Something Smells Afoul: An Analysis of the End of a District Court Split

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I. INTRODUCTION

On April 14, 2011, the Supreme Court of Florida made a final decision on Jardines v. State (Jardines III), ending an issue split in the Florida Dis-

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strict Courts of Appeal. 2 Jardines III stemmed from an appeal by the defendant seeking to quash evidence that was seized due to a search warrant. 3 In its holding, the court held that, contrary to other decisions by the First and Third District Courts of Appeal of Florida, a “sniff test” conducted at the front door of a home is a search that is protected under the Fourth Amendment. 4 In order for the test to be conducted, probable cause—and not reasonable suspicion—must be met for any search to be constitutional. 5

In the lower court decision by the Third District Court of Appeal, which was overturned by the Supreme Court of Florida, the court held that a person does not have a right of privacy involving contraband, and therefore, a “sniff test” does not fall under the meaning of the Fourth Amendment. 6 The split had been created between the third district and the fourth district, which found in State v. Rabb (Rabb II) 7 that a “sniff test” is a search under the meaning of the Fourth Amendment. 8 However, the Supreme Court of the United States reversed and remanded Rabb II back to the fourth district 9 in light of its decision in Illinois v. Caballes. 10 In its holding in Caballes, the Supreme Court stated that during a lawful traffic stop, the use of a narcotics-detection dog is not a search under the Fourth Amendment when conducted by a newly arrived officer to the scene. 11 This case was part of a line of decisions by the Supreme Court of the United States to hold that the use of a narcotics dog to sniff out narcotics is not a search under the Fourth Amendment because a person has no legitimate privacy interest in contraband. 12

At the same time, in some lower courts’ eyes, there have been decisions by the Supreme Court of the United States that have created a different impression of a dog sniff test, especially of a private residence from the front step. 13 In particular, the key decision of Kyllo v. United States 14 has been seen by lower courts as a reinforcement of the protection of the inside of a

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2. Id. at S147.
3. Id.
4. Id. at S147, S148 n.3.
5. Id. at S147.
6. See State v. Jardines (Jardines I), 9 So. 3d 1, 4 (Fla. 3d Dist. Ct. App. 2008), review granted, 3 So. 3d 1246 (Fla. 2009), and quashed by 36 Fla. L. Weekly S147 (Apr. 14, 2011).
7. 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006).
8. Id. at 1192; see also Jardines I, 9 So. 3d at 10.
11. Id. at 410.
12. Id. at 409 (citing United States v. Place, 462 U.S. 696, 707 (1983)).
home from arbitrary government intrusion. However, the Supreme Court of the United States distinguished Caballes from Kyllo, which has caused many lower courts to come to completely different conclusions on a dog sniff of a private residence, including the different appellate courts of Florida.

This article will first discuss the cases decided by the Supreme Court of the United States that evolved the law of the Fourth Amendment and the legality of a dog sniff for contraband. The next section will analyze the different decisions by the appellate courts in Florida on whether a dog sniff is a search under the Fourth Amendment. The third section will dissect the decision by the Supreme Court of Florida that ended the district court split. Finally, the last section will explain why this is probably not in accord with what the Supreme Court of the United States would decide if and when the Court finally accepts a case involving a dog sniff of a private residence from the front step.

II. SUPREME COURT DECISIONS

The decisions by the highest court of the United States have had an impact on the diverging results of lower courts on the issue of a dog sniff of a private residence from the front step of the home. The Supreme Court of the United States has only addressed the issue of a dog sniff of areas not involving the home. Because of this, when resolving the issue of a dog sniff of a private residence, lower courts have combined the holdings of multiple cases in order to formulate specific rules for these new cases.

A. Initial Fourth Amendment Cases

Before Katz v. United States, the Supreme Court of the United States used a trespass theory to decide if a person's rights under the Fourth Amendment had been violated. The Court would ask if an individual's
person, papers, house or effects had been physically invaded.\footnote{22} In \textit{Olmstead v. United States},\footnote{23} the Court addressed the issue of “whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth . . . Amendment[].”\footnote{24} The Court focused on how the Fourth Amendment specifically mentions only “material things,” and therefore, the wiretapping was not a search because it only involved use of the senses to detect a non-material item.\footnote{25}

“In \textit{Katz}, the Supreme Court overruled the trespass theory and replaced it with the reasonable expectation of privacy theory.”\footnote{26} The majority focused on the idea that the Fourth Amendment does not create “constitutionally protected area[s]— . . . the Fourth Amendment protects people, not places.”\footnote{27} However, it was Justice Harlan’s concurring opinion in \textit{Katz} that created the presently used test for Fourth Amendment searches and seizures.\footnote{28} The test has a two-fold requirement: First, the person needs to have shown an actual and subjective expectation of privacy, and second, this expectation must be recognized as reasonable by society.\footnote{29} This two-fold test has been asked in the shorthand: “Did the defendant have a reasonable expectation of privacy?”\footnote{30} One of the unusual times in which the Court has considered whether an action is a search under the Fourth Amendment is when a dog sniff was used to detect for narcotics.\footnote{31}

\section*{B. Supreme Court Cases Relied Upon by Lower Courts}

\subsection*{1. First Dog Sniff Case}

The Court first addressed the issue of a dog sniff as a search in \textit{United States v. Place}.\footnote{32} “[T]he Court addressed the issue of whether police, based on reasonable suspicion, could temporarily seize a piece of luggage at an
airport and then subject the luggage to a ‘sniff test’ by a drug detection dog. In *Place*, federal agents met the defendant at the La Guardia Airport on information they received from the Miami police. However, upon the request for his luggage, Place refused the search. Still, the agents retrieved the bags from him and told him they would obtain a search warrant for the luggage. The agents held the bags for ninety minutes as they drove to another airport for a drug detection dog to sniff the luggage, which alerted the dog positively to the presence of narcotics. On Monday, the agents received a probable cause warrant to open and physically search the luggage. The Court held the retention of the luggage for ninety minutes was impermissibly long.

