CONSTITUTIONAL LAW – UNLAWFUL SEARCHES – WHEN THE POLICE INVESTIGATE A HOME USING A DRUG-SNIFFING DOG IT IS A PHYSICALLY INTRUSIVE "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT

I. FACTS

In 2006, the Miami-Dade Police Department and Drug Enforcement Administration sent a joint surveillance team to investigate Joelis Jardines' home.[1] During the stakeout, Detective William Pedraja approached Jardines' home accompanied by Detective Douglas Bartlet and Detective Bartlet's drug-sniffing

[1] Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013). One month earlier, Detective William Pedraja of the Miami-Dade Police Department had received an unverified tip that Jardines was growing marijuana in his home. *Id.* Detective Pedraja was also sent as part of the surveillance team. *Id.*

dog.[2] As they approached Jardines' front porch, the dog alerted to the scent of a drug it had been trained to detect.[3] As the dog got up on the porch and sniffed next to the front door it sat down, indicating to Detective Bartlet that the dog had found the strongest source of the odor.[4]

After returning with a warrant, the officers searched Jardines' home and discovered he had marijuana plants inside.[5] Jardines was then charged with trafficking cannabis, and at his trial he moved to suppress the collected marijuana evidence on grounds that the drug-sniff was an unreasonable search.[6] The trial court granted Jardines' motion to suppress the evidence, but the Florida Third District Court of Appeals reversed that decision.[7] The Florida Supreme Court, however, quashed the appellate court's decision and approved the trial court's decision to suppress the marijuana evidence.[8]

The United States Supreme Court granted certiorari to determine if the officers' behavior was a search within the meaning of the Fourth Amendment and held: affirmed.[9] When the

---

[2] *Id.* The surveillance team watched the home for approximately fifteen minutes, saw no cars in the driveway or activity around the home, and could not see any activity taking place inside the home because the blinds were drawn. *Id.* Detective Bartlet was trained to be a canine handler and the dog was trained to detect the scent of marijuana, cocaine, heroin, as well as several other drugs and would indicate the presence of these substances through behavioral changes recognizable by Detective Bartlet. *Id.* The dog was also kept on a six-foot leash the whole time. *Id.*

[3] *Id.* As explained by Detective Bartlet at trial, the dog began tracking the airborne odor by "tracking back and forth," otherwise known as "bracketing." *Id.* This was an indication to Detective Bartlet that the dog had apparently detected the smell of a narcotic. *Id.*

[4] *Id.*

[5] *Id.* Detective Pedraja used the information gathered from the response of the drug-sniff as the basis for applying for the warrant. *Id.*

[6] *Id.*

[7] Jardines v. State, 73 So. 3d 34, 38 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (2012), *and aff'd*, 133 S. Ct. 1409 (2013).

[8] *Id.* (holding the use of a trained narcotics dog to investigate a home was a Fourth Amendment search that was unsupported by probable cause, therefore the warrant was rendered invalid).

[9] *Jardines*, 133 S. Ct. at 1413, 1418. Justice Scalia delivered the opinion of the Court and was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan. *Id.* at 1412. Justice Kagan filed a concurring opinion, in which Justices Ginsburg and Sotomayor joined. *Id.* at 1418 (Kagan, J., concurring). Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Kennedy and Breyer joined. *Id.* at 1420 (Alito, J., dissenting).

police employ the use of trained drug-sniffing dogs to investigate a home and its immediate surroundings, it is a "search" within the meaning of the Fourth Amendment.[10]

II. RELATED LAW

A. Searches Under Fourth Amendment Jurisprudence

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated."[11] The Supreme Court has shown it will not look with favor on the police when officers violate a person's rights in a pursuit of information.[12] For a time courts thought property rights were the forefront of what the Fourth Amendment sought to protect.[13] But the Court has since clarified property rights are only one way to measure a violation of the Amendment.[14] And while consideration is now also given to an individual's privacy expectations under the Fourth Amendment, such interests may be unnecessary to consider if other factors are present in a case.[15]

---

[10] *Id.* at 1417-18 (majority opinion).

[11] U.S. CONST. amend. IV.

[12] United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012) ("Where . . . the Government obtains information by physically intruding on a constitutionally protected area . . . a search has undoubtedly occurred."). In *Jones*, the Court took up the question of whether a Global-Positioning-System (GPS) tracking device that was attached to a suspect's vehicle to monitor movements on public streets constituted a search under the Fourth Amendment. *Id.* at 948. The Court affirmed the appellate court's reversal of the defendant's conviction, holding the installation of the device to monitor movements constituted a "search." *Id.* at 949 (finding the vehicle was an "effect" under the Amendment).

[13] *Id.* at 950 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass . . . ."); *see also* Soldal v. Cook Cnty., 506 U.S. 56, 64 (1992) (explaining how property rights were the original recognized protection under the Fourth Amendment).

