No. 124289

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- JONATHAN LINDSEY Respondent-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0877. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, No. 15-CF-290. Honorable F. Michael Meersman, Judge Presiding.

BRIEF AND ARGUMENT FOR RESPONDENT-APPELLEE

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E-FILED
8/22/2019 2:39 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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The government's use of a drug-detection dog on Jonathan Lindsey's motel door constituted a warrantless search in violation of the Fourth Amendment.

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ISSUE PRESENTED FOR REVIEW

Whether the government's use of a drug-detection dog on Jonathan Lindsey's motel door constituted a warrantless search in violation of the Fourth Amendment.

A. Whether government's use of a drug-detection dog on Lindsey's motel room door violated his reasonable expectation of privacy that the details within his dwelling unit would remain private.

B. Whether the State's focus on Lindsey's expectation of privacy in the motel hallway, instead of the relationship between the hallway and Lindsey's reasonable expectation of privacy in the details within his room, should be disregarded.

C. Whether the State's property-based analysis improperly characterizes the area immediately outside of Lindsey's motel room and ignores that there is no implied license for anyone to approach the door of a dwelling and conduct a search there.

D. Whether the good-faith exception should apply where the police could not have relied on any precedent to authorize the warrantless use of a drug-detection dog on Lindsey's motel room door.

STATEMENT OF FACTS

Jonathan Lindsey was convicted at a stipulated bench trial of one count of unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school (C57–58; R83–89). The charge was based on evidence seized pursuant to a search warrant for Lindsey's room at the American Motor Inn on April 27, 2015 (R5–11). Lindsey challenged the search of his room in a motion to suppress evidence that alleged the warrantless dog sniff of his motel room door, on which probable cause in the warrant was based, was a search within the meaning of the Fourth Amendment (C32–34).

The Search Warrant Application

The warrant application stated that the affiant, Rock Island Police Officer Tim Muehler, received information from a confidential informant at some unknown time indicating that Lindsey sold narcotics from the American Motor Inn (C16). The warrant application did not specify what kind of narcotics Lindsey allegedly sold, nor did it contain any information about the confidential informant or when and how the information was communicated (C16). The application described Lindsey's physical attributes and criminal history, which included one conviction for manufacture and delivery of a controlled substance in 2012 (C16).

Sometime within the thirty days before the warrant application was submitted, an unnamed "Fellow Officer" of the affiant contacted Lindsey on the phone to purchase some amount of a unspecified narcotic at some pre-determined location (C17). The officer and Lindsey met at the location, and the officer spoke with Lindsey "about drugs" (C17). Lindsey did not sell anything to the officer (C17). Muehler and the unidentified officer conducted surveillance of Lindsey as he walked

from the location to the American Motor Inn, and they lost sight of him as he reached the southwest corner of the building (C17).

Sometime after that on April 27, 2015, at 1643 hours, Muehler conducted surveillance of the Inn and observed Lindsey drive away (C17). Muehler knew Lindsey had a suspended driver's license and pulled over Lindsey, arrested him for driving while suspended, and transported him to the police station to be interviewed (C17). Lindsey signed a waiver of rights and told Muehler he was staying in room 129 at the Inn (C17).

The other officer went to the Inn and spoke to some staff member, who advised that Lindsey was staying in room 130, located in the southwest corner of the Inn (C17). Deputy Pena and his K-9 partner conducted a "free air sniff of . . . room 130 with a positive alert" (C17). Muehler spoke to Lindsey who advised he was staying in room 130 and not room 129 as he had previously stated (C17).[1]

The search warrant was signed and issued that same day (C18). The warrant stated the police sought cannabis and/or controlled substances, along with packaging materials, U.S. currency, drug records, drug paraphernalia, indicia of residency, firearms, ammunition, cell phones, police scanners, scales, and proceeds derived from the sale of cannabis and/or controlled substances (C15). The inventory dated May 6, 2015, indicated that police recovered from the room: 4.7 grams of heroin on a ceramic plate in the top dresser drawer, a digital scale, scissors, three plastic baggies with the corners cut off, a box of plastic baggies, two Western Union receipts,

[1] The State infers in its statement of facts that Lindsey did so because the police told him about the positive dog sniff alert (St. Br. at 3), but the warrant does not indicate that the police informed him of the alert (C15–18).

two computer tablets, a piece of Lindsey's personal mail, CADS[2] paperwork, and Lindsey's Illinois State identification card (C20–21).

Motion to Suppress Evidence

On July 30, 2015, Lindsey filed his motion to suppress evidence (C32–34). The motion stated that Lindsey refused to consent to a search of his room at the Inn, after which Deputy Pena conducted a warrantless K-9 "free air sniff" (hereinafter dog sniff) of Lindsey's motel room door (C32).[3] The motion alleged in part that the dog sniff constituted an unreasonable search within the curtilage of Lindsey's room and that the exclusionary rule should apply (C32–33). In support, the defendant cited *Florida v. Jardines,* 569 U.S. 1 (2013), and *People v. Burns*, 2015 IL App (4th) 147006, for the proposition that a warrantless dog sniff of an area within protected curtilage was an illegal intrusion into a constitutionally protected area, and *People v. Eichelberger*, 91 Ill. 2d 359 (1982), which held that the Fourth Amendment applies equally to hotel residents and private home residents (C33). The motion asserted that without the positive alert from the dog sniff, there was no probable cause to search Lindsey's room (C33).[4]

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[2] CADS is the Center for Drug and Alcohol Services for the Quad Cities. *See* http://cads-ia.com/. Defendant asks that this Court take judicial notice of that fact. *See People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118, n. 9. ("This court may take judicial notice of information on a public website even though the information was not in the record on appeal.").

[3] The defendant referred to his room as a "hotel" room in the court below, but uses the word "motel," which the Appellate Court employed in its decision, for consistency. *See* Motel. Merriam-Webster Online Dictionary. 2019. https://www.merriam-webster.com/dictionary/motel (1 August 2019) (a motel is "an establishment which provides lodging and parking and in which the rooms are usually accessible from an outdoor parking area.").

[4] The motion also alleged the warrant was not properly executed because a witness saw police activity in and around and the room before the warrant was

At the hearing on Lindsey's motion on September 23 to 24, 2015, Rock Island Sergeant Shawn Slavish testified that while he was investigating Lindsey, he determined that Lindsey was staying in room 130 at the American Motor Inn on April 27, 2015 (R28). He described the layout of the Inn as follows: "It sits right off of 11th Street and the actual hotel itself is shaped in a U or a horseshoe shape with another building that sits at the entrance forming kind of a block there" (R28). Deputy Pena and his K-9 partner conducted a dog sniff of the door of room 130, which sat in an alcove for rooms 130 and 131 (R28). Slavish stated the door to room 130 was "set back in a little alcove and as you stepped into the alcove to the right was Room 130 and . . . across the hall to that would be Room 131" (R29; Supp. E. 5). Pena informed him that there was a positive alert on the door (R29). On cross-examination, Slavish referred to defense counsel's photograph exhibits of the alcove (R30–31). Two photographs depicted the door to the alcove, both closed and opened (R30–31; Supp. E. 5–6). The photo of the closed alcove door displayed the sign, "30 & 31 INSIDE" (Supp. E. 5).

