

THE SUPREME COURT GOES TO THE DOGS: RECONCILING  
*FLORIDA V. HARRIS* AND *FLORIDA V. JARDINES*

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In the most recent Term, the United States Supreme Court has issued rulings affecting criminal investigations and Fourth Amendment rights in two cases involving the use of drug-detection dogs: *Florida v. Harris*<sup>1</sup> and *Florida v. Jardines*.<sup>2</sup> These otherwise unrelated appeals from the Florida Supreme Court both address overlapping issues concerning the use of such dogs by police officers.<sup>3</sup> Although the United States Supreme Court has previously addressed a criminal defendant's rights in cases involving drug-detection dogs,<sup>4</sup> these two decisions will significantly influence such jurisprudence going forward.

It has long been accepted "that dogs have the ability to detect the smallest traces of odors and to perceive these scents much better than human beings."<sup>5</sup> Indeed, dogs have been used for their ability to detect scents for over two hundred years.<sup>6</sup> This article provides a brief description of the development of the Fourth Amendment jurisprudence regarding sniff tests by drug-detection dogs in Part I. Specifically, it discusses *United States v. Place, City of Indianapolis*

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<sup>1</sup> *Florida v. Harris*, 133 S. Ct. 1050 (2013).

<sup>2</sup> *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

<sup>3</sup> Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81, 102 (2013).

<sup>4</sup> *E.g.*, *Illinois v. Caballes*, 543 U.S. 405, 406, 409–10 (2005); *United States v. Place*, 462 U.S. 696, 697–98 (1983).

<sup>5</sup> Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 409 (1997).

<sup>6</sup> See Timothy C. MacDonnell, *Florida v. Jardines: The Wolf at the Castle Door*, 7 N.Y.U. J.L. & LIBERTY 1, 73 & n.400 (2013).

*v. Edmond*,<sup>7</sup> and *Illinois v. Caballes*, which were the three leading Supreme Court decisions on these issues prior to the most recently concluded Term.<sup>8</sup> Taken as a whole, these three decisions establish that just a sniff by a drug detection dog does not violate the Fourth Amendment. In Part II, the factual and procedural background of *Harris* as well as its legal analysis is discussed. Next, Part III provides a similar background and analysis for *Jardines*. Part IV analyzes the differences between *Jardines* and *Harris*. This discussion reconciles their differences by finding not only consistency with existing Supreme Court jurisprudence, but also wisdom in both decisions. In Part V, the importance of the reconciliation and the applicability of *Harris* and *Jardines* are discussed in the context of cases faced in the United States District Court for the Southern District of Texas. In particular, this section focuses on a month of drug smuggling cases and examines how drug dogs are imperative to the interdiction.

#### I. SUPREME COURT JURISPRUDENCE ESTABLISHES THAT A SNIFF BY A DRUG-DETECTION DOG IS NOT A FOURTH AMENDMENT VIOLATION

##### A. *United States v. Place*

In *Place*, the United States Supreme Court addressed “whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics.”<sup>9</sup> Raymond Place purchased an airplane ticket to fly from Miami International Airport to LaGuardia Airport in New York City.<sup>10</sup> While he was waiting in line, his behavior made agents suspicious, prompting them to approach him.<sup>11</sup> As Place walked toward his gate, they interacted with him, requesting to see his ticket and identification.<sup>12</sup> Ultimately, however, these agents were unable to search his luggage because his airplane was about to depart.<sup>13</sup> Nonetheless, they noted that there were discrepancies in the addresses listed on his two checked suitcases

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<sup>7</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>8</sup> *See MacDonnell*, *supra* note 6, at 6.

<sup>9</sup> *United States v. Place*, 462 U.S. 696, 697–98 (1983).

<sup>10</sup> *Id.* at 698.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

along with discrepancies in other information that he had provided.<sup>14</sup>

Based on these various suspicions, the Drug Enforcement Agency in New York was contacted and agents met Place's flight at LaGuardia Airport where they too became suspicious of him.<sup>15</sup> Before he left the airport, these agents approached Place indicating they believed he was trafficking in narcotics.<sup>16</sup> He informed them that police officers had searched his luggage at the airport in Miami, and the agents responded by telling him they knew this was untrue.<sup>17</sup> After Place declined to authorize a search of his luggage, "one of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that" he could come with them, but he again declined.<sup>18</sup>

Instead of obtaining a search warrant, the agents took the luggage to Kennedy Airport, where a drug-detection dog performed a free air sniff of the suitcases and alerted to the smaller suitcase.<sup>19</sup> Although the trip to Kennedy Airport and the sniff test took only ninety minutes, "[b]ecause it was late on a Friday afternoon, the agents [ultimately held] the luggage until Monday morning, when they [obtained] a search warrant . . . for the smaller bag."<sup>20</sup> After executing the warrant, over a kilogram of cocaine was found.<sup>21</sup> Place was charged and subsequently "indicted for possession of cocaine with intent to distribute."<sup>22</sup>

Place filed a motion to suppress arguing that the seizure of his luggage violated his Fourth Amendment rights; however, the district court denied the motion because the "detention of the bags could be justified if based on reasonable suspicion to believe that the bags contained narcotics."<sup>23</sup> On appeal, the United States Court of Appeals for the Second Circuit reversed due in large part to the lengthy time that Place's luggage had been seized by the agents.<sup>24</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 698–99.

<sup>17</sup> *Id.* at 699.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 699–700 (applying the standard enunciated in *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)); *see also* *United States v. Place*, 498 F. Supp. 1217, 1228 (E.D.N.Y. 1980) (applying *Terry*).

<sup>24</sup> *See* *United States v. Place*, 660 F.2d 44, 52–53 (2d Cir. 1981).

The government filed a petition for a writ of certiorari, which was granted.<sup>25</sup>

The Supreme Court in *Place* explained at the outset that as a general rule the Fourth Amendment applies to search and seizure of personal effects, like luggage.<sup>26</sup> However, where law enforcement officers have probable cause to believe that luggage contains contraband, such as narcotics, then they may seize it.<sup>27</sup> Next, the Court addressed whether *Terry v. Ohio* applied.<sup>28</sup> In *Terry*, the Supreme Court held that police officers are permitted to briefly stop suspects and frisk them for weapons where “specific and articulable facts” exist to believe that they were involved in criminal activity.<sup>29</sup> In *Place*, the Court determined that the application of *Terry* principles as an exception to the probable cause standard was determined to be appropriate “to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is *properly limited in scope*.”<sup>30</sup>

After establishing reasonable suspicion for the officers to search Place’s luggage, the Court analyzed whether subjecting Place’s luggage to the sniff test was a search.<sup>31</sup> In so doing, it emphasized that this investigative technique does not require opening the suitcase or rummaging through an individual’s personal items in public view, which in turn limits any embarrassment or inconvenience to the luggage owner.<sup>32</sup> “Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item.”<sup>33</sup> The Court characterized a canine sniff as *sui generis* because “no other

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<sup>25</sup> See *United States v. Place*, 457 U.S. 1104 (1982) (granting certiorari).

<sup>26</sup> See *Place*, 462 U.S. at 700–01.

<sup>27</sup> *Id.* at 701. In *Florida v. Royer*, the Supreme Court explained that police officers could temporarily detain an airplane passenger and his luggage while addressing their suspicions that the passenger was a drug courier, but could not exceed the investigatory nature of the stop by detaining him in a room while taking his identification and barring him from leaving. *Florida v. Royer*, 460 U.S. 491, 501–05 (1983). Interestingly, the Court further posited that the use of drug detection dogs would have been a viable alternative to detention in the room as it would have provided a quick determination of whether there was a reasonable suspicion that the luggage contained narcotics. *Id.* at 505–06.

<sup>28</sup> *Place*, 462 U.S. at 702.

<sup>29</sup> *Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968); see also Lewis R. Katz & Aaron P. Golembiewski, *Curb the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 739–40 (2007) (criticizing the application of *Terry* in *Place*).

<sup>30</sup> *Place*, 462 U.S. at 706 (emphasis added).

<sup>31</sup> *Id.* at 706–07.

<sup>32</sup> See *id.* at 707.

<sup>33</sup> *Id.*; see also Katz & Golembiewski, *supra* note 29, at 751–52 (examining the veracity of the Court’s statement that a dog sniff will only confirm the “presence or absence of narcotics”).

investigative procedure . . . is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”<sup>34</sup> Consequently, the Court determined that the sniff test did not constitute a search.<sup>35</sup>

Although the sniff test was not a search within the meaning of the Fourth Amendment, the Court went on to explain that the holding of Place’s luggage did constitute a seizure in violation of the Fourth Amendment.<sup>36</sup> Ultimately, the Court concluded that holding his luggage for ninety minutes made the seizure unreasonable.<sup>37</sup>

### B. *City of Indianapolis v. Edmond*

About seventeen years later, in *Edmond*, the Court “consider[ed] the constitutionality of a highway checkpoint program whose primary purpose [was] the discovery and interdiction of illegal narcotics.”<sup>38</sup>

In August 1998, the Indianapolis Police Department started conducting vehicle checkpoints on its streets in an attempt to prevent the flow of narcotics in the city.<sup>39</sup> Between August and November of that year, it set up six checkpoints throughout the city that resulted in the stopping of 1161 vehicles leading to 104 arrests, including fifty-five arrests for drug-related offenses.<sup>40</sup>

Each checkpoint was operated with about thirty police officers, who stopped a pre-determined number of vehicles.<sup>41</sup> Based on a departmental directive regarding the operation, at least one officer was required to approach the vehicles to tell the drivers that they had been stopped at a drug checkpoint where they were required to provide the officer with their driver’s license and vehicle registration.<sup>42</sup> During each stop, an officer checked to determine whether the driver demonstrated any signs of impairment, while a

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<sup>34</sup> *Place*, 462 U.S. at 707; *see also* Bird, *supra* note 5, at 417 (“[T]he Court recognized that a canine sniff by a trained narcotics detection dog is a highly reliable form of detection.”).

<sup>35</sup> *Place*, 462 U.S. at 707.

<sup>36</sup> *Id.* at 707, 709–10; *see also* United States v. Chadwick, 433 U.S. 1, 3–4, 11, 14–15 (1977) (holding that where a drug-detection dog alerted to narcotics in defendant’s locked footlocker, the warrantless seizure and search of the footlocker after defendant’s arrest violated the Fourth Amendment).

<sup>37</sup> *Place*, 462 U.S. at 709–10.

<sup>38</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 34–35.

<sup>41</sup> *Id.* at 35.

<sup>42</sup> *Id.*

drug-detection dog circled the detained vehicle.<sup>43</sup>

The departmental directive mandated that officers could search vehicles only if they had received consent, or if they developed “the appropriate quantum of particularized suspicion.”<sup>44</sup> Moreover, each officer was required to “conduct each stop in the same manner until particularized suspicion develop[ed], and the officers ha[d] no discretion to stop any vehicle out of sequence.”<sup>45</sup> Unless there was a basis to search a vehicle, each stop was to last no more than five minutes.<sup>46</sup>

In September 1998, James Edmond and Joell Palmer were both stopped at one of the checkpoints.<sup>47</sup> Objecting to their stops, they subsequently filed a class action asserting that the checkpoints violated the Fourth Amendment.<sup>48</sup> Edmond and Palmer then filed a motion for a preliminary injunction, in which for the purpose of that motion they stipulated that the traffic stops adhered to the procedures outlined in the departmental directive, even though as a factual matter they maintained that such procedures were not followed in their stops.<sup>49</sup> The United States District Court for the Southern District of Indiana granted the request for class certification, but denied the motion for a preliminary injunction.<sup>50</sup> The United States Court of Appeals for the Seventh Circuit reversed the trial court, finding that the checkpoints violated the Fourth Amendment.<sup>51</sup>

When the case arrived before the Supreme Court, Justice Sandra Day O'Connor, writing for the majority, began her analysis by noting that any search or seizure must be reasonable and is unreasonable without some “individualized suspicion of wrongdoing.”<sup>52</sup> Previously, the Court had determined that “brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens and at a sobriety checkpoint aimed at removing drunk drivers from the road” were permissible.<sup>53</sup> However, the Court’s precedents did not authorize “a

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 36.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 37 (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)).

