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SNIFFING OUT THE PROBLEMS: A CASENOTE STUDY OF THE ANALYSIS AND EFFECTS OF THE SUPREME COURT'S DECISION IN *ILLINOIS v. CABALLES*

I. INTRODUCTION

A. Hypothetical[1]

Imagine a client comes to you with a tale of police invasion of privacy. Angry and discouraged, he recounts the events of his recent move from the West Coast to a quiet, Midwestern city in hopes of a new start. In the spirit of starting anew, the client first washed out the inside of his car, adding an air freshener to retain the clean smell. Since he was required to wear suits to work on the West Coast, suits were practically all that he owned, so he dressed in a crisp suit. Planning ahead, he hung two others in the back of the car in case the rest of his belongings, which were being shipped to him in his new Midwestern city, did not arrive in a timely manner. In the anticipation and excitement of beginning his new life, he tended to drive slightly faster than the posted speed limit. At one point, while traveling approximately six miles per hour over the speed limit, he was greeted with flashing lights in his rearview mirror. Somewhat annoyed that his arrival in the Midwest would be delayed, he begrudgingly pulled to the shoulder of the highway.

Typical with routine traffic stops for speeding, the police officer exited his car, approached the client's vehicle, and asked for the client's license and registration. Willing to cooperate, the client handed over the documents, which the officer took back to his car to use in performing a background search. Satisfied that the client had no outstanding warrants, the officer returned to the client's car and informed him that he was going to issue a citation for speeding. By that time, aggravated that his arrival was being pushed back *and* he was receiving a ticket, the client began to get restless.

The officer picked up on the client's restlessness and began to question the client: Had he ever been arrested before? Had he ever done drugs before? Did

1. Hypothetical based loosely on the facts of *People v. Caballes*. The description of the circumstances surrounding the car trip itself stem from the story that Caballes provided to the officer who actually stopped him, although it is unclear whether Caballes' rendition is true. *See* People v. Caballes, 802 N.E.2d 202, 203 (Ill. 2003), *vacated and remanded by* 543 U.S. 405 (2005).

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he currently have any drugs or other contraband in his car?[2] The client answered all of the officer's questions in the negative, growing more and more impatient with the elongated traffic stop. Then the officer asked if the client would consent to a search of his vehicle, suggesting that the client should not mind a quick search if he does not have contraband, or anything else to hide, in his vehicle. Thinking the officer had no right or reason to do so, the client declined to consent, only to have the officer inform the client that a second officer and his drug-sniffing canine had just arrived to assist in the traffic stop. Still in the process of writing out the speeding citation, the original officer asked the client to step out of the vehicle while the second officer walked the dog around the vehicle. The dog alerted to the trunk area of the car, and the officers began searching the trunk. [3]

The client, upset at what he feels was an invasion of his privacy and a blatant disregard for his wishes not to have his vehicle searched, now asks you whether this sequence of events was legal. After all, as the client points out, he had only been stopped for speeding and had already declined consent to search before the canine began the sniff.

B. The Solution in Illinois v. Caballes

In early 2005, the United States Supreme Court considered the constitutionality of a suspicionless canine sniff performed during the course of

2. Many courts recognize this type of questioning as constitutional. *See, e.g.*, United States v. Francis, 140 F.App'x. 184, 186 (11th Cir. 2005) (citing United States v. Purcell, 236 F.3d 1274, 1280 (11th Cir. 2001) and noting that "[o]nly unrelated questions which unreasonably prolong the detention are unlawful"); United States v. Galindo-Gonzales, 4 F. Supp. 2d 1016, 1020 (Dist. N.M. 1996), *aff'd*, 142 F.3d 1217 (10th Cir. 1998); *but cf.* United States v. Murillo, 255 F.3d 1169, 1174 (9th Cir. 2001) (stating that "[d]uring a traffic stop, a police officer is allowed to ask questions that are reasonably related in scope to the justification for his initiation of contact[,]" but that "[i]n order to broaden the scope of questioning, he must articulate suspicious factors that are particularized and objective"), *cert. denied*, 535 U.S. 948 (2002). Even under a *Murillo* type of analysis of the questioning at issue here, an argument could possibly be made that the questioning regarding whether Caballes had drugs in his vehicle was warranted because the officer could articulate suspicious, particularized, and objective factors, namely that Caballes appeared agitated, said that he was moving but had no belongings with him, was wearing a suit to move, and smelled of air freshener.

3. Several courts consider a drug sniffing canine's alert to constitute probable cause to search an area. *See, e.g.*, United States v. Williams, 69 F.3d 27, 28 (5th Cir. 1995), *cert. denied*, 516 U.S. 1182 (1996); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994); Romo v. Champion, 46 F.3d 1013, 1020 (10th Cir. 1995) (citing United States v. Ludwig, 10 F.3d 1523, 1527 (10th Cir. 1993)), *cert. denied*, 516 U.S. 947 (1995). For a discussion of why probable cause that there are drugs in the vehicle allows the police to automatically search the vehicle without first obtaining a warrant, see *infra* Section II(B), entitled "The Fourth Amendment and Vehicle Searches." For a discussion of the possible problems with the automatic creation of probable cause through canine alerts, see *infra* Section VI(B), entitled "Alternative Analyses."

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a routine traffic stop for a traffic violation in *Illinois v. Caballes*.[4] The Court held that a canine sniff of the exterior of a car during a legitimate stop for a traffic violation did not constitute a search of the vehicle and, therefore, did not warrant Fourth Amendment protection,[5] overruling the Illinois Supreme Court's decision to the contrary and allowing the subsequent prosecution of Caballes to include evidence of drugs found in his trunk during the traffic stop.[6]

This Casenote examines the soundness of the Supreme Court's decision in *Illinois v. Caballes*. Beginning with Part II, this Casenote explains the constitutional history relevant to a complete understanding of where the decision fits in Fourth Amendment jurisprudence, focusing on the specific rules governing contraband and automobiles. It then examines in Part III the Fourth Amendment arguments for both the State of Illinois and Mr. Caballes, as well as the analytical approaches taken by the Illinois courts and the United States Supreme Court in applying search and seizure law to the *Caballes* case. Part IV turns to the decisions of lower courts and reviews the subsequent handling of the *Caballes* analysis and holding, focusing on the practical consequences the decision has produced. Finally, Part V focuses on what the author believes to be the problematic implications of the *Caballes* decision. Part V also offers several alternative analyses the United States Supreme Court may have used in making its decision in the case. This Casenote ultimately concludes that the decision in *Illinois v. Caballes* likely will produce undesirable effects that counter public policy, but that could have been avoided had the Court utilized any of several different methods for analyzing the case.

II. BACKGROUND

The Fourth Amendment declares 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 . . . ."[7] The Fourteenth Amendment applies the protections guaranteed by the Fourth Amendment to state governments.[8] Although the United States Supreme Court originally interpreted a "search" under the Fourth Amendment as being associated with and determined by only the targeted location of the state action,[9] the Court drastically altered this

4. *See generally* Illinois v. Caballes, 543 U.S. 405 (2005).

5. *Id*. at 410.

6. *Id.*

7. U.S. CONST. amend. IV.

8. The Fourteenth Amendment prohibits any state from "mak[ing] or enforce[ing] any law which shall abridge the privileges or immunities of citizens of the United States . . . . " U.S. CONST. amend. XIV.

9. Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that wiretapping did not constitute a search and therefore did not violate the Fourth Amendment because the actual wires subject to the wiretapping were not a part of the person, papers, or effects named in the Fourth

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analysis in *Katz v. United States*.[10] Justice Harlan's concurrence in *Katz* set forth the test subsequently used by the Court for whether the Fourth Amendment applied to specified state actions of invasions of privacy: first, the person against whom the search was performed had to exhibit a subjective expectation of privacy in the objects to be searched; second, the expectation of privacy had to be "one that society [was] prepared to recognize as 'reasonable.'"[11]

A. The Fourth Amendment and Contraband

Focusing on the second prong of Harlan's *Katz* test, the United States Supreme Court has emphasized the lack of an objective "reasonable" expectation of privacy in contraband of any kind.[12] Accordingly, the Court has held that state conduct revealing contraband, and only contraband, does not infringe upon a reasonable expectation of privacy and thus does not implicate Fourth Amendment protections.[13]

In *United States v. Place*, the Court considered whether the temporary detention of a man's luggage in order to perform a canine sniff of the luggage violated the Fourth Amendment.[14] In *Place*, officers at the Miami International Airport observed Place engaging in suspicious behavior while he was waiting to purchase a ticket to New York, but because his flight was departing soon, the officers allowed him to take his scheduled flight to New York.[15] The officers did, however, have the opportunity to observe that Place's luggage tags listed addresses which did not match each other or the address corresponding to the phone number he had provided to the airline.[16]

Amendment and because the wiretapping was not the equivalent of trespassing into the defendant's house).

10. *See* Katz v. United States, 389 U.S. 347, 352-53 (1967).

11. *Id.* at 361 (Harlan, J., concurring). Under this test, a man's conversation in an enclosed phone booth was held to be protected by the Fourth Amendment because the man had, by shutting the door to the booth, exhibited a subjective expectation that his conversation would be private and because society would recognize as reasonable the expectation that a conversation in an enclosed phone booth would be private. *Id.*

12. *See* United States v. Jacobsen, 466 U.S. 109, 123 (1984) (recognizing no legitimate privacy interest in the possession of cocaine); United States v. Place, 462 U.S. 696, 706-07 (1983) (recognizing no reasonable interest in possession of contraband).

13. *Jacobsen*, 466 U.S. at 123; *Place*, 462 U.S. at 707.

14. *Place*, 462 U.S. at 697-98. The Court's *Place* decision was, however, foreshadowed by a footnote in a prior decision in which the Court specifically stated that "officers, with founded suspicion, could have detained [the suspect] for the brief period during which Florida authorities at busy airports seem able to carry out the dog sniffing procedure." Florida v. Royer, 460 U.S. 491, 506 n. 10 (1983).

15. *Place*, 462 U.S. at 698.

