

DOGGEDLY PROTECTING THE SACRED HOME UNDER THE FOURTH
AMENDMENT: *JARDINES V. STATE*

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I. INTRODUCTION

The precious Fourth Amendment embodies the nation's fundamental values of freedom, liberty, and personal identity,¹ and at the core of the Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."² A recent Florida court of appeals decision rejected the idea of the home as a castle—a concept deeply rooted in Anglo-American jurisprudence³—by holding a "dog sniff" at the door of a private residence is permissible without a warrant.⁴ That opinion cited direct conflict with a prior decision,⁵ a conflict that the Florida Supreme Court sought to resolve in *Jardines v. State*.⁶

This Note attempts to show the Florida Supreme Court in *Jardines* correctly decided the issue of sniff tests conducted at the doorway of a private home by treating them as searches requiring probable cause, giving the home its historical Fourth Amendment protection.⁷ Section II of this Note provides the legal and factual background of the *Jardines* case, and Section III analyzes the court's opinion, which involved two distinct issues.⁸ The first issue considered whether a drug-

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¹ See *Jardines v. State (Jardines II)*, 73 So. 3d 34, 55-56 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (2012) (describing the special status given to the sanctity of an individual citizen's home in American jurisprudence).

² 2 *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

³ See *Jardines II*, 73 So. 3d at 45-46 (detailing the historical roots of the idea that a house is an area off limits to governmental powers).

⁴ *State v. Jardines (Jardines I)*, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008).

⁵ *Id.* at 10 (certifying direct conflict with *State v. Rabb*, 920 So. 2d 1175 (Fla. Dist. Ct. App. 2006)).

⁶ *Jardines II*, 73 So. 3d at 35-36.

⁷ See *infra* Part III-IV.

⁸ See *infra* Part II-III.

detection dog sniff at the door of a private residence was a search under the Fourth Amendment, and the second issue discussed the required evidentiary showing of wrongdoing if the sniff test was a search.⁹ Justice Lewis's concurrence is addressed in the discussion regarding the first issue,¹⁰ and Justice Polston's dissenting opinion is presented separately.¹¹ Lastly, this Note provides a brief exploration of the possible implications of the *Jardines* decision.¹²

II. BACKGROUND

A. *History of Fourth Amendment Law in Relevant Context*

The Fourth Amendment of the United States Constitution governs this analysis,¹³ for the Florida Constitution adheres to the United States Constitution's Fourth Amendment principles and interpretations.¹⁴ The Fourth Amendment's protection from unreasonable governmental intrusion involves a subjective expectation of privacy that society would recognize as reasonable.¹⁵ Because a Fourth Amendment issue analysis contains a subjective element—a consideration of the case's particular facts—holdings are “situation-sensitive.”¹⁶ However, because the United States Supreme Court had yet to address the specific issue presented in *Jardines*,¹⁷ the Florida Supreme Court analyzed sev-

⁹ *Jardines II*, 73 So. 3d at 35-36.

¹⁰ See *infra* Part III.A.2.

¹¹ See *infra* Part III.C.

¹² See *infra* Part IV.

¹³ U.S. CONST. amend. IV (“The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”).

¹⁴ FLA. CONST. art. I, § 12 (“This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.”).

¹⁵ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

¹⁶ *State v. Rabb*, 920 So. 2d 1175, 1189 (Fla. Dist. Ct. App. 2006) (quoting *Illinois v. Caballes*, 543 U.S. 405, 423 (2005) (Ginsburg, J., dissenting)).

