No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD LEWIS COLEMAN, JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether unauthorized police intrusion into a private condominium enclave to install a GPS tracking device on a vehicle constitutes a Fourth Amendment violation, especially when followed by intrusion onto a private driveway that represents protected curtilage.[1]

Whether a defendant who had a direct appeal pending on December 21, 2018, when the First Step Act became law, qualifies for resentencing under the provisions of that Act.

[1] This Court is currently considering whether to grant certiorari in *Illinois v. Bonilla*, No. 18-1219 (distributed for consideration at October 1, 2019 conference on July 3, 2019). Mr. Coleman would suggest that granting review of his case in conjunction with *Bonilla* could help the Court address these Fourth Amendment issues fully.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald Coleman requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on May 3, 2019, affirming the judgment of the United States District Court for the Western District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at *United States v. Coleman*, 923 F.3d 450 (6th Cir. 2019). It is also attached at **Appendix A**.

The judgment of the United States District Court for the Western District of Michigan, Southern Division, is unpublished and is attached at **Appendix B**. The district court's findings on this matter, also unpublished, appear in the records attached at **Appendix C**.

JURISDICTION

The United States Court of Appeals decided this case on May 3, 2019. Mr. Coleman did not seek rehearing or rehearing en banc in the Sixth Circuit. He now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). He has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of the Fourth Amendment to the United States Constitution, providing that: "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."

This case also involves application of certain provisions of the First Step Act (signed into law on December 21, 2018):

TITLE IV—SENTENCING REFORM

SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS. — The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

. . .

and

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—

(A) in subparagraph (A), in the matter following clause (viii)—

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious

violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"; and

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

. . .

(c) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

First Step Act, S. 756, 115th Cong., § 401 (2018).

STATEMENT OF THE CASE

A. Federal jurisdiction has been proper in this case since this case's inception, and this Court should exercise jurisdiction under Rule 10(a) to correct the Sixth Circuit's departure from this Court's recent Fourth Amendment jurisprudence and to clarify application of the provisions of § 401 of the First Step Act.

In accordance with this Honorable Court's Rules 14(1)(g)(ii) and 10(a) and (c), Mr. Coleman offers this statement of jurisdiction and suggestion of justifications for this Court's consideration of his case. The Sixth Circuit in this case has departed from this Court's jurisprudence, and the jurisprudence of the Illinois Supreme

Court,[2] on the matter of Fourth Amendment protections for curtilage and private-community grounds, and it has ignored (and thus, by omission, departed from) emerging district-court jurisprudence on application of the First Step Act, raising due-process and equal-protection concerns. For these reasons, Mr. Coleman asks this Court to consider these issues.

Mr. Coleman faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered its judgment on January 23, 2018. RE. 76: Judgment, PageID 401. Mr. Coleman filed his timely notice of appeal on the same day. RE. 79: Notice of Appeal, PageID 413. The Sixth Circuit exercised jurisdiction over Mr. Coleman's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts.

Mr. Coleman now asks this Honorable Court to consider the Sixth Circuit's marked departure from this Court's Fourth Amendment jurisprudence, especially as articulated in last year's decisions in *Byrd v. United States*, 138 S. Ct. 1518 (2018), *Collins v. Virginia*, 138 S. Ct. 1663 (2018), and *Carpenter v. United States*, 138 S. Ct. 2206 (2018). This case involves questions of police encroachment on protected curtilage to execute a warrant to install a GPS tracker on a vehicle. It also involves the question of how to apply the provisions of the First Step Act (namely that act's changes to the drug-offense mandatory minimum sentences, with

[2] Mr. Coleman cited in footnote 1 above this Court's current consideration of *Illinois v. Bonilla*, No. 18-1219 (distributed for review at October 1, 2019 conference on July 3, 2019), which supports Mr. Coleman's arguments here and which he will explore below.

modifications to the recidivist enhancements) to those whose cases were pending on direct appeal at the time of the act's passage.

B. Mr. Coleman's case presents a straightforward factual scenario and procedural history.

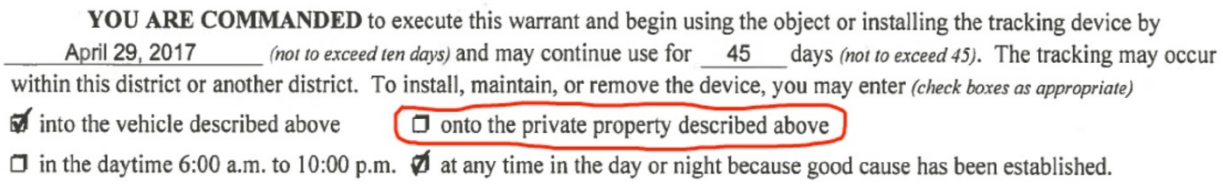
Mr. Coleman's case is relatively simple: despite not having permission to enter private property to do so, a government agent entered Mr. Coleman's private condominium community, and then intruded on Mr. Coleman's driveway, to install GPS tracking units on Mr. Coleman's vehicles. Agents went on to use data from these tracking units to further their investigation of Mr. Coleman, with the government ultimately indicting Mr. Coleman for drug-trafficking.

Police initiated an investigation of Mr. Coleman when a cooperating informant (ultimately a defendant him- or herself) told authorities that this cooperator could purchase cocaine from a seller known as Eddie Powell, and that Eddie Powell had three sources, one of whom was Mr. Coleman. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 456. Authorities conducted surveillance of Mr. Powell's residence in April 2017. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 456-57. After observing a Buick Enclave, which officers later associated with Mr. Coleman, pull up at Mr. Powell's residence, authorities began investigating Mr. Coleman. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 457.

