

# Keep Your Nose Out of My Business – A Look at Dog Sniffs in Public Places Versus the Home

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## INTRODUCTION

December 6, 2006,<sup>1</sup> began just like any other ordinary day for Joelis Jardines. However, by the end of the day, Mr. Jardines’ life would be changed forever. That day, based on an uncorroborated anonymous tip, a police officer arrived at Mr. Jardines’ home, stepped onto his property with a dog named Franky, and approached Mr. Jardines’ front porch.<sup>2</sup> However, the officer was not alone. He was accompanied by multiple law enforcement departments, narcotics detectives, DEA, and federal agents.<sup>3</sup> State and federal agencies were also on scene for surveillance and backup.<sup>4</sup> Franky began sniffing around and tracked an odor coming from inside the house at which point he alerted to the presence of illegal narcotics.<sup>5</sup> Based on Franky’s alert, the police obtained a warrant to search Mr. Jardines’ home, searched the entire house, and discovered

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1. The date initially cited in *Jardines* is December 6, 2006. However, page 46 of the case gives the date of the sniff test as December 5, 2006. This is a scrivener’s error.

2. *Jardines v. State*, 73 So. 3d 34, 37 (Fla. 2011).

3. *Id.* at 46.

4. *Id.*

5. *Id.* at 37.

marijuana being grown.<sup>6</sup> Mr. Jardines was arrested and charged with trafficking in marijuana.<sup>7</sup> The entire spectacle lasted hours, all in plain view of the neighbors and the public.<sup>8</sup> Jardines moved to suppress the evidence seized during the unlawful search.<sup>9</sup>

In reversing the trial court's granting of the motion to suppress, the appellate court held that the use of a drug detector dog at a defendant's front door does not constitute a search because the police conduct did not compromise any legitimate interest in privacy, even though the setting was a person's home.<sup>10</sup> The court relied on previous cases around the country involving dog sniffs showing a person either had no expectation of privacy or that the expectation was severely diminished and did not outweigh the minimal government intrusion.<sup>11</sup>

The Florida Supreme Court, however, in reversing the court of appeal, based its decision on the cornerstone of Fourth Amendment jurisprudence—the home is a person's castle and affords the highest protection of privacy.<sup>12</sup> Relying on Supreme Court precedent in *Kyllo v. United States*,<sup>13</sup> the Florida Supreme Court held that “[g]iven the special status accorded a citizen's home in Anglo-American jurisprudence . . . the warrantless ‘sniff test’ that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment.”<sup>14</sup> The State of Florida has recently appealed the Florida Supreme Court's ruling to the United States Supreme Court, which has issued certiorari and will hear the case later this year.<sup>15</sup> Specifically, the question the Court granted certiorari on is whether a dog sniff, at a person's home, constitutes a search for purposes of the Fourth Amendment, thus requiring the government to possess probable cause before con-

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6. *Id.* at 37–38.

7. *Id.* at 38, 48.

8. *Id.* at 48. (“The entire on-the-scene government activity—i.e., the preparation for the ‘sniff test,’ the test itself, and the aftermath, which culminated in the full-blown search of Jardines’ home—lasted for hours.”).

9. *Id.* at 38.

10. *State v. Jardines*, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008).

11. *Id.* at 5–6 (“[A] majority of federal circuit courts have viewed the *Place* Court's holding as generally categorizing canine sniffs as non-searches.”) (citing *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005); *United States v. Reed*, 141 F.3d 644, 649 (6th Cir. 1998); *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997); *United States v. Vasquez*, 909 F.2d 235 (7th Cir. 1990)). “Likewise, ‘the vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search.’” *Jardines*, 9 So. 3d at 6 (quoting *People v. Jones*, 755 N.W.2d 224, 228 (Mich. Ct. App. 2008)).

12. *Jardines*, 73 So. 3d at 45–46.

13. 533 U.S. 27 (2001).

14. *Jardines*, 73 So. 3d at 55–56.

15. *Florida v. Jardines*, 132 S. Ct. 995 (2012) (granting petition for writ of certiorari).

ducting such a sniff.<sup>16</sup>

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>17</sup> To constitute a search for purposes of the Fourth Amendment, the government must intrude into a person’s expectation of privacy that society recognizes as reasonable.<sup>18</sup> Generally, if the government conducts a search, absent exigent circumstances, probable cause is required before conducting the search.<sup>19</sup> If a person does not have an expectation of privacy, then no search occurs and probable cause is not required before the government intrudes into a person’s life.<sup>20</sup>

Ever since the “expectation of privacy” analysis started in *Katz v. United States* and upheld a person’s Fourth Amendment rights in a public place when police were attempting to wire tap a phone booth without a warrant to listen to a person’s conversations,<sup>21</sup> the United States Supreme Court has been defining what constitutes a search on a case by case basis. The Court has had to determine whether a search occurred when the police looked into a person’s garbage,<sup>22</sup> used a pen registry at a phone company to ascertain what numbers were dialed in a private home,<sup>23</sup> and used aerial surveillance of a private home’s surrounding area.<sup>24</sup> The Court has constantly determined when and where a search occurs and when and where a person has an expectation of privacy.

However, in situations where there is no physical intrusion but the police use a dog to sniff the outside of certain objects or areas to determine the presence of contraband, the test to determine if a search has occurred and whether a person has an expectation of privacy becomes more difficult. While the United States Supreme Court held in *United States v. Place* that a dog sniff does not constitute a search, it did so analyzing the situation in a public setting, in an airport with a person’s luggage,<sup>25</sup> and again in *Illinois v. Caballes*, in an automobile on a public

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16. See Petition for a Writ of Certiorari at i, *Jardines*, 132 S. Ct. 995 (No. 11-564), 2011 WL 5254666.

17. U.S. CONST. amend. IV.

18. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

19. *Arizona v. Hicks*, 480 U.S. 321, 326–29 (1987).

20. *California v. Greenwood*, 486 U.S. 35, 39–41 (1988).

21. *Katz*, 389 U.S. at 353.

22. *Greenwood*, 486 U.S. at 37.

23. *Smith v. Maryland*, 442 U.S. 735, 737–38 (1979).

24. *California v. Ciraolo*, 476 U.S. 207, 209 (1986).

25. *United States v. Place*, 462 U.S. 696, 707 (1983).

roadway.<sup>26</sup> However, the court has never addressed whether a dog sniff constitutes a search when the setting is a person's private home.

Justice Brennan and Justice Blackmun were correct in *United States v. Place*, that it was a mistake to attempt to resolve the dog sniff issue given the fact that the issue in *Place* was the narrower question of whether a seizure occurred in an airport with a person's luggage, not whether a search occurred from a dog sniff.<sup>27</sup> Neither of the parties filed briefs or researched the issue, and the Court was not in a position to consider other circumstances that could occur regarding dog sniffs.<sup>28</sup> The other circumstances that could occur arose in Mr. Jardines' home. Now there is a knock on the Supreme Court's door asking it to address whether a dog sniff constitutes a search when the setting is a person's private home and what expectation of privacy a person has in fending off unwarranted government intrusion. In today's post-9/11 society, where it appears that many of our rights to privacy are vanishing by the day, a person can only wonder, until the Court addresses the issue this year, how far government intrusion can cross the line and whether the home is still protected by the Fourth Amendment or if it is just an *Amendmyth*.

