Drugs, Dogs and the Fourth Amendment: An Analysis of Justice Stevens' Opinion in Illinois v. Caballes

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When a drug dealer delivers illegal narcotics to the American market place, he or she frequently uses our nation's roadways. n1 Even if narcotics are initially delivered to the United States through an airport n2 or seaport, n3 the logistical nature of drug trafficking requires that the product be subsequently delivered either directly to the final purchaser [*660] of illegal drugs or to the distributor. n4 Doing so often involves the use of a motor vehicle. n5 To combat the inventive ways drug dealers distribute their poison, n6 numerous police agencies have successfully used drug sniffing dogs as an integral part of their investigative strategies. n7

The law enforcement community has been successful in exploiting a dog's keen sense of smell to detect drugs located in areas that would otherwise go undetected by human observation alone. n8 Millions of dollars worth of illegal narcotics have been confiscated by police thanks in part to the detection capabilities of their four-legged friends. n9 In addition, thousands of individuals are arrested each year thanks to law enforcement's use of drug sniffing dogs. n10

Buffering law enforcement's efforts at bringing drug traffickers to justice is the Fourth Amendment of the United States Constitution ("Fourth Amendment"), n11 which is specifically designed to protect individuals from unreasonable searches and seizures by government [*661] entities. n12 While the wording of the Fourth Amendment consists of just one sentence, n13 it has generated a vast amount of criminal litigation for prosecutors and defense counsel alike. n14

The stakes are high when litigating Fourth Amendment controversies, especially in drug trafficking cases. n15 If a police officer seizes illegal narcotics in violation of the Fourth Amendment, the judicial sanction is suppression of the seized evidence. n16 This can be done pursuant to the Exclusionary Rule. n17
The U.S. Supreme Court recently placed its limited stamp of approval on the use of properly trained drug sniffing dogs with its decision in Illinois v. Caballes. In Caballes, a motorist was pulled over by an Illinois State Trooper for a traffic violation. During the early stages of the stop, there was no reasonable suspicion that Mr. Caballes was transporting narcotics.

Nonetheless, a drug sniffing police dog with his mentor, another Trooper with the Illinois State Police, arrived at the scene of the stop. After sniffing the exterior of Caballes' car, the dog gave a positive response to the detection of narcotics in the trunk. A search of Caballes' car trunk revealed a large amount of marijuana placed inside. Caballes was arrested by the Troopers and subsequently convicted of trafficking in marijuana. On appeal, the conviction was overturned by the Illinois Supreme Court. That Court held that absent reasonable suspicion there was no justification for the dog sniff and thus held that the seized drugs should have been suppressed by the trial court.

The United States Supreme Court granted certiorari. In an opinion, authored by Justice John Paul Stevens, the Court held that Caballes did not have a reasonable expectation of privacy in transporting the discovered marijuana that was detected by the drug sniffing dog. The ruling by the Illinois Supreme Court which overturned Caballes' conviction was nullified. Civil libertarians were outraged by the Court's ruling. Conversely, the Court's decision was supported by the Office of the Attorney General in Illinois, which litigated the case.

Throughout this article, I shall argue that the long-term goals of the Fourth Amendment are two-fold. First, the most well known objective of Fourth Amendment jurisprudence is that it protects individuals from unreasonable searches and seizures by the police. Second, the United States Supreme Court generally interprets the Fourth Amendment as allowing law enforcement to lawfully apprehend the criminal element without placing unreasonable constraints in their path. Justice Stevens' opinion in Caballes provides a perfect example of the dual role of the Fourth Amendment.

This article provides an analysis of Caballes and its implications for both law enforcement and the motoring public. It further examines the use of drug sniffing dogs as a tool to uncover drug trafficking strategies that involve the use of our country's roads. In addition, this article offers an in-depth review of the Court's implementation of Fourth Amendment jurisprudence in prior search and seizure cases and their effect on Justice Stevens' opinion in Caballes. Prior to commencing our discussion of Caballes, however, some background information is necessary to better understand the tensions that exist between drugs, drug sniffing police dogs, and our constitutional rights. More specifically, this information will provide background information on the tension that exists between law enforcement's duty to protect the public from drug traffickers, and its obligation to protect the public from losing its civil liberties.

II. Drugs, Dogs, and Fourth Amendment Jurisprudence: An Overview

A. The Drug Problem

The United States holds the distinction of being the largest consumer of illegal narcotics in the world. Drug traffickers, based both domestically and abroad, generate huge revenues for their illicit enterprises through American sales of their products. By the very nature of their business, drug traffickers can be both violent yet resourceful in the way they operate their affairs. Many crimes that appear at first glance to be unrelated to drugs possess at least some link to the narcotics industry.

To profit from America's enormous demand for drugs, those who traffic in narcotics use innovative and often deceptive strategies to deliver their products to the American marketplace. This is done to avoid detection from law enforcement officers.

While transporting narcotics can be a relatively simple task, there is a huge amount of risk should the drug trafficker get caught while engaged in his or her craft. Law enforcement authorities, at both the national and local levels, have implemented a national drug strategy designed to aggressively pursue those who profit from the curse of illegal drugs. The purpose of the drug strategy is simple: to lessen the prevalence of drugs in the American lifestyle.

High level drug dealers are often brutal individuals. Many have been responsible for murdering government officials, civilians, and fellow drug traffickers. Terrorist groups raise revenues for their operations by selling illegal narcotics. One plot implemented by al-Qaeda was the purchase and sale of weapons and ammunition in exchange for cash and illegal drugs. Violence and drug trafficking go hand in hand.
Additionally, health care costs for those who are addicted to drugs are enormous. It is simply not in our country's best interest to allow drug dealers to successfully market their product to the American public. Thus, our country's attempt to bring drug dealers to justice is necessary to protect the American way of life. Moreover, protecting the public from overzealous enforcement efforts is germane to our founding fathers' commitment to assuring our civil rights pursuant to the United States Constitution.

B. Drug Sniffing Dogs: Balancing Civil Liberties with Effective Law Enforcement

One of the more controversial ways the police have brought to justice those who traffic in narcotics is through the use of drug sniffing dogs. The American Civil Liberties Union has claimed using drug sniffing dogs creates an intimidating atmosphere for motorists. Nevertheless, even the Supreme Court has acknowledged that we as a nation have a significant interest in providing the law enforcement profession with the tools that are necessary to bring those who traffic in narcotics to justice.

Across the globe, law enforcement agencies have been implementing dogs to assist in their police obligations since the nineteenth century. American law enforcement has been using dogs since the 1950's. Today, there are literally thousands of dogs being used by police agencies for a variety of tasks, including homeland security initiatives, airport security, and other public safety issues.

