No.____-_____

IN THE SUPREME COURT OF THE UNITED STATES

TREMAYNE ANTWANE MITCHELL,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX TO WRIT OF CERTIORARI

Attached Appendix A.....13 pages

Attached Appendix B.....20 pages

Attached Appendix C.....2 pages

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APPENDIX A.....13 pages

Unpublished Opinion,

United States v. Mitchell, No. 17-4317 (4th Cir. March 28, 2018)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4317

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

TREMAYNE ANTWANE MITCHELL,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge. (4:16-cr-00083-AWA-LRL-1)

Argued: December 7, 2017 Decided: March 28, 2018

Before NIEMEYER and AGEE, Circuit Judges, and Paula XINIS, United States District Judge for the District of Maryland, sitting by designation.

Reversed and remanded by unpublished opinion. Judge Xinis wrote the opinion, in which Judge Niemeyer and Judge Agee concur.

ARGUED: Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellant. Nicholas Ryan Hobbs, HOBBS & HARRISON, PLLC, Hampton, Virginia, for Appellee. **ON BRIEF:** Dana J. Boente, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

XINIS, District Judge:

The government appeals the district court's order granting Tremayne Antwane Mitchell's motion to suppress evidence seized by police officers during a search of Mitchell's apartment. For the reasons stated below, we reverse.

I

The afternoon of June 27, 2016,[1] police officers Zachary Lyons and Glenn Marshall were on routine patrol at Pinedale Manor apartments located in Newport News, Virginia. Pinedale Manor is a two-story garden style apartment complex. The apartment buildings overlook a common parking lot, with sidewalks running the length of each apartment building and directly in front of the apartment doors. The complex is not gated, and the parking lot and sidewalks are openly accessible to members of the public. Management at Pinedale Manor encouraged Newport News police to patrol the complex so as to combat the high incidence of drug-related crimes. Officers typically patrolled on foot and bicycle throughout Pinedale Manor.

On June 27, 2016 at about 2:49 p.m., Newport News Officers Lyons and Marshall were on bike patrol at the apartment complex. As Officer Marshall passed in front of apartment A6, he smelled the strong odor of burning marijuana. Officer Lyons, who was riding his bicycle on the grassy area between the sidewalk and parking lot, also smelled marijuana coming from A6. Both officers were trained and experienced in smelling raw and burnt marijuana.

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[1] The district court's opinion states that these events took place on July 27, 2016. However, the record reflects that the investigation, executed search warrant, and arrest all occurred on June 27, 2016.

The officers then spent several minutes investigating the odor's source by separately walking the length of the first floor sidewalk and second floor landing of the apartment building. Each officer noted that the odor was strongest near A6, a street level apartment with the front door abutting the sidewalk. Officer Lyons sniffed the windowsill of A6's exterior screened window. Officer Marshall also smelled the exterior doorframe of A6's front door. Confident in the odor's source, Officer Lyons then knocked on A6's door.

When Mitchell opened the door, the officers immediately smelled "a stronger odor of marijuana come from [inside] the residence." Officer Lyons informed Mitchell and the other occupant, Sean Mitchell,[2] that the officers noticed a "problem" with the apartment window so as to peaceably draw the men outside. Once outside, the officers informed the men that they had smelled marijuana coming from the apartment. For officer safety and to guard against potential destruction of evidence, the men were kept outside, placed in handcuffs, and patted down. The officers asked for consent to search the apartment for narcotics, and when both men declined, Officer Lyons left to obtain a search warrant.

Officer Marshall, joined by another Newport News officer, stayed with the two men. The officers advised that although the men were not under arrest, they were detained and not free to leave. During the one-and-a-half hours it took Officer Lyons to obtain the search warrant, the two men and the officers stayed outside the apartment.

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[2] The district court's opinion repeatedly states that Tremayne Antwane Mitchell and Sean Mitchell are brothers. They are not. In fact, no record evidence suggests that the men are related.

Officer Lyons affirmed in the affidavit for the search warrant as follows:

> On June 27, 2016, at 1449 hours in the City of Newport News, Officer Lyons and Marshall were on bike patrol in the area of 749 Adams Drive. Officer Marshall rode past apartment A6 when he detected the odor of Marijuana coming from the apartment. When Officer Lyons rode past the window of the apartment[,] he also detected the odor of fresh marijuana. Both officers made contact with the residence [sic] and had them step out of the residence. Once both occupants stepped out Officer Lyons advised them of the situation and told them they were both detained for a narcotics investigation at 1450 hours. When the door to apartment A6 opened the strong odor of marijuana emitted from the apartment.

Based on this application, the local magistrate issued the warrant, finding that probable cause existed to believe that evidence of marijuana possession would be found in apartment A6, in violation of Virginia Code § 18.2-250.1. The execution of the search warrant revealed three partially burned marijuana cigarettes and a loaded semiautomatic firearm in Mitchell's bedroom. Mitchell was then charged in federal court with possession of a firearm after having sustained a felony conviction, in violation of 18 U.S.C. § 922(g)(1).

Mitchell moved to suppress the seized evidence, contending that the officers' sniffs of the exterior windowsill and door constituted a search in violation of his Fourth Amendment rights to be free from warrantless searches and seizures. Mitchell alternatively argued that even if the officers' "sniff" was not a search, the officers lacked probable cause to believe the Commonwealth's marijuana statute had been violated because the same statutory provision exempts marijuana possession for medical purposes.

At the suppression hearing, Officers Lyons and Marshall testified as to the events leading up to the search, and the court reviewed body camera footage that largely

corroborated the officers' testimony. Notably, the suppression hearing focused exclusively on whether the officers' sniffing the exterior window and door constituted a "search" cognizable under the Fourth Amendment. Mitchell had not challenged, and the district court did not address, the veracity of Lyons' affidavit submitted in support of the search warrant.

