Case No. 2007-2232

IN THE SUPREME COURT OF OHIO

STATE OF OHIO Plaintiff-Appellant,	:	**ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT**
Vs.	:	
KEVIN PETERSON	:	
Defendant-Appellee	:	**COURT OF APPEALS CASE NO.: 22008**

MERIT BRIEF OF DEFENDANT-APPELLEE, KEVIN PETERSON

DANIEL J. O'BRIEN
(Counsel of Record)
Reg. No. 0031461
131 North Ludlow Street
1210 – Talbott Tower
Dayton, Ohio 45402
(937) 228-6001
fax: 228-7448
danieljobrien@ameritech.net

COUNSEL FOR APPELLEE, KEVIN PETERSON

MATHIAS H. HECK, JR.
Prosecuting Attorney
R. Lynn Nothstine (Counsel of Record)
301 W. Third Street – Suite 500
Dayton, Ohio 45422
(937) 225-4117

COUNSEL FOR APPELLANT, STATE OF OHIO

FILED
JUL 03 2008
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUL 03 2008
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	3
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT	9
Counter Proposition of Law:	
The Fourth Amendment to the United States Constitution and Section 14, Art. I., Ohio Constitution, protect a person in their home, which includes the curtilage surrounding it, from unreasonable search and seizure.	
I. THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE FOURTH AMENDMENT DECISIONS OF THE UNITED STATES SUPREME COURT	
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Boyd v. United States (1886), 116 U.S. 616, 630 12

California v. Ciraolo (1986), 476 U.S. 207, 213. State Brf., at 5 11

Coolidge v. New Hampshire (1971), 403 U.S. 443, 454-55 13

Estate of Smith v. Marasco (3d Cir. 2003), 318 F.3d 497, 520 12

Horton v. California (1990), 496 U.S. 128, 136 12

Katz v. United States, 389 U.S. 347 (1967) 9

Kyllo v. United States (2001), 533 U.S. 27, 35 11

McDonald v. United States (1948), 335 U.S. 451, 452 11

Oliver v. United States, 466 U.S. 170 9

Payton v. New York, 445 U.S. 573, 586 (1980) 10

State v. Burchett, Mont. App. No.CA 20166, 2004-Ohio-3095 13

State v. Buzzard (2005), Crawford App. No.3-04-18, 2005-Ohio-5270 12

State v. Chapman (1994), 97 Ohio App. 3d 687 12

State v. Posey (1988), 40 Ohio St.3d 420, 427. 11

Steagold v. United States, 451 U.S. 204, 211-212 (1981) 10

United States v. Dunn (1987), 480 U.S. 294, 301 11

United States v. Gomez-Moreno (5th Cir. 2007) 479 F.3d 350, 355 13

United States v. Hatfield (10th Cir. 2003), 333 F.3d 1189, 1197-98 12

United States v. Karo (1984), 468 U.S. 705, 712-713 9

Welch v. Wisconsin, 466 U.S. 740, 748-49 (1984) 10

STATEMENT OF THE CASE

The State has appealed the well-reasoned decision of the Court of Appeals that, based on long established stare decisis case law on the Fourth Amendment to the United States Constitution, held that the police violate the Fourth Amendment when they enter a person's residence or the curtilage of the residence without a warrant and then enter, search, and seize based on observations made from the private curtilage of the residence. In this case, there is no dispute that the Dayton police officers were on the curtilage of the home without a warrant. Det. House was standing right next to a ground level basement window on the side of the home, on grass, at a location not observable by the public from the street or other public areas. Numerous police officers in undercover clothing had completely surrounded the home, at night on the alleged "knock and advise". One of the other officers, Det. Hall, properly went to the front door of the home to confront the home owner with an anonymous complaint of drug activities there. Since the front porch and front door are locations where any home owner would reasonably expect members of the general public to come to approach the owner of the home, such police conduct does not offend the Fourth Amendment.

However, rather than merely "knock and advise" the owner, as Det. Hall was doing, Det. House claimed he thought he observed subjective "suspicious activity" through the ground-level basement window while he was next to the window near the fenced-in back yard right up against the side of the home. Rather than seeking a warrant, Det. House rushed by Det. Hall and the resident, Mr. Peterson, entered the home, knocked down and seized Mr. Peterson, handcuffing him with his hands behind his back and searched for contraband, all without a warrant.

