ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE OFFICERS WERE NOT ON THE FITZHUGHS' PROPERTY WHEN THEY VIEWED THE MARIJUANA.

A trial court's findings of fact in a suppression motion may be reversed by this court when it determines that the findings were clearly erroneous. *State v. Williams*, 273 Mont. 459, 904 P.2d 1019 (1995). A finding of fact by a district court with respect to a motion to suppress is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if the supreme court has a firm conviction that the district court made a mistake. *State v. Loh*, 275 Mont. 460, 914 P.2d 592 (1996).

There can be little doubt that the trial court made a mistake in this case in concluding that the officers remained below the ordinary high-water mark of the river when they observed the marijuana in the Fitzhughs' yard. Indeed, in light of the detailed evidence presented on behalf of the Fitzhughs with regard to the topography and physical nature of the area which the officers entered, as discussed above in the Statement of Facts, the trial court's conclusion that the officers had not entered the Fitzhughs' property was completely inconsistent with the physical evidence and was not logical or reasonable. It appears that the trial court itself had little confidence in its ruling for, after concluding that the officers had stayed off the Fitzhughs' property, the court proceeded to devote the bulk of its opinion to the issue of whether the area above the high-water mark, on the Fitzhughs' property, was an area in which the Fitzhughs had a legitimate privacy interest.

Under the circumstances of this case, this court must conclude that there was an intrusion onto the Fitzhughs' property.

II. THE OFFICERS WERE ON PROPERTY IN WHICH THE FITZHUGHS HAD A LEGITIMATE PRIVACY INTEREST PROTECTED BY THE MONTANA CONSTITUTION.

The Montana Supreme Court has long recognized that the Montana Constitution establishes and protects privacy interests to a greater extent than does the United States Constitution, or than do other state constitutions. As stated in *State v. Sawyer*, 174 Mont. 512, 571 P.2d 1131, 1133 (1977), "we view the Montana Constitution to afford an individual greater protection . . . than is found under the Fourth Amendment." *Accord State v. Sheetz*, 286 Mont. 41, 950 P.2d 722, 725 (1997) ("As we apply the Montana Constitution, we have chosen not to 'march lock-step' with the United States Supreme Court, even when applying nearly identical language").

When a right-to-privacy issue arises from a search and seizure, two provisions of the Montana Constitution must be analyzed. Article II, § 10 states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Article II, § 11 states:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

In *State v. Bullock*, 272 Mont. 361, 901 P.2d 61 (1995), and *State v. Hubbel*, 286 Mont. 200, 951 P.2d 971 (1997), the Montana Supreme Court found that these provisions give Montana property owners a protected privacy interest in lands which are not necessarily protected from intrusion under the Fourth Amendment. Rejecting the "open fields" doctrine of such cases as *Oliver v. United States*, 466 U.S. 170 (1984), and *United States v. Dunn*,

480 U.S. 294 (1987), the court held in *State v. Bullock* that "in Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, 'no Trespassing,' or similar signs, or 'by some other means [which] indicate[s] unmistakably that entry is not permitted,' . . . entry by law enforcement officers requires permission or a warrant." 901 P.2d at 75-76 (quoting *People v. Scott*, 593 N.E.2d 1328, 1338 (N.Y. 1979)). Indeed, in *State v. Hubbel*, the court squarely held that "under Montana's Constitution, the concept of curtilage is . . . meaningless." 951 P.2d at 977.

Therefore, the real issue before this court is simply whether the area of the Fitzhughs' property into which the officers intruded was an area in which the Fitzhughs had a legitimate expectation of privacy and whether that privacy interest was evident to the officers. Under this analysis, there can be no doubt that the officers' intrusion was violative of the Montana Constitution. The facts show that the area in question was in close proximity to the Fitzhughs' house and that the officers were required to pass through a heavily wooded area in order to reach their vantage point. The Fitzhughs' property is fully protected from view from the public, as an eight-foot-high fence has been placed on the east boundary, an eight- to ten-foot cedar hedge protects the south, along the county road, and an eight-foot-high chain link fence, together with outbuildings, a barn, and a corral, marks the west boundary. On the north, the area in question, the property is shielded by thick natural vegetation which the Fitzhughs purposely left in place to provide privacy. Prior to the officers' entry, no one had ever attempted to penetrate this natural barrier of vegetation in order to walk onto their property from the river.

