

FOR OFFICIAL PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

PEOPLE OF THE VIRGIN ISLANDS,	)	CASE NO. SX-15-CR-383
Plaintiff,	)	CASE NO. SX-15-CR-384
v.	)	
	)	
WINSTON BERKLEY,	)	
Defendant.	)	
_____	)	
	)	
PEOPLE OF THE VIRGIN ISLANDS,	)	
Plaintiff,	)	
v.	)	
	)	
QUANZA HEATH,	)	
Defendant.	)	
_____	)	

Cite as: 2019 VI Super 73

Appearances:

ERIC S. CHANCELLOR, ESQ.

Assistant Attorney General
Virgin Islands Department of Justice
Christiansted, VI 00820
Attorney for the People

MARTIAL A. WEBSTER, SR., ESQ.

Law Offices of Martial A. Webster, Sr.
Frederiksted, VI 00840
Attorney for Quanza Heath

H.A. CURT OTTO, ESQ.

Law Office of H.A. Curt Otto, P.C.
Christiansted, VI 00820
Attorney for Winston Berkley

MEMORANDUM OPINION

MOLLOY, Judge.

¶1 **BEFORE THE COURT** are motions to suppress filed by the Defendants Winston Berkley ("Berkley") and Quanza Heath ("Heath"). Berkley and Heath request that the Court

suppress the evidence seized and statements made on December 19, 2015 because it violated the Fourth and Fifth Amendments to the United States Constitution.¹ The Court held a Suppression Hearing on June 12, 2017 (“Hearing”). Supplemental briefs were filed by Defendants on June 22, 2017; the People of the Virgin Islands (the “People”) filed a response on July 13, 2017. For the reasons stated below, the Court will deny the motions.

I. FACTUAL AND PROCEDURAL HISTORY

¶2 The facts relating to the evidence seized in this case stem from an incident that occurred on or about December 19, 2015, when Virgin Islands police officers and officers from the Marshal Division of the Virgin Islands Superior Court commenced a joint operation called “Operation Curfew.” The purpose of this operation was to assist the marshals conducting checks of individuals on release by the court in pending criminal matters, which included individuals under house arrest and curfew. Operation Curfew was memorialized by an official memorandum, coordinated between government agencies, via an informational briefing, contained a defined list of locations, was under the supervision of the marshal service, and articulated a productive government purpose—decreasing crime during Carnival and Christmas season. These checks were coordinated due to manpower limitations as well as an increase in violations during the Christmas and Carnival season.

¶3 Heath was under house arrest and ordered to reside at 176 Estate Hannah’s Rest, Frederiksted, for criminal charges related to the unlawful possession of a firearm (14 V.I.C. § 2253(a)), possession or sale of ammunition (14 V.I.C. § 2256(a)), failure to report firearms

¹ On January 5, 2017, Berkley filed *Defendant Winston Berkley’s Joinder in Defendant Quanza Heath’s Motion to Suppress*. Therefore, the Court construes Defendant Heath’s Motion to Suppress as applied to both defendants.

obtained outside or brought into the Virgin Islands (23 V.I.C. § 470(a)), alteration of identifying marks of a weapon (23 V.I.C. § 481(a)), carrying or using a deadly weapon (14 V.I.C. § 2251(a)(1)), and delaying and obstructing an officer discharging his duty (14 V.I.C. § 1508). Heath was granted pre-trial release with the conditions of a 24-hour GPS electronic monitoring ankle-bracelet and house arrest under the supervision of a third-party custodian.

¶4 Between nine and ten o'clock on the evening of December 19, 2015, officers of Operation Curfew arrived at the residence to conduct a compliance check on Heath. Police Officer Melissa Fraser-Jacobs ("Fraser-Jacobs") testified that her supervisor, Lieutenant Robert Matthews ("Matthews"), Marshal Chris Richardson ("Richardson"), and herself approached the front door and knocked for what they testified seemed an extended period. Richardson testified that they knocked on the front door for three to five minutes. Richardson testified that the delay in answering alarmed him because GPS equipment indicated that Heath was in the residence. Richardson testified that the GPS was accurate to within approximately 100 feet. Richardson also testified that officers were positioned at strategic points near the front of the house for officer safety.

¶5 Fraser-Jacobs testified that they could see a light on at the back of the residence, and that an officer said they heard noise behind the house— "like someone was back there." At that point, Matthews instructed Fraser-Jacobs to go to the back of the residence to make contact. Once in the yard, Fraser-Jacobs noticed what she described as a marijuana grow operation with over 100 marijuana plants in plain view. She also noticed movement inside the house, relayed this information to the other officers, and quickly returned to the front.

¶6 After Fraser-Jacobs returned, an individual later identified as Berkley opened the front

door and spoke with Matthews and Detective Kai Joseph ("Joseph"). Richardson testified that Berkley gave consent to search the house and signed a *Consent to Search Form*, which was also signed by two witnesses. The form was a modified *Consent to Search a Vehicle Form*; the detectives crossed out "vehicle" and wrote the word "house." Additionally, the address on the form stated "167" Hannah's Rest rather than "176." Berkley represented that he had authority to allow the officers into the house.

¶7 After Berkley signed the consent to search form, Detective Darryl Walcott ("Walcott") entered the home. Richardson then spoke with Heath and checked his GPS monitoring unit. Also present in the residence was Heath's sister and her children. Both Berkley and Heath indicated that Heath's sister did not live there; she was visiting temporarily for the holidays. Walcott asked Heath which room was his. Heath pointed to one of the rooms and said, "Go ahead and search." No contraband was found in that room. Walcott found only women's clothing inside, indicating that the room was being used by a female.