[14] *Soldal*, 506 U.S. at 64 ("[T]he 'principal' object of the Amendment is the protection of privacy rather than property. . . ."). The Court acknowledged that the message from previous cases is "that property rights are not the sole measure of Fourth Amendment violations." *Id.*

[15] United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) ("[W]hen the government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means."). In *Knotts*, a "beeper" was placed inside a bottle of chloroform that was

B. Property Intrusion Baseline Under the Fourth Amendment

Under the property intrusion baseline, the Fourth Amendment provides distinct language as to what areas are constitutionally protected: persons, houses, papers, and effects.[16] As such, it is the right of every man and woman to be free from unreasonable police intrusion within his or her home.[17] In *Oliver v. United States*, the Supreme Court extended this protection into what is called the "curtilage," or area "immediately surrounding and associated with the home."[18] While curtilage is typically marked off to inform others of where it begins, it can also be easily defined from the common experiences of our lives.[19]

Once a court finds that an area in question receives protection under the Fourth Amendment, the next step is determining whether the officer obtained the information in a way that violated the individual's rights.[20] Of course, the Fourth Amendment does not bar any and all police investigation simply

---

sold that allowed the police to track the movements of the purchaser by tracing the beeper's signal. *Id.* at 277 (majority opinion). The Court held, however, that no search or seizure within the meaning of the Fourth Amendment had occurred but based its reasoning more around privacy interests. *Id.* at 285. Justice Brennan's concurrence simply calls to mind the fact that when a "physical intrusion" occurs, it may trump a possible privacy interest argument. *Id.* at 286 (Brennan, J., concurring).

[16] *Jones*, 132 S. Ct. at 950; *see also* U.S. CONST. amend. IV; Oliver v. United States, 466 U.S. 170, 176 (1984). The Court has consistently held fast to strict construction of the Fourth Amendment's language, going so far as to exclude "open fields" from being categorized as an "effect," and finding that an intrusion into an "open field" would not be an "unreasonable search." *Id.* at 176-77 (citing Hester v. United States, 265 U.S. 57, 59 (1924)).

[17] Silverman v. United States, 365 U.S. 505, 511 (1961).

[18] *Oliver*, 466 U.S. at 180. In determining just what curtilage is, the Court looked back at old common law and found it was the area adjacent to a home that an individual would reasonably expect to remain private to them. *Id.* In essence, it is the area that a man associates with the intimate activities of his life. *Id.* (citing Boyd v. United States, 116 U.S. 616, 630 (1886)). The Court in *Oliver* also discussed how even under the newer reasonable expectation of privacy baseline the protection of curtilage under the Fourth Amendment is only natural. *Id.*

[19] *Id.* at 182 n.12.

[20] *See* California v. Ciraolo, 476 U.S. 207, 213 (1986). The curtilage here was a yard and crops surrounded by a high double fence and the intrusion in question was police observation from an aircraft operating at an altitude of one thousand feet. *Id.* The Court focused on reasonable privacy interests and held it would be unreasonable for the defendant to expect that his marijuana plants would not be observed by naked eye from that altitude, but the same theory behind the holding may apply to the property intrusion baseline as well. *Id.* at 215.

because it falls within the confines of the curtilage.[21] By no means does the Fourth Amendment require a police officer to "shield their eyes" as they walk up to a private residence.[22] But if a police officer makes an observation or gathers evidence in a physically intrusive manner, then this may violate an individual's rights under the Fourth Amendment.[23]

A physical intrusion is synonymous to the tort of trespass to real property.[24] To be on the land without being found intrusive, a stranger needs a license, or in other words approval, from the landowner to remain.[25] In *Breard v. City of Alexandria*, the Supreme Court recognized that, "the knocker on the front door is treated as an invitation or license to attempt an entry."[26] When applied to police officers, they may do "no more than any private citizen might do" if they do not have a warrant to enter or search a private residence.[27] So long as an officer restricts his or her movements to areas a common citizen would go in attempting to speak with the owner, there is no Fourth Amendment violation.[28]

---

[21] *Id.* at 213.

[22] *Id.* The Court discussed how the curtilage is so intimately linked to the family home and is also afforded the same privacy expectations because the home is "where privacy expectations are most heightened." *Id.*

[23] *Id.* The officers were within public navigable airspace and from their vantage point were able to discern the marijuana plants simply by naked eye. *Id.* The Court also held that their intention to identify marijuana plants was irrelevant and found that "[a]ny member of the public flying in [that] airspace who glanced down could have seen everything that [the] officers observed." *Id.* at 213-14 (alteration in original).

[24] Boyd v. United States, 116 U.S. 616, 627 (1886).

[25] *Id.* Such a license may also be implied from the common habits of the people that are familiar with the area. McKee v. Gratz, 260 U.S. 127, 136 (1922).