While various jurisdictions have relied on the Court's holdings in *United States v. Place* and *Illinois v. Caballes* to determine that a dog sniff is not a search when the setting is a public or quasi-public place, they also rely on the Court's holding in *United States v. Jacobsen*<sup>29</sup> to find that a person has no expectation of privacy in contraband. However, in addition to Florida, Indiana is the only other jurisdiction that has addressed dog sniffs at a person's house and found that such a sniff constitutes a search.<sup>30</sup> These two jurisdictions relied on the Supreme Court's holding in *Kyllo v. United States* to uphold the sanctity and privacy of a person's home—regardless of what is inside.

So what happens when the dog sniffs in *Place* and *Caballes* meet *Kyllo*'s private home context? What expectation of privacy, if any, will the Court determine people have in their homes in relation to dog sniffs? This article will focus on, through courts' interpretations, the expectation of privacy a person has when a dog sniffs in a public versus a private setting. Part one addresses the United States Supreme Court's holdings in *Place*, *Jacobsen* and *Caballes* and subsequent interpretations

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26. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

27. *See Place*, 462 U.S. at 710–11 (Brennan, J., concurring); *see also id.* at 720–21 (Blackmun, J., concurring).

28. *Id.* at 723–24.

29. 466 U.S. 109 (1984).

30. *See, e.g., United States v. Jackson*, No. IP 03-79-CR-1 H/F, 2004 U.S. Dist. LEXIS 15676, at \*10 (S.D. Ind. Feb. 2, 2004).

of the holdings in relation to dog sniffs in various public and quasi-public locations. Part two addresses the United States Supreme Court's holding in *Kyllo* and privacy rights in the home. Part three argues that, in considering the holdings and privacy rights in *Place*, *Jacobsen*, *Caballes*, and *Kyllo* together, the home is afforded the highest level of protection consisting of the greatest expectation of privacy. Thus, the Court should find that a dog sniff of a home is a search requiring the government to have probable cause before any dogs go sniffing around.

### I. *UNITED STATES V. PLACE*

In *United States v. Place*, government officials observed Raymond J. Place's suspicious behavior while waiting in line at the Miami International Airport.<sup>31</sup> The officials obtained Place's identification and received consent to search his two suitcases.<sup>32</sup> However, the officers decided not to search his luggage due to the fact that the plane was about to depart.<sup>33</sup> Based on discrepancies the officers observed in Place's luggage address tags, they notified authorities in New York where Place's plane was landing.<sup>34</sup>

When Place landed in La Guardia Airport in New York he was approached by DEA agents who informed him that they believed he was carrying narcotics.<sup>35</sup> Place refused consent to search his luggage at which time the agents took his luggage to Kennedy Airport where a drug detection dog sniffed the luggage and alerted to the presence of contraband.<sup>36</sup> Agents then obtained a search warrant and discovered cocaine.<sup>37</sup>

Place filed a motion to suppress the cocaine arguing that it was discovered pursuant to an illegal seizure.<sup>38</sup> The contents of the motion did not specifically address the issue of whether the dog sniff was an illegal search *per se*.<sup>39</sup> The United States Supreme Court granted certiorari and found that, under the circumstances of the case, the seizure was illegal due in part to the fact that ninety minutes had elapsed from the time police seized Place's luggage.<sup>40</sup> However, without the issue presented being whether a dog sniff constitutes a search, and without

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31. *Place*, 462 U.S. at 698.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 698–99.

36. *Id.* at 699. (“The dog reacted positively to the smaller of the two bags . . .”).

37. *Id.*

38. *Id.*

39. *Id.* at 719 (Brennan, J., concurring) (“In the District Court, respondent did ‘not contest the validity of sniff searches *per se* . . .’” (quoting *United States v. Place*, 498 F. Supp. 1217, 1228 (E.D.N.Y. 1980))).

40. *Place*, 462 U.S. at 709–10 (majority opinion) (“The length of the detention of

citing any legal authority, Justice O'Connor, writing for the majority, found the use of the drug detection dog did not constitute a search.<sup>41</sup> Justice O'Connor reasoned that a dog sniff is not a search because the "the sniff discloses only the presence or absence of narcotics" and "does not expose noncontraband items."<sup>42</sup> Justice O'Connor specifically wrote:

A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.<sup>43</sup>

Justices Brennan and Blackmun wrote opinions concurring only in the judgment that the seizure was illegal and foreshadowed the problems that would arise by the Court issuing a ruling on the dog sniff.<sup>44</sup> "The Court of Appeals did not reach or discuss the issue. It was not briefed or argued in this Court. In short, I agree with Justice Blackmun that the Court should not address the issue."<sup>45</sup> Justice Brennan also agreed "the issue is more complex than the Court's discussion would lead one to believe."<sup>46</sup>

Justice Blackmun also made clear his distaste for such a swift holding without truly understanding the ramifications. "My concern with the Court's opinion has to do . . . with the Court's haste to resolve the dog-sniff issue."<sup>47</sup> "Neither party has had an opportunity to brief the issue, and the Court grasps for the appropriate analysis of the problem . . . . The Court is certainly in no position to consider all the ramifications of this important issue."<sup>48</sup>

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respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause.").

41. *Id.* at 707.

42. *Id.*

43. *Id.*

44. *See id.* at 719–20 (Brennan, J., concurring); *id.* at 723 (Blackmun, J., concurring).

45. *Id.* at 719 (Brennan, J., concurring).

46. *Id.*

47. *Id.* at 720–21 (Blackmun, J., concurring).

48. *Id.* at 723–24.

It seems that Justices Brennan and Blackmun were correct in their concerns of the Court's holding in *Place*. Despite the fact that Justice O'Connor's opinion in *Place* was dicta and did not declare all dog sniffs constitutional, a majority of courts have determined that under *Place*, no matter the location, a dog sniff is not a search. For example, the Ninth Circuit has stated that "[w]hether or not the statement in *Place* was a holding or dictum, the Supreme Court has clearly directed the lower courts to follow its pronouncement."<sup>49</sup> As will be discussed later, it seems courts have followed that pronouncement in numerous settings—perhaps a little too literally.

Despite Justice Brennan's and Blackmun's concerns, *Place* paved the way for the debate regarding dog sniffs. However, *Place* only established that a dog sniff was not a search when conducted in a public setting. The Court in no way implied that its analysis applied in the context of the home. *Place* was careful to limit its holding to the particular facts of that case, in that a dog sniff of luggage in a public place is not a search.<sup>50</sup> This may be the case because the privacy interest a person has in luggage in an airport does not compare to the privacy interest a person has in the home.<sup>51</sup> Unfortunately, it seems as though courts have taken *Place*'s holding in a vacuum in determining that dog sniffs are not searches. Regardless, the Supreme Court did not stop at *Place* in determining when and where a person has an expectation of privacy.