In a written opinion issued after the hearing, the district court granted Mitchell's motion to suppress, finding that the officers' sniffing the exterior window frame and doorjamb constituted a warrantless search in violation of Mitchell's Fourth Amendment rights. The district court then *sua sponte* determined that because the search warrant relied on Officer Lyons' knowing or reckless omission of material information as to the officers' sniffs, the warrant was obtained in bad faith, requiring suppression of the evidence. The district court so held even though Mitchell never requested a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), which sets forth the well-established procedure for mounting challenges to a search warrant predicated on false or misleading information. Nor did the district ever hold a *Franks* hearing to give Officer Lyons an opportunity to address his supposed lack of candor in "omitting details" from the warrant application.

The government timely appealed. We review *de novo* the district court's legal conclusions and findings of fact for clear error. *United States v. Davis*, 690 F.3d 226, 233 (4th Cir. 2012).

II

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A search or seizure has "undoubtedly occurred" when " 'the Government obtains information by physically intruding' on persons, houses, papers, or effects." *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)). At its core, the Fourth Amendment protects "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). The area "immediately surrounding and associated with the home," the curtilage, is "part of [the] home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984).

However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). This is because the "touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.' " *Id.* at 211 (quoting *Katz*, 389 U.S. at 360). Accordingly, it is unreasonable to expect law enforcement officers "to shield their eyes when passing by a home on public thoroughfares." *Id.* at 213. Further, an apartment dweller maintains no expectation of privacy in the publicly accessible common areas of an apartment complex. *United States v. Jackson*, 728 F.3d 367, 373–74 (4th Cir. 2013). Law enforcement officers' use of their unenhanced senses in publicly accessible spaces, therefore, does not amount to a "search" under the Fourth Amendment.

It is beyond dispute that here, Officer Lyons and Marshall used their unenhanced sense of smell to investigate the source of the marijuana odor wafting through a public space. The officers, while biking on a walkway open to the public, smelled marijuana. They continued to investigate by sniffing in the general vicinity of A6 to confirm that the marijuana odor was indeed coming from that apartment. Once reasonably certain of the odor's source, the officers sniffed the window and door frames to confirm their suspicions, only to be met with a fresh whiff of marijuana when Mitchell opened the door. Critically, at no point did the officers use anything but their own noses to sniff in spaces open and accessible to the public. The officers' sniffs were decidedly not a search under the Fourth Amendment.

In holding to the contrary, the district court ignored decades of Supreme Court precedent rooted in the fundamental principle that law enforcement officers do no violence to the Fourth Amendment by gathering evidence in public places using their unenhanced senses. In *Taylor v. United States,* 286 U.S. 1 (1932), for example, several prohibition officers smelled the odor of whisky emanating from a garage. Based on that smell, the officers entered into the garage and seized 122 cases of whisky. *Id.* at 5–6. The Court emphasized that "officers may rely on a distinctive odor as a physical fact indicative of a possible crime," but nonetheless suppressed the evidence because the officers did not obtain a search warrant before entering the garage. *Id.* at 6.

Similarly, in *Johnson v. United States*, 333 U.S. 10 (1948), the Court noted that "a strong odor of burning opium" outside a hotel room door "might very well be found to be evidence of most persuasive character." *Id.* at 13–14. As in *Taylor,* the Court found

error not because officers gathered incriminating evidence by sniffing outside the defendant's hotel door, but because the officers entered and searched the hotel room prior to obtaining a warrant. *Id.* at 14–15.

More recently, in *California v. Ciraolo*, 476 U.S. 207 (1986), the Court reaffirmed that law enforcement officers' unenhanced observations from a vantage point available to "[a]ny member of the public," is not a search cognizable under the Fourth Amendment. *Id.* at 213. Although law enforcement officers purposely flew an airplane over the defendant's property to gain a better view of marijuana growing within a fenced area, the Court found that the officers had not conducted a "search" because all observations were made from "publicly accessible airspace." *Id.* at 213–15. In so holding, the Court soundly rejected respondent's contention that he maintained a "reasonable expectation of privacy" in a publicly observable area, or that the specific "law enforcement purpose" with which the officers made their observations rendered the fly-over a search. *Id.*; *see also Florida v. Riley*, 488 U.S. 445, 448–52 (1989) (officer's naked-eye observation of the respondent's greenhouse from a helicopter was not a search); *United States v. Dunn*, 480 U.S. 294, 303–04 (1987) (officers' act of shining a flashlight and looking into the defendant's barn from a nearby field was not a search); *United States v. Lee*, 274 U.S. 559, 563 (1927) (no search occurred when the agent used a searchlight to observe cases of liquor on deck before the defendant's boat was boarded).

The reasoning in *Ciraolo* is equally sound here. No principled distinction exists between an officer using his eyes as opposed to his nose to detect incriminating evidence. *Accord United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004); *United States v.*

Cephas, 254 F.3d 488, 494–95 (4th Cir. 2001). Stated simply, "a human sniff is not a search, we can all agree." *Florida v. Jardines*, 569 U.S. 1, 14 n. 2 (2013) (Kagan, J., concurring) ("If officers can smell drugs coming from a house, they can use that information; a human sniff is not a search, we can all agree.").

Although the district court acknowledged that the officers smelled marijuana in a manner no different than any member of the public, the district court nonetheless found the officers had conducted a search because they sniffed "with an investigatory purpose" and "with the power and authority to act on that purpose." The district court rested its decision on the Supreme Court's recent opinion, *Florida v. Jardines*, 569 U.S. 1 (2013). The district court misread *Jardines*.

