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Supreme Court of Florida

No. SC08-2101

JOELIS JARDINES,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[April 14, 2011]
REVISED OPINION

PERRY, J.

We have for review State v. Jardines, 9 So. 3d 1 (Fla. 3d DCA 2008), in which the district court certified conflict with State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006). We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. We quash the decision in Jardines and approve the result in Rabb.

Police conducted a warrantless "sniff test" by a drug detection dog at Jardines' home and discovered live marijuana plants inside. The trial court granted Jardines' motion to suppress the evidence, and the State appealed. The district

court reversed, and Jardines sought review in this Court. Jardines claims that the warrantless "sniff test" violated his right against unreasonable searches under the Fourth Amendment. The issue presented here is twofold: (i) whether a "sniff test" by a drug detection dog conducted at the front door of a private residence is a "search" under the Fourth Amendment and, if so, (ii) whether the evidentiary showing of wrongdoing that the government must make prior to conducting such a search is probable cause or reasonable suspicion.

The Fourth Amendment provides that "[t]he 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." U.S. Const. amend. IV. The United States Supreme Court has held that " '[a]t 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)). Or, more succinctly, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo, 533 U.S. at 31.

First, the dog "sniff test" that was conducted in the present case was an intrusive procedure. As explained more fully below, the "sniff test" was a sophisticated undertaking that was the end result of a sustained and coordinated

effort by various law enforcement agencies. On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity—i.e., the preparation for the "sniff test," the test itself, and the aftermath**,** which culminated in the full-blown search of Jardines' home—lasted for hours. The "sniff test" apparently took place in plain view of the general public. There was no anonymity for the resident.

Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime. Further, if government agents can conduct a dog "sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. Such an open-ended policy invites overbearing and harassing conduct. Accordingly, we conclude that a "sniff test," such as the test that was conducted in

the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it must be preceded by an evidentiary showing of wrongdoing.

And second, we note that the parties in the present case have failed to point to a single case in which the United States Supreme Court has indicated that a search for evidence for use in a criminal prosecution, absent special needs beyond the normal need of law enforcement, may be based on anything other than probable cause. We assume that this is because, as explained more fully below, all that Court's precedent in this area indicates just the opposite. And that precedent, we recognize, applies with extra force where the sanctity of the home is concerned. Accordingly, we conclude that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make prior to conducting a dog "sniff test" at a private residence.

I. BACKGROUND

On November 3, 2006, Detective Pedraja of the Miami-Dade Police Department received an unverified "crime stoppers" tip that the home of Joelis Jardines was being used to grow marijuana. One month later, on December 6, 2006, Detective Pedraja and Detective Bartlet and his drug detection dog, Franky, approached the residence. The underlying facts, which are discussed more fully

below, are summarized briefly in the separate opinion of a district court judge in Jardines:

> The Miami-Dade County Police Department received a Crime Stoppers tip that marijuana was being grown at the home of defendant-appellee Joelis Jardines. One month later the detective went to the home at 7 a.m. He watched the home for fifteen minutes. There were no vehicles in the driveway, the blinds were closed, and there was no observable activity.
>
> After fifteen minutes, the dog handler arrived with the drug detection dog. The handler placed the dog on a leash and accompanied the dog up to the front door of the home. The dog alerted to the scent of contraband.
>
> The handler told the detective that the dog had a positive alert for the odor of narcotics. The detective went up to the front door for the first time, and smelled marijuana. The detective also observed that the air conditioning unit had been running constantly for fifteen minutes or so, without ever switching off. [N. 8. According to the detective, in a hydroponics lab for growing marijuana, high intensity light bulbs are used which create heat. This causes the air conditioning unit to run continuously without cycling off.]
>
> The detective prepared an affidavit[1] and applied for a search warrant, which was issued. A search was conducted, which

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1. The affidavit that Detective Pedraja submitted to the magistrate provided as follows, in relevant part:

> "Your Affiant's" reasons for the belief that "The Premises" is being used as [a marijuana hydroponics grow lab] and that "The Property [consisting of marijuana and the equipment to grow it]" listed above is being concealed and stored at "The Premises" is as follows:
>
> On November 3, 2006, "Your Affiant" detective William Pedraja, # 1268, received information from a crime stoppers tip that marijuana was being grown at the described residence.
>
> On December 5, 2006, "Your Affiant" conducted surveillance at the residence and observed no vehicles in the driveway. "Your Affiant" also observed windows with the blinds closed. "Your Affiant" and Detective Doug Bartelt with K-9 drug detection dog

"FRANKY" approached "The Premises" in an attempt to obtain a consent to search. While at front door [sic], "Your Affiant" detected the smell of live marijuana plants emanating from the front door of "The Premises." The scent of live marijuana is a unique and distinctive odor unlike any other odor. Additionally, K-9 drug detection dog "FRANKY" did alert to the odor of one of the controlled substances he is trained to detect. "Your Affiant," in an attempt to obtain a written consent to search, knocked on the front door of "The Premises" without response. "Your Affiant" also heard an air conditioning unit on the west side of the residence continuously running without recycling. The combination of these factors is indicative of marijuana cultivation.

Based upon the positive alert by narcotics detector dog "FRANKY" to the odor of one or more of the controlled substances that she is trained to detect and "FRANKY" [sic] substantial training, certification, and past reliability in the field in detecting those controlled substances, it is reasonable to believe that one or more of those controlled substances are present within the area alerted to by "FRANKY." Narcotics Canine handler, Detective Bartelt, Badge number 4444, has been a police officer with the Miami-Dade Police Department for nine years. He has been assigned to the Narcotics Bureau for six years and has been a canine handler since May 2004. In the period of time he has been with the Department, he has participated in over six hundred controlled substances searches. He has attended the following training and received certification as a canine handler . . . .

Since becoming a team, Detective Bartelt and narcotics detector canine "FRANKY" have received weekly maintenance training . . . . Narcotics detector canine "FRANKY" is trained to detect the odor of narcotics emanating from the following controlled substances to wit: marijuana . . . . To date, narcotics detector canine "FRANKY" has worked approximately 656 narcotics detection tasks in the field. He has positively alerted to the odor of narcotics approximately 399 times. "FRANKY'S" positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana.

WHEREFORE, Affiant prays that a Search Warrant be issued . . . to search "The Premises" above-described . . . .

> confirmed that marijuana was being grown inside the home. The defendant was arrested.
>
> The defendant moved to suppress the evidence seized at his home. The trial court conducted an evidentiary hearing at which the detective and the dog handler testified. The trial court suppressed the evidence on authority of State v. Rabb.

Jardines, 9 So. 3d at 10-11 (Cope, J., concurring in part and dissenting in part) (footnote omitted).

The State appealed the suppression ruling, and the district court reversed based on the following reasoning:

> In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in Rabb, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed. Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with Rabb, we certify direct conflict.

Jardines, 9 So. 3d at 10 (footnote omitted). Jardines sought review in this Court based on certified conflict with State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006),[2] which we granted.[3]

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2. The Fourth District Court of Appeal in State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006), affirmed the trial court's suppression of illicit drugs (marijuana found growing in Rabb's house) following a warrantless "sniff test" by a drug detection dog at the front door of Rabb's home. The district court based its ruling on Kyllo v. United States, 533 U.S. 27 (2001), reasoning as follows:

> [Our logic here] is no different than that expressed in Kyllo, one of the recent pronouncements by the United States Supreme Court on law enforcement searches of houses. The use of the dog, like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house, which is reasonably considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in Kyllo, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the house at all, or in this case, the fact that a dog's sense of smell crossed the "firm line" of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an "intimate detail" of that house, no less so than the ambient temperature inside Kyllo's house. Until the United States Supreme Court indicates otherwise, therefore, we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search.

Rabb, 920 So. 2d at 1184.

3. We note that the First District Court of Appeal in Stabler v. State, 990 So. 2d 1258 (Fla. 1st DCA 2008), also certified conflict with Rabb. In Stabler, the district court held that a dog "sniff test" conducted at an apartment door that opens onto a common area accessible to the general public does not constitute a "search" for Fourth Amendment purposes. As noted herein, Stabler is distinguishable from Rabb in that Stabler involved a "sniff test" conducted at an apartment or other temporary dwelling, not a "sniff test" conducted at a private residence. See infra note 10.

II. THE APPLICABLE LAW

The Fourth Amendment to the United States Constitution contains both the Search and Seizure Clause and the Warrant Clause and provides as follows in full:

> 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.

U.S. Const. amend. IV.[4] With respect to the meaning of the amendment, the courts have come to accept the formulation set forth by Justice Harlan in Katz[5]:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the

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4. The comparable provision of the Florida Constitution is contained in article I, section 12, which further provides: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const.

5. Katz v. United States, 389 U.S. 347 (1967) (addressing the issue of whether police, without a warrant, can listen to and record one end of a telephone conversation in a public phone booth via an electronic listening and recording device attached to the outside surface of the booth).

> expectation of privacy under the circumstances would be unreasonable.

Katz, 389 U.S. at 361 (emphasis added) (Harlan, J., concurring); see California v. Ciraolo, 476 U.S. 207, 211 (1986) ("Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?"). In sum, "wherever an individual may harbor a 'reasonable expectation of privacy' he is entitled to be free from unreasonable governmental intrusion." Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)).

A. Federal "Dog Sniff" Cases

The United States Supreme Court has addressed the issue of "sniff tests" by drug detection dogs in three cases. First, in United States v. Place, 462 U.S. 696 (1983), that Court addressed the issue of whether police, based on reasonable suspicion, could temporarily seize a piece of luggage at an airport and then subject the luggage to a "sniff test" by a drug detection dog. After Place's behavior at an airport aroused suspicion, police seized his luggage and subjected it to a "sniff test" by a drug detection dog at another airport and ultimately discovered cocaine inside. The federal district court denied Place's motion to suppress, and the court of appeals reversed. The United States Supreme Court affirmed, concluding that

the seizure, which lasted ninety minutes, was an impermissibly long Terry[6] stop, but the Court ruled as follows with respect to the dog "sniff test":

> The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

Place, 462 U.S. at 706-07 (quoting United States v. Chadwick, 433 U.S. 1, 7 (1977)).

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6. Terry v. Ohio, 392 U.S. 1 (1968) (addressing the issue of whether police, based on an evidentiary showing of less than probable cause, can temporarily seize and search a person).

Second, in City of Indianapolis v. Edmond, 531 U.S. 32 (2000), the United States Supreme Court addressed the issue of whether police could stop a vehicle at a drug interdiction checkpoint and subject the exterior of the vehicle to a "sniff test" by a drug detection dog. Police stopped Edmond and other motorists at a dragnet-style drug interdiction checkpoint, and a drug detection dog was walked around the exterior of each vehicle. Later, Edmond filed a class action lawsuit against the city, claiming that the checkpoints violated his Fourth Amendment rights, and he sought a preliminary injunction barring the practice. The federal district court denied the injunction, and the court of appeals reversed. The United States Supreme Court affirmed, explaining that "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." Edmond, 531 U.S. at 41. With respect to the dog "sniff test," the Court stated as follows:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. See United States v. Place, 462 U.S. 696 (1983). Just as in Place, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. See ibid. Like the dog sniff in Place, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." Ibid.

Edmond, 531 U.S. at 40 (citation omitted) (quoting Place, 462 U.S. at 707).

And third, in Illinois v. Caballes, 543 U.S. 405 (2005), the United States Supreme Court addressed the issue of whether police, during the course of a lawful traffic stop, could subject the exterior of a vehicle to a "sniff test" by a drug detection dog. After Caballes was stopped for speeding and while the officer was writing the citation, a second officer arrived at the scene and subjected the exterior of the vehicle to a dog "sniff test." The dog alerted at the trunk and the officers searched the trunk and found marijuana. The state trial court denied Caballes' motion to suppress, and the Illinois Supreme Court reversed. The United States Supreme Court reversed, ruling as follows:

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. Jacobsen, 466 U.S., at 123. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." Ibid. This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." Id., at 122 (punctuation omitted). In United States v. Place, 462 U.S. 696 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." Id., at 707; see also Indianapolis v. Edmond, 531 U.S. 32, 40 (2000). Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case,

> the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.
>
> Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," Place, 462 U.S., at 707—during a lawful traffic stop generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Caballes, 543 U.S. at 408-09 (citation omitted).

Further, the Court in Caballes distinguished its ruling in Kyllo v. United States, 533 U.S. 27 (2001), as follows:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Kyllo v. United States, 533 U.S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." Id., at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

B. Two Additional Federal Cases

In two additional cases, the United States Supreme Court has addressed Fourth Amendment issues that are relevant here. First, in United States v.

Jacobsen, 466 U.S. 109 (1984), the Court addressed the issue of whether police, without a showing of probable cause, could temporarily seize and inspect a small portion of the contents of a package, which had been damaged in transit and was being held by a private shipping company, and then subject the contents to a field test for cocaine. After employees of a private freight carrier discovered a suspicious white powder in a damaged package and notified federal agents, the agents conducted a field chemical test on the powder and determined that it was cocaine. The federal district court denied Jacobsen's motion to suppress, and the court of appeals reversed. The United States Supreme Court reversed, reasoning as follows:

> A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.
>
> This conclusion is dictated by United States v. Place, 462 U.S. 696 (1983), in which the Court held that subjecting luggage to a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment . . . .
>
> Here, as in Place, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate

> interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.

Jacobsen, 466 U.S. at 123-24 (footnote omitted).

And second, in Kyllo v. United States, 533 U.S. 27 (2001), the United States Supreme Court addressed the issue of whether police, without a warrant, could use a thermal-imaging device to scan a private home to determine if the amount of heat generated by the home was consistent with the use of high-intensity lamps used in growing marijuana. After federal agents became suspicious that Kyllo was growing marijuana in his home, agents scanned the outside of the triplex with a thermal-imaging device, which showed that the garage roof and side of the residence were inordinately warm. The agents obtained a warrant and searched the residence and found live marijuana plants inside. The federal district court denied Kyllo's motion to suppress, and the circuit court affirmed. The United States Supreme Court reversed, reasoning as follows:

> The Katz test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. While it may be difficult to refine Katz when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology

> any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area" constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.
>
> . . . .
>
> We have said that the Fourth Amendment draws "a firm line at the entrance to the house." That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.
>
> > "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." Carroll v. United States, 267 U.S. 132, 149 (1925).
>
> Where, as here, 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.

Kyllo, 533 U.S. at 34-40 (citations omitted) (quoting Silverman, 365 U.S. at 512; Payton v. New York, 445 U.S. 573, 590 (1980)).

III. ANALYSIS

As noted above, the issue raised in the present case is twofold: (i) whether a "sniff test" by a drug detection dog conducted at the front door of a private

residence is a "search" under the Fourth Amendment and, if so, (ii) whether the evidentiary showing of wrongdoing that the government must make prior to conducting such a search is probable cause or reasonable suspicion.

A. The Federal "Dog Sniff" Cases Are Inapplicable to the Home

For reasons explained below, we conclude that the analysis used in the above federal "dog sniff" cases is inapplicable to a "sniff test" conducted at a private home. First, we recognize that the United States Supreme Court has ruled that because a "sniff test" conducted by a drug detection dog is "sui generis," or unique, in the sense that it is minimally intrusive and is designed to detect only illicit drugs and nothing more, Place, 462 U.S. at 707, a dog "sniff test" does not implicate Fourth Amendment rights when employed in the following settings: (i) when conducted on luggage that has been seized at an airport based on reasonable suspicion of unlawful activity, where the luggage has been separated from its owner and the "sniff test" is conducted in a public place, see Place, 462 U.S. 696; (ii) when conducted on the exterior of a vehicle that has been stopped in a dragnet-style stop at a drug interdiction checkpoint, see Edmond, 531 U.S. 32; and (iii) when conducted on the exterior of a vehicle that has been subjected to a lawful traffic stop. See Caballes, 543 U.S. 405. Further, the United States Supreme Court has applied a similar analysis to a chemical "field test" for drugs when conducted

on the contents of a package that has been damaged in transit and is being held by a private shipping company. See Jacobsen, 466 U.S. 109.

We note, however, that in each of the above cases, the United States Supreme Court was careful to tie its ruling to the particular facts of the case. See Place, 462 U.S. at 707 ("[W]e conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment."); Edmond, 531 U.S. at 40 ("The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search."); Caballes, 543 U.S. at 409 ("In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."); Jacobsen, 466 U.S. at 123 ("It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised."). Nothing in the above cases indicates that the same analysis would apply to a dog "sniff test" conducted at a private residence.

Significantly, all the sniff and field tests in the above cases were conducted in a minimally intrusive manner upon objects—luggage at an airport in Place, vehicles on the roadside in Edmond and Caballes, and a package in transit in Jacobsen—that warrant no special protection under the Fourth Amendment. All the tests were conducted in an impersonal manner that subjected the defendants to no untoward level of public opprobrium, humiliation or embarrassment. There was no public link between the defendants and the luggage as it was being tested in Place or the package as it was being tested in Jacobsen, and the defendants retained a degree of anonymity during the roadside testing of their vehicles in Edmond and Caballes. Further, and more important, under the particular circumstances of each of the above cases, the tests were not susceptible to being employed in a discriminatory or arbitrary manner—the luggage in Place had been seized based on reasonable suspicion; the vehicle in Edmond had been seized in a dragnet-style stop; the vehicle in Caballes had been seized pursuant to a lawful traffic stop; and the contents of the package in Jacobsen had been seized after the package had been damaged in transit by a private carrier. All these objects were seized and tested in an objective and nondiscriminatory manner, and there was no evidence of overbearing or harassing government conduct. There was no need for Fourth Amendment protection. As explained below, however, such is not the case with respect to a dog "sniff test" conducted at a private residence.

B. "Sniff Test" at a Private Home

As noted above, the United States Supreme Court has held that "wherever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable government intrusion." Terry, 392 U.S. at 9 (quoting Katz, 389 U.S. at 351 (Harlan, J., concurring)). Nowhere is this right more resolute than in the private home: " '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, 533 U.S. at 31(quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). The sanctity of the citizen's home is a basic tenet of Anglo-American jurisprudence:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B.). In his Commentaries on the Laws of England, William Blackstone noted that
>
> > "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome . . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 Commentaries 223 (1765-1769).
>
> The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home . . . .

Wilson v. Layne, 526 U.S. 603, 609-10 (1999); see also United States v. United States Dist. Court for Eastern Dist. of Mich., 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .").

Although police generally may initiate a "knock and talk" encounter at the front door of a private residence without any prior showing of wrongdoing, see State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981) ("Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time."), a dog "sniff test" is a qualitatively different matter. Contrary to popular belief, a "sniff test" conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle "sniff test" and signals an "alert" if drugs are detected. Quite the contrary. In the present case, for instance, on the morning of December 5, 2006, members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, conducted a surveillance of Jardines' home. As Detectives Pedraja and Bartlet and the drug detection dog, Franky, approached the residence, Sergeant Ramirez and Detective Donnelly of the Miami-Dade Police Department established perimeter positions around the residence and federal DEA agents assumed stand-by positions as backup units.

The "sniff test" conducted by the dog handler and his dog was a vigorous and intensive procedure. Detective Bartlet testified as follows on direct examination at the suppression hearing:

> Q. After you stepped onto the property, what did you do?
>
> A. I, basically, approached with my canine partner. The way my canine partner works, he is very strongly driven, so he is actually out in front of me. He is one of the dogs that will actually pull me around very dramatically.
>
> So he pulled directly up the porch as he is trained to do, and immediately upon crossing the threshold of the archway which you see here, upon entering the alcove of the porch, he began tracking an airborne odor.
>
> Q. Let me stop you there, Officer.
>
> A. Sure.
>
> Q. At this time in time, how far into this home did you get or into the entranceway of the home did you get? I want you to point to the Court.
>
> A. You see there's a walker there? That's about the area that it was I was in.
>
> Q. There is also an archway there. Did you ever cross in through that archway?
>
> A. Not that I recall, no.
>
> Q. So, where exactly was your dog when he alerted to an alert of contraband?
>
> A. The alert for the dog, basically, is the minute I observed out of normal behavior for him.
>
> In this particular case, the abnormal behavior would have been the head high, tracking the airborne odor. He began tracking that airborne odor by bracketing and tracking back and forth.
>
> Q. What exactly is bracketing?
>
> A. Bracketing is a technique that the dog uses once he comes to an odor—which is basically you can think of it as a cloud of odor.
>
> Once he gets into that cloud of odor, he is trained to go to the strongest point. We call that source.
>
> So, he is bracketing back and forth, back and forth, within the cone of odor to determine the strongest source. In this particular residence source for him was the base of the door.

Q. And is Detective Pedraja observing this as well? You can't speak for him?

A. Yeah, I—to be honest with you, all I'm doing is concentrating on the dog, watching the dog's head movements, his body postures, whence he is indicating towards me.

Q. Detective, your dog is on a leash at that point?

A. Oh, absolutely.

Q. How long is that leash?

A. It's approximately six feet. And then you have the length of my arm, so you can assume from there.

Q. Okay. Once the dog began—what is it the dog did that told you he had an alert?

A. Okay. He immediately told me he had an alert when he began tracking that odor. Now I know he is in odor and he needs to find source.

So, what I do is I get back as far as I can. I let him have the full six feet of the leash plus whatever safe distance I can give him without running off in order for him to determine where source is.

For example, if I don't do that, source could be the motorcycle, it could be somewhere else other than the front door.

So, in order for me to fully observe his alert and where the source is, I need to be creating as much distance as I can.

Often handlers will drop the leash and walk away completely. I don't do that with him because he is a little bit wild, so I maintain control of the leash and observe him from a distance so that I can indicate where source is going to be.

Q. Okay. So, once he detects a source and he is bracketing and he is doing this behavior, what is the next thing that you observe this dog do?

A. The final culmination of his abnormal behavior is a sitting position, and he did that immediately following the sniff at the base of the door, which indicates source to me.

Q. And once Franky, your dog, did that, what did you then do?

A. I then pulled him off of the sit and returned to my vehicle.

Q. Did you at any point in time communicate what the dog did to anybody?

A. Yeah, I indicated to the lead detective that there was a positive alert for the odor of narcotics.

Q. And where exactly, in what direction around you, was the detective at that point?

A. He would have been behind me, so I passed him up in the driveway.

Q. Once you pulled the dog away from the door, where did you then go?

A. To my vehicle.

With respect to the location of Detective Pedraja in relation to Detective Bartlet and Franky during the "sniff test," Bartlet testified as follows on redirect examination at the suppression hearing:

Q. Would Detective Pedraja be in front of you as you are conducting canine—I don't even know what you would call it.

. . . .

[A.] Would he be in front of—while Franky is sniffing the door? Definitely not.

Q. Why not?

A. Because he would be obstructing his ability to perform. He would be blocking him. He would be—if he was standing in front of the door, Franky may not be able to get to source. So he needs to be out of the way.

Q. Was Detective Pedraja standing next to you?

A. No.

Q. Why not?

A. Because he probably would get knocked over by Franky when Franky is spinning around trying to find source.

[THE PROSECUTOR]: No further questions.

After the "sniff test" was completed, Detective Bartlet and Franky left the scene to assist in another case. Detective Pedraja, after waiting at the residence for fifteen or twenty minutes, also left the scene to prepare a search warrant and to submit it to a magistrate. Federal DEA agents, however, remained behind to maintain surveillance of Jardines' home. Pedraja obtained a search warrant later that day and returned to the scene. About an hour later, members of the Miami-

Dade Police Department, Narcotics Bureau, and DEA agents executed the warrant by gaining entry to Jardines' home through the front door. As agents entered the front door, Jardines exited through a sliding glass door at the rear of the house. He was apprehended by Special Agent Wilson of the DEA and was turned over to the Miami-Dade Police Department. He was charged with trafficking in marijuana and theft of electricity.

Based on the foregoing, we conclude that the dog "sniff test" that was conducted here was an intrusive procedure. The "sniff test" was a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments. On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity—i.e., the preparation for the "sniff test," the test itself, and the aftermath, which culminated in the full-blown search of Jardines' home—lasted for hours. The "sniff test" apparently took place in plain view of the general public. There was no anonymity for the resident.

Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, whether or not he or she is present at the time of the search, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime. Cf. Place, 462 U.S. at 707 (explaining that the dog "sniff test" in that case was not a "search" within the meaning of the Fourth Amendment because it was limited in scope and was anonymous and did not subject the individual to "embarrassment and inconvenience"). And if the resident happens to be present at the time of the "sniff test," such an intrusion into the sanctity of his or her home will generally be a frightening and harrowing experience that could prompt a reflexive or unpredictable response.

Further, all the underlying circumstances that were present in the above federal "dog sniff" and "field test" cases that guaranteed objective, uniform application of those tests—i.e., the temporary seizure of luggage based on reasonable suspicion of criminal activity in Place; the temporary seizure of a vehicle in a dragnet-style stop at a drug interdiction checkpoint in Edmond; the temporary seizure of a vehicle based on a lawful traffic stop in Caballes; and the temporary seizure of a portion of the contents of a package that had been damaged in transit in Jacobsen—are absent from a warrantless "sniff test" conducted at a

private residence. Unlike the objects in those cases, a private residence is not susceptible to being seized beforehand based on objective criteria. Thus, if government agents can conduct a dog "sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. Cf. Camara v. Mun. Court of City & Cnty. of S. F., 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). Such an open-ended policy invites overbearing and harassing conduct.[7]

In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation

7. There is little doubt, however, that a dragnet-style sweep of an entire residential neighborhood or of a multi-unit residential dwelling, conducted without any individualized suspicion of wrongdoing, would be impermissible. Cf. City of Indianapolis v. Edmond, 531 U.S. at 41 ("We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion.").

and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment—specifically, the search must be preceded by an evidentiary showing of wrongdoing. We note that the rulings of other state[8] and federal[9] courts with respect to a dog "sniff test" conducted at a private residence are generally mixed, as are the rulings of other state[10] and federal[11] courts with respect a dog "sniff test" conducted at an apartment or other temporary dwelling.

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8. Compare State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006) (holding that a dog "sniff test" outside a private residence is a "search" within the meaning of the Fourth Amendment); with People v. Jones, 755 N.W.2d 224 (Mich. Ct. App. 2008) (holding that a dog "sniff test" outside a private residence is not a "search" within the meaning of the Fourth Amendment); and Porter v. State, 93 S.W.3d 342 (Tex. App. 2002) (holding that a dog "sniff test" outside a private residence is not a "search" within the meaning of the Fourth Amendment); and Rodriguez v. State, 106 S.W.3d 224 (Tex. App. 2003) (holding that a dog "sniff test" outside a private residence is not a "search" within the meaning of the Fourth Amendment).

9. See United States v. Tarazon-Silva, 960 F. Supp. 1152 (W.D. Tex. 1997) (holding that a dog "sniff test" outside a private residence is not a "search" within the meaning of the Fourth Amendment).

