*, 799 F.3d 1361, 1363 (11th Cir. 2015)); *see also*, *e.g.*, *Smith v. City of Wyoming*, 821 F.3d 697, 713 (6th Cir. 2016) (holding that, post-*Jardines*, a knock-and-talk is generally permissible); *Frederick*, 886 N.W.2d at 7-8 (stating that, "as *Jardines* makes clear, an ordinary knock-and-talk is well within the scope of the license that may be implied from the habits of the country" and 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 not transform a

knock-and-talk into an unconstitutional search") (internal quotation marks omitted).[7]

Given the Supreme Court's recognition that "the knocker on the front door is treated as an *invitation or license* to attempt an entry," *Jardines*, 133 S. Ct. at 1415 (emphasis added) (quotation marks omitted), it is axiomatic that a homeowner may take actions to *revoke* or otherwise limit that invitation or license. As elucidated by the United States District Court for the Middle District of Florida,

> [T]he license granted to enter property to knock on a person's door is not unlimited. Rather, it extends unless and until the homeowner provides "express orders" to the contrary. In determining the scope of the implied license, and therefore whether a police officer's approach to the front door was permissible under the Fourth Amendment, courts ask whether a reasonable person could do as the police did. Factors that may aid in the analysis include the appearance of the property, whether entry might cause a resident alarm, what ordinary visitors would be expected to do, and what a reasonably respectful citizen would be expected to do.

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[7] The dissent asserts that "[o]ur homes and adjoining land are protected spaces; governmental officers must have a warrant, absent special circumstances, to intrude onto this private area." As the foregoing discussion makes clear, however, officers need neither a warrant nor any special circumstances to approach a home's front door in order to conduct a knock-and-talk.

United States v. Holmes, 143 F. Supp. 3d 1252, 1259 (M.D. Fla. 2015) (citations and footnote omitted); *see also State v. Grice*, 767 S.E.2d 312, 319 (N.C. 2015) (stating that "[t]he implicit license enjoyed by law enforcement and citizens alike to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners"). The "express orders" sufficient to revoke the implied license "must be by 'clear demonstrations,' 'unambiguous,' and 'obvious to the casual visitor.'" *Holmes*, 143 F. Supp. 3d at 1262 (citing *Grice*, 767 S.E.2d at 319; *State v. Howard*, 315 P.3d 854, 860 (Idaho Ct. App. 2013); *Christensen*, 2015 WL 2330185, at *8).

The question before us in this case is whether posting "No Trespassing" signs near an unobstructed driveway is an express order sufficient to revoke or limit the invitation/license such that a police officer may not legitimately approach the residence via the driveway in order to conduct a warrantless knock-and-talk encounter. That is, did the Defendant's signs turn the investigators' entry onto his property into an intrusion subject to constitutional protections? It is the Defendant's burden of establishing, by a preponderance of the evidence, that the investigators' knock-and-talk was invalid. *See Holmes*, 143 F. Supp. 3d at 1261.[8]

[8] While it is the State's burden to establish an exception to the warrant requirement when it engages in a warrantless *search*, *see State v. Meeks*, 262 S.W.3d 710, 722 (Tenn. 2008); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970), a knock-and-talk is simply a consensual encounter, not a search. Accordingly, it falls on the defendant

The impact of "No Trespassing" signs on the validity of a knock-and-talk excursion onto a resident's curtilage has been the subject of numerous decisions by both federal and state courts and, as with much search and seizure jurisprudence, the analyses and results have varied. A few states have concluded that "No Trespassing" signs establish a legitimate expectation of privacy that renders a knock-and-talk invalid. *See, e.g.*, *State v. Roubique*, 421 So. 2d 859, 862 (La. 1982) (holding that "Private Road, No Trespassing" sign at driveway's entrance was "ample evidence of [the defendant's] intent to preserve his privacy" and that officer's entry onto the defendant's property violated the Fourth Amendment); *State v. Bullock*, 901 P.2d 61, 75-76 (Mont. 1995) (holding that, under the Montana Constitution, "No Trespassing" signs to either side of gate across driveway gave the defendant a reasonable expectation of privacy that officer violated by entering property without a warrant); *People v. Scott*, 593 N.E.2d 1328, 1338 (N.Y. 1992) (holding that, under the New York Constitution, officers' warrantless entry onto land posted with "No Trespassing" signs was illegal); *State v. Roper*, 294 P.3d 517, 520 (Or. Ct. App. 2012) (upholding grant of motion to suppress under the Oregon Constitution because defendant's "No Trespassing" signs manifested his intent to exclude the public from his fenced yard, notwithstanding open gate); *see also Robinson v. Commonwealth*, 639 S.E.2d 217, 222 (Va. 2007) (stating that "[i]mplied consent can

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to demonstrate, initially, that a knock-and-talk was, instead, a warrantless search.

be negated by obvious indicia of restricted access, such as posted 'no trespassing' signs, gates, or other means that deny access to uninvited persons"). Indeed, our Court of Criminal Appeals has indicated that "No Trespassing" signs may render a knock-and-talk invalid. *See State v. Blackwell*, No. E2009-00043-CCA-R3-CD, 2010 WL 454864, at *7 (Tenn. Crim. App. Feb. 10, 2010) ("Clearly, the presence of the 'No Trespassing' sign evinced an actual subjective expectation of privacy and a revocation of the 'implied invitation' of the front door."); *see also State v. Draper*, No. E2011-01047-CCA-R3-CD, 2012 WL 1895869, at *6 (Tenn. Crim. App. May 24, 2012) (stating, "the presence of a 'no trespassing' sign 'evince[s] an actual subjective expectation of privacy and a revocation of the implied invitation of the front door") (quoting *Blackwell*, 2010 WL 454864, at *7); *State v. Henry*, No. W2005-02890-CCA-R3-CD, 2007 WL 1094146, at *5 (Tenn. Crim. App. Apr. 11, 2007) (noting in dictum that the only way in which the knock-and-talk would have been "unacceptable would have been the presence of the 'No Trespassing' signs").

Most jurisdictions that have considered the issue, however, appear to hold that "No Trespassing" signs, in and of themselves, will not invalidate a knock-and-talk. *See, e.g.*, *United States v. Bearden*, 780 F.3d 887, 892-94 (8th Cir. 2015) (upholding knock-and-talk where officers entered property through open driveway gate despite "No Trespassing" signs); *United States v. Hopper*, 58 Fed. Appx. 619, 623 (6th Cir. 2003) (holding that knock-and-talk was allowed despite several "No Trespassing" signs near driveway); *Holmes*, 143

F. Supp. 3d at 1265 (holding that, "in the absence of another barrier (such as a fence and gate), 'No Trespassing' signs do not, in and of themselves, withdraw the implied consent to conduct a knock and talk"); *Davis v. City of Milwaukee*, No. 13-CV-982-JPS, 2015 WL 5010459, at *13 (E.D. Wis. Aug. 21, 2015) (stating that "signs stating 'Private Property' or 'No Trespassing' do not, by themselves, create an impenetrable privacy zone"); *United States v. Jones*, No. 4:13CR00011-003, 2013 WL 4678229, at *2 n.2, *6, *9 (W.D. Va. Aug. 30, 2013) (holding that multiple signs along driveway and on property stating "No Trespassing," "Posted: Private Property," and "Keep Out" did not invalidate knock-and-talk under the Fourth Amendment); *United States v. Denim*, No. 2:13-CR-63, 2013 WL 4591469, at *4 (E.D. Tenn. Aug. 28, 2013) (stating, post-*Jardines*, that, "[e]ven in the face of No Trespassing signs, it is not unreasonable for a police officer to intrude upon private property to ask if the resident has any information that will aid in the investigation of a crime"); *United States v. Schultz*, No. 13-20023, 2013 WL 2352742, at *5 (E.D. Mich. May 29, 2013) (holding that knock-and-talk entry via driveway was valid under the Fourth Amendment despite "No Trespassing" signs); *Michel v. State*, 961 P.2d 436, 437-38 (Alaska Ct. App. 1998) (holding that four "No Trespassing" signs along three-hundred-yard driveway did not invalidate knock-and-talk); *Burdyshaw v. State*, 10 S.W.3d 918, 921 (Ark. Ct. App. 2000) (holding that officers' entry onto property via driveway did not violate the Fourth Amendment in spite of "No Trespassing" signs posted on property); *State v. Rigoulot*, 846 P.2d 918, 923 (Idaho Ct. App.

1992) (stating that "No Trespassing" signs cannot "reasonably be interpreted to exclude normal, legitimate inquiries" and holding that officers did not violate the Fourth Amendment despite the presence of "No Trespassing" signs); *Jones v. State*, 943 A.2d 1, 12 (Md. Ct. Spec. App. 2008) (holding that "No Trespassing" sign did not preclude knock-and-talk by police and noting that "courts have been very consistent in concluding that no trespassing signs, in and of themselves, do not make a police officer's entry on property unlawful"); *City of Beatrice v. Meints*, 856 N.W.2d 410, 421 (Neb. 2014) (holding that a resident "could not reasonably expect that tacking a 'no trespassing' sign to a tree would prevent others from viewing or walking on his land"), *cert. denied* ___ U.S. ___, 135 S. Ct. 2388 (2015); *State v. Smith*, 783 S.E.2d 504, 509-10 (N.C. Ct. App. 2016) (holding that "No Trespassing" sign did not revoke the implied license to approach the defendant's home, therefore knock-and-talk did not violate the Fourth Amendment); *State v. Mittleider*, 809 N.W.2d 303, 307-08 (N.D. 2011) (holding that "No Trespassing" signs posted around the defendant's farmstead "did not create a reasonable expectation of privacy in the entrance of the farmstead"); *State v. Morgan*, No. 13-CA-30, 2014 WL 1836015, at *6 (Ohio Ct. App. May 1, 2014) (stating that "[t]he presence of 'no trespassing' signs does not make law enforcement's encroachment onto the curtilage presumptively unreasonable when officers are otherwise lawfully present"). As stated by the Idaho Court of Appeals,

> [while] posting "No Trespassing" signs may indicate a desire to restrict unwanted visitors and announce one's expectations of privacy[,] . . . such signs cannot reasonably be interpreted to exclude normal, legitimate inquiries or visits by mail carriers, newspaper deliverers, census takers, neighbors, friends, utility workers and others who restrict their movements to the areas of one's property normally used to approach the home.

Rigoulot, 846 P.2d at 923. Indeed, the dissent recognizes that, even for those jurisdictions that may find "No Trespassing" signs to be sufficient in and of themselves to revoke the implied license to approach the front door, such signs "must be appropriately worded and placed." In our view, this analytical approach is inadequate to provide our police officers with sufficient guidance in their efforts to act within constitutional parameters.

Recently, the United States Court of Appeals for the Tenth Circuit considered a case in which two police officers knocked on the defendant's front door in spite of several "No Trespassing" signs posted around the house and on the house's front door. *United States v. Carloss*, 818 F.3d 988, 990 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 231 (2016). The case generated a lead opinion, a concurring opinion, and a dissent. The lead opinion stated that "just the presence of a 'No Trespassing' sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock," *id.* at 995, and held that the sign

on the front door, which stated "Posted Private Property Hunting, Fishing, Trapping or Trespassing for Any Purpose is Strictly Forbidden Violators Will Be Prosecuted," was "ambiguous and did not clearly revoke the implied license extended to members of the public, including police officers, to enter the home's curtilage and knock on the front door, seeking to speak consensually with the occupants," *id.* at 996. "Therefore, the officers did not violate the Fourth Amendment when they went onto the porch and knocked on the front door of the house in which [the defendant] lived." *Id.* at 997.

The separate concurring opinion advocated that the court "deploy an objective test, asking whether a reasonable person would conclude that entry onto the curtilage – the front porch here – by police or others was *categorically* barred." *Id.* at 999 (Tymkovich, C.J., concurring). The Chief Judge elaborated:

> The signs in this case of course communicated variants of the phrase "No Trespassing." But in light of the strong social presumption that a visitor to a residential neighborhood can enter the front porch curtilage to knock, I doubt a reasonable, lawful visitor would believe that "No Trespassing" eliminated that presumption in every instance. Every reasonable person knows – even without seeing a "No Trespassing" sign – that one cannot trespass on private property. But that knowledge co-exists with knowledge of the equally well-established principle that one may generally

enter the curtilage to knock. A reasonable observer could also understand a "No Trespassing" sign as restating the "no-trespassing" principle without thinking it had any bearing on the implicit license to enter the curtilage for social reasons. In a residential context, the intention of the homeowner who posts signs, without more, seems inadequate to revoke the license. *See, e.g.*, *State v. Hiebert*, 156 Idaho 637, 329 P.3d 1085, 1090 (App. 2014) (noting that "where a 'no trespassing' sign is ambiguous and not clearly posted, the implied invitation to enter the curtilage of a home via the normal access routes is not revoked"). I emphasize that it is not my view that a "No Trespassing" sign will *never* indicate the revocation of the implied license. Rather, the circumstances of this case do not indicate a revocation occurred such that the police could not reasonably believe entry was permissible.