¶8 As he proceeded further, Walcott testified that he could smell a strong odor of marijuana. At this point, Walcott noticed in plain view from a common hallway, a bag containing what appeared to be marijuana resting on a table in another bedroom. Walcott asked whose room it was and who the bag belonged to. Heath responded that he didn't know, but that he had just smoked a "joint." Walcott searched that bedroom and found a handgun, a magnum revolver and a semi-automatic M12 gun under the mattress. The semi-automatic M12 had more than fifteen live rounds inside the attached extended magazine. The revolver contained one live round in the chamber and five in the cylinder. The handgun contained seven live rounds in the magazine. Additionally, Walcott found live rounds inside of a plastic

bag and a box of ammunition on top of the closet in that same bedroom.

¶9 Adjacent to this bedroom was a third bedroom. Walcott testified that no one said that they were using the third bedroom. Walcott searched this room which had a lot of items piled on the bed and found a semi-automatic assault rifle, a bullet proof vest and a scope resting underneath the mattress. Walcott also found a shotgun with eight live rounds and a bullet-proof vest in the closet.

¶10 After the weapons were collected, Heath and Berkley were arrested and transported to the police station where they were advised of their *Miranda* rights. Heath declined to sign an *Advise of Rights Form* and declined to waive his right to remain silent. Berkley and Heath were booked at the police station. Later, while being transported to the Bureau of Corrections (“BOC”), Heath spontaneously asked whether his sister would be involved. Joseph answered Heath’s question and stated that Heath’s sister would be interviewed as part of the investigation. Heath then spontaneously stated that he didn’t want his sister involved and that the contraband belonged to him and Berkley. Upon arrival at BOC, Heath was asked if he would be willing to provide a written statement about what he had said. Heath agreed.

¶11 On January 11, 2016, the People filed a criminal information charging Berkley with maintaining or operating a controlled substance production facility and charging Heath with: unauthorized possession of a firearm; unauthorized possession of ammunition; and failure to report firearms obtained outside or brought into the Virgin Islands.

¶12 Defendants argue that the evidence collected in and around the home was the result of an illegal search under the Fourth Amendment. Heath also argues that his statement should be suppressed because it violated his right to remain silent under the Fifth Amendment. Def.’s

Post Hr'g. Br. On Mot. to Suppress Evid. 8,12,13 (hereinafter "Def.'s Br."). Defendants presented several sub-arguments which the Court will discuss each in turn.

II. LEGAL STANDARD

¶13 "It is beyond debate that individuals have a reasonable expectation of privacy in their homes." *Simmonds v. People*, 53 V.I. 549, 555 (2010)(citing *United States v. Karo*, 468 U.S. 705, 714 (1984)). The Fourth Amendment protects against "unreasonable search and seizures." *Id.* (quoting U.S. CONST. AMEND. IV).² A warrantless search of a residence is "*per se* unreasonable . . . [absent one of] a few, . . . well-delineated exceptions." *Browne v. People*, 56 V.I. 207, 217 (2012) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). "[W]here the [People's] interest in effectuating a search or a seizure . . . outweighs . . . privacy interests, courts have found limited exceptions to the warrant requirement." *People v. Prentice*, 64 V.I. 79, 89 (Super. Ct. 2016) (citing *Horton v. California*, 496 U.S. 128, 133 (1990) (remaining citation omitted)).

¶14 Generally, "the burden of proof is on the defendant who seeks to suppress evidence." *Id.* (citing *Unites States v. Johnson*, 63 F.3d 242, 245 (3rd Cir. 1995)). However, "[t]hat burden shifts to the government to show that [a] search [and] seizure was reasonable once the defendant has established a basis for [the] motion, i.e. the search or seizure was conducted without a warrant." *Id.* (citation omitted). In this case, officers conducted a warrantless search of Berkley and Heath's residence and seized weapons, ammunition and marijuana. Thus, the People must show that the officers' actions "were reasonable." *See id.*

III. DISCUSSION

² "The Fourth Amendment to the U.S. Constitution [applies] to the [U.S.] Virgin Islands [through] section 3 of the Revised Organic Act of 1954." *People v. Turnbull*, 61 V.I. 46, 51 (Super. Ct. 2014) (quoting *People v. John*, 52 V.I. 247, 255 (2009)).

A. Officers had Implied Authority to approach the front door of the residence under the knock-and-talk doctrine.

¶15 The Defendants argue that the law enforcement's presence at the front door was unlawful.³ Def.'s Br. 8-9. The People counter that law enforcement were legally present at the front door under the doctrine of knock-and-talk. People's Resp. to Def.'s Br. 5-7 (hereinafter "People's Resp. Br."). The Virgin Islands Supreme Court recognizes the knock-and-talk as an exception to the warrant requirement, explaining that:

[O]fficers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may. According to one scholar, when the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (*e.g.*, walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment.

Simmonds, 53 V.I. at 558-59 (quoting *Est. of Smith v. Marasco*, 318 F.3d 497, 519(3d Cir. 2003)) (internal quotations and citation omitted).

¶16 Under this exception, officers are permitted to knock on the door of a residence or approach a residence to speak to the inhabitants just as any private citizen would. *Id* at 558; *see also United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005) (collecting cases). Thus, an officer without a warrant may knock on the door of a home, because that is what "any private citizen might do." *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

³ Defendants note that where an accused has agreed to conditions of pre-trial release—which some jurisdictions consider a special needs exception, with incumbent reduced expectations of privacy—the search itself must still be reasonable in nature and supported by a showing of probable cause under the totality of the circumstances. Def.'s Br. 6, (citing *United States v. Scott*, 450 F.3d 870, 873-74 (9th Cir. 2006) (holding that the search of Scott's home while on pre-trial release, "without probable cause does not pass constitutional muster.")). The People have not articulated a search-as-condition-of-pre-trial-release argument, and the Virgin Islands Supreme Court recognizes the implied authority to approach a home, thus, the Court will address the knock-and-talk doctrine.

