No. 11-564

In The Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a dog sniff at the front door of a private home by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

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STATEMENT OF THE CASE

Based on an anonymous tip, and without a warrant, probable cause or consent, a police officer with a narcotics detection dog walked up to the front door of the home of the respondent Joelis Jardines. The dog sniffed the area outside the front door of the home, sniffed around the base of the front door of the home, and then assumed a sitting position. The officer considered these actions by the dog to be a positive alert to the presence of contraband inside the home. The Florida Supreme Court held that the use of the police drug detection dog in this manner to sniff for illegal drugs at the front door of Mr. Jardines' private home constituted a Fourth Amendment search.

1. On November 3, 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified "crime stoppers" tip that marijuana was being grown at the home of Joelis Jardines. J.A. 49, 76-77. One month later, on December 5, 2006, at approximately 7:00 a.m., members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, set up a surveillance of Jardines' home. *Id*. at 49, 77, 154-55. Detective Pedraja watched the home for approximately fifteen minutes. During that time, the detective observed no vehicles in the driveway, and he observed that the blinds on the windows were closed. *Id*. at 49-50, 77.

After the fifteen-minute observation period, Detective Douglas Bartelt arrived on the scene with his

drug detection dog, Franky. *Id*. at 77, 93. Detective Bartelt, accompanied by the drug detection dog, stepped onto the property and moved up the driveway toward the front door of the home. *Id*. at 77-78, 93-94. Detective Pedraja stayed behind as Detective Bartelt and the drug detection dog approached the front of the home. *Id*. at 78. Sergeant Ramirez and Detective Donnelly of the Miami-Dade Police Department established perimeter positions around the home and federal DEA agents positioned themselves as a support unit. *Id*. at 155.

The entranceway to the front door of the home was enclosed with an archway. *Id*. at 90, 94-95. Through the archway was the alcove of the porch outside the front door of the home. *Id*. at 94. The entry of the archway was approximately six to eight feet from the front door of the home. *Id*. at 90. A photograph of the front of the house was admitted into evidence as a State exhibit at the hearing on the motion to suppress. *Id*. at 90. *See* Resp. App. 1.

The drug detection dog pulled Detective Bartelt directly up to the front porch as the dog was trained to do. The dog was "very strongly driven," and he was one of the drug detection dogs that would pull Detective Bartelt "very dramatically." *Id*. at 94. Detective Bartelt made sure to maintain his hold on the dog's leash because the dog was "a little bit wild." *Id.* at 97. Anyone standing next to the dog "probably would get knocked over by Frankie when Frankie is spinning around trying to find source." *Id*. at 78, 93-94, 104-05. Detective Bartelt stood right before the archway

leading to the alcove. *Id*. at 80, 90, 95. The dog's leash was approximately six feet long and the detective got as far back as he could to let the dog have the full six feet of the leash to go up to the front door. *Id*. at 80, 96-97. The only thing Detective Bartelt smelled as he stood at the base of the front porch was mothballs, and he saw two or three mothballs where he was standing. *Id.* at 100.

As Detective Bartelt maintained his hold on the dog's leash, the dog crossed over the threshold of the archway and began tracking an airborne odor by repeatedly bracketing and tracking back and forth to determine the strongest source of the odor. *Id*. at 94-96. Detective Bartelt considered an alert to the presence of contraband to be "the minute I observed out of normal behavior" for the dog. *Id*. at 95. In this case, Detective Bartelt considered the dog's abnormal behavior to be the dog holding his head high and bracketing and tracking back and forth. *Id*. at 95-97. After the dog repeatedly bracketed back and forth outside the front door of the house, the dog sniffed around at the base of the front door and then assumed a sitting position. Detective Bartelt considered this sitting position to be "the final culmination of his abnormal behavior," which indicated to the detective the source of the odor. *Id*. at 98.

2. Detective Bartelt told Detective Pedraja there was a positive alert for the odor of narcotics and then returned to his police vehicle with the dog. *Id*. He then prepared the information concerning the dog's training to be included in the affidavit for a search

warrant. *Id*. at 99. Since Detective Bartelt and the dog became a team they had received weekly maintenance training in accordance with established police procedures. The dog was trained to detect "the odor of narcotics emanating from the following controlled substances to wit: marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy." Upon detecting the odor of any of these controlled substances, the dog would exhibit "a noticeable change of behavior" and was trained to sit at the source of the odor. The dog had worked approximately 656 narcotics detection tasks in the field and had positively alerted to the odor of narcotics approximately 399 times. Detective Bartelt listed information concerning the amounts of narcotics detected and seized as the result of the dog's positive alerts, but he did not list any information concerning how many of those positive alerts had not resulted in the detection and seizure of any narcotics. *Id*. at 54.

3. After Detective Pedraja received the signal from Detective Bartelt that the dog had alerted to contraband, Detective Pedraja approached the front door of the house for the first time. At the front door of the house he smelled "the scent of live marijuana." *Id*. at 81. Detective Pedraja knocked on the front door and received no response. He then walked back out of the alcove. From the time he went to the front door to the time he walked out of the alcove and stood at the area outside the alcove, Detective Pedraja heard an air conditioner unit continuously running for 15-20 minutes. After making this observation the detective

got in his police vehicle and drove to a location close by to start preparing a search warrant. *Id*. at 81-83. The affidavit in support of this warrant ultimately contained the observations made at the scene by Detective Pedraja and Detective Bartelt. *Id*. at 49-50. Federal DEA agents remained behind to maintain surveillance of Jardines' home. *Id*. at 155.

Detective Pedraja obtained a search warrant later that day and about an hour after the warrant was obtained, members of the Miami-Dade Police Department, Narcotics Bureau, and DEA agents executed the warrant by gaining entry to Jardines' home through the front door. *Id*. at 59, 84. As agents entered the front door, Jardines exited through a sliding glass door at the rear of the house. Jardines was apprehended by Special Agent Wilson of the DEA and turned over to the Miami-Dade Police Department. A search was conducted, which revealed that marijuana was being grown inside the home. Jardines was arrested and charged with trafficking in marijuana and theft of electricity. *Id*. at 59.

4. Jardines subsequently filed a motion to suppress the evidence seized from his home. The trial court granted the motion to suppress, ruling that pursuant to *State v. Rabb*, 920 So.2d 1175 (Fla. 4th Dist. Ct. App. 2006), *review denied*, 933 So.2d 522 (Fla.), *cert. denied*, 549 U.S. 1052 (2006), law enforcement's use of the drug detection dog at the front door of Jardines' house constituted an unreasonable and illegal search. *Id*. at 204-06. The trial court rejected the State of Florida's argument that Detective Pedraja's

later detection of the odor of marijuana at the front door constituted a valid basis for the search warrant under the independent source doctrine. The trial court made a factual finding that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. *Id.* at 205-06, n.1.[1] The trial court ruled that no independent and lawfully obtained evidence established the probable cause necessary to support the issuance of the search warrant for Jardines' home. *Id*. at 205-06.

5. The State of Florida appealed the suppression order to the Florida Third District Court of Appeal, and that court reversed the order granting the motion to suppress. Pet.App. 99-135. The appeals court declined to follow the decision in *Rabb*, and ruled that "a canine sniff is not a Fourth Amendment search." Pet.App. 104. The court also ruled that "the officer and the dog were lawfully present at the defendant's front door." Pet.App. 104-05. Judge Cope, concurring in part and dissenting in part, disagreed with the majority's conclusion that the constitutional protection of the Fourth Amendment did not extend to the front porch of Jardines' home. Pet.App. 124-26. Judge Cope concluded that while "it is perfectly acceptable for a detective to come to the front door to speak with the owner," there are limits on the right of a police

[1] The State's argument based on the independent source doctrine was not raised in the certiorari petition filed by the State of Florida in this Court and therefore the issue is not before this Court.

officer to enter the front porch of a home to conduct a search for evidence of a crime. Pet.App. 125-26.

On petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved the result in *Rabb*. Pet.App. 1-97. The Court held that the use of the drug detection dog to determine what was inside Jardines' home was a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. *Id*. at 4. The Court further held that probable cause must be established prior to conducting such a search at a private residence. *Id*. at 4-5.[2]

The Florida Supreme Court examined in great detail the decisions of this Court in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005); *United States v. Jacobsen*, 466 U.S. 109 (1984); and *Kyllo v. United States*, 533 U.S. 27 (2001). Pet.App. 14-26. The Florida Supreme Court noted that in *Place*, *Edmond*, *Caballes* and *Jacobsen*, this Court "was careful to tie its ruling to the particular facts of the case." Pet.App. 27. The Florida Supreme Court further noted that the police investigations in the four cases "were conducted in a

[2] The State of Florida did not seek certiorari review of this holding that if the dog sniff is a Fourth Amendment search, probable cause must be established to support such a search. Accordingly, that issue is not before this Court.

minimally intrusive manner upon objects – luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen* – that warrant no special protection under the Fourth Amendment." Pet.App. 28.

The Florida Supreme Court then looked to this Court's decision in *Kyllo* and its instruction that nowhere is the right to be free from unreasonable governmental intrusion more resolute than in the private home. Pet.App. 29-30. The Florida Supreme Court also looked to the English common law background of the Fourth Amendment which demonstrates that "[t]he sanctity of the citizen's home is a basic tenet of Anglo-American jurisprudence." Pet.App. 30-31.

After fully examining this Court's precedents, the Florida Supreme Court concluded:

> Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment – specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet.App. 42. The Court also noted the significant difference between a police officer approaching the front door of a home to speak to the owner of the

home, and a police officer approaching the front door of a home with a narcotics detection dog to conduct a search for evidence of a crime:

> Although police generally may initiate a "knock and talk" encounter at the front door of a private residence without any prior showing of wrongdoing, *see 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."), a dog "sniff test" is a qualitatively different matter.

Pet.App. 31.

6. This Court granted certiorari. 132 S. Ct. 995 (2012).

SUMMARY OF ARGUMENT

I. A police officer's use of a trained narcotics detection dog at the front door of a home to reveal details inside that home which the officer is unable to discover using the officer's ordinary powers of perception without a physical intrusion into the home is a Fourth Amendment search requiring a warrant based on probable cause.

A. The history of the Fourth Amendment demonstrates that it guarantees the right to retreat into one's own home and be free from any action by government officials which intrudes upon the sanctity of

that home and the privacies of life inside the home absent a warrant issued by a magistrate based on probable cause. This Court's Fourth Amendment jurisprudence confirms that government activity that reveals any detail which an individual seeks to keep private within the home constitutes a search under the Fourth Amendment. A police officer using a narcotics detection dog to find out what is inside a home unquestionably reveals details which an individual seeks to keep private within the home. That being the case, a police officer's use of a trained narcotics detection dog to obtain information regarding the interior of a home constitutes a search under the Fourth Amendment, even if it is accepted that a trained narcotics dog discloses only the presence or absence of contraband.

B. This Court's prior decisions concluding that a dog sniff of luggage at an airport and a dog sniff of an automobile on a public street are not Fourth Amendment searches do not establish that a dog sniff at the front door of a home is not a Fourth Amendment search. This Court's Fourth Amendment decisions demonstrate that the context of the governmental actions taken to reveal evidence of criminal activity must be taken into consideration in determining if those government actions intrude upon a legitimate expectation of privacy and therefore constitute a Fourth Amendment search. This Court has found that governmental action does not constitute a Fourth Amendment search where police officers simply allow a narcotics detection dog to sniff objects in public

places, objects which have a reduced expectation of privacy, and objects already seized by government officials. In contrast, governmental action has been found by this Court to be a Fourth Amendment search where that action was taken to reveal details inside a home where all details are intimate details held safe from prying government eyes. As the use of a narcotics detection dog at the front door of a home reveals details inside a home, such police action constitutes a Fourth Amendment search under this Court's prior decisions.

This Court should reject the State of Florida's proposed rule that the use of any searching tool which reveals only the presence of contraband is not a Fourth Amendment search no matter the level of intrusiveness of that searching tool. Under this interpretation of the Fourth Amendment, police officers would be free to randomly take a narcotics detection dog up to the front door of selected houses in a suburban neighborhood, or take a narcotics detection dog up to the front door of every apartment in an inner city apartment complex selected by the police, or walk a narcotics dog up and down the halls of a school to sniff the students passing by. The State's proposed rule would also allow unlimited use of any current technology which detects only contraband or illegal activity to reveal details inside a home, and would create a significant incentive to law enforcement officials to develop new technology to reveal details inside the home.

C. The government's use of a drug detection dog to reveal details of the home constitutes a Fourth Amendment search even though the dog does not physically enter the home. This Court's decisions establish that the Government's use of a searching tool to explore details of the home that would have been unknowable without physical intrusion constitutes a search. The actions of the dog constitute a search even though the dog only detects odors emanating from the house. This Court's decisions establish that a Fourth Amendment search of a home occurs even though police officers do nothing more than draw an inference as to what is inside a home from the perception of what is emanating outside the house.

II. Aside from a police officer's use of the narcotics detection dog to reveal details inside the home, the actions of a police officer in approaching the front door of a home with the narcotics detection dog also constitute a Fourth Amendment search.

A. The front door of a home and the area immediately adjacent to the front door of a home clearly fall within the curtilage of the home as this Court's decisions establish that the area immediately surrounding a private home is within the curtilage of the home.

B. When a police officer with a narcotics detection dog approaches the front door of a home without the consent of the owner, the officer physically trespasses upon an area enumerated in the Fourth Amendment for the purpose of obtaining information.

Such a physical intrusion is a search within the meaning of the Fourth Amendment. While a police officer may have an implied invitation by custom to approach the front door of a house for the purpose of speaking to the occupant of the house, no such implied invitation by custom exists for an officer to approach the front door of a house with a narcotics detection dog for the purpose of searching for evidence. Accordingly, the officer's approach to the front door of the house with the dog is a trespass. As the officer is trespassing onto the curtilage of the home which is a constitutionally protected area, and as the trespass onto the curtilage with the dog is for the purpose of obtaining evidence, that trespass constitutes a Fourth Amendment search.

C. A police officer's approach to the front door of a home with a narcotics detection dog also constitutes a Fourth Amendment search because it violates the homeowner's reasonable expectation of privacy in the curtilage of the home. A salesperson, a person delivering a package, a young girl selling Girl Scout cookies, or a police officer intending to speak to an occupant of the house, do not invade the homeowner's reasonable expectation of privacy when they enter the curtilage of the home to knock on the front door. A homeowner must expect that such persons will approach the front door in an attempt to speak to the occupants of the house. However, a homeowner does not expect that such persons will approach the front door of the house for the purpose of trying to determine what is inside that house. A police officer who approaches the front

door of a house with a narcotics detection dog unquestionably does so for the purpose of trying to determine what is inside the home. That being the case, a police officer who approaches the front door of a house with a narcotics detection dog invades the homeowner's reasonable expectation of privacy, and therefore that police action constitutes a Fourth Amendment search.

