IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2101
DCA CASE NO. 3D07-1615

JOELIS JARDINES,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

ON APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S AMENDED BRIEF ON THE MERITS

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar No. 0230987

ROLANDO A. SOLER
Assistant Attorney General
Florida Bar No. 0684775
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, FL 33131
Telephone:(305) 377-5441
Facsimile: (305) 377-5655

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INTRODUCTION

References to the record on appeal will be designated by the symbol "R." The symbol "T" refers to the transcript of the June 8, 2007 hearing on the motion to suppress which is included in the supplemental record on appeal. The record on appeal was further supplemented with the affidavit in support of the search warrant.

STATEMENT OF THE FACTS AND THE CASE

In January 2007, defendant was charged by information with one count of trafficking in cannabis, and one count of third-degree grand theft (for stealing the utilities of Florida Power & Light to grow his cannabis). (R. 5-8). On June 5, 2007, defendant filed a "motion to suppress statements and physical evidence" resulting from the execution of a search warrant. (R. 10-14).

The Affidavit for Search Warrant included the following information: (1) Detective Pedraja received information from a crime stoppers tip that marijuana was being grown at a residence; (2) Detective Pedraja conducted surveillance at the residence and observed no vehicles in the driveway; (3) the window blinds were closed; (4) Detective Pedraja, Detective Bartelt (a canine handler) and a drug detection canine approached the residence in an attempt to obtain consent to search; (5) while at the front door, Detective Pedraja detected the smell of live

marijuana; (6) the canine alerted to the odor of one of the controlled substances he is trained to detect; (7) Detective Pedraja knocked on the door of the residence in an attempt to get written consent to search but did not get a response; (8) Detective Pedraja heard an air conditioning unit on the west side of the residence continuously running without recycling; and (9) the combination of these factors is indicative of marijuana cultivation. The affidavit also 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 detailed the extensive training, certifications, experience and reliability of both the canine and his handler.

The following testimony was presented at the hearing on defendant's motion to suppress:

Detective Pedraja arrived at the property at approximately 7:00 a.m and set up surveillance of the residence for 15 minutes before approaching the residence. (T. 11). Detective Pedraja approached the residence at the same time as Detective Bartelt and Canine Frankie. (T. 11; 24; 31). Detective Bartelt, Frankie's handler, testified: "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." (T. 24). Therefore, Detective Bartlet and Frankie "passed

[Detective Pedraja] up in the driveway." (T. 28). Detective Pedraja could not have been in front of Frankie because he would have obstructed Frankie's ability to perform, and could not have stood next to Detective Bartlet "[b]ecause he probably would get knocked over by Frankie when Frankie is spinning around trying to find source." (T. 32-33). Accordingly, Detective Bartelt and Frankie approached the front door ahead of Detective Pedraja; "immediately upon crossing the threshold of the archway . . . , upon entering the alcove of the porch, [Frankie] began tracking [an] airborne odor;" Detective Bartelt did not go up to the front door, he walked up to the archway of the front porch, which was approximately 6 to 8 feet from the front door. (T. 11-14; 21; 24-26; 28; 30-31). Detective Bartelt then extended Frankie's leash and allowed Frankie to go up to the front door. (T. 14). Detective Bartelt testified that, while standing at the entrance to the front porch, he smelled mothballs and realized that he was standing on 2 or 3 mothballs. (T. 29). Detective Bartlet signaled to Detective Pedraja that Frankie had alerted to contraband. (T. 14; 27-28). Detective Bartlet then walked away from the front door and Detective Pedraja approached the front door. (T. 14). When Detective Pedraja approached the front door, he smelled the scent of live marijuana. (T. 14). Detective Pedraja then knocked on the door several times but there was no response. (T. 15). While at the scene, Detective Pedraja heard an air conditioning

unit running continuously for approximately 15 to 20 minutes. (T. 15). Detective Pedraja testified that a hydroponics lab uses high intensity light bulbs which create heat and requires continuous air conditioning. (T. 16). He testified that he did not seek a court order permitting him to obtain the home's utility bills from FPL to determine whether the home was using an excessive amount of electricity because "a lot of these hydroponic labs have a diversion in them where they steal the power. So, even if they were using excessive electricity it wouldn't show significance [sic] in their FP&L bill because they're diverting power." (T. 18-19). He also testified that he would not be able to tell if power was being diverted at the home "just from standing outside." (T. 19-20). There were no cars in the driveway. (T. 20). Detective Pedraja explained that it is typical for there to be very little traffic at hydroponics labs because the perpetrators do not want to be seen by the neighbors or associate with the neighbors, and they are not selling or buying drugs from that location. (T. 20). Detective Pedraja then drove to a location close to the home and began preparing an affidavit for a search warrant, which he later obtained. (T. 16-17).

In his motion, defendant asserted that: the use of the dog sniff to detect the smell of the cannabis inside the home was an unconstitutional search; Detective Pedraja might not have detected the smell of cannabis without the use of the dog

sniff; but-for the illegal dog sniff, there was no probable cause to support the issuance of the search warrant; and, therefore, the physical evidence and statements made as a result of the execution of the warrant should be suppressed as fruits of the poisonous tree.

The trial court granted the motion to suppress stating:

> 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.

(R. 41-42).

In a footnote, the trial court noted: "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." (R. 42).

The state appealed the trial court's order granting the motion to suppress to the Third District Court of Appeal. The Third District reversed 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 because: (1) a canine sniff is not a Fourth Amendment search; (2) the officer and the dog were lawfully present at the defendant's front door; and (3) the evidence seized would inevitably have been discovered. State v. Jardines, --- So.2d ----, 33 Fla. L. Weekly D2455, 2008 WL 4643082, *1-*2 (Fla. 3rd DCA October 22, 2008).

The Third District expressly declined to follow the decision of the Fourth District Court of Appeal in State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006),

which held that a dog sniff at the front door of a home constituted a search, and certified direct conflict with that decision as follows:

> 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.

State v. Jardines, at *7.