¹⁷ See *id.* at 1192 (describing how the fact-intensive nature of Fourth Amendment inquiries necessitates uncertainty regarding a confrontation between dog sniff searches and the home environment). The United States Supreme Court granted Certiorari as to

eral relevant federal cases: sniff tests in public places,¹⁸ a chemical test for cocaine on a package damaged by a private carrier,¹⁹ and a search of a home involving sensory enhancement.²⁰

Federal cases addressing public sniff tests uniformly hold that sniff tests by drug-detection dogs are not searches.²¹ The privacy interest one has in contraband is in preventing certain facts from exposure to the authorities, an interest the public does not recognize as legitimate or reasonable.²² Thus, there is no legitimate privacy interest in contraband.²³ The canine sniff is *sui generis*, uniquely revealing the presence or absence of contraband without exposing noncontraband items.²⁴ Because sniff tests reveal only contraband, they are not searches.²⁵ For that reason, a sniff test performed on baggage at an airport was not a search,²⁶ a sniff test performed at a drug interdiction checkpoint was not

Jardines on January 6, 2012, presenting the following question: “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?” Petition for Writ of Certiorari at i, *Florida v. Jardines*, 132 S. Ct. 995 (2012) (No. 11-564), 2011 WL 5254666 at *i; *Florida v. Jardines*, 132 S. Ct. 995 (2012). Section IV addresses the U.S. Supreme Court’s grant of Certiorari and the Court’s likely outcome. See *infra* notes 138-43 and accompanying text.

¹⁸ See *Caballes*, 543 U.S. at 407 (discussing whether sniff tests of vehicles are searches); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (discussing whether sniff tests at highway check points are searches); *United States v. Place*, 462 U.S. 696, 706-07 (1983) (discussing sniff tests of luggage in airports).

¹⁹ See *United States v. Jacobsen*, 466 U.S. 109, 123-24 (1984).

²⁰ See *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

²¹ See, e.g., *Caballes*, 543 U.S. at 409 (holding a sniff test conducted during a lawful traffic stop was not a search); *Place*, 462 U.S. at 707 (holding a sniff test at an airport was not a search).

²² *State v. Jardines (Jardines I)*, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008) (quoting *Caballes*, 543 U.S. at 408-09).

²³ *Id.*

²⁴ *Place*, 462 U.S. at 707.

²⁵ *Jardines v. State (Jardines II)*, 73 So. 3d 34, 61-62 (Fla. 2011) (Polston, J., dissenting), cert. granted, 132 S. Ct. 995 (2012).

²⁶ *Place*, 462 U.S. at 707 (describing several factors to consider in determining if a search occurred: the sniff test did not reveal the contents of the luggage, was not intrusive, did not embarrass the baggage owner, and occurred in public).

a search,²⁷ and a sniff test performed during the course of a lawful traffic stop was not a search.²⁸

The Court applied a similar analysis and found no search when a chemical test for drugs performed on a package that a private shipping company damaged revealed only contraband.²⁹ However, there was a search when a scan of a home used thermal imaging not available to the public that would expose private facts as well as contraband.³⁰ The *Jardines* court examined those relevant Fourth Amendment cases, seeking to resolve the issue of a dog sniff occurring at the home.

B. Factual Background and Procedural History of Jardines v. State

A month after receiving an anonymous “crime stoppers” tip that marijuana was being grown at the Jardines residence, Detective Pedraja organized a sniff test at the home.³¹ The surveillance involved members from the local police department, agents from the narcotics bureau, and agents from the Drug Enforcement Administration (DEA).³² During his surveillance of the home, Pedraja noted the closed blinds and the air conditioner running constantly for fifteen minutes.³³ The dog handler and drug-detection dog³⁴ performed a sniff test—a “vigorous and intensive procedure” involving the dog dramatically spinning around trying to find the source.³⁵ After the dog alerted to the scent of contraband, the handler informed Pedraja who went to the front door for the first time

²⁷ *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

²⁸ *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005).

²⁹ *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (noting a chemical test disclosing whether a substance is cocaine without exposing any other private fact does not compromise a legitimate privacy interest).

³⁰ *Kyllo v. United States*, 533 U.S. 27, 34-35, 38 (2001) (noting a search using thermal imaging might disclose “at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate’”).

³¹ *Jardines v. State (Jardines II)*, 73 So. 3d 34, 37, 48 (Fla. 2011), cert. granted, 132 S. Ct. 995 (2012).

