

No. 11-564

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2011

STATE OF FLORIDA,
Petitioner

vs.

JOELIS JARDINES.
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

Brief of Wayne County, Michigan
as Amicus Curiae
in Support of Petitioner

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Question Presented

I.

Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties. Amicus has litigated cases involving the Fourth Amendment issue involved in the present case in the State courts, and the decision in this case will directly affect future prosecutions conducted by the office of Amicus.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Statement of the Case

Amicus joins the statement of the case of the
Petitioner, the State of Florida.

Summary of Argument

The Fourth Amendment protects citizens against unreasonable searches of their “persons, houses, papers, and effects.” While a search—as opposed to a “knowing exposure” or “misplaced confidence”—may be defined as a governmental invasion of a reasonable expectation of privacy held by the person who seeks to complain, to fall within the protections of the Fourth Amendment it must also concern that individual’s “person, house, papers, or effects,” as the “explicit language” of the Fourth Amendment “indicates with some precision *the places and things encompassed by its protections.*”

Put another way, the *Katz* decision did not sever the Fourth Amendment from its text. In a Fourth Amendment inquiry it must be ascertained 1)that there was a search; if so, 2)that the search concerned the “person, house, papers, or effects” of the person who seeks to complain; and if so, 3)whether, the search was reasonable. Here there was no search, as the dog sniff revealed “no information other than the location of a substance that no individual has any right to possess.” Nor was Respondent’s house invaded by the approach to his door. There was no trespass here, actual or virtual. Consequently, the Florida Supreme Court should be reversed.

Argument

I.

A dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is not a Fourth Amendment search requiring probable cause.

Katz established the new criterion, which is, is there an invasion of privacy? Does -- are you obtaining information that a person had a reasonable expectation to be kept private? I think that was wrong. I don't think that was the original meaning of the Fourth Amendment. But nonetheless it's been around for so long, we are not going to overrule that.¹

A. Introduction: taking the text seriously

When considering the meaning and application of a legal text, it is wise to keep the actual text front-and-center, for when only the gloss upon the text is reviewed, it is too often forgotten that “[t]he seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth ‘logical’ extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate

¹ Justice Scalia, oral argument transcript, *United States v Antoine Jones*, No. 10-1259, p. 6.

or end result is one that would never have been seriously considered in the first instance.”² The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Though much has changed since the adoption of the Bill of Rights, a wise member of an eminent court,³ Justice James Campbell, observed long ago “[t]hat the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances.”⁴ Further, “[i]t is not competent for

² *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 127, 93 S.Ct. 2665, 2668, 37 L.Ed 2d 500 (1973).

³ The Michigan Supreme Court of Cooley, Campbell, Christiancy, and Graves, serving together between 1868 and 1875, and known as the “big four” of Michigan Supreme Court history.

⁴ *People v Blodgett*, 13 Mich 127, 140 (1865)(Campbell, J.).

any department of the government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.”⁵ As Justice Harlan put it almost a half century ago, “[i]t is no service to our constitutional liberties to encumber the particular provisions which safeguard them with a gloss for which neither the text nor history provides any support.”⁶

The Fourth Amendment protects against "unreasonable searches"; the text so says. But does it protect against *every* governmental search? Should the Fourth Amendment be read as providing "The right of the People to be secure against unreasonable searches and seizures shall not be violated....," the phrase "in their persons, houses, papers, and effects" removed as surplusage, or do *all*⁷ the words matter? And what is a search?

⁵ *People v Blodgett*, 13 Mich 127, 139 (1865)(Campbell, J.) (quoted by this Court on two occasions: *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 403, 57 S.Ct. 578, 587 (1937); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 451, 54 S.Ct. 231, 244 - 245 (1934)).

⁶ *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 90, 84 S.Ct. 1594, 1624, 12 L.Ed 2d 678 (1964)(Harlan, J., concurring).

⁷ See *Marbury v. Madison*, 1 Cranch. 137, 5 U.S. 137, 174, 2 L.Ed. 60 (1803): "It cannot be presumed that any clause in the constitution is intended to be without effect. . . ." And see *Lake County v. Rollins*, 130 U.S. 662, 670, 9 S.Ct. 651, 652, 32 L.Ed. 1060 (1889): "To get at the thought or

It has become canonical that "the Fourth Amendment protects people not places,"⁸ and that a search must therefore be defined as an invasion of a "reasonable expectation of privacy" rather than being limited simply to a physical invasion of a place.⁹ But is the *Katz* test one which defines that which the Constitution protects—reasonable expectations of privacy—or one which defines when a search occurs—when the Government invades a reasonable expectation of privacy—*with regard to that which the Constitution protects*; namely, "persons, houses, papers, or effects"? The difference is not simply one of semantics.