Deputy Pena testified that he and his K-9 partner, Rio, conducted a dog sniff of room 130 (R32–33). Pena and Rio had been trained to conduct "free air sniffs" for the detection of narcotics (R33–34). Pena did not use a key to get to room 130 and to the best of his understanding, the alcove was open to the public (R34). He directed Rio to search for the odor of narcotics as follows:

> Well, I let him off lead and basically had him go to that side of the building actually checking for free air sniffs alongside that building. Once you reach Room 130, he changed his behavior, alerting to the odor of narcotics. In this particular instance what he did is he came up around the door handle and its seams and he—an alert would

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signed, but that issue is not a subject of this appeal (C33).

> be that he would actually sit and lay down, which he did, indicating that he is in the odor of narcotics.

(R34). The prosecutor asked, "And he was directed to search for narcotics not just directly at the door but in the general area?" and Pena responded, "In the general area, yes" (R34).

On cross-examination, defense counsel asked whether before Rio alerted he smelled directly under the door or further back from the door, and Pena replied,

> He was approximately at the door handle and the door seam. So if you're looking at the door handle, there is obviously the seam that comes in like that, so when he sits, he'll—you know, he'll sit right in front of where the odor is coming or the presence of the odor. So you've got the handle right here, you've got the seam right here, and, you know, when I tell him, I'll say, show me, you know, to make sure that, you know, maybe he can narrow it down where it's coming from. So that's what he'll do is he'll sit and as soon as he is in the odor of it, he'll sit down and then I'll tell him to show me a little further, that's when he'll sometimes just lay down. It's his change of behavior how he has always been.

(R36). When asked if it would "be fair to say that Rio got within inches of the door," Pena said yes (R37).

The judge found while Lindsey had a reasonable expectation of privacy in his motel room, it did not extend to the motel corridor, which he described as "a public place of accommodation" (R63–64). The judge acknowledged the Appellate Court in *Burns* held that the dog sniff of an apartment building was impermissible, but noted the decision was based on the apartment building being locked and did not concern a hotel room (R61–62, 64). The judge relied on *United States v. Roby*, 122 F. 3d 1120 (8th Cir. 1997), which the judge found "to still be good federal law," since "Illinois [had] not done anything to divest itself of that case law" (R62–63). The judge acknowledged that "there doesn't seem to be any" Illinois case law pertaining to dog sniffs of hotels, and he declined to create new case law, even

though he agreed with some of the issues raised in the *Roby* dissent (R63). The court denied the motion to suppress (R64).

Stipulated Bench Trial

A stipulated bench trial was held on October 14, 2015 (R83). The stipulated facts alleged in part that Officer Kuhlman would testify he executed a search warrant on April 27, 2015, of the American Motor Inn, Room 130, where the defendant was staying (R83). Officer Muehler and Sergeant Slavish would testify that after they located heroin, they continued to interview Lindsey, who said the narcotics were his, that he sold a portion, and intended to sell the rest (R84–85). The court found a basis for Lindsey's guilt of unlawful possession with intent to deliver a controlled substance within 1000 feet of a school (R87).

Lindsey was sentenced to seven years in prison (R95–96). The judge asked the clerk to reduce all monies owed to judgment, including costs, "because obviously, he doesn't have the ability to pay any of them and it's just silly to keep these files open just for money issues in relation to that. So hopefully the next time when you come out, sir, you'll be starting fresh. . ." (R96). Two judgments were signed on the same day (C57–58). The first did not list any fines and fees (C57), and the second judgment included a $3,000 mandatory drug assessment, a $500 Drug Street Value Fine, and a $250 DNA fee (C58).

Appellate Court Decision

On direct appeal, Lindsey argued that trial court erred in denying his motion to suppress because the government conducted a warrantless search within the meaning of the Fourth Amendment when it used a drug-detection dog on his motel

room door to discover what was inside of it.[5] In a published decision, the Appellate Court agreed and reversed Lindsey's conviction. *People v. Lindsey*, 2018 IL App (3d) 150877, ¶¶ 14–48. The Appellate Court found the drug-detection dog was "used to explore the details previously unknown in Lindsey's motel room, which the Supreme Court established was entitled to constitutional protections." *Id.* at ¶¶ 23–24. The Court also found Lindsey had a justifiable expectation of privacy because the smell of the drugs inside of his room was undetectable until Pena focused the dog sniff on the motel door and its seams to detect the odor. *Id.* at ¶ 24. The Court reasoned that Lindsey's reduced expectation of privacy in the area immediately joining his room did not mean he had "'no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public.'" *Id.* at ¶¶ 16–24 (quoting *United States v. Whitaker*, 820 F. 3d 849, 853 (7th Cir. 2016)). As a result, the Appellate Court held that the dog sniff was a warrantless search in violation of Lindsey's Fourth Amendment rights. *Id.* at ¶ 24.

The Appellate Court further held that the good-faith exception did not apply because there was no binding precedent that Deputy Pena could have relied on

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[5] Without having previously raised the point, the State misrepresents Lindsey's application of a privacy-based approach on direct appeal as "switching gears" (St. Br. at 5). The argument that the dog sniff of Lindsey's motel room door was a warrantless search in violation of the Fourth Amendment is essentially the same. *See People v. Mohr*, 228 Ill. 2d 53, 64-65 (2008) (holding that defendant adequately preserved claim of error even though grounds supporting his objection to instruction at trial and on appeal were not identical). Moreover, the trial court applied *Roby*, 122 F. 3d at 1124–25, which utilized a privacy-based approach, and found that the dog sniff was not a search because Lindsey did not have a reasonable expectation of privacy in the motel corridor (R63–64).

to justify the warrantless use of a drug-detection dog on a residence. *Id*. at ¶¶ 25–37. Instead, there was binding precedent for a reasonably well-trained officer to know that motel guests have the same as expectation of privacy in their dwelling space as residents of a single-family home and apartment tenants, and that the use of sense-enhancing technology not available to the general public to obtain information about activities inside that dwelling was a search. *Id*. at ¶¶ 31–36. The Court also reasoned that the police conduct in the instant case should be deterred because it was "a deliberately executed attempt to find drugs inside Lindsey's hotel room." *Id*. at ¶ 37.

The Appellate Court also held that in the event this Court reverses its decision as to the nature of the dog sniff, the drug assessment, street value fine, and DNA analysis fee should be vacated. *Id*. at ¶¶ 39–45, 48.

Justice Schmidt concurred in vacating Lindsey's fees, but dissented in the finding that the dog sniff was a search. *Id*. at ¶¶ 49–52. Justice Schmidt opined that even assuming the dog sniff of Lindsey's motel room door was a search, the good faith-exception would apply because the "relevant authority" indicated a hotel tenant possessed a reduced expectation of privacy. *Id*. at ¶ 51.

The government's use of a drug-detection dog on Jonathan Lindsey's motel door constituted a warrantless search in violation of the Fourth Amendment.

