IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 151450

DANIEL PAUL OPRISKO,

Appellant,

v.

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Daniel Paul Oprisko appeals the Newport News Circuit Court's July 1, 2015, judgment denying and dismissing his petition for a writ of habeas corpus. The petitioner timely filed, through counsel, a habeas petition in the Newport News Circuit Court on May 24, 2013. It attacked the validity of his conviction on a single ground:

> "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. __ (2013) (decided March 26, 2013)."

(Case No. CL13H01214-00). The circuit court denied and dismissed the petition on July 1, 2015. (App. 97-102; hereinafter, "the Order"). This Court granted his petition for appeal on April 13, 2016.

ASSIGNMENTS OF ERROR

The petitioner has assigned the following assignments of error:

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.

II. The habeas court erred in denying Oprisko's request for a plenary hearing on his Petition for a Writ of Habeas Corpus in which he is accorded his 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 record matters.

(Pet. at 16-17).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Court of Appeals of Virginia summarized the facts underlying Oprisko's conviction as follows:

> On November 2, 2006, Detective O'Halloran of the Newport News Police Department received a narcotics complaint regarding appellant's residence at 627 Randolph Road. O'Halloran and Detective Teechins took a dog trained in narcotics detection to the residence to investigate. O'Halloran and Teechins walked through a heavily wooded area to take the most direct route from the street to the front door of the home. The drug dog alerted for the presence of narcotics when it was about twenty feet from the door of the home. The dog led the officers to the door and scratched on it. The officers knocked on the door, but no one answered. The officers returned the dog to the truck.
>
> O'Halloran and Teechins testified that they then walked to the side of appellant's driveway and property, along the edge of 625 Randolph Road, to obtain a more accurate description of appellant's property and outbuildings. At no point during his investigation did O'Halloran observe a "no trespassing" sign on appellant's property.
>
> David Carmines, who lived at 625 Randolph Road, testified that both he and appellant had "no trespassing" signs in their yard that had been

> there for a long period of time.[1] [[1] Photographs of "no trespassing" signs entered into evidence showed the lettering was faded into the black background, and the trial court found the signs were not readily visible to the police officers.] . . .
>
> O'Halloran executed a search warrant at 627 Randolph Road on November 2, 2006. During the search the police seized various items of evidence.
>
> The search warrant and the search warrant affidavit were not introduced as exhibits during proceedings in the trial court. Nor does the appellate record contain testimony regarding the contents of the search warrant affidavit.

(App. 64-65).[1]

When Oprisko moved to suppress, the trial court rejected his argument that the canine sniff itself constituted a search. (App. 40-41). The court instead reasoned that the police had an implied license to approach and knock on Oprisko's door and that bringing the dog to sniff did not alter that license. (App. 41-43).

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[1] The Circuit Court found this summary to be accurate. (App. 98).

At his bench trial, the evidence demonstrated that Oprisko was operating "a marijuana growing operation with four grow lights, power supply, gardening products, and fifty marijuana plants." (App. 66). The street value of the expected yield from those plants exceeded $200,000. (App. 67). Oprisko was convicted of possession with intent to distribute marijuana and sentenced to five years' imprisonment, all of which was suspended. (App. 97).

The petitioner appealed his conviction, alleging the following two grounds:

(1) The trial court erred in denying Oprisko's motion to suppress; and

(2) The trial court erred in concluding that the evidence was sufficient to prove beyond a reasonable doubt that Oprisko possessed marijuana with intent to distribute.

In a *per curiam* decision issued September 14, 2011, the Court of Appeals denied the petition for appeal. (Record No. 0314-11-1). A three-judge panel affirmed the denial, and this Court refused the petition for appeal on May 25, 2012. (Record No. 120360).

The next year, the Supreme Court of the United States decided *Jardines*. In that case, the police received a tip that marijuana was being grown in Jardines's home and, after watching the home for approximately fifteen minutes, approached it with a drug-sniffing dog. *Id.* at 1413. As they neared the porch, the dog signaled the presence of drugs, and the police obtained a warrant and found marijuana plants. *Id*. While the court reasoned that the police possessed an implicit license to approach the defendant's door and knock, it held that the act of bringing a drug-sniffing dog on that approach transformed it into a search. *Id.* at 1417-18. The Court affirmed the Florida Supreme Court's finding that the warrant was based on an illegal search and therefore unsupported by probable cause.