However, the Court went further and analyzed the dog sniff of the luggage in dicta. In her article, Leslie Lunney points out that Justice O’Connor’s majority opinion gives a two paragraph citation-less statement saying, a dog sniff of the luggage did not reveal non-contraband items to the public. This is the first time the Court used the phrase *sui generis* to describe a dog sniff. The Court stated a dog sniff is *sui generis* because it “is so limited both in the manner in which the information is obtained” and the manner in which the information is revealed. According to Timothy MacDonnell, this dictum carved out the “contraband exception” to the Fourth Amendment, which is also known as the binary search doctrine. These names refer to the Court’s reasoning that the dog sniff only reveals the possession of contraband and therefore does not violate any legitimate privacy interest. Since the Supreme Court of the United States related in dicta the nature of a dog sniff, lower courts have been using this reasoning that a dog sniff is per se a non-search.

34. *Place*, 462 U.S. at 698.
35. *Id.* at 699.
36. *Id.*
37. *Id.*
38. *Id.*
40. See *id.* at 707 (dictum).
42. See *Place*, 462 U.S. at 707.
43. *Id.*
46. Lunney, *supra* note 41, at 831.
2. The Illegitimacy of Contraband

In 1984, the Supreme Court of the United States further addressed the illegitimacy of an interest in contraband. Employees of a freight carrier discovered a suspicious white powder in a damaged package. While United States v. Jacobsen did not involve the use of a narcotics dog to reveal the presence of contraband, the Court affirmed this thinking by holding that a chemical field test is not a search because there is no legitimate private interest in contraband. The Court explained by stating, “Congress has decided—and there is no question about its power to do so—to treat the interest in ‘privately’ possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.” Since there is no legitimate interest in cocaine, there was no legitimate interest in privacy compromised. However, not every Justice agreed with this holding. In his dissenting opinion, Justice Brennan stated, “we have always looked to the context in which an item is concealed, not to the identity of the concealed item.” Yet, the majority’s reasoning of an illegitimate interest in contraband still remains in effect today.

3. The Privacy of the Home

Another more recent decision that has centered on the possible illegitimacy of contraband is Kyllo. The Court addressed the issue of “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.” The Court answered by holding that, “[w]here, 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

48. Id. at 111.
50. See id. at 123.
51. Id.
52. Id.
53. Id. at 133–34 (Brennan, J., dissenting).
54. Jacobsen, 466 U.S. at 139 (Brennan, J., dissenting).
57. Id.
a ‘search’ and is presumptively unreasonable without a warrant.”\(^{58}\) In *Kyllo*, a federal agent came to suspect that the respondent was using his house to grow marijuana, and to determine this, the agent used a thermal imager to scan the home of the respondent.\(^ {59}\) The scan “took only a few minutes and was performed from [a car] across the street.”\(^ {60}\) The majority opinion, written by Justice Scalia, gave an extensive discussion of the special nature of the home afforded by the Constitution.\(^ {61}\) “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.”\(^ {62}\) Justice Scalia noted that with very few exceptions, the warrantless search of a home is unconstitutional.\(^ {63}\) He stated, “[w]e have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’”\(^ {64}\) The “scan was a ‘search’ because it made technology-assisted inferencing about the interior of a home possible.”\(^ {65}\) However, the dissent did not believe that intimate details were stolen from the home.\(^ {66}\)

Justice Stevens began by reminding the Court that it held “‘[w]hat a person knowingly exposes to the public’ is not protected by the Fourth Amendment.”\(^ {67}\) For a simpler argument, he pointed out that the Fourth Amendment states, “‘secure in their . . . houses.’”\(^ {68}\)

Just as “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public,” so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community.\(^ {69}\)

Justice Stevens believed the Court did not exercise judicial restraint and crafted a new rule that encompassed too much, including a dog sniff being

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58. *Id.* at 40.
59. *Id.* at 29.
60. *Id.* at 30.
62. *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).
63. *Id.*
64. *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).
67. *Id.* at 42 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).
68. *Id.* at 43 (quoting *U.S. Const. amend. IV*).
69. *Id.* at 45 (quoting *California v. Greenwood*, 486 U.S. 35, 41 (1988)).
allowed at a home.\textsuperscript{70} In response to Justice Stevens's dissenting opinion, Justice Scalia stated, "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained."\textsuperscript{71} Furthermore, to say the device only picks up the heat coming from the walls would be to say the eavesdropping device in \textit{Katz} only picked up sound waves coming off the phone booth.\textsuperscript{72} This decision would become the case most relied upon by opponents of a warrantless dog sniff at a private residence.\textsuperscript{73}

4. The Clashing of \textit{Caballes}

The most recent decision by the Supreme Court of the United States addressing a dog sniff is \textit{Caballes}.\textsuperscript{74} In this case, the Court held "[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."\textsuperscript{75} The respondent was pulled over by an officer for speeding, and while the respondent waited in the officer's car, a second officer arrived at the scene and conducted a sniff test with a narcotics dog that lasted less than ten minutes around the outside of the respondent's car.\textsuperscript{76} The Court started off by noting "that a seizure that is lawful at its inception" can become unlawful by an execution that violates a protected interest.\textsuperscript{77} However, the Court found the dog sniff did not violate any protected interest because there is no legitimate privacy interest in contraband.\textsuperscript{78} "[G]overnmental conduct that \textit{only} reveals the possession of contraband 'compromises no legitimate privacy interest.'"\textsuperscript{79} The Court also addressed the issue of a false positive by the dog.\textsuperscript{80} The Court responded to this contention raised by the respondent by saying that the tests are designed,

