

IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-2101

JOELIS JARDINES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Joelis Jardines, was the appellee in the district court of appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellant in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" designates the record on appeal; the symbol "T" refers to the transcript of the hearing on the motion to suppress on June 8, 2007; and the symbol "S" refers to the supplemental record filed by the State in the district court of appeal.

STATEMENT OF THE CASE AND FACTS

The State of Florida charged Joelis Jardines by information with one count of trafficking in cannabis, and one count of grand theft (R. 5). On June 5, 2007, Mr. Jardines filed a motion to suppress statements and physical evidence (R. 10-14). The motion to suppress alleged that the search warrant issued for the search of Mr. Jardines' home was not based on probable cause because it was based on evidence resulting from prior illegal searches (R. 11-12). Specifically, the motion alleged that the drug detection dog's alert to the odor of contraband inside Mr. Jardines' home could not be the basis for probable cause because the dog sniff at the front door of his home constituted an illegal warrantless search of that home (R. 11-12). The motion further alleged that Detective Pedraja's detection of the odor of contraband at the front door of the house could not be the basis for probable cause because Pedraja had not approached the front door of the house until after Detective Bartelt gave him the signal that the drug detection dog had alerted to the presence of contraband, and therefore Pedraja's detection of the odor of contraband was a fruit of the illegal dog sniff (R. 12). After alleging the illegality of the dog sniff and Detective Pedraja's subsequent detection of the odor of contraband, the motion argued that the search warrant was not based on probable cause because it was based on evidence resulting from these illegal searches (R. 12-13).

Based on the allegations that the dog sniff at the front door of Jardines' home was an illegal warrantless search and that the officer's detection of the odor of contraband was a fruit of that illegal search, the trial judge placed the burden on the State to present evidence at the hearing on the motion to suppress to establish either the legality of the dog sniff or that the officer's detection of the odor of contraband was not a fruit of the dog sniff (T. 3-6). The State then presented the testimony of Detective William Pedraja and Detective Douglas Bartelt in an effort to meet that burden (T. 10-33). Their testimony established the following.

At approximately 7:00 a.m. on Tuesday December 5, 2006, Detective Pedraja set up surveillance at Jardines' home (T. 11). Detective Pedraja watched the home for approximately fifteen minutes (T. 11). During that time, Pedraja observed no vehicles in the driveway (T. 20). After the fifteen minute period, Detective Bartelt arrived on the scene with a drug detector dog (T. 11, 31). Detective Pedraja joined Detective Bartelt and the drug detector dog and together they approached the front of Jardines' home (T. 11, 24, 31). Detective Pedraja was standing back behind Detective Bartelt and the dog as they approached the home (T. 11-13).

As Detective Bartelt and the dog crossed the threshold of an archway in front of the home and entered the alcove of the porch, the dog began tracking an airborne odor (T. 24). The dog tracked the odor to its source which was the base of

the front door of the home (T. 25-27). Detective Bartelt testified that he only smelled mothballs when he was at the base of the front porch (T. 29). Detective Bartelt stayed back and allowed the dog's leash to extend so that the dog could go up to the front door of the home (T. 13, 26-27). When the dog assumed a sitting position after sniffing at the base of the door, that indicated to Detective Bartelt that the base of door was the source of the odor (T. 27). At that point Detective Bartelt pulled the dog away from the front door and signaled to Detective Pedraja that the dog had given a positive alert for the odor of narcotics (T. 27-28). When Detective Bartelt gave that signal, Detective Pedraja was behind him in the driveway (T. 28). Once Detective Bartelt pulled the dog away from the door he returned to his vehicle with the dog (T. 28).

Upon receiving the signal from Detective Bartelt that the dog had detected the odor of narcotics emanating from within Jardines' home, Detective Pedraja went up to the front door of the home for the first time (T. 14). Pedraja testified that while he was at the front door, he smelled the scent of marijuana (T. 14). Once he detected the smell of marijuana, Detective Pedraja decided to knock on the front door to determine if someone was home (T. 15). Receiving no response, Detective Pedraja walked back out to the front area of the house and heard an air conditioning unit running for approximately 15 to 20 minutes from the time he went to the front door (T. 15). Detective Pedraja testified that in his experience

dealing with hydroponic lab cases, the labs used high intensity light bulbs which created heat and the air conditioning units were kept continuously running to keep the room at a low temperature (T. 15-16). Detective Pedraja also testified that in his experience with hydroponic labs there would typically be an increase in electricity usage that would show up on the FPL bill (T. 18-19). Detective Pedraja made no effort to obtain the FPL records from Jardines' home (T. 19-20).

After making his observations at the house, Detective Pedraja returned to his vehicle, drove to a nearby location, and prepared the affidavit for the search warrant. (T. 16). The affidavit identified the premises to be searched, detailed Detective Pedraja's experience in detecting hydroponic marijuana labs and the methods and equipment used in such labs, and stated:

"Your Affiant's" reasons for the belief that "The Premises" is being used as [a marijuana hydroponics grow lab] and that "The Property [consisting of marijuana and the equipment to grow it]" listed above is being concealed and stored at "The Premises" is as follows:

On November 3, 2006, "Your Affiant" detective William Pedraja, # 1268, received information from a crime stoppers tip that marijuana was being grown at the described residence.

On December 5, 2006, "Your Affiant" conducted surveillance at the residence and observed no vehicles in the driveway. "Your Affiant" also observed windows with the blinds closed. "Your Affiant" and Detective Doug Bartelt with K-9 drug detection dog "FRANKY" approached "The Premises" in an attempt to obtain a consent to search. While at front door [sic], "Your Affiant" detected the smell of live marijuana plants emanating from the front door of "The Premises." The scent of live marijuana is a unique and distinctive odor unlike any other odor. Additionally, K-9 drug detection dog "FRANKY" did alert to the odor of one of the

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

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

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

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

(S. 1-7).