To further their investigation of Mr. Coleman, officers applied for and obtained warrants to place GPS tracking devices on Mr. Coleman's 2008 Buick Enclave and 2002 Chevy Trailblazer. RE. 30: Br. in Support of Motion to Suppress, PageID 94, 97. They placed the units on April 20, 2017, a day after they obtained

the warrants. RE. 30: Br. in Support of Motion to Suppress, PageID 97. The warrant applications did not seek permission to enter designated private property. *See* RE. 30-2: Br. in Support of Motion to Suppress, Tracking Warrants, PageID 135 (seeking permission to enter a Buick Enclave but making no mention of entering private residential property); RE. 30-3: Br. in Support of Motion to Suppress, Tracking Warrants, PageID 147 (discussing entry of Trailblazer with no mention of entering private residential property).

The standard tracking-warrant application form for the Western District of Michigan includes this section with its here-red-highlighted option related to private property:


YOU ARE COMMANDED to execute this warrant and begin using the object or installing the tracking device by April 29, 2017 *(not to exceed ten days)* and may continue use for 45 days *(not to exceed 45)*. The tracking may occur within this district or another district. To install, maintain, or remove the device, you may enter *(check boxes as appropriate)*

☑ into the vehicle described above ☐ onto the private property described above

☐ in the daytime 6:00 a.m. to 10:00 p.m. ☑ at any time in the day or night because good cause has been established.

The red-circled entry explicitly anticipates the authorizing magistrate judge approving or disallowing officers' entry onto private property to install the subject GPS tracking device.

More specifically, the material above comes from the tracking warrant for the 2008 Buick Enclave in this case; the magistrate judge in this case did not check the box to allow entry onto private property. *See* RE. 30-2: Br. in Support of Motion to Suppress, Tracking Warrants, PageID 136. The same lack of permission appeared in the warrant for the tracking device for the 2002 Chevy Trailblazer. *See* RE. 30-3: Br. in Support of Motion to Suppress, Tracking Warrants, PageID 148.

Despite this lack of authorization, officers here entered the exclusive, private enclave of Mr. Coleman's condominium community, Silverleaf Condominium Community. RE. 30: Br. in Support of Motion to Suppress, PageID 99. They drove more than a mile into the enclave, using the community's private roadway. *See* RE. 30: Br. in Support of Motion to Suppress, PageID 99. They ignored the community's posted signs warding off solicitors and warning that the property was private. *See, e.g.*, 6th Cir. Doc. 27: Gov. Br., PageID 40. After passing additional signs warning of the private nature of the community and that the property and its pond were "for residents only," an agent proceeded to place tracking devices on Mr. Coleman's vehicles, including placing one on the Buick Enclave, which sat parked in the driveway of Mr. Coleman's condominium.[3] *See* RE. 84: Motion Hrg. Trans., 8/31/17, PageID 446, 457, 466-67. At the motion hearing in the district court, the ATF agent who obtained the tracking warrants for Mr. Coleman's vehicles testified that he did *not* obtain permission to enter Mr. Coleman's property to attach the trackers. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 479, 482.

Officers ultimately used data gathered from the vehicle tracking devices to obtain a search warrant for Mr. Coleman's residence on Springtree Lane (a warrant that also included a request for authorization to search vehicles found on the curtilage of the residence). *See* RE. 30-1: Br. in Support of Motion to Suppress,

[3] The government has tried to argue that the shared nature of the driveway somehow diminished Mr. Coleman's Fourth Amendment interests in it, and the Sixth Circuit looked to this shared nature in coming to its decision. *See Coleman*, 923 F.3d at 453, 456; *see also* RE. 84: Motion Hrg. Trans., 8/31/17, PageID 459 (officer describing driveway as shared by two condominium units). As Mr. Coleman will explain below, this shared nature simply means the driveway constituted curtilage for two condominiums.

Search & Seizure Warrant, PageID 110, 131. Based on evidence obtained from these warrants and other sources, the government indicted Mr. Coleman on June 27, 2017. RE. 17: Indictment, PageID 57-66. The indictment named Mr. Coleman and a co-defendant and included five counts and three forfeiture allegations. RE. 17: Indictment, PageID 57-66. Mr. Coleman appeared in counts one (conspiracy to distribute cocaine), two (possession with intent to distribute cocaine), and three (felon in possession of a firearm). RE. 17: Indictment, PageID 57-59. Two days later, on June 29, 2017, the government filed an information and notice related to Mr. Coleman's prior drug convictions, seeking the enhanced penalties under 21 U.S.C. § 841(b)(1)(B)(ii), namely a statutory sentencing range of ten years to life. RE. 20: Notice of Prior Felony Conviction, PageID 73-75.

Throughout these proceedings, Mr. Coleman has challenged the government's intrusion into his private neighborhood, and onto his driveway and protected curtilage. *See* 6th Cir. Doc. 24: Principal Br., PageID 8 (listing issues presented on appeal). He raised his arguments under the First Step Act as soon as they presented themselves—just weeks after passage of that act. *See* 6th Cir. Doc. 38: Rule 28(j) Ltr., PageID 1-2.

In the district court, Mr. Coleman filed a motion to suppress on July 25, 2017. RE. 29: Motion to Suppress, PageID 92-93. The court conducted a hearing on the motion on August 31, 2017. RE. 48: Minutes of Motion Hearing, PageID 225. The court denied the motion, and Mr. Coleman entered a conditional plea to the first three counts of the indictment on September 12, 2017. RE. 49: Order Denying

Motion, PageID 227; RE. 51: Conditional Plea Agreement, PageID 229-40; RE. 52: Minutes of Change of Plea, PageID 241.