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 47, 51.
\item \textsuperscript{71} \textit{Kyllo}, 533 U.S. at 37.
\item \textsuperscript{72} \textit{Id.} at 35.
\item \textsuperscript{73} \textit{Jardines III}, 36 Fla. L. Weekly S147, S154 (Apr. 14, 2011); \textit{Rabb II}, 920 So. 2d 1175, 1183 (Fla. 4th Dist. Ct. App. 2006).
\item \textsuperscript{74} Illinois v. Caballes, 543 U.S. 405, 407 (2005).
\item \textsuperscript{75} \textit{Id.} at 410.
\item \textsuperscript{76} \textit{Id.} at 406.
\item \textsuperscript{77} \textit{Id.} at 407.
\item \textsuperscript{78} \textit{Id.} at 408.
\item \textsuperscript{79} \textit{Caballes}, 543 U.S. at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).
\item \textsuperscript{80} \textit{Id.} at 409.
\end{itemize}
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if done properly, to only reveal the presence of contraband and no other interests.81

The Court recognized the potential misinterpretations by lower courts of Kyllo as applied to a dog sniff.82 In its opinion, the Court points out that the central factor in Kyllo was the ability of the technology to detect intimate details of a home other than contraband.83 As stated previously, when done right, a dog sniff only detects the presence of contraband; therefore, the decision of Caballes is consistent with Kyllo because no intimate details were invaded.84 However, the dissent believed there was more than a possibility for a false positive than the majority believed.85 Justice Souter pointed out that an erroneous alert is the triggering factor if there is a search that turns up nothing but intimate details of a person’s home.86

When combining these decisions by the Supreme Court of the United States, lower courts have been left at a fork in the road, needing to decide which path they will take.87 Lower courts can follow the general rule for contraband laid out in the dog sniff cases and in Jacobsen,88 or they can follow the Kyllo decision that “the Fourth Amendment draws ‘a firm line at the entrance to the house’” which the Court believes “must be not only firm but also bright.”89

III. FLORIDA DISTRICT COURT CASES

By using the above analyzed decisions by the Supreme Court of the United States, lower courts across the United States have come to varying conclusions on cases that involve a dog sniff of a private residence.90 The State of Florida is no exception to this.91

81. Id.
82. See id. (citing Kyllo v. United States, 533 U.S. 27, 29–31 (2001)).
83. Id. at 409–10 (citing Kyllo, 533 U.S. at 38).
85. See id. at 411 (Souter, J., dissenting). “Justice Souter documented cases in which dogs were accepted by a court as reliable with an accuracy rate of 71%, an error rate of 8% over a dog’s entire career, and an error rate of between 7% and 38%.” Lunney, supra note 41, at 862 n.155 (citations omitted).
86. Caballes, 543 U.S. at 413 (Souter, J., dissenting).
87. See Lunney, supra note 41, at 854.
90. See Jardines I, 9 So. 3d 1, 10 (Fla. 3d Dist. Ct. App. 2008), review granted, 3 So. 3d 1246 (Fla. 2009), and quashed by 36 Fla. L. Weekly S147 (Apr. 14, 2011).
91. See id.
A. The Beginning of a Split

In *State v. Griffin (Griffin I)*, the First District Court of Appeal of Florida held, while a positive alert by a narcotics detection dog in a dog sniff of the defendant's car was probable cause to search the car, it was not enough to search his person. However, the court reluctantly held this way. The first district certified a question to the Supreme Court of Florida, which stated, "[w]hether, under the Fourth Amendment of the United States Constitution, a trained narcotics-detection dog alert of a vehicle provides probable cause to search the vehicle's driver who is also the sole occupant of the vehicle?" The court was required to follow precedent established by *Williams v. State*, but felt the recent decision of the Supreme Court of the United States in *Caballes* conflicted with the holding of *Williams*. "Our constitution requires us to construe the right to be free from unreasonable searches or seizures 'in conformity with the [Fourth] Amendment to the United States Constitution, as interpreted by the United States Supreme Court.'" The court certified the question to the Supreme Court of Florida because it felt that *Caballes* intended for incidences like this to not be searches, but thought that the Supreme Court of Florida should decide since it is an issue that has not been analyzed by the highest court yet. The First District Court quoted the Supreme Court of the United States which stated in *Maryland v. Pringle* that the "standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" The Supreme Court of Florida denied review on this appeal.

92. 949 So. 2d 309 (Fla. 1st Dist. Ct. App. 2007).
93. Id. at 312.
94. See id. at 314.
95. Id. at 315 (emphasis omitted).
96. 911 So. 2d 861 (Fla. 1st Dist. Ct. App. 2005) (per curiam).
97. Griffin I, 949 So. 2d at 310. The Williams court held that a positive alert by a drug detection dog did not allow probable cause to search the suspect's person. Williams, 911 So. 2d at 861. The court based this decision on two Second District Court of Appeal's decisions that held a dog sniff was not probable cause to conduct a search. Id.
99. Id. at 310, 314.
101. Griffin I, 949 So. 2d at 312 (quoting Pringle, 540 U.S. at 370).
102. State v. Griffin (Griffin II), 958 So. 2d 920, 920 (Fla. 2007).
B. The Controversial Rabb Decision

Like the First District Court in Williams, the Fourth District Court of Appeal of Florida held a dog sniff for the detection of narcotics of a private residence from the outside of the home is a search under the Fourth Amendment in Rabb II.\textsuperscript{103} This court ruled on Rabb twice—on the first appeal and then on remand from the Supreme Court of the United States.\textsuperscript{104} The first decision was vacated and remanded back to the fourth district “for further consideration in light of . . . [Caballes].”\textsuperscript{105} The case centers around the dog sniff of a private residence for a probable cause warrant.\textsuperscript{106} Information was gathered from a confidential source that the defendant was cultivating marijuana.\textsuperscript{107} The police pulled the defendant over in his car after watching him leave his home.\textsuperscript{108} Upon pulling him over, the police noticed marijuana cultivation books and videos on his front seat.\textsuperscript{109} The officer performed a dog sniff on the outside of the defendant’s home, and after a positive alert, received a probable cause warrant to search the home.\textsuperscript{110}

While the State insisted the warrant was based on the totality of the circumstances and not just the dog sniff, the district court still did not believe all the circumstances combined would allow a search of the home.\textsuperscript{111} Furthermore, the court held the dog sniff of a private residence performed on the doorstep of a person’s home is a search under the Fourth Amendment.\textsuperscript{112} By this holding, the court relied on United States v. Thomas\textsuperscript{113} from the Second Circuit.\textsuperscript{114} As in Kyllo, the court strongly focused on the sanctity of the home in Anglo-American law.\textsuperscript{115} “[T]he ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’”\textsuperscript{116} The court further focused on the holding of Kyllo by analogizing the heat emanating from the home and the smell of marijuana that reached the ca-

