No. _____

IN THE
Supreme Court of the United States

_____

KEITH GRIFFIN,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

_____

On Petition for a Writ of Certiorari
to the New York Court of Appeals

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Could police search the curtilage of the home — a narrow driveway wedged between two homes — merely because they wanted to look for evidence of a nonexistent crime?

PARTIES TO THE PROCEEDING

The Petitioner is Keith Griffin, who was defendant-appellant before the New York Court of Appeals.

The Respondent is the State of New York, who was appellant before New York Court of Appeals.

There are no co-defendants.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the County Court of Erie County, the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, and the New York Court of Appeals:

> *The People of the State of New York v Griffin*, No. 00192-2017 (N.Y. County Ct., Erie County, Mar. 13, 2018).
>
> *The People of the State of New York v Griffin*, KA 18-01620, No. 573 (N.Y. App. Div., 4th Dep't., Nov. 20, 2020).
>
> *The People of the State of New York v Griffin* (N.Y. Ct. App., January 26, 2021).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Inconsistent applications of *Jardines* created a jurisprudential monster in circuit courts of appeals and state courts. Consequently, the Fourth Amendment — once treated as sacred — is now a pay-to-play game where only the most affluent can afford its protections.

OPINION AND ORDER BELOW

The Order of the New York Court of Appeals is unreported. It is reproduced at App. 6a. The opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department is reported at 136 N.Y.S.3d 619 (2020). It is reproduced at App. 1a. The Erie County Court's Order denying suppression is unpublished but is reproduced at App. 7a.

JURISDICTION

The Order of the New York Court of Appeals was entered on January 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United

> States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

With no evidence of any crime, police lock petitioner in a police vehicle and decide to look around for "evidence" in a blocked-off driveway.

Police officers were dispatched to petitioner's home following a vague 911 call that someone was "jumping on" a woman at his address.

But when the police arrived, it was painfully obvious that no one was assaulted. There was no evidence of any assault. Everyone was calm. There was no yelling.

Three people were outside. A male and a female were on the sidewalk in front of a van parked in the driveway. Petitioner was in an inaccessible portion of his driveway behind the van. The front end of the van was directed to the rear of the home and was inaccessible from the street.

The driveway was wedged between two homes. The area of the driveway petitioner was standing on was accessible only if one were to bypass a small "gap between the house and the car."

Police immediately ordered petitioner to come to the street. After squeezing through the narrow gap between the car and the house, petitioner was frisked. Even though police did not find any contraband on his person, they handcuffed petitioner and placed him in the back of a police car. This was allegedly for "officer safety"

because police officers feared petitioner would run away and they would have to chase him on foot.

In the meantime, officers confirmed, yet again, some obvious facts: the 911 caller was wrong; there was no fight. The other individuals at the scene confirmed as much. No one had any telltale markings of a fight such as cuts, markings, or blood.

Knowing that there was never a crime, an officer decided to look "around the scene, see if there was any other evidence of any domestic issue." The officer never specified what type of evidence he was looking for to support a nonexistent crime.

The officer's whim and caprice took him to the driveway. Particularly, he wanted to look at the area of the driveway enclosed by two walls and blocked by a car.

He squeezed his body between the wall and the car. And when he finally popped through, he did not see anything. That was not enough for this police officer. He leaned in close to the ground and looked under the front of the van. And that is when he saw the pistol.

Not so shockingly, petitioner was not charged with assault. But he was charged with criminal possession of a weapon for the pistol the police found in his own driveway.

The suppression court rules that the police have an "implied license" to search the curtilage because there was no fence and that petitioner lacked standing to challenge the seizure of evidence taken from his property.

Petitioner swore in an affidavit that the pistol was recovered from his home. He was the property owner. He had an expectation of privacy in the area searched.

But respondent boldly asserted that petitioner had no standing to challenge a search of his own property. To them, the pistol was in "plain view" and was "abandoned" on petitioner's own property.

To claim the protections of the Fourth Amendment, the respondent argued that petitioner was required to use a fence and post "no trespassing" signs. They contended that, in the absence of such deterrent factors, the police had unfettered discretion to look wherever they wanted on the property because the 911 call was labeled as a "domestic."