The Court of Appeals properly recognized that the Fourth Amendment requires that the police be in a lawful location when making the observation upon which they assert grounds for entry, seizure, and search, without a warrant. The State's appeal misconstrues this well-established case law as precluding any entrance upon private property by the police as part of a proper investigation. As indicated, entry without a warrant at a location generally accepted as accessible to the public generally, as Det. Hall did as walking up the front steps in approaching the front door of the home, is proper under Fourth Amendment case law, as the Court of Appeals fully appreciated and recognized.

Thus, this is a case where the State's arguments totally misconstrue the Court of Appeals ruling, and fail to acknowledge the well-settled United States Supreme Court case law that the curtilage of the home receives the same Fourth Amendment protection as the home itself and the police are not free to enter there, and then make entry, search, and seizure based on observations made there, without a warrant. In fact, the Court may consider dismissing this appeal and should as improvidently granted.

Statement of the Facts

Officer Douglas Hall of the Dayton Police Department testified that as a result of two (2) annoyance telephone calls purportedly from residents nearby 1609 Westona Drive, of possible drug related activity. On October 20, 2004, he took an undercover position watching the front of 1609 Westona from "across the intersection of Marimont" about 50 yards from the residence. T., 6/19/06, 6-14. He testified that he had been involved in several hundred "knock and advises" as a narcotics bureau investigator. Id. 7-8.

Detective Hall testified he saw one mini-van pull up in front of the residence (1609 Westona) a "front passenger got out and went up to the front of the house and entered" and another passenger "walked to the corner" and was "talking on a cellular phone." Id. 15. "This was after 9 p.m." The driver and passengers got back in the mini-van and left. Id. 18.

Detective Hall immediately and subjectively concluded, based upon his drug "world-view" that this looked like one passenger delivering and the other acting as a lookout, Id. 15. He called other officers and "asked them to help me do a "knock and advise" on the house." T. 10. Detective House, supervising Sergeant Mark Spears, officers Taylor and Emerson met with Officer Hall to execute this mischaracterized "knock and advise". T. 20. They surrounded the house.

Officer Hall, with Sgt. Spears and uniformed officers, went to the front porch at 1609 Westona. Det. House and Emerson went to the north side of the house toward the back corner of the house. T. 80. Det. House said his positioning was in case "someone might try to flee out the back" or "throw something out of the window". T. 81.

Det. House testified that he had been involved in numerous "knock and advise" actions. T. 75. The Dayton Police Department policy on "knock and advise" is contained in General Order 1.10-10, Drug Enforcement, page 2, "V. KNOCK AND ADVISE PROGRAM". Defendant Exhibit B. Paragraph A sets forth the purported purpose of the order: demonstrating police activity in response to reported citizen observation of "suspicious activity." It was "designed to provide officers and detectives with a means for addressing such complaints when further enforcement action is not

immediately feasible" *Id.* It further states, "utilization of the (knock and advise) procedure serves to:

1. Notify the resident(s) of the structure that a complaint has been received alleging drug activity at the premises.
2. Demonstrate to citizens in the neighborhood that the department is initiating enforcement action concerning the complaint."

The city general order then includes a third purpose:

3. Possibly serve as a basis for additional charges against the resident(s) if the activity is substantiated through further investigation.***"

Det. Hall stated that eight officers were involved in the operation. T. 50. He testified he knocked on the front door. T. 22. Defense witness, Kristin Brandenburg, testified she had just brought laundry up from the basement. T. 145. She was folding it and heard the knock. Kevin Peterson came down the stairs and opened the front door. T. 151-157 and T. 24. Det. Hall testified he (Hall) did not make "any announcement" when he knocked. T. 22. He stated he started telling Mr. Peterson about complaints of drug activity. T. 25. "At that point, Detective House came running from the northern side of the house, jumped up onto the porch and very loudly advised us that he was running into the basement." T. 25. "He goes past me, .---... Detective House goes in, I follow Detective House in." Id.

Detective Hall admitted, "I didn't exactly know for sure what Detective House was looking for, but I was following him, [to] act like a cover officer." T. 26.

