STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION May 20, 2008
v	No. 275438 Wayne Circuit Court
JEFFREY JUANN JONES, Defendant-Appellee.	LC Nos. 06-011698-01 06-012320-01 Advance Sheets Version

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

BORRELLO, J. (*dissenting*).

In this case, the majority has held that a person has no legitimate privacy interest in the possession of contraband and, therefore, a canine sniff of the porch of the home in which the contraband is located does not constitute a search. In my view, the majority opinion erodes the protections afforded by the Fourth Amendment to protect the privacy and sanctity of individuals' homes and runs afoul of the principle articulated by the United States Supreme Court that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo v United States*, 533 US 27, 37; 121 S Ct 2038; 150 L Ed 2d 94 (2001). Because the majority opinion disregards the heightened Fourth Amendment protection that the Supreme Court has historically recognized exists in a person's home, instead focusing on the illegality of the contraband obtained as a result of the search, I respectfully dissent. I would hold that the canine sniff in this case constituted an unreasonable search of defendant's home in violation of the Fourth Amendment of the United States Constitution, US Const, Am IV, and the prohibition against unreasonable searches and seizures in the Michigan Constitution, Const 1963, art 1, § 11, and that any evidence obtained as a result of this illegal search must be suppressed as fruit of the poisonous tree. *Wong Sun v United States*, 371 US 471, 484-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). Accordingly, I would affirm the trial court's order dismissing the charges against defendant for the reasons set forth in this dissent.

I. Expectation of Privacy in the Home

The majority concludes that the canine sniff of defendant's porch did not constitute a Fourth Amendment search because defendant has no legitimate interest in possessing contraband. According to the majority, "[t]he heightened expectation of privacy that a person has in his residence is irrelevant . . . ." *Ante* at ___. I disagree with the majority's analysis in

this regard. In my view, the majority's conclusion that the canine sniff of defendant's porch did not constitute a Fourth Amendment search disregards the significant privacy interest that the Supreme Court has historically recognized that an individual has in his or her home. At the very core of the Fourth Amendment is the right of an individual to retreat into his or her own home and be free from governmental intrusion. *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961). Thus, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v New York*, 445 US 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980). See also *United States v United States Dist Court for the Eastern Dist of Michigan*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .").

I cannot agree with the majority's failure to recognize the significance of the fact that the canine sniff at issue in this case was effectuated at defendant's home. The majority opinion ignores "the shroud of protection wrapped around a house by the Fourth Amendment[.]" *State v Rabb*, 920 So 2d 1175, 1182 (Fla App, 2006). In my view, this case turns on the fact that the search was undertaken not in a public setting where defendant would have had a diminished expectation of privacy, but at defendant's home, where defendant reasonably had the highest expectation of privacy. A person's home is not some abstract place or location for which it is unclear whether the person has a reasonable expectation of privacy. Indeed, "in the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." *Kyllo*, *supra* at 34 (emphasis in original).

The Supreme Court cases cited above plainly reveal the fact that the Fourth Amendment affords individuals a heightened expectation of privacy in their homes. While it is true that, in general, the Fourth Amendment protects people, not places,[1] it is clear that when the place involved is an individual's home and the person has not knowingly exposed the contents of the home to the public, *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967), the Fourth Amendment does provide heightened protection for that particular place. Justice Harlan's concurrence in *Katz* underscores the fact that, contrary to the view of the majority in this case, the place or location of a search is significant, particularly if that place or location is an individual's home:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is

[1] I would observe, however, that the United States Supreme Court has, in numerous Fourth Amendment cases, characterized places as "constitutionally protected areas." See, e.g., *Kyllo*, *supra* at 31, 34; *Berger v New York*, 388 US 41, 57, 59; 87 S Ct 1873; 18 L Ed 2d 1040 (1967); *Hoffa v United States*, 385 US 293, 301; 87 S Ct 408; 17 L Ed 2d 374 (1966); *Lopez v United States*, 373 US 427, 438-439; 83 S Ct 1381; 10 L Ed 2d 462 (1963); *Silverman*, *supra* at 510, 512.

> 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." Thus a man's home is, for most purposes, a place where he expects privacy . . . . [*Id.* at 361 (Harlan, J., concurring).]

