No. _____

In The
Supreme Court of the United States

BOB JARVIS RIVERA and
SANDRA DANIELLE STACKPOOLE,

Petitioners,

v.

STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The State Of Michigan, Third Judicial Circuit Court For The County Of Wayne, Criminal Division

PETITION FOR WRIT OF CERTIORARI

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November 21, 2014

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QUESTIONS PRESENTED

Is the entry onto private residential property without a warrant for the purpose of allowing a police dog to sniff the front entrance of the private residence, a violation of the Fourth Amendment of the United States Constitution?

Is the rule announced in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013) applicable to the case at bar, which was pending before the state courts at the time of this Court's decision?

Is the decision of the Michigan intermediate appellate court requiring a pattern of misconduct before the exclusionary rule will apply, an accurate interpretation of this Court's holding in *Davis v. United States,* 564 U.S. ___, 131 S. Ct. 2419 (2011)?

Where state court case law conflicts with a decision of the United States Supreme Court, can a state court claim that the state decision was binding appellate authority, such that it would allow a finding of "good faith" triggering an exception to the exclusionary rule?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The trial court's order granting the motion to suppress on October 19, 2011 is unreported (App. 16-20). The Michigan Court of Appeals opinion is an unpublished *per curiam* Opinion, reported at *People v. Rivera*, No. 307315, 2012 WL 6035353, (Mich. Ct. App. Nov. 29, 2012) (App. 7-15). The Michigan Supreme Court denied rehearing on May 28, 2013 (Supreme Court No. 146550) (App. 5).

On re-trial, the trial court's order denying motion to suppress on December 9, 2013 is unreported (App. 1-4). The Michigan Court of Appeals denied rehearing the issue in light of this Court's ruling in *Jardines,* on March 14, 2014 (Court of Appeals No. 319682) (App. 21). The Michigan Supreme Court denied rehearing the issue in light of this Court's ruling in *Jardines*, on June 24, 2014 (Supreme Court No. 149111) (App. 22).

STATEMENT OF JURISDICTION

Petitioner seeks review of the November 29, 2012, judgment of the Michigan Court of Appeals. Because the evidence in the case at bar was obtained by an illegal search of the Petitioners' residential property, by police officers without a warrant using a drug sniffing dog in a manner now forbidden by this Court's holding in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013). 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. 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

This matter began in 2010, when law enforcement officers became aware of an undated, and uncorroborated complaint from an anonymous "concerned citizen" who made "reference to narcotic trafficking and/or use at 12190 Fordline, Southgate, Michigan." (Appendix, P.1). A subsequent Law Enforcement Information Network (LIEN) search showed that "Bob Rivera" was an occupant of the premises in question, and that he had a conviction for possession of a controlled substance in 2000, over ten years before the anonymous tip. The law enforcement officers did not conduct any surveillance of the premises, or take any steps to investigate or corroborate the anonymous tip. There was no attempt to purchase drugs or make any investigation of the premises.

On November 18, 2010, at approximately 3:00 am, Detective Starzec, and K-9 Officer Demers,

accompanied by a narcotics dog, entered upon the Fordline property, without consent and without a warrant, walked onto the front porch and stood behind the front door of the home with the narcotics dog. Standing on Mr. Rivera's front porch, the narcotics dog "sniffed" behind the front door and "gave a positive indication for the presence of narcotic odor." (Appendix, P.1).

Later that day, after the entry with the narcotics dog, officers obtained a search warrant for the residence at 12190 Fordline, Southgate, Michigan. The affidavit in support of the warrant recited only the anonymous tip, the LIEN information of the ten-year-old arrest, and the dog sniff activity as probable cause for the issuance of the warrant (Appendix, P.1). After issuance of the warrant, officers entered the home and found live marijuana plants. Bob Rivera and Sandra Danielle Stackpoole, who also resided at the home, were both in the house at the time of the execution of the search warrant. Both were subsequently charged with manufacturing, and/or possessing with intent to deliver marijuana, and possession of Vicodin.

Prior to trial, defense counsel filed a motion to suppress the evidence, challenging the adequacy of the warrant, alleging that the "facts" supporting the warrant were inadequate, and that the trespass on the residential property with the drug sniffing dog was illegal. The trial court conducted an evidentiary hearing and found the search violated the Fourth Amendment, suppressed the evidence, and dismissed the case (Appendix, PP.19-20). The Government

appealed the ruling to the Michigan Court of Appeals, Michigan's intermediate appellate court.

In an unpublished *per curiam* opinion, a panel of the Michigan Court of Appeals reversed the trial court's ruling. The panel held that the warrant was adequate on its face, there was no constitutional violation in the use of a drug dog to obtain probable cause for the issuance of a search warrant, and that if there were any flaws in the search, they were excused by the Good Faith doctrine, as announced in this Court's ruling in *Davis v. United States*, 564 U.S. ___, 131 S. Ct. 2419 (2011). The appellate court reasoned that *Davis* requires a defendant to show a pattern of misconduct by the police before the Exclusionary Rule would apply, and that because of the Michigan appellate court decision, *People v. Jones*, 279 Mich. App. 86 (2008), police were relying on binding appellate authority when they brought the dog on the private property, and therefore, the Good Faith doctrine insulated any search defect from the Exclusionary Rule.

Defendants sought review in Michigan Supreme Court, which denied review, 494 Mich. 855, 830 N.W.2d 406 (2013), one vote dissenting. The matter returned to the trial court. Defendants renewed their motion to suppress, in light of this Court's intervening decision in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013). The trial court indicated its agreement with the defense analysis, but felt compelled by the Court of Appeals ruling to deny the motion as the law of the case (Appendix, P.4). The

trial court then stayed the matter to allow defendants to seek interlocutory review in the Michigan Court of Appeals because the issue would likely be case dispositive. The Court of Appeal denied the leave to appeal on March 14, 2014. Petitioners again sought leave to appeal to the Michigan Supreme Court. The Michigan Supreme Court denied leave to appeal on June 24, 2014, one vote dissenting (Supreme Court No. 149111).

Defendants Bob Jarvis Rivera and Sandra Danielle Stackpoole now seek review before this Court.

REASONS FOR GRANTING WRIT

I. In Light Of This Court's Holding In *Florida v. Jardines*, Federal Constitutional Law Is Now Settled That Police Entry Upon Private, Residential Property With A Drug Sniffing Dog, Without Consent Or A Search Warrant, Is An Unlawful Search, And The Michigan Court Decisions To The Contrary Ought To Be Reversed.

The Fourth Amendment to the United States Constitution guarantees "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, . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

At the very core of the Fourth Amendment stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). An area adjacent to the home, the front porch, is "intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened"; it is also an area "to which the activity of home life extends." *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

In the case at bar, the trial court found that the principles above applied to the facts of this case and suppressed the evidence against petitioners. The State of Michigan appealed that decision to the Michigan Court of Appeals. On November 29, 2012, the Michigan's Court of Appeals reversed the trial court's decision and reinstated the charges against petitioners. The court held that there was no constitutional violation by the warrantless police entry onto petitioners' private property with a drug dog to gather evidence. It cited as authority for that proposition the Michigan appeals court case *People v. Jones*, 279 Mich. App. 86 (2008), which had based its holding on the principles in *United States v. Place,* 462 U.S. 696 (1983), *Illinois v. Caballes*, 543 U.S. 405 (2005), and *United States v. Jacobsen*, 466 U.S. 109 (1984).

