IN THE SUPREME COURT OF FLORIDA

CASE NO.

JOELIS JARDINES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *State v. Jardines*, 33 Fla. L. Weekly D2455 (Fla. 3d DCA October 22, 2008), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix, paginated separately and identified as "A" followed by the page number.

STATEMENT OF THE CASE AND FACTS

On December 5, 2006, Officer William Pedraja, of the Miami-Dade Police Department obtained a search warrant to conduct a search of the home of Joelis Jardines (A. 2). The warrant was supported by a probable cause affidavit which stated that a drug detection dog had alerted to the odor of a controlled substance which the dog was trained to detect (A. 2-3). The affidavit asserted that based upon the positive alert by the narcotics detector dog to the odor of one or more of the controlled substances that the dog was trained to detect, and based on the dog's training, certification and past reliability in the field in detecting those controlled substances, it was reasonable to believe that one or more of those controlled substances were present within the area alerted to by the dog (A. 3). The affidavit also stated that Officer Pedraja had approached the front door of the residence in an attempt to obtain consent to search and had detected the smell of live marijuana plants emanating from the front door of the house (A. 2). A search conducted

pursuant to the warrant resulted in the seizure of live marijuana plants and Jardines was charged with trafficking in cannabis and theft of the electricity used to grow the plants (A. 4).

Jardines moved to suppress the evidence seized inside his home on the following grounds:

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

(A. 4)(footnote omitted). The trial court granted the motion to suppress based on its determination that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search." (A. 4).

On appeal, the majority decision of the Third District Court of Appeal 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." (A. 4-5). The district court of appeal relied on *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) and *United States v. Place*, 462 U.S. 696 (1983) to hold that a dog sniff is not a search under the Fourth Amendment (A. 5-7). The court rejected "the notion that Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150

L.Ed.2d 94 (2001), relied on in Rabb, makes a dog's detection of contraband while standing on a front porch open to the public, a search which compromises a legitimate privacy interest." (A. 6). 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 (A. 7), and certified direct conflict with that decision.

> In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in Rabb, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed. Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with Rabb, we certify direct conflict. To the extent that Judge Gross' dissent in Rabb is consistent with this analysis we adopt his reasoning as our own. See Rabb, 920 So.2d at 1196 (Gross, J., dissenting). Reversed and remanded.

(A. 16-17)(footnote omitted).[1]

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

[1] 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* (A. 18). 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." (A. 18).

SUMMARY OF ARGUMENT

In reaching its holding in this case that a dog sniff at the front door of a home is not a Fourth Amendment search, the Third District Court of Appeal expressly declined to follow the decision of the Fourth District Court of Appeal in *State v. Rabb*, 920 So. 2d 1175 (Fla. 4th DCA 2006), which held that a dog sniff at the front door of a home does constitute a Fourth Amendment search. The Third District Court of Appeal certified direct conflict to the extent that its analysis conflicted with *Rabb*. The Third District Court of Appeal further adopted the reasoning of the dissenting judge in *Rabb* as its own to the extent that the dissenting opinion was consistent with its analysis. It is respectfully submitted that this Court should accept jurisdiction in this case to resolve the conflict generated by the Third District's decision in this case, and establish a uniform rule as to whether a dog sniff at the exterior of a home constitutes a search under the Fourth Amendment.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *State v. Rabb*, 920 So. 2d 1175 (Fla. 4th DCA 2006).

In *State v. Rabb*, 920 So. 2d 1175, 1184 (Fla. 4th DCA 2006), the Fourth District Court of Appeal held that a dog sniff at the exterior of a house is a search under the Fourth Amendment. The court based its holding on the decision of the United States Supreme Court in *Kyllo v. United States*, 533 U.S. 27 (2001).

> Given the shroud of protection wrapped around a house by the Fourth Amendment, we conclude that *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), controls the outcome of the case at bar.
>
> * * * * *
>
> 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.
>
> * * * * *
>
> Relying on *Kyllo*, we conclude that although the use of such sensory enhancement techniques to detect contraband subsequently seized by warrant may not amount to a search in a place such as a public airport, it does when intruding into a house to discern "intimate details." *See Payton*, 445 U.S. at 586-587 n. 24, 100 S.Ct. 1371.

Rabb, 920 So. 2d at 1182-1185. The Fourth District found that the decisions of the United States Supreme Court in *United States v. Place*, 462 U.S. 696 (1983) and *Illinois v. Caballes*, 543 U.S. 405 (2005) did not establish that a dog sniff at the

exterior of a home is not a Fourth Amendment search because those cases did not address the use of law enforcement investigatory techniques at a house. *Rabb*, 920 So. 2d at 1183-84, 1188-90. The dissenting opinion in *Rabb* concluded that the decisions of the United States Supreme Court in *Place* and *Caballes* did establish that a dog sniff at the exterior of a home is not a Fourth Amendment search. *Id*. at 1196-1200, (Gross, J., dissenting).

In its decision in the present case, the Third District Court of Appeal held that a dog sniff at the exterior of a home does not constitute a Fourth Amendment search (A. 4-10, 16-17). The Third District based its holding on the decisions of the United States Supreme Court in *Place* and *Caballes* (A. 5-8). The Third District rejected "the notion that Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), relied on in Rabb, makes a dog's detection of contraband while standing on a front porch open to the public, a search which compromises a legitimate privacy interest." (A. 6). The Third District 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 (A. 7), and certified direct conflict with that decision.

> In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in Rabb, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have

> concluded substantial evidence supported the magistrate's determination that probable cause existed. Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with Rabb, we certify direct conflict. To the extent that Judge Gross' dissent in Rabb is consistent with this analysis we adopt his reasoning as our own. See Rabb, 920 So.2d at 1196 (Gross, J., dissenting). Reversed and remanded.

(A. 16-17)(footnote omitted).

It is respectfully submitted that this Court should accept jurisdiction in this case to resolve the conflict generated by the Third District's decision in this case, and establish a uniform rule as to whether a dog sniff at the exterior of a home constitutes a search under the Fourth Amendment. [2]

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[2] In a decision issued approximately one month prior to the date of the decision in the case at bar, the First District Court of Appeal also certified direct conflict with *Rabb*. *See Stabler v. State*, 990 So. 2d 1258, 1263 (Fla. 1st DCA 2008). A petition for discretionary review was filed in *Stabler*, and the case is currently pending this Court's decision on jurisdiction in Case No. 08-2006.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY:____________________________
HOWARD K. BLUMBERG
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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 6th day of November, 2008.

____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF FONT

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

____
HOWARD K. BLUMBERG
Assistant Public Defender