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# DRIVING OFF THE FACE OF THE FOURTH AMENDMENT: WEIGHING CABALLES UNDER THE PROPOSED “VEHICULAR FRISK” STANDARD

Christopher M. Pardo\*

## I. INTRODUCTION

Although society charges law enforcement with eliminating illegal drug activity, the individual Fourth Amendment rights<sup>1</sup> of every American citizen must also be respected. In *Illinois v. Caballes*,<sup>2</sup> the Supreme Court held that a trained drug-detection dog’s sniff does not constitute a search pursuant to the Fourth Amendment and that the dog’s alert, in itself, constitutes the requisite probable cause to search a citizen’s vehicle. Although *Caballes* may be effective in helping police battle a burgeoning drug trade, as it allows police to walk a drug-detection dog around any lawfully stopped vehicle, it also creates a situation ripe for the exploitation of underprivileged citizens—such as a situation where police conduct a traffic stop on false pretenses and the drug-detection dog then mistakenly alerts to the vehicle. American society is divided along economic and racial lines. These divisions in American society can be exacerbated, either inadvertently or purposely, through legally approved methods that further the violation of

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<sup>1</sup> U.S. CONST. amend. IV. The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches. *Id.* Specifically, it provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.] . . .” *Id.* But searches are permissible upon a showing of “probable cause[.]” *Id.* Difficult to define in a technical sense, probable cause is the showing that the government must satisfy in order to be allowed to conduct a full Fourth Amendment search. *State v. Rabb*, 920 So. 2d 1175, 1181 (Fla. Dist. Ct. App. 2006) (quoting *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991)). Probable cause has been explained as follows:

As a legal concept, “probable cause” is not capable of a bright-line test. Rather, it involves a fact-intensive analysis that necessarily varies from context to context. In particular, the courts are required to weigh two interests that usually are in conflict: society’s recognition that its police forces should be given discretion to investigate any reasonable probability that a crime has occurred, and the individual’s interest in not being subjected to groundless intrusions upon privacy.

*Id.*

<sup>2</sup> See 543 U.S. 405, 410 (2005).

constitutional rights and encourage mistreatment of the more vulnerable segments of society, namely poor and minority citizens.

The *Caballes* decision could have been decided many different ways, and some ways may have been more logical when viewed in the context of the Fourth Amendment's balancing of personal and government interests. In the absence of even the merest reasonable suspicion, a drug-detection dog's alert should not be considered sufficient to merit probable cause.

The *Caballes* Court could have ruled that a dog-sniff was the automotive equivalent to a frisk; therefore, before allowing a drug-detection dog to sniff a car, pursuant to *Terry v. Ohio*,<sup>3</sup> the officer would need an articulable and reasonable suspicion that crime was "afoot" and would not, for example, be allowed to frisk a citizen stopped for speeding, absent any other facts. Applying this *Terry* standard to drug-detection, dog use would lead to more fair and just results for several reasons.

First, alerts by drug-detection dogs, as delineated in the *Caballes* dissent, are not reliable enough to qualify alone as probable cause.<sup>4</sup> Although the conclusion reached from the research is not absolute, and each dog is different, even a single mistake justified through application of the *Caballes* standard should be considered one too many. Raising the standard even slightly takes away the accountability for the mistakes from a dog and places it more squarely on the officer.

Second, a standard such as that promulgated by the *Caballes* Court unnecessarily exposes society's disadvantaged members to racial, age, gender, and economic profiling by police. As further discussed below, the Supreme Court's decision allows officers to walk a drug-detection dog around *any* lawfully stopped vehicle, but does not require that they

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<sup>3</sup> See *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). In *Terry*, the Supreme Court established that stopping and frisking an individual was a "seizure[]" and "search" under the Fourth Amendment, but it was not unreasonable so long as the officer had a

reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably[,] . . . [the officer must be able to point to] specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

*Id.* at 27 (citations omitted) (footnote omitted). Thus, for these types of searches, probable cause is not required, but the Fourth Amendment still requires some level of protection for the citizen. *Id.*

<sup>4</sup> See *Caballes*, 543 U.S. at 410.

walk the dog around *every* lawfully stopped vehicle. This level of discretion, not checked by any court-mandated requirement of reasonable suspicion, is merely one more weapon in an arsenal to exploit anyone against whom an officer feels a conscious or sub-conscious prejudice.

The Court could have reworked, and ultimately applied, its same basic reasoning from *Kyllo v. United States*<sup>5</sup> and held that a dog-sniff—essentially the use of a sensory-enhancement device—constituted a full-blown search pursuant to the Fourth Amendment, thus requiring probable cause of wrongdoing or the procurement of a warrant before allowing a trained drug-detection dog to sniff a citizen's vehicle.<sup>6</sup> This approach would be problematic for several reasons. For example, it may create an inconsistency by extending the sanctity of the home argument from the *Kyllo* decision to the already de-sanctified automobile.

Additionally, through analogy, the Court could have considered the weight that a drug-detection dog's alert is given in civil forfeiture of contraband cases, where the courts require more than a mere dog-alert to sustain a finding of probable cause. Both civil and criminal laws apply a "probable cause" standard to searches when deciding whether law enforcement should be granted access to a citizen's vehicle. Generally, when determining probable cause, the civil law does not recognize a dog-alert by itself as sufficient to merit the probable cause necessary to support seizure, and ultimately forfeiture, of a citizen's personal possessions. On the other hand, the criminal law, through *Caballes*, considers a dog-alert enough to meet probable cause to invade someone's private space, regardless of whether there is reason to believe that contraband is hidden in a vehicle. To effectuate a more coherent approach to probable cause, either the standard for probable cause meriting seizure should be relaxed, or the standard for showing probable cause meriting a search should be heightened.

As further discussed in this Article, raising the required standard for probable cause would appropriately meet both the government's interest—preventing the movement of illegal contraband—and the interest of citizens—protecting individual privacy rights. Treating a dog-sniff as a "vehicular frisk" would best balance the important government interest of preventing drug-trafficking and a citizen's

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<sup>5</sup> See *Kyllo v. United States*, 533 U.S. 27, 36, 34–37 (2001) (holding that both the use of sensory enhancing devices and inferences drawn from them are searches pursuant to the Fourth Amendment, where a sensory-enhancement device was directed at a citizen's personal dwelling because it exposed "intimate details" from inside the person's home).

<sup>6</sup> See *id.* at 34–37.

fundamental, constitutional right of protection against unreasonable searches.

II. POLICY CONSIDERATIONS IN SUPPORT OF AND AGAINST THE *CABALLES* HOLDING

In order to understand the seemingly inconsistent, ill-supported, and intrusive standard adopted by the Supreme Court, one must reflect on the policy considerations that have led to the current standard. Drug-detecting dogs are often used to combat a rampant drug-trade.<sup>7</sup> Thus, even though the police cannot corroborate whether a drug-detection police dog is actually alerting to drugs before conducting a search pursuant to the alert, the dog is generally considered to be a reliable source of information about illicit activity.<sup>8</sup> Yet, despite the general acceptance of trained-dog alerts as reliable, courts rarely rely *solely* on that one indication of illegal narcotics activity to establish probable cause to merit seizure of money for forfeiture purposes, even when the person whose money is being seized may be arrested for some other criminal violation.<sup>9</sup> For example, the court in *Jones* interpreted the Florida Contraband Forfeiture Act to mean that “a positive alert by a drug dog to narcotics on currency, standing alone, does not constitute evidence that the money was used in a drug transaction[]” because, even though there were also marijuana stems and seeds found in his vehicle, the money could not actually be linked to any drug transaction.<sup>10</sup> In the context of probable cause meriting forfeiture of personal possessions, the *Jones* court stated that a dog alert does not, without more, create a link to illicit drug activity.

On the other hand, police need to establish probable cause in order to search a suspicious individual, because, through the Fourth Amendment, each American citizen is granted freedom from unreasonable searches, where the notion of “search” is to be determined

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<sup>7</sup> See generally Michael A. DiSabatino, *Evidence Considered in Tracing Currency, Bank Account, or Cash Equivocancy to Illegal Drug Trafficking so as to Permit Forfeiture, or Declaration as Contraband, Under State Law – Odor of Drugs*, 116 A.L.R. 5th 325, 325 (2004).

<sup>8</sup> Although it is a negatively-reviewed minority view, *Lobo v. Metro-Dade Police Dep’t*, 505 So. 2d 621, 623 (Fla. Dist. Ct. App. 1987), put so much weight on the alert of a drug-detecting dog that the court explained “[a]n alert by a trained, experienced narcotics dog[] . . . is in itself enough to establish probable cause for an arrest, that [a] chapter 893 [Florida statute stating that contraband goods are subject to forfeiture] violation has occurred . . .” *Id.*

<sup>9</sup> See *Dep’t of Highway Safety and Motor Vehicles v. Jones*, 780 So. 2d 949, 951–52 (Fla. Dist. Ct. App. 2001).

<sup>10</sup> *Id.*

with reference to a person's expectation of privacy,<sup>11</sup> so long as society deems that expectation reasonable.<sup>12</sup> In situations in which police gather information to obtain probable cause to search a home, the Supreme Court has upheld the reasonable expectation of privacy at its highest, ruling that certain attempts to obtain the requisite information to merit probable cause constituted searches in themselves.<sup>13</sup>

Although the policy of protecting a citizen's reasonable expectation of privacy in the home has been steadfastly upheld via the Fourth Amendment, the expectation of privacy protected by the United States Supreme Court regarding automobiles<sup>14</sup> has been so eroded that one Fourth Amendment scholar, when explaining the expectation of privacy

<sup>11</sup> See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (speaking of subjective expectation).

