Nos. 1243313, 1243314

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
vs.	§	**185TH JUDICIAL DISTRICT**
	§	
MICHAEL VESTAL, ET AL.	§	**HARRIS COUNTY, TEXAS**

SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO SUPPRESS PHYSICAL EVIDENCE

TO THE HONORABLE JUDGE OF THIS COURT:

As requested by this Court, Defendant Michael Vestal, by and through his attorney of record, respectfully submits this supplemental brief in further support of his Motion to Suppress Physical Evidence taken under submission by this Court. Having held in Defendant's favor with respect to all but one issue, the Court requested further briefing on whether a dog sniff alone of a private residence can constitute probable cause sufficient to obtain a warrant. As discussed hereinbelow, a dog sniff, when taken in isolation, cannot constitute probable cause and, thus, does not form the basis of a search warrant as a matter of law.

I. INTRODUCTION

A survey of authorities makes clear that a dog sniff alone cannot create probable cause when the sniff relates to a private residence. Moreover, public policy requires such a result. Indeed, it is axiomatic that "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 a person's life. If that line should crumble, one can only fear where future lines will be drawn and where sniffing dogs, or even more intrusive and disturbing

sensory-enhancing methods, will be seen next." *State v. Rabb*, 920 So.2d 1175, 1188 (Fla. Dist. Ct. App., 2006).

"In *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637 (1983), we categorized the sniff of the narcotics-seeking dog as *"sui generis"* under the Fourth Amendment and held it was not a search. *Id.,* at 707, 103 S.Ct. 2637. [A]n uncritical adherence to Place would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks. We should not wait for these developments to occur before rethinking Place's analysis[.]

The infallible dog, however, is a creature of legal fiction. [T]he sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime. [Dog Sniffs] are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced… in order to justify searches of the traditional sort, which may or may not reveal evidence of crime but will disclose anything meant to be kept private in the area searched. Thus in practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area. And given the fallibility of the dog, the sniff is the first step in a process that may disclose "intimate details" without revealing contraband." *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001)(Justice Souter, dissenting).

II. STATEMENT OF FACTS

On December 2, 2009, Deputy James Savell, a crime control deputy, with the Harris County Sherriff's Office ("Affiant") presented a *Search and Arrest Warrant* ("Warrant") along with accompanying *Affidavit for Search and Arrest Warrant* ("Affidavit") to the Harris County Magistrate, who signed the warrant the same day at 8:47 am. The Warrant Executed December 3, 2009 at 9:00am and the Return of Inventory was filed with the Harris County District Clerks's Office on December 9, 2009 at 11:23am.

The Warrant specified that 10456 Hammerly Blvd., Houston, Harris County, Texas and a blue Chevrolet pickup truck bearing Texas registration SWB 626 were to be searched for Methamphetamine, a Texas controlled substance, in violation of Chapter 481 of the Texas Health and Safety Code.

On December 1, 2009, Affiant accessing the Residence on a common sidewalk serving a multiple complex buildings, placed a narcotics detection canine and its handler, Deputy R. Hoyt, were placed at the front door for an open-air sniff. Deputy Hoyt alleges "a positive alert from his canine partner indicating the presence of a controlled substance."

III. ARGUMENT AND AUTHORITIES

A. Firm Line at the Entrance to the Home

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very 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." *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See *Illinois v. Rodriguez,* 497 U.S. 177, 181, 110 S.Ct. 2793 (1990); *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371 (1980).

We have said that the Fourth Amendment draws "a firm line at the entrance to the house," Payton, 445 U.S., at 590, 100 S.Ct. 1371. That line, we think, must be not only firm but also bright-which requires clear specification of those methods of surveillance that require a warrant. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001)(holding use of sense-enhancing technology to gather any information regarding interior of home that could not otherwise have been obtained without physical intrusion into constitutionally protected area constitutes a "search"). "In the home… all details are intimate details, because the entire area is held safe from prying government eyes. *Id*. at 37.

