STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Alison Renee Lee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSHAN COUNTS,

PETITIONER.

APPELLATE CASE NO. 2013-000086

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in affirming the Trial Court's refusal to grant Petitioner's motion to suppress when, based on the totality of the circumstances, law enforcement used the "knock and talk" technique to avoid the warrant requirement in violation of Petitioner's federal and state constitutional right against unreasonable searches and seizures and unreasonable invasions of privacy?

STATEMENT OF THE CASE

On July 15, 2009, the Richland County Grand Jury indicted Petitioner Rushan Counts for possession with intent to distribute marijuana, third offense, in violation of S.C. CODE ANN. § 44-53-370 (1976), as amended. R. 162, ll. 2-21; R. 312 – 313.

On August 3–6, 2009, Petitioner proceeded to trial before the Honorable Alison Lee and a jury. R. 1. Wes Kirkland represented Petitioner, and Assistant Solicitors Seth Rose and Drelton Carson represented the State. The jury found Petitioner guilty of possession with intent to distribute marijuana. R. 298, ll. 17-21. The Trial Court sentenced Petitioner to ten years imprisonment. R. 299, ll. 6-8.

On October 31, 2012, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished *per curiam* opinion. State v. Counts, Op. No. 2012-UP-585 (S.C. Ct. App. filed October 31, 2012). App. 1 – 2. Petitioner filed a petition for rehearing on November 15, 2012, which was denied by the Court of Appeals on December 13, 2012. App. 3 – 16, 17.

On January 8, 2014, this Court granted Petitioner's petition for writ of certiorari to review the Court of Appeals' decision, with all five Justices of the Court granting the writ.

STATEMENT OF FACTS

Motion to Suppress

Pre-trial, defense counsel moved to suppress the evidence found in Petitioner's home pursuant to a "knock and talk" conducted by the Drug Suppression Team of the Richland County Sheriff's Department. R. 7, ll. 9-11; R. 34, ll. 4-8. Officer David Navarro claimed that a "knock and talk" is used "to talk to the citizens in reference to a complaint that [was] received." R. 34, ll. 12-14. Defense counsel challenged the initial contact by the officers and the subsequent issuance of the search warrant for Petitioner's residence. R. 59, ll. 6-17. In support of the motion, defense counsel presented a memorandum to the Trial Court, arguing that law enforcement's use of the "knock and talk" technique violated Petitioner's constitutional rights under the Fourth Amendment to the United States Constitution as well as Article I, section 10, of the South Carolina Constitution against "unreasonable searches and seizures and unreasonable invasions of privacy." R. 7, ll. 12-13; R. 300 – 308; see U.S. CONST. AMEND. IV; see also S.C. CONST. ART. I. § 10.

Suppression Hearing

Officers Damon Robinson, David Navarro, and Brian Elliot testified at the suppression hearing regarding the anonymous tips and the events surrounding the "knock and talk."

Officer Robinson

During the suppression hearing, Officer Damon Robinson testified that he spoke to an anonymous tipster twice prior to the "knock and talk" and that the anonymous tipster claimed Petitioner was using his girlfriend's car, a Kia Spectra, to make drug deliveries. R.

60, ll. 17-19. Notably, Officer Robinson admitted that he was *unsuccessful* in setting up a drug transaction at the girlfriend's residence on *two* separate occasions and was *not* able to contact Petitioner using the phone number given to him. R. 60, l. 25 – 61, l. 5. Officer Robinson also admitted that, based on the anonymous tips, there was insufficient information to issue a search warrant. R. 72, ll. 9-17 (emphasis added). Officer Robinson further noted that he was not present during the "knock and talk" and that Officer Navarro called him after the "knock and talk" to get a search warrant because Officer Navarro had arrested Petitioner inside his residence and found marijuana. R. 61, ll. 9-13. Officer Robinson recalled that he completed a search warrant affidavit and presented it to Magistrate Davis, who then issued the search warrant. R. 61, l. 1 – 65, l. 12.

Officer Navarro

Officer David Navarro maintained that he also "received an anonymous tip from an individual in reference to a black male subject or individual selling narcotics out of Hunt Club Road" and that the anonymous tipster had contacted him several times dating back ten months prior to the "knock and talk." R. 31, ll. 15-17; R. 44, ll. 7-23. Officer Navarro claimed that the anonymous tipster told him Petitioner's name and phone number, Petitioner's girlfriend's name and phone number, the type of car Petitioner drives, and that Petitioner carries a gun. R. 43, ll. 6-19; R. 47, ll. 2-5. Officer Navarro further noted that he also "received information from Investigator Damon Robinson . . . [about] two previous tips on [Petitioner]." R. 32, ll. 22-25.