In *Jardines*, the Court was asked to determine whether "the government's use of *trained police dogs* to investigate [the exterior of] a home and its immediate surroundings is a search within the meaning of the Fourth Amendment." *Id.* at 11–12 (emphasis added). The Court answered in the affirmative because "the officers' investigation took place in a constitutionally protected area," and was accomplished by an "*unlicensed physical intrusion*" through the use of a narcotics canine. *Id.* at 7–9 (emphasis added). Indeed, the Court expressly noted that an officer may do what "any private citizen might do" outside a home and be within constitutional limits. *Id.* at 8 (quoting *Kentucky v. King*, 563 U.S. 452, 470 (2011)). But using a "trained police dog to explore the area around the home in the hopes of discovering incriminating evidence" without a warrant is the very type of "unlicensed physical intrusion" prohibited under the Fourth Amendment.

Id. at 9. It is in this context that the Court noted the constitutionality of an officer's conduct was "limited not only to a particular area but also to a specific purpose." *Id.*

At base, the district court impermissibly expanded *Jardines* to prohibit officers in public areas from using their unenhanced senses to investigate criminal wrongdoing.[3] The officers repeatedly testified that their sniffs were no different than what any passerby could have done, whether that sniff was to catch a whiff of an illegal substance or something savory cooking on the stove. Nor was it disputed that the officers caught anew the smell of marijuana after they lawfully knocked on the door and Mitchell voluntarily opened it. Just as law enforcement officers are not compelled to "shield their eyes" from plainly visible criminal activity, *Ciaraolo*, 476 U.S. at 213, Officers Lyons and Marshall were not required to plug their noses as they passed Mitchell's apartment. Because the officers' sniff outside Mitchell's apartment was not a search, we must reverse.[4]

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[3] Every case on which the district court relies involved a canine sniff. *See Jardines*, 569 U.S at 4; *United States v. Hopkins*, 824 F.3d 726, 732–33 (8th Cir. 2016); *United States v. Burston*, 806 F.3d 1123, 1125 (8th Cir. 2015); *People v. Burns*, 50 N.E.3d 610, 614 (Ill. 2016); *State v. Rendon*, 477 S.W.3d 805, 807 (Tex. Crim. App. 2015).

[4] The odor of marijuana alone provides probable cause to believe that evidence of marijuana possession would be found in Mitchell's residence. *See, e.g. United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004). Mitchell argues, however, that the Commonwealth's limited exception allowing citizens to possess marijuana for medical reasons, *see* Va. Code § 18.2-250.1, undermined the magistrate's probable cause finding. We reject this contention. "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Illinois v. Gates*, 462 U.S. 213, 235 (1983); *see also U.S. v. Carpenter*, 461 F. App'x 539, 540 (9th Cir. 2011) ("The existence of the Compassionate Use Act ('CUA') and the Medical Marijuana Program Act ('MMPA') do not change the probable cause analysis. . . . [T]he police are not required to investigate the existence of affirmative defenses under the CUA or MMPA once probable cause has been established."). This is especially the case so long as

III

As to the district court's *sua sponte* finding that Officer Lyons, in his affidavit, knowingly or recklessly misled the magistrate, here too the district court erred. Although not necessary to this Court's determination because we hold no constitutional violation occurred, the significance of the district court's error merits separate treatment.

It is well-settled that a "presumption of validity" attaches to a search warrant because a neutral, detached judicial officer must first find probable cause based on facts sworn in an affidavit. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978). Generally, evidence seized upon the execution of a search warrant is shielded from suppression, even if later revealed that the warrant was constitutionally infirm. *Id.* at 164–65; *see also United States v. Leon*, 468 U.S. 897, 920–22 (1984). To overcome this presumption of the warrant's validity, a defendant must make a "substantial" preliminary showing that the affiant acted in bad faith by knowingly or recklessly misrepresenting or omitting facts essential to the warrant's issuance. *Id.* at 155–56. If the defendant makes such a showing, then he is entitled to a *Franks* hearing, during which the defendant bears the burden of demonstrating that the affidavit included false statements or omissions material to the probable cause determination. *Franks*, 438 U.S. at 171–72; *see also United States v. Clenney*, 631 F.3d 658, 663 (4th Cir. 2011). The defendant's burden is especially demanding at a *Franks* hearing "[w]here a defendant challenges the validity of a warrant based 'on an omission, rather than on a false affirmative statement.' " *United States v.*

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marijuana possession is prohibited by federal law, without exception. 21 U.S.C. § 841(a)(1).

Simpson, 659 F. App'x 158, 160 (4th Cir. 2016) (per curiam) (quoting *United States v. Tate*, 524 F.3d 449, 454 (4th Cir. 2008)). "[M]erely showing an intentional omission of a fact from a warrant affidavit does not fulfill *Franks*' requirements." *Tate*, 524 F.3d at 455. The defendant must also demonstrate the omission was with " 'the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading.' " *Id.* (quoting *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990)). If, upon weighing the evidence and testimony presented at the *Franks* hearing, the court finds that the defendant has met his burden, only then is suppression of the evidence warranted. *Clenney*, 631 F.3d at 663.

The district court turned this process on its head. At no time did Mitchell seek a *Franks* hearing or make the requisite substantial showing. Nor did the Court hold a *Franks* hearing or ask the parties to brief the propriety of suppressing the evidence in light of a validly executed warrant. Furthermore, no record evidence supports the district court's finding that Officer Lyons' application knowingly or recklessly misled the magistrate. The district court's abrogation of the procedures announced in *Franks* — which has been followed by district courts for forty years — was improper.

IV

Because the officers' sniffs outside the Appellee's apartment were not a search under the Fourth Amendment, the order of the district court granting Appellee's suppression motion is

REVERSED AND REMANDED.

No.____-_____

IN THE SUPREME COURT OF THE UNITED STATES

TREMAYNE ANTWANE MITCHELL,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX B.....20 pages

Order from United States District Court for the Eastern District of Virginia, United States v. Tremayne Mitchell, (4:16-cr-00083-AWA-LRL-1)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA,

Criminal No. 4:16cr83

v.

TREMAYNE ANTWANE MITCHELL,

Defendant.