ARGUMENT

The issue in this case goes to the very heart of the rights secured to an individual by the Fourth Amendment. A dog sniff at the front door of a home by a narcotics detection dog is a Fourth Amendment search requiring a warrant based upon probable cause for two reasons. First, a homeowner's reasonable expectation of privacy is violated where a police officer uses a narcotics detection dog to reveal any details within the interior of a home that could not be discovered by the officer's ordinary powers of perception without a physical intrusion into the home. Second, and aside from the officer's use of a narcotics detection dog to reveal details inside the home, the actions of a police officer in taking a narcotics dog to the front door of a home also constitute a Fourth Amendment search. This is so because the officer's entry into the curtilage of the home with a narcotics detection dog is a common law trespass upon a constitutionally protected area in order to conduct a search

for evidence, and also because that entry violates the homeowner's reasonable expectation of privacy.

I. A DOG SNIFF AT THE FRONT DOOR OF A HOME BY A NARCOTICS DETECTION DOG IS A FOURTH AMENDMENT SEARCH REQUIRING A WARRANT BASED UPON PROBABLE CAUSE BECAUSE THE DOG SNIFF VIOLATES THE HOMEOWNER'S REASONABLE EXPECTATION OF PRIVACY.

A homeowner's reasonable expectation of privacy is violated where a police officer uses a narcotics detection dog to reveal any details within the interior of a home that could not be discovered by the officer's ordinary powers of perception without a physical intrusion into the home. In the home, all details are intimate details because the Fourth Amendment guarantees the right to retreat into one's home and be free from any action by government officials to reveal those details. Due to this uniquely heightened Fourth Amendment protection historically accorded to the home, this Court's decisions regarding the use of narcotics detection dogs to sniff the exteriors of luggage or stopped cars located in public places are inapposite.

A. The History Of The Fourth Amendment And This Court's Fourth Amendment Decisions Establish That Police Action Which Reveals Any Detail An Individual Seeks To Keep Private Within The Home Is A Fourth Amendment Search.

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The Fourth Amendment draws "a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 589 (1980). The line drawn at the entrance to the house "must be not only firm but also bright – which requires clear specification of those methods of surveillance that require a warrant." *Kyllo*, 533 U.S. at 40. "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Id*. at 31.

The Fourth Amendment embodies principles of respect for the privacy of the home that have a long history:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.). In his Commentaries on the Laws of England, William Blackstone noted that
>
> > "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 Commentaries 223 (1765-1769).

Wilson v. Layne, 526 U.S. 603, 609-10 (1999). Stated in more contemporary terms:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Silverman, 365 U.S. at 511 n.4 (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting).

This Court often looks to *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), to determine the proper interpretation of the Fourth Amendment. *See United States v. Jones*, 132 S. Ct. 945, 949 (2012) (noting that the Court has described *Entick* 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." (citing *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886))). This Court in *Boyd* recognized that the principles expressed in *Entick* concerning the sanctity of the home go to the very heart of the protections afforded to an individual by the Constitution:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right

> has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment.

Boyd, 116 U.S. at 630. Relying on these principles, the *Boyd* Court held that compelling a defendant to produce documents from his home is an unreasonable search and seizure under the Fourth Amendment. *Id*. at 632.

Thus, the history of the Fourth Amendment demonstrates that it guarantees the right to retreat into one's own home and be free from any governmental action which intrudes upon the sanctity of that home and the privacies of life within the home absent a warrant issued by a magistrate based upon probable cause. The Fourth Amendment prohibits any warrantless invasion of the individual's right of personal security, personal liberty, and private property. A police officer using a narcotics detection dog to find out what is inside a home unquestionably constitutes an invasion of the homeowner's right of personal security, personal liberty, and private property. That being the case, the use of a trained narcotics detection dog to obtain information regarding the interior of a home constitutes a search under the Fourth Amendment, even if it is accepted that a trained narcotics dog discloses only the presence or absence of contraband.

This Court's Fourth Amendment jurisprudence confirms that government activity which reveals any detail that an individual seeks to keep private within

the home constitutes a search under the Fourth Amendment.[3] Where no physical trespass on private property has taken place,[4] "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 32-33 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). This Court observed in *Kyllo* that while

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[3] An exception to this warrant requirement applies when " 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978); *see also Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). For example, under the "emergency aid" exception, officers may conduct a warrantless search of a house "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 403, (2006). Police officers may also conduct a warrantless search of a home when they are in hot pursuit of a fleeing suspect. *See United States v. Santana*, 427 U.S. 38, 42-43 (1976). Thus, nothing would prevent a police officer from using a bloodhound at the front door of a house if the officer has a reasonable belief that someone inside the house needs emergency medical assistance, or a reasonable belief that a missing child might be inside the house, or a reasonable belief that a fleeing suspect being chased in hot pursuit might be inside the house. The use of the bloodhound would still constitute a Fourth Amendment search because it revealed details inside the home, but that warrantless search would be allowed under the exigent circumstances exception to the warrant requirement. No exigent circumstances were present in this case.

[4] Where, as here, an officer does physically trespass onto the constitutionally protected curtilage of a home with a narcotics detection dog, this action also constitutes a Fourth Amendment search requiring a warrant based on probable cause. *See* Argument IIB, *infra*.

the *Katz* test might be difficult to apply under certain circumstances, no such difficulty applies when the object of the police search is the interior of a home. "[I]n the case of the search of the interior of homes – the prototypical and hence most commonly litigated area of protected privacy – there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." *Id*. at 34 (emphasis in original).

This Court explained in *Kyllo* that the nature of the information obtained regarding the interior of the home is not relevant to the determination of whether a Fourth Amendment search has occurred. This Court noted, "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Id*. This Court pointed out that "there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor." *Id*. Finally, this Court declared, "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id*. (emphasis in original).

This Court in *Kyllo* relied on *United States v. Karo*, 468 U.S. 705 (1984) to demonstrate the principle that all details in the home are held safe from prying government eyes. *See Kyllo*, 533 U.S. at 37-38. In *Karo*, the only thing detected inside a home was the presence of a can of ether used to extract cocaine

from clothing imported into the United States. This Court held that the detection of this can of ether in the home by the activation of a beeper inside the can was a Fourth Amendment search. Notwithstanding the fact that the only information disclosed by the beeper in *Karo* was the presence inside the house of narcotics paraphernalia (the can of ether used to extract cocaine from clothing), this Court held that the use of the beeper to disclose that information was a search because the beeper revealed details of the home that would previously have been unknowable without physical intrusion into the home.

The *Karo* Court first noted, "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *Karo*, 468 U.S. at 714. This Court acknowledged that the monitoring of a beeper is "less intrusive than a full search." *Id*. at 715. Nevertheless the *Karo* Court held this monitoring constitutes a Fourth Amendment search because "it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." *Id*. This Court rejected the Government's contention that the monitoring of the beeper was not a Fourth Amendment search because it only disclosed whether a particular object or person was inside the house at a particular time. "Indiscriminate monitoring of property that has been

withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Id*. at 716.

The beeper in *Karo* disclosed nothing more than the presence of narcotics paraphernalia used to extract cocaine. Yet this Court held that the use of the beeper to disclose the presence of that object inside a home is a Fourth Amendment search. Accordingly, even if a narcotics detection dog discloses nothing more than the presence of contraband inside a home, such use of the dog is a Fourth Amendment search because it discloses a critical fact about the interior of the home that the Government could not have otherwise obtained without a warrant.

The second example given by the *Kyllo* Court to demonstrate the principle that all details in the home are intimate details is *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, the only information detected inside the house was the serial number on the bottom of stereo equipment indicating that it was stolen. Yet this Court held that the police act of moving the stereo equipment to discover this serial number was a Fourth Amendment search. Notwithstanding the fact that the only information uncovered by the police was that the equipment was stolen property, this Court held that the police action was a search because it revealed details inside the home:

> But taking action, unrelated to the objectives of the authorized intrusion, which exposed to

> view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. This is why, contrary to Justice POWELL's suggestion, post, at 1156, the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent – serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. *A search is a search, even if it happens to disclose nothing but the bottom of a turntable*.