16. *Id.*

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Because of their suspicion, the Miami officers contacted officers at the New York airport, advising them of the situation.[17]

The New York officers also observed Place engaging in suspicious behavior and approached Place, who falsely claimed his luggage had already been searched in Miami.[18] Place declined consent to search his luggage, at which point the officers seized the luggage and transported it to a separate airport in New York in order to subject the luggage to a canine sniff.[19] More than an hour and a half after having seized the luggage from Place, the officers actually subjected the luggage to a sniff; the canine alerted to one of the two seized bags, and the officers detained the "alert" bag over the weekend in order to obtain a search warrant.[20] Upon receiving the warrant and personally searching the bag, the officers found over 1,000 grams of cocaine.[21] Place's subsequent conviction for possession and intent to distribute reached the United States Supreme Court after the United States District Court for the Eastern District of New York denied Place's motion to suppress the evidence gained from the search because the officers had reasonable suspicion that the luggage contained drugs and after the United States Court of Appeals for the Second Circuit reversed the denial due to the prolonged nature of the seizure of the luggage.[22]

Because the police could, based on their observations of Place's actions and the inconsistent addresses, articulate some reasonable suspicion that Place's luggage contained contraband, the Supreme Court approved of a temporary detention of the luggage "provided that the investigative detention [was] properly limited in scope."[23] The Court then weighed the extent of the intrusion against Place's Fourth Amendment right to privacy and concluded that temporary detention for the purposes of performing a non-intrusive, *sui generis*[24] canine sniff did not weigh heavily on the man's unreasonable expectation of privacy in the contraband in the luggage and in fact did not constitute a search at all under the Fourth Amendment.[25] The Court did, however, place a temporal limitation on the detention of the luggage for the purposes of obtaining a canine sniff, considering both the actual length of the detention and the diligence exercised by the police in obtaining the canine

17. *Id*.

18. *Id*. at 698-99.

19. *Id*. at 699.

20. *Id*.

21. *Place*, 462 U.S. at 699.

22. *Id*. at 699-700.

23. *Id*. at 706.

24. The Court considered canine sniffs to be *sui generis* precisely because they are non-intrusive and reveal only the presence of contraband. A *sui generis* search is one that is "unique" or "of its own kind." BARRON'S LAW DICTIONARY 502 (5th ed. 2003). *Place*, 462 U.S. at 707.

25. *Place*, 462 U.S. at 707.

sniff, although it declined to put a *per se* temporal limitation on detentions of personal effects.[26] On the specific facts of *Place*, the Court determined that, because the officers had advance warning of the need for the drug sniffing canine but still did not bring the canine to the appropriate airport, the officers did not act with diligence in obtaining the sniff.[27]

In accordance with its decision in *Place*, the United States Supreme Court decided *United States v. Jacobsen* the following year, in which a substance seized from a suspect was subjected to chemical testing to discover whether the substance was illegal.[28] The Court held that the chemical testing did not constitute a search under the Fourth Amendment because the chemical testing revealed, and was able to reveal, only contraband in which the defendant did not have a reasonable expectation of privacy.[29]

B. The Fourth Amendment and Vehicle Searches

In addition to a practically non-existent privacy interest in contraband, individuals also have a diminished privacy interest in their vehicles, such that a warrant is not always, or even typically, required in order for police to search an automobile.[30]

For example, if a subject is arrested in, near, or immediately after exiting his vehicle, then a search incident to arrest may include the passenger compartment of the vehicle as well as the individual himself.[31] The Supreme Court expressly allowed for searches of the person incident to arrest in *Chimel v. California*, reasoning that the need to ensure officer safety and to avoid the possible destruction of evidence outweighed the arrestee's Fourth Amendment

26. *Id*. at 708-09. Under this standard, the officers in *Place* exceeded the temporal limits of the detention when they detained the luggage for ninety minutes but were actually capable of having the canine available to perform the sniff at the airport where Place arrived and as soon as the luggage was detained. *Id*. at 709-10.

27. *Id.* at 709-10.

28. *See* United States v. Jacobson, 466 U.S. 109, 122 (1984).

29. *Id*. at 123.

30. In addition to the two justifications for vehicle searches discussed here, police may perform a valid vehicle search through an "inventory search." Officers may use an inventory search whenever an arrestee has been apprehended from his vehicle or a vehicle is impounded. The inventory search involves three interrelated justifications: (1) to protect the property of the owner of the vehicle; (2) to protect the police from theft claims by the vehicle's owner; and (3) to protect the police from potentially harmful items in the vehicle, such as a bomb. South Dakota v. Opperman, 428 U.S. 364, 369 (1976). One limitation on this type of search is that the police department performing the inventory search must have a policy that requires such a search. *See id*. at 372. The inventory search is not typically applicable to situations like that in *Caballes*, although such a search may have come into play in the *Caballes* case had Caballes been arrested for his speeding violation rather than merely given a citation.

31. *See, e.g.*, Thornton v. United States, 541 U.S. 615, 621 (2004); New York v. Belton, 453 U.S. 454, 462-63 (1981); Chimel v. California, 395 U.S. 752, 762-63 (1969).

right to privacy in his person.[32] This rationale was subsequently extended to allow for the search of an arrestee's vehicle incident to arrest, so long as the arrestee was seized in, near, or immediately after exiting the vehicle.[33] However, the Court did limit the scope of a valid search of an automobile incident to arrest to the passenger compartment of the vehicle, which did not include the trunk.[34]

Under United States Supreme Court precedent, officers may arrest motorists for violating civil traffic laws without violating the Fourth Amendment.[35] The United States Supreme Court approved of such arrests in *Atwater v. City of Lago Vista*,[36] implicitly allowing for searches of automobiles incident to arrests for traffic violations.[37] The Court has, however, expressly rejected the vehicle search incident to citation, since the officer safety and preservation of evidence rationales do not apply as readily to citations as they do to arrests.[38]

Absent an arrest, but with probable cause, officers may still search a vehicle without a warrant in some circumstances.[39] This so-called "automobile exception," justified by the mobility of the vehicle, applies whenever the police have probable cause to believe a search of the vehicle will reveal contraband or evidence of a crime.[40] Sixty years after creating the automobile exception, the Court in *California v. Carney* added the "diminished expectation of privacy" rationale to the justifications for the automobile exception, explaining that individuals have a diminished expectation of privacy in their vehicles because of the widespread government regulation of automobiles.[41]

C. Canine Sniffs, Vehicle Searches, and the Fourth Amendment

Forced to combine its contraband and automobile precedents in *City of Indianapolis v. Edmond*, the United States Supreme Court considered the

32. *See Chimel*, 395 U.S. at 762-63.

33. *See Thornton*, 541 U.S. at 621; *Belton*, 453 U.S. at 460.

34. *Thornton*, 541 U.S. at 623; *Belton*, 453 U.S. at 461 n.4.

35. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

36. *Id*.

37. The fact that searches incident to arrest had been allowed for nearly forty years before *Atwater* was decided and the fact that the court discussed no limitations on police activity incident to arrest for a civil traffic violation implies that the Court intended to allow for such searches. *See id*. at 354.

38. *See generally* Knowles v. Iowa, 525 U.S. 113 (1998).

39. *See, e.g.*, California v. Carney, 471 U.S. 386, 394-95 (1985); Carroll v. United States, 267 U.S. 132, 153-54 (1925).

40. *Carroll*, 267 U.S. at 153. The temporal limits on the ability to search were addressed in *Chambers v. Maroney*, in which the Court rejected a search conducted after the police had brought the vehicle back to the station and required that the search be conducted at the scene where the vehicle was originally encountered. *See* Chambers v. Maroney, 399 U.S. 42 (1970).

41. *Carney*, 471 U.S. at 392-93.

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implications of valid traffic stops together with canine sniffs, although only in the context of roadblocks stops and not in the context of stops for traffic violations.[42] In *Edmond*, the Court first examined the validity of roadblock stops for the primary purpose of performing canine sniffs on vehicles.[43] The Court distinguished between roadblocks with the primary purpose of discovering drunk drivers (i.e., those in which sobriety tests were administered) and those with the primary purpose of controlling drug crime (i.e., those in which canine sniffs were conducted).[44] The Court disallowed canine sniffs as the primary purpose of a roadblock because the sniffs did not serve the safety purposes necessary to justify roadblocks.[45] The Court did not stop its analysis there, however, and turned to the issue of validity of the canine sniff itself. Emphasizing that canine sniffs are not searches for Fourth Amendment purposes, the Court was careful to point out that the canine sniff itself did not invalidate the roadblock; the sniff did not turn a valid roadblock *stop* into an invalid *search*.[46] In other words, the Court implied that a valid roadblock, one designed to discover drunk drivers, could potentially involve the use of canine sniffs as its secondary purpose without being deemed an unconstitutional stop *or* search of the vehicle.[47]

Before the Supreme Court's determination of *Caballes*, an officer in most jurisdictions was prohibited from terminating the traffic stop by issuing a citation or warning, returning the motorist's documents, and only then informing the motorist that he was required to wait for the drug sniffing canine to arrive on the scene.[48] This distinction had less to do with the actual act of the canine sniff and more to do with the illegal detention of the motorist without probable cause or reasonable suspicion.[49] Despite this bright-line rule, some courts were willing to accept as legal a canine sniff occurring

42. *See generally* City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Roadblock stops are distinguishable from traffic violation stops in that roadblocks involve no reasonable suspicion or probable cause and require only a public safety justification, whereas traffic violation stops require at least reasonable suspicion, and more often involve probable cause, that a traffic violation has occurred. This distinction becomes important to the United States Supreme Court when analyzing *Caballes*. *See infra* Section III(C), entitled "The Court's Analysis."

43. *Edmond*, 531 U.S. at 34.

44. *See id*. at 41-42.

45. *Id*. at 44.

46. *Id*. at 40.

47. *See id*.

48. *See, e.g.*, United States v. Beck, 140 F.3d 1129, 1135-36 (8th Cir. 1998).

49. Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1894-95 (2004). Once the citation was issued and the driver's documents returned, the legal stop for a traffic violation terminated, and any subsequent detention required probable cause, reasonable suspicion, or some other justification. *Id*.

