NYU JOURNAL OF LAW & LIBERTY

CANINE SNIFFS: THE SEARCH THAT ISN'T

Ken Lammers*

> Q: Do you keep records as to the effectiveness of your dog?
>
> A: Yes, sir, I do.
>
> Q: Do you know how often your dog gives false positives?
>
> A: He doesn't give any false positives. We're just unable to verify the alerts at that time.[1]

I practice criminal defense in a jurisdiction where the local drug interdiction unit uses drug-sniffing dogs extensively. Generally, one officer performs a blatant pretext stop, such as pulling someone over for having an air freshener hanging from the rear view mirror.[2] Sometimes the police operate as a team and preposition the dog in anticipation of the stop. Sometimes the officer with the dog operates in a particular area and responds to nearby stops. In either case, the officers run the dog past both the stopped vehicle and its occupants.

The quotation above is taken from a case in which the police made a legitimate automobile stop, suspecting a DUI when the driver of the truck swerved out of her lane. Although the police quickly realized the driver was sober, they took advantage of the stop to look for drugs. One officer took her driver's license and checked her driving record. Another officer just happened to have a police dog with her, and ran it past the truck, driver, and passenger.

The dog did not indicate the presence of drugs in the vehicle, and reacted to the driver in a manner that the officer interpreted as a response to menstruation. Although the dog gave a definite indication of drug presence on the passenger, the passenger did not have any drugs on his person. Based on this false alert, the police

* J.D., Washington & Lee Law School 1999. Editor, CrimLaw, http://crimlaw.blogspot.com.

[1] Transcript of Record at 7-8, Commonwealth v. Fens, No. CR03F01831-01 (Chesterfield Cir. Ct. Jan 06, 2004).

[2] *See, e.g.*, Commonwealth v. Bryant, No. 0076-04-1 (Va. App. June 15, 2004).

made a non-consensual search of the truck and located drugs therein. Consequently, the police searched the driver and found drugs on her person.[3] In other words, the dog alerted when no drugs were present, failed to alert when they were, and, the one time the dog responded accurately, its handler misinterpreted the dog's actions.

Needless to say, I am somewhat skeptical of the infallibility of canines. Unfortunately, the Supreme Court does not share my concern. This past Term, in *Illinois v. Caballes*,[4] the Court relied on an assumption of infallibility in order to affirm its unique "canine sniff" jurisprudence under the Fourth Amendment. Unfortunately, while establishing the validity of canine sniffs, the Court refused to acknowledge substantial evidence of their unreliability, relied on dubious constitutional logic, and glossed over a fundamental conflict with *Kyllo v. United States*.[5]

I. Historical Background

The problems with dog-sniff jurisprudence began in 1983 when the Supreme Court overstepped its bounds in *United States v. Place*.[6] The sole issue presented in *Place* was whether "the warrantless seizure of [Place's] luggage violated his Fourth Amendment rights."[7] Nevertheless, on her way to finding the seizure unconstitutional, Justice O'Connor took an unnecessary detour to declare, in dictum, that a canine sniff is an investigative procedure but not a search under the Fourth Amendment. According to Justice O'Connor, canine sniffs are "*sui generis*," because they are uniquely "so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[8] Essentially, she assumed that a canine sniff would only expose contraband items, an assertion unnecessary to the disposition of the case and unsupported by any authority.[9]

The Court revisited canine sniffs seventeen years later in *Indianapolis v. Edmonds*, when it was presented with the question of whether the police could constitutionally stop cars at a drug checkpoint roadblock.[10] Once again, Justice O'Connor authored the opinion of the Court, which found the roadblocks unconstitutional and once again went out of her way to discuss the constitutional legitimacy of canine sniffs. Expanding on *Place*, Justice O'Connor declared, in dictum, that a car

[3] *Fens*, No. CR03F01831-01 at 6-10.
[4] 543 U.S. ___, 125 S. Ct. 834 (2005).
[5] 533 U.S. 27 (2001).
[6] 462 U.S. 696 (1983).
[7] *Id*. at 699.
[8] *Id*. at 707.
[9] *Id*.
[10] 531 U.S. 32 (2000).

does not enjoy any Fourth Amendment protection from a suspicionless canine sniff.[11]