While the instant case was still pending before Michigan courts, this Court rendered its decision in *Florida v. Jardines*, 569 U.S. 1 (2013). In that decision, this Court held that the non-consensual use of a drug sniffing dog, without a warrant, does in fact violate the Fourth Amendment of the Constitution. *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013).

The facts in *Jardines* are nearly identical to the facts of this case. In both cases the police received an unverified anonymous tip, used a narcotics dog to sniff in a private area of private property, and obtained a search warrant based on the narcotic dog's positive response to drug odor. There was no other meaningful police investigation of the area searched with the drug dog. Therefore, the police investigation took place in a constitutionally protected area accomplished through an unlicensed physical intrusion. "[W]hile law enforcement officers need not 'shield their eyes' when passing by the home 'on public thoroughfares,'" *Ciraolo,* 476 U.S. at 213, but "an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Jardines*, *supra*, 133 S. Ct. at 1415 (2013).

Because this case was pending in the Michigan appellate courts when *Jardines* was decided, the decision of the Michigan Court of Appeals which conflicted with this Court's opinion in *Jardines* should be reversed. In *United States v. Johnson,* 457 U.S. 537 (1982), this Court held: "subject to [certain exceptions], a decision of this Court construing the Fourth

Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *Id.,* at 562. Five years later in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 713 (1987), this court explained why the *Johnson* principal was important:

> As we pointed out in *United States v. Johnson,* the problem with not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: "The time for toleration has come to an end."

Id., at 323.

In *Griffith*, this Court held that decisions of the United States Supreme Court that announce constitutional principles applicable to state prosecutions apply to all non-final criminal cases in state courts. The Court explained that once it has announced a new rule of criminal law applicable to state prosecutions, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id*., at 323. This Court emphasized the importance of state courts applying new constitutional law decided by this Court, "failure to apply a newly

declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id*., at 322.

Recognizing that it could not hear each case pending on direct review, this Court observed that it would fulfill its judicial responsibility by instructing lower courts to apply the new rule to cases not yet final:

> As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.

Id., at 323.

Petitioners respectfully submit, in accord with the decision of this Court in *Florida v. Jardines*, 133 S. Ct. 1409 (2013) the ruling of the Michigan Court of Appeals in this case must be reversed.

II. The Michigan Appellate Courts' Interpretation Of *Davis v. United States* Erroneously Expands The Principles Of *Davis* To Create A New Rule That A Defendant Has To Show A Pattern Of Misconduct To Warrant Suppression Of Illegally Seized Evidence.

The reading of *Davis v. United States*, 564 U.S. ___, 131 S. Ct. 2419 (2011), by the Michigan Court of Appeals does not accurately interpret this Court's concept of reasonable reliance as stated by this Court in *Davis* and its predecessors. The holding in *Davis* was that the good faith exception to the exclusionary rule applies to objectively reasonable reliance on binding appellate authority that is subsequently overruled. *Davis*, 131 S. Ct. 2419, 2429 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.").

The Michigan Court of Appeals ignored that core holding of *Davis*, instead quoting dicta in *Davis* to attempt to expand *Davis*, holding that *Davis* stands for the proposition that "'[I]solated,' 'nonrecurring' police negligence, . . . lacks the culpability required to justify the harsh sanction of exclusion." *People v. Rivera*, No. 307315, 2012 WL 6035353, *2 (Mich. Ct. App. Nov. 29, 2012) (quoting *Davis*, 131 S. Ct. at 2428). The Michigan Court of Appeals opinion ignored the factual basis for that statement, i.e., the "isolated police negligence" referred to that of police clerical

employees, not the searching officers. *Davis*, 131 S. Ct. at 2428.

As stated in *Davis*, this statement broke no new ground. This Court had previously applied the good-faith exception in cases where errors in the maintenance of records, which are relied on in good faith by searching officers, do not form the basis for suppression, e.g., *Herring v. United States,* 555 U.S. 135 (2009); *Arizona v. Evans,* 514 U.S. 1 (1995). Other cases that relied on good faith, similarly focused on actors that were not the executing officers, see, e.g., *United States v. Leon,* 468 U.S. 897 (1984) (magistrate error) and *Illinois v. Krull,* 480 U.S. 897 (1984) (invalid statute). Neither *Davis, Herring* nor *Evans* obligate a defendant to show a pattern of misconduct by the police to justify suppression. As interpreted by the Michigan Court of Appeals in this case, however, the statement became a new principal of constitutional litigation, imposing a previously unknown burden on a search-challenging defendant.

Given the circumstances of this case, such a new burden is unwarranted and counterproductive. In *Davis*, as in *Evans* and *Herring* before it, the error had nothing to do with the conduct of the police officers investigating the case or conducting the search. There, this Court found "[a]bout all that exclusion would deter in this case is conscientious police work." *Davis,* 131 S. Ct. at 2429. In the case at bar, the misconduct was that of the investigating and executing officers. There was no conscientious police work that was erroneous because of the improper

actions of others. Instead, here there was a clear effort by officers to take a shortcut in an effort to avoid conscientious police work. There was no effort made to investigate the validity of the anonymous tip; no surveillance, no attempt to purchase, no trash pull, no investigation of any kind. The police had no information that Petitioner Sandra Stackpoole had any criminal history. There was no claim that Petitioners were connected to any known drug activity.

Under the reasoning of the Michigan Court of Appeals in this case, the exclusionary rule could never apply unless a defendant could show a pattern of police misconduct. Holding that *Davis* prohibits exclusion in a case such as this one, where no investigation is done before intrusion on private residential property, essentially reads the exclusionary rule into oblivion. Construing *Davis* to compel proof of a pattern of misconduct discourages criminal defendants, but not prosecutors, from challenging established search and seizure rules, thus "introduc[ing] a systemic bias into Fourth Amendment litigation" and undermining the exclusionary rule's role in developing the constitutional principles governing criminal procedure. Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 Geo. L.J. 1077, 1082 (2011).

III. The Good Faith Doctrine Was Improperly Applied To Uphold The Search Based On A Warrantless Canine Sniff Of Petitioners' Front Door.

A. The Good Faith Exception To The Exclusionary Rule Cannot Apply In This Case Because The Officers Were Not Relying On Then-Existing Binding Appellate Authority.

The Michigan Court of Appeals wrote:

Especially relevant here, the *Davis* Court held "that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis*, 131 S. Ct. at 2423-24. In *Davis*, the Supreme Court explained the purpose of such a rule:

> Responsible law-enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances. The deterrent effect of exclusion in such a case can

> only be to discourage the officer from doing his duty.

Rivera, No. 307315, 2012 WL 6035353, at *4 (Mich. Ct. App. Nov. 29, 2012) (citing *Davis*, 131 S.Ct. at 2429) (citations, alterations, internal quotations omitted; emphasis in original).