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immediately after the termination of the traffic stop.[50] In the wake of this weak prohibition, *Caballes* had the potential to formulate a rule workable for officers and courts but also fair to motorists.

III. FOURTH AMENDMENT ANALYSIS

A. Procedural History of Illinois v. Caballes

When the United States Supreme Court received the *Illinois v. Caballes* case, both parties to the case had experienced acceptance and rejection of their arguments in the Illinois state courts. Both the trial court and the appellate court ruled against Caballes in his motion to suppress the drugs discovered in his trunk after the police, without reasonable suspicion or probable cause, conducted a canine sniff of his vehicle during a traffic stop for speeding.[51] The appellate court based its holding on the assertion that canine sniffs do not require even reasonable suspicion in order to be legal.[52]

Not surprisingly,[53] the Illinois Supreme Court disagreed with the lower courts and held that the trial court should have granted Caballes' motion to suppress the drugs discovered in Caballes' trunk as a result of the canine sniff and subsequent search.[54] The Illinois Court based its decision on *People v. Cox*,[55] a case with facts similar to those in *Caballes*, in which the Illinois Supreme Court applied the *Terry* test[56] to decide whether a canine sniff was

50. *See, e.g.*, United States v. Gregory, 302 F.3d 805, 810 (8th Cir. 2002) (requiring a showing that the sniff itself was unduly lengthy in order to constitute an illegal detention), *cert. denied*, 538 U.S. 992 (2003); State v. Box, 73 P.3d 623, 629 (Ariz. 2003). This may have been so because of evidentiary considerations (it would be difficult to show that the sniff was performed *after* the issuance of the citation, or vice versa) or it may have been so because courts simply felt the benefits of discovering drug trafficking or use outweighed the seemingly insignificant intrusion into the driver's privacy and time.

51. People v. Caballes, 802 N.E.2d 202, 203-04 (Ill. 2003).

52. *Id*.

53. Incidentally, the Illinois courts have consistently limited the scope of actions officers may take during or after a traffic stop, although not always with the approval of the United States Supreme Court. *See, e.g.*, People v. Harris, 802 N.E.2d 219, 231 (Ill. 2003) (holding that a warrant check not supported by probable cause or reasonable suspicion violated the Fourth Amendment), *vacated*, 543 U.S. 1135 (2005); People v. Bunch, 796 N.E.2d 1024, 1030-31 (Ill. 2003) (prohibiting questioning not connected to the purpose of the initial stop), *cert. denied*, 541 U.S. 959 (2004); People v. Gherna, 784 N.E.2d 799, 811 (Ill. 2003) (extended detention of motorist found unreasonable); People v. Cox, 782 N.E.2d 275, 281 (Ill. 2002) (canine sniff not permitted during traffic stop for traffic violation), *cert. denied*, 539 U.S. 937 (2003); People v. Brownlee, 713 N.E.2d 556, 566 (Ill. 1999) (consent rendered void by actions of officer).

54. *Caballes*, 802 N.E.2d at 205.

55. *See generally* People v. Cox, 782 N.E.2d 275 (Ill. 2002).

56. The *Terry* test asks (1) whether the officer's action was justified in the first place and (2) whether any subsequent action was reasonably related in scope to the justification of the officer's initial actions. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

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reasonable.[57] The Court noted that although *Terry* itself did not deal with a traffic stop, Illinois and federal courts had previously applied the *Terry* test to traffic stop situations; therefore, the Illinois Court determined that the *Terry* test was applicable to *Caballes*.[58] Since the officer initially had probable cause to stop Caballes for speeding, the first prong of the *Terry* test was satisfied and only the second prong presented an issue for the Illinois Court.[59] Referring to its analysis in *Cox*, the Court required "'specific and articulable facts' to support the stopping officer's request for the canine unit," which the Court could not find on the facts of *Caballes* since the stopping officer had not smelled marijuana or observed other factors that would have led him to believe that Caballes had marijuana in his trunk.[60] The Court rejected the argument that the lack of belongings in Caballes' car, the smell of air freshener, Caballes' business dress, and Caballes' nervousness constituted enough evidence for reasonable suspicion to perform the sniff.[61] Because the officer could not produce the requisite specific and articulable facts, the Court held that the canine sniff unreasonably broadened the scope of the stop in violation of the Fourth Amendment.[62] As a result, the Illinois Supreme Court reversed the lower courts and held that Caballes' motion to suppress the evidence discovered as a result of the canine sniff should have been granted.[63]

B. The Argument for Illinois

In its brief to the United States Supreme Court, Illinois relied heavily on the U.S. Supreme Court precedent established in *Place*, which stated that canine sniffs for drug detection purposes were not searches.[64] Reiterating the argument in *Place* that a canine sniff does not reveal any non-contraband items, Illinois argued that canine sniffs truly are *sui generis*, thus, they do not constitute searches and do not implicate Fourth Amendment protections.[65] Illinois further argued that canine sniffs actually enhance Fourth Amendment protections by exposing individuals to the least intrusive means of discovering whether they are carrying contraband.[66] Citing several cases in which the U.S.

57. *Caballes*, 802 N.E.2d at 204.

58. *Id*.

59. *Id*.

60. *Id*.

61. *Id*. at 204-05.

62. *Id.* at 204. The Court noted that the fact that the stopping officer had not summoned the canine officer himself was of no consequence, since "the overall effect remains the same." *Id.* at 204.

63. *Caballes*, 802 N.E.2d at 205.

64. Brief for Petitioner at 6-7, Illinois v. Caballes, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 1530261 [hereinafter Brief for Petitioner].

65. *Id.* at 6.

66. *Id*. at 6-7. Apparently, the logic here is that the right to privacy is preserved when only minimal intrusions are used to gain information.

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Supreme Court utilized the holding in *Place* without questioning it, Illinois further asserted that the principles underlying *Place* were established constitutional law.[67]

In order to round out its claim that the particular vehicle sniff in *Caballes* did not violate the Fourth Amendment, the State relied on the United States Supreme Court's decision in *City of Indianapolis v. Edmond*, where the Court reaffirmed the use of canine sniffs in accord with the Fourth Amendment but disapproved of the initial stopping of vehicles absent reasonable suspicion, probable cause, or a justifying safety purpose.[68] Illinois argued that because the Court specifically stated that the use of a canine sniff did not turn the stop into a search in *Edmond*, the canine sniff also did not turn the stop into a search in *Caballes*.[69]

In addition, Illinois also attempted a "plain smell" argument.[70] Under this rationale, individuals have no reasonable expectation of privacy in the smells in the common air, such as the smell of marijuana emanating from a vehicle's trunk.[71] Because the officers would have been able to search the car if they could smell the marijuana, the State argued that the officers were likewise justified in searching the car because the canine could smell the marijuana and alert the officers to its detection.[72] In both cases, the marijuana was within "plain smell."[73]

Turning to the analytical framework question, the State claimed that the Illinois Supreme Court erred in applying the *Terry* two-pronged test to determine the validity of the canine sniff.[74] Illinois first argued that the *Terry* standard "[did] not govern a canine sniff of the exterior of a vehicle at a traffic stop supported by probable cause" because the *Terry* standard applied only to stops in which the police merely had reasonable suspicion and nothing more.[75] Responding to Caballes' assertion that the United States Supreme Court's decision in *Berkemer v. McCarty* supported the application of the *Terry* standard, Illinois cited a footnote in *Berkemer* that apparently limited the effects of the Court's analogy.[76] Before concluding this precedent established

67. *Id*. at 7.

68. *Id*. at 7-8.

69. *Id.* at 8.

70. Brief for Petitioner, *supra* note 64, at 8-10.

71. *Id*. at 9.

72. *Id*. at 10.

73. *See id*. at 8-10. This argument plays on the "plain sight" doctrine, under which officers may seize contraband within the plain sight of officers who are legally on the premises or are conducting legal activities (essentially if the contraband is out in the open where anyone could view it). See Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) for a brief explanation.

74. Brief for Petitioner, *supra* note 64, at 11.

75. *Id*. at 12.

76. *Id*. at 13-14. The footnote reads: "No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*.

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that *Terry* did not apply to the *Caballes* situation, Illinois cited several other decisions by the United States Supreme Court which, although not raised by Caballes, did not support the application of *Terry* to traffic stops for traffic violations.[77]

Illinois also claimed that even if *Terry* were applicable, the canine sniff passed the *Terry* standard, although it did not explain this position.[78] The reasoning may simply have been that the sniff was analogous to the pat-down in *Terry* itself in that it neither significantly intruded upon the stopped person's privacy because both were designed to detect only specific items (drugs in the canine sniff and weapons dangerous to officer safety in the *Terry* pat-down). The reasoning also may have been that the canine sniff was not a search at all, so that a sniff that did not unreasonably prolong a stop could not be deemed a violation of *Terry*. In fact, on this issue, the Amici Curiae Brief filed by Arkansas and Twenty-Seven Other States asserted that a canine sniff does not impermissibly expand the scope of a traffic violation stop simply because a canine sniff is what the Amici Brief referred to as a Fourth Amendment "non-event."[79] According to the Brief, this is because canine sniffs do not interfere with the stopped person's freedom any more than the initial stop, which, in the case of Caballes' stop, was supported by probable cause.[80] The Brief for the United States as Amicus Curiae Supporting Petitioner offered another rationale for why the canine sniff at issue passed the *Terry* test,[81] if that were even the applicable test. The United States in its Brief claimed that during a *Terry* stop, officers may use reasonable means to confirm or dispel any reasonable suspicion that they may have regarding the subject and that under this analysis, the canine sniff that does not physically intrude upon the subject's privacy and quickly confirms or dispels the officer's suspicion is a reasonable tool which passes the *Terry* test.[82]

We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." Berkemer v. McCarty, 468 U.S. 420, 440 n.29 (1984).

77. Brief for Petitioner, *supra* note 64, at 15 (citing Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 960 (2004); United States v. Sharpe, 470 U.S. 675, 683-88 (1985); Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); Arkansas v. Sullivan, 532 U.S. 769, 771 (2001)).