STANDARD OF REVIEW

A circuit court's ruling on a motion to suppress presents both questions of law and fact, and generally, the circuit court's findings of historical fact will be upheld unless they are against the manifest weight of the evidence. *People v. McCarty*, 223 Ill. 2d 109, 148 (2006). But this Court's legal determination of whether evidence should have been suppressed is ultimately reviewed *de novo*. *McCarty*, 223 Ill. 2d at 148.

Whether the good-faith exception applies also is reviewed *de novo*. *People v. Turnage*, 162 Ill. 2d 299, 305 (1994).

ARGUMENT

The issue before this Honorable Court is whether the government's use of a drug-detection dog on Jonathan Lindsey's motel room door was a search within the meaning of the Fourth Amendment. The Appellate Court held that the dog sniff was a search because Lindsey had a reasonable expectation of privacy that the contents of his room would remain private, and the police would not come to the door of his dwelling unit and with a sense-enhancing tool to discover what was inside of his room. *People v. Lindsey*, 2018 IL App (3d) 150877, ¶¶ 11–24. Because the police conducted the search without a warrant, it violated the Fourth Amendment. *Id.* at ¶ 36. The Appellate Court also held that the evidence obtained as a result of the search should be suppressed and the good-faith exception should not apply because there was no authority the police could rely on to conduct the warrantless search. *Id.* at ¶¶ 25–30. Instead, a reasonably well-trained officer

would have known that the warrantless use of the drug-detection dog to detect the contents *inside* of a dwelling violates the Fourth Amendment. *Id.* at ¶¶ 30–36. The Court further found the government's deliberate attempt to find drugs inside of Lindsey's motel room, despite this precedent, should be deterred. *Id.* at ¶ 37. The Appellate Court thus reversed the trial court's denial of Lindsey's motion to suppress evidence and vacated his conviction for unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school. *Id.*

However, the State in its opening brief asserts that the issue before this Court is whether Lindsey had a reasonable expectation of privacy in the motel hallway where the police and drug-detection dog were present. The State contends Lindsey had no such expectation because he did not own the hallway and had a reduced expectation of privacy there, and because dog sniffs in public are not Fourth Amendment searches (St. Br. at 7–10). Alternatively, the State argues the dog sniff was not a search under a property-based approach because the curtilage concept does not apply to the area outside of Lindsey's motel room and the police did not exceed any implied license by being present outside his door with a drug-detection dog (St. Br. at 10–14). The State also asserts the good-faith exception should apply because the police could rely on authority that dog sniffs in public are not searches, and the "legal landscape" shows dogs sniffs of hotel hallways are not searches (St. Br. at 14–21).

The State is wrong. The State attempts to re-frame this Court's central inquiry into the extent and nature of Lindsey's Fourth Amendment protections in his motel room as solely based on his property rights and expectation of privacy in the physical area outside of his room. But the State fails to address the essential

basis of the Appellate Court's decision—that Lindsey's reasonable expectation of privacy *inside* of his room was violated when the police came to his door to search without a warrant. Fourth Amendment protections do not rise and fall with one's property rights, but also extend to a person's reasonable expectation of privacy relative to a given space. The Appellate Court's decision thus is a logical and well-reasoned application of this established precedent. This Court should therefore affirm the Appellate Court's decision below.

A. The government's use of a drug-detection dog on Lindsey's motel room door violated his reasonable expectation of privacy that the details within his dwelling unit would remain private.

Both the United States Constitution and Illinois State Constitution protect against unlawful searches and seizures. U.S. Const. amend. IV, XIV; Ill. Const. 1970, art. I, § 6; *People v. Caballes*, 221 Ill. 2d 282, 314– 17 (2006) (construing Illinois's search and seizure clause in lockstep with Fourth Amendment). The Fourth Amendment has a strong preference for search warrants, which ensures that a neutral magistrate determines the limits of government intrusions into private spheres. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *Katz v. United States*, 389 U.S. 347, 354–57 (1967). "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *see also Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("But when it comes to the Fourth Amendment, the home is first among equals.").

Moreover, both the Supreme Court of the United States and this Honorable Court have held that hotel rooms are afforded Fourth Amendment protection.

Stoner v. California, 376 U.S. 483, 490 (1964) ("No less than a tenant of a house, or the occupant of a room in a boarding house (*citation*), a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. (*Citation*)." *People v. Eichelberger*, 91 Ill. 2d 359, 366 (1982) (defendant maintained legitimate expectation of privacy within his hotel room).

Courts determine whether the government conducts a Fourth Amendment search under two separate, and to some extent overlapping, analyses. Under the property-based analysis, a warrant is required when law enforcement physically intrudes upon a constitutionally protected area, such as the curtilage of a home. *Jardines*, 569 U.S. at 5–7. Under the privacy-based analysis, a warrant is required "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 32–33 (citing *Katz*, 389 U.S. at 361) (Harlan, J., concurring); *see also California v. Ciraolo*, 476 U.S. 207, 211 (1986), (quoting *Katz*, 389 U.S. at 360) ("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'"); *Katz*, 389 U.S. at 359 (Harlan, J., concurring) ("These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."). As such, a Fourth Amendment search can occur even where there is no physical intrusion into the constitutionally protected area of a dwelling itself. *Kyllo*, 533 U.S. at 40.

The Supreme Court's holding in *Kyllo* controls the police use of a drug-detection dog on Lindsey's motel door. In that case, the government used a thermal

imaging device from the vantage point of a car parked on a public street, in order to detect how much heat was being generated inside of the defendant's residence. *Id.* at 29–30. The government suspected the defendant was growing cannabis inside of his residence and utilized the information about heat concentration as part of the totality of the circumstances to establish probable cause to search the house. *Id.* at 30. The Court applied the privacy-based approach utilized in *Katz* and held that the government's conduct was a search within the meaning of the Fourth Amendment, despite the fact that the police never physically intruded on any constitutionally protected area. *Id.* at 40. The Court found that the government's conduct, which "involv[ed] officers on a public street engaged in more than naked-eye surveillance of a home," violated the defendant's reasonable expectation of privacy that the details and intimate activities in his residence would remain private. *See Id.* at 33–34 ("there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." (Emphasis in original.)).

The Court further reasoned that in the home, "*all* details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37. The Court thus did not decide the case of the "quality or quantity of the information obtained," but instead "[took] the long view" of the Fourth Amendment and held that when the 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." *Id.* at 40.

The Court in *Florida v. Jardines*, 569 U.S. at 7–12, found that the police use of a drug-detection dog was a search, but instead applied a property-based approach. However, Justice Kagan in her concurrence, also joined by two of the five majority justices, opined that a privacy-based approach equally applied to the dog sniff of a residence under *Kyllo*. *Jardines*, 569 U.S. at 12–16 (Kagan, J., concurring). Justice Kagan, reasoned that, like the thermal imaging technology employed by the police in *Kyllo*, a drug-detection dog is a "sense-enhancing tool" that is "not "in general public use" and violates a resident's reasonable expectation of privacy that the details of their residence will remain private. *Id.* at 15 (quoting *Kyllo*, 533 U.S. at 34).

