NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

Donell Jamar Hines- Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Leon* good faith exception should allow admission of evidence obtained as a result of two unconstitutional searches, in violation of *Jardines*, when law enforcement conducted two warrantless K9 sniffs Defendant's apartment doors, thereby intruding and searching the curtilage of Defendant's home without a warrant.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

(1) *United States v. Donell Jamar Hines*, 3:20-cr-12 (S.D. Iowa) (criminal proceedings), judgment entered June 28, 2021.

(2) *United States v. Hines*, 21-2477 (8th Cir.) (direct criminal appeal), judgment entered March 10, 2023, *available at* 62 F.4th 1087 (8th Cir. 2023).

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The petitioner, Donell Jamar Hines ("Defendant"), through counsel, respectfully prays a writ of certiorari issue to review the March 10, 2023, judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 21-2477.

OPINION BELOW

On March 10, 2023, a panel of the Eighth Circuit Court of Appeals affirmed Hines's conviction under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), concluding law enforcement officers acted in good faith, pursuant to *Leon*, to conduct two warrantless K9 sniffs of Defendant's enclosed apartment doors because the Circuit had not expressly explained how this Court's precedent in *Jardines* would apply to apartment doors in a common hallway.

JURISDICTION

The Court of Appeals entered its judgment on March 10, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> 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.

STATEMENT OF THE CASE

A. Factual History

On September 12, 2019, without a warrant, police entered the Betsy Ross apartment complex with a drug detection dog ("K9"). On that date, at 4:12 a.m. Officer Schertz and his K9, Kurly, entered 314 Betsy Ross Place. (R. Doc. 55 p. 1; Supp. TR 80:20–24).[1] The building is a three-story building with two units on each floor, totaling six units. (R. Doc. 55 p. 1; Supp. TR 63:5–15). Defendant resided in apartment number 2, located on the first floor. (R. Doc. 55 p. 1). The building "[is] like a split-level house where you walk in and there are stairs that go up and down, so there would be four apartments above ground, …, and then two on the lower level, the lowest level." (Supp. TR 63:6–9). There are two apartments on each level, separated by a landing, and there is a utility space on the ground level. (Supp. TR 63:16–24, 64:4–12; *see also* R. Doc. 49 at pp. 1–11, Exhs. C–M (pictures of the building and landings). The door providing access to the stairwell/hallway is locked; a key must be utilized. (Supp. TR 64:16–23).

At the upper level of the building, a landing for two apartments across from one another is located. (Supp. TR 83:25–84:10; R. Doc. 49 at pp. 8–9, Exhs. J–K).

[1] In this brief, "R. Doc." refers to the district court docket, criminal Case No. 3:20-cr-12 in the United States District Court for the Southern District of Iowa. "Supp. TR" refers to the official transcript of the suppression hearing held September 29, 2020, available at R. Doc. 92. "Exh." refers to exhibits received by the district court during the suppression hearing. *See* R. Doc. 32, 32-1, 49, 50, 52, 56. "PSR" refers to the presentence report prepared for sentencing in the case. R. Doc. 80.

Kurly was deployed there, working her way down the three levels, alerting with a final response on all doors, including the basement door—seven alerts. (Supp. TR 80:25–81:7, 69:19–25). Kurly's alert was "an aggressive alert," meaning Kurly scratched on the doors. (Supp. TR 81:8–10, 64:5–6). Kurly scratched at the same place of every door, the doorknob, for all seven doors. (Supp. TR 81:8–18). Kurly is trained to alert to the strongest source of the scent; as such, her alert is not to the door as a general location, but specifically to the door handle. (Supp. TR 84:2–12).

Officer Wayland obtained a search warrant based on, among other things, the dog sniff. (R. Doc. 55 p. 1). Before execution of the warrant, Defendant relocated to another building and apartment within the complex, 321 Betsy Ross Place Apartment 1. (R. Doc. 55 pp. 1–2). The building at 321 Betsy Ross Place is a two-story building with four units and a laundry room; unit 1 is again on the first floor. (R. Doc. 55 p. 2; Supp. TR 18:8–11, 23:16–24:1). Again, the exterior door to the building was locked and not accessible to the general public. (R. Doc. 55 p. 2; Supp. TR 17:14–22). And, again, once inside, a hallway/stairwell is located. (R. Doc. 55 p. 2; Supp. TR 19:3–11, 35:20–36:6; *see also* R. Doc. 49 pp. 12–19, Exhs. N–U (pictures of the building and landing/hallways)). Immediately inside the front door, stairs are presented; one must travel up or down. (Supp. TR 37:17–22). If one travels up or down the stairs, two apartments across from each other and separated by a landing are found. (Supp. TR 37:23–38:16). The upper units also have independent exterior entrances in the back. (Supp. TR 39:9–23). The landing space between the apartment doors is not a large area. (Supp. TR 41:14–22; *see also* R. Doc. 49, pp. 12–19, Exhs. N–U).

