In The

Supreme Court of Virginia

RECORD NO. 151450

DANIEL PAUL OPRISKO,

Appellant,

v.

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 9, 2007, Daniel Paul Oprisko was indicted in the Newport News Circuit Court on one count of possession of marijuana with intent to distribute in violation of Va. Code § 18.2-248.1. Appendix [hereinafter abbreviated "Ap."] 1. At a suppression hearing on June 30, 2008, Oprisko moved to suppress evidence derived from a warrantless search by police using a drug-sniffing dog on the front porch of Oprisko's home. The dog alerted at Oprisko's front door, and the drug-sniffing dog evidence was used afterwards to obtain a search warrant to search Oprisko's home. Oprisko moved to suppress all evidence derived from the drug-sniffing dog as the product of an illegal warrantless obtained in violation of Oprisko's Fourth Amendment rights. Ap. 39-55, 57. After hearing evidence and argument on the motion, the Honorable C. Peter Tench, Judge of the Newport News Circuit Court, denied the motion to suppress. Ap. 41-55, 57.

On January 9, 2009, Oprisko was tried and convicted in a bench trial before Judge Tench.[1] Ap. 58-59. At the sentencing

[1] Although Judge Tench found the evidence sufficient to convict, he withheld making a finding of guilty until the sentencing on February 4, 2011. Ap. 58-59.

hearing on February 4, 2011, Judge Tench sentenced Oprisko to five years in prison, all suspended for a period of five years. Ap. 59-61.

On February 11, 2011, Oprisko filed a notice of appeal to the Court of Appeals of Virginia. Ap. 62-63. On June 14, 2011, Oprisko filed a 36-page petition for appeal in the Court of Appeals of Virginia, which argued that the trial court erred in denying Oprisko's motion to suppress, where "there was no probable cause or exigent circumstances present that would justify a [warrantless] search or survey of Oprisko's deep-set wooded lot or the bringing of a drug-sniffing dog up onto the curtilage of Oprisko's property and up to the front door of his property." The Court of Appeals affirmed the judgment of the trial court in a per curiam decision on September 14, 2011, and in a three-judge decision on January 31, 2012. Daniel Paul Oprisko v. Commonwealth of Virginia, Record No. 0314-11-1. Ap. 64-69. On May 25, 2012, the Supreme Court of Virginia refused Oprisko's petition for appeal. Daniel Paul Oprisko v. Commonwealth of Virginia, Record No. 120360. Ap. 70.

On March 26, 2013, the U.S. Supreme Court issued its decision in Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409 (2013), which addressed circumstances similar to those in Oprisko's case. In

Jardines, the U.S. Supreme Court held that the use by police of a trained detection dog to sniff for narcotics on the front porch of a private home is a "search" within the meaning of the Fourth Amendment to the United States Constitution, requiring probable cause and a search warrant. The U.S. Supreme Court affirmed the Florida Supreme Court's decision reversing Jardines' conviction for marijuana distribution.

On May 24, 2013, Oprisko timely filed a seventeen-page petition for writ of habeas corpus in the Newport News Circuit Court, pursuant to Va. Code § 8.01-654. Ap. 71-87. The habeas petition argued that Oprisko's conviction for possession of marijuana with intent to distribute should be set aside, asserting, "The ruling on a motion to suppress in Oprisko's case runs directly afoul of the U.S. Supreme Court's ruling in Florida v. Jardines, 569 U.S. [1] (2013) (decided March 26, 2013)." Ap. 71.

On August 12, 2013, the Attorney General filed a nine-page Motion to Dismiss in the Newport News Circuit Court, which alleged that the Florida v. Jardines decision introduced a new rule and was not retroactive, thus rendering it unnecessary to address whether the

Jardines case would alter the Newport News Circuit Court's suppression ruling in Oprisko's case. Ap. 88-96.

On January 28, 2014, a hearing via telephone conference call was conducted before the Honorable C. Peter Tench, Judge of the Newport News Circuit Court, in which Oprisko's habeas counsel, Charles E. Haden, and Assistant Attorney General Susan Baumgartner argued the motion to dismiss and the issue of whether or not the Jardines case was based on existing law and was retroactive in effect or whether the case introduced a new rule and was not retroactive. Ap. 97. Upon mature consideration of the pleadings and exhibits, controlling legal authority, and the arguments made by counsel during the approximately one-hour-long conference call, Judge Tench granted the Attorney General's motion to dismiss, denied Oprisko's request for a plenary hearing, and denied Oprisko's petition for writ of habeas corpus. Ap. 97-102. Because there was no court reporter present to transcribe the arguments of counsel, Oprisko's counsel asked for an opportunity to append a written statement of objections to the habeas court's final order.