The Seventh Circuit applied this reasoning—that under a privacy-based approach, *Jardines* was controlled by *Kyllo*—to police use of a drug-detection dog on a door in an apartment building in *United States v. Whitaker*, 820 F. 3d 849, 851–54 (7th Cir. 2016). The court reasoned that the defendant's lack of a reasonable expectation of complete privacy in the apartment hallway did not mean he had no reasonable expectation of privacy "against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Id.* at 853. The court analogized the dog sniff to police use of a stethoscope on the door to listen to what was going on inside the apartment, which would not be allowed without a warrant. *Id.* at 853–54; *see also United States v. Thomas*, 757 F. 2d 1359, 1366–67 (2d Cir. 1985) (finding dog sniff of apartment door was a Fourth Amendment search where it violated defendant's "legitimate expectation that the contents of his closed apartment would remain private. . . [and] could not be 'sensed' from outside his door.").

Here, under the privacy-based approach employed in *Kyllo* and *Whitaker*, the police conducted a search of Lindsey's motel room when they used a drug-detection dog to sniff the seams of his door in order to discover narcotics inside of his room. *Kyllo*, 533 U.S. at 40; *Whitaker*, 820 F. 3d at 851–54. At the hearing on the motion to suppress, Deputy Jason Pena testified that he and his K-9 partner, Rio, who had been trained in the detection of narcotics, conducted a dog sniff of room 130 where Lindsey was staying (R32–34). The room was enclosed in an alcove, shielded by a door that read, "30 & 31 INSIDE" (R30–31; Supp. E. 5–6). Pena said he let the dog off the lead to sniff alongside the building, and Rio changed his behavior when he reached room 130 inside the alcove (R34). The dog sniffed the door handle and seams and sat down, which indicated the presence of narcotics (R34). When asked on cross-examination whether before the dog alerted he smelled directly under the door or further back from it, Pena replied,

> He was approximately at the door handle and the door seam. So if you're looking at the door handle, there is obviously the seam that comes in like that, so when he sits, he'll—you know, he'll sit right in front of where the odor is coming or the presence of the odor. So you've got the handle right here, you've got the seam right here, and, you know, when I tell him, I'll say, show me, you know, to make sure that, you know, maybe he can narrow it down where it's coming from. So that's what he'll do is he'll sit and as soon as he is in the odor of it, he'll sit down and then I'll tell him to show me a little further, that's when he'll sometimes just lay down. It's his change of behavior how he has always been.

(R36). When asked if it would "be fair to say that Rio got within inches of the door," Pena said yes (R37). In other words, Pena directed the dog to sniff Lindsey's door, to "show" Pena where the odor had come from.

Under *Whitaker* and Justice Kagan's concurrence in *Jardines*, a drug-detection dog is a sense-enhancing tool not available to the general public. *Whitaker*, 820

F. 3d at 851–54; *Jardines*, 569 U.S. at 15 (Kagan, J., concurring). It follows that under *Kyllo*, Lindsey had a reasonable expectation of privacy that the government would not use such a device to discover details of his residence previously unknowable without a physical intrusion. *Kyllo*, 533 U.S. at 40. The police thus engaged in a warrantless search of Lindsey's motel room in violation of the Fourth Amendment. *Kyllo*, 533 U.S. at 40; *Katz*, 389 U.S. at 360; *Stoner*, 376 U.S. at 490; *Eichelberger*, 91 Ill. 2d at 366; *Whitaker*, 820 F. 3d at 854.

The Appellate Court was persuaded by *Whitaker*, and thus the application of *Kyllo,* to the government's use of a drug-detection dog on Lindsey's room. *Lindsey*, 2018 IL App (3d) 150877, ¶¶ 23–24. The Appellate Court acknowledged that Lindsey did not have a complete expectation of privacy in the motel hallway, but a reduced expectation of privacy in "the area immediately adjoining" his motel room. *Id*. at ¶¶ 16–17 (citing *Eichelberger,* 91 Ill. 2d at 366); *United States v. Burns*, 624 F. 2d 95, 100 (10th Cir. 1980); *United States v. Agapito*, 620 F. 2d 324, 328–32 (2d Cir. 1980). Lindsey nonetheless had a justifiable expectation of privacy that the contents of his room would remain private without the use of sense-enhancing tools. *Id*. at ¶ ¶ 23–24. The Court found that until Pena focused the dog sniff on Lindsey's door and seams to detect the odor of narcotics *inside* of Lindsey's room, the smell was undetectable outside of the room. *Id*. at ¶ 24. The Court concluded that the dog sniff of Lindsey's room constituted a warrantless search in violation of his Fourth Amendment rights. *Id*. The Appellate Court's decision is thus a well-reasoned application of this Court and the Supreme Court's precedent.

B. The State's focus on Lindsey's expectation of privacy in the motel hallway, instead of the relationship between the hallway and Lindsey's reasonable expectation of privacy in the details within his room, should be disregarded.

The State contends that the dog sniff of Lindsey's motel room door was not a search because he had no reasonable expectation of privacy in the motel hallway (St. Br. at 7–10). But the State's inquiry evades the essential holding of the Appellate Court's decision—that the police presence outside of Lindsey's door with a drug-detection dog implicated Lindsey's Fourth Amendment rights *inside* of his room, as detailed in the previous section. As an initial matter, the State cites *People v. Johnson*, 237 Ill. 2d 81, 90 (2010), for factors this Court should apply to determine whether a person has a reasonable expectation of privacy (St. Br. at 7). For one, *Johnson* concerned the propriety of the search of a car. But as detailed in the previous section, where a dwelling is concerned, "there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." (Emphasis in original.) *Kyllo*, 533 U.S. at 33–34. *Johnson* is thus inapplicable.[6]

Specifically, the State asserts that Lindsey did not own the motel hallway (St. Br. at 7). The area the State discusses is more accurately described as an alcove, made evident by its assertion that room 129, which was located outside the alcove, could not be "accessed from the hallway" (St. Br. at 7; R28–31; Supp. E. 4–6). In any event, it makes no difference that Lindsey did not own the area outside of his motel room because property rights are not the sole measure of Fourth Amendment protections,. *Katz*, 389 U.S. at 359–61. The State also asserts Lindsey

[6] Even if *arguendo Johnson* did apply, the State's assertion, that Lindsey had no subjective expectation of privacy in his room because he said he was staying in room 129, is inaccurate (St. Br. at 7). The police questioned Lindsey twice, and the second time he said he was staying in room 130 (C17). In any event, it is undisputed that the door to Lindsey's motel room was closed—an objective indication that what was inside his room would remain private.

had no right to exclude others from this area (St. Br. at 7–8). The State misapprehends the expectations of a motel guest. Society recognizes as reasonable that motel guests have *some* expectation to exclude people from the area outside of their rooms, based on certain norms of behavior in a multi-unit dwelling space, including a motel. This includes the expectation that no one will "set up chairs and have a party in the hallway right outside the door." *Whitaker*, 820 F. 3d at 853. This conforms with the expectation that there will be peace and quiet so that guests and apartment residents can retreat, rest, and sleep. *See Kyllo*, 533 U.S. at 31 (recognizing right to retreat into home as core of Fourth Amendment protection). Indeed, guests can exclude motel staff from approaching the door by posting a "do not disturb" sign. Here, where the room was enclosed in an alcove, Lindsey had even more of an expectation to exclude people from the area (R28–31; Supp. E. 5–6).

