NOTES

It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations

"Because good proactive police work often creates exigencies, the legal issue is not simply whether the police created the exigency, but whether the police impermissibly created the exigency."[1]

I. INTRODUCTION

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures conducted by law enforcement personnel.[2] This right is protected in part by the requirement that law enforcement officers obtain search warrants prior to searching for and seizing evidence.[3] Searches conducted without a warrant are generally unreasonable.[4] This warrant requirement is not absolute, however, as the Supreme Court recognizes exceptions when certain exigent circumstances exist.[5] Exigent

1. Edward M. Hendrie, *Creating Exigent Circumstances*, FBI L. ENFORCEMENT BULL., Sept. 1996, at 2, *available at* http://www.fbi.gov/publications/leb/1996/sept966.txt (acknowledging legal issues arise when police create exigent circumstances through warrantless search).

2. U.S. CONST. amend. IV (establishing warrant requirement for searches, seizures, and arrests).

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

Id.

3. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) (stating warrantless searches unreasonable, but subject to few "well-delineated" exceptions); McDonald v. United States, 335 U.S. 451, 455 (1948) (declaring search warrant interjects objective evaluation process between citizens and police action); Johnson v. United States, 333 U.S. 10, 13-14 (1948) (balancing police officers' zeal against need for "neutral and detached magistrate").

4. *See* Payton v. New York, 445 U.S. 573, 586 (1980) (noting basic Fourth Amendment principles make warrantless searches unreasonable); Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971) (stating search and seizure without warrant per se unreasonable); *see also* Horton v. California, 496 U.S. 128, 138 (1990) (stating "evenhanded law enforcement" achieved through objective standards, not subjective standards); Scott v. United States, 436 U.S. 128, 136-37 (1978) (declaring Fourth Amendment only meaningful if neutral magistrate evaluates reasonableness of search or seizure).

5. *See* Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984) (listing Court-recognized conditions justifying warrantless searches and arrests). Exceptions to the warrant requirement are "few in number and carefully delineated" because the Court requires judicial approval of police action whenever possible. United States v.

circumstances exist when there is no time to obtain a warrant and the police are compelled to act quickly.[6] Under such circumstances, searches may be reasonable despite the absence of a warrant.[7]

Though the Supreme Court has upheld warrantless searches where the exigency was related to police action, in each instance, the police conduct involved a response to an exigency, not proactive conduct that created one.[8] When police actions create exigent circumstances, as opposed to merely encountering them during an investigation, courts must determine whether the police action permissibly or impermissibly created the exigency.[9] While this permissibility inquiry may appear straightforward, courts differ on the standard to apply when weighing the propriety of police actions.[10] Circuit courts seem to agree that the basis for any review is the reasonableness of police action but disagree over the role the police officers' subjective intent should play.[11]

During these inquiries, courts focus on reasonableness because of the fear police will abuse their power.[12] One police tactic that courts have increasingly subjected to reasonableness review is the procedure known as "knock and talk."[13] The "knock and talk" procedure is a common and seemingly innocuous

U.S. Dist. Court, 407 U.S. 297, 318 (1972). Preservation of evidence from destruction is a legitimate exception to the warrant requirement. *Id.* Additional examples of constitutionally permissible exceptions to the warrant requirement are when officers are in "hot pursuit" of a suspect, need to protect or preserve life, feel a threat to their safety, or reasonably believe evidence will be lost. Hendrie, *supra* note 1, at 1 (listing some exigent circumstances and providing case citations).

6. *See Katz*, 389 U.S. at 357-58 (providing citations to exemplary cases and noting certain exceptions). The Court lists searches incident to arrest, searches after "hot pursuit," and consent searches among the exceptions to the warrant requirement. *Id.*; *see also Welsh*, 466 U.S. at 750 (providing examples of Court-recognized exigent conditions); 68 AM. JUR. 2D *Searches and Seizures* § 127 (2006) (discussing exigent circumstances and rationale for permitting searches and seizures when they arise).

7. *Coolidge*, 403 U.S. at 474-75 (acknowledging exigent circumstances exception to warrant requirement); *see also* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (noting reasonable and necessary police action in exigent circumstance overcomes warrant requirement).

8. *E.g.*, Chambers v. Maroney, 399 U.S. 42, 48 (1970) (approving automobile search where fear of flight existed); Chimel v. California, 395 U.S. 752, 762-63 (1969) (validating search of person after lawful arrest in order to remove weapons); *Hayden*, 387 U.S. at 298-99 (upholding search of suspect caught in hot pursuit).

9. *E.g.*, United States v. Coles, 437 F.3d 361, 370-71 (3d Cir. 2006) (analyzing permissibility where police action created exigency); United States v. Richard, 994 F.2d 244, 248-49 (5th Cir. 1993) (discussing validity of police action creating exigency); United States v. MacDonald, 916 F.2d 766, 771 (2d Cir. 1990) (determining permissibility of police conduct where exigency arguably existed already).

10. *See infra* Part II.C (discussing different standards courts apply in determining permissibility of police-created exigencies).

11. *See infra* Part II.B (detailing circuit courts' reasonableness review and intent analysis).

12. *See* McDonald v. United States, 335 U.S. 451, 456 (1948) (noting mistrust of police action due to historical abuses of power). Police officers might act in reliance on a nonexistent exigency and subsequently manufacture an explanation that justifies their failure to first obtain a warrant. Valli F. Baldassano, *Police Created Exigencies: Implications for the Fourth Amendment*, 37 SYRACUSE L. REV. 147, 158 (1986); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1050 (1996). The Fourth Amendment exists to protect against the danger of contrived explanations for police actions. *See* Baldassano, *supra*, at 158.

13. *See* H. Morley Swingle & Kevin M. Zoellner, *"Knock and Talk" Consent Searches: If Called by a Panther, Don't Anther*, 55 J. MO. B. 25, 25 (1999) (noting recent increase in number of cases reviewing "knock

procedure that police use proactively, making the procedure vulnerable to potential abuse.[14] The "knock and talk" appears innocuous because courts do not generally consider its use a search or seizure, but rather an investigative tactic.[15] The potential for abuse arises when police attempt to gain access for consensual searches and instead provoke exigencies that normally validate a warrantless search.[16]

This Note explains the police procedure known as "knock and talk" and examines the validity of the procedure as an investigative tactic.[17] Part II.B discusses the use of the "knock and talk," focusing on the reasonableness of the procedure when it creates exigent circumstances.[18] Part II.B also provides examples of bad-faith uses of the "knock and talk" procedure.[19] Next, Part II.C examines police created exigencies and the different standards courts apply in determining whether police permissibly or impermissibly created the exigency.[20] This examination includes a discussion of both the objective reasonableness standard and the subjective bad-faith standard that courts apply.[21] Finally, Part III explains why a court's reasonableness and permissibility analyses should focus on objective criteria, rather than subjective intent, in determining Fourth Amendment compliance.[22] The analysis focuses on the objective factors relevant to "knock and talk" in judging the reasonableness of police actions.[23]

and talk" procedure); *see also infra* note 24 and accompanying text (providing explanation of "knock and talk" procedure and distinguishing it from "knock and announce" principle).

14. *See* United States v. Powell, 929 F. Supp. 231, 232 n.3 (S.D. W. Va. 1996) (noting both utility and potential for abuse of "knock and talk" procedure); *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(b) (4th ed. 2004) (acknowledging propriety of "knock and talk" procedure while noting limitations).

15. *See, e.g.*, United States v. Thomas, 430 F.3d 274, 277 (6th Cir. 2005) (recognizing legitimate investigative procedure of "knock and talk" consensual encounters); United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001) (indicating "knock and talk" is a reasonable investigative tool); Johnson v. Weaver, No. 3:04-cv-342, 2006 U.S. Dist. LEXIS 73344, at *23 (S.D. Ohio Sept. 29, 2006) (finding no search when police knocked on door seeking consent to search).

16. *See* United States v. Collins, 510 F.3d 697, 700 (7th Cir. 2007) (noting exigency common reaction to police presence); *Powell*, 929 F. Supp. at 232 n.3 (describing "knock and talk" procedure and abuse concern).

17. *See infra* Part II.A (discussing permissible circumstances for "knock and talk" procedure).

18. *See infra* Part II.B.1 (discussing reasonableness of "knock and talk" investigations).

19. *See infra* Part II.B.2 (discussing bad-faith uses of "knock and talk" procedure).

20. *See infra* Part II.C (discussing various circuit court standards of review for police created exigencies).

21. *See infra* Part II.C.1-4 (discussing reasonableness standards and bad faith analysis).

22. *See infra* Part III (supporting use of objective analysis test to comply with other Fourth Amendment jurisprudence).

23. *See infra* Part III.B.2 (applying permissibility review analysis to "knock and talk").

II. HISTORY

A. The "Knock and Talk" Procedure

The "knock and talk" involves a police officer knocking on the door of a residence, identifying himself, asking to talk to the occupant, and ultimately seeking information or consent to search the residence.[24] When done properly, a "knock and talk" does not constitute a search or seizure and therefore does not trigger the Fourth Amendment's constitutional protections.[25] This is because the procedure is an investigative tactic—not a search—that police often use when without sufficient probable cause to justify a warrant or permissible warrantless search.[26] When police procure consent, the "knock and talk" procedure allows the officers to search a residence without a warrant and without probable cause.[27] In many cases, the person answering the door consents to a police search, which makes the procedure highly effective.[28]

24. *See* United States v. Cruz, 838 F. Supp. 535, 537 (D. Utah 1993) (describing "knock and talk" procedure and noting noncustodial nature); *see also* Jayme W. Holcomb, *Knock and Talks*, FBI L. ENFORCEMENT BULL., Aug. 2006, at 22, 24, *available at* http://www.fbi.gov/publications/leb/2006/august06leb.pdf (explaining consensual nature of "knock and talk"). One should distinguish "knock and talk" from "knock and announce," which is the principle that police officers must announce their presence and provide residents the opportunity to open the door when police have a warrant to enter and search without consent. *See* Wilson v. Arkansas, 514 U.S. 927, 931-32 (1995). "Knock and announce" is a common-law principle employed after police officers secure a warrant, while "knock and talk" investigations generally occur before police have even established probable cause. *Id.*; Holcomb, *supra*, at 22.

