IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOELIS JARDINES, **CASE NO: SC08-2101**

Petitioner, 3**DCA CASE NO: 3D07-1615**

v.

STATE OF FLORIDA,

Respondent,
_____/

BRIEF OF *AMICUS CURIAE* POLICE K-9 MAGAZINE AND CANINE DEVELOPMENT GROUP

ON REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

NON-CASE LAW AUTHORITY

AUTHORITY TO FILE

Pursuant to Florida Rule of Appellate Procedure 9.370, Police K-9 Magazine and Canine Development Group requested this Honorable Court for leave to file a joint brief of ***amicus curiae*** in support of the respondent, The State of Florida. This Motion was filed with the clerk on March 11, 2009 and ***GRANTED*** by this Honorable Court on April 13, 2009.

INTEREST OF AMICUS

Police K-9 Magazine ("The Magazine") is a national publication with over 10,000 canine handlers as subscribers. Many of those subscribers are canine handlers in the State of Florida who have a vested interest in the issue before the court. The Magazine seeks to advance the cause of the Respondent due to the effect that this ruling potentially has on its readership, some of whom will be directly affected because they are Florida Police officer-dog handlers.

Canine Development Group, Inc.("The Group") is a Florida corporation dedicated to the sole purpose of training and consulting with law enforcement handlers only. The Group holds national canine seminars not only in the State of Florida but throughout the United States in order to train police officer-dog handlers on the proper and legal way to utilize their narcotics canine. The Group, providing training on a national basis, is aware of the State and Federal law related to the issue before the Court. Their interest is to have the law in the State of Florida in congruence with their

majority of the law across the country which holds that a sniff by a narcotics canine is not a search within the meaning of the Fourth Amendment of the Constitution and therefore is lawfully used to detect the only the odor of illegal narcotics emanating from inside a home, when that odor merely seeps from the interior of the home to the open outside air through the seam of a garage or front door.

STATEMENT OF THE CASE

The Question presented in this case, in pertinent part, is as follows:

WHETHER OR NOT THE USE OF A DRUG ODOR DETECTOR DOG AT THE DEFENDANT'S FRONT DOOR OF HIS HOME CONSTITUTES A SEARCH.

This cause is before the court based upon certified conflict by the Third District Court of Appeal's decision in, *Jardines v. State*, --- So.2d ---,33 Fla. L. Weekly D2455, 2008 WL 4643082 (Fla. 3d DCA 2008) with the Fourth District Court of Appeal's decision in *State v.Rabb,* 920 So.2d 1175 (Fla. 4th DCA 2006). *Rabb,* also conflicts with two other District Courts of Appeal: *Stabler v. State,* 990 So.2d 1258 (Fla. 1st DCA 2008) and *Nelson v. State,* 867 So.2d 534 (Fla. 5th DCA 2004) which have aligned themselves with the same illegal philosophy fostered in *Jardines.*

STATEMENT OF THE FACTS

The Magazine and the Group adopt the facts as set forth in the brief of the Respondent, The State of Florida filed on May 27, 2009.

SUMMARY OF THE ARGUMENT

Given the fact that a "sniff" by a well trained and certified narcotics odor detection dog is not a search, this court should hold that a lawfully present police officer at the front door of a house, is permitted to merely allow his trained canine partner to use it's God given olfactory ability to detect the odor of an illegal substance simply seeping through the seams of the door. Police officers are allowed to approach the front door of a residence. This area of the home is not off limits to the general public and therefore is not of limits to law enforcement. Home owners allow myriad of people access to this area of their homes on a regular daily basis. This includes the court authorize police technique of "Knock and Talk", where law enforcement officers are allowed to walk up to a house (being lawfully present) knock on the front door of a home, wait for an answer and have a consensual encounter with the home owner. Since Florida law permits this type of front door contact of a home owner, then it goes without saying that the contact by the officers in question is not only lawful but also sanctioned under Florida law. Therefore, their presence at the front door is also lawful and having their canine partner with them would

not, in the eyes of the law, change their legally recognized status.

A well trained and certified narcotics odor detection dog is not a technological advancement. A dog is not a man-made mechanical device, recently created in order to detect the odor of illegal substances. The use of dogs and their unique olfactory talents to smell has been around for hundreds of years. Comparing the recently enhanced, man made, mechanical thermal imaging device to the God given sense of smell of a canine is truly comparing apples to oranges, and that square peg will not fit into the round hole no matter how hard the petitioner pounds.