<sup>53</sup> *Edmond*, 531 U.S. at 37 (citing *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454–55

checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”<sup>54</sup>

A traffic stop along the road was clearly a Fourth Amendment seizure, but “[t]he fact that officers walk[ed] a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints d[id] not transform the seizure into a search.”<sup>55</sup> The problem for the Court remained that the Indianapolis checkpoints were so general in nature and purpose, that if they were permissible “there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose.”<sup>56</sup> Justice O’Connor further explained that “[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”<sup>57</sup>

Justice O’Connor next addressed the city’s argument that the severe nature of the drug problem justified the checkpoints.<sup>58</sup> Concluding that the threat of the drug problem alone cannot justify such checkpoints, she explained that “in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.”<sup>59</sup> Justice O’Connor further remarked that the Court was “particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.”<sup>60</sup> She then distinguished checkpoints for drug detection from those that addressed drunk driving in *Sitz*.<sup>61</sup> Additionally, she also distinguished the checkpoints from the traffic stops involved in *Martinez-Fuerte* at border control checkpoints because “the difficulty of examining each passing car” in and of itself “cannot justify a regime of suspicionless searches or seizures.”<sup>62</sup>

Justice O’Connor was careful to note that the Court’s holding did

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(1990) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976)).

<sup>54</sup> *Edmond*, 531 U.S. at 38.

<sup>55</sup> *Id.* at 40 (citing *Sitz*, 496 U.S. at 450 and *United States v. Place*, 462 U.S. 696, 707 (1983)).

<sup>56</sup> *Edmond*, 531 U.S. at 42.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 42–43.

<sup>60</sup> *Id.* at 43.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

not impact border searches, or searches in places like airports or government buildings that demand heightened measures based on security concerns.<sup>63</sup> In the end, the Court held that given that “the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.”<sup>64</sup>

In a dissenting opinion joined by Justice Clarence Thomas, Chief Justice William Rehnquist asserted that the Fourth Amendment historically permitted “brief, standardized, discretionless, roadblock seizures of automobiles, seizures which effectively serve a weighty state interest with only minimal intrusion on the privacy of their occupants.”<sup>65</sup> Essentially, because these checkpoints were constitutionally valid in general, it was irrelevant that the program specifically sought the capture of narcotics.<sup>66</sup> The checkpoint seizures were objectively reasonable because they lasted only a few minutes.<sup>67</sup> Moreover, as the Court established in *Place*, a sniff test by a drug-detection dog does not violate the Fourth Amendment and the Indianapolis sniff tests did not increase the duration of the traffic stops.<sup>68</sup>

### C. *Illinois v. Caballes*

In *Caballes*, the Court addressed the question of “[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.”<sup>69</sup>

After Illinois State Trooper Daniel Gillette stopped Roy Caballes for speeding on the highway, he reported the traffic stop to the police dispatcher.<sup>70</sup> Trooper Craig Graham, who was with the Illinois State Police Drug Interdiction Team, heard the report on his

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<sup>63</sup> *Id.* at 47–48.

<sup>64</sup> *Id.* at 48.

<sup>65</sup> *Id.* at 48 (Rehnquist, C.J., dissenting). Justice Scalia also joined in the first part of this opinion. *Id.* Justice Thomas also issued a separate two-paragraph dissent maintaining *Sitz* and *Martinez-Fuerte* were controlling and permitted suspicionless roadblock seizures. *Id.* at 56 (Thomas, J., dissenting). In Justice Thomas’s view, even though it was uncertain whether these two decisions were correctly decided, *Edmond* was not the appropriate case to overrule either decision. *Id.*

<sup>66</sup> *Id.* at 49–51 (Rehnquist, C.J., dissenting) (discussing the applicability of *Sitz* and *Martinez-Fuerte*).

<sup>67</sup> *Id.* at 52.

<sup>68</sup> *Id.* at 52–53 (citing *United States v. Place*, 462 U.S. 696, 706–07 (1983)).

<sup>69</sup> *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (internal quotation marks omitted).

<sup>70</sup> *Id.* at 406.



radio and headed to the traffic stop with his drug-detection dog.<sup>71</sup> When Trooper Graham arrived, Trooper Gillette was issuing a warning ticket to Caballes who was sitting in the police car.<sup>72</sup> While Trooper Gillette was engaged with Caballes, Trooper Graham walked his canine around Caballes's car, and "[t]he dog alerted [to] the trunk."<sup>73</sup> A subsequent search of the car revealed marijuana, resulting in Caballes's arrest.<sup>74</sup> This "entire incident lasted less than 10 minutes," as documented by the precise timing of Trooper Gillette's radio dispatches.<sup>75</sup>

Caballes filed a motion to suppress the narcotics evidence, which was denied by the trial court.<sup>76</sup> He was convicted of trafficking marijuana and sentenced to twelve years in prison.<sup>77</sup> The Third District Appellate Court of Illinois affirmed the conviction,<sup>78</sup> but the Illinois Supreme Court reversed, finding that there were no specific and articulable facts indicating any narcotics activity that justified the use of a drug-detection dog.<sup>79</sup> The United States Supreme Court granted the State of Illinois's petition for a writ of certiorari.<sup>80</sup>

Although the traffic stop for speeding was based on probable cause and was therefore legal, the Supreme Court explained "that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."<sup>81</sup> Consequently, a seizure predicated on "issuing a warning ticket" may become unconstitutional if the seizure extends beyond the issuance of that ticket.<sup>82</sup>

Writing for the majority, Justice John Paul Stevens noted that there was nothing unordinary about the length of time or Trooper Gillette's inquiries during the traffic stop.<sup>83</sup> Furthermore, "conducting a dog sniff would not change the character of a traffic

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 406, 408.

<sup>76</sup> *Id.* at 407.

<sup>77</sup> *Id.*; see also 720 ILL. COMP. STAT. ANN. 550/5.1(a) (LexisNexis 2013) (detailing the statutory offense of cannabis trafficking); *People v. Caballes*, No. 98-CF-447, 1999 WL 34774109 (Ill. Cir. Ct. Nov. 22, 1999) (order sentencing Caballes).

<sup>78</sup> *People v. Caballes*, No. 3-99-0932, 2001 Ill. App. LEXIS 1248 (Ill. App. Ct. Apr. 9, 2001).

<sup>79</sup> *People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2003).

<sup>80</sup> *Illinois v. Caballes*, 541 U.S. 972 (2004).

<sup>81</sup> *Caballes*, 543 U.S. at 407 (citing *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)).

<sup>82</sup> *Caballes*, 543 U.S. at 407.

<sup>83</sup> *Id.* at 408.

stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy."<sup>84</sup> In analyzing the Court's precedent regarding drug-detection dogs, he reiterated the position enunciated in *Place* that a dog sniff test is "*sui generis*" given that it only exposes the existence of illegal narcotics and nothing else.<sup>85</sup>

Next, Justice Stevens dismissed Caballes's argument that drug-detection dogs often give false positives when they alert.<sup>86</sup> First, he pointed out the record did not contain any evidence supporting this position.<sup>87</sup> He further explained that using "a well-trained narcotics-detection dog . . . generally does not implicate legitimate privacy interests."<sup>88</sup> Ultimately the Court reversed the Illinois Supreme Court's decision, finding that "[a]ny intrusion on [Caballes]'s privacy expectations does not rise to the level of a constitutionally cognizable infringement."<sup>89</sup>

Justice David Souter issued a dissent because "using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground."<sup>90</sup> He took issue with the majority opinion, as well as with the Court's decision in *Place*, because they both were improperly based on the belief that dogs do not make errors, deriding the myth of the infallible dog as a legal fiction.<sup>91</sup> His dissent focused on case law and studies that called into question the reliability of drug dogs.<sup>92</sup> For Justice Souter, this fallibility in turn undermined the wisdom of treating a dog sniff as

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 409 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)) (internal quotation marks omitted); see also Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 5–6 (2006) ("In coming to its holding, the Court reaffirmed its earlier precedent in *United States v. Place* . . ."). But see Cecil J. Hunt, II, *Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy*, 56 CASE W. RES. L. REV. 285, 296 (2005) ("By locking the contraband in his car trunk, it could be persuasively argued that Mr. Caballes evidenced a clear subjective intent to keep the substance from public view and inaccessible by anyone who did not receive the key from him, either voluntarily or through compulsion.").

<sup>86</sup> *Caballes*, 543 U.S. at 409.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 409, 410.

<sup>90</sup> *Id.* at 410 (Souter, J., dissenting).

<sup>91</sup> *Id.* at 410–11; see also Myers, *supra* note 85, at 20–22 (discussing an unreliable dog).

<sup>92</sup> *Caballes*, 543 U.S. at 411–12.

*sui generis* pursuant to the Fourth Amendment.<sup>93</sup>

Justice Ruth Bader Ginsburg also issued a dissenting opinion, joined by Justice Souter, in which she asserted that the use of a drug-detection dog without any reason to believe Caballes was engaged in criminal activity violated his Fourth Amendment rights.<sup>94</sup> In particular, she stressed that the majority failed to properly apply *Terry* even though the majority opinion does not reference that decision.<sup>95</sup>

## II. *FLORIDA V. HARRIS*

### A. *Background*

On June 24, 2006, Officer William Wheatley of the Liberty County Sheriff's Office conducted a traffic stop on Clayton Harris because the vehicle's tag was expired.<sup>96</sup> When the officer approached the truck, Harris displayed signs of nervousness such as shaking, fidgeting, and breathing rapidly.<sup>97</sup> There was also "an open can of beer in the truck's cup holder."<sup>98</sup> Harris declined to consent to a search of his vehicle.<sup>99</sup> Officer Wheatley, who served as a canine officer, had Aldo, a police dog, with him in his patrol vehicle.<sup>100</sup> Aldo was trained to detect the presence of cocaine, ecstasy, heroin, marijuana, and methamphetamine.<sup>101</sup> After Harris declined to consent, Officer Wheatley "retrieved Aldo . . . and walked him around [the] truck for a 'free air sniff,'" which resulted in Aldo alerting to the driver's door for narcotics.<sup>102</sup>

Based on Aldo's alert, Officer Wheatley determined that he had probable cause to search Harris's truck.<sup>103</sup> Although this search did

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<sup>93</sup> *Id.* at 412–13.

<sup>94</sup> *Id.* at 422, 425 (Ginsburg, J., dissenting). Some scholars have argued that *Caballes* was wrongly decided, in part, because "the public's expectation of privacy in their homes has been extended, at least to some degree, to their cars and they should therefore be equally protected from unwarranted government intrusion." Hunt, *supra* note 85, at 295.

<sup>95</sup> *Caballes*, 543 U.S. at 419–22; *see also* Myers, *supra* note 85, at 8 & n.45 (arguing that some reasonable suspicion should exist before a search is done, but that reasonable suspicion need not exist prior to the sniff of a drug-detection dog).

<sup>96</sup> *Florida v. Harris*, 133 S. Ct. 1050, 1053 (2013).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1053–54.

<sup>103</sup> *Id.* at 1054.

not reveal any narcotics that Aldo was trained to detect, Officer Wheatley found a number of ingredients used in manufacturing methamphetamine: two hundred loose pseudoephedrine pills hidden under the driver's seat as well as eight thousand matches, hydrochloric acid, antifreeze, and iodine crystals.<sup>104</sup> Having found these items, Officer Wheatley arrested Harris and read him his *Miranda*<sup>105</sup> warnings.<sup>106</sup> Harris admitted that he was addicted to methamphetamine and that he regularly cooked it at his home.<sup>107</sup> "The State [of Florida] charged [him] with possessing pseudoephedrine for use in manufacturing methamphetamine."<sup>108</sup>

Harris's problems with Officer Wheatley and Aldo did not end in June 2006. A couple of months later, while on bond, he was again pulled over by Officer Wheatley for a broken tail light.<sup>109</sup> Aldo conducted another free air sniff in which he again alerted.<sup>110</sup> When Officer Wheatley searched the truck this time, no narcotics or other contraband were found, except an open liquor bottle.<sup>111</sup>

Harris filed a motion to suppress the pseudoephedrine evidence, arguing that there was no probable cause for a search of his truck.<sup>112</sup> At the suppression hearing, Officer Wheatley testified that on the day he arrested Harris he had served as a law enforcement officer for three years with canine handler duties since 2004.<sup>113</sup> He outlined the extensive training that Aldo underwent in January 2004 to become a drug detection canine, noting that he had been certified to detect cocaine, ecstasy, heroin, marijuana, and methamphetamine, but was not trained to detect pseudoephedrine, one of the principal ingredients in methamphetamine, or alcohol.<sup>114</sup> However, pursuant to Florida law, a single-purpose dog such as

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<sup>104</sup> *Id.* at 1054; see also Katz & Golembiewski, *supra* note 29, at 754 ("[S]ome dogs are trained not only to alert to illegal drugs, but also to locate pharmaceuticals and alcohol . . .").