[26] Breard v. City of Alexandria, 341 U.S. 622, 626 (1951). *Breard* also recognized that there is no absolute invitation to attempt entry or "knock," stating, "When such visitors are barred from premises by notice or order, however, subsequent trespasses have been punished." *Id.* It further allows "solicitors, hawkers and peddlers for all kinds of salable articles" justification to attempt an entry. *Id.*

[27] Kentucky v. King, 131 S. Ct. 1849, 1862 (2011). The Court in *King* also stated, "[an] occupant has no obligation to open the door or to speak," even if it is a police officer at the door. *Id.* And even when an occupant does choose to open the door and see who has come knocking, there is no requirement to let the officers in or to answer all, or any, questions that an officer might ask the occupant. *Id.*

[28] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(f), at 600-03 (4th ed. 2004). But if they step off the common path and venture into an area that is more private, then they may have overstepped their bounds and authority. United States v. Wells, 648 F.3d 671, 680 (8th Cir. 2011)

If an officer happens to have an underlying intention different from the validating reason for initially conducting a search, this will not automatically invalidate the search.[29] The Supreme Court in *Whren* explained that the subjective intent of police officers is rarely an issue of merit.[30] So long as the justifications for an officer's actions are objectively reasonable and lawful, a suspect cannot claim an officer had a differing and improper subjective intent for making the search.[31]

C. Reasonable Expectations of Privacy Baseline Under the Fourth Amendment

For some time, it was believed that in the absence of physical intrusion onto a person's property during a search, there was no Fourth Amendment violation.[32] During those times, the Court reasoned that the Amendment was only concerned with property rights and "constitutionally protected areas."[33] But in 1967 the Supreme Court clarified in *Katz v. United States*, that this approach was incorrect for determining the full scope of the Fourth Amendment's protections.[34] Now a secondary reasonable-expectation of privacy baseline exists that may be raised, if the

---

(holding when a police officer goes around to the backyard and makes no attempt to knock on the front door they have exceeded the license allowed to them).

[29] *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011) (holding objectively reasonable arrests and detentions of material witnesses pursuant to a validly obtained warrant cannot be challenged as unconstitutional by alleging the officer had an improper subjective intent in making the arrest); Whren v. United States, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.").

[30] *Whren*, 517 U.S. at 812 ("Not only have we never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.").

[31] *Id.* at 813. "'[S]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.'" *Id.* (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

[32] Katz v. United States, 389 U.S. 347, 352 (1967); *see supra* note 13 and accompanying text. It was thought the Amendment limited itself to a concern of searches and seizures of tangible property. *Katz*, 389 U.S. at 352-53.

[33] *Katz*, 389 U.S. at 351-53.

[34] *Id.* at 350. Even the parties to *Katz* themselves apparently had gotten this wrong as the Court began its discussion by explaining that the parties mistakenly focused their arguments on characterizing what a "phone booth" was under the meaning of the Fourth Amendment. *Id.* at 351.

property intrusion baseline is not applicable, when determining whether a Fourth Amendment violation occurred.[35]

The Court in *Katz* explained that the Amendment is "not necessarily promoted by the incantation of the phrase constitutionally protected area."[36] But that at the same time it also "cannot be translated into a general constitutional right to privacy."[37] Rather the Amendment is meant to have the baselines work side-by-side in protecting a person's right to privacy from police and governmental intrusion into certain areas.[38] As Justice Harlan explained, the Amendment gives individuals a "reasonable expectation of privacy" in certain areas.[39]

D. Police Use of "Sense-Enhancing" Devices and Drug-Sniffing Dogs

As technology used by police has advanced over time, so has the law also adapted to reflect these innovations.[40] In *Kyllo*, the Court established that the use of advanced devices to obtain

---

[35] United States v. Jones, 132 S. Ct. 945, 947 (2012) ("The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test."). In *Katz*, the police listened to and recorded a conversation that took place while the individual used a telephone booth, and even though the police never entered the booth, the Court found the actions to be a search within the meaning of the Fourth Amendment. *Katz*, 389 U.S. at 353 ("The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.").

[36] *Katz*, 389 U.S. at 350 (internal quotation marks omitted).

[37] *Id.* (internal quotation marks omitted).

[38] *Id.* The Court explained that while there is a merged interest, there are times when it may be concerned with a matter that has nothing to do with privacy expectations. *Id.*; *see also Jones*, 132 S. Ct. 945.

[39] *Katz*, 389 U.S. at 360 (Harlan, J., concurring). This expectation does not necessarily protect against information about a private residence learned while in public areas, especially when it pertains to illegal narcotics. *See* United States v. Johns, 469 U.S. 478, 482 (1985) (explaining officers who approached a vehicle and detected the smell of marijuana had probable cause to believe that there was illegal contraband in the vehicle); United States v. Ventresca, 380 U.S. 102, 111 (1965) (scent of fermenting mash detected supports probable cause for a warrant); United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974) (explaining there is no reasonable expectation of privacy from a drug agent smelling marijuana coming from a person's effects).