Following the testimony at the hearing on the motion to suppress, the State and the defense argued the issue of whether the dog sniff at the base of the front

door of Jardines' home constituted a search under the Fourth Amendment (T. 33-75). The defense argued that the dog sniff constituted an illegal search and that the evidence uncovered by that illegal search could not be the basis for probable cause for the subsequently issued search warrant (T. 33-43). The defense based its argument on the decision of the Fourth District Court of Appeal in *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006).

The State argued that the trial judge should not follow *Rabb* (T. 43-53). The State also argued that the officer's detection of the odor of marijuana at the front door of the home supplied the probable cause for the search warrant independent of the dog sniff (T. 57-58). The judge responded to this argument by pointing out that the officer did not detect the odor of marijuana until after the dog sniff, and the judge asked if the State was arguing that the inevitable discovery exception applied (T. 58-59). The State said it was not arguing inevitable discovery (T. 59). The State then argued that probable cause existed without consideration of the dog sniff or the officer's detection of the odor of marijuana (T. 62). Finally, the State argued that even if the warrant was not based on probable cause, the search should be upheld under the good faith exception (T. 63-68). The issue of whether the police officers had a reasonable suspicion of criminal activity when they approached Jardines' home was not addressed at the hearing on the motion to suppress.

The trial judge issued a written order granting the motion to suppress (R. 41-43). The judge ruled that pursuant to *Rabb*, the officers' use of the drug detection dog at Jardines' home constituted an unreasonable and illegal search (R. 41). The judge further ruled that Detective Pedraja's detection of the odor of marijuana could not be considered in determining whether the search warrant was supported by probable cause because it was the product of the illegal search by the drug detector dog (R. 42). Finally, the judge ruled that when the dog sniff and the officer's detection of the odor of marijuana was excised from the affidavit for the search warrant, the remaining information in the affidavit did not establish the probable cause necessary to support the issuance of the search warrant for Jardines' home (R. 42).

The State appealed the order granting the motion to suppress to the Third District Court of Appeal (R. 44). The majority decision of that court reversed the trial court's ruling "because, first, a canine sniff is not a Fourth Amendment search; second, the officer and the dog were lawfully present at the defendant's front door; and third, the evidence seized would inevitably have been discovered." *State v. Jardines*, 33 Fla. L. Weekly D2455, 2456 (Fla. 3d DCA October 22, 2008). The court expressly declined to follow the decision of the Fourth District Court of Appeal in *Rabb* which held that a dog sniff at the front door of a home constituted a search, and certified direct conflict with that decision. *Id.* at 2458. In his opinion

concurring in part and dissenting in part, Judge Cope agreed with that part of the majority opinion which held that a warrant is not necessary for a drug dog sniff, and agreed on certifying direct conflict with the decision in *Rabb*. *Id.* Judge Cope disagreed with the majority's "sniff anytime" rule, and indicated that he would "follow those courts which hold that a drug sniff is permissible at the door of a dwelling only if there is a reasonable suspicion of drug activity." *Id.*

A notice invoking this Court's discretionary jurisdiction based on the certification of direct conflict with *Rabb* was filed on October 28, 2008.

SUMMARY OF ARGUMENT

Given the shroud of protection wrapped around a house by the Fourth Amendment, this Court should hold that the dog sniff at the exterior of Jardines' home constituted a warrantless Fourth Amendment search. The most recent pronouncement from the United States Supreme Court on the use of a sensory enhancing tool at the exterior of a home to determine information from within a home holds that the use of such a sensory enhancing tool constitutes a Fourth Amendment search. This Court should apply the principles established by that case and follow the decisions which hold that the use of a drug detection dog at the exterior of a home constitutes a Fourth Amendment search. While the *sui generis* characteristics of a dog sniff might suffice to justify random sniffs of luggage at airports and random sniffs of cars on the highway, those characteristics do not suffice to justify random drug sniffs at the front door of a home, especially when the serious questions about the infallibility of such dog sniffs, both in general and in this particular case, are considered in conjunction with the heightened constitutional protections afforded to a home.

Should this Court determine that a dog sniff at the exterior of a house is not a Fourth Amendment search which requires a search warrant, this Court should hold that a drug sniff is permissible at the door of a dwelling only if there is a reasonable suspicion of drug activity. A rule which allows police officers free rein

to approach the front door of any house with a drug sniffing dog, at any hour of the day or night, without a reasonable suspicion of criminal activity taking place inside that house, cannot be squared with the historic protections afforded to the home by the Fourth Amendment.

The officer's detection of the odor of marijuana was the fruit of the illegal dog sniff and the inevitable discovery rule does not apply. The record in this case conclusively demonstrates that Detective Pedraja's detection of the odor of marijuana at the front door of Jardines' home was a direct result of the illegal dog sniff at the front door, and there is nothing in the record to indicate that Detective Pedraja had any intention to approach the front door of the home prior to the time of the dog's illegal sniff.

Excluding the dog sniff and the officer's detection of the odor of marijuana from the affidavit for the search warrant, the only remaining facts in the affidavit for the search warrant to establish probable cause are an anonymous uncorroborated tip, no cars in the driveway of Jardines' home on a Tuesday morning, closed window blinds, and an air conditioning unit continuously running without recycling. These facts fall well short of establishing probable cause to search Jardines' home.

As the dog sniff at the front door of Jardines' home constituted an illegal search under the Fourth Amendment, and as the police officer's subsequent

detection of the odor of marijuana was tainted by that illegal search, the dog sniff and the officer's detection of the odor of marijuana must be excised from the affidavit for purposes of determining whether the affidavit establishes probable cause. As the remaining facts in the affidavit do not establish probable cause, the search of Mr. Jardines' home pursuant to the search warrant violated the Fourth Amendment, and the evidence discovered pursuant that unconstitutional search must be excluded.