The police did not have a search warrant, arrest warrant or any kind of warrant. T. 36-37. Detective Hall admitted that Kevin Peterson "did not give consent". T. 59. Detective House testified as to why he charged onto the porch, past Detective Hall and Kevin Peterson, and into the residence, "I can hear as I'm standing there what

sounds like heavy foot steps running up near the top of the stairs... then I can hear the foot steps of somebody running down the stairs. T. 83. "I look in this basement window... I can see an individual... running down the stairs... holding... a glass jar in his hands and he's holding it cupped in both hands... it looked to me like he was holding a hot jar or hot glass." T. 83. (Based solely on this) "I believed that this individual was carrying crack cocaine that had just been previously cooked up in this hot jar that he was running down into the basement to get rid of it." T. 86. Detective House admitted he had no warrant. T. 104. Yet, he admits, "I simply went right by him [Kevin Peterson]." T. 110. Kristin Brandenburg testified Mr. Peterson "was immediately wrestled down, handcuffed." T. 158.

Det. House testified that before his charge onto the porch, he had looked in the basement window at the north, front corner of the house, from a standing upright position. T. 129-130. The window was "a ground level window." T. 124. From this vantage point, he stated he could see someone holding "a glass jar in his hands and he's holding it cupped in both hands." T. 83. Kristin Brandenburg said the windows "were covered with foil, T. 147, and one "can't see through those windows." T. 150. It was that way on the date of entry. T. 148.

It is after this forcible and coercive entry by the police that they searched and seized the evidence used against Kevin Peterson. T. 165. After the forcible entry, seizure, arrest and search, they secured a warrant.

Alicia Erwin, a defense witness, testified she was upstairs and heard a crash on the north side of the house. T. 207. She looked out and saw people outside, "crouched down" and "looking in the basement window." T. 206. She started

downstairs when about ten men came in and put her in handcuffs. Id. She said the crashing noise was the fence on the north side of the house which extends from the house and surrounded the entire back of the house maintaining complete privacy in the rear. T. 215. It was intact before the police came. T. 216. "The fence was knocked down." She also stated all the basement windows were covered with aluminum foil from the inside to protect the women staying at the house from "peeping toms" as the washer and dryer were in the basement. T. 237.

ARGUMENT

State's Proposed Proposition of Law:

> Law enforcement officers acting within the scope of their duties and in good faith are privileged to enter a residential property for the purpose of making contact with the residents therein.

Counter Proposition of Law:

> The Fourth Amendment to the United States Constitution and Section 14, Art. I, Ohio Constitution, protects a person in their home, which includes the curtilage surrounding it, from unreasonable search and seizure.

I. THE COURT OF APPEALS DECISION IS CONSISTENT WITH UNITED STATES SUPREME COURT CASE LAW

The State's arguments neither provide a matter of great public or general interest nor a substantial constitutional issue. In apparent recognition that it lacks constitutional authority for its position, the State sought leave to appeal asserting that this matter is of great public or general interest. *See* Notice of Appeal. However, its argument appears to seek to have this Court create a "good faith" privilege for police officers to enter a

home or its curtilage without a warrant or probable cause, violating the Fourth Amendment and Section 14, Art. I, of the Ohio Constitution.

In its Memorandum in Support of Jurisdiction, the State erroneously referred this Court to *United States v. Karo* (1984), 468 U.S. 705, 712-713, for its proposed "minimal intrusion" exception to the requirement for a search warrant. The reference, now apparently abandoned, is entirely misplaced.

Karo involved the use of an electronic beeper placed in an ether can that was delivered to the defendant. Actually, *Karo* explains the difference between surveillance on or off a person's property. It advises readers to:. "Compare *Katz v. United States,* 389 U.S. 347 (1967) (no trespass, but Fourth Amendment violation), with *Oliver v. United States,* 466 U.S. 170 (1984) (trespass, but no Fourth Amendment violation)". 468 U.S. at 713. *Katz* was a wiretapping case and *Oliver* held the police were trespassing in an "open field" <u>not within the curtilage</u>. In fact, the State should have taken this Court's attention a few more pages into the opinion in *Karo, supra*, where the United States Supreme Court stated,

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusions not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. ...Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. *Welch v. Wisconsin,* 466 U.S. 740, 748-49 (1984). *Steagold v. United States,* 451 U.S. 204, 211-212 (1981); *Payton v. New York,* 445 U.S. 573, 586 (1980).