\textsuperscript{103} Rabb II, 920 So. 2d 1175, 1192 (Fla. 4th Dist. Ct. App. 2006); Williams v. State, 911 So. 2d 861, 861 (Fla. 1st Dist. Ct. App. 2005) (per curiam).
\textsuperscript{104} Rabb II, 920 So. 2d at 1177.
\textsuperscript{105} Rabb I, 544 U.S. 1028, 1028 (2005), substituted by 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{106} Rabb II, 920 So. 2d at 1178.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 1179.
\textsuperscript{111} Rabb II, 920 So. 2d at 1179–80.
\textsuperscript{112} Id. at 1192.
\textsuperscript{113} 757 F.2d 1359 (2d Cir. 1985).
\textsuperscript{114} Rabb II, 920 So. 2d at 1184.
\textsuperscript{115} See id. at 1182–83.
\textsuperscript{116} Id. at 1182 (quoting Payton v. New York, 445 U.S. 573, 585 (1980)).
nine’s nose on the doorstep.\textsuperscript{117} In the court’s view, the smell of marijuana originating from the inside of the home was just an intimate detail as the heat emanating from the home in \textit{Kyllo}.\textsuperscript{118}

Because of precedent set by the Supreme Court of the United States and prior decisions of the Florida district courts of appeal, the fourth district was forced to distinguish multiple cases that held a dog sniff of the outside of a private residence was not a search under the Fourth Amendment.\textsuperscript{119} First, the court distinguished this case from \textit{Place}.\textsuperscript{120} While the subject of the dog sniff in \textit{Place} was luggage, the court thought that a private residence is very different both in physical characteristics and in protection granted by law, especially historically.\textsuperscript{121} A decision by the Fifth District Court of Appeal of Florida was slightly harder to overcome.\textsuperscript{122} \textit{Nelson v. State}\textsuperscript{123} involved a dog sniff in a hotel hallway.\textsuperscript{124} The court distinguished this case from the one at hand by stating that a hotel guest expects people to be in the hallways more than one expects a person to be on the doorstep of his her private residence.\textsuperscript{125}

However, the most important distinction the \textit{Rabb II} court was forced to make relates to the reason the Supreme Court of the United States remanded.\textsuperscript{126} The Fourth District Court of Appeal of Florida felt this was different from \textit{Caballes} because the issue was not a dog sniff performed on a car, as it was in \textit{Caballes}, but the issue was a dog sniff performed on a home.\textsuperscript{127} Most importantly, the \textit{Rabb II} court believed that case law is “not developed in a vacuum.”\textsuperscript{128} Every case is situation-sensitive.\textsuperscript{129} As the majority opinion pointed out, the expectation of privacy is analyzed based on the place, not the item being retrieved from inside, as the dissent did.\textsuperscript{130} Both of those actions, looking at the expectation of privacy of the item and not evolving case law as it pertains to special circumstances, will lead to a slippery slope in the majority’s view.\textsuperscript{131}

\textsuperscript{117} Id. at 1183.
\textsuperscript{118} Id. at 1184–85.
\textsuperscript{119} \textit{Rabb II}, 920 So. 2d at 1185–86.
\textsuperscript{120} Id. at 1183–84.
\textsuperscript{121} Id. at 1184.
\textsuperscript{122} Id. at 1185.
\textsuperscript{123} 867 So. 2d 534 (Fla. 5th Dist. Ct. App. 2004).
\textsuperscript{124} Id. at 535.
\textsuperscript{125} \textit{Rabb II}, 920 So. 2d at 1187.
\textsuperscript{126} See id. at 1189.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} \textit{Rabb II}, 920 So. 2d at 1190.
\textsuperscript{131} Id.
Believing the majority created a "schizophrenic" law, the dissent had much to say. \[^1\]

\[\text{"[B]ecause a house is neither luggage in an airport nor a car by the side of the road, a dog sniff at the front door of a house is a Fourth Amendment search."}\] \[^3\]

Just as the majority believed the dissent was focusing on the incorrect area, the dissent believed the majority misinterpreted the turning factor in the decisions of dog sniff cases by the Supreme Court of the United States. \[^4\]

\[\text{"Neither of the Supreme Court's dog sniff cases turns on the location of the sniff. Both cases are based on the unique nature of the canine nose."}\] \[^5\]

While the Supreme Court of the United States did state the place in its ruling, such as luggage or a car, the main reasoning for the Supreme Court of the United States in these prior decisions of dog sniff was the fact that a sniff only discloses the presence of contraband. \[^6\]

\[\text{"If the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home."}\] \[^7\]

Moving beyond the dog sniff cases considered by the Supreme Court of the United States, the dissent also brought up *Jacobsen*. \[^8\]

In that case, the Court defined a search as occurring "when an expectation of privacy that society is prepared to consider reasonable is infringed." \[^9\]

"A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." \[^10\]

Lastly, the dissent wanted to draw attention to the lack of critical analysis the majority gave to the *Caballes* decision. \[^11\]

The Supreme Court of the United States distinguished *Caballes* from *Kyllo* by focusing on the fact that the thermal-imaging device could detect lawful activity. \[^12\]

As stated before by the Court in the federal dog sniff cases, a drug detection dog does not detect lawful activity—it only detects the unlawful possession of contraband. \[^13\]

[^1]: Id. at 1203 (Gross, J., dissenting).
[^2]: Id. at 1193.
[^3]: Id. at 1197.
[^4]: *Rabb II*, 920 So. 2d at 1193.
[^5]: *Rabb II*, 920 So. 2d at 1197 (Gross, J., dissenting) (citing United States v. Jacobsen, 466 U.S. 109 (1984)).
[^7]: *Rabb II*, 920 So. 2d at 1197 (Gross, J., dissenting) (citing United States v. Jacobsen, 466 U.S. 109 (1984)).
[^8]: *Jacobsen*, 466 U.S. at 113.
[^9]: Id. at 123.
[^10]: *Rabb II*, 920 So. 2d at 1199 (Gross, J., dissenting).
C. Post-Rabb Decision