10. Compare State v. Oritz, 600 N.W.2d 805 (Neb. 1999) (holding that a dog "sniff test" outside an apartment is a "search" within the meaning of the

C. The Requirement of Probable Cause

As noted above, the Warrant Clause of the Fourth Amendment provides that "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." U.S. Const. amend. IV. The United States Supreme Court has noted the key protective role that this clause plays with respect to private property:

Fourth Amendment); with Fitzgerald v. State, 864 A.2d 1006 (Md. 2004) (holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment); and Stabler v. State, 990 So. 2d 1258 (Fla. 1st DCA 2008) (holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment); and Nelson v. State, 867 So. 2d 534 (Fla. 5th DCA 2004) (indicating that a dog "sniff test" outside a hotel room is not a "search" within the meaning of the Fourth Amendment); and People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990) ((holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment, but is a search within the meaning of the state constitution).

11. Compare United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988) (holding that a dog "sniff test" outside a railway sleeper compartment is a "search" within the meaning of the Fourth Amendment); and United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985) (holding that a dog "sniff test" outside an apartment is a "search" within the meaning of the Fourth Amendment); with United States v. Brock, 417 F.3d 692 (7th Cir. 2005) (holding that a dog "sniff test" outside a locked bedroom is not a "search" within the meaning of the Fourth Amendment); and United States v. Roby, 122 F.3d 1120 (8th Cir. 1997) (indicating that a dog "sniff test" outside a hotel room is not a "search" within the meaning of the Fourth Amendment); and United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989) (holding that a dog "sniff test" outside a railway sleeper compartment is not a "search" within the meaning of the Fourth Amendment); and United States v. Broadway, 580 F. Supp. 2d at 1179 (D. Colo. 2008) (holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment).

> Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.

Camara, 387 U.S. at 528-29. Specifically, with respect to the home, that Court has noted as follows:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson v. United States, 333 U.S. 10, 14 (1948); see also Welsh v. Wisconsin, 466 U.S. 740, 748 (1984)("[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest."). Or, more succinctly: "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo, 533 U.S. at 31; see also Payton v. New York, 445 U.S. 573, 586 (1980) ("It it a basic principle of Fourth Amendment law that searches

and seizures inside a home without a warrant are presumptively unreasonable.") (internal quotation marks omitted).

The Court of Appeals for the District of Columbia in United States v. Colyer, 878 F. 2d 469 (D.C. Cir. 1989), was confronted with the following question: if a dog "sniff test" is a "search" under the Fourth Amendment and must be preceded by an evidentiary showing of wrongdoing, must that showing be probable cause, or reasonable suspicion? That court addressed the question at length:

> In his concurring opinion in Place, Justice Blackmun suggested that "a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under Terry upon a mere reasonable suspicion." 462 U.S. at 723 (Blackmun, J., concurring in judgment). We find ourselves hard pressed for authority from the Supreme Court to support Justice Blackmun's underlying premise—that there is a category of "minimally intrusive" searches that are supportable under Terry on less than probable cause.
>
> It is certainly true that the Supreme Court has upheld a wide variety of searches on less than probable cause as traditionally understood, but in no case was a law-enforcement search denominated "minimally intrusive." Indeed, the Supreme Court's opinion in Arizona v. Hicks, [480 U.S. 321 (1987)] may indicate that the contrary is the case, i.e., that the Fourth Amendment knows no search but a "full-blown search." Hicks, 480 U.S. at 328 ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). Compare id. with id. at 333 (O'Connor, J., dissenting) ("distin[guishing] between searches based on their relative intrusiveness . . . is entirely consistent with our Fourth Amendment jurisprudence").
>
> Rather than interpreting Terry as broad authority for the proposition that minimally intrusive searches may be justified on the basis of reasonable suspicion, the Supreme Court has on several occasions limited Terry to its precise underpinnings, i.e., protective

searches for weapons. See Dunaway v. New York, 442 U.S. 200, 210 (1979) (Terry is directed to "limited, on-the-street frisk[s] for weapons."). Indeed, the Court has gone so far as to say that Terry provides no support for "any search whatever for anything but weapons." Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). See also Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (per curiam); Sibron v. New York, 392 U.S. 40, 64-65 (1968) ("The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man."). Thus, Professor LaFave seems correct in concluding that "there is no search-for-evidence counterpart to the Terry weapons search, permissible on only a reasonable suspicion that such evidence would be found." [3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 9.4(g), at 539 (2d ed. 1987)].

However, Terry does represent one of a lengthy line of cases in which the Supreme Court has upheld a search or seizure "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). Yet a careful reading of the Supreme Court's teachings leaves us doubtful that "reasonableness balancing" is appropriate in the context of the present case. Five times in as many years the Court has indicated that balancing is only appropriate when warranted by "special needs, beyond the normal need for law enforcement." See Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Griffin v. Wisconsin, 483 U.S. 868 (1987); O'Connor v. Ortega, [480 U.S. 709 (1987)]; New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring in judgment).

This interpretation explains the various cases in which the Supreme Court has held searches to be lawful despite the absence of probable cause as traditionally understood. See T.L.O., 469 U.S. 325 (search by school official of student's purse); O'Connor, 480 U.S. 709 (work-related search by governmental employer); Griffin, 483 U.S. 873-74 (search of probationer's home); Camara v. Municipal Court, 387 U.S. 523 (1967) (housing inspections); New York v. Burger, [482 U.S. 691 (1987)] (inspections of highly regulated business premises); Donovan v. Dewey, 452 U.S. 594 (1981) (inspections of underground mines); Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (body cavity

> searches of prison inmates); United States v. Brignoni-Ponce, 422 U.S. 873, 880-81 (1975) (border patrols); United States v. Biswell, 406 U.S. 311, 316 (1972) (inspections of "pervasively regulated business" for compliance with Gun Control Act); Terry, 392 U.S. 1 (search for weapons, to protect officer and public). In no case has the Supreme Court indicated that a search for evidence qua evidence might qualify as a "special need" that would warrant reasonableness balancing. Common sense suggests that it is not.
>
> To be sure, the Supreme Court has upheld on reasonable suspicion a variety of "minimally intrusive" seizures in contexts different from the "stop and frisk" originally approved in Terry. In such cases, the " 'seizures' [were] so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." Dunaway v. New York, 442 U.S. at 210. See, e.g., United States v. Sharpe, 470 U.S. 675, 685 (1985) (investigative stop of vehicle); Delaware v. Prouse, 440 U.S. 648 (1979) (random checks for drivers' licenses and vehicle registration); United States v. Brignoni-Ponce, 422 U.S. at 880-81 (brief investigative stop of motorists near border for questioning; analogizing situation to encounter addressed in Terry); see also United States v. Villamonte-Marquez, 462 U.S. 579, 592 (1983) (random seizure of vessel in order to examine manifest); United States v. Martinez-Fuerte, 428 U.S. [543, 560 (1976)] (brief random checkpoint questioning for aliens). Although there may be no compelling reason to differentiate between seizures on the basis of their intrusiveness and failing to likewise differentiate between types of searches, the fact remains that we are unable to point to a single Supreme Court case that has upheld a search on reasonable suspicion merely because it was minimally intrusive. See, e.g., Michigan v. Long, 463 U.S. 1032 (1983); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam); Adams v. Williams, 407 U.S. 143 (1972); cf. Martinez-Fuerte, 428 U.S. at 561 (upholding as reasonable a random seizure and noting that it was not dealing with a search).

Colyer, 878 F. 2d at 477-79 (citations omitted).

Professor LaFave has reached the same conclusion with respect to the issue of probable cause versus reasonable suspicion:

> Assuming now that some uses of these dogs constitutes a search, it does not inevitably follow that they should be encumbered by the restrictions ordinarily applicable to other types of searches which are clearly more intrusive in character. While it has sometimes been asserted that if the use of trained dogs is a search then such surveillance is unconstitutional if conducted in absence of a warrant supported by probable cause, it may be argued that the Fourth Amendment does not demand such a result. In Terry v. Ohio, the Court upheld a limited warrantless search made upon less than full probable cause "by balancing the need to search . . . against the invasion which the search . . . entails," and thus a similar approach might be taken as to the kind of search here under discussion. Although there are sound reasons for not employing too generously a graduated model of the fourth amendment, the notion that searches by use of dogs trained to detect narcotics . . . is a lesser intrusion subject to lesser Fourth Amendment restrictions is an appealing one. This is because this particular investigative technique is a distinct police practice which quite obviously is much less intrusive than other searches. It seems rather unlikely, however, that the Supreme Court would now reach such a conclusion. The Court has declared that the Fourth Amendment knows no search but a "full-blown search," asserted that Terry provides no support for "any search whatever for anything but weapons," and cautioned that the balancing process is appropriate only when warranted by "special needs beyond the normal need of law enforcement."

1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.2(g), at 540-41 (4th ed. 2004) (quotation marks and footnotes omitted).

We agree with the above analyses and note that the parties in the present case have failed to point to a single case in which the United States Supreme Court has indicated that a search for evidence for use in a criminal prosecution, absent special needs beyond the normal need of law enforcement, may be based on anything other than probable cause. We assume that this is because, as noted in the

commentary above, all that Court's precedent in this area indicates just the opposite. And that precedent, we recognize, applies with extra force where the sanctity of the home is concerned. Accordingly, we conclude that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make under the Fourth Amendment prior to conducting a dog "sniff test" at a private residence.

IV. THE SUPPRESSION RULING

A magistrate's determination that probable cause exists for issuance of a search warrant is entitled to great deference when a trial court is considering a motion to suppress. Illinois v. Gates, 462 U.S. 213, 238-39 (1983) ("[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that' probable cause existed."). And a trial court's ruling on a motion to suppress in such a case is subject to the following standard of review: the reviewing court must defer to the trial court's factual findings if supported by competent, substantial evidence but must review the trial court's ultimate ruling independently, or de novo. State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001); see also Connor v. State, 803 So. 2d 598 (Fla. 2001).

In the present case, the trial court granted Jardines' motion to suppress, ruling as follows:

> This cause having come before this Court on Defendant, Joelis Alex Jardines', motion to suppress evidence seized from his house

and this Court having reviewed the motion, the arguments of counsel, the court file and the records in this case, and being otherwise fully advised in the premises therein:

A drug detector dog was used to support probable cause for the issuance of a search warrant of the Defendant's house. The Defendant moved to suppress the evidence of drugs recovered from his house as a result of the search warrant. Pursuant to State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006), this Court concludes that law enforcement's use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search.

However, the Court must also consider, absent the dog sniff information, whether any independent and lawfully obtained evidence establishes a substantial basis for concluding that probable cause existed to support the issuance of a search warrant for the Defendant's house.

The probable cause affidavit listed the information provided from a crime stoppers tip that marijuana was being grown at the residence as a basis to support probable cause for the issuance of a search warrant. However, the crime stoppers tip was unverified and came from an unknown individual rather than a qualified confidential informant. Additionally, there was no evidence to suggest the crime stoppers tip was corroborated by any evidence resulting from surveillance of the house. The only other evidence contained in the affidavit was that the window blinds were closed and the air conditioner unit was constantly running without recycling. This information, considered in its totality, simply does not suggest a fair probability of any broader criminal activity, such as the growing of marijuana in the Defendant's house. Therefore, this Court concludes that no independent and lawfully obtained evidence establishes the probable cause necessary to support the issuance of a search warrant for the Defendant's house.

Ordered and adjudged that even with great deference afforded to the search warrant for the Defendant's house in this case, the probable cause affidavit did not provide a substantial basis for concluding that probable cause existed. Therefore, the motion to suppress evidence seized from the Defendant's house is granted.

With respect to the fact that Detective Pedraja testified that he smelled the odor of live marijuana plants as he stood outside the front door of Jardines' house, the trial

court stated as follows in a footnote: "There was evidence that after the drug detection dog had alerted to the odor of a controlled substance, the officer also detected a smell of marijuana plants emanating from the front door. However, this information was only confirming what the detection dog had already revealed."

As explained above, a warrantless "sniff test" by a drug detection dog conducted at the front door of a private residence is impermissible under the Fourth Amendment. Thus, the trial court properly excluded the results of the "sniff test" from its review of the magistrate's probable cause determination. The remaining evidence consisted of the following: the unverified "crime stoppers" tip, the closed window blinds, and the constantly running air conditioner. As for Detective Pedraja's statement that he detected the odor of live marijuana plants as he stood outside the front door, we note that the trial court had the opportunity to observe Detective Pedraja's testimony first-hand at the suppression hearing. Further, the district court in Rabb addressed an identical situation and concluded as follows:

> [B]ecause the chronology of the probable cause affidavit suggests that the dog alert to marijuana occurred prior to law enforcement's detection of its odor, we cannot assume that law enforcement detected the odor of marijuana before the dog alerted . . . . As such, this is not a case in which a law enforcement officer used his senses to detect something within his plain smell; rather, a law enforcement officer used enhanced, animal senses to detect something inside a home that he might not otherwise have detected.

Rabb, 920 So. 2d at 1191. Based on our review of the present record, we conclude that the trial court's factual findings are supported by competent, substantial

evidence and the trial court's ultimate ruling is supported in the law. The district court erred in reversing the suppression ruling.

V. CONCLUSION

"We have said that the Fourth Amendment draws 'a firm line at the entrance to the house.' That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant." Kyllo, 533 U.S. at 40 (citation omitted) (quoting Payton, 445 U.S. at 590). Given the special status accorded a citizen's home in Anglo-American jurisprudence, we hold that the warrantless "sniff test" that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment.

We quash the decision in Jardines and approve the result in Rabb.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and LABARGA, JJ., concur.
LEWIS, J., specially concurs with an opinion, in which PARIENTE and LABARGA, JJ., concur.
POLSTON, J., dissents with an opinion, in which CANADY, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

LEWIS, J., specially concurring.

The importance of freedom and liberty upon which this nation was founded is expressed in the Fourth Amendment and its protection of our homes from the government. This precious amendment reflects who we are as a people and reflects our values that protect every citizen from unreasonable intrusions by the government. "'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 government intrusion.'" Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). "Of all the places that can be searched by the police, one's home is the most sacrosanct, and receives the greatest Fourth Amendment protection." United States v. McGough, 412 F.3d 1232, 1236 (11th Cir. 2005) (citing Payton v. New York, 445 U.S. 573, 585 (1980)). In light of the elevated protections afforded to the privacy of one's home, the United States Supreme Court has held that "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo, 533 U.S. at 31 (citing Illinois v. Rodriguez, 497 U.S. 177 (1990)). This Court has also expressed its reluctance to intrude on the privacy of one's home:

> The Fourth Amendment establishes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV (emphasis added). Indeed, "physical entry of the home is the chief

> evil against which the wording of the Fourth Amendment is directed," United States v. United States District Court, 407 U.S. 297, 313 (1972), and "[a]t 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." Silverman v. United States, 365 U.S. 505, 511 (1961).

State v. Titus, 707 So. 2d 706, 708 (Fla. 1998). In my view the primary emphasis in this case must fall on this concept of "home" and its sacred place under Fourth Amendment law.

First, the underlying basis for the search in question here, i.e., the anonymous tip, was insufficient to justify a search that would otherwise be in violation of the Fourth Amendment. In J.L. v. State, 727 So. 2d 204 (Fla. 1998), aff'd, 529 U.S. 266 (2000), this Court held that an anonymous tip cannot be a stand alone basis for reasonable suspicion. This Court made clear that when presented with an anonymous tip, "police must observe additional suspicious circumstances as a result of . . . independent investigation" before the police can act on that tip. Id. at 207 (citing Alabama v. White, 496 U.S. 325, 329 (1990)). In unanimously upholding this Court's decision in J.L., the United States Supreme Court also held that an uncorroborated anonymous tip is not a reliable justification for a Fourth Amendment search because, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" Florida v. J.L., 529 U.S. 266, 270

(2000) (citing Adams v. Williams, 407 U.S. 143, 146-47 (1972)) (quoting White, 496 U.S. at 329).

Here, the "sniff test" was conducted based on nothing more than an unverifiable anonymous tip. See Jardines v. State, 9 So. 3d 1, 2 (Fla. 3rd DCA 2008). Prior to entering the private porch of Jardines, the only purported "additional suspicious circumstance" referenced by the investigating officer was that he observed the air conditioning unit running continuously for fifteen minutes without interruption. See id. If a continuously running air conditioner is indicative of marijuana cultivation, then most Florida citizens and certainly all of my neighbors would be suspected drug dealers subject to intrusive searches by law enforcement. The elevation of such a ridiculous observation in the heat of Florida cannot serve as a basis for intrusion on the heightened expectation of privacy that one enjoys in one's home. Further, there was no evidence of any impending emergency or concern with regard to destruction of evidence. In light of the complete lack of any legitimate, articulable grounds for searching Jardines' home, the police officer, and his accompanying dog, should not have been on Jardines' porch "sniffing" under the front door in the first place.

Second, it is my view that the dog action here constituted a search of a home, in and of itself, and falls within the concept of a search under the Fourth Amendment. A reasonable expectation of privacy, a value of this society that has

developed over many decades, applies not only to the physical, tangible items within a home, but also to the air and odors that may be within and may unintentionally escape from within. The scent of items cooking on a stove, the whiff of an air freshener, or even the foul smell associated with a ruptured sewage line are all intimate details of a home that are expected to remain private and unavailable to the public. We as Americans have an unwavering expectation that there will not be someone, or something, sniffing into every crack, crevice, window, or chimney of our homes. We especially do not expect strangers to bring dogs onto or into our private front porches to sniff under our front doors or any of the cracks or crevices of our homes. This protected interest of the expectation of privacy will be obliterated if a single individual, manipulating an animal, is permitted to make the final determination as to whether the government should enter into a private residence based upon an unverified, uncorroborated, anonymous tip. To sanction and approve turning the "dogs loose" on the homes of Florida citizens is the antithesis of freedom of private property and the expectation of privacy as we have known it and contrary to who we are as a free people.

The private residence is completely unlike the operation of a motor vehicle on highways, the transport of suitcases in public places, or the transport of packages in public transport. See City of Indianapolis v. Edmond, 531 U.S. 32 (2000); United States v. Place, 462 U.S. 696 (1983). The sanctity of the private

residence, above all other expectations of privacy, has been a hallmark of this nation. A private residence is the most sacred of places under the Fourth Amendment, and an intrusion into that sacrosanct privacy commands the highest level of judicial scrutiny. As articulated by the Fourth District Court of Appeal, "An airport and a highway are unquestionably public places with little or no privacy, as much as a home is undoubtedly a private place characterized by its very privacy." State v. Rabb, 920 So. 2d 1175, 1186 (Fla. 4th DCA 2006). Further, luggage located in a public airport, the interior of a vehicle driving on a public highway, and the contents of a package in public transport are "quite different from a house, not only in physical attributes, but also in the historical protection granted by law." Id. at 1184. A private home, on the other hand, is just that, a private, individual home.

While the expectation of privacy inherent within the private residence may not exist in or extend to common walkways, roadways, or other locations that are not within a private dwelling, that which is within the private residence is most assuredly protected. A hallway outside a college dormitory, for example, may not contain the same expectation of privacy as the front door and living room of a private home. We may discuss and debate the concept and extent of curtilage and the nexus with a private residence necessary to be considered part of a protected area. However, it is inescapable that the air and the content of the air within the

private home is inextricably interwoven as part of the protected zone of privacy to which the expectation of privacy attaches. This air is inextricably interwoven in the constitutional context as part of the sanctity of a Florida private home and the private lives of our citizens protected therein. The home and the air within the home are expected and intended to remain within the sanctity of the home with no intent, design, or expectation that they become public or exposed beyond the walls of the home. While one of great wealth with a newly constructed air-tight private home surely has an expectation of privacy of the home and of the air constituted therein, his less wealthy Florida neighbor should not be denied the same fundamental protection simply because his less substantially constructed private home may have a crack or crevice through which air or odors may unintentionally and unexpectedly escape to its curtilage. Allowing a dog to sniff the air and odors that escape from within a home under a door is tantamount to physical entry into that home. Under the view articulated by the dissent, a dog entering a home through the front door, a window, or any other large crack or crevice would not amount to an unconstitutional search. Surely we cannot permit the sanctity of the privacy of our homes to be measured by the size of the cracks or crevices from which air may escape.

My esteemed colleague in dissent incorrectly asserts that a recognition of the right of Floridians to be free from unauthorized dog sniffs <u>in their homes</u> is a

violation of United States Supreme Court precedent. Specifically, my colleague relies on four inapplicable United States Supreme Court decisions that approve the validity of dog sniffs in limited situations outside the home, each of which is so clearly distinguishable from the facts presently before the Court. In United States v. Place, 462 U.S. 696, 697-98 (1983), the narrow question before the United States Supreme Court was whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage outside the home in a public place for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics. In United States v. Jacobsen, 466 U.S. 109, 111 (1984), the Supreme Court simply determined whether police needed to obtain a warrant before searching a damaged package in a public location, visibly leaking a white powdery substance, while in the possession of a private freight carrier. In City of Indianapolis v. Edmond, 531 U.S. 32, 34 (2000), the United Supreme Court considered in a public place the "constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics." (Emphasis supplied.) Finally, in Illinois v. Caballes, 543 U.S. 405, 407 (2005), the question before the Court was in a public place or roadway "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." (Emphasis supplied.) None of these decisions, or any

other decision of the United States Supreme Court, has ever addressed whether the Fourth Amendment requires reasonable, articulable suspicion to justify a dog sniff under the front door of a single family private residence. Accordingly, contrary to the assertion of the dissent, there is no "binding United States Supreme Court precedent" to violate. Dissenting op. at 52.

The core of the dissent's opinion fails to accommodate and is built upon a lack of appreciation for the elevated status that a protected private home has in both this Court and the United States Supreme Court. The dissent asserts that "[b]ecause the dog sniff is only capable of detecting contraband, it is only capable of detecting that which is not protected by the Fourth Amendment." Dissenting op. at 69. Perhaps this statement holds true for luggage in a public airport, a package in a public transport and distribution facility, or in a vehicle on a public roadway, but as discussed above, there are many intimate details associated with the content and odors that may flow from the cracks and crevices of a home. Each of the aforementioned items carries an expectation of privacy that is in no way as great as the expectation of privacy that exists in an individual's home. The dissent fails to accommodate and recognize the increased expectation of privacy that exists in one's home, an expectation that all courts have recognized as greater than any other. To dismiss the critical difference between this case, involving a dog sniff of an individual's home, and the four other cases relied on by the dissent dangerously

undermines the most sacrosanct place that is vulnerable to intrusion by the government, our homes.

Further, the complete absence of any United States Supreme Court precedent on dog sniffs of the cracks and crevices of a private home does not in any way preclude this Court from declaring such a search unconstitutional; rather, it empowers this Court to do so. Although it is true that article 1, section 12 of the Florida Constitution requires this Court to "follow the interpretations of the United States Supreme Court with respect to the Fourth Amendment and provide to Florida citizens no greater protection than those interpretations," Soca v. State, 673 So. 2d 24, 27 (Fla. 1996), it is also true that in the absence of a controlling United States Supreme Court decision, Florida courts are still not prohibited from providing our citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution. See id. at 26-27 (citing State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983)).

Third, the lack of a uniform system of training and certification for drug detection canines makes it unconstitutionally difficult for a defendant to challenge a dog sniff after circumstances such as these have occurred. As articulated by the Second District Court of Appeal in Matheson v. State, 870 So. 2d 8, 14 (Fla. 2d DCA 2003):

[C]onditioning and certification programs vary widely in their methods, elements, and tolerances of failure. Consider, for example, the United States Customs Service regime:

> The Customs Service puts its dog and handler teams through a rigorous twelve-week training course, where only half of the canines complete the training. Customs Service dogs are trained to disregard potential distractions such as food, harmless drugs, and residual scents. Agents present distractions during training, and reward the dogs when those diversions are ignored. The teams must complete a certification exam in which the dog and handler must detect marijuana, hashish, heroin, and cocaine in a variety of environments. This exam and the following annual recertifications must be completed perfectly, with no false alerts and no missed drugs. If a dog and handler team erroneously alerts, the team must undergo remedial training. If the team fails again, the team is disbanded, and the dog is permanently relieved from duty.

[Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog, 85 Ky. L.J. 405, 410-11 (1997)]. In contrast, the testimony below disclosed that Razor and his handler had undergone just one initial thirty-day training course and one week-long annual recertification course. In neither course was Razor conditioned to refrain from alerting to residual odors. Whereas the Customs Service will certify only dogs who achieve and maintain a perfect record, Razor's certification program accepted a seventy percent proficiency. These disparities demonstrate that simply characterizing a dog as "trained" and "certified" imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.

Finally, dogs themselves vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments and circumstances. "[E]ach dog's performance is affected differently by working conditions and its respective attention span. There is also the possibility that the handler may unintentionally or otherwise prompt his dog to alert." [Max A. Hansen, United States v. Solis: Have the

> Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?, 13 San Diego L.Rev. 410, 416 (1976)]. The Customs Service monitors its dogs' performance in the field. Recognizing that a dog's ability can change over time, it maintains records for only thirty to sixty days, then discards them because older records are not probative of the dog's skills. Bird, 85 Ky. L.J. at 415. The Hillsborough County Sheriff's Office maintained no records of Razor's performance, and his handler had not kept track.

(Emphasis supplied.) Due to the clear lack of uniformity in certification for drug detection dogs, the Second District in Matheson held that the fact that a dog is trained and certified, standing alone, is insufficient to establish probable cause to search a home based exclusively on the dog's alert. See id. I agree with the sound reasoning articulated in Matheson. The complete lack of a uniform or standardized system of certifying drug detection canines renders it unduly burdensome for a defendant to challenge the validity of an intrusive dog sniff into a private home that results in an arrest. Forcing finders of fact to rely exclusively on the assertions of police officers that their own dogs are properly trained is inconsistent with our time honored understanding of due process. Here, the probable cause affidavit simply notes that the drug detection dog received "weekly maintenance training," but does not at all indicate what that training entails or how extensive that training may be. See Jardines, 9 So. 3d at 2. This statement, void of any specificity or substance, cannot serve as an irrefutable declaration that establishes a dog's ability to detect drugs.

Finally, the dissent asserts that "distinguishing this case from the United States Supreme Court's dog sniff cases based upon the level of embarrassment the majority presumes to be present here is improper." Dissenting op. at 68. This case involves an unconstitutional search of a private residence by dogs without any verifiable training, the underlying premise of which does not pass constitutional muster. The level of embarrassment suffered by the party that has been searched is not a significant part of the constitutional analysis and does not in any way negate the constitutional invalidity of the search.

We cannot permit the protections of the Fourth Amendment, fragile as they may be, to be decimated piece by piece and little by little until they become mere vestiges of our past. All courts recognize that the home and curtilage of a home are protected and the protection is determined by factors with regard to whether an individual reasonably may expect that the area in question should receive the same status as the home itself. The cracks and crevices around our front doors or windows that may permit air to unintentionally escape are surely in a reasonably free society areas protected by our most cherished document.

