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 OF THE NATIONAL POLICE CANINE ASSOCIATION AND POLICE K-9 MAGAZINE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Police canine handlers, all across the United States, have an ardent interest in combating illegal narcotics. Drug detection dogs perform a crucial service for law enforcement related to these efforts. Police K-9 Magazine is a national publication with a 20,000 person readership that covers every state in the union. Most of those law enforcement officers are canine handlers that have a vested interest in the issue before the court. Police K-9 Magazine has a training and consulting branch in which they organize national training seminars throughout the United States in efforts to better educate law enforcement on the proper use of drug dogs. They are the leader in the industry in the area of police canine usage providing invaluable information to federal, state, and local canine law enforcement.

The National Police Canine Association is a large organization consisting of police canine handlers from all across the country. The association governs,

[1] Pursuant to Supreme Court Rule 37, amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent was granted by both the Petitioner and the Respondent and their consent letters have been filed with the Clerk of Court. This brief was authored solely by counsel for the amici and funded solely by the amici.

sets standards, and certifies police work dogs for their membership. Upon passing their independent certification, police dogs are certified that they are well trained and have the unique ability to locate the source of existing narcotic odor. The National Police Canine Association is headquartered out of Arizona. Moreover, this case is of particular interests to the Association due to the fact that they seek to represent not only the national membership but also specifically their members located in the State of Florida which will be directly impacted by this Courts action.

The amici have a substantial interest in this Court's determination of whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that a dog sniff outside the front door of a suspected marijuana grow house by a trained narcotics detection dog is a search under the Fourth Amendment requiring probable cause. The Magazine and all law enforcement officers and canine handlers in all fifty (50) states, along with the National Police Canine Association, have a distinct interest in the correct disposition of this matter.

SUMMARY OF THE ARGUMENT

Given the fact that a "sniff" by a well trained and certified narcotics odor detection dog is not a search, this Court should hold that a lawfully present police officer at the front door of a house, is permitted to merely allow his trained canine partner to use it's God-given olfactory ability to detect the odor of an illegal substance simply seeping through the seams of the door. Police officers are allowed to approach the front door of a residence. This area of the home is not off limits to the general public and therefore is not off limits to law enforcement. Home owners allow a myriad of people access to this area of their home on a regular daily basis. This includes the court authorized police technique of "**Knock and Talk**", where law enforcement officers are allowed to walk up to a house (being lawfully present) knock on the front door of a home, wait for an answer and have a consensual encounter with the home owner. Since Florida law permits this type of front door contact of a home owner, then it goes without saying that the contact by the officers in question is not only lawful but also sanctioned under Florida law. Therefore, their lawful presence at the front door with their canine partner would not, in the eyes of the law, change their legally recognized lawful status.

A well trained and certified narcotics odor detection dog is not a technological advancement. A dog is not a man-made mechanical device, recently created in order to detect the odor of illegal substances. The use of dogs and their unique olfactory talents to smell has been around for hundreds of years. Additionally, a drug dog's nose will only divulge the existence of the odor of an illegal substance. Comparing the recently enhanced, man-made, mechanical thermal imaging device to the God-given sense of smell of a canine is truly comparing apples to oranges, and that square peg will not fit into the round hole no matter how hard the Respondent pounds.

This Honorable Court should find that a dog is not a mechanical technological advancement under the law. The use of the canine's ability to smell odor from the outside of the home does not invoke any Fourth Amendment rights on a home of a marijuana grower simply because the fruits of his illegal trade allow that odor to seep through the seams of a door thereby exposing his illegal activity. This Court should reverse the Florida Supreme Court's decision in *Jardines* as well affirm the other Florida District Courts of Appeal in *Nelson* and *Stabler,* that all have held, that along with the above stated arguments, that a exterior "sniff" of a front door of a house is not a search and therefore, invokes no Constitutional protection.