The different outcome in Rabb II incited another certified question to be sent to the Supreme Court of Florida. The First District Court of Appeal of Florida certified a conflict with Rabb II in Stabler v. State. In Stabler, officers initiated a surveillance based on a tip and followed the suspect as he was leaving his home. Upon stopping the suspect in his car, the officers performed a dog sniff around the exterior of the car, whereupon a bottle of liquid codeine was found. At the same time, officers at the suspect’s girlfriend’s home had a detection dog sniff the outside of the home from the front door of the apartment. The dog alerted positively to the presence of narcotics in the private residence. Based on these two happenings, the officers obtained a probable cause search warrant and physically searched the home. The deference given to the dog sniff cases decided upon by the Supreme Court of the United States and by the court in Stabler was much greater than that of the court in Rabb II. The court stated, “[c]onsidering 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 this instant case.” Also, the court did not believe Kyllo was a controlling factor. “Critical to that decision was the fact that the device was [also] capable of detecting lawful activity . . . .” These cases represent an established pattern in the appellate courts of Florida. These cases represent two sides that interpreted very binding and valid precedent established by the Supreme Court of the United States.

145. 990 So. 2d 1258, 1263 (Fla. 1st Dist. Ct. App. 2008) (citing Rabb II, 920 So. 2d at 1192).
146. Id. at 1258–59.
147. Id. at 1259.
148. Id.
149. Id.
150. Stabler, 990 So. 2d at 1259.
151. Compare id. at 1261 with Rabb II, 920 So. 2d 1175, 1184 (Fla. 4th Dist. Ct. App. 2006).
152. Stabler, 990 So. 2d at 1260.
153. See id. at 1261–62.
154. Id. at 1261 (quoting Illinois v. Caballes, 543 U.S. 405, 409 (2005)) (alteration in original).
155. See id.; Griffin I, 949 So. 2d 309, 315 (Fla. 1st Dist. Ct. App. 2007); Rabb II, 920 So. 2d at 1192.
156. See Griffin I, 949 So. 2d at 315; Rabb II, 920 So. 2d at 1192.
Eventually, these views would come head to head and a winner would be chosen—at least a winner in the State of Florida.157

IV. THE SUPREME COURT OF FLORIDA AND JARDINES

Finally, the Supreme Court of Florida accepted a certified conflict.158 This time it was between Rabb II and State v. Jardines (Jardines I).159

A. The District Court Decision

In Jardines I, a crime stoppers tip led two police officers to approach the defendant’s door.160 When the officers stood at the door, they noticed the air conditioner was continuously running.161 A drug detection dog, which was “positively alerted to the odor of narcotics approximately 399 times” in his career, was alerted to the presence of narcotics from the front door.162 In his defense, the defendant relied on Rabb II.163

The Third District Court of Appeal of Florida held that “a canine sniff is not a Fourth Amendment search.”164 The court relied on Caballes and Place to come to this usual conclusion.165 Furthermore, the court utilized the reasoning from Jacobsen.166 Because a dog only detects contraband and because there is no “‘legitimate’ privacy interest in contraband,” a canine sniff is not a Fourth Amendment search.167 Because Kyllo is the case most cited by courts that find a dog sniff of a private residence is a search, the district court needed to explain why it found it to not apply to the dog sniff of a home.168 The court first began by stating that a dog is not technology—it has no modifications.169 That is why the Supreme Court of the United States described dogs as sui generis.170 As contrasted to the thermal imager in Kyl-
lo, a dog sniff “does not indiscriminately detect legal activity.”171 “Just as evidence in the plain view of officers may be searched without a warrant,172 evidence in the plain smell may be detected without a warrant.”173 Furthermore, in order to use this plain smell doctrine, the officer and the dog must be there lawfully.174 The court addressed this by citing, “one does not harbor an expectation of privacy on a front porch where salesmen or visitor may appear at any time.”175

Judge Cope wrote an opinion that concurred in part and dissented in part.176 He gave a different take on the dog sniff of a private residence that not many have considered in the discussion.177 He believed the court should hold that a dog sniff can be performed “if there is a reasonable suspicion of drug activity.”178 Most courts that hold that a dog sniff of a private residence is a search require probable cause.179 Judge Cope dictated three schools of thought on the issue of a dog sniff of a home.180 The first school of thought holds in accord with the general idea given by the Supreme Court of the United States: a dog sniff of a private residence is not a search.181 Logically, a search warrant is not required.182 The second school of thought is the evident counterpart of the first—the government must have a probable cause warrant in order to perform a dog sniff from the outside of a private residence.183 The last category is somewhere in the middle.184 Rather than probable cause, an officer only needs reasonable, articulable suspicion in order to perform the dog sniff of a private residence from the front door step.185 This idea centers on the idea that “a free society will not remain free if police may use this, or any other crime detection device, at random and without reason.”186 This is the position that Judge Cope advocated.187 He finished by

171. Id.
172. Id. at 6 (citing Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam)).
173. Id. (citing United States v. Harvey, 961 F.2d 1361, 1363 (8th Cir. 1992) (per curiam)).
174. Jardines I, 9 So. 3d at 6 (quoting People v. Jones, 755 N.W.2d 224, 228 (Mich. Ct. App. 2008)).
175. Id. at 7 (quoting State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981)).
176. Id. at 10 (Cope, J., concurring in part and dissenting in part).
177. See id. at 12.
178. Id. at 10.
179. Jardines I, 9 So. 3d at 12 (Cope, J., concurring in part and dissenting in part).
180. Id. at 12–13.
181. Id. at 12.
182. Id.
183. Id.
185. Id. at 13.
186. Id.
adding, "[w]hile the denial of certiorari by the United States Supreme Court has no precedential effect, it certainly indicates that the Court has decided to leave this dog sniff question open for decision another day."188