On January 22, 2018, the district court sentenced Mr. Coleman to the then-applicable mandatory minimum of 120 months (had the mandatory minimum not applied, the presentence investigation report (PSIR) gave a guideline range of 63 to 78 months). RE. 75: Amended Minutes of Sentencing, PageID 400; RE. 69: PSIR, PageID 380. Overruling Mr. Coleman's objections to the PSIR's advisory sentencing guidelines scoring, the district court calculated the guidelines as offense level 25, criminal-history category II, and agreed with the PSIR's advisory range of 63 to 78 months. RE. 83: Sent. Hrg. Trans., 1/22/18, PageID 420-22, 426-27. The district court entered its judgment on January 23, 2018, and on that day, Mr. Coleman filed his notice of appeal. RE. 76: Judgment, PageID 401; RE. 79: Notice of Appeal, PageID 413.

C. The Sixth Circuit's consideration of this matter undermined this Court's recent Fourth Amendment jurisprudence, especially as presented in Collins v. Virginia*, 138 S. Ct. 1663 (2018), and ignored Mr. Coleman's First Step Act arguments.*

In his appeal to the Sixth Circuit Court of Appeals, Mr. Coleman challenged the police intrusion into his private condominium complex and onto his protected curtilage and driveway. *See* 6th Cir. Doc. 24: Principal Br., PageID 8. (He also brought a probable-cause challenge. *See* 6th Cir. Doc. 24: Principal Br., PageID 8.) During the pendency of the appeal, Congress passed the First Step Act and the president signed that act into law. Based on the act's passage, Mr. Coleman filed a letter with the court of appeals, under Federal Rule of Appellate Procedure 28(j),

bringing a sentencing challenge and seeking remand. *See* 6th Cir. Doc. 38: Rule 28(j) Ltr., PageID 1-2.

In its opinion, the Sixth Circuit ignored this sentencing challenge based on the First Step Act. *See Coleman*, 923 F.3d at 458 (closing without addressing First Step Act argument). On the Fourth Amendment issues, the court rejected the idea that the investigating agent violated Mr. Coleman's Fourth Amendment rights by entering the private condominium complex to install the vehicle tracking devices. *See id.* at 455. It also found that Mr. Coleman's driveway did not constitute protected curtilage, and thus rejected the idea that the agent had violated Mr. Coleman's rights by entering the driveway to install the tracking device on the Buick. *See id.* at 457.

The court recognized the Fourth Amendment's protection of curtilage, but it disagreed that the private community's grounds would receive any protections under the amendment. *See id.* at 455. While recognizing the complex's private-property signage, the court found that "anyone could drive into the complex without express permission" and "[n]o gate prevented outsiders from entering, and the condo association had not taken any effort to keep non-residents out." *Id.* The property-property "sign itself did not require permission to enter, prohibit outside visitors, or even state 'no trespassing.'" *Id.*

On the issue of the driveway, the court found that "[w]hether the ATF agent intruded onto the curtilage of Coleman's building by entering his driveway, however, [wa]s a closer question." *Id.* It noted Mr. Coleman's "heavy emphasis" on

this Court's "recent decision in *Collins*." *Id.* In considering *Collins*, the Sixth Circuit parsed this Court's description of the driveway in that case. *See id.* at 456. The court recognized that this Court in *Collins* "found that the officer had violated Collins's Fourth Amendment rights by intruding onto the building's curtilage." *Id.* In trying to distinguish *Collins*, the Sixth Circuit stated, "Coleman's Enclave, in contrast, was sitting in front of the residence, was not enclosed by anything, and was on the way to the entrance of his home." *Id.* It tried to make significant the shared nature of Mr. Coleman's driveway and the lack of a tarp covering Mr. Coleman's vehicle. *See id.*

Ultimately, the Sixth Circuit fell back on its own pre-*Collins* case law to uphold the intrusion on Mr. Coleman's curtilage, finding that this older case law survived *Collins*. *See id.* The court concluded that, "[w]hile the proximity of the driveway to the residence here may lean in favor of considering it to be curtilage, the other [*United States v.*] *Dunn*[, 480 U.S. 294 (1987),] factors—whether the area is within an enclosure around the home, the uses of the area, and the steps taken to protect the area from observation by passersby—all point toward the opposite conclusion." *Id.* at 457. On the issue of probable cause, the court rejected Mr. Coleman's arguments. *See id.* at 454, 457-58. Mr. Coleman now asks this Court to review the Sixth Circuit's treatment of the curtilage and First Step Act issues.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO CLARIFY THAT UNAUTHORIZED POLICE INTRUSION INTO A PRIVATE CONDOMINIUM ENCLAVE TO INSTALL A GPS TRACKING DEVICE ON A VEHICLE CONSTITUTES A FOURTH AMENDMENT VIOLATION, ESPECIALLY WHEN FOLLOWED BY INTRUSION ONTO A PRIVATE DRIVEWAY THAT REPRESENTS PROTECTED CURTILAGE.