B. Dog Sniff Not a Search for Objects in Public Places

At first blush, it would appear that the first indication of the possibility probable cause is an alert to the presence of controlled substances by a narcotics detection canine at the front door of the Residence. The Supreme Court has held **a** dog sniff performed on the exterior of car is not a search under the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834 (2005)(A officer's arrival at scene while stop was in progress and use of narcotics-detection dog to sniff around exterior of motorist's vehicle did not rise to level of cognizable infringement on motorist's Fourth Amendment rights, such as would have to be supported by some reasonable, articulable suspicion). Similarly, the Court held exposure of luggage to a trained narcotics detection dog is not a search for

Fourth Amendment purposes. *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637 (1983)("exposure of… luggage, which was located in a public place, to a trained canine- did not constitute a 'search' within the meaning of the Fourth Amendment"). However, in these cases, the sniff was conducted on a vehicle and luggage located in public places, not a private home or business.

C. A Dog Sniff Alone is Insufficient Probable Cause for Search of Home

There is "a long-recognized distinction between stationary structures and vehicles" regarding the privacy interests recognized under the Fourth Amendment. *California v. Carney,* 471 U.S. 386, 390, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Because of this distinction, "less rigorous warrant requirements govern [vehicles] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.* (quoting *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)).

In *United States v. Olivas* "Because of the 'less rigorous warrant requirements' governing the search of a vehicle, the Court does not… hold that a dog sniff, taken alone, is sufficient for a finding of probable cause to search an entire home or commercial property, particularly where… the property encompasses nearly half a city block. Nor is there any binding authority holding that an alert necessarily provides probable cause to search a home or commercial property when a known drug trafficker is present. Nevertheless, [president] clearly demonstrate that an alert is at the very least one factor in establishing probable cause." 2009 WL 2169893 (W.D. Tex. 2009).

D. Heightened Privacy Interest in Dwelling Place

A Fourth Amendment "search," however, does not occur unless the search invades an object or area where one has a subjective expectation of privacy that society is prepared to accept as objectively reasonable. See *Caballes*, 543 U.S. at 408 ("Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment."). In this regard, the home or an individual's "dwelling place" has been afforded a "heightened privacy interest." *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985).

Insofar as the presence of narcotics is revealed by a canine sniff, the Supreme Court has held that "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.'" *See, United States v. Jacobson*, 466 U.S. 109, 123 (1984); see also *Caballes*, 543 U.S. at at 409 (holding that "the use of a well-trained narcotics-detection dog — one that 'does not expose noncontraband items that otherwise would remain hidden from public view' — during a lawful traffic stop, generally does not implicate legitimate privacy interests" (quoting *Place*, 462 U.S. at 707). "This is because the expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable." *Id*. at 408–09. Consistent with the strong expectation of privacy in the sanctity of one's home, however, a canine sniff at the door of an apartment — even if the only function of the sniff is to reveal illegal narcotics inside that apartment — is nonetheless a "search" subject to the constraints of the Fourth Amendment. *See, Thomas*, 757 F.2d at 1367; States v. Hayes, 551 F.3d 138 (2d Cir. 2008). A canine sniff at the

door to an apartment that revealed narcotics inside the apartment, “the defendant had a legitimate expectation that the contents of his closed apartment would remain private.” *Thomas*. at 1367. Although a dog’s sniff in an airport is not a search, [it is] quite another [thing] to say that a sniff can never be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy. While one generally has an expectation of privacy in the contents of personal luggage, this expectation is much diminished when the luggage is in the custody of an air carrier at a public airport. *Hayes* at 145.

Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Thomas, 757 F.2d at 1366–67.

E. Nature of What the Dog Detects is Not the Focus of Fourth Amendment

Denying certiorari, the United States Supreme Court in *Florida v. Rabb*, 127 S. Ct. 665, 166 L. Ed. 2d 513 (U.S. 2006), let stand a decision of a Florida appellate court in *State v. Rabb*, 920 So. 2d 1175 (Fla. Dist. Ct. App. 4th Dist. 2006), review denied, 933 So. 2d 522 (Fla. 2006) and cert. denied, 127 S. Ct. 665 (U.S. 2006), that the use of a police dog to sniff for illegal drugs at the front entrance of a private residence violated the owner's reasonable expectation of privacy under the Fourth Amendment. In so holding, the Florida court distinguished the United States Supreme Court's decision in *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, (2005), which held that the use of a narcotics-detection dog to sniff around the exterior of a motorist's vehicle during a lawful traffic