Further, as an alternative basis for reversing the trial court's order granting defendant's motion to suppress evidence, the Third District determined that "[e]ven if the dog sniff constituted an illegal search, the evidence seized at Jardines' home would still be admissible under the inevitable discovery rule." State v. Jardines, at *6. The Third District explained that "[b]oth 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 search, Officer Pedraja would, pursuant to normal police practices, have detected the scent of marijuana as he approached

Jardines' door." State v. Jardines, at *7. Accordingly, the Third District concluded:

> 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.

State v. Jardines, at *7.

SUMMARY OF ARGUMENT

The United States Supreme Court has clearly and consistently held that a dog sniff does not constitute a "search" under the Fourth Amendment to the United States Constitution because it does not reveal anything other than the presence or absence of contraband and there can be no legitimate expectation of privacy in contraband. A dog sniff is simply an investigative technique, and a positive alert by a drug sniffing dog simply serves to provide probable cause for a subsequent search; it is the subsequent search that is subject to review under the Fourth Amendment guarantee against unreasonable searches and seizures. The fact that a dog sniff occurs at the front door of a home accessible to the public is of no consequence. In Illinois v. Caballes, the United States Supreme Court specifically stated that its decision was "entirely consistent" with its recent decision in Kyllo v.

United States that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an illegal search. It went on to specifically distinguish a dog sniff from the thermal-imaging device used in Kyllo. Further, in Caballes, the Court upheld a suspicionless dog sniff of the trunk of a car despite the fact that there is a recognized reasonable expectation of privacy in the trunk of one's car which requires reasonable articulable suspicion prior to a Fourth Amendment search. Thus, it is clear that a dog sniff of a home is not a search.

There is no expectation of privacy in a front porch freely accessible to the general public. Therefore, the dog sniff in this case was proper because the police officer and police dog were lawfully present at Petitioner's door when the dog sniff occurred. Further, even if the dog sniff constituted an illegal search, the evidence would still be admissible under the inevitable discovery doctrine.

ARGUMENT

THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

A. A CANINE SNIFF IS NOT A FOURTH AMENDMENT SEARCH.

A legitimate expectation of privacy cannot be violated when the governmental conduct at issue can reveal nothing about non-contraband items or innocent activity. The use of a specially trained dog does not reveal to a human police officer anything other than the presence or absence of contraband, and this

information is not mere circumstantial evidence of a crime, it is the very gravamen of the crime itself.

In United States v. Place, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), the Court held that subjecting a traveler's luggage in an airport to a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment because the information obtained through this investigative technique revealed only the presence or absence of narcotics. The Court explained:

> 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.

Id. at 707. [Emphasis added.]

The United States Supreme Court confronted a similar situation in United States v. Jacobsen, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984). It held that a chemical field test of a substance found inside a package was not a Fourth Amendment search and did not compromise any legitimate privacy interest because the test merely discloses whether or not a particular substance is cocaine, and there is no legitimate interest in possessing cocaine. During an examination of a damaged package, the employees of a private freight carrier observed a white powdery substance, originally concealed within eight layers of wrappings. They summoned a federal agent, who removed a trace of the powder, subjected it to a chemical test and determined that it was cocaine. The question presented to the United State Supreme Court was whether the Fourth Amendment required the agent to obtain a warrant before testing the powder. The Jacobsen Court explained:

> The question remains whether the additional intrusion occasioned by the field test, which had not been conducted by the Federal Express agents and therefore exceeded the scope of the private search, was an unlawful "search" or "seizure" within the meaning of the Fourth Amendment.

> The field test at issue could disclose only one fact previously unknown to the agent-whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder. We must first determine whether this can be considered a "search" subject to the Fourth Amendment-did it infringe an expectation of privacy that society is prepared to consider reasonable?
>
> The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities. Indeed, this distinction underlies the rule that Government may utilize information voluntarily disclosed to a governmental informant, despite the criminal's reasonable expectation that his associates would not disclose confidential information to the authorities.

Id. at 122-23.

The Court noted:

> Obviously, however, a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.' His presence, in the words of Jones [v. United States, 362 U.S. 257, 267, 80 S.Ct. 725, 734, 4 L.Ed.2d 697 (1960)], is 'wrongful,' his expectation of privacy is not one that society is prepared to recognize as 'reasonable.' Katz v. United States, 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring). And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in

> criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Rakas v. Illinois, 439 U.S. 128, 143-144, n. 12, 99 S.Ct. 421, 430-431, n. 12, 58 L.Ed.2d 387 (1978). See also United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (use of a beeper to track car's movements infringed no reasonable expectation of privacy); Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (use of a pen register to record phone numbers dialed infringed no reasonable expectation of privacy).

Id. at 123, fn. 22. The Court went on to explain:

> **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.**
>
> * * *

> 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.

Id. at 123-24. [Emphasis added.] It further noted:

> Respondents attempt to distinguish Place arguing that it involved no physical invasion of Place's effects, unlike the conduct at issue here. However, as the quotation makes clear, the reason this did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items. That rationale is fully applicable here.

Id. at 124, fn. 24. [Emphasis in original.] Therefore, Jacobsen confirms that Place stood for proposition that a legitimate expectation of privacy cannot be violated when the governmental conduct can reveal nothing about noncontraband items.

In Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Court held that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Kyllo involved the use of a mechanical device which detected heat radiating from the walls of a home. In United States v. Broadway, 580 F.Supp.2d 1179 (D.Colo 2008), the court explained:

> The Kyllo Court emphasized that requiring a warrant for the use of thermal imaging technology

"assures preservation of that degree of privacy against government that existed when the *Fourth Amendment* was adopted." Kyllo, 533 U.S. at 34-35, 121 S.Ct. 2038. Quoting Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court further noted: "The *Fourth Amendment* is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted." Kyllo, 533 U.S. at 40, 121 S.Ct. 2038. Thus, if "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Id.