ARGUMENT

THE SEARCH WARRANT FOR THE SEARCH OF JARDINES' HOME WAS NOT SUPPORTED BY PROBABLE CAUSE, AS THE DOG SNIFF AT THE EXTERIOR OF THE HOME CONSTITUTED AN ILLEGAL SEARCH, THE OFFICER'S SUBSEQUENT DETECTION OF THE ODOR OF MARIJUANA WAS TAINTED BY THAT ILLEGAL SEARCH, AND THE REMAINING FACTS IN THE AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE.

The Fourth Amendment to the United States Constitution guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. The Florida Constitution expressly provides that the right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *See* art. I, § 12, Fla. Const. Items obtained in violation of the rights guaranteed by section 12 of Florida’s Declaration of Rights shall be excluded from evidence if the items would be excluded pursuant to the decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution. *See id.*¹

¹ The standard of review for orders on motions to suppress is that appellate courts should accord a presumption of correctness to the trial court’s rulings on motions to suppress with regard to the trial court’s determination of historical facts, but appellate courts must independently review mixed questions of law and fact that

In the present case, a search warrant was issued for Mr. Jardines' home based on an affidavit which included evidence obtained from a dog sniff at the front door of that home, and a police officer's detection of the odor of marijuana when he approached the front door of the home after he was advised that the dog had detected the odor of marijuana. As the dog sniff at the front door of Jardines' home constituted an illegal search under the Fourth Amendment, and as the police officer's subsequent detection of the odor of marijuana was tainted by that illegal search, the dog sniff and the officer's detection of the odor of marijuana must be excised from the affidavit for purposes of determining whether the affidavit establishes probable cause. As the remaining facts in the affidavit do not establish probable cause, the search of Mr. Jardines' home pursuant to the search warrant violated the Fourth Amendment, and the evidence discovered pursuant that unconstitutional search must be excluded.

A.

The dog sniff at the exterior of Jardines' home constituted an illegal search under the Fourth Amendment and therefore the information gathered from the dog's alert may not properly be used to support the issuance of the search warrant for Jardines' home.

A Fourth Amendment search occurs when law enforcement conduct violates a “constitutionally protected reasonable expectation of privacy.” *California v.*

ultimately determine constitutional issues arising in the context of the Fourth Amendment and Article I, section 12 of the Florida Constitution. *Fitzpatrick v. State*, 900 So. 2d 495, 510 (Fla. 2005); *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001).

Ciraolo, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). As Justice Harlan pointed out in his concurring opinion in *Katz*: “As the Court's opinion states, ‘the Fourth Amendment protects people, not places.’ The question, however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a ‘place.’ ” *Katz*, 389 U.S. at 361.

As the “place” where the law enforcement conduct in this case occurred was the home of Mr. Jardines, it is necessary to focus on the constitutional protections afforded a house under the Fourth Amendment. “At the very core” of the Fourth Amendment “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Silverman v. United States*, 365 U.S. 505, 511 (1961). “[T]he ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” *Payton v. New York*, 445 U.S. 573, 585-586 (1980) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). The Fourth Amendment draws “a firm line at the entrance to the house.” *Payton*, 445 U.S. at 589. “The principle that a man’s home is his castle is basic to our system of jurisprudence.” *Lombard v. Louisiana*, 373 U.S. 267, 275 (1963). “[P]rivacy expectations are most heightened” in the area immediately adjacent to a private home. *Dow Chemical Co. v. United States*, 476 U.S. 227, 237, n.4 (1986).

The United States Supreme Court has not decided whether the use of a drug detection dog at the front door of a home to determine what is inside the home constitutes a Fourth Amendment search. *Kyllo v. United States*, 533 U.S. 27 (2001), is the latest pronouncement of the United States Supreme Court on the issue of whether the use of a sensory enhancing tool at the exterior of a home to determine a detail from within the home not otherwise ascertainable constitutes a Fourth Amendment search. In *Kyllo*, law enforcement officers utilized a thermal imaging device to scan Kyllo's house because they believed he was growing marijuana inside of his home. *Kyllo*, 533 U.S. at 29. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of the agent's vehicle across the street from the front of the house and also from the street in back of the house. *Id.* at 30. The thermal imager, which revealed heat signatures, discovered that a portion of the roof and a wall of the house were relatively hot compared to the rest of the house and surrounding houses. *Id.* As a result, the agent concluded that Kyllo was using halide lamps to grow marijuana. *Id.* Based on the evidence revealed by the thermal imager and further information gathered, law enforcement officers obtained a warrant and discovered marijuana plants in Kyllo's house. *Id.*

The United States Supreme Court held that the law enforcement officer's use of the sensory enhancing tool at the exterior of the house constituted a Fourth Amendment search:

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman*, 365 U.S., at 512, 81 S.Ct. 679, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

Id. at 34-35. The Court rejected the Government's claim that no search had occurred because the thermal imager only detected heat that had reached the exterior of the house:

The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house," Brief for United States 26. The dissent makes this its leading point, see *post*, at 2047, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth.

Id. at 35. The Court also rejected the Government’s contention that the use of thermal imager was not a search because it did not detect private activities occurring in private areas:

The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, “by even a fraction of an inch,” was too much, 365 U.S., at 512, 81 S.Ct. 679, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.

Id. at 37 (emphasis in original).

In *United States v. Thomas*, 757 F.2d 1359 (2d Cir.1985), the Second Circuit squarely addressed the issue before this Court in the present case --- whether the use of a drug detector dog as a sensory enhancing tool at the exterior of a house constitutes a Fourth Amendment search. The court first noted that in *United States v. Place*, 462 U.S. 696 (1983), the United States Supreme Court held that the practice of using trained dogs to sniff baggage at airports did not constitute a search. *Thomas*, 757 F.2d at 1366. The court found that the holding in *Place* did not establish that use of a drug detector dog to sniff the exterior of a house was not a Fourth Amendment search due to the constitutional protections afforded a house under the Fourth Amendment:

Thus, a practice that is not intrusive in a public airport may be intrusive when employed at a person's home. Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, *see United States v. Place*, 103 S.Ct. at 2644, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation. The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here-exposure of respondent's luggage, which was located in a public place, to a trained canine-did not constitute a 'search' within the meaning of the Fourth Amendment." *Place*, 103 S.Ct. at 2644-45. Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Id. at 1366-67. The Second Circuit very recently reaffirmed its holding in *Thomas*:

Consistent with the strong expectation of privacy in the sanctity of one's home, however, this Court has held that a canine sniff at the door of an apartment-even if the only function of the sniff is to reveal illegal narcotics inside that apartment-is nonetheless a "search" subject to the constraints of the Fourth Amendment. *See Thomas*, 757 F.2d at 1367. As we explained in *Thomas*, with regard to a canine sniff at the door to an apartment that revealed narcotics inside the apartment, "the defendant had a legitimate expectation that the contents of his closed apartment would remain private." *Id.* at 1367.