The problem with the Michigan Court of Appeals opinion is that it relied on appellate authority that was neither binding nor accurate. Therefore, the foundation of the Michigan Court of Appeals holding that its opinion would not be overruled by an unfavorable decision in *Jardines* was in error.[1] The problem with the *Davis* analysis of the exclusionary rule by the Michigan Court of Appeals in this case, is that it

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[1] In a footnote the panel noted that *Florida v. Jardines*, and the issue of the constitutionality of a dog intrusion, was then pending before this Court. The Michigan Court of Appeals was aware that the Florida Supreme Court had ruled that the intrusion onto private residential property with a drug dog was, in fact, a search, 73 So.3d 34 (Fla. S. Ct. 2011). On that point, the panel stated:

> We note that the United States Supreme Court will soon be hearing the case of *Jardines v. State,* 73 So. 3d 34 (Fla. 2011), cert. granted ___ U.S. ___, 132 S. Ct. 995, 181 L.Ed.2d 726 (2012), wherein the Florida Supreme Court held contrary to this Court's decision in *Jones.* Given our ruling disposing of this case on the basis of the exclusionary rule, even should the United States Supreme Court effectively overrule *Jones* and similarly-decided cases, it will not impact our ruling.

People v. Rivera, docket No. 307315, 2012 WL 6035353, n.2 (Mich. Ct. App. Nov. 29, 2012).

attempted to pronounce federal rights without looking at federal law. The Court of Appeals acknowledged the legal principle of binding appellate authority as controlling the decision in this case, and then ignored the binding federal appellate authority applicable to this case.

The Michigan Court of Appeals relied upon its own decision in *People v. Jones*, 279 Mich. App. 86 (2008). While it is true that *Jones* had held that a dog sniff was not an illegal search, *Jones* was not binding appellate authority on the federal constitutional issue before the court. The binding appellate authority applicable to this issue was this court's decision in *Kyllo v. United States*, 533 U.S. 27 (2001) a decision ignored by *Jones*.

This Court's decision in *Kyllo* firmly placed limits on extraordinary government intrusion into private property. In *Kyllo*, this Court clearly stated that "the Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained," *id*., at 37, thus undercutting the foundation of the state case, the argument that there is no privacy interest in contraband, and establishing that it has no place in the discussion of the Fourth Amendment's application to private property. *Katz v. United States,* 389 U.S. 347 (1967) made it clear that "the Fourth Amendment protects people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351.

The "binding appellate authority" that should have been relied on by the Michigan Court of Appeals was set out clearly in *Kyllo*, and said that the use of "enhanced sensory systems" is, in and of itself, a search, and requires law enforcement to apply for and obtain a warrant prior to using it. *Kyllo*, 533 U.S. at 40. *Kyllo* made it clear that for purposes of the Fourth Amendment, when "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, the surveillance is a "search" and is presumptively unreasonable without a warrant." *Id*.

It does not matter for *Kyllo* purposes that the intrusion is simply a dog sniffing at the door.

> . . . we [have] made clear that any physical invasion of the structure of the home, "*by even a fraction of an inch,*" was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.

Id., at 37 (emphases added, citations and quotations omitted).

Nothing in *Kyllo* limited its reach to electronic or mechanical devices. *Kyllo* deliberately used the phrase "enhanced sensory" to describe in broad terms

the scope of its decision. Indeed, the language of the Court in *Kyllo* demonstrated that the Court intended its decision to be broadly interpreted due to the evolution and growth of technology, and how such advancements "would leave the homeowner at the mercy of advancing technology – including imaging technology that could discern all human activity in the home." *Id*., at 35. This Court was also able to glimpse into the future and conclude that "while the technology used in [*Kyllo*] was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." *Id*., at 36-37.

Michigan courts and police are not free to disregard the binding appellate authority that flows from *Kyllo*, and create their own worldview. A state-court decision is contrary to precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Supreme Court. *Williams v. Taylor*, 529 U.S. 362 (2000). The federal courts are the ultimate binding authority on what the Constitution says and means. States are not free to operate their own independent view of the United States Constitution and its amendments. For that reason, it was error for the Michigan Court of Appeals to hold that *Davis* authorized it to disregard the mandate of the exclusionary rule by substituting the view of an intermediate state court of Michigan for that of the United States Supreme Court, in *Kyllo*.

The attempt by the Michigan Court of Appeals in this case to ignore *Kyllo* and carve out an exception

for dogs by relying on the Michigan appellate court decision that conflicted with *Kyllo* does not establish the binding authority of the prior intermediate court's decision. Nothing in *Kyllo* supported the logic which caused the Michigan Court of Appeals to decide in *People v. Jones* that dog sniffs were excepted from the analysis of *Kyllo*, and that the use of dogs were excluded from *Kyllo's* ruling. Indeed, the Court in *Jardines* specifically held that dog searches were within the ambit of its decision in *Kyllo*, 533 US at 40.

The analysis of the court below that the erroneous decision of an intermediate appellate court within the State of Michigan could be binding appellate authority that would excuse the illegal conduct of the police, and therefore avoid exclusion under *Davis*, was clearly error. Therefore, the decision of the Michigan Court of Appeals must be reversed, and the evidence suppressed.

CONCLUSION

Certiorari ought to be granted to enforce this Court's Decision, promote judicial efficiency and to ensure consistent application of the law. Petitioners respectfully submit that the matters presented here ought to be decided by this Court. Decision of these matters will promote judicial efficiency. Decision of these matters will ensure consistency in the interpretation of the federal constitutional principles presented here by state and federal courts.

Petitioners respectfully submit that law enforcement conducted an illegal warrantless canine search of their home and that the subsequently obtained warrant did not vitiate the illegality of that entry. Petitioners further submit that the decision of the Michigan Court of Appeals upholding the search of their home was erroneous and contrary to law in that the conduct of police officers in introducing a drug dog onto their property without a warrant is not saved by any good faith exception to the Fourth Amendment's warrant requirement. It is important to the jurisprudence of the United States that this Court issue a Writ of Certiorari to the Supreme Court of the State of Michigan, and reverse the opinion of the Michigan Court of Appeals in this case.

Respectfully submitted,

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Dated: November 21, 2014

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff.

v

SANDRA DANIELLE STACKPOOLE and BOB JARVIS RIVERA,

Defendants. /

No. 11-007502-01-FH, and 11-007524-01-FH

PROCEEDINGS HAD BEFORE THE HONORABLE RICHARD M. SKUTT, a Judge of the Third Judicial Circuit of Michigan, at 403 Frank Murphy Hall of Justice, 1441 St. Antoine Street, Detroit, Michigan 48226, on Monday, December 9, 2013.

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DEFENDANT'S JOINT MOTION to SUPPRESS

* * *

[7] THE COURT: Okay. The – I told you – I told all the attorneys I've been confounded by the way the Michigan Supreme Court dealt with this cases from the beginning. Because there were four dog sniff cases that were before them – I don't know how they were presented so I – at the – after the decision in ***Florida*** Versus ***Jardines*** – or Jardines I guess it is, J-A-R-D-I-N-E-S, one of which they suppressed the evidence, the other three they denied leave on. All of which came out of the Court of Appeals basically with the same holdings.

The problem that confronts me as the Trial Judge is that as a general rule – if there is an interlocutory appeal which there was in this case – and many of the issues were addressed. One; that the only thing that they had was a very sketchy description that somebody may be using or may be selling drugs out of a house with no description of what the drugs were or might have been – whether they were selling or using. We spent some time talking about the medical marijuana law and what expectation of privacy that created. I felt that – at least at a minimum, that

there [8] had to be some question as to whether not there was an expectation of privacy given the change of the law in Michigan.