Critically, society recognizes that what the occupant of a hotel room *does not* expose by plain sight, sound, or smell, will remain private. *Id.*; *see United States v. Burns*, 624 F. 2d 95, 100 (10th Cir. 1980) (applying privacy-based analysis to hotel room and reasoning that what is "knowingly" exposed to plain sight, sound, and smell is not constitutionally protected). For example, common experience dictates that society does not expect anyone, let alone a police officer, to traverse the motel walkways and place a stethoscope on a door to listen to conversations going on inside the room. *Whitaker*, 820 F. 3d at 853. It would be customary for a hotel guest to ask that person to leave, and contact hotel management or law enforcement to aid in excluding them if necessary. It follows that Lindsey had

some ability to exclude people from the area outside his motel room, based on his expectation of privacy in his room.

But the State contends that "legitimate expectations of privacy do not extend to the area immediately outside the room" (St. Br. at 20–21). The State cites *Eichelberger* and *Agapito* for the proposition that Lindsey had a reduced expectation of privacy in the area outside of his room (St. Br. at 7–8). As detailed in Section A, these cases do not stand for the proposition that the defendants had *no* reasonable expectation of privacy relative to hotel hallway (St. Br. at 7–8, 20–21). *Eichelberger*, 91 Ill. 2d at 366; *Agapito*, 620 F.2d at 331. Further, the State's citation to cases concerning commercial establishments are inapposite (St. Br. at 8), as motels contain *motel rooms* which enjoy Fourth Amendment protections. *Stoner*, 376 U.S. at 490; *Eichelberger*, 91 Ill. 2d at 366. Thus *Donovan v. Dewey*, 452 U.S. 594, 597–99 (1981), is inapplicable because it concerned the constitutionality of a federal regulation authorizing warrantless inspections of underground surface mines (St. Br. at 8). The State's citation of the footnote of an unpublished federal case also is inapposite because that case concerned the propriety of a *Terry* stop in a motel hallway. *United States v. Dockery*, 738 F. App'x 762, 764, n. 4 (3d Cir. 2018). As the Appellate Court reasoned, Lindsey had a justifiable expectation of privacy that the details of what was inside of his room would remain private and go unintercepted, which was violated when the government, while standing in the area outside his room, focused the dog sniff on the seams of his door to discover what was previously unknown. *Lindsey*, 2018 IL App (3d) 150877, ¶¶ 16–24. The State thus misapprehends the applicable law.

If this Court decides that the dog sniff of Lindsey's motel room door is not a search within the meaning of the Fourth Amendment based exclusively on the nature of area outside his door, the practical effect could result in more "monitoring" by drug-detection dogs in some dwelling spaces but not others. If drug-detection dogs can be released through the alcoves, hallways, and outer perimeter walkways of motels that provide less-stable, transient housing, but not those of lease-type rental buildings, police will use their limited resources in the most accessible areas, resulting in a potentially discriminatory effect. *Cf.* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 Geo. Wash. L. Rev. 1265, 1281–87 (1999) (suggesting discriminatory impact of "racial tilt in drug enforcement" due in part to limited police resources which "drive" law enforcement to police certain spaces because cost of policing those spaces is lower than in other spaces).

The State also asserts that dog sniffs are not Fourth Amendment searches because they reveal only the presence of contraband (St. Br. at 8–9, 17–18, 20). The cases the State relies on are distinct because they concerned the use of a drug-detection dog on objects public, while the police used the drug-detection dog here on the door of a dwelling. *See Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (dog sniff of car trunk on public road during lawful traffic stop); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (dog sniff of car at highway checkpoint); *United States v. Place*, 462 U.S. 696, 707 (1983) (dog sniff of luggage located in "public place" of an airport); *People v. Bartlett*, 241 Ill. 2d 217, 226–31 (2011) (dog sniff of car during traffic stop); *People v. Bew*, 228 Ill. 2d 122, 130 (2008) (same). A person's expectation of privacy in their car is less substantial than in their residence. *Arizona v. Gant*, 556 U.S. 332, 345 (2009). Under the precedent of the Supreme Court and

this Court, the door of a hotel or other multi-unit dwelling space has been treated like the door of a home and not the door of a car or the surface of a piece of luggage in an airport. *Stoner*, 376 U.S. at 490; *Eichelberger*, 91 Ill. 2d at 366; *see also Whitaker*, 820 F. 3d at 853 (holding that *Caballes* and *Place* did not "implicate[] the Fourth Amendment's core concern of protecting the privacy of a home."); *Thomas*, 757 F.2d at 1367 ("It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can never be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy."). The Supreme Court has not held that a dog sniff can never be a Fourth Amendment search, since the use of a drug-detection dog on the door of a residence is. *Jardines*, 569 U.S. at 10–12.

Moreover, the Court's reasoning in *Caballes* indicated that its holding was not inconsistent with *Kyllo*, on which Lindsey relies. *See Caballes*, 543 U.S. at 409 (describing holding as "entirely consistent" with *Kyllo*). While the Court in *Caballes* reasoned in part that a dog sniff did not expose non-contraband items that would otherwise remain hidden from public view, its holding also was dependent on the fact that the dog sniff concerned the trunk of a car:

> The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband *in the trunk of his car*. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

(Emphasis added.) *Id.* at 410. *Caballes* thus did not overrule *Kyllo*'s explicit holding that, "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S.

at 37. Thus, the sanctity of the home within the meaning of the Fourth Amendment is not measured by the absence or presence of contraband, or lawful or unlawful activity. The kind of "ends justifies the means" analysis the State puts forth is not applied to the detection of any other kind of contraband in a dwelling. The holding that dog sniffs of objects in public are not searches therefore does not apply to the dog sniff of Lindsey's motel room door.

If this Court is not persuaded that the dog sniff here is distinct from dog sniffs of objects in public, the dog sniff here is not controlled by *Caballes* because it was not limited to the detection of contraband. In 2013, the Illinois General Assembly decided that some use of cannabis was legal, and therefore, some substances previously deemed contraband were no longer so classified. *See* 410 ILCS 130 *et seq*. (eff. Jan. 1, 2014) (Compassionate Use of Medical Cannabis Pilot Program). The law was put into effect nearly a year-and-a-half before the dog sniff of Lindsey's door in April of 2015 (C17). The warrant here specified that the police sought cannabis and/or a controlled substance, but did not indicate whether Rio the dug-detection dog was trained only at detecting a particular kind of contraband, let alone the heroin that was eventually discovered (C15; R33–34). It necessarily follows that the positive alert of Lindsey's motel room could have indicated the presence of a substance *not* designated as contraband at the time of the search. *See*, *e.g.*, *People v. McKnight*, 2019 CO 36, ¶¶ 7, 43 (holding that dog sniff of exterior of a car is a search requiring probable cause because it violates reasonable expectation of privacy in lawfully possessing some amount of cannabis). As a result, the *Caballes* Court's finding that a dog sniff is not a search because

it detects and reveals only substances "that no individual has any right to possess" no longer applies here. *Caballes*, 543 U.S. at 410.