United States v. Hayes, 551 F.3d 138, 144 (2d Cir. 2008).

The first case in Florida to decide the issue of whether the use of a drug detector dog as a sensory enhancing tool at the exterior of a house constitutes a

Fourth Amendment search was the decision of the Fourth District Court of Appeal in *State v. Rabb*, 920 So. 2d 1175 (Fla. 4th DCA 2006). In *Rabb*, the trial court had recognized that the question presented, “whether it is violative of the Fourth Amendment to conduct a dog sniff of a private residence in order to obtain probable cause for the issuance of a search warrant,” was one of first impression in Florida. *Rabb*, 920 So.2d at 1180. Considering *United States v. Thomas* as persuasive precedent, the trial court concluded that the dog sniff at the exterior of Rabb’s house constituted a warrantless search. *Id.* On the State’s appeal from the trial court’s order granting the motion to suppress, the Fourth District Court of Appeal affirmed.

The Fourth District concluded that “[g]iven the shroud of protection wrapped around a house by the Fourth Amendment,” *Id.* at 1182, *Kyllo* established that the dog sniff at the exterior of Rabb's house constituted a warrantless search:

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.

In reaching this conclusion, the Fourth District distinguished the decision in *Nelson v. State*, 867 So.2d 534 (Fla. 5th DCA 2004), which held that a dog sniff at the threshold of a hotel room by a dog standing in the public hallway outside the hotel room did not constitute a warrantless search. The Fourth District based its distinction in large part on the significant differences in the expectation of privacy in a home and the expectation of privacy in a hotel room:

Put very simply, a hotel room may be nearly identical to a house for Fourth Amendment purposes, but it is not a house. It is neither as private nor as sacrosanct. As a result, the fact that the Fifth District held that a trained canine's dog sniff of a hotel room does not violate the Fourth Amendment because the hotel corridor is a public area, does not conflict with our conclusion that the dog sniff of a private house, such as *Rabb's*, violates the Fourth Amendment. This is so for the same reasons of "place" discussed above when determining that *Place* is not dispositive of this case, as it addressed public airports rather than private houses.

Rabb, 920 So.2d at 1186. The Fourth District harmonized its decision in *Rabb* with the decisions in *Nelson* and *Place*:

Put simply, we view the reasonable expectation of privacy afforded to locations along a hierarchy from public to private. An airport and a highway are unquestionably public places with little or no privacy, as much as a home is undoubtedly a private place characterized by its very privacy. A hotel room lies somewhere in between, because although it possesses some of the aspects of a home, it also possesses

some of the aspects of the itinerant life present in airports and on highways. An individual expects the public to be readily present in the hallways outside a hotel room door, but an individual does not expect the public to be readily present on the porch outside the door to a home.

Id. at 1186-87.

After the Fourth District issued its initial decision in *Rabb* holding that a warrant was required for the dog sniff at the door of Rabb's house, the United States Supreme Court granted the State's petition for writ of certiorari, vacated the judgment, and remanded the matter to the Fourth District for further consideration in light of the Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005). *See Florida v. Rabb*, 544 U.S. 1028 (2005). On remand, the Fourth District again decided that the dog sniff at the door of Rabb's house constituted a Fourth Amendment search. Once again, the court in *Rabb* relied on the heightened protection afforded to a house by the Fourth Amendment to find that *Caballes* did not require a contrary result:

In the present case, there are significant place and situation differences from *Caballes*. The challenged dog sniff occurred at the exterior of Rabb's house, the most sacred of places under Fourth Amendment jurisprudence. To repeat, the Fourth Amendment draws "a firm line at the entrance to the house." *Payton*, 445 U.S. at 589, 100 S.Ct. 1371. *Caballes*, on the other hand, does not involve a house, but rather a vehicle lawfully stopped by law enforcement while traveling along a public interstate highway. 125 S.Ct. at 836. Throughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to houses for several reasons: the ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of those passing by,

and the reality of “pervasive regulation” of vehicles by government, all of which result in a decreased expectation of privacy. See *California v. Carney*, 471 U.S. 386, 390-392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). The case on which *Caballes* principally relies, *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), also does not involve a house. Rather, it involves luggage in an airport, another public place. *Place*, 462 U.S. at 699, 103 S.Ct. 2637. Without doubt any protection of luggage in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world. The individual’s expectation of privacy could not be more minimal in today’s airports with their luggage screenings, passenger scans, and patdown searches.

Rabb, 920 So.2d at 1189. The Fourth District reaffirmed its prior reliance on *Kyllo*, and found that case controlled rather than *Caballes* because the dog sniff in *Rabb* involved the exterior of a house:

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*.

Rabb, 920 So.2d at 1190.