ARGUMENT

A DOG "SNIFF" OUTSIDE THE FRONT DOOR OF A SUSPECTED MARIJUANA GROW HOUSE BY A TRAINED NARCOTICS DETECTION DOG IS NOT A SEARCH REQUIRING PROBABLE CAUSE WITHIN THE MEANING OF THE FOURTH AMENDMENT OF THE U.S. CONSTITIUTION

This Honorable Court has held on three separate occasions that a "sniff" by a well trained odor detecting narcotics canine is not a search. In *United State v. Place, 462 U.S. 696 (1983)*, held that the "sniff" of the luggage of an airport passenger was not a "search" within the meaning of the Fourth Amendment. The information obtained through the use of the dog revealed only the presence or absence of illegal narcotic odor that the dog was trained to detect. This Court again noted the talents of the trained canine were permissible when "sniffing" a car in *Indianapolis v. Edmond, 531 U.S. 32, 40, (2000)* noting that the "sniff" only discloses the mere presence or absence of illegal narcotics odor which is a contraband item. In *Illinios v. Caballes, 543 U.S. 405, (2005)*, this Honorable Court continued the philosophy that the use of well trained odor detecting narcotic dogs used to "sniff" only the odor of contraband was legally permissible. The Florida Constitution states that the Fourth Amendment

right of our State Constitution shall be construed in conformity with the United States Constitution, as interpreted by the United States Supreme Court. *See Art.I, Sec. 12, Fla. Const.*

STATE AUTHORITY

The first case in the State of Florida to touch upon the issue of narcotics odor detection dogs being present at a door and sniffing the drug odor seeping out of the door seams was *Nelson v. State, 867 So.2d 534 (Fla. 5th Dist. Ct. App. 2004).*

Factually in *Nelson,* a registration clerk for the Holiday Inn called the police to report that Nelson had registered as a guest of the hotel. The clerk testified at the suppression hearing that a lot of guests were complaining about drug trafficking at the hotel and that suspicions are aroused when someone fits a certain profile. The profile includes the location and type of room in the hotel, payment in cash, nervousness and the fact that the registering guest is a local resident.

The Police Department was familiar with Nelson since he had been involved in several drug investigations in the past and was currently the target of an ongoing drug investigation. With the permission of the hotel management, a K9 officer took his narcotics sniff dog to the hotel and walked the hallway outside of Nelson's room. The dog was

asked to sniff all room entrance doors in the hallway, but the dog alerted only at Nelson's door. The information was then included in an affidavit to obtain a search warrant. The affidavit included the history of the dog who had been a narcotic detection dog for the Palatka Police Department for the past three years. The dog had over 200 documented narcotics finds and was trained to detect the odor of cocaine as well as several other substances. The K9 officer also provided a detailed listing of the dog's experience and training. After a search warrant was issued to search Nelson's room, police officers entered the unoccupied room and found several small plastic bags of cocaine that through subsequent testimony were tied to Nelson. *Nelson, supra.*

The Florida Fifth District Court of Appeal astutely followed this Court's precedent holding that the odor of contraband is not protected when it is merely escaping through the door of a constitutionally protected area, the defendant's hotel room. They went on to find that this type of information (the escaping odor) developed from such a sniff is entirely appropriate when used to support a search warrant. This is the analogous set of facts and circumstances as the case at bar.

The Florida First District Court of Appeals has also followed precedent of this Honorable Court in their analysis of this issue in *Stabler v. State,* 990 So.2d 1258 (Fla. 1st Dist. Ct. App. 2008). Factually in *Stabler,* Officers received information that several people, including the appellant and his girlfriend,

were trafficking cocaine and liquid codeine. Based upon this information, officers initiated surveillance of the Stabler's residence and his girlfriend's apartment. During the surveillance of the appellant's residence, officers observed the appellant leave in a vehicle driven by another subject. The officers followed the vehicle and conducted a stop. During the stop, a police drug dog alerted to the odor of drugs in the vehicle. A search of the vehicle revealed a baby bottle of what appeared to be liquid codeine. With his consent, officers subsequently searched Stablers residence but found no evidence of drug trafficking. *Stabler, supra.*

During this time, officers continued surveillance of the appellant's girlfriend's apartment. During the surveillance, officers interviewed the manager and other residents of the apartment complex. The manager and the other residents reported that the appellant's girlfriend lived in the complex and that the appellant was often present. They also reported that the appellant and other suspicious subjects often came and went late at night, staying only a short time and sometimes switching vehicles. The front door of the apartment was open to public access and to a common area. Officers brought a police drug dog to the front door of the apartment and it alerted to drugs. Officers also took the dog to the front door of another apartment in the complex where it did not alert to drugs. *Stabler, supra.*