It must be noted that the drug-detection dog also could have alerted to the contamination or residual odor of contraband possessed by a previous motel tenant. Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 Hous. L. Rev. 103, 116 (2009). Additionally, Justice Souter suggested in his dissent in *Caballes* that "false" dog sniff alerts undermine the majority's reasoning that sniffs are not searches because they reveal only contraband, since "the sniff is the first step in a process that may disclose 'intimate details' without revealing contraband . . ."). *Caballes*, 543 U.S. at 412–13 (Souter, J., dissenting).

The State further attempts to distinguish *Kyllo* in part because of the alleged "antiquity" of drug-detection dogs (St. Br. at 20). The State opines that the *Jardines* majority "suggested" the outcome would be different under a privacy-based approach because the proposition that forensic dogs "have been used by police for centuries" is relevant to a privacy-based approach (St. Br. at 20). The State points to the majority's finding that the "antiquity of the tools" was irrelevant where there is a physical intrusion of the home and the curtilage (St. Br. at 20). *Jardines*, 569 U.S. at 11. But the Court did not effectively find, or even imply, that the alleged "antiquity" of the tool consequently was relevant to a privacy-based analysis, let alone find that it was a correct characterization of the nature of drug-detection dogs. Notably, in his dissent in *Kyllo*, Justice Stevens foresaw the apparent dissonance between *Caballes* and *Kyllo* for dog sniffs of residences, but acknowledged that while the majority held a dog sniff in public did not disclose anything but

the presence or absence of narcotics, a dog sniff of a dwelling would be a Fourth Amendment search under the *Kyllo* majority's decision. *Kyllo,* 533 U.S. at 47–48 (Stevens, J., dissenting). As a result, the State's inference is baseless.

Additionally, drug-detection dogs are far from tools of "antiquity." The government only began training dogs in detecting illegal substances in 1968. Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 Buff. L. Rev. 81, 135 (2013). Moreover, Justice Kagan characterized drug detection dogs as "highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents as to convey clear and reliable information to their human partners. . . . They are to the poodle down the street as high-powered binoculars are to a piece of plain glass." *Jardines*, 569 U.S. at 12–13 (Kagan, J., concurring). The Second Circuit in *Thomas*, 757 F. 2d at 1367, found the use drug-detection dogs "is not a mere improvement of [an officer's] sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument." *Whitaker* characterized a drug-detection dog as "a sophisticated sensing device not available to the general public," that detects something "otherwise . . . unknowable ." *Whitaker*, 820 F. 3d at 853. This includes "alerting the handler to the presence of odors at almost non-existent levels." *Id*. at 853, n. 1 (citing Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 Hous. L.Rev. 103, 116–31 (2009)). The court further reasoned, "[l]ike any technology, it is a tool that must be deployed in a particular way by a trained handler to be effective. (*Citation*.) And like other sophisticated detection tools, the results and accuracy of dog searches are subject to detailed research and analysis." *Id*. Drug-

detection dogs are therefore a more recent phenomenon and not tools of "antiquity" and require training beyond the reach of the general public.

The State also argues that not all uses of sense-enhancing devices are Fourth Amendment searches, and cites to government use of a helicopter to observe a greenhouse, a flashlight to see into a barn, an airplane to view the outside of the defendant's property, and a searchlight to view cases of liquor on a boat deck (St. Br. at 9). But all of these examples are inapposite because none concern the discovery of what was *inside* of a dwelling that would otherwise be undiscoverable without the use of the sense-enhancing mechanism. *Kyllo*, 533 U.S. at 40.

C. The State's property-based analysis improperly characterizes the area immediately outside of Lindsey's motel room and ignores that there is no implied license for anyone to approach the door of a dwelling and conduct a search there.

The State acknowledges that the Appellate Court did not apply the property-based approach (St. Br. at 10). The State nonetheless argues "in the interest of completeness" that *Jardines* does not apply because: (1) the motel hallway was not the curtilage of Lindsey's motel room; and (2) the police did not exceed an implied license when it brought a drug-detection dog to the door (St. Br. at 10–14). For the reasons explained in the previous two sections, such an analysis in not necessary for this Court to resolve the nature of the government's use of the drug-detection dog here. But for the sake of completeness, Lindsey addresses the State's assertions.

Curtilage

As an initial matter, the State's contention that the curtilage concept does not apply because it concerns an area adjacent to, or surrounding, a commercial establishment, is inapplicable (St. Br. at 11). This point assumes that Lindsey's room is characterized as a commercial establishment, since the State assessed

whether the hallway area *immediately adjoining the room* was curtilage. The room is actually a part of the motel. *People v. Janis*, 139 Ill. 2d 300, 304–05 (1990), therefore does not apply because it concerned the government's seizure of a stolen car on the gravel area next to the defendant's plumbing business (St. Br. at 11). The State also finds significant that, for tort purposes, Lindsey was a business invitee of the motel owner as a guest, and that he did not have the same eviction proceedings rights that an apartment renter would have (St. Br. at 11, 13). But the law could not be clearer that, for Fourth Amendment purposes, Lindsey enjoyed the same protections inside of his room as any other resident of a home. *Stoner*, 376 U.S. at 490; *Eichelberger*, 91 Ill. 2d at 366. The State fails to recognize, for example, that a hotel room can be the site of criminal offenses that can occur only in a dwelling. *See, e.g.*, *People v. Murray*, 2017 IL App (3d) 150586, ¶¶ 3–8 (defendant charged with residential burglary of hotel room).

The State otherwise contends that *Jardines* does not apply because Lindsey had no possessory interest in the motel hallway, and relies on cases in other jurisdictions that declined to find curtilage in the common areas of hotels (St. Br. at 11–13). The State fails to appreciate that a curtilage analysis is a fact-specific inquiry. This analysis is typically assessed under the factors enumerated in *United States v. Dunn*, 480 U.S. 294, 300–03 (1987), which assesses the area's proximity to the home, the presence of an enclosure, the nature of the area's use, and steps taken to protect it from observation. Under a traditional *Dunn* analysis, a person residing in a motel long-term could indeed have curtilage depending on the facts of the case. But these factors are not a formula that is dispositive in every case. *See id*. ("We do not suggest that combining these factors produces a finely tuned

formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage questions."). To be sure, the Court in *Jardines* did not cite *Dunn* or apply its factors. *Jardines*, 569 U.S. at 6–7; *cf. State v. Edstrom*, 916 N.W.2d 512, 526 (Minn. 2018), *cert. denied*, 139 S. Ct. 1262 (2019) (Lillehaug, J. dissenting) (questioning relevance of *Dunn* factors to curtilage cases involving areas immediately surrounding or adjacent to dwelling, opining their usefulness applies to cases that determine boundaries between curtilage and "open fields.").[7] As a result, it does not follow that there cannot be curtilage in a motel.

