STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2011AP2956-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID BOROWSKI, PRESIDING

# PLAINTIFF-RESPONDENT'S SUPPLEMENTAL BRIEF

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On September 3, 2013, the court issued an order requesting supplemental briefs from both parties regarding the impact of the United States Supreme Court's decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), on the following issue: "Was the act of bringing a drug-sniffing dog to the front door of Scull's residence, without a warrant or probable cause, a violation of his Fourth Amendment rights?"

## ARGUMENT

### ALTHOUGH *JARDINES* ESTABLISHES THAT THE DOG SNIFF AT SCULL'S DOOR WAS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT, THIS COURT SHOULD CONCLUDE THAT THE GOOD FAITH EXCEPTION APPLIES AND THAT SUPPRESSION OF THE EVIDENCE RECOVERED IS NOT REQUIRED.

#### A. *Jardines.*

The relevant facts in *Jardines* are virtually identical to the facts in this case. In both cases, police received information from a confidential informant that the defendant was manufacturing/delivering illicit drugs. Based on the tip, officers went to the defendant's home with a trained drug detection dog and had the dog sniff around the front door area. Based on the dog's alert to the odor of drugs, the officers then obtained a search warrant for the residence and eventually discovered illegal drugs when they executed the warrant.

Under these circumstances, the Supreme Court held that the dog sniff was a "search" under the Fourth Amendment:

> At the [Fourth] Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." 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.
>
> We therefore regard the area "immediately surrounding and associated with the home" – what our cases call the curtilege – as "part of the home itself for Fourth Amendment purposes."

*Jardines*, 133 S. Ct. at 1414 (citations omitted). The court recognized that police officers without a warrant, like private citizens, have an "implied license" to approach and knock on a suspect's door with the hope of speaking to the suspect. *Id*. at 1415-16. The court held, however, that deploying a drug detection dog was an "unlicensed physical intrusion" into the constitutionally protected area of the home and its curtilege. *Id*.

The Supreme Court also cited its decision in *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that law enforcement's use of a thermal-imaging device to detect heat emanations from a home believed to contain a marijuana-growing operation constituted a Fourth Amendment "search," which is presumptively unreasonable without a warrant), and noted that: "[S]urveillance of the home is a search 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*.'" *Jardines*, 133 S. Ct. at 1417 (citation omitted) (emphasis in original). The court explicitly held: "The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Jardines*, 133 S. Ct. at 1417-18. The dog sniff at Scull's front door was a Fourth Amendment "search."

B. Good Faith.[1]

The good faith exception is a doctrine that applies to police officers who execute a search warrant in the mistaken belief that it is valid. *United States v. Leon*, 468 U.S. 897, 918-20 (1984). In *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, this court adopted the good faith exception to the exclusionary rule, holding that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a

[1] The State continues to rely on its original argument on this point, including the issue of forfeiture (State's Br. at 12-19), and incorporates it here by reference.

detached and neutral magistrate, a good faith exception to the exclusionary rule applies." *Id.* ¶ 74.

In *Eason*, the court held that two additional requirements must be met for the good faith exception to apply in Wisconsin. *Id.* ¶ 63. First, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation . . . ." *Id.* Second, the warrant application must have been "review[ed] by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.* ¶ 63 (footnote omitted).

In *State v. Sveum*, the court noted that good faith had not been argued. 2010 WI 92, ¶ 58 n.12, 328 Wis. 2d 369, 787 N.W.2d 317. The court stated, however, that "[e]ven if we had not concluded that the circuit court's order constitutes a valid search warrant, a strong argument supportive of the good faith of law enforcement could have been made here." *Id.* "This is so because the process used to obtain the order and the detailed circuit court order itself gave law enforcement an objectively reasonable basis to conclude that they had lawful authority to proceed as they did." *Id.* The same rationale applies here.

A judge/court commissioner issued the warrant in this case based on his review of a supporting affidavit from a law enforcement officer with nineteen years' experience (32:1-4). That affidavit not only detailed the investigation of Scull's suspected drug dealing, it was "reviewed and approved by ADA Christopher Ladwig" (32:4). Scull has never claimed that the judge/court commissioner who issued the warrant was not neutral and detached, and has he challenged the prosecutor's competency to review and approve the search warrant. Instead, he focuses exclusively on the dog sniff itself. In doing so, he ignores the fact that, prior to *Jardines*, the dog sniff would have been lawful according to the existing

law in many jurisdictions, including Wisconsin.[2] Given the state of law at the time of the investigation and dog sniff, Scull cannot fairly characterize law enforcement's actions as "misconduct" (*see* Scull Reply Br. at 10). Nor can he impugn the judge/court commissioner or prosecutor for their review and approval of the warrant affidavit and subsequent search warrant.

Although Jardines now establishes that the dog sniff itself violated Scull's Fourth Amendment rights, the dispositive question is whether it was objectively reasonable for the police to rely on the search warrant in this case. The answer is yes.

Given the state of the law at the time, coupled with the separate review and approval of both the prosecuting attorney and the judge/court commissioner, the search warrant for Scull's residence "gave law enforcement an objectively reasonable basis to conclude that they had lawful authority to proceed as they did." *Sveum*, 328 Wis. 2d 369, ¶ 58 n.12.

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[2] Before *Jardines*, numerous courts—including the Seventh Circuit and Eastern District of Wisconsin— held that dog sniffs at private residences are not searches when conducted in public entryways or when conducted by an officer with authority to be inside a house. *See United States v. Brock*, 417 F.3d 692 (7th Cir. 2005); *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997); *United States v. Jones*, 2011 WL 294842 (E.D. Wis. Jan. 26, 2011); *United States v. Broadway*, 580 F. Supp. 2d 1179 (D. Colo. 2008); *United States v. Tarazon-Silva*, 960 F. Supp. 1152 (W.D. Tex. 1997); *People v. Jones*, 279 Mich. App. 86, 755 N.W.2d 224 (Mich. App. 2008); *Fitzgerald v. State*, 384 Md. 484, 864 A.2d 1006 (Md. 2004); *Porter v. State*, 93 S.W.3d 342 (Tex. App. 2002); *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (Neb. 1999); *People v. Dunn*, 77 N.Y.2d 19, 563 N.Y.S.2d 388, 564 N.E.2d 1054 (N.Y. 1990). *But see United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988); *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985); *Jardines v. State*, 73 So. 3d 34 (Fla. 2011), *cert. granted sub. nom. Florida v. Jardines*, 133 S. Ct. 1409 (2013). In addition, the law was and still is that a dog sniff of the exterior of a car is not a "search" under either the Fourth Amendment, *Illinois v. Caballes*, 543 U.S. 405, 410 (2005), or the Wisconsin Constitution. *State v. Arias*, 2008 WI 84, ¶ 25, 311 Wis. 2d 358, 752 N.W.2d 748.

## CONCLUSION

For the foregoing reasons, this court should affirm both the circuit court's decision denying Gary Monroe Scull's motion to suppress and his judgment of conviction.

Dated this 7th day of October, 2013.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,404 words.

Dated this 7th day of October, 2013.

_____
Nancy A. Noet
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of October, 2013.

_____
Nancy A. Noet
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