Moreover, the area into which the officers entered is a garden in which family members clearly expected to have privacy; uncontroverted testimony showed that on the very day that the officers intruded with photographic equipment Mrs. Fitzhugh was working in the garden, singing and talking to herself, and had removed some of her clothing. The officers also knew that the area was private by the very nature of their mission; they were going to extreme lengths to photograph something that was not visible to the public. Thus, the facts show that the Fitzhughs reasonably had an expectation of privacy in their property and that such expectation of privacy was evident to the officers, who could not enter the property from the east, west, or south, and who consequently had to approach the property by first proceeding through the mud and dirt adjacent to the river, then climbing up the river bank and walking through a thick screen of vegetation. The agents knew that they were intruding on a private area by the secrecy and stealth with which they proceeded.

The decision of the trial court simply misapplied the law regarding what land is protected from warrantless searches by the Montana Constitution. In essence, while evidently conceding that the Fitzhughs had an expectation of privacy in their property, the trial court found that because the Fitzhughs had failed to place "no trespassing" signs on their property the public could have no notice "of the private nature of the property and that the privilege to enter has been withdrawn." (Memorandum and Order at 4.) Citing *State v. Dixon*, 766 P.2d 1015 (Or. 1988), the court found that landowners who wish to afford themselves a higher degree of privacy must take "affirmative steps to manifest that intention" by posting signs and erecting barriers to entry. (Memorandum and Order at 4.)

Such a narrow view of privacy, and of what must be done in order to preserve one's privacy from the public, is clearly at odds with the Montana Constitution and the case law construing Article II, §§ 10 and 11. The Montana Constitution places the privacy interest of Montana citizens in a preeminent position, subject to invasion only by a "compelling state interest." Mont. Const. art. II, § 10. In *State v. Bullock*, the court expanded upon the right-to-privacy analysis of the United States Supreme Court and held that a landowner's property need not fall within the definition of the traditional "curtilage" in order to enjoy privacy protection. While mentioning "no trespassing" signs and fencing as one way to indicate an expectation of privacy, the court in *Bullock* certainly did not limit landowners to these means as the only ways to establish that their property was not open to the public. Indeed, such signs and fencing were mentioned in *Bullock* and *People v. Scott*, the New York case quoted in *Bullock*, simply because such measures had been taken by the landowners in those cases. Focusing on these particular means of notice, and excluding any other means, is contrary to common experience and fails to provide adequate deference to the privacy rights of Montana citizens.

This court must repudiate the analysis of the trial court and join those courts in other jurisdictions which have properly recognized that property owners may properly evidence an expectation of privacy by allowing natural vegetation to act as a privacy screen. For example, in *State v. Lange*, 463 N.W.2d 390 (Wis. Ct. App. 1990), the court addressed the issue of whether a property owner had sufficiently marked a garden area as curtilage in which he had an expectation of privacy. As in the present case, police officers had approached the defendant's garden area by passing through trees and dense undergrowth for

the purpose of observing marijuana plants about which they had received a tip. Also, as in the present case, the garden was only partially enclosed by a fence. The state contended that only the area enclosed by the fence was to be considered curtilage, arguing that the property owner had not erected any other barrier to indicate a desire for privacy. The court rejected this contention, finding that the trial court properly ruled that a property owner was not required to construct man-made privacy screens or to plant vegetation as privacy screens where the property already contained natural vegetation which acted as a screen:

> The state argues that there is nothing in the record to indicate that Lange planted the trees in question. This is not dispositive of our inquiry. . . . Whether Lange planted the trees himself, *or merely chose to live on the property because the trees afforded privacy*, he took steps to protect the area from observation by people passing by.

Id. at 394 (emphasis added).

Similarly, in *State v. Kender*, 588 P.2d 447 (Haw. 1979), the court reversed the defendant's conviction for growing marijuana after determining that the trial court had erred in denying a suppression motion. The marijuana had been observed by officers who had received a tip that the defendant was growing marijuana near a lean-to at the rear of his property behind his home. There was only one neighboring home, and the officers could not see the defendant's backyard from any road. In order to view the marijuana, the officers approached the defendant's property from the rear from the neighbor's land and then, because their view was obstructed by a thick growth of grass, climbed onto a hog wire fence which separated the two tracts. The state argued that the defendant had no expectation of privacy in the area viewed by the police because no privacy fence had been erected and no screens had been put up. The court disagreed in words equally applicable to this case:

> The existence or nonexistence of a fence or screen is not, by itself, controlling. The issue is whether the defendant sufficiently demonstrated an expectation of privacy from a particular point of surveillance.