¶17 One requirement of the knock-and-talk is that officers possess a legitimate purpose in approaching the main entrance of a household, e.g., investigate a crime, interview witnesses to a crime, or complete a task related to crime control. *See e.g., United States v. Lubrin*, Crim. No. 2014-0056, 2015 U.S. Dist. LEXIS 9682, at *17 (D.V.I. Jan. 28, 2015) (“entry through an unlocked gate on a driveway to approach the front door of a residence for a knock-and-talk is a reasonable, limited intrusion for legitimate law enforcement objectives”) (explaining *United States v. Robbins*, 682 F.3d 111, 1115 (8th Cir. 2012)(quotation marks and citation omitted).

¶18 In this case, officers conducted a knock-and-talk to assist marshals with “Operation Curfew” which was formed to address house arrest compliance and increased crime during Carnival and Christmas season. Thus, the purpose was linked to a legitimate law enforcement objective. Therefore, the officers possessed implied authority to knock on the front door. *See Simmonds*, 53 V.I. at 558.

B. The knock-and-talk doctrine provided an exception to the warrant requirement to allow an officer to enter the back yard.

¶19 The Fourth Amendment shields an individual from “unreasonable government intrusion” within one’s home. *Silverman v. United States*, 365 U.S. 505, 511 (1961) (citations omitted). The curtilage of a home, and the area immediately surrounding the home, is deemed part of a home under the Fourth Amendment. *California v. Ciraldo*, 476 U.S. 207, 212 (1986). But, “[t]he Fourth Amendment does not . . . prevent all investigations conducted on private property.” *Jardines*, 569 U.S. at 6. A warrantless search of curtilage, with implied authority, or license, is not a Fourth Amendment violation. *See id.* at 8.

¶20 The People argue that if the officers were present for a valid purpose under knock-and-talk, then “it is permissible for them to enter other parts of the property including

curtilage if the circumstances show that someone is [home] but does not answer the front door.” People’s Resp. Br. 6-7. Once in the backyard, the People argue that the marijuana was in “plain view.”⁴ *Id.* at 7-8. Defendants counter that the search of the yard was unconstitutional for two main reasons: (1) the marijuana was growing against the rear of the house—which conveys a reasonable expectation of privacy under *Kyllo v. United States*, 533 U.S. 27 (2001); and (2) officers failed to articulate an objectively reasonable purpose for targeting Heath’s home for a search—making it an unconstitutional random search under *Delaware v. Prouse*, 440 U.S. 648 (1979). Def.’s Br. 8-9.

¶21 The Court will address the more significant question of randomness first. As another Virgin Islands court observed, “the *Prouse* Court had no intention of outlawing [all police checks]—just those [performed] seemingly at random.” *Gov’t of the Virgin Islands v. Ali*, 45 V.I. 164, 170 (Terr. Ct. 2003). Factors relevant to a randomness inquiry include: established programs; created by committee; written guidelines; official procedures; site selection and publicity. *See id.* By contrast, *Prouse* involved unconstrained government discretion, no reasonable suspicion, a complete lack of empirical data and no articulated productive government interest. *See Prouse*, 440 U.S. at 659-60. In sum, the *Prouse* Court found the detention of every vehicle for document checks to be a random exercise of government authority, and thus, unreasonable. *See id.* at 661.

¶22 Here, Operation Curfew was memorialized by an official memorandum, coordinated between government agencies, via an informational briefing, using a defined list of locations, supervised by the Marshal Division and articulated a productive government purpose—

⁴ The plain view doctrine will be discussed at length at Section F, *infra*.

decreasing crime during Carnival and Christmas season. Thus, it was not random and defendants' reliance on *Prouse* is misplaced.

¶23 The Court will now address the Defendants' second argument. Defendants argue that the grow operation was situated against the back of the house within the curtilage, conveying a "reasonable expectation of privacy" under *Kyllo*, 533 U.S. 27 (2001). Def.'s Br. 5, 8. However, *Kyllo* concerns the use of an enhanced device—which is not generally available to the public to explore details of a home which would have been unknown without it. *See* 533 U.S. at 37-38, 40. Using a thermal imaging device, to "search" a home was found to be unreasonable. *Id.* at 40. And, *Kyllo* does not address walking to a back door to make contact.

¶24 During the suppression hearing, the Defendants challenged the length of time the officers waited for an answer, and the time of night, as a basis for preventing officers from walking to the rear of the home. However, the evidence reveals that the plants were on the side of the house, *not behind* the house. (People's Ex. 1.) The plants were situated between the front and back of the home. And, Richardson testified that curfew checks had been completed on Heath before at that time of night, making the time-of-night argument unavailing. Therefore, the Court finds Defendants' argument on this issue unpersuasive.

¶25 The People counter that the knock-and-talk doctrine provided authority to go to the back if no one answered at the front. Resp. Br. 4-5. As a threshold matter, the People acknowledge that it appears that this issue has not yet been decided in the Virgin Islands. People's Resp. Br. 5. In this regard, the People primarily rely upon two cases, the first of which is *Hardesty v. Hamburg Twp.*, 461 F.3d 646, 654 (6th Cir. 2006), *abrogated on other grounds by Brennan v. Dawson*, 752 F. App'x 276 (6th Cir. 2018), *petition for cert. docketed*, __ U.S.L.W.

— (U.S. Feb. 19, 2019) (No. 18-1078). However, *Hardesty* is distinguished from the instant case as it involved exigent circumstances. *See Hardesty*, 461 F.3d at 654 (holding that attempting to contact the occupants of a home—which had a sign directing visitors to the back for an underage drinking party—approaching the back entrance, looking through a window, to find a teenager passed out and unresponsive was not unconstitutional).

¶26 Second, in *Simmonds*, the Virgin Islands Supreme Court recognized the implied authority for an officer to be in the front yard and at the front door to make contact. 53 V.I. at 558-59. Evidence from an incursion into the backyard was excluded, however, because the contact was executed in an improper manner. *Id.* at 561-62. First, Simmonds’s yard was mostly surrounded by a fence and the back yard was shielded from view. *Id.* at 553. Second, when the officer made contact in the front yard, Simmonds asked the officer to leave. *Id.* at 560. Once the officer made contact in the front yard, it negated the implied authority of the knock-and-talk doctrine to head to the back yard. *See id.* at 558-60. Thus, the Court concluded that absent exigent circumstances, evidence gathered from the search of his backyard was unconstitutional. In the end, no exigent circumstances existed, and thus, evidence discovered in the backyard was suppressed. *Id.* at 561-562.