B. The Supreme Court Decision

This decision was expressly overruled by the Supreme Court of Florida.189 The court addressed two issues when deciding *Jardines III*.190 First, "whether a 'sniff test' by a drug detection dog conducted at the front door of a private residence is a 'search' under the Fourth Amendment."191 Second, "whether the evidentiary showing of wrongdoing that the government must make prior to conducting such a search is probable cause or reasonable suspicion."192 The court answered the first question with a resounding yes.193

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.194

The court focused its discussion on the home and the privacy it should be afforded.195 "[W]herever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable government intrusion."196 After analyzing the federal drug sniff cases—*Place, City of Indianapolis v. Edmond*,197 and *Caballes*—the court concluded those instances were less intrusive than the case at hand.198 The sniffs in the previous cases involved luggage or a car, whereas a home was more special to this court.199 More importantly to the court, the majority opinion believed the case at hand created more of a public spectacle and caused more harassment and embar-
The court believed the situation was a much larger affair than a “subtle” sniff test. The court listed the players involved to fabricate the drama: multiple police vehicles, multiple law enforcement personnel, a dog handler, and a trained detection dog “engaged in a vigorous search effort on the front porch,” all viewed by the general public. The court further commented on the whole scene by adding that if the resident were home, the sniff could be a “frightening and harrowing experience that could prompt a reflexive or unpredictable response.” Above all, the court did not believe that the prior decisions by the Supreme Court of the United States that involved dog sniffs applied to a sniff at a home.

What the Supreme Court of Florida was most worried about was police abuse of a dog sniff. The court felt that if the sniff was not treated as a search then there would be “nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen.” Therefore, the court believed that a warrant should be required to perform a dog sniff of a private residence from the front door. “With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.” Furthermore, anything short of a probable cause warrant would not suffice for the highest court of Florida. As opposed to Justice Cope’s opinion in the lower court’s decision, the majority did not think reasonable suspicion is enough. The court pointed to the Warrant Clause of the Fourth Amendment and said a balancing of interests—governmental and private—for reasonable suspicion is only used when there are needs that go

200. Id. at S152.
201. See id. at S150–51.
202. Id. at S151–52.
204. Id. at S150.
205. See id. at S152.
206. Id.
207. Id. at S153. Lunney thinks this is the right choice and further combats naysayers by pointing out that it does not conflict with the idea that having probable cause would defeat the purpose of the dog sniff and lead straight to a search of the home. Lunney, supra note 41, at 891. Rather, the probable cause is for the dog sniff, not the physical search inside the private residence. See id.
209. See id. at S153.
210. Jardines I, 9 So. 3d 1, 10 (Fla. 3d Dist. Ct. App. 2008), review granted, 3 So. 3d 1246 (Fla. 2009), and quashed by 36 Fla. L. Weekly S147 (Apr. 14, 2011).
AN ANALYSIS OF THE END OF A DISTRICT COURT SPLIT

Beyond the typical law enforcement. By citing to the Warrant Clause of the Fourth Amendment, the court is saying this is a search and nothing less.

The concurring opinion written by Justice Lewis takes the majority opinion one step further. He believed the court did not focus on the home enough. He continued by poking fun at the idea that the police officers could use a continuously running air conditioner as a factor for reasonable suspicion by stating that most persons in South Florida run their air continuously. Furthermore, he analogized the aromas a dog could potentially sniff with the intimate details the thermal imaging device in Kyllo could detect. There is the aroma of cooking, a scent from an air freshener, and even more unpleasant smells originating inside a home. “It is inescapable that the air and the content of the air within the private home is inextricably interwoven as part of the protected zone of privacy to which the expectation of privacy attaches.” While the majority opinion did not focus on the intimate details of the home, Justice Lewis thought this should have been emphasized more.

As the courts before that relied on the dog sniff cases by the Supreme Court of the United States, so too did the dissenting opinion in this groundbreaking case from the Supreme Court of Florida. “[D]espite statements about privacy interests in items and odors within and escaping from a home, the United States Supreme Court has ruled that there are no legitimate privacy interests in contraband under the Fourth Amendment.” In his dissenting opinion, Justice Polston lays out two reasons why his view is correct, and these two reasons are rules set out by the Supreme Court of the United States. First, a search does not occur “unless ‘the [person] manifested a subjective expectation of privacy.’” Second, and lastly, the Supreme Court of the United States has held that, “because [a dog sniff] only

212. Id.
213. See id. at S152.
214. Id. at S154 (Lewis, J., specially concurring).
215. Id. at S155.
217. See id.
218. Id.
219. Id.
220. See id.
222. Id. at S157.
223. Id. at S158.
224. Id. (quoting Kyllo v. United States, 533 U.S. 27, 33 (2001)).
reveals contraband, . . . there is no legitimate privacy interest” that can be infringed upon.225

Justice Polston addresses the issue of a dog sniff detecting legitimate interests or even alerting a false positive by saying, “as in Place, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.”226 Along this line, Justice Polston distinguished Kyllo from the situation at hand.227 The Supreme Court of the United States held in Kyllo that the thermal imager was a search under the Fourth Amendment, because it detected lawful activity that does have a legitimate privacy interest.228 Furthermore, even though Kyllo is the case relied upon by courts finding a dog sniff is a search, this dissenting opinion reasons that the dog sniff of a private residence does not matter.229 Neither Jacobsen, Place, nor Caballes center on what was being searched, such as the luggage or the car.230 The cases center on the capability of the dog to detect only a contraband item in which a person has no legitimate interest.231 Moreover, the Supreme Court of the United States specifically distinguished Kyllo in Caballes as a case that involved a home, so that the dog sniff would not be applied to that as Justice Stevens worried in Kyllo.232 It is precisely these two different views of decisions by the Supreme Court of the United States that lead to varying outcomes which may not be in accord with what the Supreme Court of the United States would choose.233

V. ISSUES ARISING FROM JARDINES

According to article I, section 12 of the Florida Constitution, the Supreme Court of Florida is allowed to grant higher protection in the absence of a precedent established by the Supreme Court of the United States that is

225. Id.
227. Id. at S159.
228. Kyllo, 533 U.S. at 40.
229. See Jardines III, 36 Fla. L. Weekly at S159 (Polston, J., dissenting).
230. See id. at S157. Justice Polston also addresses the humiliation issue that the majority felt was a major part of its decision. Id. at S159. “Place, Edmond, and Caballes all involved law enforcement activity by multiple officers.” Id.
231. Id.
directly on point to the contrary. Some states have extended protection to citizens in their homes beyond that of the Fourth Amendment because these states’ constitutions allow them to do that.