This Honorable Court should additionally find that a dog is not a mechanical technological advancement under the law. The use of the canine's ability to smell odor from the outside of the home does not invoke any Fourth Amendment rights on a home of a marijuana grower simply because the fruits of his illegal trade allow that odor to seep through the seams of a door thereby exposing his illegal activity. This court should affirm the lower court's decision in *JARDINES* as well affirm the other Florida District Courts of Appeal in *Nelson* and *Stabler,* that all have held, that along with the above stated arguments, that a exterior "sniff" is not a search and therefore, invokes no Constitutional protection.

ARGUMENT

A.
A CANINE "SNIFF" IS NOT A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT OF THE U.S. CONSTITIUTION OR UNDER THE FLORIDA CONSTITUTION

The United States Supreme Court has held on three separate occasions that a "sniff" by a well trained odor detecting narcotics canine is not a search. In *United State v. Place, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983)*, held that the "sniff" of the luggage of an airport passenger was not a "search" within the meaning of the Fourth Amendment. The information obtained through the use of the dog revealed only the presence or absence of illegal narcotic odor that the dog was trained to detect. The High Court again noted the talents of the trained canine were permissible when "sniffing" a car in *Indianapolis v. Edmond, 531 U.S. 32, 40, 121 S.Ct. 447, 148 L. Ed. 2d 333 (2000)* noting that the "sniff" only discloses the mere presence or absence of illegal narcotics odor which is a contraband item. In *Illinios v. Caballes, 543 U.S. 405, 160 L. Ed. 2d. 842, 125 S. Ct. 834 (2005),* the Supreme Court of the United States continued their philosophy that the use of well trained odor detecting narcotic dogs used to "sniff" only the odor of contraband was legally permissible. The Florida Constitution states that the Fourth Amendment right of our State Constitution shall be construed in conformity with the United States Constitution, as interpreted by the United States Supreme Court. *See Art.I, Sec. 12, Fla. Const.* Florida Courts have

consistently held, for well over 25 years that the "sniff" of a dog is not a search. *Lindo v. State, 983 So.2d 672 (Fla. 4th DCA 2007)*(a dog sniff of a UPS package was not a search); *Napoleon v. State, 985 So.2d 1170 (Fla. 1 DCA 2008)*(a dog sniff of a vehicle not a search); *Joseph v. State, 588 So.2d 1014 (Fla. 2nd DCA 1991)*(a dog sniff of a vehicle not a search); *State v. Taswell, 560 So.2d 257 (Fla. 3rd DCA 1990)*(a dog sniff of a vehicle not a search); *Sizemore v. State, 390 So.2d 401 (Fla. 3rd DCA 1980)*(a dog sniff of a briefcase not a search); *Harpold v. State, 389 So.2d 279 (Fla. 3rd DCA 1980)*(a dog sniff of a suitcase not a search); *Holden v. State, 877 So.2d 800 (Fla. 5th DCA 2004)*("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."); *State v. Carley, 633 So.2d 533(Fla. 2nd DCA 1994)*("The use of a canine unit during a consensual encounter is similar to an officer's finding illegal items in plain view during the consensual encounter.")

Our sister states and the Federal Circuits have addressed the issue of the use of well trained narcotics odor sniffing dogs in other unique areas. *United States v. Lingenfelter, 997 F.2d 632, 639 (9th Cir. 1993) & United States v. Vemema, 563 F.2d 1003, 1007 (10th Cir. 1997)*(Both allow the use of a drug dog on Warehouse and Storage Units); *U.S. v. Quoc Viet Hoang, 486 F.3d 1156 (9th Cir. 2007)*(Neither the sniff by a narcotics canine nor the police officer's visual inspection of a package addressed to defendant, after being allowed into airport holding room of a parcel

delivery service, were searches within the meaning of the Fourth Amendment); *State v. Quatsling, 24 Ariz. App. 105, 536 P.2d 226, 228(1975), cert. denied, 424 U.S. 945, 96 S.Ct. 1416, 47 L.Ed.2d 352 (1976); People v. Wieser, 796 P.2d 982, 985 (Colo. 1990)*(The Colorado Supreme Court held that a dog sniff outside a storage unit does not expose noncontraband items that otherwise would remain hidden from public view); *State v. Slowikowski, 307 Or. 19, 761 P.2d 1315, 1320 (1988)*(The Oregon Supreme Court also held that a dog sniff outside a storage unit is not a search because the odors detected were all entirely outside the locker, where anyone who tried could have detected them); *Rois v. State, 762 N.E. 2d 153 (Ind. Ct. App. 2002)*(sniff of package was not a search.); *State v. Ochadleus, 110 P.3d 448 (Mt. 2005)*(a package sniff was not a search); *Strout v. State, 688 S.W. 2d 188, 191 (Tex. Ct. App. 1985)*(safe deposit box was not a search).