. . . .

Of course, the right facts could remove that ambiguity. For example, a "No Trespassing" sign posted on a fence encircling a property imparts a different message than the same sign standing alone. And a closed or locked gate, especially in the residential context, imparts more information to the reasonable observer. *See, e.g.*, *State v. Christensen*, 131 Idaho 143, 953 P.2d 583, 587-88 (1998) (holding that "No Trespassing" sign "clearly posted on a gate across the only public access to the property" revoked the implicit license because "the message to the public was [not]

> ambiguous"). But nothing aside from their numerosity makes the "No Trespassing" signs in this case particularly distinctive. And numerosity alone does not eliminate the ambiguity I noted above. No special facts – like a fence or other physical obstacle – clarified to the reasonable visitor that these signs revoked the license.

Id. at 999-1000 (Tymkovich, C.J., concurring) (footnote omitted). The concurring opinion stressed the frequent axiom of Fourth Amendment jurisprudence: "The result turns on the totality of the circumstances." *Id.* at 1001 (Tymkovich, C.J., concurring). We agree with Chief Judge Tymkovich's approach:[9] under the totality of the circumstances, would an objectively reasonable person conclude that entry onto the Defendant's driveway was categorically barred?

The United States Supreme Court stated long ago that "[t]he law of trespass recognizes the interest in possession and control of one's property and for that

[9] We emphasize that this approach recognizes the possibility that a sign, under the right circumstances, *could* be sufficient to revoke the implied license. Accordingly, we also emphasize that we are not adopting a per se rule in this case. Nor, as the dissent contends, are we adopting a rule that differentiates between persons based upon their economic resources. This case presents the issue of whether "No Trespassing" signs posted near a private driveway are sufficient, *in and of themselves*, to create a constitutional barrier to police officers attempting to conduct legitimate police business via the resource of a consensual encounter with the occupant of the private residence. Nothing about this narrow issue reasonably implies that only wealthy homeowners can insulate themselves from law enforcement incursions onto their curtilage.

reason permits exclusion of unwanted intruders. *But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment*." *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984) (emphasis added). "Thus, trespass laws are designed to keep out unwanted intruders, such as vandals, thieves, and squatters, but those laws do not implicate the privacy interests in 'persons, houses, papers, and effects' protected by the Fourth Amendment." *Holmes*, 143 F. Supp. 3d at 1264 (citing *Oliver*, 466 U.S. at 176). Therefore,

> [t]o find that a "No Trespassing" sign on its own expressly revokes the implied consent to walk up to a front door and knock, [we] would have to find that the sign means something like, "Do not do those things that would normally be considered trespassing, and also, I now consider anyone walking up to my front door to be a trespasser as well."

Id. at 1264-65.

We agree with the overwhelming majority of jurisdictions that have addressed the issue that signs admonishing "No Trespassing," in and of themselves, are rarely going to be sufficient to revoke the implied license allowing persons to approach a front door and knock. The term "No Trespassing" is not so clear and unambiguous as the Defendant and the dissent claim. *See Carloss*, 818 F.3d at 995 (stating that no trespassing signs "by themselves, do not have the talismanic quality [the defendant] attributes to them"). Black's

Law Dictionary defines the term "trespass" as "[a]n *unlawful* act committed against the person or property of another; especially, *wrongful* entry on another's real property." *Black's Law Dictionary* 1503 (10th ed. 2014) (emphases added). This definition implies clearly that some entries onto another's real property are neither unlawful nor wrongful and, therefore, are not trespasses. Indeed, this Court recognized over one hundred and fifty years ago that, "[i]n law every entry upon the soil of another, *in the absence of a lawful authority, without the owner's license*, is a trespass." *Norvell v. Gray's Lessee*, 31 Tenn. 96, 103 (1851) (emphasis added); *see also*, *e.g.*, *City of Townsend v. Damico*, No. E2013-01778-COA-R3-CV, 2014 WL 2194453, at *3 (Tenn. Ct. App. 2014) (recognizing that "[t]he courts of this state have . . . defined the tort of trespass as an unauthorized entry upon the land of another") (citing *Norvell*, 31 Tenn. at 103); *Holmes*, 143 F. Supp. 3d at 1265 (stating that "the plain meaning of 'No Trespassing' is that it prohibits what people ordinarily think of as trespassing, and does not alter the character of an entry that one would not otherwise think to be a trespass, such as the implied license to approach the homeowner's door to knock and talk") (citing *Oliver*, 466 U.S. at 183 n.15).

In short, a homeowner who posts a "No Trespassing" sign is simply making explicit what the law already recognizes: that persons entering onto another person's land must have a legitimate reason for doing so or risk being held civilly, or perhaps even criminally, liable for trespass. Consequently, as set forth above, a

knock-and-talk conducted within constitutional parameters is a legitimate reason for police officers to enter the curtilage of a house via a driveway that is obstructed by nothing more than several "No Trespassing" signs. For this reason, we disagree with the dissent that "a 'No Trespassing' sign should be of particular significance to law enforcement officers in communicating that they may need to obtain a warrant before entering the property."[10] Officers engaging in legitimate police business will conclude, correctly, that they are not engaging in a "trespass" when they approach a front door to conduct a knock-and-talk. We also emphasize that the occupant of a residence is under no obligation to open a door when knocked upon by a police officer who holds no warrant.

The Defendant asserts that his signs were accompanied by other barriers to entry, including overgrown vegetation, the lack of a pathway to his house, and debris blocking any possible route from the driveway to the front porch, and that the totality of these circumstances made clear that no one was to enter his property absent an express invitation. We are not persuaded. First, the impact of signs at the beginning of a long driveway is not altered by the eventual accessibility of the front porch sixty or seventy yards later. Second, while a fence and a closed gate that physically

[10] The dissent's approach of allowing a simple "No Trespassing" sign to prohibit a legitimate knock-and-talk by law enforcement also would create even more problematic consequences in more densely populated areas of our state.

block access to the front door of a house, in some instances, may be sufficient to revoke the implied license to enter the curtilage of a residence,[11] mere ambiguous signage and unkemptness are not.

We agree with the lead opinion below that the Defendant's signs "would not have prevented the casual visitor or the reasonably respectful citizen from approaching [the Defendant's] residence." *Christensen*, 2015 WL 2330185, at *8. Accordingly, we hold that, under the totality of the circumstances, the Defendant's "No Trespassing" signs posted near his unobstructed driveway were not sufficient to revoke the implied license referred to in *Jardines*. The Defendant is not entitled to relief on this basis.

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[11] *See, e.g.*, *State v. Koenig*, 148 A.3d 977, 984 (2016) (stating that "[f]ences, gates *and* no-trespassing signs generally suffice to apprise a person that the area is private") (emphasis added); *Burkholder v. Superior Court*, 96 Cal.App.3d 421, 428 (Cal. Ct. App. 1979) (holding that agents' entry onto defendant's property violated the Fourth Amendment because "[e]ntry to the property was openly restricted by posted signs along, and locked gates across, the rural access road signifying an intention to deny access to the public in general, including government agents"); *Brown v. State*, 152 So.3d 619, 624 (Fla. Dist. Ct. App. 2014) (holding that agents' knock-and-talk excursion onto the defendant's curtilage offended the Fourth Amendment because the defendant's curtilage was surrounded by two gated fences posted with no trespassing signs); *State v. Johnson*, 879 P.2d 984, 992 (Wash. Ct. App. 1994) (agents violated Washington Constitution by entering property that defendant had fenced, gated, and posted with no trespassing and private property signs).

Reasonable Expectation of Privacy

Jardines dealt with two officers who entered the defendant's curtilage with a drug-sniffing dog which proceeded to sniff and, therefore, to search. 133 S. Ct. at 1416. Because the search was not supported by a warrant or any of the recognized exceptions to the warrant requirement, the Supreme Court held that the search was unconstitutional. *See id.* at 1417. The Supreme Court based its decision on "the traditional property-based understanding of the Fourth Amendment," rather than on the "reasonable expectation of privacy" test set forth in *Katz v. United States*, 389 U.S. 347 (1967). *Id. See Holmes*, 143 F. Supp. 3d at 1257 (noting that the determination of whether an intrusion was a search under the Fourth Amendment "'originally was tied to common-law trespass and involved some trespassory intrusion on property'" but that the United States Supreme Court subsequently "'added a separate test – the reasonable-expectation-of-privacy test – to analyze whether a search occurred for purposes of the Fourth Amendment'") (quoting *United States v. Davis*, 785 F.3d 498, 506, 507 (11th Cir. 2015)).

Unlike the Supreme Court in *Jardines*, we have concluded that the facts of this case do not indicate that a search in violation of the Fourth Amendment occurred under the property-based analysis used in *Jardines* when Investigators Green and Chunn drove up to the Defendant's residence. Because the Supreme Court in *Jardines* indicated that "[t]he *Katz* reasonable-expectations test 'has been *added to*, not

substituted for,' the traditional property-based understanding of the Fourth Amendment," 133 S. Ct. at 1417 (quoting *Jones*, 565 U.S. at 409), we now apply the reasonable-expectations test to the facts of this case. That is also the test we utilize under the Tennessee Constitution. *See Talley*, 307 S.W.3d at 730.

Under the reasonable-expectations test, a warrantless intrusion by government agents onto a homeowner's real property does not violate either the federal or state constitution unless the intrusion violates the homeowner's "reasonable expectation of privacy." *See Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Talley*, 307 S.W.3d at 730. Initially, it is the homeowner's burden to establish that he had a "reasonable expectation of privacy" against the intrusion. *Talley*, 307 S.W.3d at 730. The homeowner must satisfy two prongs: (1) that he had "an actual, subjective expectation of privacy," and (2) that "society is willing to view [his] subjective expectation of privacy as reasonable and justifiable under the circumstances." *Id.* (quoting *State v. Munn*, 56 S.W.3d 486, 494 (Tenn. 2001)). We examine the totality of the circumstances in determining the reasonableness of a claimed expectation of privacy. *Id.* at 734.

As he contended in his argument regarding the *Jardines* property-based test, the Defendant argues that his "No Trespassing" signs established that he had a reasonable expectation of privacy that precluded any entry onto his curtilage by Investigators Green and Chunn. We disagree. For the same reasons supporting our holding under the *Jardines* test, we hold

that the Defendant has failed to satisfy the second prong of the reasonable expectations test. *See Jardines*, 133 S. Ct. at 1419 (noting that, "[i]t is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so align. The law of property 'naturally enough influence[s]' our 'shared social expectations' of what places should be free from governmental incursions" (Kagan, J., concurring) (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006))). Even if the Defendant had an actual, subjective expectation that his signs would keep all persons from entering his property under all circumstances, a reasonable member of society would not view that expectation as reasonable and justifiable. Rather, a reasonable member of society would view the Defendant's "No Trespassing" signs as simply forbidding any unauthorized or illegitimate entry onto his property.

In short, the Defendant has failed to demonstrate that he had a *reasonable* expectation that ordinary citizens would not occasionally enter his property by walking or driving up his driveway and approaching his front door to talk with him "for all of the many reasons that people knock on front doors." *Nieminski v. State*, 60 So.3d 521, 528 (Fla. Dist. Ct. App. 2011). Therefore, Investigators Green and Chunn did not violate the Defendant's federal or state constitutional rights against unreasonable searches when they drove up his driveway and approached his front door. The Defendant is not entitled to relief on this basis.

Because we have determined that the officers' initial entry onto the Defendant's property did not violate

either the federal or Tennessee constitutions, we need not determine whether the entry was supported by probable cause and the existence of exigent circumstances.[12]

Conclusion

We hold that Investigators Green and Chunn did not violate either the federal or Tennessee constitutional prohibitions against unreasonable searches when they drove down the Defendant's unobstructed driveway past "No Trespassing" signs and approached his residence in order to conduct a knock-and-talk consensual encounter. The Defendant was not entitled to the suppression of evidence on this basis. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

JEFFREY S. BIVINS, CHIEF JUSTICE

[12] The issue of Investigator Chunn's forcible entry into the Defendant's home is not before us. Indeed, during oral arguments before this Court, defense counsel acknowledged that Investigator Chunn's entry into the residence after smelling the odor associated with the active manufacture of methamphetamine was supported by exigent circumstances and probable cause. *See United States v. Brown*, 449 F.3d 741, 745 (6th Cir. 2006) (recognizing that, "[t]o justify a warrantless entry based on exigent circumstances, there must also be probable cause to enter the residence").

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
June 2, 2016 Session Heard at Nashville

STATE OF TENNESSEE v.
JAMES ROBERT CHRISTENSEN, JR.

Appeal by Permission from the Court of Criminal Appeals, Circuit Court for Tipton County
No. 7799 Joseph H. Walker III, Judge

No. W2014-00931-SC-R11-CD – Filed April 7, 2017

SHARON G. LEE, J., dissenting.