¶27 Generally, the knock-and-talk doctrine evinces that a reasonable incursion into a property is: 1) relatively brief; 2) in order to speak with an individual known to be home but is not responding; 3) where another entrance may exist; 4) the alternate entrance is readily apparent, indicated by a driveway, walkway, path or light; and 5) is accessible to any member of the public. *See Lubrin*, 2015 U.S. Dist. LEXIS 9682 at *19-20 (D.V.I. Jan. 29, 2015) (collecting cases). And, whether a constitutional violation occurred requires “an objective assessment of

the officer's actions in light of the facts and circumstances confronting him at the time[.]” *United States v. Lewis*, 50 V.I. 366, 373 (D.V.I. 2008)(quoting *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985)(remaining citation omitted)).

¶28 The scope of knock-and-talk is generally limited to places where visitors are expected to go (e.g. walkways, driveways, porches), and observations from such vantage points are not covered by the Fourth Amendment. *See e.g., United States v. Cox*, 391 F. App'x. 756, 757-58 (11th Cir. 2010) (agents' plain view observations of marijuana plants while “directly on that route” to a cabin door for a knock-and-talk were constitutional). Additionally, items in “plain view” fall under the exception. *Lubrin*, 2015 LEXIS 9682 at *18-19, 20 (D.V.I. Jan. 29, 2015) (plants growing at the front corner of the house fell under the exception). “The mere purpose of discovering information . . . in the course of engaging in permitted conduct [of approaching the home to speak with the occupant] does not . . . violate the Fourth Amendment.” 569 U.S. at 9 n.4 (citation omitted). Officers may step off the path to speak to someone in a yard because such conduct is within the implied invitation granted to any visitor. *Id.*

¶29 Furthermore, most federal circuits and many state courts have held that when officers receive no answer at the front door, and based on a fact-specific inquiry, incursion into the curtilage is reasonably within the scope of the knock-and-talk doctrine. For example, the Eleventh Circuit has held that “officer[s] may . . . move away from the front door when seeking to contact the occupants” and “movement to the rear of the house after receiving no answer was lawful.” *United States v. Taylor*, 458 F.3d 1201, 1205 (11th Cir. 2006)(collecting cases) (quoting *United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir. 2001) and citing *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990)). Circuit courts have held that it was not

unreasonable to approach the backdoor where there was no answer at the front. *See Thomas*, 430 F.3d at 278 (finding it was not unreasonable to approach the backdoor); *see also Rogers v. Pendleton*, 249 F.3d 279, 289–90 (4th Cir. 2001) (no violation occurred where officers noted that lights were on, knocked on the front door, received no answer, and went around to knock on the back door).

¶30 Additionally, courts have commented that an individual’s right to privacy was not infringed where officers went to a back door to make contact. *See United States v. Raines*, 243 F.3d 419, 421 (8th Cir.2001) (“officers must sometimes move away from the front door when attempting to contact the occupants of a residence . . . [and finding that an officer] “did not interfere with [defendant’s] privacy interest when he, in good faith, went unimpeded to the back of [defendant’s] home to contact the occupants of the residence[.]”)(citing *United States v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977); *United States v. Garcia*, 997 F.2d 1273, 1279 (9th Cir. 1993) (same)(collecting cases).

¶31 And, finally, courts have held that it was not unlawful or unreasonable to approach the back door in order to complete a legitimate government purpose. *See Daoust*, 916 F.2d at 758 (“[I]f [the front] door is inaccessible[,] there is nothing unlawful or unreasonable about [an officer] going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person.”) (citing *Anderson*, 552 F.2d at 1300)(collecting cases). Where officers who were completing a legitimate government purpose to find an individual, the Ninth Circuit “[could not] say that the [officer’s] action in proceeding to the rear after receiving no answer at the front door was so incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded as the fruit of an

illegal search.” *Anderson*, 552 F.2d at 1300 (citing *Bradshaw*, 490 F.2d at 1100)(footnoted citation omitted). In a case investigating a report of shots fired, where only one house exhibited signs of activity, and after receiving no answer at the front door, “there was probable cause to go through the yard to approach the back door.” *United States v. Searle*, 974 F. Supp. 1433, 1439-40 (M.D. Fla. 1997). The Indiana Court of Appeals concluded that “officers may permissibly venture into spaces not normally used by the public, such as approaching a secondary entrance . . . located in curtilage . . . [based on] a reasonable belief that a person may be contacted by such entry.” *Jadrich v. State*, 999 N.E.2d 1022, 1029 (2013).

¶32 A minority of courts, however, have suggested that if no one answers the front door, officers should end the knock-and-talk and leave the premises. *See United States v. Troop*, 514 F.3d 405, 410 (5th Cir. 2008) (“although a knock and talk is a reasonable investigative tool . . . when no one answers the door, . . . officers should end the knock and talk . . . ‘change[] their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.’”)(quoting *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) and *United States v. Gomez-Moreno*, 479 F.3d, 350, 356 (5th Cir. 2007), *overruled on other grounds by King*, 563 U.S. at 470 (2011)). A more recent Second Circuit case commented that police may “approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” *United States v. Marchi*, No. 3:17-CR-00055-3 (VLB), 2018 U.S. Dist. LEXIS 46616, at *16 (D. Conn. Mar. 21, 2018)(quoting *Jardines*, 569 U.S. at 8). However, *Marchi* referenced the *Jardines* Court’s discussion of the “implied license” of “traditional invitations” to a front door, which includes hawkers, peddlers or “the Nation’s Girl Scouts and trick-or-treaters.” *See id.* And, *Marchi* involved officer actions that created

exigency through a show of force. *See id. at* *32.