The petitioner timely sought habeas corpus relief based upon *Jardines*. (App. 71-85). On August 13, 2013, Respondent moved to dismiss the petition, arguing that *Jardines* was not retroactive and that Oprisko failed to proffer any evidence that the affidavit in support of

the search warrant was based only on the canine sniff. (App. 93-94). On January 28, 2014, the circuit court heard argument, after which it found that *Jardines* was not retroactive and dismissed the petition. This appeal follows.

ARGUMENT

STANDARD OF REVIEW

When a circuit court denies a habeas petition without an evidentiary hearing, this Court reviews the decision to dismiss the petition *de novo*. *Zemene v. Clarke*, 289 Va. 303, 307, 768 S.E.2d 684, 686 (2015). The decision whether to hold an evidentiary hearing, however, is reviewed for abuse of discretion. *Yeatts v. Murray*, 249 Va. 285, 290, 455 S.E.2d 18, 21 (1995).

ASSIGNMENT OF ERROR I

The circuit court correctly held that *Jardines*, a new procedural rule, was not retroactive because Oprisko's conviction was final when *Jardines* was decided. As this Court denied Oprisko's petition for appeal more than ninety days before the United States

Supreme Court decided *Jardines*, Oprisko's conviction was final when *Jardines* announced its new procedural rule. Accordingly, it is not retroactive to Oprisko's conviction.

A. The Law of Retroactivity Governs *Jardines*'s Applicability to Oprisko's Case.

Teague v. Lane, 489 U.S. 288 (1988), governs whether the *Jardines* ruling applies to the petitioner's conviction. *See Mueller v. Murray*, 252 Va. 356, 361, 478 S.E.2d 542, 546 (1996). "[A]s a general matter, 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'" *Welch v. United States*, __ U.S. __, __, 136 S. Ct. 1257, 1264 (2016) (quoting *Teague*, 489 U.S. at 310). The *Teague* inquiry is conducted in three steps: determining whether a petitioner's conviction was final when the ruling at issue was announced; determining whether the ruling at issue announced a new rule; and, if the first two inquiries establish that both a final conviction and a new rule exist, determining whether either of

two, narrow exceptions requires that the new rule be applied retroactively. *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997).

A conviction is "final" when the United States Supreme Court denies certiorari on a defendant's direct appeal or the time for him to seek certiorari expires. *Gonzalez v. Thayer*, __ U.S. __, __, 132 S. Ct. 641, 653-54 (2012).

"[A] case announces a 'new' rule if the result was not **dictated** by precedent existing at the time the defendant's conviction became final." *Mueller*, 252 Va. at 361, 478 S.E.2d at 546 (quoting *Teague*, 489 U.S. at 301) (emphasis in *Teague*). The petitioner misstates *Teague* and its progeny by instead arguing that there is no new rule when the Supreme Court decision "bas[es] its holding on longstanding case precedent." (Pet. Br. at 15). There is a distinction between a rule dictated by precedent and one based on precedent. A new rule has been announced if its outcome was susceptible to debate

among reasonable minds. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

If a United States Supreme Court decision announces a new rule, it applies retroactively to final convictions only if one of two exceptions is met. *Welch*, 136 S. Ct. at 1264. The first exception "applies to a rule that places certain kinds of 'primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Mueller*, 252 Va. at 366, 532 S.E.2d 549 (citations omitted). This type of rule is considered substantive, and such a rule "narrows the scope of a criminal statute by interpreting its terms" or "place[s] particular conduct or persons covered by the statute beyond the State's power to punish." *Welch*, 136 S. Ct. at 1265; *accord Montgomery v. Louisiana*, __ U.S. __, __, 136 S. Ct. 718, 736 (2016) (holding bar on mandatory life-without-parole sentences for juveniles was substantive and, therefore, retroactive). In contrast, procedural rules – which are not retroactive – "regulate only the

manner of determining" guilt. *Id.* (citation and internal quotation marks omitted; emphasis in original). A new rule regulating the admissibility of evidence is procedural and not included in this exception. *See id.*