The State also improperly focuses on the motel hallway instead of the threshold of Lindsey's motel room. The alcove where Lindsey's room was located was shielded by another door (R28–31). There, the police used the drug-detection dog to sniff the seams of Lindsey's door and the area immediately in front of it (R30–31, 34). This area was the only means for Lindsey's egress and ingress into the room, which was tied to Lindsey's right to retreat. *Kyllo*, 533 U.S. at 31. This area was thus "intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *See California v. Ciraolo*, 476 U.S. 207, 212–13 (1986). As such, the facts support a curtilage finding because the area was the threshold of the room itself. *See United States v. Hopkins*, 824 F. 3d 726, 732 (8th Cir. 2016) (finding "area immediately in front of" defendant's door of rented townhome was curtilage where it was within a foot of townhome, used everyday by residents, and "daily experience" suggested it was curtilage despite not being enclosed or protected from observation). If this Court finds there is

[7] It is also worth noting that a curtilage finding is not even necessary to hold that a Fourth Amendment search by virtue of a trespass onto property has occurred. *See*, *e.g.*, *United States v. Jones*, 565 U.S. 400, 404–05 (2012).

curtilage and that *Jardines* applies, it would be a logical extension of its decisions in *People v. Burns*, 2016 IL 118973, ¶¶ 44–45, and *People v. Bonilla*, 2018 IL 122484, ¶¶ 27–32, that the government's use of a drug-detection dog on the door of a multi-unit dwelling is a Fourth Amendment search.

The State alleges that this Court adopted the "minority position" in *Burns* and *Bonilla* (St. Br. at 11–12). But the case law on whether police use of a drug-detection dog in the common area of a multi-unit dwelling is a search is not as clear-cut as the State purports. The Second Circuit in *Thomas* and Seventh Circuit in *Whitaker* agree with this Court that police use of drug-detection dogs in apartment buildings are Fourth Amendment searches. *See Whitaker*, 820 F. 3d at 851–54 (applying privacy-based approach to finding dog sniff of apartment door was a Fourth Amendment search); *Thomas*, 757 F. 2d at 1366–67 (same). The Eighth Circuit also has held that government use of a drug-detection dog on the door of a townhome is a Fourth Amendment search. *See Hopkins*, 824 F. 3d 729–32 (8th Cir. 2016) (finding use of drug-detection dog within six to eight inches of townhouse door where dog "actually sniffed the creases of the door" before alerting was a Fourth Amendment search because area immediately in front of townhouse door was curtilage); *United States v. Burston,* 806 F. 3d 1123, 1127–28 (8th Cir. 2015) (finding use of drug-detection dog within six to ten inches of residence window before alerting was a Fourth Amendment search because area was curtilage).[8]

[8] The Connecticut Supreme Court also held that dog sniffs of apartment buildings are Fourth Amendment searches under the Connecticut State constitution. *State v. Kono*, 152 A.3d 1, 22 (Conn. 2016). The Connecticut Appellate Court found that under a privacy-based approach, a dog sniff of a motel door was not a Fourth Amendment search, but that case is currently being reviewed by the Supreme Court of Connecticut. *State v. Correa*, 197 A.3d 393, 409 (Conn. 2018), *cert granted by State v. Correa*, 199 A. 3d 19 (Conn. 2019).

Conversely, the State cites decisions from three states and the First Circuit that declined to find dog sniffs of doors in multi-unit buildings are searches (St. Br. at 11, n.2).[9] Nationally speaking, the law is thus much closer to being evenly split on this issue.

The State otherwise cites two state appellate court decisions and one Second Circuit opinion (discussed later in the State's good-faith analysis) concerning the use of drug detection dogs in hotel common areas (St. Br. at 12).[10] But these cases focus on the hallway and not the area immediately outside the door. In *Sanders v. Commonwealth*, 772 S.E.2d 15, 22–23 (Va. Ct. App. 2015), the court found that *Jardines* did not apply because there was no curtilage in the hotel hallway where the defendant had no possessory interest and other people could use it. The court in *State v. Foncette*, 356 P. 3d 328, 331 (Az. Ct. App. 2015), made the same determination. As detailed above, these findings are inapplicable here.

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[9] The State also cites three unpublished cases for the proposition that the dog sniff of an apartment common area is not a search, but they are neither binding nor applicable. *Seay v. United States*, No. 14-0614, 2018 WL 1583555, at *4-5 (D. Md. Apr. 2, 2018), concerned a claim of ineffective assistance of counsel. Both *United States v. Mathews*, No, 13 CR 79, 2013 WL 5781566, at *3 (D. Minn. Oct. 25, 2013), and *United States v. Penaloza-Romero*, No, 13 CR 36, 2013 WL 5472283, at *7 (D. Minn. Sept. 30, 2013), are controlled by the Eighth Circuit, which affirmed *Mathews* by applying the good-faith exception, but reserved judgment on whether the sniff was a search. *United States v. Mathews*, 784 F.3d 1232, 1235 (8th Cir. 2015). And as detailed above, the Eighth Circuit has held that a dog sniff of common area of a townhome is a search. *Hopkins*, 824 F.3d 729–32.

[10] Again, the State cites two unpublished federal cases that are not binding in any jurisdiction (St. Br. at 13). These courts also applied the property-based approach to the common area and misapprehended *Caballes*, as detailed in the previous section, in applying a privacy-based approach. *United States v. Lewis*, No. 1:15-CR-10-TLS, 2017 WL 2928199, at *7–8 (N.D. Ind. July 10, 2017); *United States v. Legall*, 585 F. App'x 4, 5–6 (4th Cir. 2014).

Both *Sanders* and *Foncette* also applied a privacy-based analysis that proceeded much like a curtilage analysis. That analysis focused on those defendants' reasonable expectation of privacy in the physical space *outside* of the room, even though the positive alert purported to discover what was *inside* of the room. *Sanders*, 772 S.E.2d at 23–25; *Foncette*, 356 P. 3d at 331–32. It is also worth noting the *Sanders* court's finding that the dog in that case did not detect anything that was inside of the room because the odors "escaped" and "intermingled" with "public airspace" when the dog sniffed the door "jambs," *i.e.*, frame, is unsound. *Sanders*, 772 S.E.2d at 25. Police use of a drug-detection dog on the door of a dwelling purports to discover and seize what is *inside* of the room and *not* in the hallway. *See United States v. Hayes*, 551 F. 3d 138, 145 (2d Cir. 2008) (distinguishing dog sniff of bag of contraband in brush outside of home from dog sniff of apartment hallway and door in *Thomas*, 757 F.2d at 1367: "A critical consideration in *Thomas*, one not present here, was that the canine there smelled the presence of narcotics located inside the defendant's home."). Such use of a dog sniff violates a person's reasonable expectation of privacy against people, let alone the government, snooping in the hallway to discover what is inside the dwelling unit. *Lindsey*, 2018 IL App (3d) 150877, ¶ 24; *Whitaker*, 820 F. 3d at 853. As such, this Court should not be persuaded by these state appellate cases.

But as detailed in the previous section, the curtilage concept is not necessary to the disposition of this case. The Appellate Court applied the privacy-based approach employed in *Kyllo* because the police used the vantage point of the area outside of Lindsey's room to deploy a sense-enhancing tool and discover what was otherwise undetectable inside of his dwelling. *See* discussion *supra* Section A. By focusing only on the space outside of Lindsey's motel room, the State disregards

that the applicable Fourth Amendment interest centers *within* Lindsey's dwelling. *Kyllo*, 533 U.S. at 40; *Katz*, 389 U.S. at 359–61. It therefore does not follow that if Lindsey's motel room lacked curtilage, he lacked Fourth Amendment protection in his dwelling.