¶33 In *United States v. Gomez-Moreno*, the Fifth Circuit held that knock-and-talks should be limited to investigative strategies, and when no one answers the front door, officers should retreat to “conduct[] further surveillance.” *Gomez-Moreno*, 479 F.3d at 356. The *Gomez-Moreno* court reasoned that officer actions may result in a show of force and exceed the purely investigative nature of the knock-and-talk. *Id.* at 355. Despite this, the court conceded that “[officers] might have then knocked on the back door or door to the back house.” *Id.* at 356.

¶34 The Court finds that the context of the Fifth Circuit cases is distinguished from the instant case. Upon review, when analyzing whether the knock-and-talk permits officers to knock on the back door when there is no answer at the front, courts that tend to limit the scope of the knock-and-talk were reviewing circumstances of active criminal investigations in which officer actions went beyond a purely investigative nature. *See Westfall v. Luna*, 903 F.3d 534, 545 (5th Cir. 2018)(citing 479 F.3d at 355). Whereas, in this case, officers were conducting a curfew check on an individual under court-ordered house arrest. Officers testified that Fraser-Jacobs went to the back to make contact because there were signs of human activity at the back. The majority of circuits permit limited incursion to make contact when there is no answer at the front. And, as the Fifth Circuit conceded, officers may “knock[] on the back door.” 479 F.3d at 356.

¶35 For these reasons, the Court is not persuaded by the minority of circuits which urge officers to leave the premises after receiving no answer at the front. In this case, as soon as officers entered the yard, numerous marijuana plants were in plain view. And, a bright light illuminated the plants in various states of growth—some of which were four to six feet tall.

Fraser-Jacobs testified that her incursion was brief and only because of signs of human activity (light and movement) at the back, after no one answered at the front. Additionally, Richardson testified that GPS indicated Heath was home, but not answering. Richardson testified that the GPS was accurate to within 100 feet.

¶36 Based on the circumstances of this case, the Court finds that the actions taken by officers were reasonable under the circumstances. First, it was objectively reasonable to conclude that another entrance may have existed because there was an exterior light by another part of the house. Second, officers heard sounds in the yard, “like someone was back there.” Furthermore, officers were there to make contact rather than conduct a search as part of an active criminal investigation.⁵ Finally, the discovery of the grow operation was immediate, inadvertent, readily identifiable and in plain view. For these reasons, the Court concludes that the incursion into the backyard was within the scope of the knock-and-talk.

C. Even if the search of the backyard was unconstitutional, the Court does not find that that search tainted the search of the home.

¶37 The Court now turns to whether the search of the backyard could have tainted the search of the home. The Defendants argue that evidence seized after the “[unconstitutional] antecedent search” should be suppressed under *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). Def.’s Br. 15. “When considering whether the taint of an initial illegality has been purged, courts focus on three non-dispositive factors: ‘(1) the temporal proximity between unlawful conduct and the recovery of evidence; (2) . . . intervening circumstances; and (3) the

⁵ Although officers had the opportunity to freeze the scene and obtain a search warrant, *see generally, Browne v. People*, 56 V.I. 207, 218 (2012), the officers in *Brown* were conducting an active criminal investigation, whereas here, officers were attempting to contact Heath and confirm house arrest compliance. Thus, the Court finds *Brown* inapplicable.

purpose and flagrancy of the unlawfulness.” *United States v. Rose*, 189 F. Supp.3d 528, 544 (D.V.I. 2016) (quoting *United States v. Dupree*, 617 F.3d at 739 (Fisher, J. concurring)). If the primary illegality is “sufficiently distinguishable, [it can] be purged of the primary taint.” *Castillo v. People*, 59 V.I. 240, 256 (2013)(quoting *United States v. Perez*, 506 F. App’x. 672, 674 (9th Cir. 2013)(quoting *Wong Sun*, 371 U.S. at 488)).

¶38 In this case, the temporal relation to the conduct and the recovery of the evidence does not favor taint. The incursion into the backyard was brief and to make contact—*not to search*. The recovery of evidence occurred after the consent search was completed. Second, officers took the time to obtain written consent after receiving Berkley’s verbal consent. Finally, the discovery of the marijuana was not used to obtain consent. Nor was the discovery used to obtain a warrant. *Cf. Rose*, 189 F. Supp.3d at 545 (finding that where evidence was obtained by exploiting an illegally obtained statement, the evidence was tainted). The discovery was incidental to efforts to make contact; thus, it was not purposeful or flagrant. For these reasons, the consent search is distinguishable and separate from the inadvertent discovery in the yard. Therefore, any primary taint is purged. *See Castillo*, 59 V.I. at 256. Accordingly, even if the search of the backyard was unconstitutional, it did not taint the search of the home.

D. Berkley provided free and voluntary consent to search the home.

¶39 Defendants argue that Berkley’s consent was defective because it was predicated upon the discovery of the marijuana, that he did not understand what he was consenting to and that he was coerced. Def.’s Br. 9-10. Whereas, the People posit that Berkley consented voluntarily. People’s Resp. Br. 8-9. “Consent to search is a . . . valid exception to the warrant requirement.” *Thomas v. People*, 63 V.I. 595, 607 (2015) (citing *Simmonds*, 53 V.I. at 559-60,

and *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). If a person “free[ly] and voluntar[ily] consent[s] to a search, a warrantless search is . . . valid[.]” *Id.* (citing *Schneckloth*, 412 U.S. at 227). It is the government’s burden to show that the consent was “freely and voluntarily given.” *Id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

¶40 Voluntary consent is a question of fact examined in the totality of circumstances. *Id.* (citing 412 U.S. at 227). The facts must demonstrate that the consent was “knowingly, intelligently and voluntarily [given].” *United States v. Franklin*, 630 F.3d 53, 60 (1st Cir. 2011)(citing *United States v. Marshall*, 348 F.3d 281, 286 (1st Cir. 2003)). Factors that Virgin Islands courts have considered regarding voluntary consent are the following:

age, education, and intelligence; . . . cooperat[ion] with police; . . . length of the encounter; . . . attitude about discovery of contraband; whether police threatened, physically intimidated, or punished the defendant; whether . . . in custody or under arrest . . .; and [if] . . . obtained in a public or private place.