ORDER

Pending before this Court is a Motion to Suppress brought by Defendant Tremayne Antwane Mitchell ("Defendant"). ECF No. 13. A hearing on the Motion was convened on April 4, 2017. For the reasons contained herein, the Court finds that the investigating officers conducted an illegal search prior to obtaining a search warrant. For this reason, the Court is compelled to **GRANT** the Motion to Suppress.

I. BACKGROUND

On November 11, 2016, Defendant was charged in a one-count Indictment with Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. § 922(g)(1). This charge arose from a search of Defendant and his brother's home, which forms the basis of the instant suppression motion.

On July 27, 2016 at approximately 2:49 p.m., Newport News Police Officers Lyons and Marshall were on bicycles patrolling a private apartment complex located at 749 Adams Drive in Newport News. Officer Marshall rode along a public walkway that is directly adjacent to one of the buildings in the apartment complex, and Officer Lyons patrolled the parking lot area. While Officer Marshall was riding alongside the apartment building, he detected the odor of marijuana.

To localize the source of the odor, Officers Lyons and Marshall took the following steps. Officer Lyons walked upstairs to the second floor of the apartment building and observed that the odor became weaker. Tr. at 9. He and Officer Marshall walked on the public walkway alongside the ground floor of the building to continue to investigate the source of the odor. The walkway abuts the outer wall of the apartment building such that there is no border or space between the side of the building and the walkway. Gov't Exh. 1.

Officers Lyons and Marshall suspected that the odor was coming from Apartment A6 on the ground floor. Officer Lyons walked directly up to one of the windows of the residence—Defendant's bedroom window—and "smelled the area of the window." Tr. at 9. The window is recessed into the building, creating a space of a few inches between the window and the side of the apartment building. Officer Lyons stood on the public walkway and leaned closely toward the window to sniff. Body camera footage reveals that Officer Lyons leaned into the space between the window and the side of the building and likely touched the window. *See* Tr. at 29 (Q: "And when you're sniffing you're able to touch the window as well?" A: "Yes, ma'am. Anybody could."); *see also* Gov't Exh. 1.

At the same time, Officer Marshall approached the front door of Apartment A6, leaned into the threshold separating the door from the outer wall, and sniffed the crevice of the door. The front door is also recessed into the building, creating a space of about eight to ten inches between the door and the side of the building. There is also a step separating the public walkway from the front door. Officer Marshall testified that he did not come into contact with any structure while he was sniffing the area around the door frame, although he admitted that he was within inches of the front door. Tr. at 43. Body camera footage confirms that Officer Marshall

crossed the threshold into the doorway past the side of the building, and placed his face up to the door. His face appears to touch the door; it was less than an inch from the front door.

Officers Lyons and Marshall knocked on the front door of Apartment A6. Defendant and his brother answered the door. The officers asked both occupants to step outside to look at the window. Defendant and his brother stepped outside, and Defendant identified the window in question as his bedroom window. As soon as Defendant and his brother stepped outside, the officers stated that they smelled marijuana coming from the apartment, and Defendant and his brother were advised that they were detained.

Defendant stated that he was home on his lunch break, and he provided identification as requested by Officer Lyons. When Defendant's brother stepped back onto the door's threshold, Officer Marshall touched his shoulder, physically guided him out of the residence, and placed him in handcuffs. Officer Lyons confirmed that Defendant and his brother lived in the apartment and were the only occupants. Defendant and his brother denied the officers consent to search the residence. Officer Lyons responded that he was going to obtain a search warrant, and he placed Defendant in handcuffs and patted the outer pockets of Defendant's pants. *See* Gov't Exh. 1.

While both occupants were standing against the outer wall of the apartment building, Officer Marshall pushed the door open wider and looked inside. Defendant asked Officer Marshall to close the door. Officer Marshall declined, explaining that he wanted to keep the door open to ascertain whether other occupants were inside. Defendant repeated that no one else was inside the apartment. During this exchange, Officer Marshall placed his foot inside the apartment, and the front door remained ajar. *See id.*

Officer Lyons explained that Defendant and his brother were not under arrest, but they were not free to leave, and he advised both occupants of their constitutional rights pursuant to

Miranda v. Arizona, 384 U.S. 436, 458 (1966). During the initial encounter with Officers Lyons and Marshall, which lasted for about fifteen minutes, Defendant and his brother stood outside the apartment, in handcuffs, without shoes. At no point did either occupant make any effort to reenter the apartment. Ultimately, Defendant and his brother were detained for two hours outside their residence while a search warrant was obtained.

According to the state search warrant of Defendant's residence, authorization for the search was requested in relation to a violation of the Virginia Drug Control Act, Possession of Marijuana, in violation of Va. Code § 18.2-250.1. The affidavit in support of the search warrant explained that Officers Lyons and Marshall were on bike patrol around 749 Adams Drive when they detected the smell of "fresh marijuana," "made contact with the residence [sic]" of Apartment A6 and "had them step out of the residence." Search Warrant Aff. "Once both occupants stepped out[,] Officer Lyons advised them of the situation and told them they were both detained for a narcotics investigation[.]" *Id.* Officer Lyons also noted that he smelled marijuana coming from the apartment when the occupants opened the door. *Id.*

The subsequent search of the residence revealed contraband located in the bedrooms of Defendant and his brother. Inside Defendant's bedroom, officers found three partially burned marijuana cigarettes and a loaded semiautomatic firearm. After running a background check, the officers determined that Defendant had been convicted of a prior felony, and he was therefore taken into custody.

Defendant asserts that the contraband obtained from his bedroom should be suppressed because it was seized pursuant to an unlawful search. Defendant argues that the officers trespassed onto the curtilage of his residence when they contacted and sniffed the window and front door to localize the source of the marijuana odor. Defendant also argues that the officers

lacked probable cause to detain him, and that the search warrant for his residence was not supported by probable cause. The Government counters that the location of the officers on a public walkway did not implicate Defendant's constitutional rights, and that the officers' detection of the odor of marijuana provided probable cause to believe that marijuana was present.