[40] *See* Kyllo v. United States, 533 U.S. 27, 31-34 (2001). *Kyllo* questioned whether the police use of "thermal-imaging" devices aimed at private homes from public streets to detect certain heating lamps used to grow marijuana is a search within the meaning of the Fourth Amendment. *Id.* at 29.

information will be deemed a search and must typically be supported by a warrant.[41] When police obtain information from a private home using "sense-enhancing" technology this raises concerns of possible privacy violations.[42] The Court raised these concerns because of the technological physical bypass used in obtaining the information.[43]

Cases that deal specifically with drug-sniffs by canines typically focus upon whether the drug-sniff violated an individual's privacy expectations.[44] In *United States v. Place*, the Court concluded that a drug-sniff did not constitute a search when the dog alerted officers to narcotics in an individual's luggage.[45] The Court arrived at this conclusion by examining specific factors that make a drug-sniff, "*sui generis*," or unique in its own characteristics.[46] The Court found that a drug-sniff does not

---

[41] *Id.* at 40 ("Where . . . 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." (emphasis added)). The Court went into a discussion of the problems that would arise if they were to only prohibit the discovery and observance of private intimate details. *Id.* at 37-39. In essence, the Court explained that such a strict rule would be unworkable for police when they used devices to gather information from a home; there would be no way that a police officer could know in advance what they were looking at and if it would even be constitutional to do so. *Id.*

[42] *Id.* at 34. The Court focused on the fact that police have to specifically target into the interior of a closed off location, and that such targeting would violate the minimal expectation of privacy an individual has. *Id.*

[43] *Id.* In essence, the information would have been impossible to attain without the device unless the police committed some form of an intrusion into a protected area. *Id.* (citing Silverman v. United States, 365 U.S. 505, 512 (1961)).

[44] Illinois v. Caballes, 543 U.S. 405 (2005); United States v. Place, 462 U.S. 696 (1983). For a discussion by the Court over the establishment of probable cause needed to justify a search by a trained dog conducting a drug-sniff, see *Florida v. Harris*, 133 S. Ct. 1050 (2013).

[45] *Place*, 462 U.S. at 707. The Court, however, did find that an unlawful seizure had taken place after the lawful search. *Id.* at 710.

[46] *Id.* at 707. These factors were: 1) it did not require the intrusion into the individual's luggage, 2) the method of the drug-sniff does not expose items that are hidden from public view making the investigation almost nonintrusive on the person's right, and 3) the information and knowledge gained is so limited in that it "discloses only the presence or absence of narcotics." *Id.* These factors evidenced to the Court that the individual's reasonable expectation of privacy was not violated by the dog detecting the smell of narcotics in his luggage. *Id.*

involve the police discovering every detail about an individual, just that there may be something illegal in his or her luggage.[47]

More recently in *Illinois v. Caballes*, the Court held drug-sniffs conducted at traffic stops do not necessarily violate a driver's Fourth Amendment privacy expectations.[48] The Court reasoned that when the traffic stop is executed lawfully there is no violation, but certain actions taken by an officer may constitute a violation.[49] Central in *Caballes*, as well as *Place*, was that the drug-sniffs were designed only to give police notification of specific illegal activity, namely possession of narcotics, which does not give rise to legitimate privacy expectations.[50]

III. FLORIDA V. JARDINES

A. Majority Opinion

In *Florida v. Jardines*, the Supreme Court addressed whether the police's use of a drug-sniffing dog to investigate if marijuana was inside a home was a "search" under the Fourth Amendment.[51] The Court held that because the police investigated the home using the trained dogs and physically intruded onto

---

[47] *Id.* ("This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in . . . more intrusive investigative methods.").

[48] *Caballes*, 543 U.S. at 410 ("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.").

[49] *Id.* at 407-08 (citing United States v. Jacobsen, 466 U.S. 109, 124 (1984)). If an officer oversteps his bounds during the originally lawful traffic stop and begins to unreasonably search the individual, or unlawfully detain them, then they may have subsequently violated the individual's Fourth Amendment rights. *Id.*

[50] *Id.* at 408; *Place*, 462 U.S. at 707. In *Caballes*, the Court reiterated its ruling from *Jacobsen* that the possession of contraband items does not give a person a legitimate expectation of privacy in having such possession. *Caballes*, 543 U.S. at 408; *see also* United States v. Jacobsen, 466 U.S. 109, 123 (1984). Individuals who partake in illegal activities do not receive the same expectation of privacy as they would when they partake in legal activities, even in the privacy of their own home. *Caballes*, 543 U.S at 409-10 (comparing the circumstances from *Caballes* and *Kyllo v. United States*, 533 U.S. 27 (2001)). The Court explained that police investigation and conduct that "*only* reveals the possession of contraband compromises no legitimate privacy interest," and that "the expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable." *Id.* at 408-09 (internal quotation marks omitted).

[51] Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013).