The Fourth District found that *Caballes* did not establish that a dog sniff was never a search for Fourth Amendment purposes because a dog sniff detects only contraband, and because no one has a legitimate privacy interest in contraband:

It is clear from the jurisprudential history of the Fourth Amendment that it is always considered in reference to a place. Furthermore, a slippery slope portends peril for privacy if the item searched for is the measuring stick. If determining whether law enforcement conduct constitutes a search is solely a function of whether the item searched

for is illegal, whether that item be in a vehicle on a public highway or beyond the closed doors of an individual's castle, the Fourth Amendment is rendered meaningless. Nothing would deter law enforcement from marching a dog up to the doors of every house on a street hoping the dog sniffs drugs inside. If drugs are detected, then no search has occurred because there is no legitimate expectation of privacy in drugs and the Fourth Amendment is not implicated; if drugs are not detected, then law enforcement cannot charge the individual with a crime and the unfounded search goes undeterred. Such an "ends justifies the means" approach to the Fourth Amendment is simply not what the Founders intended when they embodied a barrier at the door of the home in the Fourth Amendment.

Rabb, 920 So.2d at 1190-91 (footnote omitted).

Finally, the Fourth District noted that in *Caballes* the United States Supreme Court had not decided the issue of whether a dog sniff at the exterior of a home constituted a Fourth Amendment search:

The holdings in *Caballes* and *Place* may be based on what the dog detects, but the dog sniffs in those cases occurred in very different places from the house in the present case. The United States Supreme Court has yet to address the intersection of the logic of *Caballes* and *Place* with the historical protection of the home and *Kyllo*. Just as *Kyllo* did not pass on the constitutional permissibility of thermal scans of vehicles, *Caballes* did not pass on the constitutional permissibility of dog sniffs of houses. See *Caballes*, 125 S.Ct. at 842 (Souter, J., dissenting) ("The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car.")

Rabb, 920 So.2d at 1192 (footnote omitted); see also Jeffrey A. Bekares, Case Comment, *Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways*, 57 Fla. L. Rev. 963, 973-974 (Sept. 2005) (noting that "possibly

the most profound question yet to be answered” by *Caballes* is: “Will the Court apply the analysis of *Kyllo* to a suspicionless canine sniff of the home in the future, or will it adopt the view of those circuits that have interpreted the setting in *Place* (a public place) to be irrelevant and have held that a canine sniff is not a search in any context?”). After the Fourth District issued its decision reaffirming its holding that a dog sniff at the exterior of a house constitutes a Fourth Amendment search, review was denied by the Florida Supreme Court, *State v. Rabb*, 933 So.2d 522 (Fla.2006), and certiorari was denied by the United States Supreme Court in *Florida v. Rabb*, 549 U.S. 1052 (2006), indicating that the Court has decided to leave for another day its decision as to whether a dog sniff at the exterior of a house constitutes a Fourth Amendment search.

In its decision in the present case, the majority decision of the Third District incorrectly relied on *Caballes* to hold that a dog sniff at the exterior of a house can never constitute a Fourth Amendment search because a dog sniff detects only contraband, and because no one has a legitimate privacy interest in contraband. *State v. Jardines*, 33 Fla. L. Weekly D2455, 2456 (Fla. 3d DCA October 22, 2008). The *Caballes* Court was careful to tie its holding to the facts of the case which did not involve a dog sniff at the exterior of a house: “[T]he use of a well-trained narcotics-detection dog-one that ‘does not expose non-contraband items that otherwise would remain hidden from public view,’-during a lawful traffic stop,

generally does not implicate legitimate privacy interests.” *Caballes*, 543 U.S. at 409 (citation omitted). The decision of the Third District in this case ignores the significance of the fact that the dog sniff in this case occurred at the exterior of Jardines’ home, where the Fourth Amendment draws “a firm line.” *Payton*, 445 U.S. at 589.

The decision of the Third District in this case cites to a number of decisions from other jurisdictions and claims that the vast majority of those decisions support its holding that the dog sniff at the exterior of Jardines’ home did not constitute a Fourth Amendment search. *Jardines*, 33 Fla. L. Weekly at D2456, 2460. However, only two of the decisions cited by the Third District involve a dog sniff at the exterior of a private home --- a critical distinction considering the heightened protection given to a home by the Fourth Amendment. *See People v. Jones*, 279 Mich.App. 86, 755 N.W.2d 224, 228, 231-32 (2008)(majority opinion holding that dog sniff conducted outside front door of defendant’s residence was not a search for Fourth Amendment purposes; dissenting opinion finding that “the majority opinion erodes the protections afforded by the Fourth Amendment to protect the privacy and sanctity of individuals’ homes and runs afoul of the principle articulated by the United States Supreme Court that ‘[t]he Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.’” quoting *Kyllo*); *Rodriguez v. State*, 106 S.W.3d

224 (Tex.App.2003)(dog sniff at exterior of home not a search); *see also United States v. Chapman*, 2009 WL 301906 (E.D. Tenn. February 6, 2009)(dog sniff not a search where canine unit was lawfully at the front door of defendant's residence when dog alerted to the odor of contraband).

None of the remaining cases cited by the Third District involve a dog sniff at the exterior of a private home. *See United States v. Reed*, 141 F.3d 644, 648 (6th Cir.1998) (sniff by dog already lawfully inside defendant's home did not constitute a search); *United States v. Brock*, 417 F.3d 692 (7th Cir.2005)(dog sniff outside the door of a residence bedroom rented by the defendant, by a dog lawfully inside the house in which the bedroom was located, not a search); *United States v. Roby*, 122 F.3d 1120 (8th Cir.1997)(dog sniff conducted in corridor outside defendant's hotel room not a search); *United States v. Vasquez*, 909 F.2d 235 (7th Cir.1990)(dog sniff of garage from public alley was not a search); *State v. Box*, 205 Ariz. 492, 496-497, 73 P.3d 623 (Ariz.App.2003)(dog sniff conducted on the exterior of a car in a public place not a search); *People v. Ortega*, 34 P.3d 986, 991 (Colo.2001) (dog sniff of luggage at bus depot not a search); *Bain v. State*, 839 So.2d 739 (Fla.App.2003)(dog sniff of trunk of vehicle not a search); *Cole v. State*, 254 Ga.App. 424, 562 S.E.2d 720 (2002)(dog sniff at exterior of car not a search); *State v. Parkinson*, 135 Idaho 357, 17 P.3d 301 (Idaho App.2000)(dog sniff at exterior of truck not a search); *People v. Cox*, 318 Ill.App.3d 161, 251 Ill.Dec. 133, 739