The success of any canine drug detection strategy begins with the proper training and recruitment of prospective drug sniffing dogs. Canines can be trained to sniff and detect drugs in a matter of weeks. The successful canine candidate must be even-tempered and genial. When a drug sniffing dog detects illegal narcotics, she either bites or scratches the containers or she becomes docile, sits, and wags her tail.

At the federal level, dogs have been trained to detect a variety of illegal drugs. Continuous training is a key element in a drug sniffing dog's track record of success. For example, U.S. Customs requires its drug sniffing dogs to undergo several hours of practice per month to preserve their keen senses.

Police, by the very nature of their profession, need a certain degree of discretion, prudence, and judgment to catch the criminal element and bring them to justice. The Fourth Amendment, however, provides limitations of what police officers can and cannot do to achieve their objectives.

C. Fourth Amendment Jurisprudence: The Fundamentals

The Fourth Amendment of the U.S. Constitution requires that the public be protected from unreasonable searches and seizures by government law enforcement agencies. In general, there is a presumption that a seizure of one's property is unreasonable absent a judge's issuance of a search warrant or the presence of one of the recognized exceptions to the search warrant requirement.

The Fourth Amendment was designed to prevent our nation from becoming a "police state." It was not designed to abolish interactions between the public and the police, nor was it designed to protect each and every expectation of privacy an individual may subjectively have. What is controlling is an analysis as to whether an individual's expectation of privacy is legitimate and reasonable. Thus, there is a two prong test that defense counsel must satisfy before he or she can expect to succeed in challenging a search and seizure pursuant to the Fourth Amendment.

First, defense counsel must show that the defendant had a subjective expectation of privacy. Second, defense counsel must demonstrate that the defendant's subjective expectation of privacy is objectively reasonable and thus legitimate. In other words, one's subjective expectation of privacy must be one that our American culture deems reasonable.

The highest expectation of privacy is in one's home. In contrast, courts have held that an individual's expectation of privacy in his or her car is substantially lower than in his or her house.

Prior to Caballes, the Court had held that a mere sniff from a properly trained narcotics dog of the exterior of one's belongings is not a search pursuant to the Fourth Amendment. In United States v. Place, the Supreme Court held that due to the minimally intrusive nature of canine sniffs, Fourth Amendment considerations were not triggered when the defendant was charged with distributing cocaine after a police dog detected narcotics in his suit case.
Generally, courts must balance the level of the imposition conducted by the searching officer with the necessity of obtaining information that the individual was involved in criminal activity. If the court finds that the detention strategies implemented by a law enforcement officer are "minimally intrusive" on a defendant's privacy interests, "the opposing law enforcement interests can support a seizure based on less than probable cause." 

III. The Caballes Decision

A. Statement of Facts in Caballes

In November of 1998, Roy Caballes was driving on Route eighty in Illinois when he was stopped by State Trooper Daniel Gillette for speeding. Shortly thereafter, a member of the Illinois State Police Drug Interdiction Team, Trooper Craig Graham, responded to the location of the stop along with his drug sniffing dog.

During questioning, Caballes advised Trooper Gillette that he was in the process of moving to the Chicago area from Nevada. Caballes was informed by the Trooper that he was going to receive just a warning for speeding. When Trooper Gillette asked him for permission to search his car, Caballes refused.

Dispatch advised Trooper Gillette that Caballes was arrested on two prior occasions on drug charges. Caballes however, denied that he had ever been arrested in the past.

Trooper Graham arrived with his drug detection dog. Shortly thereafter, the dog gave a positive response to the presence of drugs in Caballes' trunk. Trooper Gillette then searched the trunk and discovered Caballes had been transporting marijuana. Caballes was arrested and charged with trafficking in cannabis. As will be explained below, of significance to the case at hand is the fact that the total amount of time that elapsed between Trooper Gillette's initial stop to Caballe's arrest was approximately ten minutes.

At trial, Caballes tried to suppress the seizure of the marijuana. The trial court declined to do so. Caballes was subsequently convicted and sentenced to serve twelve years in jail and pay a monetary fine. The appellate court in Illinois affirmed the trial court's ruling.

The Illinois Supreme Court overturned the decisions of the trial court and appellate court to deny defense counsel's motion to suppress the cannabis found in Caballes' car. There, the Court held that for the dog sniff to be proper, the Troopers needed reasonable suspicion that Caballes was trafficking illegal drugs pursuant to the U.S. Supreme Court's ruling in Terry v. Ohio. The Illinois Supreme Court ruled that the two part test in Terry must be used to ascertain whether a police stop of an individual is reasonable. Thus, that Court measured whether Trooper Gillette's stop of Caballes was justified at its inception and whether the use of a drug sniffing dog was reasonably related in scope to the circumstances which justified the stop.

In an opinion delivered by Illinois Supreme Court Justice Thomas Kilbride, it was concluded that while the initial stop of Caballes by Trooper Gillette was indeed proper, reasonable suspicion that Caballes was in the process of transporting narcotics in his car was lacking. Thus, according to Justice Kilbride, as a result of the dog's detection of marijuana in Caballes' car trunk, the scope of the stop was improperly expanded from a standard traffic stop into a drug trafficking investigation.

In a blistering dissent, Illinois Supreme Court Justice Robert Thomas took his colleagues to task by accusing them of rendering a decision that is contrary to decisions handed down by the U.S. Supreme Court pertaining to search and seizure litigation. He argued that use of a drug sniffing dog is not a search for Fourth Amendment purposes. Justice Thomas opined that because dog sniffs are conducted from the exterior of the car, it cannot be said that the sniffs are intrusive.

B. Justice Stevens' Opinion: Summary and Analysis

In a 6-2 decision, the Court focused its inquiry on one important issue: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."
Interestingly, the Court ignored the fact that Caballes lied to Trooper Gillette regarding his arrest record, n119 and instead began its analysis by reviewing the legitimacy of the initial stop. n120 While the Court found Trooper Gillette's stop of Caballes to be lawful, n121 judicial analysis of the facts surrounding the stop does not cease merely because the stop began legitimately. n122 Rather, further judicial analysis of the relevant facts surrounding the stop are still required. Justice Stevens emphasized that even if a traffic stop starts lawfully and is based on probable cause, there is the potential that one's rights pursuant to the Fourth Amendment and other constitutional interests can be compromised if the stop is implemented improperly. n123 If Trooper Gillette stopped Caballes unlawfully, there would have been no question as to the Court suppressing the seizure of the marijuana and reversing [*677] the conviction. n124