78. Brief for Petitioner, *supra* note 64, at 12.

79. Brief of Arkansas and Twenty-Seven Other States as Amici Curiae in Support of Petitioner at 13-14, Illinois v. Caballes, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 1475506.

80. *Id.* at 14.

81. Brief for the United States as Amicus Curiae Supporting Petitioner at 17, C*aballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 1530263.

82. *Id.* at 17-18. This logic, at least at first glance, seems to be flawed in that the officer obviously is allowed to use reasonable means for confirming or dispelling the reasonable suspicion that gave rise to the stop initially, but the claimed "reasonable suspicion" did not exist here and was not the initial reason for the stop.

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While not connected to any specific legal argument already raised by the parties or the other amici, the Illinois Association of Chiefs of Police and the Major Cities Chiefs Association (the "Associations") added another justification for allowing canine sniffs such as the one in the *Caballes* case.[83] Claiming that the canine sniffs were minimal intrusions on the privacy of those stopped during traffic violation stops, the Associations argued that such sniffs played a vital role in detecting harmful and prevalent contraband and that without the sniffs, officers would not be able to effectively fight the War on Drugs.[84] The Associations' argument provided yet another justification for Illinois for allowing the canine sniff in *Caballes*.

C. The Argument for Caballes

In his brief to the United States Supreme Court, Caballes began by confronting the argument presented by Illinois that the canine sniff does not implicate the Fourth Amendment.[85] In response to the argument that canine sniffs are not physically intrusive, Caballes argued that the extremely well-established rule from *Katz* precluded such an argument, since *Katz* itself held that a conversation heard with devices outside of the telephone booth was nonetheless protected by the Fourth Amendment.[86] Likewise, the United States Supreme Court's recent decision that using thermal-imaging constituted a search within the meaning of the Fourth Amendment undermined the physical intrusion argument.[87]

On the issue of the analogy of the canine sniff to the "plain view" doctrine, Caballes claimed that the act of bringing a canine to the scene of a traffic stop was not the same as merely opening ones eyes to what is within sight; in other words, police officers, under "plain view," are not required to ignore what they can obviously see, but the canine sniff situation involves assertive action to bring the dog to the search.[88] Rebutting the claim by Illinois that canine sniffs are not embarrassing or inconvenient, Caballes claimed that, on the contrary,

83. Brief of Amici Curiae The Illinois Association of Chiefs of Police and The Major Cities Chiefs Association in Support of Petitioner at 4, *Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 1530262.

84. *Id*. at 4-6.

85. Brief for Respondent at 13, *Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 2097415 [hereinafter Brief for Respondent].

86. *Id*. at 13-14.

87. *Id*. at 14. In *Kyllo v. United States*, agents from the U.S. Department of the Interior used a thermal imager to view heat sources within the defendant's house. Kyllo v. United States, 533 U.S. 27, 29-30 (2001). The Court, rejecting the government's argument that the thermal imager revealed only the heat radiating from the house, held that use of the thermal imager constituted a search under the Fourth Amendment because it was a "through the wall" device (as opposed to an "off the wall" device) that revealed intimate, private activity within the house, such as when the occupants of the house took baths or showers. *Id.* at 34-36.

88. Brief for Respondent, *supra* note 85, at 15-16.

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the experience of being pulled over, singled out, and then searched in plain view of other motorists who are not receiving the same treatment indeed embarrasses and inconveniences the individual who is stopped.[89] In addition, the American Civil Liberties Union ("ACLU") and the ACLU of Illinois in their Amici Brief asserted that not only is the use of a drug-sniffing canine potentially embarrassing and inconvenient, but it is also intimidating to many drivers, most of which are innocent.[90] In addition, the ACLU pointed out that these canines may be dangerous to drivers and have been reported as biting or even attacking drivers, making the canine sniff potentially much more than just inconvenient.[91]

Finally, in response to the argument that canine sniffs reveal only contraband, Caballes conceded that properly conducted sniffs will typically reveal only contraband; however, Caballes asserted that this did not mean that the subjects of canine sniffs do not deserve Fourth Amendment protection.[92] Caballes pointed out that *Kyllo*, in determining whether the Fourth Amendment applies, demands consideration of the nature of the place to be searched as well as the nature of the items sought, asserting that, although there may have been little privacy interest in the contraband itself, there was still a privacy interest in the trunk, which called for Fourth Amendment protection.[93] Caballes also produced evidence from other cases and studies questioning the reliability of canine sniffs.[94] For example, Caballes cited one case in which evidence showed that of twenty-eight canine alerts, only one resulted in the discovery of illegal drugs, implying that canine sniffs do not always signal the presence of contraband.[95] In addition, Caballes asserted that canines often alert to smells other than that of large amounts of contraband, such as another dog or money.[96] Finally, Caballes presented evidence that canines can produce false alerts as a result of errors by the officer himself, such as failing to distinguish

89. *Id*. at 17.

90. Brief for the American Civil Liberties Union and the ACLU of Illinois as Amici Curiae in Support of Respondent at 17-18, *Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 2097416.

91. *Id*. at 18-19.

92. Brief for Respondent, *supra* note 85, at 17. The Court seizes on this language to support its own analysis, ignoring the pages of qualifications that follow the initial statement. *See Caballes*, 543 U.S. at 409; *see also infra* Section III(C), entitled "The Court's Analysis."

93. Brief for Respondent, *supra* note 85, at 18.

94. *Id*. at 18-19.

95. *Id*. (citing Merret v. Moore, 58 F.3d 1547, 1549 (11th Cir. 1995)).

96. *Id*. at 19 (citing Doe v. Renfrow, 475 F. Supp. 1012, 1017 (N.D. Ind. 1978) (in which a canine reacted to the smell of another dog); United States v. $506,231 in U.S. Currency, 125 F.3d 442, 453 (7th Cir. 1997)).

between true alerts and mere "interest" in an area, or using a canine without reasonable suspicion or probable cause.[97]

Turning to his own assertive arguments, Caballes first claimed that the sniff of his vehicle was constitutionally unreasonable without a showing of reasonable suspicion to believe that his vehicle contained drugs.[98] Conceding that probable cause is not always required to justify a search, Caballes argued that balancing his even slight interest in the privacy within his trunk with the non-existent safety justifications for performing the sniff, his privacy interests demanded that the sniff not be performed.[99]

Applying *Terry v. Ohio*, which Caballes thought to be the test applicable to his circumstances, Caballes asserted that although the police had probable cause to stop him for speeding, they did not have probable cause to believe that he was carrying drugs.[100] Therefore, the canine sniff violated the *Terry* bar against broadening the scope of a stop beyond that which initiated the stop.[101]

Finally, Caballes made a policy argument that possible problems with pretextual stops required a bar against using canine sniffs during traffic stops without any reasonable suspicion or probable cause to believe a motorist had contraband,[102] even in light of the *Whren v. United States* decision.

D. The Court's Analysis

The Court first addressed Caballes' reasonable expectation of privacy in the contents of his vehicle. Citing its own decision in *Jacobsen*, the Court asserted that Caballes had no reasonable expectation to privacy in the drugs in his trunk.[103] The logical conclusion, at least for the Court following its analysis in *Jacobsen*, was that any state conduct that uncovers only the presence of the drugs in the trunk is presumed to be legitimate.[104]

The Court responded to Caballes' arguments against canine sniffs being *sui generis* by citing the point in Caballes' own brief where he claimed "drug

97. *Id*. at 20 (citing United States v. Guzman, 75 F.3d 1090, 1096 (6th Cir. 1996); and Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 430 (1997) (asserting that canine sniffs are "least effective when they survey a random population")).

98. *Id*. at 20.

99. Brief for Respondent, *supra* note 85, at 21-22.

100. *Id*. at 23-24.

101. *Id*. at 23.

102. *Id*. at 32-34. The U.S. Supreme Court held in *Whren v. United States* that the individual intentions of stopping officers do not play a role in deciding whether a stop is constitutional. Whren v. United States, 517 U.S. 806, 813 (1996).

103. Illinois v. Caballes, 543 U.S. 405, 408 (2005). The Court's reasoning necessarily focuses on the drugs in the trunk, as the Court would not have asserted that Caballes had no reasonable expectation to privacy in any legal contents in his trunk. *See* California v. Acevedo, 500 U.S. 565, 573 (1991) (citing United States v. Ross, 456 U.S. 798, 823 (1982)).

104. *Caballes*, 543 U.S. at 408.

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sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband."[105] The Court went further, however, and rejected the argument that even if canine sniffs were sometimes in error, private information would be exposed to police.[106] Furthermore, regardless of the possible hypothetical problems with canine sniffs in general, the Court recognized that the trial court had found no such problems with the specific sniff in *Caballes*, allowing the Court to dismiss the notion of canine reliability altogether.[107] In addition, the Court found this conclusion to be in line with its recent decision in *Kyllo v. United States*, in which it held that thermal-imaging detection without a warrant or probable cause violated the Fourth Amendment.[108] The Court distinguished canine sniffs, through which only drugs can be detected, from thermal-imaging detection, through which private details such as when someone takes a bath, which do not necessarily reveal the presence of contraband, could potentially be revealed.[109]

Since Caballes did not have a reasonable expectation of privacy in the drugs in his trunk, the minimal intrusion presented by the canine sniff did not implicate the Fourth Amendment.[110] Accordingly, the Court placed no probable cause or reasonable suspicion requirement on the ability to conduct a canine sniff for drugs during a legitimate traffic stop for a traffic violation, noting, however, that "a seizure . . . justified solely by the interest in issuing a warning ticket to the driver can become unlawful if . . . prolonged beyond the time reasonably required to complete [the issuance]."[111] In other words, the Court placed a "reasonableness" limitation on the duration of such encounters but refused to put any other limitations on the ability of police to conduct canine sniffs during the course of a traffic stop or even to expand on what "reasonable" may mean in a traffic stop situation.[112]

105. *Id*. at 409 (citing Brief for Respondent, *supra* note 85, at 17).

106. *Id*.