The second exception "applies only to 'watershed' rules of criminal procedure, which are so fundamental that they are implicit in the concept of ordered liberty." *Mueller*, 252 Va. at 366, 532 S.E.2d 549 (citations omitted). Watershed procedural rules remedy "an impermissibly large risk of an inaccurate conviction." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations and quotation marks omitted). Accordingly, the holding of *Gideon v. Wainwright*, 372 U.S. 335 (1963), that all indigent felony defendants are entitled to legal representation was a watershed procedural rule because, without a defense attorney, "the risk of an unreliable verdict is intolerably high." *Whorton*, 549 U.S. at 419 (citations omitted). More limited procedural rules, however, are

consistently found not to be watershed rules. *See, e.g.*, *Chaidez v. United States*, __ U.S. __, __, 133 S. Ct. 1103, 1107 (2013) (holding *Padilla* rule was not retroactive); *Whorton*, 549 U.S. at 421 (holding *Crawford* rule was not retroactive).

B. Oprisko's Conviction Was Final when *Jardines* Was Announced.

This Court denied Oprisko's petition for appeal on May 25, 2012. (App. 70). As he did not seek certiorari from the Supreme Court of the United States, his conviction was final on August 23, 2012, his last day to do so. *Gonzalez*, 132 S. Ct. at 653-54. The United States Supreme Court did not announce its decision in *Jardines* on March 26, 2013.

The fact that Oprisko's direct appeal was pending when the Supreme Court granted certiorari in *Jardines* (Pet. Br. at 16-17) is irrelevant. The inquiry is whether the challenged conviction was final when the new rule was "announced," not when the Supreme Court agreed to hear the issue. *Welch*, 136 S. Ct. at 1264; *Teague*, 489 U.S. at 310. Indisputably, Oprisko's

conviction was final when the Supreme Court announced its holding in *Jardines.*

C. *Jardines* Does Not Apply Retroactively To Oprisko's Conviction.

The circuit court correctly dismissed Oprisko's petition for a writ of habeas corpus because his conviction was final when the court issued *Jardines* and because *Jardines* does not meet the requirements for retroactivity. Oprisko bases his argument for retroactivity on a claim that *Jardines* did not introduce a new rule. (Pet. Br. at 25). He is mistaken.

Jardines announced a new rule of criminal procedure. Its holding was contrary to Virginia and federal precedent. This Court previously refused to limit the scope of implied consent to enter a homeowner's curtilage "to the most direct path to the front door of a dwelling to 'knock and talk' with one of its residents." *Robinson v. Commonwealth*, 273 Va. 26, 35, 639 S.E.2d 217, 222 (2007). In doing so, it relied on United States Supreme Court precedent that refused to consider a police officer's subjective

intent for entering private property. *Id.* at 37-38, 639 S.E.2d at 223-24 (citing *Brigham City v. Stuart*, 547 U.S. 398 (2006)). The *Jardines* court, however, rejected an implied license for the police to approach Jardines's door precisely because of the officer's subjective intent, as demonstrated by bringing a drug-sniffing dog, which it found to be a search. *Jardines*, 133 S. Ct. at 1416.

Further, the United States Supreme Court had previously held that a canine sniff was not a search and did not convert otherwise legal activity into a constitutional violation. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (dog sniff did not change the character of a lawful traffic stop because sniff itself did not infringe on privacy interests); *United States v. Place,* 462 U.S. 696, 708 (1983) (dog sniff of luggage in a public place "did not constitute a 'search' within the meaning of the Fourth Amendment."). The *Jardines* Court explicitly found that its *Caballes* and *Place* holdings did not apply, instead basing its

holding on property rights and analogy. Given the pre-*Jardines* case law and the Supreme Court's failure to cite to any precedent where it had found a dog sniff to be a search, *Jardines* is a new rule under *Teague*.