A second K9 sniff was requested. (R. Doc. 55 p. 2). On September 21, 2019, Sergeant Koepke and his K9, Dawn, performed this search. (R. Doc. 55, p. 2). Sgt. Koepke and Dawn traveled to 321 Betsy Ross Place at 4:30 a.m. where they entered with a key. (Supp. TR 17:14–22, 19:20–21, 22:2–7, 39:24–40:1). Inside the back door, Dawn was given the command to seek dope. (Supp. TR 23:1–5). Dawn is a passive alert dog with a final response to sit; Dawn gave such a final alert response at apartment 1. (Supp. TR 21:20–23, 23:1–5, 32:19–33:3). In doing so, Dawn "came up, she sniffed near the door handle area, and then sat." (Supp. TR 23:6–8; *accord id.* at 50:13–24). Dawn came within, at least, three to six inches of the door handle. (Supp. TR 51:3–6, 52:3–6). A search warrant was obtained based, in part, on the dog sniff. (R. Doc. 55, p. 2; R. Doc. 32).

On September 25, 2019, police executed the search warrant for 321 Betsy Ross Place, Apartment 1. (R. Doc. 32, 55). The application for search warrant substantially relied upon the September 12 and September 21 searches. (R. Doc. 32). Specifically, the warrant application provided "a K9 sniff was conducted of the interior of 314 Betsy Ross Pl St due to the complaint with positive results…." and "a K9 sniff was conducted of the interior of 321 Betsy Ross Pl St due to the complaint. The K9 had a positive alert on Apartment 1 for the presence of narcotics. … The K9 used is a certified and trained drug detection dog." (R. Doc. 32 p. 4, ¶¶ 3, 5). The search yielded drug contraband. (R. Doc. 55 p. 1).

Defendant answered the door and immediately complied with officers' commands; he was handcuffed and patted down for weapons. (R. Doc. 55 p. 2).

Officers inquired whether there were any kids or animals in the apartment and then asked a series of questions, such as his name, whether he lived in the unit, his phone number, employment status, and whether he was on probation or parole. (R. Doc. 55 p. 2, fn. 3). After a few minutes, Officer Wayland asked Defendant whether he "wanted to talk" and Defendant agreed. (R. Doc. 55 p. 2). Defendant, Officer Wayland, and Detective Robert Myers went into the bathroom to speak privately; there, Officer Wayland explained what drew their attention to Defendant's unit and read Defendant his *Miranda* rights. (R. Doc. 55 pp. 2–3). Following *Miranda*, Defendant answered questions from both officers. (R. Doc. 55 p. 3). After about twenty minutes, Defendant accompanied Officer Wayland to the police station to continue questioning; at the station, Defendant was questioned by Detective Myers who reminded Defendant of his *Miranda* rights. (R. Doc. 55 p. 3).

B. Legal History

Defendant was indicted in the Southern District of Iowa with one count of possession with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). (R. Doc. 14). A prior conviction was noticed pursuant to 21 U.S.C. § 851. (R. Doc. 14).

On July 13, 2020, Defendant filed a motion to suppress evidence and motion to suppress statements. (R. Doc. 28, 28-1, 29, 29-1). The Government resisted, and Defendant filed his reply. (R. Doc. 39, 48). On September 29, 2020, Defendant appeared for hearing on his motion. (R. Doc. 51). The Government's exhibits 1–4 were admitted, and the Government called Sergeant Brandon Keopke, Officer Brian

Shertz, and Corporal Bryant Wayland. (R. Doc. 51, 56). Defendant's exhibits A–Y were admitted, and Defendant called Mr. Jerry Potter and Mr. William Hurt. (R. Doc. 32, 32-1, 49–52).

Within his motions, Defendant raised several arguments. First, looking to *Florida v. Jardines*, 569 U.S. 1 (2013), as well as 8th Circuit precedent in *U.S. v. Hopkins*, 824 F.3d 726 (8th Cir. 2016), and *U.S. v. Burston*, 806 F.3d 1123 (8th Cir. 2015), Defendant argued law enforcement's use of a K9 to twice sniff Defendant's apartment doors was an unconstitutional physical intrusion upon and search of the curtilage to Defendant's home and therefore, based upon Defendant's property interest in this protected area, a Fourth Amendment violation. (R. Doc. 28-1, pp. 5–11).