II. STANDARDS OF LAW

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. "When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)).

The Supreme Court of the United States reasoned in *Illinois v. Gates* that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." 462 U.S. 213, 232 (1983). "When reviewing the probable cause supporting a warrant, a reviewing court must consider only the information presented to the magistrate who issued the warrant." *United States v. Wilhelm*, 80 F.3d 116, 118 (4th Cir. 1996) (citing *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990)). "[T]he task of the reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984).

III. ANALYSIS

A. Trespass onto Private Property

The Court first resolves whether the steps taken by the officers to localize the source of the marijuana odor involved trespassing into the constitutionally protected curtilage of Defendant's residence. Before knocking on the door, Officer Lyons approached Defendant's bedroom window and "smelled the area of the window." Tr. at 9. Officer Marshall sniffed the crevice of the front door by placing his face up to the door, either physically touching the door or coming within less than an inch of doing so. While sniffing the window and door, the officers stood on a public walkway that abuts the apartment building, and they leaned toward the window and door. Both the window and door are recessed into the apartment building, creating space that clearly separates the window and door from the public walkway.

Curtilage is the area "immediately surrounding and associated with the home . . . to which the activity of home life extends," and it is considered "part of the home itself for Fourth Amendment purposes." *Jardines*, 133 S. Ct. at 1412 (citing *Oliver v. United States*, 466 U.S. 170, 180, 182 (1984)). To determine the boundaries of a home's curtilage, courts may consider the following factors: (1) the proximity of the area claimed to be curtilage to the home itself; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. 294, 301 (1987). The central inquiry is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

The concept of curtilage—and the constitutional protections it affords—is not unique to single family homes. In the setting of apartment complexes, the United States Court of Appeals

for the Fourth Circuit held that the curtilage of an apartment includes the back (or front) patio, but does not extend beyond a twenty-foot radius of the apartment, nor does it encompass common areas used by members of the public, such as courtyard areas, public sidewalks, or areas between apartment buildings. *United States v. Jackson*, 728 F.3d 367, 374 (4th Cir. 2013). In *Jackson*, the Fourth Circuit considered whether the area in question—a strip of grass between the public sidewalk and a private patio—was a "common area used by all residents" or an area that is "so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection." *Id.* Because the strip of grass was used by other residents of the apartment complex and was located beyond the back patio over twenty feet from the door of the defendant's apartment, it was not considered curtilage. *Id.*

Other circuits and jurisdictions have also defined curtilage in apartment settings, and have concluded that the area immediately surrounding an apartment constitutes curtilage, distinguishing those areas from areas that are accessible to the public and so do not enjoy the same constitutional protection. *See United States v. Hopkins*, 824 F.3d 726 (8th Cir. 2016) (holding that the area six to eight inches immediately in front of a townhouse's entry door was curtilage); *United States v. Burston*, 806 F.3d 1123 (8th Cir. 2015) (holding that curtilage is the area within close proximity to an apartment that is not a "common area," and finding specifically that the grassy area within six to ten inches of the defendant's apartment is considered curtilage, where the defendant made personal use of the area by setting up a cooking grill, and a bush planted in front of the window prevented close inspection by passersby); *see also United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1993) (finding no reasonable expectation of privacy in the common area hallway outside the defendant's apartment); *United States v. Acosta*, 965 F.2d 1248 (3d Cir. 1992) (same); *see also State v. Rendon*, 477 S.W.3d 805, 808 (Tex. Crim. App.

2015) (finding that the threshold at the door of an apartment home is "objectively [and] 'intimately linked to the home, both physically and psychologically,' and thus was part of the curtilage") (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

In *United States v. Jardines*, 133 S. Ct. 1409 (2013), the United States Supreme Court engaged in a two-part inquiry to determine whether an investigation outside the defendant's home constituted an unlawful "search" within the meaning of the Fourth Amendment. First, the reviewing court must determine whether officers were gathering information in the curtilage of a defendant's home; that is, the area immediately surrounding the home which "enjoys protection as part of the home itself." *Id.* at 1414. Second, the reviewing court must determine whether officers "gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* If it is undisputed that officers were present in the "constitutionally protected extension of [a defendant's] home, the only question is whether [the defendant] had given his leave (even implicitly) for them to do so." *Id.* at 1415.

Officers Lyons and Marshall trespassed into the curtilage immediately surrounding Defendant's residence. Although both officers were standing on a public walkway outside the apartment, Officer Lyons positioned himself as close to Defendant's bedroom window as physically possible, and Officer Marshall placed his face up against Defendant's front door. Both officers leaned from the public walkway into the recessed spaces separating the window and door—the home itself. Although officers may use their senses to observe items in plain view or to perceive odors that could be detected by members of the public, "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." *Jardines*, 133 S. Ct. at 141; *see also Ciraolo*, 476 U.S. at 213.

The area of curtilage surrounding Defendant's residence is limited by the public walkway directly abutting the outer wall of the apartment building. However, the window is recessed, however, creating a space of a few inches between the window and the outer wall. The front door is also recessed, providing a space of eight to ten inches between the door and the outer wall. The front door is also separated from the sidewalk by a step. The few inches directly in front of the window and front door must be curtilage if the concept of curtilage and its attendant protections are to remain meaningful in apartment complex settings. *See Hopkins*, 824 F.3d at 732 (applying the *Dunn* factors and finding that "the area immediately in front of [the defendant's] door" was curtilage because "proximity strongly supports a finding of curtilage"). A police officer who positions himself within inches of the front door or bedroom window is trespassing into the curtilage of the apartment, even if the officer is standing on a public walkway.