By focusing on the illegality of the contraband obtained by the search, the majority disregards the significant privacy interest that defendant had in his home. Under the majority's view, the crux of the issue is not where the search took place, but rather the legality of the item that was being sought. The majority's failure to engage in a meaningful discussion regarding the privacy interests that an individual has in his or her home is disturbing; any discussion of what constitutes a search that does not begin its analysis by taking into consideration the level of the expectation of privacy in the place searched is, in my view, fundamentally flawed. The majority essentially asserts that because the item sought was illegal contraband, there is no Fourth Amendment protection and no suppression remedy for illegally obtained evidence. Under this reasoning, the government could justify any search of an individual's home, no matter how unreasonable, as long as the government is searching for contraband. I find such a conclusion abhorrent to the principles and legal traditions set forth by and from the Fourth Amendment.

II. Canine Sniff

The importance of the fact that the canine sniff occurred at defendant's home, and not in a public place, is highlighted by two decisions of the United States Supreme Court that have addressed the constitutionality of the government's use of a canine sniff in public places. In *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983), the Supreme Court held that a canine sniff of a passenger's luggage at an airport did not constitute a search within the meaning of the Fourth Amendment. Although part of the rationale for the Court's conclusion that the canine sniff did not constitute a search was the fact that the canine "sniff disclose[d] only the presence or absence of narcotics, a contraband item," *id.* at 707, the fact that the sniff occurred in a public place was also an important part of the Court's rationale:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. . . . Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we 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. [*Id.* (emphasis added).]

The United States Supreme Court revisited the issue of canine searches in public places in *Illinois v Caballes*, 543 US 405; 125 S Ct 834; 160 L Ed 2d 842 (2005). In *Caballes*, the police stopped the defendant's vehicle for speeding. While one officer was writing the defendant a warning ticket, another officer walked his dog around the car, and the dog indicated that it detected drugs in the trunk. On the basis of the dog's response, the officers searched the trunk, found marijuana, and arrested the defendant. In holding that the arrest and search were lawful, the Court stated:

> [T]he use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707—during a lawful traffic stop, generally does not implicate legitimate privacy interests. 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. [*Caballes*, *supra* at 409.]

In *Place*, the fact that the canine sniff of the defendant's luggage occurred "in a public place" was part of the Court's rationale in concluding that the canine sniff did not constitute a search within the meaning of the Fourth Amendment. *Place*, *supra* at 707. Similarly, in *Caballes*, which relied on the reasoning of *Place*, the Court recognized that the expectation of privacy that an individual has regarding "intimate details in a home" is "categorically distinguishable from [a person's] hopes or expectations concerning the nondetection of contraband in the trunk of his car." *Caballes*, *supra* at 409-410. In light of the Court's explicit recognition in *Place* that the defendant's luggage was located "in a public place[,]" *Place*, *supra* at 707, I cannot concur with the majority's contention that "[t]he heightened expectation of privacy that a person has in his residence is irrelevant under *Place*'s rationale." *Ante* at ___. The plain language of the Court's opinion in *Place* reveals that part of the rationale for the Court's holding was that the canine sniff of the luggage occurred in a public place. In *Place*, the canine sniff occurred in the terminal of an airport, and in *Caballes*, the canine sniff was performed on an automobile that was stopped on an interstate highway. If anything, the majority's claim that "the holding in *Place* did not turn on the location of a canine sniff," *ante* at ___, underscores the inapplicability of the holdings of *Place* and *Caballes* to the facts of this case because although those cases involved canine sniffs, the canine sniffs occurred in public places, not, like in this case, in an individual's home.

III. *State v Rabb*, 920 So 2d 1175 (Fla App, 2006)

I am persuaded by the reasoning and holding of the Florida Court of Appeals in *Rabb*,[2] a case that is factually on point with the instant case because it did involve a canine sniff of an individual's home.[3] The issue in *Rabb* was identical to the issue in this case: "whether a dog sniff at the exterior of a house is a search under the Fourth Amendment." *Rabb, supra* at 1182. The court in *Rabb* began its analysis with a discussion about the "constitutional protections afforded a house throughout the long history of the Fourth Amendment," noting the existence of a "shroud of protection wrapped around a house by the Fourth Amendment[.]" *Id.* In ruling that the canine sniff constituted an unreasonable search of the defendant's house, *Rabb* concluded that *Kyllo*, *supra*, controlled the outcome of the case. In *Kyllo*, the police used a thermal imager to scan the petitioner's house. *Kyllo*, *supra* at 29. The scan revealed the presence of heat in certain locations in the house, from which the police concluded that the petitioner was using halide lamps to grow marijuana. *Id.* at 30. The United States Supreme Court stated that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained" and ruled that the use of the sense-enhancing thermal imager amounted to an unreasonable search of the petitioner's house. *Id.* at 37, 40.