Additionally, Defendant argued law enforcement's warrantless intrusions upon the curtilage of his apartment constituted, based upon Defendant's reasonable expectation of privacy in his home as articulated in *Jardines*, *U.S. v. Kyllo*, 533 U.S. 27 (2001), and *U.S. v. Whitaker*, 820 F.3d 849 (7th Cir. 2016), a Fourth Amendment violation. (R. Doc. 28-1, pp. 11–13). Any differential treatment in evaluating dog searches, argued Defendant, between a single-family home and an apartment, would violate the Equal Protection Clause resulting from its disparate impact based upon race and income. (R. Doc. 28-1, p. 13). Looking to the eventual search warrant, Defendant argued the decision to seek a search warrant for Defendant's apartment was inextricably impacted by tainted evidence (the warrantless dog sniffs) and the

search warrant application included a presentation of evidence discovered as a direct result of the Fourth Amendment violation. (R. Doc. 28-1 pp. 13–15).

Defendant argued the application for the search warrant misstated and omitted critical information by failing to include the dog alerted to all apartments in the building as well as an unrelated basement door (in the first warrantless sniff), failing to include the dog alerted to the door handle of the apartment door (in the second warrantless sniff), and failed to provide details of the warrantless sniffs (like description of the alert, location of the dog, how the handler interpreted the alert, or the dog certifications or training record), which justified a *Franks* hearing. (R. Doc. 28-1 pp. 15–18). Defendant argued the search warrant on its face failed to establish probable cause; the judicial officer did not have sufficient information to make a determination because the application lacked or provided only conclusory information concerning dog certification; the information provided by the dog alerts lacked probative value, failing to distinguish information particular to Defendant's apartment and failing to note the second alert was only to the door handle; and the judicial officer could not determine reliability in similar contexts or based upon a lack of documentation in this case. (R. Doc. 28-1, pp. 18–20).

Regarding to Defendant's statements, Defendant argued his initial responses to questioning lacked the benefit of *Miranda* warning and his subsequent waiver of *Miranda* and resulting statements were involuntary. (R. Doc. 29-1, pp. 2–4).

On October 15, 2020, the court denied Defendant's motions. (R. Doc. 55). The court agreed with Defendant and found the two warrantless dog sniffs of Defendant's

apartment doors, located within an enclosed locked apartment building, were unconstitutional. *Jardines*, *Dunn*, *Burston*, and *Hopkins*, when read together, ruled the district court, "compel a finding that both dog sniffs conducted at the doors of the Defendant's apartments were warrantless searches in violation of the Fourth Amendment." (R. Doc. 55, p. 7). First, "[a]pplying the factors in *Dunn*, the [c]ourt [found] the area immediately outside the doors of Defendant's apartment units qualify as curtilage." (R. Doc. 55, p. 7). Additionally, the court "[found] that the use of a drug detection dog exceeded any implied knock-and-talk license." (R. Doc. 55, p. 8 (citing *Jardines*, 569 U.S. at 10)). The court noted "the dog sniff at issue here occurred within inches of Defendant's door. Surely there is no customary invitation for one of the other tenants to 'introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." (R. Doc. 55, p. 8 (citing *Jardines*, 569 U.S. at 9; *U.S. v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016)). As such, the court found both dog sniffs, on September 12 and September 21, were unreasonable searches under the Fourth Amendment. Further, the court found "[t]he search warrant predicated on these searches is thus invalid and the evidence discovered is inadmissible against Defendant unless an exception to the exclusionary rule exists." (R. Doc. 55, p. 8).

On February 19, 2021, Defendant entered a conditional plea of guilty to possession with intent to distribute controlled substances, without an § 851 enhancement. Pursuant to the plea agreement, Defendant reserved his right to appeal the suppression issue. (R. Doc. 69, 71).

On June 28, 2021, Defendant appeared before Judge Rose for sentencing. (R. Doc. 83; Addendum p. 1). The court determined the applicable USSG range of 57–71 months. (R. Doc. 85, p. 8; Sent. TR 4:20–5:10). Judgment was entered and Defendant was sentenced to a term of imprisonment of 57 months, consecutive to a revocation sentence imposed the same date, with 3 years' supervised release to follow and $100 special assessment. (Addendum p. 2–3, 6; R. Doc. 83).

Defendant requested the Eighth Circuit reverse the District Court ruling denying Defendant's motion to suppress, arguing the district court was correct in holding law enforcement's two warrantless K9 sniffs of the curtilage of his home were violations of the Fourth Amendment but erred in applying the *Leon* good faith exception to nevertheless allow the fruits of the search to be admitted; the district court was incorrect in denying a request for a *Franks* hearing; and Defendant's statements should have been suppressed because his initial statements were without the benefit of *Miranda* and the subsequent waiver was involuntary.

The Eighth Circuit rejected Defendant's arguments, the *Leon* good faith exception applied, even if the warrantless searches were unconstitutional, because existing Circuit precedent had not yet explained how *Jardines* would apply to apartment doors in a common hallway and it was reasonable for officers to rely on then-applicable precedent. App. A.