PARIENTE and LABARGA, JJ., concur.

POLSTON, J., dissenting.

Because the majority's decision violates binding United States Supreme Court precedent, I respectfully dissent.

Despite the majority's focus upon multiple officers and the supposed time involved in surveillance and in execution of the search warrant,[12] it is undisputed that one dog and two officers were lawfully and briefly present near the front door of Jardines' residence when the dog sniff at issue in this case took place. And despite statements about privacy interests in items and odors within and escaping from a home,[13] the United States Supreme Court has ruled that there are no legitimate privacy interests in contraband under the Fourth Amendment. See Illinois v. Caballes, 543 U.S. 405, 408 (2005) ("Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed 'legitimate.' ") (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).

Contrary to the majority's position, the United States Supreme Court has ruled that a dog sniff is not a search within the meaning of the Fourth Amendment because a dog sniff only reveals contraband in which there is no legitimate privacy

12. See majority op. at 2-3, 22, 25-27.

13. See special concurrence at 43.

interest. See id. (holding that dog sniff of vehicle was not a search within meaning of Fourth Amendment and explaining that "governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.' ") (quoting Jacobsen, 466 U.S. at 408); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) ("Just as in [United States v. Place, 462 U.S. 696 (1983)], an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics."); Jacobsen, 466 U.S. at 124 n.24 ("[T]he reason [the dog sniff in Place] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items."); Place, 462 U.S. at 707 ("[T]he sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited."). Accordingly, the dog sniff involved in this case, which occurred while law enforcement was lawfully present at the front door, cannot be considered a search in violation of the Fourth Amendment.

I. BACKGROUND

On November 3, 2006, law enforcement received an anonymous tip indentifying Jardines' home as a place used to grow marijuana. On December 5, 2006, law enforcement set up surveillance of Jardines' residence. After Detective

Pedraja of the Miami-Dade Police Department had conducted surveillance for fifteen minutes, Detective Bartlet of the Miami-Dade Police Department arrived with a drug-detection dog, Franky. Detective Bartlet and Franky, who was on a six-foot leash, approached the front porch of the residence with Detective Pedraja behind them. Franky began tracking an odor and traced it to the front door, where Franky assumed a sitting position after sniffing at the base of the door, thereby alerting to the scent of marijuana. Detective Bartlet and Franky immediately returned to Detective Bartlet's vehicle. Thereafter, Detective Pedraja smelled the scent of live marijuana at the front door. Detective Pedraja then knocked on the front door, received no response, and noticed that Jardines' air conditioner was running excessively.[14]

Based upon this information, a search warrant was obtained, and Jardines' residence was searched. The search resulted in the seizure of live marijuana plants

14. According to testimony presented at the suppression hearing, Detective Pedraja remained behind Franky and Detective Bartlet while the dog sniff occurred. And based upon the facts described in the State's response to Jardines' motion to suppress, Sergeant Ramirez and Detective Donnelly established perimeter positions during the dog sniff with agents of the Drug Enforcement Administration (DEA) as a support unit. The State's response also explains that DEA continued surveillance after the sniff while Detective Pedraja obtained a search warrant. Detective Pedraja testified at the suppression hearing that he got in his vehicle and "drove to a location close by" to prepare the warrant. Furthermore, Jardines' motion to suppress states that DEA agents and members of the Miami-Dade Police Department executed the search warrant "[a]bout an hour later."

and equipment used to grow those plants. Jardines was charged with trafficking in cannabis and grand theft.

Jardines moved to suppress the seized evidence, arguing that Franky's sniff was an unconstitutional search and that Officer Pedraja's smell of marijuana was tainted by Franky's prior sniff. The trial court granted Jardines' motion. On appeal, however, the Third District reversed, reasoning as follows:

> [F]irst, a canine sniff is not a Fourth Amendment search; second, the officer and the dog were lawfully present at the defendant's front door; and third, the evidence seized would inevitably have been discovered.

State v. Jardines, 9 So. 3d 1, 4 (Fla. 3d DCA 2008). In holding that a dog sniff does not constitute a search under the Fourth Amendment, the Third District certified conflict with the Fourth District's decision in State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006).

II. ANALYSIS

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The similar right contained in the Florida Constitution is "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. Therefore, this Court's jurisprudence in

this area must conform to the United States Supreme Court's precedent interpreting the Fourth Amendment.

In this case, it is undisputed that law enforcement was lawfully present at Jardines' front door. While the Fourth Amendment certainly protects "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 (1961), the publicly accessible area around the front door of the home is not accorded the same degree of Fourth Amendment protection. See, e.g., United States v. French, 291 F.3d 945, 953 (7th Cir. 2002) ("The route which any visitor or delivery man would use is not private in the Fourth Amendment sense . . . .") (quoting United States v. Evans, 27 F.3d 1219, 1229 (7th Cir. 1994)); United States v. Hersh, 464 F.2d 228, 230 (9th Cir. 1972) ("Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.") (quoting Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964)). In fact, the majority acknowledges that "one does not harbor an expectation of

privacy on a front porch where salesmen or visitors may appear at any time." Majority op. at 22 (quoting State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981)).

Furthermore, there are no allegations here that an officer's detection of the scent of marijuana while lawfully present at Jardines' front door would have violated the Fourth Amendment. There are no such allegations because "the police may see what may be seen 'from a public vantage point where [they have] a right to be.' " Florida v. Riley, 488 U.S. 445, 449 (1989) (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)) (reversing a decision of this Court that had factually distinguished a United States Supreme Court decision to hold that a helicopter's flight at 400 feet over property near a home violated the Fourth Amendment); see also United States v. Ventresca, 380 U.S. 102 (1965) (search warrant properly based in part upon investigators' smell of odor when they walked in front of home). Or, as the Ninth Circuit plainly put it with regard to the sense of smell, one does not have "a reasonable expectation of privacy from drug agents with inquisitive nostrils." United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974); see also 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(c), at 575-77 (4th ed. 2004) ("[I]f police utilize 'normal means of access to and egress from the house' for some legitimate purpose, such as to make inquiries of the occupant, to serve a subpoena, or to introduce an undercover agent into the activities occurring there, it is not a Fourth Amendment search for

the police to see or hear or smell from that vantage point what is happening inside the dwelling.") (footnotes omitted) (quoting Lorenzana v. Superior Court, 511 P.2d 33, 37 (Cal. 1973)); United States v. Angelos, 433 F.3d 738, 747 (10th Cir. 2006) (applying the "plain smell" doctrine).

Accordingly, the only remaining question at issue in this case is whether a law enforcement officer, who is lawfully present at the front door of a private residence, may employ a dog sniff at that front door. Based upon binding United States Supreme Court precedent, the answer is quite clearly yes.

The United States Supreme Court has explained that "a Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' " Kyllo v. United States, 533 U.S. 27, 33 (2001) (quoting Ciraolo, 476 U.S. at 211) (alteration in original).

Additionally, and of great importance here, the United States Supreme Court has held that a dog sniff does not constitute a search within the meaning of the Fourth Amendment because it only reveals contraband and there is no legitimate privacy interest in contraband that society is willing to recognize as reasonable. See Caballes, 543 U.S. 405; Edmond, 531 U.S. 32; Place, 462 U.S. 696; see also Jacobsen, 466 U.S. 109.

First, in Place, 462 U.S. at 707, the United States Supreme Court stated the following regarding the unique and very limited nature of a dog sniff when holding that a dog sniff of a passenger's luggage in an airport was not a search under the Fourth Amendment:

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. Id., at 13. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

Then, the United States Supreme Court further explained its decision in Place when holding in Jacobsen, 466 U.S. at 123, that a chemical test of a package did not constitute a search because "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no

legitimate privacy interest." The Court stated that this holding was "dictated" by Place because, "as in Place, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment." Jacobsen, 466 U.S. at 124. The Court explained that "the reason [the dog sniff in Place] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items." Id. at 124 n.24.

Thereafter, in Edmond, 531 U.S. at 40, the United States Supreme Court reaffirmed Place when briefly discussing why a dog sniff of the exterior of a car stopped at a checkpoint did not constitute a search:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. See, e.g., Sitz, [496 U.S.] at 450. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. See United States v. Place, 462 U.S. 696, 707 (1983). Just as in Place, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. See ibid. Like the dog sniff in Place, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." Ibid. Cf. United States v. Turpin, 920 F.2d 1377, 1385 (CA8 1990).

Finally, in Caballes, 543 U.S. at 408-09, the United States Supreme Court again reaffirmed Place as well as Jacobsen when holding that a dog sniff of the

exterior of a vehicle during a lawful traffic stop was not a search because the sniff only revealed contraband in which there is no legitimate privacy interest:

> [C]onducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.
>
> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. Jacobsen, 466 U.S., at 123. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." Ibid. This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." Id., at 122 (punctuation omitted). In United States v. Place, 462 U.S. 696 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." Id., at 707; see also Indianapolis v. Edmond, 531 U.S. 32, 40 (2000). . . .
>
> Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," Place, 462 U.S., at 707—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

In Cabellas, the Court also explained why its dog sniff decisions are consistent with its thermal-imaging decision, namely because—unlike a thermal imaging device—a dog sniff only reveals contraband:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of

> marijuana in a home constituted an unlawful search. Kyllo v. United States, 533 U.S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." Id., at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

To summarize, in Place, Jacobsen, Edmond, and Caballes, the United States Supreme Court held that dog sniffs are not searches within the meaning of the Fourth Amendment because they only detect contraband and there is no legitimate privacy interest in contraband that society recognizes as reasonable. A vast majority of federal[15] and state[16] courts have interpreted the United States Supreme

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15. See United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010) (holding that dog sniff of apartment's front door from common hallway was not a search under the Fourth Amendment and rejecting argument that Kyllo should be extended to dog sniffs, explaining that "the Supreme Court rejected such an interpretation of Kyllo in Caballes"); United States v. Brock, 417 F.3d 692, 696 (7th Cir. 2005) ("[W]e hold that the dog sniff inside Brock's residence [specifically at the locked door of bedroom rented by Brock] was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any information about lawful activity over which Brock had a legitimate expectation of privacy."); United States v. Reed, 141 F.3d 644, 649-50 (6th Cir. 1998) (holding that dog sniff of flat was not a search when dog was lawfully present in the flat and rejecting argument that Place only applies to "public sniffs"); United States v. Broadway, 580 F. Supp. 2d 1179, 1193 (D. Colo. 2008) (rejecting the applicability of Kyllo, holding a dog sniff of apartment from hallway and from walkway outside window was not a search under the Fourth Amendment, and explaining that "as long as a canine unit is lawfully present when a drug sniff occurs, the sniff is not a

search"); United States v. Cota-Lopez, 358 F. Supp. 2d 579, 592 (W.D. Tex. 2002) (rejecting argument that the heightened privacy interest makes dog sniff of front door at private residence intrusive, explaining "Place and Jacobsen compel the conclusion that a canine sniff capable of detecting only the presence or absence of contraband is not a search within the meaning of the Fourth Amendment"), aff'd, 104 Fed. Appx. 931 (5th Cir. 2004); United States v. Meindl, 83 F. Supp. 2d 1207, 1216-17 (D. Kan. 1999) (rejecting argument that plain view/smell exception was inapplicable because the dog sniff occurred in a home rather than a public place); United States v. Tarazon-Silva, 960 F. Supp. 1152, 1162-63 (W.D. Tex. 1997) (holding dog sniff of the outside of a residence and alert at a dryer vent was not a search when dog and officer had the right to be positioned alongside residence), aff'd, 166 F.3d 341 (5th Cir. 1998); see also United States v. Roby, 122 F.3d 1120, 1124-25 (8th Cir. 1997) (holding that a dog sniff in hallway outside hotel room was not a search); United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir. 1993) (holding that dog sniff of warehouse was not a search because defendant "could have no legitimate expectation that a narcotics canine would not detect the odor of the marijuana stored in the warehouse"); United States v. Seals, 987 F.2d 1102, 1106 (5th Cir. 1993) ("A dog 'sniff' is not a search."); United States v. Vasquez, 909 F.2d 235, 238 (7th Cir. 1990) (concluding that sniff of garage from public alley was not a search); United States v. Colyer, 878 F.2d 469, 477 (D.C. Cir. 1989) (holding that dog sniff of train sleeper compartment was not a search); United States v. Burns, 624 F.2d 95, 101 (10th Cir. 1980) (stating that "olfactory activities of a trained police dog legitimately on the premises do not constitute a search" and holding that dog sniff of briefcase in motel room did not violate constitution); United States v. Marlar, 828 F. Supp. 415, 419 (N.D. Miss. 1993) (holding that dog sniff of motel room door was not a search); but see United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding that dog sniff at front door of apartment was a search under the Fourth Amendment requiring warrant based on probable cause); but cf. United States v. Whitehead, 849 F.2d 849, 853 (4th Cir. 1988) ("[T]he brief exposure of the interior of a train compartment to narcotics detection dogs is constitutionally permissible when based on a reasonable, articulable suspicion that luggage within the compartment contains contraband.").

Somewhat confusingly, while the Second Circuit in Thomas, 757 F.2d 1359, held that a dog sniff at a front door of an apartment was a search, the Second Circuit more recently held that a dog sniff in the front yard of a home was not a search because the defendant "had no legitimate expectation of privacy in the front yard of his home insofar as the presence of the scent of narcotics in the air was

capable of being sniffed by the police canine." United States v. Hayes, 551 F.3d 138, 145 (2d Cir. 2008) (citing Caballes, 543 U.S. at 409-10).

16. See State v. Guillen, 213 P.3d 230, 234 (Ariz. Ct. App. 2009) ("[W]e join the majority of jurisdictions in concluding that . . . a dog sniff reaching into a home does not rise to the level of a 'cognizable infringement' under the Fourth Amendment to the United States Constitution."), vacated on other grounds, 223 P.3d 658 (Ariz. 2010); Stabler v. State, 990 So. 2d 1258, 1263 (Fla. 1st DCA 2008) (holding that dog sniff at front door of apartment was not a search within the meaning of the Fourth Amendment because "it did not violate a legitimate privacy interest"); People v. Guenther, 588 N.E.2d 346, 350 (Ill. App. Ct. 1992) (applying Place and Jacobsen to conclude that "[s]ince a canine sniff does not constitute a search, and the police had probable cause to believe there was marijuana in the living room, the police could have brought in the dog"); Hoop v. State, 909 N.E.2d 463, 468 (Ind. Ct. App. 2009) (holding that dog sniff at front door of residence was not a search under the Fourth Amendment, explaining that "[a]s long as an officer is lawfully on the premises, the officer may have a dog sniff the residence without implicating the Fourth Amendment"); Fitzgerald v. State, 864 A.2d 1006, 1017 (Md. 2004) ("[A] dog sniff of the exterior of a residence is not a search under the Fourth Amendment. To be sure, the dog and police must lawfully be present at the site of the sniff."); People v. Jones, 755 N.W.2d 224, 228 (Mich. Ct. App. 2008) (holding that dog sniff outside front door of home was not a search under the Fourth Amendment and explaining 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"); People v. Dunn, 564 N.E.2d 1054, 1056 (N.Y. 1990) (holding dog sniff at door of apartment from common hallway was not a search within the meaning of the Fourth Amendment "[s]ince the 'canine sniff' conducted outside his apartment could reveal only the presence or absence of illicit drugs"); Romo v. State, 315 S.W.3d 565, 573 (Tex. App. 2010) ("[The dog's] sniffs of the garage door and the backyard fence [which were accessible from public alley] were not searches under the Fourth Amendment . . . because he sniffed areas that were not protected from observation by passersby and because Romo had no reasonable expectation of privacy in the odor of marihuana coming from his backyard."); Smith v. State, No. 01-02-00503-CR, 2004 WL 213395, at *4 (Tex. App. 2004) (concluding that dog sniff of house's garage door was not a search under the Fourth Amendment and explaining that "[u]nlike the surveillance device used in Kyllo, a drug-dog sniff does not explore the details of a house" because it "can do no more than reveal the presence or absence of contraband"); Rodriguez v. State, 106 S.W.3d 224, 229 (Tex. App. 2003) (holding that dog sniff

Court's decisions as holding that dog sniffs are not searches under the Fourth Amendment, even in the context of private residences.[17]

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of front door of private residence was not a search, reasoning that "a government investigative technique, such as a drug-dog sniff, that discloses only the presence or absence of narcotics, and does not expose noncontraband items, activity, or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and is thus not a 'search' for Fourth Amendment purposes"); Porter v. State, 93 S.W.3d 342, 346-47 (Tex. App. 2002) (distinguishing Kyllo and holding that dog sniff of front door of home was not a search); see also Nelson v. State, 867 So. 2d 534, 536-37 (Fla. 5th DCA 2004) (holding that dog sniff of hotel room door was not a search); but see State v. Ortiz, 600 N.W.2d 805, 816-17, 819 (Neb. 1999) (holding that a dog sniff of a private residence implicates the Fourth Amendment by relying primarily on other state courts' decisions interpreting state constitutions); State v. Woljevach, 828 N.E.2d 1015, 1018 (Ohio Ct. App. 2005) ("The information obtained from the drug-detecting dog is not available to support the warrant, because the use of the dog on appellant's property was a search that, unlike using a drug-detecting dog to sniff around a vehicle on a highway or around luggage in a public place, must itself have been premised on probable cause.").

17. Even the dissenting justices in Caballes acknowledged that the United States Supreme Court has held that dog sniffs are not searches because they only reveal contraband in which there is no legitimate expectation of privacy protected by the Fourth Amendment. See Caballes, 543 U.S. at 411 (Souter, J., dissenting) ("At the heart both of Place and the Court's opinion today is the proposition that sniffs by a trained dog are sui generis because a reaction by the dog in going alert is a response to nothing but the presence of contraband. Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff 'does not implicate legitimate privacy interests' and is not to be treated as a search." (citations and footnote omitted)); Caballes, 543 U.S. at 421 (Ginsburg, J., dissenting) ("Dog sniffs that detect only the possession of contraband may be employed without offense to the Fourth Amendment, the Court reasons, because they reveal no lawful activity and hence disturb no legitimate expectation of privacy.").

In this case, Franky the dog was lawfully present at Jardines' front door when he alerted to the presence of marijuana. And because, under the binding United States Supreme Court precedent described above, a dog sniff only reveals contraband in which there is no legitimate privacy interest, Franky's sniff cannot be considered a search violating the Fourth Amendment.

The majority concludes that the United States Supreme Court's precedent regarding dog sniffs does not apply here because those dog sniff cases did not involve dog sniffs of a home. See majority op. at 18. However, the United States Supreme Court did not limit its reasoning regarding dogs sniffs to locations or objects unrelated to the home. There is no language in Place, Jacobsen, Edmond, or Caballes that indicates the reasoning that dog sniffs are not searches (because they only reveal contraband in which there is no legitimate expectation of privacy) would change if the cases involved private residences. And, most importantly, the United States Supreme Court issued Caballes after its ruling in Kyllo, a case involving a home. Caballes specifically distinguishes Kyllo, not based upon the object sniffed, but by explaining that, unlike the thermal imaging device involved in Kyllo, a dog sniff only reveals contraband. See Caballes, 543 U.S. at 409-10. Therefore, the very limited and unique type of intrusion involved in a dog sniff is the dispositive distinction under United States Supreme Court precedent, not whether the object sniffed is luggage, an automobile, or a home. Accordingly, the

majority's holding based upon the object sniffed is contrary to the United States Supreme Court's precedent.[18] Kyllo is the precedent that is inapplicable to this dog sniff case, not the United States Supreme Court's cases that actually involve dog sniffs.

In addition, the majority distinguishes the binding precedent regarding dog sniffs based upon what it terms "public opprobrium, humiliation and embarrassment." Majority op. at 3, 20, 27, 28-29. By focusing upon the multiple officers and the supposed time involved in surveillance and the execution of the search warrant, the majority concludes that the sniff here was more intensive and involved a higher level of embarrassment than the sniffs involved in Place, Edmond, and Caballes. See majority op. at 22-23, 25-27. However, Place, Edmond, and Caballes all involved law enforcement activity by multiple officers. See Place, 462 U.S. at 698-99 (describing law enforcement activity by multiple officers in Miami and two DEA agents in New York); Edmond, 531 U.S. at 34-36 (describing law enforcement activity by approximately thirty officers of the Indianapolis Police Department); Caballes, 543 U.S. at 406 (describing law

18. As the highest court in Maryland explained, "The Supreme Court precedent [makes] clear that the status of a dog sniff does not depend on the object sniffed." Fitzgerald, 864 A.2d at 1016. This is so because, as the highest court in New York explained, "[w]hether or not there exists a heightened expectation of privacy, the fact remains that a 'canine sniff' reveals only evidence of criminality." Dunn, 564 N.E.2d at 1057 (citations omitted).

enforcement activity by two officers). And although the majority states that the law enforcement activity in this case "lasted for hours," majority op. at 3, 26, there is no evidence in the record to support that supposition. To the contrary, when asked during the suppression hearing how long he and the dog "remain[ed] on the scene that day," Detective Bartlet responded, "That was a day we were doing multiple operations and I had probably two other people waiting for the dog. So I couldn't have been there much more than five or ten minutes, just enough to grab the information on the flash drive, hand it over and leave." The other specific testimony regarding time in the record is Detective Pedraja's testimony during the suppression hearing explaining that he conducted surveillance for fifteen minutes before approaching the residence with Detective Bartlet and the dog and that it was "approximately 15 to 20 minutes from the time that [he] went to the front door, was standing at the threshold, went to the front door and then came back." Furthermore, as explained above, there are no allegations here that the multiple officers near Jardines' residence violated the Fourth Amendment, regardless of the level of "public opprobrium, humiliation, and embarrassment" that the presence of these officers may have caused Jardines. Therefore, distinguishing this case from the United States Supreme Court's dog sniff cases based upon the level of embarrassment the majority presumes to be present here is improper.

Finally, it is critical to note that the majority's (and the special concurrence's) assumption that Jardines had a reasonable expectation that the smell of marijuana coming from his residence would remain private is contrary to the explicit pronouncements in Jacobsen and Caballes that the possessor of contraband has no legitimate expectation of privacy in that contraband. See United States v. Colyer, 878 F.2d 469, 475 (D.C. Cir. 1989) ("[T]he Supreme Court's analyses in Place and Jacobsen indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed."). Indeed, the fact that one has no reasonable expectation of privacy in contraband is precisely why a dog sniff is not a search under the United States Supreme Court's precedent interpreting the Fourth Amendment. Because the dog sniff is only capable of detecting contraband, it is only capable of detecting that which is not protected by the Fourth Amendment. See Caballes, 543 U.S. at 408 ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.' ") (quoting Jacobsen, 466 U.S. at 123).

III. CONCLUSION

As held by United States Supreme Court, a dog sniff is not a search within the meaning of the Fourth Amendment because it only reveals contraband and

there is no legitimate expectation of privacy in contraband that society is willing to recognize as reasonable. Given this binding precedent, Franky's sniff, while lawfully present at Jardines' front door, cannot be considered a search under the Fourth Amendment. Therefore, I would approve the Third District's decision in Jardines and disapprove the Fourth District's contrary decision in Rabb.

Accordingly, I respectfully dissent.

CANADY, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions

Third District - Case No. 3D07-1615

(Dade County)

Carlos J. Martinez, Public Defender, and Howard K. Blumberg, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida,

for Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, Richard L. Polin, Bureau Chief, and Charmaine Millsaps, Assistant Attorneys General, Miami, Florida,

for Respondent

Arthur T. Daus, III, Fort Lauderdale, Florida, on behalf of Police K-9 Magazine and Canine Development Group,

as Amicus Curiae

Third District Court of Appeal

State of Florida, July Term, A.D. 2008

Opinion filed October 22, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D07-1615
Lower Tribunal No. 06-40839

The State of Florida,
Appellant,

vs.

Joelis Jardines,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Bill McCollum, Attorney General, and Rolando A. Soler, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, and Jorge Rodriguez and Mariam Deghani, Certified Legal Interns, for appellee.

Before COPE, WELLS, and SALTER, JJ.

WELLS, Judge.

The State of Florida appeals from an order suppressing evidence seized pursuant to a search warrant executed on the home of Joelis Jardines. We reverse because the trial court erred in ruling that the magistrate lacked probable cause to issue the warrant and because the evidence suppressed was admissible under the "inevitable discovery" doctrine.

On December 5, 2006, William Pedraja, an officer with the Miami-Dade Police Department, obtained a search warrant from Miami-Dade County Court Judge George Sarduy. The warrant was supported by a probable cause affidavit which identified the premises to be searched, detailed Officer Pedraja's extensive experience in detecting hydroponic marijuana laboratories and the methods and equipment used in such laboratories, and stated:

> "Your Affiant's" reasons for the belief that "The Premises" is being used as [a marijuana hydroponics grow lab] and that "The Property [consisting of marijuana and the equipment to grow it]" listed above is being concealed and stored at "The Premises" is as follows:
>
> On November 3, 2006, "Your Affiant" detective William Pedraja, #1268, received information from a crime stoppers tip that marijuana was being grown at the described residence.
>
> On December 5, 2006, "Your Affiant" conducted surveillance at the residence and observed no vehicles in the driveway. "Your Affiant" also observed windows with the blinds closed. **"Your Affiant" and Detective Doug Bartelt with K-9 drug detection dog "FRANKY" approached "The Premises" in an attempt to obtain a consent to search. While at front door [sic], "Your Affiant" detected the smell of live marijuana plants emanating from the front door of "The Premises."** The scent of live marijuana is a unique and distinctive odor unlike any other odor. Additionally, K-9 drug detection dog "FRANKY" did alert to the odor of one of the

controlled substances he is trained to detect. "Your Affiant," in an attempt to obtain a written consent to search, knocked on the front door of "The Premises" without response. "Your Affiant" also heard an air conditioning unit on the west side of the residence continuously running without recycling. The combination of these factors is indicative of marijuana cultivation.

Based upon the positive alert by narcotics detector dog "FRANKY" to the odor of one or more of the controlled substances that she is trained to detect and "FRANKY" [sic] substantial training, certification and past reliability in the field in detecting those controlled substances, it is reasonable to believe that one or more of those controlled substances are present within the area alerted to by "FRANKY." Narcotics Canine handler, Detective Bartelt, Badge number 4444, has been a police officer with the Miami-Dade Police Department for nine years. He has been assigned to the Narcotics Bureau for six years and has been a canine handler since May 2004. In the period of time he has been with the Department, he has participated in over six hundred controlled substances searches. He has attended the following training and received certification as a canine handler . . . .