Last year, this Court issued pellucid guidance in *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018): driveways generally constitute curtilage and enjoy constitutional protections. Mr. Coleman's driveway certainly enjoyed such protections, as did the parking area across from his unit. A witness at the motion hearing in the district court described Mr. Coleman's condominium's driveway (where the Buick Enclave sat when an agent installed the GPS tracking device on it) and the private parking area across from the condo (where the Chevy Trailblazer sat when the agent installed the tracker on it)—this latter parking area was reserved exclusively for residents and their guests. *See* RE. 84: Motion Hrg. Trans.,8/31/17, PageID 447-48; *see also* 6th Cir. Doc. 24: Principal Br., PageID 31 (describing vehicles' parking arrangement).

This witness emphasized the non-public nature of the parking area across from Mr. Coleman's unit: people from outside the condominium complex could not park in the area. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 448. Regarding members of the general public possibly parking in the area, the witness testified that if she became aware of a member of the public parking in a spot uninvited she would ask them to leave or call for them to be escorted off the premises. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 448. Visitors to the complex would need

permission to enter and park. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 453. During cross-examination of this witness, the government asked about condominium guests, and the witness made clear "[a]nyone that's coming to visit us or on the grounds have to get permission." RE. 84: Motion Hrg. Trans., 8/31/17, PageID 453. The condo driveway itself was flanked by trees and landscaping. See RE. 43-2: Gov. Resp. to Motion to Suppress, Ex. B, PageID 208.

A. As protected curtilage, the driveway here offered only a limited "implied license" for entry and the authorities violated that license.

As an initial matter in *Collins*, this Court had to decide whether the part of the driveway where Mr. Collins's motorcycle sat parked (and was subsequently searched) constituted curtilage. *See Collins*, 138 S. Ct. at 1670. Looking at photographs in the record, the Court noted that the subject driveway ran "alongside the front lawn and up a few yards past the front perimeter of the house"; its top portion sat "behind the front perimeter of the house" and was "enclosed on two sides by a brick wall about the height of a car and on a third side by the house." *Id.* A side door provided direct access between the partially enclosed section of the driveway and the house. *Id.* at 1670-71. Visitors endeavoring to reach the front door of the house would have to walk partway up the driveway, but they would turn off before entering the enclosure area, and then proceed up a set of steps leading to the front porch. *Id.* at 1671. When the officer in *Collins* searched the subject motorcycle, that motorcycle sat parked inside the partially enclosed top portion of the driveway that abutted the house. *Id.*

In considering whether this driveway constitutes protected curtilage, the Court recognized that the idea of defining curtilage is "familiar enough" and easily understood from daily experience. *Id.* Front porches, side gardens, and areas outside front windows qualify as curtilage. *See id.* The driveway enclosure where the officer searched the subject motorcycle constituted an area adjacent to the home and one to which the activity of home life extended; the Court found it qualified as curtilage. *Id.*

In coming to this conclusion, the Court reviewed its decision in *Florida v. Jardines*, 569 U.S. 1 (2013), a decision that also clarifies the issues presented in Mr. Coleman's case. In *Jardines*, the Court considered "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." *Jardines*, 569 U.S. at 3. The Court reminded practitioners that the area "immediately surrounding and associated with the home" constitutes curtilage and that the law regards this area as part of the home itself for purposes of the Fourth Amendment. *Id.* at 6. This concept of curtilage rests on "ancient and durable roots." *Id.* The Court emphasized "the identity of home" and cited Blackstone on the "curtilage or homestall": "for the 'house protects and privileges all its branches and appurtenants.'" *Id.* at 6-7. This area around the home has intimate links to the home, "both physically and psychologically," and it enjoys the highest privacy expectations. *Id.* at 7.

The *Jardines* Court also noted that "the boundaries of the curtilage are generally 'clearly marked,'" and (again) that conceptions defining curtilage enjoy a

familiarity, being easily understood from daily experience. *Id.* In considering the dog sniff at the heart of the case, the *Jardines* Court emphasized that no doubt existed as to whether officers had intruded on protected curtilage: "The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Id.* (citation omitted).

Of course, an implicit license based on "the habits of the country" may exist to allow certain limited entry onto curtilage. *Id.* at 8. The *Jardines* Court acknowledged its recognition that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Id.* (citation omitted). Such an "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* Complying with the terms of this traditional invitation does not require any "fine-grained legal knowledge." *Id.* Generally, it is "managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.* And under this "invitation," "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id.* (citation omitted).

Introducing an investigatory tool like a trained police dog or a GPS tracker, however, changes the equation. *See id.* at 9. "There is no customary invitation to do *that*." *Id.* An invitation to engage in "canine forensic investigation" does not inhere in the act of hanging a knocker on the front door. *Id.* To find a visitor knocking on the front door is routine (even if sometimes unwelcome), but to spot a "visitor

exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission," or installing a GPS tracker on the vehicle in the driveway "would inspire most of us to—well, call the police." *See id.* The scope of any implied license "is limited not only to a particular area but also to a specific purpose." *Id.* Background social norms that can invite a visitor to the front door do *not* invite that visitor to conduct a search . . . or install a GPS tracker on a vehicle in the driveway. *See id.*

This Court in *Collins* pointed out that the state's proposed rule in that case rested "on a mistaken premise about the constitutional significance of visibility"—a person's "ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible." *Collins*, 138 S. Ct. at 1675. Contrary to the Sixth Circuit's suppositions in Mr. Coleman's case, "[s]o long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage." *Id.*

As this Court said in *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018), people do "not surrender all Fourth Amendment protection by venturing into the public sphere." Things people seek to preserve as private, even in a publicly accessible space, may yet enjoy constitutional protections. *Carpenter*, 138 S. Ct. at 2217. Thus, even if there was limited public access to the private residential complex, and even if the driveway here was not enclosed, such "accessibility" or