REASONS FOR GRANTING THE WRIT

The facts of this case are so deficient as justification for a warrantless search of the curtilage of the home that, respectfully, the Supreme Court should grant certiorari to consider the denial of Defendant's suppression motion. Although the District Court for the Southern District of Iowa properly concluded an illegal warrantless search had occurred, the District Court and Eighth Circuit wrongly concluded the *Leon* good faith exception should nevertheless save the illegal search. Such calls for an exercise of this Court's supervisory power.

A writ of certiorari in this case is also imperative because it involves an issue of exceptional importance: the permissible scope of the *Leon* exception to the Fourth Amendment's warrant requirements. Indeed, the Fourth Amendment offers little meaningful protection from governmental overreach when it is interpreted to protect single family homeowners more so than the apartment dwellers. *See* Supreme Ct. Rules 10(a), (c).

Argument

1. *This Court Should Make Clear 4th Amendment Protections Apply, pursuant to* Jardines*, to Enclosed Apartment Doors Contained Within a Common Hallway As Was Correctly Held By The District Court.*

The Eighth Circuit erred when it held law enforcement could reasonably rely upon the *Leon* good faith exception to allow and justify a warrantless search of Defendant's home. An apartment door contained within an enclosed apartment building should be granted the same protections as long held under the Fourth Amendment. That is, the Fourth Amendment's protections must be read so as to reaffirm those protections granted to the curtilage of the home, including apartment doors. To read the protections of the home otherwise would impermissibly delineate between the wealthy and the poor based solely upon whether an individual lives in an enclosed apartment building or a single-family residence. There is no historic or legal justification for such delineation; indeed, long-established precedent has repeatedly emphasized the importance of the home. Allowing law enforcement to ignore these principles, using the *Leon* good faith exception, undermines the basic premises of Fourth Amendment jurisprudence and undermines confidence and guarantees in fundamental constitutional protections. Respectfully, the Eighth Circuit's allowance for the same must be reversed.

Of course, the Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. More specifically, the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Id.* "The overriding function of the

Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions by the State." *Schmerber v. Cali.*, 384 U.S. 757, 767 (1966). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf v. People of the State of Colo.*, 338 U.S. 25, 27 (1949). If no warrant is had, a search can only be considered reasonable if it falls within a specific exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 382 (2014).

Evidence obtained in violation of the Fourth Amendment must be suppressed via the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *accord Davis v. Mississippi*, 394 U.S. 721 (1969); *U.S. v. Riesselman*, 646 F.3d 1072, 1078 (8th Cir. 2011) (evidence is subject to the exclusionary rule and cannot be used in a criminal proceeding). Evidence derived from illegality must also be suppressed as fruit of the poisonous tree:

> The exclusionary rule extends to evidence later discovered and found to be derivative of an illegality of 'fruit of the poisonous tree.' If the defendant establishes a nexus between a constitutional violation and the discovery of evidence sought to be excluded, the government must show the challenged evidence did not arise by exploitation of that illegality … [but] instead by means sufficiently distinguishable to be purged of the primary taint. The illegality must be at least a but-for cause of obtaining the evidence.

U.S. v. Tuton, 893 F.3d 562, 568 (8th Cir. 2018) (internal citations and quotation marks omitted). Put another way, "The Fourth Amendment's exclusionary rule prohibits the introduction into evidence 'tangible materials seized during an unlawful search,' 'testimony concerning knowledge acquired during an unlawful search,' and

'derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search.'" *U.S. v. Kelly*, 2020 WL 4915434 at *9 (S.D. Iowa Aug. 20, 2020) (citing *Murray v. U.S.*, 487 U.S. 533, 536–37 (1988); *U.S. v. Vega-Rico*, 417 F.3d 976, 979 (8th Cir. 2005) (citations omitted)); *see also Wong Sun v. U.S.*, 371 U.S. 471, 484 (1963) (holding the exclusionary rule extends to indirect as well as direct products of unconstitutional searches). The fruit of the poisonous tree doctrine extends, even, to voluntary consent. *Florida v. Royer*, 460 U.S. 491, 508 (1983) (voluntary consent search was "tainted by the illegality and [the consent] was ineffective to justify the search."); *Brown v. Illinois*, 422 U.S. 590 (1975) (*Miranda* warnings, by themselves, may not purge taint of an illegal arrest); *U.S. v. Alvarez-Manzo*, 570 F.3d 1070, 1077 (8th Cir. 2009) (describing application of the fruit of the poisonous tree doctrine to subsequent consent).

Central to the Fourth Amendment's protections against unlawful searches is the home, and warrantless searches inside the home are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 587 (1980); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) ("Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, … reasonableness generally requires the obtaining of a judicial warrant."). Stated another way, "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 569 U.S. at 6. The curtilage of the home, the area immediately surrounding and associated with the home, is considered part of the home itself for Fourth Amendment

purposes. *Id.*; *accord Collins v. Virginia*, 138 S.Ct. 1663, 1670 (2018) (citations omitted) (finding partially enclosed car port/driveway was curtilage). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Collins*, 138 S.Ct. at 1670 (citing *California v. Ciraolo*, 476 U.S. 207, 212–213 (1986)).

