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State v. Howard Appellant's Reply Brief Dckt. 40239

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Docket No. 40239-2012
Plaintiff-Respondent,)	
)	Gooding County Case No.
v.)	CR-2011-2029
)	
DERK WARNER HOWARD,)	
)	APPELLANT'S REPLY BRIEF
Defendant-Appellant.)	
)	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

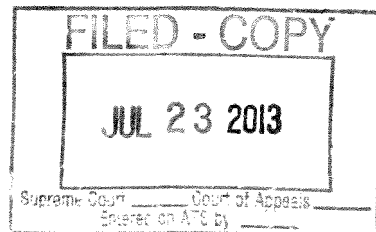
HONORABLE JOHN K. BUTLER
District Judge

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* * * * *

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APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

* * * * *

HONORABLE JOHN K. BUTLER
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* * * * *

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COMES NOW The Appellant, Derk Warner Howard, and submits the following reply to the State's Brief filed in this matter.

INTRODUCTION

The State failed to answer in any meaningful way the points of error raised by Mr. Howard in his appeal. Further, the very recent United States Supreme Court case of *Florida v. Jardines* ___ U.S. ___, 133 S.Ct. 1409 (2013), holding that the front porch of a citizens home is offered the same protection as the home itself for Fourth Amendment purposes, requires the reversal of the District Court's denial of Mr. Howard's Motion to Suppress Evidence.

- A. The State failed to address any of the assignments of error set forth by Mr. Howard in his brief.

The State's Responsive Brief contains no response to the legal and factual errors argued by Mr. Howard. The State simply copied excerpts from the District Court's Memorandum Opinion (Res. Brief, pp. 1 - 6), and then argues in a solely conclusory fashion that the District Court's findings were supported by substantial evidence and that Mr. Howard has failed to demonstrate error. (Res. Brief, pp. 9 - 11). The State failed to address the District Court's conclusion that Mr. Howard did not "prove" that there was clearly posted a NO TRESPASSING sign at the access point on the private road the ISP officers traveled on in order to obtain access to Mr. Howard's residence. The State did not respond to Mr. Howard's assertion on appeal that upon detecting the odor of suspected marijuana while at Mr. Howard's doorway to his residence, that the ISP officers committed a further trespass under the guise of the "open fields" doctrine while in fact actually going on to Mr. Howard's property. The State failed to address the District Court's unsubstantiated factual finding that the testimony of both Mr. Hepworth and Mr. Howard was "mistaken" where

each clearly saw the ISP officers in Mr. Howard's backyard looking in his shed "trawling for evidence with impunity". *Florida v. Jardines*, 133 S. Ct. at 1415. As such, this Court should give no weight to the State's Responsive Brief, because in the absence of any analysis argument, reasoning or application of law to the disputed and undisputed facts, the State's position is to simply ask this Court to rubber stamp the District Court's decision. Mr. Howard respectfully requests that this Court thoughtfully consider his arguments and position. Mr. Howard has raised an issue that is at the very core of the Fourth Amendment's protection afforded to a person's home and to be free from unreasonable governmental intrusion. Such an important right requires significantly more consideration than the State's request simply to uphold the District Court's decision.

B. *Florida v. Jardines*, _____ U. S. _____, 133 S.Ct. 1409 (2013), requires this Court to reverse the District Court's Decision on Mr. Howard's Motion to Suppress.

The facts of the *Jardines* case are simple and straightforward, but have certain application and meaning to Mr. Howard's case. In *Jardines*, a detective received an anonymous tip that marijuana was being grown at Mr. Jardines' house. After watching the Jardines home for a short period, law enforcement then took a drug sniffing dog to the Jardines' front porch where the dog alerted at or near the front door of Mr. Jardines' house. Based thereon law enforcement obtained a warrant and a subsequent search pursuant to that warrant revealed marijuana plants. The U.S. Supreme Court stated the principle involved as "straightforward".

"The principle renders this case a straightforward one. The officers were gathering information in an area belong to Jardines and immediately surrounding his house - in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gather that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner."

Jardines, 133 S.Ct. at 1414

The Court went on to emphasize that a citizens home affords the highest protections under the Fourth Amendment.

But when it comes to the Fourth Amendment, the home is first among equals. 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. United States*, 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.

Jardines, 133 S.Ct. at 1414

It is beyond dispute that when ISP Officer Sweesy and ISP Officer Ward were at Mr. Howard's door to his house, they were in a constitutionally protected area. The question becomes whether it was a licensed or unlicensed physical intrusion. In the *Jardines'* case, the Court stated that:

"While law enforcement officers need not 'shield their eyes when passing by the home' 'on public thoroughfares', *California v. Ciraolo*, 476 U.S 213, 106 S. Ct. 1809, an officers leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendments protected areas."

Jardines, 133 S.Ct. 1415.

The ISP Officers when approaching Mr. Howard's home, however, were not "passing by" while on a public street. Rather it is undisputed that they were on a private road, and as set forth in Mr. Howard's Brief, a private road that ISP Officers gained access to by crossing through a fence that was posted NO TRESPASSING. The ISP Officers were on a drug investigation and conducted themselves for investigative purposes. (T. pp. 45, 73). Officer Sweesy's testimony, that based upon his law enforcement experience and training that he detected the odor marijuana, is no different than the drug sniffing dog alerting on Mr. Jardines' front porch. Neither had an express or implied

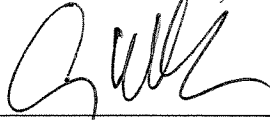
license to do so, therefore the District Court's denial of Mr. Howard's Motion to Suppress must be reversed.

CONCLUSION

For the reasons set forth in the record on appeal, Mr. Howard's Appellant Brief and the instant Reply Brief, Mr. Howard respectfully requests this Honorable Court reverse the District Court's Order denying his Motion to Suppress.

DATED This 22nd day of July, 2013.

VALDEZ LAW OFFICE, PLLC

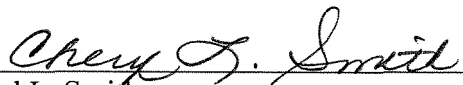
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CERTIFICATE OF SERVICE

Cheryl L. Smith, secretary with Valdez Law Office, PLLC located at 2217 Addison Avenue East, Twin Falls, Idaho, certifies that on the 22nd day of July, 2013, she caused a true and correct copy of the **APPELLANT'S REPLY BRIEF** to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

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