Amicus submits that it is not necessary to overrule *Katz* here, but that *Katz* should be viewed as establishing when a search has occurred, as opposed to a "knowing exposure"¹⁰ or a revelation

meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them."

⁸ One noted commentator, Judge Moylan, has referred to Justice Stewart's phrase as "Seven hallucinogenic little words . . ." Moylan & Sonsteng, "Fourth Amendment Applicability," 16 Wm. Mitchell L. Rev. 209, 219 (1990).

⁹ *Katz v United States*, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967).

¹⁰ *Katz*, 88 S.Ct. at 511.

through “misplaced confidence,”¹¹ neither of which invoke the Fourth Amendment. If the government *has* invaded a reasonable expectation of privacy held by the person who seeks to complain, then it must be asked whether that invasion concerned the “person, houses, papers, or effects” of that individual, and then, if so, whether it was reasonable. Here, Respondent’s claim fails both the first two inquiries: there was no search, nor was there any invasion of the “house.”

B. The Katz test defines that which constitutes a search, but does not hold that all searches are within the Fourth Amendment

In *Katz* the Government tape recorded (and overheard) Katz's end of telephone conversations through the use of an electronic device placed on a public telephone booth from which Katz was known to place long-distance calls. Neither Katz nor the other parties to the conversations had consented to this activity. The Court agreed to hear the case on Katz's petition raising the question whether the public telephone booth was a "constitutionally protected area," and, if so, whether a physical penetration of a constitutionally protected area was necessary in order for it to be said that a Fourth Amendment search had occurred.

The Government argued both that the place was not protected (the telephone booth), and that no search had occurred because there had been no

¹¹ See e.g. *Hoffa v. United States*, 385 U.S. 293, 302, 87 S.Ct. 408, 413, 17 L.Ed. 2d 374 (1966).

physical penetration of the telephone booth; actually, both arguments were arguments that no search had occurred. As to whether the telephone booth was a "constitutionally protected area," the Government stressed that the telephone booth was "partially constructed of glass." This is an argument of a lack of a governmental invasion—that the subject has "knowingly exposed" himself to the public—so that no search had occurred. But as Justice Stewart pointed out, it was the uninvited ear, not the intruding eye, which Katz had sought to exclude. And on its face, the argument regarding a lack of physical penetration of the booth is an argument that no search occurred within the meaning of the Fourth Amendment.

In its opinion, the Court reformulated the issues. The Court began by flatly stating that the "Fourth Amendment cannot be translated into a general right of privacy,"¹² finding that formulation at once too narrow, in that the Fourth Amendment protection may on occasion have nothing to do with privacy, and too broad, in that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."¹³ The Court concluded, however, that while what a person "knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection..., what he seeks to preserve as private, even in an area accessible to the public, may be

¹² *Katz*, at 581.

¹³ *Katz*, at 581.

constitutionally protected...."¹⁴ The Court rejected the requirement that there be a "physical intrusion" in order to constitute a search, finding that doctrine inconsistent with its previously stated conclusion that the Fourth Amendment protects people, and not "areas."

The holding of the Court, rejecting the trespass doctrine, was an explicit finding that the Government's activities "violated the privacy upon which (Katz) justifiably relied while using the telephone booth *and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.*"¹⁵ The Court then undertook to determine whether the search was reasonable, finding it was not. Thus, the innovation in the law in *Katz* was its definition of *that which constitutes a search.*

But it was Justice Harlan's concurring opinion which formulated the test which came to capture the field. While he agreed in principle that the Fourth Amendment protects people, he observed that the protection afforded people "requires reference to a place."¹⁶ Justice Harlan's "reasonable expectation of privacy" test has since become the formula for when the Fourth Amendment is implicated—if the Government has invaded a reasonable expectation of privacy, then whether that conduct is reasonable is to be measured by Fourth Amendment standards. But it

¹⁴ *Katz*, at 582.

¹⁵ *Katz*, at 582 (emphasis supplied)..