B.

DOG PLACED ON THE EXTERIOR OF A HOME IN ORDER TO PERFORM A SNIFF OF THE RESIDENCE FOR THE ESCAPING ODOR OF NARCOTICS CONTRABAND IS LAWFUL

The State of Texas has gone on to examine the direct issue of detecting odor from houses. In *Delosreyes v. State, 853 S.W. 2d 684 (Tex. Crim. App. 1993)*, the Texas Court of Appeals found as follows:

> Appellant argues that, even though in the present case there was no fence for Officer King to peer through, there was a

> closed garage door under which he "sniffed" to detect the odor of marijuana. Appellant takes the position that he had a legitimate, reasonable expectation of privacy with regard to the garage, its contents, and the smells emanating from it…. In the case before this court, Officer King merely walked from the street in front of the house, a short way up the driveway to
>
> the garage door, and smelled the marijuana emanating from the garage. The driveway is situated so that ***anyone*** approaching the house would walk up the driveway and pass near the garage in order to get to the front door of the house…. We hold the trial court did not err in concluding that Officer King by his actions, "invaded no privacy interests of any resident of the residence.

The Court of Appeals in *Texas v. Smith, not reported in S.W.3d, 2004 WL 213395 (Tex. Crim. App. 2004) cert. denied by U.S. Supreme Court, 544 U.S. 961, 125 S.Ct. 1726, 161 L.Ed.2d 602 (U.S. 2005)* found the use of a drug dog on a house Constitutionally permissible stating:

> Appellant argues that the drug-dog sniff outside appellant's garage door was an illegal search; therefore, the information obtained from the sniff (*i.e.*, the drug dog's positive alert) was acquired illegally and could not be the basis of a valid search warrant. …In the instant case, Officer Foose approached appellant's garage by walking up the driveway. The driveway Officer Foose traversed led both to the front of the garage and to the entrance of the house. Like in *Delosereyes,(Supra.)* anyone approaching appellant's house would walk up the driveway and pass near the garage in order to reach the entrance of the house. We conclude that appellant's privacy interests under the United States and Texas Constitutions were not invaded when Officer Foose walked up appellant's driveway to allow a drug dog to sniff appellant's garage door.

The Michigan Court of Appeals also has addressed the same issue of dogs used on a house in order to detect the odor of illegal narcotics from the exterior of the home in, *People v. Jones, 755 N.W. 2d 224 (Mich.App. 2008).* In following the lead of the State of Texas, the Michigan Appeals Court held in favor of the use of the canine on the home ruling:

> The majority of the federal circuit courts have viewed the *Place* Court's holding as a general categorization of canine sniffs as nonsearches. See, e.g., *United States v. Redd, 141 F.3d 644, 648 (C.A.6, 1998)* holding that a canine sniff of the inside of an apartment was not a search when the canine team was lawfully present in the building); see also *United States v. Roby, 122 F.3d 1120 (C.A.8, 1997); United States v. Brock, 417 F.3d 692 (C.A.7, 2005); United States v. Vasquez, 909 F.2d 235 (C.A.7, 1990).* Similarly, the vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search. (FN4) Binding and 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 legally present at its vantage point when its sense is aroused. *Reed, supra at 649;* see also *Place, supra at 709, 103 S.Ct. 2637* (noting that the sniffed luggage was located in a public place), and *United States v. Daiz, 25 F.3d 392, 397 (C.A.6, 1994)....*
>
> Here, the canine was lawfully present at the front door of defendant's residence when it detected the presence of contraband. There is no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch. See *People v. Custer (On Remand), 248 Mich.App. 552, 556, 561, 640 N.W.2d 576 (2001)*(under Michigan law, the police can lawfully stand on a person's front porch and look through the windows into the person's home, as long as there is no evidence that the person expected the porch to remain private, such as by erecting a fence or gate). The record

> contains no evidence that the canine team crossed any obstructions, such as a gate or fence, in order to reach the front door, or that the property contained any signs forbidding people from entering the property. Any contraband sniffed by the canine while on defendant's front porch-an area open to public access-fell within the "canine sniff" rule. Consequently, there was no search in violation of the Fourth Amendment….
>
> The canine sniff here was constitutionally sound, not because defendant had no legitimate privacy interest in the contraband, which will always be the case in Fourth Amendment disputes over seized incriminating evidence, but because no legitimate privacy interests or expectations were intruded upon by the canine sniff. As indicated in *Place* it is the uniqueness and attributes of a canine sniff that dictate a finding that the Fourth Amendment was not violated in the case at bar.