Now the Court of Appeals when they overturned me specifically dealt with the line of cases in Davis versus United States indicating that the police had been acting on – in conformity with case law including ***People*** versus ***Jones,*** that allowed the use of dog sniff on a person's front porch, distinguished it from the airplane overflight cases under both federal and state law. They went so far as to note in footnote two that the – even if the Florida case was – reached the result that the U.S. Supreme Court did, that their ruling was solely on whether or not the Exclusionary Rule applied because the police were acting in bad – in good faith.

I've always had a question about good faith when the officer who writes the affidavit, takes it to the magistrate and then effectuates the affidavit, but that really isn't before us – but is similar to many of the legal fictions we have.

Miss Silver indicates about the change in the law, but the case of ***People*** versus ***Russell,*** 149 Mich App 110, indicates that if there is a change in the law – and there is still an appeal pending or time to take an appeal, that that does not negate the earlier holding of the appellate [9] court. In that case there was a guilty plea that was reversed and remanded by the Court of Appeals. The Michigan Supreme Court overturned the law that required reversal in that case

and the trial court reinstated the conviction. Because the prosecutor hadn't appealed or there was – it did not negate the law of the case doctrine.

There are conflicting cases on that. In ***People*** versus ***Spinks,*** 206 Mich App, a 1994 case, there was indication where one panel had ordered suppressed evidence to be admitted at trial, but the panel on the appeal of right was not bound by that decision. As a general rule – I've had a case remanded to me with the specific instruction that the evidence be allowed in. I think based upon the ruling of the Court of Appeals – and I have indicated all along that I don't think it's correct under the United States Supreme Court decision or the decision of our Supreme Court where they actually addressed the Florida Supreme Court case. The matter then did pend on appeal and was held in abeyance by the Michigan Supreme Court pending the outcome in the United State Supreme Court case. Afterwards they denied leave to appeal and I think I'm bound by the decision that the Exclusionary Rule does not apply in this case so I'm going to have to deny the motion to suppress.

MS. SILVER: Yes, Judge. We would like to ask the Court for a stay so we can appeal the Court's ruling.

[10] THE COURT: So ordered.

* * *

Order

Michigan Supreme Court
Lansing, Michigan

May 28, 2013

Robert P. Young, Jr.,
Chief Justice

146550

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

BOB JARVIS RIVERA,
Defendant-Appellant. /

SC: 146550
COA: 307315
Wayne CC: 11-007524-FH

On order of the Court, the application for leave to appeal the November 29, 2012 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J., would grant leave to appeal.

[SEAL] I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 28, 2013 Larry S. Royster
Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v BOB JARVIS RIVERA, Defendant-Appellee.	UNPUBLISHED November 29, 2012 No. 307315 Wayne Circuit Court LC No. 11-007524-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v SANDRA DANIELLE STACKPOOLE, Defendant-Appellee.	No. 307316 Wayne Circuit Court LC No. 11-007502-FH

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Defendants Bob Rivera and Sandra Stackpoole were each charged with manufacture of marijuana, MCL 333.7401(2)(d)(*ii*), possession with intent to deliver marijuana, MCL 333.7401(2)(d)*(iii),* and possession of Vicodin, MCL 333.7403(2)(b)(*ii*), after drugs were found at their residence during the execution of a search warrant. The trial court granted their

motions to suppress the evidence and thereafter dismissed the charges. The prosecutor appeals as of right the orders of dismissal. We reverse and remand for reinstatement of the charges.

The police received a citizen tip about defendant Rivera. The tip, according to the affidavit submitted by an officer in support of the request for a search warrant, related "to narcotic trafficking and/or use at" the house. After the police discovered that defendant Rivera had a prior conviction for possession of a controlled substance, a police canine handler took his trained narcotic detection dog to the house. While at the front door of the house, the dog, according to the search warrant affidavit, "gave a positive indication for the presence of narcotic odor." The police obtained and executed a search warrant for the house, which led to the discovery of drugs inside the home.

Defendant Rivera moved to suppress the evidence, arguing that the use of a drug dog at a residence without probable cause is improper and that, absent the dog's positive response, the remainder of the information in the search warrant affidavit did not provide probable cause for the issuance of a warrant. Defendant Rivera also asserted that he had a registry identification card issued under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.,* and that the dog's response would not justify a search because, to the extent the dog detected marijuana, it was "detecting legal activity." Defendant Stackpoole joined in the motion. The trial court ruled that persons with a registry identification

card issued under the MMMA have a legitimate expectation of privacy in their marijuana and, therefore, the use of a drug dog constitutes a search that must be supported by "more detailed information" than that provided in the affidavit.

A trial court's ultimate ruling on a motion to suppress evidence is reviewed de novo on appeal. *People v Marcus Davis,* 250 Mich App 357, 362; 649 NW2d 94 (2002).

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak,* 461 Mich 411, 417; 605 NW2d 667 (2000). "A search or seizure is considered unreasonable when it is conducted pursuant to an invalid warrant or without a warrant where the police officer's conduct does not fall within one of the specific exceptions to the warrant requirement." *People v Hellstrom,* 264 Mich App 187, 192; 690 NW2d 293 (2004).

Issuance of a search warrant must be based on probable cause. MCL 780.651(1); *Hellstrom,* 264 Mich App at 192. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Kazmierczak,* 461 Mich at 417-418. Assuming arguendo that the information in the search warrant affidavit apart from that relating to the use of the

drug dog did not establish probable cause for issuance of a warrant, an affidavit which indicates, as here, that a properly trained narcotics dog alerted its handler to the presence of drugs is sufficient to establish probable cause that contraband is present. *People v Jones,* 279 Mich App 86, 90 n 2; 755 NW2d 224 (2008); *People v Clark,* 220 Mich App 240, 243; 559 NW2d 78 (1996). However, suppression may still be appropriate if "the use of the dog is itself the result of illegal" police conduct. *Id.*

In *Jones,* 279 Mich App at 93, this Court held "that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused."[1] This is true even when the sniff is conducted at a residence because "[w]hether or not a heightened expectation of privacy exists, the fact remains that a canine sniff reveals only evidence of contraband" and "there is no legitimate expectation of privacy" in contraband. *Id.* at 94. The *Jones* panel stated that "[a]ny intrusion on defendant's expectation of privacy was insufficient to find a Fourth Amendment infringement, given that the canine sniff could only intrude to the extent that illegal drugs or activities, for which there is no legitimate privacy interest, were detectable." *Id.* at 96. The Court concluded that the canine sniff did not violate the defendant's constitutional rights where, as here, "the

[1] Defendants do not claim that the dog was not legally present on their property.

canine was lawfully present at the front door of defendant's residence when it detected the presence of contraband." *Id.* at 94.

We find it unnecessary to determine whether the enactment of the MMMA effectively altered the holding in *Jones,* which was issued before the MMMA took effect, such that the conduct of the police now violated defendants' rights to be secure against unreasonable searches and seizures. Even were we to find a constitutional violation, there is no valid reason to invoke the exclusionary rule under the circumstances presented; therefore, the evidence is admissible and there is no basis for dismissal of the charges.