stop did not violate the Fourth Amendment because it revealed no information other than the location of a substance that the individual had no right to possess. The Florida court noted that unlike a vehicle, a house is not movable or on display to the public—at least as far as its interior, which is not pervasively regulated by the government. "If the Fourth Amendment has any meaning at all," the Florida court said, "a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy." The court said that the nature of what the dog detects is not the focus of Fourth Amendment concern; instead the "concern is that the government endeavored at all to employ sensory-enhancing methods to cross the firm line at the entrance of a house." Furthermore, the court said, the record was at best contradictory regarding whether the dog was trained to detect only contraband.

F. Different Jurisdictions Conclude the Same

The Washington Supreme Court approached this subject in a similar manner, adopting the rationale that "a dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection." *State v. Young*, 867 P.2d 593, 600 (Wash. 1994). This led a Washington Court of Appeals to hold that the use of a trained narcotics dog on the garage of a home constituted an unreasonable search under Washington's state constitution. *State v. Dearman*, 962 P.2d 850, 853 (Wash. Ct. App. 1998). See also, *State v. Woljevach*, 160 Ohio App. 3d 757, 2005-Ohio-2085, 828 N.E.2d 1015 (6th Dist. Huron County, 2005)(Information obtained from drug-detecting dog was not available to support issuance of warrant to search barn for presence of marijuana; use of dog on property was a search that itself needed to be premised on probable cause).

In *United States v. Jackson*, the use of a drug-sniffing dog at the door of the defendant's home to enhance their ability to find out what was inside the home constituted a warrantless and unconstitutional search. The court found, "this reasoning applies directly to the 'sense-enhancing' use of a specially trained dog and [d]ogs with such training are not in 'general public use.'" "The information such a dog can provide about the interior of the home would not otherwise be obtained without a physical intrusion into the home." The court also found "no constitutional distinction between the use of specially trained dogs and sophisticated electronics from outside a home to detect activities in or contents of the home's interior." 2004 WL 1784756 (S.D. Ind. 2004).

In *People v. Dunn*, a case involving a warrantless canine sniff in an apartment hallway, the New York Court of Appeals concluded a canine sniff was a search. The court held that "[g]iven the uniquely discriminate and nonintrusive nature of such an investigative device, as well as its significant utility to law enforcement authorities, we conclude that it may be used without a warrant or probable cause, provided police have a reasonable suspicion that a residence contains illicit contraband." The court reasoned, "[t]o hold otherwise, would raise the specter of the police roaming indiscriminately through the corridors of public housing projects with trained dogs in search of drugs. . . Such an Orwellian notion would be repugnant . . ." 77 N.Y.2d 19 (1990).

State v. Ortiz also involved a warrantless canine sniff in a residential hallway. Here, the Nebraska Supreme Court followed Dunn, holding that a canine sniff in hallways adjoining residential quarters intrudes into an area where an individual has a reasonable expectation of privacy, and such a sniff must be supported by at least reasonable suspicion based on articulable facts. 600 N.W.2d 805 (Neb. 1999).

IV. CONCLUSION

Here**,** he evidence also shows the Officer relied solely upon a canine alert as probable cause to enter the home. Thus, there were no other contextual considerations in the probable cause analysis. Under the totality of the circumstances, and the absence of exigent circumstances, the police lacked probable cause to enter the premises, seize the individuals and perform a search of the residence. Defendant raised several collateral arguments to challenge probable cause in its preliminary motion which have already been accepted by this Court. Thus, the only question remaining is whether the dog sniff alone of a residence can constitute probable cause. Accordingly, Defendant's argument that the dog sniff alone could not form the basis of probable cause sufficient to obtain a warrant has merit. Thus, the property seized in connection with the unlawful search should be excluded.

Respectfully submitted,

Clay Thomas Attorneys at Law, P.C.
3110 Caroline St.
Houston, TX 77004
Tel: 713.237.8100
Fax: 713.237.8108

By:______________________________
Jon P. Thomas
State Bar No. 24037593

CERTIFICATE OF SERVICE

This is to certify that on April 27, 2010, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Harris County, 1201 Franklin, Houston, TX 77002, by hand delivery.

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Jon P. Thomas