IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-2101

JOELIS JARDINES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY 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

In this reply brief of petitioner on the merits, as in the initial brief of petitioner on the merits, 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.

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.

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.

The State relies heavily on the decision of the federal district court judge in *United States v. Broadway*, 580 F.Supp.2d 1179 (D. Colo. 2008) in its attempt to distinguish the use of a drug sniffing dog from the use of the thermal imaging device in *Kyllo v. United States*, 533 U.S. 27 (2001). In *Broadway*, the district court judge focused on olden tales of dogs sniffing out the true identity of disguised individuals and the use of dogs for hundreds of years to track down wanted individuals by detecting their scent. *Broadway*, 580 F.Supp.2d at 1191. However, the district court judge in *Broadway* did not reference any olden tales of dogs being used to obtain information regarding the interior of a home. Thus, it cannot be said that such use of a dog to obtain information regarding the interior of a home does not violate "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34-35, or that such

use of a dog was not "deemed an unreasonable search and seizure when it was adopted." *Id*. at 40. Furthermore, a dog trained by the police to detect the scent of contraband is not something that is "in general public use" and therefore when the police use such a dog "to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id*.

The district court judge in *Broadway* also erroneously determined that "a dog---unlike a thermal imaging device---does not detect anything inside a home, but merely detects the particulate odors that have escaped from a home." *Broadway*, 580 F.Supp.2d at 1181. Just as the thermal imaging device in *Kyllo* revealed details of the interior of the home by detecting heat on the outside of the walls of the house, a drug sniffing dog reveals details of the interior of the home by detecting odors on the outside of the house.

The State's claim that "a dog is not a sensory enhancing tool" (answer brief of respondent at 17) defies logic. The very reason a dog is called to a scene by a police officer is because the dog can smell odors which a human sense of smell cannot detect. Thus, just as a powerful directional microphone is a sensory enhancing device which enhances a human's sense of hearing, a drug sniffing dog is a sensory enhancing device which enhances a human's sense of smell. The fact that a drug sniffing dog may not fall within the rubric of "technology" as did the

thermal imaging device in *Kyllo*, is not significant. The Court in *Kyllo* was concerned with sensory enhancing devices used to reveal information inside a home which could not be detected by humans using their normal sensory capabilities. In this regard, there is no significant distinction between a thermal imaging device which enhances a police officer's senses and a drug sniffing dog which enhances a police officer's sense of smell.

In its answer brief on the merits, the State contends that "the training and reliability of a particular dog is a question to be considered by the magistrate in determining whether sufficient probable cause exists to issue a search warrant, and is separate from the question whether a dog sniff is a *Fourth Amendment* search." (answer brief of respondent at 32; emphasis in original). However, as pointed out by Justice Souter, once the dog's fallibility is recognized, "[t]he point is simply that the sniff and alert cannot claim the certainty that *Place* assumed, both in treating the deliberate use of sniffing dogs as sui generis and then taking that characterization as a reason to say they are not searches subject to Fourth Amendment scrutiny." *Illinois v. Caballes*, 543 U.S. 405, 413 (2005)(Souter, J., dissenting). Thus, the dog's fallibility is directly relevant to the question of whether that dog's sniffing at the front door of a house to determine details inside that house constitutes a Fourth Amendment search.

Moreover, the State misses the point when it claims that any deficiency in the dog's ability to detect only the odor of contraband can be remedied by the magistrate issuing the search warrant. If the dog sniff constitutes an unlawful Fourth Amendment search, that illegality cannot be remedied by the magistrate who later decides whether to issue the search warrant. If the dog does not detect only the presence of contraband inside the house and therefore the sniff constitutes an unlawful Fourth Amendment search of the home, the constitutional damage is done before the magistrate is ever presented with the affidavit for the search warrant.

In *Caballes*, the Court pointed out that the defendant did not suggest that an erroneous alert, in and of itself, reveals any legitimate private information. *Caballes*, 543 U.S. at 409. Petitioner is raising such a suggestion in the present case. Just as the thermal imaging device in *Kyllo* was capable of detecting intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id*., at 38, a dog detecting smells other than contraband is capable of detecting similar intimate details in a home such as at what hour the family members eat their meals. Thus, the potential fallibility of the drug sniffing dog is directly relevant to the issue of whether a dog sniff at the exterior of a home constitutes a Fourth Amendment search.

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.

The State claims no basis exists to require a reasonable suspicion of criminal activity for a police officer's deployment of a drug sniffing dog at the exterior of a home because there is no reasonable expectation of privacy which would preclude a police officer without a drug sniffing dog from knocking on the front door of the house. This argument fails to recognize the distinction between the two scenarios most recently pointed out in the decision of the Arizona Court of Appeals in *State v. Guillen*, --- P.3d ---, 2009 WL 1783537 (Ariz. App. June 24, 2009):

> The dissent correctly observes that officers may lawfully, without reasonable suspicion, approach a home's front door to conduct a consensual inquiry of a resident. . . . But, there is a marked difference between such a benign approach-which the resident may lawfully ignore altogether by declining to acknowledge the officer or declining to answer any inquiry-and the arrival on one's threshold of an officer in the act of deploying a sensory-enhancing piece of equipment, without the consent of the resident, designed to collect information from within the residence. *Indeed, when an officer deploys a dog to sniff the seams of a house, the officer has unmistakably targeted the residents of the home for criminal investigation. We do not believe that an officer's mere arrival on a threshold, without a canine, to make an inquiry on some unknown topic is similarly embarrassing or worrisome for a law-abiding citizen.*

Id., 2009 WL 1783537 at *8 (citation omitted)(emphasis supplied). Based on this distinction, the Arizona Court of Appeals joined the ranks of the state courts holding that dog sniffs at the exterior of a home require a reasonable suspicion of

criminal activity. *See People v. Dunn*, 77 N.Y.2d 19, 563 N.Y.S.2d 388, 564 N.E.2d 1054 (1990); *State v. Ortiz*, 257 Neb. 784, 801, 600 N.W.2d 805 (1999).

The requirement of a reasonable suspicion of criminal activity prior to a police officer's deployment of a drug sniffing dog at the front door of a home does not require a prohibited basis in Florida's constitutional protection against unreasonable searches and seizures found in Article I, section 12. Just as this Court is free to determine that a dog sniff at the exterior of a home constitutes a Fourth Amendment search because the United States Supreme Court has not yet spoken to this issue, this Court is free to determine that the Fourth Amendment requires a reasonable suspicion of criminal activity prior to a police officer's deployment of a drug sniffing dog at the front door of a home because the United States Supreme Court has not yet spoken to that issue either.

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 record does not support the State's claim that "[t]he canine unit reached the door before Detective Pedraja simply because the dog is very energetic and Detective Pedraja would have been in its way." (answer brief of respondent at 47). The record in this case clearly establishes that Detective Pedraja made no attempt to approach the front door of the home until after the dog had alerted to the

presence of contraband inside the house. 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). Thus an essential component of the inevitable discovery doctrine --- a reasonable probability that, even in the absence of the dog sniff, Detective Pedraja would have knocked on the door pursuant to normal police practices in the normal course of events that day --- is lacking in this case.

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.

The State has abandoned the argument it made in the district court of appeal that probable cause existed independent of the dog sniff and the officer's detection of the odor or marijuana.

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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BY:_____
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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 30th day of June, 2009.

_____
HOWARD K. BLUMBERG
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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.

_____
HOWARD K. BLUMBERG
Assistant Public Defender