Michigan recognizes the good-faith exception to the exclusionary rule. *People v Goldston,* 470 Mich 523, 543; 682 NW2d 479 (2004). Under that exception, suppression is not required where "[t]he police officers' reliance on the district judge's determination of probable cause and on the technical sufficiency of the search warrant was objectively reasonable." *Id.* at 542. The exclusionary rule is to be applied on a case-by-case basis, and suppression is only appropriate when it furthers the purpose of the rule, which is to deter police misconduct. *Id.* at 539, 543. Suppression remains a proper remedy (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," such that "no

reasonably well trained officer should rely on the warrant," (3) if the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" and (4) if 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." *United States v Leon,* 468 US 897, 923; 104 S Ct 3405; 82 L Ed 2d 677 (1984) (citations omitted).

Here, there was no misleading or false information in the police affidavit, there was no indication that the issuing magistrate wholly abandoned his judicial role, the affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, and the warrant was not facially deficient. Rather, the reliance by the police on the magistrate's probable cause determination and on the technical sufficiency of the search warrant was objectively reasonable. Considering this Court's holding in *Jones,* 279 Mich App 86, the police could reasonably conclude that they were acting within constitutional limits when going to the unobstructed front door of a home with a trained narcotics detection dog and then obtaining a search warrant based on a positive response to narcotics by the dog. There was no police misconduct in the case at bar.

In *Davis v United States,* ___ US ___.; 131 S Ct 2419, 2427-2429; 180 L Ed 2d 285 (2011), the United

States Supreme Court discussed the Fourth Amendment, the exclusionary rule, and the good-faith exception to the rule, noting:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way."
>
> * * *
>
> "[I]solated," "nonrecurring" police negligence . . . lacks the culpability required to justify the harsh sanction of exclusion.
>
> * * *
>
> Indeed, in 27 years of practice under *Leon*'s good-faith exception, we have "never applied" the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. [Citations omitted.]

Especially relevant here, the *Davis* Court held "that searches conducted in objectively reasonable reliance on binding appellate precedent are not

subject to the exclusionary rule." *Davis,* 131 S Ct at 2423-2424. The Supreme Court elaborated:

> About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from doing his duty. [*Id.* at 2429 (citations, alterations, internal quotations omitted; emphasis in original).]

Here, the police acted in conformity with this Court's binding decision in *Jones.* We recognize that the police were certainly aware of the subsequent enactment of the MMMA, but it would be unreasonable to demand that the police engage in their own legal analysis concerning *Jones* and the MMMA, make a conclusion regarding the MMMA's impact on the decision in *Jones,* and then proceed in accordance with their independent, non judicial finding. Even *assuming* that the police needed to contemplate the MMMA's effect on dog sniff matters, and *assuming*

that the MMMA actually negates some or all of the holding in *Jones,* the police conduct here, at worst, amounted to simple, isolated negligence, not deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.[2] We find that innocent, good-faith police conduct was involved and that the police lacked the culpability required to justify the harsh sanction of exclusion. Accordingly, we reverse the trial court's orders granting defendants' motions to suppress the evidence and dismiss the charges.

Reversed and remanded for reinstatement of the charges against each defendant. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

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[2] We note that the United States Supreme Court will soon be hearing the case of *Jardines v State,* 73 So 3d 34 (Fla, 2011), cert gtd ___ US ___; 132 S Ct 995; 181 L Ed 2d 726 (2012), wherein the Florida Supreme Court held contrary to this Court's decision in *Jones.* Given our ruling disposing of this case on the basis of the exclusionary rule, even should the United States Supreme Court effectively overrule *Jones* and similarly-decided cases, it will not impact our ruling.

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff.

v

SANDRA DANIELLE STACKPOOLE and BOB JARVIS RIVERA,

Defendants. /

No. 11-007502-01-FH, and 11-007524-01-FH

PROCEEDINGS HAD BEFORE THE HONORABLE RICHARD M. SKUTT, a Judge of the Third Judicial Circuit of Michigan, at 403 Frank Murphy Hall of Justice, 1441 St. Antoine Street, Detroit, Michigan 48226, on Wednesday, October 19, 2011.

APPEARANCES:

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Appearing on behalf of
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**DEFENDANT'S JOINT MOTION
to SUPPRESS SEARCH WARRANT**

* * *

[3] Detroit, Michigan

Wednesday, October 19, 2011 – at 9:52 a.m.

THE CLERK: Miss Stackpoole – ?

THE COURT: Okay, we have your motion to suppress?

MS. SILVER: Yes, Your Honor. Gabi Silver appearing on behalf Bob Rivera. I'm assuming – since the Prosecution hasn't filed their response, they agree with my position. So we're just ready for your ruling.

THE COURT: I would assume that the assumption is probably –

MS. GUIRGUIS: Good morning, Your Honor. Christina Guirguis for the People and that would not be a correct assumption.

THE COURT: I expected that response. Do we have people here for –

MS. GUIRGUIS: Judge, I'd like to address that, if I could.

THE COURT: Yes.

MS. GUIRGUIS: There's two – when you look at a search warrant – a challenge to a search warrant – and don't mean to like simplify it too much, but there is an argument that the search warrant does not establish probable cause. In that sense we just look at the four corners of the warrant. There's also – the only way to get a hearing where we actually have testimony – which is called a **Franks** [4] **Hearing**, is that there has to be allegations – not that there's not probable cause in the search warrant, but that there are false allegations or deliberate – basically that something in the search warrant is a lie.

In order to get to a hearing the Defense has the burden of proof – by preponderance of the evidence, that something in the search warrant is untrue. That can be done by affidavit, by testimony that the Defense is putting on. There was nothing in the motion that was even alleging that, so we haven't reached the point where we can even have a hearing on the search warrant. Obviously the controlling case on that is ***Franks*** v ***Delaware*** which is found at 438 U.S. 154. That is again challenging not the credibility of an informant, but that is challenging the credibility of the affiant.

So if that burden is not – if the affiant is brought in to testify and if the Court believes that the affiant's testimony raises some questions as to his credibility, then the informant is brought in in an in-camera

review. So there's many steps that have to be developed before we even get to a hearing.

THE COURT: Miss Silver – ?

MS. SILVER: Well, you know I generally don't disagree with that. The problem is when search warrants are issued like the one that was issued in this particular case [5] – I mean how do we even begin to attack that when allegation that supposedly gets them to a probable [Illegible] that, " . . . The affiant received information from a – ", this is paragraph four of the affidavit:

> "The affiant received information from a concerned resident; reference to narcotic trafficking and/or use."

I mean when? Where? Who? How? What narcotics? Are we using? Are we selling? Where is it taking place? I mean how can we even begin to attack such a bare bones kind of a search warrant? I mean – really, it's just incredible to me.

That's all it says. There's no date. So we don't know if any of the information is stale. I mean this affiant doesn't even have information – it's got a name of a person and a date of birth. It doesn't mention what type of narcotics were either trafficking in or using. I mean is it marijuana by somebody who has a legal marijuana card which my client did? It's – I can't even begin to attack it other than to say to the Court that it is a completely bare bones search

warrant that has absolutely no probable cause in it and begin there.

THE COURT: Okay, that – if that was the sole information that was contained there, what about the following paragraph where the officers went to the house on [6] the date –

MS. SILVER: Sure.

THE COURT: – that the affidavit was issued with a narcotic dog?

MS. SILVER: Sure. First of all, how do they even get to go to the person's house with a dog based on an allegation that somewhere in life Mr. Rivera was either trafficking in or using narcotics? That's the first question. I mean based on what do they take a dog to somebody's home? Second of all – and what is the dog alerting to? Is it alerting to drugs that are on the premises? Is it alerting to drugs that may have been on the premises at some point in time in the past? Is it alerting to the presence of legal narcotics which we all know – if you have a medical marijuana card, you can legally possess marijuana.