<sup>12</sup> See generally *id.* Hence, lacking a reasonable expectation of privacy, a question of reasonableness of the search cannot even arise, in default of the very constitutive elements of the notion of "search." *Id.*

<sup>13</sup> See *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that gaining probable cause for a search warrant by obtaining information through the use of sense-enhancing technology regarding the interior of the home, which could not have been obtained without physical intrusion into a constitutionally protected area, constitutes a search pursuant to the Fourth Amendment—at least where the technology in question is not in general public use); see also *Payton v. New York*, 445 U.S. 573, 586–87 (1980). This case states:

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet is [sic] is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.

*Payton*, 445 U.S. at 586–87 (footnote omitted). But see *California v. Ciraolo*, 476 U.S. 207 (1986). The Court held that a person does not have a reasonable expectation of privacy when he puts up a fence around his yard, where police observe, with the naked eye, from a low-flying airplane, that he is committing illegal acts in his backyard. *Id.* In such a case, the person's activities are visible to the naked eye. *Id.* "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* *Katz*, 389 U.S. at 351.

<sup>14</sup> See generally *New York v. Belton*, 453 U.S. 454 (1981). Belton was pulled over for speeding, and was taken outside of the car away from the vehicle. *Id.* at 456. He was handcuffed and arrested, leaving no opportunity for him to either get something from the car or destroy any evidence. *Id.* The police then searched the car, found a coat inside the car, opened his coat pocket, and found cocaine. *Id.* Belton was later indicted for possession of a controlled substance, and the United States Supreme Court held that the search without a warrant was reasonable, even though the vehicle was secured by the police. *Id.* The Court reasoned that the expectation of privacy in a vehicle is low. *Id.* at 457. See also *Texas v. White*, 423 U.S. 67 (1975) (creating a bright-line rule that officers can search an arrested person's vehicle at their police station, without showing probable cause for a warrant, regardless of the fact that they could have easily obtained a warrant to search the car, based on probable cause that evidence was inside the car).

in a vehicle to her criminal procedure class, describes driving in a car as, “skidding off the face of the Fourth Amendment.”<sup>15</sup>

When considering the Fourth Amendment constitutional rights of a citizen in a vehicle, Supreme Court cases mainly focus on the reduced expectation of privacy in a vehicle when probable cause existed to obtain a search warrant. Based primarily on the effect of the reduced expectation of vehicle privacy rights, the United States Supreme Court recently and ominously held in *Caballes* that allowing a drug-sniffing dog to smell around a car during a routine traffic stop, where an arrest would not be warranted under the law, did not constitute a search under the Fourth Amendment, and was merely a valid way of obtaining probable cause to search a vehicle for contraband.<sup>16</sup>

The Supreme Court deftly carved a distinction between *Caballes* and past cases, such as *Kyllo*,<sup>17</sup> based on the differences between privacy expectations in a house versus in a car. This is especially true considering the difference between the potentially lawful activities that the use of sensory-enhancing equipment could have exposed in *Kyllo*<sup>18</sup>

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<sup>15</sup> Interview with Professor Amy D. Ronner, St. Thomas University School of Law (October, 2005).

<sup>16</sup> *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005).

<sup>17</sup> *Id.* at 409. The Court explained as follows:

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search . . . . The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from [Caballes]’s hopes or expectations concerning the nondetection of contraband in the trunk of his car.

*Id.* at 409–10 (citations omitted).

<sup>18</sup> See *Kyllo*, 533 U.S. at 38–39. The Supreme Court recently explained the “intimate details” which could be exposed through the use of sense-enhancing technology, and the reason the prohibition of thermal imaging was necessary:

Limiting the prohibition of thermal imaging to “intimate details” would not only be wrong in principle; it would be impractical in application, failing to provide “a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment[.]” To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the “intimacy” of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 [the heat-sensing device used by the law enforcement officers] might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider “intimate”; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies

(although marijuana was found in *Kyllo*) and the illegal activity that took place in *Caballes*. In fact, one recent Florida case,<sup>19</sup> upon remand by the Supreme Court so as to reconsider its holding in light of the *Caballes* decision, held that when a drug-dog was taken to the front of a citizen's house and alerted to the house, the police officer had conducted a warrantless search and, thus, violated the Fourth Amendment.<sup>20</sup> This holding, considered in light of *Caballes* and *Kyllo*, must already be seen as placing a limitation on, or carving out an exception to, the *Caballes* holding, on the basis that the expectation of privacy in a house is much greater than that in a vehicle.<sup>21</sup>

The *Caballes* Court tried to rationalize searching the defendant's car based on the resulting discovery of drugs in the car, but the Court ignored the results garnered by the search in *Kyllo*, where drugs were also found. In an effort to differentiate the cases, the Court concluded, "[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from [Caballes]'s hopes or expectations concerning the nondetection of contraband in the trunk of his car."<sup>22</sup>

Does an innocent citizen have a reasonable expectation that his lawful activities will remain private when he steps into a vehicle? In reality, does the above quotation answer that question? The quotation above is a legal slight-of-hand, which should not be allowed to confuse the protection against unreasonable searches with the protection of the home. Although, for allegedly clear policy reasons,<sup>23</sup> different expectations of privacy exist between a vehicle and a house, it is a

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objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up "intimate" details—and thus would be unable to know in advance whether it is constitutional.

*Id.* (citation omitted).

<sup>19</sup> See *State v. Rabb*, 920 So. 2d 1175 (Fla. Dist. Ct. App. 2006).

<sup>20</sup> See Carl Jones, *From the Courts: Appellate Review*, Daily Business Review, Broward, September 19, 2005, at A16.

<sup>21</sup> *Id.* (stating that the dissent argued "the majority was creating a 'residence exception' in the precedent established by *Caballes* . . . [although] determining the legality of drug dog's work based on place was not a legal analysis the U.S. Supreme Court had yet established.").

<sup>22</sup> *Caballes*, 543 U.S. at 410 (emphasis added).

<sup>23</sup> See generally *California v. Carney*, 471 U.S. 386 (1985) (delineating the policy that vehicles may be searched only upon a showing of probable cause, but that they may be searched without meeting the warrant requirement because of their heightened mobility and the corresponding diminished expectation of privacy, as vehicles are on wheels and the use of vehicles is highly regulated by the government).



separate policy argument that *any* innocent citizen should be protected from searches that invade that reasonable expectation, however highly or lowly courts regard that expectation.

A. *Caballes Exacerbates Potential Police Infringements on the Individual Right to Privacy by Giving Too Much Weight to Potentially Inaccurate Drug-Detection Dog Alerts*

Due to the nearly pandemic proportions to which the sale and use of illegal drugs has grown, the *Caballes* decision does take an important step in helping police stop anyone who is transporting drugs, as it allows police to walk a drug-detection dog around a vehicle in the absence of probable cause. However, the holding exposes society's impoverished and underprivileged to potential violations of their constitutional rights.

Since *Caballes*, case law can fairly be described as running the gamut from unthinking adherence to the Supreme Court's basic holding to defiant differentiation from the *Caballes* Court's factual scenario.<sup>24</sup> In *Commonwealth v. Feyenord*, the Massachusetts Supreme Court argued that the use of a trained narcotics detection dog is both "intimidating" and "upsetting" to an innocent person who is stopped by the police,<sup>25</sup> especially because even "[w]ell-trained dogs often 'alert' to innocent people[.]" as the dissent acknowledged in *Caballes*.<sup>26</sup>

Particularly, in one case, a trained dog alerted to a junior-high school girl, who was subsequently strip-searched, only to later find out that the dog alerted to her because "the girl had been playing that morning with her own dog, who was in heat."<sup>27</sup> Under *Caballes*, regardless of the reason for the dog's alert, police officers would have probable cause to search her vehicle for contraband, despite their failure to show any other indication of illicit activity.

In *Caballes*, the Supreme Court was clearly privy to information showing that trained drug-detection dog alerts are not inherently reliable, and Justice Souter went so far as to call the supposed reliability of a drug-detection dog a "legal fiction."<sup>28</sup> Justice Souter's dissent analyzed, case-by-case, the reliability of drug-detection dogs in past cases and found staggering results:<sup>29</sup>

<sup>24</sup> See generally *Commonwealth v. Feyenord*, 833 N.E.2d 608 (Mass. 2005).

<sup>25</sup> *Id.* at 607-08.

<sup>26</sup> *Id.* at 608 n.3 (citing to *Caballes*, 543 U.S. at 411).

<sup>27</sup> *Id.* (citing to and discussing *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979)).

<sup>28</sup> *Caballes*, 543 U.S. at 411 (Souter, J., dissenting).

<sup>29</sup> *Id.* This Article is not a scientific study, and is merely taking the statistical research of the United States Supreme Court as true. See *id.* This Article recognizes that drug-detection dog accuracy is a hotly debated scientific topic, as well as a legal topic. See *id.*

The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. See, e.g., *United States v. Kennedy*, 131 F.3d 1371, 1378 (C.A.10 1997) (describing a dog that had a 71% accuracy rate); *United States v. Scarborough*, 128 F.3d 1373, 1378, n. 3 (C.A.10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); *United States v. Limares*, 269 F.3d 794, 797 (C.A.7 2001) (accepting as reliable a dog that gave false positives between 7% and 38% of the time); *Laine v. State*, 347 Ark. 142, 159, 60 S.W.3d 464, 476 (2001) (speaking of a dog that made between 10 and 50 errors); *United States v. \$242,484.00*, 351 F.3d 499, 511 (C.A.11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), vacated on other grounds by rehearing en banc, 357 F.3d 1225 (C.A.11 2004); *United States v. Carr*, 25 F.3d 1194, 1214-1217 (C.A.3 1994) (Becker, J., concurring in part and dissenting in part) ("[A] substantial portion of United States currency . . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence").<sup>30</sup>

Justice Souter did not want to create a per se standard that a drug-detection dog alert is sufficient to merit probable cause to invade a citizen's privacy, particularly in situations where it has been proven that dogs are accurate only half the time, or in some cases, significantly less than half the time.