The very fact that *Jardines* was a five-to-four decision suggests that reasonable minds vigorously debated its outcome and were unable to agree. *See Butler*, 494 U.S. at 415 (outcome's susceptibility to debate among reasonable minds indicates outcome is new rule). Only three justices – one third of the court – agreed, in the concurrence, that the case was governed by "firm" and "bright" precedent. *Jardines*, 133 S. Ct. at 1419 (Kagan, Ginsburg, and Sotomayor, JJ.).

Multiple courts have recognized that *Jardines* announced a new rule. *See United States v. Lozano*,[2] Criminal No. 12-CR-174, 2013 U.S. Dist. LEXIS 163670, at *14 (D. Minn. Nov. 18, 2013) (characterizing *Jardines* as an "unanticipated change in the law"); *United States v. Cota,* Case No. 1:12-CR-00209-TWP-TAB,

[2] Pursuant to Rule 5:1(f), unpublished cases are cited for informative, not precedential, purposes.

2013 U.S. Dist. LEXIS 120008, at *10 (S.D. Ind. Aug. 23, 2013) (noting that *Jardines* departed from Supreme Court precedent); *United States v. Herman*, Case No. 10-CR-20003, 2013 U.S. Dist. LEXIS 110938, at *15-16 (C.D. Ill. Aug. 7, 2013) (recognizing that *Jardines* "called into serious question" precedent that canine sniff was not search). Accordingly, because *Jardines* announced a new rule after Oprisko's conviction became final, it applies to this case only if it meets one of the two exceptions. *Welch*, 136 S. Ct. at 1264. It meets neither.

The first exception does not apply because *Jardines* does not narrow the scope of drug possession statutes, prevent the Commonwealth from punishing a specific type of conduct, or offer certain people immunity from punishment. *See Welch*, 136 S. Ct. at 1265. To the contrary, it only regulates the manner of determining guilt by, in this case, regulating the admissibility of certain evidence obtained through the reliance on a positive canine sniff. This makes it a criminal

procedural rule that does not fall under the first *Teague* exception. *See Montgomery*, 136 S. Ct. at 736.

The second exception does not apply because *Jardines* is not a "watershed" rule. This case presents no likelihood of an inaccurate verdict if the contested evidence were admitted because "claims of illegal search and seizure do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers.'" *Stone v. Powell*, 428 U.S. 465, 479 (1976) (quoting *Kaufman v. United States*, 394 U.S. 217, 224 (1969)). Because the exclusionary rule excludes highly probative evidence despite its reliability, no risk of an unreliable verdict would occur if *Jardines* were not applied retroactively. Accordingly, its rule does not meet the second exception. *See Whorton*, 549 U.S. at 419.

Oprisko cites no cases that have applied *Jardines* retroactively to convictions that were already final on March 26, 2013.[3] It appears that no published cases have addressed the issue. The two unpublished cases that have, however, both found that *Jardines* did not apply retroactively to final convictions. *United States v. Purifoy*, Case No. 2:08-CR-20238, 2:11-CV-1504, 2014 U.S. Dist. LEXIS 59347, at *18 (E.D. Mich. Apr. 23, 2014), adopted by 2014 U.S. Dist. LEXIS 58392 (E.D. Mich. Apr. 28, 2014); *Webb v. Coakley*, Case No. 4:13-

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[3] Because Oprisko's case was final, every case that he claims found *Jardines* to be retroactive is inapposite because none of those cases were final when *Jardines* was announced. (Pet. Br. at 23-24). *See Elias v. State*, No. 08-14-00215-CR, 2016 Tex. App. LEXIS 324, at *5 (Tex. Ct. App. Jan. 13, 2016) (*Jardines* issued before suppression hearing held); *State v. Davis*, No. 05-15-00232-CR, 2016 Tex. App. LEXIS 16, at *8 (Tex. Ct. App. Jan. 5, 2016) (*Jardines* issued before suppression hearing held); *People v. Burns*, 25 N.E.3d 1244, 1246 (Ill. App. Ct. 2015) (*Jardines* issued before motion to suppress filed), *aff'd* 2016 IL 118973, 2016 Ill. LEXIS 281 (Mar. 24, 2016); *Perez v. State*, No. PD-0231-15, 2015 Tex. Crim. App. Unpub. LEXIS 937, at *2 (Tex. Crim. App. July 1, 2015) (direct appeal pending when *Jardines* issued). His citation of *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987), similarly conflates retroactivity to final convictions with the application of new rules to cases pending on direct appeal. (*See* Def. Br. at 26).