Id. at 450. The court then concluded:

> In the instant case, the growth of California grass in appellant's backyard created a *natural barrier behind which he could reasonably expect privacy in his own backyard* from his neighbor's gaze.
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> . . . [T]he appellant, by allowing a thick brush of California grass to grow which effectively prevented observation into that part of the backyard where the marijuana plants were located, exhibited a reasonable expectation of privacy against observations by persons positioned in his neighbor's property and the reasonableness of that expectation is only reconfirmed by the intrusiveness of the police officer's conduct.

Id. at 450-51 (emphasis added); *accord State v. Hoke*, 866 P.2d 670 (Wash. Ct. App. 1994) (thick foliage on border of property signaled subjective expectation of privacy).

The Idaho Supreme Court recently stated the governing principle well when it held:

> The State in its argument emphasized the fact that there was no fence or other physical barrier to entry surrounding the property. While the presence of a fence is a factor to consider in determining whether an area is open to the public, it is not dispositive. Many factors such as geography, aesthetics and economics may go into the decision whether or not to erect a fence. We do not believe that the ability to exclude the public is available only to those Idaho citizens with the resources to construct extensive fencing. . . . Idaho citizens, especially those in rural areas, should not have to convert the areas around their homes into the modern equivalent of a medieval fortress in order to prevent uninvited entry by the public, including police officers.

State v. Christensen, 953 P.2d 583, 587 (Idaho 1998). Montana citizens are entitled to no less protection from their supreme court.

This court must therefore conclude that the officers illegally entered onto an area of the Fitzhughs' property in which the Fitzhughs had a legitimate expectation of privacy

guaranteed by the Montana Constitution. All evidence observed and seized subsequent to this illegal entry must be suppressed.

III. THE OFFICERS ENTERED THE "CURTILAGE" OF THE FITZHUGH'S HOME, AS THAT TERM IS USED IN INTERPRETING THE PRIVACY INTERESTS PROTECTED BY THE UNITED STATES CONSTITUTION.

Although the Montana courts have effectively abolished the concept of curtilage under the Montana Constitution, this state's officers must still comply with the dictates of the Fourth Amendment, and it is clear that the officers violated the Fourth Amendment in entering the curtilage area of the Fitzhughs' property. As the evidence demonstrates, the area into which the officers intruded was within a barrier of vegetation and fencing, in close proximity to the Fitzhughs' house, and was directly adjacent to the Fitzhughs' barn, shed, garden, and corral. All of these buildings involve activities which are traditionally considered to take place within a curtilage.

The determination of the extent of the curtilage area is similar to the expectation-of-privacy analysis adopted by the Montana Supreme Court in *State v. Bullock* and *State v. Hubbel*. Numerous cases have concluded that the relevant inquiry is whether the property owner "had a reasonable expectation of privacy" in the area. *United States v. Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996); *United States v. Depew*, 8 F.3d 1424 (9th Cir. 1993). In determining whether a particular area is within the curtilage, the courts are guided by the factors discussed in *United States v. Dunn*, 480 U.S. at 301: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps

taken by the resident to protect the area from observation by people passing by. The Court in *Dunn* warned against the mechanistic application of any one factor. *Id.* Rather, the central component of the curtilage question is "whether the area harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'" *Id.* at 300 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

As discussed above in Argument II, in this case all of these factors favor the finding that the officers intruded into the curtilage of the Fitzhughs' residence. The area was near the house, within an area enclosed by fencing and thick vegetation, was used by the Fitzhughs for daily private activities, and was not visible to the public.

Recent factually similar cases discussing the extent of the curtilage compel the conclusion that the area into which the officers intruded was within the recognized scope of the curtilage. For example, in *United States v. Reilly*, the area in question was adjacent to a small cottage about 375 feet from the residence of the defendant. Officers in search of marijuana entered the defendant's property, passing a pond, a gazebo, and a patio, and claimed to smell marijuana in the cottage, although they could not see inside it. They then walked through a wooded area to a clearing about 125 feet from the cottage, where they discovered 20 marijuana plants.