Lower courts generally adopted Justice O'Connor's dual dicta, echoing her assertion that a canine sniff of an object or car is not a search.[12] Fleshing out *Place*, those courts developed an "emanations" rationale, concluding that when anything emanating from a vehicle, bag, house, or person enters a public area, it is no longer private property and that an examination of it does not constitute a search. This was a "plain view" analysis that asserted that dogs are merely augmentations of police officers' own senses.[13] More in line with prevailing Fourth Amendment doctrine than Justice O'Connor's original rationale, the emanations theory became the strongest argument in favor of canine sniffs. One court even allowed police officers to squeeze air out of a suitcase in order to help a dog detect contraband.[14]

Then came *Kyllo v. United States*.[15] In *Kyllo*, Justice Scalia held that law enforcement's use of a thermal imaging device to read the heat emanating from a house violated the Fourth Amendment. He reasoned that the Court had previously "rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth."[16] In essence, *Kyllo* rejected the emanations theory. Justice Stevens' dissent recognized the implications of doing so, pointing out that the reasoning of *Kyllo* would disallow "potential mechanical substitutes for dogs trained to react when they sniff narcotics." In fact, "the use of such a device would be unconstitutional under the Court's rule, even if the devices (like the canine sniffs) are 'so limited in both the manner in which' they obtain information and 'in the content of the information' they reveal."[17]

Of course, if a mechanical device that does the same thing as a dog is unconstitutional, so is a regular canine sniff. A constitutional analysis cannot coherently distinguish between two tools that accomplish the same thing. And yet the

---

[11] *Id*. at 40 ("The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the canine sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'") (internal citations omitted).

[12] *See, e.g.*, United States v. Stone, 866 F.2d 359 (10th Cir. 1989); Idaho Dep't of Law Enforcement v. $34,000 United States Currency, 121 Idaho 211 (1991); State v. Carlson, 102 Ohio App. 3d 585 (1995).

[13] *See, e.g.*, Brown v. Commonwealth, 15 Va.App. 1, 6 (1992) ("A reasonable expectation of privacy did not extend to the airspace surrounding appellant's vehicle, and reasonable and articulable suspicion is not required before the police may use a canine trained in drug detection to sniff the air about an enclosure believed to contain drugs. Nothing in the Fourth Amendment prohibits a law enforcement officer from using trained canines to augment the sensory faculties bestowed on the officer at birth.").; *Accord* United States v. Lovell, 849 F.2d 910 (5th Cir. 1988); People v. Dunn, 553 N.Y.S.2d 257 (1990).

[14] Sprowls v. State, 433 So.2d 1271 (Fla. Dist. Ct. App. 1983).

[15] 533 U.S. 27 (2001).

[16] *Id*. at 35.

[17] *Id*. at 47 (Stevens, J., dissenting).

courts that considered *Kyllo* either ignored its necessary implications[18] or simply refused to apply it.[19] Thus, it became necessary for the Supreme Court to explicitly determine whether a canine sniff is a search or simply an investigation.

II. Background of *Illinois v. Caballes*

On November 12, 1998, an Illinois state trooper pulled over Roy Caballes on Interstate 80 for driving six miles per hour over the speed limit. When the trooper radioed in this obviously pretextual stop, another trooper announced over the radio that he was en route with a drug dog. The first trooper then engaged in a number of delaying tactics. He took Caballes' papers, had him move his car, then had him come back and get into the police car. After informing Caballes that he was going to write a warning ticket, the trooper called for Caballes' driving record. While waiting for the record the trooper engaged Caballes in conversation, asking him where he was going and why he was wearing a suit. When the driving record came in a few minutes later, the trooper called for Caballes' criminal record. Then the trooper asked Caballes if he could search his car. When Caballes refused, the trooper asked if he had a criminal record. After receiving Caballes' criminal record over the radio, the trooper began to write a warning ticket, but was interrupted by a call on another matter, which he dealt with first. Finally, the second trooper arrived and ran the dog past Caballes' car. The dog indicated the presence of drugs.[20]

The Illinois Supreme Court had previously ruled in *People v. Cox*[21] that a police stop followed by a canine sniff of a car is subject to a two-part constitutional inquiry as to whether (1) the stop was justified at its inception, and (2) the police officer did not exceed the scope of the stop. In other words, the court had to determine whether the driver would have still been on the scene when the drug dog arrived, had the officer written the traffic ticket expeditiously. The *Cox* court also stated in dicta that a canine sniff is impermissible unless justified by specific and articulable facts.