The Court provided a very subtle critique of the Illinois Supreme Court's reliance on People v. Cox when it rendered its holding in Caballes. n125 In Cox, a woman was pulled over by an Illinois police officer and arrested after a drug sniffing dog detected drugs in her car and on her person. n126 The drug sniffing dog in Cox, however, arrived approximately fifteen minutes after the defendant was stopped. n127 The drugs were suppressed. n128 The Court described the amount of time that was needed to effect the arrest in Cox as "unreasonably prolonged." n129

In contrast to the Cox case, the entire traffic stop, including the dog's detection of marijuana, record check, and arrest in Caballes was completed in less than ten minutes. n130 Of significance, the Court held, is an analysis of the amount of time an officer uses to complete his or her actions; specifically, the Court examines the reasonableness of that amount of time. n131 The Court deferred to the Illinois state court's finding that the amount of time Trooper Gillette and Trooper Graham used during their stop of Caballes was appropriate. n132

Here, the Court had little choice but to acknowledge the remarkably brief amount of time that Trooper Gillette, Trooper Graham, and their canine companion needed to ascertain that Caballes was transporting illegal narcotics. n133 In a matter of minutes, the Troopers were able to confirm the presence of illegal narcotics in Caballes' car thanks to the drug sniffing dog. This was perhaps the most impressive ingredient in the prosecution's case and provides clear evidence that the stop was [*678] conducted in a competent and efficient manner.

Additionally, the brief amount of time needed to find the drugs pursuant to the dog's sniff from the exterior of Caballes' car validates observations that have been made by the Court that support the use of drug sniffing dogs due to the sniff's minimal level of intrusion. n134 Justice Stevens further argued that so long as an officer stops a motorist lawfully and conducts the stop in an appropriate manner, a drug sniff that violates no legitimate privacy interest does not automatically change the nature of a stop from a traffic stop into a narcotics investigation. n135 For this reason, the Court found that a law enforcement investigation, like the one conducted by Trooper Gillette which does not infringe upon one's "legitimate interest in privacy," does not constitute a search pursuant to the Fourth Amendment of the United States Constitution. n136 The Court found that there is simply no way for one trafficking illegal narcotics to enjoy a constitutionally protected privacy interest in the drugs that is "legitimate." n137 Society, the Court ruled, does not deem one's privacy interest in transporting illegal drugs as an interest that is sound pursuant to the Constitution. n138

Here, Justice Stevens adds a fair amount of common sense to his opinion. It is inherently illegal for one to possess or transport illegal narcotics. How then can one expect to enjoy a constitutionally protected, legitimate privacy interest in possessing something that the law says one cannot possess? Caballes most certainly had an enormous interest in keeping private the fact that he was transporting marijuana. That interest was in transporting his cannabis without being detected by law enforcement and staying out of prison. One would imagine most individuals who transport illegal narcotics have similar privacy interests. With such a self-serving motive in maintaining his privacy, it is [*679] inconceivable that Caballes' efforts to conceal his marijuana from the prying eyes of the Illinois State Police can constitute a privacy interest that is legitimate or reasonable. n139

The Court found persuasive the fact that drug sniffing dogs are trained to find just one thing when conducting a sniff: n140 illegal narcotics. n141 Caballes' legal team even conceded to such. n142 The Court found that using dogs, whose sole job is to detect illegal contraband like narcotics, and not legal personal items, does not trigger constitutional privacy issues when the initial stop is lawful. n143

Another persuasive factor was that the dog that sniffed Caballes' car did so from the "exterior" of the car, not the interior. n144 The Court disagreed with the Illinois Supreme Court's finding that the dog sniff, which occurred "outside" the defendant's car, was unlawful. n145 Thus, the alleged encroachment on this defendant's right to privacy in transporting drugs is not, according to Justice Stevens, a right protected by the Constitution. n146
The Court, however, does not give law enforcement unfettered access to a motorist's personal belongings. n147 If the dog were trained to detect items that are legal to possess or transport, it is doubtful that Caballes' conviction would stand pursuant to the Court's ruling in Kyllo v. United States. n148

[*680]  In Kyllo, the defendant was charged by federal authorities for growing cannabis in his home. n149 The agents who conducted the investigation used a thermal imager to scan the defendant's residence for high intensity lamps that are used to grow marijuana indoors. n150 The trial court upheld the validity of the search warrant that was executed at the defendant's home. n151 In an opinion authored by Justice Antonin Scalia, the Supreme Court reversed, and it held that if a government agency implements an apparatus that "is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant." n152

According to the Court in Caballes, the decisive factor in Kyllo was that the thermal imager could sense legal activities in the home as well as illegal activities. n153 Here, drug sniffing canines are trained to find drugs, not household items that are perfectly legal. n154 Thus, if a dog were capable of detecting items of a particularly personal nature, it is doubtful the seizure of the drugs would have withstood judicial scrutiny. n155

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IV. Conclusion

It is seldom that a judicial opinion provides such clear guidance on how to implement an efficient, well planned, counter-drug strategy. Justice Stevens' opinion should be mandatory reading for both prosecutors and defense attorneys who litigate drug cases that involve the use of drug sniffing dogs. Law enforcement agencies that use drug sniffing canines are well advised to educate their officers in order to carry out drug detection strategies that are compliant with the Court's ruling. In addition, academics who teach and publish in the areas of Fourth Amendment jurisprudence, criminal justice, and criminal procedure should note Justice Stevens' precise, yet well researched, constitutional analysis.

It would be a mistake to conclude that the Court's approval of drug sniffing dogs during routine traffic stops provides law enforcement with a ticket to improperly implement any type of counter-drug strategy that includes the use of canines. It is simply not enough for a law enforcement agency to conclude that they can use drug sniffing dogs in an untimely, undisciplined manner because the Court ruled that one cannot be deemed to have a legitimate expectation of privacy in possessing or transporting illegal narcotics. n156 Justice Stevens was quite clear in his opinion that drug sniffing dogs must be properly trained to detect just narcotics, not other perfectly lawful items that one can carry while driving in a car. n157 A drug strategy that includes canine interdiction during traffic stops must include guarantees that canine detections be conducted in a fair, prompt, and professional manner. n158 If the stop is unreasonably prolonged, the officers risk suppression of the evidence they seize pursuant to the dog sniff. n159

Some civil libertarians have expressed apprehension over Caballes. n160 It should be candidly acknowledged that some law enforcement agencies have, in the past, made significant, even indefensible blunders in investigating drug trafficking. n161 The fact of the [*682] matter is that the missteps of the past should not stop the law enforcement profession from seeking fair and effective ways to apprehend those who use America's roadways to benefit from the illegal drug trade. A counter-narcotics trafficking program that includes the proper use of drug sniffing dogs, pursuant to the Court's ruling in Caballes, can represent a significant step forward in confiscating illegal drugs before they reach the American public. This is important because it would be tragic to allow drug traffickers free access to America's highways by allowing them to effectively conceal illegal drugs from the eyes of law enforcement. n162

Drug traffickers continue to exploit American roadways to deliver their product to their customers. n163 Prohibiting police officers from appropriately using drug sniffing dogs to detect the presence of illegal narcotics from the exterior of an automobile, the way the Illinois Supreme Court attempted to do, would accomplish nothing but reward drug traffickers for hiding their poison. It would be akin to sending police officers out on patrol to apprehend drug dealers with blindfolds over their eyes and their hands tied behind their back.