#### A. United States v. Jacobsen

The following year the Court decided *United States v. Jacobsen*, which proved to be a partner to *Place* in the dog sniff arena. While *Jacobsen* did not involve a dog sniffing for contraband, it did pave the way for the Court's position on a person's expectation of privacy in contraband. When Federal Express employees were examining a damaged package, they noticed a white substance in a plastic bag, inside a tube.<sup>52</sup> They notified DEA agents who saw that the package had been damaged.<sup>53</sup> The agents removed the white powder to conduct a field test and determined the substance was cocaine.<sup>54</sup> The defendants were then

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49. *United States v. Beale*, 736 F.2d 1289, 1291 (9th Cir. 1984) (holding narcotics detection dog sniff of defendant's luggage in the checked baggage area at the airport was not a search).

50. 1 JOHN WESLEY HALL, JR., *SEARCH & SEIZURE* § 9.18 (3d ed. 2000).

51. *Id.*

52. *United States v. Jacobsen*, 466 U.S. 109, 111 (1984).

53. *Id.*

54. *Id.* at 111–12. “As the test is described in the evidence, it involved the use of three test tubes. When a substance containing cocaine is placed in one test tube after another, it will cause liquids to take on a certain sequence of colors. Such a test discloses whether or not the substance is cocaine, but there is no evidence that it would identify any other substances.” *Id.* at 112 n.1.

arrested.<sup>55</sup>

In granting certiorari, it seems the Supreme Court wanted to send a message regarding its position on the new hot topic of the War on Drugs, which was a recent development at the time.<sup>56</sup> In finding that no search occurred, Justice Stevens, writing for the majority, held:

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in “privately” possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably “private” fact, compromises no legitimate privacy interest.<sup>57</sup>

Justice Stevens noted that the decision was premised on *Place*'s holding and referred to the fact that dog sniffs are only able to disclose the presence or absence of contraband, like the field test conducted in *Jacobsen*.<sup>58</sup> It became eerily apparent in *Jacobsen* that the Court was taking a different approach when analyzing a person's expectation of privacy. As Justice Brennan wrote in the dissenting opinion:

In sum, until today this Court has always looked to the manner in which an individual has attempted to preserve the private nature of a particular fact before determining whether there is a reasonable expectation of privacy upon which the government may not intrude without substantial justification. And it has always upheld the general conclusion that searches constitute at least “those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties.” *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). Nonetheless, adopting the suggestion in *Place*, the Court has veered away from this sound and well-settled approach and has focused instead solely on the product of the would-be search. In so doing, the

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55. *Id.* at 112.

56. *Id.* at 112–13. (“[B]ecause field tests play an important role in the enforcement of the narcotics laws, we granted certiorari.”) (internal citation omitted).

57. *Id.* at 123.

58. *Id.* at 124 (“Here, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the *Fourth Amendment*.”) (emphasis added).



Court has ignored the fundamental principle that “[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light.” *Byars v. United States*, 273 U.S. 28, 29 (1927).<sup>59</sup>

After the Court decided *Place* and *Jacobsen*, it seemed obvious, based on the Court’s new “end justifying the means” approach, how the Court would decide the next case involving dog sniffs, contraband, and a person’s expectation of privacy. However, of utmost importance, the next dog sniff case the Court addressed did not involve the home.

### B. Illinois v. Caballes

In *Illinois v. Caballes*, the Court next addressed the issue of whether police could conduct a sniff test by a drug detection dog during the course of a lawful traffic stop.<sup>60</sup> Roy Caballes was stopped for speeding and, while the officer was writing a citation, another officer arrived with a drug detection dog to sniff the exterior of the vehicle.<sup>61</sup> The dog alerted at the trunk at which point the officers searched the trunk and discovered marijuana.<sup>62</sup> The Supreme Court granted certiorari and Justice Stevens, writing for the Court, quoted *Jacobsen* stating that “[o]fficial conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment.”<sup>63</sup> The Court reasoned that because “any interest in possessing contraband cannot be deemed ‘legitimate,’ . . . governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’”<sup>64</sup>

It is important to note, however, that central to *Caballes* was the fact that the motorist was driving on a public road and was lawfully stopped. As Justice Stevens wrote, “A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”<sup>65</sup>

*Caballes* and *Place* are the only two Supreme Court decisions that have addressed the Fourth Amendment implications of dog sniffs, and by no means did either decision determine whether a dog sniff at a private home is a search. The decisions only involved dog sniffs in public places. While the Court has clearly shown in *Place*, *Jacobsen*, and *Caballes* that a person possesses a diminished expectation of privacy in

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59. *Id.* at 140 (Brennan, J., dissenting).

60. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

61. *Id.* at 406.

62. *Id.*

63. *Id.* at 408 (quoting *Jacobsen*, 466 U.S. at 123).

64. *Caballes*, 543 U.S. at 408 (quoting *Jacobsen*, 466 U.S. at 123).

65. *Caballes*, 543 U.S. at 410.

a public setting and has no expectation of privacy with regard to contraband, these situations and privacy rights are completely distinguishable from the privacy afforded to a person and the home. It seems, however, that anything outside the home, in most courts' views, is fair game.

### C. Dog Sniffs in Public Places

Since the Court decided *Place*, and especially *Caballes*, many federal and state courts have found that a dog sniff in a public place is not a search.<sup>66</sup> Additionally, courts justify this by finding that a person does not have an expectation of privacy in the odors that emanate from an enclosed space because such odors are accessible to the public.<sup>67</sup> For example, as one court noted: "A person does not have a legitimate expectation of privacy in the odors emanating from his or her belongings in a public place, so the use of a well-trained and reliable narcotics dog in a public place is generally not a search for Fourth Amendment purposes."<sup>68</sup>

While it is clear that a person has a lessened expectation of privacy when the setting occurs in an ordinary public place, this is especially true in the automobile context. As the Supreme Court has stated:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.<sup>69</sup>

For example, in *United States v. Jeffus*, a case determined before, and strikingly similar to, *Caballes*, Edward Jeffus was lawfully stopped while driving his vehicle.<sup>70</sup> During the encounter, the police officer grew suspicious of Jeffus' nervous behavior.<sup>71</sup> After Jeffus refused to consent to a search of his vehicle, the officer took a drug-detector dog and had the dog sniff the exterior of Jeffus' vehicle.<sup>72</sup> After the dog alerted to the

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66. See, e.g., *United States v. Branch*, 537 F.3d 328 (4th Cir. 2008); *United States v. Olivera-Mendez*, 484 F.3d 505 (8th Cir. 2007); *People v. Esparza*, 272 P.3d 367 (Colo. 2012); *Wright v. Commonwealth*, 663 S.E.2d 108 (Va. Ct. App. 2008).