"visibility" does not defeat the constitutional protections afforded to the exclusive area or somehow make the driveway something other than curtilage. In requiring a warrant for police gathering of cell-site data, this Court in *Carpenter* took a strong stance on protecting private activities, even if those activities have been "revealed" to others in some way. *See id.*

Paralleling this protection of "visible" spaces is the fact that spaces not far removed from public thoroughfares can and do enjoy constitutional protections. As Justice Alito chided in his dissent in *Collins*, the officer in that case "had to walk 30 feet or so up the driveway of the house rented by petitioner's girlfriend, and by doing that, [the officer] invaded the home's 'curtilage.'" *Collins*, 138 S. Ct. at 1681 (Alito, J., dissenting). It took only thirty feet to make the subsequent search illegal. Justice Alito could have been describing the agent in Mr. Coleman's case when he wrote, "Nor does the Court claim that [the officer's] short walk up the driveway did petitioner or his girlfriend any harm"; the officer "did not damage any property or observe anything along the way that he could not have seen from the street." *Id.* "But, the Court insists, [the officer] could not enter the driveway without a warrant, and therefore his search of the motorcycle was unreasonable and the evidence obtained in that search must be suppressed." *Id.*

This Court decided in *Collins* that a "good reason" exists to differentiate between a vehicle "parked in plain view in a driveway just a few feet from the street" and one parked on that public street. *See id.* at 1682 (Alito, J., dissenting). Mr. Coleman's vehicle sat parked in that driveway—and that driveway was *not*

"just a few feet from the street" but rather over a mile from the public streets, ensconced in an exclusive, private, enclave community not served by public services, as Mr. Coleman will discuss further below. Ordinary people of common sense understand that the privacy interests at stake in private residential property far exceed those inherent in a public street. *See id.* at 1673 n.3. This Court explicitly rejected the "the dissent's suggestion" in *Collins* that "it [wa]s of no significance that the motorcycle was parked just a 'short walk up the driveway.'" *Id.* "The driveway was private, not public, property." *Id.* Mr. Coleman's driveway, and the vehicle in it, enjoyed a similar situation and similar constitutional protections—and the agent's intrusion onto that driveway to install a GPS tracking device violated Mr. Coleman's Fourth Amendment rights.

B. Mr. Coleman's driveway, and the parking area across from it, did not constitute "open fields" and thus did not lack constitutional protections.

In deciding Mr. Coleman's case, the Sixth Circuit ignored the distinction between "open fields" and an implied license to enter curtilage. *See Collins*, 138 S. Ct. at 1681 (Alito, J., dissenting) ("Instead, a person's 'house' encompasses the dwelling and a circumscribed area of surrounding land that is given the name 'curtilage.' . . . Land outside the curtilage is called an 'open field,' and a search conducted in that area is not considered a search of a 'house' and is therefore not governed by the Fourth Amendment. . . . Ascertaining the boundaries of the curtilage thus determines only whether a search is governed by the Fourth Amendment." (citations omitted)). While this Court's ruling in *Collins* goes to the

general nature of driveways as curtilage—some driveways may not fit that general rule—it certainly applies in Mr. Coleman's case, especially given the private nature of the community surrounding the driveway and given the non-public nature of the abutting road. *Cf. Collins*, 138 S. Ct. at 1674 (discussing *Pennsylvania v. Labron*, 518 U.S. 938 (1996), and pointing out how, unlike in *Collins*, "there was no indication that the individual who owned the truck in *Labron* had any Fourth Amendment interest in the farmhouse or its driveway, nor was there a determination that the driveway was curtilage").

As a community resident, Mr. Coleman had the right to ask passersby to leave the community's complex if these passersby were not residents or guests of residents. The complex was a private community and the city did not enter the premises to perform any tasks. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 445. Prominently posted signs informed the public, passersby, essentially everyone (including the officers here), that the complex was private property. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 445-46. These signs carried announcements that the property was for "residents only" and "private property." RE. 84: Motion Hrg. Trans., 8/31/17, PageID 446. They also prohibited dogs and soliciting. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 449.

Regarding members of the general public possibly parking in the area across from Mr. Coleman's residence (the area where the Trailblazer sat when the agent installed the tracking unit), a witness testified that if she became aware of a member of the public parking in a spot uninvited she would ask them to leave or

call for them to be escorted off the premises. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 448. Visitors to the complex would need permission to enter and park. RE. 84: Motion Hrg. Trans., 8/31/17, PageID 453. During cross-examination of this witness, the government asked about condominium guests, and the witness made clear "[a]nyone that's coming to visit us or on the grounds have to get permission." RE. 84: Motion Hrg. Trans., 8/31/17, PageID 453.

As Mr. Coleman's attorney argued at this motion hearing, one can easily distinguish condominium complexes from apartment developments. See RE. 84: Motion Hrg. Trans., 8/31/17, PageID 499. With condos, owners buy into a community and pay dues to maintain and improve that community's infrastructure. See RE. 84: Motion Hrg. Trans., 8/31/17, PageID 499. Through paying his association dues, Mr. Coleman had an ownership interest in the parking area where his Trailblazer was parked (and of course, he had an interest in the driveway where the Buick sat). See RE. 84: Motion Hrg. Trans., 8/31/17, PageID 499.