The first case in the State of Florida to touch upon the issue of narcotics odor detection dogs being place on a door and sniffing the drug odor seeping out of the door seams was *Nelson v. State, 867 So.2d 534 (Fla. 5th DCA 2004).* In *Nelson,* the Fifth District Court held:

> Here, Nero walked the Hampton Inn's fourth floor hallway. During this walk, he alerted at Room 426, the room occupied by Mr. Roby. Roby contends the dog's detection of the odor molecules emanating from his room is the equivalent of a warrantless intrusion. We find that it is not. The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. *See United State 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, *seeHarris v. United States, 390 U.S. 2234, 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). Mr. Roby had an expectation of privacy in his Hampton Inn hotel room. But because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far. Neither those who stroll the corridor nor a sniff dog needs a warrant for such a trip. As a result, we hold that a trained dog's detection of odor in a common corridor does not contravene the Fourth Amendment. The information developed from such a sniff may properly be used to support a search warrant affidavit.

The Fifth DCA astutely noted that the odor of contraband is not protected when it is merely escaping through the door of a constitutionally protected area, the defendant's Hampton Inn hotel room. They went on to find that this type of information (the escaping odor) developed from such a sniff is entirely appropriate when used to support a search warrant. This is the exact set of facts and circumstances in the case at bar.

The First District Court of Appeals has also followed suit in their most recent analysis of this issue in *State v. Jardines, --- So.2d--- , 33 Fla. L. Weekly D2455 (Fla. 3rd DCA 2008).* The Third DCA held:

> The appellant argues that the trial court erred in denying his motion to suppress because the dog sniff at the front door of the apartment constituted an illegal search under the Fourth Amendment and, thus, could not be used as evidence of probable cause for the search warrant. This contention, however, lacks merit.

> As pointed out by the State, the United States Supreme Court recently addressed the issue of whether a dog sniff constitutes a search. In *Illinois v. Caballes, 543 U.S. 405, 410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)*, the Court held that "[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." Explicitly reaffirming its prior reasoning that the unique nature of a dog sniff renders it distinguishable from a traditional search, the Court stated: [T]he use of a well-trained narcotics-detection dog…-"does not expose noncontraband items that otherwise would remain hidden from public view"-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 409, 125 S.Ct. 834* (quoting *United States v. Place, 462 U.S. 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)*(holding 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 [airport], to a trained canine-did not constitute a 'search' within the meaning of the Fourth Amendment")). Considering that *Caballes* and *Place* represent the only two cases in which the Court has endeavored to address the dog sniff issue, the reasoning espoused therein is controlling and must guide this Court's ruling in the instant case.

The First District Court concluded 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." *Stabler, supra.* It is clear that from the Appellate Courts of our sister states of Texas and Michigan along with the First, Third, and Fifth District Courts of Appeal of Florida that this issue has been thoroughly vetted. All siding with the fact that it is Constitutionally permissible to allow a trained narcotic odor detection dog to sniff a door of a protected area whether it be a hotel door, apartment door or home front door in order to detect the odor of contraband that is escaping the seams.

This issue has been considered by many Federal Courts. The Seventh Circuit Court of Appeal in *U.S. v. Brock, 417 F.3d 692 (7th Cir. 2005)* resolved a very similar factual scenario as the case at bar. In *Brock,* the defendant contended that the canine sniff outside his locked bedroom door constituted an illegal warrantless search, and that the warrant to search 3381, which was issued in reliance on that sniff, violated the Federal and Indiana Constitutions. The government argues that the dog sniff was not a search at all because the police were lawfully present inside Brock's residence with Godsey's consent, and Brock possessed no reasonable expectation that his drugs would go undetected. As we have in this case, we have the use of a dog to smell narcotics odor in relation to a home. But in *Brock,* the door in question was actually located ***inside the home itself and was used on the exterior of the bedroom door***.