Based upon the information they had gathered during their surveillance of the apartment, officers

prepared a probable cause affidavit and subsequently received a search warrant for the apartment. During the search, cocaine was found. Stabler was arrested and charged with trafficking in 400 grams or more, but less than 150 kilograms. The Florida First District Court of Appeal held:

> The appellant argues that the trial court erred in denying his motion to suppress because the dog sniff at the front door of the apartment constituted an illegal search under the Fourth Amendment and, thus, could not be used as evidence of probable cause for the search warrant. This contention, however, lacks merit. As pointed out by the State, the United States Supreme Court recently addressed the issue of whether a dog sniff constitutes a search. In *Illinois v. Caballes, 543 U.S. 405, 410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)*, the Court held that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Explicitly reaffirming its prior reasoning that the unique nature of a dog sniff renders it distinguishable from a traditional

search, the Court stated: [T]he use of a well-trained narcotics-detection dog…-"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. 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. *Id. at 409, 125 S.Ct. 834* (quoting *United States v. Place, 462 U.S. 696, 707, (1983)* (holding 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 [airport], to a trained canine-did not constitute a 'search' within the meaning of the Fourth Amendment"). Considering that *Caballes* and *Place* represent the only two cases in which the Court has endeavored to address the dog sniff issue, the reasoning espoused therein is controlling and must guide this Court's ruling in the instant case.

The State of Texas has gone on to examine the direct issue of detecting odor from houses. In *Delosreyes v. State, 853 S.W.2d 684 (Tex. Crim. App. 1993)*, Officer King, assigned to police department's narcotics investigation division, received a phone call from a reliable informant. The informant said he "observed several persons unloading blocks, plastic wrapped blocks from a van, carrying [them] into the residence, 309 West Calvin." Officer King and Officer Smith drove by the address in an unmarked car and corroborated the tip. They could see one person in the back of a van, and another person carrying a one-foot-cube, plastic-wrapped block into the residence. At the hearing, Officer King identified Delosreyes as the person who was carrying the block. The officers could not tell, from driving by, what was in the block, but Officer King had seen marihuana packed in blocks like that on several occasions before. After driving by several times, the officers found a place where they could keep constant surveillance on the house, and called in a surveillance team. When it became dark outside, Officer King parked his vehicle on another street, got out, and walked up to the West Calvin residence. Officer King walked up to the garage area, "To see if I could detect any smell of any drugs." He sniffed by the edge of the garage door and smelled the odor of "unburned, fresh marihuana." *Delosreyes, supra.*

The Texas Court of Appeals found as follows:

> Appellant argues that, even though in the present case there was no

> fence for Officer King to peer through, there was a closed garage door under which he "sniffed" to detect the odor of marijuana. Appellant takes the position that he had a legitimate, reasonable expectation of privacy with regard to the garage, its contents, and the smells emanating from it.... In the case before this court, Officer King merely walked from the street in front of the house, a short way up the driveway to the garage door, and smelled the marijuana emanating from the garage. The driveway is situated so that ***anyone*** approaching the house would walk up the driveway and pass near the garage in order to get to the front door of the house.... We hold the trial court did not err in concluding that Officer King by his actions, "invaded no privacy interests of any resident of the residence."

The Court of Appeals in *Texas v. Smith, not reported in S.W.3d, 2004 WL 213395 (Tex. Crim. App. 2004) cert. denied by U.S. Supreme Court, 544 U.S. 961, 125 S.Ct. 1726, 161 L.Ed.2d 602 (U.S. 2005)* found the use of a drug dog on a house Constitutionally permissible stating:

> Appellant argues that the drug-dog sniff outside appellant's garage door was an illegal search; therefore, the information obtained from the sniff (*i.e.,* the drug dog's positive alert) was acquired illegally and could not be the basis of a valid search warrant. …In the instant case, Officer Foose approached appellant's garage by walking up the driveway. The driveway Officer Foose traversed led both to the front of the garage and to the entrance of the house. Like in *Delosereyes, (Supra.)* anyone approaching appellant's house would walk up the driveway and pass near the garage in order to reach the entrance of the house. We conclude that appellant's privacy interests under the United States and Texas Constitutions were not invaded when Officer Foose walked up appellant's driveway to allow a drug dog to sniff appellant's garage door.