It cannot seriously be argued that a dog can explore "details of the home" that would "previously have been unknowable" without physical intrusion. As early as 800 B.C., Homer told the story of Argos-a dog raised by Ulysses before setting out for Troy-who recognized Ulysses disguised as a beggar. In 1848, John Lord Campbell recounted the tale of Sir Thomas More, after being appointed Lord Chancellor in October 1529, employing a beggar-woman's little dog to discover her identity. John Lord Campbell, 1 the Lives of the Lord Chancellors 548-49 (3d ed. 1848). In 1918, a court in Kentucky noted dogs had been employed as scent-detectors for hundreds of years. See Fitzgerald v. Maryland, 153 Md.App. 601, 837 A.2d 989, 1037 (2003) (citing Blair v. Kentucky, 181 Ky. 218, 204 S.W. 67, 68 (Ky.Ct.App.1918)). To the extent a dog can detect a scent, therefore, it does not detect anything that "would have been unknowable" without physical intrusion when the *Fourth Amendment* was adopted in 1791. Cf. Cusumano, supra, 67 F.3d at 1509 (distinguishing a thermal imaging device from "the less refined tools of days past"). Moreover, it cannot be doubted that a dog sniff-unlike a thermal imaging device-does not reveal "details of the home" because a dog sniff-unlike a thermal imaging device-does not reveal any details at all,

but "informs the police instead merely of a reasonable chance of finding contraband they have yet to put their hands on." See Caballes, supra, 543 U.S. at 416, 125 S.Ct. 834 (Souter, J., dissenting).

Further-unlike the thermal imaging devices in Kyllo-a dog sniff does not detect "information regarding the interior of the home" that could not otherwise have been obtained without "physical 'intrusion into a constitutionally protected area.' " Kyllo, 533 U.S. at 34, 121 S.Ct. 2038 (quoting Silverman v. United States, 365 U.S. 505, 512, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). Simply put, a dog-unlike a thermal imaging device-does not detect anything inside a home, but merely detects the particulate odors that have escaped from a home. In that sense, the odors are no longer "private," but instead are intermingled with "the public airspace containing the incriminating odor." See Morales-Zamora, supr*a*, 914 F.2d at 205. No physical intrusion is-or historically has been-required to detect suspicious odors. See, e.g., Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (noting the smell of opium emanating from a room provides probable cause to believe opium is being smoked inside); Taylor v. United States, 286 U.S. 1, 6, 52 S.Ct. 466, 76 L.Ed. 951 (1932) (noting police officers-as they "approached the garage"-relied on their sense of smell to determine "the odor of whisky coming from within"); Venema, supra, 563 F.2d at 1005 (holding the detection of odors outside the locker involved "no physical trespass of the locker itself"). The fact that the smell at issue here was detected by a dog rather than a human does not change its fundamental non-private nature. Cf. United States v. Bronstein, 521 F.2d 459, 461 (2d Cir.1975) (noting the constitutional privacy interest in a smell is the same whether the smell is detected by a canine nose or a human nose). Accordingly, I hold that "as long as the canine unit is lawfully present when the sniff occurs, the 'canine sniff is not a search within the meaning of the *Fourth*

> *Amendment*.' " Meindl, supra, 83 F.Supp.2d at 1217 (quoting Reed, supra, 141 F.3d at 650).

Id. at 1190-91. Further, a dog is not a sensory enhancing tool. Unlike, for example, the use of binoculars to enhance a human's sense of sight, a dog does not enhance or simply augment the human police officer's own sense of smell. If it did, then the human police officer might be able to detect legitimate odors inside the home along with the odor of contraband, as did the thermal-imaging device utilized in Kyllo. Instead, the use of a dog does not reveal to the human police officer anything other than the presence or absence of contraband in the residence. Moreover, the investigative technique employed in Kyllo detected only circumstantial evidence of crime, not the very gravamen of crime itself, i.e., the contraband.

In Illinois v. Caballes, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005), the Court held that a dog sniff of a vehicle during a traffic stop, conducted absent reasonable suspicion of illegal drug activity, did not violate the Fourth Amendment because it did not implicate any legitimate privacy interest. The Court explained:

> **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, 104 S.Ct. 1652. **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." 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, 103 S.Ct. 2637-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.

Id. at 408-09. (Emphasis added.) See Johnston, "Drugs, Dogs, and the Fourth Amendment: An Analysis of Justice Stevens' Opininion in Illinois v. Caballes,"24 Quinnipiac L. Rev. 659 (2006). The Court in Caballes specifically noted 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 the growth of marijuana in a home constituted an unlawful search. Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 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.

Id. at 409-10. (Emphasis added.)

The Third District therefore explained:

> Based on this reasoning, we reject the notion that Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (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, 121 S.Ct. 2038 ("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, 103 S.Ct. 2637. 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.

State v. Jardines, 2008 WL 4643082 at *3.

Thus, there are two concepts central to the decisions of the United States Supreme Court: there is no legitimate expectation of privacy in the odor of contraband, and a sniff by a drug-detection dog will alert only to contraband and will not provide any information about lawful activity over which there may be a

legitimate expectation of privacy. Accordingly, a dog sniff is not a Fourth Amendment search.

In United States v. Brock, 417 F.3d 692 (6th Cir. 2005), the police were informed by the defendant's roommate that the defendant rented a room at a house they shared and used the room as a "stash house." The defendant's roommate consented to a search of the common areas of the house. A drug-sniffing police canine alerted to the presence of narcotics while sniffing just outside of the defendant's locked bedroom door. The police used the information provided to them by the roommate and the dog sniff to procure a search warrant for the entire house. At trial, the defendant moved to suppress the contraband discovered in his bedroom, arguing that the search warrant was illegal because it was issued in reliance on the dog sniff which was an illegal warrantless search. The Court held that the dog sniff from the common area of the defendant's residence, where police were lawfully present with the consent of the defendant's roommate, did not violate the defendant's Fourth Amendment rights. The Court explained:

> Defendant tries to distinguish [Place, Jacobsen and Caballes] on the ground that he has a far greater privacy interest inside his home, particularly inside the bedroom, than one has in a public space or even a car. He relies on the Court's decision in Kyllo, which held that the use of a thermal-imaging device to detect relative amounts of heat within a private home was a Fourth Amendment search and must be supported by probable cause and a

warrant. In Kyllo, the Court held that where the government uses "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Id. at 40.