480 U.S. at 325 (emphasis added).

Just as the actions of the government officials in *Karo* did nothing more than reveal the presence inside a home of contraband narcotics paraphernalia, the actions of the police in *Hicks* did nothing more than reveal the presence inside a home of an item of contraband, a stolen turntable. Nevertheless, this Court held in both cases that the officers' acts in disclosing the presence of these objects inside the home constituted a Fourth Amendment search because all details in the home are held safe from prying government eyes. That being the case, a dog sniff by a trained drug detection dog which does nothing more than reveal the presence of contraband inside the home constitutes a search under the Fourth Amendment

because all details in the home are intimate details safe from prying government eyes. A search of a home without a warrant supported by probable cause is presumptively unreasonable. *Kyllo*; *Payton*. Accordingly, a police officer's use of a trained narcotics detection dog at the front door of a home to obtain information about what is inside that home is a Fourth Amendment search requiring a warrant based upon probable cause.

B. The Decisions Of This Court In *Place*, *Edmond*, And *Caballes* Do Not Establish That A Dog Sniff At The Front Door Of A Home Is Not A Fourth Amendment Search.

The State of Florida contends that the decisions of this Court in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Illinois v. Caballes*, 543 U.S. 405 (2005), establish that the use of a narcotics detection dog to reveal the details of the interior of a home is not a Fourth Amendment search. The State argues that because a narcotics detection dog only reveals the presence of contraband, the use of a detection dog, or any other tool which law enforcement officials might conceivably develop to reveal only the presence of contraband, cannot be considered a search under the Fourth Amendment no matter the circumstances under which the contraband is revealed. This argument should be rejected for several reasons.

1. *Place*, *Edmond*, and *Caballes* Are Inapposite Because These Decisions Involve Searches of Seized Luggage and Stopped Cars in Public Places, Not Government Intrusion Into the Sanctity of the Home Revealing Details Inside the Home.

In *Place*, this Court addressed the issue of whether police could temporarily seize a piece of luggage at an airport and then expose the luggage to a narcotics detection dog. After holding that the detectives' ninety-minute detention of the luggage was too lengthy to be supported under *Terry v. Ohio*, 392 U.S. 1 (1968), this Court found that the exposure of the luggage to the drug detection dog did not constitute a Fourth Amendment search. In reaching this conclusion, this Court noted that the exposure of the luggage at the airport to the drug detection dog was "much less intrusive than a typical search." *Place*, 462 U.S. at 707. This Court also noted that the content of the information revealed by the drug detection dog was limited, as "the sniff discloses only the presence or absence of narcotics, a contraband item." *Id*. In these respects, this Court found the canine sniff of the luggage to be "sui generis." *Id*. However, this Court limited its conclusion to the specific factual context of the case, stating "that *the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine* – did not constitute a 'search' within

the meaning of the Fourth Amendment." *Id*. (emphasis added).

Next, in *Edmond*, this Court determined that walking a narcotics detection dog around the exterior of a vehicle stopped at a highway checkpoint did not transform that seizure into a Fourth Amendment search. Again, as in *Place*, this Court focused on the limited nature of the intrusion under the specific facts of the case before the Court, and concluded, "Like the dog sniff in *Place*, a sniff by a dog *that simply walks around a car* is 'much less intrusive than a typical search.'" *Edmond*, 531 U.S. at 40 (quoting *Place*, 462 U.S. at 707).

Finally, in *Caballes*, this Court ruled that a sniff by a drug detection dog of the exterior of a vehicle during the course of a lawful traffic stop did not constitute a Fourth Amendment search. In *Caballes*, this Court focused on the fact that generally governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest. As an example of this principle, this Court cited its previous decision in *United States v. Jacobsen*, 466 U.S. 109 (1984), holding that a government agent's field test of an unidentified powder already exposed to view by a private freight carrier was not a Fourth Amendment search because the test could only reveal whether the powder was cocaine. Another example of this principle given in *Caballes* was the ruling in *Place* that exposing luggage to a well-trained narcotics detection dog which only revealed the presence of contraband was not a Fourth Amendment search.

Based on these examples, this Court found that the specific governmental conduct under the circumstances of that case did not constitute a Fourth Amendment search:

> Accordingly, the use of a well-trained narcotics-detection dog – one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637 – *during a lawful traffic stop, generally* does not implicate legitimate privacy interests. *In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation.* Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Caballes, 543 U.S. at 409 (emphasis added).

The *Caballes* Court explained that its holding was consistent with the conclusion in *Kyllo* that the use of a thermal imaging device to determine the level of heat emanating from a home was a search. This Court pointed out that the two cases involved two different factual contexts. *Kyllo* involved the use of a searching tool (the thermal imaging device) that revealed details inside a home which might relate to lawful activity or unlawful activity. *Caballes* involved the use of a searching tool (a narcotics detection dog) to reveal details that related only to unlawful activity inside the trunk of a car stopped on a public street.

This case presents a third factual context – the use of a searching tool (a narcotics detection dog) which revealed details inside a home which related only to unlawful activity. This Court's decisions demonstrate that whether a police action reveals details inside a home is the critical factor which establishes that the governmental action is a Fourth Amendment search.

Where the governmental action is a police officer's field test of an unidentified powder in a package already discovered by a private freight carrier, and the test could only reveal whether the powder was cocaine, there is no intrusion of a legitimate expectation of privacy and thus no Fourth Amendment search. *Jacobsen*. Where a police officer exposes the exterior of luggage in an airport to a well-trained drug detection dog which only reveals the presence of contraband, there is no intrusion of a legitimate expectation of privacy and thus no Fourth Amendment search. *Place*. Where the police expose the exterior of an automobile already stopped by police on a public roadway to a well-trained drug detection dog which only reveals the presence of contraband, there is no intrusion of a legitimate expectation of privacy and thus no Fourth Amendment search. *Edmond*; *Caballes*.

On the other hand, where the police action is the use of a tool to gather information about details inside a home, whether those details are lawful or unlawful, the action intrudes upon a legitimate expectation of privacy and therefore is a Fourth Amendment

search. Police use of a beeper to disclose nothing more than the presence inside a home of narcotics paraphernalia used to extract cocaine is a Fourth Amendment search because it reveals a detail inside the home. *Karo*. Similarly, a police officer moving a piece of stereo equipment inside a home to reveal a serial number on the bottom of the equipment indicating that it was stolen is a search within the meaning of the Fourth Amendment because it discloses a detail inside a home. *Hicks*. Finally, police use of a thermal imaging device to view heat emanating on the outside of a home is a Fourth Amendment search because it reveals details inside the home. *Kyllo*.

"In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37 (emphasis in original). This is so because the history of the Fourth Amendment and this Court's Fourth Amendment jurisprudence establish that the Constitution guarantees the right to retreat into one's home and be free from any action by government officials which intrudes upon the sanctity of that home and the privacies of life inside the home absent a warrant based on probable cause. Indisputably, *Place*, *Jacobsen*, *Edmond*, and *Caballes* do not involve the historical foundations of the Fourth Amendment that are such a critical factor in considering whether government actions to determine what is inside a home constitute a Fourth Amendment search. Accordingly, those decisions do not establish that the use of a trained drug detection dog at the front door of a home

to obtain information about what is inside the home does not constitute a Fourth Amendment search.[5] Because the use of a narcotics detection dog to reveal what is inside a home does involve the historical special status afforded to a home, it constitutes a

[5] The lower court decisions which hold that a dog sniff at the front door of a home does not constitute a Fourth Amendment search fail to properly consider the historical foundations of the Fourth Amendment and the sanctity of the home derived from those historical foundations. *See, e.g.*, *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011); *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005); *Fitzgerald v. State*, 837 A.2d 989 (Md. Ct. Spec. App. 2003), *affirmed*, *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004). Those decisions are based on an overly broad interpretation of this Court's decisions in *Place*, *Edmond*, *Jacobsen* and *Caballes*, disregard the importance of the context of the police actions in those cases, and rely instead on a mathematical-type equation to reach the conclusion that a dog sniff at the front door of a home is not a search. *See, e.g., Fitzgerald*, 837 A.2d at 1030 ("The raison d'etre for treating a dog sniff as a non-search is that the binary nature of its inquiry, 'contraband "yea" or "nay"?,' precludes the possibility of infringing any expectation of privacy that society objectively considers to be legitimate."). On the other hand, the decision of the Florida Supreme Court in this case and the other lower court decisions which have found that a dog sniff at the front door of a home is a Fourth Amendment search properly consider the historical foundations of the Fourth Amendment and the sanctity of the home derived from those historical foundations, and properly recognize that *Place*, *Edmond*, *Jacobsen* and *Caballes* must be considered in the context of the particular police actions in those cases. *See* Pet.App. 14-23, 26-31; *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), *cert. denied*, 474 U.S. 819 (1985) and 479 U.S. 818 (1986); *State v. Rabb*, 920 So.2d 1175 (Fla. 4th Dist. Ct. App. 2006), *review denied*, 933 So.2d 522 (Fla.), *cert. denied*, 549 U.S. 1052 (2006).

Fourth Amendment search, even if the only details revealed are illegal activity.

2. The State of Florida's Proposed Rule Would Allow Highly Intrusive Searches of Individuals and Indiscriminate Random Searches of Homes So Long As the Searching Tool Reveals Only the Presence of Contraband.

The State of Florida argues that the prior holdings of this Court establish that the use of a well-trained narcotics detection dog, or any other searching tool which law enforcement officials might conceivably develop to reveal only the presence of contraband, cannot be considered a search under the Fourth Amendment under any circumstances. The State asks this Court to rule that "[u]nder this exception, any test, including a dog sniff, which merely reveals contraband, and no other private fact, compromises no legitimate privacy interest and, therefore, is not a search." Pet.Br. 16-17.

Justice Brennan warned against such a broad reading of this Court's prior decisions in his dissenting opinion in *Jacobsen*. If a dog sniff which only reveals contraband and no other private fact is not a search under any circumstances, then "law enforcement officers could release a trained cocaine-sensitive dog – to paraphrase the California Court of Appeal, a 'canine cocaine connoisseur' – to roam the streets at random, alerting the officers to people carrying

cocaine." *Jacobsen*, 466 U.S. at 138 (Brennan, J., dissenting) (citation omitted). "Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar . . . to the police setting up such a device on a street corner and scanning all passersby." *Id*. Or, "if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present." *Id*. Under the interpretation of the Fourth Amendment urged by the State of Florida in the present case, "these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire." *Id*. Justice Brennan expressed confidence in this Court's readiness to reject such a broad interpretation of the contraband exception when the context of the particular governmental search technique warranted such limitations. He noted that this Court's precedents establish "that this Court ultimately stands ready to prevent this Orwellian world from coming to pass." *Id*.

Justice Souter also warned against such a broad reading of this Court's decisions in his dissenting opinion in *Caballes*. Justice Souter noted that uncritical application of the contraband exception without consideration of the context of the government action "would render the Fourth Amendment indifferent to

suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks." *Caballes*, 543 U.S. at 411 (Souter, J., dissenting). Justice Souter also expressed confidence in this Court's willingness to limit the scope of the contraband exception:

> The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car, *ante*, at 838. For this reason, I do not take the Court's reliance on *Jacobsen* as actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car, about which Justice GINSBURG is rightly concerned, *post*, at 845-846, or on the person of any pedestrian minding his own business on a sidewalk.

Id. at 417.

Under the interpretation of the Fourth Amendment urged by the State of Florida in this case, suspicionless sniffs of children in school would not constitute searches and therefore could be freely pursued whenever law enforcement officers desire. The unsoundness of such a rule is demonstrated in *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982). In *Horton*, the court first noted that "the fourth amendment applies with its fullest vigor against any intrusion on the human body."

Horton, 690 F.2d at 478. The court then observed that "[o]ne can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person." *Id*. at 479. The Court described how the school officials used Doberman pinschers and German shepherds because of the image maintained by the large dogs, and how these dogs "walked up and down the aisles and stopped at every desk and sniffed on each side all around the people, the feet, the parts where you keep your books under the desk." *Id*. The court found the dog's sniffing technique, which consisted of "sniffing around each child, putting his nose on the child and scratching and manifesting other signs of excitement in the case of an alert" to be intrusive and held that the police action was "a search within the purview of the fourth amendment." *Id*. Under the Fourth Amendment test endorsed by the State of Florida in this case, such a dog sniff of a child in school would never constitute a Fourth Amendment search because the dog sniff reveals only the presence of contraband.[6]

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[6] It should be noted that in *Horton* no contraband was found on either of the two students who triggered an alert when they were subjected to the sniffing of the narcotics detection dogs. A small bottle of perfume was found on one of the students searched as a result of the alert by the narcotics detection dog. It appears that narcotics detection dogs trained to alert to the presence of cocaine do not actually alert to the cocaine itself but

(Continued on following page)

In addition, Florida's test would allow unlimited use of any current technology that detects only contraband or illegal activity to reveal details inside a home, and would create a significant incentive to law enforcement officials to develop new technology to reveal details inside the home. The State of Florida, and the states which have joined in the amicus brief filed in support of the State of Florida, readily acknowledge the intent of these States to use narcotics detection dogs as much as possible to search for contraband inside homes. *See* Pet.Br. 28 (characterizing narcotics dogs as "an irreplaceable tool" for detecting illegal activity inside homes); Amicus Br. Of States of Texas, *et al.* 9 (seeking reversal of the decision of the Florida Supreme Court "to ensure that detection dogs retain their proper place at the forefront of state and

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instead likely alert to the chemical methyl benzoate. *See United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars ($ 30,670.00)*, 403 F.3d 448, 458 (7th Cir. 2005) ("In addition, the research indicates that dogs do not alert to byproducts other than methyl benzoate and would not alert to synthetic 'pure' cocaine unless methyl benzoate was added."). Methyl benzoate is a common chemical used in multiple consumer products including perfume. *See Jacobson v. $ 55,900 in U.S. Currency*, 728 N.W.2d 510, 534-35 (Minn. 2007) (Hanson, J., concurring); *see also* Lunney, "*Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*" 88 Or. L. Rev. 829, 839 (2009) (pointing out that the drug detection dog in *Horton* appears to have alerted to the bottle of perfume which was a lawful source of methyl benzoate, and arguing that "[b]ecause methyl benzoate is commonly found in the home, further scientific clarification concerning the reliability of canine home-sniffs is essential.").

federal efforts against production and distribution of illegal drugs."). Presumably, these States will be just as eager to use current technology and develop and use new technological innovations which will reveal only the presence of contraband inside a home.

The State of Florida seeks to ease these justifiable fears of the widespread use of narcotic detection dogs and other searching tools by pointing out the "practical limits" of law enforcement to use dogs in "time consuming random sweeps of entire neighborhoods" and that dogs are not "cheap and surreptitious devices that evade the ordinary checks of limited police resources and community hostility." Pet.Br. 27-28. In the first place, if police are given carte blanche authority to search constrained only by their good faith and limited resources, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers or effects' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964).