The *Karo* Court further explained,

> "For purposes of the [Fourth] Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained <u>by observation from outside the curtilage of the house</u>." (Emphasis added). 468 U.S. at 715. "Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." 468 U.S. at 716. "In sum, we discern no reason for deviating from the general rule that a search of a house should be conducted pursuant to a warrant." 468 U.S. at 718.(Emphasis added).

The State also erroneously refers this Court to *California v. Ciraolo* (1986), 476 U.S. 207, 213. State Brf., at 5. *Ciraolo* approved a naked-eye, aerial surveillance into

the curtilage (backyard) protected by the Fourth Amendment, because any member of the public could make that observation when flying over the back yard. It was a 5-4 decision. However, all nine justices agreed that if the observation had been made at "ground level" from within the curtilage, it would have violated the Fourth Amendment. 476 U.S. at 222. (Powell, J., dissenting). Unfortunately, the State's brief ignores that the observation in this case was at ground-level and from within the curtilage.

There is no reasonable basis presented for this Court to reconsider this established search and seizure law and the excellent and well reasoned decision by the Second District Court of Appeals.

The State offers a benign proposition of law that avoids the substance of this case and the appellate court decision. As written, the proposed proposition of law is nothing new or needed and does not reflect what occurred in this case. Specifically, it does not relate to the Court of Appeals' thorough discussion of Fourth Amendment law and its applicability to the curtilage of the home. If the State is seeking a broad "good faith" exception that would allow a warrantless entry and search of a home merely if the police are acting within the scope of their duties, it would contradict and undermine the United States Supreme Court's rulings interpreting the purpose and intent of the Fourth Amendment. For example, "[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 pre se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-55; *State v. Posey* (1988), 40 Ohio St.3d 420, 427.

Entering a home and searching it, without a warrant, requires truly extraordinary circumstances. *McDonald v. United States* (1948), 335 U.S. 451, 452. The "prototypical...area of protected privacy " is the home. *See Kyllo v. United States* (2001), 533 U.S. 27, 35. The curtilage is treated as an indivisible part of the home. It includes "the area to which extends the intimate activity associated with the sanctity of a man's home, the privacies of life, and therefore has been considered part of [the] home itself for Fourth Amendment purposes." *Oliver v. United States* (1984), 466 U.S. 170, 180. *See United States v. Dunn* (1987), 480 U.S. 294, 301. "The invasion of the

curtilage, without a warrant, to make the claimed observation is a search subject to the Fourth Amendment." 480 U.S. at 304. As the United States Supreme Court stated, "in *Oliver* [we] recognized that the Fourth Amendment protects the curtilage of a home." *Dunn, supra,* 403 U.S. at 466.

The long-established prerequisite that the State ignores is, "an essential predicate to any valid warrantless seizure of incriminating evidence [is] that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California* (1990), 496 U.S. 128, 136. As the Court of Appeals stated on page 8 of its opinion, "We explained, however, that '[i]f the investigators had physically breached the curtilage there would be little doubt that any observations made therein would have been proscribed. . . . ." Ct. App. Op., at 8, quoting from *United States v. Hatfield* (10th Cir. 2003), 333 F.3d 1189, 1197-98.

The State does not dispute the Court of Appeals conclusion that the police officer was within the curtilage when he claims he observed what he subjectively believed was illegal activity through the ground-level basement window of the home. Ct. App. Op., at 12. Since the officer did not have a warrant, he had no right to be in the place where he asserts he made the observation. As the Court of Appeals noted, "In executing a search warrant, the warrant normally authorizes officers to enter the residence, the surrounding curtilage, and any detached garage or outbuildings listed in the warrant." Ct. App. Op., at 11-12. It is undisputed that these officers did not have a warrant.

Again, the State's brief fails to recognize that the home is the most inviolable of places. *Kyllo, supra.* It references the appellate court decision in *State v. Buzzard* (2005), Crawford App. No.3-04-18, 2005-Ohio-5270, *rev'd on other grounds,* 112 Ohio St.3d 451, 2007-Ohio-373. That case involved a garage, <u>not a home,</u> and the observation was from the driveway, where there was "a diminished expectation of privacy." 112 Ohio St. 3d ¶19. The State correctly notes that the Court of Appeals had held the police officer was lawfully on Buzzard's property. It had cited *State v. Chapman* (1994), 97 Ohio App. 3d 687, in support. *State v. Buzzard,* 163 Ohio App. 3d 592, 2005-Ohio-5270, ¶19. <u>In *Chapman*, the police had come to the front door where any member of the public would be expected.</u> 97 Ohio App. 3d at 690. As in *Buzzard,* It did not involve "the area to which extends the intimate activity associated with the 'sanctity of a

man's home and the privacies of life,' *Oliver, supra,* 466 U.S. at 180, quoting *Boyd v. United States* (1886), 116 U.S. 616, 630." Thus, neither *Buzzard* nor *Chapman* involved police observation from within the curtilage of a home.