³² *Id.* at 46.

³³ *Id.* at 37 (“[I]n a hydroponics lab for growing marijuana, high intensity light bulbs are used which create heat. This causes the air conditioning unit to run continuously without cycling off.”).

³⁴ The dog’s name is “Franky.”

³⁵ *Id.* at 46-48.

and personally identified the scent of marijuana.³⁶ Pedraja then prepared and received a search warrant of the home, which the police, narcotics officials, and DEA officials who had remained at the home carried out later that day.³⁷ The search revealed marijuana being grown in the Jardines home.³⁸ The entire process of the sniff test included the preparation of the test, the test itself, execution of the search warrant, and the aftermath, all of which endured for several hours.³⁹

The trial court granted Jardines's motion to suppress the evidence obtained with an invalid search warrant,⁴⁰ pursuant to *State v. Rabb*.⁴¹ The Third District Court of Appeal reversed, issuing a mandate requiring the trial court to admit the sniff test results into evidence.⁴² The Florida Supreme Court quashed the court of appeals decision, approving *Rabb*.⁴³

III. ANALYSIS

Justice Perry delivered the opinion of the court, delineating two separate issues: (1) whether there was a search under the Fourth Amendment when a drug-detection dog conducted a sniff test at the front door of a private residence and, if so, (2) the required degree of wrongdoing that had to be proven, probable cause or reasonable suspicion.⁴⁴ Each issue is addressed below, along with Justice Polston's dissenting opinion.⁴⁵

³⁶ *Id.* at 37.

³⁷ *Id.* at 48.

³⁸ *Id.* at 38.

³⁹ *Id.* at 36.

⁴⁰ *Id.* at 35.

⁴¹ *State v. Rabb*, 920 So. 2d 1175, 1180, 1192 (Fla. Dist. Ct. App. 2006) (holding a warrantless sniff test at a home violated the Fourth Amendment and required probable cause).

⁴² *Jardines II*, 73 So. 3d at 35.

⁴³ *Id.* at 56.

⁴⁴ *Id.* at 35-36.

⁴⁵ *See infra* Part III.A-C.

A. *The Majority's Fourth Amendment Analysis, Including Justice Lewis's Separate Special Concurring Opinion*

1. The Special Case of a Dog Sniff at a Private Home

Because a Fourth Amendment issue analysis involves a subjective consideration,⁴⁶ the Court carefully limited Fourth Amendment holdings to the particular facts of the case.⁴⁷ Therefore, the only instances in which the Court has declared dog sniffs were not searches occurred in public and were minimally intrusive upon objects.⁴⁸ Reasoning applicable in the past did not transfer to the consideration of a home sniff test, which searches private property rather than an object and involves a great intrusion.⁴⁹

The majority centered its reasoning largely on an “intrusiveness” analysis, because at the 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.”⁵⁰ A sniff test at the home involves an extreme level of governmental intrusion.⁵¹ In *Jardines*, the sniff test did not simply involve a canine and its handler, but also required the presence of police officials, narcotics bureau members, and DEA agents.⁵² The scene lasted for several hours and subjected the resident to “public opprobrium, humiliation and embarrassment.”⁵³ Such embarrassment existed regardless of whether the resident was present during the course

⁴⁶ See *supra* notes 13-16 and accompanying text.

⁴⁷ See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (“In this case, the dog sniff was performed on the exterior of respondent’s car while he was lawfully seized for a traffic violation. Any intrusion on respondent’s privacy expectations does not rise to the level of a constitutionally cognizable infringement.”); *United States v. Place*, 462 U.S. 696, 707 (1983) (“[W]e conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent’s luggage, which was located in a public place, to a trained canine—did not constitute a ‘search’ within the meaning of the Fourth Amendment.”).

⁴⁸ See *Jardines II*, 73 So. 3d at 45.

⁴⁹ See *id.* at 44, 49.

⁵⁰ *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

⁵¹ *Jardines II*, 73 So. 3d at 46.