67. See, e.g., *State v. Davis*, 711 N.W.2d 841, 845 (Minn. Ct. App. 2006) (holding that where the odor of narcotics exists in a common hallway and is detectable through a human being's sense of smell, a dog sniff is proper).

68. *State v. Cleave*, 33 P.3d 633, 636 (N.M. 2001) (citing *United States v. Place*, 462 U.S. 696, 707 (1983); *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir. 1990); *State v. Villanueva*, 796 P.2d 252, 255 (N.M. Ct. App. 1990)).

69. *United States v. Knotts*, 460 U.S. 276, 281 (1983) (internal quotations omitted).

70. *United States v. Jeffus*, 22 F.3d 554, 556 (4th Cir. 1994) (The vehicle Jeffus was traveling in had a broken headlight).

71. *Id.*

72. *Id.*

presence of contraband, the officer searched the vehicle and discovered cocaine, a firearm, and drug paraphernalia.<sup>73</sup> In affirming the denial of Jeffus' motion to suppress, the Fourth Circuit relied on *Place*'s holding and held that "[h]aving the trained dog sniff the perimeter of Jeffus' vehicle, which had been lawfully stopped in a *public* place, did not of itself constitute a search."<sup>74</sup>

Likewise, in *Merrett v. Moore*, the Eleventh Circuit held that a dog sniff of the exterior of a car during a license check did not constitute a search.<sup>75</sup> In so holding, the court stated:

Here, the dogs sniffed the exterior of the plaintiffs' vehicles; *they did not invade plaintiffs' homes* or their bodily integrity. The sniffs occurred while plaintiffs were lawfully stopped in a *public place*; and because the sniffs occurred during the license check, plaintiffs were not delayed to conduct the sniffs. The sniffs also alerted the officers only to the potential presence of drugs; they did not expose the contents of plaintiffs' vehicles to public view.<sup>76</sup>

The Eleventh Circuit interestingly noted that the setting in the case was not a home, implying perhaps that had the location of the dog sniff been outside the home, the result would be different. Regardless, most courts have ruled similarly, finding in the public setting, a person's expectation of privacy is not the same as the home. Accordingly, courts have found a dog sniff not to be a search when of a car,<sup>77</sup> a car at a border patrol checkpoint,<sup>78</sup> a truck,<sup>79</sup> luggage,<sup>80</sup>

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73. *Id.*

74. *Id.* at 557 (emphasis added) (citing *United States v. Place*, 462 U.S. 696, 707 (1983)).

75. See *Merrett v. Moore*, 58 F.3d 1547, 1553 (11th Cir. 1995).

76. *Id.* (emphasis added).

77. *United States v. Franklin*, 547 F.3d 726, 733 (7th Cir. 2008); *United States v. Farrior*, 535 F.3d 210, 218 (4th Cir. 2008); *State v. Box*, 73 P.3d 623, 627–28, (Ariz. Ct. App. 2003) ("The dog sniff alone cannot have been an unreasonable search because a dog sniff is not a search for Fourth Amendment purposes when, as here, it is conducted on the exterior of a car in a public place at which the police have a right to be present.") (citing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)); *Cole v. State*, 562 S.E.2d 720, 722 (Ga. Ct. App. 2002); *State v. Washington*, 687 So. 2d 575, 580 (La. Ct. App. 1997).

78. *United States v. Hernandez*, 976 F.2d 929 (5th Cir. 1992) (finding no search occurred when border patrol agents conducted dog sniff test of a vehicle at a border patrol checkpoint) (citing *United States v. Gonzalez-Basulto*, 898 F.2d 1011, 1013 (5th Cir. 1990); *United States v. Dovali-Avila*, 895 F.2d 206, 207–08 (5th Cir. 1990)).

79. *State v. Parkinson*, 17 P.3d 301, 307 (Idaho Ct. App. 2000); *State v. LaFlamme*, 869 S.W.2d 183, 188 (Mo. Ct. App. 1993); *State v. England*, 19 S.W.3d 762, 766–67 (Tenn. 2000).

80. *United States v. Williams*, 365 F.3d 399, 405 (5th Cir. 2004); *United States v. Carter*, 859 F. Supp. 202, 204 (E.D. Va. 1994); *People v. Ortega*, 34 P.3d 986, 991 (Colo. 2001) ("The Supreme Court, moreover, has explicitly held that under the United States Constitution subjecting luggage to dog sniffs does not constitute a search or seizure.") (citing *United States v. Place*, 462 U.S. 696 (1983)); *Scott v. State*, 927 P.2d 1066, 1068 (Okla. Crim. App. 1996).

packages,<sup>81</sup> a storage unit,<sup>82</sup> or even a school locker.<sup>83</sup>

The dog sniffs in these cases, however, all occurred in a public place. These cases do not address a person's expectation of privacy in their home where privacy rights are at their greatest. When people travel in their cars on public roadways, they encounter curious passersby that may look inside the car. When stopped at a traffic light, individuals are surrounded by others who may be observing what is around them. Even when in a parking lot, pedestrians constantly walk by vehicles, glance in, and are able to observe the belongings inside.

A person's luggage is also constantly within the public view and is often given to other people for handling. In the typical situation of checking into a hotel, a person hands their bags to the hotel staff for assistance to their room. When a person is on a bus, usually their bags are checked either underneath or in a compartment above. If taking a taxi to or from an airport, the driver will customarily put the passenger's luggage in the trunk.

Especially in today's society, in an airport a person arguably has the most severely diminished expectation of privacy. Ever since 9/11, people's expectations of privacy in airports seem to dwindle by the hour while government security increases by the second. People are repeatedly subjected to random scans and questioning. A person knows and expects to relinquish their belongings at some point. Whether checking the bags to store underneath the plane, or having them put under an x-ray machine, a government official is always viewing a person's belongings.

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.<sup>84</sup>

While a person has an expectation of privacy in these situations, however minimal, a person expects public viewing and exposure of their belongings to some extent. Accordingly, the expectation of privacy in a public setting, or lack thereof, does not compare to the expectation of privacy in the home. But what about locations that fall within the middle of the spectrum of complete public exposure and the privacy in the

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81. *State v. Kesler*, 396 N.W.2d 729, 735 (N.D. 1986).

82. *State v. Washburn*, 685 S.E.2d 555, 558 (N.C. Ct. App. 2009); *Commonwealth v. Johnston*, 530 A.2d 74, 78 (Pa. 1987).

83. *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 477 (5th Cir. 1982).

84. *State v. Rabb*, 920 So. 2d 1175, 1189 (Fla. Dist. Ct. App 2006).

home? Most courts have still sided with *Place* and found that a dog sniff is not a search.

#### D. *Quasi-Public Settings*

Many courts are making their way to the front door of a person's home and have addressed dog sniffs in locations that can be classified as quasi-public or semi-private settings. Courts have found that in situations where there is public access to some extent, a person has a diminished expectation of privacy, coupled with no expectation of privacy in contraband. Accordingly, they find no search occurs when police conduct a dog sniff. This has occurred when a dog sniffs a garage from a public alley,<sup>85</sup> or when a dog sniffs a yard that is in plain view of the public.<sup>86</sup> Courts have repeatedly found that, when subjected to a dog sniff, areas outside the home do not carry the same protections as the inside of a home.

