ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOMAR ANTAVIS ROBINSON,

APPELLANT

APPELLATE CASE NO. 2012-212042

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in deciding that the police's warrantless search and seizure of petitioner on a porch did not violate the United States and South Carolina Constitutions because petitioner had no expectation of privacy and the police's actions were based on reasonable suspicion?

STATEMENT

Jomar Antavis Robinson ("Robinson") was indicted by a York County grand jury of possession of crack cocaine, third offense, an associated proximity charge, unlawful carrying of a pistol, possession of marijuana, third offense, and resisting arrest. R. 243-52. He was tried before the Honorable Lee S. Alford and a jury on February 9, 2009. R. 1. He was represented by J. Christopher Mills and James Morton. R. 1. E.B. Springs, IV, represented the State. R. 1. He was convicted, and sentenced to life imprisonment pursuant to S.C. Code Ann. §17-25-45.

Robinson appealed his convictions. On February 15, 2012, the Court of Appeals affirmed. App. 1; State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012). The petition for rehearing was denied on March 29, 2012. App. 17. This Court granted certiorari and this brief follows.

ARGUMENT

The Court of Appeals erred in deciding that the police's warrantless search and seizure of petitioner on a porch did not violate the United States and South Carolina Constitutions because petitioner had no expectation of privacy and the police's actions were based on reasonable suspicion.

Introduction

When the police stepped onto the porch where Jomar Robinson was standing for the purpose of searching and seizing its occupants, they violated the Fourth Amendment. The police did not have a warrant allowing them to tread upon private property. They had no excuse for failing to obtain a warrant. The trial court and the Court of Appeals essentially found that Robinson's constitutional rights were diminished because he was standing on a porch in a poor neighborhood. This warrantless search was unreasonable and all subsequent evidence must be suppressed.

Relevant Facts

On March 20, 2006, an officer with the York County Multi-Jurisdictional Task Force, Sergeant Rayford Ervin, Jr., was hiding out in the woods with binoculars, surveilling a public housing project. R. 19, l. 11 – 20, l. 17. It was a Thursday night, and officers testified that they had received "anonymous complaints" about drug dealing and "people carrying guns" in the area. R. 128, ll. 3-5. An officer testified that they received a complaint on that particular night, although he could not offer any specific information about it:

> Q: Now, in the—first of all, you tell me that you had numerous complaints?

A: Yes, sir.

Q: Are those documented anywhere?

A: Yes, sir, they were.

Q: Where are they documented?

A: We have a—we have in-tell (sic) sheets that come in and we also have citizen complaints that come in through via the telephone, and we also have arrest cases that have also been made in that area, some that I have actually made myself in that area for drug possessions and things of that nature. Even some trafficking cases have been made there directly in that parking lot at that very spot.

Q: Okay. Let me ask you this. You said you had a call that night?

A: Actually we had a complaint and we were sitting up watching it, yes, sir.

Q: Who was the complaint from?

A: We have anonymous tips that come in.

Q: So do you not know the source of the complaint?

A: No, sir, I do not.

R. 18, ll. 10-24.

During this particular night of surveillance, Ervin testified that he observed five cars approach the parking lot which were met by one of five young men standing on a porch. Ervin believed this conduct was consistent with drug dealing, and he called for backup. R. 129, l. 9- 131, l.4. Law enforcement did not take any notes documenting these visits even though they claimed it led them to believe that the men on the porch were dealing drugs. R. 136, ll. 8-14. The lack of documentary evidence in this case was consistent with these officers' view of the need: "Well, you have got three officers that came up here and testified. I'm sure that's just as good as a picture." R. 169, ll. 18-19.

Counsel asked the officer:

> Q: Now, this is a little apartment complex and there is a lot of traffic in people hanging out on the porches, aren't there?
>
> A: Yes, sir.
>
> Q: And all those people aren't dealing drugs, are they?
>
> A: Not all of them.

R. 136, ll. 15-20.

As part of this police operation, officers followed cars leaving the public housing project and pulled them for minor traffic violations as a pretext for searching the cars.

> Q: Would he call in license plates, or anything like that? How would he know to tell somebody to follow for a traffic stop?
>
> A: Basically he would give a description on the vehicle, and we sat up in that area somewhat tight to where we can have pretty much most avenues covered in that area. He will give out the description of the vehicle and the officers would then pick that vehicle up as it left the area. He would be able to tell us if it took a left or a right turn on Charlotte Avenue from Hall Street, or if it went up to 49, or what we call North Congress and make a left or right from North Congress.
>
> Q: So the purpose of that is to try and stop the vehicle, correct?
>
> A: Yes, sir, it is.
>
> Q: Because you want to search for drugs, or whatever else is there, correct?
>
> A: If they make a traffic violation, yes sir.
>
> Q: I understand. That's doesn't—**your motivation is to search for the drugs, but you are looking for an excuse if they have a traffic violation, correct?** If they violate the law, or cross the line, or something—
>
> A: **Yes, sir,** if they violate the law.
>
> Q: You are allowed to—

A: Yes, sir.