In relying on *Kyllo*, the *Rabb* court noted the importance of the fact that the canine sniff was a search of the defendant's home:

> This logic is no different than that expressed in *Kyllo*, one of the recent pronouncements by the United States Supreme Court on law enforcement searches of houses. The use of the dog, like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house, which is reasonably considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in *Kyllo*, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the house at all, or in this case, the fact that a dog's sense of smell crossed the "firm

[2] This was the *Rabb* court's second opinion in the matter. Its first opinion, *State v Rabb*, 881 So 2d 587 (Fla App, 2004), was vacated by the United States Supreme Court and remanded for further consideration in light of *Caballes*, *supra*. *Florida v Rabb*, 544 US 1028 (2005).

[3] The majority conclusorily rejects *Rabb* with the statement: "*Rabb* has not been cited in any subsequent decisions for the holding that a canine sniff at a residence's front door constitutes an illegal search." *Ante* at ___ n 1. For reasons explained in the body of my dissent, I, like the trial court in this case, am persuaded by the reasoning and holding of the *Rabb* opinion. Furthermore, I would note that, while the United States Supreme Court's denial of certiorari does not express the Supreme Court's view of the merits of the lower court's judgment, *Hathorn v Lovorn*, 457 US 255, 262 n 11; 102 S Ct 2421; 72 L Ed 2d 824 (1982), the United States Supreme Court did deny certiorari following the *Rabb* court's decision on remand. *Florida v Rabb*, ___ US ___; 127 S Ct 665; 166 L Ed 2d 513 (2006).

> line" of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an "intimate detail" of that house, no less so than the ambient temperature inside Kyllo's house. Until the United States Supreme Court indicates otherwise, therefore, we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search. [*Rabb*, *supra* at 1184.]

In concluding that the canine sniff of the defendant's house constituted an unreasonable search, the *Rabb* court distinguished the United States Supreme Court's rulings in *Place* and *Caballes* on the basis that although *Place* and *Caballes* involved canine sniffs, the canine sniffs in those cases occurred in public places, whereas in *Rabb* the canine sniff occurred at the defendant's house:

> In the present case, there are significant place and situation differences from *Caballes*. The challenged dog sniff occurred at the exterior of Rabb's house, the most sacred of places under Fourth Amendment jurisprudence. To repeat, the Fourth Amendment draws "a firm line at the entrance to the house." *Payton*, 445 U.S. at 589. *Caballes*, on the other hand, does not involve a house, but rather a vehicle lawfully stopped by law enforcement while traveling along a public interstate highway. 125 S.Ct. at 836. Throughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to houses for several reasons: the ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of those passing by, and the reality of "pervasive regulation" of vehicles by government, all of which result in a decreased expectation of privacy. . . . The case on which *Caballes* principally relies, *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L. Ed. 2d 110 (1983), also does not involve a house. Rather, it involves luggage in an airport, another public place. *Place*, 462 U.S. at 699, 103 S.Ct. 2637. Without doubt any protection of luggage in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world. The individual's expectation of privacy could not be more minimal in today's airports with their luggage screenings, passenger scans, and patdown searches.
>
> Juxtaposed against the realities of travel by car and plane, the house stands strong and alone, shrouded in a cloak of Fourth Amendment protection. A house is not movable or on display to the public (at least as far as its interior). The interior of the house is not pervasively regulated by government. If the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, this most sacred of places under Fourth Amendment jurisprudence. [*Id.* at 1189.]

Ultimately, the *Rabb* court, observing that the Supreme Court has not yet addressed "the intersection between the staunchly-protected house, as discussed in *Kyllo*, and law enforcement's use of dog sniffs by trained canines to detect contraband[,]" *id.* at 1183, ruled that a canine sniff of a home constitutes an unreasonable search because "the Fourth Amendment remains decidedly about 'place,' and when the place at issue is a home, a firm line remains at its entrance

blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life." *Id.* at 1192.