⁵² *Id.*

⁵³ *Id.* at 48.

of the proceedings, because a home search offered no anonymity.⁵⁴ Because the sniff test involved a high level of governmental intrusion into the home, the court held the sniff test was a Fourth Amendment search.⁵⁵

Additionally, each prior dog sniff case guaranteed uniform application and was unsusceptible to discrimination.⁵⁶ Objective reason to conduct each sniff test existed based on reasonable suspicion, a routine dragnet-style stop, or when the sniff test occurred during the course of a lawful traffic stop.⁵⁷ In the event of a warrantless home sniff test, however, nothing prevented arbitrary or discriminatory sniff tests on a whim.⁵⁸ Policy necessitated an objective showing of wrongdoing prior to a search in order to prevent discrimination and harassment; to avoid said discrimination, home sniff tests compelled a showing of wrongdoing prior to the test's execution.⁵⁹

The majority reached the correct decision, but its reasoning exceeded that required in the instance of a private home.⁶⁰ While a *sui generis* dog sniff revealed only contraband, the majority held a dog sniff at a home was a search because it involved an unreasonable level of governmental intrusion.⁶¹

2. Justice Lewis's Special Concurrence

Advocating for a bright-line approach, Justice Lewis rightly promoted focusing the analysis on the sacrosanct home as was proper under the Fourth Amendment.⁶² Justice Lewis reasoned that an any-

⁵⁴ Compare *id.* (considering lack of anonymity in a private home), with *United States v. Place*, 462 U.S. 696, 707 (1983) (holding a sniff test of luggage in an airport was not a search since it was anonymous and did not subject the individual to "embarrassment and inconvenience").

⁵⁵ *Jardines II*, 73 So. 3d at 45.

⁵⁶ *Id.* at 45, 49.

⁵⁷ *Id.* at 49.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *infra* Part IV.

⁶¹ *Jardines II*, 73 So. 3d at 49-50 (noting the split of authority as to the issue of dog sniffs at a private residence).

⁶² *Id.* at 56 (Lewis, J., concurring).

mous tip alone could not justify a home search, a sniff test at a home constituted a *per se* search, and the lack of uniform training for drug detection dogs required a bright-line rule to uphold due process.⁶³

Unlike a tip from an identified informant, an anonymous tip requires corroboration and additional evidence of suspicious behavior.⁶⁴ A known informant allows for a level of accountability and reputational verification, whereas an anonymous informant's tip "seldom demonstrates the informant's basis of knowledge or veracity."⁶⁵ In this case, Detective Pedraja received an anonymous tip and arranged the home's surveillance on the tip alone.⁶⁶ Pedraja's additional "evidence" of suspicious behavior consisted of a constantly-running air conditioner, hardly an inappropriate or suspicious activity in the heat of a Florida summer.⁶⁷ Because the anonymous tip was uncorroborated by valid evidence indicating suspicious behavior, the police presence was unjustified at the home, and the sniff test was inappropriate.⁶⁸ Regardless of whether there had been corroborating evidence, the sniff test without a warrant still would not have been acceptable.⁶⁹

Justice Lewis promoted a *per se* approach to dog sniffs at the home stating, "the dog action here constituted a search of a home, in and of itself."⁷⁰ Because of the home's inviolability, sniff tests conducted on objects such as cars or luggage cannot compare.⁷¹ Americans have a reasonable and unwavering expectation of privacy in the home, one grounded in the Fourth Amendment and upheld by decades of Anglo-American jurisprudence.⁷² The freedom from governmental intrusion in the home extends beyond physical objects to air and odors seeping out unintentionally.⁷³ A sniff test intrudes upon the home's air,

⁶³ *Id.* at 56-57.

⁶⁴ *Id.*

⁶⁵ *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)).

⁶⁶ *Jardines II*, 73 So. 3d at 57 (Lewis, J., concurring).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *infra* notes 70-79 and accompanying text.