Q: So it's not really a traffic stop, like a normal traffic stop? You are going there with a specific purpose, aren't you?

A: Yes, sir.

Q: And you are going to want to get in the search of the car, correct?

A: Yes, sir.

R. 25, l. 22- 27, l. 3 (emphasis added).

On this night, a car was pulled and searched, but no drugs were found. R. 140, ll.6-8. A stolen pistol, however, was found, and its owner arrested. R. 132, l. 16 - 133, l. 8; R. 21, ll. 14-21. The police admitted that petitioner Robinson had nothing to do with the stolen pistol. R. 22, ll. 2 – 3. Thirty minutes after failing to find drugs in the searched vehicle, two plainclothes officers approached an apartment's porch to engage in what they claimed was a "consensual encounter" with the five young men. R. 23, l. 17 – 25, l. 12. R. 28, ll. 7 – 12. Critically, the officers entered **onto** the porch before asking the men for their identifications. R. 74, ll. 13 – 19. R. 102, l. 5 – 103, l. 4. R. 52, ll. 14 – 16 (trial judge's finding that officers were on the porch when they asked to see identification). Robinson, and others, gave law enforcement their identification. R. 27, l. 14 – 29, l. 17.

Lieutenant Mike Ligon testified that "as soon as **coming up on the porch** and encountering these five individuals" they could smell a "strong odor of green marijuana." R. 10, ll. 10-17 (emphasis added). He also testified that, "**[a]s we actually got to them**" is when they could smell the 3.2 grams of marijuana, sealed in a plastic bag, and located in Robinson's jacket pocket. R. 30, ll. 19-21. R. 31, l. 21- 32, l. 8 (emphasis added). Of the

five people located on the porch, Ligon claimed that he could tell that either Robinson, or another male, had the marijuana. R. 33, ll.2-11.

As the officers were standing on the porch in possession of the men's identification, Ligon testified that he observed the butt of a pistol hanging out of Robinson's right jacket pocket. R. 76, ll. 4-9. At that point, Ligon informed the men that he was going to conduct a Terry[1] frisk. R. 77, ll. 4-5. When asked why he did not simply reach for the gun, the officer testified that he did not know:

> Q: -- and then you had the opportunity right there at that point to get on him. So why are you telling him you are going to search him and alert him to the fact that you are now going for the gun, instead of just going for the gun?
>
> A: I don't know. I can't tell you.

R. 106, ll. 16-22.

According to Ligon, at that point, Robinson began to back away from him, which scared him, and so he then grabbed for Robinson's weapon. R. 77, ll. 4-16. A tussle ensued, and Ligon managed to remove Robinson's jacket. Robinson then ran. Shortly thereafter, he was caught and handcuffed. The drugs were found in Robinson's jacket pocket and he was subsequently charged with these crimes. R. 15, l. 7- p. 16, l. 7.

Robinson argued a motion to suppress before trial started. R. 6 - 59. After hearing argument from Robinson and the State, the trial judge began his ruling with the following colloquy concerning whether these apartments were public housing:

> THE COURT: Let me ask you this. In looking at State's Exhibit 1 and for purposes of this hearing that appears to be a public housing project, is that correct?

---

[1] Terry v. Ohio, 392 U.S. 1 (1968).

MR. SPRINGS: It is, yes, sir.

THE COURT: And so the parking lot [we're] talking about really is a public parking lot, is that correct? I mean, it goes with the public housing, correct?

MR. SPRINGS: It does. It does. I pondered whether going into the question of how private—private property—

THE COURT: Well, that's not the key issue, but I'm just—the point I'm trying to make is that that appears to be a public housing project, right?

MR. SPRINGS: It is.

THE COURT: And, you know, **certain people are allowed to live there**, obviously, and meet certain criteria, and that sort of thing, as I understand it. But, in any event, the parking lot has a number of people. There are several apartments there, correct?

MR. SPRINGS: Yes, sir.

THE COURT: So there is—the parking lot out there really, there's people coming and going, but people live there and that. **And so it's not like a house that you got right here and then you have got a little bit of yard, that's your house and that's your yard.** Here you have got several apartments in one building, and there is more there, but all of these people have access to this parking lot, is that correct?

MR. SPRINGS: Yes, sir. Yes, sir.

R. 48, l. 5- 49, l. 8 (emphasis added). Following this discussion about public housing, the trial judge denied Robinson's suppression motion in a lengthy recitation of the facts and Fourth Amendment law. R 49, l. 24 – 59, l. 16. Robinson renewed his objection at the time the drugs were admitted. R. 179-180.

Discussion

Two recent United States Supreme Court cases demonstrate that the police violated the Fourth Amendment when they stepped on the curtilage of the apartment for the purpose of searching and seizing the occupants. Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013); United States v. Jones, ___ U.S. ___, 132 S.Ct. 945, 949 (2012). Jardines is very similar to this case; however, this brief will address Jones first because it was decided earlier and the reasoning of Jardines builds upon the reasoning of Jones.