Kyllo does not support defendant's position. The Kyllo Court did reaffirm the important privacy interest in one's home. *See* id. at 37 ("In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."). However, as the Court subsequently explained in Caballes, it was essential to Kyllo's holding that the imaging device was capable of detecting not only illegal activity inside the home, but also lawful activity, including such intimate details as "at what hour each night the lady of the house takes her daily sauna and bath." Caballes, 125 S. Ct. at 838 (quoting Kyllo, 533 U.S. at 38). As the Court emphasized, an expectation of privacy regarding lawful activity is "categorically distinguishable" from one's "hopes or expectations concerning the nondetection of contraband in the trunk of his car." Id. Based on this reasoning, **we hold that the dog sniff inside Brock's residence 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.**

Defendant's contention that the dog could have been wrong in alerting to his bedroom, even if supported, would not affect whether the sniff itself was a search. A false alert would not reveal any private information about what was behind Brock's door, although the dog's error rate might affect whether a warrant issued in reliance on the dog sniff was supported by probable cause. In any event, Brock does not challenge Yoba's qualifications, nor does he argue that the totality of the evidence,

including the dog's alert to his bedroom, was insufficient to support the search warrant.

This conclusion is consistent with previous decisions of this Court, as well as those of **the majority of our sister circuits, which have held that canine sniffs used only to detect the presence of contraband are not Fourth Amendment searches.** See United States v. Vasquez, 909 F.2d 235, 238 (7th Cir.1990) (collecting cases) (canine sniff of a private garage from a public alley was not a warrantless search). Accord United States v. Reed, 141 F.3d 644, 650 (6th Cir.1998) (where canine team was lawfully present inside a home, the canine sniff itself was not a Fourth Amendment search); United States v. Reyes, 349 F.3d 219, 224 (5th Cir.2003) (dog sniff of passengers exiting bus from distance of four to five feet was not a Fourth Amendment search); United States v. Roby, 122 F.3d 1120, 1125 (8th Cir.1997) (defendant's reasonable expectation of privacy in his hotel room did not extend to hallway outside his room, and no warrant was needed to bring trained dog to conduct a narcotics sniff in hallway); United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir.1993) (canine sniff of a commercial warehouse was not a search because defendant "could have no legitimate expectation that a narcotics canine would not detect the odor of marijuana"); United States v. Colyer, 878 F.2d 469, 477 (D.C.Cir.1989) (dog sniff of a sleeper car from train's public corridor was not a search because it was not overly intrusive and "did not expose noncontraband items that otherwise would remain hidden from view"). But see United States v. Thomas, 757 F.2d 1359, 1366-67 (2d Cir.1985) (canine sniff of doorway outside defendant's apartment was a search because it impermissibly intruded on defendant's legitimate expectation that the contents of his closed apartment would not be sensed from outside his door).

> Whatever subjective expectation Brock might have had that his possession of narcotics would remain private, that expectation is not one "that society is prepared to consider reasonable." Jacobsen, 466 U.S. at 113, 104 S.Ct. 1652. **The Second Circuit's holding to the contrary in Thomas, on which defendant relies, has been rightly criticized.** See Lingenfelter, 997 F.2d at 638 (Thomas's implication "that a person has a reasonable expectation that even contraband items hidden in his dwelling place will not be revealed" is inconsistent with Supreme Court precedent); Colyer, 878 F.2d at 475 (questioning correctness of Thomas's assertion that possessor of contraband "had a legitimate expectation that the contents of his closed apartment would remain private").

Id. at 695-697. [Emphasis added.]

Therefore, the Court in Brock noted that the majority of federal circuit courts have held that canine sniffs used only to detect the presence of contraband are not Fourth Amendment searches. This same observation was also recently made in People v. Jones, 755 N.W.2d 224, 228 (Mich. Ct. App. 2008). See also United States v. Chapman, 2009 WL 301906 (E.D. Tenn. February 6, 2009) ("Where the canine unit is lawfully present [on the front porch of a defendant's home], a sniff by a drug-detection dog does not violate the Fourth Amendment.").

Likewise, "the vast majority of state courts [including Florida] considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment

search." People v. Jones, 755 N.W.2d at 228. In People v. Jones, the Court explained:

> the holding in Place did not turn on the location of a canine sniff. Central to the holding in Place and its progeny is the fact that a canine sniff detects only contraband, in which there is no legitimate expectation of privacy. The heightened expectation of privacy that a person has in his residence is irrelevant under Place's rationale. Whether or not a heightened expectation of privacy exists, the fact remains that a canine sniff reveals only evidence of contraband. Place, supra at 707; Jacobsen, supra at 122-124. The only relevant locational determination is whether the canine was lawfully at the location where the object was sniffed. The location or circumstance of the sniff is relevant only to determine whether the presence of the canine and the officer at the location was constitutional.
>
> * * *
>
> a canine sniff is simply not a search or an intrusion on an expectation of privacy that implicates the Fourth Amendment under Caballes, Place, and their progeny, where the police and the canine are lawfully present at the location at issue, **even if it is at the front door of a defendant's home**.

People v. Jones, 755 N.W.2d at 229. (Emphasis added). In Rodriguez v. State 106 S.W.3d 224 (Tex. App. 2003), the court stated:

> A "search" does not occur, for *Fourth Amendment* purposes, even when the explicitly protected area of a house is concerned, unless a reasonable expectation of privacy exists in the object of the challenged search. There is no legitimate expectation or interest in "privately" possessing an illegal narcotic. **An investigative method that can only detect the existence**

> **of illegal items in a home and does not reveal legal information about the interior of a home, is not a search for *Fourth Amendment* purposes**. Therefore, 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.

Id. at 228-29. (Citations omitted; Emphasis added).

In Nelson v. State, 867 So.2d 534 (Fla. 5th DCA 2004), the Fifth District held "that a trained dog's detection of odor [of contraband] in a common corridor [of a hotel] does not contravene the Fourth Amendment. The information developed from such a sniff may properly be used to support a search warrant affidavit." Id. at 537. The Court found that the defendant had an expectation of privacy in his hotel room, but his reasonable privacy expectation did not extend to the corridor outside the room. The Court noted, relying on Place and Jacobsen, that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed, and no legitimate expectation of privacy is impinged by governmental conduct that can reveal nothing about noncontraband items. It explained: "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected

by the Fourth Amendment." Id. at 537. Notably, Nelson was decided before Caballes, which provides further support for the Fifth District's holding.