Since becoming a team, Detective Bartelt and narcotics detector canine "FRANKY" have received weekly maintenance training . . . . Narcotics detector canine "FRANKY" is trained to detect the odor of narcotics emanating from the following controlled substances to wit: marijuana . . . . To date, narcotics detector canine "FRANKY" has worked approximately 656 narcotics detection tasks in the field. He has positively alerted to the odor of narcotics approximately 399 times. "FRANKY'S" positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana.

WHEREFORE, Affiant prays that a Search Warrant be issued . . . to search "The Premises" above-described . . . .

(Emphasis added).

A search conducted pursuant to the warrant resulted in seizure of live marijuana plants and the equipment used to grow them, and resulted in Jardines being charged with trafficking in cannabis and theft for stealing the electricity needed to grow it.

Jardines, relying primarily on State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006), moved to suppress[1] arguing that no probable cause existed to support the warrant because: (1) the dog "sniff" constituted an illegal search; (2) Officer Pedraja's "sniff" was impermissibly tainted by the dog's prior "sniff"; and (3) the remainder of the facts detailed in the affidavit were legally insufficient to give rise to probable cause.

We reverse the trial court's determination that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search" and that the evidence seized at Jardines' home must be suppressed. We do so because, first, a canine sniff is not a Fourth Amendment search; second, the officer

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[1] Florida Rule of Criminal Procedure 3.190 provides in pertinent part:

> **(h) Motion to Suppress Evidence in Unlawful Search.** (1) *Grounds*. A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:
>
> . . . .
>
> (D) there was no probable cause for believing the existence of the grounds on which the warrant was issued.

and the dog were lawfully present at the defendant's front door; and third, the evidence seized would inevitably have been discovered.

A Canine Sniff Is Not A Fourth Amendment Search

In Illinois v. Caballes, 543 U.S. 405, 408 (2005), the United States Supreme Court expressly rejected the notion that a "dog sniff itself infringed [a] . . . constitutionally protected interest in privacy." In doing so, the Court confirmed that because a dog sniff detects only contraband, and because no one has a "legitimate" privacy interest in contraband, a dog sniff is not a search under the Fourth Amendment.

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. [United States v. Jacobsen, 466 U.S. 109, 123, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984)]. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." Ibid. This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." Id., at 122, 104 S.Ct. 1652 (punctuation omitted). In United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "*sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item." Id., at 707, 103 S.Ct. 2637; see also Indianapolis v. Edmond, 531 U.S. 32, 40, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband."

Caballes, 543 U.S. at 408-9 (some citations omitted).

Based on this reasoning, we reject the notion that Kyllo v. United States, 533 U.S. 27 (2001), relied on in Rabb, makes a dog's detection of contraband while standing on a front porch open to the public, a search which compromises a legitimate privacy interest. Kyllo involved the use of a mechanical device which detected heat radiating from the walls of a home. There, the Court was concerned with the use of constantly improving technological devices that, from outside a home, could intrude into the home and detect legitimate as well as illegal activity going on inside. Kyllo, 533 U.S. at 40 ("Where, as here, 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 presumptively unreasonable without a warrant.").

A dog's nose is not, however, a "device," nor is it improved by technology. Dogs have been used to detect scents for centuries all without modification or "improvement" to their noses. That, perhaps, is why the Supreme Court describes them as "*sui generis*," in Place. Place, 462 U.S. at 707. Moreover, and unlike the thermal imaging device at issue in Kyllo, a dog is trained to detect only illegal activity or contraband. It does not indiscriminately detect legal activity.

These differences prompted the Court in Caballes to note that its conclusion that the dog sniff involved there was lawful was consistent with its earlier decision in Kyllo:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect growth of marijuana in a home constituted an unlawful search Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2083, 150 L.Ed.2d 94 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity-in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." Id., at 38, 121 S.Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

As recently observed in People v. Jones, 755 N.W.2d 224, 228 (Mich.Ct. App. 2008),[2] a majority of federal circuit courts have viewed the Place Court's holding as generally categorizing canine sniffs as nonsearches. See, e.g., United States v. Reed, 141 F.3d 644, 648 (6th Cir. 1998); see also 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. Vasquez, 909 F.2d 235 (7th Cir. 1990).[3] Likewise, "the

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[2] We commend the Public Defender for the 11th Judicial Circuit, and particularly, Howard K. Blumberg, Esq., for its and his professionalism in bringing this case—which undercuts their position here—to our attention.

[3] People v. Jones identifies United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), as an exception to the "sniff is not a search" holdings. People v. Jones, 755 N.W.2d at 228. Thomas was relied on in Rabb which we decline to follow. Rabb, 920 So. 2d at 1184; but see Nelson v. State, 867 So. 2d 534, 536 (Fla. 5th DCA 2004) (observing "the very correctness of the Thomas decision is called into question by its assertion that the defendant 'had a legitimate expectation that the contents of his closed apartment would remain private.' As was shown above, the

vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search."[4] People v. Jones, 755 N.W.2d at 228.

Supreme Court's analyses in Place and Jacobsen indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can 'reveal nothing about noncontraband items.'" (quoting United States v. Colyer, 878 F. 2d 469, 475 (D.C. Cir. 1989))).

[4] As listed in People v. Jones, the following states, including Florida, have in various contexts concluded that a canine sniff is not a Fourth Amendment search:

> State v. Box, 205 Ariz. 492, 496-497, 73 P.3d 623 (Ariz. App. 2003); Sims v. State, 356 Ark. 507, 157 S.W.3d 530 (2004); People v. Ortega, 34 P.3d 986, 991 (Colo. 2001); Bain v. State, 839 So. 2d 739 (Fla.App. 2003); Cole v. State, 254 Ga.App. 424, 562 S.E.2d 720 (2002); State v. Parkinson, 135 Idaho 357, 17 P.3d 301 (Idaho App. 2000); People v. Cox, 318 Ill.App.3d 161, 251 Ill.Dec. 133, 739 N.E.2d 1066 (2000); Bradshaw v. State, 759 N.E.2d 271 (Ind. App. 2001); State v. Bergmann, 633 N.W.2d 328 (Iowa 2001); State v. Barker, 252 Kan. 949, 850 P.2d 885 (1993); State v. Kalie, 699 So.2d 879 (La. 1997); State v. Washington, 687 So. 2d 575 (La.App., 1997); Fitzgerald v. State, 384 Md. 484, 864 A.2d 1006 (2004); Commonwealth v. Feyenord, 62 Mass. App. 200, 815 N.E.2d 628 (2004); Millsap v. State, 767 So. 2d 286 (Miss. App., 2000); State v. LaFlamme, 869 S.W.2d 183 (Mo. App. 1993); Gama v. State, 112 Nev. 833, 920 P.2d 1010 (1996); State v. Van Cleave, 131 N.M. 82, 33 P.3d 633 (2001); People v. Offen, 78 N.Y.2d 1089, 578 N.Y.S.2d 121, 585 N.E.2d 370 (1991); State v. Fisher, 141 N.C.App. 448, 539 S.E.2d 677 (2000); State v. Kesler, 396 N.W.2d 729 (N.D. 1986); State v. Rusnak, 120 Ohio App.3d 24, 696 N.E.2d 633 (1997); Scott v. State, 927 P.2d 1066 (Okla. Crim. App. 1996); State v. Smith, 327 Or. 366, 963 P.2d 642 (1998); Commonwealth v. Johnston, 515 Pa. 454, 530 A.2d 74 (1987); State v. England, 19 S.W.3d 762 (Tenn. 2000); Rodriguez v. State, 106 S.W.3d 224 (Tex. App. 2003); State v.

Thus, as the Fifth District concluded in Nelson v. State, 867 So. 2d 534, 537 (Fla. 5th DCA 2004):

> The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. See United States v. Sullivan, 625 F.2d 9, 13 (4th Cir.1980). Just as evidence in the plain view of officers may be searched without a warrant, see Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968), evidence in the plain smell may be detected without a warrant. See United States v. Harvey, 961 F.2d 1361, 1363 (8th Cir. 1992); See also Horton v. Goose Creek Independent School District, 690 F.2d 470, 477 (5th Cir. 1982); United States v. Pinson, 24 F.3d 1056, 1058 (8th Cir. 1994) ("plain feel," no reasonable expectation of privacy in heat emanating from a home).

See Cardwell v. State, 482 So. 2d 512, 514 (Fla. 1st DCA 1986) ("Just as no police officer need close his eyes to contraband in plain view, no police officer armed with a sniff dog need ignore the olfactory essence of illegality.").[5]

In sum, "persuasive authority convinces us that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is

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> Miller, 256 Wis.2d 80, 647 N.W.2d 348 (Wis. App. 2002); Morgan v. State, 95 P.3d 802 (Wy. 2004).

People v. Jones, 755 N.W.2d at 228 n.4.

[5] Contrary to Nelson and Cardwell, State v. Ortiz, 257 Neb. 784, 801, 600 N.W.2d 805, 819-20 (Neb. 1999), relied on by the partial dissent, likens the canine sniff to electronic surveillance equipment.

legally present at its vantage point when its sense is aroused." People v. Jones, People v. Jones, 755 N.W.2d at 228.

The Officer And The Dog Were Lawfully Present At The Defendant's Front Door

The Fourth Amendment to the United States Constitution clearly protects "the right of the people to be secure in their persons, houses, papers, and effects," from "unreasonable government intrusions into their legitimate expectations of privacy." Place, 462 U.S. at 706 (quoting United States v. Chadwick, 433 U.S. 1, 7 (1977)). However "[t]he Fourth Amendment does not necessarily protect areas of a home which are 'open and exposed to public view.'" State v. Duhart, 810 So. 2d 972, 973 (Fla. 4th DCA 2002).

While this right to, and expectation of, privacy, no doubt, extends to the contents of a home, we need not resolve the extent to which this constitutional protection extends to every entryway in every possible factual scenario. Rather, at issue is this officer's presence at this defendant's front door. Here, police received a tip as to criminal activity and observed other indications of criminal activity. In such circumstances, the officer had every right to walk to the defendant's front door, as a number of Florida cases confirm.

In State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981), the Florida Supreme Court concluded that a police officer had the right to approach a front door after

being told by a neighbor that Morsman was growing marijuana plants in his backyard:

> When the officer went to respondent's front door to investigate the neighborhood complaint, he was not infringing upon respondent's privacy. Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time. State v. Detlefson, 335 So.2d 371 (Fla. 1st DCA 1976); State v. Belcher, 317 So. 2d 842 (Fla. 2d DCA 1975).

Our decision that this officer was lawfully present at defendant's door is likewise consistent with Potts v. Johnson, 654 So. 2d 596, 597-98 (Fla. 3d DCA 1995). Potts was a police detective investigating a theft and had been given a suspect's name. At the suspect's home, Potts stepped into a hole, was injured, and sued. Discussing Potts' right to be on the property, we observed:

> A police officer in the scope of his duties may approach a suspect's front door and knock in an attempt to talk to that suspect. See United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); Younger v. State, 433 So. 2d 636 (Fla. 5th DCA), *rev. denied,* 440 So. 2d 354 (Fla.1983). "Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where a salesman or visitor may appear at any time." State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981).

Potts, 654 So. 2d at 598.

We also noted:

> The "Plain View" doctrine has frequently been considered an exception to the warrant requirement. In reality, materials that are seized because they are in plain view of an officer who observes from a location where he has a legal right to be are not subject to [a] Fourth Amendment [analysis] ...

Potts, 654 So. 2d at 599 n.5 (quoting Hornblower v. State, 351 So. 2d 716, 718 n.1 (Fla. 1977)).

Also supporting our conclusion is State v. Pereira, 967 So. 2d 312, 313 (Fla. 3d DCA 2007). In Pereira, officers went to the defendant's home based on an anonymous tip that the defendant was growing marijuana. A detective walked toward the premises and, while standing in front of the premises, smelled marijuana. Officers returned the next day with a narcotics-search dog. Approaching the front door, the officer again smelled the marijuana, and the canine alerted.

While we chose not to address the legality of the dog sniff, we rested our decision on the officer's right to be on the defendant's front porch:

> We disagree with the defendant's contention that the officers' detection of the odor of marijuana emanating from the defendant's home while standing on the sidewalk and front porch of the defendant's home is an invasion of the defendant's privacy protected by the Fourth Amendment. Admittedly, there was no evidence that the front yard or porch was enclosed by a fence or any other structure and was, in fact, open to public access. We follow those cases which hold that there is no reasonable expectation of privacy at the entrance to property which is open to the public, including the front porch. See State v. Morsman, 394 So. 2d 408 (Fla. 1981); State v. E.D.R., 959 So. 2d 1225 (Fla. 5th DCA 2007), and cases cited; Ramize v. State, 954 So. 2d 754 (Fla. 3d DCA 2007); Potts v. Johnson, 654 So. 2d 596 (Fla. 3d DCA 1995); see, e.g., United States v. Cota-Lopez, 104 Fed.Appx. 931 (5th Cir. 2004). Compare State v. Rabb, 920 So. 2d at 1191.

Pereira, 967 So. 2d at 314 (footnote omitted); State v. E.D.R., 959 So. 2d 1225, 1226 (Fla. 5th DCA 2007) (concluding that defendant's porch "was not a constitutionally protected area"); see also State v. Garcia, 374 So. 2d 601, 602-03 (Fla. 3d DCA 1979) (concluding "[w]hen the lawful performance of his duty requires that an officer enter upon private property to make a general inquiry, such an entry is justifiable," and holding that officers smelling "the odor of marijuana smoke" at the front door of a residence was a factor supporting a finding of probable cause).

From these cases, it is clear that Officer Pedraja had a right to approach Jardines' front door. The fact that he waited for the dog and approached with the dog does not change this result, even if the dog alerted before the officer detected the scent. The officer's presence with the dog and their sniff of the odor of marijuana as well as the other facts identified in the probable cause affidavit was sufficient to establish probable cause for the warrant to issue.[6] The trial court erred in concluding that the magistrate lacked probable cause to issue the warrant and erred in suppressing the evidence obtained as a result of the warrant.

[6] To our way of thinking, this factual pattern, including the crime stopper tip leading to the officer's presence at defendant's front door meets "option two" of the dissent's "three option" analysis, and the trial court's decision would require reversal on that basis. The officer did not decide to do a random stroll of the neighborhood in search of drugs behind closed doors so there is no need to address such a factual scenario.

Inevitable Discovery

Even if the dog sniff constituted an illegal search, the evidence seized at Jardines' home would still be admissible under the inevitable discovery rule. In Fitzpatrick v. State, 900 So. 2d 495, 514 (Fla. 2005), our Supreme Court explained that illegally seized evidence may still be admitted into evidence if that evidence inevitably would have been discovered by legal means:

> In Nix v. Williams, 467 U.S. 431, 448, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court adopted the "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine. Under this exception, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." Maulden v. State, 617 So. 2d 298, 301 (Fla. 1993). In adopting the inevitable discovery doctrine, the Supreme Court explained, "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Nix, 467 U.S. at 446, 104 S.Ct. 2501. In making a case for inevitable discovery, the State must demonstrate "that at the time of the constitutional violation an investigation was already under way." Moody v. State, 842 So. 2d 754, 759 (Fla. 2003) (quoting Nix v. Williams, 467 U.S. 431, 457, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (Stevens, J., concurring in the judgment)); see also Jeffries v. State, 797 So. 2d 573, 578 (Fla. 2001); Maulden, 617 So. 2d at 301. In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct. See Moody, 842 So. 2d at 759.

See Moody, 842 So. 2d at 759 (confirming that "fruit of the poisonous tree" doctrine does not automatically render all illegally seized evidence inadmissible and that such evidence may be admitted if the State can show that the evidence

inevitably would have been discovered in the course of a legitimate investigation); Rosales v. State, 878 So. 2d 497, 500 (Fla. 3d DCA 2004) ("Evidence which was originally obtained improperly should not be suppressed, provided that it would have been legitimately uncovered pursuant to normal police practices."); State v. Ruiz, 502 So. 2d 87, 87 (Fla. 4th DCA 1987) (finding that "to apply this doctrine, there does not have to be an absolute certainty of discovery, but rather, just a reasonable probability" (citing United States v. Brookins, 614 F.2d 1037 (5th Cir.1980))); see also Jeffries, 797 So. 2d at 578 (quoting Ruiz).

Both the affidavit and the evidence adduced below confirm that an investigation was already well under way, and Officer Pedraja had already decided to knock on Jardines' front door to see if he could obtain consent to search, by the time the dog got involved. Thus, even in the absence of the canine sniff, Officer Pedraja would, pursuant to normal police practices, have detected the scent of marijuana as he approached Jardines' door. See Potts, 654 So. 2d at 599 (confirming that a "police officer in the scope of his duties may approach a suspect's front door and knock in an attempt to talk to that suspect"). With or without the canine alert, the contraband would inevitably have been detected. On this basis alone, the motion to suppress should have been denied. See Rabb, 920 So. 2d at 1196 n.8 (Gross, J., dissenting); see generally Zeigler v. State, 922 So. 2d 384, 385 (Fla. 1st DCA 2006) ("Under the inevitable discovery rule, when

evidence is obtained through the result of unconstitutional police procedures, the evidence will still be admissible if it would have been discovered through legal means.). See Jeffries, 797 So. 2d at 577-78 ("Here, the trial court determined that Officer Brownfield smelled marijuana when he went to Appellants' stopped vehicle. Had Officer Brownfield immediately explained the reason for the stop when he made personal contact with Appellants, rather than first asking Appellants for their identification, he would have still smelled marijuana and thus developed probable cause to detain Appellants."); Jones v. State, 758 So. 2d 722, 722 (Fla. 3d DCA 2000) (citing Maulden, 617 So. 2d at 298, for the proposition that "under 'inevitable discovery' doctrine, evidence obtained as the result of an unlawful search is admissible if the evidence would ultimately have been discovered by legal means"); A.J.M. v. State, 746 So. 2d 1222, 1225 (Fla. 3d DCA 1999) ("Florida has adopted the inevitable discovery doctrine which provides that 'evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means.'" (quoting Maulden, 617 So. 2d at 298)).

Conclusion

In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in Rabb, a warrant was not necessary for the

drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed.[7] Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with Rabb, we certify direct conflict. To the extent that Judge Gross' dissent in Rabb is consistent with this analysis we adopt his reasoning as our own. See Rabb, 920 So. 2d at 1196 (Gross, J., dissenting). Reversed and remanded.

SALTER, J., concurs.

[7] While we conclude that existing case law, both Federal and State, support our analysis, we, like the dissent, cannot fault the trial court's reliance on Rabb. See Pardo v. State, 596 So. 2d 665, 666-67 (Fla. 1992) (observing that "in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court [is] required to follow that decision").

COPE, J. (concurring in part and dissenting in part).

The question before us is whether, and to what extent, the Fourth Amendment is applicable when the police seek to use a drug-sniffing dog at the front door of a private home. I agree with that part of the majority opinion which holds that a warrant is not necessary for a drug-dog sniff, and agree on certifying direct conflict with the Fourth District decision in State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006).

I do not agree with the majority opinion's "sniff anytime" rule. We should instead follow those courts which hold that a drug sniff is permissible at the door of a dwelling only if there is a reasonable suspicion of drug activity.

I.

The Miami-Dade County Police Department received a Crime Stoppers tip that marijuana was being grown at the home of defendant-appellee Joelis Jardines. One month later the detective went to the home at 7 a.m. He watched the home for fifteen minutes. There were no vehicles in the driveway, the blinds were closed, and there was no observable activity.

After fifteen minutes, the dog handler arrived with the drug detection dog. The handler placed the dog on a leash and accompanied the dog up to the front door of the home. The dog alerted to the scent of contraband.

The handler told the detective that the dog had a positive alert for the odor of narcotics. The detective went up to the front door for the first time, and smelled marijuana. The detective also observed that the air conditioning unit had been running constantly for fifteen minutes or so, without ever switching off.[8]

The detective prepared an affidavit and applied for a search warrant, which was issued. A search was conducted, which confirmed that marijuana was being grown inside the home. The defendant was arrested.

The defendant moved to suppress the evidence seized at his home. The trial court conducted an evidentiary hearing at which the detective and the dog handler testified. The trial court suppressed the evidence on authority of State v. Rabb. The State has appealed.

II.

The Fourth Amendment protects "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures . . . ." U.S. Const. amend. IV; Art. I, § 12, Fla. Const..

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[8] According to the detective, in a hydroponics lab for growing marijuana, high intensity light bulbs are used which create heat. This causes the air conditioning unit to run continuously without cycling off.

The majority opinion takes the position that constitutional protection extends only to the interior of a home, and not the front porch. However, the cases the majority relies on do not apply in the present context.

While the United States Supreme Court has "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property," Kyllo v. United States, 533 U.S. 27, 32 (2001), the law of trespass is useful by way of analogy. In an ordinary residential neighborhood, a typical home has walkway (or possibly driveway) access leading to the front porch. Although the walkway, driveway, and porch are part of the homeowner's private property, the owner "by implication, invites others to come to his house as they may have proper occasion, either of business, or courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation." Prior v. White, 180 So. 347, 355 (Fla. 1938) (italics and internal quotation marks omitted). The homeowner may expect a knock at the door from a seller of goods, a solicitor of charitable contributions, or a neighbor on a social call. The postal service will deliver the mail and a delivery truck may drop off a package.

On the other hand, there is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows. The vendor who may hawk his goods

during daylight hours is not welcome to knock at the door at two o'clock in the morning.

Turning to crime investigation, it is perfectly acceptable for a detective to come to the front door to speak with the owner. Where the officer has come to the front door to speak to the owner, there is no expectation of privacy regarding any incriminating objects the owner has left in plain view, or in any odors (such as marijuana) that may be emanating from the dwelling. The cases relied on by the majority opinion fall into this fact pattern. See State v. Morsman, 394 So. 2d 408, 408-09 (Fla. 1981) (permissible for officer to go to front door to investigate complaint); State v. Pereira, 967 So. 2d 312, 314 (Fla. 3d DCA 2007) (officer walked from sidewalk to the home and smelled marijuana); State v. E.D.R., 959 So. 2d 1225, 1226 (Fla. 5th DCA 2007) (officer walked up walkway to determine why several young men were asleep on front porch and observed crack cocaine on E.D.R.'s lap); Potts v. Johnson, 654 So. 2d 596, 599 (Fla. 3d DCA 1995) (permissible for officer to go to front door to investigate theft); see also Ramize v. State, 954 So. 2d 754 (Fla. 3d DCA 2007) (no facts given; cites Morsman and Potts).

But here, too, there are limits. A crime scene investigation unit cannot (absent consent or a warrant) cordon off the front porch and begin dusting the

porch for fingerprints, or conduct a microscopic examination for blood stains, or deploy a magnetometer or sonar to determine what lies beneath the porch.

In short, it is inaccurate to say that there is never any reasonable expectation of privacy with regard to the front porch of a house, although it is a more reduced expectation than applies to the house interior.

III.

A number of courts have considered the question how the Fourth Amendment applies in the context of a dog sniff at the door of a house or apartment. Three schools of thought have emerged: (1) A dog sniff of a dwelling is a search which can only be conducted pursuant to a warrant. United States v. Thomas, 757 F.2d 1359, 1366-67 (2d Cir. 1985); Rabb, 920 So. 2d at 1186-87. (2) A dog sniff can only be conducted where there is a reasonable, articulable suspicion of drug activity inside the residence, but no warrant is required. State v. Ortiz, 600 N.W.2d 805, 820 (Neb. 1999). (3) A dog sniff is not a search and can be conducted without a warrant and without a reasonable suspicion. People v. Jones, 755 N.W.2d 224 (Mich. Ct. App. 2008). See generally Brian L. Porto, Annotation, Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment, 150 A. L. R. Fed. 399 (2008); Lewis R. Katz & Aaron P. Golemboewski, Curbing the Dog: Extending the Protection of the

Fourth Amendment to Police Drug Dogs, 85 Neb. L. Rev. 735 (2007); 1 Wayne R. LaFave, Search and Seizure, § 2.2(g) (4th ed. 2004).

Turning to the first alternative−a dog sniff at the front door is a search requiring a warrant−the Second Circuit has explained, "It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy." Thomas, 757 F.2d at 1366 (citing Katz v. United States, 389 U.S. 347 (1967)). The courts "have recognized the heightened privacy interest that an individual has in his dwelling place." Thomas, 757 F.2d at 1366; Kyllo, 533 U.S. at 34. "Thus, a practice that is not intrusive in a public airport may be intrusive when employed at a person's home." Thomas, 757 F.2d at 1366. Because of the defendant's "heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search," id. at 1367, for which a warrant was required. The Fourth District reached the same conclusion in Rabb, 920 So. 2d at 1187.[9]

[9] Questions have been raised about the reliability of dog sniffs. Illinois v. Caballes, 543 U.S. 405, 417 (Souter, J., dissenting); Lewis R. Katz and Aaron P. Godemboewski, supra, 85 Neb. L. Rev. at 752-65; 1 Wayne R. LaFave, supra, § 2.2(g), at 532-34.

Requiring either a warrant or reasonable suspicion addresses this concern by requiring articulable facts pointing to existence of drug activity within the dwelling. In the event of a positive alert by the dog, the affidavit in support of the

The second school of thought is that a dog sniff does not require a search warrant, but should instead be allowed on the showing of a reasonable suspicion. The Nebraska Supreme Court explained:

> We agree with the courts which conclude an individual's Fourth Amendment privacy interests may extend in a limited manner beyond the four walls of the home, depending on the facts, including some expectation of privacy to be free from police canine sniffs for illegal drugs in the hallway outside an apartment or at the threshold of a residence, and that a canine sniff under these circumstances must be based on no less than reasonable, articulable suspicion.

Ortiz, 600 N.W.2d at 817 (Neb. 1999).

The Court ruled:

> We believe that there is a Fourth Amendment middle ground applicable to the investigations conducted by police handlers of narcotics detection dogs. On the one hand, much of the law enforcement utility of such dogs would be lost if full blown warrant procedures were required before a canine sniff could be used; but on the other, it is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason. Accordingly, we hold that a narcotics detection dog may be deployed to test for the presence of narcotics . . . where:
>
> (1) the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and
>
> (2) the police are lawfully present in the place where the canine sniff is conducted.

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search warrant for the search of the home will then include the articulable facts plus the sniff, not just the sniff alone.

Id. at 816 (quoting Commonwealth v. Johnston, 530 A.2d 74, 79 (Pa. 1987)).

The third school of thought is that a dog sniff is not a search, and there is no reasonable expectation of privacy on a front porch, so that a dog sniff can be conducted at the front door, without a warrant and without having a reasonable suspicion. The majority opinion adopts that position.

A number of courts have expressed concern about the breadth of such a rule. The Fourth District expressed disapproval of the prospect that a drug-sniffing dog could be brought at random to the front door "of every house on a street hoping the dog sniffs drugs inside." Rabb, 920 So. 2d at 1190. The Nebraska Supreme Court and New York Court of Appeals likewise disapprove the prospect that such a rule would allow drug-sniffing dogs to be brought at random through the corridors of public housing projects. Ortiz, 600 N.W.2d at 816 (quoting People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990)). Those jurisdictions conclude that a rule must be crafted which reasonably balances law enforcement and privacy interests.