25. *See* Johnson v. Weaver, No. 3:04-cv-342, 2006 U.S. Dist. LEXIS 73344, at *23 (S.D. Ohio Sept. 29, 2006) (finding no search and seizure when police knocked on door seeking consent to search); *see also* Florida v. Bostick, 501 U.S. 429, 439 (1991) (noting Fourth Amendment protection against unreasonable searches and seizures does not prohibit voluntary cooperation); Terry v. Ohio, 392 U.S. 1, 20 n.16 (1968) (requiring a police exertion of force or authority in restraining liberty for seizure to occur). When a citizen voluntarily cooperates with police in response to noncoercive conduct, no constitutional concerns arise. United States v. Morgan, 936 F.2d 1561, 1566 (10th Cir. 1991) (citing United States v. Santillanes, 848 F.2d 1103, 1106 (10th Cir. 1988)).

26. *See* United States v. Hall, No. 3:05-CR-087-R, 2005 U.S. Dist. LEXIS 19986, at *38 (N.D. Tex. Sept. 14, 2005) (finding use of "knock and talk" procedure unreasonable once probable cause established). *But see* Hoffa v. United States, 385 U.S. 293, 310 (1966) (noting police have no duty to halt investigation the moment probable cause established); United States v. Newman, No. 05-20603, 2006 U.S. App. LEXIS 29813, at *12 (5th Cir. Dec. 5, 2006) (upholding "knock and talk" inquiry when searching for suspect for whom police had arrest warrant).

27. *See* Hardesty v. Hamburg Twp., 461 F.3d 646, 653-54 (6th Cir. 2006) (recognizing validity of soliciting consent through "knock and talk"); *see also Hall*, 2005 U.S. Dist. LEXIS 19986, at *45 (finding "special urgency" may justify use of "knock and talk" over pursuit of warrant). The "special urgency" exception that the court notes in *Hall* allows police to use a "knock and talk" in lieu of a warrant when responding to an exigency, but not in creating one. 2005 U.S. Dist. LEXIS 19986, at *25-26, 45.

28. *See* Illinois v. Lidster, 540 U.S. 436, 477-78 (1966) (noting responsible citizens often provide police with help when asked); *see also* Herbert Gaylord, *What Good is the Fourth Amendment? "Knock and Talk" &* People v. Frohriep, 19 T.M. COOLEY L. REV. 229, 229 n.5 (2002) (indicating consent given eighty to ninety percent of time when "knock and talk" used); Jacqueline Bryks, Comment, *Exigent Circumstances and Warrantless Home Entries:* United States v. MacDonald, 57 BROOK. L. REV. 307, 357 (1991) (noting two options in response to "knock and talk:" consent or refusal). It is not entirely clear why suspects readily give consent, but they may be unaware of their right to refuse entry or believe consenting simply allows for the

Police have noted this effectiveness, leading to expanded use of the procedure.[29]

Because the "knock and talk" is neither a search nor seizure, police officers need not have probable cause or reasonable suspicion of criminal activity before initiating an encounter.[30] Instead, police officers conducting "knock and talk[s]" usually are acting on incomplete information and the need to conduct further investigation.[31] In conducting this additional investigation, the goal for police is to gain consent to search, thereby making a warrant unnecessary.[32] While the "knock and talk" does not give police any right of entry without consent, the procedure remains vulnerable to abuse.[33] The tactic can create exigent circumstances, resulting in illegal searches and seizures, when an occupant reacts to police presence with more than a mere grant or denial of consent to search.[34] Courts must determine whether the police action in such

inevitable. Craig Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 UMKC L. REV. 559, 595 n.382 (1998). People may not be aware they can refuse consent or may be uncomfortable exercising the right to deny consent when confronted with a police presence. Gaylord, *supra*, at 229.

29. *See* Hemmens, *supra* note 28, at 595 n.382 (quoting detective who equates use of "knock and talk" to shooting fish). Police awareness of the utility of "knock and talk" has made it a popular tactic but one which the courts have only recently begun to closely examine. Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297, 312 (2005); *see also* Elizabeth Donald, *Collinsville "Knocks and Talks" in Effort to Halt Drug Dealing*, BELLEVILLE NEWS-DEMOCRAT (Ill.), Jan. 31, 2007, *available at* 2007 WLNR 1845335 (noting procedure's effectiveness by providing notice of police presence even if no consensual search allowed).

30. United States v. De Jesus Cruz-Mendez, 467 F.3d 1260, 1264 (10th Cir. 2006) (affirming "knock and talk" as reasonable tactic even absent reasonable suspicion); United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000) (recognizing suspicion not required to justify "knock and talk"). While one Fifth Circuit case mentions reasonable suspicion of criminal activity as a basis for "knock and talk," the court pointed out only that suspected criminal activity might exist when police use the tactic, not that such suspicion is mandatory. *See* United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001).

31. State v. Smith, 488 S.E.2d 210, 212 (N.C. 1997) (describing typical situation in which police use "knock and talk"). Police typically use a "knock and talk" when they receive information that triggers an investigation but does not provide the probable cause needed for a search warrant. *Id.*

32. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (affirming consensual-search exception to warrant requirement); Katz v. United States, 389 U.S. 347, 358 n.22 (1967) (noting search conducted with consent meets Fourth Amendment requirements).

33. *See* United States v. Cruz, 838 F. Supp. 535, 542-43 (D. Utah 1993) (discussing potential use of "knock and talk" as ruse to gain entry to residence). Police, in using a "knock and talk," may attempt to gather information based on the exigencies that arise from the reaction of the suspect to police presence. *See* United States v. Ward, 1998 U.S. App. LEXIS 17740, at *2 n.1 (4th Cir. Aug. 3, 1998). Proactive law enforcement tactics often result in such exigencies. *See* Hendrie, *supra* note 1, at 8.

34. *See, e.g.*, United States v. Newman, No. 05-20603, 2006 U.S. App. LEXIS 29813, at *2 (5th Cir. Dec. 5, 2006) (describing suspect fleeing from residence when police approached); United States v. Coles, 437 F.3d 361, 364 (3d Cir. 2006) (noting suspects reacted to "knock and talk" with rustling, running footsteps, and toilet flushing); United States v. Berry, 468 F. Supp. 2d 870, 873-74 (N.D. Tex. 2006) (discussing police observation of drugs thrown from window in response to "knock and talk" attempt); *see also* Gaylord, *supra* note 28, at 229-30 (noting lack of procedural safeguards in use of "knock and talk"). Police might not create an exigency intentionally, but police action may nevertheless contribute to the creation of exigencies. Baldassano, *supra* note 12, at 176-77; *see* United States v. Santana, 427 U.S. 38, 42-43 (1976) (holding suspect created exigency by fleeing from lawful arrest).

situations permissibly provoked such a reaction.[35]

B. The "Knock and Talk" Procedure Under Review

The "knock and talk" has proven an effective and constitutionally valid investigative practice that police have embraced.[36] The use of the tactic for investigations, however, can be a catalyst for the initiation of a warrantless search or seizure.[37] Accordingly, the "knock and talk" is subject to review under the standards for permissibility of police-created exigencies discussed later in this Note.[38] The different standards of inquiry, however, lead to conflicting results regarding whether a "knock and talk" permissibly created an exigency.[39]

1. Reasonableness of "Knock and Talk" as an Investigative Tactic

Courts will presume that the use of the "knock and talk" is reasonable unless the occupant can show that the circumstances under which it occurred created a coercive investigatory stop, effectively rendering the encounter a seizure to which Fourth Amendment protections apply.[40] Even a "knock and talk" that is initially reasonable may become a coercive investigatory stop.[41] A "knock and talk" may become coercive when police compel an occupant to open the door

35. *See* United States v. Vega, 221 F.3d 789, 800 (5th Cir. 2000) (reviewing whether police created exigency or whether it naturally occurred during investigation).

36. *See supra* notes 27-29 and accompanying text (discussing use and effectiveness of "knock and talk" in procuring consent to search); *see also supra* note 25 and accompanying text (noting Fourth Amendment protections not triggered during normal "knock and talk" investigation).

37. *See* United States v. Johnson, 170 F.3d 708, 721 (7th Cir. 1999) (Evans, J., concurring) (suggesting police may use "knock and talk" as shortcut, which is fraught with constitutional problems); *see also* Holcomb, *supra* note 24, at 28 (stating use of "knock and talk" often gives rise to exigent circumstances).

38. *See infra* Part II.C.1-4 (providing standards of permissibility from various circuit courts).

39. *See Coles*, 437 F.3d at 370-71 (rejecting "knock and talk" when intent to provoke warrantless search shown); United States v. Chambers, 395 F.3d 563, 568-69 (6th Cir. 2005) (denouncing "knock and talk" when deliberately used to evade warrant requirement); United States v. Jones, 239 F.3d 716, 721-22 (5th Cir. 2001) (declaring "knock and talk" valid after finding of reasonableness); United States v. MacDonald, 916 F.2d 766, 771 (2d Cir. 1990) (upholding "knock and talk" as lawful tactic in permissible exigency creation). *But see* New York v. Belton, 453 U.S. 454, 458 (1981) (noting necessity for clear standards in Fourth Amendment analysis).

40. *See* United States v. Jerez, 108 F.3d 684, 691-92 (7th Cir. 1997) (recognizing "knock and talk" is consensual absent coercive circumstances). In *Jerez*, the court concluded inherent coercion existed when police attempted a "knock and talk" in the middle of the night with repeated knocking and verbal announcements until an occupant answered the door. *Id.* at 690-91. The court pointed to "the special vulnerability of those awakened in the night by a police intrusion at their dwelling place." *Id.* at 690. *But see* United States v. Brown, No. 05-6080, 2006 U.S. App. LEXIS 20562, at *13 (10th Cir. Aug. 8, 2006) (holding "knock and talk" not coercive where police established occupant was awake); United States v. Severe 29 F.3d 444, 446-47 (8th Cir. 1994) (declaring "knock and talk" without show of force afforded suspects opportunity to deny consent).