In State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006), the Court held that a dog sniff at the exterior of a house is a search under the Fourth Amendment. In so holding, the Fourth District relied exclusively on Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). The Fourth District reasoned:

> 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.

Id. at 1184. (Emphasis added.).

> To this end, we re-emphasize our discussion of Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150

> L.Ed.2d 94 (2001). In that discussion, **we stress that the nature of what the dog detects-whether phrased as the quality or quantity of information or the presence or absence of contraband-is not the focus of Fourth Amendment concern**. The Fourth Amendment concern is that the government endeavored at all to employ sensory-enhancing methods to cross the firm line at the entrance of a house. Id. at 593, 100 S.Ct. 1371. Once that line is violated by a dog's nose or a thermal imager, it brings an onslaught of prying government eyes in its wake, and the formerly intimate details of that house become open to public display. This reality, in which other intimate and fully legal details of an individual's life could be revealed, again sets the present case apart from Caballes and Place. Vehicles on public roadways and luggage in airports are simply different because the privacy to be invaded by government's prying eyes is necessarily limited by the size of the vehicle or bag, plus only the effects of one's traveling life chosen to appear outside the home and in public are at risk of exhibition. Once again, the risks to privacy are greatest at the threshold of the house; what may be tolerable on a public roadway or in an airport may not necessarily be countenanced at home. After all, "[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." Kyllo, 533 U.S. at 37, 121 S.Ct. 2038. In sum, the distinguishing feature between Kyllo and Caballes is that Kyllo involved a search of a private house, but Caballes involved a search of a vehicle lawfully stopped on a public street. The constitutionally-suspect dog sniff in this case involved the visibly unattainable interior of a private house rather than a vehicle lawfully stopped on a public street, further demonstrating that the outcome of the case at bar is controlled by Kyllo.

Id. at 1190. (Emphasis added.).

Rabb is incorrectly decided and contrary to the United States Supreme Court's reasoning in Caballes. It was "of no importance [to the Fourth District] that a dog sniff provides limited information regarding only the presence or absence of contraband," and the Fourth District "stress[ed] that the nature of what the dog detects – whether phrased as the quality or quantity of information or the presence or absence of contraband – is not the focus of Fourth Amendment concern." However, the *sui generis* nature of a dog sniff was of critical and dispositive significance to the United States Supreme Court in determining that a dog sniff is not a Fourth Amendment search. Further, contrary to the Fourth District's determination that the smell of marijuana was an "intimate detail" of Rabb's house, the United States Supreme Court concluded that contraband cannot be an "intimate detail" because there is no legitimate expectation of privacy in contraband. Moreover, the Fourth District completely ignores the fact that Caballes specifically distinguished the thermal-imaging device used in Kyllo from a dog sniff. Finally, in Caballes the Supreme Court determined that the officers needed no suspicion to conduct a dog sniff of the car despite the fact that there is a recognized expectation of privacy in the trunk of a car. Therefore, the fact that a car or a home is sniffed is not dispositive; it is the binary nature of a dog sniff and the lack of a legitimate expectation of privacy in contraband that are dispositive.

The dissent in Rabb explained that the dog "stood on constitutionally unprotected ground at the moment of his sniff." Id. at 1196. Further, "[t]here is no legal distinction between officers in an airport with the suspect's luggage, as in Place, and the officers and dog at the front door of Rabb's residence in this case. The Fourth Amendment did not preclude the officers in either case from being where they were when the canine sniff took place." Id. at 1197. The dissent further explained that:

> The [United States Supreme Court in Caballes] distinguished Caballes from Kyllo which involved the use of a thermal-imaging device to detect the growth of marijuana in a home. Crucial in Kyllo "was the fact that the device was capable of detecting lawful activity," unlike a trained dog. Caballes, 125 S.Ct. at 838. Contrary to the majority's contention, Caballes does not turn on the location where a dog sniff occurs.
>
> The majority fails to grasp the importance of the two concepts central to Place, Jacobsen, and Caballes. There is no legitimate expectation of privacy in the odor of contraband; a well-trained dog will alert only to contraband, and not to odors or other things protected by the Fourth Amendment. This is not a case where the defendant challenged the dog's training or experience. The majority's misunderstanding is evident from the statement that the "dog's sense of smell crossed the 'firm line' of Fourth Amendment protection at the door of Rabb's house." Rather, it was the constitutionally unprotected odor of contraband that crossed the threshold of the home to the dog's nose, which sniffed from a place open to the public.

Id. at 1198-99.

The dissent in Rabb aptly discussed Nelson v. State, supra, as follows:

> Finally, the majority opinion struggles at length to distinguish Nelson v. State, 867 So.2d 534 (Fla. 5th DCA 2004). Seven words summarize the majority's reasoning: [A] hotel room is not a house. The majority thus avoids conflict by creating an exception to Place and Caballes. However, one has an expectation of privacy in a hotel room similar to that in a home. Both a hotel hallway and front doorstep are open to the public. The dog sniff in each case should be judged by the same standards. No other area of Fourth Amendment law is as schizophrenic as the majority has made this one. What is good for the home should be good for the Hilton.

Rabb at 1202-03.

Thus, the Fourth District in Rabb misinterpreted the precedent of the United States Supreme Court which clearly provides that there is no legitimate expectation of privacy in the odor of contraband, a sniff by a drug-detection dog will alert only to contraband and will not provide any information about lawful activity over which there may be a legitimate expectation of privacy, and therefore, a dog sniff is not a Fourth Amendment search.

In Stabler v. State, 990 So.2d 1258 (Fla. 1st DCA 2008), the First District expressly disagreed with the holding in Rabb and certified direct and express conflict with Rabb. The First District held that a dog sniff at the front door of an apartment, which occurred while the dog was located on a common walkway

within the apartment complex, did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest. The Court explained that:

> the appellant had neither a legitimate interest in possessing the cocaine, nor a legitimate expectation that the cocaine hidden in the apartment would not be revealed. Moreover, the binary nature of a dog sniff renders it unique in that it is distinguishable from traditional search methods. Thus, we conclude that the dog sniff at the front door of the apartment did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest. Paramount to this conclusion is the fact that the dog was located on a common walkway within the apartment complex when the sniff occurred.