The situation of these parking areas—the community's parking area and the driveway itself (even if shared with a neighbor)—point toward finding constitutional protections for them . . . point toward finding reasonable expectations of privacy in them. *See Byrd v. United States*, 138 U.S. 1518, 1530 (2018). If anything, a shared driveway simply points to the agent violating *two* residences' Fourth Amendment protections. This Court does not need counsel to remind it that a privacy interest does not require some sort of exclusivity of possession or even a contractual agreement. *See id.* at 1531. If, as in *Byrd*, "the mere fact that a driver in

lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy," than a common interest in residential property space like a condominium complex, or a shared interest in a driveway, should not defeat a privacy expectation. *See id.*

C. Mr. Coleman's exclusive, private condominium community's grounds did not constitute "open fields" or public byways, but rather, they enjoyed constitutional protections as private curtilage to the homes within them.

While an officer may have a warrant to attach a GPS tracker to a vehicle parked on a public street, that officer cannot intrude on protected curtilage to make the same attachment onto the vehicle. *Compare Jardines*, 569 U.S. at 10-11 (discussing the Fourth Amendment's especial protection of property). And that officer cannot intrude into a private enclave community, without authorization, to make such an attachment.

The issue of intrusion onto non-public roadways, into a private community, with signs posted to that effect, to install a GPS tracker—without authorization for such an intrusion—finds an answer even in Justice Alito's *dissent* in *Jardines.* In that dissent, Justice Alito posited that "[t]he law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time." *Jardines*, 569 U.S. at 16 (Alito, J., dissenting). Such a "license" would not be "limited to persons who intend to speak to an occupant or who actually do so": "Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without intending to converse." *Id.* Nor is such a "license" restricted to visitors

whom an occupant of the residence "is likely to welcome; as the Court acknowledges, this license applies even to 'solicitors, hawkers and peddlers of all kinds.'" *Id.* (citation omitted). Justice Alito then lengthened this reasoning to suggest that "the license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions)." *Id.*

Under even this dissenting perspective, the authorities violated Mr. Coleman's Fourth Amendment rights when they entered Mr. Coleman's private condominium community because that community had explicitly revoked any possible "license" for "solicitors, hawkers and peddlers of all kinds"—anyone uninvited. *Cf. id.* The fact the community invited postal carriers, garbage collectors, landscapers, and snow removers to enter does not change the analysis. The $180-month homeowners'-association fee Mr. Coleman paid went toward snow plowing and removal, landscaping, property maintenance, and other upkeep, demonstrating the community's *invitation* for these service providers to enter the enclave. *See* RE. 84: Motion Hrg. Trans., 8/31/17, PageID 444. Neither the city nor the county provided snow plowing for the community's roads in the winter. *See* RE. 84: Motion Hrg. Trans., 8/31/17, PageID 444-45. Rather, the community organized, collected fees, and invited in service providers to take care of these requirements. This invitation vitiates the government's argument that "the mail carrier, the garbage company, even a neighbor's friends—would need to obtain express permission to drive past the [private-property] sign." *See* 6th Cir. Doc. 27: Gov. Br., PageID 33.

The government's own pictures (as included in its brief) illustrate the community's commitment to maintaining a peaceful privacy, removed from public access. A labyrinthine arrangement of homes and landscaped space increased privacy by eliminating a grid layout that would otherwise facilitate navigation by those unfamiliar with the area. *See* 6th Cir. Doc. 27: Gov. Br., PageID 14. Fourth Amendment rights, of course, do not depend on no-trespassing signs, but as already discussed, signage conspicuously prohibited dogs and solicitors and made clear the private nature of the community. *See* 6th Cir. Doc. 27: Gov. Br., PageID 40. Additional photographs from the motion hearing show benches and walkways that created a private park where people could sit and linger, enjoying private, introspective time away from public thoroughfares. *See, e.g.*, RE. 111-1: Gov. Exhibits—Motion to Suppress Hearing, PageID 764, 774, 776. Large trees and bushes created private spaces, even around parking areas. *See* RE. 111-1: Gov. Exhibits—Motion to Suppress Hearing, PageID 766 770, 774, 776.

This community did not include homes on public thoroughfares that implicitly licensed "solicitors, hawkers and peddlers of all kinds" to approach. *Cf. Jardines*, 569 U.S. at 16 (Alito, J., dissenting). Even Justice Alito's "tolerable" "door-to-door peddler"—the Girl Scout selling cookies—should not have approached the doors in Mr. Coleman's neighborhood (unless perhaps she herself lived in the neighborhood). *Cf. id.* at 19 (Alito, J., dissenting). The neighborhood, through its signage and design, explicitly revoked any possible license to approach the enclave's homes.

Likewise, officers here exceeded the scope of any arguable license to be in Mr. Coleman's neighbor and on his driveway. Any possible "license" would be "limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer) leave." *See id.* at 20 (Alito, J., dissenting). Here, an agent did far more than that. An agent engaged in surveillance in the neighborhood and installed GPS tracking units on two vehicles.

A footnote in *Collins* started to address somewhat parallel considerations but stopped short. In this footnote, the *Collins* majority spoke on the century-old conclusions in *Carroll v. United States*, 267 U.S. 132 (1925). *Collins*, 138 S. Ct. at 1673 n.3. In *Carroll*, the Court really just laid a foundation for the automobile exception to the warrant requirement, upholding a distinction between homes and automobiles in terms of the need for search warrants. *See Carroll* 267 U.S. at 147, 155-56. This distinction does not present itself in Mr. Coleman's case because *Collins* made clear that the Fourth Amendment protections of curtilage trump the automobile exception to the warrant requirement. *Collins*, 138 S. Ct. at 1673.