N.E.2d 1066 (2000)(exterior sniff of vehicle by dog was not a search); *Bradshaw v. State*, 759 N.E.2d 271 (Ind.App.2001)(dog sniff of vehicle not a search); *State v. Bergmann*, 633 N.W.2d 328 (Iowa 2001)(dog sniff outside vehicle not a search); *State v. Barker*, 252 Kan. 949, 850 P.2d 885 (1993)(dog sniff of exterior of vehicle not a search); *State v. Kalie*, 699 So.2d 879 (La.1997)(dog sniff of vehicle's exterior surfaces not a search); *State v. Washington*, 687 So.2d 575 (La.App., 1997)(drug dog sniffing car not a search); *Fitzgerald v. State*, 384 Md. 484, 864 A.2d 1006 (2004)(drug sniff of apartment from apartment building's common hallway accessible to the public not a search); *Commonwealth v. Feyenord*, 62 Mass.App. 200, 815 N.E.2d 628 (2004)(drug dog sniffing exterior of car not a search); *Millsap v. State*, 767 So.2d 286 (Miss.App., 2000)(dog sniff of trunk of car not a search); *State v. LaFlamme*, 869 S.W.2d 183 (Mo.App.1993)(dog sniff of truck not a search); *Gama v. State*, 112 Nev. 833, 920 P.2d 1010 (1996)(use of dog to sniff exterior of vehicle not search); *State v. Van Cleave*, 131 N.M. 82, 33 P.3d 633 (2001)(drug sniff of vehicle trunk not a search); *People v. Offen*, 78 N.Y.2d 1089, 578 N.Y.S.2d 121, 585 N.E.2d 370 (1991)(issue of whether dog sniff of defendant's package constituted a search not decided; court noted its prior holding on state constitutional grounds that dog sniff outside apartment did constitute a search); *State v. Fisher*, 141 N.C.App. 448, 539 S.E.2d 677 (2000)(dog sniff of vehicle's perimeter not a search); *State v. Kesler*, 396 N.W.2d 729 (N.D.1986)(dog

sniff of package not a search); *State v. Rusnak*, 120 Ohio App.3d 24, 696 N.E.2d 633 (1997)(exterior dog sniff of vehicle not a search); *Scott v. State*, 927 P.2d 1066 (Okla.Crim.App.1996)(dog sniff of luggage in custody of common carrier not a search); *State v. Smith*, 327 Or. 366, 963 P.2d 642 (1998)(dog sniff of exterior of locked storage unit not a search); *Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987)(dog sniff of individual storage locker from common area of storage facility not a search); *State v. England*, 19 S.W.3d 762 (Tenn.2000)(canine sweep around perimeter of pickup truck not a search); *State v. Miller*, 256 Wis.2d 80, 647 N.W.2d 348 (Wis.App.2002)(dog sniff around unoccupied vehicle not a search); *Morgan v. State*, 95 P.3d 802 (Wy.2004)(dog sniff of exterior of defendant's disabled vehicle not a search); *see also Stabler v. State*, 990 So.2d 1258 (Fla. 1st DCA 2008)(dog sniff at front door of apartment where dog standing in common area open to the public did not constitute Fourth Amendment search).

The United States Supreme Court's holding in *Place* that a dog sniff of luggage at an airport is not a Fourth Amendment search, and its holding in *Caballes* that a dog sniff of a car is not a Fourth Amendment search, are based in large part on the Court's treating the sniff as *sui generis* under the Fourth Amendment because the dog sniff detects only contraband, and no one has a legitimate privacy interest in contraband. However this premise has been the subject of significant criticism. As pointed out by Professor LaFave:

. . . . dogs are not fool-proof and thus their use sometimes leads to serious intrusions upon the privacy of innocent people. The classic example is *Doe v. Renfrow*, where such a dog “alerted” to a 13-year-old girl during a school-wide “sniff” of all students. This dog continued to “alert” even after she emptied her pockets, so she was then subjected to a nude search by two women; no drugs were found, but it was later discovered that she had been playing that morning with her dog, who was in heat. This was not an isolated instance of error. The dogs used in this undertaking alerted to some fifty students, only 17 of whom were found to be in possession of drugs.

1 Wayne R. LaFave, *Search and Seizure*, § 2.2(g) (4th ed. 2004)(footnote omitted).

Justice Souter expressed similar sentiments in his dissenting opinion in

Caballes:

Once the dog’s fallibility is recognized, however, that ends the justification claimed in *Place* for treating the sniff as sui generis under the Fourth Amendment: the sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime. (...) And when that aura of uniqueness disappears, there is no basis in *Place*’s reasoning, and no good reason otherwise, to ignore the actual function that dog sniffs perform. [i.e. that of a search under the 4th Amendment] They are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conditionally enhanced. The information is not provided by independent third parties beyond the reach of constitutional limitations, but gathered by the government’s own officers in order to justify searches of the traditional sort, which may, or may not reveal evidence of crime but will disclose anything meant to be kept private in the area searched. Thus in practice the government’s use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area. And given the fallibility of the dog, the sniff is the first step in a process that may disclose “intimate details” without revealing contraband, just as a thermal-imaging device might do, as described in *Kyllo*.

Caballes, 543 U.S. at 412-13. See also Katz & Goembiewski, "Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs," 85 Neb. L. Rev. 735 (2007).

In addition to these general concerns about the infallibility of drug detector dogs, the record in this case raises specific concerns about whether the dog used in this case would alert only to contraband and would not provide any information about lawful activity inside Jardines' home. Although the affidavit for the search warrant in the instant case details the number of times the dog has correctly alerted to the presence of contraband, the affidavit gives no information concerning the amount of false alerts or mistakes the dog has furnished (S. 6). One of the critical factors in determining whether a narcotics detection dog is sufficiently reliable is the prior track record of the dog, and when examining that track record "emphasis must be placed on the amount of false alerts or mistakes the dog has furnished." *State v. Foster*, 390 So. 2d 469, 470 (Fla. 3d DCA 1980). An alert followed by a search in which no drugs are found is a "false alert." *Id.* As the affidavit in this case fails to give any indication as to the number of false alerts, the State's claim that the drug detector dog in this case will alert only to contraband is not supported by the record.