CV-649, 2013 U.S. Dist. LEXIS 60953, at *13 (N.D. Ohio Apr. 29, 2013).

Accordingly, this Court should refuse the petition to appeal the circuit court's denial of habeas relief because the circuit court did not err in finding that *Jardines* was not retroactive.

ASSIGNMENT OF ERROR II

The circuit court did not err in denying Oprisko an evidentiary hearing. *Jardines*'s retroactivity is a pure question of law that does not require the development of evidence. Even if the circuit court had mistakenly found that *Jardines* did apply to Oprisko's case, however, Oprisko's petition would not have entitled him to an evidentiary hearing.

A. No Evidentiary Hearing Was Necessary To Determine *Jardines*'s Retroactivity.

Because the circuit court correctly found that *Jardines* was not retroactive, no evidentiary hearing was necessary. The petitioner's sole ground for habeas relief was that his case ran "directly afoul" of *Jardines.* (App. 71). As a threshold requirement for

relief, therefore, *Jardines* had to apply to his conviction.

This threshold determination of retroactivity is purely a question of law. *Mays v. United States*, 817 F.3d 728, 732 (11th Cir. 2016) (retroactive application under *Teague* is question of law); *Jones v. Davis*, 806 F.3d 538, 543 (9th Cir. 2015) (same); *cf. Matherly v. Andrews*, 817 F.3d 115, 119 (4th Cir. 2016) (retroactive application of statute is a question of law); *Taylor v. Commonwealth*, 44 Va. App. 179, 184, 604 S.E.2d 103, 105, (2004) (same). The specific facts of Oprisko's conviction had nothing to do with whether *Jardines* applied to convictions that were final when the United States Supreme Court announced its *Jardines* decision.

Moreover, if *Jardines* was not retroactive, the only relevant fact of Oprisko's conviction was the date on which it became final. The date on which Oprisko's conviction became final is a matter of record, and it is indisputable. (App. 70). The court properly denied the evidentiary hearing because the record contained

sufficient information to refute the essential allegation of the petition: that he was entitled to relief under *Jardines*. *See Smith v. Warden*, __ Va. __, __, 781 S.E.2d 744, 747 (2016) ("In many cases, habeas claims can be resolved solely on the recorded matters.").

B. Oprisko's Habeas Petition Did Not Entitle Him to an Evidentiary Hearing.

Even if this Court finds that the circuit court erred in finding that *Jardines* was not retroactive, however, this Court should deny Oprisko relief due to the deficiencies of his habeas petition. The petitioner waived review of the sufficiency of the search warrant on direct appeal. Moreover, his petition is conclusory and does not contain sufficient facts to establish a *prima facie* case that his search warrant was granted solely due to a canine sniff.

Challenges to the validity of a search warrant are properly heard on direct appeal. *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974) (non-jurisdictional defects must be raised at trial or

on direct appeal). Here, while Oprisko assigned error to the search, his challenge was barred by his failure to include the search warrant and its affidavit in the record. (App. 66). Accordingly, the petitioner's attack on the search warrant's validity is not cognizable because substantive claims must be raised at trial and on direct appeal, not in habeas corpus. *Parrigan*, 215 Va. at 29, 205 S.E.2d at 682. Oprisko now asks this Court to apply a new rule despite his failure to obtain a merits decision previously.

Additionally, the petitioner failed to proffer sufficient facts to the circuit court that entitled him to an evidentiary hearing. Even if Oprisko had met the threshold of establishing that *Jardines* applied retroactively, he did not proffer sufficient facts to establish a *prima facie* case that *Jardines* applied to his conviction. In arguing why he was entitled to a hearing, Oprisko conflates his burdens to establish both a *prima facie* case and a material dispute of fact. (Pet. Br. at 30). To obtain an evidentiary hearing, a

petitioner must allege sufficient facts to establish a *prima facie* case. *Smith*, __ Va. at __, 781 S.E.2d at 747; *Fitzgerald v. Bass*, 6 Va. App. 38, 44, 366 S.E.2d 615, 618 (1988) (*en banc*). Here, Oprisko proffered no evidence that the search warrant was based solely on the canine sniff; indeed, he proffered no evidence of the contents of the search warrant. This failure to proffer a *prima facie* case is not a material dispute of fact because he establishes no facts.