On July 1, 2015, Judge Tench entered a six-page Final Order granting the Attorney General's Motion to Dismiss and denying

Oprisko's petition for writ of habeas corpus. Ap. 97-102. Appended to the order was a twelve-page Statement by Counsel for Petitioner Daniel Paul Oprisko of Reasons for Objecting to Entry of the Attached Order. Ap. 102-114. The Final Order noted that the record in the case of Commonwealth v. Daniel Paul Oprisko, Newport News Circuit Case No. CR07-061986-00, was incorporated into and made a part of the record in the habeas case. Ap. 97.

On July 22, 2015, Oprisko filed a notice of appeal to the Supreme Court of Virginia from the final order of the Newport News Circuit Court. Ap. 115-116. Oprisko's counsel noted in his notice of appeal that he would not file a transcript or statement of facts because the sworn pleadings and the final order with Oprisko's attached objections thereto were sufficient to document the arguments of counsel and the habeas court's ruling on the arguments. Ap. 115-116.

STATEMENT OF FACTS

Daniel Paul Oprisko was tried and convicted of having possessed in excess of one-half ounce but less than five pounds of marijuana with the intent to distribute, at Oprisko's home at 627 Randolph Road in Newport News on November 2, 2006. Oprisko, a 55-year-old research associate at the Jefferson Lab in Newport News who had no prior felony convictions, was discovered to be growing marijuana plants inside his house. Ap. 43-45.

At a pre-trial suppression hearing on June 30, 2008, before the Honorable C. Peter Tench, Judge of the Newport News Circuit Court, Oprisko moved to suppress evidence obtained in violation of his constitutional rights, where the police used a trained detection dog to sniff for narcotics on the front porch of his private home and thereby conducted an illegal warrantless search in the absence of probable cause, in violation of Oprisko's rights under the Fourth Amendment to the United States Constitution. Ap. 39-55. Oprisko presented evidence that he had posted "no trespassing" signs on his property, and that such no trespassing signs had been posted for nearly all of the twenty years that Oprisko had resided at 627 Randolph Road, a residence set back from the street on a deep wooded lot about an

acre in size and obscured from view from the street by the woods and undergrowth. Ap. 29-31, 34-35, 56 (Defendant's Exhibit 2 -- photograph). Oprisko had multiple "no trespassing" signs, including one posted on a tree by the gravel driveway leading to his house. Ap. 30, 35. Oprisko established this fact not only by the testimony of two neighbors, David Carmines and Mrs. Potts, but also by photographs. Ap. 56 (Defendant's Exhibit 2 -- photograph). Oprisko thus contended that any implied consent to enter upon the curtilage of Oprisko's property to contact him and ask some questions was thus negated by these obvious indicia of restricted access. Ap. 39-50. Although Detectives O'Halloran and Teechins testified that they never saw the "no trespassing" signs, it appears they weren't looking for them. The officers testified they never saw the "no trespassing" signs posted upon Oprisko's property but also never saw the "no trespassing" signs posted upon the property of David Carmines and Mrs. Potts when the officers went onto their property to take a walk around the edges of Oprisko's lot and determine what, if any, outbuildings were present on Oprisko's property. Ap. 6-20, 22-27. However, the testimony of David Carmines and Mrs. Potts and corroborating photographs clearly showed that their property and

Oprisko's property were marked "no trespassing." Ap. 29-31, 34-35. It would appear that the officers either intentionally ignored the "no trespassing" signs or failed to notice the "no trespassing" signs due to a remarkable degree of inattentiveness and obliviousness to their surroundings as they entered upon other persons' property. As Detective Teechins conceded, "I wasn't looking for any signs." Ap. 27. Judge Tench noted at the suppression hearing that he had difficulty seeing the word "no" in the "no trespassing" sign on Oprisko's property, but the word "trespassing" by itself should have put the officers on notice that they did not have implied consent and were not welcome to enter upon Oprisko's property. Ap. 30, 43-44.