Given the shroud of protection wrapped around a house by the Fourth Amendment, this Court should hold that the dog sniff at the exterior of Jardines'

home constituted a warrantless Fourth Amendment search. *Kyllo* is the most recent pronouncement from the United States Supreme Court on the use of a sensory enhancing tool at the exterior of a home to determine information from within a home, and that decision holds that the use of such a sensory enhancing tool constitutes a Fourth Amendment search. This Court should apply the principles established by *Kyllo* and follow the decisions which hold that the use of a drug detection dog at the exterior of a home constitutes a Fourth Amendment search. See *United States v. Thomas*, reaffirmed by *United States v. Hayes*; *State v. Rabb*; *People v. Jones* (dissenting opinion); rather than the few decisions which reach a contrary result. See *United States v. Chapman*, 2009 WL 301906 (E.D. Tenn. February 6, 2009); *People v. Jones*, 279 Mich.App. 86, 755 N.W.2d 224, 228, 231-32 (2008); *Rodriguez v. State*, 106 S.W.3d 224 (Tex.App.2003). While the *sui generis* characteristics of a dog sniff might suffice to justify random sniffs of luggage at airports, see *Place*, and random sniffs of cars on the highway, see *Caballes*, those characteristics do not suffice to justify random drug sniffs at the front door of a home, especially when the serious questions about the infallibility of such dog sniffs, both in general and in this particular case, are considered in conjunction with the heightened constitutional protections afforded to a home.

B.

A dog sniff at the front door of a home is a search which can only be conducted where there is a reasonable, articulable suspicion of drug activity inside the home.

Should this Court determine that a dog sniff at the exterior of a house is not a Fourth Amendment search which requires a search warrant, this Court should adopt the position taken by Judge Cope in his opinion in this case concurring in part and dissenting in part, and follow those courts which hold that a drug sniff is permissible at the door of a dwelling only if there is a reasonable suspicion of drug activity. *Jardines*, 33 Fla. L. Weekly at D2458-60. A number of courts have expressed concern about the ramifications of a rule which allows police officers to randomly bring police dogs to the front doors of private residences based on nothing more than the hope that the dogs might detect the presence of drugs inside the residence. As noted by the Fourth District in *Rabb*, if a dog sniff is not a search and can be conducted without a warrant and without a reasonable suspicion, “[n]othing would deter law enforcement from marching a dog up to the doors of every house on a street hoping the dog sniffs drugs inside.” *Rabb*, 920 So.2d at 1190. The Nebraska Supreme Court and New York Court of Appeals have expressed similar concerns that such a rule would allow drug-sniffing dogs to be brought at random through the corridors of public housing projects. *State v. Ortiz*, 257 Neb. 784, 801, 600 N.W.2d 805, 816 (1999)(quoting *People v. Dunn*, 77 N.Y.2d 19, 563 N.Y.S.2d 388, 564 N.E.2d 1054, 1058 (1990)).

As explained by Judge Cope, a homeowner's implied invitation to others to use the home's walkway, driveway and porch to approach the home is not unlimited:

The homeowner may expect a knock at the door from a seller of goods, a solicitor of charitable contributions, or a neighbor on a social call. The postal service will deliver the mail and a delivery truck may drop off a package.

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

Jardines, 33 Fla. L. Weekly at D2458. These same reasonable limitations on a homeowner's implied invitation to others also apply to law enforcement personnel:

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

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

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

Id.

Based on these types of concerns, the Nebraska Supreme Court crafted the following rule to balance law enforcement and privacy interests:

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

(1) the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and

(2) the police are lawfully present in the place where the canine sniff is conducted.

Ortiz, 600 N.W.2d at 816 (quoting *Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74, 79 (1987)); *see also* 1 Wayne R. LaFare, § 2.2(g), at 533-34 (“with rare exception the [reported] cases have involved situations in which the [dog] alert occurred after a pre-existing reasonable suspicion.”)(footnotes omitted).

Should this Court determine that a dog sniff at the exterior of a house is not a Fourth Amendment search which requires a search warrant, this Court should adopt the *Ortiz* rule and hold that a drug sniff is permissible at the door of a

dwelling only if there is a reasonable suspicion of drug activity. A rule which allows police officers free rein to approach the front door of any house with a drug sniffing dog, at any hour of the day or night, without a reasonable suspicion of criminal activity taking place inside that house, cannot be squared with the historic protections afforded to the home by the Fourth Amendment.

As noted by Judge Cope, at the hearing on the motion to suppress in this case the focus was on the issue of whether the dog sniff at the exterior of Jardines' home was a Fourth Amendment search which required a warrant, and there was no consideration of a reasonable suspicion standard. *Jardines*, 33 Fla. L. Weekly at D2459. Accordingly, should this Court decide to adopt the *Ortiz* rule and hold that a drug sniff is permissible at the door of a dwelling only if there is a reasonable suspicion of drug activity, the case should be remanded to the trial court to consider whether there was a reasonable suspicion which supported the dog sniff in this case.

C.

Detective Pedraja's subsequent detection of the odor of marijuana at the front door of the home was tainted by the prior illegal search and the inevitable discovery rule is inapplicable.

The inevitable discovery rule allows evidence obtained as the result of unconstitutional police procedure to be admitted if the evidence would ultimately have been discovered by legal means. *See Nix v. Williams*, 467 U.S. 431 (1984); *Fitzpatrick v. State*, 900 So.2d 495, 514 (Fla.2005). For the inevitable discovery

doctrine to apply, the State must establish that at the time of the constitutional violation the case was 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*, 900 So.2d at 514; *see also Moody v. State*, 842 So.2d 754, 759 (Fla.2003).