The maxim, "every man's house is his castle," is deeply rooted in our jurisprudence. *Weeks v. United States*, 232 U.S. 383, 390 (1914). It applies whether the house is a castle or a cottage – a mansion or a mobile home.[1] The right to retreat into the privacy of one's home and be free from governmental intrusion is a basic tenet of the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution. Our homes and adjoining land are

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[1] "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!" *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting remarks of William Pitt, Earl of Chatham, during 1763 debate in Parliament) (internal quotation marks omitted).

protected spaces; governmental officers must have a warrant, absent special circumstances, to intrude onto this private area.

Today, the Court holds that the posting of multiple "No Trespassing" signs is not enough to protect our constitutional rights against a warrantless search and that it may take "a fence and a closed gate that physically block access to the front door of a house" to revoke the implied license to enter the land around a residence.

I disagree that we must barricade our homes with a fence and a closed gate, and perhaps even a locked gate, to protect our constitutional rights against warrantless searches. This option is rarely convenient, affordable, practical, or even possible. Revocation of implied consent to enter one's property should be available to all – not just to those citizens who can afford to erect a fence and a gate and live in an area where this form of barricade is possible.

A search occurs when the government obtains information through an actual physical intrusion into a constitutionally protected area[2] or by violating a person's reasonable expectation of privacy.[3] By ignoring the "No Trespassing" signs, the officers physically

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[2] *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)).

[3] *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see also Jardines*, 133 S. Ct. at 1417.

intruded into Mr. Christensen's constitutionally protected area and violated his reasonable expectation of privacy.

Physical Intrusion

A person's right to retreat into his home and be free from unreasonable government searches and seizures stands at the very core of the Fourth Amendment's protections.[4] "This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity. . . ." *Jardines*, 133 S. Ct. at 1414. The protections of the Fourth Amendment extend to the curtilage of a home. *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

Visitors have an implied license to enter another person's property and step onto the front porch. The Supreme Court has held 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.'" *Id.* at 1415 (quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)).[5] This license also extends to law enforcement.

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[4] *Silverman v. United States*, 365 U.S. 505, 511 (1961); *see also Kentucky v. King*, 563 U.S. 452, 474 (2011) (Ginsburg, J., dissenting) ("In no quarter does the Fourth Amendment apply with greater force than in our homes. . . .").

[5] *See also State v. Cothran*, 115 S.W.3d 513, 522 (Tenn. Crim. App. 2003) ("A sidewalk or pathway leading from a public street to the front door of a residence represents an 'implied invitation' to the public to use the pathway in pursuing legitimate business

Id. at 1416 ("[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.'" (quoting *King*, 563 U.S. at 469)).

A citizen may revoke the public's implied license to enter his property. Police officers may lawfully "knock and talk" at a citizen's front door without having probable cause or reasonable suspicion, but *not* when the citizen has expressly revoked the implied license to enter. *State v. Blackwell*, No. E2009-00043-CCA-R3-CD, 2010 WL 454864, at *7 (Tenn. Crim. App. Feb. 10, 2010).[6]

Mr. Christensen sufficiently revoked the public's implied license to enter his property by posting multiple "No Trespassing" and "Private Property" signs near the entrance to his driveway. A person need not have a

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or social interests with those inside the residence." (quoting *State v. Harris*, 919 S.W.2d 619, 623 (Tenn. Crim. App. 1995))).

[6] *See also United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006) (" 'Absent express orders from the person in possession,' an officer may '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.'" (quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964))); *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000) (quoting *Davis*, 327 F.2d at 303); *United States v. Taylor*, 90 F.3d 903, 909 (4th Cir. 1996) (quoting *United States v. Hersh*, 464 F.2d 228, 230 (9th Cir. 1972)); *United States v. Holmes*, 143 F. Supp. 3d 1252, 1259 (M.D. Fla. 2015) (holding that a person may revoke the implied license but must do so expressly (quoting *Taylor*, 458 F.3d at 1204)); *State v. Grice*, 767 S.E.2d 312, 319 (N.C. 2015) (finding that the implied license to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners (citing *Jardines*, 133 S. Ct. at 1415-16)), *cert. denied*, 135 S. Ct. 2846 (2015).

law degree or an understanding of the various legal nuances of "trespass" discussed by the Court to know that these signs meant visitors were not welcome. Ms. Tammy Atkins, who visited homes in the area to share her faith, understood the meaning of the signs. She testified there were several "No Trespassing" signs near Mr. Christensen's driveway, and she did not go to houses that had "No Trespassing" signs.

Courts across the country have taken different approaches when determining whether an individual has revoked the public's implied license for entry onto his property. In Tennessee, the Court of Criminal Appeals has held that "No Trespassing" signs, even without physical barriers such as fences and gates, are sufficient to revoke the public's implied license to enter. *Blackwell*, 2010 WL 454864, at *7 (acknowledging that a "knock and talk" is generally a lawful technique absent express orders against trespass, but the presence of a "No Trespassing" sign evidences a subjective expectation of privacy and a revocation of the implied license to enter the property); *State v. Draper*, No. E2011-01047-CCA-R3-CD, 2012 WL 1895869, at *1, *6 (Tenn. Crim. App. May 24, 2012) (quoting *Blackwell*, 2010 WL 454864, at *7) (ruling a search was illegal where an officer bypassed the front door, entered the backyard, and knew that the owner had posted "No Trespassing" signs, which effectively revoked the implied invitation of the front door); *see also State v. Henry*, No. W2005-02890-CCA-R3-CD, 2007 WL 1094146, at *5 (Tenn. Crim. App. Apr. 11, 2007) (holding a "knock and talk" permissible but noting that if

there had been evidence that "No Trespassing" signs were present at the time of the search, the "knock and talk" would have been unacceptable).

These Tennessee cases are consistent with decisions from other jurisdictions that have also determined that "No Trespassing" signs, without physical barriers, are sufficient for a person to preserve his privacy and revoke the implied license to enter his property. *See Powell v. State*, 120 So. 3d 577, 584 (Fla. Dist. Ct. App. 2013), *on reh'g* (Aug. 1, 2013) (stating that homeowners who post "No Trespassing" or "No Soliciting" signs effectively negate the license to enter the property and conduct a "knock and talk"); *State v. Roubique*, 421 So. 2d 859, 861-62 (La. 1982) (finding a "Private Road, No Trespassing" sign at the entrance to the driveway was ample evidence of the resident's intent to preserve his privacy); *see also State v. Poulos*, 942 P.2d 901, 904 (Or. Ct. App. 1997) (indicating that "No Hunting or Trespassing Under Penalty of Law," "KEEP OUT," "Guard Dog on Duty," and "STOP" signs posted along the driveway were sufficient to communicate the property owner's intent to exclude the public even without a gate or barrier).[7]

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[7] Under this approach, signs may be sufficient to revoke the implied license, but they must be appropriately worded and placed. *See Holmes*, 143 F. Supp. 3d at 1262 (noting that other courts have required that the revocation of the implied license be accomplished by clear demonstrations that are unambiguous and obvious to the casual visitor); *State v. Kapelle*, 344 P.3d 901, 905 (Idaho Ct. App. 2014) (noting that where a "No Trespassing" sign is ambiguous and not clearly posted, the implied license is not revoked); *State v. Howard*, 315 P.3d 854, 860 (Idaho Ct. App. 2013)

In other jurisdictions, courts have held that the expectation of privacy and desire to restrict entry can be effectuated by either physical barriers *or* appropriate signage. *See People v. Scott*, 593 N.E.2d 1328, 1338 (N.Y. 1992) (holding that "where landowners fence or post 'No Trespassing' signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected and that they will be free from unwanted intrusions is reasonable"), *quoted in State v. Bullock*, 901 P.2d 61, 74 (Mont. 1995); *Dixson*, 766 P.2d at 1024 (stating that signs, such as "No Trespassing" signs, fences, or other similar measures indicate the property owner's intent to protect privacy and exclude the public); *Cooksey v. State*, 350 S.W.3d 177, 184 (Tex. Ct. App. 2011) (stating that a homeowner may manifest an expectation of privacy, restrict access to pathways leading to the house, and revoke the implied license by erecting a locked gate or by posting "No Trespassing" signs); *see also State v. Hubbel*, 951 P.2d 971, 977 (Mont. 1997) (holding that the property owner had no reasonable expectation of privacy in the property leading to the front door where the property owner did not erect a fence, place a gate, plant shrubs or

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(finding that the implied license had not been revoked because the "No Trespassing" sign was very small and not easily noticed, was not posted over or next to the entrance to the curtilage, and was over a mile from the actual residence); *State v. Dixson*, 766 P.2d 1015, 1024 (Or. 1988) (en banc) (finding that "No Hunting" signs were insufficient to communicate to law enforcement an intent to exclude non-hunting access).

bushes, or post "No Trespassing" or other signs), *as modified on denial of reh'g* (Feb. 3, 1998).

Another approach taken by courts in other jurisdictions is to determine whether the public's implied license to enter has been revoked by considering the totality of the circumstances, with a "No Trespassing" or similar signage a factor to be considered. *See Powell*, 120 So. 3d at 584 (finding that the existence and extent of a license to conduct a "knock and talk" depends on the circumstances); *Jones v. State*, 943 A.2d 1, 12 (Md. Ct. Spec. App. 2008) (finding that "No Trespassing" signs may be considered as part of the totality of the circumstances); *State v. Kuchera*, Nos. 27375-6-II, 27376-4-II, 2002 WL 31439839, at *5 (Wash. Ct. App. Nov. 1, 2002) (holding that the presence of "No Trespassing" signs "is not dispositive of the establishment of privacy, but is a factor to be considered 'in conjunction with other manifestations of privacy'" (quoting *State v. Johnson*, 879 P.2d 984, 992 (1994))).

Under any of these approaches and particularly under existing Tennessee law, Mr. Christensen revoked the public's implied license to enter his property. Near the entrance to his driveway, he posted two signs that said "PRIVATE PROPERTY, NO TRESPASSING" and one sign that said "NO TRESPASSING, HUNTING OR FISHING, VIOLATORS PROSECUTED, UNDER PENALTY OF LAW" and listed his phone number. These signs were clearly visible to anyone approaching his driveway from the main road. Even in the absence of a fence or other physical barrier, the signs effectively communicated Mr. Christensen's intent to protect his

privacy and exclude others from approaching his home. As the Idaho Supreme Court has said, "[C]itizens, especially those in rural areas, should not have to convert the areas around their homes into the modern equivalent of a medieval fortress in order to prevent uninvited entry by the public, including police officers." *State v. Christensen*, 953 P.2d 583, 587 (1998).

The Court appears to adopt the totality of the circumstances approach but then determines that an objectively reasonable person faced with a "No Trespassing" sign would not conclude that entry is barred. I disagree. Common sense tells us that "No Trespassing" signs, depending on the circumstances, can communicate the property owner's desire not to have members of the public on his land.[8] Moreover, a "No Trespassing" sign should be of particular significance to law enforcement officers in communicating that they may need to obtain a warrant before entering the property.

"No Trespassing" signs factor into criminal trespass cases. In Tennessee, it is a crime to enter or remain on property without the owner's consent. Tenn. Code Ann. § 39-14-405(a). A defense to this crime is

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[8] *Cf. Madruga v. County of Riverside*, 431 F. Supp. 2d 1049, 1061 (C.D. Cal. 2005) (noting that even if signs do not contain the words "No Trespassing" or "Keep Away" "[c]ommon sense and common experiences teaches us that such 'WARNING Guard Dog' signs are placed to dissuade people, be they intruders, sales representatives, delivery agents, or even police officers, from approaching the home. . . . [A]nyone seeing such a sign would understand that the homeowner seeks to exclude them from entering the area beyond the sign.").

that the alleged trespasser reasonably believed that he had the owner's consent to enter the property. *Id.* § 39-14-405(b)(1). However, this defense is not available if the property owner has posted signs "visible at all major points of ingress to the property . . . and the signs are reasonably likely to come to the attention of a person entering the property." *Id.* § 39-14-405(c).

Mr. Christensen did not just post one "No Trespassing" sign – he posted multiple signs near the entrance to his property that were clear, unambiguous, and obvious to anyone approaching his driveway. These signs adequately communicated Mr. Christensen's intent to revoke the implied license to enter his property. Under the facts of this case, law enforcement officers should have heeded the signs and taken the appropriate steps to obtain a search warrant.

Expectation of Privacy

Without a physical intrusion, a search can occur when the government violates a subjective expectation of privacy that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).[9]

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[9] *See also Jardines*, 133 S. Ct. at 1417 ("The *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas."); *Jones*, 565 U.S. at 407 ("*Katz* did not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information,

To determine whether a search has occurred under the *Katz* analysis, courts consider whether the individual had an actual, subjective expectation of privacy and whether society will view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances. *State v. Talley*, 307 S.W.3d 723, 730 (Tenn. 2010) (quoting *State v. Munn*, 56 S.W.3d 486, 494 (Tenn. 2001)).