The Illinois Supreme Court applied the *Cox* test to Caballes's case, but changed the gravamen of the second part. Rather than ask whether the police impermissibly prolonged the length of the stop in order to do a canine sniff, the *Caballes* court asked whether the canine sniff impermissibly exceeded the scope of the stop by changing it into a drug investigation. Applying this new interpretation of its test, the court found that the traffic stop was proper but that "the police impermissibly broadened the scope of the traffic stop in this case into a drug inves-

---

[18] *See* United States v. Lopez, 380 F.3d 538, 544-45 (1st Cir. 2004) (distinguishing thermal imaging scan of house from drug dog sniff of car).

[19] *See* United States v. Ibarra, 345 F.3d 711, 715 n.4 (9th Cir. 2003) (refusing to apply *Kyllo* because the Supreme Court had not explicitly overruled *Place*); *accord* United States v. Williams, 356 F.3d 1268 (10th Cir. 2004) ("As academically interesting a question as that may be, however, we see no need to answer it today.").

[20] People v. Caballes, 207 Ill. 2d 504, 507 (2003).

[21] 202 Ill. 2d 462 (2002).

tigation because there were no specific and articulable facts to support the use of a canine sniff."[22]

III. You Only Have a Fourth Amendment Right if the Government Allows You One

The Supreme Court granted certiorari in *Caballes* on a narrow question: "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."[23] The Court answered that question in the negative. However, because the emanations rationale was made untenable by the *Kyllo* decision, the Court's opinion fell back on the original justification that Justice O'Connor offered in *Place*. According to Justice Stevens, a person only has a legitimate expectation of privacy in things the government permits people to possess. He also assumes that dogs are utterly infallible detectors of contraband:

> "We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'"[24]

In other words, an individual only has a privacy right in things the government allows him to keep private. In a fine bit of circular reasoning, Justice Stevens supports this proposition, lifted from *Place*, with a citation from *United States v. Jacobsen*—which cites *Place* as its primary source.[25]

Defining the scope of the Fourth Amendment right in relation to the object of a search fundamentally changes the nature of Fourth Amendment jurisprudence. Since *Katz v. United States*,[26] the Fourth Amendment test has focused on the person searched, not the object of the search itself. In *Katz*, the police used a microphone attached to the outside of a telephone booth to listen to the defendant discuss illegal activities on the telephone. The defendant was clearly breaking the law, but the Supreme Court concentrated on his expectation of privacy: "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[27] The *Katz* formulation replaced a "trespass" doctrine under which the Fourth Amendment only prevented government agents from violating a "constitutionally protected area."[28] However, neither *Katz* nor the trespass doctrine implied that the

---

[22] *Caballes*, 207 Ill. 2d at 509.
[23] Illinois v. Caballes, 543 U.S. __, 125 S. Ct. 834, 837 (2005).
[24] *Id*. at __, 125 S. Ct. at 837 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)) (emphasis in original).
[25] *Jacobsen*, 466 U.S. at 123.
[26] 389 U.S. 347 (1967).
[27] *Id*. at 353.
[28] *Id*. at 350–53.

Fourth Amendment only protects things the government permits individuals to possess.

The history of the Fourth Amendment makes it even clearer that Justice Stevens' position is inconsistent with the Amendment's meaning and purpose. The idea that the Fourth Amendment does not protect contraband directly contradicts American history. Pre-revolutionary British attempts to locate contraband were a major source of conflict in the Boston area.[29] Furthermore, many founding fathers were smugglers, including such luminaries as John Hancock and his lawyer, John Adams.[30] It is impossible to argue convincingly that early Americans did not expect the Fourth Amendment to hamper the government in its search for contraband.

In fact, the Fourth Amendment obviously assumes that the government and the citizenry will come into conflict over what people can legally possess. The government tries to suppress officially disapproved activities, and searches are among its most powerful tools. Anticipating this conflict, the founding generation banned wide-ranging general searches. Also, they limited specific searches for government-declared contraband (the wrong version of the Bible, religious tracts, political pamphlets, escaped slaves, prohibited alcohol, prohibited drugs, et cetera). They favored the right to be left alone, unless the government could demonstrate "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."[31]

Moreover, the Fourth Amendment only makes sense if it operates to curtail the government's search for contraband. After all, how often does the government search for the change in your ashtray or the ancient *King of Rock* tape in your glove compartment? Never. Even though there is a reasonable expectation of privacy in such things, the only reason to assert that expectation is in order to contest the discovery of contraband. Unfortunately, courts tend to dismiss claims involving contraband as *de minimis* violations.