41. *Jerez*, 108 F.3d at 692 (reasoning additional actions created coercive attempt to produce response after failed "knock and talk"). After an occupant refuses the initial "knock and talk," further advances by police may transform an attempted consensual encounter into a search and seizure subject to Fourth Amendment warrant requirements. *Id.*

under the "badge of authority."[42] Additionally, if the police exhibit unreasonable persistence in attempting to gain entry or solicit cooperation, a court may deem the "knock and talk" coercive.[43] Courts review the totality of the circumstances to determine whether police used the "knock and talk" in a manner that converted it from an investigatory practice to a seizure triggering Fourth Amendment protections.[44] The reasonableness of the "knock and talk" is predicated on its use as an investigative tool to seek consensual encounters.[45] Some have argued that a "knock and talk" is not reasonable once police are aware that the occupant will not consent.[46]

During an investigation, a "knock and talk" initiated to solicit a consensual encounter may become unreasonable before completion.[47] If the police use tactics that force the individual to exit his home, courts may find this to be a "constructive entry" and thus unreasonable under the Fourth Amendment.[48] Constructive entry may also occur when police conduct a "knock and talk" with

42. United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000) (indicating voluntary nature of consensual encounter terminated when occupant forced to open door); *see also* United States v. Thomas, 430 F.3d 274, 277 (6th Cir. 2005) (stating permissible consensual encounter becomes impermissible constructive entry when police exhibit show of force). The term "badge of authority" indicates police used a demand or force to compel entry to a residence as if they have a lawful right to make such a demand. *See Cormier*, 220 F.3d at 1109. Compliance with police demands, as distinguished from police requests, is not consent but rather acquiescence to authority. United States v. Winsor, 846 F.2d 1569, 1573 n.3 (9th Cir. 1988); *see* United States v. Cabrera, 117 F. Supp. 2d 1152, 1157-58 (D. Kan. 2000) (holding police used "knock and talk" in manner improperly implying lawful authority).

43. *Cormier*, 220 F.3d at 1109 (reasoning consensual nature of encounter destroyed when occupant not free to ignore police presence). A "knock and talk" may become a seizure when police display weapons, physically intimidate or threaten occupants, or conduct questioning at an unusual place or time. United States v. Munoz, 150 F. Supp. 2d 1125, 1133 (D. Kan. 2001).

44. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (viewing all circumstances surrounding incident to determine whether seizure occurred). Police seize a person when the person reasonably believes that he or she is not free to leave. *Id.*

45. United States v. Newman, No. 05-20603, 2006 U.S. App. LEXIS 29813, at *12 (5th Cir. Dec. 5, 2006) (affirming legitimacy of "knock and talk" as investigative tactic);
United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001) (recognizing "knock and talk" reasonable when used for investigative purposes).

46. *See* United States v. Gomez-Moreno, 479 F.3d 350, 355-56 (5th Cir. 2007) (holding "knock and talk" unreasonable when no one answers and officers seek forcible entry); *see also* United States v. Gould, 364 F.3d 578, 595 (5th Cir. 2004) (Smith, J., dissenting) (arguing indications suspect does not want to speak to police end legitimate "knock and talk" encounter).

47. *See Thomas*, 430 F.3d at 277 (describing situations in which "knock and talk" becomes unreasonable). In *Thomas*, the court held a "knock and talk" was reasonable because police made a request without raised voices or weapons drawn, and the defendant responded without being compelled to do so. *Id.* at 278. The court distinguished the situation from previous cases in which the police used a "knock and talk" while also overbearing the suspect with a show of force that quashed the procedure's consensual nature. *Id.* at 278-79; *see* United States v. Saari, 272 F.3d 804, 806-807 (6th Cir. 2001) (noting police had weapons drawn and pointed at suspect while demanding his exit from home); United States v. Morgan, 743 F.2d 1158, 1161 (6th Cir. 1984) (noting police surrounded home, used flood lights, and summoned suspect with bullhorn).

48. *See* United States v. Thomas, 430 F.3d 274, 277 (6th Cir. 2005) (defining "constructive entry"). A "constructive entry" is a situation in which police do not enter a residence but instead deploy overbearing tactics and essentially force the individual out of the home by making him reasonably believe he must comply with police demands. *Id.*

weapons drawn, while yelling at the occupant, using a bullhorn, or while preventing the occupant from leaving the premises.[49]

Under some circuits' standards, the reasonableness of the "knock and talk" is subject to review regardless of police intentions.[50] Generally, courts deem the tactic reasonable when police solicit information during a consensual encounter.[51] Moreover, the law does not limit consensual "knock and talk" encounters to inquiries made at the front door of a residence, as the law considers police to be visitors to a residence and accordingly affords them the same latitude as other visitors with regard to permissive intrusion.[52]

2. Bad-Faith Use of "Knock and Talk"

Bad-faith applications of the "knock and talk" procedure occur when police officers knowingly try to circumvent Fourth Amendment warrant requirements.[53] Police officers act in bad faith when they believe a "knock and talk" will result in some foreseeable exigency and are tempted to use the

49. Id. at 277-78 (contrasting typical consensual encounter with examples of coercive police conduct constituting constructive entry). *But see* Unites States v. Cade, No. 3:05-CR-0139-L, 2006 U.S. Dist. LEXIS 47561, at *13-15 (N.D. Tex. July 13, 2006) (finding initial contact with suspect noncoercive despite pretextual police questioning).

50. *See infra* notes 88-93, 99-102, 122 and accompanying text (discussing reasonableness standards applied objectively and without requirement of bad faith).

51. *See* United States v. Chambers, 395 F.3d 563, 568 n.2 (6th Cir. 2005) (ruling "knock and talk" generally legitimate investigative procedure to obtain consent to search); United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001) (noting "knock and talk" reasonable when officers merely seek consent to search); *see also* United States v. Kim, 27 F.3d 947, 951, 954 (3d Cir. 1994) (describing permissible consensual "knock and talk" encounter). The justification for police solicitation of information through consensual encounters at a suspect's home is found in an oft-cited holding from the Ninth Circuit:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.

Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964). *But see* Gaylord, *supra* note 28, at 229 (expressing concern police will use "knock and talk" to circumvent Fourth Amendment protections).

52. Hardesty v. Hamburg Twp., 461 F.3d 646, 654 (6th Cir. 2006) (extending permissible use of "knock and talk" to back door or backyard). In some circumstances, police officers may use the tactic in the curtilage of a residence. *Id.* at 654. Police officers can reasonably enter the curtilage of the residence when such entry is the only practicable way to establish contact with the resident. *Id.*; *see also* United States v. Titemore, 335 F. Supp. 2d 502, 505 (D. Vt. 2004) (comparing police presence to uninvited visitors with respect to permissible areas of access); United States v. Cota-Lopez, 358 F. Supp. 2d 579, 590-91 (W.D. Tex. 2002) (finding approaching house through garage door in absence of direct path to front door to be reasonable).

53. *See, e.g.*, Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (noting police efforts to intentionally evade warrant requirement indicative of impermissibly created exigency); United States v. Rico, 51 F.3d 495, 502 (5th Cir. 1995) (examining specific intent to avoid warrant requirement in creation of exigency); United States v. Socey, 846 F.2d 1439, 1448 (D.C. Cir. 1988) (rejecting claim of intentionally created exigency where no underlying purpose to subvert warrant requirement).

technique instead of properly obtaining a warrant.[54] While it is difficult for courts to retrospectively determine the officers' subjective intent, they recognize that certain types of "knock and talk" encounters are indicative of bad faith.[55]

Courts review the totality of the circumstances to determine the subjective intent of police.[56] The use of deception is one indicator of bad faith.[57] For example, where police officers conduct a "knock and talk" and fail to identify themselves, or misidentify themselves, it is difficult for the court to find that the officers were simply seeking consent to search.[58] The use of "subterfuge," therefore, is likely to trigger a finding of bad faith.[59]

Bad-faith intentions also exist when police have knowledge of criminal activity or have the ability to obtain a warrant prior to the execution of a "knock and talk" and fail to do so.[60] Though police can use the "knock and talk" with or without reasonable suspicion of criminal activity, the use of the tactic becomes suspicious when police officers are certain such activity is underway.[61] Once police officers establish probable cause or become convinced that criminal activity is occurring, the procedure loses its presumption of reasonableness and indicates bad faith.[62] The procedure's otherwise valid investigatory purpose becomes unnecessary once the police can

54. *See* Baldassano, *supra* note 12, at 158 (cautioning against exigencies fabricated or contrived by police officers).

55. *See infra* notes 56-71 and accompanying text (discussing and providing examples of bad faith).

56. United States v. Berry, 468 F. Supp. 2d 870, 880 (N.D. Tex. 2006) (finding "knock and talk" impermissibly used where circumstances suggest improper motive of police).

57. *See* United States v. Coles, 437 F.3d 361, 370 (3d Cir. 2006) (reasoning actions displaying intent to mislead significant in bad faith analysis).

58. *See id.* (reasoning deceptive misidentification by police precludes claim of intent to investigate and seek consent). *But see Ewolski*, 287 F.3d at 505 (ruling officers' failure to identify themselves ill-advised, but rejecting claim of impermissibly created exigency). In *Coles*, the police conducted a "knock and talk" by first knocking and identifying themselves as "room service" and then as "maintenance." 437 F.3d at 363. Only after these deceptive attempts to gain access failed did the police properly identify themselves. *Id.* In *Ewolski*, the police were investigating a potential domestic violence situation and did not initially identify themselves as police when encountering the suspect. 287 F.3d at 498. The court held that the officers had made a strategic decision to conceal their identity with the intention of peaceably investigating the reported situation. *Id.* at 504-05. The court concluded that this conduct did not give rise to the subsequent exigency. *Id.*

59. *Coles*, 437 F.3d at 371 (declaring police actions impermissibly created exigency after pretextual attempts at entrance failed).

60. *See, e.g.*, United States v. Jones, 239 F.3d 716, 721 (5th Cir. 2001) (reasoning officer's knowledge of criminal activity renders "knock and talk" "nugatory"); United States v. Rico, 51 F.3d 495, 502 (5th Cir. 1995) (stating concern that exigency manufactured when agents could obtain warrant first); United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974) (concluding "knock and talk" use improper when procurable warrant not obtained).

61. *See Jones*, 239 F.3d at 721 (holding "knock and talk" investigation "nugatory" once officers certain of criminal activity).