So there's – you know, if there was something more in paragraph four in terms of the information that was known to the police at the time they went to the house with this dog to tie it in, you know maybe the Prosecutor would have something. But I submit to the Court that based on information that somebody is either using or selling drugs at some time in life, some kind of drugs – we don't know what, they don't

have enough to even get to the second point of going to someone's home with a dog to – it doesn't [7] really, I mean what – you know, there's still no substantial basis shown in here that there's a fair probability that illegal activity is taking place and that illegal narcotics are going to be found. I mean that's just one of the arguments that I have for the Court, but I – I'm not sure how the Prosecutor gets over that.

It's not like you have a confidential informant saying, 'On November 5th I was at the house. I saw Bob Rivera. He had a whole bunch of drugs in the house. You know I don't know if he's using or if he's selling, but I saw a whole bunch of stuff there'. We don't even have that.

We don't have any information in this warrant at all that would lead the police to be able to say that there was a substantial basis or a fair probability that narcotics are going to be found at that house and that the narcotics are of an illegal nature such that we can go into someone's home – which we all know the **Fourth Amendment** protects. More than any other place on earth, the sanctity of someone's home is protected by the Fourth Amendment. That's why we have to be so careful when we decide whether or not search warrants have what is necessary in them to conduct a legally protected search – and this one doesn't. As many times as I've read it, I don't see it. I don't – under any stretch of the imagination, under any point of law, I don't see anything in here that would allow the police to then get [8] a warrant and go search a home.

THE COURT: Would you –

MS. SILVER: I can't – I'd like to be able to respond –

THE COURT: Right.

MS. SILVER: – after she responds since we never received –

THE COURT: Do you wish to add anything?

MR. EGAN: Your Honor, John Egan appearing on behalf of Miss Stackpoole and naturally we join in Miss Silver's motion. Judge – just to emphasize a point eloquently stated by Miss Silver, we reviewed the affidavit on a common sense, realistic manner. The personal knowledge element within the affidavit – case law says, should be derived from the information provided or material facts, not merely a resuscitation – or recitation of the informant having personal knowledge. Here there's no personal knowledge stated at all as to time, what type of narcotics or any of the other elements. Judge – looking at these two paragraphs, it's not even inferred.

Second – with regard to the temporal element. Probable cause exists when a person – excuse me. The age of the information alone is not determinative, but it must be evaluated as part of the particular circumstances of the case. Here there's no indication as to when this [9] information was provided, to whom and to what the information actually was. So therefore they don't meet the temporal element either

and therefore we respectfully request the relief sought in the motion.

THE COURT: Go ahead, Miss Guirguis.

MS. GUIRGUIS: Thank you, Your Honor.

So now when we're reviewing the search warrant the standard of review – because it's not the police that determine that there was probable cause, it was a magistrate that signed the search warrant. Under ***People*** v ***Russo*** the review of a magistrate's decision to issue a search warrant involves determining whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause and a reviewing court should pay great deference to the magistrate's determination.

In this case there are three items. There's the – what I'll call the tip from the concerned citizen that gives an address and a name. The name of Mr. Rivera is ran. He does have two prior drug convictions and a dog is taken to the house on November the 18th.

Just to address the dog sniff briefly. There is a published Court of Appeals case that actually originated out of this court – when I say "this court", Third Circuit Court. It's People v Jones – ***People*** v ***Jeffrey Jones***. I actually have – it's a 2008 case. I don't have the cite [10] because I printed it out from the Court of Appeals' cite. The Court of Appeals Docket Number is 275438. It's right on point. Judge

Allen had suppressed a search warrant based on the fact that a dog was taken to the house.

People v Jones indicates that a dog's sniff on the front porch – or at the front door, is not a search indicating that:

> "A K-9 is lawfully present at the front door of a defendant's residence when it was detecting the presence of contraband. There was no reasonable expectation of privacy at the entrance to property that is open to the public including the front porch."

So the issue of the K-9 sniff – that case is right on point. I would argue that the Court of Appeals in a published opinion has said that you can take for – here we had a tip, but technically for no reason at all you could take a dog to someone's front door. I would direct that – the Court to that case.

Finally, Your Honor, Michigan is a good faith state when it comes to search warrants under ***People*** v ***Goldston*** which is found at 470 Mich 523. The holding in that is that Michigan has adopted the good faith exception to the exclusionary rule. So if this Court finds that, 'No, I don't believe that this search warrant established probable cause – ', just – the Michigan Supreme Court held [11] that the exclusionary rule does not bar the admission of evidence that was seized in reasonable, good faith reliance on a search warrant ultimately found to be – to have been defective.

So even though it's the People's position that there is probable cause established in this warrant – if the Court disagrees, in order to suppress the evidence there has to be a finding of bad faith on the part of the affiant or bad faith and reliance on a search warrant that was approved by a magistrate under People v Goldston. So for all those reasons, Your Honor, we would ask the Court to deny both Defendants' motions.

THE COURT: Let me ask you this. Is there a – when somebody has registered as a – for a marijuana card, is that also available to the police?

MS. GUIRGUIS: Judge, I'm glad that you brought that up because I meant to address that. Currently – under the way the medical marijuana statute is – and this is trying to be legislated or changed, the police cannot find out because of **HIPPA** before they go to the house whether somebody is a medical marijuana card holder. There's no way to determine that. So at this point marijuana is an illegal substance. Having a card is an affirmative defense, but there is no way legally to find out if somebody has a card before going into the location because of HIPPA. They're [12] trying now to legislate in a law enforcement exception to that but at this time – and at the time of this warrant, that doesn't exist.

MS. SILVER: Which is really why the police need to be even more cautious when they're going to people's homes based on information like the

information that was contained in this particular search warrant.

Now the Jeffrey Jones case – by the way, the cite is 279 Mich App 86 and that decision was appealed to the Michigan Supreme Court. The Michigan Supreme Court did not decide to accept the case at that time. I would indicate to the Court of course that that's before this whole medical marijuana thing came into play. In the Jeffrey Jones case there was a lot of evidence provided in the search warrant besides the hit on the house; that there was narcotic trafficking going on by Jeffrey Jones and that it had been seen to be going on at the places that were the subject of the search warrants. That's not the case here.

The case here is a bare bones paragraph in a search warrant saying that maybe he's using, maybe he's selling. No information as to where. No information as to what substance. So maybe the police – because of the medical marijuana and the HIPPA violation – or the HIPPA law which is another protection of someone's privacy, maybe the police need to be a little bit more careful when they're [13] relying on information received from concerned citizens if in fact information such as this was received from a concerned citizen.

But in the Jeffrey Jones case – beside the information that this individual was selling drugs and the places that he had been selling drugs and that he kept large amounts of illegal narcotics at a particular residence – not the same information that's in this

particular case. But the interesting thing about the Jeffrey Jones case is that it talks about why the fact that police – that dogs coming to somebody's front porch – why that's not a protected area. The reason that it's not protected is because you don't have a right of privacy there and because the dog is only going to sniff on something that's illegal. You don't have a right of privacy in contraband. That's why – you know, they used to be able to go overhead and check for heat because people had heat lamps and stuff in their house. This Jeffrey Jones case talks about that. You can't do that any more because you may be detecting legal activity. So you're not allowed to do that any more and that's the same situation here.