---

[29] *See* J.W. BARBER, *Affair of the Sloop Liberty*, *in* THRILLING INCIDENTS IN AMERICAN HISTORY (1860), *available at* http://www.generalatomic.com/AmericanHistory/sloopliberty.html (last visited Apr. 26, 2005).

[30] *See* ALGIE MARTIN SIMONS, SOCIAL FORCES IN AMERICAN HISTORY 61–62 (1911), *available at* http://www.ku.edu/carrie/texts/carrie_books/simons/06.html. ("Nine-tenths of their merchants were smugglers. One quarter of all the signers of the Declaration of Independence were bred to commerce, the command of ships, and the contraband trade. Hancock, Trumbull (Brother Jonathan), and Hamilton were all known to be cognizant of contraband transactions, and approved of them. Hancock was the prince of contraband traders, and, with John Adams as his counsel, was appointed for trial before the admiralty court of Boston, at the exact hour of the shedding of blood at Lexington, in a suit for $500,000 penalties alleged to have been incurred by him as a smuggler.") (quoting David H. Wells, *American Merchant Marine*, *in* JOHN J. LAYLOR, CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND THE POLITICAL HISTORY OF THE UNITED STATES (1881))

[31] U.S. CONST. amend. IV.

A. The Infallible Dog Theory

Justice Stevens also embraces the most untenable justification Justice O'Connor advanced in *Place*—that dogs are uniquely infallible in that they can only expose the presence of contraband. Unable, or at least unwilling, to deal with the high error rates demonstrated in actual cases, Justice Stevens simply ignores them.[32] By limiting his holding in *Caballes* to the facts of that case, which do not address the failure rates of canine sniffs, Justice Stevens obscures this fundamental flaw.

Justice Stevens then offers the strange suggestion that false alerts are a non-issue because the dog itself is not revealing anything: "[R]espondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information."[33] It simply makes no sense to ask whether a false alert "in and of itself" reveals legitimate private information. Of course a false alert doesn't itself reveal anything; a true alert doesn't reveal anything either. Both create a suspicion which can only be confirmed or denied by a physical search. A physical search inevitably follows a false indication and certainly reveals legitimate private information. This hyper-technical evasion rings of sophistry and is inconsistent with any other interpretation of the Fourth Amendment. It is as if Justice Stevens had upheld a warrant by arguing: "When Officer Smith lied to Judge Jones in order to get the warrant, the lie, in and of itself, did not reveal any legitimate private information, and therefore the warrant is valid." The Supreme Court may have all but rendered warrants unchallengeable in *United States v. Leon*, but it did not go so far as to protect those based on falsities.[34]

B. The Fallible Dog Reality

In his dissent, Justice Souter presents the facts that Justice Stevens ignores. He points to cases where there were canine sniff error rates as high as 38%[35] and where the drug contamination rate of circulating currency was established as 80%,[36] rendering a dog's reaction meaningless. Even the study the government relied on to establish the reliability of canine sniffs reported error rates between 12.5 and 60%.[37]

And these figures probably overstate the accuracy of canine sniffs. Presumably, the accuracy figures offered in case law were derived from law enforcement records and therefore presented the most favorable possible account of the

---

[32] *Cf.* Illinois v. Caballes, 543 U.S. __, 125 S. Ct. 834, 839-40 (Souter, J., dissenting) (citing judicial opinions describing the "less than perfect accuracy" of dog sniffs).
[33] *Id*. at __, 125 S. Ct. at 838.
[34] 468 U.S. 897, 914 (1984) ("the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based.").
[35] *Caballes*, 543 U.S. at __, 125 S. Ct. at 839 (Souter, J., dissenting) (citing United States v. Limares, 269 F.3d 794, 797 (7th Cir. 2001)).
[36] *Id*. (citing United States v. $242,484.00, 351 F.3d 499, 511 (11th Cir. 2003)).
[37] *Id*. at __, 125 S. Ct. at 840 (Souter, J., dissenting).

reliability of canine sniffs. Researchers have recently tested the reliability of canine sniffs in making medical diagnoses. In tests far more controlled than possible on the street, they recorded an error rate of 59%.[38] Admittedly, these results are not directly probative because they involve dogs trained to detect cancer, not drugs. They nevertheless offer a relevant indication of a dog's general ability to accurately detect odors.