62. *See id.* (explaining unreasonableness of "knock and talk" when officer certain of criminal activity); United States v. Hall, No. 3:05-CR-087-R, 2005 U.S. Dist. LEXIS 19986, at *42 (N.D. Tex. Sept. 14, 2005) (determining "knock and talk" unnecessary once probable cause established).

obtain a warrant.[63] In *United States v. Jones*,[64] a police officer testified that he conducted a "knock and talk" in response to complaints of drug activity with the purpose of identifying the occupants of the apartment and discussing the complaints.[65] The Court of Appeals for the Fifth Circuit held that because the officer did not know the occupants were armed and did not see a gun until he was already at the doorway, there was a lack of certainty of criminal activity and the "knock and talk" was appropriate and reasonable.[66] The court held that the officer's actions were in good faith because his initial intent in approaching the residence was to investigate received complaints, not to provoke an exigency.[67]

Additionally, courts find that bad-faith intent likely exists when police actions indicate a planned operation, rather than a casual "knock and talk" encounter.[68] The use of the "knock and talk" in lieu of procuring an obtainable search warrant indicates police are choosing to instigate an exigency rather than comply with Fourth Amendment requirements.[69] The bad faith apparent in a planned operation is similar to a constructive entry.[70] A finding of constructive entry due to an unreasonable "knock and talk" indicates bad faith rather than simple overzealousness by innocent officers.[71]

C. Police Created Exigencies

Exigent circumstances are limited situations in which the police can

63. *Jones*, 239 F.3d at 721 (negating otherwise reasonable "knock and talk" procedure once police certain criminal activity was present).

64. 239 F.3d 716 (5th Cir. 2001).

65. *Id.* at 720 (providing details of testimony from investigating officer).

66. *Id.* at 721 (noting "knock and talk" reasonable investigative procedure under circumstances known to officer). The Fifth Circuit's opinion in *Jones* distinguished the officer's actions from those of the two federal agents in *United States v. Munoz-Guerra* where the agents had conducted surveillance and observed illegal narcotics before they knocked. *Id.* at 720-21 (citing United State v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986)).

67. *See id.* at 720-21 (indicating officer's actions entirely reasonable and without underlying intent to circumvent warrant requirement).

68. *See* United States v. Berry, 468 F. Supp. 2d 870, 880 (N.D. Tex. 2006) (finding planned effort to evade warrant requirements with "knock and talk" use). In determining that police officers used the "knock and talk" impermissibly, the *Berry* court noted that at least eight police officers were present at the residence, surrounded the house, and took cover positions. *Id.* Four police officers then approached the front door of the residence. *Id.* The court found such police action to be "overkill" for a "knock and talk" and cited these factors as evidence of a plan or effort to evade the warrant requirement. *Id.*

69. *Accord* United States v. Campbell, 261 F.3d 628, 633-34 (6th Cir. 2005) (holding no bad faith where no realistic opportunity to procure warrant before exigency prompted search). In *Campbell*, the court held that the police did not create the exigent circumstances when it was a "practical impossibility" for the police to obtain a search warrant prior to a controlled drug delivery. *Id.* at 634.

70. *Compare* United States v. Thomas, 430 F.3d 274, 277 (6th Cir. 2005) (declaring "overbearing" police tactics forcing individual from residence as "constructive entry"), *with Berry*, 468 F. Supp. 2d at 880 (finding planned operation "overkill" for purposes of "knock and talk").

71. *See Thomas*, 430 F.3d at 277 (explaining difference between permissible consensual encounter and impermissible constructive entry).

demonstrate an urgent need to conduct a warrantless search.[72] These "well-delineated" exceptions to the warrant requirement include very specific situations when the warrantless entry of a residence is constitutionally permissible.[73] The exigent circumstance likely to result from a "knock and talk" is the destruction of evidence.[74] When police announce their presence, many suspects either panic or are unaware of their right to refuse cooperation.[75] If suspects begin to destroy evidence, an exigency arises that officers may react to in order to preserve that evidence.[76] Under such circumstances, courts must determine whether police actions impermissibly created the exigency.[77] Circuit courts have adopted different tests to analyze the permissibility of police actions that give rise to exigencies.[78]

1. The Fifth Circuit Test

The Fifth Circuit precludes police from justifying warrantless searches on the existence of intentionally created exigencies.[79] The circuit, however, distinguishes intentionally manufactured circumstances from those that arise naturally.[80] In reviewing exigencies, courts indicate that police might create

72. *See supra* note 6 and accompanying text (defining and providing examples of exigent circumstances).

73. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (prohibiting warrantless searches unless specific exception exists).

74. *See* United States v. Collins, 510 F.3d 697, 700 (7th Cir. 2007) (calling destruction of evidence "common reaction" whenever police knock on door); United Stated v. Mercadel, 226 F. Supp. 2d 810, 816 (E.D. La. 2002) (noting suspect's knowledge of police presence creates "high likelihood of destruction or removal" of evidence).

75. *See* Hemmens, *supra* note 28, at 595 n.382 (discussing likely reasons for consent during "knock and talk" and police awareness of such reasons).

76. United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973) (concluding threatened destruction of evidence is an exigent circumstance and exception to warrant requirement). The threatened destruction of evidence creates a valid exception to the warrant requirement when police have reason to believe that destruction is *imminent*. United States v. Thompson, 700 F.2d 944, 947-48 (5th Cir. 1983) (emphasis added). Reasonable belief that suspects are about to remove contraband is another factor in evaluating the exigency of a situation. *Id.* at 948 (citing *Rubin*, 474 F.2d at 268). In analyzing whether police had reason to believe the suspects would destroy evidence, courts review the facts known to officers at the moment of the warrantless entry and determine whether a reasonable, experienced officer would have believed destruction was imminent based on those facts. United States v. Rivera, 825 F.2d 152, 156 (7th Cir. 1987).

77. *See, e.g.*, United States v. Gomez-Moreno, 479 F.3d 350, 354-55 (5th Cir. 2007) (focusing on whether police created exigency); United States v. Coles, 437 F.3d 361, 370 (3d Cir. 2006) (reviewing whether police impermissibly manufactured or created exigent circumstances); United States v. Munera-Uribe, No. 98-20438, 1999 U.S. App. LEXIS 18426, at *25 (5th Cir. Aug. 5, 1999) (determining warrantless search based on exigent circumstance justified).

78. *See infra* Part II.C.1-4 (discussing standards of review adopted by various circuit courts).

79. United States v. Richard, 994 F.2d 244, 248 (5th Cir. 1993) (asserting exigent circumstances do not withstand Fourth Amendment protection analysis when deliberately created); *Thompson*, 700 F.2d at 950 (rejecting justification for search based on police manufactured exigencies).

80. *Richard*, 994 F.2d at 248 (differentiating between exigent circumstances resulting from delay in obtaining warrant and those deliberately created); *Thompson*, 700 F.2d at 950 n.4 (distinguishing between expected exigencies and exigencies police action created). The *Thompson* court held that unforeseeability is not an element of the exigent circumstances exception. 700 F.2d at 950 n.4.

exigent circumstances with the intent of circumventing the Fourth Amendment's warrant requirement.[81] Exigencies may also arise, however, even when police have no intention of circumventing the law.[82] Recognizing this dichotomy, the Fifth Circuit employs a two-part analysis in determining whether police permissibly or impermissibly created an exigent circumstance.[83]

The two-part test first considers whether police deliberately created an exigent circumstance with the bad-faith intent of circumventing the warrant requirement.[84] Under this bad-faith inquiry, courts look to whether police "deliberately designed" their actions to create an exigent circumstance.[85] The Fifth Circuit rejects the argument that police deliberately created an exigency when there is no showing that they "planned or 'faked' the precipitating cause of the exigent circumstance . . . ."[86] The Fifth Circuit, however, has declined to limit its inquiry to a determination of police officers' good or bad faith.[87] Instead, it has held that Fourth Amendment jurisprudence requires a reasonableness analysis as well.[88]

81. *See* United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004) (reviewing possibility officers intended to circumvent warrant requirement); *supra* notes 53-54 (discussing situations when police attempt to circumvent warrant requirement by using "knock and talk"). As an Indiana state appellate court noted, "Knock and talk might more aptly be named 'knock and enter,' because it is usually the officer's goal not merely to talk but to conduct a warrantless search of the premises. . . . [T]he knock and talk procedure 'pushes the envelope' and can easily be misused." Hayes v. State, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003).

82. *See Gould*, 364 F.3d at 590 (rejecting idea police acted with bad-faith intent to avoid warrant requirement); United States v. Rico, 51 F.3d 495, 502 (5th Cir. 1995) (stressing created exigencies not necessarily intentional, but may be innocently caused); *see also* United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990) (stating "in some sense" police always create exigent circumstances).

83. *Gould*, 364 F.3d at 590 (describing two steps to analysis); *see also Rico*, 51 F.3d at 502 n.18 (declaring bad faith not required to violate Fourth Amendment protections).

84. *Gould*, 364 F.3d at 590 (explaining first level of inquiry into permissibility of police actions creating exigency); *Rico*, 51 F.3d at 502 (citing United States v. Socey, 846 F.2d 1439, 1449 (D.C. Cir. 1988)) (providing bad faith analysis test).

85. United States v. Socey, 846 F.2d 1439, 1449 (D.C. Cir. 1988) (refusing to second guess police actions not deliberately designed to manufacture exigency). In *Socey*, the court held police actions did not deliberately create the exigency. *Id.* at 1448. The court determined the actions taken did not have the underlying purpose of subverting the warrant requirement and that police did not design them to create a commotion. *Id.* The court refused to second guess the police by considering other actions the police could have taken. *Id.* at 1449. The court deemed such considerations irrelevant when there is no bad faith on the part of the officers. *Id.*

86. United States v. Hultgren, 713 F.2d 79, 88 (5th Cir. 1983) (concluding government did not deliberately create exigent circumstance). The *Rico* court also declined to second-guess law enforcement tactics in cases where no bad-faith intent existed, so long as the court deemed such tactics reasonable. 51 F.3d at 505.

87. *See* United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004) (showing two levels of inquiry necessary to determine whether officers impermissibly manufactured exigency); *Rico*, 51 F.3d at 502 n.18 (stating D.C. Circuit standard of review too narrow). In decrying the D.C. standard as too narrow, the Fifth Circuit points to instances in its own history in which courts found police actions to have impermissibly created exigencies despite no finding of bad faith. *Rico*, 51 F.3d at 502 n.18. In those instances, the court held that the police-created exigency was impermissible under a reasonableness, rather than bad-faith, inquiry. *See* United States v. Richard, 994 F.2d 244, 248-50 (5th Cir. 1993) (employing reasonableness inquiry); United States v. Munoz-Guerra, 788 F.2d 295, 298-99 (5th Cir. 1986) (concluding officers' actions unreasonable).