The second inquiry under *Jardines* is whether the officers' investigation was accomplished through an "unlicensed physical intrusion." *Jardines*, 133 S. Ct. at 1415. "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." *Id.* at 1416. "[I]mplicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* A police officer without a warrant "may approach a home in hopes of speaking to its occupants, because that is 'no more than any private citizen might do.'" *Id.* at 1412 (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). Where, as here, the officers'

behavior "objectively reveals a purpose to conduct a search," an unlicensed physical intrusion has occurred. *Id.* at 1417.

Officers Lyons and Marshall carried out an investigatory purpose when sniffing the bedroom window and front door of Defendant's residence, which was to localize the odor of marijuana. *See Jardines*, 133 S. Ct. at 1417-18 (holding that officers' use of a drug-sniffing dog to investigate a home and its immediate surroundings is a "search" under the Fourth Amendment); *Hopkins*, 824 F.3d at 723-33 (concluding that the officer lacked implicit license to have the drug-sniffing dog enter the curtilage and sniff the "crease of the door"); *Burston*, 806 F.3d at 1127 (finding that "police officers would not have an implicit license to stand six to ten inches from the window in front of [the defendant's] apartment"); *see also People v. Burns*, 50 N.E.3d 610 (Ill. 2016) (holding that a canine sniff of an apartment door in a multiunit apartment building is a "search" under the Fourth Amendment, requiring a warrant supported by probable cause); *Rendon*, 477 S.W.3d at 810-11 (holding that the dog sniff at the threshold of the defendant's apartment door was an unlawful search within the meaning of the Fourth Amendment because the officers' express purpose was to conduct a search for illegal narcotics). *Jardines* recognized that the officers' investigatory *purpose* in conducting a search is dispositive in determining whether an unlicensed physical intrusion occurred; whether the search is conducted by drug-sniffing dogs or officers is immaterial.

Officers Lyons and Marshall also exceeded the scope of implicit license by sniffing Defendant's bedroom window and the crease of his front door. Although it is possible for passersby to place their faces within inches of the window and front door of an apartment to determine the source of a particular odor, doing so would violate the "background social norms that invite a visitor to the front door." *See Jardines*, 133 S. Ct. at 1416 ("To find a visitor

knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.").

Sniffing the bedroom window and front door by Officers Lyons and Marshall is also distinguishable from similar behavior by members of the public because the officers' investigatory purpose was coupled with the power and authority to act on that purpose. Unlike members of the public, the officers were empowered to detain the occupants of the residence and to seek and obtain a warrant to conduct a search—which is exactly what they did.

Alternatively, the "common-law trespassory test" also confirms that Officer Marshall conducted an unlawful "search" when he crossed the threshold into the entryway of the residence and touched the front door prior to initiating contact with the occupants of the apartment, and when he stepped inside the residence after the occupants denied consent to enter. *United States v. Jones*, 565 U.S. 400, 407 (2012) (holding that the government's installation of a GPS device on a defendant's vehicle constitutes a "search" because "when the Government . . . engage[s] in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.").

The front door and bedroom window of Defendant's apartment are part of the home itself. By almost touching the door and window to attempt to localize the source of the marijuana odor, Officers Lyons and Marshall "physically occupied private property for the purpose of obtaining information. . . . [S]uch a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* at 404-05 (citing *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765) ("[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his

leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.")).

A trespass also occurred when Officer Marshall stepped inside the apartment, despite the occupants' clear refusal to allow entry. *See New York v. Class*, 475 U.S. 106, 114-15 (1986) (holding that an officer's momentary reach into the interior of a vehicle constitutes a "search"). Just as an officer may not reach into a vehicle without a warrant, consent, or another exception to the warrant requirement, neither can an officer even momentarily enter a private residence under similar circumstances. By trespassing into the apartment Officer Marshall also displayed an investigatory purpose: he opened the door wider and looked inside the residence. Thus, an unlawful "search" occurred because the officers trespassed into the curtilage of Defendant's apartment—and intruded upon the residence itself—with the investigatory purpose of localizing the source of the marijuana odor.

B. Insufficient Probable Cause

Even if an initial warrantless search was improper, as was the officers' unlawful intrusion outside Defendant's bedroom window and front door, the Government may still admit evidence gathered subsequently pursuant to a lawful search warrant. *Murray v. United States*, 487 U.S. 533, 542 (1988). For the search warrant to be considered lawful, it must contain sufficient evidence, apart from the evidence obtained during the initial unlawful search, which would support a finding of probable cause. *United States v. Walton*, 56 F.3d 551 (4th Cir. 1995) (holding that the district court must examine the search warrant affidavit absent the illegally obtained information to determine whether the untainted portion of the affidavit alone established probable cause). Therefore, the Court must also determine whether the search

warrant procured by Officers Lyons and Marshall was supported by sufficient probable cause, absent the evidence that was illegally obtained.

The material facts supporting a finding of probable cause were based solely on the evidence obtained through the officers' unlawful sniff of Defendant's bedroom window and front door. The Addendum to the Search Warrant Affidavit states: "Officer Marshall rode past apartment A6 when he detected the odor of Marijuana coming from the apartment. When Officer Lyons rode past the window of the apartment he also detected the odor of fresh marijuana." According to the Affidavit, this evidence prompted the officers to "ma[ke] contact with the residence [sic]" and detain its occupants for a narcotics investigation. The affidavit contains no other evidence or information establishing probable cause of illegal possession of marijuana. The only evidence supporting a finding of probable cause—the officers' belief that the odor of marijuana emanated from Defendant's residence—was collected improperly and so was illegally obtained.