⁷⁰ *Jardines II*, 73 So. 3d at 57 (Lewis, J., concurring).

⁷¹ *Id.* at 57-58.

⁷² *Id.* at 58.

⁷³ *Id.* at 57.

and “the air within the private home is inextricably interwoven as part of the protected zone of privacy.”⁷⁴ People harbor the expectation that someone or something will not sniff around their home, and the fundamental notion of freedom of private property advanced by the Fourth Amendment commands respect of this expectation of privacy.⁷⁵

A bright-line rule should apply not only because the sniff test occurs at a home, but also because drug-detection dog training is not uniform and the Constitution requires due process.⁷⁶ Certification requirements, exam difficulty, training elements, and training duration vary widely between programs.⁷⁷ Because of dog training’s nonuniform nature and the unpredictability of dog capabilities, admitting a sniff test into evidence threatens the time-honored notion of due process.⁷⁸ A dog sniff alone cannot establish a showing of wrongdoing.⁷⁹

B. The Majority’s Analysis of the Required Evidentiary Showing of Wrongdoing

In the midst of uncertain Fourth Amendment interpretation stands the unwavering principle that a nonconsensual search of a home is presumptively unreasonable without a warrant.⁸⁰ Precedent consistently indicated the showing of wrongdoing for obtaining a warrant could be nothing other than probable cause, and because *Jardines* dealt with the home, the court deferred to precedent.⁸¹ There were few lim-

⁷⁴ *Id.* at 58.

⁷⁵ *Id.* at 57. The concurrence then responded to the dissent, noting the dissent’s cases were distinguishable because the searches did not occur at private residences but in public places. *Id.* at 58-59.

⁷⁶ *Id.* at 60-61.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 56-61. Justice Lewis briefly responded to the dissent’s disapproval of considering the level of embarrassment suffered from the search by saying that consideration was merely a minor factor in the majority’s analysis. *Id.* at 61.

⁸⁰ *Id.* at 50 (majority opinion); *see also* *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”).

⁸¹ *Id.* at 36-37.

ited exceptions to the probable cause requirement, none of which applied to a sniff test at a home.⁸²

An exception to the probable cause requirement arose from *Terry v. Ohio*,⁸³ which allowed reasonable suspicion when the search was “minimally intrusive” and a protective search for weapons.⁸⁴ The Supreme Court expressly limited the *Terry* holding to “its precise underpinnings” on numerous occasions,⁸⁵ only allowing less than probable cause when the search was for weapons and was minimally intrusive.⁸⁶ A concurring opinion once suggested applying the *Terry* rule to sniff tests, permitting less than probable cause if the search was minimally intrusive,⁸⁷ but the *Jardines* majority stood by the Supreme Court’s ruling that “the Fourth Amendment knows no search but a ‘full-blown search.’”⁸⁸ In determining the required showing of wrongdoing, the court did not consider the nature of the search.⁸⁹ Regardless of the degree of intrusiveness, a sniff test required a showing of probable cause.⁹⁰

Although its holding has been limited, *Terry* represented a trend toward upholding a search or seizure despite the lack of probable cause.⁹¹ An exception to a warrantless search being per se unreasonable exists when, upon balancing public and private interests, public interest would be served best by applying a reasonableness standard less than

⁸² *Id.* at 51-52, 54 (quoting *United States v. Colyer*, 878 F.2d 469, 477-79 (D.C. Cir. 1989)).

⁸³ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁸⁴ *Jardines II*, 73 So. 3d at 51 (quoting *Colyer*, 878 F.2d at 478).

⁸⁵ *Id.* (quoting *Colyer*, 878 F.2d at 478).

⁸⁶ *See, e.g., Dunaway v. New York*, 442 U.S. 200, 210 (1979) (“*Terry* itself involved a limited, on-the-street frisk for weapons.”).

⁸⁷ *United States v. Place*, 462 U.S. 696, 723 (1983) (Blackmun, J., concurring).

⁸⁸ *Colyer*, 878 F.2d at 477 (quoting *Arizona v. Hicks*, 480 U.S. 321, 328 (1987)). *But see Hicks*, 480 U.S. at 337 (O’Connor, J., dissenting) (“[D]istin[guishing] between searches based on their relative intrusiveness . . . is entirely consistent with our Fourth Amendment jurisprudence.”).

⁸⁹ *See Jardines II*, 73 So. 3d at 54.

⁹⁰ *Id.*

⁹¹ *Id.* at 52 (quoting *Colyer*, 878 F.2d at 478). For example, applying *Terry*, the Court held probable cause was unnecessary for the search of a purse in a school because the search was reasonable. *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985).

probable cause.⁹² Like the *Terry* exception, the “reasonableness balancing” exception is limited, applying only “when warranted by ‘special needs, beyond the normal need for law enforcement.’”⁹³ Mere evidence gathering is not a special need beyond the normal need of law enforcement and does not require reasonableness balancing.⁹⁴ Because conducting a sniff test is a procedure used to gather evidence, a sniff test does not qualify as a special need.⁹⁵ Professor LaFave noted the temptation of diminishing the required evidentiary showing of wrongdoing for the *sui generis* dog sniff test but cautioned against expanding the definition of “special needs.”⁹⁶ Precedent, policy, and common sense indicate the special needs exception does not apply to dog sniff tests.⁹⁷

Instances exist in which the special needs exception applied to minimally intrusive seizures, but the exception has never applied to searches, and the *Jardines* court did not extend the exception to searches.⁹⁸ Because neither *Terry*’s minimally intrusive exception nor the special needs exception applied to sniff tests, the unwavering rule requiring an evidentiary showing of probable cause applied.⁹⁹

After determining the proper evidentiary showing of wrongdoing as probable cause, the *Jardines* majority considered whether the government established probable cause for the search warrant.¹⁰⁰ In the event of a motion to suppress, the upper-level court defers to the trial court’s factual findings if they are well supported and reviews the trial court’s ruling de novo.¹⁰¹ The facts must be viewed in the totality of the circumstances.¹⁰² Here, the trial court granted *Jardines*’s motion to sup-

⁹² *Jardines II*, 73 So. 3d at 52 (quoting *Colyer*, 878 F.2d at 478).

⁹³ *Colyer*, 878 F.2d at 478 (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989)).

⁹⁴ *Id.* (“Common sense suggests that [evidence *qua* evidence] is not [a special need].”).

⁹⁵ *Jardines II*, 73 So. 3d at 52, 54 (quoting *Colyer*, 878 F.2d at 478).

⁹⁶ *Id.* at 53-54 (quoting 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(g), at 540-41 (4th ed. 2004)).

⁹⁷ *See id.* at 54.

⁹⁸ *Id.* at 52-54 (quoting *Colyer*, 878 F.2d at 478).

⁹⁹ *Id.* at 54-55.

¹⁰⁰ *Id.* at 54.

¹⁰¹ *Id.* at 54-55.

¹⁰² *Id.* at 55.

press and analyzed the remaining evidence after excluding the sniff test: Pedraja's smelling the marijuana at the front door, the anonymous tip, the closed window blinds, and the air conditioner running constantly.¹⁰³ Pedraja smelled the marijuana only after the dog alerted to its scent, thus, he merely confirmed the dog's finding and his testimony was tainted.¹⁰⁴ The unverifiable, anonymous tip was not strong evidence,¹⁰⁵ and the running air conditioner and closed blinds were insufficient to establish probable cause.¹⁰⁶ Because its facts were well reasoned and its ruling was bolstered legally, the trial court properly granted the motion to suppress.¹⁰⁷

C. Justice Polston's Dissenting Opinion

Justice Polston wrote the dissenting opinion, and Justice Canady joined, arguing the sniff test was not a search and was ineligible for Fourth Amendment protection.¹⁰⁸ The dissent disagreed with the majority on several levels: there was no legitimate privacy interest in contraband,¹⁰⁹ there was a lower expectation of privacy at the home's front door,¹¹⁰ Pedraja's smelling of the marijuana qualified as admissible evidence,¹¹¹ and the intensity and embarrassing nature of the sniff test should not have been considered.¹¹²