Of course, in *Buzzard,* the defendant did not even pursue the curtilage argument before this Court, 112 Ohio St.3d at 453, 2007-Ohio-373, ¶10, arguably recognizing the slightly diminished expectation of privacy in a garage and a driveway.

The State no longer references the federal court decisions in its memorandum in support of jurisdiction. It is no secret why. For example, *Estate of Smith v. Marasco* (3d Cir. 2003), 318 F.3d 497, 520, states,

> "Although the officers had a right to knock at Smith's front door in an attempt to investigate Shafer's complaint, we reject the defendant's argument that this right necessarily extended to the officers right to enter into the curtilage." (Emphasis added).

The State would have this Court believe that the Second District's decision impairs the Dayton Police Department's use of the "knock and talk" technique when the officers lack probable cause. State Brf., at 7. It does not. The Court of Appeals decision is firmly based on the Fourth Amendment protection of the home. The Court of Appeals specifically recognized the purported use of a "knock and advise" technique. Ct. App. Op., at 11. It referenced The Dayton Police Department's policy statement, stating, "The purpose of the knock and advise program, as stated in the General Order of the Dayton Police Department, is to notify the residents of the structure that a complaint has been received alleging drug activity at the premises. (See Def. Ex. C.). This, of course, can be accomplished by going to the front door of the residence and knocking and advising the resident of the purpose of the visit." Id. Moreover, "The purpose of a "knock and talk" is not to create a show of force, nor to make demands on occupants, nor to raid a residence, [but] to make investigatory inquiry." *United States v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355. In this case, as in *Gomez-Moreno,* "the officers improperly executed the 'knock and talk' strategy", by surrounding the residence. *Id.*

Furthermore, the Second District Court of Appeals has previously acknowledged that a knock on the front door to talk does not implicate the Fourth Amendment. *See*

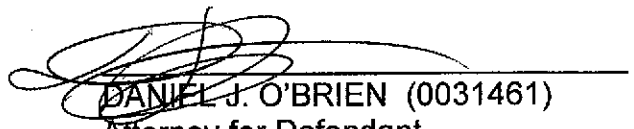
State v. Burchett, Mont. App. No. CA 20166, 2004-Ohio-3095, ¶18. The State's argument herein misstates the appellate ruling.

Being on the curtilage, without a warrant, and then using a claimed subjective and less than compelling envision by the city's knock and advise policy observation to coercively enter, forcibly arrest and seize and search, cannot be sanctioned as an ordinary citizen contact. People expect that the public may come to the front door. "Citizens, especially women, have an objectively reasonable expectation that police will not enter onto the side yards of their homes in the night time and peer into their basement windows." Ct. App. Op., at 12. The Court of Appeals decision is consistent with this reasonable expectation of privacy in one's residence. As it indicates, this is a line drawn by the Constitution, an essential part of our constitutional government. Id., at 12-13.

CONCLUSION

There being no matter of great general or public interest presented, and the appellate ruling being based on long established Fourth Amendment law, this Court should dismiss the State's appeal as improvidently granted. Alternatively, the Court should affirm the Court of Appeals decision as consistent with well established case law on the rights of home owners and residents to be protected from unreasonable search and seizure, and consider adopting the Court of Appeals decision, in toto, as its own.

Respectfully submitted,



DANIEL J. O'BRIEN (0031461)
Attorney for Defendant
1210 Talbott Tower
131 North Ludlow Street
Dayton, Ohio 45402
(937) 228-6001

Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a file-stamped copy of the foregoing was mailed, via U.S. Ordinary mail, to R. Lynn Nothstine, Assistant Prosecuting Attorney, Appellate Division, 301 West Third Street, Suite 500, Dayton, Ohio 45422, on the 30th day of June, 2008.

DANIEL J. O'BRIEN