C. Inapplicability of the Good Faith Exception

Under the good faith exception to the exclusionary rule, courts may decline to exclude evidence obtained pursuant to a later-invalidated search warrant if law enforcement's reliance on the warrant was objectively reasonable. *United States v. Leon*, 468 U.S. 897, 922 (1984); *United States v. Doyle*, 650 F.3d 460, 467 (4th Cir. 2011). When considering the application of the good faith exception, courts are "not limited to consideration of only the facts appearing on the face of the affidavit." *Doyle*, 650 F.3d at 471 (internal citation omitted). Instead, courts must "examine the totality of the information presented to the magistrate in deciding whether an officer's reliance on the warrant could have been reasonable." *United States v. Legg*, 18 F.3d

240, 244 n.1 (4th Cir. 1994). The evidence obtained pursuant to the search warrant of Defendant's residence must be suppressed because the good faith exception is inapplicable.

There are four circumstances in which the good faith exception is inapplicable:

> (1) if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) if the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); (3) if the affidavit supporting the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) if under the circumstances of the case the warrant is so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.

Doyle, 650 F.3d at 467 (citing *United States v. DeQuasie*, 373 F.3d 509, 519–20 (4th Cir. 2004) (quoting *Leon*, 468 U.S. at 923)).

"[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* Overall, "the exclusionary rule is applicable when police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, [and] the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *United States v. Stephens*, 764 F.3d 327, 336 (4th Cir. 2014) (citation omitted).

To challenge a search warrant on the theory that it contains misleading information or omits material facts ("prong one"), a defendant must show: (1) that the affiant deliberately or recklessly included inaccurate information or omitted material facts from the affidavit; and (2) given the totality of the circumstances, that the errors and/or omissions in the affidavit are critical to the finding of probable cause and the decision to issue the search warrant. *United States v.*

or conceal the drugs in his residence; (3) the police "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy"; and (4) the restriction imposed was for a limited time period that was no longer than necessary to obtain the warrant. *Id.* at 332-33.

As noted, the defendant in *McArthur* was prevented from entering his residence for a period of two hours. During that time, he was permitted to reenter the apartment several times (to retrieve cigarettes and make phone calls) while an officer stood "just inside the door to observe what [the defendant] did." *Id.* at 329. The detention of Defendant and his brother is distinguishable. There was less reliable evidence establishing probable cause, and the officers expressed no concern regarding exigent circumstances justifying detention. Moreover, Defendant and his brother were handcuffed outside their residence, and were not free to leave the scene, for two hours. Any concern about the loss or destruction of evidence inside the residence could have been addressed through far less restrictive measures. *Id.* at 333 (police "might lawfully have sealed the apartment from the outside, restricting entry into the apartment while waiting for the warrant"); *see also Segura v. United States*, 468 U.S. 796 (1984); *Mincey v. Arizona*, 437 U.S. 385 (1978); *United States v. Jeffers*, 342 U.S. 48 (1951).

The officers' conduct in initiating contact with Defendant, and throughout the course of their interaction, was also unreasonable. The officers exceeded the permissible bounds of the "knock and talk" exception when Officer Lyons lured Defendant outside under false pretenses by telling him that he needed to look at something on the window. *United States v. Crapser*, 472 F.3d 1141 (9th Cir. 2007) (holding that when a suspect voluntarily opens the door of his residence in response to a non-coercive "knock and talk" request, the police may temporarily seize the suspect outside the home, or at the threshold, provided that they have reasonable

suspicion of criminal activity). Although this action falls short of coercion, Defendant was advised that he was detained as soon as he stepped outside, and his reasonable statement that he would have declined to open the door had the officers been truthful casts doubt upon whether his actions can be construed as voluntary.

After the occupants were detained, Officer Marshall exceeded the scope of Fourth Amendment protections when he pushed the open the front door, looked into the apartment, and stepped inside the residence, despite Defendant's requests to close the door. The Ninth Circuit has held that "police officers may only gain visual access to a hotel room if (1) the room's occupant voluntarily opens the hotel room door in response to a request (but not a threat or command), (2) the officers have a warrant, or (3) the officers have probable cause and one of the exceptions to the warrant requirement exists." *United States v. Washington*, 387 F.3d 1060, 1070 (9th Cir. 2004) (citing *United States v. Winsor*, 846 F.2d 1569, 1573-74 (9th Cir. 1988) (holding "that the police did effect a 'search' when they gained visual entry into the room through the door that was opened at their command," which the officers needed probable cause to justify)). In this case, no exigent circumstances were articulated to justify pushing open the front door and examining the interior of the residence. If the officers were concerned for their safety, they could have closed the door.

The Court is also compelled to address the fact that the scope of the officers' search exceeded the clear boundaries of the search warrant for Defendant's residence. The warrant expressly authorizes the search and seizure of the following "property, objects, and/or persons": "Marijuana, paraphernalia, smoking devices, packaging material, rolling papers and anything else used to smoke or consume marijuana." In executing the search warrant, the officers seized two computer tablets and two cell phones in addition to contraband that was described in the

warrant. Although Defendant was charged with Possession with Intent to Distribute Marijuana and Cocaine over three weeks later, the cell phones and tablets were unrelated to the offense that was the basis of the search warrant for his residence. The seizure of items outside the scope of the warrant suggests recklessness continued throughout the course of the investigation and during the execution of the warrant.

The Court also is troubled by the misleading testimony elicited during the April 4, 2017 suppression hearing. In response to the Court's question about why the occupants were detained, Officer Lyons stated that he and Officer Marshall did not know if anybody else was in the residence, and that one of the occupants "made a couple of attempts to try to go back inside the residence after we advised them of the smell." Tr. at 30. Officer Marshall contradicted this statement when he testified that as soon as the occupants stepped outside they were advised that they were being detained. Tr. at 43 (Q: "And as soon as they stepped outside, they were detained." A: "They were advised they were being detained, yes."). Officer Marshall later conceded that the reason the officers knocked on the door was to detain the occupants based on the odor of marijuana. Tr. at 45 (Q: "The reason you knocked and had them open the door, though, is because you were going to detain them for this odor; is that correct?" A: "Yes.").