A. The Court of Appeals Erred by Not Considering the Illegality of the Search

Before discussing the merits of the Fourth Amendment issue, the Court of Appeals' refusal to address the merits of the marijuana search should be examined by and reversed by this Court. The Court of Appeals held that Robinson could not contest the search as to the marijuana because he introduced it into evidence during his cross-examination of Ligon. App. 2-3. The Court of Appeals erred in finding that an error preservation rule applied to what was an obvious tactical decision made by trial counsel.

The question of the marijuana's suppression should not have been addressed differently because defense counsel introduced the evidence. Defense counsel only introduced the marijuana after the trial judge denied his motion to suppress. Defense counsel already had an unfavorable ruling from the trial court on the suppression issue, which undoubtedly altered his trial strategy. The Court should not punish petitioner for altering his strategy at trial after an incorrect ruling by the trial judge. The Court of Appeals should have addressed the suppression of the drugs together, and not separated the marijuana because of the change in strategy forced by the trial judge's erroneous ruling.

The trial judge's ruling on this issue after the suppression hearing was a final ruling.[2] Once a final ruling on an issue is obtained, counsel is allowed to mitigate the damage of the ruling without abandoning the preservation of the issue for appeal. See State v. Mueller, 319 S.C. 266, 267-68, 460 S.E.2d 409, 410-11 (Ct. App. 1995). In Mueller, the defendant asked for a ruling on whether the defense's first witness's prior convictions would be admissible for impeachment. See id. The trial court ruled one of the convictions was admissible. On direct examination, defense counsel asked the witness about the prior conviction to prevent the State from introducing it first on cross-examination. On appeal, the State argued the issue of the conviction's admissibility was not preserved because the defense introduced it during direct examination.

The Mueller court held that the issue was preserved, stating that "because the trial court's ruling was final, the defense had every right to rely on the ruling and raise the matter of the prior conviction strategically." Id. at 269, 460 S.E.2d at 411. "To force a defendant to choose between challenging an incorrect final ruling on appeal or minimizing the impact of damaging evidence would be fundamentally unfair." Id. As in Mueller, the defense in this case should not be punished for making a full and complete record during the suppression hearing, obtaining a final ruling from the trial judge, and then making a strategic decision to minimize the ruling's damage.

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[2] After Judge Alford ruled, defense counsel discussed the need for a contemporaneous objection during the trial. App. 64, l. 21 – 65, l. 15. Judge Alford agreed the issue would be preserved and gave no indication that his ruling would be subject to change at trial. In fact, Officer Ligon was the State's first witness, so nothing transpired after Judge Alford's ruling that could have changed his mind about the suppression issue.

B. United States v. Jones: A Return to Property Principles in the Fourth Amendment

Any police intrusion on private property for the purpose of obtaining information is a search under the Fourth Amendment. United States v. Jones, ___ U.S. ___, 132 S.Ct. 945, 949 (2012); see also McHam v. State, 404 S.C. 465, 477-80, 746 S.E.2d 41, 48-49 (2013) (finding officer's slight intrusion into a vehicle was a search under the Fourth Amendment). Jones compels suppression in this case. Comprehension of Jones' facts and reasoning is vital to reaching the correct result in this case. Jones concerned the government's warrantless placement of a GPS tracking device on the undercarriage of Jones' car. Id. at 948 and n.1. The government contended that a warrant was not required because the placement of the tracking device was not a "search" under the Fourth Amendment. Id. at n.1 and 950-51. The government argued that Jones had no "reasonable expectation of privacy" both in the underbody of his car and in the location of his car on public roads "which were visible to all." Id. at 950. The government's "reasonable expectation of privacy" argument was based on Katz v. United States, 389 U.S. 347 (1967).

Jones represents a return to a property rights tradition in the United States Supreme Court's jurisprudence because it rejects the notion that the Katz "reasonable expectation of privacy" test is the sole arbiter of whether government conduct constitutes a search. Jones at 953-54. Jones held that the Katz analysis is an additional layer of Fourth Amendment protection to an even more fundamental concern: property rights. Id. at 950-51.

To reach this conclusion for the majority, Justice Scalia found that the Court's "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." Id. at 949. The Court applied the text of the Fourth Amendment and its context when it was drafted and found that the right of the people to be free from

unreasonable searches and seizures in their "houses, papers, and effects" meant the drafters viewed the Amendment as having a "close connection to property." Id. The Court concluded that the Fourth Amendment, through its connection with trespass law as it was understood at the time it was drafted, must still contain this "minimum" protection. Id. at 953.