Jardines' property, they had committed a "search" within the meaning of the Fourth Amendment.[52] The Court did not decide, however, whether the officers' investigation of Jardines' home violated his reasonable expectations of privacy under the Fourth Amendment.[53]

The Court began its analysis by discussing the Fourth Amendment's two baselines for determining whether a search has occurred.[54] The Court noted that while the newer privacy expectations baseline presents new considerations, it does not take away from the property rights baseline when a physical intrusion does in fact occur.[55] The Court explained that under this principle Jardines' case was an easy one to decide.[56]

Beginning its discussion on the property intrusion baseline, the Court discussed the enumerated areas that receive Fourth Amendment protection.[57] When applied against an intrusion by a police officer, the Court explained how this protection would be all but diminished if an officer could freely snoop around on a person's property.[58] The Court then discussed how the area known as the "curtilage" is afforded the same protections as the individual's home itself.[59] Using *Oliver* as instruction for defining the boundaries of curtilage, the Court found the front porch was a

---

[52] *Id.* at 1417-18.

[53] *Id.* at 1417. The Court found this inquiry unnecessary since a search had already been proven under the property intrusion baseline. *Id.*

[54] *Id.* at 1414.

[55] *Id.* (citing United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)); *see also supra* note 15 and accompanying text.

[56] *Jardines*, 133 S. Ct. at 1414. The Court here quickly summarized that the curtilage enjoys the same protection the home itself does and the police had gathered the information in such an area by physically entering it without the permission of Jardines. *Id.*

[57] *Id.*; *see also supra* note 16 and accompanying text. The Court explained that the language of the Amendment provides protection of a person's home that is "first among equals," and that every man has the right to be free from intrusion when he is in the sanctity of his own home. *Jardines*, 133 S. Ct. at 1414; *see also supra* note 17 and accompanying text.

[58] *Jardines*, 133 S. Ct. at 1414. The Court gave two specific examples of such intrusion that would diminish the protection, namely actually being on an individual's porch looking for evidence and being able to look in on a house from right outside their window. *Id.*

[59] *Id.* at 1414-15 (citing California v. Ciraolo, 476 U.S. 207, 213 (1986); Oliver v. United States, 466 U.S. 170, 180 (1984)); *see also supra* note 18 and accompanying text.

part of the curtilage of Jardines' home and the officers undoubtedly had entered it.[60]

After finding the officers' investigation took place within the bounds of the curtilage, the Court took to deciding whether the investigation was done in an unlicensed and intrusive way.[61] Referencing the "knocker rule" from *Breard*, the Court stated individuals have an implicit license to momentarily intrude into certain constitutionally protected areas, but they may only remain there in a quick effort to gain further invitation and entry.[62] The Court explained that when you apply this rule to the officers, they were in a position of no greater authority than that of a common citizen.[63] The Court then found the police did more than the implied license permitted when they had a trained narcotics dog perform a drug-sniff on Jardines' porch with the specific purpose of discovering incriminating evidence.[64] The Court also dismissed

---

[60] *Jardines*, 133 S. Ct. at 1415; *see also supra* note 19 and accompanying text. The Court stated,

> The front porch is the classic exemplar of an area . . . to which the activity of home life extends . . . . [I]t is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home . . . .

Jardines, 133 S. Ct. at 1415 (internal quotation marks omitted).

[61] *Jardines*, 133 S. Ct. at 1415. The Court mainly questioned whether Jardines had implicitly given the officers permission as they acknowledged the general rule that, "no man can set his foot upon his [neighbor's] close without his leave." *Id.* at 1415-16 (alteration in original) (quoting United States v. Boyd, 116 U.S. 616, 627 (1886)); *see also supra* note 25 and accompanying text. The Court dismissed an argument of the State and its amicus, the Solicitor General, that Jardines conceded the officers had a right to be there, finding Jardines only conceded the officers could have approached his home to initially speak with him, while the officers here did much more. *Jardines*, 133 S. Ct. at 1415 n.1.

[62] *Jardines*, 133 S. Ct. at 1415-16 (citing Breard v. City of Alexandria, 341 U.S. 622, 626 (1951)); *see also supra* note 26 and accompanying text. The Court made note that this implicit license is easy enough to understand from our every day-to-day experiences by referencing how it is used by Girl Scouts and trick-or-treaters who go door to door. *Jardines*, 133 S. Ct. at 1415.

[63] *Jardines*, 133 S. Ct. at 1416 (citing Kentucky v. King, 131 S. Ct. 1849, 1862 (2011)); *see also supra* notes 27-28 and accompanying text. The Court explained that when officers enter into one of the protected areas, their ability to gather information becomes sharply circumscribed and they do so by nonintrusive means. *Jardines*, 133 S. Ct. at 1415; *see also supra* notes 22-23 and accompanying text.