Aside from the negation of implied consent resulting from the posted "no trespassing" signs, Oprisko contended that Detectives O'Halloran and Teechins exceeded the scope of implied consent to enter the curtilage of Oprisko's home. Specifically, to the extent, if any, there was an implied consent, Oprisko contended that such implied consent would be only to the approach to the front door to knock and make inquiry. Thus, if one presumed an implied consent (a circumstance Oprisko did not concede in light of his "no trespassing" signs), the officers at best had implied consent to go to

the entrance of the home only by the most direct route. The detectives did not, however, have implied consent to bring a drug-sniffing dog onto Oprisko's property to conduct a warrantless search. Moreover, the officers did not have implied consent to walk around the edges of Oprisko's lot to conduct a survey of Oprisko's property, including his backyard; to the extent that any implied consent existed, it would have been only to go to the entrance of Oprisko's home only by the most direct route to make contact with him. Instead, the officers walked around the edges of Oprisko's property including Oprisko's backyard, either actively searching for evidence of a crime within a constitutionally protected area or else actively seeking to determine what outbuildings were on the property so that those structures could be included in the officers' anticipated request for a search warrant. Either activity exceeded the scope of any reasonably implied consent. Moreover, there was no probable cause or exigent circumstances present that would justify a search or survey of Oprisko's deep-set wooded lot or the bringing of a drug-sniffing dog up onto the curtilage of Oprisko's property and up to the front door of his property, without a warrant and in the absence of probable cause.

Oprisko contended that the Newport News officers conducted a search or seizure within the curtilage of Oprisko's property, in the absence of probable cause and exigent circumstances, and without a warrant, and thus the officers' actions were presumptively unreasonable and unlawful. Oprisko contended the only evidence supporting probable cause in the subsequent search warrant pertained to the illegal search inside the curtilage of Oprisko's property with a drug-sniffing dog. The police subsequently obtained a warrant to search Oprisko's house, based on the probable cause derived from a drug-sniffing dog having "alerted" at the front door of Oprisko's house. The affidavit in support of the search warrant was based entirely upon the drug-sniffing dog's illegal entry upon the curtilage of Oprisko's property. At the suppression hearing, Oprisko contended that the affidavit supporting the search warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Moreover, Oprisko contended that where the issuance of the search warrant was based entirely upon evidence derived from a patently illegal search by a drug-sniffing dog, the warrant was rendered so facially deficient that the executing officers could not reasonably presume it to be valid. Moreover, where

the magistrate issued the search warrant based entirely upon what he should have recognized as illegally obtained evidence, one must conclude that the magistrate wholly abandoned his judicial role and acted as a rubber stamp to law enforcement. As Oprisko's counsel observed at the suppression hearing, "[T]here are a number of cases that say, number one, a dog sniff is a search, and also, that you can't get a search warrant based solely on an illegal search." Ap. 40. Thus, the Leon good faith exception did not apply. After hearing evidence and argument on the motion, Judge Tench denied the motion to suppress. Ap. 41-55, 57.

The Court of Appeals affirmed the trial court's denial of the motion to suppress in a per curiam decision on September 14, 2013, and in a three-judge decision on January 31, 2012. Daniel Paul Oprisko v. Commonwealth of Virginia, Record No. 0314-11-1. Ap. 64-69. On May 25, 2012, the Supreme Court of Virginia refused Oprisko's petition for appeal. Daniel Paul Oprisko v. Commonwealth of Virginia, Record No. 120360. Ap. 70.

On May 24, 2013, Oprisko timely filed a seventeen-page petition for writ of habeas corpus in the Newport News Circuit Court, pursuant to Va. Code § 8.01-654. Ap. 71-87. The habeas petition

argued that Oprisko's conviction for possession of marijuana with intent to distribute should be set aside, asserting, "The ruling on a motion to suppress in Oprisko's case runs directly afoul of the U.S. Supreme Court's ruling in Florida v. Jardines, 569 U.S. [1] (2013) (decided March 26, 2013)." Ap. 71.

On July 1, 2015, the Newport News Circuit Court entered a six-page Final Order granting the Attorney General's Motion to Dismiss and denying Oprisko's petition for writ of habeas corpus. Ap. 97-102. The Final Order ruled, among other things, that the Florida v. Jardines decision introduced a new rule and was not retroactive, thus rendering it unnecessary to address whether the Jardines case would alter the Newport News Circuit Court's suppression ruling in Oprisko's case.

ASSIGNMENTS OF ERROR

1. The habeas court erred in ruling that "it need not determine whether Florida v. Jardines would alter its suppression ruling in the instant case because Jardines introduced a new rule and is not retroactive," where the trial court's ruling was plainly wrong and contrary to what the U.S. Supreme Court indicated in Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409 (2013), in which the Jardines majority stated it was basing its holding on longstanding case precedent rather than announcing a new rule of constitutional law and thereby signaled that its holding would have retroactive effect. Ap. 83-84, 103-110.