<sup>105</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>106</sup> *Harris*, 133 S. Ct. at 1054.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; see generally FLA. STAT. ANN. § 893.149 (LexisNexis 2013) ("It is unlawful for any person to knowingly or intentionally: (a) Possess a listed chemical with the intent to unlawfully manufacture a controlled substance; (b) Possess or distribute a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to unlawfully manufacture a controlled substance.").

<sup>109</sup> *Harris*, 133 S. Ct. at 1054; *Harris v. State*, 71 So. 3d 756, 761 (Fla. 2011).

<sup>110</sup> *Harris*, 133 S. Ct. at 1054.

<sup>111</sup> *Harris*, 71 So. 3d at 761.

<sup>112</sup> *Harris*, 133 S. Ct. at 1054.

<sup>113</sup> *Harris*, 71 So. 3d at 760.

<sup>114</sup> *Id.*; see also Bird, *supra* note 5, at 412 ("Canine training is a relatively simple task, lasting only two to six weeks.").

Aldo who only detects narcotics is not required to be certified and indeed there are no set certification standards.<sup>115</sup>

Officer Wheatley affirmed that he and Aldo began working together in July 2005, and that he further trained Aldo weekly in various scenarios where drugs may be hidden.<sup>116</sup> Together they completed a forty-hour training seminar in February 2006.<sup>117</sup> Aldo received rewards during training when he accurately detected whether or not there were hidden narcotics.<sup>118</sup> During the hearing, Officer Wheatley went on to testify regarding how he conducted detection with Aldo and how he evaluated the dog's success.<sup>119</sup> In November 2005, he began maintaining training records regarding Aldo's performance, which he indicated was satisfactory 100 percent of the time.<sup>120</sup> Regarding Aldo's field performance, Officer Wheatley only kept records from alerts where narcotics were discovered.<sup>121</sup>

At the suppression hearing, Harris presented evidence of Aldo's unreliability based on the second traffic stop in which he had a false positive alert to Harris's vehicle.<sup>122</sup> Officer Wheatley explained that Aldo detects residual odors based on narcotics that had previously been in the vehicle or that were applied through a person's contact

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<sup>115</sup> *Harris*, 71 So. 3d at 760–61. Some dogs are dual-purpose in that they may be trained to detect not only narcotics, but other odors such as explosive materials or human cargo. For example, the dogs working at Border Patrol checkpoints can be trained to detect humans who are hidden in vehicles. See *United States v. One 2003 Kenworth Tractor*, No. C-06-536, 2007 U.S. Dist. LEXIS 35906, at \*4 (S.D. Tex. May 15, 2007) (“Agent Garza and the canine Diango were conducting a non-intrusive free-air sniff of the tractor. Diango ‘alerted’ . . . [and a] total of twelve people overall were found . . .” (citation omitted)); *Criminal Complaint* at 2–3, *United States v. Franco*, No. 2:13-mj-00382 (S.D. Tex. Apr. 7, 2013) (“Agent Rios and service canine ‘Tiennus’ were conducting a non-intrusive free air canine sniff of the exterior of the vehicle. . . . ‘Tiennus’ . . . alert[ed] towards the rear of the tractor. . . . Agent Rios and his canine conducted a systematic search of the trailer. . . . During the search of the trailer, Agent Rios found [fifteen undocumented aliens].”).

<sup>116</sup> *Harris*, 71 So. 3d at 760; see generally Bird, *supra* note 5, at 412 (“Training a human handler . . . requires more time and effort [than training the dog]. A dog and handler will train together for ten to sixteen weeks.”).

<sup>117</sup> *Harris*, 133 S. Ct. at 1054; see generally Bird, *supra* note 5, at 412 (“The handler needs the extra time to learn how her dog responds to the targeted narcotics.”).

<sup>118</sup> *Harris*, 71 So. 3d at 760.

<sup>119</sup> See *Harris*, 133 S. Ct. at 1054. “The judiciary’s sole focus on reliability of the dog is misplaced. Handlers interpret their dogs’ signals, and the handler alone makes the final decision whether a dog has detected narcotics.” Bird, *supra* note 5, at 425.

<sup>120</sup> *Harris*, 71 So. 3d at 760.

<sup>121</sup> See *Harris*, 133 S. Ct. at 1054.

<sup>122</sup> *Harris*, 71 So. 3d at 761. This high percentage may be deceiving in that “[t]he use of statistical analysis reveals that even a very high accuracy rate can produce an unreasonable amount of false positives under certain conditions.” Bird, *supra* note 5, at 427; see also *id.* at 427–30 (discussing the statistical analysis); Myers, *supra* note 85, at 12–18 (discussing a Bayesian analysis of determining probable cause based on a dog alert).

on the vehicle after touching narcotics.<sup>123</sup> When pressed to explain how long such an odor would linger, he declined to answer such questions, indicating that such a question was more appropriate for an expert.<sup>124</sup>

The prosecution argued that there was probable cause for the search based on Harris's nervousness, the open container, the expired tag, and Aldo's alert to the truck.<sup>125</sup> Harris countered that the prosecution had failed to establish Aldo's reliability because he was trained to detect certain narcotics, and despite alerts on two separate occasions involving Harris's truck, no narcotics were ever found.<sup>126</sup>

The trial court concluded that there was probable cause to search the vehicle and denied the motion to suppress.<sup>127</sup> Harris pleaded no contest to the charge against him, but preserved his right to appeal the denial of his motion to suppress.<sup>128</sup> The First District Court of Appeal of Florida summarily affirmed his conviction.<sup>129</sup>

### *B. The Florida Supreme Court Decision*

The Florida Supreme Court granted Harris's petition for discretionary review.<sup>130</sup> In addressing the appeal, the court framed the issue as: "When will a drug-detection dog's alert to the exterior of a vehicle provide an officer with probable cause to conduct a warrantless search of the interior of the vehicle?"<sup>131</sup> Specifically, the petition was granted to address a split among the various Florida appellate courts regarding what evidence the prosecution "must introduce to establish that probable cause existed for the warrantless search of a vehicle based on a drug-detection dog's alert to the vehicle."<sup>132</sup> However, the court explicitly distinguished existing jurisprudence of the United States Supreme Court,

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<sup>123</sup> *Harris*, 71 So. 3d at 761.

<sup>124</sup> *Id.*; see generally Bird, *supra* note 5, at 408–10 (discussing the science of canine's scent detection capabilities).

<sup>125</sup> *Harris*, 71 So. 3d at 762.

<sup>126</sup> *Id.*

<sup>127</sup> Florida v. Harris, 133 S. Ct. 1050, 1054 (2013).

<sup>128</sup> *Id.* at 1054–55.

<sup>129</sup> *Id.* at 1055; *Harris*, 71 So. 3d at 62.

<sup>130</sup> *Harris*, 71 So. 3d at 762.

<sup>131</sup> *Id.* at 758.

<sup>132</sup> *Id.* at 762; see also Gibson v. State, 968 So. 2d 631, 631 (Fla. Dist. Ct. App. 2d Dist. 2007) (holding that a drug dog alert was insufficient to establish probable cause for the search of the vehicle); Matheson v. State, 870 So. 2d 8, 15 (Fla. Dist. Ct. App. 2d Dist. 2003) (same).

explaining that “[t]he issue in this case is *not* whether a dog’s sniff of the exterior of a vehicle constitutes a search. That has been answered by the United States Supreme Court.”<sup>133</sup>

In beginning the analysis, the Florida Supreme Court quoted the Fourth Amendment as well as the United States Supreme Court’s admonishment in *Katz v. United States*<sup>134</sup> against searches conducted without the authorization of a neutral magistrate.<sup>135</sup> The court then addressed the development of jurisprudence regarding the exception afforded to warrantless searches of automobiles.<sup>136</sup> Even though *Carroll v. United States*<sup>137</sup> established the guiding principles for a warrantless vehicle search based on the belief that contraband was present,<sup>138</sup> such a search is still governed by the Fourth Amendment because people have an expectation of privacy in their cars.<sup>139</sup> Furthermore, it explained that a finding of probable cause to conduct a warrantless vehicle search was based on the totality of the circumstances supporting the reasonable belief in the probability that narcotics would be found.<sup>140</sup>

Next, the Florida Supreme Court acknowledged the decisions in *Caballes* and *Place*: “[T]he United States Supreme Court has explained that the use of a well-trained narcotics-detection dog—one that ‘does not expose noncontraband items that otherwise would remain hidden from public view,’—during a lawful traffic stop, generally does not implicate legitimate privacy interests.”<sup>141</sup> Whereas the *Caballes* Court characterized a “well-trained” dog as one that does not expose such noncontraband items, the Florida court simply defined “a well-trained dog [a]s a reliable dog.”<sup>142</sup>

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<sup>133</sup> *Harris*, 71 So. 3d at 758 n.1 (citing *Illinois v. Caballes*, 543 U.S. 405, 407–08 (2005); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696, 706–07 (1983)).

<sup>134</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>135</sup> *Harris*, 71 So. 3d at 765.

<sup>136</sup> *See id.*

<sup>137</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>138</sup> *Carroll*, 267 U.S. at 149.

<sup>139</sup> *Harris*, 71 So. 3d at 765.

<sup>140</sup> *Id.* at 766 (quoting *United States v. Grubbs*, 547 U.S. 90, 95 (2006) and *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)); *see also* *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (“[W]e reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations.”).

<sup>141</sup> *Harris*, 71 So. 3d at 766 (quoting *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)); *see also* Stephen A. Simon, *Dog Sniffs, Robot Spiders, and the Contraband Exception to the Fourth Amendment*, 7 CHARLESTON L. REV. 111, 123–24 (2012) (noting that the *Caballes* Court reiterated the contraband exception enunciated in *Place*).

<sup>142</sup> *Harris*, 71 So. 3d at 766 n.6. *But see* *Katz & Golembiewski*, *supra* note 29, at 754 (stating that some dogs are trained to find alcohol and pharmaceutical drugs, which are *per se*

Because “a well-trained dog is not necessarily a dog that has merely been trained and certified,” courts must look at “the totality of the circumstances, including the dog’s training, certification, and performance.”<sup>143</sup> These factors, as well as the officer’s training and experience as a dog handler, are important to consider in assessing whether there was probable cause for the search because a canine obviously cannot provide testimony or be subject to cross-examination.<sup>144</sup> The court analogized the assessment of a drug-detection dog’s reliability to the assessment of the reliability of tips from informants, in that both require an evaluation of the accuracy of information that has been previously provided by the same source.<sup>145</sup>

The alert by a dog that is not particularly reliable, the Florida Supreme Court continued, cannot be very useful in establishing whether there are narcotics in a vehicle and thus whether there is probable cause for a search of the vehicle.<sup>146</sup> Consequently, the court “conclude[d] that when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause to search the interior of the vehicle and the person.”<sup>147</sup> It continued with a discussion of the lack of uniformity in certification standards, decrying the mythical infallible dog’s nose, and noting that “whether a dog has been sufficiently trained and certified must be evaluated on a case-by-case basis.”<sup>148</sup> Additionally, the court expressed concern that “any presumption of reliability based only on the fact that the dog has been trained and certified does not take into account the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors.”<sup>149</sup> The court then addressed the issue of inadvertent or intentional cuing by the officer handling the dog.<sup>150</sup>

In its argument before the Florida Supreme Court, the prosecution argued that field performance records “are meaningless because dogs do not distinguish between residual odors and drugs

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not contraband).

<sup>143</sup> *Harris*, 71 So. 3d at 766 n.6.

<sup>144</sup> *Id.* at 767; *see also* Bird, *supra* note 5, at 422 (“A handler must be able to properly interpret a canine’s subtle signals. In fact, almost all erroneous alerts originate not from the dog, but from the handler’s misinterpretation of the dog’s signals.”).

<sup>145</sup> *Harris*, 71 So. 3d at 767 & n.7.

<sup>146</sup> *Id.* at 767.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 767–68.

<sup>149</sup> *Id.* at 768.