[64] *Jardines*, 133 S. Ct. at 1416. Noting implied licenses are also limited to a specific purpose, the Court reasoned that under the background of common social norms, an

the State's argument that the subjective intent of the officers is not a factor for the Court to consider.[65]

Upon finding the officers committed a search under the Fourth Amendment's property intrusion baseline, the Court found it unnecessary to decide whether the officers had violated Jardines' expectation of privacy.[66] By doing so, the Court also dismissed arguments made by the State that pertained to this baseline.[67] The Court stated that because *Katz* merely added another approach, it is unnecessary to consider if the evidence shows the officers committed a search by physically intruding into a constitutionally protected area.[68] The Court also stated that when police commit an intrusive search, the "antiquity" of any tool or device used is irrelevant.[69]

The Court then affirmed the judgment of the Supreme Court of Florida.[70] The officers' use of a drug-sniffing dog to investigate Jardines' home was a "search" within the Fourth Amendment.[71]

---

individual gives no implied license to someone to start rummaging around protected areas to gather information. *Id.* ("An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker."). The Court then rejected the dissent's argument that the particular instrument used should be focused upon, instead focusing on the manner in which the police used the instrument and behaved. *Id.* at 1416 n.3. The Court also rejected the dissent's argument that *King* allows the police to approach and gather evidence, finding instead that a police officer may discover evidence during the implied invitation to speak and not violate the Fourth Amendment, but that the officer may not enter the protected area in order to do nothing else but conduct a search. *Id.* at 1416 n.4.

[65] *Id.* at 1416-17. The Court explained the State misstated the rule from prior cases, in that even if the officers' subjective intent reveals a different purpose, so long as the validating reason for their conduct is objectively reasonable the Court will not find the officers in violation of the Fourth Amendment. *Id.*; *see also supra* notes 32-34 and accompanying text. Here the Court found the search was committed in an objectively unreasonable way. *Jardines*, 133 S. Ct. at 1417.

[66] *Jardines*, 133 S. Ct. at 1417. The Court did, however, reference cases involving devices and drug-sniffs that found no violation of reasonable privacy expectations occurred. *Id.* (citing Illinois v. Caballes, 543 U.S. 405 (2005); United States v. Jacobsen, 466 U.S. 109 (1984); United States v. Place, 462 U.S. 696 (1983)).

[67] *Id.* The two arguments put forth by the state were: 1) The investigation did not implicate Jardines' privacy interests, and 2) that forensic dogs have been commonly tools used by the police. *Id.*

[68] *Id.* (citing United States v. Jones, 132 S. Ct. 945, 952 (2012)); *see also supra* notes 15, 35, 38, 55 and accompanying text.

[69] *Jardines*, 133 S. Ct. at 1417; *see also supra* notes 41-43 and accompanying text. The Court made this statement when it dismissed the State's argument that forensic dogs were "commonly used by the police for centuries." *Jardines*, 133 S. Ct at 1417.

[70] *Jardines*, 133 S. Ct. at 1418; *see also supra* note 8 and accompanying text.

B. Justice Kagan's Concurring Opinion

Justice Kagan, joined by Justices Ginsburg and Sotomayor, concurred with the majority opinion of the Court, but also found the police had violated Jardines' reasonable expectation of privacy under the Fourth Amendment.[72] Justice Kagan argued that the police had used a "super-sensitive instrument" to discover details about the inside of Jardines' home that were private to the public.[73] She further argued that in doing so, the police invaded Jardines' privacy expectations in an area where they were most heightened.[74] Justice Kagan explained that when the area in question is a person's home, it is only natural that both property and privacy baselines should reach the same conclusion.[75]

To support her position, Justice Kagan argued that if the majority had decided *Jardines* based on privacy grounds, then *Kyllo* would have been the controlling authority.[76] She found that under the rule from *Kyllo*, the use of a drug-sniffing dog as a "sense-enhancing" device is undoubtedly a search that violates reasonable privacy expectations.[77] Justice Kagan concluded that,

---

[71] *Jardines*, 133 S. Ct. at 1417-18.

[72] *Id.* at 1418 (Kagan, J., concurring).

[73] *Id.*; *see also supra* notes 41-43 and accompanying text. Justice Kagan rejected an argument of the dissent that the ubiquity of dogs and use of them as forensic investigators was unimportant stating, "Detective Bartlet's dog was not your neighbor's pet, come to your porch on a leisurely stroll." *Jardines*, 133 S. Ct. at 1418. She then compared the dog to binoculars to discover an object, but in this instance instead of trying to see something not in plain view, the police were trying to smell something not in plain view. *Id.*

[74] *Jardines*, 133 S. Ct. at 1418-19; *see also supra* note 22 and accompanying text.

[75] *Jardines*, 133 S. Ct. at 1419 ("Jardines' home was his property; it was also his most intimate and familiar space.").

[76] *Id.* (citing Kyllo v. United States, 533 U.S. 27 (2001)); *see also supra* notes 40-43 and accompanying text. Justice Kagan then argued the dissent's position, that the case is controlled instead by *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005), was incorrect because the location (searching a home versus a car at a traffic stop) in the present case gave rise to a greater expectation of privacy. *Jardines*, 133 S. Ct. at 1419 n.1.