In my view the balance is best struck by the second option: a drug-dog sniff is permissible only if there is a reasonable suspicion that drugs may be present in the place the police seek to test. As Professor LaFave points out, "with rare exception the [reported] cases have involved situations in which the [dog] alert occurred after a pre-existing reasonable suspicion." 1 Wayne R. LaFave, supra, § 2.2(g), at 533-34 (footnotes omitted).

The State argues that the third option--sniff anytime--is correct and is mandated by the United States Supreme Court's decision in Caballes, 543 U.S. at 405, but that is not so. In Caballes, the defendant was stopped in a legal traffic stop. Although there was no reasonable suspicion of drug activity, the police brought a drug dog to the car, which alerted on the trunk. The Court upheld the search, saying, "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate Fourth Amendment." Id. at 410. The State argues that this logic is equally applicable, and dispositive, of a dog sniff at a front door. The State's reliance on Caballes is misplaced.

In the first place, the Caballes Court was careful to tie its holding to the facts of the case: "the use of a well-trained narcotics-detection dog−one that 'does not expose non-contraband items that otherwise would remain hidden from public view,'−during a lawful traffic stop, generally does not implicate legitimate privacy interests." Id. at 409 (citation omitted); see also id. at 417 (Souter, J., dissenting) ("The Court today does not go so far as to say explicitly that sniff searches by dogs trained to scent contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car[.]").

Second, the unusual procedural history of the Fourth District's Rabb decision indicates that the Court has, for now, decided to leave the issue open. In 2004, the Fourth District issued its initial decision in State v. Rabb, 881 So. 2d 587 (Fla. 4th DCA 2004), in which it held that a warrant is required for a dog sniff at the door of Rabb's house. Id. at 595-96. On the State's petition for writ of certiorari, the United States Supreme Court granted the petition, vacated the judgment, and remanded the matter to the Fourth District for further consideration in light of the Court's 2005 decision in Caballes. Florida v. Rabb, 544 U.S. 1028 (2005). On remand, the Fourth District issued a new and more detailed opinion, again deciding that a warrant was necessary for a dog sniff at the front door of the house. Rabb, 920 So. 2d at 1188-92. Review was denied by the Florida Supreme Court, State v. Rabb, 933 So. 2d 522 (Fla. 2006), and certiorari was denied by the United States Supreme Court in Florida v. Rabb, 127 S. Ct. 665 (2006). While the denial of certiorari by the United States Supreme Court has no precedential effect, it certainly indicates that the Court has decided to leave this dog sniff question open for decision another day.

For the stated reasons, we should adopt the middle alternative, which is to allow a drug-dog sniff at a front door if there is a reasonable suspicion of drug activity. When this case was pending in the trial court, the debate was about whether the warrant requirement of Rabb should be followed, and there was no

consideration of a reasonable suspicion standard. We should therefore remand the case to the trial court to consider whether there was a reasonable suspicion which supported the dog sniff in this case.

IV.

The majority opinion contains an alternative analysis for reversal which is based on the inevitable discovery rule of Nix v. Williams, 467 U.S. 431 (1984), and Fitzpatrick v. State, 900 So. 2d 495, 514 (Fla. 2005). The majority opinion reasons that even if the dog sniff must be excluded from consideration, the detective came to the porch after the dog sniff and also smelled marijuana. The majority opinion concludes that the detective's own "sniff" is sufficient to supply probable cause for the issuance of the search warrant. I am unable to agree.

The problem here is that the dog handler went to the porch first, and informed the detective that the dog had a positive alert. It was with the knowledge of the positive alert that the detective then went to the front door and smelled marijuana. In light of this time sequence, the second identification is tainted by the first. That being so, I do not believe that we can reverse the trial court's ruling on the basis of the inevitable discovery rule. I agree with the Rabb decision on this point. 920 So. 2d at 1191.

V.

Although we are reversing the trial court order, it bears mention that the trial court should not be faulted for its ruling. That is so because under Florida Supreme Court precedent, the trial court had no realistic alternative other than to follow the Fourth District's decision in Rabb. The Florida Supreme Court has explained that when "the only case on point on a district [court of appeal] level is from a district other than the one in which the trial court is located, the trial court [is] required to follow that [other district's] decision." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (quoting State v. Hayes, 333 So. 2d 51 (Fla. 4th DCA 1976)). The only decision squarely addressing a dog sniff at the front door of a private home was Rabb, and the trial court correctly concluded that the court was bound to follow it.

VI.

For the stated reasons, I agree that a search warrant was not required for a dog sniff at the door of a dwelling, and concur in reversing the order now before us. I concur in certifying direct conflict with the Fourth District's decision in Rabb.

We should, however, adopt the rule that a reasonable suspicion is required before a drug-dog sniff is allowed at the front door of a dwelling. We should remand for a determination whether a reasonable suspicion existed.

Please copy and paste the web address below into your browser address bar to access the links to the U. S. Supreme Court merit and amicus briefs in Florida v. Jardines.

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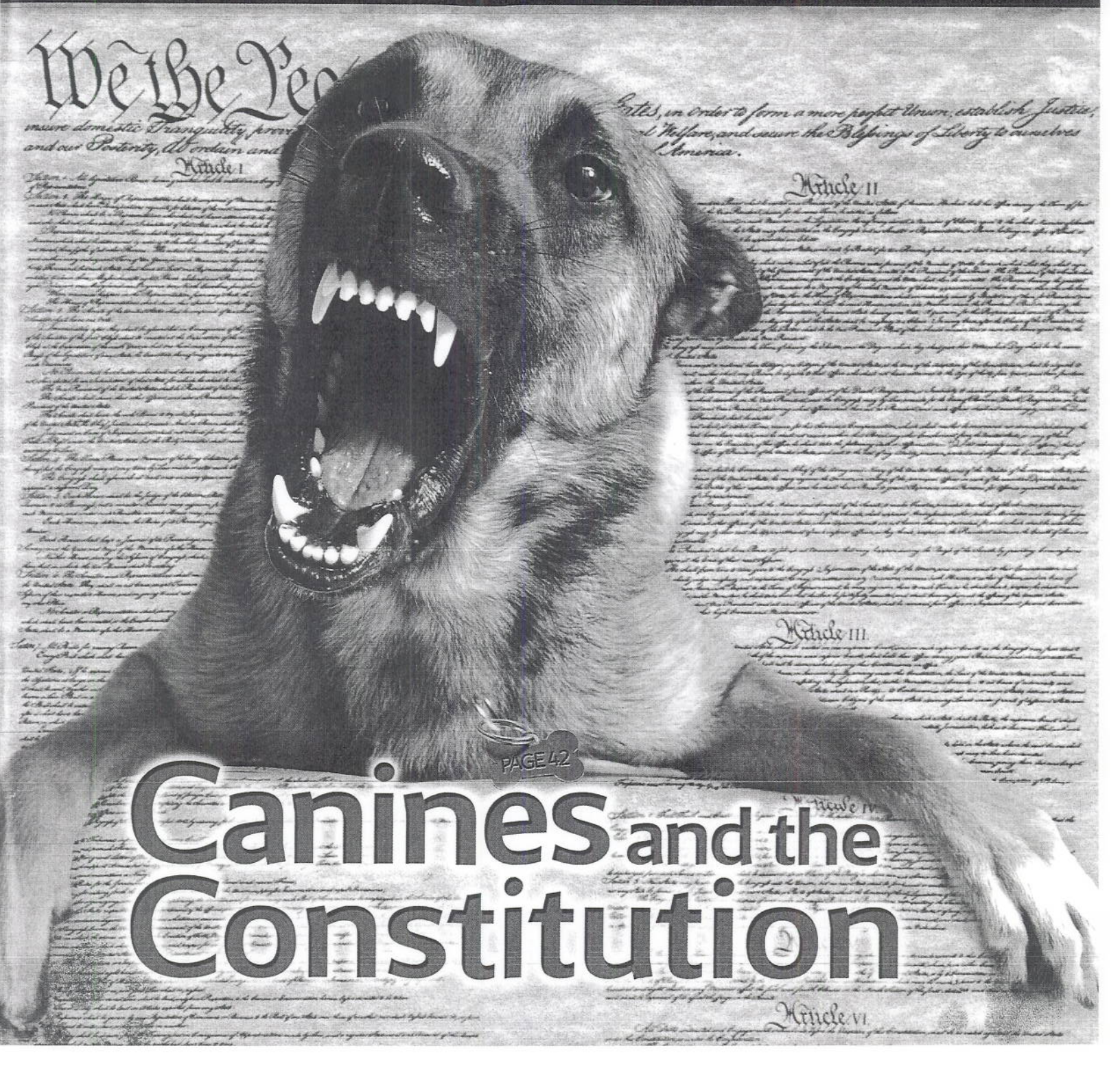

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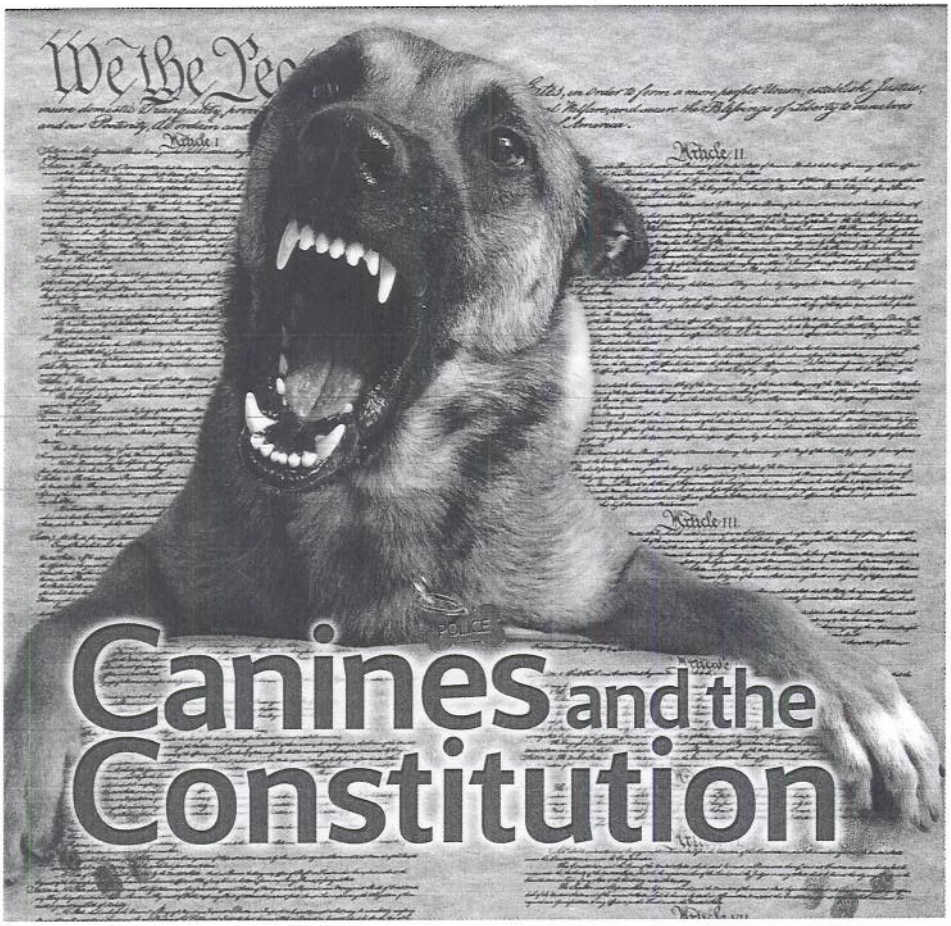

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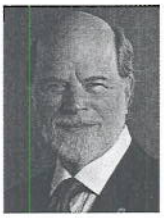

by Jeffrey S. Weiner

Dog owners everywhere know that dogs can be trained to do just about anything. A dog owner can use subtle physical or audible cues to induce a dog to bark, sit, rollover, play dead, fetch or perform other countless behaviors. In a law enforcement situation, any of these indexed behaviors could easily be interpreted as a positive K-9 "alert." Courts around the country are finally beginning to realize that the use of drug detection dogs to establish probable cause is not nearly as reliable as it was once thought to be.

While dogs can be trained, they are not motivated in the same way as humans. Dogs are conditioned to respond in particular ways to various stimuli. Dog trainers use treats, toys and praise to reward dogs when they do what they have been conditioned to do; so do police K-9 handlers: the police dog alerts—it gets a reward.

Although dogs can be trained to react to certain odors which they are physically much better equipped to detect than humans, the dogs are far from infallible, as are their officer/agent handlers. The purpose of this article is not to discredit the use of trained dogs for law enforcement, emergency response, public safety and other vital purposes. Rather, this article addresses two of the primary deficiencies regarding the use of drug detection dogs to provide the necessary "probable cause" to permit warrantless searches, predominantly focusing on "cueing" by officer/handlers and the lack of standardized training and certification. Additionally, this article highlights the recent decisions from the Oregon Supreme Court in *State of Oregon v. Foster*, 252 P.3d 292 (Or. 2011); and *State of Oregon v. Helzer*, 252 P.3d 288 (Or. 2011). This article will also discuss the important recent Florida Supreme Court decisions in *Harris v. State of Florida*, No. SC08-1871, 2011 WL 1496470 (Fla. Apr. 21, 2011); and *Jardines v. State of Florida*, No. SC08-2101, 2011 WL 1405080 (Fla. Apr. 14, 2011).

Most courts reflexively credit testimony of a police K-9 officer that his or her police dog "alerted" to the presence of narcotics.[1] This stems from the fact that judges typically fail to consider, and ignore the subjective role of the police K-9 officer/handler.[2] The lack of uniform training and meaningful certification programs for single purpose detection dogs[3] and their handlers is a critical challenge to the fallacies relied upon by the United States Supreme Court in *United States v. Place*, 462 U.S. 696 (1983) (which held that a sniff-test by a "trained" narcotics dog does not constitute a search within the meaning of the Fourth Amendment).

In *Place*, the Supreme Court held that the use of a "trained" narcotics detection dog — one that does not expose non-contraband items that otherwise would remain hidden from public view during a lawful traffic stop — generally does not implicate legitimate privacy interests.[4] In *Illinois v. Caballes*, 543 U.S. 405 (2005) and in *Place*, the Court considered the issue of whether the use of a "well-trained" drug-detection dog constitutes a search.[5] The *Caballes* and *Place* decisions neglected to consider how the trial court determines whether the drug-detection dog is "well-trained" and when the dog's alleged alert should constitute probable cause to believe that illegal substances are actually present.[6]

Just as repeated litigation has exposed the flaws of other firmly-accepted law enforcement techniques, so, too, may the canine alert come to be regarded in its proper perspective. The Fourth Amendment to the United States Constitution provides that:

> [T]he 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.[7]

In the landmark case of *Katz v. United States*, 389 U.S. 347 (1967), the United States Supreme Court stated: "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

In April 2011, the Florida Supreme Court decided two groundbreaking cases regarding the use of drug detection dogs. *Harris v. State of Florida*, No. SC08-1871, 2011 WL 1496470 (Fla. Apr. 21, 2011); and *Jardines v. State of Florida*, No. SC08-2101, 2011 WL 1405080 (Fla. Apr. 14, 2011). While these are both excellent cases, they do not go far enough in diminishing the legal significance and ramifications of an actual K-9 alert.

Harris addressed the issue of what evidence must be introduced by the State in order for the trial court to adequately undertake an objective evaluation of the basis of the officer's belief in the dog's reliability as a predicate for determining probable cause. *Harris* held that being "trained" and "certified" alone is insufficient for the State to meet its burden of establishing that the officer had a reasonable basis for believing the dog to be reliable in order to establish probable cause.[8] According to *Harris*, the State must now present the training and certification records, an explanation of the meaning of the particular training and certification of the particular dog, and its field performance records. Additionally, Florida trial courts now require evidence concerning the experience and training *of the officer* handling the dog, as well as other objective evidence known to the officer about the dog's reliability in being able to detect the presence of certain illegal substances within a vehicle.[9]

While the holding in *Harris* applies to dog-sniff cases in general, the court's holding in *Jardines* was limited to private residences, which historically receive the highest Constitutional protection in our nation's jurisprudence.[10] *Jardines* focused on two issues: (i) whether a sniff-test by a drug detection dog conducted at the front door of a private residence is a "search" under the Fourth Amendment and, if so, (ii) whether the evidentiary showing of wrongdoing that the prosecution must make prior to conducting a residential sniff-test requires "probable cause" or "reasonable suspicion."[11] *Jardines* held that a sniff test is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment.[12] Regarding the second issue in *Jardines*, the court concluded that probable cause, not mere reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make prior to conducting a dog-sniff test at a private residence.[13]

On October 26, 2011, Florida's Attorney General filed a Petition for Certiorari in the United States Supreme Court seeking review of the *Jardines* case. The State of Florida is alleging that "Florida courts are now alone in refusing to follow" earlier U.S. Supreme Court opinions and that the state's ability to enforce drug laws will be hampered if the *Jardines* decision is allowed to stand.

HANDLER CUEING

Handler "cueing" is the subtle conduct of the handler during the sniff which, *consciously or unconsciously*[14] influences the reaction of the dog and can easily prompt an "alert" from the dog in response to the handlers subtle cue(s) rather than the presence of illegal contraband.[15] Cueing is not necessarily done by verbal command, it can be achieved by various methods, some of which are very subtle. For example, manipulating a leash, moving hands in a certain way, blocking a dogs path, making certain sounds or saying words, changes in heart-rate or breathing patterns of the handler,

even looking at a dog a certain way making "facial expressions" or displaying a particular object (such as an edible treat, ball, tug toy, or other inducement) will typically and easily elicit a response that can easily be labeled an alert.[16] In *Harris*, the court noted that:

[E]ven the best of dogs, with the best-intentioned handler, can respond to subconscious cueing from the handler. If the handler believes that contraband is present, they may unwittingly cue the dog to alert regardless of the actual presence or absence of any contraband. Finally, some handlers may consciously cue their dog to alert to ratify a search they already want to conduct.[17]

Officers may cue consciously in order to justify a warrantless search or unconsciously, perhaps to potentially increase their arrest statistics in their zeal to ferret out crime. In *Harris*, the court also noted that "[h]andlers interpret their dog's signals, and the handler alone makes the final decision whether a dog has detected narcotics. Practitioners in the field reveal that handler error accounts for the majority of false detections."[18] When the K-9 officer's subjective conclusion or assertion that his/her dog has alerted, in and of itself, constitutes "probable cause," the public is not protected from illegal, intrusive searches.

In *Jardines*, the court acknowledged the subjective nature of officer/handler interpretations: "...if government agents can conduct a dog 'sniff-test' at a private residence without any prior evidentiary showing of wrongdoing, there is nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen."[19] The *Jardines* court then stated that "such an open-ended policy invites overbearing and harassing conduct by officers."

In *United States v. Warren*, 997 F.Supp. 1188 (E.D.Wis. 1998), the officer/handler credited his drug detection dog with one hundred percent accuracy. However, evidence showed that when the dog was brought to a scene, it would alert to the suspected container, but usually only after some direction or coaching from its handler, and drugs might—or might not—be found in the container.[20] If no drugs were found, the handler did not record it as a "false positive alert" but instead noted that "the dog must have smelled the residual odor of drugs *which must have been present* at some time in the past."[21] In almost all instances, no proof existed that the contraband was ever present.

United States v. Anderson, 367 Fed. Appx. 30 (11th Cir. 2011) held that officers lacked probable cause to search for narcotics because the detection dogs were trained to detect the *odor* of narcotics, not the *presence* of narcotics.[22] *Anderson* stated that because the dog was trained to detect the odor of drugs, which may not be present, there is no reliable way of knowing whether contraband is actually present.[23] The holding in *Anderson* goes to the very essence of the absurdity of allowing even a valid police dog alert to rise to the standard of "probable cause." In other words, at best, a valid police dog alert does not and cannot necessarily indicate the probability that contraband is present in the conveyance or area to be searched.

Barry Cooper is a former Texas police officer who worked with police drug detection dogs for over eight years.[24] Mr. Cooper has launched a nationwide crusade in which he criticizes the use of canines in law enforcement. Cooper stated: "[T]hey're using dogs as an excuse to search cars when people refuse consent. The reason it's like this is because the dogs aren't always really alerting: it's actually the cops using those dogs to trample our rights as citizens."[25] Anyone doubtful that the use of drug detection dogs in law enforcement is open to manipulation and abuse by officer/handlers, should watch videos of false K-9 alerts presented by Mr. Cooper and others on *youtube.com*.[26] Also, particularly noteworthy and enjoyable is a video featuring comedian Ron White, entitled: "Caught with pot next to airplane."[27]

DOG-SNIFF TERMINOLOGY: A PRIMER

A "single purpose detection dog" is trained and certified differently than a "dual purpose detection dog." Single purpose dogs are trained only to detect certain odors, such as drugs or explosives, while dual purpose dogs are trained to detect specific odors and apprehend suspects as well.[28] Under Florida law, dual purpose dogs must have Florida Department of Law Enforcement (FDLE) certification.[29] In contrast, Florida does not have a set standard of certification for single purpose drug detection dogs, such as the one used in *Harris*.[30]

An "alert" is a particular response that a dog is trained to perform when it detects certain odors. Generally, alerts are classified as either "passive" or "aggressive" and result in a wide range of very specific physical manifestations.[31] Dogs trained to alert aggressively will attempt to contact the scent source (biting, pawing, scratching, penetrating, or attempting to retrieve).[32] Dogs trained to alert passively (such as bomb detection dogs and some drug dogs) do not try to touch the source; instead, they perform trained, silent behavior (usually sitting and intently focusing on the source, or clearly sniffing toward the source).[33]

A "false alert" also euphemistically called a "false positive" is an alert by a detection dog in the absence of the substance it is trained to detect.[34] The percentage of false alerts by a particular dog is arguably one of the best methods of determining that dog's level of accuracy and reliability.[35] The challenge is getting the officer/handler to acknowledge the false alerts properly attributable to his/her dog. Police K-9 officers commonly attribute false alerts to "residual odors" or "trace odors" that purportedly linger on an object, assuming that their dog would not alert if no residual odor was present. Due to the sensitivity (or hypersensitivity) of a dog's nose, a dog may alert to a residual odor even though there is no presence of drugs in the person's property or vehicle at the time of the sniff.[36]

The court in *Harris* stated: "...given the level of sensitivity that many dogs possess, it is possible that if the person being searched had attended a party where other people were using drugs, the dog might alert because of the residue on clothing or fabric."[37] Imagine if someone has a friend or family member that has recently been to such a party, or a valet parking attendant who had recently handled drugs. The innocent driver could be subjected to a humiliating search which fails to reveal contraband simply because the police dog "alerted."

A "residual odor" can be transferred onto almost any tangible object (*i.e.*, door handles, trunk, keys, currency, purses, documents, et cetera). Residual odors and false alerts both result in searches that fail to discover narcotics. One court reasoned that "[a]n officer who knows only that his dog is trained and certified, and who has no other information, at most, can only *suspect* that a search based on the dog's alert will yield contraband."[38] Mere suspicion does not justify a warrantless search — that is, except in K-9 cases!

Drug users live in the same world as non-drug users. We share door handles, gas pumps, hand rails, elevator buttons, computers, and a myriad of other objects. Documents and currency are frequently exchanged between drug users and non-users alike. Residual odors are, arguably, everywhere. Alerts based on residual odors are meaningless. K-9 alerts alone should never be the legal justification for a warrantless search.

HARRIS v. STATE OF FLORIDA

Clayton Harris was pulled over in Florida by Liberty County Sheriff's K-9 Officer William Wheetley because his automobile tag was expired.[39] Officer Wheetley testified that Harris was "breathing rapidly and could not stand still." The officer noticed an open beer can and requested consent to search the vehicle, but Harris refused. When Harris declined consent to the search, Officer Wheetley decided to deploy his drug detection dog, Aldo, to perform a "free air sniff" of the exterior of Mr. Harris's truck. Aldo supposedly alerted to the door handle on the driver's side of Harris's vehicle, providing the officer probable cause to conduct a search of the truck.

The search of Harris's truck uncovered pseudoephedrine pills (a common cold medicine), eight boxes of matches and muriatic acid (commonly used to clean swimming pools). Although these are common household products, they can also be used to produce methamphetamine. The State charged Mr. Harris with possession of pseudoephedrine with intent to use it to manufacture methamphetamine, in violation of Florida Statute 893.149(1)(a). Although Aldo *was* trained and certified to detect cannabis, cocaine, ecstasy, heroin, and methamphetamine, he *was not* trained to detect pseudoephedrine.[40]

At trial, Harris's criminal defense attorney introduced evidence to support his argument that Officer Wheetley's drug detection dog, Aldo, was unreliable. Approximately two months after the initial incident, Officer Wheetley stopped Mr. Harris for a second time. Again, Aldo alerted to the same driver's side door handle of Harris's truck. Again, no drugs were found, only a bottle of liquor (which Aldo was not trained to detect), which is not illegal to possess. The court in *Harris* stated:

> [E]vidence that the dog has been trained and certified to detect narcotics, standing alone, is not sufficient to establish the dog's reliability for purposes of determining probable cause—especially since training and certification in this state are not standardized and thus each training and certification program may differ with no meaningful way to assess them.[41]

As dog handlers are usually police officers, courts must not lose sight of the fact that members of law enforcement, by trade, are engaged in the often competitive enterprise of ferreting out crime.[42] In *Harris*, Officer Wheetley testified on cross-examination:

Officer Wheetley: [W]hen

my dog alerts to a door handle, it usually means, in the cases which I have worked in the past, that somebody has either touched the narcotics or have smoked narcotics, the odor is on their hand when they touched the door handle is when the odor transfer occurs. And that's when my dog will pick up on the residual odor of the narcotics.

Defense Counsel: So you have no idea—do you know how long ago somebody might have touched that vehicle?

Officer Wheetley: Ma'am, you're asking me a question for an expert. I don't feel comfortable answering that.

Defense Counsel: Do you know whether it could have been someone other than the person driving the vehicle?

Officer Wheetley: I can't answer that question, ma'am.

• • •

Officer Wheetley: The residual odor is there. That's what caused my dog to show the response. So if it's there, my dog responded to the odor, so which—apparently the odor was there.

Defense Counsel: But you have no way of establishing in this case that this is not just a false alert by your dog?[43]

The dog in *Harris* was described by his handler as performing satisfactory one hundred percent of the time, yet the handler failed to explain whether a "satisfactory" performance includes any alerts to vehicles where drugs were not found.[44] The officer/handler in *Harris* testified that he only keeps records of his dogs' positive alerts whenever an arrest is made; alerts where no contraband is found are not recorded. The officer/handler in *Harris* also testified that his dog is rewarded for positive alerts.[45] An analysis of these facts raises serious concern as to whether the dog was alerting to a residual odor from some unknown source or just wanted a treat and knew from prior experience that alerting (such as to Mr. Harris's driver side door handle) would provide one.