We as a society have a right and an obligation, especially to our children, n164 to protect ourselves from drug abuse and drug traffickers. n165 Doing so, while at the same time protecting the goals of the Constitution, pursuant to Justice Steven's opinion in Caballes, provides our nation with the opportunity to accomplish that relevant and necessary task.

Justice Stevens' opinion is well written. It combines a brilliant examination of judicial precedent coupled with common sense. Caballes provides a balanced approach to the issue by assuring that the public is protected from unrea-
sonable searches while at the same time providing law enforcement with the tools to fairly and effectively bring drug traffickers to justice.

[*683] Lastly, Caballes acknowledges one central point: the Fourth Amendment of the United States Constitution does more than just protect the public from unreasonable searches by law enforcement. n166 When obeyed, it also allows the police to lawfully protect every man, woman, and child that calls America home, from the narcotics trafficking business. This, I argue, will be the long-term legacy of Justice Stevens’ sound application of Fourth Amendment jurisprudence in Illinois v. Caballes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional Law
Bill of Rights
Fundamental Rights
Search & Seizure
Exclusionary Rule
Criminal Law & Procedure-
Criminal Offenses
Controlled Substances
Delivery, Distribution & Sale
General Overview
Criminal Law & Procedure-
Search & Seizure
Expectation of Privacy

FOOTNOTES:

n1. For example, in Illinois, Chicago is the major transportation hub and distribution center for illegal drugs throughout the Midwest, due to its geographic location and multi-faceted transportation infrastructure. Commercial trucks, passenger vehicles, package delivery services, air packages or couriers, and railways are the most common means traffickers use to transport drugs into Chicago. See DEA Briefs & Background, Drugs and Drug Abuse, State Facts Sheet, Illinois (February 2005), available at http://www.usdoj.gov/dea/pubs/states/illioisp.html.

n2. See, e.g., United States v. Place, 462 U.S. 696 (1983) (O'Connor, J. delivered the opinion of the Court joined by Burger, C.J., and White, Rehnquist, Stevens, and Powell, JJ. Joined; Brennan, J., concurring in which Marshall, J. joined). In Place, the defendant was found to have transported cocaine into the United States through an airport. Id. at 699.

n3. See Drug Trafficking in the United States, infra note 33:

More than 90,000 merchant and passenger ships dock at U.S. ports. These ships carry 9 million shipping containers and 400 million tons of cargo. Another 157,000 smaller vessels visit our many coastal towns. Amid this voluminous trade, drug traffickers conceal cocaine, heroin, [and] marijuana ... for distribution in U.S. neighborhoods.

n4. See discussion supra note 1.

n5. Id.

n6. See discussion infra notes 37-38.

A dog's nose is uniquely equipped to detect the faintest of odors. Dogs possess potentially billions of chemical receptors called olfactory cells. These receptors are located among large supports inside the dog's nose called turbinate bones.

Turbinate bones form numerous cylindrical passages that allow air exposure to millions more cells than is possible with simple tubular nasal passages, such as those found in human beings. Laid out, the surface area of these cells would cover a space the area of the skin on a dog's body. In comparison, the surface area of human olfactory cells would cover no more than a postage stamp.

n9. See, e.g., Christopher Wren, Harnessing the Powerful Secrets of a Dog's Nose, N.Y. Times August 19, 1999, at F5 (reporting on one dog that was used by a federal agency who was, "responsible for more than 155 seizures of smuggled cocaine and heroin worth $25 million on the street"). See also Seper, infra note 37 (reporting on a drug sniffing dog that "seized more than $13 million in illicit narcotics").

n10. See Hurley-Deal, supra note 7, at 51 (observing that, "in 2002, the United States Custom's Canine Enforcement Program recorded 4,980 arrests resulting from canine enforcement activity").

n11. 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, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

n12. See United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (7-2 decision) (Powell, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, White, Blackmun, Rehnquist, and Stevens, JJ., joined; Brennan, J., dissenting in which Marshall, J., joined) (holding that, "The Fourth Amendment imposes limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals"); see also United States v. Place, 462 U.S. 696, 700-01 (1983); see also Jennifer R. Weiser, The Fourth Amendment Right of Female Inmates to be Free From Cross-Gender Pat-Frisks, 33 Seton Hall L. Rev. 31, 39 (2002); see also Antoinette Vitale, Note, Video Voyeurism and The Right to Privacy: The Time for Federal Legislation is Now, 27 Seton Hall Legis. J. 381, 384 (2003); see also, Inga L. Parsons, Fourth Amendment Practice and Procedure 41 (National Institute for Trial Advocacy) (2005) ("The Fourth Amendment prohibition against unreasonable searches and seizures is limited to searches and seizures by government agencies").

n13. See supra note 11 and accompanying text; see also Parsons, supra note 12, at 1 (observing that, "the Fourth Amendment of the Constitution of the United States of America is relatively succinct").

n14. See California v. Acevedo, 500 U.S. 565, 582 (1991) (7-2 decision) (Blackmun, J., delivered the opinion of the Court in which Rehnquist, C.J., and O'Connor, Kennedy, and Souter, JJ., joined; Scalia, J., filed a
concurring opinion; White, J., filed a dissenting opinion in which Marshall, J., joined) (describing the "explosion" in litigating Fourth Amendment controversies); see also Parsons, supra note 12, at 1-2 (observing that, "as Justice Scalia observed in his concurrence in California v. Acevedo, there was an "explosion' of Fourth Amend-
ment litigation after the exclusionary rule was adopted in 1914") (citations omitted); see also William J. Stuntz, Privacy's Problem and the Law of Criminal Procedure, 93 Mich. L. Rev. 1016, 1078 (1995), Professor Stuntz quite accurately describes the amount of litigation based on Fourth Amendment issues as "enormous." Id; see also, Parsons, supra note 12, at 1 (observing that, "despite its brevity, and in part because of it, the Fourth Amendment has spawned (and continues to spawn) an enormous amount of litigation and case law").

n15. See, e.g., Place, 462 U.S. at 699. In Place, DEA Agents, with the assistance of a drug sniffing dog, arrested an individual after they found over 1,000 grams of cocaine in a piece of luggage at an airport. Id. The Court ruled that because the agents violated the defendant's Fourth Amendment rights, all of the seized cocaine was suppressed and his conviction was overturned. Id. at 710.