Should the Court interpret the Fourth Amendment so narrowly as to allow for such potential intrusions against the privacy of innocent American citizens in the name of compiling evidence to show probable cause against a criminal? Even though the trafficking of contraband is a tremendous societal problem, refusing to acknowledge that a dog-sniff invokes the Fourth Amendment right to be free from unreasonable

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<sup>30</sup> *Id.* at 411-12.

searches creates a constitutional harm that tears the societal fabric that preventing drug trafficking and other crime is supposed to preserve.

Initially, it is important to recognize that although different policy considerations exist concerning Fourth Amendment jurisprudence as it relates to both vehicles and homes, these areas of the law do not exist in a vacuum, and the logical links that allow them to be evaluated in a consistent way must be considered.

*B. The Caballes Holding Creates a New Avenue for Discriminatory Abuse of the Poor and Minorities*

As with other cases creating a bright-line Fourth Amendment rule,<sup>31</sup> the *Caballes* decision is problematic because it subjects the American citizen to a method of gathering information, in the pursuit of probable cause, that is highly intrusive to the average American and ignores the subjective intention of the acting officer.<sup>32</sup> Allowing officers to conduct a sensory identification of the air around a vehicle,<sup>33</sup> and considering an alert made pursuant to this sensory identification sufficient to merit probable cause to search a vehicle, will undoubtedly lead to abuses against anyone that an officer personally desires to harass or specifically target, most notably the underprivileged and minorities.<sup>34</sup>

The Supreme Court, at least in part, recognized that granting discretion to police officers to choose who they investigate could lead, and has led, to groundless racial profiling, and, essentially, has led to

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<sup>31</sup> See generally *United States v. Robinson*, 414 U.S. 218, 224 (1973). The Court asserted that, regarding the warrant exception for searches incident to an arrest, officers are not required to specifically establish that they are promoting either of the twin-aims that justify this bright-line rule, namely either protecting themselves from dangerous objects or finding evidence to prove the violation. *Id.* at 236. In fact, the Defendant in *Robinson* demonstrated that no justification existed, under either of the two policy goals of a search incident to arrest, to merit searching the Defendant's car. *Id.* at 240. It follows that, as the search incident to arrest can be made without questioning the officer's subjective intent, the opportunity for abusive searches of certain targeted groups is not capable of challenge under the *Robinson* rule. *Id.* at 248.

<sup>32</sup> See *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983) (reasserting the *Robinson* rule—that following a bright-line rule which suspends the Fourth Amendment “arises independently of a particular officer's subjective concerns[.]”).

<sup>33</sup> See *Caballes*, 543 U.S. at 408–09. It is only semantically and legally that this is not considered to be a search. According to *Caballes*, apparently there is not an expectation of privacy that society is willing to acknowledge as reasonable. *Id.*

<sup>34</sup> See generally Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 403, 403–09 (2001). Ronner argued that “repression[.]” of deeply buried racist feelings by police officers may lead to Fourth Amendment abuses against minorities. *Id.* (internal quotation marks omitted). It seems that the behavior leading to Professor Ronner's concerns is exacerbated when police officers are given too much discretion. *Id.*

categorizing people as potential criminals based on their race.<sup>35</sup> Because the Court held that "sweep" interrogations did not merit a Fourth Amendment violation, Justice Marshall was concerned with, what were to him, the obvious collateral effects and abuses caused by allowing police free reign to question riders on a bus about their activities and to gain consent to search their bags without "articulable suspicion" of wrongdoing (i.e., the showing needed to conduct a *Terry* stop).<sup>36</sup> Although "the police who conduct these sweeps decline to offer a reasonable, articulable suspicion of criminal wrongdoing[,] . . ." <sup>37</sup> Justice Marshall stated, "[i]t does not follow[] . . . that the approach of passengers during a sweep is completely random."<sup>38</sup> Exemplifying the obvious and dangerous opportunity for abusive police behavior created by the recent *Caballes* decision, "at least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach."<sup>39</sup>

The *Caballes* decision should also be considered in light of undeniable socioeconomic constraints under which certain factions of society function. Fundamentally leading to more frequent and negative police interaction, "African Americans and Hispanics tend to populate poor, inner city neighborhoods, which are commonly known to be high

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<sup>35</sup> See *Florida v. Bostick*, 501 U.S. 429, 441 n.1 (1991). In *Bostick*, Justice Marshall states:

That is to say, the police who conduct these sweeps decline to offer a reasonable, articulable suspicion of criminal wrongdoing sufficient to justify a warrantless "stop" or "seizure" of the confronted passenger. It does not follow, however, that the approach of passengers during a sweep is completely random. Indeed, at least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach. See *United States v. Williams*, No. 1:89CR0135 (ND Ohio, June 13, 1989), p. 3 ("Detective Zaller testified that the factors initiating the focus upon the three young black males in this case included: (1) that they were young and black . . ."), *aff'd*, No. 89-4083 (CA6, Oct. 19, 1990), p. 7 [916 F.2d 714 (table)] (the officers "knew that the couriers, more often than not, were young black males"), vacated and remanded, 500 U.S. 901, 111 S.Ct. 1572, 114 L.Ed.2d 74 (1991). Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*.

*Id.* (citations omitted).

<sup>36</sup> See generally *id.* at 441-42.

<sup>37</sup> *Id.* at 442 n.1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *United States v. Williams*, No. 1:89CR0135 (N.D. Ohio, June 13, 1989), where an officer testified that his reasons for focusing on three black males included that they were "young and black").

crime areas.”<sup>40</sup> This is not the fault of the average member of a minority group but is instead caused by basic societal inequities.<sup>41</sup> In support of her discussion, in *Fleeing While Black*, Amy D. Ronner paraphrases George C. Galster’s argument in *Polarization, Place, and Race* to highlight the most basic, and terrible, societal constraints imposed upon minority groups, namely their everyday environment coupled with the disadvantages that constant and widespread racism inflict upon them:

Members of racial-ethnic minority groups disproportionately face an urban opportunity structure that substantially constrains their mobility across socioeconomic strata. Some of the most important place-based constraints include segregated housing; lack of positive role models as neighbors; limitations on capital; inferior public services; lower quality public education; more violent, drug-infested neighborhoods; and impaired access to employment and job-related information networks. As if these spatial penalties were not enough, racial-ethnic minorities face the additional burdens of discrimination in a variety of markets.<sup>42</sup>

Common logic dictates that more crime in a specific geographic area results in more negative interaction with police and a heightened suspicion by those officers, regardless of their good intentions, of anyone in those neighborhoods.

Hypothetically, in Florida, if one-thousand white men in their early twenties and one-thousand black men in their early twenties were pulled over by police for traffic infractions for which they could not be arrested according to state law,<sup>43</sup> all of the men could be subjected to a police dog

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<sup>40</sup> Ronner, *supra* note 34, at 386 (citing generally to George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421 (1993)).

<sup>41</sup> *See id.* at 385–88.

<sup>42</sup> *Id.* at 385 n.18 (citing Galster, *supra* note 40) (in support of her discussion, in *Fleeing While Black*, Amy D. Ronner paraphrases Galster’s argument in *Polarization, Place, and Race* to highlight some of the most basic and terrible societal constraints imposed upon minority groups, namely their everyday environment).

<sup>43</sup> *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The United States Supreme Court has clearly ruled that the Constitution does not prohibit the arrest of a person who is pulled over for any traffic violation, even though a state offers more protection to its citizens. *Id.* The Court held that the Fourth Amendment allows a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine, so long as there is probable cause that the violation has been committed. *Id.* *But see* FLA. STAT. § 316.1923 (2005) (mandating that “[a]ggressive careless driving,” alone, is not an arrestable offense, and, thus, raising the standard for a traffic arrest in Florida above the constitutionally protected floor) (internal quotation marks omitted).

sniffing the outside of their car for the scent of illegal contraband, at the discretion of the officer. Although this hypothetical does not, in itself, lead to a risk of Fourth Amendment reasonableness violations against minority groups, it demonstrates a situation ripe for unreasonable police action, particularly when considered alongside substantial statistical evidence that "race is a significant factor in pretextual traffic stops[]"<sup>44</sup> and that the vast majority of motorists stopped are drivers of color, even though drivers of color constitute only a miniscule percentage of total drivers.<sup>45</sup>

Considering these statistics, it can reasonably be inferred that the majority of people who suffer from a lowered expectation of privacy in a vehicle, and ultimately suffer from the Supreme Court's pronouncement of such a low standard to show probable cause to search a vehicle—namely a mere police-dog alert—are, and will be, non-white, Black, and Hispanic Americans.

Although the Supreme Court has come to many decisions that have helped minorities,<sup>46</sup> this is not the first Supreme Court holding which seems to allow for the railroading of the rights of minorities.<sup>47</sup> In one of

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<sup>44</sup> Ronner, *supra* note 34, at 387 n.24 (summarization of research by and citing to Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997)).

<sup>45</sup> *Id.* at 387 (citing to Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. at 431-32). Davis cites to research that exemplifies the racial turmoil being exacerbated by the slackening enforcement of the Fourth Amendment:

[L]awsuits filed by black motorists in New Jersey and Maryland reveal that 71 percent of the 437 motorists stopped and searched along a northeastern stretch of Interstate 95 in the first nine months of 1995 were black. One hundred and forty-eight hours of videotaped traffic stops in Florida revealed that seventy percent of the 1,048 motorists stopped along Interstate 95 were black or Hispanic, even though Blacks and Hispanics made up only five percent of the drivers on that stretch of the highway. Less than one percent of the drivers received traffic citations and only five percent of the stops resulted in an arrest.