For example, in *United States v. Roby*, the Eighth Circuit addressed a dog sniff in the hallway of a hotel.<sup>87</sup> When the dog alerted to the presence of contraband outside one of the rooms, police obtained a search warrant and found ten kilograms of cocaine inside Roby's hotel room.<sup>88</sup> On appeal, the Eighth Circuit addressed Roby's expectation of privacy inside a hotel and stated:

Mr. Roby had an expectation of privacy in his Hampton Inn hotel room. But because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far. Neither those who stroll the corridor nor a sniff dog needs a warrant for such a trip. As a result, we hold that a trained dog's detection of odor in a common corridor does not contravene the Fourth Amendment.<sup>89</sup>

Additionally, in *Fitzgerald v. State*, a Maryland court addressed whether a dog sniff of an apartment while conducted at the common hallway of an apartment building is a search.<sup>90</sup> Fitzgerald moved to suppress the marijuana and the circuit court denied the motion. The circuit court found that "the apartment hallway was open to the public" and no

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85. *United States v. Vasquez*, 909 F.2d 235, 238 (7th Cir. 1990) (relying on *Place* and *Jacobsen*).

86. *United States v. Hayes*, 551 F.3d 138, 145 (2d Cir. 2008) (finding dog sniff did not violate defendant's legitimate expectation of privacy because the contents of the bag that the dog smelled were not located inside defendant's home and because the sanctuary of the home did not extend to the front yard where the sniff occurred).

87. *United States v. Roby*, 122 F.3d 1120, 1124 (8th Cir. 1997).

88. *Id.* at 1122–23.

89. *Id.* at 1125.

90. *Fitzgerald v. State*, 864 A.2d 1006, 1007 (Md. 2004).

search occurred.<sup>91</sup> On appeal, the Court of Special Appeals affirmed to which the Maryland Supreme Court granted certiorari.<sup>92</sup> The Maryland Supreme Court found “the apartment building’s common area and hallways were accessible to the public” and thus, the dog sniff was not a search.<sup>93</sup>

Additionally, in *Stabler v. State*, a Florida appellate court also addressed the issue of a dog sniff outside a person’s apartment.<sup>94</sup> *Stabler*’s apartment had a common area and his front door was open to public access.<sup>95</sup> Police officers brought a drug dog to the front door of the apartment, where it alerted to the presence of contraband.<sup>96</sup> A search was conducted, during which the police discovered cocaine.<sup>97</sup>

The Florida First District Court of Appeal, relying heavily on *Place* and *Caballes*, contended that:

Neither *Caballes* nor *Place* turned on the location of the dog sniff but rather on the target of the dog sniff and the unique nature of a dog’s nose: “a canine sniff by a well-trained narcotics-detection dog [is] ‘*sui generis*’ because it ‘discloses only the presence or absence of narcotics, a contraband item.’”<sup>98</sup>

The court, agreeing with *Place*, *Jacobsen*, and *Caballes*, found that the dog sniff did not constitute a search and that one does not have an expectation of privacy in contraband.<sup>99</sup> It further concluded that “the dog sniff at the front door of the apartment did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest.”<sup>100</sup> Interestingly, the court seemed to contradict itself by first claiming that *Place* and *Caballes* did not focus on the location of the dog sniff, and then writing that “[p]aramount to [its] conclusion is the fact that the dog was located on a common walkway within the apartment complex when the sniff occurred.”<sup>101</sup>

These conclusions are troubling for several reasons. It appears that courts are taking the holdings of *Place*, *Jacobsen*, and *Caballes* in a

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91. *Id.* at 1008.

92. *Id.* at 1009.

93. *Id.* at 1017.

94. *Stabler v. State*, 990 So. 2d 1258, 1258 (Fla. Dist. Ct. App. 2008).

95. *Id.* at 1259.

96. *Id.*

97. *Id.*

98. *Id.* at 1261 (alteration in original) (citing *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)) (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

99. *Stabler*, 990 So. 2d at 1263.

100. *Id.*

101. *Id.* See also *State v. Davis*, 711 N.W.2d 841, 845 (Minn. Ct. App. 2006) (“‘[C]ommon hallways . . . [are] available for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises.’”) (alterations in original) (quoting *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977)).

vacuum and are not focusing on the protections afforded to a home under the Fourth Amendment. Instead, courts are focusing on the fact that there is contraband and will look to any scenario where there may be public access for the end to justify the means. However, as Justice Scalia, writing for the majority, stated in *Kyllo* with regard to the home, “all details are intimate details, because the entire area is held safe from prying government eyes.”<sup>102</sup>

By narrowly focusing on a location where there may be some form of public access, like in *Fitzgerald* and *Stabler*, courts run the risk of defining Fourth Amendment rights through economic class.<sup>103</sup> Why should one person who can afford a house be more protected than a person with less means that can only afford to rent an apartment? If courts continue to find that no search occurs when in the context of an apartment building, but perhaps a search does occur when at a person’s private home, then people who are more financially successful would have greater Fourth Amendment protections than others who are not. Nowhere in the text of the Fourth Amendment does it state that *property owners* are secure from unreasonable searches and seizures. It shows that all people are protected from unwarranted government intrusion. Affording greater protections to those with more wealth is certainly not the intention of the Fourth Amendment. Courts need to focus on the privacy afforded inside the home when analyzing dog sniffs. In doing so, the privacy rights of individuals will remain consistent, regardless of whether a person’s home is “‘situated by itself on a spacious multi-acre estate or stacked upon others in a . . . crowded tenement in the inner city.’”<sup>104</sup> Otherwise, the Fourth Amendment will be rendered meaningless. It is undeniable that the home, regardless of the situation, affords the greatest protection because the home is the one place a person has the greatest expectation of privacy. It is the place a person retreats from the world and it is the cornerstone of the Fourth Amendment.<sup>105</sup>

## II. KYLLO AND THE HOME

*Kyllo v. United States* is turning out to be the defender and guardian against dog sniffs at the home. Although *Kyllo* did not involve police using a dog to conduct a sniff test, it did highlight the magnitude of a person’s expectation of privacy inside the home.

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102. *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

103. *People v. Jones*, 125 Misc. 2d 91, 93–94 (N.Y. Sup. Ct. 1984) (argument by counsel that passengers had a reasonable expectation of privacy in vehicle and stating, “Fourth Amendment rights should not depend on one’s economic status.”).

104. *Cowles v. State*, 23 P.3d 1168, 1180 (Alaska 2001) (Fabe, J., dissenting) (quoting *Smith v. State*, 510 P.2d 793, 805 (Alaska 1973) (Rabinowitz, C.J., dissenting)).

105. *Kyllo*, 533 U.S. at 31.