The Seventh Circuit stayed within the mainstream of American Jurisprudence in finding:

> The Court held in *Caballes* 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. *Id.* at 837-38. The Court explained that, because there is no legitimate interest in possessing contraband, the use of a well-trained narcotics-detection dog that " *only* reveals the possession of narcotics 'compromises no legitimate privacy interest' " and does not violate the Fourth Amendment. *Id.* (quoting *Jacobsen, 466 U.S. at 1123, 104 S.Ct. 1652).* *Caballes* relied on the Court's opinion in *Place, supra*, which held that a canine sniff of a traveler's luggage in the airport 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. Adhering to this reasoning, the Court held in *Jacobsen* that a chemical field test of a substance found inside a package was not a Fourth Amendment search because the test "merely discloses whether or not a particular substance is cocaine." *466 U.S. at 123, 104 S.Ct. 1652.* As there is no legitimate interest in possessing cocaine, the field test did not compromise any legitimate privacy interest. *Id. see also Edmond, supra*(officers' practice of walking a narcotics-detection dog around the exterior of each car at a drug interdiction checkpoint does not transform the seizure into a search). 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"); *Untied 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).

The overwhelming number of judicially authored cases, from both state and federal courts all across the country, should guide this Honorable Court to the same logical conclusion the vast number of well educated minds have reached. A sniff is not a search. Drug odor is surely not Constitutionally protected when purely escaping from inside one's home through the seams of the front door of the house. Therefore, the action of law enforcement, in this case, trigger no Fourth Amendment safeguards and this Honorable Court should find the police officers actions lawful.

C.

THE POLICE OFFICER AND HIS CANINE PARTNER WERE LAWFULLY PRESENT AT THE FRONT DOOR OF THE RESIDENCE

Law enforcement officers have the same rights as any citizen with regard to being present at the door of a home. Logic dictates, that absent a showing, by the homeowner,

that he or she wishes that area to remain private, it is open to the public for general access. The record contains no evidence that the officer/k-9 handler crossed over or through any obstructions, like a fence or gate, in order to gain access to the front door nor that there were any signage demonstrating their intent to forbid, prevent or prohibit the general public access to the everyday common use of the front door.

On a regular daily basis, all across this country, homeowners allow many different types of the general public access to their front doors. The UPS or Fedex delivery drivers carry packages from their truck, parked in the driveway, or from their truck, parked out on the roadway, to the homeowners front door. People receive surprise gift packages at their home on a regular basis. The drivers are lawfully present when making such a delivery. The neighborhood high school student raising money for his school sports team by selling magazines is lawfully present at the front door. The girl scout, knocking at the front door in an attempt to sell her cookies, is lawfully present. A police officer, going door to door with a picture of a missing little girl, is lawfully present at the front door, when canvassing the area for anyone who might have seen her last. All of these practices are accepted general use, by the public, to our homes. A police officer with his canine, merely standing in a place were others are lawful present, and making ***NO CONTACT*** with the homeowner, causing no door to be opened, not interrupting anyone's personal time but purely standing at the door, is lawfully present outside the house.

Florida courts have addressed the issue of police officers conducting drug investigation at the front door of a house and approved of the technique. "Knock and Talks" are a routine technique to make contact at the front door of homes in order to carry out drug investigations. *State v. Navarro, --- So.2d ---, WL 142400 (Fla. 2nd DCA May 2009).* In *Navarro*, the Second District Court of Appeals found that a knock and talk "is an investigative technique whereby an officer knocks on the door to a residence and attempts to gather information by explaining to the occupants the reason for the police interest."*United States v. Norman, 162 F. App'x 866, 869 (11th Cir.2006)*; *see also Luna-Martinez v. State, 984 So.2d 592, 598 (Fla. 2nd DCA 2005)*(quoting *Murphy v. State, 898 So.2d 1031, 1032 n. 4 (Fla. 5th DCA 2008)*). *See generally* Fern L. Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits under fourth Amendment and State Constitutions, 15 A.L.R.6th 515 (2006).*

A knock and talk is considered a legitimate investigative procedure...*State v. Triana, 979 So.2d 1039, 1043 (Fla. 3d DCA 2008)*.

In *Triana, supra.*, the Third District explained that a knock and talk "is a purely consensual encounter, which officers may initiate without any objective level of suspicion." *Id.* (emphasis added); *see also Untied States v. Cruz-Mendez, 467 F.3d 1260, 1264 (10th Cir.2006)* ("[A] 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable

suspicion."); *Untied States v. Cormier, 220 F.3d 1103, 1109 (9th Cir.2000)*("[N]o suspicion needed to be shown in order to justify the 'knock and talk.' "). Also See, *Luna-Martinez, supra.; Murphy, supra.; Evans v. State, 911 So.2d 792 (Fla. 1st DCA 2005).* Since Florida law recognizes the ability of law enforcement to be at the front door of a home, without any suspicion being needed to justify their presence, knock on the front door, make contact with the occupant, and speak to them about their possible involvement in a drug investigation related to drugs in their home, certainly this Honorable Court should find the presence of an officer and his dogs at the front door permissible when there is no contact with the occupants, no opening of a door, no conversation related to drugs being in the house but instead solely the detection of drug odor escaping out the seams of the front door.