n16. See infra note 17 and accompanying text.

n17. See Arizona v. Evans, 514 U.S. 1, 10 (1995) (7-2 decision) (Rehnquist, C.J., delivered the opinion of the Court in which O'Connor, Scalia, Kennedy, Souter, Thomas and Breyer, JJ., joined; O'Connor, J., filed a concurring opinion in which Breyer, J., joined; Stevens, J., filed a dissenting opinion; Ginsburg, J., filed a dissenting opinion in which Stevens, J., joined.) (holding that, "the Exclusionary Rule operates as a judicially created remedy designed to safeguard against future violators of Fourth Amendment rights through the rule's general deterrent effect"); see Parsons, supra note 12, at 77 (observing that, "the sanction for violating the Fourth Amendment is the exclusion of the evidence from use by the prosecution at trial .... . The Exclusionary Rule was judicially created to deter police misconduct and is one of the most controversial aspects of criminal law"); see also Parsons, supra note 12, at 1 (observing that, "because the remedy for violating the amendment's provisions is the judicially created penalty of exclusion of the evidence, the amount of litigation on both sides has been massive since the decision on whether to suppress the evidence could ultimately determine if the case can be prosecuted at all, regardless of the guilt of the defendant").

n18. 543 U.S. 405 (2005) (6-2 decision) (Stevens, J., delivered the opinion of the Court in which O'Connor, Scalia, Kennedy, Thomas and Breyer, JJ., joined; Souter, J., filed a dissenting opinion; Ginsburg, J., filed a dissenting opinion in which Souter, J., joined; Rehnquist, C.J., took no part in the decision).

n19. Id. at 406 ("Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway").

n20. See discussion infra note 25.

n21. Caballes, 543 U.S. at 406 ("When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics detection dog").

n22. Id. ("While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent").

n23. Id.

n24. Id. ("Respondent was convicted of a narcotics offense and sentenced to 12 years imprisonment and a $256,136 fine"); see also 720 Ill. Comp. Stat. Ann. 550/5.1(a) (LEXIS 2005) ("Except for purposes authorized by
this Act, any person who knowingly brings or causes to be brought into this State for the purpose of manufacture or delivery or with the intent to manufacture or deliver 2,500 grams or more of cannabis in this State or any other state or country is guilty of cannabis trafficking.

n25. *Illinois v. Caballes*, 802 N.E.2d 202, 205 (2003) (holding that, "a canine sniff was performed without specific and articulable facts to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation. Under these circumstances, the trial court should have granted defendant's motion to suppress the evidence obtained after the dog's alert").

n26. Id.


n28. *Id. at 409* ("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").

n29. *Id. at 410* ("The judgment of the Illinois Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion").

n30. See, e.g., Court OKs Dog Sniff During Traffic Stop, Supreme Court Rules Dog Sniff During Traffic Stop OK Without Suspicion of Drugs (January 24, 2005) available at http://abcnews.go.com/Politics/wireStory?id=438652&CMP=OTC-RSSFeeds0312. According to one attorney with the American Civil Liberties Union, "the use of dogs is intimidating. Thousands of motorists have called complaining about suddenly finding their cars surrounded by policemen and drug dogs. Now no one is safe from this major intrusion into our lives." *Id.*

n31. *Id.* In regard to the Court's approval of the use of drug sniffing police dogs, the Attorney General for Illinois, Lisa Madigan, was quoted as saying, "the use of canine units to help fight this battle is indispensable." *Id.*

n32. Molly McConville, Note, A Global War on Drugs: Why the U.S. Should Support the Prosecution of Drug Traffickers in the International Criminal Court, 37 Am. Crim. L. Rev. 75, 77 (2000) (observing that the United States is the "largest importer and consumer of narcotic drugs and psychotropic substances in the world").

n33. See Drug Trafficking in the United States (September 2001) available at http://www.usdoj.gov/dea/concern/drug Trafficking.html (noting that drug groups that are based both domestically and abroad "cultivate, produce, manufacture, or distribute illegal drugs such as marijuana, methamphetamines, phencyclidine (PCP), and lysergic acid diethylamide (LSD)).

n34. *Id.* ("The illegal drug market in the United States is one of the most profitable in the world").

n35. *Id.* (observing that the illegal drug trade, "attracts the most ruthless, sophisticated and aggressive drug traffickers"); see also McConville, supra note 32, at 76-77 (observing that, "drug trafficking networks also breed further violence and related criminal offenses, such as murder, firearms offenses, racketeering, conspiracy, bribery, tax evasion, banking violations and money laundering").

n36. See discussion supra note 35.
n37. See, e.g., Jerry Seper, U.S. Agency Honors Dog With PAWS to Recognize Award; Labrador "Crazy Joe" Sniffs Out Over $ 13 Million in Cocaine, Marijuana, Washington Times, August 21, 2003, at A09 (reporting on drug seizures made by a drug sniffing dog that included "2,854 grams of cocaine concealed in a false-bottom suitcase that resulted in five arrests; 1,054 grams of cocaine in the belly of an aircraft; 1,790.1 grams of heroin in a false-bottom suit case, leading to the discovery of a passenger who swallowed 76 pellets of heroin; and two suitcases containing coat jackets lined with 1,238 grams of heroin." There were also instances where "17 pounds of cocaine [were] found in a false-bottom suitcase, which also contained three cheese cans of cocaine."); see, e.g., Dennis Hevesi, Man Who Used Dog to Smuggle Receives 3-Year Sentence, N.Y. Times, April 27, 1995, at 3 (reporting on a man who tried to "pick up a dog at the airport [that] had nearly 5 pounds of cocaine surgically implanted before being shipped as cargo from Bogota, Columbia"); see, e.g., D.W. Miller, Canine Carrier, U.S. News and World Report, December 19, 1994, at 14 (reporting on drugs "concealed in fake yams, liquefied in fruit pulp, fashioned into plastic statues of the Virgin Mary, Implanted in a man's thigh and even hidden in shipments of live animals. In an exercise known as Operation Cocaine Constrictor, Florida offi- cers intercepted a load of Boa Constrictors from Columbia, their intestines stuffed with condoms full of co- caine").