107. *Id.* Presumably, had the canine in Caballes' specific case presented a question of the reliability of the individual canine's sniffs, then the Court could have addressed the issue further. From the Court's analysis, however, it is unclear whether one particular canine's unreliability would cause the Court to disallow canine sniffs of this sort in general. In other words, even if Caballes had been successful in arguing the unreliability of the specific canine in his case, other defendants in similar situations would not necessarily benefit from Caballes' success, since canine sniffs in general are still considered to be reliable, *sui generis* tools.

108. *See generally* Kyllo v. United States, 533 U.S. 27 (2001).

109. *Caballes*, 543 U.S. at 410.

110. *Id*.

111. *Id.* at 407.

112. This limitation on the duration actually has nothing to do with the canine sniff itself but rather points to the fact that a prolonged detention of a driver beyond the time required to issue the warning or citation could result in the detention being deemed an arrest for Fourth Amendment purposes, an arrest for which the officer would have no probable cause or likely even reasonable suspicion. *Id*.

E. Justice Souter's Dissent

In his avid dissent from the Court's majority opinion, Justice Souter attacked not only the holding the Court reached but also the precedent upon which that holding was based.[113] He began his dissent by calling into question the analysis used by the Court to make its decision in *Place*, specifically, the classification of canine sniffs as *sui generis*.[114] Citing several opinions dealing with the accuracy of canine sniff alerts, Justice Souter concluded that at least "dozens" of alerts out of "hundreds" will actually be false positives.[115] The prevalence of such false positives suggested that canine sniffs are, at least some of the time, revealing something other than the presence of drugs[116] meaning canine sniffs are not *sui generis* after all.[117]

Responding to the Court's suggestion that canine sniffs, reliable or not, do not reveal any non-contraband items in an individual's possession, Justice Souter aptly noted that although the sniff itself may not reveal non-contraband items, "the sniff is the first step in a process that may disclose 'intimate details' without revealing contraband."[118] While searches are allowed to reveal non-contraband items if conducted with probable cause, and in most cases, a warrant, the operative words for Justice Souter were "searches" and "with probable cause."[119] Justice Souter did not suggest that drug sniffing canines may never be used, only that their use constitutes a search requiring probable cause.[120] In this sense, the canine sniff at issue was, in Justice Souter's opinion, more akin to the thermal-imaging search in *Kyllo v. United States*, as both the canine sniff and the thermal imager could potentially produce evidence of contraband as well as legitimate activities.[121]

113. *See id*. at 410-17 (Souter, J., dissenting).

114. *Id*. at 410-13 (Souter, J., dissenting).

115. *Caballes*, 543 U.S. at 411-12 (Souter, J., dissenting). The "dozens" out of "hundreds" language raises an interesting question as to how reliable canine sniffs would have to be in order to qualify as *sui generis* searches. Perhaps the Majority would accept even "dozens" of false alerts as minimal enough to justify the *sui generis* label, in which case Souter's argument does nothing to counter the Court's justifications for allowing the sniffs. As the Court said in its own opinion, however, the issue in this particular case seemed to be irrelevant. *Id.* at 409 (majority opinion).

116. Justice Souter does not, on the other hand, intend to imply with his cynicism that the alert of a drug sniffing canine does not provide at least reasonable suspicion, and possibly probable cause, that drugs are present. However, the initial question of whether canine sniffs are searches under the Fourth Amendment is a different issue requiring a different analysis. *See id*. at 413 (Souter, J., dissenting).

117. *Id*.

118. *Id*.

119. *See id*. at 413-14.

120. *Id.* at 414.

121. *Caballes*, 543 U.S. at 413.

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Having asserted that canine sniffs are searches under the Fourth Amendment, Justice Souter then applied the *Edmond* rule that "the object of enforcing criminal law does not, without more, justify suspicionless Fourth Amendment intrusions."[122] Because the responding officer did not have reasonable suspicion or probable cause to believe that Caballes was carrying drugs in his car, Justice Souter turned to the *Terry* requirement that a search must be related to the purpose for the temporary detention in order to satisfy the Fourth Amendment.[123] Absent some connection between speeding and the search for drugs, which accurately described the situation in *Caballes*, the canine sniff of Caballes' vehicle constituted an unreasonable search in violation of the Fourth Amendment.[124] Consequently, Justice Souter would have deemed the marijuana discovered in Caballes' trunk to be the "fruits" of an unlawful search[125] and would have suppressed the evidence accordingly.[126]

Finally, in responding to the majority opinion's reliance on *United States v. Jacobsen* and its claim that state conduct revealing only contraband cannot be considered a search, Justice Souter pointed out that *Caballes* is distinguishable from *Jacobsen* because the state action in *Jacobsen* occurred when the contraband was already in the custody of the police, at a time when Jacobsen surely could have had no reasonable expectation of privacy in the contraband.[127] For this and the other aforementioned reasons, Justice Souter concluded that canine sniffs are searches governed by the Fourth Amendment.[128]

F. Justice Ginsburg's Dissent

Building on Justice Souter's brief mention of the applicability of *Terry v. Ohio* to the *Caballes* case, Justice Ginsburg also dissented from the Court's

122. *Id*.

123. *Id*.

124. *Id*.

125. The "fruit of the poisonous tree" doctrine was first referred to in *Nardone v. United States*, in which the Court stated that it would exclude evidence (the "fruit") that was gained through an unlawful search or seizure (the "poisonous tree") or was gained as a direct result of the unlawful search or seizure. Nardone v. United States, 308 U.S. 338, 341 (1939). While the taint from an unlawful search can be attenuated by discovery through an independent, untainted source, *see, e.g.*, Murray v. United States, 487 U.S. 533, 537 (1988), or through inevitable discovery by other means, *see, e.g.*, Nix v. Williams, 467 U.S. 431, 441 (1984), neither of these cases appears to be present here since no other source likely could have informed the police of the contraband in Caballes' trunk and it was unlikely that the officers would have discovered the contraband anyway.

126. *Caballes*, 543 U.S. at 414 (Souter, J., dissenting).

127. The state action in *Caballes* occurred when the contraband was still in the custody of Caballes, hidden in his trunk, away from public view. *Id.* at 415-17 (Souter, J., dissenting).

128. *Id*. at 415-17.

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majority opinion.[129] Agreeing with the Illinois Supreme Court in its analysis of the issues in *Caballes*, Justice Ginsburg began her analysis with an outline of the *Terry* doctrine, which requires that the officer's stop of the individual be legitimate in its inception and that, absent new probable cause or reasonable suspicion, the officer not broaden the scope of the detention beyond that which led to the original stop.[130] Acknowledging that the Court itself had previously analogized a traffic stop for a traffic violation with a *Terry* stop,[131] Justice Ginsburg noted that the temporal scope of the traffic stop was not the only relevant factor in determining whether the canine sniff at issue unconstitutionally expanded the traffic stop.[132] Consequently, Justice Ginsburg considered the vast difference in purposes of the traffic stop for the traffic violation itself and the subsequent canine search, concluding that the canine sniff, conducted for the purpose of enforcing criminal law outside of the traffic code, impermissibly expanded the scope of the traffic stop and was, therefore, unconstitutional.[133] Justice Ginsburg did, however, note that canine sniffs for explosives presented a different issue, since explosives implicate a public safety rationale not present in the search for drugs.[134]

Recognizing that the majority analyzed only whether the traffic stop itself was justified in determining whether Caballes' rights were violated, Justice Ginsburg criticized the majority for failing to finish the analysis by applying the second prong of the *Terry* test.[135] Unlike the majority, Justice Ginsburg would have applied *Terry* as such: The first prong was satisfied because the officer had probable cause to stop Caballes for speeding; the second prong was not satisfied, not because the stop was unreasonably prolonged but because the canine sniff broadened the scope of the stop since the sniff constituted a drug investigation and the stop was initially for a traffic violation.[136]

Justice Ginsburg further challenged the Court's decision for exposing both the potentially guilty and the potentially innocent to what will likely be stressful and embarrassing encounters with the police during what previously were routine traffic stops for traffic violations.[137] Perhaps carrying the argument to the extreme, or perhaps foreshadowing future events, Justice Ginsburg expressed concern that the Court's decision in *Caballes* would allow

129. *Id*. at 417 (Ginsburg, J., dissenting).

130. *Id.* at 418-19.

131. *See* Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

132. *Caballes*, 543 U.S. at 420 (Ginsburg, J., dissenting).

133. *Id*. at 419-22.

134. *Id*. at 423.

135. *Id.* at 421-22.

136. *Id*. at 421-22.

137. *Id.* at 422. The language in Ginsburg's challenge regarding the potentially innocent appears to hint at the potential the Court's holding has for resulting in pretextual stops or even harassment.

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suspicionless canine sniffs of cars parked in public or even those stopped at red lights.[138] Finding yet another problem with the Court's holding, Justice Ginsburg noted that by giving the police the ability to conduct a canine sniff without any probable cause and even in light of a denial of consent to search, the Court effectively stripped individuals of the right to ignore and deny police requests to search.[139]

Unsettled with the probable affects of the Court's majority opinion, Justice Ginsburg would have held that the canine sniff during a routine stop for a traffic violation, without any probable cause or reasonable suspicion that the vehicle contained drugs, was a search in violation of the Fourth Amendment.[140] Together, the dissents by Justices Souter and Ginsburg provide at least one alternative analysis the majority could have used, and they raise several unsettling concerns with the decision the majority did reach.

IV. SUBSEQUENT USES OF *CABALLES*

While many courts have undoubtedly used *Caballes* in its least offensive manner,[141] some courts have misapplied *Caballes* or applied the case in a way that magnifies the concerns raised by the decision. In addition, courts have already applied the *Caballes* reasoning and analysis to situations arguably vastly dissimilar to that in *Caballes*, raising concerns for further implications.