The *Carroll* decision did *not* involve a ruling on crossing private property to execute a warrant (namely, the legality of crossing a private wharf to search a ship pursuant to a warrant). *Cf. Collins*, 138 S. Ct. at 1673 n. 3; *see also Collins*, 138 S. Ct. at 1682 n.3 (Alito, J., dissenting). *Carroll* simply involved an automobile stopped on a public roadway. *See Carroll*, 267 U.S. at 163 (McReynolds, J., dissenting). In fact, the majority in *Collins* suggested it would not countenance such a crossing of

private property. *See id.* at 1682 (Alito, J., dissenting). And it certainly would not countenance crossing *housing* curtilage without a warrant. *See id.* at 1673 n.3; *see also id.* at 1682 (Alito, J., dissenting) ("We have not held that the need to cross the curtilage independently necessitates a warrant, and there is no good reason to apply a different rule here," implying the majority did just that.).

The idea that older legislation (including 1866's "An Act Further to Prevent Smuggling and for Other Purposes") demonstrates an approval of crossing private property to execute warrants cannot prevail to defeat Mr. Coleman's arguments. Justice Alito raised this idea in his dissent in *Collins*, positing that "*Carroll* itself noted that the First Congress enacted a law authorizing officers to search vessels without a warrant" and "[a]lthough this statute did not expressly state that these officers could cross private property such as wharves in order to reach and board those vessels, I think that was implicit" or "the statute would very often have been ineffective." *Collins*, 138 S. Ct. at 1682 n.3 (Alito, J., dissenting). He continued, "[a]nd when Congress later enacted similar laws, it made this authorization express," and reasoned that the conduct of the officer in *Collins* was thus "consistent with the original understanding of the Fourth Amendment, as explicated in *Carroll*." *Id.*

Aside from the question of whether such legislation could pass constitutional muster if challenged now, any analysis based on its ostensible "approval" of crossing private property to execute a warrant must fail in this case. Here, the magistrate judge explicitly *declined* to authorize such crossing of private property. The

magistrate *could* have authorized it here, but he did not. He left that box on the warrant unchecked.

Less than a year ago, the Illinois Supreme Court interpreted *Collins* and *Jardines* to mean that an unlocked, accessible common area in an apartment building constituted protected curtilage; and the court refused to apply the good-faith exception. *See People v. Bonilla*, 2018 IL 122484, ¶¶ 49, 51, __ N.E.3d __ (Ill. 2018). (This Court is currently considering *Bonilla* pursuant to a petition for a writ of certiorari. *See Illinois v. Bonilla*, No. 18-1219 (distributed for Oct. 1, 2019 conference on July 3, 2019). Should this Court find that Mr. Coleman's issues do not merit review standing alone, he asks the Court to consider his case in conjunction with *Bonilla*.) Unlike the Sixth Circuit, the Illinois Supreme Court recognized the protections afforded by this Court's recent Fourth Amendment decisions.

In *United States v. Jones*, 565 U.S. 400, 404 (2012), this Court gave the basis for the authorities' tracking warrants in this case: "It is beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment. . . . We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" The authorities' warrants here covered that search, namely the physical intrusion of placing the tracking devices on the vehicles, and then use of those devices to monitor the vehicles. But those warrants explicitly did not cover the intrusion onto the curtilage of the driveway or into the private community, which is exactly the issue *Collins* addressed.

In *Collins*, the automobile exception would have allowed a search of the motorcycle had it sat in a public place. *See Collins*, 138 S. Ct. at 1669, 1671 ("The question before the Court is whether the automobile exception justifies the invasion of the curtilage. The answer is no."). But it did not sit in such a public place, so the officer's intrusion onto the subject home's curtilage caused a Fourth Amendment violation. *See id.* at 1671. In Mr. Coleman's case, the same principles govern. Had the target vehicles sat in a public place, the agent could have installed the tracking devices under the warrants he possessed. But because those warrants denied him access to a private place to effect such installation, his invasion of the private condominium community and then the driveway violated the Fourth Amendment. Mr. Coleman asks the Court to recognize these constitutional violations.

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO CLARIFY THAT A DEFENDANT WHO HAD A DIRECT APPEAL PENDING ON DECEMBER 21, 2018, WHEN THE FIRST STEP ACT BECAME LAW, QUALIFIES FOR RESENTENCING UNDER THE PROVISIONS OF THAT ACT.

The First Step Act altered the application of the recidivist drug-offender sentencing enhancements. *See* First Step Act, S. 756, 115th Cong., § 401 (2018). The act provided for certain retroactive application of its provisions, stating that the amendments to the recidivist sentencing enhancements would "apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." *See id.* at § 401(c). If Mr. Coleman were to face sentencing today, he would *not* qualify for the ten-year mandatory minimum sentence he is now serving. *See* RE. 76: Judgment, PageID

402. Mr. Coleman does not have a prior drug conviction involving a sentence in excess of twelve months. *Cf.* 21 U.S.C. § 802(57) (2019) (reflecting First Step Act amendments and defining qualifying prior offenses as involving sentences in excess of twelve months and release from custody within fifteen years of the instant offense).

So, the question becomes: was sentence "imposed" on Mr. Coleman before enactment of the First Step Act, when he had a direct appeal pending on the date of that act's enactment? When statutory language presents an ambiguity, of course, the Rule of Lenity dictates that a defendant should receive the benefit of the doubt. *See, e.g.*, *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) ("We do not think any ambiguity survives. If any did, however, we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity . . . ."); *see also R.L.C.*, 503 U.S. at 307-08 (Scalia, J., concurring) ("The rule of lenity, in my view, prescribes the result when a criminal statute is ambiguous: The more lenient interpretation must prevail.").