In applying the *Dunn* factors, the court first acknowledged that the distances from the marijuana plants to the cottage (125 feet) and to the house (over 375 feet) were farther than what traditionally was found to encompass a curtilage area. However, the court further found that the rural nature of the setting affected the curtilage analysis, and it concluded that the curtilage may reach a larger area in a rural setting. In fact, the court held, "[o]n a large

parcel of land, a pond 300 feet away from a dwelling may be as intimately connected to the residence as is the backyard grill of the bloke next door." 76 F.3d at 1277. The court next concluded that the defendant's property was surrounded by an old wire fence on three sides, although parts of it had fallen down. Significantly, the court found that the property was also bordered by hedgerows along two sides and by thick woods on another side. "Taken together," the court concluded, "these barriers satisfy the requirements of an enclosure." *Id.* at 1277-78. Thus, the court in *Reilly* did not require that the defendant have erected the privacy screens himself. In fact, the court went on to cite *Williams v. Garrett*, 722 F. Supp. 254, 260-61 (W.D. Va. 1989), which stated that "reading the word 'enclosure' in *Dunn* to require an artificial barrier seems unduly narrow. The boxwood hedge and the heavy woods created a natural enclosure around the home and yard; *requiring a person to expend resources and sacrifice aesthetics by building a fence in order to obtain protection from unreasonable searches is not required by the constitution*" (emphasis added).

The court next concluded that the use of the area in question favored the finding that the area was curtilage, as the evidence indicated that the defendant and others used it for fishing, swimming, croquet, cooking, and sexual intercourse—all intimate uses associated with the home. In addition, the court again noted that the area was not visible to the public and was obviously restricted to the private use of the defendant and his guests.

Finally, the court then held that the officers could not rely upon the good-faith exception to the exclusionary rule of *United States v. Leon*, 468 U.S. 897 (1984), because the officers failed to give a full description of their entry on the property to the magistrate. Indeed, the court found that the bare-bones description given to the magistrate was "almost

calculated to mislead," for it failed to provide information as to the officers' movements which could have alerted the magistrate to the possibility that the affidavit was the product of an illegal search. Citing numerous cases, the court concluded that *Leon* cannot apply when the method by which the officers obtained evidence supporting a search warrant was illegal.

Similarly, in *United States v. Depew*, the court reversed the defendant's conviction in a case in which an officer entered onto the defendant's property pursuant to a tip that the defendant was growing marijuana. To get onto the property, the officer crossed over a ditch, climbed up a steep embankment, and went through a row of thick coniferous trees to walk up a driveway. At a spot about 60 feet from the house, and outside a picket fence which separated the driveway from the house, the officer detected the odor of growing marijuana coming from the house. The officer then left and returned later with a warrant based on his earlier observation. Holding that the district court had erred in denying the defendant's motion to suppress, the court concluded that the entire area in which the officer had walked was within the curtilage of the defendant's house. Applying the *Dunn* factors, the court found that the distance of 60 feet was close enough to permit a finding of curtilage and held that the natural barriers constituted an enclosure of the area. The court disregarded the fact that a picket fence was between the officer and the house, noting that there was no bright-line rule requiring a holding that the curtilage extends no further than the nearest fence surrounding a fenced house. Third, the court found that the defendant used the area for those activities associated with the privacies of domestic life. Finally, the court found that the defendant had taken adequate steps to prevent observation. Indeed, the court held that the

defendant had chosen the residence at issue because it was in a remote, secluded area, and the house was not visible from the road. The court dismissed the contention that there was no "no trespassing" sign posted where the officer entered, noting that such a finding was insignificant in light of the fact that the officer "entered from an unusual location, *i.e.*, a location not usually traversed by foot traffic, by crossing a ditch and climbing up a steep embankment." 8 F.3d at 1428 n.3. Accordingly, the court found that the warrant had been based on illegally obtained evidence. *See also United States v. Van Dyke*, 643 F.2d 992 (4th Cir. 1991) (it was an illegal search for officers to climb fence and watch from honeysuckle patch 150 feet from house in rural area; curtilage not limited to nearer mowed area); *State v. Hoke* (curtilage area adequately marked by thick foliage); *State v. Cada*, 923 P.2d 469 (Idaho Ct. App. 1996) (absence of fence has little effect on the determination of whether resident had legitimate expectation of privacy in curtilage area).

Therefore, under the Fourth Amendment of the United States Constitution, this court must conclude that the officers intruded into the curtilage area of the Fitzhughs' residence. Accordingly, all evidence obtained as a result of the intrusion must be suppressed on that basis.