88. United States v. Rico, 51 F.3d 495, 502 n.18 (5th Cir. 1995) (noting Fourth Amendment focus on reasonableness of search and seizure). The *Rico* court recognized the reasonableness inquiry as a necessary

The second part of the Fifth Circuit's analysis, therefore, considers whether the police actions that created the exigency were unreasonable or improper.[89] The Fifth Circuit looks first at whether the police could have obtained a search warrant prior to the development of any exigencies.[90] The court then determines whether the officers' investigative tactics leading up to the warrantless entry were reasonable.[91] If warrantless entry is a "foregone conclusion" before the police employ the investigative tactics, the tactics are unreasonable.[92] When a court finds police tactics unreasonable, it will conclude that police impermissibly created any resulting exigency and thus the warrantless search predicated on that exigency is improper.[93]

2. The Sixth Circuit Test

The Sixth Circuit also prohibits police from justifying warrantless searches

part of the analysis because "the danger to constitutional rights more often comes from 'zealous officers' rather than faithless ones." *Id.* at 502 (quoting United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990)).

89. *Gould*, 364 F.3d at 590 (explaining second level of inquiry into permissibility of exigency creation); *Rico*, 51 F.3d at 502 (acknowledging court must consider "reasonableness and propriety of investigative tactics" when police created exigency).

90. *Rico*, 51 F.3d at 502 (providing court's first factor in analyzing reasonableness). The failure to obtain a warrant at the earliest opportunity alone is not dispositive in the reasonableness analysis. *See id.* at 502-03; *see also* United States v. Thompson, 700 F.2d 944, 950 (5th Cir. 1983) (finding failure to obtain warrant at first opportunity not fatal defect). The Fifth Circuit has held that failure to obtain a warrant is not conclusive proof of unreasonable police action because exigent circumstances could still arise between the time the police could first obtain a warrant and the time they actually obtain the warrant. *Rico*, 51 F.3d at 502-03. The court, therefore, will allow warrantless searches under exigent circumstances when there is a "plausible explanation" for the delay in obtaining a warrant. *Thompson*, 700 F.2d at 950. Courts, however, also look with some suspicion at situations in which officers fail to obtain a warrant, yet control the timing of the encounter that leads to an exigent circumstance. *See Hultgren*, 713 F.2d at 88 (suggesting warrantless search unreasonable when police control time and place of drug transaction).

91. *See Rico*, 51 F.3d at 503 (articulating second factor in reasonableness analysis); *see also* United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001) (providing reasonableness of investigative tactics standard for assessing police actions); *Thompson*, 700 F.2d at 950 (indicating opportunity to obtain warrant one factor considered in reasonableness analysis). Reasonable police tactics may cause occupants of a house to respond in a way that creates an exigency, but this does not factor in the reasonableness of the law enforcement tactic used. United States v. Newman, No. 05-20603, 2006 U.S. App. Lexis 29813, at *13-14 (5th Cir. Dec. 5, 2006). When an exigency arises in response to reasonable tactics, the court will not find that police impermissibly created the exigency. *Id.*

92. United States v. Munoz-Guerra, 788 F.2d 295, 298 (5th Cir. 1986) (citing foregone conclusion of entry as sign of unreasonable tactics). In *Munoz-Guerra*, local police and the Drug Enforcement Agency (DEA) conducted surveillance on a residence and observed that drugs were present inside. *Id.* at 297. Two DEA agents then knocked on a patio door and Munoz-Guerra answered, but he needed a key to open the door. *Id.* When Munoz-Guerra went to retrieve the key, the officers kicked in the door and entered. *Id.* The Fifth Circuit held this "knock and talk" on the patio door was unreasonable as police already had probable cause for a warrant. *Id.* at 298. The court held that the warrantless entry was therefore unavoidable once the agents knocked and identified themselves. *Id.* The court noted that the agents knew they were in potential danger and that there was potential for destruction of the evidence at the time they knocked on the door. *Id.*

93. *Rico*, 51 F.3d at 502 (declaring unreasonable police-created exigency outside scope of warrant requirement exceptions).

on exigent circumstances impermissibly created by their own actions.[94] In order to find an impermissibly created exigency, the Sixth Circuit requires "some showing of deliberate conduct" by police to evade the warrant requirement.[95] This requirement is analogous to the first prong of the Fifth Circuit's analysis, which focuses on bad-faith police actions deliberately designed to create exigencies.[96] Unlike the Fifth Circuit, however, the Sixth Circuit requires this showing of bad-faith "deliberate conduct" in order to invalidate police created exigencies.[97] Where there is no evidence that police made a deliberate effort to incite an exigency, the Sixth Circuit holds that the police permissibly created the resulting exigency.[98]

In ascertaining whether police impermissibly created an exigency through deliberate conduct, the Sixth Circuit focuses first on whether police controlled the timing of the encounter that led to the exigency.[99] When courts find the police clearly had probable cause and ample time to obtain a warrant, they hold that no exigency exists to justify a warrantless search.[100] Alternatively, courts question the legitimacy of police tactics when police create an exigency for a warrantless search rather than take the opportunity to secure a warrant.[101]

94. United States v. Campbell, 261 F.3d 628, 633 (6th Cir. 2001) (noting warrantless entries invalidated where police conduct deliberately creates exigency); United States v. Morgan, 743 F.2d 1158, 1163 (6th Cir. 1984) (holding intentional police-created exigencies invalidate warrantless searches).

95. Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (establishing deliberate conduct requirement for finding police impermissibly created exigency); *see also* United States v. Chambers, 395 F.3d 563, 569 (6th Cir. 2005) (noting indications police calculated exigency to facilitate warrantless search evidences deliberate conduct); *Campbell*, 261 F.3d at 633 (noting court invalidates exigency created by conduct deliberately evasive of warrant requirement).

96. *See supra* notes 84-85 and accompanying text (outlining Fifth Circuit's bad faith analysis).

97. *See supra* notes 84-85, 95 and accompanying text (highlighting bad-faith portion of analysis of police-created exigencies). *But see supra* notes 89-93 and accompanying text (displaying Fifth Circuit's willingness to find police impermissibly created exigency without showing of bad faith).

98. *Ewolski*, 287 F.3d at 504 (holding officers did not create threat in order to justify warrantless search).

99. *Chambers*, 395 F.3d at 566 (applying emergency and inadvertence principles to timing analysis). When police control the timing of a warrantless search encounter, it creates a presumption that the police intentionally created the exigency as it evidences a lack of emergency or inadvertence. *See id.* For example, police making controlled deliveries of narcotics direct the timing of an encounter, which may give rise to an exigency in a way that shows intent to evade the warrant requirement. *Ewolski*, 287 F.3d at 504.

100. *See Chambers*, 395 F.3d at 568 (noting police had probable cause and clearly should have sought warrant). The *Chambers* court held there was no exigency prior to the employment of police tactics. *Id.* Further, the court held that police had probable cause for a warrant after receiving a reliable informants' tip and conducting three days of surveillance. *Id.* at 566-67. These two factors led the court to conclude that the police completely controlled the timing of the encounter giving rise to the warrantless search, thus impermissibly creating an exigency through the use of "knock and talk." *Id.* at 568-69.

101. Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (declaring sufficient time to obtain warrant when police control timing of encounter resulting in search). The Fifth Circuit will find exigent circumstances did not exist when officers had the opportunity to secure a warrant but chose not to obtain one. United States v. Campbell, 261 F.3d 628, 634 n.3 (6th Cir. 2001). In *Campbell*, officers secured a warrant, but before they could execute it, Campbell relocated to another dwelling with the package for which the police had a warrant to search. *Id.* at 634. The court upheld the warrantless search based on exigent circumstances even though police already obtained a previous warrant. *Id.* The court held that exigent circumstances arose between the time officers obtained the warrant and when they could conduct the search. *Id.* Because the police

Further, the Sixth Circuit considers a show of force by the police as indicative of deliberate conduct used to impermissibly create an exigency.[102] These inquiries regarding timing and show of force by the police are analogous to the Fifth Circuit's reasonableness inquiry.[103]

3. The Second Circuit Test

The Second Circuit applies a more lenient standard of analysis.[104] As explained in *United States v. MacDonald*,[105] the Second Circuit permits police officers to create exigent circumstances and rely on such circumstances in conducting warrantless searches if the tactics used are lawful.[106] The Second Circuit specifically noted that subjective factors, such as the bad-faith intentions of police, are not part of its analysis.[107] Instead, the *MacDonald* court held that ex post facto speculation regarding police officers' subjective intent is futile and irrelevant.[108] The court further conceded that police officers may want, or even expect, suspects to react in a manner that gives rise to exigent circumstances.[109] According to the Second Circuit, the reaction of the suspect, rather than police conduct, creates the exigency.[110] Consequently,

had no role in the suspect's creation of the exigency, they could rely on such exigency to perform a warrantless search, instead of having to wait for a new warrant. *Id.* This reasoning regarding exigencies arising after police obtain a warrant mirrors the findings of the Fifth Circuit. *See supra* note 90 and accompanying text (articulating Fifth Circuit's reasonableness test in reviewing exigencies supporting warrantless search).

102. United States v. Chambers, 395 F.3d 563, 569 (6th Cir. 2005) (noting multiple officers entering with guns drawn evidences deliberate effort to evade warrant requirement). In *Chambers*, three cars of armed deputies arrived at the residence and conducted a "knock and talk." *Id.* at 568. A woman responding to the knock retreated and yelled out upon seeing police, at which point the police entered the residence with weapons drawn. *Id.*

103. *See supra* notes 90-93 and accompanying text (discussing Fifth Circuit standard regarding timing and foregone conclusion of entry in reasonableness analysis).

104. *See infra* notes 106-107 and accompanying text (discussing Second Circuit's elimination of bad faith analysis used by other circuits).

105. 916 F.2d 766 (2d Cir. 1990).

106. *See id.* at 772 (holding created exigencies valid grounds for warrantless search where conduct was proper). When police use lawful tactics, the court places the blame for arising exigencies on suspects, rather than the police. *Id.* The Second Circuit refuses to invalidate lawful tactics resulting in exigencies when suspects respond to such tactics by attempting to escape, destroying evidence, or otherwise reacting negatively to the police presence. *Id.* at 771. This refusal to automatically invalidate deliberately created exigencies results in deference to police judgment unseen in the Fifth or Sixth Circuits. *See supra* Part II.C.1-2 (providing standards of analysis used by Fifth and Sixth Circuits).

107. *MacDonald*, 916 F.2d at 771 (noting precedent for rejecting bad faith analysis in created exigency cases). The Second Circuit noted that some police tactics are likely to provoke reactions from suspects that give rise to exigent circumstances. *Id.* The court considers such instances to be good police work, showing creative investigative effort, and refuses to deem these efforts impermissible when exigencies result. *Id.* at 772; *see* United States v. Rengifo, 858 F.2d 800, 803-04 (1st Cir. 1988) (allowing deception in conducting reasonable investigation).