*Id.* (quoting Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. at 431-32) (footnotes omitted).

<sup>46</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249-50 (1964) (upholding the authority of the federal government to enforce the Civil Rights Act of 1964 in hotel desegregation, despite claims made both by segregationists and strict-interpretation constitutional scholars that the Commerce Clause should not be used to promote desegregation).

<sup>47</sup> See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926). The Court allowed for lower-income housing to be based out of specific areas, explaining:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive

the clearest legal attempts to help American minorities, in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld the Civil Rights Act of 1964 as constitutional when applying desegregation to commercial interests, such as hotels.<sup>48</sup> This was a difficult decision, as it required an arguably creative reading of the Commerce Clause.<sup>49</sup> On the other hand, in *Village of Euclid v. Ambler Realty Co.*, the Supreme Court determined that zoning against “apartment houses[]” should be allowed because the apartment building, and inferably, that which it brings, is “often . . . a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”<sup>50</sup> The Court went so far as to prophesize that the introduction of apartment buildings negatively affects the single-family areas until “finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.”<sup>51</sup> The Supreme Court may have been rationally concerned about the effects of introducing apartment buildings into single-family neighborhoods, and it is possible that the Court did not specifically consider the effect that this decree would have on the rights of minorities. However, as George Galster wrote in *Polarization, Place, and Race*,<sup>52</sup> the socioeconomic realities of American minorities lead them to live in inexpensive housing, thus resulting in the type of heightened societal segregation, which was created—justifiably or not—by the landmark *Village of Euclid* decision.<sup>53</sup>

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surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.

*Id.*

<sup>48</sup> See generally *Heart of Atlanta Motel, Inc.*, 379 U.S. at 241.

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause of the United States Constitution states, “[Congress shall have the power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]” *Id.*

<sup>50</sup> See *Village of Euclid*, 272 U.S. at 394.

<sup>51</sup> *Id.*

<sup>52</sup> See Ronner, *supra* note 34, at 385 (citing Galster, *supra* note 40).

<sup>53</sup> See generally *Village of Euclid*, 272 U.S. 365 (holding that the creation of zoning districts for different types of land uses was constitutional).

Unlike the brave,<sup>54</sup> but controversial, application of the Commerce Clause in *Heart of Atlanta Motel, Inc.*, the *Caballes* Court could have more easily looked toward the future effects of its ruling and to further a system of law enforcement which would have limited opportunity for police abuses, especially against those already oppressed by their economic situation and racial background.<sup>55</sup> Although the Supreme Court could have easily held that dog-sniffs pursuant to a non-arrestable traffic stop constitute warrantless searches through the use of sensory-enhancing technology, as it held in *Kyllo*,<sup>56</sup> the *Caballes* Court instead opened the door for further abuse of the rights of minorities. Minorities are already disproportionately victims of traffic stops.<sup>57</sup> Because the Court failed to recognize the use of trained police dogs as a search and instead authorized such a highly intrusive mechanism for obtaining probable cause, when faced with a situation where there is a lack of racial compassion, these same profiled and abused minorities will face officers who carry one more high-tech weapon in their arsenal.

In these *Caballes*-like situations, officers can randomly decide to walk a contraband-detection dog around a citizen's car, even when the citizen is cooperative during a minor traffic stop. Based on actual admissions of past racial profiling abuses by police officers,<sup>58</sup> the threat of racial abuse clearly exists. The Court should not continue facilitating this abuse of minorities by creating new abuse-ripe precedent that grants officers even more discretion in picking random targets that are not actually "completely [racially] random."<sup>59</sup> Instead, the Court should require a reasonable basis for selecting targets, in a way that protects poor and minority citizens and does not leave them vulnerable to persecution based on nothing more "articulable"<sup>60</sup> than skin color.

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<sup>54</sup> Just like the ruling that the Commerce Clause did not authorize Congress to pass the Civil Rights Act of 1964 may have permanently stunted the positive effects of the civil rights movement, *Caballes* was a brave, risky, and ultimately debatable decision that is presently accepted without any serious debate.

<sup>55</sup> See generally Galster, *supra* note 40.

<sup>56</sup> See generally *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>57</sup> See *Florida v. Bostick*, 501 U.S. 429, 441-42 (1991).

<sup>58</sup> See *id.* at 441 n.1. This footnote cites to several cases supporting this assertion, namely: *United States v. Williams*, No. 1:89CR0135 (ND Ohio, June 13, 1989), p. 3 ("[D]etective Zaller testified that the factors initiating the focus upon the three young black males in this case included: (1) that they were young and black . . . ["]"), *aff'd*, No. 89-4083 (CA6, Oct. 19, 1990), p. 7 [916 F.2d 714 (table)] [and] (the officers [']knew that the couriers, more often than not, were young black males[']), vacated and remanded, 500 U.S. 901 (1991).

*Id.* (citation omitted).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 441 (internal quotation marks omitted).



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Considering repeated holdings that the Fourth Amendment does not allow for abuse, coupled with the *Caballes* decision's allowance of police discretion to abuse the poor and other minorities, perhaps Justice Marshall best articulated the fear of abuse faced by minorities when he stated that the "basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*."<sup>61</sup>

C. *Considering A Reality-Based Hypothetical Under the Effects of the Caballes Holding*

In order to truly appreciate the problems caused by the *Caballes* holding, consider the following hypothetical situation, based loosely on an actual case reviewed by the Ninth Circuit in 2000:

*While dropping their friend off at home in an upper-class white suburb, two black high school students rode in the front seat of a car that the driver bought with money saved from his job coaching baseball at his local Boys and Girls Club. Their white friend sat in the backseat. After making a legal turn, the boys were pulled over by a white police officer. The officer stated that the car's tail-light was malfunctioning and that violation of the traffic code merited giving the driver a ticket. This was a false pretense for making the stop because, as the boys knew, the tail-light was working fine. The officer then looked into the car, and as he had only seen the black teenagers in the front seat until that point, asked the "[white teen] whether he knew the two black teens, whether they were actually his friends, and how long he had known them."<sup>62</sup> Then he asked "the two African American teens, '[w]hat are you doing out here?'"<sup>63</sup> "Here[,]" the boys knew, meant a "white" neighborhood. The officer then said to one of the black teenagers, "You're not supposed to be here."<sup>64</sup> With that, he informed them that he was printing out a traffic citation and told them not to move. The officer, while still speaking, led his trained, narcotics-detection dog from the patrol car and walked it around the vehicle's perimeter, where the dog sniffed the entire body of the vehicle, never making a noise. Then, while the officer was writing a ticket, his dog indiscriminately barked. The officer then made the boys get out of the car. He searched the entire vehicle, found nothing suspicious, and ordered the boys back into the vehicle. The officer then shoved the ticket into the*

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<sup>61</sup> *Id.* at 441, n.1.

<sup>62</sup> *Price v. Kramer*, 200 F.3d 1237, 1251 (9th Cir. 2000). It should be noted that although the quotations in this hypothetical are taken from this historical case, the issues raised in the hypothetical are not similar to those of the cited case. The purpose of using these actual quotations is to show that, unfortunately, the possibility for abuses, in many cases, will lead to their realization. Fact, sometimes, as in *Price v. Kramer*, is more horrible than fiction.

<sup>63</sup> *Id.* at 1242.

<sup>64</sup> *Id.* at 1243.

*driver's hand. Before letting the petrified young men leave, "the officer[']s last words to the boys were, '[g]et the hell out of here.'"*<sup>65</sup>

This aforementioned scenario, police officer's language, and fabricated reason for the traffic stop are based on an actual case of abusive police conduct, which was deemed a Fourth Amendment violation.<sup>66</sup> Although the actual case involved an illegal use of force against the citizens by the officer,<sup>67</sup> merely substituting that illegal use of force with a now-legal police dog-sniff and subsequent vehicular search exemplifies the opportunity for highly intrusive and subjective police conduct. This should have been reasonably anticipated by the Supreme Court as an unavoidable result of its most recent articulation of the law delineating whether a trained, drug-alerting dog's sniff constitutes a search under the Fourth Amendment.<sup>68</sup> But for allowing the dog to sniff the vehicle, the stop would have been much less intrusive on the young citizens' right to privacy.

### III. ALTERNATIVES TO THE PROPOSED "VEHICULAR FRISK" STANDARD AND THE POTENTIAL RATIONALES FOR AND EFFECTS OF A DIFFERENT SUPREME COURT RULING IN *CABALLES*

As stated in the Introduction,<sup>69</sup> *Caballes* could have been decided many different ways, for many different reasons. At least some of these alternative decisions more appropriately balance the interests of both the government and individuals when viewed in light of Fourth Amendment jurisprudence.

#### A. *The Full-Blown Search Alternative: Application of the Kyllo Reasoning and Problems With Extending It to Vehicles*

The *Caballes* Court could have ruled differently had it adopted its *Kyllo* reasoning and held that a dog-sniff constituted a full-blown search as a sensory-enhancement device pursuant to the Fourth Amendment. The Court could have required probable cause before ever allowing a trained drug-detection dog to sniff a citizen's vehicle. Although adopting *Kyllo* may lead to a more fair result, as discussed below, this approach would be problematic for many reasons.

As stated earlier in this Article, although the trafficking of contraband is a tremendous societal problem, refusing to acknowledge a

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<sup>65</sup> *Id.* at 1251.

<sup>66</sup> *See generally id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

<sup>69</sup> *See supra* Parts I-II.

dog-sniff as triggering the Fourth Amendment right to be free from unreasonable searches creates a constitutional harm that tears the societal fabric that preventing drug trafficking, and other crime, is supposed to preserve. If the *Caballes* Court had merely applied *Kyllo's* analysis<sup>70</sup> to an officer initiating a dog-sniff around a vehicle when no articulable suspicion of contraband or “[crime] afoot[]”<sup>71</sup> existed, it would have avoided entirely the possibility of exacerbating the already rampant abuse of the rights of minorities by discretionary police action. The Court decided otherwise, taking a different and equally extreme route. American citizens, particularly minorities, will now wake up in a United States where they will feel more susceptible to police abuse. The level of protection afforded to an American citizen when stopped for a traffic violation did not have to diminish as it did through *Caballes*, and, most importantly, *does not have to stay that way*.

The Supreme Court could have rationalized ruling differently in a variety of ways, such as by creating a different standard for vehicular dog-sniffs that required, either, probable cause based on the *Kyllo* standard<sup>72</sup> or reasonable suspicion based on the *Terry v. Ohio* standard.<sup>73</sup>

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<sup>70</sup> See generally *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>71</sup> See *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968). The Court held as follows:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

*Id.*

<sup>72</sup> See generally *Kyllo*, 533 U.S. at 27.

<sup>73</sup> See *Terry*, 392 U.S. at 13–14. *Terry* concludes that only reasonable suspicion is necessary to stop and investigate a person because the Fourth Amendment guards against *unreasonable* searches and seizures, *not every* search and seizure:

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or

For example, the Court could have simply applied the *Kyllo* holding and, analogous to similar precedent, found that the dog-sniff was a search under the Fourth Amendment.<sup>74</sup> However, as discussed further below, the *Caballes* Court found the reasoning in *Kyllo* problematic because it categorizes a dog-sniff as a full-blown search, thus bringing it under the most intense Fourth Amendment scrutiny and providing free reign of the roadways to drug traffickers.<sup>75</sup>

*B. Potential Problems With Finding That the Caballes Dog-Sniff Is a Search Pursuant to the Fourth Amendment*

First, it should be noted that there was substantial precedent, other than *Kyllo*, for finding that the *Caballes* dog-sniff was impermissible under the Fourth Amendment. In *City of Indianapolis v. Edmond*, the Court held that police checkpoints, where drug-detection canines were led around vehicles in pursuit of obtaining probable cause of illegal activity, constituted Fourth Amendment violations.<sup>76</sup> Due to the *randomness* of checkpoints and the lack of actual suspicion, the checkpoints were deemed impermissible, and the Court explained: "When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, . . . stops can only be justified by some quantum of individualized suspicion."<sup>77</sup> Although the reasoning applied in *Edmond* was applicable to the *Caballes* situation, the scenarios were sufficiently different to determine that the expectation of privacy for a citizen stopped at a fully random checkpoint and a citizen lawfully stopped due to a traffic violation should be evaluated separately.

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loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule.

*Id.* (footnote omitted).

<sup>74</sup> See generally *Kyllo*, 533 U.S. at 27.

<sup>75</sup> See *id.* at 34 (holding "that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use.") (citation omitted).

<sup>76</sup> See generally *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (declaring that random police checkpoints where drug-detection canines were randomly led around police-stopped vehicles, in pursuit of obtaining probable cause of illegal activity, was a Fourth Amendment violation, as there was no reasonable suspicion of the people being stopped).

<sup>77</sup> *Id.* at 47 (emphasis added).

The *Caballes* Court seems to hone in on what the State's brief argues is "the fundamental distinction under the Fourth Amendment between homes and cars."<sup>78</sup> "As the [*Kyllo*] Court explained, because 'all details [in the home] are intimate details,' a reasonable expectation of privacy lies in all aspects of the home that would otherwise remain concealed[.]"<sup>79</sup> "In so holding, however, the Court emphasized that the 'firm' and 'bright' line it drew 'at the entrance to the house[.]'"<sup>80</sup> would not apply to other places, 'such as automobiles[.]'"<sup>81</sup> The State summarized its argument against applying *Kyllo* to *Caballes* by stating, "[i]n cars and other places outside the home, not all details are intimate details, and thus all do not fall within the reasonable expectation of privacy."<sup>82</sup>

If the Supreme Court had found that a search pursuant to the Fourth Amendment had taken place when a dog-sniff was conducted outside a car, the only time that a dog-sniff could be used by police to locate drugs would be when an officer already had probable cause to believe that a person inside the stopped vehicle had committed a crime or was in possession of contraband based on other factors. This would greatly reduce the usefulness of trained drug-detection dogs for determining whether a person was in possession of contraband, because, generally, if the officer had probable cause to search the vehicle, the officer would be able to visibly locate the contraband.

Additionally, if a trained drug-detection dog could only be used when an officer already had probable cause to search a vehicle, the goals of lowering the expectation of privacy when an automobile is the subject of a search would likely be frustrated.<sup>83</sup> The "automobile exception to the Fourth Amendment[.] warrant requirement[.]" exists because, without the diminished expectation of privacy in a vehicle, if the officer was required to obtain a warrant to search a vehicle, an automobile carrying evidence of a crime or contraband could be moved out of the jurisdiction of the officers and evidence could be lost.<sup>84</sup> The justifications for this diminished expectation of privacy stem from the fact that the driver is in plain view, the government highly regulates driving, cars travel through public thoroughfares, and cars must be registered by the government.<sup>85</sup>

<sup>78</sup> Reply Brief for the Petitioner at \*5, *Illinois v. Caballes*, 543 U.S. 405 (2005) (2004 WL 2398459 (October 22, 2004)) [hereinafter *State's Brief*].

<sup>79</sup> *Id.* (quoting *Kyllo*, 533 U.S. at 34-38).

<sup>80</sup> *Id.* (quoting *Kyllo*, 533 U.S. at 40).

<sup>81</sup> *Id.* (quoting *Kyllo*, 533 U.S. at 34) (citation omitted).

<sup>82</sup> *Id.*

<sup>83</sup> See generally *California v. Carney*, 471 U.S. 386 (1985).

<sup>84</sup> See *id.* at 388.

<sup>85</sup> See *Wyoming v. Houghton*, 526 U.S. 295, 303-04 (1999). The Supreme Court identified factors which contributed to the diminished expectation of privacy in a vehicle, stating:

Applied to the *Caballes* scenario, where police officers are trying to gain probable cause to make that search, if the Supreme Court had ruled that the dog-sniff was a search pursuant to the Fourth Amendment, police officers would be stripped of one of their main weapons in obtaining probable cause for fighting drug-distribution.<sup>86</sup> Although Richard Nixon's "war on drugs[]"<sup>87</sup> admittedly still needs to be fought, the government's abuse of the American citizenry in order to effectuate this goal cannot continue to be ruled legally acceptable. Because of the need to classify drug-detection dog's use as something other than a Fourth Amendment search, the Court should create a new category of "vehicular frisks" applicable to *Caballes* scenarios. This intermediate standard, falling between the current, abuse-ripe lack of a standard for the use of a drug-dog and the standard which requires full-blown probable cause pursuant to the Fourth Amendment, could provide a higher level of protection to abused classes of Americans and also give police officers the bounded discretion they need to determine whether suspicious individuals are in possession of contraband.

C. *The Low Weight Given to Dog-Sniffs in Civil Forfeiture Cases Compared to the Substantial Weight Given to Dog-Sniffs in Ascertaining the Probable Cause Needed to Invade Citizens' Privacy Is Contradictory and Troubling*

When deciding *Caballes*, the Supreme Court could have considered, by analogy, the weight that a drug-detection dog's alert is given in civil forfeiture cases to help decide that more than a mere dog-alert should be required for finding probable cause to search a person's vehicle. As previously stated, both civil and criminal law apply the same probable

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Even if the historical evidence, as described by *Ross*, were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which "trave[ ] public thoroughfares[ ] seldom serv[e] as . . . the repository of personal effects[ ]" are subjected to police stop and examination to enforce "pervasive" governmental controls "[a]s an everyday occurrence[ ]" and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny.

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Whereas the passenger's privacy expectations are, as we have described, considerably diminished, the governmental interests at stake are substantial.

*Id.* (citations omitted)

<sup>86</sup> See generally *California v. Acevedo*, 500 U.S. 565 (1991) (holding that a warrant is not required to search a container, package, or compartment—including the trunk—within a vehicle provided that there is probable cause to believe that there is contraband in the vehicle).

<sup>87</sup> See *Gonzales v. Raich*, 545 U.S. 1, 10 (2005) (internal quotation marks omitted).

cause standard to gain access to search a citizen's vehicle, but when determining whether illicit activity has occurred by a preponderance of the evidence, civil law does not recognize a dog-alert alone as sufficient to merit forfeiture of a citizen's personal possessions.

Generally, and with one particularly noteworthy<sup>88</sup> and hotly disputed<sup>89</sup> exception, there is a higher threshold in civil cases for proving probable cause meriting the forfeiture of money used in the purchase or sale of contraband goods, than for establishing probable cause to search a citizen's vehicle under the *Caballes* standard in both civil and criminal cases.<sup>90</sup> In Florida, where during a traffic stop a police officer seizes money solely because he is alerted to it by a drug-sniffing dog, courts have generally followed the national consensus<sup>91</sup> that a canine's alert, without the fulfillment of other factors,<sup>92</sup> does not establish the requisite

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<sup>88</sup> See *Lobo v. Metro-Dade Police Dep't*, 505 So. 2d 621, 623 (Fla. Dist. Ct. App. 1987). *Lobo* held that, based on the totality of the circumstances, seizure and forfeiture of the appellant's money was proper, although the court explained that "[a]n alert by a trained, experienced narcotics dog[] . . . is in itself enough to establish probable cause for an arrest, that [a] chapter 893 [Florida statute stating that contraband goods are subject to forfeiture] violation has occurred[,] and that the [alerted to] money is itself strong evidence that it was involved in a drug transaction." *Id.* This interpretation of probable cause for seizure is particularly troublesome for residents of Miami-Dade County and the Florida Keys because this *highly irregular and criticized* case precedent is binding in Florida's Third Appellate District. *Id.* at 625.

<sup>89</sup> See *Dep't of Highway Safety and Motor Vehicles v. Jones*, 780 So. 2d 949, 951-52 (Fla. Dist. Ct. App. 2001) (criticizing *Lobo* and stating that "[g]enerally, a positive alert by a drug dog to narcotics on currency, standing alone, does not constitute evidence that the money was used in a drug transaction.").

<sup>90</sup> See *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

<sup>91</sup> See 167 A.L.R. Fed. 365 § 25(b). Although this is a statute-based standard, most cases require probable cause based on a totality of the circumstances test, which a trained, drug-detection dog alert, alone, does not meet.

<sup>92</sup> See *id.* In a discussion of *United States v. One Lot of U.S. Currency Totaling \$14,665*, 33 F. Supp. 2d 47 (D. Mass. 1998), the article states:

the court found that the government failed to demonstrate that it had probable cause to institute a forfeiture proceeding against nearly \$15,000 in currency bundled with rubber bands and carried in suitcase by a young man who was a member of an ethnic minority, who was nervous and upset when the airport security guard asked him to open his briefcase, who initially forgot the combination to his briefcase, who purchased his ticket in cash the day of the flight, for a stay of four days in Las Vegas, who explained that he intended to use the money to put a down payment on a home, and who did not have the telephone number of the friend that he was planning on meeting in Las Vegas, notwithstanding that a trained narcotics dog alerted positively for the presence of narcotics on the seized currency; the claimant's story about source of the money was reasonable and largely confirmed, the claimant did not have criminal record, was not shown to have had

probable cause to seize and forfeit the money.<sup>93</sup> However, during a lawful traffic stop, which can be based on nothing more than "reasonable suspicion" of illegal activity,<sup>94</sup> as well as on a minor and non-arrestable traffic infraction, the mere alert of a narcotics-detection dog when used to "sniff" around the exterior of the motorist's vehicle, is not considered a search and is sufficient to establish probable cause to search the vehicle for contraband.<sup>95</sup> This dichotomy in showing probable cause is not only inconsistent, but is unfair. The events of *Caballes* could have easily been ruled unconstitutional based on the Fourth Amendment right to protection against unreasonable searches and seizures,<sup>96</sup> but the Court did not agree.

One way to examine the *Caballes* decision would be to recognize that the probable cause requirement to search someone's car should maintain some conformity with applicable precedent when viewed from a big-picture vantage point, specifically in relation to the civil standard for seizure and forfeiture. To effectuate this logical approach to probable cause, either the standard for probable cause meriting seizure and forfeiture should be relaxed, or the standard for showing probable cause meriting a search should be heightened.

Raising the standard for probable cause warranting a vehicular search makes the most sense and best promotes a system of law enforcement where individual rights are appropriately respected. The Fourth Amendment specifically protects citizens against unreasonable searches and seizures. This has been interpreted to mean that a search should not take place without official approval, such as through the issuance of a warrant, unless there are particular circumstances which make obtaining a warrant unreasonable. Considering the constitutional protection against unreasonable searches and seizures, the harm in depriving an American citizen of his or her liberty through a highly invasive search should be more difficult to inflict than the harm in depriving the same citizen of a material possession.

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personal relationships with drug dealers and was truthful with the police.

*Id.* Thus, if the dog alert alone were sufficient to merit probable cause for seizure and forfeiture, the other factors would not have been considered, and the totality test would not be applied when considering 21 U.S.C. § 881. *Id.*

<sup>93</sup> Dep't of Highway Safety and Motor Vehicles v. Jones, 780 So. 2d 949, 951-52 (Fla. Dist. Ct. App. 2001).

<sup>94</sup> Ronner, *supra* note 34, at 393 (internal quotation marks omitted).

<sup>95</sup> *Caballes*, 543 U.S. at 410.

<sup>96</sup> See U.S. CONST. amend. IV (stating 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[] . . ."); see also *Caballes*, 543 U.S. at 410-413 (Souter, J., dissenting); *State's Brief*, *supra* note 78, at 1 (citing to the Respondent's Brief).



Expounding on the above analysis, both the Florida and federal forfeiture standards<sup>97</sup> are based on similarly worded statutes which allow the seizure of contraband that can reasonably be linked to drug transactions. The State of Florida codified what items may be considered “contraband[]” and seized for forfeiture.<sup>98</sup> These “[c]ontraband article[s]”<sup>99</sup> include currency “that was used, was attempted to be used, or was intended to be used” in a drug transaction.<sup>100</sup> This statute calls for the application of a “totality of the facts” test when determining whether probable cause existed to support a “nexus . . . between the [money] seized and the narcotics activity,”<sup>101</sup> although the statute also points out that the use of the contraband article does not have to “be traced to a specific narcotics transaction.”<sup>102</sup>

As applied, courts have interpreted this standard as requiring a significant showing of facts indicating illicit activity for seizure and forfeiture to be granted.<sup>103</sup> Although “probable cause [to seize money]

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<sup>97</sup> 21 U.S.C. § 881(a)(6)(2000) states, in pertinent part:

(a) Subject property [to seizure and forfeiture:]

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

....

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

*Id.*

<sup>98</sup> See State of Florida Dep’t of Highway Safety and Motor Vehicles v. Holguin, 909 So. 2d 956, 958-59 (Fla. Dist. Ct. App. 2005) (holding that there was sufficient probable cause that “seized money was used for the sale and/or purchase of contraband, based on the totality of the circumstances.”). The case also quoted FLA. STAT. ANN. § 932.701(a)(1) (2007). The Florida Contraband Forfeiture Act provides, in pertinent part:

(a) “Contraband Article” means:

1. Any . . . currency . . . that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893 . . . if the totality of the facts presented by the state is clearly sufficient to meet the state’s burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction.

*Id.* at 958.

<sup>99</sup> FLA. STAT. ANN. § 932.701(a) (West 2007) (internal quotation marks omitted).

<sup>100</sup> *Id.* at § 932.701(a)(1).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See generally Dep’t of Highway Safety and Motor Vehicles v. Jones, 780 So. 2d 949 (Fla. Dist. Ct. App. 2001).

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can be established [merely through] . . . circumstantial evidence[.]”<sup>104</sup> when seizing money found in a legally searched vehicle, courts have considered an extensive list of factors including, but not exclusively limited to, the following:

1. A smell of drugs emanating from inside the car,<sup>105</sup>
2. An alert made to the money by a drug-detecting police dog,<sup>106</sup>
3. Whether any illegal drugs were found within a reasonable proximity of the money,<sup>107</sup>
4. Whether the suspect made any admission to recent drug use,<sup>108</sup>
5. Whether the money was wrapped in a manner consistent with drug dealing (such as separated by denomination and wrapped in rubber bands),<sup>109</sup> and
6. Whether the suspect or suspects gave unbelievable, proven unreliable, or conflicting stories as to the source of the money.<sup>110</sup>

In one of the more recent cases addressing this issue, *State of Florida Department of Highway Safety and Motor Vehicles v. Holguin*,<sup>111</sup> Judge Angel A. Cortiñas reiterated the rule that “[w]hile each one of these facts, standing alone, may be insufficient to meet the State’s probable cause burden, . . . the aggregation of facts based on the totality of the circumstances is legally sufficient to satisfy the State’s burden.”<sup>112</sup>

Although the standard meriting probable cause for seizure is flexible based on the facts presented, Florida courts almost exclusively hold<sup>113</sup>

<sup>104</sup> *Lobo v. Metro-Dade Police Dep’t*, 505 So. 2d 621, 623 (Fla. Dist. Ct. App. 1987). *See also Jones*, 780 So. 2d at 951 (also stating that “[p]robable cause for forfeiture may be established by circumstantial evidence[.] . . .”) (citation omitted).

<sup>105</sup> *See id.*; *see also Fitzgerald v. Metro-Dade County*, 508 So. 2d 747 (Fla. Dist. Ct. App. 1987).

<sup>106</sup> *See State Dep’t of Highway Safety and Motor Vehicles v. Holguin*, 909 So. 2d 956, 959 (Fla. Dist. Ct. App. 2005); *see also Fitzgerald*, 508 So. 2d at 747; *Jones*, 780 So. 2d at 949.

<sup>107</sup> *See Jones*, 780 So. 2d at 954. Based on the totality of the circumstances, the court found that the police officer lacked probable cause to seize \$13,000 in cash currency during an vehicle stop, where the drug dog did not alert to the money until after the cash was removed from driver’s possession and in police custody, marijuana seeds found under the vehicle seat were so insignificant that the officer did not arrest the driver for possession or attempt to retrieve the marijuana particles, and the driver’s explanation regarding the cash was not inconsistent. *Id.* The court determined that no probable cause existed to show that the money found inside the car was “used or intended to be used in drug offenses.” *Id.*

<sup>108</sup> *See Holguin*, 909 So. 2d at 956.

<sup>109</sup> *See id.*; *see also Fitzgerald*, 508 So. 2d at 747; *Jones*, 780 So. 2d at 949; *Lobo*, 505 So. 2d at 621.