n38. See e.g., United States v. Flores-Montano, 541 U.S. 149 (2004) (Rehnquist., C.J., delivered the opinion of the Court, in which Breyer, J. filed a concurring opinion). In Flores Montano, American customs officers confiscated thirty-seven kilos of marijuana from the defendant's gas tank that was attached to the car he was driving from Mexico into California. Id. at 150. The Court ruled that the search of the gas tank that uncovered the mari- juana "did not require reasonable suspicion." Id.; see, e.g., U.S. v. Montayo De Hernandez, 473 U.S. 531 (1985) (Rehnquist, J. delivered the opinion of the Court, in which Burger, C.J., and White, Blackmun, Powell, and O'Connor, JJ., joined. Stevens, J., concurring. Brennan, J., dissenting joined by Marshall, J.). In Montoya De Hernandez, the defendant tried to smuggle "88 cocaine filled balloons in her alimentary canal" into the United States. Id. at 532-33. The Court held that detaining "a traveler at the border, beyond the scope of a routine cus- toms search and inspection is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." Id. at 541; see, e.g., Press Release, Drug Enforcement Administration, Guatemalan-Columbia Heroin and Cocaine Cartel Dismantled (February 15, 2005), available at http://www.dea.gov/pubs/pressrel/pr021505p.html (discussing drug traffickers use of car batteries to hide illegal narcotics); see, e.g., Press Release, Drug Enforcement Administration, DEA Disrupts Columbian Drug Ring (January 16, 2004) available at http://www.dea.gov/pubs/states/newsrel/mia011604p.html (discussing drug traffickers who secreted narcotics into drinking straws and placed them in boxes of seafood. The drugs eventually landed in Miami and New York for distribution).


Referring to the problem of intercepting drug couriers in the Nation's airports, Justice POWELL has observed: "Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs ... may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."

n40. Andrew M. Belt, Anticipatory Search Warrants: State and Federal Applications and Their Future in Maryland, 28 U. BALT. L. REV. 337 (observing that, "given the ease with which illegal drugs can be moved, waiting until they actually reach a location before obtaining a warrant may allow suspects to destroy or transfer the contraband before the warrant is executed.").
n41. Eric Blumenson and Eva Nilson, Policing for Profit: The Drug War's Hidden Economic Agenda, 65 U. Chi. L. Rev. 35, 37 (1998) (observing that America's drug strategy has resulted in "record numbers of drug seizures, asset forfeitures, and prosecutions").

n42. Id. at 40 (observing that Congress gave "financial benefits to state and local law enforcement both directly, through block grants earmarked for drug law enforcement, and indirectly, through forfeiture provisions authorizing law enforcement agencies to seize drug related assets.").

n43. Note, Winning the War on Drugs: A "Second Chance" For Nonviolent Drug Offenders, 113 Harv. L. Rev. 1485 (2000) (noting that "since the mid 1980's the United States has undertaken an extensive effort to incarcerate drug offenders using congressionally prescribed sentencing guidelines and mandatory minimums").

n44. McConville, supra note 32, at 78 ("The narcotics control objectives of the United States are expressed in varying ways by government officials, but they share the common desire to reduce the availability, use and harmful effects of drugs").

n45. Id.


n47. McConville, supra note 32, at 77:

Shocking acts of violence committed by drug traffickers in Columbia and other major narcotics-producing states demonstrate the serious threat the traffickers pose to international peace and security. Narco terrorists have murdered hundreds of law enforcement officers, judges and political leaders, generating an atmosphere wherein bringing drug traffickers and terrorists to justice is life threatening.


n49. Id. (discussing how "U.S. law enforcement derailed an al-Qaeda plot to exchange 9,000 assault weapons, such as AK-47 rifles, sub-machine guns, and sniper rifles; 300 pistols; rocket-propelled grenade launchers; 300,000 grenades; shoulder fired anti-aircraft missiles and 60 million rounds of ammunition for $ 25 million in cash and currency. Attorney General Ashcroft said that the toxic combination of drugs and terrorism threatens the U.S. National Security") (quotations omitted).

n50. See discussion supra notes 46-49.
n51. Blumenson & Nilson, supra note 41, at 38 (observing that, "the drug problem continues to produce massive amounts of crime, $20 billion in annual medical costs, one third of all new HIV infections, prisons filled with drug related offenders and the attendant decimation of inner city communities."); see also McConville, supra note 32, at 78 (observing that "the work of international criminals and the drug use that results, wreak havoc within the borders of the United States: we can see it in the violence and the ruined lives that plague so many of our communities. The drug problem costs billions of dollars annually, including the costs of increased health care, criminal activity, extra law enforcement, and lost productivity") (quotations omitted).

n52. See discussion supra note 51.

n53. McConville, supra note 32, at 78.

n54. See Bird, supra note 8, at 405-06:

The narcotics detection dog has been a stalwart ally in ... detecting illegal narcotics on countless occasions. Canine alerts have proved highly effective ... . Nevertheless, the use of such dogs has sparked controversy. For example, state legislators debate whether a canine sniff should constitute a search under the Fourth Amendment. Some courts criticize the sufficiency of canine sniffs in light of studies revealing that most U.S. currency is tainted with trace amounts of cocaine. Other courts examine the effects of a false alert. Still others address the cultural myth of a canine as an infallible detector, and claim this myth has significant effects on juries and the judiciary.

See also Hurley-Deal, supra note 7 ("With the advent and increase in the use of canines in police work, the issues surrounding search and seizure have been visited frequently by North Carolina courts and by the Supreme Court of the United States in an effort to define the boundaries of the canine sniff").

n55. See discussion supra note 30

n56. See United States v. Place, 462 U.S. 696, 703 (1983) ("As observed in United States v. Mendenhall ... the public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit").

n57. See Hurley-Deal, supra note 7 (observing that, "canines were first used by law enforcement in 1899 in the city of Ghent, Belgium").

n58. Id. (observing that "It was not until 1957, after failed attempts to implement dogs in the early 1950's that an organized canine unit was operated successfully in the United States").

n59. Dave Hunter, Note, Common Scents: Establishing a Presumption of Reliability for Detector Dog Teams Used in Airports in Light of the Current Terrorist Threat, 28 Dayton L. Rev. 89, 90-91 (2002) ("More than 7,000 dog and handler teams are currently in use by law enforcement agencies in North America. In addition to detecting contraband, dogs are also used for crowd control, search and rescue and tracking").

n60. Id. at 91:

Various agencies of the federal government had about 8,000 dogs in service before September 11. The enlistment of an additional 10,000 dogs is now planned because of the terrorist attacks on the World Trade Center ... . The United States Customs Service uses dogs to screen arrivals at major air sea and land border ports for contraband.
n61. See Bird, supra note 8, at 411 (observing that "developing a skilled narcotics detection canine begins with finding the right dog. Canine candidates are usually obtained from the local dog pound or animal shelter"); see also id. at 421 (observing that, "][a] well trained dog is required for a reliable canine sniff").

n62. Id. at 412 (observing that "canine training is a relatively simple task, lasting only two to six weeks").

n63. See Wren, supra note 9 (reporting that "the affability of the favored breeds ... makes them less threatening to travelers. Customs rejects dogs that look aggressive or are spooked by loud noises and sudden movements").