Body camera footage indicates that the officers informed both occupants that they were detained as soon as they stepped outside. Gov't Exh. 1. Because the occupants were advised that they were detained prior to any attempted re-entry, then the reason for the detention was something aside from preventing re-entry. The misleading nature of the officers' testimony is also indicative of an overall recklessness characterizing the underlying investigation.

IV. CONCLUSION

In sum, an unlawful "search" occurred in violation of the Fourth Amendment when Officers Lyons and Marshall trespassed upon the curtilage of Defendant's residence—and possibly trespassed upon the residence itself—with the investigatory purpose of localizing the source of the odor of marijuana. Absent this evidence, the search warrant for Defendant's apartment contained no other evidence or information to support a finding of probable cause.

Based on the totality of the circumstances, the good faith exception is inapplicable—and the evidence seized pursuant to the search warrant must be suppressed—because of the reckless and apparent disregard for truth that was apparent from the face of the warrant affidavit and during the course of the investigation. The Court concludes that suppression will likely result in appreciable deterrence of future constitutional violations, which further justifies application of the exclusionary rule. *See United States v. Stephens*, 764 F.3d 327, 336 (4th Cir. 2014) (citation omitted) (holding that "the exclusionary rule is applicable when police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, [and] the deterrent value of exclusion is strong and tends to outweigh the resulting costs."); *Herring v. United States*, 555 U.S. 135, 144 (2009) (finding that the good faith exception applies to errors that arise from nonrecurring and attenuated negligence on the part of the police, as opposed to intentional or culpable conduct).

For the foregoing reasons, Defendant's Motion to Suppress, ECF No. 13, is **GRANTED.**

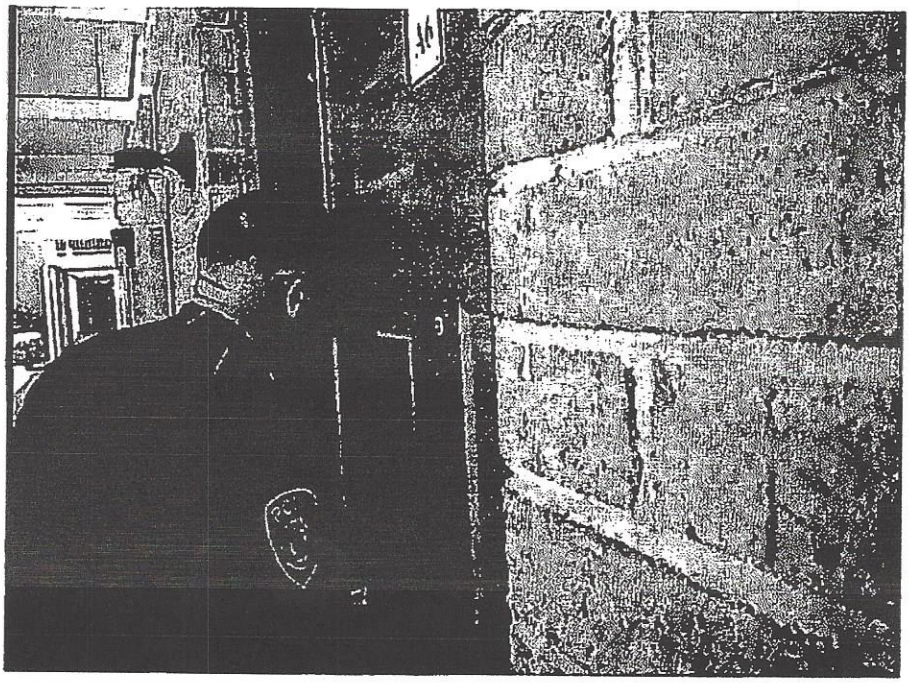
The Clerk is **REQUESTED** to mail a copy of this Order to all attorneys of record.

IT IS SO ORDERED.

Arenda L. Wright Allen
United States District Judge

Norfolk, Virginia
April 25, 2017

United States v. Jackson, 728 F.3d 367, 386 exh.2 (4th Cir. 2013) (finding that the grass strip between the defendant's back patio and the public sidewalk was not curtilage).



United States v. Mitchell, No. 4:16cr83, Gov't Exh. 1 at 25 seconds (showing officer leaning into threshold and placing face against Defendant's front door).

No.____-_____

IN THE SUPREME COURT OF THE UNITED STATES

TREMAYNE ANTWANE MITCHELL,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX C.....2 pages

Order from United States Court of Appeals for the 4th Circuit, appointing counsel (counsel was also appointed in district court)

FILED: May 19, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4317
(4:16-cr-00083-AWA-LRL-1)

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

TREMAYNE ANTWANE MITCHELL

Defendant - Appellee

ORDER

The court appoints Nicholas Ryan Hobbs] to represent appellee. Counsel is referred to the **CJA Payment Memorandum** and the **CJA eVoucher Page** for information on appointment terms and procedures.

CJA authorization for preparation of transcript is obtained by submitting an AUTH-24 request in the district eVoucher system. New appellate counsel must contact district eVoucher staff for appointment to the underlying district court case in order to submit the AUTH-24 request for district judge approval and the CJA 24 voucher for transcript payment. Counsel must also submit a Transcript Order Form

with attached AUTH-24 or CJA 24 form to the court reporter and district court and file the same in the court of appeals with the docketing statement. Upon filing of the Transcript Order Form, the Fourth Circuit will set deadlines for completion of the transcript.

CJA 20 and 21 vouchers are submitted for payment through the Fourth Circuit's CJA eVoucher system. Upon receiving email notification of this appointment from eVoucher, counsel may create CJA 20 and 21 vouchers for use in maintaining time and expense records and paying for expert services.

All case filings must be made using the court's Electronic Case Filing system (CM/ECF). Counsel not yet registered for electronic filing should proceed to the court's web site to register as an ECF filer. See **Required Steps for Registration as an ECF Filer**.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk