Florida Law Review

Volume 57 | Issue 4 Article 4

September 2005

Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways

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CASE COMMENTS

CONSTITUTIONAL LAW: RATIFYING SUSPICIONLESS CANINE SNIFFS: DOG DAYS ON THE HIGHWAYS

Illinois v. Caballes, 125 S. Ct. 834 (2005)

Jeffrey A. Bekiares * **

Respondent, a motorist on an Illinois highway, was arrested and charged with one count of cannabis trafficking in contravention of chapter 720, section 550/5.1(a) of the Illinois Code.[1] An Illinois State trooper pulled Respondent over for traveling 6 miles per hour in excess of the speed limit.[2] The trooper radioed to the dispatcher that he was making the stop.[3] Meanwhile, a second trooper, who was part of the Illinois State Police Drug Interdiction Team, overheard the transmission[4] and informed the dispatcher that he was going to bring his canine unit to the scene to conduct a sniff.[5] The first trooper approached the vehicle, informed the driver that he was speeding, and requested registration documents.[6] The trooper then requested that the driver accompany him back to the patrol car,[7] where the trooper told the driver that he was only going to write him a warning for speeding.[8] At this time, the trooper also requested

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* For my dad Wayne—the inspiration; for my mom Susan—the wisdom; and for my brother Mike—the role model. I hope the apple doesn't fall too far from the tree.

** *Editor's Note*: This Case Comment received the George W. Milam Award for the best Case Comment written during Spring 2005.

1. People v. Caballes, 802 N.E.2d 202, 202 (Ill. 2003).

2. *Id.* at 203.

3. *Id.*

4. *Id.* The record does not disclose that there was any communication over the radio between the two troopers during the incident. *Id.*

5. *Id.* A canine sniff consists simply of walking a dog around the exterior of the vehicle while the handler watches for the dog to "alert" to any portion of the vehicle. *Id.*

6. *Id.* At this point, the trooper made several observations regarding the overall appearance of the vehicle; specifically, the trooper observed that there was an atlas on the floor, two suits hanging in the back seat, and that the car smelled of air freshener. *Id.* The Illinois Supreme Court would later determine that these observations collectively were not enough to support any reasonable, articulable suspicion that the driver was engaged in drug trafficking. *Id.* at 204-05.

7. *Id.* at 203. A request for a driver to exit his vehicle is neither unusual nor typically subject to challenge on the grounds of expanding the scope of a seizure. *See* Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977). The Supreme Court held in *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), that probable cause to believe a crime has been committed justifies arrest for even *de minimus* infractions.

8. *Caballes*, 802 N.E.2d at 203.

permission to search Respondent's car, but was denied consent.[9] The canine unit then arrived, and the dog was walked around Respondent's car while the trooper wrote the warning.[10] The dog "alerted" to Respondent's trunk in less than one minute.[11] A subsequent search of the trunk revealed marijuana.[12] At trial, Respondent's motion to suppress the drugs found in the trunk was denied.[13] Respondent was convicted, and the appellate court affirmed.[14] The Illinois Supreme Court concluded that the canine sniff was an unreasonable expansion of the reason justifying the stop and therefore was an unlawful search.[15] The United States Supreme Court reversed and HELD, under the Fourth Amendment of the United States Constitution,[16] a canine sniff conducted during a lawful traffic stop that reveals no information other than the presence or absence of contraband is not a search and is not subject to any heightened standard of reasonable suspicion.[17]

The protection against unreasonable searches and seizures has been considered fundamental at both the federal and state levels.[18] There is significant historical evidence, however, suggesting that, as originally conceived, the Fourth Amendment was not intended to extend beyond protection of the home.[19] Nevertheless, the Supreme Court has slowly

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9. *Id.*

10. *Id.*

11. *Id.* The Respondent evidently made no appeals with respect to the reliability of the dog and handler team. Such challenges often focus on either the dog's training or whether the dog's reaction constitutes an "alert." *See, e.g.*, Matheson v. State, 870 So. 2d 8, 12-15 (Fla. 2d DCA 2003) (noting that use of a dog that has been trained is not sufficient to establish probable cause to search a container after the dog reacts to the container because the handler must reasonably believe that the dog's reaction was an "alert").

12. *Caballes*, 802 N.E.2d at 203.

13. *Id.*

14. People v. Caballes, 797 N.E.2d 250 (Ill. App. Ct. 2001) (published without opinion).

15. *Caballes*, 802 N.E.2d at 205. The Illinois Supreme Court did not expressly state whether it was deciding the case based on Article I, section 6 of the Illinois Constitution or Amendment IV of the U.S. Constitution. Both provisions are substantially the same, *compare* U.S. CONST. amend. IV, *with* ILL. CONST. art. I, § 6, but the distinction is important since Illinois is free to construe its constitutional provisions beyond the minimum federal protections. People v. Cox, 782 N.E.2d 275, 287 (Ill. 2002) (Thomas, J., dissenting). Illinois has traditionally chosen, however, to mirror the federal decisions on the Fourth Amendment. *Id.* (Thomas, J., dissenting).

16. U.S. CONST. amend. IV. "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 . . . ." *Id.*

17. Illinois v. Caballes, 125 S. Ct. 834, 838 (2005).

18. For example, compare U.S. CONST. amend. IV, with FLA. CONST. art. I, § 12, ILL. CONST. art. I, § 6, and IOWA CONST. art. I, § 8. For a discussion of the early state adoptions of the Fourth Amendment, see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

19. *See, e.g.*, David E. Steinberg, *The Original Understanding of Unreasonable Searches and*

expanded the protections of the Fourth Amendment to reach a variety of contexts outside of the home that include situations in which a person manifests an "actual (subjective) expectation of privacy and . . . [where] the expectation [is] one that society is prepared to recognize as 'reasonable.'"[20] The Supreme Court has further noted that certain searches, in the traditional sense of the word, do not constitute "searches" within the meaning of the Fourth Amendment.[21]

The Court first addressed the Fourth Amendment ramifications of canine sniffs in the context of an airport luggage search. In the seminal case of *United States v. Place*,[22] the Court considered the question of whether a canine sniff constitutes a search within the meaning of the Fourth Amendment.[23] In *Place*, law enforcement officers at an airport in Miami became suspicious of the respondent because of his peculiar behavior.[24] Nevertheless, he was allowed to fly to his destination in New York, where other law enforcement officers had been alerted to his arrival.[25] After failing to receive consent to search the respondent's baggage, the officers detained his effects and informed him that they were going to seek a warrant to open the baggage.[26] The officers then moved the baggage to another airport and subjected it to a canine sniff, during which a dog alerted to one bag.[27] The respondent was arrested after the bag was found to contain cocaine.[28] His conviction at the trial level, however, was reversed when the court of appeals determined that the detention of his baggage for such an extended period of time between the initial encounter and the canine sniff was unreasonably lengthy.[29]

Seizures, 56 FLA. L. REV. 1051, 1079-80 (2004).

20. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

21. *See* Oliver v. United States, 466 U.S. 170, 182-84 (1984) (holding that a search of open fields in view of officers did not implicate the Fourth Amendment); United States v. Jacobsen, 466 U.S. 109, 125-26 (1984) (holding that a field test on a substance that reveals only whether the substance is contraband would not implicate the Fourth Amendment).

22. 462 U.S. 696 (1983).

23. *Id.* at 706-07. Technically, the Court's discussion of the canine sniff was dicta, as it was not necessary to determine that the seizure of defendant's luggage was unconstitutional. This point was vociferously advanced in Justice Blackmun's concurrence and probably formed the basis of much of the subsequent confusion over the status of canine sniffs. *Id.* at 723 (Blackmun, J., concurring).

24. *Id.* at 698.

25. *Id.*

26. *Id.* at 699.

27. *Id.* The time that elapsed from the initial seizure to the sniff was approximately ninety minutes. *Id.* Once the dog had alerted, however, the officers had to wait over a weekend to obtain a search warrant to open the baggage. *Id.* The respondent had declined to accompany the officers to the other airport. *Id.*

28. *Id.*

29. United States v. Place, 660 F.2d 44, 53 (2d Cir. 1981).

The Supreme Court affirmed the judgment of the Second Circuit Court of Appeals, concluding that the officers had detained the baggage too long.[30] In its discussion of the case, however, the Court opened the floodgate to two new channels, which would expand the permissibility of searches in a variety of contexts. The first of these channels was the further ratification of applying the reasonable suspicion standard from *Terry v. Ohio*[31] outside of the typical stop-and-frisk situations.[32] The Second Circuit applied this standard in *Place*, even though doing so continued the controversial expansion of the scope of searches permissible under reasonable suspicion from exclusively personal safety searches to evidence-gathering searches as well.[33] The Supreme Court considered this approach acceptable, and it specifically recognized that reasonable suspicion could be used to justify brief seizures of any baggage suspected of containing contraband or evidence of a crime.[34] The second channel opened was the recognition that canine sniffs, at least in the context of this case, do not implicate the Fourth Amendment.[35] The Court reached this conclusion by noting the limited level of intrusion upon privacy that a canine sniff creates.[36] As such, the Court categorized the canine sniff as *sui generis* among search techniques.[37] Thus, the Court concluded that the exposure of the respondent's baggage to a canine sniff did not constitute a search under the Fourth Amendment.[38]

Seventeen years after the *Place* decision, in *City of Indianapolis v.*

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30. *Place*, 462 U.S. at 710.

31. 392 U.S. 1 (1968). The *Terry* case was a significant departure from traditional notions of Fourth Amendment protections that rested on probable cause for almost all searches. In *Terry*, the Court authorized personal searches of suspects in limited situations where officer safety is at stake on grounds of reasonable suspicion of crime, rather than full-blown probable cause. *Id.* at 30. This decision authorized the now familiar stop-and-frisk technique used by police. *Id.* at 30-31. The Terry stop has been applied in several contexts. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 880-81 (1975) (applying reasonable suspicion standard to border searches); United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (applying the reasonable, articulable suspicion standard to traffic stops).

32. *Place*, 462 U.S. at 702.

33. *Place*, 660 F.2d at 50. Courts have been reticent to expand the scope of the narrow probable cause exception established in *Terry*. This principle was expounded in *Dunaway v. New York*, 442 U.S. 200, 210 (1979) (relaying the Court's carefulness not to expand the scope of reasonable suspicion, but further enumerating the limited contexts in which it has been applied).

34. *Place*, 462 U.S. at 702.

35. *Id.* at 707.

36. *Id.* Specifically, the Court observed that a canine sniff does not expose non-contraband items to public view (as a traditional search might) and that a properly conducted sniff reveals information only about the presence or absence of contraband within the container. *Id.*

37. *Id.*

38. *Id.* The narrowness of this part of the holding is significant. The Court specifically notes that the baggage was in a "public place" and the exposure was to a "trained canine." *Id.*

Edmond,[39] the Court considered canine sniffs in the context of motorist traffic.[40] In *Edmond*, law enforcement had established a roadblock checkpoint to screen drivers randomly for narcotics.[41] Police walked drug dogs around the outside of each vehicle that had been diverted from the roadway.[42] Respondents filed a lawsuit on behalf of themselves and the class of motorists who had been stopped, claiming that the checkpoints violated the Fourth Amendment.[43] The trial court held that the checkpoint did not violate the Fourth Amendment,[44] but the appellate court reversed.[45]

The Supreme Court affirmed on the basis that the primary purpose of the roadblock was indistinguishable from the general interest in crime control.[46] This holding confirmed the Court's disapproval of roadblocks which are based on neither individualized suspicion nor "special needs."[47] The Court found that drug enforcement simply cannot be considered an extraordinary circumstance that would justify such an intrusion.[48] In its discussion of the canine component of the search, however, the Court reaffirmed the logic of *Place*.[49] In finding that "walk[ing] a narcotics-detection dog around the exterior of each car . . . does not transform the seizure into a search,"[50] the Court opened the door for canine sniffs to be used at any checkpoint that is lawful at its inception. Indeed, in perhaps a prescient moment, the Court specifically declined to address the legality of stops where canine sniffs might be used in circumstances wholly unrelated to drug interdiction.[51] This holding reinforced the logic of *Place*

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39. 531 U.S. 32 (2000).

40. *Id.* at 40. In *Edmond*, as in *Place*, the Court's treatment of the canine sniff issue left many questions unresolved that future courts would struggle with. This is because the canine sniff was not the primary issue in either case, but rather, was an ancillary point that the Court felt compelled to address. *Id.* at 47-48; *Place*, 462 U.S. at 711 (Brennan, J., concurring).

41. *Edmond*, 531 U.S. at 34-35. The vehicles were stopped according to a pre-determined sequence and without police discretion, and each stop generally lasted no longer than five minutes. *Id.* at 35.

42. *Id.*

43. *Id.* at 36.

44. Edmond v. Goldsmith, 38 F. Supp. 2d 1016, 1028 (S.D. Ind. 1998).

45. Edmond v. Goldsmith, 183 F.3d 659, 666 (7th Cir. 1999).

46. *Edmond*, 531 U.S. at 48.

47. *Id.* at 47-48. The State relied heavily on cases which upheld roadblocks in situations of special needs. *See* Brief for Petitioners at 7, City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (No. 99-1030).

48. *Edmond*, 531 U.S. at 42-43.

49. *Id.* at 40.

50. *Id.*

51. *Id.* at 47 n.2. The dissent in *Edmond* made a forceful argument that the only difference between the roadblock in that case and the one that the Court approved of in *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), was the presence of a dog. *Edmond*, 531 U.S. at 52-53 (Rehnquist, J., dissenting). In *Sitz*, the Court held that a roadblock designed for the sole purpose of detecting drunk driving did not violate the Fourth Amendment. *Sitz*, 496 U.S. at 455. Therefore,

to reassure law enforcement that conducting searches with canine enhancement does not implicate the Fourth Amendment.

The following year, however, the Court invalidated a search that used sensory enhancement to detect details of the home.[52] In *Kyllo v. United States*,[53] the Court considered whether a thermal imaging device could be used by police to determine the relative amount of heat emitted in a residence, in an attempt to detect if marijuana was being grown inside.[54] The police used the device to scan a portion of the petitioner's house, and they determined that the portion they scanned was relatively hot compared to other portions.[55] Based partly on the results of this scan, a Federal Magistrate issued a search warrant for the home; a subsequent search revealed more than one hundred marijuana plants.[56] The District Court found that the search warrant was valid, and the appellate court affirmed.[57]

The Supreme Court reversed, deciding to suppress the evidence as the fruit of an illegal search.[58] The Court focused its reasoning on both the nature of the device and the location to be searched. With regard to the device, the Court found that obtaining details of a "'constitutionally protected area'" by sensory-enhancing equipment—which could not be otherwise obtained without a physical intrusion—is proscribed.[59] This statement was qualified, however, with a suggestion that if the device was "in general public use," the search might be acceptable.[60] With regard to the location, the Court reiterated its belief that the Fourth Amendment draws "'a firm line at the entrance to the house.'"[61] Although the Government contended that only non-intimate details of the home were being captured, the majority rejected this argument by noting first that the

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states could simply initiate their roadblocks for a lawfully recognized special need and have a drug sniffing dog present as a secondary measure. *Edmond*, 531 U.S. at 55-56 (Rehnquist, C.J., dissenting).

52. Sensory-enhancing surveillance has been a source of great challenge and exception since the early days of *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (holding that wiretapping did not amount to a search). The logic of *Olmstead* has since been rejected, and such surveillance is now regulated by a variety of legislation. *E.g.*, 18 U.S.C. § 2518 (2005) (permitting wiretapping for investigative purposes typically only under regulated circumstances and court supervision).

53. 533 U.S. 27 (2001).

54. *Id.* at 29.

55. *Id.* at 29-30.

56. *Id.* at 30.

57. *Id.* at 30-31.

58. *Id.* at 40-41.

59. *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

60. *Id.* This suggestion appears to come from the Court's notions about reasonable expectations of privacy. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). If such a device is known to be in widespread use, perhaps the expectation that it will not be directed at any one given person is diminished. *See Kyllo*, 533 U.S. at 34.

61. *Kyllo*, 553 U.S. at 40 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).

distinction between "'off-the-wall'" observations and "'through-the-wall'" observations is illusory,[62] and second that any details of the home can be considered intimate details.[63] The Court combined this logic to hold that such surveillance is, in fact, a search and, as such, is presumptively unreasonable without a warrant.[64]

The instant Court distinguished *Kyllo* by emphasizing the divide between sensory enhancements that, like a canine, detect only unlawful activity and those that, like a thermal imager, could potentially reveal lawful private information.[65] In the instant case, since the Respondent had no right to reasonably expect privacy in concealing illegal material, the canine search did not reach to a cognizable level of constitutional infringement.[66] In reaching this conclusion, the instant Court grounded its logic on a reaffirmation of its holding in *Place*.[67] Since well-trained canine sniffs disclose only the presence or absence of a contraband substance, they are considered *sui generis*.[68] In the instant case, the traffic stop itself was concededly lawful at its inception, and it was not found to be impermissibly delayed.[69] As such, the instant Court felt that the Illinois Supreme Court had erred in determining that the canine sniff was the cause of a constitutional violation.[70] This conclusion was essentially a ratification of the scenario imagined in *Edmond*, as the instant Court pronounced that conducting a canine sniff does not change the character of an otherwise lawful traffic stop.[71]

By ratifying the use of canine sniffs in the context of traffic stops absent any reasonable, articulable suspicion of the presence of drugs, the Court sidestepped serious issues of reliability, which would be better addressed by the application of the *Terry* standards. The Illinois Supreme Court's attempt to apply *Terry* standards to traffic stops of this nature had a credible measure of precedential support.[72] That court's main proposition

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62. *Id.* at 35-36. Specifically, the Court dismisses this distinction by pointing out that all external observations of an enclosed space can be considered "off-the-wall" since only information that escapes the space is detected. *Id.* Such information, however, always reveals details about the contents of the enclosure. *Id.* This distinction, the Court noted, was rejected by the logic of *Katz*. *Id.*

63. *Id.* at 37-39. The oft-quoted language used here is: "[t]he [device] might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath." *Id.* at 38.

64. *Id.* at 40.

65. Illinois v. Caballes, 125 S. Ct. 834, 838 (2005).

66. *Id.* at 837-38.

67. *Id.*

68. *Id.* at 838.

69. *Id.* at 837.

70. *Id.*

71. *Id.*

72. *See* United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001) (confining investigations pursuant to traffic stops to the scope of the circumstances that justified the stop according to *Terry*);

was that a canine sniff should be treated as an expansion of the scope of a traffic stop.[73] The canine sniff would therefore still be permissible, but only after an independent suspicion of further criminal wrongdoing is formed by the officer.[74] Indeed, if there was a misapplication of *Place* by the Illinois court, it was most likely due to the unclear scope of that holding. Since *Place* itself dealt with a situation in which the police already had reasonable suspicion that the defendant was carrying drugs, *Place*'s rationale could easily have been interpreted to mean that subsequent police encounters in similar situations would also require reasonable suspicion.[75]

The Illinois Supreme Court's attempt to extend the *Terry* protections to canine sniffs at traffic stops would seem to travel a middle road between the needs of law enforcement and the protection of privacy[76] by inserting at least a moderate level of judicial scrutiny into canine sniff situations. This approach was favored, in this instant case, by the dissenting opinion of Justice Ginsburg, where she voiced her preference for application of the *Terry* standard to determine if the canine sniff impermissibly expanded the scope of the search.[77] Nevertheless, the instant Court chose to decline the extension of *Terry* protections to this context, and once again simply excised the canine sniff portion of the *Place* holding to stand alone.[78] In

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cf. Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984) (likening standard traffic stops to *Terry* stops, but noting that stops based on probable cause might be subject to different standards).

73. People v. Caballes, 802 N.E.2d 202, 204 (Ill. 2003).

74. This would make it similar to the situation in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam). In *Mimms*, a police officer permissibly ordered a motorist out of his car during a routine traffic stop. *Id.* at 107, 110-12. Once the officer observed a "bulge" under the defendant's jacket, he had the necessary reasonable suspicion to authorize a pat-down. *Id.* at 111-12. As applied by the Illinois Supreme Court, this standard would subject any further investigation, after reasonable suspicion had been formed by an officer, to the two-part *Terry* test. *Caballes*, 802 N.E.2d at 204. Further guidance on such stops can be found in the dictates enunciated in *Florida v. Royer*, 460 U.S. 491, 500 (1983) (holding an investigative stop must be no longer than necessary to confirm or dispel the officer's suspicions and must be minimally intrusive).