Officer Navarro stated that he "did some homework and pulled out some pictures o[f] [Petitioner]." R. 33, ll. 1-2. Officer Navarro recalled that he also "pull[ed]

[Petitioner's] rap sheet and confirm[ed] that Petitioner had two previous charges of distribution . . . ." R. 33, ll. 11-12. Officer Navarro revealed, "Once I - - we completed [Petitioner's background check], ***I went ahead and somewhat briefed the Drug Suppression Team, the rest of my guys as to what we was going to do***" and "*I got in an undercover vehicle and began surveillance of the residence.*" R. 33, ll. 16-20 (emphasis added).

Officer Navarro testified that during the surveillance of Petitioner's residence, Petitioner arrived in a *different* car than the anonymous tipster had described (Crown Victoria or Grand Marquee) and he watched Petitioner enter the residence. R. 33, ll. 21-25. Officer Navarro admitted, "***At that particular time, I notified the Drug Suppression Team, the rest of the guys which were actually staged in different areas within the vicinity***," that he and Officer Elliott were about to approach the residence to conduct a "knock and talk." R. 34, ll. 4-8 (emphasis added). Notably, Officer Navarro admitted that during the surveillance of the residence, ***no*** drug transactions occurred at the residence and ***no*** confidential informants were used in an attempt to buy drugs from Petitioner because Officer Navarro "*didn't find it necessary at that time.*" R. 56, ll. 9-14; R. 57, ll. 4-10 (emphasis added).

As to the "knock and talk," Officer Navarro asserted: (1) he knocked on Petitioner's door at Petitioner's request; (2) Officer Elliott stood in view of the peephole of the door, so Petitioner could see his badge; (3) Petitioner opened the door; (4) the officers immediately smelled marijuana; (5) he simultaneously saw Petitioner holding a gun behind his back; (6) the officers entered the residence and detained Petitioner; (5) marijuana was found on

Petitioner's person; (7) marijuana and a weighing scale were found during a protective sweep of the residence; (8) a search warrant was then issued; and (9) Petitioner's residence was searched. R. 34, l. 9 – 41, l. 17.

Officer Elliott

Officer Elliott testified the anonymous tipster "stated that a lot of traffic [was] coming in and out of the residence." R. 15, ll. 1-3. Officer Elliott maintained, "On complaints, [police officers] go and do what you call knock and talks, meet and greet," and that he and Officer Navarro went to Petitioner's home to conduct a "knock and talk" as part of an investigation regarding the anonymous drug complaint. R. 15, l. 23 – 16, l. 5. Notably, Officer Elliott admitted that the surveillance of Petitioner's residence ***did not*** reveal any activity of people coming or going from the residence or any other evidence of drug transactions. R. 17, ll. 20-25. Officer Elliott confirmed that *no* confidential informants were used in an attempt to buy drugs from the residence and that, other than the anonymous complaint, the officers saw ***no evidence*** of drug activity. R. 18, ll. 1-13.

Officer Elliott's recollection of what transpired during the "knock and talk" was consistent with Officer Navarro's testimony. Specifically, Officer Elliott maintained that he knocked on door of the residence and "[Petitioner] asked who it was . . . [and he responded,] Richland County Sheriff's Department." R. 9, ll. 21-24. Officer Elliott claimed that Petitioner then asked him to stand in front of the peephole and that he complied with Petitioner's request. R. 10, ll. 11-13. Officer Elliott further asserted, "[O]nce [Petitioner] opened the door, immediately the strong odor of marijuana came from the residence" and from the doorway, he saw a blunt (i.e., a cigar filled with marijuana) on a coffee table inside

the residence. R. 10, ll. 14-20. According to Officer Elliott, this prompted him to use the code number 600 to alert Officer Navarro that drugs were present. R. 11, ll. 23.

Furthermore, Officer Elliott stated that it looked as if Petitioner was holding something "behind his leg," and that Officer Navarro saw Petitioner holding a gun behind his back and "yelled 59/59." R. 10, l. 14 – 11, l. 25. Officer Elliott indicated that he and Officer Navarro drew their weapons and Petitioner "dropped the gun in a basket . . . next to the door." R. 13, ll. 5-7. Officer Elliott further noted that they subsequently detained Petitioner and read Petitioner his Miranda rights. R. 13, ll. 8-010. Officer Elliott recalled that they found a small bag of marijuana while conducting a search of Petitioner's person and that he found a "large bag of marijuana" and a weighing scale while "clearing the house." R. 22, l. 23 – 24, l. 17.

Notably, Officer Elliott's testimony that he observed the "blunt" from the doorway of residence is inconsistent with the incident report Officer Elliott filled out immediately after these events occurred. R. 309. In the incident report, Officer Elliott wrote, "While detaining [Petitioner,] [Officer] Elliott observed a hand rolled cigar "blunt" containing a green leafy substance believe[d] to be marijuana in plain view on the living room table." R. 310. On cross-examination, defense counsel asked Officer Elliott in regards to a "knock and talk," "best case scenario, the person opens the door and there's drugs present . . . from your perspective?" Officer Elliott replied, "*And the odor of marijuana, yes, sir.*" R. 16, ll. 9-12 (emphasis added).

Suppression Argument

Defense counsel argued that the standard for a "knock and talk" is different when

there is an on-going investigation, "that's what distinguishes things." R. 83, ll. 17-23. In comparing the facts of this case to a Terry stop, defense counsel stated, "What we got here is essentially pulling the house over . . . and in this one, they didn't have reasonable suspicion." R. 84, l. 19 – 85, l. 3. Defense counsel also argued that Kirk v. Louisiana, 536 U.S. 635 (2002) applies to the instant case. In Kirk, 536 U.S. at 638, the United States Supreme Court held that pursuant to Payton v. New York, 445 U.S. 573 (1980), "police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." (emphasis added); R. 78, l. 1 – 79, l. 1. Defense counsel noted, "[T]he anonymous tip was uncorroborated" and prior to the "knock and talk," "there was not enough probable cause to go to a magistrate." R. 80, ll. 7-11. Consequently, defense counsel argued that the "knock and talk" conducted by Officers Elliott and Navarro was "a clear violation of the Fourth Amendment [to the United States Constitution] and [Article 1, section 10,] of the South Carolina Constitution." R. 83, ll. 11-13.

In response, the Solicitor cited Rogers v. Pendleton, 249 F.3d 279 (4th Cir. 2001) and argued that "no testimony" was given where Petitioner asked the officers to leave and he voluntarily opened the door to his residence. R. 85, ll. 14-23. The State also argued (1) that Kirk is factually distinguishable from this case and (2) that exigency exceptions (plain view and police safety) to the warrant requirement are applicable to this case under Horton v. California, 496 U.S. 128 (1990). R. 86, l. 20 – 93, l. 3.

Suppression Ruling

The Trial Court stated that she was only "concerned about what happened ***after the knock on the door***" and that she was unsure of what standard to apply. R. 128, ll. 20-23

(emphasis added); R. 132, ll. 7-16. The Trial Court noted, "*There are still questions that don't ... satisfy the Court as to whether or not there was a basis for [the officers] to enter the premises.*" R. 133, ll. 14-18. Specifically, the Trial Court questioned whether Petitioner holding a gun when he opened the door was a sufficient basis for the officers to enter the home because the gun was not pointed at the officers. R. 140, l. 17 – 141, l. 17. The Trial Court also posed two questions: (1) whether the "marijuana cigarette known as a blunt . . . was seen before the officers observed the gun in the defendant's hand" and (2) "*whether that is the appropriate sequence of events in light of the fact that there was testimony that the defendant stood between the door and the wall.*" R. 151, ll. 5-15 (emphasis added). This is because the incident report ***did not*** mention the "blunt" until "after the subject was being detained." R. 151, ll. 22-25.

The Trial Court ultimately ruled that exigent circumstances existed and the officers had a reason to enter Petitioner's home "for fear of their safety" under State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (2000). R. 153, l. 11 – 154, l. 8. The Trial Court also ruled that the officers conducted a valid protective sweep of the home and seizure of the drug evidence that was in plain view. R. 154, l. 9 – 155, l. 7. The Trial Court further held that "no matter the pretext, there's still the right [for police officers] to be able to come to the door, to knock on the door and engage in conversation" because "police officers do not need a warrant to do what any private citizen may legitimately do, approach a home and speak to the inhabitants." R. 157, ll. 3-25. The Trial Court noted that Petitioner being a felon and possessing a firearm gave the officers probable cause to enter the residence and detain Petitioner. R. 158, ll. 8-13.

Although the Trial Court stated that the smell of marijuana "would have been sufficient for further conversation to give rise to . . . probable cause," she decided ***not*** to base her decision on the smell of marijuana, but on Petitioner's possession of a gun. R. 158, l. 18 – 159, l. 1. This is because the Trial Court found that "it was reasonable under the circumstances for [the officers] to react in the way in which they did." R. 159, ll. 11-12. The Trial Court also ruled that the information contained in the search warrant affidavit was reasonable and probable cause existed for the Magistrate to issue the search warrant. R. 159, l. 15 – 160, l. 5. Consequently, the Trial Court denied defense counsel's motion to suppress the evidence seized by the Drug Suppression Team. R. 160, ll. 6-9.