But beyond that, the broad searches that the State of Florida asks this Court to authorize would be much less of a strain on limited police resources than would current individualized searches based on probable cause developed by traditional means of police investigation. Indeed, randomly taking a narcotics detection dog up to the front door of selected houses in a suburban neighborhood, or taking a narcotics detection dog up to the front door of every apartment in an inner city apartment complex selected by the police, or walking a narcotics dog up and down the

halls of a school to sniff the students passing by, requires a relatively small investment of time and resources by police officers compared to more time-consuming traditional methods of police investigation.

The State of Florida accurately notes that dogs have been used to aid police investigations for many years. However, the paramount consideration in this case is the history of the Fourth Amendment, not the history of dogs used in police investigations. As demonstrated, the Fourth Amendment was based in large part on an individual's right to retreat inside his or her home secure in the knowledge that government officials could not find out what was inside that home without a warrant based on probable cause. There is no historical basis to suggest that if British officials had the ability to train dogs to detect only the presence of contraband tea, sugar, or pamphlets inside a colonial home, the use of dogs to detect these contraband items inside the home would have escaped censure by colonial residents. These residents were offended by the suspicionless searches of their homes and businesses by customs authorities under the writs of assistance regime, no matter how those searches were carried out. *See, e.g.,* Phillip Hubbart, *Making Sense of Search and Seizure Law* 21-24 (2005) and authorities collected.

Accordingly, this Court should reject the State of Florida's argument that the use of any tool which detects the presence of contraband under any circumstances is not a search, and hold that a police officer's

use of a trained narcotics detection dog at the front door of a home to obtain information regarding the interior of the home which the officer is unable to obtain using the officer's ordinary powers of perception without a physical intrusion, is a Fourth Amendment search requiring a warrant based on probable cause.

C. The Government's Use Of A Drug Detection Dog To Reveal Details Of The Home Constitutes A Fourth Amendment Search Even Though The Dog Does Not Physically Enter The Home And The Dog Only Detects Odors Emanating From The Front Door.

The fact that the narcotics detection dog reveals the details of the home without physically intruding inside the home does not establish that the use of the dog at the front door of the home is not a Fourth Amendment search requiring a warrant. A narcotics detector dog does the same thing as the thermal imaging device in *Kyllo* and the beeper in *Karo*; it reveals details of the home that would have been unknowable without physical intrusion into the home. That being the case, the use of the narcotics detection dog constitutes a search under the Fourth Amendment.

In *Karo* and *Kyllo*, this Court squarely addressed the question of whether a Fourth Amendment search of a home occurred where police officers did not physically enter the home. In each case, police obtained information about what was inside a home from a

lawful vantage point where the officer was unable to obtain such information using the officer's ordinary powers of perception. In *Karo*, this Court held that the use of the beeper to disclose the presence of the can of ether inside the home constituted a Fourth Amendment search because the beeper revealed details of the home that would previously have been unknowable without physical intrusion into the home. This Court found no difference between the acts of a government agent in entering the house to verify that the can of ether was inside and the surreptitious use of an electronic device to obtain that same information:

> In this case, had a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched.

Id. at 715. This Court acknowledged that the monitoring of a beeper is "less intrusive than a full search," but nevertheless held that such monitoring constitutes a Fourth Amendment search because "it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that *it could not have otherwise obtained without a warrant*." *Id*. (emphasis added).

Similarly, in *Kyllo*, this Court addressed the question "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." *Id*. at 29. The scan of the home took only a few minutes and was performed from inside an agent's vehicle on the street outside the house. The scan showed that the roof over the garage and a side wall of the home were relatively hot compared to the rest of the home and substantially warmer than the other homes in the triplex.

This Court held that the use of the thermal imager to detect the relative amounts of heat within the home constituted a 'search' within the meaning of the Fourth Amendment. While acknowledging that "no 'significant' compromise of the homeowner's privacy" had occurred in the case, this Court pointed out that it was required to "take the long view, from the original meaning of the Fourth Amendment forward," and that long view mandated the conclusion that, "Where, as here, the Government uses a device that is not in general public use, to explore details of

the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id*.

In this case, a police officer used a trained narcotics detection dog to obtain information regarding the interior of Mr. Jardines' home that the officer was otherwise unable to obtain using his ordinary powers of perception without a physical intrusion into the constitutionally protected area of the home. Detective Bartelt testified at the hearing on the motion to suppress that he only smelled mothballs when he was at the base of the front porch (T. 29).[7] Pursuant to *Karo* and *Kyllo*, this use of the trained narcotics detection dog to obtain the information from the interior of Mr. Jardines' home that would have been unknowable without physical intrusion is a Fourth Amendment

[7] One of the other officers on the scene decided to approach the front door of the house after the drug detection dog was used to detect the odor of contraband emanating from the house, and that officer claimed that he smelled the odor of contraband at the front door of the house. The fact that an officer might have been able to detect the odor of contraband without using the drug detection dog is not relevant to the issue of whether the use of the drug detection dog was a search which violated the Fourth Amendment. In *Kyllo*, this Court found it "quite irrelevant" that outside observers might have been able to perceive the home without using the thermal imager, because "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo*, 533 U.S. at 35 n.2.

search and is presumptively unreasonable without a warrant based upon probable cause.

The State claims that a police officer's use of a narcotics detection dog is not a search because "[o]fficers routinely use tools such as field glasses, flashlights, and dogs as aids to their senses." Pet.Br. 22. However, field glasses and flashlights simply enhance a police officer's sense of sight. A narcotics detection dog, on the other hand, does not enhance any of the officer's senses. When the dog alerts it provides the officer with information that the officer could not otherwise discern without the use of the dog. Professor LaFave has so analyzed this issue:

> Because, so the argument goes, the cases have generally held that the use of a flashlight or binoculars to aid the natural senses does not constitute a Fourth Amendment search, it follows that it is not a search to resort to "canine assistance in pursuit of the criminal." This analogy is equally unsound. As Judge Mansfield noted in his concurring opinion in [*United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975)],
>
> > the police have been permitted to enhance or magnify the human senses with the aid of instruments such as binoculars or flashlights. . . . But that is not the case here where the "nose" being put into others' business was clearly an intrusion. The police agents here did not smell or see any contraband, nor were their senses enhanced. Their only indication that

> marijuana was present was the action of the dog. Their own senses were replaced by the more sensitive nose of the dog in the same manner that a police officer's ears are replaced by a hidden microphone in areas where he could not otherwise hear because of the inaudibility of the sounds. The illegality of the latter practice in the absence of a search warrant or special circumstances has long been established.
>
> A seemingly closer analogy is to the utilization of magnetometers and similar devices, which have consistently been held to amount to a search within the meaning of the Fourth Amendment.

1 Wayne R. LaFave, *Search & Seizure* §2.2(g) (4th ed. 2010) (footnotes omitted).

In his concurring opinion in *Place*, Justice Brennan recognized the qualitative difference between the use of a tool by the police to aid the natural senses and the use of a narcotics detection dog. Justice Brennan pointed out that "a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual's privacy." *Place*, 462 U.S. at 719-20 (Brennan, J., concurring).