<sup>150</sup> *Id.* at 769.



that are present and, thus, alerts in the field without contraband having been found are merely unverified alerts, not false alerts.”<sup>151</sup> The court responded that the record was not clear on this point and that Officer Wheatley’s testimony regarding Aldo’s field performance did not fully address these questions.<sup>152</sup> The court determined that it was the prosecution’s duty to “explain the significance of the percentage of unverified alerts in the field.”<sup>153</sup> To require otherwise would inappropriately shift the burden to a criminal defendant to obtain all the necessary records to rebut a dog’s presumption of reliability, which would in turn shift the burden to the defendant of establishing that there was no probable cause for the warrantless search.<sup>154</sup>

The Florida Supreme Court ultimately “adopt[ed] a totality of the circumstances approach . . . hold[ing] that the State, which bears the burden of establishing probable cause, must present all records and evidence that are necessary to allow the trial court to evaluate the reliability of the dog.”<sup>155</sup> In light of this standard, the trial court erred in finding that the prosecution had established sufficient evidence to satisfy the probable cause standard regarding the search of Harris’s truck.<sup>156</sup> The court reiterated the evidence that the prosecution had offered regarding the reliability of Aldo and Officer Wheatley, but stressed that there was no evidence to illuminate Aldo’s field performance, even taking into account Officer Wheatley’s testimony.<sup>157</sup> Cautioning law enforcement officers, the court explained that “[i]f an officer fails to keep records of his or her dog’s performance in the field, the officer is lacking knowledge important to his or her belief that the dog is a reliable indicator of drugs.”<sup>158</sup> The court concluded that the prosecution failed to establish that Aldo was reliable, including regarding residual odors, and looking at the totality of the circumstances determined that probable cause had not been established.<sup>159</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 769–70.

<sup>153</sup> *Id.* at 770.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 771.

<sup>156</sup> *Id.* at 772.

<sup>157</sup> *Id.* at 772–73.

<sup>158</sup> *Id.* (citing *Florida v. J.L.*, 529 U.S. 266, 271, 273–74 (2000)).

<sup>159</sup> *Id.* at 773–75.

*C. The United States Supreme Court Decision*

On March 26, 2012, the Supreme Court granted the State of Florida's petition for a writ of certiorari.<sup>160</sup> On February 19, 2013, the Court, in a unanimous decision authored by Justice Elena Kagan, reversed the judgment by the Florida Supreme Court.<sup>161</sup>

In Justice Kagan's opinion, she framed the issue as "how a court should determine if the 'alert' of a drug-detection dog during a traffic stop provides probable cause to search a vehicle."<sup>162</sup> As did the Florida Supreme Court, the Court enunciated the standard as an analysis based on "the totality of the circumstances."<sup>163</sup> Despite both courts having this same starting point, the Court explained that "[t]he Florida Supreme Court flouted this established approach to determining probable cause" because it essentially "created a strict evidentiary checklist, whose every item the State must tick off."<sup>164</sup> Such an approach, however, "is the antithesis of a totality-of-the-circumstances analysis."<sup>165</sup> Justice Kagan chided the Florida Supreme Court for placing too much emphasis on a canine's field performance.<sup>166</sup> Because of the controlled environment in training and certification assessment, regardless of the inaccuracies in assessing field performance, such records are a better indicator of a dog's reliability.<sup>167</sup>

The Court concluded that formal certification or completion of a bona fide training program creates a rebuttable presumption of the dog's reliability.<sup>168</sup> Indeed, law enforcement officials have a strong incentive that both of the programs be effective lest they have dogs poorly equipped to locate contraband and facilitate narcotics investigations.<sup>169</sup> Of course, a criminal defendant must be afforded the opportunity to challenge this presumption through either cross-examination of the dog handler, or testimony by a defense expert through several lines of attack, including those aimed at the quality

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<sup>160</sup> Florida v. Harris, 132 S. Ct. 1796 (2012).

<sup>161</sup> Florida v. Harris, 133 S. Ct. 1050, 1059 (2013).

<sup>162</sup> *Id.* at 1053.

<sup>163</sup> *Id.* at 1055 (citing Maryland v. Pringle, 540 U.S. 366, 371 (2003); Illinois v. Gates, 462 U.S. 213, 232 (1983); Brinegar v. United States, 338 U.S. 160, 176 (1949)).

<sup>164</sup> Harris, 133 S. Ct. at 1056.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1056–57.

<sup>167</sup> *Id.* at 1057.

<sup>168</sup> *See id.*

<sup>169</sup> *Id.*; *see also* Bird, *supra* note 5, at 432 ("Erroneous alerts trigger potentially traumatic searches and frustrate the efforts of law enforcement.").

of the certification or training program as well as the performance of the dog handler.<sup>170</sup>

In the end, however, a suppression hearing involving a drug-detection dog's alert is treated just like any other hearing in which the totality of the circumstances are analyzed.<sup>171</sup> Applying these principles to the case at bar, the Court noted that the cross-examination of Officer Wheatley did not rebut the presumption of Aldo's reliability.<sup>172</sup> Consistent with this approach, the Court found that there was probable cause to search Harris's truck based on the alert by Aldo and other factors related to the traffic stop.<sup>173</sup>

### III. *FLORIDA V. JARDINES*

#### A. *Background*

On November 3, 2006, Detective William Pedraja, of the Miami-Dade Police Department, received an unsubstantiated tip that marijuana was being grown at Joelis Jardines's home.<sup>174</sup> At seven o'clock in the morning on December 6, 2006, Detective Pedraja, accompanied by Detective Douglas Bartlet and his drug-detection dog, Franky, visited Jardines's home.<sup>175</sup> Detective Pedraja observed the home for about fifteen minutes, and saw no activity or vehicles.<sup>176</sup> Detective Bartlet then placed Franky on a leash and approached the residence's front door where Franky alerted to the odor of narcotics.<sup>177</sup> Moreover, after Franky's alert, Detective Bartlet indicated that he then smelled marijuana while standing at the front door.<sup>178</sup>

After leaving the residence, Detective Pedraja sought a search warrant based in part on the alert by Franky.<sup>179</sup> When the search warrant was executed, marijuana was found growing inside the home.<sup>180</sup> Jardines was apprehended attempting to flee his home; he

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<sup>170</sup> *Harris*, 133 S. Ct. at 1057–58.

<sup>171</sup> *See id.* at 1058.

<sup>172</sup> *Id.* at 1058–59.

<sup>173</sup> *Id.* at 1059.

<sup>174</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2012); *Jardines v. State*, 73 So. 3d 34, 37 (Fla. 2011).

<sup>175</sup> *Jardines*, 73 So. 3d at 37.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Jardines*, 133 S. Ct. at 1413; *Jardines*, 73 So. 3d at 37–38 & n.1, 48.

<sup>180</sup> *Jardines*, 133 S. Ct. at 1413.

was arrested and charged with marijuana trafficking as well as theft of electricity related to the high volume of electricity necessary to operate a hydroponic lab.<sup>181</sup>

Jardines filed a motion to suppress all of the evidence obtained through the search of his residence.<sup>182</sup> After a hearing, the trial court granted the motion to suppress all evidence from this search.<sup>183</sup> On appeal, the Third District Court of Appeal of Florida reversed the trial court's finding that no probable cause had existed to issue the search warrant for Jardines's home, finding instead that there was probable cause:

We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in [*State v.*] *Rabb*, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed.<sup>184</sup>

### B. *The Florida Supreme Court Decision*

Jardines filed a petition for discretionary review, which was granted by the Florida Supreme Court.<sup>185</sup> The court determined that the petition presented two issues.<sup>186</sup> First, it raised the question of "whether a 'sniff test' by a drug detection dog conducted at the front door of a private residence is a 'search' under the Fourth Amendment."<sup>187</sup> If it is a search, then the court was called upon to analyze "whether the evidentiary showing of wrongdoing that the government must make prior to conducting such a search is probable cause or reasonable suspicion."<sup>188</sup>

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<sup>181</sup> See *Jardines*, 73 So. 3d at 48.

<sup>182</sup> See *Jardines*, 133 S. Ct. at 1413; see also FLA. R. CRIM. P. 3.190(g) (detailing the motion to suppress evidence in unlawful search).

<sup>183</sup> *Jardines*, 133 S. Ct. at 1413.

<sup>184</sup> *State v. Jardines*, 9 So. 3d 1, 10 (Fla. Dist. Ct. App. 3d Dist. 2008). In *Rabb*, the Florida Fourth District Court of Appeal held that a drug-detection dog's sniff at the outside of a house without a warrant violated the Fourth Amendment. *State v. Rabb*, 920 So. 2d 1175, 1188 (Fla. Dist. Ct. App. 4th Dist. 2006).

<sup>185</sup> *Jardines v. State*, No. SC08-2101, 2009 Fla. LEXIS 218, at \*1 (Fla. Feb. 4, 2009).

<sup>186</sup> *Jardines*, 73 So. 3d at 35-36.

<sup>187</sup> *Id.* at 36, 44; see generally Simon, *supra* note 141, at 113 (discussing the first issue presented in *Florida v. Jardines*, specifically, whether a dog sniff is a search).

<sup>188</sup> *Jardines*, 73 So. 3d at 36, 44.

As with *Harris*, the Florida Supreme Court began its discussion of the applicable law by quoting the Fourth Amendment and by noting that *Katz* controlled whether a search is appropriate based on a reasonable expectation of privacy.<sup>189</sup> This expectation is analyzed in the context of the Supreme Court's three decisions regarding drug-detection dogs.<sup>190</sup> In addition to those three decisions, the court also noted that *United States v. Jacobsen* and *Kyllo v. United States*<sup>191</sup> were applicable case law that had to be addressed in dealing with the issues presented in *Jardines*.<sup>192</sup>

In analyzing these decisions, which the Florida Supreme Court had characterized as applicable to the issues at hand, it declared that the Supreme Court's existing triumvirate of drug-detection dog cases was inapplicable to residences.<sup>193</sup> The court noted that each of the decisions "was careful to tie its ruling to the particular facts of the case."<sup>194</sup> Significantly for the court, none of these cases involved the use of a drug-detection dog at a private residence as a factual matter.<sup>195</sup> The court then discussed the unique place that a home holds in Fourth Amendment jurisprudence.<sup>196</sup>

Florida law generally allows police officers to knock on the front door of a home even if there is no evidence of any criminal activity.<sup>197</sup> The *Jardines* court, however, characterized a sniff test by a dog as qualitatively different: "Contrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle 'sniff test' and signals an

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<sup>189</sup> *Id.* at 39–40 (quoting the Fourth Amendment of the U.S. Constitution and the test set forth by Justice Harlan in *Katz v. United States*, 389 U.S. 347, 361 (1967)).

<sup>190</sup> *Id.* at 40–42 (discussing *Place*, *Edmond*, and *Caballes*).

<sup>191</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>192</sup> *Jardines*, 73 So. 3d at 42–44; see also *Kyllo*, 533 U.S. at 34–35 (holding that the use of thermal imaging technology to measure the amount of heat emanating from a residence constituted a search); *United States v. Jacobsen*, 466 U.S. 109, 119–21 (1984) (holding that a law enforcement agent could seize, inspect, and test for cocaine a portion of the contents of a damaged package in the custody of a private shipping company); *Katz & Golembiewski*, *supra* note 29, at 766–67 (discussing *Kyllo*).

<sup>193</sup> *Jardines*, 73 So. 3d at 44.

<sup>194</sup> *Id.* at 44–45 (citing *Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *Jacobsen*, 466 U.S. at 123; *United States v. Place*, 462 U.S. 696, 707(1983)).

<sup>195</sup> See *id.* at 45.

<sup>196</sup> *Id.* at 45–46.

<sup>197</sup> *Id.* at 46 (citing *State v. Morsman*, 394 So. 2d 408, 409 (Fla. 1981) ("Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time.")).