ARGUMENT

The Court of Appeals erred in affirming the Trial Court's refusal to grant Petitioner's motion to suppress when, based on the totality of the circumstances, law enforcement used the "knock and talk" technique to avoid the warrant requirement in violation of Petitioner's federal and state constitutional right against unreasonable searches and seizures and unreasonable invasions of privacy.

In the Court of Appeals' unpublished *per curiam* opinion (1) the Court of Appeals failed to address whether law enforcement used the "knock and talk" technique to intentionally avoid the warrant requirement; (2) the Court of Appeal cited cases to support the affirmance of Petitioner's conviction and sentence that are factually distinct from the instant case; and (3) the Court of Appeals failed to address whether Petitioner's right against unreasonable invasions of privacy was violated under South Carolina's heightened privacy protection. App. 1 – 2; *See* U.S. CONST. AMEND. IV; see also S.C. CONST. ART. I. § 10. Based on the testimony presented during the suppression hearing, the officers who conducted the "knock and talk" "were in essence conducting a general search in hopes that something would turn up – the very kind of search the Fourth Amendment was designed to regulate." United States v. Johnson, 170 F.3d 708, 714 (7th Cir. 1999). Thus, the Court of Appeals erred in affirming the Trial Court's refusal to grant Petitioner's motion to suppress. App. 1 – 2.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The 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. The South Carolina Constitution also provides a safeguard against unlawful searches and seizures. See State v. Forrester, 343 S.C. 637, 541 S.E.2d

837 (2001) (citing S.C. CONST. ART. I. § 10). The relationship between the two constitutions is significant because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." Id. at 643, 541 S.E.2d at 840 (quoting State v. Easler, 327 S.C. 121, 131, n. 13, 489 S.E.2d 617, 625, n. 13 (1997)). Accordingly, this Court may interpret the state protection against unreasonable searches and seizures in such a way as to provide *greater protection* to its people than the federal Constitution. See id.

In addition to language that mirrors the Fourth Amendment, Article 1, section 10, of the South Carolina Constitution contains an express protection of the right to privacy: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated[.]" Forrester, 343 S.C. at 649, 541 S.E.2d at 843 (emphasis added); see S.C. CONST. ART. 1 § 10. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841). Therefore, "*the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.*" Id. (emphasis added).

The United States Supreme Court has held that the "zone of privacy is nowhere more clearly defined than when bounded by unambiguous physical dimensions of individual's home," and "[a]t very core of [the] Fourth Amendment stands [the] right of a

man to retreat into his own home and there be free from unreasonable government intrusion." Payton v. New York, 445 U.S. 573, 590 (1980) (internal citations omitted). Unequivocally, the home occupies a special place in Fourth Amendment jurisprudence and warrantless searches of homes are presumptively unreasonable. See Welsh v. Wisconsin, 466 U.S. 740, 748-49, 104 S.Ct. 2091 (1984).

Furthermore, the United States Supreme Court has held that "searches [and seizures] 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." Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted); see State v. Weaver, 361 S.C. 73, 80–81, 602 S.E.2d 786, 790 (Ct. App. 2004). "The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption . . . that the exigencies of the situation make the course imperative." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (internal quotations omitted). Specifically, the burden is on the State to justify a warrantless search or seizure based upon one of these recognized exceptions. See id.

Yet, despite these exceptions, the United States Supreme Court has emphasized its concern with warrantless searches and seizures:

> "The point of the Fourth Amendment, which often is *not grasped by zealous officers*, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate *instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*

Johnson v. United States, 333 U.S. 10, 14-15 (1948) (emphasis added). The United

States Supreme Court has also addressed the warrant requirement's effect on law enforcement: "*In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause* [or the existence of a recognized exception]." Carroll v. United States, 267 U.S. 132, 156 (1925) (emphasis added).

The exclusionary rule also prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding if the police exploit an unlawful search to seize evidence that would not have otherwise come to light, that evidence is the "fruit of the poisonous tree," and is not admissible); Forrester, 343 S.C. at 643, 541 S.E.2d at 840. The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. See Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Constitutionality of the "Knock and Talk"

"Though the 'knock and talk' procedure is not automatically violative of the Fourth Amendment, it can become so." Keenom v. State, 80 S.W.3d 743, 747 (Ark. 2002); see Johnson, 170 F.3d at 720 ("We do not hold today that the "knock and talk" technique is automatically unconstitutional. Nevertheless, . . . the police themselves must recognize the inherent limits in this more informal way of proceeding.").