2. The habeas court erred in denying Oprisko's request for a plenary hearing on his Petition for Writ of Habeas Corpus in which he is accorded the right to present witnesses and testimony in support of his habeas petition, where the allegations of the illegality of Oprisko's detention cannot be fully determined on the basis of recorded matters. Ap. 84-85, 111-114.

ARGUMENT

I. THE HABEAS COURT ERRED IN RULING THAT "IT NEED NOT DETERMINE WHETHER *FLORIDA V. JARDINES* WOULD ALTER ITS SUPPRESSION RULING IN THE INSTANT CASE BECAUSE *JARDINES* INTRODUCED A NEW RULE AND IS NOT RETROACTIVE," WHERE THE TRIAL COURT'S RULING WAS PLAINLY WRONG AND CONTRARY TO WHAT THE U.S. SUPREME COURT INDICATED IN *FLORIDA V. JARDINES*, 569 U.S. 1, 133 S. CT. 1409 (2013), IN WHICH THE *JARDINES* MAJORITY STATED IT WAS BASING ITS HOLDING ON LONGSTANDING CASE PRECEDENT RATHER THAN ANNOUNCING A NEW RULE OF CONSTITUTIONAL LAW AND THEREBY SIGNALED THAT ITS HOLDING WOULD HAVE RETROACTIVE EFFECT.

Standard of Review

Whether a habeas petitioner is entitled to habeas relief is a mixed question of law and fact, which is reviewed de novo. Laster v. Russell, 286 Va. 17, 22, 743 S.E.2d 272, 274 (2013). "[T]he [habeas] court's findings and conclusions are not binding upon this Court, but are subject to review to determine whether the [habeas] court correctly applied the law to the facts." Hash v. Director, Dep't of Corr., 278 Va. 664, 672, 686 S.E.2d 208, 212 (2009) (quoting Curo v. Becker, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997)). "The [habeas] court's factual findings, however, are entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them." Hedrick v. Warden,

Sussex I State Prison, 264 Va. 486, 496, 570 S.E.2d 840, 847 (2002); Dominguez v. Pruett, 287 Va. 434, 440, 756 S.E.2d 911, 914 (2014).

This assignment of error involves a potential violation of the Fourth Amendment. Constitutional arguments raise questions of law which are reviewed *de novo.* Covel v. Vienna, 280 Va. 151, 163, 694 S.E.2d 609, 617 (2010). Likewise, interpretation of statutory and common law "presents a pure question of law subject to *de novo* review" on appeal. Horner v. Dep't. of Mental Health, 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004).

Discussion of the Issue

Oprisko has assigned error to the trial court's ruling that "it need not determine whether Florida v. Jardines would alter its suppression ruling in the instant case because Jardines introduced a new rule and is not retroactive." Ap. 99. Oprisko submits that the trial court's ruling was plainly wrong and contrary to what the U.S. Supreme Court indicated in Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409 (2013). Oprisko noted the U.S. Supreme Court indicated in Jardines that it was basing its holding on longstanding case precedent as opposed to announcing a new rule of constitutional law and thereby signaled that its holding would have some retroactive effect.

Generally, whether criminal law decisions apply retroactively is determined under Teague v. Lane, 489 U.S. 288 (1989). Under Teague, a decision is retroactive if it is an "old rule," i.e., a decision dictated by prior court precedents. Under Teague, a decision is retroactive if (1) it is an "old rule," i.e., a decision dictated by prior precedent, or (2) it is a new substantive rule that narrows the scope of criminal liability, or (3) it is a new "watershed" procedural rule that is fundamental to the fairness of criminal proceedings. This is in contrast to the "new rule" situation, where the new rule for the conduct of criminal prosecutions is to be applied retroactively only to "cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

Because the Supreme Court indicated in Jardines that its decision was dictated by existing court precedents relating to the Fourth Amendment "search and seizure" rules that were in existence at the time of Oprisko's suppression hearing on June 30, 2008 and did not purport to be a "new rule," Oprisko contends that the Jardines decision ought to operate retroactively to invalidate Oprisko's

conviction, which was pending on direct appeal in the Virginia Court of Appeals when the U.S. Supreme Court granted certiorari on the question of law presented in the Florida v. Jardines appeal on January 6, 2012.