In deciding whether Mr. Christensen had an actual, subjective expectation of privacy, we apply a multi-factor test that inquires into whether the defendant owns the property seized; has a possessory interest in the thing seized and the place searched; has the right to exclude others from that place; has shown a subjective expectation that the place would remain free from governmental invasion; took normal precautions to maintain his privacy; and was legitimately on the premises. *State v. Ross*, 49 S.W.3d 833, 841 (Tenn. 2001) (quoting *United States v. Haydel*, 649 F.2d 1152, 1154-55 (5th Cir. 1981)); *see also Talley*, 307 S.W.3d at 730-31.

Under this test, Mr. Christensen had an actual, subjective expectation of privacy in his property. He owned the property, had a possessory interest in the place searched, had the right to exclude others from the property, showed a legitimate interest in keeping others off his property, took precautions to maintain

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that intrusion may constitute a violation of the Fourth Amendment.' " (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring))).

his privacy by posting multiple "No Trespassing" signs, and was legitimately on the premises.

To determine whether society views Mr. Christensen's subjective expectation of privacy as reasonable and justifiable, we consider factors such as the "intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver*, 466 U.S. at 177-78 (citations omitted).

Privacy expectations are heightened in the home and the adjacent area. *See Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986). The Court in *Katz* held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But *what he seeks to preserve as private*, even in an area accessible to the public, *may be constitutionally protected*." *Katz*, 389 U.S. at 351 (emphases added) (citations omitted).

Mr. Christensen did not expose his home and the adjoining property to the public; instead, he tried to protect his property by posting multiple signs clearly communicating that visitors were not welcome. If multiple "No Trespassing" signs are not sufficient to convey a property owner's intent to exclude the public from his property, then the constitutional protections against unreasonable searches may be beyond the grasp of ordinary citizens for whom the posting of "No Trespassing" signs is the only feasible option.

Mr. Christensen's expectation of privacy by the posting of multiple "No Trespassing" signs was reasonable and justifiable under the circumstances. Police officers violated Mr. Christensen's reasonable expectation of privacy when they entered his land without a warrant despite the "No Trespassing" signs.

Conclusion

For the reasons stated, law enforcement officers conducted an illegal search of Mr. Christensen's property, and the evidence obtained from the search should be suppressed. The Court's decision that multiple "No Trespassing" signs are not sufficient to revoke the implied license for entry denies ordinary citizens the protections of the United States and the Tennessee Constitutions against warrantless searches. The result is that only citizens wealthy enough and situated in an area where they can "convert the areas around their homes into the modern equivalent of a medieval fortress," *Christensen*, 953 P.2d at 587, may protect themselves from governmental intrusion and invasion of privacy.

SHARON G. LEE, JUSTICE

IN THE COURT OF
CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
February 3, 2015 Session
Heard at University of Memphis
Cecil C. Humphreys School of Law[1]

STATE OF TENNESSEE v.
JAMES ROBERT CHRISTENSEN, JR.

Appeal from the Circuit Court
for Tipton County
No. 7799 Joseph H. Walker III, Judge

No. W2014-00931-CCA-R3-CD – Filed May 14, 2015

Appellant, James Robert Christensen, Jr., stands convicted of resisting arrest, a Class B misdemeanor; promotion of methamphetamine manufacture, a Class D felony; initiation of methamphetamine manufacture, a Class B felony; and two counts of possession of a firearm during the commission of a dangerous felony, Class D felonies. He received an effective sentence of three years' incarceration followed by eight years suspended to supervised probation. On appeal, appellant contends that the trial court erred by denying his motion to suppress evidence and that the evidence was insufficient to sustain his convictions for two counts of possession of a firearm during the commission of a

[1] This case was heard on the campus of the University of Memphis Cecil C. Humphreys School of Law as a special project of the Tennessee Court of Criminal Appeals in furtherance of the educational process of students and faculty.

dangerous felony. Following our careful review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROGER A. PAGE, J., delivered the opinion of the court. JOHN EVERETT WILLIAMS, J., filed a concurring and dissenting opinion. CAMILLE R. MCMULLEN, J., concurred in results only.

Charles A. Brasfield (at trial and on appeal) and Amber Griffin Shaw (at trial), Covington, Tennessee, for the appellant, James Robert Christensen, Jr.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; D. Michael Dunavant, District Attorney General; and James Walter Freeland, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

On August 3, 2013, investigators with the Tipton County Sheriff's Office discovered an active methamphetamine lab, multiple firearms, materials used in the manufacture of methamphetamine, and several inactive methamphetamine labs in appellant's residence. As a result of these findings and appellant's conduct when officers attempted to detain him, appellant was indicted for resisting arrest, promotion of

methamphetamine manufacture, initiation of methamphetamine manufacture, and two counts of possession of a firearm during the commission of a dangerous felony.

A. Motion to Suppress

Prior to trial, appellant moved to suppress the evidence against him, arguing that because appellant had posted "no trespassing" signs on his property, the officers' actions in entering his property were subject to the warrant requirement.

At the suppression hearing, Investigator Michael Green testified that the sheriff's office had received information that Mariah Davis had purchased pseudoephedrine. Investigators were aware that she was associated with Cody Gatlin, whom Investigator Green knew through his law enforcement experience. Investigator Green and Investigator Brent Chunn went to Mr. Gatlin's home, which was next door to appellant's residence. They spoke first to Ms. Davis, who called Mr. Gatlin to come home. Mr. Gatlin reported to the investigators that he had taken the pseudoephedrine to appellant and that appellant was in the process of making methamphetamine. The investigators then went to appellant's residence. Investigator Green recalled that the grass around appellant's driveway was very tall, that a "no spraying" sign was posted near the road, and that the driveway was sixty to seventy yards long. There were two trailers at the end of the driveway. The investigators parked in the driveway and

proceeded directly to the front door of appellant's trailer. Investigator Green testified that he smelled the odor commonly associated with the active manufacturing of methamphetamine as he approached the residence. Appellant exited the front door and closed it behind him. The investigators asked for appellant's consent to search his residence, but appellant refused. Investigator Green testified that methamphetamine labs were "very volatile" and could "catch fire real quick," so he and Investigator Chunn decided that they needed to locate the active lab for safety reasons. Investigator Chunn entered appellant's residence while Investigator Green attempted to detain appellant. He placed a handcuff on appellant's right wrist, but thereafter appellant began to fight him. Appellant yelled for "Bear," later determined to be a dog, to come and for his mother, who lived in an adjacent trailer, to call 1-800-THE-FIRM.[2] When Investigator Chunn returned, the investigators were able to handcuff appellant. Investigator Green testified that he then entered the residence and saw a "bolt action 410 pistol right at the door, [and] a 410 shotgun and a rifle on the couch." Investigator Chunn located the active lab, and they found "remnants of . . . older cooks, several cans of empty Coleman fuel, and then [they] located the ten separate one-pot labs in the freezer." The investigators took turns letting pressure off the active lab to make it safe. Investigator Green testified that the fire department decontaminated appellant and transported him

[2] We have determined that 1-800-THE-FIRM is the number for the Cochran Firm, established by the late Johnnie Cochran.

to the hospital because "his heart rate or blood pressure was really, really elevated."

On cross-examination, Investigator Green testified that Ms. Davis told them that she had purchased the pseudoephedrine for appellant. Investigator Green said that after speaking with Ms. Davis and Mr. Gatlin, he did not believe that he had probable cause to obtain a search warrant nor exigent circumstances to search appellant's residence without a search warrant. He felt that he had exigent circumstances to enter appellant's residence after appellant exited his residence. Investigator Green testified that he did not see the "no trespassing" sign posted by appellant's driveway, but he recalled seeing a handwritten sign stating, "organic farm, do not spray," or words to that effect. He stated that he did not see any "private property" signs or other similar signage. He said that he asked for consent to search appellant's residence despite believing that he had exigent circumstances because he wanted to develop a rapport with appellant. He recalled appellant's telling the investigators to leave his property but stated that he had already smelled the methamphetamine at that point. Investigator Green further recalled appellant's saying that he had an injury that would prevent his being handcuffed but because "[h]e showed [Investigator Green] shortly thereafter that those injuries didn't apply to fighting," Investigator Green believed that "handcuffs would have been okay." Investigator Green testified that appellant told the investigators where to find the active lab after he had been handcuffed.

On re-direct examination, Investigator Green testified that when a methamphetamine lab catches fire, it is "just like a flame thrower." He further testified, "I've seen one that actually was in a trailer like this, that it actually blew the walls away from the flooring, and the guy that was in there had a tattoo up here [by his shoulder], and it was down here [by his wrist]. It just melted, just ran down his skin."

Investigator Brent Chunn testified that he did not believe that Cody Gatlin's information (that he had taken the pseudoephedrine to appellant and that appellant was in the process of making methamphetamine) was enough for probable cause to search appellant's residence or to obtain a search warrant. He characterized their approach of appellant as a "follow up investigation" rather than a "knock and talk" because they would have been more cautious if they had been conducting a "knock and talk." Investigator Chunn did not recall seeing any "no trespassing" signs on appellant's property or any other signs. Investigator Chunn testified that he first smelled methamphetamine when he was approximately fifteen feet away from appellant. He recalled that appellant first asked them whether he could help them. After appellant would not consent to a search of his residence, Investigator Chunn "[f]orced the door open." He went through the residence to make sure no one else was inside. He testified that he saw a pistol "right inside the door." When he exited, he saw Investigator Green and appellant "wrestling on the ground." Investigator Chunn

testified that he later found the active methamphetamine lab in the freezer of appellant's refrigerator. Investigator Green found the inactive labs in a separate deep freezer. Investigator Chunn commented that placing labs in freezers was not a common practice.

Tammy Atkins testified that she knew appellant through her church. She said that on July 13, 2013, she was visiting people on appellant's road for her church and noticed "no trespassing" signs on his property. She testified that there were several "no trespassing" or "private property" signs and identified three such signs in a photograph of appellant's property. Ms. Atkins said, "[W]e're not supposed to go to houses that have 'no trespassing' signs." She testified that she had been on appellant's road several times since July 13 and always saw the "no trespassing" signs.

The trial court took the matter under advisement and later issued an order denying appellant's motion to suppress. In its order, the trial court stated that the investigators "had reasonable suspicion of illegal activity based on substantiated facts" and that the "no trespassing" sign "was not a bar from the officers['] investigating an ongoing dangerous highly combustible activity." The trial court further stated that the investigators had "reasonable grounds" to search appellant's residence after smelling methamphetamine because "[t]hey knew that the lab must be bled or it might burst into flames or explode."

B. Trial

At trial, Investigator Green testified consistently with his testimony at the suppression hearing. In addition, he testified that appellant's trailer was forty to fifty feet from Cody Gatlin's residence, "as the crow flies." Investigator Green also listed all of the items seized from appellant's residence: one pound of non-liquid drain opener; thirty-two ounces of liquid drain opener; four empty Coleman fuel cans; two jars of Coleman fuel; nine inactive labs; eight empty HCL generators; a bag of Epsom salts; an empty box of Sudafed; and "miscellaneous lab trash." All of these items were destroyed because they were contaminated with methamphetamine. Investigator Green said that he collected from just inside the front door a loaded, sawed-off 410 shotgun[3] with a homemade magazine made from duct tape. He also collected a loaded 410 shotgun with a laser sight and an unloaded .22 rifle from the residence's couch.

On cross-examination, Investigator Green testified that he first learned about methamphetamine possibly being manufactured on August 3 from his lieutenant, whose source was Kyle Wolfe. The specific information was that Mariah Davis would be purchasing pseudoephedrine for the purpose of manufacturing methamphetamine. Investigator Green said that when he talked to Cody Gatlin, Mr. Gatlin had just come from appellant's house. He stated that he saw Mr.

[3] Apparently this weapon was short enough that the trial participants also referred to it as a handgun.

Gatlin in appellant's yard and assumed that he had come from inside the house. Mr. Gatlin told the investigators that there "was an active cook going on." He agreed that it would have been possible for Mr. Gatlin to have been the person actually manufacturing.

Investigator Chunn testified next. He narrated the video from a patrol car driven by Corporal Jeff Thompson that was recorded when Corporal Thompson responded to appellant's address on August 3. Investigator Chunn said that he did not see a "standard 'no trespassing' sign[]" in the video. The remainder of Investigator Chunn's testimony was consistent with his suppression hearing testimony and Investigator Green's testimony. Notably for purposes of this case, he affirmed that he saw the three guns previously mentioned when he was conducting his first sweep of appellant's residence.

On cross-examination, Investigator Chunn identified a still-shot photograph taken from the patrol car video. He confirmed that the photograph depicted signs on a post but that the photograph was too blurry to read the signs.

The State rested its case after Investigator Chunn's testimony. For the defense, Kyle Wolfe testified that he had been to appellant's house once. He recalled watching appellant and Cody Gatlin shooting guns in the yard. The three men also smoked marijuana that day. Mr. Wolfe testified that he told law enforcement that Mr. Gatlin was going to "cook" methamphetamine on August 3. He knew this information

because Mr. Gatlin had asked him to purchase a box of pseudoephedrine. He refused to do so.