The petitioner claims that his personal assertion that the search warrant was based solely on the canine sniff was a sufficient *prima facie* showing. (Pet. Br. at 31). To the contrary, his "mere conclusions or opinions" do not make out a case. *Fitzgerald*, 6 Va. App. at 44, 366 S.E.2d at 618; *accord Muhammad v. Warden*, 274 Va. 3, 19, 646 S.E.2d 182, 195 (2007) (petitioner's claim that counsel was ineffective for failing to call expert witnesses failed because he did not proffer affidavits of experts explaining what their testimony would have been). This is particularly true

because there is no evidence that Oprisko has any personal knowledge of the search warrant affidavit; as it is not part of the underlying criminal record and he was not privy to its preparation, there is no reason to believe that he knows anything about its contents. *See Burket v. Angelone*, 208 F.3d 172, 185-86 (4th Cir. 2000) (noting that court struck affidavits in state habeas because they were based on hearsay rather than personal knowledge).

The petitioner had the opportunity to proffer sufficient facts in his petition. He claims that the basis for the search warrant could not be established based on recorded matters and instead requires an evidentiary hearing. (Pet. Br. at 31-32). This claim relies on a misapprehension of what counts as a recorded matter; it is not, as he argues, simply the underlying criminal record. (App. 31). Habeas courts routinely consider affidavits and exhibits along with the criminal record. *Smith*, __ Va. at __, 781 S.E.2d at 747. If Oprisko wanted to establish the basis of the

search warrant, he could have proffered either the search warrant affidavit or affidavits from Detectives O'Halloran and Teechins. Instead, he requested an evidentiary hearing as a fishing expedition. Hearings are granted when there is a dispute of fact; not to give one side the opportunity to discover a fact.

Finally, even if Oprisko had established retroactivity and received a hearing to present evidence regarding the contents of the search warrant affidavit, he would have been unable to demonstrate prejudice because there remained yet another legal bar to relief. Even if *Jardines* applied retroactively, meaning Oprisko could rely upon it, the exclusionary rule does not apply to evidence obtained from a seizure that was proper under then-existing law and became improper only after a later case was decided. *See Davis v. United States*, 564 U.S. 229, 232 (2011). The purpose of the exclusionary rule is to deter police misconduct. Because law enforcement officers in this case followed established precedent and did not engage

in misconduct, the exclusionary rule does not apply to Oprisko's case.

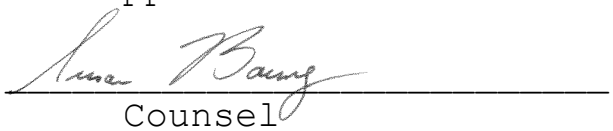
Should this Court, then, find that the trial court erred in finding that *Jardines* was not retroactive, it should not remand the case for further proceedings. Instead, it should affirm the dismissal on the alternate grounds that Oprisko's claim is not cognizable under *Parrigan* and that he failed to state a *prima facie* case for relief.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

DIRECTOR OF THE
DEPARTMENT OF CORRECTIONS,
Appellee herein.



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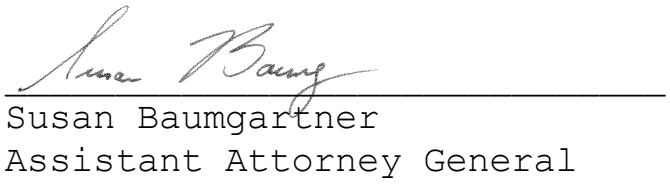
CERTIFICATE OF TRANSMISSION AND SERVICE

On June 3, 2016, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5:26(e). A copy was emailed to appellant's counsel, Charles E. Haden, Esquire, at cehaden@mindspring.com. In accordance with Rule 5:26(h), I certify that this document contains 4,323 words, in compliance with Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.



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