Like the *Rabb* court, I would conclude that this case is controlled by *Kyllo* because, similar to the facts of this case, *Kyllo* involved the government's use of sensory-enhancing technology to effect a search of a home.[4] The use of a thermal-imaging device in *Kyllo* and the

[4] Two other cases decided by the United States Supreme Court, in which the government used beepers to monitor the defendants' activities, further underscore the fact that whether the use of sensory-enhancing methods constitutes an unreasonable search is dependent on whether the monitoring is of a public place or a private home. In *United States v Knotts*, 460 US 276, 280-285; 103 S Ct 1081; 75 L Ed 2d 55 (1983), the Supreme Court held that the monitoring without a warrant of a beeper (located in a container of chloroform) in an *automobile* did not invade any legitimate expectation of privacy and that there was neither a search nor a seizure within the contemplation of the Fourth Amendment because the governmental surveillance conducted through the beeper was nothing more than following an automobile on public streets. Justice Rehnquist, writing for the majority, recognized that there is a "diminished expectation of privacy in an automobile" and opined that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts, supra* at 281. However, in *United States v Karo*, 468 US 705, 714; 104 S Ct 3296; 82 L Ed 2d 530 (1984), the Supreme Court held that the monitoring without a warrant of a beeper (located in a can of ether) in a *home* violated the Fourth Amendment. In *Karo*, Justice White, writing for the majority, opined:

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. . . .
>
> The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. . . .
>
> We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time. Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight. [*Id.* at 714-716.]

(continued…)

use of a canine sniff in this case are both forms of sensory-enhancing technology, and in both this case and *Kyllo*, the government's use of sensory-enhancing technology was used to effect a search of an individual's home. I firmly agree with the *Rabb* court's conclusion that "[a]t the end of the analysis, the Fourth Amendment remains decidedly about 'place,' and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life." *Id.*

IV. Response to the Majority

The majority relies on *United States v Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984), for the proposition that a person has no legitimate privacy interest in possessing contraband. This assertion underscores the fundamental distinction between my view of this issue and the majority's view. In my view, the proper inquiry is whether an individual had a reasonable expectation of privacy in the place or location searched, particularly if the place or location is an individual's home. In the majority's view, the inquiry is whether the individual had a reasonable expectation of privacy in the item searched. Like the court in *Rabb*, I fear the erosion of the Fourth Amendment that will result from any approach that focuses, not on the expectation of privacy that an individual has in the place searched, but on the expectation of privacy that an individual has in the item searched:

> [A] slippery slope portends peril for privacy if the item searched for is the measuring stick. If determining whether law enforcement conduct constitutes a search is solely a function of whether the item searched for is illegal, whether that item be in a vehicle on a public highway or beyond the closed doors of an individual's castle, the Fourth Amendment is rendered meaningless. Nothing would deter law enforcement from marching a dog up to the doors of every house on a street hoping the dog sniffs drugs inside. If drugs are detected, then no search has occurred because there is no legitimate expectation of privacy in drugs and the Fourth Amendment is not implicated; if drugs are not detected, then law enforcement cannot charge the individual with a crime and the unfounded search goes undeterred. Such an "ends justifies the means" approach to the Fourth Amendment is simply not what the Founders intended when they embodied a

---

(…continued)

While *Knotts* and *Karo* are admittedly factually distinguishable from the instant case because they involve the government monitoring individuals' activities with beepers, in my view, the Supreme Court's holdings in *Knotts* and *Karo* underscore the fact that when sensory-enhancing methods are used to effectuate a search or monitor the activities of an individual or individuals, the location of the search or monitoring, and specifically whether it occurs in the privacy of an individual's home, is critical to the determination whether there has been a Fourth Amendment violation. Thus, just as with a canine sniff, a beeper used to monitor activities that occur in a public place does not constitute a Fourth Amendment violation, *Knotts*, *supra*; however, once the same technology is employed to monitor what goes on inside a private dwelling, the Fourth Amendment precludes their use without first obtaining a search warrant. *Karo*, *supra*.

> barrier at the door of the home in the Fourth Amendment. [*Rabb*, *supra* at 1190-1191.]