<sup>110</sup> *Lobo*, 505 So. 2d at 623.

<sup>111</sup> *Holguin*, 909 So. 2d at 956.

<sup>112</sup> *Id.* at 959 (deriving its reasoning from *Lobo*, 505 So. 2d at 623 and *Fitzgerald*, 508 So. 2d at 750).

<sup>113</sup> *See generally Lamboy v. Metro-Dade Police Dep’t*, 757 So. 2d 1317 (Fla. Dist. Ct. App. 1991); *see also In re Forfeiture of \$37,388.00*, 571 So. 2d 1377 (Fla. Dist. Ct. App. 1990). *But see*

that a reliable drug-detecting police dog's alert, without other factors, does not reach the requisite level to show probable cause.<sup>114</sup> The only case that seemingly decided otherwise<sup>115</sup> is highly criticized and should be overruled, considering the broad body of sister-circuit case law both directly and indirectly bearing against it.<sup>116</sup> Even in *Dewey*, a case where drugs were found in the same vehicle as a highly suspicious amount of money,<sup>117</sup> a Florida court held that, based on the totality of the circumstances, insufficient probable cause existed to seize the money.<sup>118</sup> In that case, "[t]he driver was arrested on [an] outstanding warrant[.]"<sup>119</sup> Based on the warrant exception for a search incident to a lawful arrest,<sup>120</sup> the trooper searched the vehicle, found a bag of coins and pad of paper, and, in the trunk, "found a brown paper bag with a mason jar inside the bag. There was \$13,000 in the bag and jar."<sup>121</sup> He then decided to carefully search the inside of the car:

A search of the interior of the car revealed a marijuana cigarette and several marijuana seeds. A canine unit was called to sniff for narcotics. The dog alerted to the passenger door, the ashtray where the seeds were found, and the armrest where the cigarette was found. Upon being placed in the trunk of the car without the bag or mason jar therein, the dog did not alert to anything. When the bag and mason jar were replaced in the trunk by the trooper, the dog was

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*Lobo*, 505 So. 2d 621. Although only one case, *Jones*, directly disagrees with *Lobo*, close examination of cases which have differentiated *Lobo* shows a disturbing pattern of miniscule differences put on a pedestal in order to circumvent the seemingly unreasonable bright-line standard that *Lobo* promulgates.

<sup>114</sup> *Jones*, 780 So. 2d at 951-52.

<sup>115</sup> See generally *Lobo*, 505 So. 2d at 621.

<sup>116</sup> See *Jones*, 780 So. 2d at 951-52.

<sup>117</sup> *Id.* at 953 (citing, with approval, to *Dewey v. Dep't of Highway Safety and Motor Vehicles*, 529 So. 2d 300 (Fla. Dist. Ct. App. 1987)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See generally *United States v. Robinson*, 414 U.S. 218, 224 (1973). *Robinson* clearly articulated the warrant exception and scope of a search incident to arrest, stating:

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.

*Id.*

<sup>121</sup> *Jones*, 780 So. 2d at 953.

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brought back and alerted on the mason jar and the money. The trooper testified that the coins and pad were significant in that drug dealers often use pay phones and need a pad to record their contacts.

The *Dewey* court . . . concluded . . . that the circumstances created no more than a mere suspicion of the requisite nexus between the money and criminal activity.<sup>122</sup>

Based on this body of case law, one can reasonably conclude that in order to merit seizure and forfeiture of money through the Florida civil law, at a minimum, the state must show that it is more likely than not that the *particular money* seized was used in violation of the Florida Contraband Forfeiture Act.<sup>123</sup> This standard equates to the state having to meet its burden, showing at least by a preponderance of the evidence, probable cause to believe that the currency was used in a drug transaction.

Next, looking to the standards for ascertaining probable cause to conduct a search, the Supreme Court recently held that during a routine traffic stop, allowing a trained drug-alerting police dog to sniff around the outside of a motorist's car was not a violation of the Fourth Amendment so long as the motorist was not unreasonably delayed.<sup>124</sup> In *Caballes*, the Supreme Court justified its decision by stating that "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment."<sup>125</sup> This is a reiteration of the Supreme Court's abiding standard for what constitutes a search under the Fourth Amendment.<sup>126</sup>

First clearly delineated in *Katz v. United States*,<sup>127</sup> the Supreme Court ruled that, for Fourth Amendment purposes, a search takes place when (1) the person alleging a violation of his constitutional rights exhibits an actual, subjective expectation of privacy, and (2) that expectation is one that society is prepared to recognize as reasonable.<sup>128</sup> The *Caballes* Court affirmed its past holdings that "any interest in possessing contraband

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<sup>122</sup> *Id.*

<sup>123</sup> FLA. STAT. ANN § 932.701.

<sup>124</sup> *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (stating that a seizure justified only by the issuance of a traffic violation "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."). See U.S. CONST. amend. IV.

<sup>125</sup> *Caballes*, 543 U.S. at 408 (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

<sup>126</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (wording taken from Professor Tamara Lawson, St. Thomas University School of Law).

cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'"<sup>129</sup>

Discussed later in this Article, the assertion that this government conduct only reveals the existence of contraband is extremely debatable.<sup>130</sup> Thus, it can be inferred, because the alert of the trained drug-detecting dog does not constitute a search for purposes of the Fourth Amendment, the dog's alert, alone, is sufficient to merit probable cause to search a vehicle for contraband. The *Caballes* Court had to wrestle with a highly arguable case, *Kyllo*, and distinguish (some would argue unconvincingly) binding precedent that categorized the use of sensory-enhancement equipment as a search governed by the Fourth Amendment.<sup>131</sup>

In summary, considering that a drug-detecting dog's alert, *alone*, is sufficient to meet the probable cause requirement to search a vehicle when there is no indication of contraband relating to the traffic stop at hand, coupled with the fact that the alert of the same police-trained dog does not, *alone*, create probable cause in the civil context for seizure and forfeiture of money, it is alarming that the threshold for invasion of a potentially innocent motorist's personal vehicle is lower than the standard that the State must meet in order to merely dispossess a citizen of a physical possession, such as money. Even where money is forfeited upon a showing that it could reasonably be linked to a drug transaction,

<sup>129</sup> *Caballes*, 543 U.S. at 408 (quoting *Jacobsen*, 466 U.S. at 122-23).

<sup>130</sup> *See id.* at 412 (Souter, J., dissenting).

<sup>131</sup> *See Kyllo v. United States*, 533 U.S. 27, 34-37 (2001). *Kyllo* establishes both that the use of sensory enhancing devices and inferences drawn from them are searches pursuant to the Fourth Amendment by reasoning as follows:

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman*, 365 U.S., at 512, 81 S.Ct. 679, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

. . . .

And, of course, the novel proposition that inference insulates a search is blatantly contrary to *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawful.

*Id.* (footnote omitted).

the liberty of the money's owner has not been compromised. Yet, allowing an American citizen's personal vehicle to be invaded when that person is not accused of any illicit activity beyond that meriting a traffic stop, creates a probable cause threshold that is so low that a malfunctioning canine, reacting to the smell of a female dog in heat, can breach it.<sup>132</sup>

#### IV. CONSIDERING THE MIDDLE GROUND: APPLICATION OF THE *TERRY* REASONING

The Supreme Court could have, and should have, ruled that a dog-sniff was the automotive equivalent to a frisk, and, before allowing the police to use a drug-dog to sniff a car, should have required that the officer have an articulable and reasonable suspicion that "[crime was] afoot[.]" pursuant to *Terry v. Ohio*.<sup>133</sup> This approach would best balance the important governmental interest of preventing drug-trafficking and the citizen's fundamental constitutional right of protection against unreasonable searches.

Instead of taking such an extreme stand that may legitimately handcuff police from finding contraband through application of the *Kyllo* standard, the Supreme Court could have applied the *Terry v. Ohio*<sup>134</sup> standard for "reasonable suspicion" as the standard required in order to walk a drug-detecting police dog around a vehicle. This standard would equate a drug-dog's sniffs with the allowable equivalent of a "frisk." The rationale for allowing an officer's dog to sniff around the outside of a vehicle could be similarly equated to the rationale behind allowing a police officer to "pat-down" a citizen even though officers do not have probable cause to fully search and arrest. This "vehicular frisk" theory creates a middle ground where officers are prohibited from conducting a (figurative) random pat-down of a vehicle until they have an "articulable suspicion"<sup>135</sup> of wrongdoing, so that the citizen is protected from the most extreme types of abuses. On the other hand, affording citizens no protection, the Supreme Court has not classified dog-sniffs around a vehicle to be a Fourth Amendment search. Accordingly, no minimal standard is imposed on police officers to directly curb abuses, such as by limiting race as a reason for invading a citizen's privacy. These abuses should be curbed, and the indirect effect would be that the probable cause standards for civil penalties, like forfeiture, and for the serious

<sup>132</sup> See *supra* note 27 and accompanying text (discussing *Renfrow*, 475 F. Supp. 1012).

<sup>133</sup> See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>134</sup> See *id.*

<sup>135</sup> *Id.* at 31 (Harlan, J., concurring).

deprivation of physical liberty that searches pursuant to probable cause create, would be in more logical conformity with one another.

V. LIMITING POTENTIAL FOR POLICE ABUSES AND INCREASING MINORITY TRUST: THE ARGUMENT FOR EQUATING THE *CABALLES* DOG-SNIFF TO A VEHICULAR "FRISK" UNDER THE *TERRY V. OHIO* STANDARD

Perhaps the biggest failure in the *Caballes* Court's reasoning is that the Court seemingly accepts that the reasoning from *Kyllo* can easily be dismissed when looking at vehicle-based cases versus home-based cases on the grounds that "[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from [a citizen's] hopes or expectations concerning the nondetection of contraband in the trunk of his car."<sup>136</sup> The Court ignores the big-picture by focusing on one, albeit important, distinction, and it ignores that a diminished expectation of privacy does not mean an *elimination* of the citizen's expectation of privacy.