Cody Gatlin testified that appellant was his father's next-door neighbor. Mr. Gatlin said that he did not know anything about the guns in appellant's house but recalled hearing appellant shooting on his property. Mr. Gatlin recalled that on August 3, he took "sinus medication" to appellant and that appellant had asked Ms. Davis to purchase the medication for him. He said that appellant promised to give Ms. Davis money and drugs for the medication. Mr. Gatlin testified that he did not see any money exchange, however. He also testified that he had been on his way back from appellant's house when Ms. Davis called him about the investigators being at his father's house. Mr. Gatlin said that he was not going to help anyone manufacture methamphetamine and that he did not know how methamphetamine was manufactured.

Appellant testified that he had four or five "no trespassing" signs on his property and identified a photograph of the one that was at the beginning of his driveway, which read, "no trespassing[,] hunting[,] or fishing." Appellant said that he started using methamphetamine when he suffered depression due to an unfortunate medical diagnosis. He stopped using drugs for a time period but resumed using drugs when he allowed Cody Gatlin to begin manufacturing methamphetamine in his house. He said that Mr. Gatlin purchased all the supplies for manufacturing and explained that he only left his home a few times a year

because he did not have a driver's license or a car. Appellant said that his agreement with Mr. Gatlin was that Mr. Gatlin would give him half of the drugs made in exchange for the use of his house. Appellant testified that on August 2, 2013, he practiced target shooting in his backyard. He would normally have cleaned his guns after practicing but did not do so that day. On August 3, he was about to clean his guns when Mr. Gatlin came over and began making methamphetamine. Mr. Gatlin received a telephone call from Ms. Davis about the police being at his father's house, so Mr. Gatlin placed the methamphetamine lab in the freezer and left. Appellant testified that he shut and locked his front door (for which he did not have a key), exited his back door, and walked to his front porch to await the officers. He said that he was not armed at that time and did not have access to his guns. Appellant testified that when the officers approached him, he told them, "Could I help you? I don't know if you've noticed this or not, but you passed 'no trespassing' signs to get here. If you don't have a search warrant, you need to leave my property. What you're doing is unconstitutional." Appellant said that Investigator Green told him that he was going to detain him. Appellant responded that because of previous injuries, they would have to break his arm to handcuff him. He said that Investigator Chunn stated, "'Oh, we're breaking your arm.'" When Investigator Green did not contradict Investigator Chunn, appellant said that he pulled his arm back and told them to leave his property. Instead, he said that "[t]hey started punching [him] and kicking [him] and choking [him]."

On cross-examination, appellant testified that the loaded handgun on the floor by the front door was there because he had been interrupted before he could clean it. He said that he set it on top of his television when he went to answer the door and that it must have fallen when the door was kicked in. Appellant said that during the struggle with the police, his elbow and shoulder were dislocated but that he did not receive medical treatment for the dislocation. Rather, the joints "come back in place [sic]" approximately a week later.

After the close of proof and deliberations, the jury convicted appellant as charged. The trial court held a sentencing hearing and imposed an effective sentence of three years' incarceration followed by eight years suspended to supervised probation. Appellant's motion for new trial was subsequently heard and denied, and he now appeals the judgments of the trial court.

II. Analysis

A. Motion to Suppress

Appellant argues that the trial court erred by denying his motion to suppress, in which he contended that the evidence seized should be suppressed due to an illegal search of his residence. On appeal, he maintains that the "no trespassing" signs on his property meant that the investigators could not legally enter his property to conduct a "knock and talk" investigation. Instead, appellant asserts that the investigators either

needed a warrant or exigent circumstances to approach his residence, and he further asserts that there was no exigency until the investigators were already at appellant's front door. Appellant also contends that any exigency had expired after the initial sweep of appellant's residence and that consequently the investigators should have obtained a warrant before reentering the residence.

In reviewing the trial court's decision on a motion to suppress, we review the trial court's legal conclusions de novo. *State v. Northern*, 262 S.W.3d 741, 747 (Tenn. 2008). In doing so, we give deference to the trial judge's findings of fact unless the evidence preponderates otherwise. *Id.*; *see State v. Ross*, 49 S.W.3d 833, 839 (Tenn. 2001); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). "'[C]redibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.'" *Northern*, 262 S.W.3d at 747-48 (quoting *Odom*, 928 S.W.2d at 23). In reviewing the findings of fact, evidence presented at trial may "'be considered by an appellate court in deciding the propriety of the trial court's ruling on the motion to suppress.'" *State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003) (quoting *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001)). The prevailing party on the motion to suppress is afforded the "'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *Northern*, 262 S.W.3d at 748 (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn.

1998)); *see State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000); *Odom*, 928 S.W.2d at 23.

At a hearing on a motion to suppress evidence recovered as a result of a warrantless search, the State must prove that the search was reasonable. *State v. Coulter*, 67 S.W.3d 3, 41 (Tenn. Crim. App. 2001). To carry its burden, the State must prove that law enforcement conducted the warrantless search or seizure pursuant to one of the narrowly-defined exceptions to the warrant requirement. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000). Our supreme court has held:

> [U]nder both the federal constitution and our state constitution, a search without a warrant is presumptively unreasonable, and any evidence obtained pursuant to such a search is subject to suppression unless the [S]tate demonstrates that the search was conducted under one of the narrowly defined exceptions to the warrant requirement. Moreover, Tennessee has approved of and adopted exceptions to the requirement of obtaining a valid search warrant, including search incident to arrest, plain view, stop and frisk, hot pursuit, search under exigent circumstances, and others.

State v. Cox, 171 S.W.3d 174, 179 (Tenn. 2005) (citations omitted); *see State v. Echols*, 382 S.W.3d 266, 277 (Tenn. 2012). Pursuant to the exigent circumstances exception, a warrantless search may be conducted where there are exigent circumstances and probable cause. *Fuqua v. Armour*, 543 S.W.2d 64, 68 (Tenn.

1976); *State v. Adams*, 238 S.W.3d 313, 321 (Tenn. Crim. App. 2005). "Exigent circumstances are limited to three situations: (1) when officers are in 'hot pursuit' of a fleeing suspect; (2) when the suspect presents an immediate threat to the arresting officers or the public; or (3) when immediate police action is necessary to prevent the destruction of vital evidence or thwart the escape of known criminals." *Adams*, 238 S.W.3d at 321 (quoting *State v. Steven Lloyd Givens*, No. M2001-00021-CCA-R3-CD, 2001 WL 1517033 (Tenn. Crim. App. Nov. 29, 2001)) (internal quotation marks omitted). "Given the importance of the warrant requirement in safeguarding against unreasonable searches and seizures, a circumstance will be sufficiently exigent only where the State has shown that the search is imperative." *State v. Meeks*, 262 S.W.3d 710, 723 (Tenn. 2008) (citations omitted). "No amount of probable cause can justify a warrantless search or seizure, absent 'exigent circumstances.'" *Fuqua*, 543 S.W.2d at 68 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971)) (internal quotation marks omitted).

However, "[i]t is well settled that the Fourth Amendment's procedural safeguards do not apply to police investigative activities unless those activities constitute a 'search' within the meaning of the Fourth Amendment." *State v. Bell*, 832 S.W.2d 583, 589 (Tenn. Crim. App. 1991). "In consequence, 'an investigation by governmental authorities which is not a search as defined by the Supreme Court may be conducted without probable cause, reasonable suspicion or a search warrant.'" *State v. Talley*, 307 S.W.3d 723, 730 (Tenn. 2010)

(quoting *Bell*, 832 S.W.2d at 589-90). Under both the federal and state constitutions,[4] we must inquire "(1) whether the individual had an actual, subjective expectation of privacy and (2) whether society is willing to view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances." *State v. Munn*, 56 S.W.3d 486, 494 (Tenn. 2001). A government intrusion without a warrant or without an applicable exception to the warrant requirement is illegal when an individual has a justifiable expectation of privacy. *See Bell*, 832 S.W.2d at 589; *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.). The United States Supreme Court has also presented an alternative definition of a search as an "unlicensed physical intrusion" into a constitutionally protected area. *Florida v. Jardines*, ___ U.S. ___, ___, 133 S. Ct. 1409, 1415, 185 L. Ed. 2d 495 (2013). For purposes of our opinion, we will apply both the reasonable expectation of privacy test and the *Jardines* test for a search in our analysis.

In this case, there are three separate government actions to consider when determining whether the evidence seized as a result of the warrantless search of

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[4] We note that our state supreme court has held that Article 1, section 7 of the state constitution " 'is identical in intent and purpose with the Fourth Amendment' " but that under the state constitution, the state supreme court may extend greater privacy protections than the federal constitution when necessary. *State v. Randolph*, 74 S.W.3d 330, 334 (Tenn. 2002) (quoting *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968)).

appellant's residence should have been suppressed. First, the investigators entered appellant's property to conduct a "follow-up investigation" despite appellant's "no trespassing" signs, which the officers did not see. Second, after smelling methamphetamine, Investigator Chunn forced entry into appellant's residence and conducted a brief sweep, during which he saw the firearms and some of the components for making methamphetamine but did not see the active or inactive labs. Third, after appellant told the officers that the lab was in the freezer, the investigators re-entered appellant's residence and collected the active lab from the refrigerator freezer and the inactive labs from the deep freezer. Investigators also collected the firearms and manufacturing components.

Thus, we must first inquire whether the investigators were legally on appellant's property when they drove down appellant's driveway and approached his front door to contact him about the information they received from Mr. Gatlin and Ms. Davis. "As with all Fourth Amendment questions, the touchstone of the analysis is reasonableness." *State v. Moats*, 403 S.W.3d 170, 194 (Tenn. 2013). Our courts have recognized the validity of the so-called "knock and talk" police procedure, whereby police officers approach a residence for purposes of furthering an investigation by asking questions of the inhabitants or asking for consent to search the residence. *State v. Cothran*, 115 S.W.3d 513, 521-23 (Tenn. Crim. App. 2003). The reasoning behind the validity of the "knock and talk" procedure is that any private citizen, by a "license . . . implied from the

habits of the country," may "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 133 S. Ct. at 1415. "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 1416 (quoting *Kentucky v. King*, 563 U.S. ___, ___, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011)). In addition, our supreme court has reasoned that "[a] person does not have an expectation of privacy in the area in front of his or her residence leading from the public way to the front door." *State v. Carter*, 160 S.W.3d 526, 533 (Tenn. 2005).

Appellant contends that unreported cases from this court have held that a "no trespassing" sign invalidated the "knock and talk" procedure by revoking the implied invitation of the front door. *See State v. Monty Blackwell*, No. E2009-00043-CCA-R3-CD, 2010 WL 454864, at *7 (Tenn. Crim. App. Feb. 10, 2010) (stating in dicta that "no trespassing" signs revoked the implied invitation of the front door); *see also State v. Rebecca Draper and J.C. Draper*, No. E2011-01047-CCA-R3-CD, 2012 WL 1895869, at *6 (Tenn. Crim. App. May 24, 2012) (quoting *Monty Blackwell*, 2010 WL 454864, at *7), *State v. Scotty Wayne Henry*, No. W2005-02890-CCA-R3-CD, 2007 WL 1094146, at *5 (Tenn. Crim. App. Apr. 11, 2007) (stating in dicta, "The only issue presented that would have made the 'knock and talk' unacceptable would have been the presence of the 'No Trespassing' signs."). It is upon these cases that appellant relies, essentially arguing that these cases present

a bright-line rule that this court should follow. However, unreported cases are persuasive authority, not controlling. *See* Tenn. R. Sup.Ct. 4G. Furthermore, our supreme court has eschewed the creation of bright-line rules for purposes of Fourth Amendment analysis. *See Talley*, 307 S.W.3d at 734 ("[W]e reject any bright-line rule and maintain our view that the totality of the circumstances test is best-suited for determining the reasonableness of an expectation of privacy."). Likewise, the United States Supreme Court has stated that "[i]n applying this [reasonableness] test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 34 (1996). In addition, the cases relied upon by appellant are distinguishable from the case sub judice; therefore, we conclude that no bright-line rule has been established by this court. Thus, we will examine the totality of the circumstances in this case to determine whether appellant revoked the implied invitation of the front door.

We must determine for this case what effect, if any, the "no trespassing" sign had on appellant's expectation of privacy and the validity of the law enforcement action in this case. In so doing, we have reviewed numerous cases from this and other jurisdictions. Our court, in the case that first recognized the validity of the "knock and talk" procedure, quoted a Ninth Circuit case that stated a "knock and talk" was acceptable "[a]bsent express orders from the person in possession against any possible trespass. . . ." *Cothran*, 115 S.W.3d at 521 (quoting *United State* [sic] *v. Cormier*, 220

F.3d 1103, 1109 (9th Cir. 2000)). The Ninth Circuit has repeatedly held that "no trespassing" signs alone did not invalidate "knock and talk" procedures. *See United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir. 2001) (holding that "no trespassing" signs posted at entry of driveway did not invalidate "knock and talk" when officers approached home from helicopter's landing site and did not see the signs); *United States v. Robert*, 747 F.2d 537, 541-43 (9th Cir. 1984) (holding that it was acceptable for troopers to approach house after having accessed house by means of a private road posted with "no trespassing" signs). Thus, for the Ninth Circuit, "no trespassing" signs alone do not rise to the level of "express orders . . . against any possible trespass."