OREGON SUPREME COURT CASES

The Oregon Supreme Court in two superb opinions, recently addressed some of the problems associated with drug detection canines and in doing so, has increased the level of protection afforded to its citizens. In light of the holding in *Oregon v. Foster*, 252 P.3d 292 (Or. 2011), Oregon courts must now analyze the training, performance and reliability of the officer/handler and the dog/handler team, in addition to any other information relevant to the dog's reliability or fallibility. *Foster* and *Harris* are similar cases; they both highlight that drug detection dogs who are "trained" and "certified" is not alone reliable enough to establish probable cause for a warrantless search.[46]

In *Oregon v. Helzer*, 252 P.3d 288 (Or. 2011), the Oregon Supreme Court, applying this higher standard of reliability, focused on the officer/handler's training and the use of conscious and subconscious cueing by the handler. In holding that the state failed to establish that the dog's alert was sufficiently reliable to establish probable cause, the court focused on the lack of evidence related to any "training the officer received to avoid handler cues or other errors that can cause a dog to alert falsely."[47]

CERTIFICATION

Some K-9 officers and handlers claim that their police dog may alert to the presence of narcotics in several different ways. Ideally, the dog should have only one way to alert, and that alert must be objectively clear and unmistakable. The lack of standardized certification in this regard opens the door to subjective claims by officer/handlers that there has been an "alert" when no actual alert took place. The officer may claim that there was an alert in order to justify a search when he/she has nothing more than a hunch that contraband is present. For example, a dog which may have been trained to scratch at the source of a certain odor or to sit, might bark at a particular area and the action might still be "interpreted" as a positive alert by the officer/handler.[48] Sadly, most courts are all too apt to reflexively credit testimony from officer/handlers of the "I know an alert when I see it" variety.[49]

Dr. Daniel Craig, a noted expert in canine training and performance stated:

> [D]etector dog handlers have been known to say things such as "I can read my dog," "I can read my dog's behavioral change and I know the odor is in there," "I know my dog, that's an alert," "I am the only one who can read my dog," "I know what my dog is thinking," and other self-serving, non-verifiable claims which stretch credibility.... Guesses based on the handler's knowledge of their dog's training and past performance are nothing more than educated guesses when their dog fails to make the defined final response during a specific search.[50]

The lack of a standardized training and certification process has enabled an environment in which any private person can operate a company to "train" law enforcement dogs and sell them for a profit. Additionally, if a particular police department decides that one of their dogs has failed to meet some abstract level of accuracy, the dog is typically sold to another department that has less stringent standards and typically, a more limited budget. For example, dogs that have failed the U.S. Customs Service training due to low accuracy rates, can be sold to local police departments for less money than a proficient dog certified by the U.S. Customs Service.

The Florida Supreme Court's decision in *Harris* was heavily premised on the lack of a standardized national or state training and certification process for single purpose drug detention dogs in Florida.[51] *Harris* sets a new standard for K-9 officer/handlers in Florida, requiring trial courts to review the training and accuracy records of not only the dogs, but of their handlers as well.[52]

The district court of appeal in

Matheson v. Florida, 870 So. 2d 8 (Fla. 2d DCA 2003) pointed out the vast differences between the certification process of the U.S. Customs Service and various state agencies.[53] For example, in *Matheson*, the dog and handler had undergone only one initial thirty-day certification program and one week-long annual recertification.[54] Dog certification programs vary tremendously in their methods, elements, and tolerances of failure. Consider, for example, the United States Customs Service regime:

> [T]he Customs Service puts its dog and handler teams through a rigorous twelve-week training course, where only half of the canines complete the training. Customs Service dogs are trained to disregard potential distractions such as food, harmless drugs, and residual scents. Agents present distractions during training, and reward the dogs when those diversions are ignored. The teams must complete a certification exam in which the dog and handler must detect marijuana, hashish, heroin, and cocaine in a variety of environments. This exam and the following annual recertifications must be completed perfectly, with no false alerts and no missed drugs. If a dog and handler team erroneously alerts, the team must undergo remedial training. If the team fails again, the team is disbanded, and the dog is permanently relieved from duty.[55]

In the *Jardines* concurring opinion, Justice Lewis, referring to the lack of standardized training and certification for single purpose drug detection dogs, stated: "*[t]hese disparities demonstrate that simply characterizing a dog as 'trained' and 'certified' imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.*"[56]

JARDINES V. STATE OF FLORIDA

On November 3, 2006, police received an unverified "crime stoppers" tip that marijuana was being grown at the home of Joelis Jardines.[57] One month later, a detective went to the home of Mr. Jardines and conducted surveillance for fifteen minutes and reported no observable activity. However, the detective testified that he became suspicious because the air-conditioning had been running without recycling for the entire fifteen minutes, which indicated to him that the home was being used to grow marijuana. This testimony was criticized by Justice Lewis in the concurring opinion in *Jardines*:

> [T]he only purported additional suspicious circumstance referenced by the investigating officer was that he observed the air conditioning unit running continuously for fifteen minutes without interruption.... The elevation of such a ridiculous observation in the heat of Florida cannot serve as a basis for intrusion on the heightened expectation of privacy that one enjoys in one's home. [58]

Because of his "reasonable suspicion," the detective then called for a drug detection canine, which arrived a short while thereafter with his handler. The dog was placed on a leash and led to the front door of the home. While there, the dog alerted. After the alert, the detective approached the door of Jardines's home for the first time and testified that he smelled the distinct odor of marijuana.[59] The detective then prepared an affidavit for a search warrant, which was issued. A subsequent search confirmed that marijuana was being grown in the home.

After analyzing applicable federal "dog-sniff" cases, the Florida Supreme Court in *Jardines* stated that none of the federal cases apply to a dog sniff-test conducted at a private residence.[60] The court relied heavily on a federal case which fails to mention dogs, but rather, discusses the use of sense enhancing technology by law enforcement officials. The court in *Jardines* analogized the use of the thermal imaging device in *Kyllo v. United States*, 533 U.S. 27 (2001) to using drug detection dogs in law enforcement: "[w]here, as here, 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."[61] The dissent in *Jardines* claims the use of trained dogs is no different than officers seeing or smelling illegal contraband from a legal vantage point, applying what Justice Polston called the "plain smell doctrine."[62] The dissent did not acknowledge the fact that drug dogs are sense enhancing animals that have been specially trained and are not used by the general public.

In light of the ancient legal maxim that "a man's house is his castle," one of the oldest and most deeply rooted principles in Anglo-American jurisprudence,[63] the holding in *Jardines* was narrowly limited to dog-sniffs at private residences. The court in *Jardines* also relied on the fact that both false alerts and trace odors will ultimately result in a humiliating search where no drugs or contraband are discovered. *Jardines* noted that "such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime."[64]

Persons are subjected to considerable humiliation and are often terrified when forced to undergo searches at their private residences. The range of potential onlookers associated with searches conducted in public increases the likelihood that an innocent person's reputation would be forever tarnished by being subjected to such a search. Interestingly, the United States Supreme Courtt in *Place*, purported to be concerned about privacy interests, emphasizing the search of luggage in a non-public area. Public searches of individuals and searches of private residences cause comparable levels of public opprobrium—and should not be permitted in light of well-established Fourth Amendment precedent.[65] After all, "[t]he Fourth Amendment knows no search but a full blown search."[66] The

reasoning in *Jardines* should be extended to all dog-sniffs, not only residential dog-sniffs.

Allowing officers to use unverifiable K-9 alerts as justification for warrantless searches also provides private persons the opportunity to tamper with each other's privacy rights (by planting evidence or unverifiable "residual odors" on another's personal property). For example, any person wanting to harass or humiliate their innocent neighbor can easily subject that person to an embarrassing search and even a potential arrest merely by spreading or rubbing some drug residue on their car door. This is akin to calling the police and telling them that a neighbor has drugs in an effort to subject that person to a warrantless search.[67] Fortunately, the United States Supreme Court has ruled that such anonymous tips cannot be a standalone basis for providing reasonable suspicion, much less, probable cause.[68] When officers are presented with an anonymous tip, they "must observe additional suspicious circumstances as a result of... independent investigation" before they can act on that tip.[69] In much the same way that an unverifiable anonymous tip does not amount to reasonable suspicion, positive alerts by drug detection K-9 dogs should never be enough to substantiate a warrantless search.

Regardless of the item or location, a sniff-test or dog alert should never satisfy the requirements to establish probable cause. Allowing a dog alert to constitute probable cause essentially reduces the Fourth Amendment to meaningless jargon. Although there are many cases where police dogs have been well trained to detect the presence of illegal contraband with good results, those examples fail to outweigh the injustice from cueing, potentially present in every K-9 case involving a handler, especially when the officer/handler is handling the dog by its leash. Allowing police officers to interpret responses from dogs, and then use those subjective interpretations as justification for a warrantless search should be constitutionally impermissible. The practice should be abolished nationwide in state and federal courts. In most instances, human judges are preferable to dogs when it comes to establishing probable cause.

[1] *See, e.g., United States v. Sanchez*, 417 F.3d 971, 976 (8th Cir. 2005); *United States v. Williams*, 403 F.3d 1203, 1207 (10th Cir. 2005); *United States v. Robinson*, 390 F.3d 853, 874 (6th Cir. 2004); *United States v. Williams*, 365 F.3d 399, 406 (5th Cir. 2004); *United States v. Banks*, F.3d 399, 402 (11th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994). *But see United States v. Trayer*, 898 F.2d 805, 808 (D.C.Cir. 1990) (dog alert at door of train roomette did not by itself establish probable cause), *cert. denied*, 498 U.S. 839 (1990).

[2] *See* Jeffrey S. Weiner & Kimberly Homan, "Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs," *The Champion*, April 2006, at 13.

[3] *Harris v. State of Florida*, . SC08-1871, 2011 WL 1496470 (Fla. Apr. 21, 2011) at *9 ("We first note that there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs.").

[4] *Illinois v. Caballes*, 543 U.S. 405 at 409 (2005) (quoting *United States v. Place*, 462 U.S. 696 (1983)) (emphasis added).

[5] *Harris*, 2011 WL 1496470 at *8 (citing *Caballes* and *Place*).

[6] *Id.*

[7] U.S. Constitution, Fourth Amendment.

[8] *Harris*, at *1.

[9] *Id.* (emphasis added).

[10] *See, e.g., Weeks v. United States*, 232 U.S. 383 (1914).

[11] *Jardines*, 2011 WL 1405080 at *1.

[12] *Id.*

[13] *Id.* at *2.

[14] *See id.* at *22-23 (Lewis, J. concurring) (citing Max A. Hansen, "*United States v. Solis:* Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?" 13 *San Diego Law Review* 410, 416 (1976)).

[15] *See* Weiner & Homan, *supra* note 2, at 14.

[16] *See id.* (citing *United States v. Heir*, 107 F.Supp.2d 1088, 1091 (D.Neb. 2000); *United States v. Stephenson*, 274 F.Supp.2d 819, 824 n.1 (S.D.Tex. 2002) (noting that dogs may be entirely without bias, but their handlers may not be)).

[17] *Harris*, at *10 (quoting Richard E. Myers II, "Detector Dogs and Probable Cause," 14 *George Mason Law Review* 1, at 5 (2006)).

[18] *Id.* (quoting Robert C. Bird, "An Examination of the Training and Reliability of the Narcotics Detection Dog," 85 *Kentucky Law Journal* 405, 425 (1997).

[19] *Jardines*, at *1.

[20] *United States v. Warren*, 997 F.Supp. 1188 (E.D.Wis. 1998).

[21] *Id.* (emphasis added).

[22] *United States v. Anderson*, 367 F. App'x 30 (2011) (emphasis in original).

[23] *Id.*

[24] *See* http://nevergetbusted.com/2010/about.

[25] Daniel Tencer, "'False positives' Suggest Police Exploit Canines to Justify Searches," *Raw Story*, Jan. 6, 2011, www.rawstory.com/rs/2011/01/06/false-positives-police-canines-searches/.

[26] *See* False K-9 Alert – Liberty Hill Police – Williamson County, Texas *available at www.youtube.com/watch?v=Hkw8Kgz_LhU uploaded* Jan. 30, 2009). *But see* Barry Cooper – A Drug Dog's True Alert, *available at* www.youtube.com/watch?v=VsNnd1cUe5o&feature=related uploaded Aug. 4, 2007).

[27] *See* Ron White *available at* www.youtube.com/watch?v=dK2-Y37aso0.

[28] *Harris*, 2011 WL 1496470 at *3 (emphasis added).

[29] *Id.*

[30] *Id.*: *see also id.* at *9.

[31] *United States v. Johnson*, 323 F.3d 566 at 557 (7th Cir. 2003) (quoting Sandy Bryson, *Police Dog Tactics* 257 (2d ed. 2000)).

[32] *Id.*

[33] *Id.*

[34] *Harris*, at *10 (quoting Myers, *supra* note 16, at 12).

[35] *Jardines*, at *23 (Lewis, J. concurring) "The Customs Service monitors its dogs' performance in the field. Recognizing that a dog's ability can change over time, it maintains records for only 30 to 60 days, then discards them because older records are not probative of the dog's skills." (quoting Bird, *supra* note 17 at 415).

[36] *Harris*, at *11.

[37] *Id.* at *10 (quoting Myers, *supra* note 16, at 4-5).

[38] *Matheson v. State*, 870 So. 2d 8 (Fla. 2d DCA 2003) (emphasis added). *Matheson* expressly and directly conflicted with the decision of the First District Court of Appeal in *Harris v. State*, 989 So. 2d 1214 (Fla. 1st DCA 2008) and was ultimately relied upon by the court in *Harris v. State*, 2011 WL 1496470 (Fla. Apr. 21, 2011).

[39] *Harris*, at *2.

[40] *Id.* (emphasis added).

[41] *Id.* at *6 (citing *Matheson*, 870 So.2d at 14).

[42] *See Aguilar v. Texas*, 378 U.S. 108 (1964).

[43] *Harris*, at *3-4.

[44] *Id.* at *3.

[45] *Id.*

[46] *See State of Oregon v. Foster*, 252 P.3d 292 (Or. 2011); *Harris*.

[47] *State of Oregon v. Helzer*, 252 P.3d 288 (Or. 2011).

[48] *See Harris*, at *10 (quoting Bird, *supra* note 17, at 425).

[49] *See* Weiner & Homan, *supra* note 2, at 14 (citing *United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993), where handler testified that he knew how his dog alerted and that the dog had done so on the challenged occasion. In *United States v. Diaz*, 25 F.3d 392, 394-95, the dog's handler testified that the dog alerted by barking, biting, and scratching, but occasionally would alert by coming to a standstill in order to scent more intently. This latter behavior is likely not a true alert. Similarly, in *United States v. Trayer*, 898 F.2d 805, 808 (D.C.Cir.), *cert. denied*, 498 U.S. 839 (1990), the handler testified that the dog had been trained as an aggressive alerted, but that, on this occasion, it froze and pointed to the defendant's train compartment "like a bird dog," which was the way it alerted on the majority of occasions. In *United States v. Bartz*, 2004 WL 1465780 at *5 (S.D. Ind. June 25, 2004), the handler testified that, under controlled

JEFFREY S. WEINER is the Managing Partner of Jeffrey S. Weiner, P.A., in Miami, Florida. Mr. Weiner has been a practicing criminal defense attorney since 1974.

For more than 38 years, Jeffrey S. Weiner has been a staunch advocate for the preservation of our constitutional rights. Mr. Weiner is a nationally Board Certified Criminal Trial Lawyer by the National Board of Legal Specialty Certification.

Mr. Weiner represents United States citizens and foreign nationals in international criminal-law matters, and members of various professions before regulatory agencies. Many of his cases are "high profile," in which he represents fellow attorneys, professional athletes, politicians, and business executives.

Mr. Weiner has argued trials and appeals throughout the country, including appeals before the United States Supreme Court, the Florida Supreme Court, and numerous Florida and federal courts of appeal. Mr. Weiner had the distinction of arguing *Florida v. Jimeno*, 500 U.S. 248 (1991), before the United States Supreme Court .

Mr. Weiner's distinguished legal career includes terms as president of the National Association of Criminal Defense Lawyers (NACDL), president of the Florida Criminal Defense Attorney's Association, chair of the Dade County Bar Criminal Courts Committee, chair of the Academy of Florida Trial Lawyers' Criminal Law Section, and Felloe of the American Board of Criminal Trial Lawyers. He is also a former Regent of the National Criminal Defense College.

Mr. Weiner was voted by fellow lawyers as on the 2011 Best Lawyers in America and as a "Florida Super Lawyer," is named in *Florida Trend*'s "Legal Elite," which singles out less than 2% of the nearly 63,000 Florida Bar Members practicing in Florida, is named in the 2011 *South Florida Legal Guide*'s "Top Lawyers," and enjoys an AV-rating by Martindale-Hubbell.

Mr. Weiner received the Robert C. Heeny Award, NACDL's highest honor, awarded annually "to the one criminal defense attorney who best exemplifies the goals and values of the Association, and the legal profession."

Mr. Weiner is a popular CLE lecturer and author of articles pertaining to criminal law and constitutional procedure topics. He has authored several articles for *The Champion*.

circumstances, the dog would alert by sitting and staring, but that it had "intermediate behaviors" on the "path to final response;" *i.e.*, the dog would stretch up on his hind legs and stare if the drug were concealed in a high place or lie down if the drugs were concealed in a low place, and that the handler's training included learning to recognize the changes in the dog's behavior that signaled the presence of drugs. The court concluded that the dog had alerted by stretching up on his hind legs and "locking up" at the minivan's rear bumper. This was, however not a trained final alert; it was an "intermediate behavior." The court also found that the dog had alerted two other times, during neither of which the dog gave his trained final response. *See also United States v. Gregory*, 302 F.3d 805,811 (8th Cir. 2002) (defendant's passenger testified that the dog did not alert; on appeal, Court concluded that district court had not clearly erred in crediting handler's testimony that the dog had alerted), *cert. denied*, 538 U.S. 992 (2003)).

[50] *See* Weiner & Homan, *supra* note 2, at 13-14 (citing J.G. Aristotelidis, "Trained Canines at the U.S.-Mexico Border Region: A Review of Current Fifth Circuit Law and a Call for Change," 5 *The Scholar: St. Mary's Law Review on Minority Issues* 227, 230-31 (2003)).

[51] *Harris*, at *5-7.

[52] *Id.* at *1.

[53] *Matheson v. Florida*, 870 So. 2d 8 (Fla. 2d DCA 2003).

[54] *See id.*

[55] *Jardines*, at *23 (Lewis, J., concurring).

[56] *Id.* (emphasis in original).

[57] *Id.* at *2.

[58] *Id.* at *20 (Lewis, J., concurring).

[59] *Id.* at *2.

[60] *See id.*

[61] *Id.* at *8 (citing *Kyllo*, 533 U.S. at 34-40).

[62] *Id.* at *26 (Polston, J., dissenting).

[63] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 390 (1914).

[64] *Jardines*, at *8.

[65] *See e.g.*, U.S. Constitution, Fourth Amendment.

[66] *Arizona v. Hicks*, 480 US 321 (1987).

[67] *Jardines*, at *19 (Lewis, J., concurring) (citing *J.L. v. Florida* 529 U.S. 266, 269-70 (2000)).

[68] *J.L. v. Florida* 529 U.S. 266, 269-70.

[69] *Id.* (citing (citing *Alabama v. White* 496 U.S. 325, 329 (1990)).

[Excerpt from the SCOTUS Blog]

The dog-sniffing cases: Made simple

By Lyle Denniston on Jul 26, 2012 at 3:20 pm

Editor's note: During the Supreme Court's summer recess, the blog will be publishing a series of posts that explain, in non-legal terms, some of the most important cases that will be decided in the new Term that starts October 1. This is another in that series. This post explains two cases, Florida v. Jardines *and* Florida v. Harris. *Both involve the use by police of dogs that can detect the odor of illegal narcotics. The Court has scheduled those cases for separate hearings on Wednesday, October 31.*

Police forces across the country have found that dogs, which have a highly developed sense of smell, can be trained to detect specific odors, such as scents from a human body, or the odors given off by illegal drugs. This makes police dogs highly valued partners to police as they search for missing persons, or for illegal narcotics. When a trained dog's capacity to detect a certain odor has been formally certified by an expert, the evidence that police gain from dog searches frequently is permitted in criminal cases in court. But the Supreme Court several times has had to rule on whether a search by a trained police dog is the kind of inspection that must be done so that it does not violate the constitutional right to privacy of the individual targeted. The Court will give further constitutional guidance in two new cases, both originating in Florida.

The Fourth Amendment is one of the Constitution's strongest guarantees of personal privacy, especially for the privacy of the home. The Supreme Court has made clear that the protection given by the Amendment is intended to protect people, rather than physical space. But its protection does extend beyond the individual's own body, to places and things which the owner and society in general would recognize as intended to be free from government intrusion. Thus, the protection can apply to houses, documents, and personal belongings. Searches by police or other government agents, however, are generally barred only if they are "unreasonable." That is a sufficiently flexible word that courts have traditionally had to fill in meaning on how to apply it in specific situations. The Amendment also provides that, as a general rule, police cannot carry out a search unless they have the permission of a judge, through a "warrant." Police can obtain a warrant to carry out a search only if they have a fairly strong reason to believe that the search will turn up evidence of crime. Police do not have to be absolutely certain that the search will lead to evidence, but rather that prospect must be "probable." In some situations, a warrant is not needed, but police still need to show that a search "probably" will turn up criminal evidence.

But, before Fourth Amendment protection comes into play, police activity must actually be found to be a "search" in a legal sense. For example, if one puts the family trash out on the curb, police can inspect it without getting a warrant because the family has given up any expectation

that the contents of the trash bags are private. But, if the trash is still in the can inside the house, perhaps in the kitchen, police could search it only if they got a warrant allowing them to do so; that would be a search in a place that the homeowner considers to be private, and so does society in general. For another example, if one keeps drugs in the glove compartment of a car or truck, and police pull over that vehicle for a traffic violation, police are not allowed to search the glove compartment unless they have some reason to think that the search will turn up evidence related to the reason the vehicle was stopped. But if the individual, on getting out of the vehicle, drops a package of drugs on the ground, police can gather that up and use it as evidence, because they were not searching for it when it just turned up.

It is clear, then, that the factual situation can make a difference constitutionally. And that is why the Supreme Court has had to return periodically to define the situations in which the police may use a drug-sniffing dog, without violating someone's right to privacy under the Fourth Amendment. That issue arises, of course, because a well-trained drug-sniffing dog, by giving an "alert" to its police handler when the animal smells a specific drug, may actually lead the police to the discovery of evidence of a crime. If the Fourth Amendment does not apply at all, police may hand over that evidence to a prosecutor who pursues criminal charges. But if the Fourth Amendment might apply, the evidence might be valid or it might not be, depending upon the factual situation.

Police and prosecutors have generally argued in court cases that the use of a drug-sniffing dog is not a "search" at all, because the only thing that a dog's "alert" identifies is something that is illegal anyway, and no one has any privacy right in illegal items or substances. The Supreme Court has sometimes embraced that argument.

For example, the Court has ruled that it is not a "search" under the Fourth Amendment if police use a dog to sniff the exterior of luggage that police have temporarily seized in an airport terminal, believing that it is likely to contain something illegal. It also has allowed police to check the outside of a vehicle that police have legitimately stopped at a highway checkpoint set up to search for illegal drugs, or to check the outside of a vehicle that police have legally stopped for a suspected traffic violation. In each of those situations, the impact on privacy was considered to be very slight, because the intrusion was minimal, so the use of the dog did not violate the Fourth Amendment.

Suppose, though, that police use a dog to check for narcotics on the exterior of a home that they suspect is being used for drug trafficking. Does the fact that the site of the search is a private home make a constitutional difference? That is one of the new factual situations that the Supreme Court is now preparing to confront. In the case of *Florida v. Jardines*, Florida's state supreme court ruled that the U.S. Supreme Court's past rulings on the use of drug-sniffing dogs did not apply at all when a dog was used at a home, even if the dog only sniffed exterior surfaces of a house. Nowhere is the right of privacy stronger than in a private home, the state court said.

That case originated when police in Miami got a tip from a "crime stopper" source that the home of Joelis Jardines was being used to grow marijuana. Police went to the home, based on that tip alone, and used a trained detection dog named Franky to check out the front porch of the house. After circling for a few minutes, Franky sat down, near the front door. That indicated to his

police handler that the dog had detected an odor of marijuana coming from under the front door. At that point, the officers obtained a search warrant, which the officers then carried out, finding a marijuana-growing operation inside the house. Jardines was charged with growing illegal marijuana plants, but his lawyer contended that the search was unconstitutional because it intruded on the privacy of the home.

The state's highest court relied primarily upon a 2001 Supreme Court decision, in the case of *Kyllo v. United States*, a ruling that it is unconstitutional for police to use a heat-sensing device aimed at the outside walls of a house, to check to see if marijuana was being grown inside with the use of high-intensity lamps. When the government uses a device that the general public does not employ, and the police use it to explore the details of a home, the state court said, that is a "search" under the Fourth Amendment. A trained dog's sniff test fits into that category, it concluded, adding that such a test reveals not only the presence of something illegal, but it also is capable — when carried out in public view — of exposing the homeowner to public humiliation and embarrassment, and further is capable of being used in a discriminatory way. Before police may conduct such a sniff test, it ruled, they must be able to show in court — after the fact — that they had more than mere suspicion that a crime was being committed in the crime; they had to have information indicating that it was "probable" that there was such criminal wrongdoing taking place in the home. The bottom line of the ruling: the use of Franky at the Jardines home was "unreasonable," so the marijuana evidence could not be used against him.

That ruling is being challenged by state officials of Florida in their appeal to the Supreme Court. They have the support of the federal government for their challenge. Their basic claim is that a sniff test by a drug is not a search at all, at a home or elsewhere.

In the other Florida case that the Justices will be reviewing (*Florida v. Harris*), state officials have persuaded the Court to return to the issue of a dog sniff test on a car or truck, not a home. But this time, the sniff test was done on the inside of a private truck. The Florida Supreme Court, finding that the U.S. Supreme Court's prior rulings involving sniff tests and vehicles only involved checking the exterior of a vehicle, decided that the Fourth Amendment provided greater protection when the dog's "alert" led police to search the interior of a vehicle. But the decision also is important because the state court spelled out the information that police must have in order to convince a court that a drug-sniffing dog can be trusted to make a reliable "alert" indicating that illegal drugs were present.