108. *MacDonald*, 916 F.2d at 772 (refusing to speculate regarding officers' subjective intentions).

109. *Id.* (indicating police interest in or expectation of suspect reaction immaterial when tactics lawful).

110. *See id.* (stating unlawful reaction of suspect provided exigency).

police are justified in relying upon such exigencies.[111]

Prior to *MacDonald*, the Second Circuit held that warrantless searches based on police-created exigencies were impermissible.[112] The Second Circuit distinguished the police behavior in *United States v. Segura*,[113] which involved "contrived behavior," from the "lawful" police tactics seen in *MacDonald*.[114] The *MacDonald* court affirmed that an objective standard should apply to determinations of whether police permissibly created exigent circumstances.[115] Under this purely objective standard, courts do not factor in the good or bad faith of police officers, but rather look only at the lawfulness of tactics employed.[116] In establishing the purely objective "lawful conduct" standard, however, the Second Circuit has not provided a definition of "lawful" or a guideline for determining what constitutes lawful conduct.[117]

4. The Third Circuit Test

The Third Circuit, in *United States v. Coles*,[118] became the most recent circuit court to explain its standard for determining the permissibility of police created exigencies.[119] The Third Circuit prohibits justification of warrantless

111. *See* United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (approving reliance on exigent circumstances created in reaction to lawful police conduct). The *MacDonald* court explained that "[l]aw enforcement agents are required to be innocent but not naïve." *Id.* The Second Circuit does not require that police created exigencies be inadvertent, so long as actions leading to the exigency are lawful. *Id.*

112. United States v. Segura, 663 F.2d 411, 415 (2d Cir. 1981) (rejecting police-created exigency as grounds for warrantless search). The *Segura* court adopted the Ninth Circuit's standard that police cannot rely on exigencies created through illegal conduct. *Id.* (citing United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980)). In *United States v. Allard*, the Ninth Circuit rejected justifications based on exigencies arising from illegal conduct. 634 F.2d 1182, 1187 (9th Cir. 1980).

113. 663 F.2d 411 (2d Cir. 1981).

114. *MacDonald*, 916 F.2d at 772 (differentiating "contrived" display by police in *Segura* from "lawful" knock by police). In *Segura*, the police arrested a suspect and forcibly brought him to his apartment. 663 F.2d at 415. The police then knocked on the door to let the occupants know they arrested Segura, anticipating a subsequent destruction of evidence. *Id.* The court held that because none of the apartment's occupants were aware that the police had arrested Segura, they were not likely destroying evidence. *Id.* Rather, the court held that the police contrived the commotion of bringing Segura to the apartment to create such an exigency. *Id.* The *MacDonald* court differentiated this type of contrived action from a police "knock and talk" with exigencies fully expected to occur on their own. 916 F.2d at 772.

115. *MacDonald*, 916 F.2d at 772 (clarifying officers' subjective state of mind irrelevant in determining permissibility of exigency creation). The Second Circuit uses an objective "totality of the circumstances" analysis of police officers' actions. *Id.*

116. *See id.* (applying only objective determination of lawfulness in concluding police actions valid). Conversely, the dissent in *MacDonald* called for a standard in accordance with that set out by the Fifth and Sixth Circuits, namely the invalidation of warrantless searches predicated upon deliberately created exigencies. *See id.* at 776 (Kearse, J., dissenting). The dissent would reject searches based on police tactics that are merely a "pretext" or "contrivance" to create an exigency. *Id.*

117. *See* United States v. MacDonald, 916 F.2d 766, 772-73 (2d Cir. 1990) (establishing lawful conduct standard without providing criteria for lawfulness). The *MacDonald* court simply distinguished the officers' conduct from the "illegal conduct" seen in *Segura*. *Id.* at 772.

118. 437 F.3d 361 (3d Cir. 2006).

119. *Id.* at 367-70 (reviewing other circuit courts' adopted standards and establishing Third Circuit standard).

searches on exigent circumstances deliberately created by police.[120] To determine whether law enforcement officers deliberately created the asserted exigency, the Third Circuit employs a test that incorporates principles from the Fifth, Sixth, and Second Circuits.[121]

In determining whether officers impermissibly created exigencies, the Third Circuit examines the "reasonableness and propriety" of police actions and investigative tactics.[122] In analyzing reasonableness, the Third Circuit incorporates an examination of police actions for bad faith.[123] In *Coles*, the court held that police engaged in subterfuge and manifested intent to mislead occupants of a dwelling in bad faith, thereby impermissibly creating an exigency through unreasonable investigative tactics.[124] The court held that when police exhibit bad faith, resulting exigencies do not "arise naturally" and therefore the police cannot rely upon them for warrantless searches.[125]

In both *Coles* and *United States v. Acosta*,[126] the Third Circuit's bad faith analysis turned on officers' use of trickery or subterfuge.[127] These signs of bad

120. *Id.* at 366 (noting deliberately created exigencies do not meet Fourth Amendment standards); *see also* United States v. Acosta, 965 F.2d 1248, 1254 (3d Cir. 1992) (refusing police justification of forced entry based on impermissibly created exigency).

121. *See Coles*, 437 F.3d at 367-71 (reviewing Fifth and Second Circuit precedents and applying analysis). While the Third Circuit in *Coles* explicitly discusses only Fifth and Second Circuit precedents, the first factor examined in the court's analysis is the existence of probable cause prior to the use of the "knock and talk." *Id.* at 370. The Third Circuit determined that the police had sufficient probable cause and time to obtain a search warrant before attempting a "knock and talk." *Id.* This analysis closely resembles the Sixth Circuit's "timing of the encounter" analysis discussed previously. *See supra* notes 99-100 and accompanying text (highlighting Sixth Circuit's focus on whether police control "timing of the encounter").

122. *Coles*, 437 F.3d at 370 (adopting reasonableness test used by Fifth Circuit).

123. *See id.* at 369-70 (citing United States v. MacDonald, 916 F.2d 766, 776 (2d Cir. 1990) (Kearse, J., dissenting)) (adopting *MacDonald* dissent's position regarding contrivances by law enforcement officials). In *Coles*, the Third Circuit noted that the officers clearly engaged in "pretextual conduct" to gain access and conduct a warrantless search of the defendant's hotel room. *Id.* at 369 n.13. The court stated that the police "demonstrated . . . no intention of merely investigating matters further or perhaps obtaining consent to search." *Id.* at 370. Interestingly, the court considered the officers' demonstrated bad-faith intent while proclaiming application of a "reasonableness and propriety" test. *Id.* By including both reasonableness and bad-faith factors in its analysis, the Third Circuit's approach is more in line with that of the Fifth and Sixth Circuits, rather than the Second Circuit's more lenient analysis. *See id.* (noting majority opinions in Fifth and Sixth Circuits and dissent in Second Circuit guide analysis).

124. United States v. Coles, 437 F.3d 361, 370-71 (3d Cir. 2006) (holding police use of misidentification as pretext constitutes unreasonable tactic).

125. *Id.* at 371 (holding deliberate pretextual conduct by police negates claim of naturally occurring exigency).

126. 965 F.2d 1248 (3d Cir. 1992).

127. *See Coles*, 437 F.3d at 370-71 (invalidating search where police resorted to subterfuge and therefore impermissibly created exigency); *see also Acosta*, 965 F.2d at 1253 (permitting warrantless search when police did not use trickery as pretext to create exigency). In *Coles*, the officers used subterfuge by falsely identifying themselves in an attempt to gain access to the suspect's hotel room. 437 F.3d at 363. The police first identified themselves as room service and, after this proved unsuccessful, as maintenance workers. *Id.* After the occupants denied both attempts to solicit access to the room, the officers identified themselves as police and demanded entry. *Id.* In *Acosta*, the police knocked on the suspect's door and announced themselves immediately as police officers. 965 F.2d at 1250. The police officers demanded entry, seeking to arrest a suspect believed to be in the residence, but officers did not engage in any pretext to solicit consent. *Id.* at 1253.

faith generally invalidate police conduct designed to circumvent Fourth Amendment protections.[128] The Third Circuit asserts that it adopted a reasonableness standard analogous to the second prong of the Fifth Circuit's analysis.[129] Because the Third Circuit's analysis closely scrutinizes police use of trickery or subterfuge, its test is more analogous to the first prong of the Fifth Circuit's analysis or the Sixth Circuit's test generally, both of which focus on demonstrations of subjective bad faith by police to invalidate a warrantless search.[130]

III. ANALYSIS

To provide clear guidance to law enforcement agents, the Supreme Court should remedy disparities between the various circuit courts' standards of review.[131] The Court should develop an easily discernable standard that both preserves the proven effectiveness of the "knock and talk" and prevents police abuse.[132] Though the standard should protect individuals from officer misconduct, it should not prevent police from acting when recognized exigencies result from a suspect's adverse reaction to a reasonable police presence.[133]

128. *See Coles*, 437 F.3d at 370-71 (discussing intent of police to conduct warrantless search). The Third Circuit indicated that when police officers clearly intend to conduct a warrantless search, rather than to continue their investigation or seek consent to search, they impermissibly create any resulting exigency. *Id.* Police can demonstrate this intent by the use of subterfuge or trickery. *See id.* at 370 n.14 (stating court cannot take seriously government's argument that police attempted only to seek information).

129. *Id.* at 370 (stating review of exigent circumstances based on "reasonableness and propriety" of police investigative tactics); *see also supra* notes 84-86 and accompanying text (discussing Fifth Circuit analysis of reasonableness).

130. *See supra* note 127 and accompanying text (noting court's analysis in *Acosta* and *Coles* turned on police use of trickery or subterfuge); *supra* notes 84-86 and accompanying text (discussing Fifth Circuit analysis of deliberate design); *supra* notes 94-95 and accompanying text (discussing Sixth Circuit standards requiring some showing of deliberate conduct in creation of exigency).

131. *See* New York v. Belton, 453 U.S. 454, 459-60 (1981) (noting clear standards provide individuals with knowledge of constitutional protections and police with scope of authority); Hendrie, *supra* note 1, at 8 (revealing unsettled issues regarding permissibility in created exigencies may require officers to consult legal counsel); Holcomb, *supra* note 24, at 30 (noting police officers must understand "full spectrum" of legal issues when using "knock and talk").