Nothing about the "minimum" protections afforded by the Fourth Amendment's "close connection" to property rights prevents the additional layer of protection given citizens under the Katz test. Jones clarified that "the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." Id. at 952 (emphasis in original). The Court also found that its consideration of property rights did not change the outcome of long-held propositions such as the idea that "mere visual observation does not constitute a search" or the "open fields" doctrine because neither instance implicated a constitutionally protected property right. Id. at 953-54. An examination of the facts and holding of Jones illustrates this difference.

The police affixed a GPS device to Jones' car that "relayed more than 2,000 pages of data" to the government. Id. at 948. The government (and the concurrence) argued that the GPS device provided no more information than could have been obtained from constant surveillance by police officers on public roads. Id. at 952 (noting government's argument that the exterior of a car is in the public eye and its examination is not a search) and at 953-54 (noting concurrence's argument concerning "traditional surveillance"). The majority held such a distinction made no difference, even if the proposition was correct. Justice Scalia wrote:

> Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4-week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

Id. at 953-54 (internal citation omitted). The reason the Court could avoid that question was because Jones **did** involve an actual physical trespass: the attachment of the government's GPS device to Jones' car. In order to attach the GPS device, the government needed a warrant. Id. at 954. See also State v. Dykes, 403 S.C. 499, 515 n.13, 744 S.E.2d 505, 518 n.13 (2013) (Hearn, J., noting in her dissent that trespass theory was dispositive in the Jones majority's decision).

The analysis of Jones applies with equal force to this case. The police were free to observe Robinson and his fellows because they were in public view. However, the police were not free to trespass on private property for the purpose of obtaining information or conducting a search. The police obtained no information about Robinson until after they committed a trespass. Stepping on the porch was a trespass. The police were there to obtain information and to search and seize the occupants. The police did not smell marijuana until they stepped on the porch. Therefore, under the "minimum" protection of Jones, the smelling of the marijuana on the porch was a Fourth Amendment search that required a warrant. Had the police smelled marijuana or seen marijuana from the parking lot, the property implications of Jones would not apply, but such a hypothetical situation is not before this Court.

C. Florida v. Jardines: The Application of Jones to the Curtilage

A post-Jones United States Supreme Court case demonstrates that this warrantless search violated the Fourth Amendment. Florida v. Jardines, ___ U.S. ___, 133 S.Ct. 1409 (2013). Much like the instant case, Jardines involved an illegal sniff by the police on a front porch. Id. at 1413. The police had "an unverified tip" that Jardines was growing marijuana in his home. Id. Without a warrant, the police took a drug dog into the curtilage of Jardines' house and on his front porch. Id. The dog indicated marijuana was present at "the base of the front door." Id. The police then used the dog's activity to obtain a warrant.

The Court ruled this police activity violated the Fourth Amendment. Id. at 1417-18. Justice Scalia wrote the majority opinion and found that the trespass analysis used in Jones made this an "easy" case. Id. at 1417. The majority decided the case solely on property rights grounds without resorting to the Katz test. Id. ("[W]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under Katz."). The facts of Jardines are nearly indistinguishable and therefore the result here should be the same. Both Jardines and this case involve a police sniff (one canine, one primate) on a front porch without a warrant. Both are illegal searches under the Fourth Amendment.

In a post-Jardines case, the Texas Court of Appeals recognized the Fourth Amendment rights of an apartment dweller. McClintock v. State, 405 S.W.3d 277 (Tex. Ct. App. 2013). In McClintock, the police placed a man's apartment under surveillance because they suspected drug activity. He lived in an apartment upstairs from a business. The police said they had seen him coming and going at odd hours, which was consistent with drug activity. The court found this assertion patently ridiculous and sarcastically used lyrics from several popular songs to show that the defendant's conduct could have been innocent. Id. at

286-87, n.3-n.6 (citing, e.g., Patsy Cline, George Strait, and the Beatles). The police crept onto the apartment's landing and used a drug dog to sniff at the door. Even though the police claimed the apartment landing was accessible to the public, the Texas court rejected this notion, finding the landing was part of the curtilage of the apartment. Id. at 283-84.

Similar to McClintock, the police in this case invaded the curtilage of an apartment based on claimed drug-related conduct which could have been innocent. The porch was located appurtenant to the apartment area, was part of its curtilage, and is a place where individuals engage in domestic activities. See United States v. Dunn, 480 U.S. 294 (1987); Oliver v. United States, 466 U.S. 170 (1984); Rogers v. Pendleton, 249 F.3d 279 (4th Cir. 2001); State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009) (Kittredge, J. and Pleicones, J. concurring). All the police saw was people from the porch walking to and from cars. Under the reasoning of Jardines and as applied in post-Jardines cases like McClintock, the warrantless intrusion by police in this case was illegal. See also State v. Tarantino, 368 S.E.2d 588 (N.C. 1988) (holding that officer's warrantless search from porch was invalid under Fourth Amendment)

D. The "Knock and Talk" License for Police Trespass Does Not Apply

Jardines also disposes of what would be perhaps the State's least distasteful argument in this case: that police are allowed to approach a home without a warrant "because that is no more than any private citizen might do." Id. at 1415-16. The Court distinguished the line of cases stating that "the subjective intent of the officer is irrelevant." Id.at 1416-17. Subjective intent is not considered unless the police conduct is objectively unreasonable. Id. at 1416. Jardines explicitly asked the question of "whether the officers had an implied license to enter the porch, which in turn depends

upon the purpose for which they entered." Id. at 1417. Jardines requires the Court to analyze the purpose of police conduct in a police trespass case such as Robinson's.