75. For similar interpretations, see *State v. Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002) and *People v. Ortiz*, 738 N.E.2d 1011, 1020 (Ill. App. Ct. 2000). Justice Souter also makes this observation in his dissent in the instant case, in which he notes that the police in *Place* already had independent grounds to suspect that the luggage in question contained contraband before they employed the canine sniff. *Caballes*, 125 S. Ct. at 841 n.5 (Souter, J., dissenting).

76. *But see Caballes*, 802 N.E.2d at 207 (Thomas, J., dissenting) (arguing that the majority's desire to extend *Terry* protections in this context actually weakens Fourth Amendment rights because such expansion further erodes the idea of probable cause).

77. *Caballes*, 125 S. Ct. at 844 (Ginsburg, J., dissenting). Such an approach is also favored by Fourth Amendment scholar Wayne LaFave, who posits that the right result is reached by applying the *Terry* standard in such contexts. Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1894-98 (2004).

78. *Caballes*, 125 S. Ct. at 838.

rejecting the application of the *Terry* standard to the instant case, the Court chose instead to answer the question that it had left open in *Edmond*: whether a suspicionless canine sniff at an otherwise lawful traffic stop constitutes a search.[79] The Court's answer, in no uncertain terms, was "no."[80] Such a simple answer, however, necessarily places greater discretion in the hands of the police (and their canines) than the framers would have envisioned, as well as tremendous faith in the accuracy of a technique that immediately grants law enforcement probable cause for a full-blown warrantless search.[81]

That the Court has decided to treat canine sniffs as non-searches even without articulable suspicion demonstrates a willingness to ignore salient and growing evidence on false positives.[82] The Court reiterates time and again that since canine sniffs only reveal the presence or absence of contraband, they are minimally intrusive in nature and deserve *sui generis* classification.[83] A multitude of credible evidence, however, has shown that the reliability of canine sniffs in certain contexts is questionable.[84] Justice Souter warns of this risk in his dissent, in which he notes that "[t]he infallible dog . . . is a creature of legal fiction."[85] Respondent, in the instant case, relied heavily on evidence that false positives can occur for a number of reasons, including drug-tainted money and handler error.[86] The Court, however, gives little consideration to this argument and dismisses it simply

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79. City of Indianapolis v. Edmond, 531 U.S. 32, 47 n.2 (2000).

80. *Caballes*, 125 S. Ct. at 838.

81. *E.g.*, State v. Tucker, 979 P.2d 1199, 1201 (Idaho 1999) (holding that a canine sniff alert provides the necessary probable cause for a full-blown warrantless vehicle search under the vehicle exception).

82. *See generally* Mark Curriden, *Courts Reject Drug-Tainted Evidence: Studies Find Cocaine-Soiled Cash So Prevalent That Even Janet Reno Had Some*, 79 A.B.A.J. 22 (1993) (chronicling courts' growing reticence to accept drug-tainted money as the only evidence of criminal wrongdoing); Robert Pool, *New Equipment Roundup Dazzles Scientists*, 243 SCIENCE 1554 (1989) (outlining a study suggesting that almost all US currency is contaminated with traces of narcotics); Andy Rickman, Note, *Currency Contamination and Drug-Sniffing Canines: Should Any Evidentiary Value be Attached to a Dog's Alert on Cash?*, 85 KY. L.J. 199 (1996) (detailing the process and extent of narcotic contamination in US currency).

83. *Caballes*, 125 S. Ct. at 838; *Edmond*, 531 U.S. at 40; United States v. Place, 462 U.S. 696, 707 (1983); *see also* United States v. Jacobsen, 466 U.S. 109, 123 (1984) (holding one year after *Place* that a field test for cocaine that could only serve to reveal the presence or absence of cocaine did not constitute a search).

84. *See, e.g.*, *Rickman*, *supra* note 82, at 206-09.

85. *Caballes*, 125 S. Ct. at 839 (Souter, J., dissenting). Justice Souter proceeds to briefly list some authorities supporting the proposition that canine sniffs can be unreliable in certain contexts, and he concludes that "[i]n practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times." *Id.* at 839-40 (Souter, J., dissenting).