[77] *Jardines*, 133 S. Ct. at 1419; *see also* Kyllo v. United States, 533 U.S. 27, 40 (2001); *supra* note 41 and accompanying text. Justice Kagan's argument focused upon the idea that a dog trained to detect specific narcotics is not a device "in the general public use." *Jardines*, 133 S. Ct. at 1418-20. Justice Kagan then again disagreed with another of the dissent's arguments that the police themselves could have smelt the odor of marijuana coming from the house. *Id.* at 1419-20 n.2 ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment . . . .").

according to her further observations, the present case was an easy one to decide from either baseline.[78]

C. Justice Alito's Dissenting Opinion

Justice Alito, joined by Chief Justice Roberts, and Justices Kennedy and Breyer, dissented that no search within the meaning of the Fourth Amendment had occurred.[79] Justice Alito began his dissent by claiming the majority opinion's explanation of the facts was not as clear as it should have been.[80] The dissent argued the implied license that allows police to approach an individual's door does not exclude them from also gathering evidence while they are on someone's property.[81] According to that rule, Justice Alito determined that the officers had not exceeded the implied license, and as such had not violated Jardines' Fourth Amendment rights.[82]

---

[78] *Jardines*, 133 S. Ct. at 1420.

[79] *Id.* (Alito, J., dissenting). The dissent argued there was no basis in trespass law that provided support for the Court's holding, or that there was a reasonable expectation of privacy when it came to odors emitting from their house. *Id.* at 1420-21.

[80] *Id.* Justice Alito explained that in reality only a couple of minutes had elapsed from the moment the officers began walking down the driveway to the time they were back to their cars and then reasoned the amount of time that the dog, Franky, was on the porch could not have been more than those two minutes. *Id.* at 1421. Justice Alito also claimed the Court failed to explain that Detective Pedraja had also identified the smell of marijuana while on the porch, this is the only mention of this anywhere in the entire opinion. *Id.*

[81] *Id.* at 1423. Justice Alito argued that the law has never sought to exclude specific categories of individuals who may wish to approach a house, and so long as those who wish to seek further entry confine themselves to both the territorial and temporal limitations, no trespass, and therefore no intrusion, occurs. *Id.* at 1422; *see also supra* notes 26, 28 and accompanying text. Justice Alito then explained that when a police officer conducts a "knock and talk"—speaking with a person at their front door to gather evidence and information—they are not engaging in a search and are permitted to see, hear, and smell whatever can be detected even if such information or evidence may lead to the individual's arrest. *Jardines*, 133 S. Ct. at 1423; *see also supra* note 23 and accompanying text.

[82] *Jardines*, 133 S. Ct. at 1423. Justice Alito disagreed with the majority's reasoning, that because the officers' objective purpose was to conduct a search, the officers had therefore violated Jardines' rights. *Id.* at 1423-24. Justice Alito argued that under such reasoning a standard "knock and talk" would be a search, since in both situations the officers' objective purpose is almost always to gather evidence or discover information. *Id.* Justice Alito explained that under the law an officer may gather evidence by means other than talking, such as through smell. *Id.* at 1424. Justice Alito also questioned the majority's proposition that it is the use of a drug-sniffing dog that

Justice Alito next disagreed with Justice Kagan's concurring opinion, asserting the officer's conduct also did not violate Jardines' reasonable expectation of privacy under the Amendment.[83] The dissent argued that under the circumstances from the present case, Jardines and society in general, could have no *reasonable* expectation of privacy.[84] Justice Alito also called into question Justice Kagan's reliance on *Kyllo*, explaining it also does not fit under the present case.[85] Justice Alito argued that if *Kyllo* were to apply, then what constitutes a search would expand into knowledge gained from drug-sniffs while units occupy public areas.[86]

IV. DISCUSSION

The Supreme Court's decision in *Florida v. Jardines* again shows that courts will not look with favor on the police when they intrude into an individual's life to gather information.[87] The Court distinguished that the implied license is not available to police when they go and specifically conduct a search, rather than happen upon information through standard "knock and talks."[88] The dissent, however, made a valid point that it is almost

---

is a trespass. *Id.* at 1424 (noting there is not one case regarding this from the past eight hundred years).

[83] *Id.* Justice Alito explained that, in his opinion, individuals have no reasonable expectations of privacy when it comes to odors, especially the odor of marijuana, originating from inside a home and traveling outside the home thereby reaching the public's nostrils. *Id.* at 1425; *see also supra* note 39 and accompanying text.

[84] *Jardines*, 133 S. Ct. at 1425; *see also supra* note 50 and accompanying text. Justice Alito posed a list of questions and considerations he believed a person who is growing marijuana would have to take into account to come to a reasonable expectation that a police officer, let alone a drug-sniffing dog, would detect the smell coming from his or her residence. *Jardines*, 133 S. Ct. at 1425.

[85] *Jardines*, 133 S. Ct. at 1425-26. Justice Alito claimed by way of *Caballes*, that the use of a drug-sniffing dog would not be the same as the thermal imaging device from *Kyllo*, thereby rendering Justice Kagan's argument incorrect. *Id.* Justice Alito pointed out that, in his opinion, *Kyllo* addressed the use of *new and advanced* technology not commonly available to the general public, whereas a dog is not new and advanced technology and is available to the public. *Id.*; *see also supra* notes 40-41, 43 and accompanying text.