The crux of the dissenting opinion rested upon the Court's ruling that "there are no legitimate privacy interests in contraband under the Fourth Amendment."¹¹³ The Fourth Amendment's protection from unreasonable governmental intrusions required a subjective and objective

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see also *State v. Rabb*, 920 So. 2d 1175, 1191 (Fla. Dist. Ct. App. 2006) (noting that the detective's smelling marijuana only after the dog sniff's positive alert was tainted and inadmissible).

¹⁰⁵ See *supra* notes 64-69 and accompanying text.

¹⁰⁶ *Jardines II*, 73 So. 3d at 55.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 61-62 (Polston, J., dissenting).

¹⁰⁹ *Id.* at 70.

¹¹⁰ *Id.* at 63.

¹¹¹ *Id.*

¹¹² *Id.* at 69-70.

¹¹³ *Id.* at 61-62 (citing *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)).

expectation of privacy,¹¹⁴ a test that also applied to intrusions of the home.¹¹⁵ Society did not recognize an expectation of privacy in contraband as reasonable, and because a dog sniff only revealed the presence or absence of contraband, a dog sniff failed the objective test.¹¹⁶ Furthermore, all sniff test precedent indicated a dog sniff was not a search.¹¹⁷ Since precedent did not explicitly limit its reasoning to locations or objects unrelated to the home, its reasoning applied to the home as well.¹¹⁸

The dissent did not consider the home as a whole but treated the front door of the home differently.¹¹⁹ Because the expectation of privacy lessened at the front door, it was not subject to the rest of the home's sacred Fourth Amendment protection.¹²⁰ Additionally, no rule existed preventing a person from accessing another's front door, which made a police presence at the front door and any evidence gathered from that location perfectly acceptable.¹²¹ Because the police presence at the front door was lawful, Pedraja's detection of marijuana's scent at the front door was lawful.¹²² After all, "one does not have 'a reasonable expectation of privacy from drug agents with inquisitive nostrils.'"¹²³

The dissent disagreed with the majority's analysis of the sniff test's intensity and embarrassing nature.¹²⁴ Although the majority

¹¹⁴ See *supra* note 15.

¹¹⁵ *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("[A] Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless 'the individual manifested a subjective expectation of privacy . . . and society [is] willing to recognize that expectation as reasonable.'" (alteration in original))).

¹¹⁶ *Jardines II*, 73 So. 3d at 64 (Polston, J., dissenting).

¹¹⁷ See *supra* notes 21-28 and accompanying text.

¹¹⁸ *Jardines II*, 73 So. 3d at 68-69 (Polston, J., dissenting).

¹¹⁹ *Id.* at 63; see also *United States v. French*, 291 F.3d 945, 953 (7th Cir. 2002) (quoting *United States v. Evans*, 27 F.3d 1219, 1229 (7th Cir. 1994)) ("The route which any visitor or delivery man would use is not private in the Fourth Amendment sense . . .").

¹²⁰ *Jardines II*, 73 So. 3d at 63 (Polston, J., dissenting).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 63-64 (quoting *United States v. Johnston*, 497 F.2d 397, 398 (9th Cir. 1974)).