Notably, the federal district court in the Eastern District of Tennessee recently ruled that a "no trespassing" sign did not prevent officers from conducting a "knock and talk." *United States v. Denim*, No. 2:13-CR-63, 2013 WL 4591469, at *4 (E.D. Tenn. Aug. 28, 2013). The *Denim* court reasoned as follows:

> As sacred as the home is, including its curtilage, society is not willing to accept as reasonable an expectation that a police officer may not come within the curtilage to question a resident of a dwelling to ascertain if that resident has information regarding the commission of a criminal offense. Even in the face of No Trespassing signs, it is not unreasonable for a police officer to intrude upon private property to ask if the resident has any information that will aid in the investigation of a crime.

Id. The Sixth Circuit has also held that a "no trespassing" sign was of no consequence when the police were conducting a "knock and talk." *See United States v. Hopper*, 58 F. App'x 619, 623 (6th Cir. 2003). The Sixth Circuit reasoned that "no trespassing" signs did not extend the curtilage of the defendant's residence and that even if the signs had extended the curtilage, "the actions of the police in this case would not have violated the Fourth Amendment because law enforcement officials may encroach upon the curtilage of a home for the purpose of asking questions of the occupants." *Id.* We find the reasoning in these cases to be persuasive. *See Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968) (holding that federal search and seizure cases should be considered persuasive authority in Tennessee).

We have also examined cases from other federal circuits and states. Some states have held that "no trespassing" signs demonstrate a legitimate expectation of privacy that requires a warrant to overcome. *See State v. Roubique*, 421 So. 2d 859, 862 (La. 1982); *State v. Bullock*, 901 P.2d 61, 75-76 (Mont. 1995); *People v. Scott*, 593 N.E.2d 1328, 1338 (N.Y. 1992). The vast majority of states that have directly addressed the issue, however, consider signage to be but one consideration when determining whether a person has demonstrated a legitimate expectation of privacy. *See, e.g.*, *Michel v. State*, 961 P.2d 436, 437-38 (Alaska Ct. App. 1998) (holding that "[p]ersons visiting the residence for social or commercial purposes" would not construe "no trespassing" signs along driveway "as meant to prohibit their entry"); *Burdyshaw v. State*, 10

S.W.3d 918, 921 (Ark. Ct. App. 2000) ("[E]ven though the property was posted, the gates were open, the driveway was not blocked, and entry onto the property was not an intrusion prohibited by the Fourth Amendment."); *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 428 (Cal. Ct. App. 1979) (holding that expectation of privacy was objectively reasonable when "[e]ntry to the property was openly restricted by posted signs along, and locked gates across[ ] the rural access road signif[ied] an intention to deny access to the public in general, including government agents"); *Brown v. State*, 152 So.3d 619, 624 (Fla. Dist. Ct. App. 2014) ("While this Court has found that a policeman may enter the curtilage surrounding a home in the same way as a salesman or visitor could, no such person would reasonably go through both a gated four-foot fence and a gated six-foot fence, surrounded by several 'No Trespassing' signs in order to conduct business with the residents."); *Wysong v. State*, 614 So.2d 670, 671 (Fla. Dist. Ct. App. 1993) (holding that officers did not illegally enter yard to knock on door despite "no trespassing" sign); *State v. Rigoulot*, 846 P.2d 918, 923 (Idaho Ct. App. 1992) ("Posting 'No Trespassing' signs may indicate a desire to restrict unwanted visitors. . . . However, such signs cannot reasonably be interpreted to exclude normal, legitimate, inquiries or visits by mail carriers, newspaper deliverers, census takers, [etc.] who restrict their movements to the areas of one's property normally used to approach the home." (citations omitted)); *Mundy v. State*, 21 N.E.3d 114, 118-19 (Ind. Ct. App. 2014) (holding that it was unreasonable for officers to enter property when it was posted, there

was a chain across the driveway, and a security camera was on a tree near the chain); *State v. Fisher*, 154 P.3d 455, 470-75 (Kan. 2007) (ruling that deputy was legally on property to conduct "knock and talk" but could not seize evidence from curtilage; presence of "no trespassing" signs was part of curtilage analysis); *Jones v. State*, 943 A.2d 1, 12 (Md. 2008) ("For Fourth Amendment purposes, appellant could not have had a reasonable expectation that the 'No Trespassing' sign would or should prevent visitors with a legitimate purpose from walking to the front door, including police officers in furtherance of an investigation."); *State v. Kruse*, 306 S.W.3d 603, 611-12 (Mo. Ct. App. 2010) (stating that signage is one consideration when determining whether police intrusion into backyard was reasonable); *State v. Pasour*, 741 S.E.2d 323, 326 (N.C. Ct. App. 2012) ("[W]hile not dispositive, a homeowner's intent to keep others out and thus evidence of his or her expectation of privacy in an area may be demonstrated by the presence of 'no trespassing' signs".); *State v. Mittleider*, 809 N.W.2d 303, 307-08 (N.D. 2011) (holding that "no trespassing" signs on farm did not create reasonable expectation of privacy in entrance to the farm but leaving open the question of whether such signs could ever create a reasonable expectation of privacy); *State v. Morgan*, No. 13-CA-30, 2014 WL 1836015, at *3-4 (Ohio Ct. App. May 1, 2014) (holding that initial "knock and talk" was "unobjectionable" – despite "no trespassing" signs in front of house but entry into backyard was unreasonable, partly because of the signage), *no perm. app. filed*; *State v. Roper*, 294 P.3d 517, 520 (Or. Ct. App. 2012) (holding that fence plus signage

"objectively manifested intent to exclude the public"); *State v. Gabbard*, 877 P.2d 1217, 1221 (Or. Ct. App. 1994) (concluding that "no trespassing" sign on boundary fence, without more, would not have served to exclude the "reasonable visitor . . . who desired to contact the residents" and that, therefore, officers could rightfully use driveway to approach house); *Robinson v. Commonwealth*, 639 S.E.2d 217, 222 (Va. 2007) ("Implied consent can be negated by obvious indicia of restricted access, such as posted 'no trespassing' signs, gates, or other means that deny access to uninvited persons."); *State v. Johnson*, 879 P.2d 984, 992 (Wash. Ct. App. 1994) (holding that the defendants manifested "their subjective intent to close their property by fencing it, erecting a gate, and placing signs near the gate saying 'No Trespassing' and 'Private Property.' ").

In addition, we note that the United States Supreme Court in *Oliver v. United States*, when determining whether "no trespassing" signs created a legitimate expectation of privacy in open fields when there would otherwise be no expectation of privacy stated, "Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No Trespassing' signs." *Oliver*, 466 U.S. at 183 n.13. Even under the Jardines search test, which focuses more on trespass law than on expectation of privacy, the officers' actions in merely conducting a "knock and talk" would not be proscribed as a warrantless search. *See Jardines*, 1415-18 (ruling that bringing

a drug-sniffing canine into defendant's curtilage objectively demonstrated that the police were intruding upon a constitutionally protected area to search, not merely conducting a "knock and talk"). "The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time." *Id.* at 1420 (Alito, J., dissenting). Consequently, if the officers' actions were not a search, then the Fourth Amendment protections would not apply.

Taking all of these cases into consideration, the emerging rule appears to be that the implied invitation of the front door can be revoked but that the revocation must be obvious to the casual visitor who wishes only to contact the residents of a property. *See State v. Grice*, 767 S.E.2d 312, 319 (N.C. 2015) ("The implicit license enjoyed by law enforcement and citizens alike to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners and is already limited by our social customs."). Thus, in this case, we must determine whether a small sign reading "no trespassing[,] hunting[,] or fishing," posted in a field next to appellant's driveway that is difficult to see when driving down the driveway, as evidenced by the "dashcam" video presented in this case, is sufficient to revoke the implied invitation.[5] Several courts

[5] We note that Ms. Atkins testified that there were other signs on the property, but because the "dashcam" video does not show those signs, we conclude that they are not visible to someone approaching the house using the driveway, as the officers did in this case.

when ruling on this issue have noted that such a sign, especially on a rural property, is generally intended to prevent people from unauthorized use of the property, not to prevent a casual visitor from approaching the residence. *See, e.g.*, *U.S. v. Ventling*, 678 F.2d 63, 66 (8th Cir. 1982); *Michel*, 961 P.2d at 438. The *Ventling* court quoted with approval the magistrate's opinion in that case:

> The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to contact the occupants for a lawful request and if the request is refused to leave by the same way. The presence of "no trespassing" signs in this country without a locked or closed gate make the entry along the driveway for the purposes above described not a trespass and therefore does not constitute an intrusion prohibited by the Fourth Amendment.

Ventling, 678 F.2d at 66. The *Michel* court likewise reasoned that the "no trespassing" signs were not intended to forestall casual visitors from using the driveway to reach the residence:

> The Michels live in rural Alaska, and their residence lies some distance off the main highway, connected by a long driveway. Under these circumstances, a visitor to the Michels' residence would reasonably conclude that the "No Trespassing" signs posted along the driveway were intended to deter people who might be tempted to leave the highway and use the

> Michels' driveway as an access route for their own purposes (e.g., hunting, camping, hiking, or the like). Persons visiting the residence for social or commercial purposes would not construe those signs as meant to prohibit their entry.

Michel, 961 P.2d at 438. Likewise, we conclude that the sign in this case would not have prevented the casual visitor or the reasonably respectful citizen from approaching appellant's residence. Therefore, the sign did not revoke the implied invitation of the front door, and Investigators Green and Chunn lawfully entered appellant's property when they drove up his driveway and approached his front door. Such conduct was not a search under Fourth Amendment jurisprudence.

However, the warrantless entry into appellant's home for the purpose of discovering active methamphetamine labs was unquestionably a search; therefore, we must consider whether exigent circumstances justified the warrantless entry into appellant's residence. The investigators testified that they smelled the methamphetamine as they approached the residence. There is no question that an active methamphetamine lab was present in appellant's residence. The investigators stated that an active lab has a distinctive odor apart from the general odor of methamphetamine. They also testified about the dangers of unattended active labs. Investigator Green in particular gave a graphic description of the aftermath of a methamphetamine explosion. Our supreme court has held that

exigent circumstances existed to justify law enforcement's warrantless entry into a hotel room when an active methamphetamine lab was present:

> The undisputed facts clearly establish the sort of exigent circumstances that justified the officers' decision to enter Room 110 of the Park Motel without first obtaining a search warrant. They knew that an actively operating methamphetamine laboratory posed a serious danger not only to the persons in the room itself but also to all persons in the immediate vicinity. The distinct odor surrounding Room 110, the intensity and strength of the odor, the fumes emanating from Room 110, and the effects of the odor and fumes on the inhabitants of Room 109 provided the officers with enough facts to believe that the persons in Room 110 were actively manufacturing methamphetamine. This conclusion provided the officers with an objectively reasonable basis for concluding that there was an immediate need to act to protect themselves and others from serious harm. The fact that the officers overlooked clearing the adjoining rooms before they entered Room 110 does not undermine the reasonableness of their decision to enter Room 110 without waiting for a search warrant. Accordingly, the officers' warrantless entry into and search of Room 110 was not an unreasonable search under either the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Constitution of Tennessee.

State v. Meeks, 262 S.W.3d 710, 726-27 (Tenn. 2008) (footnote omitted). While appellant's residence was in a more rural area, there was a trailer immediately adjacent to his own, and neighbors were located within fifty feet. Moreover, appellant himself and the investigators were in immediate danger had the active lab exploded. Therefore, we conclude that exigent circumstances not only existed to justify the initial warrantless entry into the residence but that the exigency continued until the active lab was deactivated and no other active labs were found.[6]

Finally, we must determine whether evidence other than the active lab was properly seized. The State argues that the plain view doctrine operates to justify the seizure of the evidence in this case. This court has stated that the plain view exception applies when: (1) the objects seized were in plain view; (2) the viewer had a right to be in position to view the seized

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[6] In appellant's reply brief and at oral argument, he argued that appellant's statement to investigators that the laboratory was in the freezer did not create additional exigent circumstances. However, our ruling that the exigency continued from the time that investigators smelled methamphetamine until the active lab was disabled encompasses both Investigator Chunn's initial entry, when he did not find an active lab, and his second entry, when he found an active lab based on appellant's statement; thus, appellant's argument regarding his statement is inapposite. Moreover, any argument that appellant's statement was not voluntary or was taken in contravention of his constitutional rights is waived for failure to address it in the trial court. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

object; and (3) the incriminating nature of the object was immediately apparent. *Cothran*, 115 S.W.3d at 524-25 (Tenn. Crim. App. 2003) (citing *State v. Hawkins*, 969 S.W.2d 936, 938 (Tenn. Crim. App. 1997)). In this case, the pictures of appellant's residence show that the majority of the seized evidence was in plain view. The exception is that the inactive labs were concealed in a freezer; however, the necessity of finding any and all active labs, especially when appellant mentioned a freezer in particular, means that the exigent circumstances encompassed the search of the deep freezer. We have already concluded that the investigators were rightfully in position to view all of the objects seized. Based on the investigators' experience with methamphetamine manufacturing, the incriminating nature of the evidence seized was apparent to them. Therefore, we conclude that none of the evidence seized in this case was subject to suppression. Appellant is therefore without relief as to this issue.