In *Kyllo*, government agents suspected Danny Kyllo of growing marijuana in his home.<sup>106</sup> When marijuana is grown in a home, typically a person will use high-intensity lamps that emit high amounts of heat.<sup>107</sup> As such, government agents sitting in a parked car across the street used a thermal imager scan on Kyllo's home to detect infrared radiation.<sup>108</sup> The imaging device showed that the roof over Kyllo's garage and one side wall were hotter than normal.<sup>109</sup> Based on the reading, the agents determined that Kyllo was growing marijuana inside his house.<sup>110</sup> The agents obtained a search warrant and found over a hundred marijuana plants growing inside Kyllo's home.<sup>111</sup>

Kyllo filed a motion to suppress the evidence seized which was denied.<sup>112</sup> After the Ninth Circuit Court of Appeals remanded the case to determine the intrusiveness of thermal imaging devices, the district court found that the device did not show any images of people or activities occurring within the home and the device could not penetrate any walls or windows to observe conversations or activities.<sup>113</sup> Ultimately, the district court found that the device did not reveal any of the home's "intimate details."<sup>114</sup> The Court of Appeals affirmed.<sup>115</sup>

The Supreme Court was faced with the challenge of determining whether a search of Kyllo's home occurred. Writing for the Court, Justice Scalia conceded that "the antecedent question whether or not a Fourth Amendment 'search' has occurred is not so simple under our precedent."<sup>116</sup> In finding that a search occurred, the majority rejected the notion of a distinction between "off-the-wall" observations and "through-the-wall" surveillance, which Justice Stevens advocated for in his dissent.<sup>117</sup> Instead, as Justice Scalia wrote, "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe

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106. *Id.* at 29.

107. *Id.*

108. *Id.* at 29–30 ("Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images.").

109. *Id.* at 30.

110. *Id.* (In addition to the thermal imaging, the agents also based their conclusions on tips from informants and utility bills.).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 30–31.

116. *Id.* at 31.

117. *Id.* at 35 ("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*,



from prying government eyes.”<sup>118</sup> What seemed to be of particular importance was the thermal imaging device’s inability to differentiate between intimate details or non-intimate details.<sup>119</sup> Justice Scalia noted that the device could not differentiate between the intimate details of a woman taking a nightly bath or the simple fact that someone left a light on inside the home.<sup>120</sup> This point, as discussed later, directly addresses a dog’s inability to differentiate between legal and illegal contraband, intimate and non-intimate details.

The Court looked to its precedent and found heat emanating from the home, just like specific items, such as a can of ether<sup>121</sup> and the registration number to a phonograph turntable,<sup>122</sup> is an intimate detail.<sup>123</sup> The Court recognized that:

We have said that the Fourth Amendment draws “a firm line at the entrance to the house.” That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no “significant” compromise of the homeowner’s privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.<sup>124</sup>

While Justice Scalia failed to analyze the original meaning of the Fourth Amendment in *Kyllo*, this principle is consistent with his earlier opinion in *Wyoming v. Houghton*, where he stated that a historical inquiry is the starting point for searches and seizures.<sup>125</sup> It seems as though the Court, as evidenced by *Place*, *Jacobsen*, and *Caballes*, forgot

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where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth.”).

118. *Id.* at 37.

119. *Id.* at 38 (“Limiting the prohibition of thermal imaging to ‘intimate details’ would not only be wrong in principle; it would be impractical in application, failing to provide ‘a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.’”) (quoting *Oliver v. United States*, 466 U.S. 170, 181 (1984)).

120. *Kyllo*, 533 U.S. at 38.

121. *Id.* at 37–38 (citing *United States v. Karo*, 468 U.S. 705 (1984)).

122. *Kyllo*, 533 U.S. at 38 (citing *Arizona v. Hicks*, 480 U.S. 321 (1987)).

123. *Kyllo*, 533 U.S. at 38.

124. *Id.* at 40 (citations omitted).

125. *See Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (determining probable cause existed to conduct a search of an automobile under the Fourth Amendment and stating, “[i]n determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”).

that principle somewhere along the way. While *Place* and *Caballes* involved dog sniffs in a public setting, the privacy protections and history of the home were not thought of or analyzed. Accordingly, if the Court is going to address dog sniffs in the home, it must first start by analyzing the history and privacy afforded to the home.

As early as 1604, an English court stated that “the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose . . . .”<sup>126</sup> William Blackstone later wrote, “the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity . . . .”<sup>127</sup> The primary reason the Fourth Amendment was enacted was due to British troops conducting searches and seizures of homes that people sought to eliminate forever.<sup>128</sup> “The driving force behind the adoption of the Amendment . . . was widespread hostility among the former colonists to the issuance of writs of assistance . . . and general search warrants . . . .”<sup>129</sup> Those writs gave officers complete power and discretion to conduct searches of places.<sup>130</sup> “Opposition to the search policies centered upon the use by British customs house officers of the writs of assistance, general warrants which allowed officers of the crown to search, *at their will*, wherever they suspected untaxed goods to be.”<sup>131</sup>

[T]he writ of assistance was ‘the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English lawbook . . . . It is a power that places the liberty of every man in the hands of every petty officer.’<sup>132</sup>

As English government searches increased and became frequent after 1485, English thought began to postulate that certain types of house searches by government agents were unreasonable and unlawful. “[T]he colonists’ memory of the use and abuse of the writs was one of the reasons for the adoption, by several colonies, of constitutional safe-

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126. *Semayne’s Case*, (1604) 77 Eng. Rep. 194 (K.B.) 195; 5 Co. Rep. 91 a, 91 b (footnote omitted).

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128. See generally NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (Leonard W. Levy ed., De Capo Press 1970) (1937).

129. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (citing *Boyd v. United States*, 116 U.S. 616, 625–26 (1886)).

130. *Boyd*, 116 U.S. at 625.

131. *Commonwealth v. Blood*, 507 N.E.2d 1029, 1035 (Mass. 1987) (quoting *Commonwealth v. Cundriff*, 415 N.E.2d 172 (Mass. 1980)).

132. *Blood*, 507 N.E.2d at 1035 (quotations omitted).

guards regulating searches.”<sup>133</sup> In fact, the framers focused “almost exclusively about the need to ban house searches under general warrants.”<sup>134</sup>

Due to these historical concerns, courts have afforded the home the greatest protection. Courts focus on the special nature of homes and give homes additional protection as compared to things observed in public. For example, as Justice Douglas noted in *Lombard v. Louisiana*, “[t]he principle that a man’s home is his castle is basic to our system of jurisprudence.”<sup>135</sup> Almost all courts will agree that “[n]owhere are expectations of privacy greater than in the home.”<sup>136</sup>

“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.”<sup>137</sup> Accordingly, the Fourth Amendment draws “a firm line at the entrance to the house.”<sup>138</sup> Based on this principle, “the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’”<sup>139</sup>

In this context, courts have afforded the home the greatest protection. For example, the Supreme Court has held that a search of a home, generally, can only be done with a warrant.<sup>140</sup> The Court has made it “clear that any physical invasion of the structure of the home, ‘by even a fraction of an inch,’ was too much . . . .”<sup>141</sup> Conversely, searches of other types of property, such as cars and even people, often may be conducted without warrants.<sup>142</sup> Similarly, government officials must secure a warrant, absent exigent circumstances, before arresting a person in the home, while no warrant is required to arrest a person in public.<sup>143</sup>

Therefore, it is clear that the expectation of privacy people have in their homes is unquestionably greater than the expectation of privacy a person has in a public setting, like an automobile or luggage at an air-

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133. *Id.* (alteration in original) (quotations omitted).

134. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

135. *Lombard v. Louisiana*, 373 U.S. 267, 275 (1963) (Douglas, J., concurring).

136. *Segura v. United States*, 468 U.S. 796, 820 (1984) (Stevens, J., dissenting).

137. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

138. *Payton v. New York*, 445 U.S. 573, 590 (1980).

139. *Id.* at 585 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972)).

140. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (holding that searches of homes by the federal government require warrants).

141. *Kyllo*, 533 U.S. at 37 (quoting *Silverman*, 365 U.S. at 512).

142. *See, e.g., California v. Acevedo*, 500 U.S. 565, 579 (1991) (holding no warrant required when police possessed probable cause to search vehicle).

143. *United States v. Watson*, 423 U.S. 411, 423–24 (1976) (no warrant requirement for arrest made on street).

port. Luggage and the automobile cannot find its roots in the past five hundred years of history. Luggage and automobiles are not a person's castle. Neither were luggage, nor automobiles the focal points in drafting the Fourth Amendment.

### III. BRINGING *PLACE*, *CABALLES*, AND *KYLLO* TOGETHER

So, what happens when *Place*, *Jacobsen*, *Caballes*, and *Kyllo* come together at the home? Will the Court apply the analysis in *Kyllo* or will it follow the precedent set by *Place*, *Jacobsen*, and *Caballes*? The Supreme Court had the opportunity to finalize the issue in *State v. Rabb*,<sup>144</sup> a case decided before the Court's holding in *Caballes*. Instead of hearing arguments, the Court, after deciding *Caballes*, passed on the issue and remanded the case back to the Florida District Court of Appeal to readdress the issue in light of the Court's recent holding in *Caballes*.<sup>145</sup>

#### A. Florida v. Rabb

In *State v. Rabb*, an anonymous tipster informed the police that James Rabb was growing marijuana in his home.<sup>146</sup> After conducting surveillance, the police observed Rabb leave his house in his car and followed him.<sup>147</sup> When Rabb committed a traffic infraction, officers stopped his vehicle.<sup>148</sup> During the seizure, the officers observed books and videos in Rabb's car detailing how to cultivate marijuana.<sup>149</sup>

The police brought a drug detection dog to sniff the exterior of Rabb's vehicle and, after the dog's positive alert, the police found a cannabis cigarette inside the vehicle.<sup>150</sup> The police took the dog to Rabb's residence where they approached the front door and had the dog conduct a sniff test that alerted to the presence of contraband inside.<sup>151</sup> The police obtained a warrant to search the home and found numerous marijuana plants growing inside the residence along with other contraband that was present.<sup>152</sup>

On remand from the Supreme Court, the Florida appellate court did not change its opinion or analysis, and rightfully so. The court's analysis

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144. 881 So. 2d 587 (Fla. Dist. Ct. App. 2004), *vacated*, 544 U.S. 1028 (2005).

145. *Florida v. Rabb*, 544 U.S. 1028, 1028 (2005).

146. *State v. Rabb*, 920 So. 2d 1175, 1178 (Fla. Dist. Ct. App. 2006).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1179.

151. *Id.* ("The drug detector dog walked from the public roadway in front of the residence, up to the front door and alerted.")

152. *Id.*

centered on the privacy rights of the home and found that “[g]iven the shroud of protection wrapped around a house by the Fourth Amendment,” *Kyllo* was the appropriate case to control the issue.<sup>153</sup>

The Florida court agreed that the Supreme Court’s holding in *Place* demonstrated that a dog sniff in a public place was not a search.<sup>154</sup> However, the court differentiated between a person’s expectation of privacy in luggage in an airport and a person’s expectation of privacy in the home.<sup>155</sup> Quoting the Second Circuit in *United States v. Thomas*, the court found that “‘a practice that is not intrusive in a public airport may be intrusive when employed at a person’s home.’”<sup>156</sup> The court went on to compare the thermal imaging device in *Kyllo* to that of a dog sniff and found that “[t]he 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.”<sup>157</sup>

The court rejected the notion that a dog sniff provides limited information regarding only the presence or absence of contraband.<sup>158</sup> Following *Kyllo*’s precedent, the court noted that the quality or quantity of information obtained through the search is not the main concern.<sup>159</sup> Instead, the court focused on the fact that the police attempted to obtain information from inside the house, or in the context of a dog sniff, the sniff crossed the “firm line” of the protection afforded under the Fourth Amendment inside a person’s home.<sup>160</sup> Regardless of the fact that the dog only detects odors, the court noted that the smell coming from inside the house was an intimate detail, just like the temperature inside *Kyllo*’s home.<sup>161</sup>

## B. United States v. Jackson

On point with *Rabb*, in *United States v. Jackson*, an Indiana federal

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153. *Id.* at 1182.

154. *Id.* at 1184.

155. *Id.* at 1184–85.

156. *Id.* at 1184 (quoting *United States v. Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985)).

157. *Rabb*, 920 So. 2d at 1184.

158. *Id.*

159. *Id.*

160. *Id.* (“[I]t 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.”).

161. *Id.*

district court found a dog sniff of the exterior of the home was a search by comparing dog sniffs to *Kyllo's* thermal imaging devices.<sup>162</sup> In finding no distinction between the two, the court noted:

Dogs with such training are not in "general public use" (which refers to the general public, not to police forces, which often use such dogs to detect drugs). The information such a dog can provide about the interior of the home would not otherwise be obtained without a physical intrusion into the home. The court sees no constitutional distinction between the use of specially trained dogs and sophisticated electronics from outside a home to detect activities in or contents of the home's interior.<sup>163</sup>

The court then differentiated between dog sniffs in public places versus those that occur in the setting of a private home. The court found that privacy rights in a public place are severely diminished, however:

The same is not true of a home . . . . The privacy interest a person maintains in a home is more substantial than the privacy interest in personal luggage while traveling on public carriers or in an automobile. And in *Place*, the Supreme Court specifically noted that the sniffed luggage was located in a public place. There is nothing about the back door to a private residence that qualifies as a similarly "public place," even though the police officers themselves had a right to stand at the door, to knock, and to talk with anyone who came to the door.<sup>164</sup>

### C. United States v. Thomas

The Second Circuit addressed the same issue, which was heard after *Place* but before the Supreme Court's guidance in *Kyllo*. In *United States v. Thomas*, police officers used a dog to conduct a sniff outside the front door of one of the defendant's apartments.<sup>165</sup> After the dog alerted to the presence of contraband, a search warrant was executed and the police discovered narcotics inside the apartment.<sup>166</sup> Recognizing the Supreme Court's holding in *Place*, the Second Circuit noted:

It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy.<sup>167</sup>

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162. *United States v. Jackson*, No. IP 03-79-CR-1 H/F, 2004 U.S. Dist. LEXIS 15676, at \*10 (S.D. Ind. Feb. 2, 2004).