The Michigan Court of Appeals also has addressed the same issue of dogs used at the exterior of a house in order to detect the odor of illegal narcotics in, *People v. Jones, 755 N.W. 2d 224 (Mich. App. 2008).* In following the lead of the State of Texas, the

Michigan Appeals Court held in favor of the use of the canine on the home ruling:

> The majority of the federal circuit courts have viewed the *Place* Court's holding as a general categorization of canine sniffs as nonsearches. See, e.g., *United States v. Redd, 141 F.3d 644, 648 (C.A.6, 1998)* holding that a canine sniff of the inside of an apartment was not a search when the canine team was lawfully present in the building); see also *United States v. Roby, 122 F.3d 1120 (C.A.8, 1997); United States v. Brock, 417 F.3d 692 (C.A.7, 2005); United States v. Vasquez, 909 F.2d 235 (C.A.7, 1990).* Similarly, the vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search. (FN4) Binding and persuasive authority convinces us that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused. *Reed, supra at 649;* see also *Place, supra at 709, 103 S.Ct. 2637* (noting that the sniffed luggage was located in a public place), and *United States v. Daiz, 25 F.3d 392, 397*

(C.A.6, 1994)....Here, the canine was lawfully present at the front door of defendant's residence when it detected the presence of contraband. There is no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch. See *People v. Custer (On Remand), 248 Mich.App. 552, 556, 561, 640 N.W.2d 576 (2001)*(under Michigan law, the police can lawfully stand on a person's front porch and look through the windows into the person's home, as long as there is no evidence that the person expected the porch to remain private, such as by erecting a fence or gate). The record contains no evidence that the canine team crossed any obstructions, such as a gate or fence, in order to reach the front door, or that the property contained any signs forbidding people from entering the property. Any contraband sniffed by the canine while on defendant's front porch-an area open to public access-fell within the "canine sniff" rule. Consequently, there was no search in violation of the Fourth Amendment....The canine sniff here was constitutionally sound, not because defendant had no legitimate privacy interest in the contraband,

> which will always be the case in Fourth Amendment disputes over seized incriminating evidence, but because no legitimate privacy interests or expectations were intruded upon by the canine sniff. As indicated in *Place* it is the uniqueness and attributes of a canine sniff that dictate a finding that the Fourth Amendment was not violated in the case at bar.

Thus, following the natural flow of logic from this Courts precedent, the overwhelming majority of state courts have concluded that the dog sniff at the front of a home did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest.

If the *Amici* could point this Honorable Court to examine the rational of one case, it would have to be the persuasive and well reasoned holding of *Fitzgerald v. State*, 837 A.2d 989 (Md. App. 2003). Judge Moylan masterfully tackled many issues related to narcotic canine search and seizure including the central issue in this case. As Judge Moylan hit the nail on the head with the question that he thoroughly vetted, "**Does the Presence of a Home Transform a "Non–Search" Into a "Search"?**

In 2003, without the benefit or guidance from this Court's 2005 *Caballes* opinion, the *Fitzgerald* court found that:

The smelling, by man or dog, of odors emanating from such protected, albeit lesser protected, repositories of property as automobiles, suitcases, and school lockers does not constitute a Fourth Amendment "search," the appellant maintains strenuously that when the odors emanate from the interior of a home, the Fourth Amendment interests are of a higher order. He argues that adding to the equation the enhanced protection of the home is enough to elevate the dog sniffing into a "search," thereby engaging the gears of Fourth Amendment protection.

The higher level of justification required to satisfy the Fourth Amendment when it applies, however, is not to be confused with the very different issue of whether the amendment applies. Even the enhanced protection of the home is still limited to being a protection against "unreasonable searches and seizures." It is not a protection against non-searches and non-seizures, reasonable or unreasonable.

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. If the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home. It is the criminal nature of the possession itself that takes the activity out from under the protection of the Fourth Amendment, not the place where the possession occurs.

We hold that a sniff by a trained dog, standing where it has a right to be, of odors emanating from any protected place, residence or otherwise, is not a "search" within the contemplation of the Fourth Amendment. *Fitzgerald, supra.*

The *Amici* wishes to stress to this Honorable Court that the Appellate Courts of Maryland, Texas, and Michigan along with the First, Third, and Fifth District Courts of Appeal of Florida have thoroughly vetted this issue. All following this Court's precedent that it is Constitutionally permissible to allow a trained narcotic odor detection dog to sniff a protected area whether it be a suitcase, a car door, hotel door, apartment door or home front door in order to detect the odor of contraband that is escaping the seams.