The State of Florida also argues that the use of the narcotics detection dog at the front door of a home

is not a search because the dog only detects odors emanating from the house. Once again, this Court's decisions in *Karo* and *Kyllo* refute this argument. In *Kyllo*, the Government maintained that the thermal imaging was not a search because it detected only the heat radiating from the external surface of the house and did not detect any heat inside the home. *Kyllo*, 533 U.S. at 35. This Court found no constitutionally significant difference between revealing the contents of a home by "off-the-wall" observations and "through-the-wall" surveillance. *Id*. This Court noted that "just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house – and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house." *Id*. This Court further noted that "such a mechanical interpretation of the Fourth Amendment" had been rejected in *Katz* where the police used a device which detected only the sound waves that reached outside the phone booth. *Id*. This Court declared that even though the device used in *Kyllo* to detect the heat emanating from the house was "relatively crude," the rule adopted had to take into account "more sophisticated systems that are already in use or in development." *Id*. at 36 (footnote omitted). Finally, this Court firmly rejected the contention that anything learned about the content of a house by inference from information coming out of the house cannot be a search. This Court pointed out:

> [T]he novel proposition that inference insulates a search is blatantly contrary to *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawful.

Id. at 36-37 (footnote omitted).

This Court's decisions establish that a Fourth Amendment search of a home occurs even though police officers do not physically enter the home but rather from a lawful vantage point use a tool to obtain information about what is inside the home which the officer is unable to obtain using the officer's ordinary powers of perception. This Court's decisions further establish that a Fourth Amendment search of a home occurs even though police officers do nothing more than draw an inference as to what is inside a home from the perception of what is emanating from the house. Accordingly, the Government's use of a drug detection dog to reveal details of the home that would have been unknowable without physical intrusion constitutes a Fourth Amendment search even though those details are revealed through inferences drawn from the odors detected by the dog emanating from the house.

II. A DOG SNIFF AT THE FRONT DOOR OF A HOME BY A NARCOTICS DETECTION DOG IS A FOURTH AMENDMENT SEARCH REQUIRING A WARRANT BASED UPON PROBABLE CAUSE BECAUSE A POLICE OFFICER TAKING THE DOG TO THE FRONT DOOR OF THE HOUSE IS A COMMON LAW TRESPASS AND VIOLATES THE HOMEOWNER'S REASONABLE EXPECTATION OF PRIVACY.

Aside from a police officer's use of the narcotics detection dog to reveal details inside the home, the actions of a police officer in taking a narcotics dog to the front door of a home also constitute a Fourth Amendment search. The front door of a home and the area immediately adjacent to the front door are within the curtilage of the home, and thus warrant the Fourth Amendment protections that attach to the home. That being the case, the officer's approach to the front door of the home constitutes a Fourth Amendment search of the home for two reasons. First, a physical trespass onto the constitutionally protected curtilage of a home for the purpose of obtaining information is a search within the meaning of the Fourth Amendment. Second, a police officer's entry into the curtilage of the home with a narcotics detection dog violates the homeowner's reasonable expectation of privacy.

A. The Front Door Of A Home And The Area Immediately Adjacent To The Front Door Of A Home Are Within The Curtilage Of That Home.

The curtilage of the home is one of the constitutionally protected areas enumerated in the Fourth Amendment, and accordingly "warrants the Fourth Amendment protections that attach to the home." *Oliver v. United States*, 466 U.S. 170, 180 (1984); *Jones*, 132 S. Ct. at 953. "[T]he common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home." *Id.* (citing 4 W. Blackstone, Commentaries *225). This Court has defined curtilage as the "area intimately linked to the home, both physically and psychologically," *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986), as distinguished from "open fields," which "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver*, 466 U.S. at 179. "[A]n individual may not legitimately demand privacy for activities out of doors in fields, *except in the area immediately surrounding the home*." *Id.* at 178 (emphasis added). "*The curtilage area immediately surrounding a private house* has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986) (emphasis added). "[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining

the curtilage – as the area around the home to which the activity of home life extends – is a familiar one easily understood from our daily experience." *United States v. Dunn*, 480 U.S. 294, 302 (1987) (quoting *Oliver*, 466 U.S. at 182 n.12).

In *Dunn* this Court considered the issue of whether a barn which was located 60 yards from a home and which was not within the area enclosed by a fence surrounding the house was within the curtilage of the home. This Court identified four factors to be used as a reference in determining whether such an area outside the area immediately surrounding a private home falls within the curtilage of the home. These four factors are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301. Applying those four factors to the barn and the area surrounding it, this Court had "little difficulty in concluding that this area lay outside the curtilage of the ranch house." *Dunn*, 480 U.S. at 301.

This Court's decisions clearly establish that the front door of a home and the area immediately adjacent to the front door of a home always fall within the curtilage of the home. *Oliver*, 466 U.S. at 178, 180; *Dow Chem. Co.*, 476 U.S. at 235. Accordingly, reference to the four-factor test for determining the extent of curtilage beyond the area immediately surrounding

a private home is unnecessary in this case. *See United States v. Charles*, 290 F.Supp.2d 610, 614 (D.V.I. 1999), *aff'd*, 29 Fed.Appx. 892 (3d Cir. 2002) ("Clearly, the doorknob on the defendant's front door of the Catherine's Rest residence is within the curtilage of the home.").

The police officer in this case took the narcotics detection dog directly to the front door of the house. The entranceway to the front door of the home was enclosed with an archway. Through the archway was the alcove of the porch outside the front door of the home. The entry of the archway was approximately six to eight feet from the front door of the home. *See* Resp. App. 1. In taking the narcotics detection dog through the archway, into the alcove, and up to the front door of the home the officer and the narcotics detection dog intruded into the curtilage of Jardines' home.

Not all police intrusions into the curtilage of a home constitute a Fourth Amendment search. "This is because a portion of the curtilage, being the normal route of access for anyone visiting the premises, is 'only a semi-private area.'" 1 LaFave, *supra*, at §2.3(f) (quoting *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975)). However, when a police officer intrudes into the curtilage of a home with a narcotics detection dog, that intrusion does constitute a Fourth Amendment search because the intrusion is a common law trespass for the purpose of conducting a search for evidence, and because the intrusion violates the

homeowner's reasonable expectation of privacy in the curtilage of the home.

B. A Police Officer's Approach To The Front Door Of A Home With A Narcotics Detection Dog Is A Fourth Amendment Search Because It Is A Common Law Trespass Upon A Constitutionally Protected Area For The Purpose Of Conducting A Search For Evidence.

When the Government physically trespasses upon the areas enumerated in the Fourth Amendment for the purpose of obtaining information, such a physical intrusion is a search within the meaning of the Fourth Amendment. *Jones*, 132 S. Ct. at 950 n.3. In holding that the Government's installation of a GPS device on a vehicle, and its use of that device to monitor the vehicle's movements, constitutes a Fourth Amendment search, this Court reaffirmed the significance of property rights in determining whether Government action constitutes a search under the Fourth Amendment:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

Id. at 949. To support this conclusion, this Court quoted the following expression by Lord Cameron in *Entick* of the importance of property rights in analyzing search and seizure issues:

> "[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; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

Id. (quoting *Entick*, 95 Eng. Rep. at 817).

This Court noted its obligation to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Id*. at 950 (quoting *Kyllo*, 533 U.S. at 34). This Court further pointed out 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." *Id*. (footnote omitted). Accordingly, this Court concluded:

> [O]ur task, *at a minimum*, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

Id. at 950 n.3 (emphasis in original). This Court identified the curtilage of a home as "one of those protected areas enumerated in the Fourth Amendment." *Id*. at 953. This Court emphasized that trespass alone into a constitutionally protected area does not constitute a Fourth Amendment search, but trespass coupled with "an attempt to find something or to obtain information" does constitute such a search. *Id*. at 953 n.5.