The Rabb court could not avoid the issue as other courts had by declaring that the state constitution provided greater protection than the United States Constitution. Article I, section 12 of the Florida Constitution, which provides Florida citizens the right to be free from unreasonable searches and seizures, also states section 12 “shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court.” . . . The Rabb court focused its analysis on distinguishing Caballes from Kyllo and explaining why Kyllo was more applicable to the case at bar.

Therefore, the Supreme Court of Florida can only ignore precedent established by the Supreme Court of the United States when the precedent is contrary to the case at hand. The Supreme Court of Florida, in Jardines III, tried to do just that—first, by stating that neither Caballes nor Place involved dog sniffs of a home, and second, by stating that Kyllo’s use of a thermal imager is more on point because it involved a home.

A. Kyllo Should Not be Applied to the “Dog Sniff” Cases

Kyllo is not the proper case to be used for comparison to the dog sniff of a home. The use of the thermal imager in Kyllo was a search under the Fourth Amendment because the device revealed intimate details of a home other than the illegitimate interest from the heat produced by the growing lamps. While the concurring opinion in Jardines III tried to take the fact

234. FLA. CONST. art. I, § 12.
235. MacDonnell, supra note 21, at 336. For example, Indiana’s constitution has the same written language as the Fourth Amendment, but an appeals court of Indiana has interpreted its constitution as allowing greater protection. Id. The court states the highest court of Indiana “explicitly rejected the expectation of privacy as a test of the reasonableness of a search or seizure.” Id. (quoting Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005)). In this case, the greater protection is treating a dog sniff of a private residence from the front porch of the home as a search under the Fourth Amendment. Id.
236. Id. at 341–42 (quoting FLA. CONST. art I, § 12).
237. MacDonnell, supra note 21, at 341.
239. Id. at S159 (Polston, J., dissenting).
that a dog can smell the presence of other items in a home, such as air fresheners or cooking, Justice Lewis failed to remember one thing: this is a dog. A person had to evaluate the heat scan to determine if there was extra heat radiating from the home. The person who must read the scan is invading a privacy interest, whereas when a dog is detecting the intimate smells of a home, it is not telling a human: They are baking an apple pie in there.

The rule established by the Kyllo court should be considered when deciding if Kyllo should be applied to a dog sniff performed at a private residence. "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." This standard raises multiple issues. First, is a dog technology? Second, would a dog sniff be considered a physical intrusion? Third, is a narcotics detection dog considered in "general public use"? The first and last questions can be considered similarly. Dogs have been used throughout history for hundreds of years. However, Leslie Lunney cites to the White House's Office of National Drug Control Policy, which lists detection dogs as "Non-Intrusive Technology." While this may seem to create conflict, the focus then should be on the non-intrusive part of the title, which leads to the second question.

The Jardines III court relied on this language in Kyllo to relate...
the dog sniff of the private residence to the use of the thermal imager.\textsuperscript{255} The Supreme Court of Florida stated that the information gathered by the dog sniff could not have otherwise been obtained without physical intrusion.\textsuperscript{256} On the other hand, the \textit{Place} court called the act of a dog sniff less intrusive than a physical search because a dog sniff does not require the opening of a car door.\textsuperscript{257} Just the same, neither would the dog sniff of a home require the opening of a door.\textsuperscript{258}

B. Caballes as the Controlling Precedent for “Dog Sniff” Cases

Furthermore, \textit{Caballes} addressed the issue of a false positive, which would reveal to humans a privacy interest that should have been protected.\textsuperscript{259} The Supreme Court of the United States pointed out that when done right, a dog sniff should not jeopardize any privacy interests in a home.\textsuperscript{260} This seems to say the Court recognized that there is a potential, but that it is too remote.\textsuperscript{261} In the same opinion, Justice Stevens responded to the false positive argument raised by the respondent by stating that a false positive does not, in and of itself, reveal any legitimate privacy interest.\textsuperscript{262} While some may read this as completely discarding the issue of a false positive,\textsuperscript{263} this is probably not what Justice Stevens was hinting at.\textsuperscript{264} Justice Stevens was not saying a false positive does not reveal any legitimate interests because clearly, it would.\textsuperscript{265} What Justice Stevens was probably implicating is the fact that the physical intrusion will actually be the cause of invasion of a legitimate interest, rather than the dog sniff.\textsuperscript{266}

Some have criticized the \textit{Caballes} court for going “beyond what was strictly necessary” by explaining “why the \textit{Caballes} decision was ‘entirely consistent with’ \textit{Kyllo}.”\textsuperscript{267} MacDonnell believes that the majority in \textit{Caballes} changed the meaning of \textit{Kyllo} from the home being protected to what