The suppression court readily accepted respondent's arguments. It focused on the fact that the police were responding to a second call at that residence that night. App. 8a. However, it failed to acknowledge that the prior call was not for petitioner. *Id.*

Much like respondent argued, the court decided that petitioner had no expectation of privacy in his own property. *Id.* at 9a. To be entitled to the protections of the curtilage, the court held that petitioner was required to erect a fence or post no trespassing signs. *Id.* Because of petitioner's failure to do so, the police had "implied permission" to search the entire area surrounding his home. *Id.* It also found that he somehow lacked standing to challenge the search of his property. *Id.* As an alternative holding, the court determined that the pistol was abandoned on petitioner's property. *Id.*

Defense counsel asked the court to reconsider its decision. She explained that the court misunderstood key concepts such as standing, property rights, and

curtilage. Citing, *Collins*, she argued petitioner had an expectation of privacy in his own real property and, as owner of the property, had standing to challenges searches of it. *See Collins v Virginia*, 138 S. Ct. 1663, 1671 (2018).

The respondent argued that the curtilage cases were inapplicable because the officers were called to the residence twice in one day. They cited no exceptions to the warrant requirement.

The court denied the motion to reconsider, holding that "this case is distinguishable from the Supreme Court case and the Second Circuit case."

The Appellate Division unanimously affirms County Court's Decision and the Court of Appeals denies leave to appeal.

Petitioner advanced similar arguments on his direct appeal to the Appellate Division, Fourth Judicial Department. The petitioner appealed the suppression decision to the Appellate Division, Fourth Judicial Department. On direct appeal, the petitioner advanced, among other arguments, that the officers could not search the curtilage of the home without a warrant once the justification for the initial approach was exhausted.

Respondent also reiterated its arguments: 1) the pistol was abandoned; 2) petitioner had no expectation of privacy because his driveway was not "completely fenced-in."

The Appellate Division declined to decide whether the driveway was within the curtilage of the home. *Id.* at 4a. Instead, it held that there was no expectation of privacy in the driveway because it was attached to a public sidewalk. *Id.* Just as the the suppression court, the Appellate Division held that the absence of fencing and no

trespass signs was dispositive. *Id.* It also focused on the spatial proximity of the pistol to the sidewalk. *Id.* Because the officer was entitled to enter the blocked-off driveway, the court further held that the pistol was in plain view because he observed it from a "lawful" vantage point. *Id.*

Petitioner sought leave to appeal to the New York Court of Appeals. He advanced the same arguments as he did before the suppression court and the Appellate Division. The Court of Appeals thereafter denied him permission to appeal. *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

This Court has never given police officers free reign to search inaccessible areas immediately adjacent to the home. These areas are protected as the curtilage of the home. Absent limited circumstances in which the police enter the curtilage to knock on the door, intrusions such as the one in the instant matter, are unlawful.

Following this Court's decision in *Florida v. Jardines*, (569 U.S. 1, 7-8 (2013)), the outcome of this case was apparent: evidence seized following police intrusion into the blocked-off driveway should have been suppressed when officers exceeded the scope of any implied license.

But inconsistent applications of *Jardines* muddied the waters in what should have been an easy decision. States such as New York are consistently applying the wrong standards and give officers broad discretion to search curtilage. The same is apparent in federal circuit courts as well. Clarification of *Jardines* and its progeny is necessary to resolve these dangerous applications.

Officers do not have unfettered discretion to conduct evidentiary fishing expeditions in the curtilage.

The Appellate Division's decision rendered the Fourth Amendment into mere surplusage. There is no question that the area immediately surrounding the home is the curtilage. *See Jardines*, 569 U.S. 1, 7-8 (2013). And there is no question that homeowners have standing to challenge searches of the curtilage. *See Collins*, 138 S. Ct. at 1671.

Determining whether an area is part of the home's curtilage is done on a case-by-case basis. But select factors are not *per se* dispositive over others. *See United States v. Dunn*, 480 U.S. 294, 301 (1987). Regarding the reasonable expectation of privacy first seen in *Katz*, this Court was clear when it noted that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *United States v Jones*, 565 U.S. 400, 407 (2012); *see also Katz v. United States*, 389 U.S. 347 (1967).

Courts have seemingly adopted the antithesis of Jones in analyzing curtilage cases. And petitioner was not immune from this misapplication of *Jones* and *Jardines*.

Persistent confusion and the misapplication of *Jardines* warrants review from this Court.

Jardines' holding appeared clear in this regard: there are certain implied licenses for police to enter the curtilage. But there is no expectation or license for police to enter the curtilage for the express purpose of conducting a search. *See Jardines*, 569 U.S. at 9-10; *see also Collins*, 138 S. Ct. at 1670). Any evidence obtained

from such an intrusion must be suppressed. *See Collins*, 138 S. Ct. at 1671. Even though the search of petitioner's property was for the express purpose of conducting a search, the Appellate Division somehow reached a different outcome.