The U.S. Supreme Court plainly indicated in Jardines that it was basing its decision on existing property-based concepts of privacy rights under the Fourth Amendment, not announcing a new right or changing existing rights. The Fourth Amendment of the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Since the Supreme Court's decision in Katz v. United States, 389 U.S. 347 (1967), "the touchstone" of Fourth Amendment analysis has been "the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)), quoted with approval in Rideout v. Commonwealth, 62 Va. App. 779, 786, 753 S.E.2d 595, 599 (2014). As the U.S. Supreme Court has repeatedly made clear, however, the decision in Katz did not "'snu[f] out'" the previously recognized protection for

property; rather, Katz "established that 'property rights are not the sole measure of Fourth Amendment violations.'" United States v. Jones, 132 S. Ct. 945, 951 (2012) (quoting Soldal v. Cook Cnty., 506 U.S. 56, 64 (1992)) (holding that attaching a GPS device to the bumper of a motor vehicle was a trespass to property and, therefore, an unconstitutional search). In fact, the Court has "embodied that preservation of past rights in [the] very definition of 'reasonable expectation of privacy,'" which is "an expectation 'that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" Jones, 132 S. Ct. 945, 951 (2012) (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1998)).

Determining whether particular action by law enforcement constitutes a search for purposes of the Fourth Amendment involves a two-pronged test. First, a defendant must show "'that he personally has an expectation of privacy in the place searched.'" Rideout, 62 Va. App. at 786, 753 S.E.2d at 599 (quoting Carter, 525 U.S. at 88). Second, he must prove that his expectation is objectively "reasonable" based on "'a source outside of the Fourth Amendment.'" Rideout, 62 Va. App. at 786, 753 S.E.2d at 599 (quoting Carter, 525

U.S. at 88) (internal quotation marks omitted). The defendant may establish such a source by reference to either: (1) "'concepts of real or personal property law'" or (2) "'understandings that are recognized and permitted by society.'" Jones, 132 S. Ct. at 951 (quoting Carter, 525 U.S. at 88).

A classic example of an area in which one has an objectively reasonable expectation of privacy based on concepts of property law is the curtilage of one's home. See, e.g., Foley v. Commonwealth, 63 Va. App. 186, 194-95, 755 S.E.2d 473, 477-78 (2014). It is this property-based concept of privacy rights, analyzed by the Supreme Court in Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409 (2013), upon which Oprisko relies. In Jardines, the U.S. Supreme Court considered whether the use of a drug detection dog on the front porch of a private residence was a Fourth Amendment search of that residence, requiring either (1) a warrant or (2) probable cause and exigent circumstances. Jardines, 133 S. Ct. at 1413-18. In conducting this analysis, the U.S. Supreme Court highlighted the protections afforded to both the home and "the area 'immediately surrounding and associated with the home,'" referred to as the

curtilage. Jardines, 133 S. Ct. at 1414 (quoting Oliver, 466 U.S. at 180). It emphasized:

> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand [on] a home's porch or [in its] 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 from just outside the front window.

Florida v. Jardines, 569 U.S. 1, ___, 133 S. Ct. 1409, 1414 (2013) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). The U.S. Supreme Court noted the "ancient and durable roots" of the principle that the curtilage "is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" Id. at 1414-15 (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)). In contrast to areas qualifying as curtilage, the Jardines Court juxtaposed "open fields." Id. at 1414. It noted that the Fourth Amendment does not "prevent all investigations conducted on private property." Jardines, at 1414. It made clear that private property classified as "open fields" may be searched without a warrant or exigent circumstances because such areas are not considered to be protected by the Fourth Amendment. Id.; see

Johnson v. Commonwealth, 26 Va. App. 674, 684, 496 S.E.2d 143, 148 (1998) (noting that an area "'need be neither "open" nor a "field" as those terms are used in common speech'" in order to be so classified for Fourth Amendment purposes (quoting Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986))).

Based on these principles, the U.S. Supreme Court recognized in Jardines that the front porch is "the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" Jardines, 133 S. Ct. at 1415 (quoting Oliver, 466 U.S. at 182 n.12). It then proceeded to analyze whether the officers' investigation in a constitutionally protected area "was accomplished through an unlicensed physical intrusion." Id. It noted that despite strict common law rules preventing entry upon the property of another without permission, the "'license … implied from the habits of [our] country' … typically permits [a] visitor to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. (quoting McKee v. Gratz, 260 U.S. 127, 136 (1922)). The Jardines Court reasoned, therefore, that a police officer, without a warrant, may approach a home and knock on the door because a private citizen may engage in the same behavior. Id.

at 1416. However, it concluded that "background social norms that invite a visitor to the front door" do not include an "implied[] invit[ation] to enter the protected premises of the home in order to do nothing but conduct a search." Id. at 1416 & n.4. The Jardines Court made clear that it was not overruling its line of cases which hold that "canine inspection[s] of luggage in an airport" or "an automobile during a lawful traffic stop[] do not violate the 'reasonable expectation of privacy' described in Katz." Id. at 1417 (citing United States v. Place, 462 U.S. 696 (1983); Illinois v. Caballes, 543 U.S. 405 (2005)). It emphasized that the Katz test, upon which it had relied to validate dog sniffs, "'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment." Id. (quoting Jones, 132 S. Ct. at 952). As a result, the Jardines Court explained, it was unnecessary to engage in a broad expectation-of-privacy analysis under Katz when the government has obtained evidence "by physically intruding on [a] constitutionally protected area[]." Id.; see also Sanders v. Commonwealth of Virginia, 64 Va. App. 734, 743-47, 772 S.E.2d 15, ___ (2015).

In Jardines, "the officers learned what they learned only by physically intruding on [the defendant's] property to gather evidence."

Id. The Jardines Court held that this physical intrusion, standing alone, proved an unlawful search. Id. at 1417-18; see Jones, 132 S. Ct. at 951-52. Likewise, in the case at bar, Newport News police officers learned what they learned only by physically intruding upon Oprisko's property to gather evidence without a warrant. Oprisko had an objectively reasonable expectation of privacy that was violated by the police when they "physically intruded on a constitutionally protected area" by bringing a drug-sniffing police dog onto to the porch of Oprisko's house, set well back from the road on a wooded lot, well inside the curtilage of Oprisko's home, and had the dog sniff at the front door to Opisko's home. Just as Jardines had an expectation of privacy under existing Fourth Amendment law that was violated when the government has obtained evidence "by physically intruding on [a] constitutionally protected area[]," so too did Oprisko have an expectation of privacy under existing Fourth Amendment law that was violated by the government's physical intrusion on a constitutionally protected area.

Cases holding that Florida v. Jardines applies retroactively include People v. Burns, 2015 Ill. App (4th) 140006, at *9 (Ill. App., 2015) ("The State concedes Jardines applies retroactively to

defendant's case as it was not yet final at the time Jardines was decided…."); Osvaldo Miguel Perez v. State, Case No. PD-0231-15, WL 4040810, at *1, 23-24 (Tex. App. 2016) (unpublished opinion issued January 27, 2016) ("We conclude that the trial court was aware of and considered the Jardines issue; therefore, the issue was not forfeited. The holding in Jardines negates an essential part of the search warrant affidavit in this case, and without the canine search, there is no probable cause to uphold."); State v. Blake Christopher Davis, Case No. No. 05-15-00232-CR, at *7 (Tex. App., 2016) (unpublished opinion issued January 5, 2016) ("Jardines applied when the trial court ruled on appellee's motion to suppress and it applies to this Court's review of the State's issue on appeal."); Abran Elias v. State, Case No. 08-14-00215-CR, at *9 footnote 5 (Tex. App. 2016) (unpublished opinion issued January 13, 2016) ("[B]y the State's own acknowledgement, Jardines applies retroactively in this case…."). Using the key words "Florida v. Jardines AND retroactive" in a search on the FastCase and CaseFinder search engines, Appellant's counsel was unable to find any published or unpublished cases in any jurisdiction applying retroactivity rules to conclude that Florida v. Jardines was not retroactive in application. Appellant's

counsel searched on FastCase for an unpublished case from a federal district court in the Eastern District of Michigan, United States v. Purifoy, 2014 U.S. Dist. LEXIS 59347, *20 (E.D. Mich. April 3, 2014), which the Attorney General cited on page 14 of its brief in opposition for the proposition, "Jardines not retroactive," but Appellant's counsel was unable to locate the Purifoy decision on CaseFinder or find any opinion in any jurisdiction citing that case. In any event, a holding by a federal district court in Michigan is obviously not binding authority on the Supreme Court of Virginia.

No new rule was introduced in Jardines, and thus Jardines has retroactive effect. Prior to Jardines, the United States Supreme Court had decided drug dog sniff cases involving searches of automobiles, searches at the border, and searches of luggage at an airport. See, e.g., Illinois v. Caballes, 543 U.S. 405, 408-09, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (dog sniff of a car during a traffic stop); Indianapolis v. Edmond, 531 U.S. 32, 40, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (dog sniff at drug interdiction checkpoint); United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) (dog sniff of a traveler's luggage in the airport). Jardines did not explicitly overrule any of these cases -- they all dealt with different

circumstances. Jardines, 133 S. Ct. at 1417. Oprisko respectfully submits that the habeas court's ruling ignored the substance and import of the Jardines holding when the habeas court ruled that Jardines introduced a new rule and therefore wasn't retroactive. Oprisko thus respectfully objects that the habeas court's ruling regarding retroactivity is plainly wrong and without support under existing case law, including Jardines and Teague v. Lane, 489 U.S. 288 (1989). As the U.S. Supreme Court observed in Griffith v. Kentucky, 479 U.S. 314, 322, 107 S. Ct. 708, 713, 93 L. Ed. 2d 649 (1987), "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."