You have a bare bones search warrant that says maybe he's using/maybe he's selling and you have a dog hit on something that is potentially – and in this particular case was, legal. Now if you have the affiant – or the [14] concerned citizen say that – you know, 'Bob Rivera – ' and by the way she said that he's got a couple of drug convictions. He had one 11 years ago – not recently, but 11 years ago. The search warrant indicates that he had a drug conviction back in 2000. So how – you know, so you can say, 'Okay, well – so that gives them the probable cause'? 'That gives them the right to do what they did'?

The problem in this case is that they don't have – number one; any information as to the type of drugs. They don't have any information as to whether or not there even is in fact illegal activity going on at this

house. If Bob Rivera is smoking marijuana in his house – or using marijuana in his house, that is not a crime. He is legally allowed to do that. So they have no information to the contrary. So to take the dog at that point – we have no idea what this dog is trained to do. We have no idea what kind of contraband this dog is sniffing out when he goes to the front porch of this house. We have no idea if the dog is sniffing legal narcotics or if he's sniffing out something illegal that's going on in the house. You don't have any of that there.

This case is completely different from the situation in Jeffrey Jones, but Jeffrey Jones is a good case to look at because it talks about the reason why – that dog searches are permissible and under what circumstances they [15] are. But in this case – when you've got this whole new thing of medical marijuana coming into play, how can we say that you can take a dog to a house? I mean if my client's got a right to privacy based on HIPPA to have marijuana, he's got a right to privacy to have it in his house because it's not contraband as it relates to him. So the dog is hitting on something that's completely legal as it relates to my client – something that he has a right to privacy on, not like the Jeffrey Jones case.

If this concerned citizen would have said, 'He's selling cocaine out of that house', then maybe that's a different story, but we don't have that. Or if a concerned citizen said, 'No, I was in his house yesterday – ' or even a week ago, ' – and he had kilos of heroin in there', okay, take a dog over there. That's a

different situation, but you don't even have that from this alleged concerned citizen. So when the alleged concerned citizen is reporting this to the police – what if she's reporting that he's just smoking? That's legal as it relates to this guy.

So for those reasons it's our position that the Jeffrey Jones case helps to understand – I think, the law as it relates to this particular area, but it's pretty clear that – and you know maybe this is a good test case; it's pretty clear that when you're trying to get your substantial probability, some – you know, everything that's included in [16] a search warrant – you don't have it here because you still – even if with a dog hit on the house there is still not a substantial basis to conclude that contraband is going to be found. So for those reasons I – I again argue to the Court that the suppression of the evidence is proper in this case.

THE COURT: What – let me ask you how do you respond to Miss Guirguis' point that the holding of a medical marijuana card provides a defense to a criminal charge rather than itself affording protection?

MS. SILVER: This isn't a trial so I'm not – this isn't a bench trial where I making an argument. This is a motion. The **Rules of Evidence** don't apply. It's not time for us to be presenting defenses.

THE COURT: No, I understand that, but in terms of – I see her argument being that the possession of marijuana is, per se, illegal under the Health Code and –

MS. SILVER: I understand what the Court is asking me, but I suggest to the Court that that's why – when the only information you have from a concerned citizen –

THE COURT: Is that there may be use –

MS. SILVER: – that is use or selling – and you have nothing more and you don't know what the item is that – you know what – you do some police work. You don't just run in. You've got to – you know, take a dog over there? You do a little bit of police work. I mean it's not like [17] this is a registered P.I. that has provided them good information – you know, five or six times in the past. This is a concerned citizen who has basically told them absolutely nothing. In fact maybe even told them that Bob Rivera was conducting legal activities.

So maybe as a police officer you don't rush in and get a warrant, but you do what police officers are supposed to do before making hasty judgements and taking a warrant over to a judge who probably didn't even look at it. Really – a magistrate looking at this? Doesn't say, 'Wait a minute. I'm a little concerned. He's either using or selling – what? What is he using or selling?' A reasonably cautious magistrate would have asked a couple of questions. 'Go back and get a little more information before you come to me with this.' He's got a conviction from 2000 and – really. I mean it doesn't – they could have done a little bit more work before they went and got a search warrant to invade somebody's home, invade somebody's

privacy without more. Without even stopping to say, 'Because we don't know what we're talking about here', unless maybe they did know. Maybe they didn't want to put it in here.

MS. GUIRGUIS: Judge, my final thing – this goes again to the affirmative defense aspect of it, is that there's a – I don't believe that the medical marijuana statute – creating an affirmative defense for when you come [18] into court, changes what a police officer needs to put in their search warrant. We keep referring to what was inside that's legal. Obviously it was not legal, because if it was we wouldn't be here today.

MS. SILVER: Well, except for that the police didn't know that. They had no idea – based on this warrant, even what they were looking for. I mean they've got a warrant here that wants to look for trafficking information. They haven't – they didn't even know if trafficking was going on, but that's what they're looking for. They don't even have a warrant that is limited to the information they had; use or trafficking. I mean come on.

THE COURT: Are you done?

MS. GUIRGUIS: Yes. Thank you.

THE COURT: Okay. I do want to look at the Jones case. The others I'm familiar with. We'll take a couple minutes.

MS. GUIRGUIS: Thank you, Your Honor.

(At 10:16 a.m., Proceedings Recessed)

(At 10:39 a.m., Proceedings Reconvened)

[18] THE COURT: All right. The – when I look at the arguments and the search warrant the magistrate had before – I guess it's "him", the probable cause that was given to the magistrate was based on the K-9 sniff which – even on a cursory review, would – which unfortunately too often occurs [19] in these cases, would probably have been adopted. So I think the question revolves around if the K-9 sniff was proper in this case.

I've read over the Jones case. The reasoning that was relied on by the Court of Appeals – Judge Fitzgerald writing for the majority, relies heavily on a number of U.S. Supreme Court cases and whether suppression on the basis of a K-9 sniff is proper because of rights guaranteed under the Fourth Amendment. There are three cases that the Court of Appeals relied on; ***United States*** versus ***Place,*** 462 U.S. 696, ***United States*** versus ***Jacobson,*** 466 U.S. 109 and ***Caballes*** – I believe it is, C-A-B-A-L-L-E-S.

The reasoning turned on – as was discussed in the Jacobson court at 123:

> " – there being no legitimate interest in possessing cocaine, the field test did not compromise any legitimate any privacy interest."

They used that to go on in Caballes at 407 through 408, 125 Supreme Court 834, talking about:

> "There's no interest in possessing contraband. The only use of a well trained narcotics dog that, 'only reveals the possession of contraband – '

with an inserted quote:

> " – compromises no legitimate privacy interest – "

unquote:

> [20] " – and therefore does not violate the Fourth Amendment."

They went on to distinguish the case from ***Kyllo,*** K-Y-L-L-O, versus ***United States***, 533 U.S. 27, which prohibits the use of overhead flights for heat seeking because:

> "There is a legitimate expectation that information about perfectly lawful activity will remain private which is categorically distinguishable from the expectations of the non-detection of contraband."

So our court went on to hold that:

> "Central to the holding is the fact that a K-9 sniff detects only contraband to which there is no expectation of privacy."

And then went on to say the front porch – using the Supreme Court decisions, does not create – or is not an area that shows privacy. I think that's clearly distinguishable from the facts in this case.