In this case, Detective Bartelt and the narcotics detection dog set foot upon Mr. Jardines' property without his consent and therefore trespassed on that property. A person who enters upon the property of another is not a trespasser if consent to enter may be implied from custom, usage, or conduct. These principles are explained in 2 Cooley on Torts, 4th ed., p. 238, §248, where it is stated:

> Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit; the mechanic extends the like invitation to those who may have occasion to become his customers; the physician and the lawyer invite them to their respective offices, and so on * * * No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise. *So every man, by implication, invites others to come to his house as they may have proper occasion, either of business, or courtesy, for information, etc. Custom must*

> *determine in these cases what the limit is of the implied invitation.*

(emphasis added); *see also Prior v. White*, 132 Fla. 1, 180 So. 347, 355 (1938); *Florida Pub. Co. v. Fletcher*, 340 So.2d 914, 916 (Fla. 1977); 75 Am.Jur.2d *Trespass* §73 (2007); Restatement (Second) of the Law of Torts, §167, cmt. d (1965).

Thus, a salesperson, a person delivering a package, a young girl selling Girl Scout cookies, or possibly even a police officer intending to speak to an occupant of the house, are not trespassers because they have an implied invitation by custom to approach the front door of a house for the purpose of speaking to the occupant of the house. However, the implied invitation by custom to approach the front door of a house is not unlimited. In his concurring opinion in this case in the Third District Court of Appeal of Florida, Judge Gerald B. Cope, Jr., discussed the limitations on the implied invitation by custom to approach the front door of a house:

> Although the walkway, driveway, and porch are part of the homeowner's private property, the owner "by implication, invites others to come to his house as they may have proper occasion, either of business, or courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation." *Prior v. White*, 132 Fla. 1, 180 So. 347, 355 (1938) (italics and internal quotation marks omitted). The homeowner may expect a knock at the door from a seller of

> goods, a solicitor of charitable contributions, or a neighbor on a social call. The postal service will deliver the mail and a delivery truck may drop off a package.
>
> On the other hand, there is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows. The vendor who may hawk his goods during daylight hours is not welcome to knock at the door at two o'clock in the morning.

Pet.App. 124-25.

While a police officer may have an implied invitation by custom to approach the front door of a house for the purpose of speaking to the occupant of the house, no such implied invitation by custom exists for an officer to approach the front door of a house with a narcotics detection dog for the purpose of searching for otherwise undiscoverable evidence. That being the case, Detective Bartelt and the narcotics detection dog set foot upon Mr. Jardines' property without his consent and therefore they were trespassers on that property. Moreover, because the detective took the narcotics detection dog to the front door of the house and the area immediately adjacent to the front door which was within the curtilage of the home, the Government trespassed onto a constitutionally protected area. Finally, because the detective indisputably

approached the front door of the house with the narcotics detection dog in an attempt to obtain information, that trespass into a constitutionally protected area constitutes a Fourth Amendment search. A search of a home without a warrant supported by probable cause is presumptively unreasonable. *Kyllo*; *Payton*. Accordingly, a police officer taking a trained narcotics detection dog to the front door of a home is a Fourth Amendment search requiring a warrant based upon probable cause.

C. A Police Officer's Approach To The Front Door Of A Home With A Narcotics Detection Dog Is A Fourth Amendment Search Because It Violates The Homeowner's Reasonable Expectation Of Privacy In The Curtilage Of The Home.

Notwithstanding the fact that the front door and the area immediately adjacent to the front door of a home are within the curtilage of that home, a homeowner has a reduced expectation of privacy in that area. As this Court recently noted, "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011). The following statement is often quoted in cases involving the authority of police officers to approach the front door of a home with the intent to question the occupant of the home:

> Absent express orders from the person in possession against any possible trespass,

> there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' *with the honest intent of asking questions of the occupant thereof* – whether the questioner be a pollster, a salesman, or an officer of the law.

Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964) (emphasis added). In reaching this conclusion, the court distinguished the situation where a police officer approaches the front door of a house with the intent to question the occupant from the situation "wherein the intent of the several officers at the time of their entry on the premises without possessing a legal warrant for search or arrest, was actually either to arrest without warrant or search without warrant." *Davis*, 327 F.2d at 304; *see also United States v. Ochoa-Almanza*, 623 F.2d 676, 677 (10th Cir. 1980) (distinguishing *Davis* based on "the fact that the officers went to the door with the intent to search" and noting that the *Davis* court "emphasized that the officers did not have any intent to search."); *Madruga v. County of Riverside*, 431 F.Supp.2d 1049, 1058 (C.D. Cal. 2005) (finding deputy's approach to front door of home invaded homeowner's reasonable expectation of privacy because deputy "did not want to talk, he wanted to detain. The same cannot be said of other persons who use the same causeways to and from the home's front door, be they salespersons, trick-or-treaters, or deliverymen.").

In his concurring opinion in this case in the Third District Court of Appeal of Florida, Judge Cope illustrated this distinction between a police officer who approaches the front door of a house with the intent to question the occupant and a police officer who approaches the front door of a house for the purpose of searching for evidence:

> Turning to crime investigation, it is perfectly acceptable for a detective to come to the front door to speak with the owner. Where the officer has come to the front door to speak to the owner, there is no expectation of privacy regarding any incriminating objects the owner has left in plain view, or in any odors (such as marijuana) that may be emanating from the dwelling. . . . But here, too, there are limits. A crime scene investigation unit cannot (absent consent or a warrant) cordon off the front porch and begin dusting the porch for fingerprints, or conduct a microscopic examination for blood stains, or deploy a magnetometer or sonar to determine what lies beneath the porch.
>
> In short, it is inaccurate to say that there is never any reasonable expectation of privacy with regard to the front porch of a house, although it is a more reduced expectation than applies to the house interior.

Pet.App. 125-26.

Thus, a salesperson, a person delivering a package, a young girl selling Girl Scout cookies, or a police officer intending to speak to an occupant of the house,

do not invade the homeowner's reasonable expectation of privacy when they enter the curtilage of the home. However, a police officer who approaches the front door of a home to search for evidence invades the homeowner's reasonable expectation of privacy. This Court has recognized that a police officer's actions with respect to private property, taken for the purpose of searching for evidence, can constitute a Fourth Amendment search even though the owner of the property has no reasonable expectation of privacy that the general public or a police officer would not interfere with the property without such purpose. In *Bond v. United States*, 529 U.S. 334 (2000) this Court considered the issue of whether a law enforcement officer's physical manipulation of carry-on luggage in the compartment above a bus passenger's seat constituted a Fourth Amendment search. This Court concluded that the officer's physical manipulation of the luggage was a Fourth Amendment search because it violated the bus passenger's reasonable expectation of privacy:

> When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical

> manipulation of petitioner's bag violated the Fourth Amendment.

Bond, 529 U.S. at 338-39.

When a police officer approaches the front door of a home with a trained narcotics detection dog for the purpose of detecting odors emanating from the front door of the house, that officer is indisputably searching for evidence and thus invades the homeowner's reasonable expectation of privacy in the home. Consequently, a police officer's approach to the front door of a home with a narcotics detection dog is a Fourth Amendment search of the home requiring a warrant based on probable cause.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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App. 1

[06-40839]

MTN TO SUPP

IN THE
CIRCUIT/COUNTY COURT
IN AND FOR MIAMI-DADE
COUNTY FLORIDA

CASE NO. F06-40839

DEFENDANT(S)

J. JARDINES

STATE'S	DEFENDANT'S
☑	☐

COURT'S
☐

FILED:
☑ FOR ID ~~1A~~
DATE JUN – 8 2007
BY /s/ C. Burgen 3300 D.C.
☑ AS EXHIBIT 1
DATE JUN – 8 2007
BY /s/ C. Bergen 3300 D.C.
CLKCT 416 REV. E/O HARVEY ROVIN, CLERK

[Bar Code]