¹⁶ *Katz*, at 587.

is appropriate to look beneath the formula to the words of the Constitution itself.¹⁷ On its face, *Katz* defines *not* when the Fourth Amendment applies, but rather when a search occurs. In practice these two are generally viewed as synonymous, but the question of whether there has been a governmental search, and the question whether that search falls within Fourth Amendment protections, are separate, and *both* are necessary parts of the inquiry in any particular case.

The Fourth Amendment protection refers to searches and seizures of "persons, houses, papers, and effects." If there has been a search—if one has a reasonable expectation of privacy in the area or interest invaded—but the governmental invasion is not of the "person, house, papers, or effects" of that person, can it be said to be covered by the Fourth Amendment? If the entire test for whether the Fourth Amendment is involved is whether there has been an invasion of a reasonable expectation of

¹⁷ See Nagel, "The Formulaic Constitution," 84 Mich L Rev 165, 182 (1985): "...judicial decisions are an effort to approximate a standard external to the opinion itself. Although all types of doctrine have the natural effect of substituting themselves for primary constitutional meaning, formulaic explanations are especially incompatible with maintaining the authority of the original text....The Justice who argued that the 'minimum scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection' was struggling against the dead weight of words to get back to the Constitution" (footnotes omitted).

privacy, without regard to whether that expectation of privacy is related to the core privacy values associated with an individual's person, house, papers, or effects—if, in fact, answering whether a search has occurred leads directly to asking whether it was reasonable—is the Fourth Amendment not then translated into the protection of a general right of privacy disavowed in *Katz*, at least all privacy that is reasonably expected *and* that society recognizes as justifiable? Failing to consider the language of the Fourth Amendment itself—persons, houses, papers, and effects—skips a step, and rewrites the Fourth Amendment.¹⁸

¹⁸ This is not to say that *Katz* reach the wrong result. To invade a reasonable expectation of privacy in speech through the sort of electronic interception employed in that case should be considered a search of the person. It is no leap to find that among the protections of the *person* from unreasonable search and seizure is a protection of the unreasonable seizure of private speech. In all cases there are three steps to be taken, not two: not 1)was there a search, and 2)if so, was it reasonable, but 1)was there a search, 2)if so, was it a search involving the core privacy values associated with those privacy interests protected by the Fourth Amendment—the person, houses, papers or effects of an individual; and 3)if so, was it reasonable? And see Moylan, *supra*, at 220-223.

C. The Katz “reasonable expectation of privacy” standard did not sever Fourth Amendment doctrine from the Amendment's language; the Fourth Amendment protects “persons, houses, papers, and effects” from unreasonable searches and seizures

In *Oliver v United States*¹⁹ narcotics agents of the Kentucky State Police received reports that marijuana was being grown on Oliver's farm, and proceeded to investigate. They encountered a locked gate with a "No Trespassing" sign, and followed a footpath around the gate. Over a mile from Oliver's home they discovered a field of marijuana. Because of the sign, and because the field was bounded on all sides by woods and embankments and could not be seen from any public access, the trial court found a violation of the Fourth Amendment in the warrantless entry on the property leading to the field, only to be reversed by the circuit court. This Court then took up the issue.

Writing for the Court Justice Powell turned to the "explicit language" of the Fourth Amendment itself, which "indicates with some precision *the places and things encompassed by its protections.*"²⁰ Finding that the open fields did not come within the "house" of Oliver, the Court cited Justice

¹⁹ *Oliver v United States*, 466 US 170, 80 L Ed 2d 214, 104 S Ct 1735 (1984).

²⁰ *Oliver*, at 222 (emphasis added).

Holmes statement in *Hester v United States*²¹ that "The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."²² And plainly the open fields are not "effects," which encompass personal property and not realty. In response to the dissent, Justice Powell observed that "Katz' 'reasonable expectation of privacy' standard *did not sever Fourth Amendment doctrine from the Amendment's language*."²³ While the Court found *Katz* itself faithful to the language of the Fourth Amendment without at the same time "wedding itself to an *unreasonable* literalism,"²⁴ it viewed the position of the dissent as going beyond disapproval of an unreasonable literalism, instead ignoring the language of the Constitution completely.

Katz, then, has been cabined by *Oliver*, which simply makes clear that the text of the Fourth Amendment—"persons, houses, papers, and effects"—matters.

²¹ *Hester v United States*, 265 US 57, 68 L Ed 898, 44 S Ct 445 (1924).