A constitutional "knock and talk" occurs when an officer conducts a "knock and talk" in a place where he/she is lawfully present and the encounter is consensual. See

Kentucky v. King, 131 S.Ct. 1849 (2011) (noting that officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs); see also Rogers v. Pendleton, 249 F.3d 279, 289-90 (4th Cir. 2001) (noting that "police officers do not need a warrant to do what any private citizen may legitimately do–approach a home to speak to the inhabitants").

For example, when an occupant has not refused to open the door to the home or the officer has not coerced or intimidated the occupant to open the door, a "knock and talk" is constitutional: (1) where an officer seeks to ascertain information about a crime from a witness or a non-suspect who has knowledge about a crime; (2) where an officer responds in a protective capacity to an emergency call; or (3) where an officer has reasonable suspicion or probable cause to justify a search or seizure.

An unconstitutional "knock and talk" occurs when an officer conducts a "knock and talk" in a place where the officer is not lawfully present and/or the encounter is not consensual. See Johnson, 170 F.3d at 710 (explaining that "[a]lthough the [United States] Supreme Court has found exceptions to the warrant requirement in a number of compelling situations, it has never deviated from the rule that generalized suspicion alone is not enough to justify a warrantless search of a home"). For example, a "knock and talk" is unconstitutional when: (1) the occupant has refused to open the door to the home or consent to a search of the home, but the officer entered or searched anyway; and/or (2) an officer in an *on-going* investigation that is *focused* on a suspect lacks reasonable suspicion or probable cause and deliberately conducts a "knock and talk" to circumvent the warrant requirement.

***Terry* Standard Applied to "Knock and Talks"**

The Seventh Circuit Court of Appeals provided the proper analysis for when law enforcements lacks reasonable suspicion and uses the "knock and talk" technique to avoid the warrant requirement. Johnson, 170 F.3d 708. In Johnson, the police "received a citizen report [from a community organization] that drug activity was probably taking place in an apartment building." Id. at 711. Based on this report, several officers "decided to respond to the complaint using their 'knock and talk' technique." Id. The Seventh Circuit noted that the officers had "*nothing but generalized suspicion*" before approaching the residence to conduct the "knock and talk," and same as in this case, "the police conceded [that this generalized suspicion] could not have supported [the issuance of] a warrant." Id. at 714 (emphasis added).

Furthermore, just as one of the officers was "prepared to knock," Johnson opened the door and the officer "identified himself as a police officer." Id. at 711. Another officer "asserted that at the moment [the door opened] he saw a woman inside the apartment, seated at a table, throw . . . a crack pipe to the floor." Id. at 712. As the officers attempted to force Johnson back into the apartment, a struggle ensued, and the officers forced Johnson to the ground. Id. During the struggle, one of the officers "felt a gun in Johnson's pocket." Id. Johnson was then hand-cuffed and frisked. Id. The officer found a loaded gun and cocaine on Johnson's person. Id. "Johnson subsequently filed a motion to suppress the evidence that was seized from him during the police investigation . . . ." Id.

The Seventh Circuit ultimately decided to apply the standard set forth in Terry v.

Ohio, 392 U.S. 1 (1968):

> Applying the Terry standard, we have consistently held that reasonable suspicion is to be determined in light of the totality of the circumstances . . . Specifically, ***the inquiry on appeal must focus on the events which occurred leading up to the stop or search***, and then the trial judge's decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion.

Johnson, 170 F.3d at 714-15 (emphasis added).[1] The Seventh Circuit explained, "The fact that the police had only the vaguest information about [drug activity at Johnson's residence] *is critical to our analysis as a whole, because it reveals that the officers were in essence conducting a general search in the hopes that something would turn up – the very kind of search the Fourth Amendment was designed to regulate.*" Id. at 714-715 (emphasis added). Consequently, based on the totality of the circumstances, the Seventh Circuit affirmed the district court's decision to suppress the evidence found in Johnson's home. Id. at 720.

In his concurring opinion, Judge Evans noted, "[O]ur case today really presents a question about where the proper analysis of this search begins, and in my view it doesn't start just as the door to [Johnson's residence] was opened." Id. at 721 (emphasis added).

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1 See Terry, 392 U.S. at 30 (noting that in the absence of probable cause for arrest, a police officer may stop and briefly detain a person for investigative purposes, so long as the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot."); see also United States v. Cortez, 449 U.S. 411, 417 (1981) (noting that an officer's reasonable suspicion should be based on "the totality of the circumstances—the whole picture.").

Notably, while the inquiry must focus on the events which occurred leading up to the stop or search, in this case the Trial Court stated that she was only "concerned about what happened ***after the knock on the door***." R. 128, ll. 20-23 (emphasis added).