Some of the subsequent cases citing to *Caballes* have interpreted the "reasonableness" standard for the duration of a stop and sniff in such a way that may not withstand an actual "reasonableness" test. For example, in *United States v. Martin*, the defendant was pulled over for speeding on a highway, and after thirty minutes of questioning by the stopping officer, the defendant waited twenty minutes for a drug-sniffing canine to arrive and waited another ten minutes before he was arrested for possession of a weapon and narcotics.[142]

138. *Caballes*, 543 U.S. at 422 (Ginsburg, J., dissenting). Justice Ginsburg's concerns may seem far-fetched, but Lisa Madigan, attorney for the State of Illinois in *Caballes* actually stated in oral argument that she felt that, since canine sniffs are not searches, there would be nothing wrong with approaching people walking down the sidewalk and subjecting them to suspicionless canine sniffs. *See* Oral Argument at 5-6, *Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 2663949.

139. *Caballes*, 542 U.S. at 423 (Ginsburg, J., dissenting).

140. *Id*. at 425.

141. *See, e.g.*, United States v. Davis, 430 F.3d 345, 355-56 (6th Cir. 2005) (justifying an initial canine sniff with the *Caballes* precedent but refusing to allow for a second canine to be brought to the scene after the initial canine did not alert); United States v. Williams, 429 F.3d 767, 771-72 (8th Cir. 2005) (allowing for a canine sniff under *Caballes* reasoning when the officers already had suspicion that the car contained contraband).

142. United States v. Martin, 422 F.3d 597, 600 (7th Cir. 2005). The United States Court of Appeals for the Seventh Circuit accepted this prolonged detention because the questioning was warranted by the fact that Martin did not have a driver's license with him and because reasonable suspicion of concealing contraband arose during the questioning. *Id*. at 602.

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Such a case seems to undermine assertions that canine sniffs typically take only a minute or even seconds to complete and do not inconvenience drivers. Furthermore, the "reasonableness" standard may be ineffective in distinguishing between what truly is a reasonable or justified duration and what is an unreasonable or purposefully elongated duration. For example, the United States District Court for the District of Idaho in *United States v. Brown* held that just over five minutes was a reasonable length of time for an officer to complete a citation while waiting for a canine to arrive but stated that seven or eight minutes would possibly have been unreasonable.[143] The court failed to explain exactly why less than two minutes may have made a difference in the reasonableness analysis. In addition, when determining whether the duration of the stop was in fact reasonable, the court virtually ignored the stopping officer's testimony that he was "not going to let [the driver] go until such time as [the officer with the canine] arrived."[144] These cases are representative of the lack of guidance *Caballes* gave to officers and courts alike in determining the temporal bounds of detentions involving canine sniffs. An officer cannot be sure that the sixty minute limit approved of in *Martin* is actually acceptable or if the five to seven minute *Brown* standard is all that a court will consider reasonable. Such uncertainty fails to restrain officers at the time of the stop and fails to inform courts at the time of trial.

Magnifying a separate concern raised by the *Caballes* decision, the United States Court of Appeals for the Seventh Circuit, in *United States v. Johnson*, specifically brushed aside the issue of a driver's consent to search the vehicle, stating that "[*Caballes*] makes it irrelevant whether [the driver's] consent for the dog sniff was voluntary."[145] In place of the voluntary consent issue, the court substituted the issue of whether the trooper initiating the stop had completed the citation process before the canine sniff occurred; finding that the sniff began before the citation was written, the court affirmed the lower court's denial of Johnson's motion to suppress.[146] Similarly, the United States Court of Appeals for the Ninth Circuit held in *United States v. Ringgold* that "the threat of a lawful dog sniff did not render [the detainee's] consent involuntary" and cited *Caballes* as supporting the holding.[147] In fact, the Court in *Caballes* did not even face the issue of voluntary consent. Instead the courts in *Johnson*

143. United States v. Brown, No. CR05-73-S-EJL, 2005 WL 2847434, at *3 (D. Idaho Oct. 26, 2005).

144. *Id.* The court did state that it considered testimony that the officer was typically slower at writing citations because of his lack of experience; however, the court still appeared to give little to no weight to the officer's admission that he was going to detain the driver until a canine arrived, an admission that in itself tends to show an intent to purposefully elongate the detention in order to obtain a sniff. *Id.*

145. United States v. Johnson, 123 F. App'x. 240, 240 (7th Cir. 2005).

146. *Id.*

147. United States v. Ringgold, 132 F. App'x. 116, 118 (9th Cir. 2005).

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and *Ringgold* seem to apply nonexistent assertions from *Caballes*. The misapplication of *Caballes* in these cases speaks directly to the concern that the *Caballes* decision will not only shave away any significance of the power to decline consent to search one's person or property but also, as *Ringgold* implies, diminish one's ability to deny consent to search without threats or coercion.

A slightly related analysis was applied by the United States District Court for the Western District of Michigan, Southern Division in *United States v. Estrada-Jimenez*.[148] There, the court held that the owner of a vehicle had implicitly consented to a search of his car and that no unlawful search or seizure had occurred.[149] In addition, however, the court applied the holding in *Caballes* to support an "inevitable discovery" analysis, stating that even if the search or seizure had been unlawful or the consent invalid, since a drug sniffing canine was present at the time of the search, the canine would have been permitted under *Caballes* to sniff the vehicle without probable cause and likely would have alerted to the drugs in the vehicle.[150] This alert, the court reasoned, would have provided probable cause for the search of the vehicle.[151] The reasoning of the *Estrada-Jimenez* court not only provides a way to circumvent invalid consents but also unlawful searches and seizures, likely an unintended but possibly logical result of the *Caballes* holding.

The United States Supreme Court in *Muehler v. Mena*, decided only weeks after *Caballes*, applied *Caballes* to justify police questioning of Mena as to his immigration status during a lawful detention.[152] Analogizing the questioning in *Muehler* to the canine sniff in *Caballes*, the Court held that such questioning was constitutional so long as the questioning did not unreasonably lengthen the legal detention.[153] While the application of the *Caballes* reasoning to the *Muehler* facts may not seem unjustified at first glance, such an application becomes more threatening when one views application of the *Caballes* decision as one way to justify increasing limitations on privacy and personal freedom. If *Caballes* can be used to allow police more and more freedom of action during traffic stops, it is hard to imagine where free reign will end and the Fourth Amendment will again begin functioning.

Likely the most disturbing usage of the *Caballes* precedent, however, came from two decisions by the United States Court of Appeals for the Seventh Circuit and the Florida Court of Appeals for the Fourth District. In *United States v. Brock*, the defendant argued a canine sniff outside his bedroom door

148. United States v. Estrada-Jimenez, No. 1:05-CR-21, 2005 WL 2277073 (W.D. Mich. Sept. 19, 2005).

149. *See generally id*.

150. *Id*. at 4.

151. *Id*.

152. Muehler v. Mena, 544 U.S. 93, 100-02 (2005).

153. *Id*.

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violated the Fourth Amendment, distinguishing his case from *Caballes* by pointing out the increased privacy interest in one's house.[154] The court disagreed, however, and held that the canine sniff did not violate the Fourth Amendment.[155] In making its decision, the court explained that the analysis in *Caballes*, not that in *Kyllo*, applied to the sniff outside Brock's bedroom door.[156] The court reasoned that the distinguishing feature between Brock's situation and Kyllo's situation was that the canine sniff in *Brock* could only reveal the presence or absence of contraband and no other private information, whereas the thermal imaging device in *Kyllo* could potentially reveal private information as well as evidence of contraband.[157] In addition, the court stressed that the police officers using the canine entered the home with the consent of Brock's roommate, implying that the situation was even more analogous to *Caballes*, in which the officer also was legally outside of Caballes' vehicle.[158]

In *State v. Rabb*, however, the Florida Court of Appeals for the Fourth District approached the issue and the *Caballes* precedent differently. On remand from the United States Supreme Court,[159] the Florida court drew the distinction between the privacy interest in a home and the privacy interest in an automobile that the *Brock* court was unwilling to make, stressing the increased Fourth Amendment protections provided to homes.[160] The Florida court also differed from the *Brock* court in its analysis by analogizing the canine sniff used to smell what is inside the home with the thermal imager used to see what is inside the home and ultimately held that the canine sniff violated the Fourth Amendment.[161] These differences between *Brock* and *Rabb* exhibit a serious problem with the *Caballes* precedent: *Caballes* may have unclear but vast implications for situations beyond that of a canine sniff during a valid stop for a traffic violation.[162]

154. United States v. Brock, 417 F.3d 692, 695 (7th Cir. 2005).

155. *Id*. at 697.

156. *Id*. at 696.

157. *Id*.

158. *Id*. at 697.

159. Florida v. Rabb, 544 U.S. 1028 (2005). The fact that the Supreme Court vacated the Florida court's previous decision and remanded the case for further consideration in light of the *Caballes* decision is slightly disturbing in that the Supreme Court appears to be implying that the *Caballes* decision has implications far beyond those in traffic violation situations. See *infra* Section V(A), entitled "Concerns with the Court's Decision" for an analysis of the problems that may arise from such implications.

160. State v. Rabb, 920 So. 2d 1175, 1182 (Fla. Dist. Ct. App. 2006).

161. *Id*. at 1182, 1192.

162. For an in-depth discussion of the implications of the C*aballes* decision for future *sui generis* devices, see Ric Simmons, *The Two Unanswered Questions of* Illinois v. Caballes: *How to Make the World Safe for Binary Searches*, 80 TUL. L. REV. 411 (2005).

The subsequent uses of *Caballes* in general point out and magnify the concerns raised by the Supreme Court's analysis in the case. At a minimum, they raise questions as to how lower courts are to interpret the "reasonableness" standard, what role consent plays in current Fourth Amendment jurisprudence, and even how far the *Caballes* precedent may be taken to chip away at Fourth Amendment protections.

V. AUTHOR'S ANALYSIS

A. Concerns with the Court's Decision

As evidenced by the subsequent uses of *Caballes* in lower courts, the United States Supreme Court's analysis and holding in *Caballes* present several concerns with the future application of the decision. The Court's "reasonableness" standard could prove unworkable or itself unreasonable. The holding may allow pretextual stops with the intent of performing canine sniffs or may allow harassment or discrimination. Finally, the decision also potentially undermines previous protections recognized under the Fourth Amendment.