²² *Oliver*, at 222.

²³ *Oliver*, at 222-223 (fn 6) (emphasis supplied).

²⁴ *Oliver*, at 222-223 (fn 6) (emphasis supplied).

D. A dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is neither a search nor a trespass into the “house”

*Kyllo v United States*²⁵ and *Illinois v Caballes*²⁶ are central to the inquiry here. Danny Kyllo was suspected of growing marijuana in his residence, a process that requires high-intensity lamps. Agents employed an “Agema Thermovision 210” thermal imaging device to scan the premises. These devices detect infrared radiation, and convert them into images based on relative warmth (black is cool, white is hot, shades of gray indicate relative differences). The device was employed from the agents’ vehicle across the street from the residence, and also from the street in the back of the house. It revealed that the roof over the garage and a side wall of the residence were relatively hot and substantially warmer than neighboring homes. From the readings, the agents concluded that Kyllo was using halide lights to grow marijuana in the house (as he in fact was). This information, along with other information, was detailed in an affidavit to obtain a search warrant for the premises.

This Court rejected the idea that the use of the device was not a “search” because all it revealed was heat radiating from the external surface of the house, observing that a powerful directional

²⁵ *Kyllo v United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

²⁶ *Illinois v Caballes*, 543 US 405, 125 S Ct 834, 160 L Ed 2d 842 (2005).

microphone also picks up only sound emanating from a house, and yet all would agree its use to overhear conversations in the home would, in the absence of a warrant, be unlawful.²⁷ The Court concluded that 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.”²⁸

In other words, to use the approach taken by Justice Campbell almost a century and a half ago, the Court did *not* hold that the Fourth Amendment means something other than it did when it was adopted, but regarded it “as meant to apply to the present state of things as well as to all other past or future circumstances.” With modern technology, *virtual trespasses* are now possible, allowing, as it were, a “remote” invasion of a reasonable expectation of privacy held *within the home* of the person who seeks to complain. When this is to occur, said the Court, a warrant is needed, founded on probable cause.

But that use of a dog trained to sniff out marijuana is not comparable to use of a thermal-imaging device is made plain in *Illinois Caballes*, for the reason that the dog sniffs reveal nothing other than the “presence of absence of a contraband item,” something in which no one has a reasonable expectation of privacy—nor is the use of the sense of smell of a dog a “device” not available to general

²⁷ *Kyllo*, 121 S Ct at 2044.

²⁸ *Kyllo*, 121 S Ct at 2046.

public use.²⁹ The case involved a dog sniff of an automobile, and the Court noted that in *United States v Place*³⁰ it had treated a “canine sniff by a well-trained narcotics-detection dog as ‘sui generis’ because it ‘discloses only the presence or absence of narcotics, a contraband item.’”³¹ The use of such a dog, then, is not a search because it “does not expose noncontraband items that otherwise would

²⁹ It is not use of a device at all, and the use of the remarkable sense of smell of dogs dates back centuries. See dissenting opinion in *State v. Juarez-Godinez*, 900 P.2d 1044, 1056 (Or.App.,1995), overruled *State v Smith*, 963 P.2d 642 (Or., 1998): “. . . in the ancient Greek epic, *The Odyssey*, written in approximately 700 B.C., Homer describes the return of Odysseus to his home and family. Because Odysseus is disguised as a beggar, no one recognizes him except Argos, his devoted tracking hound. See also *Cynegeticus* (Greek treatise on hunting and dogs authored by Xenophone between 430 and 370 B.C.). In England and in this country from its earliest days, there is literature about the use of dogs to find objects and people by detecting the odor left behind when the object or the person was no longer discernible by humans. See generally 1 *Wigmore on Evidence* § 177 (3d ed 1940); J.C. McWhorter, *The Bloodhound as a Witness*, 54 Am L Rev 109, 114 (1920). . . .”

³⁰ *United States v Place*, 462 US 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

³¹ *Caballes*, 125 S Ct at 838.

remain hidden from public view.”³² The Court specifically addressed *Kyllo*, finding it distinguishable *precisely* because the device there was “capable of detecting lawful activity” whereas the dog sniff revealed “no information other than the location of a substance that no individual has any right to possess....”³³

1. No search occurred here through either the “sniff,” as there was no invasion of a reasonable expectation of privacy, given that only contraband could be “sniffed”

Does the use of a trained drug-detection dog at the front door of premises—a sniff that “does not expose noncontraband items that otherwise would remain hidden from public view”—constitute a search because of the place employed; that is, at the *threshold* of a home rather than the outside of an automobile? The Florida Supreme Court answered this question incorrectly, and should be reversed, for neither a search, nor a virtual trespass into the home, occurred here.