n64. See id. (reporting that "some detector dogs are trained to be active, scratching and biting at containers in the baggage tunnels. Others are passive, sitting down and wagging their tails when a drug scent emanates from a suitcase").

n65. See id. (reporting that "the Customs training center teaches dogs to recognize heroin, cocaine, methamphetamine and marijuana").

n66. See Bird, supra note 8, at 421 (observing that "trained dogs practice frequently to maintain their skills. For example, the Customs Service spends four hours per week on each dog to maintain its training").

n67. See id. (observing that "the Customs Service requires an annual recertification of its dogs, requiring them to complete a rigorous sets of tests").

n68. See United States v. Place, 462 U.S. 696, 704 (1983) (Blackmun, J., dissenting) ("The special need for flexibility in uncovering illicit drug couriers is hardly debatable") (quoting Florida v. Royer, 460 U.S. 491, 519 (1983)).


n70. See Kyllo v. United States, 533 U.S. 27, 31 (2001) (Scalia, J., delivered the opinion of the Court. Souter, Thomas, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed a dissenting opinion joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ.) ("The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

n71. See Place, 462 U.S. at 701 ("In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularity describing the items to be seized").

n72. Id.: Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the
property, pending issuance of a warrant to examine its contents, if the exigencies demand it or some other recognized exception to the warrant requirement is present.

n73. Laser, supra note 69:

In Johnson v. United States, the Supreme Court stated that the point of the Fourth Amendment, which often is not grasped by zealous officers is to protect one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law.

(quotations omitted); see also Johnson v. United States, 333 U.S. 10, 13-14 (1948).

n74. Laser, supra note 69 (observing that "in United States v. Mendenhall, the Court explained: the purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals"); see also United States v. Mendenhall, 446 U.S. 544, 553-54 (1980).

n75. Kyllo, 533 U.S. at 33 (holding that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as legitimate"); see also Katz v. United States, 389 U.S. 347 (1967); see also Parsons, supra note 12, at 4 ("A search is legally defined as an invasion of an individual's legitimate expectation of privacy").

n76. Kyllo, 533 U.S. at 33 ("We have subsequently applied this principle to hold that a Fourth Amendment search does not occur ... unless the individual manifested a subjective expectation of privacy in the object of the challenged search and society [is] willing to recognize that expectation as reasonable"); see also Place, 462 U.S. at 706-07 ("The Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy") (quotations omitted) (citing United States v. Chadwick, 433 U.S. 1, 7 (1977); see also Parsons, supra note 12, at 21:

In sum, a search, for Fourth Amendment purposes, is an intrusion into an area where there has been exhibited a subjective expectation of privacy which society recognizes as reasonable. By definition then, there is no Fourth Amendment search unless a two-pronged test is met: 1) the individual manifested a subjective expectation of privacy; and 2) that expectation is one society is willing to accept as reasonable. Thus physical or other government intrusion is not a search unless there is a reasonable expectation of privacy.

(citing Katz, 389 U.S. at 361 (Harlan, J., concurring) and California v. Ciarolo, 476 U.S. 207, 211 (1986)).

n77. See discussion supra notes 75-76.; see also Weiser, supra note 12, at 37:

Determining whether a search of an individual violates the Fourth Amendment requires a two-step analysis. First, a court must decide whether a person has a constitutionally protected reasonable expectation of privacy. This requires a court to determine whether the individual has exhibited a subjective expectation of privacy, and whether society recognizes that expectation as reasonable. Second, a court must determine whether the government action is constitutional. To make this determination a court must decide whether, in the particular context, the interests asserted by the state actors are reasonable when balanced against the individual's privacy expectations.
n78. See supra notes 75-76 and accompanying text.

n79. Id.

n80. See id; see also Parsons, supra note 12, at 4.

n81. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("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 government intrusion") (quotations omitted) (citing *Silverman v. United States*, 363 U.S. 505, 511 (1961)); see also Parsons, supra note 12, at 22 ("The highest privacy protections are reserved for the home, which is still regarded as the proverbial castle").

n82. Id. at 155 ("The courts generally agree that people have a far reduced expectation of privacy in automobiles. For that reason, automobile searches are not subject to the same Fourth Amendment limitations that other types of searches are").


n84. Id. at 707:

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. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. 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 .... We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in then 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.

n85. Id. at 699. In Place, while the Court held that using a narcotics sniffing police dog to detect narcotics was not a search pursuant to the Fourth Amendment, the confiscated cocaine was suppressed due to the extended length of time the defendant's luggage was detained. *Id. at 709.*

n86. Place, 462 U.S. at 703:

We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.
See also Parsons, supra note 12, at 4, 21.

n87. Place, 462 U.S. at 703.


n89. Id. (“On hearing Gillette’s radio transmission reporting the stop, Trooper Craig Graham of the Illinois State Police Drug Interdiction Team announced to the dispatcher he was going to meet Gillette to conduct a canine sniff”).

n90. Id. (“Defendant replied that he was moving from Las Vegas to Chicago”).

n91. Id. (“Defendant complied, and Gillette told defendant he was going to write a warning ticket for speeding”).

n92. Caballes, 802 N.E.2d at 203 (“Gillette testified that defendant continued to act nervous even after being told he was receiving only a warning ticket. Gillette considered defendant’s nervousness unusual”).

n93. Id.

Dispatch informed Gillette that defendant had surrendered a valid Illinois license to Nevada, but the validity of the Nevada license was not confirmed for two more minutes. After receiving that confirmation, Gillette requested defendant’s criminal history. He then asked defendant for permission to search his vehicle, and defendant refused to consent.

Id.

n94. Id. (“The dispatcher subsequently reported that defendant had two prior arrests for distribution of marijuana”).

n95. Caballes, 802 N.E.2d at 203 (“Gillette next asked defendant if he had ever been arrested, and defendant responded that he had not”).

n96. Id. (“Gillette testifies he was still writing the warning ticket when Trooper Graham arrived with his drug-detection dog and began walking around defendant’s car”).

n97. Id. (“The dog alerted at defendant’s trunk in less than a minute. After Graham advised him of the alert, Gillette searched the defendant’s trunk and found marijuana”).

n98. Id. (Defendant was then arrested and taken to the police station, where he signed the warning ticket. He was subsequently charged with one count of cannabis trafficking”). See also supra note 16 and accompanying text.

n100. *Caballes*, 802 N.E.2d at 203 (“Defendant filed a motion to suppress the drugs found in the trunk and to quash the arrest. The trial court denied the motion and found defendant guilty after a bench trial”).

n101. Id.

n102. Id. (“Defendant was sentenced to 12 years in prison and ordered to pay a street value fine of $256,136”).