II. THE HABEAS COURT ERRED IN DENYING OPRISKO'S REQUEST FOR A PLENARY HEARING ON HIS PETITION FOR WRIT OF HABEAS CORPUS IN WHICH HE IS ACCORDED THE RIGHT TO PRESENT WITNESSES AND TESTIMONY IN SUPPORT OF HIS HABEAS PETITION, WHERE THE ALLEGATIONS OF THE ILLEGALITY OF OPRISKO'S DETENTION CANNOT BE FULLY DETERMINED ON THE BASIS OF RECORDED MATTERS.

Standard of Review

This assignment of error involves a mixed question of law and fact. A circuit court's finding on the issue of whether the allegations of illegality could be fully determined on the basis of recorded matters

alone is not conclusive and binding upon the reviewing court but is properly subject to judicial review. "[T]he [habeas] court's findings and conclusions are not binding upon this Court, but are subject to review to determine whether the [habeas] court correctly applied the law to the facts." Hash v. Director, Dep't of Corr., 278 Va. 664, 672, 686 S.E.2d 208, 212 (2009) (quoting Curo v. Becker, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997)). "The [habeas] court's factual findings, however, are entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them." Hedrick v. Warden, Sussex I State Prison, 264 Va. 486, 496, 570 S.E.2d 840, 847 (2002); Dominguez v. Pruett, 287 Va. 434, 756 S.E.2d 911 (2014). To the extent that this assignment of error requires interpretation of Va. Code § 8.01-654(B)(4), it is a question of statutory interpretation. Statutory interpretation "presents a pure question of law subject to *de novo* review" on appeal. Horner v. Dep't. of Mental Health, 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004); Wright v. Commonwealth, 275 Va. 77, 80-81, 655 S.E.2d 7, 9 (2008).

Discussion of Authority

Oprisko contends that the habeas court erred in refusing to conduct a plenary or evidentiary hearing pursuant to Va. Code § 8.01-654(B)(4) and Rule 4:15, in which Oprisko would be accorded the right to present witnesses and testimony in support of his habeas petition, where the allegations of the illegality of Oprisko's detention could not be fully determined on the basis of recorded matters alone. Va. Code § 8.01-654(B)(4) permits a habeas court to adjudicate a petitioner's claims based upon the trial record but does not prohibit the use of affidavits to supplement the record. Although a habeas petitioner is not entitled to a plenary hearing as a matter of right, see Yeatts v. Murray, 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995), the habeas court's authority to adjudicate the issues solely upon the record is conditioned upon a preliminary finding that "the allegations of the illegality of the petitioner's detention can be fully determined on the basis of recorded matters." Va. Code § 8.01-654(B)(2); see, e.g., Crawley v. Johnson, 09 Va. S. Ct. UNP 090144 (2009). As the Virginia Supreme Court observed in Superintendent v. Barnes, 221 Va. 780, 273 S.E.2d 558 (1981), due process requires a plenary

hearing unless the determination of validity can be made on the basis of the record alone:

> "[A] habeas court is not limited to the official record of the proceedings underlying the petitioner's conviction. If the issue "can be fully determined on the basis of recorded matters, the court may make its determination ... on the basis of the record." Code § 8.01-654(B)(4). Otherwise, due process requires a plenary hearing. "To be sure, the … record is competent evidence, … but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues." Townsend v. Sain, 372 U.S. 293, 322 (1963)."

Superintendent v. Barnes, 221 Va. 780, 785, 273 S.E.2d 558, 561 (1981).

A circuit court's decision whether to hold an evidentiary hearing in a habeas corpus proceeding depends chiefly on the adequacy of the trial record. Va. Code § 8.01-654(B)(4) addresses this issue and provides direction for the court's determination:

> In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

Va. Code § 8.01-654(B)(4)*;* see also Yeatts v. Murray, 249 Va. 285, 289, 455 S.E.2d 18, 21 (1995); Walker v. Mitchell, 224 Va. 568, 571, 299 S.E.2d 698, 699 (1983); Superintendent v. Barnes, 221 Va. 780,

785, 273 S.E.2d 558, 561 (1981); Friedline v. Commonwealth, 265 Va. 273, 277, 576 S.E.2d 491, 493-94 (2003).