In *Jardines*, this Court noted first the "simple baseline…that for much of our history formed the exclusive basis for [the Fourth Amendment's] protections," a property interest in the item searched. *Jardines*, 569 U.S. at 5. Although that scope of interest in property rights has been expanded, the historic principle of physical intrusion upon a constitutionally protected area made the *Jardines* case "a straightforward one." *Id.* After all, said the Supreme Court,

> At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. [U.S.]*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

Id. at 6. Thus, when police brought a drug detection dog onto the porch of the defendant's property to conduct a warrantless sniff, a search occurred. *See id.* at 8–9 (noting, as well, the police exceeded the implied license to knock-and-talk by "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence"); *see also id.* at 12–16 (Kagan, J., concurrence)

(although majority analyzed case as a property interest, concurrence would "just as happily have decided it by looking to [defendant's] property interests.")).

Since the *Jardines* decision, the Eighth Circuit has found warrantless governmental intrusion on the curtilage of multi-family housing is a violation of the Fourth Amendment. After all, "[t]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *U.S. v. Ross*, 456 U.S. 798, 822 (1982); *see also Collins*, 138 S.Ct. at 1675 (rejecting proposal for a bright-line rule which "would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage.").

In *Burston*, the Eighth Circuit found police violated the Fourth Amendment when they "released [a drug detection dog] off-leash to sniff the air alongside the front exterior wall of the west side of the [eight-unit] apartment building" where the defendant lived. *U.S. v. Burston*, 806 F.3d 1123, 1125 (8th Cir. 2015). The dog proceeded to alert next to a private window of the defendant's apartment. *Id.* "The area where [the dog] sniffed was not in an enclosed area. Nor was the public physically prevented from entering or looking at that area other than by the physical obstruction of [a] bush [partially covering the window]." *Id.* Evidence was presented the defendant used the nearby space for grilling. *Id.* Based on the K9's positive alert, as well as the defendant's criminal record, police obtained a state-issued search warrant, executed six days later, resulting in the location of firearm and drug

evidence. *Id.* The defendant also waived *Miranda* and consented to speak to law enforcement, making incriminating statements. *Id.* Examining the *Dunn*[2] factors, the Eighth Court held the area was curtilage and "police officers would not have an implicit license to stand six to ten inches from the window in front of [the defendant's] apartment. *Id.* at 1127 (internal quotation omitted).

Next, in *Hopkins*, the Eighth Court determined the police violated the Fourth Amendment when a drug dog[3] was deployed to "sniff the door bottoms on every apartment." *U.S. v. Hopkins*, 824 F.3d 726, 730 (8th Cir. 2016) (internal quote omitted). The K9 was deployed "to sniff along the exterior walls of the building in which [the defendant] rented a townhome" and "alerted after sniffing within 6 to 8 inches of Hopkins' front door." *Id.* at 729. Based on this, the officer applied for a state issued search warrant. *Id.* at 730. In the application, the officer attested the dog had "sniffed the door bottoms of all the apartments from the outside common area." *Id.* at 730. Upon the warrant's execution, firearm and drug evidence was located. *Id.* The Court echoed its holding in *Burston*, finding "[t]he area immediately in front of Hopkins' door was also curtilage." *Id.* at 732. In particular, the Court looked to the fact the K9 "was within six to eight inches of the door" and "actually sniffed the creases of the door." *Id.* (internal quote omitted). "'Daily experience' also

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[2] *U.S. v. Dunn*, 480 U.S. 294, 301 (1987) (four relevant factors are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.")

[3] Incidentally, the same officer, K9, and apartment complex involved in *Burston*.

suggests that the area immediately in front of the door of the apartments in this complex is curtilage." *Id.* (quoting *Jardines*, 569 U.S. at 7). Concluding also law enforcement "had no license to have [the K9] enter the curtilage and sniff the door," the Court held "[t]he dog sniff at Hopkins' front door violated *Jardines*, and the warrant application was not otherwise supported by probable cause." *Id.* at 732–33.

Following this authority, the district court here found "*Jardines*, *Dunn*, *Burston*, and *Hopkins*, when read together, compel a finding that both dog sniffs conducted at the doors of the Defendant's apartments were warrantless searches in violation of the Fourth Amendment." (R. Doc. 55 p. 7). Because the areas immediately outside the doors of Defendant's apartments were curtilage, and because law enforcement conducted two warrantless searches thereof, the Fourth Amendment was offended. (*See* R. Doc. 55 pp. 7–8 (property interest analysis)). The district court also found these warrantless searches exceeded the bounds of the implied knock-and-talk license, and therefore unreasonably infringed upon Defendant's reasonable expectation of privacy in violation of the Fourth Amendment. (*See* R. Doc. 55 p. 8). Because the Fourth Amendment was violated in these particulars, "[t]he search warrant predicated on these searches is thus invalid and the evidence discovered is inadmissible against Defendant unless an exception to the exclusionary rule exists." (R. Doc. 55 p. 8). The district court was correct in so holding.