There is a – the only information had by the officers was that the Defendant was either selling or using drugs at a location. The types of drugs were not identified. They went out with a dog who was placed on the porch and responded to an odor – I think the language used is, " . . . Gave a positive indication for the presence of a narcotic odor". Given the change in circumstances we have [21] in Michigan with the passage of the Medical Marijuana Act – which is going to probably take more years to figure out what it means; what rights are available under it, that there is a legitimate expectation of privacy held by persons that do have a medical marijuana card.

While the Act itself creates a defense to the possession of what otherwise might be contraband, that expectation of privacy requires the police to provide more detailed information as to what may or may not be going on in order to execute a proper search warrant and to make some determination.

When I've looked at these – and you look at the case law, there is information from an informant that is relatively timely. There is usually some type of surveillance, a controlled buy or something of that nature which indicates what is the nature of the drugs that are involved and what is the nature of the trafficking involved. None of that is available here for the magistrate's review. The only thing that the officers did in this case was go to the front porch with a dog who sniffed out something which to which I think that the Defendant had a legitimate privacy

interest, and therefore I do think the search warrant was defective.

I do think that there was – while the magistrate may have had a finding that – on a review of the search [22] warrant might have found probable cause from the dog sniffing, I think the use of a dog in this case has to be addressed in light of the expectation of privacy and therefore that was an invalid basis, an improper action by the police and I will grant the motion and suppress the evidence at this time.

* * *

Court of Appeals, State of Michigan

ORDER

People of MI v Bob Jarvis Rivera	Kurtis T. Wilder Presiding Judge
Docket No. 319677	Kirsten Frank Kelly
LC No. 1-007524-FH	Karen M. Fort Hood Judges

The Court orders that the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

[SEAL] A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

Mar 14, 2014	Jerome W. Zimmer Jr.
Date	Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

June 24, 2014

Robert P. Young, Jr.,
Chief Justice

149111

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

BOB JARVIS RIVERA,
Defendant-Appellant. /

SC: 149111
COA: 319677
Wayne CC: 11-007524-FH

On order of the Court, the application for leave to appeal the March 14, 2014 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J., would grant leave to appeal.

[SEAL] I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 24, 2014 Larry S. Royster
Clerk

STATE OF MICHIGAN JUDICIAL DISTRICT	**AFFIDAVIT FOR SEARCH WARRANT**	CASE NO. **DRN-202-10**

* * *

boxes, certificates of deposit, and other financial instruments to avoid detection. It is also common, based on affiant's investigative experience, for traffickers to keep tally of the amount of narcotics sold and the proceeds obtained as a result of those sales.

2. Further, affiant has been involved with the execution of numerous search warrants and in many instances people who traffic narcotics frequently use their garages and/or outbuildings for storage and/or concealment of their narcotics. Often time's people who traffic and/or use narcotics attempt to conceal narcotics, weapons, and/or proceeds in their pockets or elsewhere on their persons. Further, all information in this affidavit was obtained either through the affiant's personal investigation, training or experience, or from officers of the DRANO unit.

3. Further, through affiant's prior experience and knowledge it is common for people to hide assets and proceeds from illegal drug sales and to conceal them in places such as safe deposit boxes and storage units.

4. Further, through affiant's prior experience it is common for drug traffickers to store illegal drugs, weapons and proceeds in motor vehicles. Also,

traffickers use these vehicles as a mode of transportation for delivery of illegal drugs.

5. Further, Affiant received information from a concerned resident reference to narcotic trafficking and/or use at 12190 Fordline. Affiant was further advised that the suspect is Bob Rivera D.O.B. 7-12-1979.

6. Further, on 11-18-10 Affiant, Det. Starzec, and Southgate K-9 officer Demers proceeded to 12190 Fordline, Southgate, MI. At that time K-9 officer Demers and his K-9 Apollo approached the front door of 12190 Fordline where Apollo gave a positive indication for the presence of narcotic odor.

7. Further, Southgate K-9 officer Demers and his K-9 Apollo have been together for five years. Apollo is a six year old Gorman shepherd and has been certified by the North American Police Work Dog Association. Apollo is a full service narcotic detection dog.

8. A LEIN/SOS inquiry shows Bob RIVERA D.O.B. 7-12-79 registered to 12190 Fordline. A criminal history check of Bob RIVERA shows a 1996 felony conviction from Clinton Twp. for assault with intent to do great bodily harm less than murder. RIVERA also has a felony conviction from 2000 for possession of cocaine, heroin or another narcotic 25-49 grams.

9. Affiant requests that the Affidavit be suppressed until further order of the court.

10. Further, affiant sayeth not.

This affidavit consists of 3 pages.

/s/ [Illegible]
Affiant

Review on 11-18-10/1435 Date APA Christina Guirguis P#66016 Prosecuting official	Subscribed and sworn to before me on 11-18-10 Date /s/ [Illegible] Judge/Magistrate

C 231 (6/94) AFFIDAVIT FOR SEARCH WARRANT

STATE OF MICHIGAN JUDICIAL DISTRICT	**SEARCH WARRANT**	**CASE NO.** **DRN-202-10**

Police Agency: MSP/CID/DRANO
Report Number: DRN-202-10

TO THE SHERIFF OR ANY PEACE OFFICER:

Det. M. Mydlarz has sworn to the attached affidavit regarding the following:

1. The PERSON, PLACE, or THING to be searched is described as and is located at: 12190 Fordline, city of Southgate, County of Wayne, State of Michigan. 12190 Fordline is a single story single family residence with light brown brick, light tan siding, a brown roof, and a white front door. 12190 Fordline is the first house on Fordline south of Yorkshire on the west side of the street with a front

door that faces east. The numerals 12190 are affixed to the right of the door on post supporting the porch overhang. Also to be searched is the suspect Bob RIVERA D.O.B. 7-12-79 as well as all persons present, arriving, or departing 12190 Fordline upon execution of the search warrant. Also to be searched are all vehicles, basements, containers and outbuildings within the curtilage at 12190 Fordline, as well as any safes, lock boxes, computer hard drives, and/or discs associated with Fordline upon execution of the search warrant.

The PROPERTY to be searched for and seized, if found, is specifically described as: All suspected controlled substances, all items used in connection with the sale, manufacture, use, storage, distribution, transportation, delivery and/or concealment of controlled substances. All books, records and tally sheets indicating sales of controlled substances and any items obtained through the sale of controlled substances. All computers, data storage devices hard drives and software that contain documentation of illegal drug transaction. Any and all assets and property related to narcotic, trafficking storage unit or safety deposit box keys due to the fact that these places are often used by narcotic traffickers to conceal/hide their narcotics and narcotic proceeds. All weapons and items establishing ownership, control occupancy, or possession of the above-described place and any and all evidence of illegal activity.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN:

I have found that probable cause exists and you are commanded to make the search and seize the described property. Leave a copy of this warrant with affidavit attached and a tabulation (a written inventory) of all property taken with the person from whom the property was taken or at the premises. You are further commanded to promptly return this warrant and tabulation to the court.

Issued: 11-18-10 /s/ [Illegible]
Date Judge/Magistrate Bar no

RETURN AND TABULATION

See attached form.

_____
Officer

Copy of affidavit, warrant, and tabulation served on:

_____

Tabulation filed: _____
Date