B. Sufficiency of the Evidence

For his second issue, appellant contends that the evidence was insufficient to prove that he possessed firearms with the intent to go armed during the commission of a dangerous felony. He does not contest his other convictions. The State responds that the jury had ample evidence from which it could have determined that appellant was guilty of the two firearm offenses.

The standard for appellate review of a claim challenging the sufficiency of the State's evidence is

"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)); *see* Tenn. R. App. P. 13(e); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). To obtain relief on a claim of insufficient evidence, appellant must demonstrate that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977).

On appellate review, "'we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.'" *Davis*, 354 S.W.3d at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)); *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). This court presumes that the jury has afforded the State all reasonable inferences from the evidence and resolved all

conflicts in the testimony in favor of the State; as such, we will not substitute our own inferences drawn from the evidence for those drawn by the jury, nor will we re-weigh or re-evaluate the evidence. *Dorantes*, 331 S.W.3d at 379; *Cabbage*, 571 S.W.2d at 835; *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Because a jury conviction removes the presumption of innocence that appellant enjoyed at trial and replaces it with one of guilt at the appellate level, the burden of proof shifts from the State to the convicted appellant, who must demonstrate to this court that the evidence is insufficient to support the jury's findings. *Davis*, 354 S.W.3d at 729 (citing *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)).

In this state, "[i]t is an offense to possess a firearm with the intent to go armed during the commission of . . . a dangerous felony." Tenn. Code Ann. § 39-17-1324(a). Initiating the process to manufacture methamphetamine is listed in section 39-17-1324(i)(1)(K) as a dangerous felony. As appellant stands convicted of initiation of the process to manufacture methamphetamine, that element of the offense has clearly been met. Appellant claims, however, that the State failed to prove that he intended to go armed. This court has previously ruled that "[t]he fact that the firearm was holstered, loaded, and within the immediate proximity of the contraband established the defendant's intent to go armed and demonstrated a nexus between the firearm and the drugs." *State v. Ronnie Paul Trusty*, No. W2012-02445-CCA-R3CD, 2013 WL 3488150, at *4 (Tenn. Crim. App. July 11, 2013) (citing *State v. Yarbro*,

618 S.W.2d 521, 524-25 (Tenn. Crim. App. 1981)), *no perm. app. filed*; *State v. Victor Armando Martinez*, No. M2010-01820-CCA-R3-CD, 2012 WL 5992148, at *9 (Tenn. Crim. App. Dec. 3, 2012)). In this case, appellant had loaded firearms within reach and/or actually in his hands as the methamphetamine lab was processing in the same small mobile home. From this information, the jury was within its prerogative to find appellant guilty of two counts of possessing a firearm with the intent to go armed during the commission of a dangerous felony. Therefore, we affirm appellant's convictions for this offense.

CONCLUSION

Following our careful review of the record, the arguments of the parties, and the applicable law, we affirm the judgments of the trial court.

ROGER A. PAGE, JUDGE

IN THE COURT OF
CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
February 03, 2015 Session

STATE OF TENNESSEE v.
JAMES ROBERT CHRISTENSEN, JR.

Appeal from the Circuit Court
for Tipton County
No. 7799 Joseph H. Walker III, Judge

No. W2014-00931-CCA-R3-CD – Filed May 14, 2015

JOHN EVERETT WILLIAMS, J., concurring in part and dissenting in part.

I agree that in this case, there are three separate state actions to consider when determining whether the evidence seized, as a result of the warrantless search of the defendant's residence, should have been suppressed. First, the investigators entered the defendant's property to conduct a "follow-up investigation," without a search warrant, despite the defendant's "no trespassing" signs. Second, after smelling methamphetamine, Investigator Chunn forcibly entered the defendant's residence and conducted a brief sweep, during which he saw the firearms and some of the components for making methamphetamine, but did not see the active nor inactive labs. Third, after the defendant told officers that the lab was in the freezer, the investigators re-entered the defendant's residence and collected the active lab from the refrigerator and

the inactive lab from the deep freezer. I believe the majority has correctly analyzed actions two and three. My disagreement with the majority only relates to the State's first action. My review of the record leads me to conclude that this defendant had clearly revoked any implied consent for the officers to come upon his property without a search warrant. Without lawfully being upon the premises, the second and third actions are void and the fruit of the poisonous tree.

I begin my analysis at the same point as the majority. A search without a warrant is presumptively unreasonable, and any evidence obtained pursuant to such a search is subject to suppression unless the State demonstrates that the search was conducted under one of the narrowly defined exceptions to the warrant requirement. *State v. Talley*, 307 S.W.3d 723, 729-30 (Tenn. 2010). I also agree with the majority that the totality of the circumstances in this case should be examined to determine whether the defendant revoked the implied consent invitation to his front door. This case does not involve a search incident to a lawful arrest, the plain view doctrine, stop and frisk, hot pursuit, or a search under exigent circumstances.[1] The

[1] I wish to make it clear that I do not believe that exigent circumstances existed to allow the initial entry onto the defendant's property. Good information about an active methamphetamine lab under these circumstances is simply not enough to invoke the exception to the search warrant requirement known as exigent circumstances. These investigators knew that no one else was in the house, except the defendant. They could easily monitor who came in and out. They gave no explanation as to why they did not call for backup or other assistance. The State argued during the suppression hearing that with the information the officers

language used in this case would suggest that this search is incident to a "follow-up investigation." Being unaware of any such named exception to the requirement for a search warrant, I believe the majority correct when they review this action as being akin to a "knock and talk" situation.

This record is devoid of any attempt to obtain, or mention of obtaining, a search warrant to access and discover any illegal activity regarding methamphetamine manufacturing upon the property of the defendant. It is difficult to determine the reasonableness of officers' actions when they do not attempt to convey why they chose not to get a search warrant but instead relied upon an exception to the requirement for a search warrant. Upon this record, we do not know if it saved them 30 minutes, an hour, two hours or longer. Given that the burden is on the State to prove the reasonableness of the warrantless search, I would have expected some testimony to explain why the officers wished to abandon a tried and true and safe practice of acquiring a search warrant to enter the residence in favor of risking the entire suppression of any evidence. I fear that the investigators are operating under an erroneous assumption that they have a right to enter any person's property simply to speak with them. Their assumption is valid in perhaps 98% of the cases that they

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had obtained, they had a duty to act. The State contended that the officers would be sued if they did not act and something happened to the defendant. I do not agree with the assertion that had the defendant been injured while the investigators were doing their duty by securing a search warrant to enter upon his premises that Tipton County was subject to civil liability.

investigate, as it is not "'illegal per se, or a condemned invasion of a person's right to 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[.]" *State v. Cothran*, 115 S.W.3d 513, 521 (Tenn. Crim. App. 2003) (quoting *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000)). However, this procedure is only permissible "'[*a*]*bsent express orders from the person in possession against any possible trespass*[.]'" *Id.* (emphasis added). Thus, when someone, such as this defendant, revokes any implied consent to enter their property, officers are obliged to get a search warrant. Today, with training and technology, officers can obtain search warrants in a more timely fashion than in the past. I submit that had the officers been impeded by a locked gate, a search warrant is exactly what they would have obtained. I submit that had the investigators met this defendant coming out of his one lane driveway as they were coming in and he demanded that they leave his property, they would not have gone further upon his property without a search warrant.

I would like to address this issue by attempting to answer the question, what must a private citizen do in order to revoke the so-called implied consent invitation to the front door. The federal government can put up a single "No Trespassing" sign on a fence at a nuclear facility or an abandoned munitions facility, and a trespass there upon is a trespass. The state government can put one "No Trespassing" sign upon a state

facility, and a trespass is a trespass. When entering a penal institution a sign may inform a citizen that they are giving up their Fourth Amendment right against unreasonable searches and seizures by merely entering the premises. Often, a citizen is informed that he or she is subject to greater punishment for bringing contraband into a penal institution than a school room or a church. If governments can use a single sign so effectively against citizens, why then can not citizens use a sign equally against governments? Whether the words are used by the government or a citizen, "No Trespassing" means no trespassing. The government or the private citizen may prohibit the other from entering upon the other's property without permission.

The record in this case reveals that the defendant lives in a mobile home. There are clearly nine signs upon the property.[2] Two signs appear to be at the edge of the defendant's property. They appear to have been purchased, and they have white lettering with a black background. They read "**PRIVATE PROPERTY**" in large letters and "**NO TRESPASSING**" in smaller letters. These two signs are close to the roadway and are easily visible to passersby. There is a third sign approximately two car lengths off of the main road, and this is the sign that was visible on the investigators' dash camera. It is located approximately in the middle of the property. It is very close to the driver's side of a vehicle

[2] I acknowledge that the descriptions of these signs are based off of a photograph of the defendant's property that was taken several months after his arrest. It was made an exhibit and the proof showed the signs were present on the day of the search.

that would be traveling along the driveway leading to the defendant's home. Atop the sign are the numbers "**342**," in white letters and a black background, arranged vertically and appearing as 911 numbers. Below the numbers is a sign with red letters on a white background, which reads "**NO TRESPASSING, HUNTING OR FISHING, VIOLATORS PROSECUTED, UNDER PENALTY OF LAW**," along with what appears to be a telephone number. Below that sign is another sign with blue letters on a white background that appears to be homemade. It reads "**ORGANIC FARM, *DO NOT SPRAY*, NO ROCIAR, ZOMA ORGANICA**." Below that sign is another like the one above, which reads "**WATER LINES, SEPTIC LINES, SMALL TREES, PLANT SEEDLINGS**" and is in the middle of two arrows pointing down the word "**SO**." Below that sign is a purchased sign with white letters and a black background reading "**KEEP OFF THE GRASS**." There is another sign appearing somewhat in the middle of the property and closest to the road, which has red letters and a white background at the top and bottom with white letters in red background in the middle. It appears to be a purchased sign and reads like the first sign above with blue letters on a white background. There is yet one more sign located on a tree with red letters and a white background that cannot be read on this record.

As the majority has noted, there are cases that can be cited that stand for the proposition that a "no trespassing" sign demonstrates a legitimate expectation of privacy that requires a warrant to legally enter

the property, and there are cases that state that one sign is insufficient to create a legitimate expectation of privacy. As to the cases cited by the majority that do not believe a single trespassing sign demonstrates a legitimate expectation of privacy, I find them unpersuasive. A wall; a gate, perhaps locked; a guard tower, perhaps a manned guard tower; the installation of cameras or other surveillance devices; or more ominous warnings on the signs would more unmistakably convey that the person behind those walls revoked any implied consent for others to come upon their property. However, the problem with requiring such additional barriers to revoke the implied right of consent is that it extends a privilege to the wealthy while trampling the rights of the poor, who deserve equal protection from the intrusion of government. An individual should not be stripped of their right to exclude others from their property simply because they cannot afford to install a gate or other security items. A simple sign, whether purchased or homemade, is a clear expression of one's intention to exclude others. The sign operates to speak to all those who see it as if the owner himself were there speaking. For years, citizens, living in the city or the country, that have wanted to avoid contact with others and wanted others not to intrude upon their property have done so by posting the simple and easy to understand "No Trespassing" sign. Giving these signs great weight is consistent with living in a free society.

Here, the investigators had enough information to obtain a search warrant for the defendant's premises.

For reasons unclear to me, the officers chose to enter the defendant's property without such a warrant, instead relying on an exception to the warrant requirement. The lesson here is simple: the easiest way is not always the best way. Because there is not an applicable exception to the warrant requirement to justify the entry onto the defendant's property, the search was unreasonable. Therefore, all of the evidence resulting from the search should be suppressed.

In all other regards, I agree with the majority opinion. I would remand this case to the trial court to sentence the defendant for the class B misdemeanor of resisting arrest. Because I concluded that the evidence obtained was a result of an unlawful search, I would reverse and dismiss all other convictions.

JOHN EVERETT WILLIAMS, JUDGE

IN THE CIRCUIT COURT OF TIPTON COUNTY, TN

STATE OF TENNESSEE
v. **R.D. 7799**
JAMES ROBERT CHRISTENSEN

ORDER

(Filed Mar. 10, 2014)

The motion to suppress came on for consideration on March 7, 2014, upon the testimony of witnesses from which the Court finds:

Officer Green testified he is with the drug investigators in Tipton County, and received word on August 3, 2013, of a meth operation with pills being purchased by Mariah Davis. He looked up the pseudoephedrine logs and found the name of Mariah Davis which gave credence to the report. He went to Beaver Creek Lane to speak with Ms. Davis. At her house he spoke with her and two others, including Cody Gatlin, who is known to the officer to be involved in the past with meth. Mr. Gatlin reported that the pills were delivered next door. They reported that the meth cook was in operation at this time next door.