‘alert’ if drugs are detected. Quite the contrary.”<sup>198</sup> The court then quoted at length the suppression hearing testimony by Detective Bartlet about how the free air sniff was conducted.<sup>199</sup> The circumstances surrounding Franky’s free air sniff involved a perimeter established by Miami-Dade police officers and Drug Enforcement Agency agents who maintained surveillance on Jardines’s home for over an hour after the sniff test while Detective Pedraja obtained the search warrant.<sup>200</sup> Consequently, the court concluded that the sniff test “was an intrusive procedure” and “a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments.”<sup>201</sup>

Moreover, the entire process of sniff test, surveillance, and subsequent search took hours and occurred “in plain view of the general public” with “no anonymity for the resident.”<sup>202</sup> This public spectacle leading to humiliation and embarrassment for the residents of the searched home was radically different from the sniff test in *Place*, which was so limited and brief that it did not cause embarrassment or inconvenience.<sup>203</sup> Thus, unlike the Supreme Court’s prior existing drug-detection dog jurisprudence, the use of such a dog at a residence constitutes a search that must comply with Fourth Amendment requirements, and there must accordingly be evidence of wrongdoing that establishes a finding of probable cause.<sup>204</sup>

After concluding that the use of a drug-detection dog is a search, the Florida Supreme Court elaborated on why probable cause was the appropriate evidentiary showing as opposed to reasonable suspicion.<sup>205</sup> Ultimately, the court harkened back to the unverified crime hotline tip that initiated the investigation of Jardines.<sup>206</sup> After excluding the alert from the warrantless sniff test with its resulting evidence, the Court found that there was insufficient evidence to support a finding of probable cause.<sup>207</sup>

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<sup>198</sup> *Jardines*, 73 So. 3d at 46 (emphasis added).

<sup>199</sup> *Id.* at 46–48.

<sup>200</sup> *Id.* at 46, 48.

<sup>201</sup> *Id.* at 48.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 48–49 (citing *United States v. Place*, 462 U.S. 696, 707 (1983)).

<sup>204</sup> *Jardines*, 73 So. 3d at 49.

<sup>205</sup> *Id.* at 50–54 (citing *United States v. Colver*, 878 F. 2d 469, 477–79 (D.C. Cir. 1989)).

<sup>206</sup> *Id.* at 58.

<sup>207</sup> *Id.* at 57–58.

*C. The United States Supreme Court Decision*

The Supreme Court granted in part the State of Florida's petition for a writ of certiorari.<sup>208</sup> The Court limited the issue to "whether the officers' behavior was a search within the meaning of the Fourth Amendment."<sup>209</sup> Justice Antonin Scalia authored the majority in a decision joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, affirming the judgment of the Florida Supreme Court.<sup>210</sup>

After quoting the Fourth Amendment, Justice Scalia began the analysis by explaining that the reasonable expectation of privacy standard first enunciated in *Katz* established that while "property rights 'are not the sole measure of Fourth Amendment violations,'" the *Katz* analysis does not limit or replace the property rights approach.<sup>211</sup> He then announced that this principle made the resolution of this petition a simple one because the officers physically entered and engaged in conduct unauthorized by *Jardines* in the area of his home and its curtilage.<sup>212</sup>

Justice Scalia continued with a discussion of Fourth Amendment jurisprudence and its special solicitudes for the home. The essence of the Fourth Amendment establishes that "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."<sup>213</sup> Such a right would be meaningless if police officers were permitted to simply stand outside the home on the porch or garden looking into the window.<sup>214</sup> Indeed, the protection of the home from unreasonable searches has long included the house's curtilage.<sup>215</sup>

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<sup>208</sup> *Jardines*, 73 So. 3d 34, cert. granted, 80 U.S.L.W. 3392 (U.S. Jan. 6, 2012) (No. 11-564).

<sup>209</sup> Florida v. *Jardines*, 133 S. Ct. 1409, 1414 (2013).

<sup>210</sup> *Id.* at 1412, 1418.

<sup>211</sup> *Id.* at 1414 (quoting *Soldal v. Cook County*, 506 U.S. 56, 64 (1992) and citing *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)); accord *United States v. Jones*, 132 S. Ct. 945, 951 (2012) (discussing *Katz* and *Soldal*); see also Fabio Arcila, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends: United States v. Jones and the Katz Conundrum*, 91 N.C. L. REV. 1, 26–37 (2012) (discussing Justice Scalia's resolution in *Jones* reassessing the importance of a trespassory "property-centric" approach to the Fourth Amendment).

<sup>212</sup> *Jardines*, 133 S. Ct. at 1414.

<sup>213</sup> *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); but see *United States v. Chadwick*, 433 U.S. 1, 7 (1977) ("We do not agree that the Warrant Clause protects only dwellings and other specifically designated locales.").

<sup>214</sup> *Jardines*, 133 S. Ct. at 1414.

<sup>215</sup> *Id.* at 1414–15 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223, 225 (1770)); but see David A. Strauss, *On The Origin of Rules (With Apologies to Darwin): A Comment on Antonin Scalia's The Rule of Law as a Law of Rules*, 75 U. CHI. L. REV. 997, 1007 (2008) (critiquing the common law definition of curtilage as not "entirely rule-

Because the officers' actions took place within the constitutionally protected confines of Jardines's residence, the next step was to analyze "whether it was accomplished through an unlicensed physical intrusion."<sup>216</sup> Given that the detectives and Franky were standing squarely on a constitutionally protected part of Jardines's home, the Court had occasion to determine whether they were authorized by Jardines to be there.<sup>217</sup> Justice Scalia emphatically announced that Jardines had provided no such permission.<sup>218</sup>

Within the development of jurisprudence regarding the sanctity of the home, Justice Scalia continued, there has evolved the principle of a license to approach a residence's front door, for example to ring a door bell.<sup>219</sup> He elaborated that "[t]his implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."<sup>220</sup> This implicit license applies to law enforcement officers in the same manner as it does to private citizens.<sup>221</sup> However, he continued that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker."<sup>222</sup> Because the scope of the license "is limited not only to a particular area but also to a specific purpose[,] . . . the background social norms that invite a visitor to the front door do not invite him there to conduct a search."<sup>223</sup>

Relying on the Supreme Court's prior precedent in *Place*, *Jacobsen*, and *Caballes*, the State of Florida argued that such searches, including those utilizing dogs, do not violate the reasonable expectation of privacy enunciated in *Katz*.<sup>224</sup> In response, Justice Scalia explained that "[t]he *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth

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like").

<sup>216</sup> *Jardines*, 133 S. Ct. at 1415.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* (quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 1416 (quoting *Kentucky v. King*, 131 S. Ct. 1849 (2011)).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 1417.



Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.”<sup>225</sup> He declined to address whether Jardines’s rights were violated based on a reasonable expectation of privacy within the meaning of *Katz* because a “virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy,” including here where “the officers learned what they learned only by physically intruding on Jardines’ property to gather evidence . . . .”<sup>226</sup> Accordingly, the Court held that governmental “use of trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”<sup>227</sup>

In a concurring opinion by Justice Kagan, joined by Justices Ginsburg and Sotomayor, she maintained that the detectives’ actions constituted both a trespass and an invasion of privacy.<sup>228</sup> She further explained that analysis of the case according to a right to privacy theory would have led to the conclusion that *Kyllo* resolved the issue.<sup>229</sup>

In dissent, Justice Samuel Alito, joined by Chief Justice John Roberts as well as Justices Anthony Kennedy and Stephen Breyer, argued that the majority decision was based on a faulty interpretation of the law of trespass.<sup>230</sup> Specifically, he asserted that the law of trespass “generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time,” even for people who do not intend to engage the occupants.<sup>231</sup> He noted that this “license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions).”<sup>232</sup> This implied license has limits in both space and time, but does not require the visitor to ring the doorbell or speak with the residents.<sup>233</sup>

Moreover, Justice Alito took issue with the majority’s characterization that the sniff test was a lengthy process as a

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<sup>225</sup> *Id.* (quoting *United States v. Jones*, 132 S. Ct. 945, 952 (2012)).

<sup>226</sup> *Id.*; see also Antonin Scalia, *The Rule Of Law As A Law Of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (addressing the advantage of a bright-line rule leading to predictability for society).

<sup>227</sup> *Jardines*, 133 S. Ct. at 1417–18.

<sup>228</sup> *Id.* at 1418 (Kagan, J., concurring).

<sup>229</sup> *Id.* at 1419.

<sup>230</sup> *Id.* at 1420 (Alito, J., dissenting).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 1421–23.

factual matter.<sup>234</sup> Instead, he asserted that the process of Franky walking up and alerting to the marijuana odor took no more than two minutes from start to finish.<sup>235</sup> Applying the facts to the law of trespass, Justice Alito concluded that Detective Bartlet's walk to the front door in daytime for a brief time did not violate the implied license to visitors.<sup>236</sup>

Justice Alito also criticized Justice Kagan's concurring opinion, arguing against reasonable expectations of privacy as an alternative basis for finding in *Jardines*'s favor.<sup>237</sup> He asserted that not only was this position rejected in *Caballes*, but *Jardines* had no "reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand."<sup>238</sup>

#### IV. *JARDINES* AND *HARRIS* ARE DOCTRINALLY CONSISTENT WITH EXISTING SUPREME COURT PRECEDENTS

The Supreme Court's *Harris* and *Jardines* decisions are two different cases, but are "interrelated" in that they both address issues involving drug detection dogs.<sup>239</sup> Interestingly, the description by Detective Bartlet of Franky's free air sniff of *Jardines*' home is not much different than the free air sniff by Aldo in *Harris* or in other Supreme Court decisions.<sup>240</sup> Despite these similarities, these two cases seemed on their face to reach different conclusions about the use of such dogs.<sup>241</sup>

Ultimately, these two decisions are reconcilable based on the different facts that they present. In *Jardines*, the Court addressed the issue of whether the use of the dog was done in a place in which

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<sup>234</sup> *Id.* at 1421.

<sup>235</sup> *Id.*

<sup>236</sup> *See id.* at 1423.

<sup>237</sup> *Id.* at 1424–26.

<sup>238</sup> *Id.* at 1424 (citing *Illinois v. Caballes*, 543 U.S. 405, 409–10).

<sup>239</sup> *Braverman*, *supra* note 3, at 102.

<sup>240</sup> *Compare Jardines*, 133 S. Ct. at 1413 (describing the free air sniff conducted by Franky), *with Harris v. United States*, 133 S. Ct. 1050, 1053–54 (describing the free air sniff conducted by Aldo), *and Caballes*, 543 U.S. at 406 (describing the free air sniff conducted by the narcotics-detection dog).

<sup>241</sup> *Compare Jardines*, 133 S. Ct. at 1417–18 ("use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."), *with Harris*, 133 S. Ct. at 1059 (holding that the narcotics-detection dog's free air sniff of the defendant's vehicle was not a search in and of itself, but merely provided probable cause to search the defendant's vehicle).

law enforcement officers had a right to be.<sup>242</sup> In contrast, the Court in *Harris* focused on whether based on the totality of the circumstances the dog's alert constituted a sufficient basis for the officers to conduct a search.<sup>243</sup>

In *Jardines*, Justice Scalia decided the case based on a trespass theory-based interpretation of the Fourth Amendment.<sup>244</sup> In taking this approach, as opposed to the "reasonable expectation of privacy" standard discussed in Justice Kagan's concurring opinion, he reiterated a position that he had previously relied upon in *United States v. Jones* and *Kyllo v. United States*.<sup>245</sup>

In *Jones*, the Court addressed whether federal agents could place a Global Positioning Satellite (GPS) tracking device on a suspect's car to monitor his movement.<sup>246</sup> Justice Scalia analyzed the Fourth Amendment protections based on trespass and its historical roots in the English common law: "*Entick v. Carrington*, is a case we have described as a monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure."<sup>247</sup> This language in *Jones* echoes Justice Scalia's decision in *Jardines*:

*Entick v. Carrington*, a case "undoubtedly familiar" to "every American statesman" at the time of the Founding, *Boyd v. United States*, states the general rule clearly: "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave."<sup>248</sup>

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<sup>242</sup> See *Jardines*, 133 S. Ct. at 1415; see also Myers, *supra* note 85, at 9 ("was the dog in a place where it had a right to be, during a lawful stop?"); Simon, *supra* note 141, at 124 ("[I]nvestigatory techniques that are not physically invasive and which reveal only the presence or absence of an illegal substance are not searches.").

<sup>243</sup> *Harris*, 133 S. Ct. at 1053, 1055; see also Myers, *supra* note 85, at 10 ("[T]he . . . inquiry is whether a search by a particular dog under specific circumstances constitutes probable cause to search under the Fourth Amendment.").

<sup>244</sup> *Jardines*, 133 S. Ct. at 1414.

<sup>245</sup> See *Jones v. United States*, 132 S. Ct. 945, 951; *Kyllo v. United States*, 533 U.S. 27, 28, 34–35 (2001) (applying the reasonable expectation of privacy standard where sense-enhancing technology, not in general public use, was used to obtain information about the interior of the home).