In the case at bar, the matter at issue cannot be fully determined on the basis of recorded matters. In the Attorney General's Motion to Dismiss dated August 12, 2013, the Attorney General disputed certain facts asserted in Oprisko's sworn habeas corpus petition, and thus there existed a factual dispute that cannot be resolved by merely reading conflicting affidavits. It was therefore necessary to hold a plenary hearing to hear testimony of witnesses concerning the disputed facts and assess the credibility and demeanor of the witnesses.

For example, in the Attorney General's Motion to Dismiss, the Attorney General asserted that Oprisko "never established that the search warrant was based solely on information gathered when Detectives O'Halloran and Teechins used the drug-sniffing dog." Ap. 93. The Attorney General went on to assert that Oprisko's sworn habeas petition made conclusory assertions without providing sufficient factual evidence in support of the assertions, maintaining, "Petitioner proffers no facts to support his claim that "the affidavit in support of the search warrant was based entirely upon the drug-

sniffing dog's illegal entry upon the curtilage of Oprisko's property" and that Petitioner "neither cites to the record … nor offers any other support for this claim." Ap. 94. However, Oprisko did provide evidence for his assertions in his habeas petition, which was submitted to the trial court under oath by Oprisko himself. Ap. 72-77, 86. Plainly, a factual dispute existed in the competing pleadings of the parties that could not be resolved on the basis of recorded matters alone, and thus an evidentiary hearing was required.

The Attorney General noted that a reason the Virginia Court of Appeals affirmed the decision of the circuit court in Oprisko's direct appeal was that "The search warrant and the search warrant affidavit were not introduced as exhibits during proceedings in the trial court" and "the appellate record [did not] contain testimony regarding the contents of the search warrant affidavit." Ap. 93. Thus, as the Attorney General's implicitly admitted, the issue of whether the search warrant was based solely on information gathered when Detectives O'Halloran and Teechins used the drug-sniffing dog was a factual determination that could not be resolved by recorded matters alone.

A plenary hearing is necessary in this case to afford Oprisko an opportunity to call Detectives O'Halloran and Teechins as witnesses to establish that their application for a search warrant was based solely on information gathered when the two detectives used the drug-sniffing dog. A plenary hearing is also necessary to afford Oprisko the opportunity to introduce the search warrant and search warrant affidavit into evidence. As the Virginia Supreme Court observed in Superintendent v. Barnes, 221 Va. 780, 785, 273 S.E.2d 558, 561 (1981), the habeas petitioner "must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues." Because the trial court has refused to conduct an evidentiary hearing on the claims raised in Oprisko's habeas petition notwithstanding the existence of a serious factual dispute, Oprisko respectfully submits that the trial court erred in denying Oprisko's request to conduct a plenary hearing. Accordingly, the final order of the Newport News Circuit Court should be reversed and the matter remanded for a plenary evidentiary hearing.

CONCLUSION

For the reasons herein, it is requested that this Court reverse the judgment of the circuit court and set aside Oprisko's conviction, as the decision in Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409 (2013), operates retroactively to invalidate Oprisko's conviction, which was pending on direct appeal in the Virginia Court of Appeals when the U.S. Supreme Court granted certiorari in the Jardines case.

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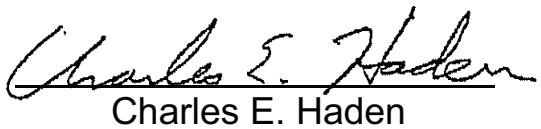
CERTIFICATE

I, Charles E. Haden, certify this 13th day of May, 2016 that: 1) An electronic copy of the Opening Brief of Appellant was served, via email, and electronic copies on CD of the Opening Brief of Appellant and Appendix were served, via UPS Ground Transportation, to Susan Baumgartner, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, 900 E. Main Street, Richmond, VA 23219-3548 (telephone: 804-786-2071; fax: 804-371-0151; email: sbaumgartner@oag.state.va.us); 2) electronic copies of the Opening Brief of Appellant and Appendix were e-filed, via VACES, and ten paper copies of the Opening Brief of Appellant and three paper copies of the Appendix were hand-filed in the Clerk's Office of the Supreme Court of Virginia, 100 N. Ninth Street, Richmond, VA 23219-2334; 3) I am a retained attorney; 4) I request oral argument; 5) the word count is 6,549 words; and 6) I have complied with Rule 5:26(h).



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