People v. Caesar, Case No. ST-2015-CR-186, 2016 V.I. LEXIS 18, at *9 (V.I. Super. Ct. Mar. 4, 2016)(collecting cases); *see also People v. Schulerbrandt*, Case No. ST-2016-CR-F34, 2016 V.I. LEXIS 121, at *13 (V.I. Super. Ct. Aug. 22, 2016) (footnoted citations omitted).

¶41 Here, the testimony shows that Berkley understood English, was cooperative, and that the length of time between asking and receiving consent was brief. The testimony further shows that police did not threaten to arrest, physically threaten or punish Berkley, nor place him in custody. Consent was given while at the front door—which is not a secluded place. There was no testimony that officers used the discovery of marijuana to threaten to obtain a warrant or threaten arrest. The evidence shows that officers waited until a *Consent to Search Form* was signed before entering the residence.

¶42 Defendants further argue that since there was an error on the consent form “167”

versus “176”—it negates Berkley’s consent. Def.’s Br. 9. The People counter that officer testimony supports that Berkley knew that they wished to search Berkley’s residence rather than another. People’s Resp. Br. 9. Generally, exceptions to the warrant requirement do not demand that police are always correct, but that the search was reasonable, in which “reasonable [officers], acting on facts leading sensibly to their conclusions of probability.” *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990)(quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). These conclusions require a proper “assessment of probabilities in particular factual contexts.” *Rodriguez*, 497 U.S. at 184 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

¶43 In this case, oral consent had been provided and no evidence was presented that Berkley was confused or didn’t know which house the officers wished to search. Officers testified that Berkley knew that they wished to search his residence. Thus, the Court finds that this was a matter of a scrivener’s error and that it was reasonable for the parties to know which house was to be searched. Factual descriptions of locations to be searched require “sufficient particularity of a description [for] . . . practical accuracy rather than technical nicety.” *United States v. Pelayo-Landero*, 285 F.3d 491, 496 (6th Cir. 2002)(quoting *United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975)). Therefore, for all these reasons, under the totality of the circumstances, consent was freely and voluntarily given.

E. Berkley had apparent authority to provide consent to search the house.

¶44 Defendants argue that Berkley did not have the authority to consent because he didn’t own or reside in the home. Def.’s Br. 10-11. The People counter that Berkley had apparent authority to consent to the search. People’s Resp. Br. 10-11. Consent may be obtained either

from the individual whose property is searched, *Schneckloth*, 412 U.S. at 245, or a “third party who possesses common authority” over the premises. *United States v. Matlock*, 415 U.S. 164, 171 (1974) (footnoted citations omitted).

¶45 A third-party must be shown to have common authority over the areas to be searched, which is defined as “joint access or control” of the area to be searched. *Matlock* 415 U.S. at 171, n.7. Where officers have relied upon a representation that an individual had common authority to consent, this reliance must be shown to be based on objective facts drawn to a reasonable conclusion. *Rodriguez*, 497 U.S. at 188-89 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)) (“determination of consent to enter must ‘be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief’ that the consenting party had authority over the premises[.]”). Furthermore, where one tenant had “complete access to the entire (first floor)” co-tenants “assumed the risk” that the tenant may provide consent to search the first floor. *United States v. Jenkins*, 496 F.2d 57, 72 (2d Cir. 1974) (citation omitted).

¶46 In this case, Berkley told officers that he lived at the residence, that he and his sister owned the house and represented this both verbally and by signing a consent form. It is uncontroverted by the parties that Heath’s sister was a temporary guest visiting for Christmas, and that Berkley and Heath resided at the home. Defendant’s witness, Jocelyn Hodge, confirmed that Berkley had been living at the residence since 2014, and that the only people living there were Berkley and Heath. Berkley represented and expressly stated that he co-owned the home. Therefore, when coupled with the fact that Berkley alone answered the front door, it was reasonable to conclude that Berkley had authority to consent. Thus, “acting

on facts leading sensibly to their conclusions of probability” it was reasonable for officers to conclude that Berkley possessed the authority to provide consent. *Rodriguez*, 497 U.S. at 186 (citation omitted). Moreover, even if Berkley did not have the authority, the officers’ reliance on the objective facts was reasonable under the circumstances. *Id.* at 185-86.

¶47 Apparent authority, however, can be limited by co-tenancy. A joint tenant does not have authority to consent to search areas which another tenant has exclusive control and authority. *See Matlock* 415 U.S. at 170-71. Heath argues that Berkley’s consent only applied to common areas and areas which were under Berkley’s exclusive control. Def.’s Br. 8. The People counter that a roommate can “consent to search common areas to which he has access.” People’s Resp. Br. 10-11.

¶48 In this case, Berkley and Heath were co-tenants. Officers asked Heath which room was his, which defines the scope of Berkley’s consent. Heath pointed to a room and indicated that it was his. Walcott asked for Heath’s consent to search that room; Heath responded, “Sure, go ahead.” The testimony does not indicate that Heath had exclusive control over any other area in the residence. And, importantly, Heath did not object to the search of any part of the home. *See Georgia v. Randolph*, 547 U.S. 103, 106 (2006)(citation omitted).

¶49 Therefore, Berkley’s consent to search the home applied to the entire house, except one room—the room Heath indicated as his. By living in the same home together, Heath assumed the risk that Berkley may give consent to search the rest of the home. And, the one area Berkley’s consent was excluded from, Heath provided consent, saying, “Go ahead and search.” *United States v. Lopez-Mendoza*, 601 F.3d 861, 867-68 (8th Cir. 2010) (finding implied consent implied where a defendant said, “Go Ahead,” nodded his head and did not object when

officer searched his car for 30 minutes). Thus, Berkley's consent, which here-to-for covered the whole house—except Heath's room—became consent to search the entire home.