The search-warrant application affidavit here included that a trained dog had “alerted” for the presence of marijuana at the front door of Jardines’s residence. The Florida Supreme Court found that the use of the drug-detecting dog was itself a warrantless search in violation of the

³² *Caballes*, 125 S Ct at 838 (quoting *Place*). The opinion was joined by the author of *Kyllo*, Justice Scalia.

³³ *Caballes*, at 838.

Fourth Amendment, based largely on *Kyllo*.³⁴ That court found *Place* distinguishable not because the investigative method employed differed, as it did not, but because of the *location* of its employment—a dwelling rather than upon luggage at an airport. This analysis is both question-begging (where the issue is whether a search occurred, to resolve it on the ground that the “search” crossed the threshold begs the question), and factually inaccurate (the dog’s sense of smell hardly crosses the threshold; rather, the odor of marijuana escapes the threshold, to be noticed by the dog). And its transformation of an investigative technique described as *not a search* by this Court because, given that it “does not expose noncontraband items that otherwise would remain hidden from public view,” it invades no expectation of privacy that society will recognize as reasonable, into a search because of the *place* employed, renders the Fourth Amendment nonsensical.³⁵ Either a sniff by a trained dog is a search or it is not (and in this case no invasion of the house occurred in the placement of the dog). And other cases reject the notion that *Kyllo* requires the conclusion that it is the place employed rather than

³⁴ *Jardines v State*, 73 So.2d 34, 44 ff (2011).

³⁵ See Comment, “State V. Rabb: Dog Sniffs Close to Home,” 80 St. John's L. Rev. 1123, 1133 (Summer 2006)(stating that “The Rabb court incorrectly read *Kyllo* as evidence that *Place* and its progeny concern location,” and taking the position that *Rabb* was wrong in both rationale and result).

the technique that governs whether a search has occurred.

The point was considered in *United States v Brock*.³⁶ As in the present case, a trained drug-sniffing dog alerted to the presence of contraband from outside the door to premises (a locked bedroom occupied by Brock in the residence of another person), and that information was employed in an affidavit to obtain a search warrant. The court found *Caballes* rather than *Kyllo* controlling precisely because the technique employed does not somehow transmogrify based on the location where it is employed, even though employed in the same manner.

Kyllo does not support defendant's position. The *Kyllo* Court did reaffirm the important privacy interest in one's home....However, as the Court subsequently explained in *Caballes*, it was essential to *Kyllo's* holding that the imaging device was capable of detecting not only illegal activity inside the home, but also lawful activity including such intimate details as "at what hour each night the lady of the house takes her daily sauna and bath."...the dog sniff inside Brock's residence was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any

³⁶ *United States v Brock*, 417 F3d 692 (CA 7, 2005).

information about lawful activity over which Brock had a legitimate expectation of privacy.³⁷

To much the same effect is the Maryland Supreme Court's decision in *Fitzgerald v State*.³⁸ Again, a trained dog was used and detected the odor of marijuana outside Fitzgerald's apartment door, and this information was used in the affidavit to a search warrant. The court reviewed the *Place* decision and remarked that from the language employed in that opinion "it is possible to view the Court's holding either as narrowly directed at airplane luggage or as a general categorization of canine sniffs as non-searches. Subsequent Supreme Court decisions make clear that the Court has adopted the latter view."³⁹ The question does not turn on the location of the dog sniff, said the court, except "to determine whether the dog and officer's presence there was constitutional,"⁴⁰ a matter at

³⁷ *Brock*, at 696.

³⁸ *Fitzgerald v State*, 864 A2d 1006 (Maryland, 2004). The court affirmed the decision of the Maryland Court of Appeals, *Fitzgerald v State*, 837 A2d 989 (Md App, 2002), written by Judge Charles Moylan. As is always the case with opinions of Judge Moylan, its analysis is very helpful on the question here.

³⁹ *Fitzgerald*, at 1010.

⁴⁰ *Fitzgerald*, at 1010.

issue in none of these cases, including the present case.