Id. at 1263.

Petitioner raises concerns about the reliability of drug detection dogs. However, the fact that a dog may alert on noncontraband items "is not, of course, to deny that a dog's reaction may provide reasonable suspicion, or probable cause, to search the container or enclosure; the *Fourth Amendment* does not demand certainty of success to justify a search for evidence or contraband." Illinois v. Caballes, 543 U.S. at 413 (Souter, J. dissenting). As explained by Professor LaFave, the training and reliability of a particular dog is a question to be considered by the magistrate in determining whether sufficient probable cause exists to issue a search warrant, and is separate from the question whether a dog sniff is a *Fourth Amendment* search:

> In light of the careful training which these dogs receive, an "alert" by a dog is deemed to constitute probable cause for an arrest or search if a sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband. The more difficult question, which is of primary concern here, is whether such use of "canine cannabis connoisseurs" or similarly trained dogs itself constitutes a search so as to be subject to the limitations of the Fourth Amendment.

1 Wayne R. LaFave, Search and Seizure, §2.2(g), p. 526 (4th ed. 2004). Of course, as stated above, the question whether a dog sniff in general is a *Fourth Amendment* search has been answered in the negative by the United States Supreme Court in United States v. Place, supra, and most recently in 2005 in the case of Illinois v. Caballes, supra. Further, a search warrant is obviously required before the police may search a home, and therefore, a neutral and detached magistrate will have the opportunity to scrutinize the training, qualifications and history of the particular dog in question as a factor in determining whether probable cause exists for a search warrant. As explained by Professor LaFave:

> It may be argued, of course, that this objection is irrelevant to the matter here under discussion. If these dogs are not as accurate as the Court assumed in *Place* then, it might be reasoned, this bears not so much on the question of whether the dog's sniffing is itself a search as it does on the question of whether the dog's "alert" standing alone constituted probable cause supporting a *real* search of the effects or person to which the dog

> reacted. **By thus focusing upon the probable cause issue, one of two conclusions would be reached: (1) that the "well-trained narcotics detection dog" referred to in *Place* may sometimes be mistaken (as in *Doe*), but nonetheless is sufficiently accurate to provide the degree of probability of contraband needed under the Fourth Amendment probable cause test**; or (2) that because of the possible unreliability some independent corroboration is needed, meaning not that the wholesale use of dogs described earlier would be impermissible, but rather that once the dog alerted to a particular container additional investigation disclosing other suspicious circumstances would be necessary before a warrant could issue. While **the lower courts and a plurality of the Supreme Court appear to accept the first of these conclusions**, it is well to remember that with rare exception the cases have involved situations in which the alert occurred after a pre-existing reasonable suspicion. In any event, acceptance of the latter conclusion would make the *Place* reasoning more convincing, for whether this problem of reliability is seen as one of probable cause or Fourth Amendment intrusion, unquestionably the extent to which there exists a risk of error weakens the Court's claim that "only the presence or absence of narcotics" will be disclosed.

1 Wayne R. LaFave, Search and Seizure, §2.2(g), p. 533-34 (4th ed. 2004). (Emphasis added). In other words, the question of the reliability of a dog sniff is relevant to the probable cause determination in each particular case and the reliability of each particular dog. Respondent submits that in cases such as the instant case which involve a home, unlike cases involving the dog sniff of a person or a vehicle during a traffic stop, the risk of a false alert is adequately addressed by

the requirement of a search warrant prior to the "real" search of the home. Not every action that eventually leads to a search becomes part of the search itself. If so, any activity intended to obtain probable cause would require a warrant. In determining whether probable cause exists for a search warrant, a neutral and detached magistrate is able to scrutinize the particular dog's training, qualifications, and "track record" including the number of prior false alerts.

Any intuitive concerns as to the reliability of dog sniffs more likely stem from the probable cause standard than from the dog sniff itself. In fact, the United States Supreme Court dismissed the concern over the reliability of a drug dog in Illinois v. Caballes, supra, a case which involved the search of a motor vehicle after a traffic stop, as follows:

> **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** . . .

Id. 543 U.S. at 409. (Emphasis added.) Concerns about the inaccuracy of dog sniffs have existed for many years, and yet the U.S. Supreme Court has chosen time and again to determine that a dog sniff is not a search.

Here, there was no evidence impugning the dog's reliability. The affidavit for the search warrant provided the following information:

> Since becoming a team, Detective Bartelt and narcotics detector canine "FRANKY" have received weekly maintenance training in accordance with established Miami-Dade Police Department procedures, including controlled negative testing and distracter training, as well as continuing training in basic and advanced search techniques. Narcotics detector canine "FRANKY" is trained to detect the odor of narcotics emanating from the following controlled substances to wit: marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy. Upon detection of the odor of any of these controlled substances, "FRANKY" is trained to sit at the source of the odor, and will exhibit a noticeable change in behavior. The canine's change in behavior indicates that he has detected the odor of one or more of the controlled substances he is trained to detect. 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.

(S.R. 6). Further, Petitioner did not challenge the dog's reliability in his written motion to suppress the evidence, or at the hearing on the motion. (R. 10-13; T. 1-77). Accordingly, there is absolutely no evidence in the record that the dog was in any way unreliable and the trial court obviously did not make any such findings. (R. 41-42). Indeed, "Franky" correctly detected the presence of contraband in this

case. Finally, in this particular case, even if there had been reason to question the dog's reliability, the other facts included in the affidavit for search warrant were more than enough to provide probable cause for the "real" search of Petitioner's residence. These facts included: (1) an anonymous tip; (2) an air conditioning unit continuously running without recycling at 7:00 a.m.; (3) no vehicles in the driveway; (4) closed window blinds; and, most importantly, (5) the detection of the smell of live marijuana by Detective Pedraja. The combination of these factors is certainly sufficient to establish probable cause for a search warrant.

In conclusion, "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. Jones, 755 N.W.2d at 228. A canine sniff is simply an investigative technique which may or may not establish probable cause for a subsequent search; it is the subsequent search that is subject to review under the Fourth Amendment guarantee against unreasonable searches and seizures.

