

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-116

**RAYDEL B. RODRIGUEZ,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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**BRIEF OF PETITIONER ON JURISDICTION**

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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. Rodriguez*, Case No.: 3D07-2451 (Fla. 3d DCA December 24, 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**

A search warrant was obtained by law enforcement based upon a positive dog sniff at the exterior of the Petitioner’s home (A. 2). Incriminating evidence of a “marijuana farm” was then seized from within the premises (A. 1). The trial court suppressed this evidence because the probable cause asserted in the affidavit in support of the warrant was primarily founded upon the dog sniff (A. 2). The State appealed the suppression order (A. 1).

On appeal, the Third District Court of Appeal reversed the trial court’s ruling “because, without more, reversal is required by *State v. Jardines*, 33 Fla. L. Weekly D2455 (Fla. 3d DCA Oct. 22, 2008), which held that *Rabb* was wrongly decided” (A. 2). 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 notice invoking this Court's discretionary jurisdiction based on this express and direct conflict was filed on January 22, 2009.

### **SUMMARY OF ARGUMENT**

In reaching its holding in this case that a dog sniff at a residence 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. Moreover, the Court found in this case that “reversal is required” based upon the Third District Court of Appeal’s decision in *State v. Jardines*, 33 Fla. L. Weekly D2455 (Fla. 3d DCA, October 22, 2008), which certified direct conflict with *Rabb*. In that case, the Third District Court of Appeal 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. 2). The Third District based its holding on its decision in *Jardines* which rejected *Rabb* and found the decisions of the United States Supreme Court in *Place* and *Caballes* to be controlling. In *Jardines*, 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.” Thus, as here, 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 and consequently certified direct conflict with that decision.

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.<sup>1</sup>

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<sup>1</sup> In a decision issued approximately one month prior to the date of the decision in *Jardines* and cited 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. SC08-2006.

## 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: \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing notice has been mailed this \_\_\_\_ day of January, 2009, to: Timothy R. M. Thomas, Assistant Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131-2406.

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GEORGE T. PALLAS, P.A.  
Attorney for Petitioner

**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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GEORGE T. PALLAS, P.A.  
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