To the argument that *Kyllo* mandates a different result the court gave the back of its hand: “Even a perfunctory reading of *Kyllo* reveals that its standard does not apply to dog sniffs.”⁴¹ And, consistent with the analysis of the *Brock* case, discussed above, the court found that “*Kyllo*’s concern with thermal imagers’ scope and potential revelation of intimate private details fits neatly with *Place*’s rationale that dog sniffs are unique in their narrow yes/no determination of the presence of narcotic. A person does not have a legitimate expectation of privacy in contraband, but does in bath water. A dog that can determine contraband’s existence and nothing else is not a search, even when sniffing the exterior of a home.”⁴²

⁴¹ *Fitzgerald*, at 1015.

⁴² *Fitzgerald*, at 1016.

See also *United States v Coyler*, 878 F2d 469 (CA DC, 1989); *United States v Reed*, 141 F3d 644, 649-650 (CA 6, 1998) (“...a person has no legitimate privacy interest in the possession of contraband, thus rendering the location of the contraband irrelevant to the [Supreme Court’s holding in *Place*] that a canine sniff does not constitute a search”); *Rodriguez v. State*, 106 SW3d 224 (Tex.App, 2003); *People v Jones*, 279 Mich.App 86, 93, 755 N.W.2d 224 (2008) (“[A] canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused”).

2. No trespass into Respondent's house, either actual or virtual, occurred here

Nor was there any trespass, virtual or actual, into Respondent's home here in order to achieve the "sniff." The police handler walked the dog up the porch, and the dog alerted to marijuana at the Respondent's front door. Though the officer was on Respondent's property, no trespass, "technical" or otherwise, occurred. The Fourth Amendment does not disable the police from doing that which any ordinary citizen could lawfully do. As Professor LaFave has said:

It is not objectionable for an officer to come upon that part of the property which "has been opened to public common use." The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus if police take that route "for the purpose of making a general inquiry" or for some other legitimate reason, they are "free to keep their eyes open," and thus it is permissible for them to look into a garage or similar structure from that location. On the other hand, if the police depart from that route and go to other, more private parts of the curtilage in order to look into a structure there, this constitutes a search, even if the police might have been able to (but didn't) make the

same observation from outside the curtilage.⁴³

And so entries onto property of residences such as walkways, driveways, carports, and the like, and, as here, porches, have been held not to constitute intrusions under the Fourth Amendment.⁴⁴

The sniff of the dog, then, did not constitute a search, nor did walking onto the porch with the dog.

E. Conclusion: the Florida Supreme Court should be reversed

Concerning what he called those “[s]even hallucinogenic little words”—“the Fourth Amendment protects people not places”—Judge Moylan remarked that “[s]tanding alone, they appeared unnerving and many courts went berserk under their intoxicating influence. A closer reading of *Katz*, however, should have dispelled the alarm.”⁴⁵ This is such a case. The police entry onto that part of Respondent’s property which was “opened to public common use” of those who wished to make inquiry within was not objectionable under the Fourth Amendment. The sniff of the dog was

⁴³ LaFave, *Search and Seizure* (4th Ed), § 2.3(f). (footnotes omitted).

⁴⁴ LaFave, *supra*, see cases at fn 213 through 217. And see *People v Houze*, 425 Mich. 82, 387 N.W.2d 807 (1986).

⁴⁵ Moylan, *supra*, at 219.

not a search, as it did “not expose noncontraband items that otherwise would remain hidden from public view.” There was neither a search under the Fourth Amendment—an invasion of a reasonable expectation of privacy held by the person who seeks to complain—nor any cognizable intrusion concerning Respondent’s “person, house, papers, or effects.” By taking the text seriously—“persons, houses, papers, and effects”—the Court may and should avoid a quagmire of privacy questions that are not within the Fourth Amendment, but belong instead to the People’s elected political representatives, with difficult and competing interests involved.⁴⁶

The Fourth Amendment was not violated here, and the Florida Supreme Court should be reversed.

⁴⁶ “Why isn't this precisely the kind of a problem that you should rely upon legislatures to take care of?” Justice Scalia, oral argument transcript, *United States v Antoine Jones*, No. 10-1259, p. 51 (discussing nonconsensual placement of GPS locating devices on automobiles).

Relief

Wherefore, the Petitioner submits that the Florida Supreme Court Should be reversed.

Respectfully submitted,

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