<sup>246</sup> *Jones*, 132 S. Ct. at 948.

<sup>247</sup> *Id.* at 949 (citations omitted) (internal quotation marks omitted); see also *Minnesota v. Carter*, 525 U.S. 83, 92–96 (1998) (Scalia, J., concurring) (discussing the history of the Fourth Amendment and common law trespass); *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) (discussing common-law trespass).

<sup>248</sup> *Jardines*, 133 S. Ct. at 1415 (alteration in original) (citations omitted) (quoting *Entick*, 95 Eng. Rep. at 817); see also Dana Raigrodski, *Property, Privacy and Power: Rethinking the Fourth Amendment in the Wake of U.S. v. Jones*, 22 B.U. PUB. INT. L.J. 67, 106–07 (2013)

In *Jones*, Justice Scalia further elaborated that “for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (‘persons, houses, papers, and effects’) it enumerates.”<sup>249</sup> It is on this trespass theory of the Fourth Amendment that the Court held the government’s attachment of the GPS tracking device to Jones’ vehicle without a warrant violated the Fourth Amendment.<sup>250</sup> Thus, as with *Jones*, Justice Scalia once again limited the Court’s “contraband exception inside and outside the home.”<sup>251</sup>

In *Kyllo*, federal agents suspected that Danny Kyllo was growing marijuana within his home, so they conducted thermal-imaging on his residence to assess the amount of heat being emitted.<sup>252</sup> Because of substantially higher levels of heat emanating from his residence as well as utility records and informant’s information, they obtained a search warrant and discovered numerous marijuana plants growing inside.<sup>253</sup>

Based on this discovery of marijuana plants, the *Kyllo* Court addressed “whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment.”<sup>254</sup> Justice Scalia began the *Kyllo* opinion with a discussion of English law and common-law trespass.<sup>255</sup> He explained that “well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.”<sup>256</sup> Ultimately, for

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(discussing *Entick*’s importance to the development of Fourth Amendment jurisprudence and its significance to the *Jones* decision); Kevin Emas & Tamara Pallas, *United States v. Jones: Does Katz Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116, 122 n.25 (2012) (“Justice Scalia relies on . . . *Entick* in framing his analysis for the majority opinion in *Jones*.”).

<sup>249</sup> *Jones*, 132 S. Ct. at 950 (quoting U.S. CONST. amend. IV.); see also Arcila, *supra* note 211, at 26–37 (discussing Justice Scalia’s trespass analysis in *Jones* and its consistency with Fourth Amendment jurisprudence); Emas & Pallas, *supra* note 248, at 145–57 (discussing Justice Scalia’s analysis in *Jones*).

<sup>250</sup> *Jones*, 132 S. Ct. at 949.

<sup>251</sup> MacDonnell, *supra* note 6, at 75.

<sup>252</sup> *Kyllo v. United States*, 533 U.S. 27, 29.

<sup>253</sup> *Id.* at 29–30.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 31–32.

<sup>256</sup> *Id.* at 31 (citing *Goldman v. United States*, 316 U.S. 129, 134–36 (1942); *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928); *Silverman v. United States*, 365 U.S. 505, 510–12 (1961)); see also Lawrence Rosenthal, *Originalism In Practice*, 87 IND. L.J. 1183, 1199–1200 (2012) (discussing trespass and the *Kyllo* decision); *Originalism And Criminal Law And Procedure*, 11 CHAP. L. REV. 277, 284 (2008) (statement by Professor Craig Lerner) (“[Justice Scalia] seems more willing [than Chief Justice Taft] to translate the Fourth Amendment to modern conditions, finding Fourth Amendment violations even in the absence of physical trespass”); but see Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA.

Justice Scalia, the issue was not the thermal-imaging device, but the invasion into the home: “The Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained . . . . In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”<sup>257</sup> Although some have argued that Justice Scalia was ambiguous in whether his analysis emphasized “protection of the home or protection from high-tech devices,”<sup>258</sup> this concern seems misplaced in light of *Jones* and now *Jardines*.

The tension in *Jardines* with existing dog-detection jurisprudence lies with the Court’s conclusion that Detective Bartlet’s use of Franky to sniff the residence and its curtilage constituted a search in violation of the Fourth Amendment, whereas the use of a drug-detection dog in *Place* and *Caballes* did not constitute a search.<sup>259</sup> This tension would further extend to the Court’s decision from earlier in the term—*Harris*—addressing when an alert creates probable cause to conduct a search.<sup>260</sup> In each of those earlier decisions, the Court essentially determined that the sniff was much ado about nothing, unlike seemingly the same sniff in *Jardines*.<sup>261</sup>

Prior to *Jardines* being handed down, law enforcement officials benefitted from the Court’s view of the sniff by a drug-detection dog as being relatively benign.<sup>262</sup> Consequently, the possibility that the Supreme Court might rule in favor of the criminal defendant in *Jardines* caused some alarm.<sup>263</sup> Indeed, in an *amicus* brief in support of the State of Florida, a number of states argued that if the Florida Supreme Court’s ruling were upheld in *Jardines* “it could have a profound chilling effect on law-enforcement efforts to combat illegal drugs.”<sup>264</sup> This position overstates the situation. The Court’s

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L. REV. 687, 709 (2011) (“it is fair to describe the Court’s Fourth Amendment doctrine as incompatible with originalism”).

<sup>257</sup> *Kyllo*, 533 U.S. at 37; see also Katz & Golembiewski, *supra* note 29, at 775–76 (discussing the impact of *Kyllo*).

<sup>258</sup> Katz & Golembiewski, *supra* note 29, at 767.

<sup>259</sup> See *supra* Parts I.A., I.C., III.C.

<sup>260</sup> See *supra* Part II.C.

<sup>261</sup> See *supra* Parts I.A., I.C., II.C., III.C., note 247.

<sup>262</sup> See generally Braverman, *supra* note 3, at 82–83 (describing the extensive use of drug-detection dogs in a variety of public places as part of a new model of policing and noting that Franky alone had sniffed out more than 2.5 tons of marijuana, eighty pounds of cocaine and five million dollars in drug-contaminated currency).

<sup>263</sup> See *id.* at 88 & n.23.

<sup>264</sup> *Id.* at 88; Brief of Texas, Alabama, Arizona, Colorado, Delaware, Guam, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Nebraska, New Mexico, Tennessee, Utah, Vermont, and Virginia as Amici Curiae in Support of Petitioner, *Florida v. Jardines*, 133 S.

decision in *Jardines* is relatively narrow involving a drug-detection dog that was used to conduct a free air sniff on a residence.<sup>265</sup> As both the majority and concurring opinions established, the home maintains a sacred place in terms of Fourth Amendment protection and privacy.<sup>266</sup> The result quite possibly would have been different had the building been a warehouse or some other building.<sup>267</sup> Moreover, had the detectives in *Jardines* conducted some additional surveillance and gathered additional evidence to corroborate the anonymous tip, they might have been able to develop probable cause to utilize a dog for a free air sniff.<sup>268</sup>

Ultimately, the placement of a weightier onus on law enforcement to ensure that warrantless searches of homes are not conducted is consistent with prior precedent holding that the sniff by a drug detection dog is not a search. It is the trespass—*not the sniff*—that constitutes the Fourth Amendment violation. On the other hand, the sniff in *Harris* did not violate the Constitution because it was done during the course of a lawful traffic stop.<sup>269</sup> Indeed, the various state *amici* in *Jardines* should have been more concerned about the impact of *Harris*.<sup>270</sup> If the Court had ruled in such a manner that provided criminal defendants with greater protections at any suppression hearings, then the benefit and value of the sniff of a drug dog would be greatly diminished.

#### V. THE USE OF DRUG-DETECTION DOGS IN TEXAS DEMONSTRATES THE APPLICABILITY OF BOTH *JARDINES* AND *HARRIS*

One only needs to look at the Corpus Christi Division of the

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Ct. 1409 (2013) (No. 11-564), 2011 WL 6069617, at \*5–6.

<sup>265</sup> See *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

<sup>266</sup> See *id.* at 1414; *id.* at 1418 (Kagan, J., concurring); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Boyd v. United States*, 116 U.S. 616, 626–27 (1886).

<sup>267</sup> *Minnesota v. Carter*, 525 U.S. 83, 90 (1998) (“Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property.”); *New York v. Burger*, 482 U.S. 691, 700 (1987) (“An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual’s home.”); *United States v. Chaves*, 169 F.3d 687, 691 (11th Cir. 1999) (“Certainly, the government’s ability to conduct searches of a warehouse is far broader than its ability to search a residence.”).

<sup>268</sup> See *United States v. Chadwick*, 433 U.S. 1, 3–4, 15 (1977); *Bird*, *supra* note 5, at 415.

<sup>269</sup> See *Myers*, *supra* note 85, at 7.

<sup>270</sup> See *Braverman*, *supra* note 3 at 88 n.23 (noting that *Harris* had fewer *Amici Curiae* briefs submitted in support of the state than *Jardines*); see also *supra* notes 161–67, and accompanying text (describing Kagan’s opinion in which she criticizes the Florida Supreme Court’s flawed determination of probable cause for creating “a strict evidentiary checklist” and the court’s undue emphasis on a canine’s field performance—the possible consequences of *Harris* had it been upheld).

Southern District of Texas to see how a heightened standard in Harris would alter the landscape in courts on the border and around the country. In February 2013, I signed twenty-two criminal complaints regarding thirty-two defendants who were arrested and charged with narcotics offenses in the Corpus Christi Division<sup>271</sup> of the Southern District of Texas.<sup>272</sup> In only two cases were drug detection dogs not mentioned as having some role in the criminal complaints. In the first prosecution, five aliens with no legal status to be in the United States were apprehended walking in the brush and charged with carrying about 164 kilograms of marijuana between them.<sup>273</sup> They were attempting to circumvent the Falfurrias Border Patrol Checkpoint.<sup>274</sup>

In the other case, the two defendants were stopped at the Sarita Border Patrol Checkpoint<sup>275</sup> and questioned by a Border Patrol

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<sup>271</sup> See 28 U.S.C. § 124(b)(6) (2006) (comprising the counties of Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleburg, Live Oak, Nueces, and San Patricio).

<sup>272</sup> See Complaint at 1, *United States v. Canizares-Barreras*, No. 2:13-mj-00134 (S.D. Tex. Feb. 1, 2013); Complaint at 1, *United States v. Guerra-Ruiz*, No. 2:13-mj-00136 (S.D. Tex. Feb. 2, 2013); Complaint at 1, *United States v. Hagist*, No. 2:13-mj-00140 (S.D. Tex. Feb. 3, 2013); Complaint at 1, *United States v. Garcia*, No. 2:13-mj-00142 (S.D. Tex. Feb. 4, 2013); Complaint at 1, *United States v. Rojas*, No. 2:13-mj-00143 (S.D. Tex. Feb. 4, 2013); Complaint at 1, *United States v. Rodriguez*, No. 2:13-mj-00151 (S.D. Tex. Feb. 6, 2013); Complaint at 1, *United States v. Norris*, No. 2:13-mj-00155 (S.D. Tex. Feb. 7, 2013); Complaint at 1, *United States v. Hernandez-Gonzalez*, No. 2:13-mj-00159 (S.D. Tex. Feb. 7, 2013); Complaint at 1, *United States v. Pineda-Duarte*, No. 2:13-mj-00160 (S.D. Tex. Feb. 7, 2013); Complaint at 1, *United States v. Guerrero*, No. 2:13-mj-00170 (S.D. Tex. Feb. 9, 2013); Complaint at 1, *United States v. Salinas-Prado*, No. 2:13-mj-00175 (S.D. Tex. Feb. 12, 2013); Complaint at 1, *United States v. Aleman*, No. 2:13-mj-00176 (S.D. Tex. Feb. 12, 2013); Complaint at 1, *United States v. Flores*, No. 2:13-mj-00194 (S.D. Tex. Feb. 12, 2013); Complaint at 1, *United States v. Garcia*, No. 2:13-mj-00189 (S.D. Tex. Feb. 14, 2013); Complaint at 1, *United States v. Vela*, No. 2:13-mj-00192 (S.D. Tex. Feb. 15, 2013); Complaint at 1, *United States v. DeLeon*, No. 2:13-mj-00207 (S.D. Tex. Feb. 15, 2013); Complaint at 1, *United States v. Calandrelis*, No. 2:13-mj-00196 (S.D. Tex. Feb. 16, 2013); Complaint at 1, *United States v. Rodriguez*, No. 2:13-mj-00197 (S.D. Tex. Feb. 17, 2013); Complaint at 1, *United States v. Johnson*, No. 2:13-mj-00212 (S.D. Tex. Feb. 22, 2013); Complaint at 1, *United States v. Corben*, No. 2:13-mj-00214 (S.D. Tex. Feb. 23, 2013); Complaint at 1, *United States v. Luna*, No. 2:13-mj-00215 (S.D. Tex. Feb. 23, 2013); Complaint at 1, *United States v. Jackson*, No. 2:13-mj-00226 (S.D. Tex. Feb. 27, 2013).