B. THE OFFICER AND DOG WERE LAWFULLY PRESENT AT PETITIONER'S FRONT DOOR.

Petitioner does not contest the determination by the Third District Court of Appeal that Detective Pedraja had every right to walk to Petitioner's front door,

and was therefore lawfully present at Petitioner's front door at the time of the dog sniff. 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 a salesman or visitor may appear at any time."); State v. Pereira, 967 So.2d 312, 313 (Fla. 3d DCA 2007) ("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."); 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").

Petitioner contends only that this Court should adopt the position taken by Judge Cope in his opinion in this case concurring in part and dissenting in part. Judge Cope first "agree[d] with that part of the majority opinion which holds that a warrant is not necessary for a drug-dog sniff, and agree[d] on certifying direct conflict with" State v. Rabb. State v. Jardines, supra at *8. Therefore, by determining that a search warrant is not necessary for a dog sniff at the threshold of a home, and thereby rejecting "option one" of his analysis, Judge Cope apparently acknowledges that a dog sniff from a front porch does not constitute a *Fourth Amendment* search of the home; if it did, it would obviously require probable cause

and a search warrant. Thus, the issue is reduced to whether a dog sniff of a front porch is permissible without reasonable suspicion.

Indeed, in this case, the odor was clearly emanating from the home and was present on the front porch. Detective Bartelt testified that he had been standing on mothballs at the entrance to the front porch. It is reasonable to infer that the odor was present at the front porch and was so strong that mothballs were used in an attempt to hide the odor. Further, Detective Pedraja testified that he smelled the odor of live marijuana when he stood on the porch.

Judge Cope acknowledges that "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." State v. Jardines, supra at *9. However, "a drug sniff is permissible at the door of a dwelling only if there is a reasonable suspicion of drug activity." Id. at 8. Judge Cope states that "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." Id. (Emphasis added.)

Respondent respectfully submits that if there is no reasonable expectation of privacy in a front porch accessible to the public which would preclude a human police officer from approaching the front door of the home without reasonable suspicion of criminal activity, and a dog sniff is not a search under the *Fourth Amendment*, then the dog's presence is of no consequence and there is no reason to require reasonable suspicion of drug activity prior to a dog sniff of a front porch. While a human police officer would be able to detect lawful as well as unlawful activity at the front porch, the dog would be able to detect only contraband. Further, because a dog sniff is not a search, there exists no valid constitutional basis for subjecting it to a suspicion requirement. Moreover, a dog sniff is much less intrusive than a knock on the door by a police officer. In fact, it may take place when no one is inside the residence, and even those inside the residence would likely not even know it occurred. Petitioner was not even inside the residence at the time of the dog sniff. Therefore, to conclude that there is some reasonable expectation of privacy to be free from police canine sniffs at the front porch, but no such expectation of privacy with regard to the presence of a human police officer does not make sense.

Petitioner relies only upon State v. Ortiz, 600 N.W.2d 805, 820 (Neb. 1999) and People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990). Respondent respectfully

submits that reliance on these cases is misplaced. In Dunn, the court specifically held that a dog sniff "to detect the presence of controlled substances in a person's apartment . . . does not implicate the protections of the Fourth Amendment." People v. Dunn, 564 N.E.2d at 1055. In so holding, it specifically determined that United States v. Place was applicable to "residential sniffs" and that "the heightened expectation of privacy that a person has in his residence, is irrelevant under Place's rationale." Id. The court went on to hold that its state constitution required reasonable suspicion before a dog sniff may be employed. In Ortiz, the court concluded that "a canine sniff for illegal drugs conducted at the threshold of a dwelling detects information regarding the contents inside the home, and an individual has a legitimate expectation of privacy inside the home even as to these unworthy contents." State v. Ortiz, 600 N.W.2d at 823. However, as explained above, a dog sniff from a front porch does not constitute a *Fourth Amendment* search of the inside of the home, and there is no legitimate expectation of privacy in contraband. The Ortiz court further concluded that "an occupant has a legitimate expectation of some measure of privacy in the hallway immediately outside his or her apartment or at the threshold of his or her home. Given such constitutional protection, before a drug-detecting canine can be deployed to test the threshold of a home, the officers must possess at a minimum reasonable,

articulable suspicion that the location to be tested contains illegal drugs." Id. However, as explained above, Florida does not recognize any expectation of privacy in, and does not provide constitutional protection for, a front porch accessible to the public.

To the extent Ortiz and Dunn held that a dog sniff may be a search under their state constitutions, Respondent notes that the searches and seizures provision of the Florida Constitution is interpreted in conformity with the Fourth Amendment of the United States Constitution. Art. I, § 12, Fla. Const (providing "[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."); Perez v. State, 620 So.2d 1256, 1258 (Fla. 1993).

Further, Ortiz was decided before the United States Supreme Court decided Kyllo in 2001 and Caballes in 2005. The Nebraska Supreme Court's analysis only perfunctorily discussed Place and focused mainly on state courts' holdings based on their state constitutions. In Caballes, the United States Supreme Court granted certiorari on the following question: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Illinois v. Caballes, 543 U.S. at 407. The Court held that reasonable suspicion was not required to justify a dog sniff of the

exterior of the vehicle. The Nebraska Supreme Court in Ortiz did not have the benefit of the Caballes decision. Judge Cope contends that "the Caballes Court was careful to tie its holding to the facts of the case:" i.e., the trunk of a car during a lawful traffic stop. State v. Jardines, supra, at *11. However, Respondent respectfully submits that there is no expectation of privacy in a front porch accessible to the public, whereas there is generally an expectation of privacy in the locked trunk of a motor vehicle. Further, a dog sniff of a front porch is no more intrusive than a sniff of a motor vehicle. Accordingly, there is no apparent reason to hold that the logic of Caballes does not apply to a front porch, particularly when it is conceded that the dog sniff at the front porch does not require a search warrant and therefore does not constitute a search of the inside of the home.

C. EVEN IF THE DOG SNIFF CONSTITUTED AN ILLEGAL SEARCH, THE EVIDENCE WOULD STILL BE ADMISSIBLE UNDER THE INEVITABLE DISCOVERY RULE.