A Liberty County sheriff's deputy with a drug-detecting dog named Aldo, who had been trained to detect the illegal drug methamphetamine, was on patrol in Blountstown, Florida. The deputy pulled over a truck driven by Clayton Harris because the license plate on the vehicle had expired. The officer noticed that Harris was shaking badly, and was breathing rapidly — telltale signs, for the officer, that Harris might be on drugs. The officer asked for permission to search the truck, but Harris refused. The dog then "alerted" to a drug on the door handle of the driver's side of the truck. With that "alert" as legal justification, the officer searched the interior of the truck's cab, and found ingredients for making methamphetamine.

Harris was charged with possessing materials for making the illegal drug, and his defense lawyer challenged the use of the evidence found in the truck's cab, arguing that the search of the truck's

interior violated the Fourth Amendment because the deputy had no legal basis for conducting such a search. The Florida Supreme Court agreed, concluding that Aldo's "alert" to a substance on the truck door handle was not sufficient to justify searching the cab. A police dog's "alert," the state court said, is not enough by itself to satisfy a court that the dog is properly trained and certified for the detection of a specific illegal drug. A court can accept an "alert" as a basis for a search only if the evidence shows how the particular dog was trained, what was done to satisfy an expert that the dog was adequately trained, how the dog had actually performed in "alerting" to drugs in other situations, and how well trained and how experienced was the dog's police handler.

The state court remarked that it appeared that, in dog-sniffing drug cases, "the courts often accept the mythic dog with an almost superstitious faith. The myth so completely has dominated the judicial psyche in these cases that the courts either assume the reliability of the sniff or address the question cursorily; the dog is the clear and consistent winner."

Finding in the Harris case that there was not enough proof that Aldo was a reliable drug detector, the state court overturned Clayton Harris's no-contest plea to the criminal charge, because the evidence taken out of the truck cab should not have been allowed in court.

State officials, with the support of the federal government, have asked the Supreme Court to rule that the fact that a trained and certified dog does make an "alert" should be enough to justify a police officer's further search of a vehicle for illegal drugs.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2012

For the Session Beginning October 29, 2012

Monday, October 29	**Monday, November 5**
(1) 11-1025 CLAPPER V. AMNESTY INTERNATIONAL USA	(1) 11-864 COMCAST V. BEHREND
(2) 11-697 KIRTSAENG V. JOHN WILEY & SONS, INC.	(2) 11-1085 AMGEN INC. V. CONNECTICUT RETIREMENT PLANS
Tuesday, October 30	**Tuesday, November 6**
(3) 11-820 CHAIDEZ V. UNITED STATES	(3) 11-8976 SMITH V. UNITED STATES
(4) 11-770 BAILEY V. UNITED STATES	(4) 11-1327 EVANS V. MICHIGAN
Wednesday, October 31	**Wednesday, November 7**
(5) 11-564 FLORIDA V. JARDINES	(5) 11-982 ALREADY, LLC V. NIKE, INC.
(6) 11-817 FLORIDA V. HARRIS	(6) 11-1175 MARX V. GENERAL REVENUE CORP.

Arguments begin at 10 a.m.

July 23, 2012

COURTS

Should there be limits on drug-sniffing police dogs?

The work of a trained narcotics detection dog in Miami is part of a legal dispute that could very well reach the Supreme Court.

BY DAVID ROYSE
News Service of Florida

TALLAHASSEE — Was a do sniffing at the front door of a suspected drug house a case of "good boy, Franky, good boy," or was he violating the Fourth Amendment rights of the people who lived there? That question may be headed to the U.S. Supreme Court in a Florida case.

The state is asking the nation's high court to consider overturning a decision by the Florida Supreme Court, asking whether a sniff at the front door of the house by a trained narcotics detection dog is itself a search that requires probable cause.

The case involves a search of a Miami house where police had been tipped that someone was growing marijuana. After surveillance of the house turned up nothing, a detective went up onto the porch with Franky the drug sniffing dog. Franky gave the alert signal that he'd been trained to give when smelling drugs, and at that

• TURN TO DOGS, 2B

Herald 11/22/11
1B

COURTS

Questions arise over drug-sniffing dogs

• DOGS, FROM 1B

point the police left the porch. Another detective — aware that the dog had smelled drugs — then went to the door to knock on it and, while there was no answer, he said he also smelled marijuana.

The detective then left and went to get a warrant to search the house. The information he gave to the judge noted Franky's alert at the house. The magistrate issued the warrant, police returned and found a lot of marijuana and arrested the resident, Joelis Jardines, as he tried to flee.

Jardines argued that Franky's first sniff on the porch itself was a "search," a determination that was made in a 2004 case by a federal appeals court, which had said that when the place involved in a search was someone's private home "a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life."

A trial court agreed and threw out evidence obtained at the house in a felony case against Jardines. But the Third District Court of Appeal in Miami disagreed, finding that a mere sniff by a dog of someone's front door doesn't equal a search of the premises and no warrant is needed for the dog to go up on the porch and sniff around.

ILLINOIS CASE

The Florida appeals court relied on a U.S. Supreme Court ruling from 2005 in an Illinois case, that said that dog sniffs only find contraband, and because nobody has a legitimate privacy interest in contraband, a dog sniff is not a search.

Dogs, unlike certain technological devices such as a wiretap or a device that detects heat in a house, only alert police to illegal activity, not indiscriminately also capturing random legal activity.

But the Florida Supreme Court reversed the Third DCA, concluding that a dog sniff test at the door is " a substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment."

The Florida Supreme Court noted the "special status accorded a citizen's home in Anglo-American jurisprudence," and ruled that a dog sniff of a house without a warrant was "an unreasonable government intrusion into the sanctity of the home."

That decision wasn't unanimous, with Justices Ricky Polston and Charles Canady noting in a dissent that the U.S. Supreme Court had held otherwise. Because of that, "Franky's sniff cannot be considered a search violating the Fourth Amendment," Polston wrote.

The state, represented by Attorney General Pam Bondi, cited that reasoning — the disconnect with the earlier U.S. Supreme Court decision in the Illinois case — in its reasoning for why the court should take up the Jardines case.

"Florida courts are now alone in refusing to follow" that earlier U.S. Supreme Court opinion, the state's petition says.

The state also noted that its ability to enforce drug laws would be hampered if it couldn't use dogs. "The Florida Supreme Court's decision requires that the officers have probable cause before employing a dog," the state's petition to the Supreme Court says.

"It is the dog's alert, however, that often provides the probable cause to obtain the search warrant."

LOW TECH

The state also notes that unlike in complicated cases involving the use of technology to find out what's going on in a house, in which someone might arguably say the state went to extraordinary Big Brother-type lengths to gather information, a dog is pretty low tech.

"Chocolate Labrador retrievers are not sophisticated systems," the state reminded the Supreme Court. "Rather, they are common household pets that possess a naturally strong sense of smell.....Nor was there a 'vigorous search effort' at the front door; all Franky really did was breathe."

THE National Association of Criminal Defense Lawyers
CHAMPION
April 2012

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June 7-8 / NACDL's 2nd Annual
West Coast White Collar Conference

Canine Searches
Entrusting the Fourth Amendment to the Dogs

Important Election Updates See Page 10

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Police K-9's and the Constitution: What Every Lawyer and Judge Should Know

Positive K-9 "alerts" are treated as *per se* probable cause in most states and in the federal courts, including the U.S. Supreme Court, when the K-9 is assumed to be "trained" and "reliable."[1] The terms "trained," "reliable," and "certified" appear repeatedly in judicial opinions handed down over the years relating to dog sniffs. Following *United States v. Place*,[2] the courts, with few exceptions, have demonstrated a lack of understanding of what these concepts actually mean in the real world, and an entrenched disinclination to look beyond the fact that the dog's handler testified to the occurrence of an alert and that the dog was "trained" and "certified."[3]

Judges and justices have been all too eager to blindly accept affidavits from officer/handlers stating that their dog was "trained" or "certified" and that their dog "alerted" to justify a warrantless search or a basis for the issuance of a search warrant. The reality is, much of the "training" is inadequate and the so-called "certifications" are meaningless.[4]

Fortunately, several courts in recent years — mostly state courts — have come to see the light. While these recent cases are excellent opinions, they do not go far enough, since they allow for the continued use of a K-9 alert to establish probable cause. Of particular significance are the beautifully written decisions of the Florida Supreme Court in *Jardines v. State of Florida* and *Harris v. State of Florida*.[5] The U.S. Supreme Court has granted certiorari in both of these cases and arguments will be heard in the October 2012 term. These two cases are discussed in this article, as are the important decisions from the Oregon Supreme Court in *State of Oregon v. Foster* and *State of Oregon v. Helzer*.[6] These cases are mandatory reading for practitioners who want to understand K-9 searches and the dangers for abuse inherent in allowing a K-9 alert to provide probable cause for a full-blown search.

The purpose of this article is not to discredit the use of trained dogs for law enforcement, emergency response, public safety and other vital purposes. Rather, it addresses a primary deficiency in the use of drug-detection dogs to establish "probable cause," focusing on the subjective role of the officer/handlers and the unreliability of dog "alerts" in general.

In April 2006, *The Champion* published an article by Jeff Weiner and Kimberly Homan titled *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs!* The article discussed the sorry state of the law and many of the problems inherent in relying upon K-9 alerts to establish probable cause for warrantless searches.

BY JEFF WEINER

The Truth About Dogs

Most dog owners know that a smart and motivated dog — a dog with drive or energy — can be trained to do just about anything. A dog owner can use subtle physical or audible cues to induce a dog to bark, sit, rollover, play dead, fetch and perform countless other behaviors. Often, dogs respond to cues that an owner/handler may give unintentionally. In law enforcement situations, this is a problem because virtually any behavior by a K-9 can be, and often is, interpreted by its law enforcement handler as an "alert."

Dogs are not motivated in the same way as humans. Dogs have no interest in ridding the world of illegal drugs. Dog trainers, including police K-9 trainers, use treats, toys and praise to reward dogs when they do what they have been conditioned to do. If a police K-9 alerts, it gets a reward. K-9 handler/trainers know this, and the dogs quickly learn that an alert results in a reward in most instances, even if nothing is found. If law enforcement or magistrate judges, who are presumed to be impartial, were to be similarly incentivized, it would constitute violations of the Fourth, Fifth and Fourteenth Amendments.[7]

Although dogs can be trained to react to certain odors with some degree of accuracy, dogs are not infallible; nor are they able to tell us what is causing them to react. So, K-9 responses are subject to interpretations claimed by their police handlers. The problem is clear and, for the most part, the courts have ignored it.

Dog Sniff Terminology

Police dogs, when properly trained, give a particular response when they detect certain odors (i.e., specific illegal drugs, explosives, etc.) that they are trained to detect. During training, they are rewarded when they correctly give that response in the presence of the substance that emits that odor.[8]

Generally, alerts are classified as either "passive" or "aggressive," and result in different physical manifestations.[9] Dogs trained to alert aggressively will attempt to contact the scent source (biting, pawing, scratching, penetrating, or attempting to retrieve).[10] Dogs trained to alert passively (such as bomb-detection dogs, agricultural and bedbug-detection dogs, and some drug-detection dogs) perform trained, silent behavior, usually sitting and intently focusing on the source, or clearly sniffing toward the source while walking around or near it (sometimes referred to as "bracketing").[11]

A "false alert," also known as a "false positive," is an alert by a detection dog in the absence of the substance it is trained to detect.[12] Police K-9 officers, attempting to bolster their dogs' credibility and justify their search, commonly attribute false alerts to "residual odors" or "trace odors" that purportedly linger on an object, even though in almost all instances of false alerts, no proof exists that the controlled substance was ever present where the dog alerted. This poses a major problem with using a K-9 alert to provide probable cause: even if the dog alert is valid, the alert is often to the *odor* of a narcotic that the dog was trained to detect, not necessarily to the presence of actual contraband. Possession of contraband is a crime. The possession of an alleged residual odor of contraband is not a crime and should not be the basis for a search.

In *United States v. Warren*,[13] the officer/handler credited his drug-detection dog with 100 percent accuracy. The evidence showed that when the dog was brought to a scene, it would alert to the suspected container, but usually only after some direction or coaching from its handler, and drugs might — or might not — be found in the container.[14] If no drugs were found, the handler did not record it as a "false positive alert" but instead noted "the dog must have smelled the residual odor of drugs, *which must have been present* at some time in the past."[15] In almost all instances of claimed "residual odor," no evidence exists that the contraband was ever present where the dog alerted.

A recent study presented to the American Chemical Society confirmed that approximately 90 percent of paper money circulating in the United States contains trace amounts or "residual odors" of narcotics, specifically cocaine.[16] Washington, D.C., ranked the highest in terms of contaminated currency, reporting drug residue on 95 percent of the bills tested.[17] Currency is often contaminated with drug residue through touching the bills at the time of a drug deal or when a user uses a bill to inhale powder cocaine. However, currency does not need to be used to consume drugs in order to become contaminated. Bills can become contaminated when intermingled with other bills in cash registers, wallets, vending machines and currency-counting machines at a bank.[18] "[W]hen the machine gets contaminated, it transfers the cocaine to the other bank notes."[19] A March 2012 article in *Harper's Magazine* cites a study that found that the chances are nine in 10 that diaper-changing tables in the United Kingdom carry trace amounts of cocaine.[20]

A "residual odor" can be transferred to almost any tangible object. In a world where drug and non-drug users share door handles, gas pumps, handrails, chairs, elevator buttons, telephones, computers, currency and myriad other objects, it is fair to conclude that residue from cocaine and other prohibited substances is everywhere. Therefore, alerts claimed to be based on the presence of residual odors are meaningless. If such alerts are sufficient to establish probable cause, no one is safe from being subjected to a search.

False alerts routinely occur when K-9 searches fail to reveal narcotics. The Florida Second District Court of Appeal reasoned that "[a]n officer who knows only that his dog is trained and certified, and who has no other information, at most, can only *suspect* that a search based on the dog's alert will yield contraband."[21] And, when police are honest in reporting the actual results of alerts, it is clear that many, if not a majority of alerts, are false alerts. The *Chicago Tribune* recently obtained and analyzed data from 2007-2009 collected by the Illinois Department of Transportation related to police K-9 searches.[22] Of all the police departments that participated in the study, the McHenry County Sheriff's Department had the highest number of alerts. Of the 103 searches where drug-detection dogs were used to obtain probable cause, drugs or paraphernalia were found only 32 percent of the time.[23]

Harris v. State of Florida

Clayton Harris was pulled over in Florida by Liberty County Sheriff's K-9 Officer William Wheetley because his vehicle tag had expired.[24] The officer testified that Harris was "breathing rapidly and could not stand still." The officer noticed an open beer can and requested consent to search the vehicle. Harris refused to give consent. Then (as is typical during traffic stops — often pre-textual — where consent to search is declined), Wheetley decided to deploy his drug-detection dog, Aldo, to perform a "free air sniff" of the exterior of Harris' truck. The officer testified that Aldo alerted to a door handle on Harris' vehicle, thus instantly providing him the probable cause necessary to conduct a non-consensual, warrantless search of the truck.

The search of Harris' truck uncov-

ered pseudoephedrine pills (cold medicine), matches, and muriatic acid (used to clean swimming pools). These are common household products; however, they can also be used to produce methamphetamine. The State charged Harris with possession of pseudoephedrine with intent to use it to manufacture methamphetamine. Although the officer testified that Aldo was trained and certified to detect cannabis, cocaine, ecstasy, heroin, and methamphetamine, he *was not* trained to detect pseudoephedrine.[25] Therefore, the alert should have been invalidated *ab initio* because there was no contraband present and Aldo was not trained to alert to the items in the truck. In other words, Aldo's alert was a false alert.

Approximately two months after the initial incident, Officer Wheetley stopped Harris a second time.[26] Again, Aldo alerted to the same driver's side door handle of Harris' truck. And again, no drugs were found. Another false alert.

Courts must not lose sight of the fact that members of law enforcement, by trade, are engaged in the competitive enterprise of ferreting out crime.[27] In *Harris*, Officer Wheetley testified on cross-examination:

Officer Wheetley: [W]hen my dog alerts to a door handle, it usually means, in the cases which I have worked in the past, that somebody has either touched the narcotics or have smoked narcotics, the odor is on their hand when they touched the door handle is when the odor transfer occurs. And that's when my dog will pick up on the residual odor of the narcotics.

Defense Counsel: So you have no idea — do you know how long ago somebody might have touched that vehicle?

Officer Wheetley: Ma'am, you're asking me a question for an expert. I don't feel comfortable answering that.

Defense Counsel: Do you know whether it could have been someone other than the person driving the vehicle?

Officer Wheetley: I can't answer that question, ma'am.

. . .

Officer Wheetley: The residual odor is there. That's what caused my dog to show the response. So if it's there, my dog responded to the odor, so which — apparently the odor was there.

Defense Counsel: But you have no way of establishing in this case that this is not just a false alert by your dog?

. . .

Defense Counsel: The dog, however, did not alert to any of the things he's been trained to alert to as far as your knowledge?

Officer Wheetley: Ma'am, he was trained to alert to the odor of narcotics, which he alerted to the odor of narcotics on the door handle.[28]

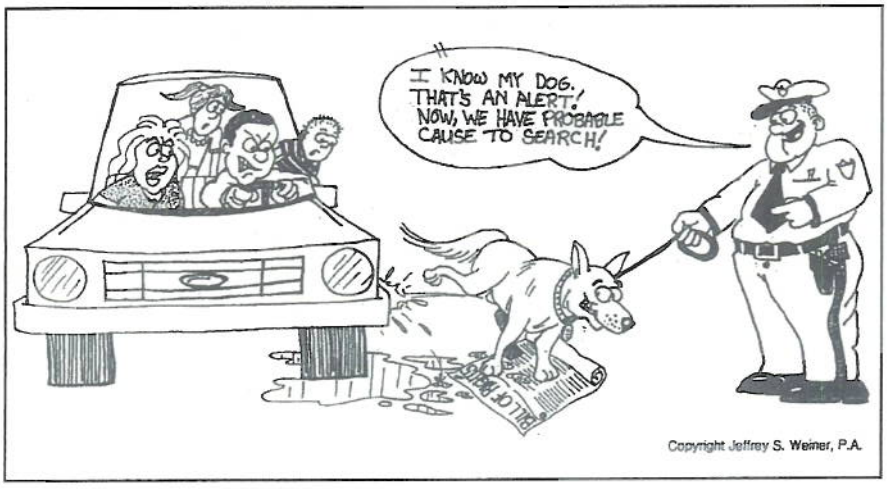
The dog in *Harris* was described by his handler as performing "satisfactory" 100 percent of the time, yet the handler failed to explain why a "satisfactory" performance included alerts where drugs were not found.[29] The officer/handler in *Harris* testified that he only kept records of his dog's positive alerts whenever an arrest was made; alerts where no contraband was found were not recorded. The officer/handler in *Harris* also testified that his dog was rewarded for positive alerts.[30] So, Aldo was rewarded each time after a false alert, thereby teaching Aldo that any alert results in a reward. An analysis of these typical facts raises an unanswerable question: Was the dog alerting to an odor he detected or merely wanted a treat and knew from prior experience that alerting would result in him getting a reward from his handler/admirer? The handler testified that Aldo was perfect in his alerts — which, clearly, was not the case.

The Florida Supreme Court in *Harris* stated: "[G]iven the level of sensitivity that many dogs possess, it is possible that if the person being searched had attended a party where other people were using drugs, the dog might alert because of the residue on clothing or fabric."[31] This could easily be the case when an individual has been in physical contact (such as a hug or a handshake) with someone who has recently handled drugs. Something as simple as parking one's car with a valet service whose attendant has handled drugs could easily subject the innocent owner or driver of the vehicle to a humiliating search because a police dog "alerted" (to a supposed residual odor on the door handle).

Harris is a realistic, thoughtful opinion. It addressed the issue of the evidence that must be introduced by the State in order for the trial court to adequately undertake an objective evaluation of the basis of the officer's belief in the dog's reliability as a predicate for determining probable cause.

> [W]e hold that evidence that the dog has been trained and certified to detect narcotics, standing alone, is not sufficient to establish the dog's reliability for purposes of determining probable cause — especially since training and certification in this state are not standardized and thus each training and certification program may differ with no meaningful way to assess them.
>
> *Harris v. State of Florida*[32]

Florida prosecutors must now present the training and certification records, an explanation of the training and certification of the particular dog[33] and *the officer* handling the dog, as well as other objective evidence known to the officer about the dog's reliability in being able to detect the presence of certain illegal substances within a vehicle.[34] The trial judge must consider the totality of circumstances when determining the dog's reliability.[35]



The *Harris* case is a major step forward in that Florida judges can no longer blindly accept a police officer's mere assertion that his/her dog is "trained" and "certified" and therefore reliable to establish probable cause for a search. It is an excellent case for all criminal defense lawyers to use when challenging K-9 alerts under the present state of the law. However, for reasons set forth in this article, a police dog's alert, regardless of its training and certification, should never be the sole basis to establish probable cause.

On March 26, the State of Florida's petition for certiorari in *Harris* was granted by the U.S. Supreme Court to decide whether an alert by a "well-trained narcotics-detection dog" certified to detect illegal contraband is by itself sufficient to establish probable cause. Law enforcement agencies and interest groups such as the National Police Canine Association and *Police K-9 Magazine* filed amicus petitions because of their reluctance to provide details of their methods and to avoid subjecting their training and certification procedures to judicial scrutiny.

While the holding in *Harris* applies to law enforcement dog-sniff cases in general, the Florida Supreme Court's holding in the *Jardines* case is limited to private residences, which historically receive the highest constitutional protection in the nation's jurisprudence.[36]

Jardines v. State of Florida

In November 2006, police received an unverified "crime stoppers" tip that marijuana was being grown at the home of Joelis Jardines.[37] One month later, a detective went to the home of Mr. Jardines and conducted "surveillance" for 15 minutes and reported no observable activity. The detective testified that he became suspicious because the air conditioning had been running without recycling for 15 minutes, which the detective told the judge indicated to him that the home was being used to grow marijuana. That testimony was criticized by Justice Lewis in a specially concurring opinion.

> Prior to entering the private porch of Jardines, the only purported additional suspicious circumstance referenced by the investigating officer was that he observed the air conditioning unit running continuously for fifteen minutes without interruption. If a continuously running air conditioner is indicative of marijuana cultivation, then most Florida citizens and certainly all of my neighbors would be suspected drug dealers subject to intrusive searches by law enforcement. The elevation of such a ridiculous observation in the heat of Florida cannot serve as a basis for intrusion on the heightened expectation of privacy that one enjoys in one's home. Further, there was no evidence of any impending emergency or concern with regard to destruction of evidence.
>
> *Jardines v. State of Florida*[38]

Because of his claimed "reasonable suspicion," the detective called for a drug-detection K-9. The dog was placed on a short leash and led to the front door of the home. While there, the dog alerted. After the alert, the detective approached the door of Jardines's home and testified that he smelled the distinct odor of marijuana. He then prepared an affidavit for a search warrant, which was issued. A subsequent search confirmed that marijuana was being grown in the home.[39]

Jardines focused on two issues: (1) whether a "sniff test" by a drug-detection dog conducted at the front door of *a private residence* is a "search" under the Fourth Amendment and, if so, (2) whether the evidentiary showing of wrongdoing that the prosecution must make *prior* to conducting a residential sniff test requires "probable cause" or "reasonable suspicion."[40] *Jardines* held that a residential sniff test is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment.[41] The Florida Supreme Court also held that probable cause, not mere reasonable suspicion, is the proper evidentiary showing of wrongdoing that the State must make prior to conducting a dog sniff at a private residence.[42]

After analyzing each of the applicable U.S. Supreme Court "dog-sniff" cases, the Florida Supreme Court in *Jardines* stated that none of the three U.S. Supreme Court "K-9 cases" applied to a dog-sniff test conducted at a private residence.[43] The Florida Supreme Court referred to *Kyllo v. United States*,[44] a 5-4 decision with the majority opinion written by Justice Scalia, which discusses the use of sense enhancing technology (thermal imaging device) by law enforcement officials outside of a home. "Where, as

here, 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."[45] The dissent in *Jardines* claims the use of trained dogs is no different than officers seeing or smelling illegal contraband from a legal vantage point, applying what Justice Polston called the "plain smell doctrine."[46] However, the dissent did not mention the fact that drug-detection dogs are sense enhancing animals.[47]

The Florida Supreme Court in *Jardines* discussed the *Kyllo* case for two purposes: to analogize the enhanced ability of dogs to sniff to the thermal imaging device in *Kyllo*, and for the principles of law annunciated in *Kyllo* concerning the heightened expectation of privacy in the home.[48]

Anonymity and privacy are absent when police surround a home and have a K-9 dog perform sniffs. "Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, for such dramatic government activity in the eyes of many — neighbors, passersby, and the public at large — will be viewed as an official accusation of crime."[49] The U.S. Supreme Court in *United States v. Place*[50] emphasized that the K-9 luggage search was conducted in a non-public area of an airport. Public searches of individuals and searches of private residences cause comparable levels of public opprobrium and should not be permitted in light of well-established Fourth Amendment precedent.[51] After all, "[t]he Fourth Amendment knows no search but a full-blown search."[52]

The *Jardines* opinion is well written and reasoned; anyone interested in this subject should read the decision, including the excellent concurring opinion. *Jardines* is particularly helpful to criminal defense practitioners in states that are permitted to expand constitutional protections to their citizens beyond those authorized by the U.S. Supreme Court (unfortunately, Florida is not one of those states). Justice Lewis points out, however, that "it is also true that in the absence of a controlling U.S. Supreme Court decision, Florida courts are not prohibited from providing their citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution."[53]

In their petition for certiorari filed in the U.S. Supreme Court, Florida's Attorney General claimed that Florida courts are now alone in refusing to follow earlier U.S. Supreme Court opinions and that the state's ability to enforce drug laws will be hampered if the *Jardines* decision is allowed to stand. Nineteen Attorneys General signed the *amici curiae* in an eight-page brief, arguing that *Jardines* conflicts with prior U.S. Supreme Court K-9 case precedent as set forth in *Illinois v. Caballes*,[54] *City of Indianapolis v. Edmond*,[55] and *United States v. Place*. The State's petition ignores the detailed, logical analysis by the Florida Supreme Court, which clearly shows that a K-9 sniff at a home has never been dealt with or alluded to in U.S. Supreme Court decision involving K-9 dogs. The State's brief did not discuss training, certification, handler cueing, and other material and relevant factors that should be considered by the court before simply concluding that the dog was a "well trained narcotics-detection dog."

The State's certiorari petition incorrectly states that the Florida Supreme Court in *Jardines* created a "public spectacle" test because the opinion discussed in detail how a K-9 sniff at a residence door (with numerous police officers and agents attendant at the home) would expose the residents to public opprobrium, humiliation and embarrassment. The Florida Supreme Court contrasted the K-9 sniffing at the front door of the Jardines's home with the U.S. Supreme Court cases in which the K-9 sniffs were conducted in a "minimally intrusive manner" upon objects, such as luggage at an airport in *Place*, or vehicles on the roadside in *Edmond* and *Caballes*.