<sup>273</sup> Complaint at 2–3, *Pineda-Duarte*, No. 2:13-mj-00160.

<sup>274</sup> See *id.* at 2. The Falfurrias Border Patrol Checkpoint is about seventy miles north of the Rio Grande River and about thirteen miles south of Falfurrias, Texas on Highway 281 in Brooks County. *Falfurrias Station*, U.S. CUSTOMS AND BORDER PROT., [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/border\\_patrol\\_sectors/rio\\_grande\\_v\\_alley\\_sector/mcallen\\_stations/falfurrias.xml](http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_sectors/rio_grande_v_alley_sector/mcallen_stations/falfurrias.xml) (Sept. 21, 2010).

<sup>275</sup> See Complaint at 1, *Jackson*, No. 2:13-mj-00226. The Sarita Border Patrol Checkpoint is in Sarita, Texas on Highway 77 in Kenedy County. *Kingsville Station*, U.S. CUSTOMS AND BORDER PROT., [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/border\\_patrol\\_sectors/rio\\_grande\\_v\\_alley\\_sector/mcallen\\_stations/kingsville.xml](http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_sectors/rio_grande_v_alley_sector/mcallen_stations/kingsville.xml) (July 3, 2013).

agent. Because of signs of nervousness, the agent asked the driver for consent to further inspect their car.<sup>276</sup> After receiving consent, the car was sent to a secondary inspection area where it was scanned by a Z Backscatter Van.<sup>277</sup> This technology made apparent some anomalies that ultimately led to the discovery of 15.9 kilograms of methamphetamine in a welded aftermarket compartment in the driver's side front tire.<sup>278</sup>

The remaining twenty cases all involved alerts by drug-detection dogs at the Border Patrol Checkpoints in either Falfurrias or Sarita, Texas. In each case, the dog's alert led to additional scrutiny and ultimately the discovery of narcotics and the apprehension of the vehicles' occupants. Consider the following:

-While on primary BPA Foster informed BPA Stone of a positive K-9 alert to the exterior of the tractor . . . . While in secondary, service canine Harry-E again alerted to the exterior of the tractor in the vicinity of the fuel tanks. The subsequent ZBF Backscatter image revealed anomalies in both fuel tanks located on both sides of the tractor.<sup>279</sup>

-Defendant was encountered "during an immigration inspection of an El Espresso Bus . . . . BPA Sherman Kemp and his canine partner 'Trixie' conducted a non-intrusive free air sniff of Guerra's camouflaged backpack and Shampoo bottles. 'Trixie' alerted to the bottle and a subsequent test of their substances tested positive for the presence of methamphetamine."<sup>280</sup>

-"Agent Oscar Ortiz utilized his service issued canine, Peppie (020612) to conduct a non-intrusive free air sniff of the exterior of the vehicle. . . . [In secondary,] Agent Oscar and his Service canine proceeded to conduct a systematic search of the vehicle. . . . [He] then informed [the lead agent] that Canine Peppie had alerted and indicated to the trailer."<sup>281</sup>

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<sup>276</sup> Complaint at 2, *Jackson*, No. 2:13-mj-00226.

<sup>277</sup> *Id.* The Z Backscatter Van is a "cargo and vehicle screening system" that takes "photo-like imaging quickly and clearly reveals threats like explosives, drugs, currency, and trade-fraud items such as alcohol and cigarettes." *Mobile ZBV*, AMERICAN SCIENCE AND ENGINEERING, INC., <http://as-e.com/products-solutions/cargo-vehicle-inspection/mobile/product/zbv/> (last visited Oct. 6, 2013); see also Arcila, *supra* note 211, at 30 n.131 (discussing backscatters).

<sup>278</sup> Complaint at 2-3, *Jackson*, No. 2:13-mj-00226.

<sup>279</sup> Complaint at 2, *United States v. Canizares-Barreras*, No. 2:13-mj-00134 (S.D. Tex. Feb. 1, 2013) (stating that 95 kilograms of marijuana were found).

<sup>280</sup> Complaint at 2, *United States v. Guerra-Ruiz*, No. 2:13-mj-00136 (S.D. Tex. Feb. 2, 2013).

<sup>281</sup> Complaint at 2-3, *United States v. Hagist*, No. 2:13-mj-00140 (S.D. Tex. Feb. 3, 2013)



-After sending the vehicle to secondary inspection based on the driver's nervousness, "Agent Flores then performed a systematic search of the vehicle utilizing his service K-9. . . . [He then] advised that his K-9 alerted to the vehicle in the secondary inspection area. . . . As [this] vehicle was being worked on, approximately thirty minutes later, another similar vehicle . . . approached the primary inspection lane . . . . At this time Agent Brandon Perryman was working the primary lane inspection, alongside Agent Perryman was Agent Robert Vega and his service K-9 Zaki. As Agent Perryman was performing his immigration inspection, Agent Vega was performing a free air sniff utilizing his service K-9 . . . . Agent Vega then verbally told Agent Perryman to secondary the vehicle due to his K-9 alerting."<sup>282</sup>

-“Agent Kooiman advised that his canine [Rudie-p] was alerting to the vehicle . . . . Once in the secondary area ‘Rudie-p’ alerted and indicated to the trunk of the vehicle”<sup>283</sup>

-BPA Longest allowed canine “Hagos” to perform a non-intrusive, free-air sniff of the exterior of the vehicle. BPA Longest then informed BPA Irugues that “Hagos” had alerted to the vehicle . . . . Once in the secondary inspection area, . . . BPA Longest and canine “Hagos” performed a canine search of the vehicle. [He] informed BPA Iruegas that the canine had alerted and indicated to the front driver's side floor board. A further search of the vehicle revealed two aftermarket compartments . . . .<sup>284</sup>

-BPA Silva and his Service Canine Snyder were conducting a non-intrusive free-air sniff of the tractor and trailer's exterior . . . . BPA Silva notified BPA Aleman that Snyder had alerted to the trailer . . . . In the secondary inspection area, BPA Silva and his Service Canine Snyder alerted and indicated to the back of the trailer <sup>285</sup>

-In the secondary inspection area, BPA Silva and service canine, Snyder, performed a non-intrusive free air sniff of the vehicle . . . . BPA Silva conducted a systematic search of the tractor trailer

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(stating that 1,106 kilograms of marijuana were found).

<sup>282</sup> Complaint at 2–4, *United States v. Garcia*, No. 2:13-mj-00142 (S.D. Tex. Feb. 4, 2013) (stating that 69.5 kilograms of marijuana were found).

<sup>283</sup> Complaint at 2, *United States v. Rojas*, No. 2:13-mj-00143 (S.D. Tex. Feb. 4, 2013) (stating that 52.22 kilograms of marijuana were found).

<sup>284</sup> Complaint at 2, *United States v. Rodriguez*, No. 2:13-mj-00151 (S.D. Tex. Feb. 6, 2013) (stating that 15.12 kilograms of cocaine were found).

<sup>285</sup> Complaint at 1–2, *United States v. Norris*, No. 2:13-mj-00155 (S.D. Tex. Feb. 7, 2013) (finding 188.5 kilograms of marijuana).

utilizing his service canine. Service canine Snyder indicated to the possible presence of humans or illegal contraband located on the underside of the trailer. Upon further inspection, BPA Silva discovered an aftermarket metal compartment located underneath the trailer.<sup>286</sup>

-BPA DeLeon and his service canine partner “Rocco-B” performed a non-intrusive free air sniff on the vehicle. [He] advised BPA Garcia that his canine partner “Rocco-B” alerted to the vehicle . . . . Once in the secondary inspection area, BPA DeLeon utilized his service canine partner “Rocco-B,” to perform a systematic search of the vehicle. BPA DeLeon stated that his canine partner ‘Rocco-B’ alerted and indicated to the driver’s side rear wheel well of the vehicle.<sup>287</sup>

-“BPA Jose Flores conducted a ‘Free Air Sniff’ with his Border Patrol Canine ‘Tyson-E’ around the Dodge Pick-up truck driven by SALINAS-Prado. BPA Jose Flores notified BPA Salinas that ‘Tyson-E’ alerted to the vehicle.”<sup>288</sup>

-“BPA Rodolfo Rios and his service canine Tiennus were performing a free air sniff of the vehicle, BPA Rios notified BPA that his service canine alerted to the vehicle . . . . [In secondary,] BPA Rios notified BPA Tubbs that the Service Canine had alerted and indicated to the undercarriage of the vehicle.”<sup>289</sup>

-BPA Lemay utilized his canine partner and conducted a non-intrusive free-air sniff of the exterior of the vehicle. BPA Lemay then informed BPA Tudor that his canine partner was alerting to the rear undercarriage of the vehicle . . . . Utilizing his canine partner [in secondary], BPA Lemay conducted a canine search of the vehicle. BPA Lemay later informed BPA Tudor that his canine partner, Monza, again alerted under the rear of the vehicle.<sup>290</sup>

-BPA Garcia advised BPA Gonzalez that his canine partner “Rico” alerted to the cab of the tractor . . . . Once in the secondary inspection area, BPA Garcia utilized his canine partner “Rico”, to

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<sup>286</sup> Complaint at 1–3, *United States v. Hernandez-Gonzalez*, No. 2:13-mj-00159 (S.D. Tex. Feb. 7, 2013) (finding 1437.55 pounds of marijuana).

<sup>287</sup> Complaint at 1–2, *United States v. Guerrero*, No. 2:13-mj-00170 (S.D. Tex. Feb. 9, 2013) (finding 52.75 kilograms of methamphetamine).

<sup>288</sup> Complaint at 1–2, *United States v. Salinas-Prado*, No. 2:13-mj-00175 (S.D. Tex. Feb. 12, 2013) (finding 30 kilograms of marijuana).

<sup>289</sup> Complaint at 1–2, *United States v. Aleman*, No. 2:13-mj-00176 (S.D. Tex. Feb. 12, 2013) (finding 34.86 kilograms of marijuana).

<sup>290</sup> Complaint at 1–2, *United States v. Flores*, No. 2:13-cr-00194 (S.D. Tex. Feb. 12, 2013) (finding five kilograms of cocaine).

perform a Canine search of the vehicle. [He] advised BPA Gonzalez that his canine partner was alerting to the cab area of the tractor.<sup>291</sup>

-BPA Valdez advised BPA Paz that his canine was alerting to the rear of the vehicle . . . . Once in the secondary inspection area, BPA Valdez and his service canine “Ringo-A” continued to perform a free air sniff of the vehicle. [He] advised BPA Paz that his service canine “Ringo-A” alerted to the trunk of the vehicle<sup>292</sup>

-During the immigration inspection Canine Handler J. Acosta utilized his service canine “Goody” (#080910) to perform a free air sniff of the vehicle’s exterior . . . [and] informed BPA Fraga that his service canine was alerting to the rear of the vehicle . . . . Once in secondary Canine Handler Acosta performed a systematic search of the tractor trailer. Canine alerted to the rear doors of the trailer. Once inside, canine alerted and indicated to one of the pallets of charcoal<sup>293</sup>

-“BPA Montemayor allowed the service canine to conduct a non-intrusive, exterior, free-air sniff of the vehicle operated by GUTIERREZ. [He] informed BPA Barrientos that the service canine had alerted toward the trunk of the vehicle . . . . BPA Montemayor and the service canine performed a secondary search of the vehicle . . . [and] the service canine had alerted and indicated toward the glove compartment of the vehicle . . .” where the narcotics were ultimately found.<sup>294</sup>

-BPA Ford had his canine partner, “Kyra-D” conduct a non-intrusive, free-air sniff of the exterior of the vehicle. [He] informed BPA Villarreal that “Kyra-D” was alerting to the area between the front gooseneck of the trailer and bed portion of the truck . . . . [In secondary, he] and his canine partner “Kyra-D” conducted a systematic search of the interior of the travel trailer . . . [and] “Kyra-D” had alerted and indicated to the air conditioning duct opening in the forward compartment of the travel trailer.<sup>295</sup>

-Agent John Frisco allowed his canine partner, Mari NCF#

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<sup>291</sup> Complaint at 1–2, *United States v. Garcia*, No. 2:13-mj-00189 (S.D. Tex. Feb. 14, 2013) (finding 7.5 kilograms of cocaine).