[86] *Jardines*, 133 S. Ct. at 1426. Justice Alito illustrated that this could cause a dog that is trained to detect explosives, and does so while on a public sidewalk, to be deemed searches in violation of the Fourth Amendment. *Id.*

[87] *See supra* notes 10, 12, 28, 58, 64, 69 and accompanying text.

[88] *See supra* notes 63-65 and accompanying text.

impossible to distinguish between the two, since the objective purpose of knock and talks is typically to gather information.[89] The majority addressed this concern by explaining that courts must step back and examine the circumstances as a whole, and when an officer approaches an individual's front door with a trained narcotics dog it is obvious the purpose is to conduct a search.[90]

The concurring and dissenting opinions came to opposite conclusions in a subsequent debate over whether Jardines' reasonable expectations of privacy had been violated.[91] The concurrence reasoned individual's have the highest expectations of privacy within their homes, and the officers violated Jardines' expectations by learning something that otherwise would be impossible to know.[92] Justice Alito's dissent argued that, in general, a reasonable person would not expect smells emanating from their home to remain private or go unnoticed by others, noting that here even one of the officers smelled the marijuana.[93]

These two opinions further clashed as Justice Kagan claimed *Kyllo* was the obvious controlling authority.[94] Justice Kagan does make a good comparison, that the use of a dog's trained nose to discover paraphernalia is indeed quite similar to a sense-enhancing device.[95] But as the dissent shows, such a comparison has previously been rejected by the Court and, at least in Justice Alito's opinion, the language from *Kyllo* should not apply to dogs.[96] The dissent also raises a frightening policy concern, that by including trained police dogs under the rule from *Kyllo*, we may inadvertently provide kidnappers and even bomb-makers a legal technicality for them to suppress evidence with.[97] A step in this direction would go directly against public policy that favors an "ends justify the means" approach, and is one the courts should be extremely hesitant to take.

---

[89] *See supra* notes 81-82 and accompanying text.
[90] *See supra* notes 64-65 and accompanying text.
[91] *See supra* notes 72, 83 and accompanying text.
[92] *See supra* notes 73-74 and accompanying text.
[93] *See supra* notes 39, 84 and accompanying text.
[94] *See supra* notes 76-77, 85-86 and accompanying text.
[95] *See supra* note 77 and accompanying text.
[96] *See supra* note 85 and accompanying text.
[97] *See supra* note 86 and accompanying text.

The majority avoided discussing these issues by narrowing its holding to the intrusion made by police, showing privacy expectations are simply a secondary consideration courts may address.[98] It did, however, reference a few cases that show a part of the majority may likely have agreed with the dissent on this issue.[99] Those cases all found that when the police conducted forensic investigations, the only thing discovered was the presence, or lack thereof, of narcotics.[100] It stands to reason that as the same illegal activity was present in *Jardines*, Justices Scalia and Thomas would have likely concluded Jardines had no reasonable expectation of privacy just as the dissent did.[101]

While *Jardines* does provide sound basis for law, the only direction it leaves courts with for determining when police conduct is objectively a search, is the interpretation of social norms.[102] It also leaves open a secondary question of how much weight should actually be given to an officer's subjective intent when a court examines the officer's individual behavior and objective purpose together.[103] As it stands the appellate circuits will have to individually address these questions as they arise. Such leeway in interpretation will allow for the appellate courts to better adapt the rule to the particular social and cultural norms that may differ between them. But of course this could run the risk of a serious difference in interpretation that would have to be addressed by the Supreme Court.

CONCLUSION

In *Florida v. Jardines*, the Supreme Court narrowed its ruling to only one of the two baselines used to determine if a police officer has violated the Fourth Amendment. Applying the property intrusion baseline, the Court held that when a warrantless officer invades a constitutionally protected area with a trained narcotics dog and gathers information it is a search. In consideration of the second baseline, the concurring opinion found the use of a trained

---

98 *See supra* notes 15, 66, 68 and accompanying text.
99 *See supra* note 66 and accompanying text.
100 *See supra* notes 46-48, 50, 66 and accompanying text
101 *See supra* notes 5, 39, 55, 66, 83 and accompanying text.
102 *See supra* notes 64-65, 71 and accompanying text.
103 *See supra* notes 65, 82 and accompanying text.

narcotics dog to investigate a home violates reasonable expectations of privacy. The dissent meanwhile found that no search had occurred under either baseline approach.

Through its decision, the Court clarified that the "knock and talk" rule does not apply when an officer's objective purpose is to commit a search. It left open how to differentiate between the two, and how to know for sure when an officer's objective purpose was to conduct a search, to case specific judicial examination and interpretation of the overall circumstances and norms. The concurrence also attempted to argue that trained narcotics dogs should be classified as a "sense-enhancing" device capable of violating an individual's expectations of privacy. But the dissent showed this labeling not only goes against Court precedent, but could also have unfortunate consequences, and in any instance, individuals can have no reasonable expectation in the privacy of smells coming from their home, especially the smell of marijuana.

*Daniel D. Schick**

* J.D. Candidate, University of Mississippi School of Law, 2015.