FEDERAL AUTHORITY

This issue has been considered by many Federal Courts. The Seventh Circuit Court of Appeal in *U.S. v. Brock, 417 F.3d 692 (7th Cir. 2005)* resolved a very similar factual scenario as the case at bar. In *Brock,* the defendant contended that the canine sniff outside his locked bedroom door constituted an illegal warrantless search, and that the warrant to search 3381, which was issued in reliance on that sniff, violated the Federal and Indiana Constitutions. The government argues that the dog sniff was not a search at all because the police were lawfully present inside Brock's residence with Godsey's consent, and Brock possessed no reasonable expectation that his drugs would go undetected. As we have in this case, we have the use of a dog to smell narcotics odor in relation to a home. But in *Brock,* the door in question was actually located ***inside the home itself and was used on the exterior of the bedroom door***.

The Seventh Circuit stayed within the mainstream of American Jurisprudence in finding:

> The Court held in *Caballes* that a dog sniff of a vehicle during a traffic stop, conducted absent reasonable suspicion of illegal drug activity, did not violate the Fourth Amendment because it did not implicate any

legitimate privacy interest. *Id.* at 837-38. The Court explained that, because there is no legitimate interest in possessing contraband, the use of a well-trained narcotics-detection dog that " *only* reveals the possession of narcotics 'compromises no legitimate privacy interest' " and does not violate the Fourth Amendment. *Id.* (quoting *Jacobsen, 466 U.S. at 1123, 104 S.Ct. 1652). Caballes* relied on the Court's opinion in *Place, supra*, which held that a canine sniff of a traveler's luggage in the airport was not a search within the meaning of the Fourth Amendment because the information obtained through this investigative technique revealed only the presence or absence of narcotics. Adhering to this reasoning, the Court held in *Jacobsen* that a chemical field test of a substance found inside a package was not a Fourth Amendment search because the test "merely discloses whether or not a particular substance is cocaine." *466 U.S. at 123, 104 S.Ct. 1652.* As there is no legitimate interest in possessing cocaine, the field test did not compromise any legitimate privacy interest. *Id. see also Edmond, supra*(officers' practice of walking a

narcotics-detection dog around the exterior of each car at a drug interdiction checkpoint does not transform the seizure into a search). This conclusion is consistent with previous decisions of this Court, as well as those of the majority of our sister circuits, which have held that canine sniffs used only to detect the presence of contraband are not Fourth Amendment searches. *See United States v. Vasquez, 909 F.2d 235, 238 (7th Cir. 1990)* (collecting cases) (canine sniff of a private garage from a public alley was not a warrantless search). *Accord United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998)*(where canine team was lawfully present inside a home, the canine sniff itself was not a Fourth Amendment search); *United States v. Reyes, 349 F.3d 219,224 (5th Cir.2003)* (dog sniff of passengers exiting bus from distance of four to five feet was not a Fourth Amendment search); *United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997)* (defendant's reasonable expectation of privacy in his hotel room did not extend to hallway outside his room, and no warrant was needed to bring trained dog to conduct a narcotics sniff in hallway); *United States v. Lingenfelter, 997 F.2d 632,*

> *638 (9th Cir. 1993)* (canine sniff of a commercial warehouse was not a search because defendant "could have no *legitimate* expectation that a narcotics canine would not detect the odor of marijuana"); *Untied States v. Colyer, 878 F.2d 469, 477 (D.C. Cir.1989)* (dog sniff of a sleeper car from train's public corridor was not a search because it was not overly intrusive and "did not expose noncontraband items that otherwise would remain hidden from view). *Brock, supra.*

In U.S. v. Roby, 122 F.3d 1120 (8th Cir.1997), considered a factually similar incident to the instant case and is persuasive in its analysis, as it relates to the issue raised by *Jardines:*

> Here, Nero [the dog] walked the Hampton Inn's fourth floor hallway. During this walk, he alerted at Room 426, the room occupied by Mr. Roby. Roby contends the dog's detection of the odor molecules emanating from his room is the equivalent of a warrantless intrusion. We find that it is not. The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. *See United State v. Sullivan, 625 F.2d 9, 13 (4th Cir.1980).* Just as evidence in