Jardines concluded that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." Id. at 1416 n.4. Perhaps because of the presence of the police dog, Jardines was marginally easier to decide than the current case. But not much easier. The police in this case came upon a group of young men socializing on their porch. They drove to the porch and shined their headlights on the men, keeping them illuminated as they walked to the porch. R. 24, l. 21 – 25, l. 4. Invited visitors do not behave this way. The police shined flashlights and flashed badges. R. 16, ll. 15 – 25. Invited visitors do not behave this way. They asked to see identification of people standing on their own porch. R. 29, ll. 7 – 17. Invited visitors do not behave this way.

The officers not only admitted their purpose was to investigate, but admitted they were unwelcome. Officer Ligon testified he was there "to investigate a crime." R. 27, ll. 14 – 17. They also admitted they would not have been welcome visitors. Officer Ligon testified he pulled his badge and identified himself as a police officer because he assumed a white person would not only be unwelcome, but would be in danger from young black men:

> Q. And by pulling out your badge, you are essentially giving a show of authority to let them know that you are the police and you want to – you are going to detain them to talk to them, correct?
>
> A. No, sir, it's to – basically for safety issues. If we – you know, if we don't identify yourselves as the police and then somebody wants to come back and – just say an instance with Mr. Robinson.

Q. Uh-huh.

A. You know, you have two white male subjects entering an area that is predominantly black.

Q. Yes, sir.

A. If they don't identify themselves as police officers, you know, things could potentially get bad in those areas.

R. 27, l. 18 – 28, l. 6. Immediately after making the statement, Officer Ligon then fatuously characterized his encounter with the men on the porch as "consensual." R. 28, ll. 11 – 12.

Nothing about the police officers' conduct that evening would lead a reasonable person to believe that they were welcome or this encounter was "consensual." Even the solicitor admitted that the officers' behavior appeared heavy-handed. The solicitor argued he should be able to tell the jury that the police were at this property because of anonymous tips. R. 59, l. 18 – 61, l. 14. Without this knowledge, he argued, the police "look like they are going out there like Nazi storm troopers, let's go out there **and roust these guys out.**" R. 61, ll. 14 – 16 (emphasis added). The solicitor's melodramatic comparison with the Gestapo aside, driving up to the property and demanding to see the papers of citizens standing on their own porch indicates law enforcement's purpose was beyond what would be expected of a normal visitor.

The idea that this encounter with the police was consensual because Robinson was "free to leave," as the police and the State contend, turns the Fourth Amendment on its head. A "free to leave" analysis may help address an encounter between the police and a citizen in a public place, but insults a man's rights when the police are trespassing

in his home. Robinson was lawfully on private property and should not have had to leave because of the police's actions. "At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" Id. at 1414 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). "This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose or just outside the front window." Id.

Overbearing police conduct was recently held to be an unreasonable search and seizure by the Fourth Circuit. United States v. Robertson, ___ F.3d ___, No. 12-4486 (4th Cir. Dec. 3, 2013). In Robertson, the defendant was sitting in a bus shelter. Id. at 2. Several officers approached the shelter and roused the people inside. Id. at 3. One of the officers first asked the defendant whether he "had anything illegal on him." Id. at 4. The officer then waved him forward to search him. Id. The defendant silently complied. Id. The Fourth Circuit reversed the district court's finding that this was a consensual encounter, describing the defendant's actions as a "begrudging submission to a command." Id. at 6. Just as in Robertson, the idea that Robinson and his friends on the porch consented to the police's overbearing conduct in this case simply because they relinquished their identification is fiction.

Justice Kagan's concurrence in Jardines further underscores the illegality of this search. She begins her concurrence with an analogy of a "visitor" who "doesn't knock or say hello" standing on your porch using high-powered binoculars to "peer through your windows." Id. at 1418. She concluded that such a "visitor" has not only trespassed, but

also invaded your reasonable expectation of privacy. Id. Creating a similar analogy for this case, if citizens are socializing on their own front porch, would a visitor who shines his car's headlights, strides onto your porch with a flashlight and a badge, and demands to see your driver's license be a welcome addition to their gathering? The answer is patently obvious under Jones, Jardines, or Katz.