It may be impossible to determine the actual accuracy of canine sniffs in the field. One of the most troubling problems is the likelihood that a dog's handler influences its reactions. Officers with years of experience often know where a suspect is likely to have drugs hidden. Consequently, the "Clever Hans Effect," or the ability of an animal to recognize and react to a person's posture, facial expressions, tone of voice, and so on, is a major concern.[39] In other words, an animal may appear to be accomplishing the job it is trained to perform, while in reality it is merely responding to cues from its handler. When an officer believes there is marijuana in the ashtray and the dog reacts to the front passenger area of the car, it is impossible to know whether the dog is actually smelling marijuana or simply reacting to the fact that the officer leaned forward slightly or let the canine sniff for half a second longer than usual.

Furthermore, a dog's accuracy depends on the quality of its training, which is currently impossible to judge. Dogs sold to government agencies by one Virginia business, Detector Dogs Against Drugs and Explosives, failed five different tests of their reliability. During one test, "the dogs and handlers failed to detect 50 pounds of TNT, 50 pounds of trenchrite, 5 [pounds of] dynamite, and 15 pounds of C-4, hidden in three different vehicles which entered the Federal Reserve parking facility."[40] Unfortunately, information on the reliability of dogs trained by particular facilities is generally unavailable.

These problems are exacerbated by other factors unique to each particular dog: differing temperaments, varied levels of cognitive ability, illness, and age. Obviously, the infallible dog is a theoretical fantasy concocted to get around the reality that canine sniffs are anything but infallible.

IV. The Problem with Kyllo

Caballes concludes by announcing that its holding does not conflict with *Kyllo*. The reason? Because a canine sniff is incapable of revealing something legal. Of course, that was not the *Kyllo* test. Rather, *Kyllo* stated that: "Where, as here, the

---

[38] CBS News, *Can Dogs Sniff Out Cancer?* (CBS television broadcast Jan 9, 2005), *available at* http://www.cbsnews.com/stories/2005/01/06/60minutes/main665263.shtml.

[39] *See* ROBERT H. WOZNIAK, *Oskar Pfungst:* Clever Hans (The Horse of Mr. von Osten), *in* CLASSICS IN PSYCHOLOGY, 1855-1914: HISTORICAL ESSAYS (1999), *available at* http://www.thoemmes.com/psych/pfungst.htm.

[40] Press Release, Department of Justice, Eastern District of Virginia (Sept. 8, 2003*), available at* http://www.usdoj.gov/usao/vae/ArchivePress/SeptemberPDFArchive/03/ebersole090803.pdf.

Government uses a device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[41]

Notably, Justice Stevens chose not to rely on the easiest means of distinguishing *Kyllo* from *Caballes*, namely that *Kyllo* involved the search of a home, which was entitled to a higher level of protection under the Fourth Amendment. The argument that the Fourth Amendment provides multiple grades of protection is nothing new.[42] Most trial courts assume that a person driving a car is entitled to less protection than that afforded at a residence. Conversely, case law developed in response to the Supreme Court's canine pronouncements has found a greater right of privacy in the home[43] and person[44] and therefore refused to extend *Place*.

It is not clear why Justice Stevens did not distinguish *Kyllo* on these grounds. Perhaps he was trying to restore the viability of the emanations test. In any event, dogs clearly fail the *Kyllo* test, even as characterized by Justice Stevens in *Caballes*, because it is clear that they can be trained to detect more than contraband. Dogs are trained to detect the presence of numerous drugs, each with a different odor. A dog trained to react to a legal drug like percocet or triazolam reveals a (potentially) legally prescribed drug entitled to full Fourth Amendment protection. Furthermore, dogs used for arson investigations are trained to detect many entirely legal substances.[45] This demonstrates that dogs can be trained to react to the presence of non-contraband items, like a can of paint thinner in the trunk of a car. Obviously, police investigators can train dogs to detect many different legal items. Additionally, given the extraordinary error rates previously discussed, it is obvious that even dogs trained solely to detect contraband will fail any number of times and cause legitimate items to be subjected to a search.