F. Marijuana in the home was subject to the Plain View Exception because it was inadvertently discovered, from a vantage point the officer had a legal right to be in and was identifiable as contraband.

¶50 The People argue that the marijuana found on the property fell under the plain view exception.⁶ People's Resp. Br. 10. While in the house, Walcott smelled the odor of marijuana. From a common hallway he saw in plain view, resting on a table in another room, a bag of what appeared to be marijuana. "If an article is already in plain view, neither its observation nor seizure would involve any invasion of privacy." *Horton*, 496 U.S. at 133-34 (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)).

¶51 The "plain-view doctrine has [also] been applied where police are not searching for evidence[,] . . . but nonetheless inadvertently come[] across" something incriminating. *Id.* at 135. (citation omitted). The plain view doctrine is permitted where it is "immediately apparent" to the police, based on experience, that they have incriminating evidence before them. *People v. Santana*, 63 V.I. 25, 31 (Super. Ct. 2014) (citing *Horton*, 496 U.S. at 136-37). Under the plain view exception, it is reasonable to seize an item if "the officer is lawfully in

⁶ At the close of the suppression hearing, the People made a cursory argument that the marijuana found in the yard would have been subject to inevitable discovery. To succeed on this point, the "[People] must show a chain of events that would have led to the discovery without the intervening illegality[,] . . . using historical facts capable of . . . verification[.]" *People v. Santana*, 63 V.I. 25, 35 (Super. Ct. 2014). "[T]he [People] . . . [must] establish by the preponderance of the evidence that the information ultimately or inevitably, [by following routine police procedures,] would have been discovered by lawful means[.]" *United States v. Vasquez de Reyes*, 149 F.3d 192, 195 (3rd Cir. 1998) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)). However, in this case, the People did not provide a police procedure that would have inevitably led to the discovery. Additionally, the People did not provide legal authority or analysis to support this argument. Accordingly, the Court will not address the inevitable discovery doctrine argument. See *Tutein v. Ford Motor Co.*, 67 V.I. 34, 39 (2016); see also *Bernhardt v. Bernhardt*, 51 V.I. 341, 346 (2009) ("issues raised in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[.]" (quoting *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 526 (3d Cir. 2003))).

the place from which the evidence is in plain view and has a lawful right of access to the object itself." *Id.* at 30-31. Thus, police may come across an item "while acting pursuant to some exception to the warrant clause." *See Texas v. Brown*, 460 U.S. 730, 738 n.4 (1983) (citation omitted).

¶52 Here, Walcott asked, "Who does that belong to?" and "Who does that room belong to?" Heath answered that he did not know, but that he had just smoked a joint.⁷ In this case, the plain view doctrine is predicated upon the prior exceptions of implied authority, consent, apparent authority, co-tenancy, and the absence of objection. It was also readily identifiable as likely contraband. Walcott testified that he was a detective with prior experience in drug and gun arrests; the items in the bag were readily identifiable to him as marijuana. Even setting aside plain view, Berkley provided consent to search. Walcott subsequently searched the second bedroom and found three firearms together with ammunition. Walcott found additional firearms in another room, described as a storage room.

G. Heath's right to remain silent was not violated because Heath initiated the conversation and waived his rights by completing a written statement.

¶53 Defendant Heath argues that his statement made to the officers while in transit to BOC was the result of a coercive custodial interrogation in violation of his right to remain silent. Def.'s Br. 12. Heath also argues that he was not advised of his rights before he signed the written statement. *Id.* Whereas, the People argue that Heath waived his rights when he spontaneously initiated a conversation with the officer and by providing a written statement.

⁷ Heath also argues that Walcott's question violated Heath's Sixth Amendment Right to Counsel. Def.'s Br. 13. However, at this point, Heath had not been accused of or charged with any crime, and it is not clear that Walcott was even speaking to Heath when Walcott asked, "Who does that room belong to?" Although Heath was on pretrial release for other criminal offenses, the Sixth Amendment Right to Counsel "cannot be invoked once for all future prosecutions." *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)(citation omitted).

People's Resp. Brf. 12-13.

¶54 After the discovery of the semi-automatic weapons, revolver and ammunition to match, officers arrested Berkley and Heath. Officers transported Heath to the police department where he was advised of his rights; Heath refused to sign the *Advise of Rights* form. No interrogation or questioning of Heath occurred. Later, while being driven to BOC, Heath spontaneously asked one of the detectives a question, the detective answered the question, after which Heath made an incriminating statement.

¶55 Because Heath had been advised of his *Miranda* rights, both the Fifth and Sixth Amendments⁸ guaranteed his right to remain silent and right to counsel at custodial interrogations. *United States v. Briscoe*, 41 V.I. 446, 451 n.4 (D.V.I App. Div. 1999) (citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)). These protections, however, only apply to statements elicited through "custodial interrogation." *Ramirez v. People*, 56 V.I. 409, 418 (2012) (quoting *Miranda*, 384 U.S. at 444). Spontaneous statements, which are not the product of custodial interrogation are not subject to suppression. *Wolfrath v. Lavallee*, 576 F.2d 965, 973 n.6 (2d Cir. 1978) ("[S]ince the statement . . . was a gratuitously volunteered statement, *Miranda* itself is inapplicable, for spontaneous statements which are not the result of 'official interrogation' have never been subject to [*Miranda*] strictures." (citation omitted)).