The greatest evil that the law should be trying to prevent is abuse of the innocent person. This can be done while still effectively policing those who behave unlawfully. The means for allowing the invasion of an individual's private space, regardless of the person's comparative expectation of privacy between the car and a house, must be carefully drawn to be the least intrusive, not the most intrusive. Justice Souter, in his dissent in *Caballes*, identifies many federal cases in which dog alerts were proven to be highly unreliable.<sup>137</sup> Additionally, he noted that "a study cited by [the State of] Illinois in [*Caballes*] for the proposition that dog sniffs are 'generally reliable' shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search."<sup>138</sup> If the big-picture policy that the Court is trying to promote is the protection of the average American's reasonable privacy rights, finding probable cause to search a person's vehicle based solely on a dog-alert which may only have a fifty percent chance of being correct<sup>139</sup> fails each and every American citizen.<sup>140</sup> The very real possibility that a dog-alert is only accurate half the time<sup>141</sup> is probably the reason that the civil courts have almost

<sup>136</sup> *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

<sup>137</sup> *Id.* at 411-12 (Souter, J., dissenting) (attacking the accuracy of drug-dogs). *See supra* text accompanying note 30 (citing judicial opinions describing statistical failings of trained drug-detection dogs).

<sup>138</sup> *Id.* at 412 (Souter, J., dissenting) (citing to *State's Brief, supra* note 78, at 13).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

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universally rejected the argument that a dog-alert, *alone*, merits the requisite probable cause to seize a citizen's currency.<sup>142</sup> In his dissent in *Caballes*, Justice Souter best summarized the reason that, in circumstances similar to *Caballes*, a dog-alert should not, alone, be enough to merit probable cause to search the person when he argued, "given the fallibility of the dog, the sniff is the first step in a process that may disclose 'intimate details' without revealing contraband, just as a thermal-imaging device might do, as described in *Kyllo v. United States*["]"<sup>143</sup>

As discussed earlier, and clearly progressing from Justice Souter's logic, because of the need to classify drug-detection dog use as something other than a Fourth Amendment search, courts should create a new category of 'vehicular frisks' in *Caballes* scenarios.<sup>144</sup> While

[a]ttempting to analogize this case to *Kyllo*, [the defendant, *Caballes*] notes that a drug-detection dog, like a thermal-imaging device, reveals information about an enclosed space that could not otherwise be obtained without some physical intrusion. From this premise, [*Caballes*] maintains that a canine sniff, while not rising to the level of a search, may not be conducted without some Fourth Amendment justification.<sup>145</sup>

This sound argument, despite its rejection in *Caballes*, hearkens back to the Supreme Court's decision in *Terry v. Ohio*,<sup>146</sup> where the Court first delineated the Fourth Amendment standard upon which the over-the-clothes "frisk" of a suspect could be justified. *Terry* held that, upon being able to point to specific and articulable facts which reasonably justify an intrusion on an individual's privacy, an officer may conduct a limited search of persons whom he reasonably suspects to be dangerous, with the purpose of discovering any weapons that might be used to assault the officer or other nearby persons.<sup>147</sup> These "Terry Stops" are not violative of the Fourth Amendment because they are less invasive than entering one's home or patting down one's clothing, and the officer

<sup>142</sup> See Dep't of Highway Safety and Motor Vehicles v. Jones, 780 So. 2d 949, 951-52 (Fla. Dist. Ct. App. 2001) (clearly stating that "[g]enerally, a positive alert by a drug dog to narcotics on currency, standing alone, does not constitute evidence that the money was used in a drug transaction.").

<sup>143</sup> *Caballes*, 543 U.S. at 413 (Souter, J., dissenting) (citation omitted).

<sup>144</sup> See generally *id.* at 410-13.

<sup>145</sup> *State's Brief*, *supra* note 78, at \*4.

<sup>146</sup> See *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

<sup>147</sup> See *id.*



is required to have articulable facts to justify this less invasive intrusion.<sup>148</sup>

The application of the *Terry* analysis to the *Caballes* scenario was argued by *Caballes's* amici,<sup>149</sup> namely the American Civil Liberties Union, which took "*Kyllo* a step further [than merely arguing that the dog-sniff was a search], [by] arguing that a canine sniff is actually a 'search,' albeit one that requires only reasonable suspicion, not probable cause."<sup>150</sup> The application of a *Terry*-type reasonable suspicion standard to deciding whether to allow dog-sniffs during a lawful traffic stop would allow for the protection of the general public, as a whole, because, as was held in *Adams v. Williams*, the Supreme Court decided that it is permissible, under a "Terry Stop," to stop and frisk an individual suspected of having narcotics (and a concealed weapon).<sup>151</sup> It could even be argued that the presence of narcotics makes it more likely that a person would be carrying an illegal firearm, thus making a more direct link to the specific reasoning for which the *Terry* Court ruled that a frisk was not a full-blown Fourth Amendment search. An officer still needs to protect himself and others around him from the risk of possible harm due to the use of weapons, even though no probable cause exists to conduct a full-blown search of a suspicious individual.<sup>152</sup> Although it is generally an exception to the warrant requirement, the need to conduct a cursory "vehicular frisk" could be justified by the same "exigency"<sup>153</sup> argument applied in drug cases such as *California v. Carney*.<sup>154</sup> In *Carney*, the Court argued that not applying a Fourth Amendment warrant exception when dealing with mobile vehicles (such as cars) and illegal contraband, would allow an unacceptable loophole in the government's power to police society's criminal element.<sup>155</sup> Considering this societal goal to stop crime, the movement of a car containing contraband may be considered an emergency situation<sup>156</sup> one which will result in harm if the criminal is released regardless of whether "articulable suspicion"<sup>157</sup> that "[crime was] afoot" is feasible.<sup>158</sup>

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<sup>148</sup> See generally *id.*

<sup>149</sup> *State's Brief*, *supra* note 78, at \*4.

<sup>150</sup> *Id.* (citing to the A.C.L.U.'s Brief at 25-30).

<sup>151</sup> See generally *Adams v. Williams*, 407 U.S. 143 (1972).

<sup>152</sup> See generally *Terry*, 392 U.S. at 1.

<sup>153</sup> *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (describing exigent circumstances as emergency conditions).

<sup>154</sup> See generally 471 U.S. 386 (1985).

<sup>155</sup> *Id.*

<sup>156</sup> See generally *Adams*, 442 U.S. at 143 (considering an emergency situation to be one where a suspicious person possesses a firearm in public).

<sup>157</sup> *Terry*, 392 U.S. at 31 (Harlan, J., concurring).

<sup>158</sup> *Id.* at 30.

The hypothetical situation set forth earlier in this Article, although still disturbing, would seem drastically different from a detached observer's point of view if the proposed "vehicular frisk" standard applied. The earlier hypothetical set forth a scenario in which a police officer made a traffic stop based solely on the race of the people in the vehicle, and then, while writing a ticket, walked a drug-detection dog around the vehicle. When the dog made an ambiguous noise after the dog sniff was completed and some time passed, the officer forced the people out of the car and thoroughly searched it. Finding nothing, he sent the scared and harassed boys on their way. Under the "vehicular frisk" standard, the officer could stop the vehicle and question the driver but then would have to allow him to leave unless the officer chose to engage in an extreme violation of the law.

#### VI. CONCLUSION

In conclusion, limiting the Fourth Amendment acceptability of an interrogatory dog-sniff through the implementation of a "vehicular frisk" standard, specifically when an officer merely has an articulable suspicion that crime is afoot, could reduce the fear of citizen abuse, improve society's impression of police officers, and still allow police officers the discretion needed to locate illegal contraband.

In *Davis v. United States*,<sup>159</sup> the Supreme Court responded to warnings regarding its holding not requiring police officers to ask clarifying questions upon an ambiguous request for counsel by explaining, "[w]e recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present."<sup>160</sup> This loathsome statement reveals that the Supreme Court, in 1994, had knowledge that a certain segment of society would suffer abuse due to a decision that could have been resolved with the simple implementation of some further prophylactic requirement. In particular, although he had an overall positive outlook of police officers, Justice White expressed concern about facilitating police officer abuse of underprivileged members of society. In his dissenting opinion, Justice White stated as follows:

[M]ost police officers will decline the Court's invitation and will continue to do their jobs as best they can in

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<sup>159</sup> *Davis v. United States*, 512 U.S. 452 (1994).

<sup>160</sup> *Id.* at 460.

accord with the Fourth Amendment. But the very purpose of the Bill of Rights was to answer the justified fear that governmental agents cannot be left totally to their own devices, and the Bill of Rights is enforceable in the courts because human experience teaches that not all such officials will otherwise adhere to the stated precepts. Some policemen simply do act in bad faith, even if for understandable ends, and some deterrent is needed. In the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the Court ignores precedent, logic, and common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed.<sup>161</sup>

Unfortunately for socioeconomically disadvantaged and minority citizens, the Supreme Court has again made a decision which will lead to episodes of police abuse, despite the Court's opportunity to adopt an alternate reasoning and decide otherwise. Hopefully the Court will reconsider its past holdings and apply the proposed "vehicular frisk" standard to situations similar to the one posed in *Caballes*.

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<sup>161</sup> Rakas v. Illinois, 439 U.S. 128, 169 (1978) (White, J., dissenting).