132. *See supra* Part II.A (discussing "knock and talk" effectiveness and potential for police abuse); *supra* note 39 and accompanying text (discussing alternative analyses amongst circuit courts and need for clear, applicable standard); *supra* note 131 and accompanying text (discussing why police need clear standard).

133. *See Belton*, 453 U.S. at 458 (declaring single familiar standard essential to guide police officers). As the Supreme Court has noted:

> Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

A. Courts Should Apply an Objective Standard Alone in Analyzing "Knock and Talk" Propriety

For a standard to both comply with Fourth Amendment jurisprudence and apply easily, courts should focus on police officers' objective actions when using the "knock and talk," not their subjective intentions.[134] Both the Fifth and Sixth Circuits attempt to determine whether police had subjective bad-faith intentions to precipitate an exigency.[135] It is often difficult, however, for courts to precisely determine what an officer intended to accomplish during an investigation.[136] By the time a case reaches the court, police officers can think of justifications for why they used an investigative tactic, even if those reasons did not actually factor into their conduct.[137] Further, courts have noted that overzealous police officers acting in good faith are often a greater danger than officers acting in bad faith.[138] Arguably, this makes subjective intent irrelevant in most cases.[139] A standard of review that focuses on officers' subjective intent in employing police tactics invites fabrications and justifications developed in hindsight, rather than providing a standard that prevents illegal police actions.[140]

Police officers' intentions do not force a suspect to respond to a "knock and talk" by destroying evidence or otherwise creating an exigency.[141] Even if

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Id. (quoting William LaFave, *"Case-By-Case Adjudication" versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974)).

134. *See* Scott v. United States, 436 U.S. 128, 136-37 (1978) (holding otherwise lawful conduct not illegal or unconstitutional because of subjective intent alone).

135. *See supra* notes 84-85 and accompanying text (detailing Fifth Circuit's deliberate-design standard in permissibility analysis); *supra* note 95 and accompanying text (providing Sixth Circuit standard regarding deliberate conduct of police).

136. *See* United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (stressing futility of speculation in judicial determination of police intent); United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990) (noting officers' discovery during investigation always creates exigency in some sense).

137. *See* Baldassano, *supra* note 12, at 158 (noting danger police fabricated or contrived facts where officers present facts for review after incident); Slobogin, *supra* note 12, at 1050 (acknowledging danger police will "cook up" facts to support their actions).

138. *See Duchi*, 906 F.2d at 1284 (noting constitutional violations by police more often from overzealousness than bad faith). The Supreme Court has described the role of police as the "competitive enterprise of ferreting out crime." United States v. Johnson, 333 U.S. 10, 14 (1948). Due to this competitive element, officers violating the Fourth Amendment by conducting warrantless searches are arguably getting carried away, rather than intentionally trying to undermine the Constitution. *See Duchi*, 906 F.2d at 1284.

139. *See* United States v. Rico, 51 F.3d 495, 502 (5th Cir. 1995) (noting police can manufacture exigencies "guilelessly or ulteriorly"); United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974) (noting high risk of error when police seeking cooperation misinterpret suspect's reaction); *see also* Terry v. Ohio, 392 U.S. 1, 22 (1968) (noting officers' subjective good faith alone does not provide Fourth Amendment protections).

140. *See* Horton v. California, 496 U.S. 128, 138 (1990) (stating "evenhanded law enforcement" achieved through objective standards not subjective standards); *see also supra* notes 108-111 and accompanying text (discussing irrelevance of ex post facto speculation on subjective intent).

141. *See MacDonald*, 916 F.2d at 771 (stating exigencies not disregarded when suspects respond negatively to lawful police conduct); *see also supra* note 34 (providing examples of suspects' reactions to "knock and talk"). The *MacDonald* court noted suspects may attempt to escape, destroy evidence, or engage in

police anticipate that a suspect will react in this way, courts should place some accountability on the suspect.[142] In most cases, a person's reaction to a casual police presence at his residence will not create an exigency.[143] Courts should not reward a suspect with a finding of an impermissibly created exigency when the suspect adversely reacts to a lawful police presence.[144]

Due to these factors, courts should eliminate any attempt to determine a police officer's subjective intent when conducting a "knock and talk."[145] Specifically, courts should not consider the "timing of the encounter" in discerning police intentions.[146] Police are not constitutionally required to cease investigations when they establish a minimum level of probable cause and police must have the ability to collect sufficient evidence to ensure conviction.[147] So long as police are acting lawfully, the investigation should be allowed to continue.[148]

In analyzing police timing, some courts have found that, where probable cause exists, use of a "knock and talk" is evidence of deliberate conduct to evade the warrant requirement.[149] The problem with this analysis is that the

other unlawful activity in response to police presence. 916 F.2d at 771.

142. *See* United States v. Coles, 437 F.3d 361, 371 (3d Cir. 2006) (Roth, J., dissenting) (noting alleged criminals may react haphazardly in response to police investigation); *see also* United States v. Collins, 510 F.3d 697, 700 (7th Cir. 2007) (noting police presence does not manufacture exigency simply because "but for" cause of the exigency). In *Collins*, the court emphasized that there is no requirement that police obtain a warrant simply to knock on someone's door. 510 F.3d at 700.

143. *See* United States v. Chambers, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J., dissenting) (noting presumption that people will react lawfully to police presence). The lawful, "normal" reaction to police presence during a "knock and talk" is either to invite the police in or refuse entry, nothing more. *See* Bryks, *supra* note 28, at 337 (noting only two options for person responding to "knock and talk").

144. *See* United States v. Santana, 427 U.S. 38, 42-43 (1976) (approving "hot pursuit" exigency doctrine where suspect retreated into private residence). The Supreme Court in *Santana* held "a suspect may not defeat [a proper] arrest . . . by the expedient of escaping to a private place." *Id.* at 43. The Court held that the suspect's flight in response to lawful police conduct created the exigency, and the suspect should therefore not benefit by an invalidation of the resulting search. *Id.*

145. *See Coles*, 437 F.3d at 371 (Roth, J., dissenting) (stating analysis of subjective intent not part of judicial role); United States v. Gould, 364 F.3d 578, 590-91 (5th Cir. 2004) (stating court will not question police judgment where reasonable minds may differ). In *Coles*, Judge Roth argued that focusing the exigency analysis on the subjective intent of the police creates a "could've, should've, would've" analysis that incorrectly stresses alternatives police could have taken rather than the legality of the actions they actually took. *See* 437 F.3d at 371, 373 (Roth, J., dissenting) (analyzing each interaction between police and suspect as it occurred).

146. *See* United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991) (discussing timing issue in warrantless searches when police have probable cause); *supra* notes 99-101 and accompanying text (describing Sixth Circuit test). In *Tobin*, the Eleventh Circuit implied that police continuing investigations when a warrant may otherwise be available does not signify intent to circumvent the warrant requirement. 923 F.2d at 1511.

147. *See Tobin*, 923 F.2d at 1511 (quoting Hoffa v. United States, 385 U.S. 293, 310 (1966)) (upholding exigency despite previously established probable cause).

148. *See* United States v. MacDonald, 916 F.2d 766, 771 (2d Cir. 1990) (holding law enforcement agents acting lawfully may afford suspects opportunity to create exigency).

149. *See supra* notes 99-100 and accompanying text (explaining courts question police tactics when police have probable cause or control timing of encounter).

courts conduct it retrospectively.[150] The police may or may not have believed they had probable cause at the time of the "knock and talk."[151] Further, the existence of probable cause for a search warrant does not end the need for police investigation.[152] Even if police believed probable cause existed, arguably making a "knock and talk" unnecessary, the law should permit continued reasonable investigation, allowing police to gather more information and thus build a stronger evidentiary case.[153] The existence of probable cause gives the police the ability to seek a warrant, but this should not prevent police from using a reasonable "knock and talk" to seek a suspect's consent and cooperation instead.[154]

Further, police officers who have potentially sufficient probable cause to seek a warrant and still choose to use a "knock and talk" risk their investigation by tipping off suspects and raising suspects' suspicion of police presence.[155] Logical officers would not gamble that a suspect will create an exigency rather than simply deny consent and prevent further necessary investigation.[156] Once consent or cooperation is denied, a suspect may leave the premises, dispose of evidence, or otherwise protect his own interests before the police return to serve a search warrant and thereby thwart any police effort to prevent those

150. *See* United States v. Chambers, 395 F.3d 563, 576 (6th Cir. 2005) (Sutton, J., dissenting) (noting court's decision criticized police for failure to appreciate probable cause before acting). The majority in *Chambers* held that the failure of the police to obtain a warrant constituted a showing of deliberate conduct evincing an effort to evade the warrant requirement. *Id.* at 569 (majority opinion). In his dissenting opinion, Judge Sutton reasoned that officers could have just as likely been investigating a dangerous situation after an anonymous tip raised concerns, with no intent to create an exigency. *Id.* at 576 (Sutton, J., dissenting). The differing opinions in this case illustrate the inherent difficulties in discerning police officers' subjective intent. *See supra* note 136 and accompanying text (discussing speculative nature of subjective intent determinations).

151. *See Chambers*, 395 F.3d at 576 (Sutton, J., dissenting) (noting court's decision based on court's assessment of probable cause, not officers' determination). Judge Sutton points out that conditioning the permissibility of a created exigency on subjective determinations of probable cause may result in the subsequent invalidation of warrantless searches regardless of police officers' beliefs at the time of search. *Id.*

152. *See* Hoffa v. United States, 385 U.S. 293, 310 (1966) (refusing to require police to guess precise moment probable cause established); United States v. Coles, 437 F.3d 361, 373 (3d Cir. 2006) (Roth, J., dissenting) (arguing determination of further investigation unnecessarily speculative when court makes it in hindsight).

153. *See* United States v. Jones, 239 F.3d 716, 721 n.4 (5th Cir. 2001) (declaring reasonable "knock and talk" lawful for further investigation regardless of feasibility of obtaining warrant); *see also supra* notes 146-147 and accompanying text (discussing inherent inaccuracy of timing analysis in determining police intent).

154. *See Coles*, 437 F.3d at 373 (Roth, J., dissenting) (stating malfeasance of suspect should not restrict law enforcement ability to investigate). Invalidating a reasonable police investigation technique because it might cause a suspect to react unreasonably hampers the ability of police officers to procure enough evidence for conviction. *Id.*

155. *See Chambers*, 395 F.3d at 577 (Sutton, J., dissenting) (arguing sensible police officers would not gamble that suspect will create exigency in response to "knock and talk"); *see also* Donald, *supra* note 29 (noting suspects denying consent after "knock and talk" provided notice police aware of illegal activity).