Relying on *Place*, the majority opinion asserts that the "United States Supreme Court has held that a 'canine sniff' does not unreasonably intrude upon a person's reasonable expectation of privacy." *Ante* at ___. The majority opinion also relies on *Place* for the proposition that an individual has no expectation of privacy in contraband. According to the majority, "[t]he heightened expectation of privacy that a person has in his residence is irrelevant under *Place*'s rationale." *Ante* at ___. However, as I explained above, I would conclude that *Place* is distinguishable from the instant case because the canine sniff in that case occurred in a public place and not in an individual's home. Furthermore, the notion that a person has no legitimate interest in possessing illegal contraband and that a search revealing contraband can never be unreasonable and never result in the suppression of the contraband is negated by the Supreme Court's holding in *Kyllo*. In *Kyllo*, the Supreme Court held that the use of a thermal-imaging device to detect the growing of marijuana in a home constituted an unlawful search. *Kyllo*, *supra* at 40. Even though the evidence obtained by the search was contraband, the Supreme Court essentially held that the contraband obtained as a result of the illegal search must be suppressed, ruling that it could not be used to establish probable cause for the search warrant. *Id.* The Supreme Court's decision rested on "the Fourth Amendment sanctity of the home" and the fact that the thermal-imaging device was capable of detecting lawful intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath . . . ." *Id.* at 37-38. If, as the majority suggests, a person never has an expectation of privacy in contraband, irrespective of the location of the contraband, then it would follow that a search of contraband would never be unreasonable and such evidence would therefore never be suppressed. As evidenced by the Supreme Court's decision in *Kyllo*, this is clearly not the case. In light of *Kyllo*, I would reject any contention that because a person does not have any expectation of privacy in contraband, there is no suppression remedy when an illegal search of a home uncovers contraband.

Citing *Caballes*, the majority asserts that because the use of the canine sniff *only* reveals the possession of narcotics (marijuana), the canine sniff does not compromise any legitimate privacy interest. I am highly suspicious of any claim that canine sniffs are always reliable and only reveal the presence of marijuana. Moreover, I would observe that in *Caballes*, the Supreme Court, in rendering its decision in that case, somewhat defensively noted that its holding was consistent with *Kyllo*. In so noting, the Supreme Court itself noted the distinction between cases involving searches of an individual's home and cases involving a search of an automobile, stating:

> Critical to [the decision in *Kyllo*] was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home . . . . The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. [*Caballes*, *supra* at 409-410.]

Because defendant's contraband was located in his home and was not in plain view, the existence of the contraband was an intimate detail of his home that the government was not entitled to see

without a warrant. As the Supreme Court noted in *Kyllo*: "[i]n the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, *supra* at 37 (emphasis in original).

The majority is willing to conclude, primarily on the bases of *Place* and *Caballes*, United States Supreme Court cases involving canine sniffs of contraband in public areas, that a canine sniff of a home similarly does not constitute a search within the meaning of the Fourth Amendment. This, despite the fact that the Supreme Court has never addressed the issue whether a canine sniff of an individual's home amounts to a Fourth Amendment search. See *Rabb*, *supra* at 1192. The fact that this case involves the government's use of sensory-enhancing methods to effectuate a search of defendant's home requires a different analysis because of the historical Fourth Amendment protection that has been afforded to homes. I share the *Rabb* court's fear of the erosion of the Fourth Amendment by the use of sensory-enhancing methods to effectuate searches of individual's homes:

> The Fourth Amendment concern is that the government endeavored at all to employ sensory-enhancing methods to cross the firm line at the entrance of a house. Once that line is violated by a dog's nose or a thermal imager, it brings an onslaught of prying government eyes in its wake, and the formerly intimate details of that house become open to public display. [*Id.* at 1190 (citation omitted).]

V. Conclusion

In sum, I would conclude that the canine sniff of defendant's home constituted an unreasonable search in violation of the Fourth Amendment. I agree with *Rabb* that the outcome of this case is determined by *Kyllo* rather than *Place* or *Caballes* because the search in *Kyllo* involved a home. While *Place* and *Caballes* involved canine sniffs, the sniffs occurred in public places. Given the historical Fourth Amendment protection of the home, I find *Place* and *Caballes* distinguishable on this basis. Moreover, I would note that the Supreme Court has yet to address the intersection of the logic of *Place* and *Caballes* with the historical protection of the home under the Fourth Amendment and *Kyllo*. I agree with the *Rabb* court that "[i]f the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, the most sacred of places under Fourth Amendment jurisprudence." *Rabb*, *supra* at 1189. Because the canine sniff in this case constituted the use of a sensory-enhancing method to effectuate an unreasonable search of defendant's home, any evidence discovered was obtained in violation of the Fourth Amendment and Const 1963, art 1, § 11.[5] I would therefore affirm the order of the trial court suppressing the evidence as fruit of the poisonous tree. *Wong Sun*, *supra* at 484-488.

/s/ Stephen L. Borrello

[5] The prosecution concedes that absent evidence revealed by the canine sniff, there is insufficient independent and lawfully obtained evidence to establish probable cause.