⁸ The Fifth and Sixth Amendments to the United States Constitution apply to the Virgin Islands through section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561. *See Blyden v. People*, 53 V.I. 637, 653, n.9, 661, n.18 (2010), *aff'd sub nom. Virgin Islands v. Blyden*, 437 F. App'x 127 (3d Cir. 2011). Heath referenced the Sixth Amendment in section B of Defendant's Brief entitled, "The Alleged Confession By Heath Was Obtained In Violation of Defendant's Rights." (Def.'s Br. 12). Although a valid waiver of the right to counsel can be shown where "the suspect himself initiates dialogue with the authorities," *Bradshaw*, 462 U.S. at 1045 (quoting *Wyrick v. Fields*, 459 U.S. 42, 103 (1982) (*per curiam*)), we need not reach that argument here because Heath did not present legal authority or argument in support. *See Tutein*, 67 V.I. at 39; *see also Bernhardt*, 51 V.I. at 346 ("issues raised in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[.]" (quoting *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 526 (3d Cir. 2003))). Heath asserted a right to counsel argument in Section E. *See supra*, n. 8. Def.'s Br. 13-15.

The Virgin Islands Supreme Court echoed this principle that “[v]olunteered statements of any kind are not barred by the Fifth Amendment[.]” *Blyden v. People*, 53 V.I. 637, 662 (2010)), (citing *United States v. Avery*, 717 F.2d 1020, 1025 (8th Cir. 1983)(collecting cases), *aff’d sub nom. Virgin Islands v. Blyden*, 437 F. App’x 127 (3d Cir. 2011).

¶56 In this case, it is undisputed that Heath was in custody. It is also uncontroverted that Heath initiated the conversation with the officer. The question is whether this exchange amounts to custodial interrogation. The Supreme Court defined interrogation broadly as:

words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. . . . A practice that the police should know reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (internal footnotes omitted).

¶57 Here, Heath initiated the conversation by asking a question. The officer answered Heath’s question. This does not qualify as interrogation because it is a factual response to Heath’s question as opposed to a confrontation, accusation, threat, unduly protracted discussion, comment about guilt, or action intended to “elicit an incriminating response.” *Id.*; *see also Arizona v. Mauro*, 481 U.S. 520, 526-27 (1987). Heath spontaneously stated that he didn’t want his sister involved and that the items seized at the home belonged to Berkley and Heath. Thus, Heath controlled the conversation, brought up the topic, asked the question and spontaneously admitted ownership of the contraband.

¶58 Next, the issue is whether Heath voluntarily waived his right to remain silent. Here too, courts consider the totality of the circumstances. *Castillo*, 59 V.I. at 265-66 (citation omitted). The People must establish “waiver by a preponderance of the evidence.” *Briscoe*, 41 V.I. at

449. To determine an effective waiver of the right to remain silent, Courts first look to the spontaneous nature of the question. *Castillo*, 59 V.I. at 257 (“a suspect’s Fifth Amendment right can be waived if a voluntary statement is given[.]”). And, the waiver need not be “explicit . . . to prove a Defendant waived his right to remain silent when a Defendant volunteered incriminating statements.” *Gov’t of the Virgin Islands v. Rivera*, 45 V.I. 226, 230 (Terr. Ct. 2003)(citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

¶59 Next, courts also inquire whether waiver was “knowing and intelligent . . . under the totality of the circumstances,” which includes whether an accused “reopened” conversation. *Bradshaw*, 462 U.S. at 1045 (quoting *Edwards v. Arizona*, 451 U.S. 477, 486 n.9 (1981)). The Virgin Islands Supreme Court recognized lawful waiver where a suspect “makes a[n uncoerced] statement to the police.” See *Blyden*, 53 V.I. at 662 (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010)). The *Berghuis* court elaborated that “knowing and intelligent waiver” should be without indicia of coercion such as: “incapacitation or sedat[ion], sleep and food deprivation, [or] threats.” *Berghuis*, 560 U.S. at 387. Knowing and intelligent waiver must be made with “full awareness of both the nature of the right being abandoned and the consequences[.]” *Castillo*, 59 V.I. at 263 (quoting *Berghuis*, 560 U.S. at 370)(citation omitted). Yet, “[t]he requirement to administer warnings in advance only attaches to statements which are the product of custodial interrogation[.]” rather than “volunteered. . . spontaneous statements.” *Castillo*, 59 V.I. at 265 (citations omitted).

¶60 In this case, Heath’s spontaneous question was not a bare inquiry or routine question. There was no evidence presented of trickery or coercion on the part of officers or that Heath was unaware that his statement could be used against him. The spontaneous conversation

initiated by Heath was not an interrogation. *See Innis*, 446 U.S. at 302. The spontaneously volunteered incriminating statement demonstrates an intent to waive his rights. *See Blyden*, 53 V.I. at 663. Moreover, Heath willingly provided a written statement, demonstrating an intent to waive his rights. For all of these reasons, Heath's statement shall not be excluded.

IV. CONCLUSION

¶61 For the reasons set forth above, the Court finds that the marijuana found in the yard was discovered in plain view when officers went to the back to contact the occupants under the knock-and-talk exception. The Court finds that Berkley possessed apparent authority to consent to the search of the home, and that his consent was voluntary. The Court also finds that evidence seized in the home was not the result of an illegal search. Furthermore, the Court finds that Heath's spontaneous statement was not a product of custodial interrogation and, thus not protected by the Fifth Amendment. Finally, the Court finds that Heath intentionally waived his right to remain silent. Therefore, the motions to suppress are denied. An Order consistent with this Memorandum Opinion shall follow.

Date: May 22, 2019

ATTEST:

ESTRELLA H. GEORGE

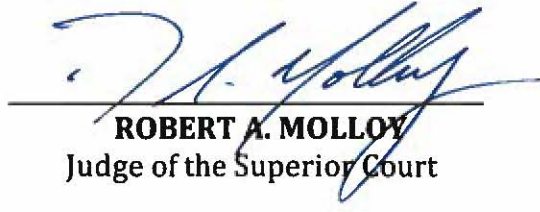
Clerk of the Court

By:

Court Clerk

Date:

5/22/19


ROBERT A. MOLLOY
Judge of the Superior Court