156. *See* United States v. Chambers, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J., dissenting) (noting likely action by sensible police officers). Sensible police will consider the risk of proceeding without a warrant, which may cause a court to suppress the evidence, to bee too costly in relation to the potential benefit of a suspect's adverse reaction justifying a warrantless search. *Id.*; *see also* Bryks, *supra* note 28, at 337 (noting refusal to consent to police entry reasonable reaction to police presence).

very occurrences under a claim of exigency.[157]

B. Reasonableness Analysis as Part of an Objective Standard

Rather than attempt to discern police intentions in "knock and talk" use, courts should view each "knock and talk" situation objectively to determine if police conduct was reasonable in its effect on the suspect.[158] If a suspect could reasonably deny consent under the circumstances, then the "knock and talk" is reasonable and the police permissibly create any resulting exigency.[159] Even if the exigency would not have occurred but-for the police presence, the suspect's adverse reaction, not the "knock and talk," created it.[160]

1. "Knock and Talk" Reasonable When Not Coercive

When police conduct the "knock and talk" in a reasonable manner—one that invites cooperation free from coercion—the law both protects citizens and permits police to respond to exigencies created by criminally adverse reactions.[161] Under such circumstances, even if courts remove an officer's subjective intent as an independent factor in the analysis, they will still extend Fourth Amendment protections by assessing the reasonableness of a "knock and talk."[162] Regardless of what an officer intended, requiring that tactics

157. *See Chambers*, 395 F.3d at 577 (Sutton, J., dissenting) (describing result of failed "knock and talk" encounter).

> When no one answers the door . . . [,] when no one at the home is willing to talk . . . [,]or when no one at the home does anything incriminating, the investigation will have reached a conspicuously low point. The officers will have to leave, and the [suspect] will have the kind of warning that even the most elaborate security system cannot provide.

Id.

158. *See id.* at 573 (declaring suspect's reaction to "knock and talk" not reaction of law-abiding citizen). The Supreme Court held that "citizens will often react positively when police simply ask for their help as 'responsible citizens' to 'give whatever information they may have to aid in law enforcement.'" Illinois v. Lidster, 540 U.S. 419, 425 (2004) (quoting Miranda v. Arizona, 384 U.S. 436, 477-78 (1966)). The Supreme Court in *Lidster* noted that citizens are more likely to cooperate with police provided the encounter is not one which provokes anxiety or proves intrusive. *See id.*

159. *See supra* notes 40-43 and accompanying text (noting "knock and talk" unreasonable when inherently coercive); *see also* United States v. Severe, 29 F.3d 444, 446-47 (8th Cir. 1994) (declaring "knock and talk" without show of force afforded suspects' opportunity to deny consent). In *Severe*, because the officers knocked, clearly identified themselves as police, and made no showing of force, the court held the encounter was valid and consensual. 29 F.3d at 446-47.

160. *See* Florida v. Bostick, 501 U.S. 429, 437 (1991) (noting individual free to ignore police presence or refuse cooperation when free from seizure). When police conduct a reasonable "knock and talk" and an individual is free to ignore the police or deny consent, the individual's unreasonable reaction creates the exigency. *See supra* notes 51-52 and accompanying text (discussing reasonableness of "knock and talk" as investigative tactic).

161. *See supra* notes 40-49 and accompanying text (describing coercive investigation and constructive entry in use of "knock and talk").

162. *See* Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984) (indicating police must overcome presumption

provide reasonable individuals with an opportunity to deny consent or cooperation prevents police from unilaterally circumventing the warrant requirement.[163] Courts should compare police conducting a reasonable "knock and talk" to salesmen approaching a residence for a peaceable, consensual encounter and thus find it unreasonable for the occupant to react by destroying evidence or creating a dangerous situation.[164] The lack of coercion allows courts to hold individual suspects accountable for creating exigencies when they respond in an adverse manner.[165] The law should protect individuals from police coercion, but it should not justify the individual's use of noncoercive police presence as an excuse to destroy evidence.[166]

2. "Knock and Talk" Reasonable When Not Deceptive

Courts have held that the use of deception and trickery is a sign of bad faith.[167] As the Second Circuit noted in *MacDonald*, some deception is part of creative investigations and good police work.[168] Police acting in good faith may conclude that deception or trickery is necessary as an investigative tactic.[169] For this reason, courts should not consider the subjective intent of police in the use of investigative tactics like the "knock and talk."[170] This is not

of unreasonableness in conducting warrantless search).

163. *See* United States v. Gould, 364 F.3d 578, 600-01 (5th Cir. 2004) (Demoss, J., dissenting) (inferring suspect cannot create exigency by merely refusing cooperation).

164. *See supra* note 51 and accompanying text (discussing reasonableness of consensual encounter and comparing police to salesman who reasonably approaches residence).

165. *See supra* note 34 and accompanying text (noting exigencies created when suspect's reaction is other than simple consent or denial of cooperation).

166. *See* United States v. Coles, 437 F.3d 361, 373 (3d Cir. 2006) (Roth, J., dissenting) (arguing suspect's response to reasonable police presence did not impermissibly create exigency); United States v. Jones, 239 F.3d 716, 721-22 (5th Cir. 2001) (holding suspect created exigency by creating safety risk to officers once "knock and talk" began). In *Jones*, the suspect approached the door after the police knocked, and police could see another suspect with an accessible firearm. 239 F.3d at 721-22. The court held that the suspects' unreasonable action created the exigency when the police approached the door. *Id.*

167. *See supra* notes 57-59 and accompanying text (discussing totality of circumstances review for bad faith).

168. *See* United States v. MacDonald, 916 F.2d 766, 771-72 (2d Cir. 1990) (noting many courts rejected argument police acted in bad faith where deceptive tactics used). The *MacDonald* court indicated that the deceptive tactics that the Second Circuit previously approved included the use of marked money and counterfeit goods. *Id.* at 771. The court noted that these deceptive tactics increased the risk of exigencies arising, yet it did not find the tactics representative of an impermissible effort to circumvent the warrant requirement. *Id.* at 771-72.

169. *See* United States v. Rengifo, 858 F.2d 800, 803-04 (1st Cir. 1988) (holding deceptive tactic employed when police lacked probable cause not impermissible); *see also* Unites States v. Cade, No. 3:05-CR-0139-L, 2006 U.S. Dist. LEXIS 47561, at *13-15 (N.D. Tex. July 13, 2006) (finding "knock and talk" reasonable when police use deceptive tactic to establish contact with suspect). In *Cade*, the police were investigating possible drug activity and initiated a "knock and talk" at the suspect's residence under the pretext of investigating a complaint about his dogs. 2006 U.S. Dist. LEXIS 47561, at *14-15. Despite this deception, the court found the "knock and talk" reasonable because it did not involve threats or other coercive tactics in procuring consent to enter the residence. *Id.*

170. *See MacDonald*, 916 F.2d at 772 (holding exigent circumstance determinations should not attribute

to say that the law leaves suspects unprotected from deceptive "knock and talk" tactics because a court may not find a deceptive "knock and talk" objectively reasonable even if conducted in good faith.[171]

An essential element of a reasonable "knock and talk" is that the police give the suspect the right to refuse cooperation or deny consent.[172] In determining whether a "knock and talk" gave a suspect the reasonable opportunity to deny consent, courts should look at the reasonableness of the overt actions of police, not the intent behind such actions.[173] When the police knock and unequivocally identify themselves, the suspect has the right to refuse cooperation, whether the suspect appreciates that right or not.[174] On the other hand, courts can easily find police tactics unreasonable for the purpose of soliciting a consensual encounter when police use trickery or deception.[175] Officers will have difficulty arguing that they wanted a consensual encounter if they did not identify themselves to a suspect, or worse, if they misidentified themselves.[176] When police use trickery or deception, they remove any onus on the suspect to appreciate his right to refuse cooperation because they prevent the suspect from fully understanding the purpose of the encounter.[177]

IV. CONCLUSION

The "knock and talk" is a constitutionally valid investigatory technique through which the police seek cooperation with suspects or consent to search the premises. The presence of police during a "knock and talk," however, can lead to exigent circumstances. The circuit courts have adopted varied standards to determine whether police permissibly or impermissibly create such exigencies and therefore whether evidence seized as a result is admissible. In

any significance to subjective intent of police).

171. *See* United States v. Cabrera, 117 F. Supp. 2d 1152, 1158 (D. Kan. 2000) (finding police used deceptive tactic during "knock and talk" unreasonably to gain consent to search).

172. *See* United States v. Jerez, 108 F.3d 684, 691-92 (7th Cir. 1997) (recognizing "knock and talk" consensual absent coercive circumstances); *see also* United States v. Thomas, 430 F.3d 274, 277 (6th Cir. 2005) (stating permissible consensual encounter becomes impermissible when police exhibit force to compel consent).

173. *See supra* notes 46-49 and accompanying text (discussing limitations on police actions in determining reasonableness of "knock and talk").

174. *See* United States v. Chambers, 395 F.3d 563, 575 (6th Cir. 2005) (Sutton, J., dissenting) (arguing suspect creates exigency by responding to legitimate law-enforcement technique in incriminating and risky ways); *see also* Hemmens, *supra* note 28, at 595 n.382 (stating unclear why suspects react unreasonably or ignorantly to police presence). Hemmens theorizes that suspects consent to searches because they are ignorant and think police will not notice illegal activity. *See id.* The Fourth Amendment should not be a factor in such cases because the Fourth Amendment protects against unreasonable governmental action, not the ignorance of the citizenry. *See supra* note 2 and accompanying text (providing text of Fourth Amendment).

175. *See* Coles v. United States, 437 F.3d 361, 370 (3d Cir. 2006) (holding misleading of suspects negated claim police only seeking consent to search).

176. *See id.* at 370 n.14 (declaring court cannot take claims of investigatory purpose seriously when subterfuge used).

177. *See supra* note 24 and accompanying text (describing "knock and talk" encounter and its purpose).

determining permissibility, some courts have considered both the subjective intent of the officer and the objective reasonableness of the police action.

Courts that consider the subjective intentions of officers engage in a guessing game in which the courts question police actions in hindsight. Police intent should not be questioned if the use of the "knock and talk" was objectively reasonable. An objectively reasonable "knock and talk" gives a suspect the opportunity to give or deny consent or cooperation. As long as police use tactics that provide this opportunity, the police should not be barred from responding to any resulting exigency created by the suspect's unreasonable reaction.

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