V. Future Battles

Caballes leaves us with a host of unsupportable presumptions. The lynchpin of its error is the "infallible dog." Because dogs are eminently fallible, they do not merely reveal contraband, but also reveal private items in the absence of any contraband. Even an "infallible" dog may be trained to detect legal items. Thus, the question becomes how to continue to challenge the use of dogs as a means of circumventing the 4th Amendment.

Perhaps the Court will limit *Caballes* to its facts, even though its logic makes it difficult. Can the police use dogs to sniff the cars in a parking lot? Can they use a

---

[41] Kyllo v. United States, 533 U.S. 27, 40 (2001).
[42] *Compare* United States v. Karo, 468 U.S. 705 (1984) (monitoring a tracer in a house is a search) *with* United States v. Knotts, 460 U.S. 276 (1983) (monitoring a tracer in public not a search).
[43] United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985).
[44] Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982).
[45] ***See, e.g.,*** Dave Goode**, *Sniffing Out Arson: Keen Sense of Smell All in a Day's Work for Special Canine*,** (CHESTERFIELD, VA.) COUNTY COMMENTS, March 2005, at 9.

dog to sniff a person? Can they use a dog to sniff a home without offending the Fourth Amendment? The logic of *Caballes* would allow police to walk a dog around a parking lot on the off chance that it would identify a car as containing contraband. Because such an investigation does not require any particular level of suspicion, it is exceptionally difficult to challenge in court. In fact, these types of canine searches are already taking place.[46]

In moments of sanity, courts have required an elevated level of suspicion for canine sniffs. Fifth Circuit cases state that a person's body is entitled to more protection than a suitcase or a car, and therefore found that a canine sniff of a person requires a reasonable level of suspicion.[47] The Second Circuit has held that residences are more protected than luggage or vehicles.[48] Additionally, the Nebraska Supreme Court held that a canine sniff outside an apartment violates the Fourth Amendment.[49] While canine sniffs of individuals are rarely challenged, sniffs of houses and apartments often are. A week after the *Caballes* decision, the Supreme Court asked Texas to file a response to *Smith v. Texas*,[50] in which a search warrant was justified by a canine sniff indicating drugs in a garage attached to a house in which no drugs were found (drugs were found in a bedroom). [51] In the end, certiorari was denied, leaving open the question of when a canine sniff of a personal area becomes a search, if ever.

Another question—probably the more important question—is how to challenge canine sniffs. The Supreme Court apparently intended to end the debate over canine sniffs in *Caballes*. Lower courts may perceive *Caballes* as an approval of canine sniffs as a class, and limit challenges to specific dogs. This would make a challenge difficult, if not impossible, especially in states like Virginia with limited discovery in criminal trials. Even in states which allow more comprehensive discovery, trial courts are unlikely to favor challenges directed at particular dogs. Trial judges are likely to favor law enforcement and appellate judges will defer to trial judges. For example, in *Smith* the defendant showed that the dog in question was not trained as often as the Sheriff's department required, was trained that drugs are always present, and that its available training records were incomplete.[52] Although

---

[46] *Lee Class President Suspended*, NEWS VIRGINIAN, Feb. 3, 2005 at __ (Class president suspended after a dog swept the high school parking lot and falsely alerted on his father's car, revealing in the subsequent search a pocket knife and bottle of liqueur his father had left in the car after a Christmas party).

[47] *See Horton*, 690 F.2d at 478 ("[T]he fourth amendment applies with its fullest vigor against any intrusion on the human body."); *see also* B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999) (adopting the Fifth Circuit's *Horton* holding).

[48] *See Thomas*, 757 F.2d at 1366.

[49] State v. Ortiz, 600 N.W.2d 805 (Neb. 1999) (citing *Thomas*, 757 F.2d 1359 and *State v. Dearman*, 962 P.2d 850 (Wash. 1998)).

[50] Smith v. State, No. 01-02-00503-CR, 2004 WL 213395 (Tex. Crim. App. Feb. 5, 2004), *cert. denied*, Smith v. Texas, 125 S. Ct. 1726 (2005).