\begin{itemize}
\item \textsuperscript{255} Jardines \textit{III}, 36 Fla. L. Weekly S147, S149 (Apr. 14, 2011) (citing \textit{Kyllo} v. United States, 533 U.S. 27, 29 (2001)).
\item \textsuperscript{256} Id. at S150.
\item \textsuperscript{257} See United States v. \textit{Place}, 462 U.S. 696, 707 (1983).
\item \textsuperscript{258} See \textit{Jardines \textit{III}}, 36 Fla. L. Weekly at S151.
\item \textsuperscript{259} Illinois v. \textit{Caballes}, 543 U.S. 405, 409 (2005).
\item \textsuperscript{260} Id.
\item \textsuperscript{262} \textit{Caballes}, 543 U.S. at 409.
\item \textsuperscript{263} See \textit{Lunney, supra} note 41, at 871 (calling this an “artificial conclusion”).
\item \textsuperscript{264} See \textit{Caballes}, 543 U.S. at 409.
\item \textsuperscript{265} See id.
\item \textsuperscript{266} See id.
\item \textsuperscript{267} MacDonnell, \textit{supra} note 21, at 316 (citing \textit{Caballes}, 543 U.S. at 409).
\end{itemize}
is being protected—or not, in the dog sniff case.\(^{268}\) However, the distinction between *Caballes* and *Kyllo* could be seen as directly in accord with other previous decisions by the Supreme Court of the United States.\(^{269}\) In *California v. Ciraolo*,\(^{270}\) the Court stated, “[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.”\(^{271}\) Just as an officer need not close his eyes when he is approaching a home, he need not block his other senses, such as smell.\(^{272}\) While some believe that a narcotics dog should not be equated to an officer, dogs have been used in law enforcement since the constitution was created.\(^{273}\)

Furthermore, the protection of the Fourth Amendment allows “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”\(^{274}\) Similarly, the rule from Justice Harlan’s concurring opinion in *Katz* asks whether the person has a reasonable subjective expectation of privacy.\(^{275}\) Both of these statements from the Supreme Court of the United States involve a reasonable expectation.\(^{276}\) The Court has held that there is no reasonable expectation of privacy in contraband.\(^{277}\) Therefore, a person should have no expectation of privacy in respect to contraband, even if that item is located within a private residence.\(^{278}\) Protectors of the home worry that allowing a dog sniff of a home will allow officers to begin arbitrarily sniffing anytime at any home.\(^{279}\) However, while Anglo-American law may afford the home more protection, it does not afford that protection to contraband.\(^{280}\)

The Supreme Court of the United States even remanded a case back to the Supreme Court of Florida in light of its decision in *Caballes*.\(^{281}\) The Supreme Court of the United States reviewed a decision by an appellate court

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268. *Id.* at 317.
270. *Id.* at 213, 215 (holding that aerial surveillance is not a search).
272. *Id.; see also Silverman*, 365 U.S. at 511.
279. *Id.; Place*, 462 U.S. at 707.

https://nsuworks.nova.edu/nlr/vol36/iss1/8
of Florida on the issue of a dog sniff of a private residence and remanded it back to the appeals court in order for the Florida court to reevaluate the decision.\textsuperscript{282} If the Supreme Court of the United States felt like it was the right decision, it probably would not have remanded the case back to be reevaluated. The \textit{Rabb II} court distinguished the two cases by stating that \textit{Rabb I} did not involve a dog sniff of a car.\textsuperscript{283} By stating this, it seems to imply that the Supreme Court of the United States did not read the issue before it.\textsuperscript{284} \textit{Kyllo} was before \textit{Caballes}; if the Supreme Court of the United States wanted \textit{Kyllo} to apply to \textit{Caballes}, the Court would have explained that.\textsuperscript{285} After quickly dismissing \textit{Caballes}, the \textit{Rabb II} court then relied on another circuit's opinion,\textsuperscript{286} a case by the Supreme Court of the United States, not involving a dog sniff,\textsuperscript{287} and a dissenting opinion from \textit{Caballes},\textsuperscript{288} instead of the majority opinion that the Supreme Court of the United States was intending the Florida court to reconsider.\textsuperscript{289}

\section*{VI. CONCLUSION}

The Supreme Court of Florida has held that a dog sniff performed on a private residence from the front step is a search under the Fourth Amendment of the Florida Constitution.\textsuperscript{290} According to the Florida Constitution, the highest court of Florida is allowed to make decisions in the absence of precedent to the contrary by the Supreme Court of the United States.\textsuperscript{291} Feeling that none of the federal “dog sniff” cases pertained directly to a private residence, the Supreme Court of Florida made an unprecedented decision in the theater of the Fourth Amendment.\textsuperscript{292}

However, by focusing so strongly on the importance of the privacy of a home, the Supreme Court of Florida, overlooked—and noticeably ignored—

\begin{small}
\begin{thebibliography}{9}
\bibitem{282} Id.
\bibitem{283} \textit{Rabb II}, 920 So. 2d 1175, 1189 (Fla. 4th Dist. Ct. App. 2006).
\bibitem{284} \textit{See id.; Rabb I}, 544 U.S. at 1028.
\bibitem{286} United States, \textit{v. Thomas}, 757 F.2d 1359 (2d Cir. 1985). The second circuit is the only federal circuit to decide that a dog sniff of a home from the outside is a search under the Fourth Amendment. Lunney, \textit{supra} note 41, at 887–88. The seventh circuit criticized \textit{Thomas} by pointing out that even if \textit{Thomas} had a subjective expectation of privacy, society is not ready to consider that expectation to be reasonable in contraband. United States \textit{v. Brock}, 417 F.3d 692, 697 (7th Cir. 2005), \textit{cert. denied}, 130 S. Ct. 762 (2009).
\bibitem{288} \textit{Caballes}, 543 U.S. at 411 (Souter, J., dissenting).
\bibitem{289} \textit{Rabb I}, 544 U.S. at 1028.
\bibitem{290} \textit{Jardines III}, 36 Fla. L. Weekly S147, S154 (Apr. 14, 2011).
\bibitem{291} \textit{See FLA. CONST.} art I, § 12.
\bibitem{292} \textit{See Jardines III}, 36 Fla. L. Weekly at S152.
\end{thebibliography}
\end{small}
the holdings of the Supreme Court of the United States that a person has no legitimate privacy interest in contraband.\textsuperscript{293} Still, as long as there is no binding decision by the highest court of this nation on a case involving a dog sniff of a private residence, the Supreme Court of Florida's decision will stand in its jurisdiction.\textsuperscript{294}

\textsuperscript{293} Id.; United States v. Place, 462 U.S. 696, 707 (1983).
\textsuperscript{294} See Fla. Const. art I, § 12.