> the plain view of officers may be searched without a warrant, *see, Harris v. United States, 390 U.S. 2234, 236, 88 S.Ct. 992, 993, 19 L.ed.2d 1067 (1968)*, evidence in the plain smell may be detected without a warrant. *See United States v. Harvey, 961 F.2d 1361, 1363 (8th Cir.1992); See also Horton v. Goose Creek Independent School District, 690 F.2d 470, 477 (5th Cir. 1982);*... Mr. Roby had an expectation of privacy in his Hampton Inn hotel room. But because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far. Neither those who stroll the corridor nor a sniff dog needs a warrant for such a trip. As a result, we hold that a trained dog's detection of odor in a common corridor does not contravene the Fourth Amendment. The information developed from such a sniff may properly be used to support a search warrant affidavit.

Most Recently in *U.S. v. Byle*, 2011 WL 1983355 (slip copy), (M.D. Fla. May 2011). The Judge in the Federal Middle District of Florida astutely rejected the logic of the Florida Supreme Court holding in *Jardines* in it's findings saying, "In each case, the United States Supreme Court held that dog sniffs

are not searches under the Fourth Amendment. The Florida Supreme Court focused on the particular place of the sniff and concluded that, while a dog sniff may not be a search of a vehicle or luggage, it becomes a search when conducted in front of one's home. This Court disagrees ." *Byle, supra*.

Unlike the Florida Supreme Court in *Jardines*, the Middle District in *Byle* followed this Court's precedent holding "Without belaboring all of the myriad chameleonic situations that could shift a dog sniff from "not a search" to a "search" within the proscription of the Fourth Amendment, this Court accepts the Supreme Court meant what it said—a dog sniff is not a search." *U.S. v. Byle*, 2011 WL 1983355 (slip copy), (M.D. Fla. May 2011).

In agreeing with the premise in *Byle,* the 2011 Nova Law Review article thoroughly examined the *Jardines* search and seizure aspect of a dog sniff. After assessing the relevant law and logically vetting the issue, the author reached one inescapable conclusion "by focusing so strongly on the importance of the privacy of a home, **the Supreme Court of Florida, overlooked—and noticeably ignored—the holdings of the Supreme Court of the United States** that a person has no legitimate privacy interest in contraband." (*Emphasis added*) Abigail Brown, *Something Smells Afoul: An Analysis of the End of a District Court Split*, 36 Nova L. Rev. 201, 225-226 (2011).

The overwhelming number of judicially authored cases, from both state and federal courts all across the country, should guide this Honorable Court to the same logical conclusion the vast number of well educated minds have reached. A sniff is not a search. Drug odor is surely not Constitutionally protected when purely escaping from inside one's home through the seams of the front door of the house. Therefore, the action of law enforcement, in this case, trigger no Fourth Amendment safeguards and this Honorable Court should find the police officers actions lawful.

Similar to the Respondent's argument in the instant case, the defendant in *Brock* attempted to distinguish these cases by relying on *Kyllo* for the proposition that an individual has a far greater privacy interest inside a home, particularly inside a bedroom, than one has in a car or public place. *Brock, 417 F.3d at 659.* However, the court explicitly rejected this assertion, stating that *Kyllo* did not support the defendant's position. *Brock, 417 F.3d at 696.* Although *Kyllo* did reaffirm the importance of the privacy interest in one's home, the Seventh Circuit was primarily influenced by the subsequent clarification of *Kyllo* in *Caballes:* "[I]t was essential to *Kyllo's* holding that the imaging device was capable of detecting not only illegal activity inside the home, but also lawful activity.... As the Court emphasized, an expectation of privacy regarding lawful activity is 'categorically distinguishable' from one's 'hopes or expectations concerning the

nondetection of contraband....' " *Brock, 417 F.3d at 696* (quoting *Caballes, 543 U.S. at 409-10, 125 S.Ct. 834);* Abigail Brown, *Something Smells Afoul: An Analysis of the End of a District Court Split*, 36 Nova L. Rev. 201, 221 (2011).

As many courts, both state and federal have held, the age old use of dogs and their God given ability to smell better than humans has been recognized in the law for well over a 100 hundred years. *See*, *Pedigo v. Commonwealth, 44 S.W. 143 (Ky. App. 1898) and State v. Hunter, 56 S.E. 547 (N.C. 1907).* This Honorable Court should find that the Canine's nose is not advanced technology. A "sniff" of a home would only divulge the presence of marijuana, cocaine, heroin, or methamphetamine odor and nothing else. In no way, shape or form, would the nose of a dog ever disclose lawful activity inside a home because the dog's nose is simply not trained to reveal the presence of lawfully possessed items.