163. *Id.*

164. *Id.* at \*12-\*13 (internal citation omitted).

165. *United States v. Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985).

166. *Id.*

167. *Id.*

In finding that the home is a completely different setting than a public place, such as an airport, the court wrote:

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, 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." Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.<sup>168</sup>

While some courts have criticized *Thomas's* holding,<sup>169</sup> the Second Circuit very recently affirmed its *Thomas* holding in *United States v. Hayes*, which was decided after *Caballes* and *Kyllo*.<sup>170</sup> The *Hayes* court noted:

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. 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."<sup>171</sup>

It is clear from *Rabb*, *Jackson*, and *Thomas* that the courts differentiate a private home from a public place in determining whether a search

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168. *Id.* at 1366–67 (internal citations omitted).

169. *United States v. Hogan*, 122 F. Supp. 2d 358, 369 (E.D.N.Y. 2000) ("*Thomas* appears never to have been followed by any court outside the Circuit and has been criticized by several other circuit courts.>").

170. *United States v. Hayes*, 551 F.3d 138, 144 (2d Cir. 2008) (holding that a dog sniff of a black bag left inside a bush did not constitute a search).

171. *Id.* (internal citations omitted).

has occurred. Those courts “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.”<sup>172</sup>

Accordingly, in *Jardines*, the Supreme Court needs to focus its analysis on the fact that the dog sniff occurred at a home, rather than a public setting, and not on the fact that the end result may or may not be contraband. *Place* and *Caballes* do not address the constitutionality of a dog sniff in a private setting. Instead, *Place* and *Caballes* focus on two situations that occur in public. It is undeniable that a person’s expectation of privacy in an airport or a vehicle is nowhere near the same as a private home:

A house is not movable or on display to the public (at least as far as its interior). The interior of the house is not pervasively regulated by government. If the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, this most sacred of places under Fourth Amendment jurisprudence.<sup>173</sup>

D. *This Focus is on the Privacy of the Home, Not the End Result Being Contraband*

While the Supreme Court has stated that there is no expectation of privacy in contraband, this rationale ignores certain principles and exceptions. For one, it fails to take into account *Kyllo*’s acknowledgment that all details in the home are intimate. Just as the majority in *Kyllo* was concerned with the thermal imager’s inability to differentiate between intimate and non-intimate details, so too does a dog sniff fail to differentiate between intimate and non-intimate details, along with legal and non-legal contraband. If a dog only alerts to the presence of contraband, what about contraband that is lawfully present inside the home? What about the all too common scenario of prescription medication? While history shows that dogs sniffs can alert to bombs, illegal contraband, and even people, it is disingenuous to assume that a the dog sniff differentiates illegal contraband from a written prescription.

Determining if there is contraband inside a home is only ascertained after the dog sniffs the location. This end justifying the means approach is contrary to the very nature of the Fourth Amendment and is exactly what Justice Brennan was concerned about in his dissent in *Jacobsen*. The focus is not the end result; the focus is what action the

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172. *State v. Rabb*, 920 So. 2d 1175, 1186 (Fla. Dist. Ct. App. 2006).

173. *Id.* at 1189.



government is undertaking in conducting a dog sniff. If the Court focuses on the end result being contraband and does not focus on the privacy rights afforded to a person in the home, there would be no measure to hold police accountable for arbitrary action. If police were allowed to conduct sniffs at a private home and the dog alerts to contraband, there would be no preventative measure to stop the police from invading one's privacy by entering the home, only to find that whatever "contraband" was inside the home was lawfully prescribed by a doctor. This is why the Supreme Court's holding in *Caballes*—that a dog sniff only alerts to the presence of contraband— fails to consider the lawful intimate details of the home. The Court's ruling also fails to take into account that all things inside the home are protected by the Fourth Amendment and that dogs cannot differentiate between what is lawful and unlawful.

As one scholar wrote:

The most disturbing aspect of the *Caballes* opinion, however, is its application in California and the other states that lawfully permit possession of marijuana for medicinal purposes. Justice Stevens' lapse in recalling this exception is especially disturbing, since he himself wrote a sympathetic concurring opinion in *Oakland Cannabis Club*, suggesting the Court was *not* deciding the availability of a medical necessity defense for *patients* who possess marijuana for medicinal purposes, only that the defense was unavailable for *distributors*. Obviously, drug sniffing dogs are not trained to distinguish between marijuana that is possessed by a distributor and marijuana that is possessed by a patient.<sup>174</sup>

Furthermore, while a dog sniff discloses only the presence or absence of narcotics, this argument fails to take into account the purpose of the Fourth Amendment—protecting people's privacy in a place, not quantifying information.

[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

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174. Gerald F. Uelman, *Illinois v. Caballes: Some Disturbing Questions*, *THE CHAMPION*, May 2005, at 38.

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.<sup>175</sup>

The *Jardines* court was also concerned with this possible situation when it noted that “if government agents can conduct a dog ‘sniff test’ at a private residence without any prior evidentiary showing of wrongdoing, there is nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen.”<sup>176</sup>

Interestingly enough, Justice Brennan originally recognized this concern twenty-five years ago in his dissent in *Jacobsen* when he wrote:

In fact, the Court’s analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present. In short, under the interpretation of the Fourth Amendment first suggested in *Place* and first applied in this case, these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire. Hence, at some point in the future, if the Court stands by the theory it has adopted today, search warrants, probable cause, and even “reasonable suspicion” may very well become notions of the past.<sup>177</sup>

#### IV. CONCLUSION

*Place*, *Jacobsen*, and *Caballes* do not address a person’s expectation of privacy in the home. In the home, all details are private and intimate. Regardless of the results of a dog sniff, the focus needs to be on the expectation of privacy afforded to the home through history and the original intent of the Fourth Amendment. It is clear that a person’s expectation of privacy in a public setting is severely diminished. However, that context is not the same as the home, which affords the highest protections. If the Court focuses on whether there is contraband, instead of what is the expectation of privacy in the home, the Fourth Amendment will be eliminated. The government will have free reign to invade people’s lives based on a whim or hunch. The future is unclear; however, we can only hope that the Constitution remains intact. Until the Court addresses the issue this year, people in most jurisdictions are at

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175. *Rabb*, 920 So. 2d at 1190–91.

176. *Jardines v. State*, 73 So. 3d 34, 36 (Fla. 2011).

177. *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting).

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the mercy of arbitrary government action that requires no showing of probable cause. As such, the entire history of the Constitution and Fourth Amendment is in jeopardy.