Here, police committed two unlawful searches, first on September 12, 2019 and again on September 21, 2019. On September 12, police entered the locked six-unit

apartment building to access Defendant's apartment, within which he had a property interest, and did so with a sophisticated device outside the realm of general public use.[4] *See Kyllo v. U.S.*, 533 U.S. 27, 40 (2001) (where "the Government uses a device that is not in general public use" to "explore details of the home that would previously have been unknowable without physical intrusion" a search is had). That is a search. Then, again on September 21, police entered the locked four-unit apartment building to access Defendant's apartment, again doing so with a sophisticated device outside the realm of general public use. That is a search. Each of these searches was warrantless, in violation of Defendant's property interest, and outside the permissible scope of an implied license to enter. This was presumptively unreasonable and contrary to the bounds of the Fourth Amendment, both as it relates to Defendant's property interest and his privacy interest.

All evidence obtained on September 25 resulting from execution of a search warrant supported by the violative searches was properly determined by the district court to be inadmissible. The government intrusion involved in this matter is exactly the type of transgression of Fourth Amendment rights prohibited by the Fourth Amendment and *Jardines* and its progeny. As such, the exclusionary rule applied to preclude use of all evidence obtained in law enforcement's search warrant application and derivative evidence obtained by the search the subsequent interview. *See*

[4] Although *Jardines*, *Burston*, and *Hopkins* decided the matter as a property interest issue, as an additional basis (as found by the concurrence in *Jardines*), the Amendment is offended as it relates to Defendant's reasonable expectation of privacy.

Burston, 806 F.3d at 1129 (holding exclusionary rule applied to preclude use of evidence from the dog sniff in state search warrant application and derivative evidence from search of apartment and post-arrest interview).

2. *The* Leon *Good Faith Exception Should Not Apply to Save the Admission of the Evidence Seized.*

Application of the *Leon* good faith exception was error. This Court should reject application of the *Leon* good faith exception to save the otherwise inadmissible evidence under the circumstances found in this case.

Pursuant to *Leon*, evidence otherwise inadmissible by function of the exclusionary rule may be admitted if "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," even though a court later found the warrant invalid. *U.S. v. Leon*, 468 U.S. 897, 920 (1984). In order for the *Leon* good faith exception to apply to a warrant based on evidence obtained through a violation of the Fourth Amendment, "the detectives' prewarrant conduct must have been close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable." *U.S. v. Cannon*, 703 F.3d 407, 413 (8th Cir. 2013). "Our inquiry is confined to 'the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'" *Hopkins*, 824 F.3d at 733 (quoting *Leon*, 468 U.S. at 922, n. 23); *accord U.S. v. Barnes*, ___ F.4th ___ 2021 WL 3700089 at *2 (Aug. 20, 2021). Four circumstances "preclude a finding of good faith:"

> (1) when the affidavit or testimony supporting the warrant contained a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge; (2) when the issuing judge wholly abandoned his judicial role in issuing the warrant; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant is so facially deficient that no police officer could reasonably presume the warrant to be valid.

Cannon, 703 F.3d at 412 (citations omitted).

In *Burston*, the Eighth Court rejected application of the similar *Davis* good faith exception,[5] finding officers' reliance upon prior precedent in *Scott*[6] and *Brooks*[7] was not objectively reasonable because those opinions did not "specifically authorize a dog sniff six to ten inches from a suspect's window, present similar facts, or provide a rationale to justify [law enforcement's] search." *Burston*, 806 F.3d at 1129. If a law enforcement officer could not rely upon prior precedent, in effect at the time of that search, to excuse an otherwise unconstitutional search had six to ten inches from a defendant's side window, the government likewise should not be able to rely upon the *Leon* exception to excuse the unconstitutional search had immediately upon Defendant's front door, particularly when that search involved a physical intrusion onto the threshold barrier to the home.[8]

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[5] Pursuant to *Davis*, the exclusionary rule may not apply when officers act in objectively reasonable reliance on binding circuit precedent. *See Davis v. U.S.*, 564 U.S. 229 (2011).

[6] *U.S. v. Scott*, 610 F.3d 1009 (8th Cir. 2010).

[7] *U.S. v. Brooks*, 645 F.3d 971 (8th Cir. 2011).