The officers then went up the drive next door and the defendant came out of a trailer and shut the door. Officer Green could smell "an overwhelming odor" of a meth cook. The officer requested of the defendant permission to search for the meth cook he could smell. The defendant denied consent. The officer stated he was

placing the defendant under arrest, and he swung at the officer. They scuffled. The defendant was calling out to call "1-800-the firm."

Upon entry of the trailer, the officer discovered a meth cook lab that was active. It had pressure and was actively making meth, and had a strong odor. The officers bled off the pressure to prevent a fire or explosion They also located guns and other bottles containing meth labs. The meth task force was called to dismantle and take off the hazardous materials.

The defendant at a later point appeared erratic, and stated that it was not him fighting the officer, that it was his brother EJ. The defendant became incoherent and was sweating. The defendant was decontaminated by washing at the end of the drive, and an ambulance was called to transport him for treatment.

Officer Chun testified about the circumstances of approaching the defendant to discuss the information they had about an active meth cook. There was a strong odor of an active meth cook. In the opinion of the officer there was danger of a bomb or a fire.

Tammy Atkins testified she knows the defendant from church. On July 13, 2013 she was on Beaver Creek Road and noticed no trespassing signs on the property of the defendant.

The defendant moves to suppress all evidence obtained after the officers entered his property. The defendant relies upon *State v. Blackwell*, E2009-00043-CCA-R3-CD, which concerned a warrantless search of

a residence and adjoining property after a flyover drug eradication operation for marijuana. None was seen, and the officers entered the property to speak with the defendant for consent to search. The property was posted with no trespassing signs, and the court found a revocation of the implied invitation to approach the front door.

Tennessee has approved of and adopted exceptions to the requirement of obtaining a valid search warrant, including search incident to arrest, plain view, stop and frisk, hot pursuit, search under exigent circumstances, and others. Bartram, 925 S.W.2d 227, 230.

A warrantless entry by law enforcement may be legal when there is compelling need for official action and no time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499 (1978). An objective standard is used to determine the reasonableness of the officer's belief that an emergency situation existed at the moment of entry. Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968). The inquiry is whether the facts available to the officer at the moment of entry would 'warrant a man of reasonable caution in the belief' that the action taken was appropriate. Carroll v. United States, 267 U.S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543, T.D. 3686 (1925). The reasonableness of that belief must be judged on the basis of the officer's knowledge at the time he or she entered a defendant's residence. See People v. Thompson, 770 P.2d 1282, 1285 (Colo. 1989) (citing People v. Malczewski, 744 P.2d 62, 66 (Colo. 1987)). In determining whether the officer acted

reasonably, the court must consider the totality of the circumstances.

It is well-established in Tennessee that the odor of an illegal substance, either alone or in conjunction with other facts and circumstances, can provide sufficient probable cause, depending on the situation, for either a warrantless search or the issuance of a search warrant. See Hart v. State, 568 S.W.2d 295, 296 (Tenn. Crim. App. 1978). Further, a recent federal case from the Eastern District of Tennessee upheld a warrantless search of a hotel room where the officer noticed smoke coming out of the room's window air conditioner and the "strong unmistakable odor of methamphetamine" outside the defendant's room. United States v. Denson, No. 1:05 CR 088, 2006 U.S. Dist. LEXIS 7898, 2006 WL 270287, at *1 (E.D. Tenn. Feb. 2, 2006). In so doing, the court reviewed the requirements for a warrantless search under exigent circumstances. The court determined that probable cause existed based on the officer's "smelling the unmistakable odor of methamphetamine and his training to recognize the smell, along with visible smoke and fumes emanating from the room, and the finding of methamphetamine and coffee filters on defendant's person." 2006 U.S. Dist. LEXIS 7898, [WL] at *3. After determining that probable cause existed to believe that methamphetamine was illegally being processed in the defendant's room, the court went on to find that exigent circumstances existed justifying the warrantless search of the room. Id. The court commented:

The dangers of methamphetamine are well-established. As noted by the Sixth Circuit and addressed by the House of Representatives, methamphetamine: "poses serious dangers to both human life and to the environment . . . these chemicals and substances are utilized in a manufacturing process that is unstable, volatile, and highly combustible. Even small amounts of these chemicals, when mixed improperly, can cause explosions and fires." United States v. Layne, 324 F.3d 464, 468-69 (6th Cir. 2003) (quoting H.R. Rep. 106-878, pt.1 at *22 (Sept. 21, 2000)); see also U.S. v. Dick, 173 F. Supp. 2d 765, 769 (E.D. Tenn. 2001). Id. Castile, 2006 Tenn. Crim. App. LEXIS 492, 2006 WL 1816371, at *7-8. The Castile Court further opined that

> the officers could have justified a warrantless search of the room based on the smell of methamphetamines alone without the seizure of the wallet and discovery of the receipts for precursors based on the exigent circumstances created by the dangers associated with methamphetamine production. . . . While the officers procured a search warrant for the hotel room prior to their search which resulted in the discovery of a multitude of items used in the production of methamphetamine and some actual methamphetamine, we conclude that they would have been justified in searching the room without a warrant based on the dangerous

> exigent circumstances presented by an active methamphetamine laboratory. 2006 Tenn. Crim. App. LEXIS 492, [WL] at *8.

In this case the officers entered the driveway of the defendant based on the report of an active meth cook presently taking place. The officers had reasonable suspicion of illegal activity based on substantiated facts, and a duty to investigate further. They had confirmed that pills were purchased for a meth cook and a report of an active cook taking place on the property. While the no trespassing sign evinced an expectation of privacy, it was not a bar from the officers investigating an ongoing dangerous highly combustible activity. As they approached the trailer the defendant came out and they could smell the distinctive odor of a meth cook taking place. The officers were then justified to conduct a warrantless search of the trailer.

In most cases, suspecting evidence of drugs would not establish the exigency necessary to validate a warrantless search of a residence. However, cases involving methamphetamine labs are an exception. Evidence regarding the purchase and possession of materials used to manufacture methamphetamine, the strong odor of cooking methamphetamine emitting from the residence, and an agents knowledge of the inherent dangerousness of an active lab, established that reasonable grounds existed for the agents to believe there was an immediate need to protect the public by entering the home and discontinuing the lab's production. *U.S. v. Rhiger*, 315 F.3d 1283 (2003).

The officers knew of the purchase and possession of materials used to manufacture meth and were told the materials were delivered to the defendant's home next door and that an active meth lab was in progress. With this knowledge they had the authority to investigate despite the no trespassing sign. When the officers approached the trailer and smelled the strong odor of an active meth cook, that established reasonable grounds for the officers to enter the home and discontinue the meth lab's production. They knew that the lab must be bled or it might burst into flames or explode.

The court finds that the motion to suppress should be and the same is denied.

It is therefore ordered that the motion to suppress evidence is denied.

/s/ J Walker
Judge

To the Clerk: Please deliver a copy to the DA, and Mr. Brasfield

Certificate: I certify I have delivered a copy as directed this 10 day of March 2014 MF/ga

IN THE CIRCUIT COURT OF TIPTON COUNTY, TENNESSEE FOR THE TWENTY-FIFTH JUDICIAL CIRCUIT AT COVINGTON

STATE OF TENNESSEE
Plaintiff

VS.

DOCKET NO. 7799

JAMES ROBERT CHRISTENSEN, JR.
Defendant

MOTION TO SUPPRESS

(Filed Feb. 20, 2014)

Comes the Defendant by and through counsel, and hereby moves this Honorable Court as follows:

1. For any and all evidence against the Defendant be suppressed because law enforcement violated the Defendant's Fourth Amendment rights under the United State [sic] Constitution and Article 1, Section 7 rights of the Tennessee Constitution pertaining to unreasonable searches.

2. The bases for this Motion are set forth in the accompanying Memorandum.

WHEREFORE, THE DEFENDANT PRAYS: That this Motion be granted in all aspects.

Respectfully submitted,

/s/ Charles Brasfield

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IN THE CIRCUIT COURT OF TIPTON COUNTY, TENNESSEE FOR THE TWENTY-FIFTH JUDICIAL CIRCUIT AT COVINGTON

STATE OF TENNESSEE
Plaintiff

VS.

DOCKET NO. 7799

JAMES ROBERT CHRISTENSEN, JR.
Defendant

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

Comes the Defendant by and through counsel, and would file this Memorandum with the court:

ISSUES PRESENTED

1. Whether the Defendant's Fourth Amendment rights under the U.S. Constitution and Article I Section 7 rights of the Tennessee Constitution were violated.

STATEMENT OF THE CASE

Investigators Green and Chunn received information that the Defendant was manufacturing methamphetamine inside his residence at 342 Beaver Creek Lane in Brighton, TN. The investigators did not obtain

a warrant before approaching the Defendant's residence. The investigators also disregarded multiple "No Trespassing" signs that were displayed on the Defendant's property. The Defendant observed the Investigators approaching his residence, stepped outside on his porch, and shut the door to his residence behind him. The Defendant denied officers' request for consent to search the residence. Investigators then claimed there were exigent circumstances because they smelled a "strong chemical odor commonly associated with the manufacture of methamphetamine" (Affidavit of Complaint in the General Sessions Court of Tipton County) that required their entry into the home. Once inside the residence, the Investigators found products used in the manufacture of methamphetamine inside a refrigerator freezer.

ARGUMENT

1. The Investigators violated the Defendant's Fourth Amendment right to be secure from unreasonable searches and seizers [sic].

Both the federal and state constitutions offer protection from unreasonable searches and seizures. The Fourth Amendment to 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." *See* U.S. Const. Amend. IV. Similarly, Article I, § 7 of the Tennessee Constitution provides "[t]hat the people shall be secure in their persons, houses, papers

and possessions, from unreasonable searches and seizures." *See* Tenn. Const. art. I, § 7. "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *see also State v. Berrios*, 235 S.W.3d 99, 104 (Tenn. 2007). "[A] trial court necessarily indulges the presumption that a warrantless search or seizure is unreasonable, and the burden is on the State to demonstrate that one of the exceptions to the warrant requirement applied at the time of the search or seizure." *State v. Bobby Killion*, E2008-01350-CCA-R3-CD, 2009 WL 174859, at *14 (Tenn. Crim. App. June 22, 2009). "Exceptions to the warrant requirement include searches incident to arrest, plain view, hot pursuit, exigent circumstances, and others, such as the consent to search." *Berrios*, 235 S.W.3d at 104 (citing *State v. Cox*, 171 S.W.3d 174, 179 (Tenn.2005)). "Exigent circumstances are limited to three situations: (1) when officers are in 'hot pursuit' of a fleeing suspect; (2) when the suspect presents an immediate threat to the arresting officers or the public; or (3) when immediate police action is necessary to prevent the destruction of vital evidence or thwart the escape of known criminals." *State v. Givens*, No. M2001-00021-CCA-R3-CD, 2001 WL 1517033 (Tenn. Crim. App., at Nashville, Nov. 29, 2001), *perm. app. denied* (Tenn. May 6, 2002). The mere existence of these circumstances does not

necessarily validate a warrantless search. The State is required to show that "the exigencies of the situation made the search imperative." *State v. Yeargan*, 958 S.W.2d 626, 635 (Tenn.1997).

The initial intrusion occurred when Investigators Green and Chunn approached the front door of the Defendant's residence in order to obtain his consent to search his property. In hopes of gaining the Defendant's consent to search, the Investigators entered on to the Defendant's property for the purpose of conducting a "knock and talk." A "knock and talk" is a lawful and appropriate investigative technique that does not require either probable cause or reasonable suspicion. Yet, knock and talks are only lawful and appropriate "[a]bsent express orders from the person in possession against any possible trespass." *State v. Cothran*, 115 S.W.3d 513, 521 (Tenn. Crim. App. 2003) (citing *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000). The Defendant clearly denied the Investigators' requests for consent to search his residence.

Moreover, the Investigators' actions in coming on the Defendant's property were subject to the warrant requirement if the Defendant had a legitimate expectation of privacy in the area searched. *State v. Wert*, 550 S.W.2d 1 (Tenn. Crim. App. 1977). The presence of "No Trespassing" signs on Defendant's property unmistakably evidenced an actual and subjective expectation of privacy. *Id.* (if the open field exhibits evidence of a desire of the owner for privacy such as a fence or no trespassing signs, the owner then has a reasonable expectation of privacy); *see also State v. Henry*, 2007 WL

1094146, (Tenn. Crim. App., Apr. 11, 2007) ("The only issue presented that would have made the "knock and talk" unacceptable would have been the presence of the "No Trespassing" signs".)) Investigators had no warrant but came on to Defendant's property notwithstanding the "No Trespassing" signs. It was only at that point that Investigators claimed to have exigent circumstances to enter Defendant's home.

CONCLUSION

Therefore, Investigators violated Defendant's Fourth Amendment right from unreasonable searches and seizers [sic], and the evidence obtained during this time should be suppressed.