86. Brief for the Respondent at 18-20, Illinois v. Caballes, 125 S. Ct. 834 (2005) (No. 03-923).

by stating that the record contains no support for it.[87]

Ironically, in its dismissal of Respondent's discussion about false positives, the Court quotes a portion of Respondent's brief that states that canine sniffs, if "properly conducted," generally reveal only contraband.[88] While there can be little doubt that this is true, it is precisely the phrase "properly conducted" that this contention rests upon and that the majority ignores. Although most canine sniffs purport to have a stunningly high rate of accuracy,[89] there is reliable statistical evidence to suggest that random searches, conducted without any individualized suspicion, can produce abysmal results.[90] Situations that might resemble an *Edmond* roadblock, therefore, would likely be not only intrusive, but also ineffective.[91] This situation is further complicated by strong evidence that somewhere between sixty percent and ninety-five percent of all money in the United States is contaminated with drugs.[92] Under such conditions, a canine sniff undertaken without at least reasonable suspicion starts to look very unreasonable indeed.

Most of the theoretical support for finding that a canine sniff constitutes a search seems to come from comparisons with *Kyllo*.[93] The Court's distinction of *Kyllo* in the instant case, however, is brief and

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87. *Caballes*, 125 S. Ct. at 838.

88. "[D]rug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." *Id.* (quoting Brief for the Respondent at 17, United States v. Caballes, 125 S. Ct. 834 (2005) (No. 03-923).

89. Practitioners regularly report accuracy above ninety percent. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 428 (1996).

90. In his article, Bird produces a statistical example of how high error rates can occur in random sample populations. Using numbers estimates of the percentage of the population that might possess narcotics (0.5%), Bird calculates that an overall success rate in a randomly sampled population of 10,000 people could be as low as twenty percent. *Id.* at 427-28.

91. For one such example of poor results, see *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) (documenting the results of a two-day Florida narcotics roadblock in which approximately 1,450 vehicles were sniffed, and noting that alerts to 28 vehicles that resulted in full-blown searches led to only one arrest for narcotics).

92. *See* United States v. $506,231 in United States Currency, 125 F.3d 442, 453 (7th Cir. 1997) (taking testimony from the government that no one can place much weight on the results of canine sniffs because at least one-third of all US currency is tainted with cocaine); Lord v. State, 616 So. 2d 1065, 1066 (Fla. 3d DCA 1993) (noting that currency contamination is so pervasive in South Florida that traces can be found on much of the currency there); Curriden, *supra* note 82, at 22; Pool, *supra* note 82, at 1554-55; Jeff Brazil & Steve Berry, *You May Be Drug Free, But Is Your Money?*, ORLANDO SENTINEL, June 15, 1992, at A6 (contending that over ninety percent of US currency in some major cities is likely contaminated with narcotics).

93. *E.g.*, Steinberg, *supra* note 19, at 1088-90 (asserting that the decisions in *Kyllo* and *Place* are inconsistent and impossible to reconcile given the similarity in search techniques and the current state of Fourth Amendment jurisprudence).

troublesome.[94] The best option probably would have been for the Court to emphasize the setting of *Kyllo* as a primary reason for its holding,[95] as the Court in *Kyllo* was careful to stress that its holding turned on the reasonable expectations of privacy in the home.[96] Privacy in a vehicle, on the other hand, although recognized, has long been subject to diminished protection, even before the *Katz* test was created.[97] Indeed, this kind of analytical approach was favored and already outlined by Chief Justice Rehnquist in his dissent in *Edmond*.[98] Instead, the instant Court chose to distinguish *Kyllo* by focusing on the critical distinction between those devices that can reveal "intimate" lawful details and those that can reveal only contraband.[99] Such a distinction, however, is once again predicated on a disregard of evidence of false positives in canine sniff cases.

In its holding, the instant Court avoided the issue of context altogether. By contending that the canine sniff is a nonsearch, there is no need to even analyze whether the expectation of privacy in the vehicle's trunk was one that society was prepared to recognize as reasonable.[100] Making such a cursory distinction, however, may well ignore the potential for abuse of this technique.[101] The Court, therefore, perhaps should have proffered a footnote stating that the majority was expressing no opinion on whether a suspicionless canine sniff would be acceptable in the context of individuals walking down the street, or even at the homestead itself. This is possibly the most profound question yet to be answered by the decision in the instant case:[102] Will the Court apply the analysis of *Kyllo* to a suspicionless

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94. Illinois v. Caballes, 125 S. Ct. 834, 838 (2005).