The State cannot establish the requirements for the applicability of the inevitable discovery rule in this case because the record conclusively establishes that Detective Pedraja only approached the front door of Jardines' home and detected the odor of marijuana at the front door because the dog had alerted to the odor of marijuana. Detective Pedraja arrived at Jardines' home at 7:00 a.m. and set up surveillance outside the home (T. 11).² Detective Pedraja simply watched the house for approximately fifteen minutes and did not approach the house prior to

² As the motion to suppress filed in this case alleged that the search warrant was not based on probable cause because it was based on evidence resulting from an illegal search, the trial judge properly held an evidentiary hearing to determine the legality of the police officer's actions in gathering the information provided to the magistrate in the affidavit for the search warrant. While a magistrate's determination of probable cause based on an affidavit for a search warrant is entitled to great deference and the determination of probable cause is based on the facts contained within the four corners of the affidavit, *see Illinois v. Gates*, 462 U.S. 213 (1983); *Pilienci v. State*, 991 So.2d 883 (Fla. 2d DCA 2008), it is the function of the trial judge considering a subsequent motion to suppress to determine if any of the information contained in the affidavit had been obtained by means of an illegal search, and if so to excise that information from the affidavit and determine if probable cause exists without consideration of that evidence. *Waldo v. State*, 975 So. 2d 542 (Fla. 1st DCA 2008); *Rabb*, 920 So. 2d at 1187; *State v. Hunwick*, 434 So. 2d 1000 (Fla. 4th DCA 1983).

the time that Detective Bartelt arrived on the scene with the drug detector dog (T. 11, 31). Once the dog arrived on the scene, Detective Pedraja joined Detective Bartelt and the dog and together they approached the front of Jardines' home (T. 11, 24, 31). Detective Pedraja was standing back behind Detective Bartelt and the dog as they approached the home (T. 11-13). Detective Pedraja remained behind Detective Bartelt and the dog as they crossed the threshold of an archway in front of the home and entered the alcove of the porch and the dog began tracking an airborne odor (T. 24). When the dog assumed a sitting position after sniffing at the base of the door, Detective Bartelt pulled the dog away from the front door and signaled to Detective Pedraja that the dog had given a positive alert for the odor of narcotics (T. 27-28). When Detective Bartelt gave that signal, Detective Pedraja was still behind him in the driveway (T. 28). Detective Pedraja did not approach the front door of the home until after Detective Bartelt pulled the dog away from the door and returned to his vehicle with the dog (T. 14, 28). It was only at this point, after Detective Pedraja had approached the door of the home based on the dog's positive alert, that Pedraja detected the smell of marijuana himself (T. 14-15).

Thus, the record in this case conclusively demonstrates that Detective Pedraja's detection of the odor of marijuana at the front door of Jardines' home was a direct result of the illegal dog sniff at the front door, and there is nothing in the

record to indicate that Detective Pedraja had any intention to approach the front door of the home prior to the time of the dog's illegal sniff. That being the case, the inevitable discovery doctrine does not apply because the State cannot establish that at the time of the illegal dog sniff the case was in such a posture that Detective Pedraja would have detected the odor of marijuana on his own notwithstanding the illegal dog sniff. While it was possible that Detective Pedraja would have approached the home, it was not inevitable. *See Rabb*, 920 So.2d at 1192 (officer's detection of odor of marijuana at front door of defendant's home not considered when determining probable cause for search warrant where the chronology of the probable cause affidavit suggested that the dog alert to marijuana occurred prior to law enforcement's detection of its odor); *compare State v. Pereira*, 967 So. 2d 312 (Fla. 3d DCA 2007) (officer's detection of odor of marijuana at front door of defendant's home properly considered when determining probable cause for search warrant where officer's detection of odor of marijuana occurred the day before detection of odor of marijuana by drug detection dog). As the inevitable discovery rule does not apply and the officer's detection of the odor of marijuana was the fruit of the illegal dog sniff, it cannot be considered in determining whether the affidavit established probable cause.

D.

Excluding the dog sniff and the officer's detection of the odor of marijuana from the affidavit for the search warrant, the remaining facts in the affidavit did not establish probable cause.

Excluding the dog sniff and the officer's detection of the odor of marijuana from the affidavit for the search warrant, the only remaining facts in the affidavit for the search warrant to establish probable cause are an anonymous uncorroborated tip, no cars in the driveway of Jardines' home on a Tuesday morning, closed window blinds, and an air conditioning unit continuously running without recycling (S. 1-7). In the district court of appeal the State understandably did not challenge the trial court's ruling that these facts do not establish probable cause to search Jardines' home, and the district court of appeal did not find that such facts constituted probable cause. The trial court's finding that these facts do not establish probable cause to search a home is clearly correct. *See Rabb*, 920 So.2d at 1187 (anonymous tip that there was a marijuana grow operation in Rabb's house, cannabis cultivation books and video discovered during traffic stop of Rabb's vehicle, and cannabis located in Rabb's vehicle and on his person were insufficient to establish probable cause for a search warrant); *compare Pereira*, 967 So. 2d at 314 (anonymous tip, coupled with officer's detection of odor of marijuana at front door of defendant's home which occurred the day before detection of odor of marijuana by drug detection dog, was sufficient to establish probable cause for a search warrant).

As the dog sniff at the front door of Jardines' home constituted an illegal search under the Fourth Amendment, and as the police officer's subsequent detection of the odor of marijuana was tainted by that illegal search, the dog sniff and the officer's detection of the odor of marijuana must be excised from the affidavit for purposes of determining whether the affidavit establishes probable cause. As the remaining facts in the affidavit do not establish probable cause, the search of Mr. Jardines' home pursuant to the search warrant violated the Fourth Amendment, and the evidence discovered pursuant that unconstitutional search must be excluded. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and remand this case with instructions that the defendant's motion to suppress be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 1st day of April, 2009.

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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