n103. Id. at 203-04 (“Defendant appealed, and the appellate court affirmed, finding that the police did not need reasonable suspicion to justify the canine sniff.”).

n104. *Caballes*, 802 N.E.2d at 205 (“Accordingly, we hold that the trial court should have granted defendant’s motion to suppress based on the unjustified expansion of the scope of the stop”).

n105. Id. at 204.

n106. Id.; see also *Terry v. Ohio*, 392 U.S. 1 (1968).

n107. *Caballes*, 802 N.E.2d at 204 (“Accordingly, we will ... apply the Terry test in this case”).

n108. Id. (“We must consider: (1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place”) ( citations omitted) (quotations omitted).

n109. Id. (“Finally, even when these factors are viewed together, they constitute nothing more than a vague hunch that defendant may have been involved in possible wrongdoing”).

n110. Id. at 205:

Here a canine sniff was performed without specific and articulable facts to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation. Under these circumstances, the trial court should have granted defendant's motion to suppress the evidence obtained after the police dog’s alert. The judgments of the appellate court and the trial court are reversed.

(quotations omitted). In addition to *Terry*, The Illinois Supreme Court also relied on their prior ruling in *People v. Cox*, 728 N.E.2d 275 (2002). See *Caballes*, 802 N.E.2d at 202-05.

n111. See id. at 205-06 (Thomas, J., dissenting).

n112. Id. at 206.

n113. Id.

n114. *Caballes*, 802 N.E.2d at 206 (Thomas, J., dissenting):
In the case before us, the majority has not held that defendant's vehicle was subjected to an illegal detention. Therefore, because the police did not impermissibly extend the traffic stop to allow the canine to sniff defendant's car, defendant's fourth amendment rights were not violated. The canine sniff was not a search, and thus the police did not need probable cause or a reasonable suspicion of wrongdoing before conducting it .... This decision is wholly incompatible with United States Supreme Court case law construing the fourth amendment and is subject to reversal by that court.

n115. Id.

After ignoring the cases holding that canine sniffs are not searches, the Cox majority held that sniffs were controlled by Terry principles, even though the Supreme Court has made it clear that Terry applies only to searches for weapons. It has never been extended to general searches for incriminating evidence.

Id.

n116. See supra note 27 and accompanying text.

n117. Caballes, 543 U.S. at 407.

n118. Id.

n119. See discussion supra notes 94-95.

n120. Caballes, 543 U.S. at 407 ("We proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about respondent that might have triggered a modicum of suspicion").

n121. Id. at 437 ("Here, the initial seizure of respondent when he was stopped on the highway was based on probable cause, and was concededly lawful").

n122. See discussion infra note 123.

n123. Caballes, 543 U.S. at 407 ("It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.") (citing U.S. v. Jacobsen, 466 U.S. 109, 124 (1984)).

n124. Id. at 407-08:

In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure. We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.

(citing People v. Cox, 782 N.E.2d 275 (2002)).
n125. See id; see also discussion supra note 110.

n126. See Cox, 782 N.E.2d at 277.

n127. Id.

n128. Id.

n129. See discussion supra note 124.

n130. See discussion supra note 99.

n131. Caballes, 543 U.S. at 407 ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete the mission").

n132. Id. ("We accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop").

n133. See discussion supra note 99.

n134. See discussion supra note 84.

n135. Caballes, 543 U.S. at 408 ("In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed defendant's constitutionally protected interest in privacy. Our own cases hold that it did not").

n136. Id. at 408 ("Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment") (citing United States v. Jacobsen, 466 U.S. 109, 123 (1984)).

n137. Id. ("We have held that any interest in possessing contraband cannot be deemed legitimate and thus government conduct that only reveals the possession of contraband compromises no legitimate privacy right") (quotations omitted).

n138. Id. at 408-09 ("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").

n139. See discussion supra notes 136-38.

n140. Caballes, 543 U.S. at 409 ("In [Place], we treated a canine sniff by a well trained narcotics detection dog as "sui generis" because it discloses only the presence or absence of narcotics, a contraband item").

n141. Id.
n142. Id. ("Respondent likewise concedes that drug sniffs are designed, and if properly conducted are generally likely to reveal only the presence of contraband") (quotations omitted).

n143. Id. (Accordingly, the use of a well trained narcotics detection dog - one that does not expose non-contraband items that otherwise would remain hidden in public view - during a lawful traffic stop, generally does not implicate legitimate privacy interests) (quotations omitted) (citing United States v. Place, 462 U.S. 696, 707 (1983)).

n144. Caballes, 543 U.S. at 409 ("In this case, the dog sniff was performed on the exterior of the respondent's car while he was lawfully seized for a traffic violation.") (emphasis added).

n145. Id. at 408 ("Despite this conclusion, the Illinois Supreme Court held that the initially lawful stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car").

n146. Id. at 409 ("Any intrusion on defendant's privacy expectations does not rise to the level of a constitutionally cognizable infringement").

n147. Id. ("This conclusion is entirely consistent with our recent decisions that the use of thermal-image devices to detect growth of marijuana in a home constituted an unlawful search) (citing Kyllo v. United States, 533 U.S. 27 (2001)).

n148. Caballes, 543 U.S. at 409-10 ("Critical to that decision was the fact that the device was capable of detecting lawful activity - in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath.' The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the non-detection of contraband in the trunk of his car").

n149. Kyllo v. United States, 533 U.S. 27, 30 (2001) ("Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana ...").

n150. Id. at 29:

Indoor marijuana growth typically requires high-intensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, ... Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex.

n151. Id. at 30 ("The District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress").

n152. Kyllo, 533 U.S. at 40.

n153. Caballes, 543 U.S. at 409-10 ("Critical to that decision was the fact that the device was capable of detecting lawful activity - in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath").
n154. See discussion supra notes 142-43.

n155. Caballes, 543 U.S. at 410:

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. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

n156. See discussion supra notes 136-37.

n157. See discussion supra notes 140-43.

n158. See discussion supra note 143.

n159. See discussion supra note 131.

n160. See discussion supra note 30.


n162. See discussion supra Part II.A.

n163. See discussion supra note 1.

n164. See United States v. Mendenhall, 446 U.S. 544, 561-62 (1983) ("Few problems afflicting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances); see also Bird, supra note 8, at n. 1.

n165. See Florida v. Royer, 460 U.S. 491, 512 (1983) (Brennan, J., concurring) ("The traffic in illicit drugs is a matter of pressing national concern ... "); see also id. at 508 (Powell, J., concurring) ("The public has a compelling interest in identifying by all lawful means those who traffic in illegal drugs for personal profit"); see also Bird, supra note 8, at n. 1.

n166. See discussion supra note 12.