[8] At the time of the first search, Kurly physically touched and intruded upon Defendant's apartment—scratching at Defendant's doorknob. (Supp. TR 81:8–18; *see also id.* at 84:2–12 (Kurly is trained to alert to the strongest source of the scent; as such, her alert is not to the door as a general location, but specifically to the door

Of even greater import, the Eighth Circuit likewise rejected application of the *Leon* good faith exception. In *Burston*, the Circuit determined "[t]he officers' reliance on the search warrant could not be deemed objectively reasonable because the same officers' prewarrant conduct was not 'close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable. *[U.S.] v. Cannon*, 703 F.3d 407, 413 (8th Cir. 2013) (quoting [*U.S.*] v. *Conner*, 127 F.3d 663, 667 (8th Cir. 1997))." The same analysis applies here, and this Court should make clear *Leon* cannot be utilized as a "free pass" for everything.

Here, Cpl. Wayland contacted Sgt. Koepke and Officer Schertz with the specific intent they perform the searches, and they conducted the unconstitutional searches at Cpl. Wayland's request. (Supp. TR 17:18–22 (Sgt. Koepke), 62:1–13 (Ofc. Schertz)). Sgt. Koepke and Ofc. Schertz then immediately relayed the information back to Cpl. Wayland, who included that information in his application for search warrant. (Supp. TR 26:1–8 (Sgt. Koepke), 75:11–15 (Ofc. Schertz), 102:10–13, 105:9–24 (Cpl. Wayland); R. Doc. 32). Like *Burston*, "the same officers' prewarrant conduct was not 'close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable."

Although in *Hopkins* the Eighth Court found *Leon* applied, the circumstances in *Hopkins* are distinguishable. In *Hopkins*, the officer testified he was aware of

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handle.)). At the second search, Dawn "came up, she sniffed near the door handle area, and then sat." (Supp. TR 23:6–8; *accord id.* at 50:13–24). Dawn came within, at least, three to six inches of the door handle. (Supp. TR 51:3–6, 52:3–6).

Jardines but did not believe it applied, making him, as *Leon* would say, a "reasonably well trained officer." *Hopkins*, 824 F.3d at 733; *see also Leon*, 468 U.S. at 922 n. 23. Here, however, Cpl. Koepke testified law enforcement had not been trained on *Jardines* and, in fact, there is no formalized training, at all, concerning dog searches or applicable Circuit precedent. (Supp. TR 53:24–54:4). Additionally, in *Hopkins*, the Court noted law enforcement's belief was reasonable because *Jardines* involved a single-family residence and *Burston* had not yet been decided. *Hopkins*, 824 F.3d at 733. Here, however, *Burston* and *Hopkins* had been long decided, as have comparable cases in other circuits, like *Whitaker*,[9] and the notion constitutional protections like those discussed in *Jardines* apply only to single family residences[10] has been long since dispelled. In fact, no Circuit decision, following *Jardines*, has found the warrantless K9 search of an apartment curtilage reasonable. Likewise, *Jardines* and *Kyllo* were long-established at the time of the K9 searches here. Law enforcement should not be able to benefit from willful blindness or ignorance of the law any more

[9] In *Whitaker*, "law enforcement…brought a narcotics-detecting dog to the locked, shared hallway of the apartment building. The dog alerted to the presence of drugs at a nearby apartment door and then went to the targeted apartment…." *U.S. v. Whitaker*, 820 F.3d 849, 850 (7th Cir. 2016). In a detailed opinion, the Seventh Circuit in *Whitaker* found the search to be a violation of the defendant's reasonable expectation of privacy, pursuant to *Kyllo* and the concurrence opinion of *Jardines*. *Id.* at 852–53. Next, the Seventh Circuit refused to apply the *Davis* good faith exception noting, in part, "no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the warrant without a warrant. … Moreover, *Kyllo* was decided before the search…. The logic of *Kyllo* should have reasonably indicated…a warrantless dog search at an apartment door would ordinarily amount to an unreasonable search in violation of the Fourth Amendment." *Id.* at 854–55.

[10] And therefore only to the benefit of the wealthy.

than the average citizen or defendant. The exclusionary rule still has merit to prevent officers from being encouraged to be willfully ignorant or blind as to their constitutional requirements. By definition, such an officer is not a "reasonably well trained officer" nor operating in good faith.

Further, in *Hopkins*, the officer disclosed "legally relevant facts about the dog sniff" to the state magistrate, attesting the K9 had "sniffed the door bottoms of all the apartments from the outside common area." *Id.* at 730, 734. As articulated in *Hopkins*, "'once the state court judge considered these facts and issued the warrant, it was reasonable for the detectives to believe the warrant was valid. Although we conclude that the dog sniff in this case violated *Jardines*, the legal error 'rest[ed] with the issuing magistrate, not the police officer." *Id.* at 734 (citations omitted).