Other courts applying Jones and Jardines under similar factual circumstances reach the conclusion that "knock and talk" does not save a warrantless entry. United States v. Perea-Rey, 680 F.3d 1179, 1186-88 (9th Cir. 2012). In Perea-Rey, U.S. Border Patrol agents watched a man scale the border fence between the United States and Mexico and followed him to Perea-Rey's house. Id. at 1182-83. Uninvited, the agent walked into Perea-Rey's carport. Id. Based on Jones and Jardines, the court determined that the warrantless entry into the carport was an entry into the curtilage and violated the Fourth Amendment. Id. at 1186. The court stated, "[T]he ability to see into the curtilage or the home does not, absent some other exception to the warrant requirement, authorize a warrantless entry by the government." Id.

The government contended that "the so-called 'knock and talk' exception to the warrant requirement" justified the warrantless trespass. Id. at 1187. The court rejected this contention, based in part on the agent's conduct. Id. at 1187-88. The court noted the agent "did not seek Perea-Rey's consent to enter the property or even to speak with him." Id. at 1188. The agent identified himself and ordered Perea-Rey not to move. Id. Importantly, the court held that "Perea-Rey never had an opportunity to simply ignore a knock on the door to his home by police." Id.

The same rationale applies in Robinson's case. The police simply barged onto the porch and demanded to see identification. While the police claimed this encounter was consensual, they never testified that they sought or received permission to step onto the porch. As the Perea-Rey court reasoned, "If we were to construe the knock and talk exception to allow officers to meander around the curtilage and engage in warrantless detentions and seizures of residents, the exception would swallow the rule that the curtilage is the home for Fourth Amendment purposes. Id. at 1189.

Perea-Rey also shows that the case relied upon by the Court of Appeals is of dubious validity after Jardines. The Court of Appeals relied on In the Matter of Bazen, 275 S.C. 436, 272 S.E.2d 178 (1980) for the proposition that Robinson did not have an expectation of privacy while standing on the porch. In Bazen, a police officer entered a man's carport and then smelled marijuana. Id. at 436, 272 S.E.2d at 178. The Bazen court only cited Katz and did not conduct a property analysis. Id. As shown by Perea-Rey, the failure to first conduct a trespass analysis in Bazen was erroneous. The Katz test alone does not control.

In Bazen, the men fled at the officer's approach. Id. In Perea-Rey and in this case, the police essentially cornered the men on their own property. Finally, the policeman in Bazen's response to a complaint of a loud noise is wholly unlike the surveillance operation conducted in this case. The officer's conduct in investigating a loud noise in Bazen, although a trespass, fit the circumstances of the investigation more than the multitude of officers in this case, at least one of whom could have sought out a magistrate and applied for a warrant. See State v. Dugan, 276 P.3d 819, 826-27 (Kan. Ct. App. 2012) (noting in Jones trespass-analysis Fourth Amendment case that the police had

no reason for not attempting to obtain a warrant). As in Perea-Rey, no exigent circumstances or other pressing need vitiated the requirement that the officers seek a warrant in this case. See also Powell v. State, 120 So.3d 577, 584-89 (Fla. Ct. App. 2013) (holding that knock and talk did not salvage officers' purposeful warrantless intrusion into the curtilage and peering through a window); State v. Ojeda, ___ So.3d ___, 2013 WL 1810631 (Fla. Ct. App. 2013) (holding that knock and talk did not apply when officer knocked on a neighbor's door for "no lawful reason"—to make a warrantless arrest).

Law enforcement's trespass on the porch was an unreasonable fishing expedition because they knew they lacked probable cause or reasonable suspicion in this case. Had the police believed they had probable cause or reasonable suspicion, then arguably they would not have needed the pretext of a traffic violation to stop cars leaving the scene. R. 25, l. 22- 27, l. 3. The police admitted these traffic stops were pretextual. R. 25, l. 22-27, l. 3. The level of police suspicion for the individuals on the porch can be no greater than for those in cars leaving the scene. The suspected crime may be different, but the quantitative amount of suspicion cannot.

In this case, the police—in the words of the solicitor—"rousted" these men who were standing on their own porch. They illuminated the porch with their headlights and strode onto the porch flashing badges and demanding to see identification. The police never asked for permission to enter the property. They had no excuse for not getting a

warrant. No exception to the warrant requirement existed. The police cannot use the "knock and talk" to excuse their unreasonable conduct in this case.[3]

E. Robinson's Status as a Guest is Immaterial

The Court of Appeals held that Robinson did not satisfy the Katz test, but as shown above, when the Jones trespass analysis is used, the Katz test need not be met. However, part of the Court of Appeals' reasoning contains the troublesome notion that Robinson could not show he had an expectation of privacy because "there is no evidence he was an overnight guest or otherwise had a connection to the premises or apartment lessee." App. 3. The court also stated, "Robinson failed to establish he had an expectation of not being discovered on the porch, nor did he ask the police to leave." App. 3. It appears the court impermissibly shifted the burden of proof to Robinson. "The prosecution bears the burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures." State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). It was not Robinson's duty to prove he was there lawfully. Under Jones and Jardines, the police had the burden to prove their presence was lawful.