Judge Evans further noted:

> [T]he police had no warrant when they went to [Johnson's residence] . . . [Therefore, the officers] ***were taking a shortcut in the hope that something good (from a drug busting perspective) would turn up*** [when a] little more work would have given the police the probable cause they needed to secure a warrant, but they didn't want to take the time to do something more.

Id. at 721 (emphasis added). Judge Evans stated, "***If the police use a shortcut and a need to protect themselves arises, they run the risk of not being able to use, in court, evidence they stumble on***." Id. (emphasis added).

Furthermore, Judge Evans questioned the credibility of one of the officer's testimony:

> And I think a fair reading of this record compels the conclusion that *the police knew they were on thin legal ice when they decided to go to the door . . . for their "knock and talk."* That's why, I suspect, they tried to gussy up their case *(i.e., inject it with probable cause)* through Officer Reilly's claim that as soon as the door opened he saw a woman in the apartment toss a crack pipe to the floor.

Id. (emphasis added). In conclusion, Judge Evans found, "*[T]he seeds of this bad search were sown when the police decided to use the "knock and talk" technique* . . . And that process—which sounds more like a friendly visit to sell tickets to a police picnic than a perilous visit to a suspected drug hive—is fraught with danger, not to mention constitutional problems." Id. (emphasis added).

***Terry* Standard Applied to this Case**

The "Terry standard" is applicable to the instant case because this case mirrors the

facts presented in Johnson, 170 F.3d at 714-715. Defense Counsel argued the standard for a "knock and talk" is different when there is an ongoing investigation and compared the facts of this case to a Terry stop. R. 83, l. 17 – 85, l. 3. Accordingly, the analysis should be whether Officers Elliott and Navarro had reasonable suspicion "in light of the totality of the circumstances" (i.e., uncorroborated and unreliable anonymous tips and the actions of the Drug Suppression Team) to conduct the "knock and talk" at Petitioner's residence. See Terry, 392 U.S. at 30; see also United States v. Cortez, 449 U.S. 411, 417 (1981).

In this case, there was an on-going investigation against Petitioner, and Officers Elliott and Navarro did not have reasonable suspicion or probable cause prior to conducting the "knock and talk" at Petitioner's residence; therefore, the Trial Court erred in failing to grant defense counsel's motion to suppress for six reasons. See United States v. Morgan, 743 F.2d 1158, 1161 (6th Cir. 1984) (noting their concern with "knock and talks" being used as an investigative tool by police: "The right of officers to thrust themselves into a home is a grave concern, not only to the individual but to society which chooses to dwell in reasonable security and freedom from surveillance."); see also Hayes v. State, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003) (finding "the knock and talk procedure 'pushes the envelope' and can easily be misused" because a "[k]nock and talk might more aptly be named 'knock and enter' because [that] is usually the officer's goal.").

First, the information given by the anonymous tipster was uncorroborated and unreliable: (1) two of the prior anonymous tips concerned two residences other than

Petitioner's residence and the investigations of those anonymous tips yielded no evidence; (2) surveillance of Petitioner's residence did not reveal any evidence of drug activity; (3) no confidential informants were used to buy drugs from the residence; and (4) the officer who submitted the search warrant affidavit admitted that prior to the "knock and talk" "there was insufficient information for a search warrant." R. 17, l. 20 – 18, l. 13; R. 31, ll. 15-17; R. 56, l. 9 – 57, l. 10; R. 60, l. 25 – 61, l. 5; R. 72, ll. 9-12; R. 80, ll. 7-11; See State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000) (provides that reasonable suspicion requires tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person); see also Alabama v. White, 496 U.S. 325 (1990) (The United States Supreme Court has held that in determining whether the informant's tip establishes sufficient probable cause, "the informant's veracity, reliability, and the basis of knowledge are highly relevant.")

Second, the officers conducted the "knock and talk" in hopes of finding an exigent circumstance that would allow them to circumvent the warrant requirement. For example, despite Officer Elliott's comparison of a "knock and talk" to a "meet and greet," defense counsel asked Officer Elliott in regards to a "knock and talk," "best case scenario, the person opens the door and there's drugs present . . . from your perspective?" and Officer Elliott replied, "And the odor of marijuana, yes, sir." R. 15, l. 23 – 16, l. 12. See Johnson, 170 F.3d at 721 (finding the officers "were taking a shortcut in the hope that something good (from a drug busting perspective) would turn up" and "that [the] process—which sounds more like a friendly visit to sell tickets to a police picnic than a perilous visit to a suspected drug hive—is fraught with danger, not to mention

constitutional problems.").