While the act's application may seem fairly straightforward at first blush ("if a sentence for the offense has not been imposed as of such date of enactment"), the issue of a pending direct appeal and the possibility of a vacated sentence and remand reveal ambiguity on the issue. A pending direct appeal means a conviction and sentence are not final. For example, jurisprudence related to the death of a defendant shows how a conviction can be "wiped away" during an appeal: courts have found it "well established" that a defendant's death pending an appeal of the

"case abates, *ab initio*, the entire criminal proceeding." *See, e.g.*, *United States v. Parsons*, 367 F.3d 409, 413 (5th Cir. 2004) (en banc). An "appeal does not just disappear, and the case is not merely dismissed. Instead, everything associated with the case is extinguished, leaving the defendant 'as if he had never been indicted or convicted.'" *Id.* Two primary approaches support abatement *ab initio*: "The finality principle reasons that the state should not label one as guilty until he has exhausted his opportunity to appeal" and "The punishment principle asserts that the state should not punish a dead person or his estate." *Id.* The finality principle militates in favor of reading the First Step Act's provisions to favor application of the new sentencing provisions to Mr. Coleman.

Yet one does not have to go this far. Even without death, a conviction or sentence can, of course, be vacated by an appellate court. Courts have said that, under 28 U.S.C. § 2106, appellate courts may issue either general or limited remands. *See, e.g.*, *United States v. McFalls*, 675 F.3d 599, 604 (6th Cir. 2012). General remands permit "the district court to redo the entire sentencing process, including considering new evidence and issues." *Id.* And courts presume that remands fall in the general-remand category. *Id.*

General remands essentially wipe the slate clean—including the sentencing slate when an appellate court vacates a sentence. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 507 (2011). On remand, district courts can "reconfigure" the entire sentencing calculus. *See id.* Constraints on such reconfiguration are few, though courts typically feel due-process considerations prohibit "a court from imposing a

harsher sentence on a defendant to punish him for exercising his right to appeal." *See McFalls*, 675 F.3d at 607.

In the First Step Act context, resentencing courts have looked at 1 U.S.C. § 109 and this Court's jurisprudence in *Dorsey v. United States*, 567 U.S. 260 (2012), and the retroactivity provisions of the act itself, and concluded that defendants coming back for resentencing should receive the benefit of mitigated sentences under the act. *See, e.g.*, *United States v. Jackson*, No. 1:15-CR-453-001, 2019 U.S. Dist. LEXIS 102563, at *1 (N.D. Ohio June 18, 2019) (unpublished). In *United States v. Jackson*, for example, the Northern District of Ohio applied the lowered sentencing provision of the First Step Act for a defendant convicted under 18 U.S.C. § 924(c). *Id.* Section 403 of the act amended § 924(c) and contained an "applicability provision" almost identical to the one at hand (the one under § 401(c)). *See id.* at *2-*3, *6 (noting another case that pointed out the parallels between these sections). That provision provided that § 403 of the act, would "apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." *Id.*

The *Jackson* Court found "that the express language in Section 403(b) demonstrates Congress's intent to apply the Section 924(c) penalty provisions retroactively." *Id.* at *3. Because resentencing courts "begin anew" after a remand, it would make "little sense to interpret Section 403(b) in a manner that prevents a defendant from the application of an expressly retroactive amendment based on a sentence that became, in essence, a nullity." *Id.* at *4-*5.

The *Jackson* court is not alone in its approach. In *United States v. Uriarte*, No. 09-CR-332-03, 2019 U.S. Dist. LEXIS 70363, at *3-*4 (N.D. Il. Apr. 25, 2019) (unpublished), the Northern District of Illinois took the same stance. The *Uriarte* court was one of the first courts to speak on this matter. *See id.* at *5. And it did so cogently, asking observers to "consider how an appeal in a relatively complex, multi-defendant case like this one can play out." *Id.* at *8. The court presented a hypothetical in which one defendant in such a case pleaded guilty while another went to trial. *Id.* In the hypothetical, the first defendant received a sentence and appealed. *Id.* at *8-*9. The court of appeals vacated the sentence and remanded for resentencing; by that time, the defendant who went to trial was awaiting sentencing. *Id.* at *9. Then Congress passed the First Step Act. *See id.* As the hypothetical unfolds, the two defendants stand convicted of the same offenses and await sentencing before the same judge. *Id.* If the sentencing judge does not apply the First Step Act to the defendant who received the remand, that defendant would face a twenty-five-year mandatory minimum sentence while the defendant who went to trial would not. *See id.* As the *Uriarte* court pointed out, such a disparity is more than six times the four-year deficit this Court found "Congress intended to avoid in *Dorsey*." *Id.*

Now add the even greater inequity of one defendant receiving a remand on an unrelated issue (such as a suppression issue) and ultimately receiving the benefit of the act when his or her codefendant did not prevail on appeal and had to accept a sentence that could be more than double that of the remanded codefendant. While

some line drawing must occur, due-process and equal-protection concerns arise if one defendant gets to take advantage of the First Step Act provisions simply because they prevailed on appeal. The line drawing must happen at a place that allows those on direct appeal at the time of the act's passage to benefit from the act. *See id.* (discussing line drawing).

CONCLUSION

For these reasons, Mr. Coleman asks this Honorable Court to grant this Petition for a Writ of Certiorari, vacate the Judgment of the Sixth Circuit Court of Appeals, and remand for reconsideration of his conviction and sentence in light of this Court's Fourth Amendment jurisprudence and the provisions of the First Step Act.

Respectfully submitted,
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