The Court's resolution of the temporal issue with a "reasonableness" standard leaves the issue virtually unresolved.[163] Even before the *Caballes* decision, many cases involved courts allowing stops to be elongated while waiting for a drug sniffing canine to arrive on the scene or while waiting for the canine to perform its sniff.[164] While these cases were not governed by the *Caballes* "reasonableness" standard, the courts reviewing the cases must still have felt that the durations were reasonable, since even the *Terry* doctrine requires that the detention not extend beyond what is reasonable and necessary. Subsequent to *Caballes*, courts have continued this trend, allowing for arguably over-extended stops in order to wait for or perform the canine sniff.[165]

Furthermore, the Court's decision in *United States v. Sharpe*[166] may hold the "reasonableness" door open further than is actually "reasonable." There, the Court accepted an officer's continued detention of a motorist where he justified the delay by explaining that he was awaiting an officer with more training and experience with such stops and diligently pursued the retrieval of

163. One author has argued that the temporal issue should not, in fact, be an issue at all, since holding that canine sniffs are simply not allowed during routine traffic stops would negate the need for a temporal limitation on the scope of the sniff. LaFave, *supra* note 49, at 1895-96.

164. *See, e.g.*, United States v. Simmons, 172 F.3d 775, 776-77 (11th Cir. 1999) (nearly one hour after the traffic violation stop began); United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (nearly one hour after the conversion of the traffic stop into a *Terry* stop); Cresswell v. State, 564 So. 2d 480, 481 (Fla. 1990) (forty-five minutes after traffic violation stop began).

165. *See supra* Section IV, entitled "Subsequent Uses of *Caballes*."

166. United States v. Sharpe, 470 U.S. 675 (1985).

such an officer.[167] While the *Caballes* holding arguably puts a limit on such practices with retrieval of canines, one can imagine the Court giving deference to an argument that obtaining a canine was diligently pursued and the police did everything in their power to complete the traffic stop as soon as possible or even that the stopping officer was awaiting an officer with more canine training to perform the sniff.

Even if such a *Sharpe* rationale is later barred by the Court, as one author recognizes, several other tactics may be used to search the vehicle nonetheless: requesting information about the vehicle, the driver, or the driver's criminal history; developing reasonable suspicion or probable cause, presumably through questioning or monitoring the motorist; requesting consent to search the vehicle, possibly even through threatening to obtain a drug sniffing canine.[168] Whether these tactics would destroy an otherwise reasonable detention remains to be seen.

In addition to the lack of clarity on the issue of "reasonableness," the Court failed to fully consider the policy implications of its decision, which will allow police to use traffic stops as a pretext to searching for drugs. While the Supreme Court rejected the pretext argument in *Whren v. United States*,[169] the Court's decision in *Caballes* may make the pretext problem more prevalent, eventually requiring a re-evaluation of the Court's holding in *Whren*. In giving police the go-ahead to utilize minor traffic violations as a valuable tool in the War on Drugs, the Court is essentially allowing police to target traffic violators in high-crime areas simply because such motorists may be more likely to have drugs in their vehicles. In one example pre-dating *Caballes* but presumably allowed in light of the Supreme Court's holding, the police stopped each and every vehicle with a minor traffic violation on the highway, not for the purpose of ticketing them, but rather for the purpose of running a canine sniff on the vehicles in order to search for drugs.[170]

In a related aspect, the Court's decision in *Illinois v. Caballes* also opens the door for allowing police to use canine sniffs in a discriminatory manner and for harassment purposes.[171] Because the Court will no longer consider the

167. *Id*. at 686-87.

168. *See* Craig Scheiner, *Time is of the Es'scents': The Fourth Amendment, Canine Olfaction, and Vehicle Stops*, 76 FLA. B.J. 26, 32 (2002).

169. Whren v. United States, 517 U.S. 806, 813 (1996).

170. James A. Adams, *The Supreme Court's Improbable Justifications for Restriction of Citizens' Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV. 833, 846 (1999) (referring to United States v. Holloman, 113 F.3d 192 (11th Cir. 1997), where the police even told the motorist that they were searching for drugs).

171. LaFave, *supra* note 49, at 1896; Craig M. Bradley, *Supreme Court Review: Saying No to Drug Roadblocks*, 37 TRIAL 80, 81 (Apr. 2001) (noting that the dissenters in *Edmond* left this possibility open by forcing the majority to "vigorously insist that the use of the drug-sniffing dog did not doom [the] search").

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pretext argument, and because high-crime areas typically house minorities, the Court appears to have, perhaps inadvertently, left minorities more exposed and less protected by the Fourth Amendment, a result that offends equal protection values. For example, it is unlikely that individuals in high-crime areas commit significantly more traffic violations than do individuals in lower-crime areas, but officers could target high-crime areas for traffic violation stops, ignoring the traffic violations in lower-crime areas, simply because they may then use a drug sniffing canine to search the car stopped in the high-crime area for drugs. While blatant discrimination may not be upheld by the Court in light of civil rights remedies against discrimination, so long as the police can cite a valid stop for a traffic violation, the detention of the motorist and any subsequent canine sniffs of the vehicle will presumably be valid and not necessarily discriminatory.[172]

Allowing for suspicionless canine searches as part of a routine traffic stop also undermines both the consent doctrine and the prohibition against the "search incident to citation." This was reiterated in Justice Ginsburg's dissent in *Caballes* when she recognized that "a sniff could substitute for an officer's request to a bus passenger for permission to search his bag."[173] While Ginsburg applied the possibility to situations like that in *Bond v. United States*,[174] where the officer theoretically could have asked for consent to search and then, when consent was denied, brought a drug sniffing canine aboard the bus to sniff the bag regardless, one can imagine the situation being used in the traffic stop context. In fact, this appears to have been the situation in *Caballes*, and the court appears to have had no problem with this. If officers can simply use the canine sniff regardless, the ability of a subject to deny consent in a suspicionless situation is essentially nonexistent.

While the Court's decision in *Illinois v. Caballes* dealt only with canine searches during traffic stops, the decision may have implications beyond the vehicle search. As one student-authored casenote on *Caballes* points out, the Court may be headed down a slippery slope in that, as the Court chips away at what privacy interests are protected by the Fourth Amendment, citizens begin to expect less and less privacy.[175] Under the *Katz* standard, the diminishing of reasonable expectations of privacy afforded to citizens affects whether a Fourth Amendment search has even occurred; if the subject of the search has

172. *See* John F. Decker et al., *Curbing Aggressive Police Tactics During Routine Traffic Stops in Illinois*, 36 LOY. U. CHI. L.J. 819, 836 (2005).

173. Illinois v. Caballes, 543 U.S. 405, 423 (2005) (Ginsburg, J., dissenting).

174. In *Bond*, the Court held that an officer's squeezing a bus passenger's bag, which was stored in the overhead bin, violated the Fourth Amendment because the passenger had a reasonable expectation of privacy in the bag, *even though* it contained drugs. Bond v. United States, 529 U.S. 334, 338-39 (2000).

175. Nina Paul & Will Trachman, Note, *Fidos and Fi-don'ts: Why the Supreme Court Should Have Found a Search in Illinois v. Caballes*, 9 CAL. CRIM. L. R. 1, 21 (2005).

no expectation of privacy because the Court's previous decisions have stripped him of that expectation, then there is no search. Likewise, if society does not believe that a subject's expectation of privacy was reasonable because of the Court's trend in limiting the expectation of privacy, then no search has occurred.

To this extent, the second prong of the *Katz* test has become more a judgment of what the Court believes society *should* find is a reasonable expectation of privacy rather than what society actually *does* find is a reasonable expectation of privacy. In essence, the Court may be laying a foundation for future narrowing of what is considered a search by reinforcing society's diminishing expectations for privacy not just in cars but in other places where society currently feels that an expectation of privacy is reasonable. For example, after the *Caballes* decision, society may move toward expecting canine sniffs to be performed on their cars, on their persons, even on their homes absent any probable cause for performing the sniffs. If society in fact expects such sniffs, then there is no recognition of a reasonable expectation of privacy in these places, at least against canine sniffs. This result, stemming directly from the Court's own actions, gives the Court less ammunition for striking down such sniffs because of the lack of a reasonable expectation. In this way, the Court may find it difficult to stop itself from further expanding what is a "reasonable" search under the Fourth Amendment.

Obviously, the Court's analysis and holding in *Caballes* raises serious concerns. The "reasonableness" standard provides little guidance for officers and courts and potentially may lead to vastly different standards in different jurisdictions. The holding raises concerns regarding harassment or discrimination through pretextual stops for the purpose of performing canine sniffs. Finally and perhaps most disturbing, the holding has the ability to undermine protections already recognized by the Court under the Fourth Amendment.

B. Alternative Analyses

While one team of student authors claimed the United States Supreme Court's decision in *Illinois v. Caballes* violated established Fourth Amendment law,[176] this was not the likely case. Instead, the case was probably more that the precedents on which the Court relied in making its most recent decision were not consistent with the intended meaning of the Fourth Amendment. In other words, although the Court followed established Fourth Amendment law as had previously been announced, the Court's previous decisions themselves may be flawed. Alterations in previous decisions would have significantly changed the Court's decision in *Illinois v. Caballes* and perhaps led to a decision more in line with the meaning of the Fourth Amendment.

176. *See id*. at 13.

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The first problem with the precedents that the Court used in deciding *Caballes* is that the Court in *Place* incorrectly applied the *Katz* standard when it assumed that the Fourth Amendment does not protect against suspicionless searches of places where contraband may be contained. For example, while precedent holds that individuals have a diminished expectation of privacy in their vehicles, the trunk seems to be more protected than the passenger compartment.[177] This means that an individual has some expectation of privacy in his trunk, although not as much as he has in his house. If this is true, then storing items of any sort in the trunk of a car would afford those items at least some level of protection. *Place* held the opposite and would presumably allow a canine sniff of the trunk, disregarding the reasonable expectation of privacy in the trunk. To that extent, *Place* incorrectly assumed that canine sniffs do not impinge upon a reasonable expectation of privacy. Certainly the court in *Katz* would not have considered the argument that using the electronic device to overhear Katz's conversation did not constitute a search because Katz's conversation itself was evidence of illegal activity. The outcome in *Place* suggests that the argument could be made and may even be accepted by the Court.