[51] Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2005/02/drugsniffing_do_1.html (Feb. 13, 2005, 19:22 EST).

[52] 2004 WL 213395, at *4.

the trial judge apparently never ruled on the dog's reliability, the appellate court found that "the trial court implicitly found that both the drug dog and Officer Foose were well-trained. We must defer to the trial court's factual determination that the drug-dog sniff was executed by a well-trained dog and handler."[53]

Challenging canine sniffs as a class will be difficult. A showing that one or two dogs are error-prone is unlikely to call all canine sniffs into question. Instead, this will require a large-scale study. Furthermore, it will require a case with expert testimony supporting the general fallibility of dogs. The resources for either of these are well beyond the means of the vast majority of defendants. Even if a defendant had the money, the time frame of a trial would limit a defendant's ability to commission such a study. Thus potential defendants must rely on interested organizations to perform the necessary research. One wonders what organization has the credibility, desire, and drive to commit to such an expensive study, especially when the Court might dismiss its results as easily as it did the Baldus study.[54]

How far can the logic of *Caballes* be extended? As technology advances, more sensitive devices may be even better able to "see" into private areas. An extremely sensitive device that only informed the operator of contraband would apparently be acceptable under *Caballes*, even though such a device would theoretically be capable of much more. However, in *Katz*, the Court held that a search was unconstitutional even if the police enforced limitations that would have made it valid if specified by the magistrate.[55] Thus, the limitations placed upon such equipment by law enforcement do are an argument for its constitutionality. Since the Supreme Court never addressed this issue in *Caballes,* it may even offer another ground upon which to challenge canine sniffs. The limits on the reliability of even an infallible dog are not natural. A dog indicates the presence of certain items only because law enforcement officials have limited its training to identifying those items.

A. General Searches

In his dissent to *Caballes*, Justice Souter states that the Court's opinion, combined with its prior opinions, will lead to "an open-sesame for general searches."[56] He is entirely correct. Few people remember that the Fourth Amendment and its state constitution analogues were intended to prohibit general search warrants as well as warrantless general searches. While the Fourth Amendment does not itself specify the evil it was intended to stop, other contemporary sources do. For example, the Virginia Constitution states "[t]hat general warrants, whereby

---

[53] *Id*. at *5.
[54] *See* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (rejecting the contention that a study—showing black killers of white victims received the death penalty more frequently than white killers of black victims—established that decision-makers in the instant case had acted with discriminatory purpose).
[55] Katz v. United States, 389 U.S. 347, 359 (1967); *see also* Chicago v. Morales, 527 U.S. 41 (1999) (holding police regulation insufficient to save unconstitutional ordinance).
[56] Illinois v. Caballes, 543 U.S. at __, 125 S. Ct. 834, 841 (Souter, J., dissenting).

an officer or messenger may be commanded to search suspected places without evidence of a fact committed . . . are grievous and oppressive, and ought not to be granted."[57]

Caballes does not explicitly permit general searches. However, it does give the Court's imprimatur to each and every search undertaken via a canine sniff, used at the complete discretion of the police. In conjunction with the Court's absolute refusal to curtail pretext stops,[58] it permits police to use a dog to search any suspect car, even without reasonable articulable suspicion that there is contraband to be found. Any competent officer can find a pretextual reason to pull over a car and delay it long enough for another officer to arrive with a dog. Thus, *Caballes* effectively allows any officer to arrange a search of any car for any reason—or for no reason. In other words, Caballes, so far as it reaches, renders the Fourth Amendment a nullity.

Conclusion

After an inevitable flurry of challenges, canine sniffs will probably retain the Court's approval. Perhaps the only saving grace of *Caballes* is the Supreme Court's decision to consecrate only dogs as the perfect and perfectly unique tool for detecting contraband. Canine sniff cases seem to inhabit a unique universe, subject to a unique Fourth Amendment analysis. If the Court can be taken at its word it will analyze new technologies under *Kyllo* and limit *Caballes* to canine sniffs. This would limit the impact of *Caballes* on Fourth Amendment doctrine but it won't do anything to limit the thousands of suspicionless searches that *Caballes* will justify.

[57] VA. CONST. art. I, § 10. (General warrants of search or seizure prohibited). [is this a quotation?]
[58] Whren v. United States, 517 U.S. 806 (1996).