THE POLICE DOG'S TRAINING AND EXPERIENCE

Factually, in the case at bar, the Miami-Dade police officers obtained a search warrant for the residence in question. Included in the affidavit for search warrant were various factors contributing to the finding of probable cause, one of which was the training and experience of "Franky", the police

narcotics dog.[2] Franky was a well trained and certified narcotics dog. (Pet. J. App. A49-56). As a well trained and certified narcotics dog, Franky would only alert to one of the six odors that he was trained to locate. (Pet. J. App. A49-56). Franky was a passive alert dog (non-aggressive) who's alert to narcotics odor was merely a change of behavior with a final indication of sitting. (Pet. J. App. A49-56) At the time of the sniff, Franky had been independently certified, as a narcotics dog, by the International Forensic Research Institute of Florida International University. (Pet. J. App. A49-56) This method of certification is similar in nature to the manner of certification that is provided by the National Police Canine Association, one of the amici in this case. As of December 5th 2006 (approx. 2 ½ years of service) Franky had been utilized on 656 deployments with narcotics odor being located on 399. *Jardines v. State*, 73 So.3d 34 (Fla. 2011). The record indicates, in the affidavit for the search warrant, that Franky initially completed two training scenarios consisting of first, one 40 hour block of preliminary training through the Metropolitan Police Institute and then second, primary training consisting of 60 days with the narcotics detector canine through the narcotics bureau of the Miami-Dade Police Department. (Pet. J. App. A49-56) The dog then received the first of three yearly (2004, 2005, 2006) independently

[2] Franky is a Labrador retriever. He is currently enjoying retirement as the family pet for his handler in Miami-Dade County Florida.

certifications with Florida International University as a narcotic canine. (Pet. J. App. A49-56) Not to mention, the weekly maintenance training that is conducted on a regular basis that keeps the dog up to standards throughout the three year period. (Pet. J. App. A49-56) This means that on 257 deployments no odor was detected and therefore no search was conducted nor was the owner even contacted related to the non-alerts. These owners never even knew of the sniff of their property nor did the sniff impact their daily lives in any way shape or form. In fact, owners of homes never know that the police are using a narcotics dog on their home while the sniff is being conducted because the police, as in the case at bar, merely sniff the door without anyone knowing. The only way for a homeowner to even know that their house was sniffed by a narcotics dog is after the search warrant has been read to them related to their illegal grow house that has been discovered. Franky's positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana" at the time of the sniff in this case. *Jardines*, supra. Franky was a truly talented drug dog and served the law abiding citizens of Miami-Dade County well. (Pet. J. App. A-54)

The amici wish to impress upon this Honorable Court that it is not their position that an alert to a home in and of itself, standing alone, is enough for probable cause to search one's home. Therefore, the argument that police officers will be wondering the myriad of residential streets in the United States in order to locate front doors with narcotics odor is ludicrous. Law enforcement in this country has neither the time nor the man power to aimlessly meander door to door like the ***Fuller Brush Man*** in mere hope of making a sale. The dog is being used across the country not to start investigations but has a tool to further them. As in the case at bar, the sniff should be allowed as one factor, among multiple factors, in a search warrant that could persuade a neutral and detached magistrate to issue a search warrant for a residence. The mere use of a dog on the front door of the house, itself, is not a search invoking the protections of the Fourth Amendment.

CONCLUSION

Police K-9 Magazine and the National Police Canine Association argue to this Honorable Court that the Florida Supreme Court errored when it ignored long standing precedent holding that an exterior sniff by a trained and certified narcotics dog, of a home's front door, was a search within the plan meaning of the Fourth Amendment The legal philosophy propounded by the Florida Supreme Court is on a legal island virtually all by itself. The Respondent, as in Greek mythology, is trying to lure this Honorable Court close to this preverbal island with its siren song only to have this Court crash into the unseen rocks surrounding the island. The Magazine and The Association urge this court to sail past this island to the shores of mainstream American jurist prudence and reverse the Florida Supreme Court by finding that a sniff is just a sniff and carries no Fourth Amendment protection.

Respectfully submitted,

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