95. Another interesting option for the Court might have been to distinguish *Kyllo* by noting that canine sniffs utilize a device (a dog) that is in *general public use*, whereas the device used in the *Kyllo* case was a relatively uncommon thermal imager. Such an approach is intellectually interesting, but is beyond the scope of this Comment.

96. Kyllo v. United States, 533 U.S. 27, 40 (2001).

97. *See* Carroll v. United States, 267 U.S. 132, 153 (1925) (establishing that, although privacy interests in vehicles are constitutionally protected, their ready mobility justifies a lesser degree of protection of these interests); State v. Tucker, 979 P.2d 1199, 1201 (Idaho 1999) (declaring the validity of a warrantless search of a vehicle once probable cause had been established under the vehicle exception).

98. City of Indianapolis v. Edmond, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting).

99. *Caballes*, 125 S. Ct. at 838.

100. This point is pursued by Justice Souter in his dissent, in which he argues that adherence to *Place* in this context allows the sniff to escape all Fourth Amendment review. *Id.* at 838-39 (Souter, J., dissenting).

101. One of the main concerns of Justice Ginsburg's dissent is the potential for random, suspicionless sniffs of persons and property by police dogs that have simply been loosed onto the streets. *Id.* at 845-46 (Ginsburg, J., dissenting).

102. In his dissent, Justice Souter states that he does not read the majority's opinion as explicitly holding that dog sniffs "always get a free pass" and therefore that the issue might not be revisited in a different context. *Id.* at 842 (Souter, J., dissenting). This may, however, be a wishful interpretation, as the text of the majority's opinion at the section cited never clearly addresses the

canine sniff of the home in the future, or will it adopt the view of those circuits that have interpreted the setting in *Place* (a public place) to be irrelevant and have held that a canine sniff is not a search in any context?[103]

The instant case presented the Court with an opportunity to link the dicta from *Place* and *Edmond* to form a general rule exempting canine sniffs in public places from Fourth Amendment scrutiny. Clarity, however, can come at the price of inflexibility, and in its decision, the Court treads a fine public policy line. On the one hand, the public support for the "war on drugs" demands tough law enforcement measures. The scenario of drug dogs being loosed on the streets to roam at will, envisioned by Justice Ginsburg's dissent, however, necessarily gives pause as to how far the principle that a sniff is not a search can comfortably extend.[104] Despite these warnings, the instant Court declined to extend the reasonable suspicion standard to canine sniffs. In so doing, the Court has, in effect, turned the police canine into a member of the judiciary, by allowing its senses alone to perform the usual function of the reviewing magistrate in determining probable cause. The Fourth Amendment may yet reach the canine nose, but it seems likely that it will not do so until either evidence of false positives in random search situations becomes overwhelming or egregious intrusions upon the home begin to occur.[105] Until that time, the canine sniff will simply remain another search that is not a search.

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issue of canine sniffs in other contexts. *Id.* at 838.

103. *Compare* United States v. Thomas, 757 F.2d 1359, 1366-67 (2d Cir. 1985) (considering a canine sniff a search because "a practice that is not intrusive in a public airport may be intrusive when employed at a person's home"), *with* United States v. Reed, 141 F.3d 644, 649-50 (6th Cir. 1998) (considering a canine sniff of a home not to be a search), United States v. Garcia, 42 F.3d 604, 606 (10th Cir. 1994) (considering a canine sniff of a nonpublic baggage car on a train not to be a search), United States v. Colyer, 878 F.2d 469, 474-77 (D.C. Cir. 1989) (considering a canine sniff of a train sleeper car not to be a search), *and* Porter v. State, 2002 Tex. App. LEXIS 4978, at *9 n.1 (Tex. App. July 11, 2002) (considering a canine sniff of a home not to be a search).

104. *Caballes*, 125 S. Ct. at 845-46 (Ginsburg, J., dissenting).

105. At this time this Comment was being edited for publication, the question was under close consideration in Florida. The Fourth District Court of Appeal of Florida had held that a canine sniff that detected narcotics outside a private residence violated the Fourth Amendment. State v. Rabb, 881 So. 2d 587 (Fla. 4th DCA 2004). The Supreme Court, however, recently vacated and remanded the decision for further consideration in light of *Caballes*. Florida v. Rabb, 125 S. Ct. 2246 (2005).