More importantly, under the Jones and Jardines trespass analysis, the fact that Robinson was not an owner of the property is immaterial. See Jones at 949 n.2 (noting that

[3] Petitioner is not advocating a new bright-line rule in this case. This case can be easily decided based on the police trespass analysis of Jardines and the fact that warrantless searches are presumptively unreasonable. The conduct of the police here was unreasonable and the Court need not undertake the creation of any new rules governing "knock and talk" or warrant requirements in order to decide this case.

the car Jones was driving was registered to his wife and that the government conceded this had no effect on "his ability to make a Fourth Amendment objection"); People v. LeFlore, 996 N.E.2d 678, 686-87 (Ill. Ct. App. 2013). In LeFlore, a warrantless GPS case, the court addressed whether "a person who borrows a vehicle with the owner's consent comes into lawful possession of that vehicle and has standing to challenge a search under the fourth amendment." LeFlore at 686. The court held that "the State's trespass on [the owner's] vehicle would not have ended when the defendant came into lawful possession by borrowing the vehicle with consent." Id. at 687. The court concluded that, "if defendant came into lawful possession of the vehicle by borrowing it with [the owner's] consent, and while the State's trespass remained ongoing, his standing to challenge the use of the GPS device would come within the ambit of Jones." Id.

The LeFlore court's analysis applies with equal force to this case. The police committed a trespass and were continuing to trespass when the search occurred. The police behavior to be deterred by the exclusionary rule in this case is the warrantless trespass and search. If the Court were to decide that Robinson—who, as compared to the police—was lawfully on the premises cannot challenge the search because he was not a tenant, then the police have no incentive not to violate the Fourth Amendment. Under such a rule, if the target of a search was ever a guest in another's home, the police could invade without a warrant and conduct a search. The Fourth Amendment rights of all citizens would be at risk. Law enforcement's incentive to obey the Fourth Amendment's warrant requirement would be significantly reduced. Furthermore, in this case, the police had no idea who was the owner of the property and should not benefit from their own ignorance. Dumb luck should not absolve a violation of the Fourth Amendment.

Guests in another's home have a reasonable expectation of privacy. Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, 5th ed. § 11.3(b). As put by Professor LaFave in a hypothetical, "[W]hile *A* is legitimately present in *B*'s home as a dinner guest, it is quite reasonable for him to expect that *B*'s residence constitutes a zone of privacy where he as an individual may expect to be free from unreasonable governmental interference. Entry of *B*'s house in violation of the Fourth Amendment, even if unaccompanied by an arrest or search of *A*, may fairly be said to interfere with *A*'s personal privacy." Id.

Robinson is in an even better position than Professor LaFave's hypothetical dinner guest because his person was searched and seized. He had a legitimate expectation that his person would not be searched by the government while he was lawfully on his friend's property. This is not a case where the challenged items belonged to the owner of the property and Robinson challenges the admission of another's property. This case involves Robinson's own property, on his person, while he is lawfully on private property.

The cases cited by the Court of Appeals do not support the notion that Robinson did not have a reasonable expectation of privacy because he was not the property owner. App. 3, citing State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) and State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 728 (Ct. App. 2004). In Flowers, a guest refused police permission to enter a house he did not own. Flowers at 3-4, 598 S.E.2d at 727. When the owner arrived, she told police drugs were in the house and granted police permission to search her house. Id. The defendant objected, arguing that even though he was only a guest, his refusal to grant consent to search could override the property's owner's express permission. Id. While the Court of Appeals held Flowers did have an expectation

of privacy as a guest, he could not override the property owner's decision to grant consent. Id. at 5-6, 598 S.E.2d at 728.

Missouri strongly supports the position urged by Robinson in this case: even "social guests present for less than an overnight stay may enjoy a reasonable expectation of privacy in their host's home." Missouri at 114, n.3, 603 S.E.2d at 597 n.3. This Court recognized in Missouri that a majority of the United States Supreme Court concluded that the Fourth Amendment protects social guests present for less than an overnight stay. Id. citing Minnesota v. Olson, 495 U.S. 91 (1990) and Minnesota v. Carter, 525 U.S. 83 (1998). See also Kolle v. State, 386 S.C. 578, 589-90, 690 S.E.2d 73, 79 (2010) (holding that guests in an apartment had standing to challenge search); LaFave, Search and Seizure: A Treatise on the Fourth Amendment, 5th ed. § 11.3(b) (discussing the interplay of Olson and Carter and interpreting the cases in the exact fashion as this Court). From these cases, it is clear that the Court of Appeals and the trial court erred when they concluded that Robinson was not protected by the Fourth Amendment while on another's property.