Apparently *Jardines* was not clear enough for some courts. It was not clear enough for the Appellate Division in petitioner's case even though the court was confronted with the fact that the officer entered the curtilage with the intent to look for evidence. And it was not clear enough for myriad circuit courts and state courts.

These basic concepts have been flipped on their heads through inconsistent and varied applications of *Jardines*. These misapplications have created a haves and haves-not situation for the Fourth Amendment and the concept of the curtilage: the greater protections you can afford, the more likely it is that you will receive Fourth Amendment protection. For those who cannot afford as many protections, they can expect their Fourth Amendment protections to diminish and fade. Petitioner was unable to receive these protections because he lacked the funds to put up a fence.

This is a problem that three Justices of this Court recognized when dissenting from a recent denial of certiorari. *See Bovat v. Vermont*, — U.S. —, 141 S. Ct. 22, 23 (2020) (Gorsuch, Sotomayor, and Kagan, JJ., dissenting). The message in *Jardines* seems to be falling on deaf ears in state and circuit courts. And what was once considered an improper "meandering" search is now routinely accepted. *Id.* at 22.

Some courts, fortunately, understood that *Jardines* does not afford police officers unbridled discretion to search the curtilage of the home. *See United States v. Jackson*, 618 F. App'x. 472, 477 (11th Cir. 2015). Others acknowledged that, while

officers can approach the front door, they cannot overstay their welcome. *See Brennan v. Dawson*, 752 F. App'x. 276, 283 (6th Cir. 2018); *see also Smith v City of Wyoming*, 821 F.3d 697, 713 (6th Cir. 2016). At least one state court acknowledged that information-gathering is a search under *Jardines*. *See People v Frederick*, 895 N.W.2d 541, 545 (Mich. 2015).

But these circuit courts and one state court appear to be in the minority. As the three justices feared in *Bovat*, justices within circuit courts and state courts are divided on the application of *Jardines* into a context such as petitioner's.

At least three circuit courts interpret *Jardines* in this way. And in each of those circuit courts, dissents signaled the divide within the circuit courts on the application of *Jardines*. *See United States v. Carloss*, 818 F.3d 988, 1005 (10th Cir. 2016) (Gorsuch, J., dissenting); *United States v. Holley*, 831 F.3d 322, 334 (5th Cir., 2016) (Graves, J., dissenting); *United States v. Beene*, 818 F.3d 157, 175 (5th Cir. 2016) (Graves, J., dissenting); *United States v Jackson*, 728 F.3d 367, 382, 384 (4th Cir. 2013) (Thacker, J., dissenting).

Some states even have internal division on this issue, signaled with dissents. *See State v. Christensen*, 517 S.W.3d 60, 79 (Tenn. 2017) (Lee, J., dissenting); *State v. Phillips*, 382 P.3d 133, 171-172 (Haw. 2016) (Nakayama & Recktenwald, JJ., dissenting in part, concurring in part). But many state courts continue to misapply *Jardines* in the strangest ways.

It seems now that the only way to claim that an area is the curtilage is to create an impassable moat around the home. Even though a homeowner may create a

makeshift fence or place no-trespassing signs in conspicuous locations, this apparently is not enough to get rid of the pervasive mindset that police have an express license to enter any portion of the property outside of the home. *See State v. Smith*, 783 S.E.2d 504, 509 (N.C. 2016); *State v. Howard*, 315 P.3d 854, 854 (Idaho 2013). Others interpret *Jardines* as saying that some parts of the curtilage are definitively semi-private, subject to police intrusion, and accorded lesser protections. *See State v. Boyer*, 133 A.3d 262, 262 (N.H. 2016). Others hold that *Jardines* should be interpreted to mean that officers can walk up to any door they see and peer into homes. *See Taylor v. State*, 120 N.E.3d 661, 666 (Ind. 2019).

Economic considerations and one's ability to create an insurmountable fence have never been considerations in assessing whether an area is worthy enough to be afforded fundamental constitutional protections. *See United States v Ross*, 456 U.S. 798, 822 (1982). Requiring a particular type of fence or obstacle to claim these protections necessarily deprives citizens of their basic rights. *See Collins*, 138 S. Ct at 1675.

The conduct in petitioner's case is precisely what this court expressed concern about in *Jardines* and in the recent dissent in *Bovat*. An officer went into a protected area not to look for petitioner and talk to him, but to look for evidence. Even though the *Jardines* issue was addressed before the Appellate Division, it declined to even address it.

New York is not alone in its desperate need for clarification with *Jardines*. Intervention from this Court is critical to settle these horrid applications of *Jardines* and to prevent courts from whittling away what remains of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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