Third, the officers' actions illustrate that they were doing *more* than a simple "meet and greet" or investigation to a neighborhood complaint. Officer Navarro's testified that prior to the "knock and talk:" (1) "*I went ahead and somewhat briefed the Drug Suppression Team, the rest of my guys as to what we was going to do* [sic]" and (2) "*I notified the Drug Suppression Team, the rest of the guys which were actually staged in different areas within the vicinity*[.]" R. 33, l. 16 – 34, l. 8 (emphasis added). See United States v. Berry, 468 F. Supp. 2d 870, 880 (N.D. Tex. 2006) (noting at least eight officers took cover positions around the house and the officers had a planned effort to evade the warrant requirement because such police action was "overkill" for a "knock and talk").

Fourth, the drug suppression team did not even try to have a confidential informant buy drugs from Petitioner or from the residence. Instead, Officer Navarro admitted that he "*didn't find it necessary at that time*" even though the two prior investigations based on the anonymous tips yielded no evidence of drug activity. R. 15, l. 23 – 16, l. 5; 56, l. 9 – 57, l. 10 (emphasis added); See Johnson, 170 F.3d at 721 (noting "[a] little more work would have given the police the probable cause they needed to secure a warrant, but they didn't want to take the time to do something more.").

Fifth, the existence of exigent circumstances does *not* excuse the officers' deliberate actions to avoid the warrant requirement because law enforcement cannot create the exigency. R. 10, l. 14 – 14, l. 25; 22, l. 23 – 24, ll. 14-17; 34, l. 9 – 41, l. 17; See State v. Green, 341 S.C. 218, 532 S.E.2d 897 (noting even if an officer's suspicions "turned out to be correct [it] does not suggest that the officer had a reasonable basis for

[suspecting the defendant] of engaging in unlawful conduct."); Accord Johnson, 170 F.3d at 721 ("[i]f the police use a shortcut and a need to protect themselves arises, they run the risk of not being able to use, in court, evidence they stumble on."); United States v. Chambers, 395 F.3d 563, 569 (6th Cir. 2005) (noting law enforcement controlled the timing of the encounter giving rise to the warrantless search, thus impermissibly creating an exigency through the use of the "knock and talk" technique.).

Sixth, after reviewing the evidence presented during the suppression hearing, the trial court noted her uncertainty as to Officer Elliott's testimony. Specifically, the Trial Court questioned "whether that is the appropriate sequence of events" in light of Officer Elliott's testimony that he viewed the "blunt" from the doorway when the incident report he filled out indicated that he saw the "blunt" on the coffee table after [Petitioner] was detained and "there was testimony that the defendant stood between the door and the wall." R. 151, ll. 5-25; See Johnson, 170 F.3d at 721 (noting "the police knew they were on thin legal ice when they decided to go to the door . . . for their 'knock and talk.' That's why, I suspect, they tried to gussy up their case (i.e., inject it with probable cause)").

Accordingly, Petitioner's Fourth Amendment right against unreasonable searches and seizures and unreasonably invasions of privacy were violated because Officers Elliott and Navarro intentionally sought to avoid the warrant requirement using the "knock and talk" technique. See U.S. CONST. AMEND. IV; see also S.C. CONST. ART. I § 10; accord Payton, 445 U.S. at 590 (finding the "zone of privacy is nowhere more clearly defined than when bounded by unambiguous physical dimensions of individual's home," and

"[a]t very core of [the] Fourth Amendment stands [the] right of a man to retreat into his own home and there be free from unreasonable government intrusion.").

Cited Case are Factually Distinct

In the unpublished *per curiam* opinion, the Court of Appeals relied on three cases to affirm Petitioner's conviction and sentence: (1) Kentucky v. King, 131 S.Ct. 1849 (2011); (2) State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011); and (3) United States v. Cephas, 254 F.3d 488 (4th Cir. 2001). Notably, the cases cited by the Court of Appeals are factually distinct from the facts presented in this case.

In Kentucky v. King, law enforcement had *probable cause* to approach the defendant's residence: (1) the officers set up a drug transaction; (2) "watched the [drug] deal take place from an unmarked car in a nearby parking lot;" (3) followed the suspect towards an apartment complex; (4) as the officers "entered the breezeway [of the apartment complex], they heard a door shut and detected a very strong odor of burnt marijuana in the breezeway;" (5) believing that the suspect was inside the apartment, the officers knocked on the door; and (6) the officers subsequently "kicked in the door" because they heard sounds coming from inside the apartment and thought evidence was being destroyed. Id.