E. Economic Class Should Not Diminish a Citizen's Fourth Amendment Rights

Respectfully, it also appears that the trial judge conflated the idea of a public housing project with whether the police were on public property. In addition to noting this was a public housing project, the trial court stated that "a lot of drug activity goes on" in this neighborhood. R. 50, ll. 12 – 19. This opinion was not based on any verifiable empirical evidence. See Andrew Guthrie Ferguson and Damien Bernache, The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis, 57 Am. U. L. Rev. 1587, 1591-93 (2008) (noting that the use of "high-crime area" in Fourth Amendment analysis has significant class and race biases

and suggesting a requirement that police use statistical data instead of "subjective assertions or unprovable suspicions.") The trial judge also stated that "certain people" were allowed to live in public housing. R. 48, ll. 19 – 23. He made a distinction between the privacy one might expect in a single-family home with a yard versus an apartment. R. 49, ll. 2 – 7.

Public housing apartments are not public property nor is this a proper consideration under the Fourth Amendment and Article I, Section 10 of the South Carolina Constitution. U.S. Const., Amends. 4, 14; S.C. Const. art. I, § 10. Citizens who live in housing projects should not have a lesser expectation of privacy than those who do not. See Christopher Slobogin, The Poverty Exception to the Fourth Amendment, 55 Fla. L. Rev. 391 (2003); Jordan C. Budd, A Fourth Amendment for the Poor Alone: Subconstitutional Status and the

Myth of the Inviolate Home, 85 Ind. L. J. 355 (2010); Amelia L. Diedrich, Note, Secure in their yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment, 39 Hastings Const. L. Q. 297, 317-322 (2011). The fact that people are disadvantaged economically should not also mean that they are disadvantaged under the law. The police admitted that law-abiding citizens residing in this subdivision often congregate on these porches and treat them as part of their home. R. 136, ll. 15-20.[4]

As discussed by these commentators, the practical effect of the privacy factors considered under the trial court and the Court of Appeals' analysis is that wealthier people can buy more constitutional rights than poor people. If a wealthy citizen can afford a house with a large yard, a fence, and a gate, then she receives more protection under the constitution than those who cannot. A poor person living in an apartment therefore receives less constitutional protection solely because of their economic circumstances. Had Robinson and his friends been on the front porch of a three-story mansion behind a fence and gate and the police had behaved in the same fashion, this search would easily be held in violation of the Fourth Amendment.

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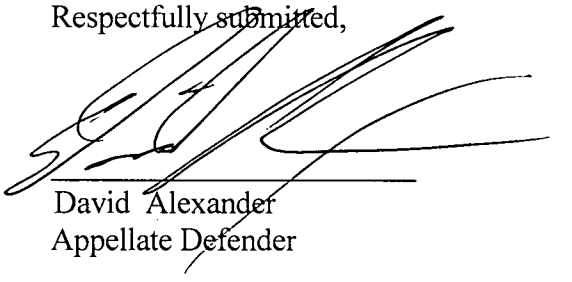
[4] The Florida Supreme Court's opinion in Jardines, which was affirmed by the United States Supreme Court albeit on the simpler trespass analysis, used an additional rationale that was unaffected by the United States Supreme Court's decision. See Jardines v. State, 73 So.3d 34, 48-49 (Fla. 2011). The Florida court emphasized the intrusiveness of the police behavior. Id. After noting that the police conduct took place "in plain view of the general public," the court was troubled by the lack of anonymity for the resident. Id. The court stated, "Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident. . . for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of a crime." Id. at 48. The rationale applies to the police conduct in Robinson's case and further demonstrates the wisdom of requiring judicial review through the warrant process as a check on such intrusions.

But because Robinson and his friends were poor, were hanging out in a poor neighborhood, and were standing on the only small piece of outdoor private property they had, their Fourth Amendment rights were discounted by the trial court and the Court of Appeals. This Court should reject this class distinction and treat rich and poor alike under our interpretation of the federal and South Carolina constitutions. See State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of protection than the Fourth Amendment."). The diminishment of any one citizen's constitutional rights, regardless of his economic class, threatens the rights of all.

CONCLUSION

For the foregoing reasons, the decisions of the trial court and the Court of Appeals upholding Robinson's conviction should be reversed.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 6th day of December, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

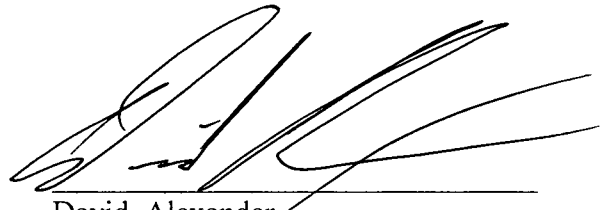
JOMAR ANTAVIS ROBINSON,

APPELLANT

APPELLATE CASE NO. 2012-212042

CERTIFICATE OF SERVICE

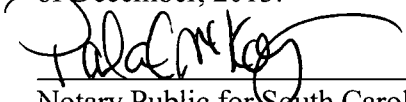
I certify that a true copy of the brief of petitioner, in this case has been served on Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of December, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day of December, 2013.



_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022