¹²⁴ *Id.* at 69-70.

stated the entire production endured for hours, the facts did not support that proposition.¹²⁵ Pedraja surveyed the house for fifteen minutes before the sniff test, and the test itself lasted between five and ten minutes.¹²⁶ The dissent argued the majority's reasoning based on the degree of intrusiveness was supported by exaggerated calculations, and building an argument on unsupported facts was improper.¹²⁷

IV. CONCLUSION

A sniff test upon a home is a search requiring probable cause, not because of the degree of "public opprobrium, humiliation and embarrassment" that may result from the sniff test, but because it is a search of a home.¹²⁸ A person has the right to be free from unreasonable governmental intrusion in his or her home, and an outright intrusion exists when the sniff test occurs.¹²⁹ The *Jardines* court's decision was correct, but its rationale was flawed. The court applied a nebulous standard considering the quantity of officers on the scene and the duration of the sniff test.¹³⁰ However, as the majority stated in its discussion regarding probable cause, "the Fourth Amendment knows no search but a 'full-blown search.'"¹³¹ The majority should have applied this same bright-line approach in determining whether a sniff test is a search, rather than creating an imprecise rule considering the degree of intrusiveness.¹³² This test is flawed not only because it will be difficult for courts to apply in the future, but the test also overlooks the sacred nature of the home.¹³³ The home's historical significance alone should qualify a home sniff test for Fourth Amendment protection.¹³⁴

While there is no legitimate privacy interest in contraband, as the dissent argued, applying this rule to sniff tests on homes dangerously threatens the sanctity of the home and decimates fundamental

¹²⁵ *Id.* at 69.

¹²⁶ *Id.*

¹²⁷ *See id.* at 69-70.

¹²⁸ *Id.* at 36 (majority opinion).

¹²⁹ *See supra* Part III.A.2.

¹³⁰ *See Jardines II*, 73 So. 3d at 46-49.

¹³¹ *Id.* at 51 (quoting *Arizona v. Hicks*, 480 U.S. 321, 328-29 (1987)).

¹³² *See id.* at 56 (Lewis, J., concurring).

¹³³ *See id.*

¹³⁴ *See id.*

Fourth Amendment principles.¹³⁵ Lastly, because the home requires special treatment under the Fourth Amendment, cases involving sniff tests on objects in public places cannot compare in resolving the *Jardines* issue.¹³⁶ As the *Rabb* court stated eloquently, “the house stands strong and alone, shrouded in a cloak of Fourth Amendment protection,”¹³⁷ a long-standing protection the *Jardines* court properly upheld.

The State of Florida petitioned for a Writ of Certiorari after the Florida Supreme Court’s decision in *Jardines*,¹³⁸ presenting two questions to the Court: first, whether a dog sniff at the front door of a suspected “grow house” is a Fourth Amendment search; and second, whether the officers’ conduct at a home in the course of a sniff test’s execution constitutes a search.¹³⁹ The U.S. Supreme Court accepted jurisdiction but limited its grant of Certiorari to the first issue as to whether a dog sniff at a home is a search.¹⁴⁰ The Court will likely agree with the Florida Supreme Court’s outcome and find that a dog sniff is a search, but will likely use different reasoning in reaching that conclusion. Rather than defining this crucial Fourth Amendment analysis based on uncertain factors,¹⁴¹ the Court will probably find an intrusion per se. The Court’s decision not to grant Certiorari as to whether the officers’ conduct at the home escalated the process into a search indicates its decision will not consider the degree of intrusion. Further, the Court will likely distinguish this case from cases allowing warrantless sniff tests on objects located in public,¹⁴² thereby reaffirming its historical protection of the sacred home.¹⁴³ Regardless of the Court’s rationale, it is reasonable to believe the Court will affirm the Florida Supreme Court.

¹³⁵ *Id.* at 61.

¹³⁶ *Id.* at 57-58.

¹³⁷ *State v. Rabb*, 920 So. 2d 1175, 1189 (Fla. Dist. Ct. App. 2006).

¹³⁸ *Petition for Writ of Certiorari at i, Florida v. Jardines*, 132 S. Ct. 995 (2012) (No. 11-564), 2011 WL 5254666 at *i.

¹³⁹ *Id.*

¹⁴⁰ *Florida v. Jardines*, 132 S. Ct. 995 (2012).

¹⁴¹ *See supra* notes 51-55 and accompanying text.

¹⁴² *See supra* Part II.A.

¹⁴³ *See supra* notes 70-72 and accompanying text.