Here, however, legally relevant facts were not disclosed, thus misleading the magistrate judge. Such a circumstance precludes application of *Leon*. The only disclosure relating to the unconstitutional searches was: "On 09/12/19 a K9 sniff was conducted *of the interior of 314 Betsy Ross Pl St* due to the complaint with positive results…" and "On 09/21/19 a K9 sniff was conducted *of the interior of 321 Betsy Ross Pl St* due to the complaint. The K9 had a positive alert *on Apartment 1*…." (R. Doc. 32 p. 4, ¶¶ 3, 5 (emphasis added)). The application did not disclose Ofc. Schertz had encroached upon the curtilage of Defendant's home, doing so at 4:12 a.m. (R. Doc. 55 p. 1; Supp. TR 80:20–24); the area was in an enclosed, locked building (Supp. TR 64:16–23); Kurly provided alerts to all seven doors and not just Defendant's (Supp. TR 80:25–81:7, 69:19–25); and Kurly had touched and scratched the doorknob (not

merely alerting to the door generally) (Supp. TR 81:8–18, 64:5–6, 84:2–12). The application also did not disclose Cpl. Koepke had encroached upon the curtilage of Defendant's home, doing so at 4:30 a.m. (Supp. TR 17:14–22, 19:20–21, 22:2–7, 39:24–40:1); the area was in an enclosed, locked building (R. Doc. 55 p. 2; Supp. TR 17:14–22); and Dawn had sniffed the door handle, coming within at least three to six inches of the handle (Supp. TR 23:6–8, 50:13–24, 51:3–6, 52:3–6). If the application did not disclose those legally relevant facts. If it had, the *Jardines* and Fourth Amendment violation would have been obvious. *See* (R. Doc. 55 p. 8 (finding searches unconstitutional)). A reliance upon *Leon* under these facts is circular: Law enforcement cannot place the legal error upon the magistrate, thereby shielding itself in a cloak of good faith reliance upon the magistrate, if it does not act in good faith by misleading or failing to disclose material information to the magistrate. Stated differently, law enforcement cannot be said to be relying in good faith on the magistrate's legal determination if they withhold or recklessly fail to disclose information material to the issuance of a warrant.

Fourth Amendment protections for the home and its curtilage are not novel concepts in the law.[11] Rather, these "sacred" concepts are as old as the nation itself and have their roots in English law prior to the founding of this country. As noted by

[11] In contrast with the good faith exception under *Davis*, followed in *U.S. v. Givens*, 763 F.3d 987 (8th Cir. 2014) and *U.S. v. Mathews*, 784 F.3d 1232 (8th Cir. 2015), where officers are not to be held responsible for constitutional principles not yet articulated, officers should be held responsible for constitutional principles long since established and penalized for willful ignorance by exclusion of the evidence obtained through said ignorance.

Jardines:

> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver* [*v. U.S.*, 466 U.S. 170, 180 (1984)]. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," *Hester* [*v. U.S.*, 265 U.S. 57, 59 (1924)], so too is the identity of home and what Blackstone called the "curtilage or homestall," for the "house protects and privileges all its branches and appurtenants." 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).
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> While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver*, 466 U.S., at 182, n. 12, 104 S.Ct. 1735. Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends." *Ibid.*
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> …
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> …*Entick v. Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765), a case "undoubtedly familiar" to "every American statesman" at the time of the Founding, *Boyd v. United States*, 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886), states the general rule clearly: "[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." 2 Wils. K.B., at 291, 95 Eng. Rep., at 817.

Jardines, 569 U.S. at 6–8.

Because the unconstitutional searches here were not "close enough to the line of validity" to make the officers' belief in the validity of the warrant objectively reasonable, *Leon* cannot save the admission of the unconstitutionally obtained evidence. Further, *Burston* rejected application of the good faith exception. There

was no reason for the Eighth Circuit to deviate from such precedent, particularly when the facts of the cases are so akin and, if anything, the facts of this case are more egregious than those found in *Burston*. *Hopkins* is distinguishable in material ways. And, *Cannon* precludes application of *Leon* because the warrant affidavit contained false statements made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge. The exclusionary rule and the fruit of the poisonous tree doctrine prevent the government from benefitting from the multiple unconstitutional searches.

As such, the *Leon* exception, which has become in practice a seeming "free pass" for any scenario, should not apply to save police conduct here. Rather, Fourth Amendment principles should be given primary import and jealously protected. This Court should make clear, once again, that the boundaries of the home are, if nothing else, sacred in Fourth Amendment analysis, and this conclusion is no less true for enclosed apartment buildings.

CONCLUSION

For the foregoing reasons, Donell Hines respectfully requests the Petition for Writ of Certiorari be granted and the Eighth Circuit's opinion and judgment be vacated.

RESPECTFULLY SUBMITTED,

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APPENDIX