On Jan. 6, 2012, the U.S. Supreme Court granted Florida's petition for certiorari in *Jardines*, agreeing to decide whether a dog sniff at the front door of a suspected grow house *by a trained narcotics-detection dog* is a Fourth Amendment search requiring probable cause. Again, the concept of a "trained narcotics-detection dog" is assumed and not questioned. Among other obvious issues, the U.S. Supreme Court may discuss the concepts of curtilage and physical trespass while deciding the *Jardines* case.[56]

In the past, the Supreme Court has ignored a key issue emphasized by Justice Souter in his dissent in *Caballes*: that is, the incredibly high canine sniff error rates, coupled with the contamination of drug residue, essentially renders a K-9's reaction meaningless.[57] Hopefully, the Supreme Court will not, as they have in the past, summarily accept the words "trained narcotics dog" as proof of reliability of the K-9, before reaching the issue of whether a K-9 sniff test is a search. The threshold question should not be the search issue pertaining to a residence, but rather, whether Fourth Amendment protections should be entrusted to a dog.

The U.S. Supreme Court has ruled that anonymous tips cannot be a stand-alone basis for providing reasonable suspicion, much less probable cause.[58] If a

Clever Hans

Photo is reprinted from the book "Clever Hans (The Horse of Mr. Von Osten): A Contribution to Experimental Animal and Human Psychology," Author: Oskar Pfungst, Translator: Carl L. Rahn. Copyright 1911 by Henry Hold & Co., which is now in the public domain.

The threshold question should be whether Fourth Amendment protections should be entrusted to a dog.

police officer is presented with an anonymous tip, the officer "must observe *additional* suspicious circumstances as a result of … independent investigation" before acting on that tip.[59] So, under the law, mere suspicion (by a human being) does not rise to the level of "probable cause" and does not justify a warrantless search. Yet, an "alert" by a K-9 dog does, even though the alert is, at best, nothing more than an indication of suspicion by the dog, the handler, or both.

Handler Cueing: The Alert

Most judges readily credit the testimony of a police K-9 officer that the officer's police dog "alerted" to the presence of actual narcotics.[60] Judges trust the testimony because they typically fail to consider — or even recognize — the subjective role, motive, interest and bias of the police K-9 officer/handler in the process.[61] Although the lack of standardized training and meaningful certification programs for detection dogs and their handlers[62] is a critical challenge to the fallacies relied upon in decision after decision, it is important to note that even the most professional and thorough training cannot entirely eliminate the possibility of handler cueing. Due to the social cognitive abilities of domestic dogs, even highly trained dogs respond to subtle cues from their officer/handler.[63]

Handler cueing between animals and humans is not a recent phenomenon. A famous case in the 1890s involved a German math teacher, Wilhelm Von Osten, who purportedly trained his horse, Clever Hans, to solve mathematical problems.[64] When asked, "What is the sum of two plus four?" the horse would tap his hoof six times. Hans was also believed to spell out basic words. One tap equaled "A," two taps "B," and so on. Clever Hans appeared to respond to human language and to grasp mathematical concepts. Thousands of people traveled from all over Europe to watch him perform. More than a dozen scientists and animal experts studied Clever Hans and concluded that no tricks or prompting were involved.

However, in 1904, psychologist Oskar Pfungst discovered that the accuracy of Clever Hans was greatly diminished when the questioner was positioned at a distance from him. Also, if the questioner did not know the answer to the problem, the accuracy of the horse's responses decreased markedly. Through observation, Pfungst realized that the posture, breathing, and facial expressions of each questioner changed involuntarily each time the hoof tapped, showing minute increases in tension. Once the correct number of taps had been reached, the tension disappeared, giving Hans the cue he was looking for to stop tapping.

Dogs, even more than horses, are very skilled at reading signals from their owners/handlers, regardless of whether those signals are given intentionally.

Handler "cueing," in this context, is the subtle, *conscious or unconscious* conduct of the officer/handler during the sniff that influences the reaction of the dog and can easily prompt an "alert" stemming from the handler's cues rather than the presence of illegal contraband.[65] Cueing need not be verbal. It can be conveyed by various methods, many of which are very subtle. Slightly manipulating a leash, moving hands in a certain way, blocking a dog's path, holding the dog at a sniff site longer than normal (even a second or two), making certain sounds or saying words, a change in the handler's breathing pattern or tone of voice, even looking at a dog a certain way, making "facial expressions," or reaching for a particular object (such as an edible treat, ball, tug toy, or other inducement) will typically elicit a response that can easily be labeled an alert.[66]

> [E]ven the best of dogs, with the best-intentioned handler, can respond to subconscious cueing from the handler. If the handler believes that contraband is present, they may unwittingly cue the dog to alert.
>
> *Harris v. State of Florida*[67]

This is especially true when the officer has a "hunch" that contraband is present and wants to conduct a search without a warrant or consent.

The idea that sensory information is subconsciously transmitted from the officer/handler to the dog may seem questionable to someone with limited knowledge of dogs. However, experienced dog owners and trainers agree that there is non-verbal communication that occurs between humans and dogs in everyday life. In his short story *Master and Dog*, Thomas Mann gives a wonderful description of non-verbal, sensory communication between man and animal:

> Whatever the master planned to do — as long as it had the slightest bearing on the interests of the dog — the dog knew it right away. When, for example, the master wanted to sneak out of the house because he didn't want the dog along on his walk, he left the room as nonchalantly as possible, acting as if he were just going to get something from another room. But it was to no avail: the dog jumped up with excitement. There was something that revealed his master's plan to the dog.[68]

In *State of Oregon v. Foster*,[69] the Oregon Supreme Court addressed the issue of subconscious cueing, citing changes in the handler's heart rate or breathing patterns as a common example. The main issue in *Foster* was whether, and under what circumstances, an alert by a drug-detection dog provides probable cause to search.[70] Similar to *Harris*, *Foster* held that an alert by a properly trained and reliable drug-detection dog can be a basis for probable cause to search. However, Oregon trial courts must now perform an individualized inquiry in each case, based on the totality of the circumstances known to police, which typically will include considerations such as training, certification, and performance of the dogs and their handlers.[71]

Officer/handlers may intentionally cue their dogs in order to justify a warrantless search or to obtain a search warrant. Video recordings are rarely introduced into evidence at motions to suppress in cases involving purported K-9 alerts and, as a result, it often comes down to the officer's word against the defendant's. To hinder the soon-to-be defendant's ability to become a witness, he will often be intentionally placed

Man and His Dog

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where his view of the dog sniff is obstructed (such as sitting in the back of a police car or behind an officer who is standing between the arrestee and the police K-9, blocking the video camera if there is one).

Barry Cooper is a former Texas police officer who worked with police drug-detection dogs for over eight years.[72] He has launched a nationwide crusade in which he criticizes the use of canines in law enforcement. Cooper states: "[T]hey're using dogs as an excuse to search cars when people refuse consent. The reason it's like this is because the dogs aren't always really alerting: it's actually the cops using those dogs to trample our rights as citizens."[73]

Anyone who doubts that the use of drug-detection dogs in law enforcement is open to manipulation and abuse by officer/handlers should watch videos of false K-9 alerts presented by Cooper and others on YouTube.[74] Also, particularly noteworthy is a comedy routine featuring comedian Ron White entitled *Behavioral Problems*.[75] After conducting a sniff test of White's luggage, an officer told White that the police K-9 alerted to drugs on the plane. White replied to the officer, "No he didn't. That dog didn't do anything. I was staring straight at him, he didn't wink, blink, move a paw. ... What's the signal? A blank stare?"[76]

Oregon v. Helzer,[77] a recent Oregon Supreme Court case requiring a valid basis for concluding that the police K-9 alert was legitimate, focused on the officer/handler's training and the use of conscious and subconscious cueing by the handler. In holding that the state failed to establish that the dog's alert was sufficiently reliable to establish probable cause, the court focused on the lack of evidence of "training the officer received to avoid handler cues or other errors that can cause a dog to alert falsely."[78]

Although the Oregon Supreme Court wisely recognized the deficiencies associated with using drug-detection canines to establish probable cause, this heightened standard of proof of the reliability of the K-9 alert is simply not enough to protect the public. A K-9 officer's subjective assertion that a dog has "alerted" to the presence of a prohibited substance or contraband should not suffice as a basis to invalidate the protections guaranteed under the Fourth Amendment. An actual K-9 alert might be triggered by a residual odor. It might also be in reaction to another odor of interest to the dog (food, the scent of a female dog in heat, etc.). Or, it may have nothing to do with odor at all, but with a learned behavior by the dog to perform a certain act (such as sitting, pawing, barking, "bracketing", etc.) in order to receive a reward. In *Harris*, the Florida Supreme Court noted that "[h]andlers interpret their dogs' signals, and the handler alone makes the final decision whether a dog has detected narcotics."[79] This presents an obvious problem, since the officer/handler is hardly objective. As long as K-9 officers are permitted to determine what constitutes an "alert" and are thus able to establish probable cause on their own, the public is at risk of being subjected to humiliating searches at the whim of a police officer.

Unfortunately, most courts are all too apt to automatically credit testimony from officer/handlers of the "I know an alert when I see it" variety.[80]

Dr. Daniel Craig, a noted expert in canine training and performance, stated that detector dog handlers have been known to say things such as "I can read my dog," "I can read my dog's behavioral change and I know the odor is in there," "I know my dog; that's an alert," "I am the only one who can read my dog," "I know what my dog is thinking," and other self-serving, non-verifiable claims that stretch credibility. "Guesses based on the handler's knowledge of their dog's training and past performance are nothing more than educated guesses when their dog fails to make the defined final response during a specific search."[81]

A dog alert should never suffice to establish probable cause. Allowing a dog alert to constitute probable cause essentially reduces the Fourth Amendment to meaningless rhetoric. Although there are many cases in which police dogs have detected the presence of illegal contraband and have properly alerted to contraband that was seized, there are an unknowable number of instances in which individuals have been subjected to invasive and humiliating searches — often involving the destruction of personal property — where no contraband or drugs were present.

The uncertainty of whether a K-9 alert is based on a residual odor, any odor, or the presence of a prohibited substance (assuming a proper "alert" took place), and the potential for handler cueing, are fatal flaws in a system that allows police officers to determine what constitutes a K-9 alert, and then use those subjective interpretations as justification for warrantless searches.

It is preferable to rely upon the criteria of human judges, however imperfect, rather than dogs, when it comes to establishing probable cause. Simply put, the Fourth Amendment is much too important to be left to the dogs! Searches based on K-9 "alerts" are subjective and unreliable, and are often used as a means of circumventing the sanctity of the Fourth Amendment. Warrantless, non-consensual searches require real, solid probable cause and nothing less.

Thanks to my wife Bonnie and my colleague Alex Turner, Esq., for their assistance in preparing this article.

This is a revised version of an article that appeared in the Winter 2011 edition of the Florida Defender, *the magazine published by the Florida Association of Criminal Defense Lawyers.*

Truths

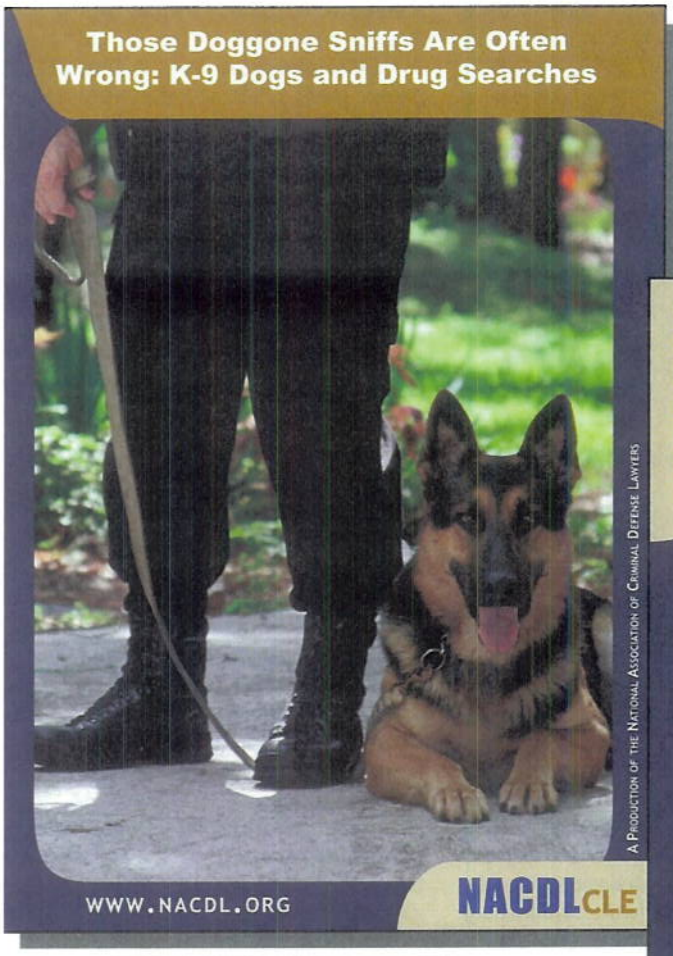
- Drug residue is everywhere.
- Police K-9 dogs often "alert" simply to get a reward regardless of whether a substance the dog has been trained to detect is present.
- K-9 alerts can be based on a residual odor and not the presence of a prohibited substance.
- K-9 alerts are unreliable.
- K-9 alerts are often not alerts.
- Police K-9 handlers may wittingly or unwittingly cause their dogs to alert.
- Fourth Amendment protections should not be forfeited or surrendered based on a supposed K-9 alert or an officer's interpretation that the dog alerted.
- Courts should never conclude that a K-9 alert equals probable cause.

Notes

1. Citing United States v. Sanchez, 417 F.3d 971, 976 (8th Cir. 2005); United States v. Williams, 403 F.3d 1203, 1207 (10th Cir. 2005); United States v. Robinson, 390 F.3d 853, 874 (6th Cir. 2004); United States v. Williams, 365 F.3d 399, 406 (5th Cir. 2004); United States v. Banks, 3 F.3d 399, 402 (11th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994). *But see* United States v. Trayer, 898 F.2d 805, 808 (D.C.Cir. 1990) (dog alert at door of train roomette did not by itself establish probable cause), *cert. denied*, 498 U.S. 839 (1990).

2. *United States v. Place*, 462 U.S. 696

K-9 Dogs and Drug Searches



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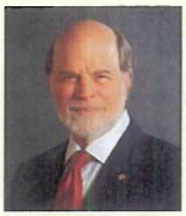

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(1983).

3. *See id.*

4. Jeffrey S. Weiner, *Canines and the Constitution*, 23, no.3 FLORIDA DEFENDER 42, at 46 (Winter 2011) (discussing the lack of standardized training and certification programs for drug detection K-9 dogs).

5. *Jardines v. State of Florida*, 73 So. 3d 34 (Fla. 2011); *Harris v. State of Florida*, 71 So. 3d 756 (Fla. 2011).

6. *State of Oregon v. Foster*, 252 P.3d 292 (Or. 2011); *State of Oregon v. Helzer*, 252 P.3d 288 (Or. 2011).

7. Connaly v. Georgia, 429 U.S. 245 (1977) (a magistrate who was being paid five dollars for each search warrant issued was not being fair and impartial).

8. *See* Jeffrey S. Weiner & Kimberly Homan, *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs*, THE CHAMPION, April 2006 at 13 (citing Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 410-15 (1997)).

9. *Id.*

10. *Id.*

11. *Id.*

12. Harris v. State of Florida, 71 So. 3d 756, 768 (Fla. 2011) (citing Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 12)).

13. *United States v. Warren*, 997 F. Supp. 1188 (E.D. Wis. 1998).

14. United States v. Warren, 997 F. Supp. 1188, 1192 (E.D.Wis. 1998).

15. *Id.* (emphasis added).

16. Madison Park, *90 Percent of U.S. Bills Carry Traces of Cocaine*, CNN, Aug. 14, 2009, *available at* http://articles.cnn.com/2009-08-14/health/cocaine.traces.money_1_cocaine-dollar-bills-paper-bills?_s=PM:HEALTH; *see also* David Biello, *Cocaine Contaminates Majority of U.S. Currency*, SCIENTIFIC AMERICAN, Aug. 16, 2009, *available at* http://www.scientificamerican.com/article.cfm?id=cocaine-contaminates-majority-of-american-currency.

17. *See id.*

18. Tiffany O'Callaghan, *Nearly 90% of U.S. Money Has Traces of Cocaine*, TIME HEALTHLAND, Aug. 16, 2009, *available at* http://healthland.time.com/2009/08/16/nearly-90-of-u-s-money-has-traces-of-cocaine/.

19. *See* Park, *supra* note 16, at 1 (quoting researcher Yuegang Zuo, professor of chemistry and biochemistry at the University of Massachusetts/Dartmouth).

20. HARPER'S INDEX, March 2012, (Magazine) (According to a 2011 Guardian Media study, there is 90 percent chance that a diaper changing table in the U.K. carries trace amounts of cocaine.).

21. Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003) (emphasis added). *Matheson* expressly and directly conflicted with the decision of the First District Court of Appeal in Harris v. State, 989 So. 2d 1214 (Fla. 1st DCA 2008) and was ultimately relied upon by the court in Harris v. State, 71 So. 3d 756 (Fla. 2011).

22. Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB., Jan. 06, 2011, *available at* http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog.

23. *Id.*

24. *Harris*, 71 So. 3d at 759-60.

25. *Id.* (emphasis added).

26. *Id.* at 761.

27. *See* Aguilar v. Texas, 378 U.S. 108 (1964).

28. *Harris*, at 761-62.

29. *Id.* at 760.

30. *Id.*

31. *Id.* at 769 (quoting Myers, *supra* note 12, at 4-5).

32. *Harris*, at 759 and 764.

33. *See generally id.* (An explanation of the training and certification of the particular dog should include details of the training program, criteria for choosing which dogs are selected to be K-9 dogs, length of the training program, what specific drugs were used in training, how the training drugs were packaged, where and how drugs were hidden during training, whether the trainer was aware of the drug's location while testing the dog, details of handler training to avoid false alerts, whether the handlers and their dogs were trained to avoid handler cues or whether the training simulated the variety of environments and distractions typically present in the streets, in addition to field performance records when attempting to establish the reliability of the police dog.).

34. *Id.* (emphasis added).

35. *Id.*

36. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

37. Jardines v. State of Florida, 73 So. 3d 34, 37 (Fla. 2011).

38. *Id.* at 57 (Lewis, J., specially concurring).

39. *Id.* at 37.

40. *Id.* (emphasis added).

41. *Id.* at 36.

42. *Id.* at 37.

43. *See id.* at 40-43 (citing United States v. Place, 462 U.S. 696 (1983) (whether police, based on reasonable suspicion, could temporarily seize a piece of luggage at an airport and then subject the luggage to a "sniff-test" by a drug detection dog); City of Indianapolis v. Edmond, 531 U.S. 32 (2000), (whether police could stop a vehicle at a drug interdiction checkpoint and subject the exterior of the vehicle to a "sniff-test" by a drug detection dog); Illinois v. Caballes, 543 U.S. 405 (2005) (whether police, during the course of a lawful traffic stop, could subject the exterior of a vehicle to a "sniff-test" by a drug detection dog).

44. *Kyllo v. United States*, 533 U.S. 27 (2001).

45. *Jardines*, at 44-45 (citing *Kyllo v. United States*, 533 U.S. 27, at 34-40 (2001)).

46. *Id.* at 64 (Polston, J., dissenting).

47. *See id.*

48. *See* Respondent's Amended Brief in Opposition at 12, Jardines v. State of Florida, 73 So. 3d 34 (Fla. 2011).

49. *Jardines*, at 48-49.

50. *United States v. Place*, 462 U.S. 696 (1983).

51. *See, e.g.*, U.S. CONST. amend. IV.

52. Arizona v. Hicks, 480 U.S. 321 (1987).

53. *Jardines*, 73 So. 3d at 59 (Lewis, J., specially concurring) (citing Soca v. State of Florida, 673 So. 2d 24, 26-27 (Fla. 1996)).

54. *Illinois v. Caballes*, 543 U.S. 405 (2005).

55. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

56. *See generally* Max Stul Oppenheimer, *Cybertrash*, 90 OR. L. REV. 1 (2011) (citing United States v. Karo, 468 U.S. 705 (1984)). *But see* United States v. Knotts, 460 U.S. 276, (1983); United States v. Jones, No. 10-1259, slip op. (U.S. Jan. 23, 2012).

57. *Caballes*, 543 U.S. at 411-413 (Souter, J., dissenting).

58. Florida v. J.L., 529 U.S. 266 (2000).

59. *Jardines*, at 56-57 (Lewis, J., specially concurring) (citing Florida v. J.L., 529 U.S. 266 (2000)) (citing Alabama v. White, 496 U.S. 325, 329 (1990)) (emphasis in original).

60. *See* Weiner & Homan, *supra* note 8, at 13. (citing United States v. Sanchez, 417 F.3d 971, 976 (8th Cir. 2005); United States v. Williams, 403 F.3d 1203, 1207 (10th Cir. 2005); United States v. Robinson, 390 F.3d 853, 874 (6th Cir. 2004); United States v. Williams, 365 F.3d 399, 406 (5th Cir. 2004); United States v. Banks, F.3d 399, 402 (11th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994). *But see* United States v. Trayer, 898 F.2d 805, 808 (D.C. Cir. 1990) (dog alert at door of train roomette did not by itself establish probable cause), *cert. denied*, 498 U.S. 839 (1990)).

61. *See id.*

62. *Harris*, 71 So. 3d at 767 ("We first note that there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs.").

63. Lisa Lit, Julia B. Scweitzer & Anita M. Oberbauer, *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION 3 (2011) at 387-394 *available at* http://www.springerlink.com/content/?k=HANDLER+BELIEFS+AFFECT+SCENT; *see also* Steven D. Nicely, *The Clever Hans Effect on the Judicial*

System, (June 26, 2010) *available at* www.k9consultantsofamerica.com.

64. *Id.*

65. *See* Weiner & Homan, *supra* note 8, at 14.

66. *See id.* at 14 (citing United States v. Heir, 107 F. Supp. 2d 1088, 1091 (D. Neb. 2000); United States v. Stephenson, 274 F. Supp. 2d 819, 824 n.1 (S.D.Tex. 2002) (noting that dogs may be entirely without bias, but their handlers may not be)).

67. *Harris*, at 769 (citing Myers, *supra* note 12, at 5).

68. Bernt Spiegel, THE UPPER HALF OF THE MOTORCYCLE — ON THE UNITY OF RIDER AND MACHINE, 105 (Meredith Hassal trans., Whitehorse Press 2010) (1998) (the author would like to thank Whitehorse Press for permission to republish this excerpt as well as the photograph of a man with his dog).

69. *State of Oregon v. Foster*, 252 P.3d 292 (Or. 2011).

70. *Id.*

71. *Id.*

72. *See* http://nevergetbusted.com/2010/about.

73. Daniel Tencer, *'False Positives' Suggest Police Exploit Canines to Justify Searches*, RAW STORY, Jan. 6, 2011, *available at* http://www.rawstory.com/rs/2011/01/06/false-positives-police-canines-searches/.

74. *See* False K-9 Alert — Liberty Hill Police — Williamson County, Texas *available at* http://www.youtube.com/watch?v=Hkw8KgZ_LhU (uploaded Jan. 30, 2009). Racist Police Dogs?! *available at* http://www.youtube.com/watch?v=uM62JdjZ_Rk (uploaded Jan. 7, 2011). *But see* Barry Cooper — A Drug Dog's True Alert, *available at* http://www.youtube.com/watch?v=VsNnd1cUe5o&feature=related (uploaded Aug. 4, 2007).

75. RON WHITE, *Got in a Little Trouble, on* BEHAVIORAL PROBLEMS (Comedy Central 2009).

76. *Id.*

77. *Oregon v. Helzer*, 252 P.3d 288 (Or. 2011).

78. *State of Oregon v. Helzer*, 252 P.3d 288 (Or. 2011).

79. *Harris*, at 768-69 (quoting Bird, *supra* note 8 at 425).

80. *See* Weiner & Homan, *supra* note 8, at 14 (citing United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir. 1993), where handler testified that he knew how his dog alerted and that the dog had done so on the challenged occasion. In United States v. Diaz, 25 F.3d 392, 394-95, the dog's handler testified that the dog alerted by barking, biting, and scratching, but occasionally would alert by coming to a standstill in order to scent more intently. This latter behavior is likely not a true alert. Similarly, in United States v. Trayer, 898 F.2d 805, 808 (D.C.Cir.), *cert. denied*, 498 U.S. 839 (1990), the handler testified that the dog had been trained as an aggressive alerter, but that, on this occasion, it froze and pointed to the defendant's train compartment "like a bird dog," which was the way it alerted on the majority of occasions. In United States v. Bartz, 2004 WL 1465780 at *5 (S.D. Ind. June 25, 2004), the handler testified that, under controlled circumstances, the dog would alert by sitting and staring, but that it had "intermediate behaviors" on the "path to final response;" *i.e.*, the dog would stretch up on his hind legs and stare if the drug were concealed in a high place or lie down if the drugs were concealed in a low place, and that the handler's training included learning to recognize the changes in the dog's behavior that signaled the presence of drugs. The court concluded that the dog had alerted by stretching up on his hind legs and "locking up" at the minivan's rear bumper. This was, however not a trained final alert; it was an "intermediate behavior." The court also found that the dog had alerted two other times, during neither of which the dog gave his trained final response. *See also* United States v. Gregory, 302 F.3d 805,811 (8th Cir. 2002) (defendant's passenger testified that the dog did not alert; on appeal, court concluded that district court had not clearly erred in crediting handler's testimony that the dog had alerted), *cert. denied*, 538 U.S. 992 (2003)).

81. *See id.* at 13-14 (citing J.G. Aristotelidis, *Trained Canines at the U.S.-Mexico Border Region: A Review of Current Fifth Circuit Law and a Call for Change*, 5 SCHOLAR 227, 230-31 (2003)). ■

About the Author

Jeff Weiner is a former President of NACDL and the Florida Criminal Defense Attorneys Association. He is a nationally Board Certified Criminal Trial Lawyer by the National Board of Legal Specialty Certification. In practice since 1974, he has argued trials and appeals throughout the country, including the U.S. Supreme Court. He is a recipient of the Robert C. Heeney Award, NACDL's highest honor.

Jeff Weiner
Jeffrey S. Weiner, P.A.
Two Datran Ctr., Ste. 1910
9130 S. Dadeland Blvd.
Miami, FL 33156
305-670-9919
Fax 305-670-9299
E-MAIL lawfirm@jeffweiner.com