<sup>292</sup> Complaint at 1–2, *United States v. Vela*, No. 2:13-mj-00192 (S.D. Tex. Feb. 15, 2013) (finding 12.99 kilograms of marijuana).

<sup>293</sup> Complaint at 1–2, *United States v. DeLeon*, No. 2:13-cr-00207 (S.D. Tex. Feb. 15, 2013) (finding 1156 kilograms of marijuana).

<sup>294</sup> Complaint at 1–2, *United States v. Calandreli*, No. 2:13-mj-00196 (S.D. Tex. Feb. 16, 2013) (finding .64 kilogram of methamphetamine).

<sup>295</sup> Complaint at 1–2, *United States v. Rodriguez*, No. 2:13-mj-00197 (S.D. Tex. Feb. 17, 2013) (finding 250.56 kilograms of marijuana).

031040, to perform a free air sniff of the vehicle's exterior. [He] notified BPA Torres that [his] canine partner had alerted to the trailer . . . . BPA Frisco allowed his canine partner to perform a systematic search of the tractor and trailer. [His] canine partner once again alerted to the rear of the trailer . . . . [He] allowed his canine partner to enter the trailer to continue the search. [His] canine partner alerted once again to the sides of the bags which was [sic] filled with the carbon black.<sup>296</sup>

-BPA Padron and service canine Rex-YY conducted a free air sniff on the exterior of the vehicle. [He] advised BPA Garza that the canine was alerting to the rear of the vehicle . . . . Once in the secondary inspection lane, BPA Padron and service canine Rex-YY conducted a systemic search of the vehicle . . . . Rex-YY was alerting and indicating to the bed of the pickup. There were two ice chests in the bed of the pickup. The canine Rex-YY began to alert to the ice chests when BPA Padron place[d] the canine on the bed of the truck.<sup>297</sup>

-BPA Ford conducted a non-intrusive free air sniff of the truck and trailer [with Kyra-D] . . . [He] told BPA Valle that the canine had alerted to the vehicle . . . . Once at the secondary inspection lane, . . . [t]he canine once again alerted to the rear of the trailer.<sup>298</sup>

A reading of these criminal complaint excerpts reveals that these alerts are being used to search cars and locate narcotics. The initial alert often led to a request that the vehicle enter the secondary lane and that the driver consent to a search of a vehicle. I almost never saw a case in which a driver had not consented to the search of a vehicle. Moreover, these alerts do not result in motions to suppress any evidence related to the sniff by a drug-detection dog at either the Sarita or Falfurrias Border Patrol checkpoint.<sup>299</sup>

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<sup>296</sup> Complaint at 1–2, *United States v. Johnson*, No. 2:13-mj-00212 (S.D. Tex. Feb. 22, 2013) (finding 1295.23 kilograms of marijuana).

<sup>297</sup> Complaint at 1–2, *United States v. Corben*, No. 2:13-mj-00214 (S.D. Tex. Feb. 23, 2013) (finding 35.15 kilograms of marijuana).

<sup>298</sup> Complaint at 1–2, *United States v. Luna*, No. 2:13-mj-00215 (S.D. Tex. Feb. 23, 2013) (1366.81 kilograms of marijuana were found).

<sup>299</sup> A Westlaw search for various district judges in the Corpus Christi and Victoria divisions of the Southern District of Texas reveals that the database contains no rulings on motions to suppress evidence based on challenges to alerts by dogs. As of April 28, 2013, in Westlaw's DCT database the search of "suppres! & dog" revealed no such decisions by Judge Hayden Head, Judge Nelva Gonzales Ramos, Judge John Rainey, or Judge Janis Jack. Judge Rainey did suppress evidence from a search within the Victoria Division, 28 U.S.C. § 124(b)(5) (2006), in a valid highway traffic stop in which the sheriff's deputy did not act diligently when he delayed the use of the drug-detection dog. *United States v. Grant*, No. V-05-151, 2007 U.S. Dist. LEXIS 14221, at \*45 (S.D. Tex. Feb. 28, 2007). In a decision by Judge Jack in which she

In the end, there will likely be some prosecutions that do not go forward based on warrantless canine sniffs of residences. In one of the few cases addressing the issue to date, a Texas appellate court, relying on *Jardines*, affirmed the trial court's suppression of evidence seized pursuant to a search warrant that was issued "based, in pertinent part, on an 'alert' by a drug dog at the front door of appellee's home."<sup>300</sup> Another Texas appellate court reversed and remanded after concluding that the landing to the defendant's apartment was part of the apartment's curtilage such that the warrantless use of a drug detection dog violated the defendant's Fourth Amendment rights.<sup>301</sup> Excluding information obtained through the warrantless dog sniff, there was insufficient evidence to establish probable cause necessary to support issuing a search warrant.<sup>302</sup> Similarly, the Supreme Court of Michigan relying on *Jardines* reversed the Michigan Court of Appeals:

In light of the prosecutor's concession that absent the canine sniff the warrant was not supported by probable cause, and given the reasoning provided by the United States Supreme Court, the trial court in this case properly granted the defendant's motion to suppress the evidence seized in the search of his home.<sup>303</sup>

The *Jardines* Court created a bright-line rule that law enforcement should be able to understand and easily apply going forward.

Indeed, in another case involving a challenge to a search of a residence another Texas appellate court declined to extend *Jardines*.<sup>304</sup> In *Wright*, the officers performed a "knock and talk" investigation at a residence where they believed hydroponic marijuana was being grown.<sup>305</sup> They approached the house with a

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denied a motion to suppress, she cited a number of reasons to find that the stop and the search of his vehicle did not violate the Fourth Amendment, including the alert by the drug-detection dog. See *United States v. Martinez*, No. C-07-436, 2007 U.S. Dist. LEXIS 101775, at \*7-8, \*11 (S.D. Tex. Sept. 27, 2007). In another case, she granted a motion to suppress evidence of narcotics in which a dog alerted, but noted that the defendant did "not challenge the legality of the canine search of his vehicle" observing that "a dog sniff does not constitute a search or seizure under the Fourth Amendment." *United States v. Richardson*, No. C-10-883, 2010 U.S. Dist. LEXIS 124076, at \*7 n.5 (S.D. Tex. Nov. 23, 2010) (citing *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993)).

<sup>300</sup> *State v. Williamson*, Nos. 05-12-699 & 05-12-700, 2013 Tex. App. LEXIS 4845, at \*1 (Tex. App. Apr. 17, 2013).

<sup>301</sup> See *McClintock v. State*, 405 S.W. 3d 277, 284 (Tex. App. 2013).

<sup>302</sup> *Id.* at 288.

<sup>303</sup> *People v. Holt*, 831 N.W.2d 241, 241-42 (Mich. 2013).

<sup>304</sup> See *Wright v. State*, 401 S.W.3d 813, 823 (Tex. App. May 9, 2013).

<sup>305</sup> *Id.* at 815-16

drug-detection dog, but before even employing the dog, they themselves detected a strong odor of marijuana.<sup>306</sup> Subsequently, they obtained a search warrant and ultimately discovered 155 live plants based on the search.<sup>307</sup> The trial court denied the defendant's motion to suppress based on the totality of the circumstances.<sup>308</sup> The appellate court affirmed noting that although defendant did not properly raise the argument on appeal that the search was proper because "[t]he information in the affidavit other than the statements regarding the narcotics-detection dog was acquired independently from the use of the dog and in a lawful manner."<sup>309</sup> Consequently, "even if the use of the narcotics-detection dog were an unreasonable search that violated the United States Constitution, the search warrant would not be rendered invalid if, putting aside the statements in the affidavit regarding the dog, the remaining information in the affidavit clearly established probable cause."<sup>310</sup> The bright-line from *Jardines* was not applied in *Wright* where the search was not based on the sniff by the dog, but the smell by the police officers prior to using the dog as well as other evidence.<sup>311</sup> Both *Wright* and *Nagy* demonstrate that courts will construe *Jardines* very narrowly.

On the other hand, there have been a number of decisions applying *Harris* upholding the use of drug-detection dogs and evidence seized based on their alerts.<sup>312</sup> Some cases demonstrate

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<sup>306</sup> *Id.* at 816.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 817.

<sup>309</sup> *Id.* at 822; *see also* United States v. Nagy, No. 12-50289, 2013 U.S. App. LEXIS 9308, at \*3 (5th Cir. May 7, 2013) (per curiam) (unpublished) ("the validity of the warrant authorizing the search of Nagy's residence did not depend on information revealed by the sniff . . . Thus *Jardines* does not call into question the probable cause ruling.")

<sup>310</sup> *Wright*, 401 S.W.3d at 822 (citing United States v. Karo, 468 U.S. 705, 720–21 (1984)).

<sup>311</sup> *See id.* at 823.

<sup>312</sup> *See* United States v. Patton, 517 F. App'x. 400, 402–03 (6th Cir. 2013) (finding in light of *Harris* that the dog was reliable and its alert established probable cause); *see also* United States v. Herrera-Osornio, Nos. 10-10044, 10-10174, 2013 U.S. App. LEXIS 6252, at \*6 (9th Cir. Mar. 28, 2013) ("the dog sniff evidence in this case was reliable, and [appellant] had ample opportunity to subject the dog's handler to voir dire and cross-examination") (citing Florida v. Harris, 133 S. Ct. 1050, 1057 (2013)); United States v. Salgado, No. 12-30088-0L-02-RAL, 2013 U.S. Dist. LEXIS 48696, at \*25 (D.S.D. Apr. 1, 2013) (finding in light of *Harris* that the dog was reliable and its alert established probable cause); Phippen v. State, 297 P.3d 104, 109 (Wyo. 2013) (discussing *Harris* and finding that the dog and handler were reliable and the alert established probable cause to search the vehicle); People v. Andres, No. D060774, 2013 Cal. App. Unpub. LEXIS 2150, at \*19 (Ct. App. Mar. 25, 2013) ("the officers were entitled to have the narcotics detection dog sniff Andres's truck, and, once the dog indicated the presence of narcotics, they had probable cause to search the truck") (citing *Harris*, 133 S. Ct. 1050 (2013)); State v. Morrison, No. C-120406, 2013 Ohio App. LEXIS 858,

that drug smugglers attempt to thwart drug dogs in a myriad of ways including putting trace amounts of narcotics in a lead vehicle to draw the time and attention of drug dogs and their handlers while a vehicle loaded with narcotics follows the vehicle and seeks to capitalize on the distracted Border Patrol agents.<sup>313</sup>

These decisions tend to favor law enforcement in part because there is a limit to how much defendants can seek in terms of records regarding a drug-detection dog's performance for use in any suppression hearing. At the same time, the Court reiterated that the "totality of the circumstances" was the appropriate standard so that criminal defendants have some flexibility as to how to attack a dog's reliability at any suppression hearing.<sup>314</sup>

## VI. CONCLUSION

Dogs have been used for their sense of smell for hundreds of years in criminal investigations. Both *Jardines* and *Harris* demonstrate that this usage will continue. In the end, these two cases, while different, have benefits for all involved—law enforcement, criminal defendants, attorneys, and the courts. They are consistent with each other as well as with existing Supreme Court precedent.

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\*4 (Ohio Ct. App. Mar. 15, 2013) ("On appeal, Morrison acknowledges that the drug dog's alert had given the police officers probable cause to search his car.") (citing *Harris*, 133 S. Ct. at 1056 n.2).

<sup>313</sup> See Complaint at 3, *United States v. Patton et al.*, No. 2:05-mj-00461 (S.D. Tex. July 29, 2005). The agent recognized that the defendant "was attempting to distract Agents from the [other vehicle] using a technique known as a 'spike'" which "is accomplished by placing trace amounts of an illegal substance in a vehicle and driving it through the Border Patrol checkpoint in order to alert and distract the canine from a second loaded vehicle." *Id.*

<sup>314</sup> *Harris*, 133 S. Ct. at 1055.