D.

THE USE OF A NARCOTICS ODOR DETECTION DOG'S NOSE IS NOT A TECHNOLOGICAL ADVANCEMENT

A well trained and certified narcotics odor detection dog is not a technological advancement. A dog is not a man-made mechanical device, recently created in order to detect the odor of illegal substances. The use of dogs and their unique olfactory talents to

smell has been around for hundreds of years. Comparing the recently enhanced, man made, mechanical thermal imaging device to the God given sense of smell of a canine is truly comparing apples to oranges.

Similar to the petitioner's argument in the instant case, the defendant in *Brock* attempted to distinguish these cases by relying on *Kyllo* for the proposition that an individual has a far greater privacy interest inside a home, particularly inside a bedroom, than one has in a car or public place. *Brock, 417 F.3d at 659.* However, the court explicitly rejected this assertion, stating that *Kyllo* did not support the defendant's position. *Brock, 417 F.3d at 696.* Although *Kyllo* did reaffirm the importance of the privacy interest in one's home, the Seventh Circuit was primarily influenced by the subsequent clarification of *Kyllo* in *Caballes:* "[I]t 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.... 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....' " *Brock, 417 F.3d at 696* (quoting *Caballes, 543 U.S. at 409-10, 125 S.Ct. 834).*

As many courts, both state and federal have held, the age old use of dogs and their God given ability to smell better than humans has been recognized in the law for well over a 100 hundred years. See, *Pedigo v. Commonwealth, 44 S.W. 143 (Ky. App. 1898)* and

State v. Hunter, 56 S.E. 547 (N.C. 1907). This Honorable Court should find that the Canine's nose is not advanced technology. A "sniff" of a home would only divulge the presence of marijuana, cocaine, heroin, or methamphetamine odor and nothing else. In no way, shape or form, would the nose of a dog ever disclose lawful activity inside a home because the dog's nose is simply not trained to reveal the presence of lawfully possessed items.

CLOSING SUMMARY

In the interest of being short, sweet and to the point, after reviewing the law and this brief, this Honorable Court should find that a "sniff" is not a search thereby conveying no Constitutional protection. The officers were lawfully present to perform the exterior "sniff" of the residence. The *Kyllo,* argument advanced by the petitioner was summarily rejected by the Untied State Supreme Court in *Caballes.* A dogs nose is not technology nor is it an advancement in technology which would reveal lawful activity from outside one's home. Instead, only marijuana, heroin, cocaine and methamphetamine odor that is escaping naturally, on it's own, could or would be detected by an exterior "sniff" of a front door.

CONCLUSION

The Magazine and the Group ask this Honorable Court to follow the well-reasoned,

common sense, Constitutional analysis of judges: Roberts, Kahn, Webster of the 1st DCA of Florida (the *Stabler* Court); Cope, Wells, Salter of the 3rd DCA of Florida (the *Jardines* Court); Peterson, Sharp, Torpy of the 5th DCA of Florida (the *Nelson* Court); Highley, Radack, Jennings of the Texas Appellate Court (the *Smith* Court); Fitzgerald, Murphy of the Michigan Appellate Court (the *Jones* Court); Gross of the 4th DCA of Florida (the *Rabb* Court). They all have found that the use of a well trained narcotics canine at the front door of a house is allowed because it is neither a search nor a seizure and does not invoke any Constitutional protections. As this Honorable Court is at the precipice of a mammoth, far reaching decision for police handlers all across the country, the Magazine and the Group ask this court not to step off the cliff, as urged by the petitioner, but instead stand on the firm ground of the courts cited above and find in favor of the respondents, the State of Florida, by Affirming the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this ____ day of June, 2009, I served a copy of the foregoing brief request by U.S. Mail upon Rolando A. Soler, Assistant Attorney General, Attorney General's Office Miami, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 and Howard K. Blumberg, Assistant Public Defender, Public Defender's Office Miami, 1320 N.W. 14th Street, Miami, Florida 33125.

_____
Arthur T. Daus III

CERTIFICATE OF COMPLIANCE

I certify that this request is composed in Times New Roman, 14 point.

_____
Arthur T. Daus III