The Court's reliance on *Place* is also unwarranted in that *Place* did not recognize that the reliability of canine alerts calls into question the *sui generis* nature of canine sniffs and, therefore, the Fourth Amendment implications of canine sniffs. If canine sniffs are not truly *sui generis*, then they must be considered searches under the meaning of the Fourth Amendment and require probable cause accordingly. In many instances, the likelihood that a drug sniffing dog is alerting to something other than a "secret stash" of drugs is high.[178] For example, in *United States v. $639,558 in United States Currency*, the United States Court of Appeals for the District of Columbia acknowledged that between seventy and ninety-seven percent of U.S. currency is tainted with enough drugs, often cocaine, that a drug sniffing canine can and will alert to the presence of the drugs on money.[179] In that case, an alert to the trunk of

177. *See, e.g.*, New York v. Belton, 453 U.S. 454, 461 n.4 (1981).

178. *See* Jeffrey A. Bekiares, Comment, *Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways*, 57 FLA. L. REV. 963, 971-972 (2005); Paul & Trachman, *supra* note 175, at 15-16; *see generally* Bird, *supra* note 97.

179. United States v. $639,558 in United States Currency, 955 F.2d 712, 714 n.2 (1992). For other cases discussing the reliability of drug sniffing canines, *see, e.g.*, United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir. 1997); United States v. Scarborough, 128 F.3d 1373, 1378 n.3 (10th Cir. 1997); United States v. Limares, 269 F.3d 794, 797-98 (7th Cir. 2001); Laime v. State, 60 S.W.3d 464, 475-76 (Ark. 2001); United States v. $242,484 in United States Currency, 351 F.3d 499, 511 (11th Cir. 2003), *vacated on other grounds by rehearing en banc*, 357 F.3d 1225 (11th Cir. 2004).

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someone's car may simply be an alert that large amounts of money are present there, which in and of itself is not illegal.[180]

In addition, even trained drug sniffing canines may "alert" to scents other than those from drugs. In fact, in one case, a canine alerted to a girl's person not because the girl was carrying drugs but because she had the smell of her own dog, which apparently was in heat.[181] Dogs, regardless of their training, are still fallible animals; the chances of their alerting to something other than illegal contraband is at least a possibility, revealing that canine sniffs, in reality, are not *sui generis*. While Justice Souter's dissenting argument that a canine sniff is "the first step in a process that may disclose 'intimate details' without revealing contraband"[182] may be countered by the fact that searches regularly disclose "intimate details," Souter's point implicates something slightly different than what his words actually say. The result of a canine sniff may, at least in some cases, lead to a physical search by the police officer of an individual's private places and things, without any actual probability that contraband existed among them. The Fourth Amendment can bear searches revealing intimate details *only if* there is an actual probability (probable cause) that contraband is actually contained in the area of the search. Under this analysis, the Fourth Amendment would apply to canine sniffs, and probable cause, in the case of a vehicle sniff or probable cause in the case of perhaps a residency sniff, would be required before such a sniff could be conducted.

In addition to the problems with the actual canine sniff process, some lower courts have disregarded or distinguished *Place* and found that a canine sniff constituted a Fourth Amendment search after all.[183] Like these cases, *Illinois v. Caballes* can be distinguished from *Place*. In *Place*, the officers had reasonable suspicion that Place was carrying drugs in his luggage, thus authorizing a *Terry* stop of Place and a temporary detention of his luggage.[184] However, the police officer conducting the traffic stop involving Caballes had only probable cause that Caballes had violated a traffic ordinance. He did not have probable cause, or even the reasonable suspicion present in *Place*, that Caballes was carrying contraband in his vehicle.[185] This significant difference

180. Although a large amount of money may admittedly be evidence of illegal activity, the point is not that police officers would have no interest in the money or searching the trunk but rather that they would be required to obtain a search warrant or articulate probable cause that the money is connected to illegal activity in order to search the trunk.

181. Doe v. Renfrow, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979).

182. Illinois v. Caballes, 543 U.S. 405, 413 (Souter, J., dissenting).

183. *See, e.g.*, United States v. $53,082 in United States Currency, 985 F.2d 245 (6th Cir. 1993); United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); State v. Ortiz, 600 N.W.2d 805 (Neb. 1999).

184. *See* United States v. Place, 462 U.S. 696, 698 (1983).

185. People v. Caballes, 802 N.E.2d 202, 205 (2003) (acknowledging that the police had "nothing more than a vague hunch," and not even a hunch of drug trafficking, but of "possible wrongdoing").

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suggests that *Place* may not have been the appropriate precedent to apply to *Caballes*, since the police in *Place* conducted the canine sniff precisely because of their reasonable suspicion.

The Court in *Caballes* took another wrong turn in its analysis by relying upon its decision in *Edmond*. The Court in *Edmond* ironically leaves the door open to canine sniffs as secondary purposes for roadblocks in the same opinion that it shuts the door to canine sniffs as primary purposes for roadblocks.[186] While one author seems to claim that *Edmond* supports a holding that drug sniffing by canines during a traffic stop is illegal because it has no relationship to the purpose for the traffic stop,[187] this argument seems to be undermined by the Court's implicitly leaving the door open for canine sniffs that are the secondary purpose of a roadblock. After all, the canine sniff that occurs during a traffic stop at a roadblock with the primary purpose of stopping drunk driving is equally as unrelated to the purpose of the stop as is the canine sniff that occurs during a traffic stop for a traffic violation.[188]

Only if the Court in *Edmond* had refused to allow canine sniffs at roadblocks altogether would *Edmond* support the "no relationship to the purpose" logic. In fact, this likely would have been a more logical approach for the Court to take in *Edmond*, since the Court's allowance of canine sniffs for secondary purposes completely defeats the purpose of its own ruling by allowing the police to now kill two birds with one stone: The police may still use canine sniffs, as they wished, but now they may also combine the sniff with other privacy intrusions, such as stopping motorists to check for drunk driving. This essentially puts the driver in a *worse*, not better, position than the driver had been in before *Edmond*.

Finally, had the Court properly applied the *Terry* two-pronged test to the *Caballes* case, the Court would have found that the canine sniff unconstitutionally broadened the scope of the traffic stop of Caballes. While *Terry* involved the stopping and frisking of suspicious persons walking down a street, the Supreme Court has analogized the traffic stop with a *Terry* stop.[189] Even noting Illinois' assertion that the Supreme Court did not mean for *Terry* to apply to traffic violation stops, the Court's rejection of the ability to perform a search of a subject or his vehicle incident to citation in *Knowles v. Iowa* suggests that the Court also did not mean to give stopping officers unrestricted

186. Bekiares, *supra* note 178, at 967.

187. *See* LaFave, *supra* note 49, at 1896-97.

188. The analysis would be different, however, if the stop were for driving under the influence of drugs, instead of alcohol, in which the canine sniff would actually be related to the stop and presumably would not be legally troublesome. *Id*. at 1895 n.308.

189. Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (specifically stating that a traffic stop is more like a *Terry* stop than it is like a formal arrest). While the *Berkemer* case dealt with whether *Miranda* warnings were required for conversations between a police officer and the subject of a traffic stop, the analogy is still applicable.

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ability to perform suspicionless searches on those who are stopped. Therefore, *Terry* appears more applicable to the *Caballes* situation.

Under *Terry*, only reasonable suspicion is required to temporarily detain and pat search an individual.[190] Unfortunately for police officers and lower courts, the Court did not attempt to define the phrase "reasonable suspicion." According to the *Terry* standard, the initial stop, here the traffic stop, must be legitimate, and any subsequent action must be related to the reason for initiating the stop.[191] Had the Court applied these standards to *Caballes*, it would have found that, although the initial stop was valid, the subsequent actions of the officers, particularly in conducting the canine sniff, illegally broadened the scope of the stop since the initial stop had nothing to do with a police drug investigation.

Regardless of possible flaws in the Court's previous rulings and regardless of the fact that the Court was indeed following its Fourth Amendment precedent, the Court could have found the canine sniff of Caballes' car to violate public policy based on pretext, discrimination and harassment, and even developing inconsistencies in the law, all of which are significant concerns raised by the Court's actual decision in *Caballes*.

VI. CONCLUSION

The Court missed three distinct chances to rekindle the spirit of the Fourth Amendment and bar the use of suspicionless drug sniffing canines during traffic stops for traffic violations. First, the Court could have corrected the precedent established in *Place* and *Edmonds* and held that canine sniffs are, in actuality, searches under the Fourth Amendment that illegally broaden the scope of the traffic stop. Second, the Court could have applied *Terry* principles and the *Terry* standard and held that the canine sniffs, because they are unrelated to the initial reason for the stop, illegally broadened the scope of the stop, assuming no showing of reasonable suspicion or probable cause that the motorist was hiding drugs in his vehicle. Finally, the Court could have rested a holding that canine sniffs during the course of a traffic stop for a traffic violation on public policy, since a contrary holding allows for widespread pretext stops, discrimination and harassment, undermines an individual's ability to deny consent to search, and paves the way for further chipping away at Fourth Amendment protections.

While the Court itself is unlikely to alter its analysis or holding in *Illinois v. Caballes* in subsequent cases, perhaps the concerns voiced nearly sixteen years ago by Judge Kogan of the Supreme Court of Florida in his dissent in

190. Terry v. Ohio, 392 U.S. 1, 20 (1968). The Court did reiterate, however, that a "severe requirement of specific justification" existed in order to breach an individual's privacy. *Id.* at 11.

191. *Id.* at 19-20.

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Cresswell v. State will at least bring to light the practical effects of the decision: "If the zeal to eliminate drugs leads this state and nation to forsake its ancient heritage of constitutional liberty, then we will have suffered a far graver injury than drugs can ever inflict upon us. Drugs injure some of us. The loss of liberty injures all."[192]

AMANDA M. BASCH*

192. Cresswell v. State, 564 So. 2d 480, 484-85 (Fla. 1990) (Kogan, J., dissenting).

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