In its written order, the trial court stated: "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." (R. 42). The trial court erred in refusing to consider this evidence in

determining whether sufficient probable cause existed to support the search warrant.

The "fruit of the poisonous tree" doctrine does not automatically render any and all evidence inadmissible. A court may admit such evidence if the State can show that an independent source existed for the discovery of the evidence, or the evidence would have inevitably been discovered in the course of a legitimate investigation. Moody v. State, 842 So.2d 754, 759 (Fla. 2003).

This Court has explained: For "evidence to be admissible it is not necessary that it have been found independently of the [illegal police procedure] if there was a reasonable probability that in the normal course of events it would have been found independently." Craig v. State, 510 So.2d 857, 862 (Fla. 1987).

> One basis for finding that the connection between a constitutional violation and the questioned evidence is severed or attenuated is the fact that the police were able to obtain the same evidence from a separate and independent source not affected by the unlawful police conduct. Closely related to the independent source doctrine is the rule that the exclusionary rule will not be applied where it can be shown that, had the evidence in question not been obtained by the challenged police conduct, it "ultimately or inevitably would have been discovered by lawful means."

Id.

Under the "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." Fitzpatrick v. State, 900 So.2d 495, 514 (Fla. 2005); Maulden v. State, 617 So.2d 298, 301 (Fla. 1993). "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." Fitzpatrick v. State, 900 So.2d at 514; Moody v. State, 842 So.2d 754, 759 (Fla. 2003); see also Jeffries v. State, 797 So.2d 573, 578 (Fla. 2001); Maulden v. State, 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." Fitzpatrick v. State, 900 So.2d at 514; Moody v. State, 842 So.2d at 759. "Evidence which was originally obtained improperly should not be suppressed, provided that it would have been legitimately uncovered pursuant to normal police practices." Rosales v. State, 878 So.2d 497, 500 (Fla. 3d DCA 2004). If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered, then the evidence should be received. Jeffries v. State, 797 So.2d at 578. In order to apply this doctrine, there

does not have to be an absolute certainty of discovery, but rather, just a reasonable probability. Id.; Carter v. State, 868 So.2d 1276, 1278 (Fla. 4th DCa 2004).

Detective Pedraja's smell of the scent of live marijuana while standing at the front door of the home was independent of the dog sniff. However, even if the evidence that Detective Pedraja smelled the scent of live marijuana while standing at the front door of the home was not independent of the dog sniff, it should have been considered in determining whether probable cause existed for the warrant if: an investigation was already under way; the facts already in the possession of the police would have led to this evidence notwithstanding the alleged police misconduct; and, the state can establish, by a preponderance of the evidence, a reasonable probability that it ultimately or inevitably would have been discovered by lawful means pursuant to normal police practices in the normal course of events.

Here, it is undisputed that an investigation was already underway. Detective Pedraja was in the process of actively investigating a tip that marijuana was being grown in the residence. Detective Pedraja testified that he had conducted surveillance of the property for 15 minutes before approaching the door with the canine and its handler. The window blinds were closed, there were no cars in the driveway, and the air conditioning unit was running continuously for at least 15 to

20 minutes without recycling. He testified that he knew, based on his experience, that a hydroponics lab uses high intensity light bulbs which create heat and requires continuous air conditioning. Detective Pedraja deemed the facts already in his possession sufficient to justify the request for the assistance of a canine unit. In fact, Detective Pedraja testified that he started to approach the door of the house at the same time as the canine unit and its handler, even before the canine alerted to the smell of contraband. The canine unit reached the door before Detective Pedraja simply because the dog is very energetic and Detective Pedraja would have been in its way. Detective Bartelt, Frankie's handler, testified: "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." (T. 24). Therefore, Detective Bartlet and Frankie "passed [Detective Pedraja] up in the driveway." (T. 28). Detective Pedraja could not have been in front of Frankie because he would have obstructed Frankie's ability to perform, and could not have stood next to Detective Bartlet "[b]ecause he probably would get knocked over by Frankie when Frankie is spinning around trying to find source." (T. 32-33). Therefore, there is a very strong probability that, in the absence of the canine sniff, Detective Pedraja would still have approached the front door that day to attempt to obtain consent for a search, and/or to attempt to detect the smell of marijuana,

pursuant to normal police practices. Indeed, if he had not had the assistance of the canine, he would have had no choice but to rely on his own senses to determine if there were any odors emanating from the residence. Detective Pedraja knocked on the door in an attempt to obtain consent to search even after the dog had positively alerted to the scent of contraband. A positive alert by a drug dog indisputably provides sufficient probable cause for a search warrant. Certainly, he would have had a much greater incentive to conduct further investigation in the absence of a positive alert by a drug dog.

Thus, the state established, by a preponderance of the evidence, a reasonable probability that, even in the absence of the dog sniff, Detective Pedraja would have knocked on the door pursuant to normal police practices in the normal course of events that day and would have detected the scent of marijuana as he approached the door. Accordingly, the trial court erred in failing to consider the fact that Detective Pedraja independently smelled the scent of live marijuana while standing at the front door of the residence.

D. THE DOG SNIFF AND THE DETECTION OF THE SMELL OF MARIJUANA BY DETECTIVE PEDRAJA PROVIDED MORE THAN ENOUGH PROBABLE CAUSE TO SUPPORT THE SEARCH WARRANT.

The positive alert by the drug dog and the detection of the smell of marijuana by Detective Pedraja as he knocked on the door of the residence, along with all of the other factors included in the affidavit for search warrant, provided more than enough probable cause for a search warrant.

CONCLUSION

Based on the foregoing, this Court should approve the decision of the Third District Court of Appeal herein and disapprove the decision of the Fourth District Court of Appeal in Rabb.

Respectfully Submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

and

ROLANDO A. SOLER
Florida Bar Number 0684775
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar Number 230987

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S AMENDED BRIEF ON THE MERITS was mailed this _____ day of June, 2009, to Howard Blumberg, Esq., Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125.

_____
ROLANDO A. SOLER
Florida Bar Number 0684775
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
ROLANDO A. SOLER
Florida Bar Number 0684775
Assistant Attorney General