In State v. Wright, 391 S.C. at 440, 706 S.E.2d at 325, law enforcement "received an anonymous tip about dogfigting at a mobile home off Jackson Road in Clarendon County." "Two deputies then drove past the Jackson Road address on a public road and observed a large number of vehicles parked at the mobile home and spotlights shining in an area next to the mobile home." Id. at 440, 706 S.E.2d at 326. Unlike this case, there

were facts present that corroborated the anonymous tip and allowed law enforcement to investigate further.

This prompted law enforcement to drive down the dirt road where the mobile home was located with their headlights off and "[w]hen the deputies turned their headlights on, they saw people and dogs running away from the mobile home." Id. At trial, one police officer testified that "as he got of his car to chase the people and the dogs, he could hear dogs fighting in the woods behind the mobile home" and two other police officers testified "that while they were driving down the dirt road they saw a portable dogfighting pit in the area with the sport lights." Id. Accordingly, law enforcement's intent was *not* to circumvent the warrant requirement.

When comparing United States v. Cephas, 254 F.3d 488, to the instant case, law enforcement in Cephas responded to the *initial* complaint by "a concerned citizen" and not from a proven unreliable anonymous tipster. Id. Therefore, there was no intent to avoid the warrant requirement in Cephas because there was not an on-going investigation solely focused on a specific suspect. Id.

Heightened Protection under S.C. CONST. ART. I § 10

The Court of Appeals also failed to address the South Carolina Constitution's heightened protection against unreasonable invasions of privacy. See S.C. CONST. ART. I, § 10. At the suppression hearing, defense counsel properly argued that Petitioner was protected under the Fourth Amendment to the United States Constitution and the South Carolina Constitution against "unreasonable searches and seizures and unreasonable invasions of privacy." R. 7, ll. 12-13; R. 301. This is because "the South Carolina

Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment" and the invasion of privacy that occurred in this case (i.e., Officers Elliott and Navarro conducted a "knock and talk" for the sole purpose of avoiding the warrant requirement) was unreasonable. Weaver, 374 S.C. at 322, 649 S.E.2d at 483 (citation omitted).

Additionally, there is a "meaningful distinction" between a constitutional "knock and talk" where an officer in an on-going investigation has reasonable suspicion or probable cause (lawful presence and reasonable invasion of privacy), and an unconstitutional "knock and talk" where an officers lacks reasonable suspicion (unlawful presence and unreasonable invasion of privacy). See id. Therefore, the evidence found in Petitioner's home should have been suppressed because the "knock and talk" conducted by Officers Elliott and Navarro was "a clear violation of the Fourth Amendment and of the South Carolina Constitution." R. 83, ll. 11-13; S.C. CONST. ART. I. § 10; See State v. Forrester, 343 S.C. at 649, 541 S.E.2d at 843 (providing evidence seized in violation of the Fourth Amendment must be excluded from trial).

Erosion of Fourth Amendment Protection

A commentator noted in a law review article that law enforcement's use of the knock and talk procedure to circumvent the warrant requirement "has severely limited the Fourth Amendment protection afforded to homes, despite the Supreme Court's stance that homes are heavily protected." Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment,* 84 IND. L.J. 1099, 1099 (2009); see Miller v. United States, 357 U.S. 301, 307 (1958) (stating that for Fourth Amendment purposes a man's home is his castle).

It is undisputed that law enforcement can respond to citizen complaints as well as act in their protective capacity during an emergency because *neither* of these situations involve criminal investigations focused on a particular individual based on an uncorroborated anonymous tip or are justified by exigent circumstances not deliberately created by the police. Based on the evidence presented during the suppression hearing, law enforcement's use of the "knock and talk" technique has become a "talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971) (plurality opinion).

Accordingly, the Court of Appeals erred in affirming the Trial Court's refusal to grant Petitioner's motion to suppress when, based on the totality of the circumstances, law enforcement used the "knock and talk" technique to avoid the warrant requirement in violation of Petitioner's federal and state constitutional right against unreasonable searches and seizures and unreasonable invasions of privacy. App. 1 – 17; see U.S. CONST. AMEND. IV; see also S.C. CONST. ART. I § 10.

CONCLUSION

The search of Petitioner Rushan Counts and seizure of the drug evidence contravened the requirements of the Fourth Amendment. Therefore, evidence of his possession of marijuana was inadmissible as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963). Accordingly, Petitioner requests this Court reverse his conviction for possession with intent to distribute marijuana, third offense.

Respectfully submitted,

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Assistant Public Defender

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Appellate Defender

ATTORNEYS FOR PETITIONER.

This 20th day of March, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Alison Renee Lee, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSHAN COUNTS,

PETITIONER.

APPELLATE CASE NO. 2013-000086

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Rushan Counts #336261, Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 20th day of March, 2014.

C- C—

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of March, 2014.

Hank Lindsay (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.