Critically, the practical effect of applying a privacy-based approach to dog sniffs of dwellings, where a traditional curtilage concept and analysis do not apparently or readily apply, militates against the drawing of "arbitrary lines" between single-family homes and other multi-unit dwellings, such as apartments, split-level duplexes, and garden apartments whose doors "open directly to the outdoors." *Whitaker*, 820 F. 3d at 854; *see also Burns*, 2016 IL 118973, ¶¶ 97 (Garman, J, concurring) ("Recognizing that the fourth amendment interest here centers within the home likewise produces a uniform result for multiunit dwellings irrespective of whether the unit's door is within a locked building, within an unlocked building, or opens directly onto outdoor private property."). The *Whitaker* Court found that if Fourth Amendment protections extend only to single-family homes, it would apportion such rights "on grounds that correlate with income, race, and ethnicity." *Id.* Relying on the Census's American Housing survey of 2013, the Court reported that 67.8% of White households lived in single-unit houses, followed by 52.1% of Hispanic households, and 47.2% of Black households. *Id.* Additionally, 84% of single-unit households earned more than $120,000 and 40.9% earned less than $10,000. *Id.*; *People v. Bonilla*, 2018 IL 122484, ¶ 26 (characterizing application of Fourth Amendment protection to dog sniff of single-family residences but not apartments as "a distinction with an unfair difference"). The application of the privacy-based approach to multi-unit dwellings where curtilage is not readily apparent thus avoids the potentially discriminatory effect of police use of drug-

detection dogs on some dwellings but not others, as discussed in Section B.

Implied License

The State also argues that the police in this case did not exceed any implied license because the area the police entered was accessible to the public and it was not "customary for motel guests to limit or even be aware of who may enter unlocked common areas of the hotel" (St. Br. at 13). In applying *Jardines* to support this point, the State misapprehends the full extent of the Court's finding in that case. *Jardines*, 569 U.S. at 8–9. Recognizing that a license can be "implied from the habits of the country," the Court in *Jardines* found that in the case of a single-family home, there is an implied license for people to approach and knock on the door. *Id.* at 8. But the police conduct objectively revealed that their purpose was to conduct a search because of the use of a drug-detection dog. *Id.* at 9. The police thus exceeded an implied license because there is no "customary invitation" for *anyone* to "introduc[e] a trained police dog to explore the area around the home in the hopes of discovering incriminating evidence . . ." *Id.*

Applying the concept of customary invitation here, the State's analysis of whether an implied license was exceeded is essentially incomplete. The *Jardines* concurrence recognized that "the law of property naturally enough influence[s] our *shared social expectations* of what places should be free from governmental incursions." (Emphasis added.) *Id.* at 13–14. The *Jardines* Court's license analysis thus informs the privacy-based analysis here of whether Lindsey had a reasonable expectation of privacy that no one would stand at his door to detect what was otherwise undiscoverable inside of his room. While it may be customary for a person to approach a motel door and knock, there is no implied license for anyone to approach the door of a room that is treated as a residence for Fourth Amendment

purposes and conduct a search there. It follows that because a motel room enjoys the same Fourth Amendment protection as a home, it should likewise be free from "governmental incursions" at the door. *Id.*; *Lindsey*, 2018 IL App (3d) 150877, ¶ 24; *Whitaker*, 820 F. 3d at 851–54; *Thomas*, 757 F. 2d at 1366–67. Such a result creates a predictable, uniform body of law on which citizens and law enforcement alike can rely.

D. The good-faith exception should not apply because the police could not have relied on any precedent to authorize the warrantless use of a drug-detection dog on Lindsey's motel room door.

The State argues that if this Court finds the dog sniff of Lindsey's dwelling was a Fourth Amendment search, the evidence should not be suppressed and instead, the good-faith exception to the exclusionary rule should apply (St. Br. at 14–21). On direct appeal, the State conceded the police could not have relied on any binding precedent to authorize the warrantless dog sniff of Lindsey's motel room door. *Lindsey*, 2018 IL App (3d) 150877, ¶ 30. But here, the State's main assertion is that the good-faith exception should apply because the police relied on binding appellate precedent that motel room guests have a reduced expectation of privacy and that dog sniffs are not Fourth Amendment searches (St. Br. at 14–18). The State further asserts that the "legal landscape" would not have led the police to suspect that their conduct was wrong (St. Br. at 18–19). Because there was sufficient binding precedent establishing that a reasonably well-trained officer would have known the use of a drug-detection dog on the door of Lindsey's dwelling was a search, the State is wrong.

It is well-established that where police obtain evidence by violating a defendant's constitutional rights, the evidence should be suppressed under the "fruit of the poisonous tree" doctrine. *New York v. Harris*, 495 U.S. 14, 18–19 (1990);

Wong Sun v. United States, 371 U.S. 471, 484–87 (1963); *People v. Bonilla*, 2018 IL 122484, ¶ 35. The exclusionary rule provides that where a defendant's Fourth Amendment rights are violated, the evidence will be suppressed if the benefit of deterring the police misconduct that resulted in the violation, *i.e.* preventing future Fourth Amendment violations, outweighs the cost of exclusion. *People v. LeFlore*, 2015 IL 116799, ¶¶ 23–24. However, the good-faith exception to the exclusionary rule will apply where "'a reasonably well-trained officer would have known the search was illegal in light of all the circumstances.'" *Burns*, 2016 IL 118973, ¶ 52 (quoting *LeFlore*, 2015 IL 116799, ¶ 25). This includes reliance on binding precedent that specifically authorized a particular practice but was subsequently overruled. *Davis v. United States*, 564 U.S. 229, 241 (2011); *LeFlore*, 2015 IL 116799, ¶¶ 29–31. Consequently, where no binding authority authorizes the police conduct at issue, the good-faith exception may not apply. *Burns*, 2016 IL 1158973, ¶ 68; *see Whitaker*, 820 F.3d at 854–55 (finding no reasonable reliance by police on appellate precedence where "no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant."). It is the State's burden to prove the good-faith exception applies. *People v. Turnage*, 162 Ill. 2d 299, 313 (1994).

The Appellate Court held that the good-faith exception should not apply here. *Lindsey*, 2018 IL App (3d) 150877, ¶¶ 30–37. The Court found in part that a reasonably well-trained officer would have known that a warrantless dog sniff of Lindsey's motel room door to detect what was inside of his room violated the Fourth Amendment. *Id.* at ¶¶ 30–35. Specifically, the police would have known that a motel room guest enjoys the same Fourth Amendment protections as the

resident of any other home. *Stoner*, 376 U.S. at 490; *Eichelberger*, 91 Ill. 2d at 366. And while this Court's precedent also established that a motel guest has a reduced expectation of privacy in the area surrounding a motel room, this expectation nevertheless includes the expectation that what is undetectable outside of the room will remain private. *Eichelberger,* 91 Ill. 2d at 366 (*citing Burns*, 624 F. 2d at 100); *Agapito*, 620 F. 2d at 328–32.

The State asserts this reduced expectation of privacy meant Lindsey had no expectation of privacy in the area surrounding a motel room (St. Br. at 16–17). But as argued under section B, the State misapprehends the full extent of a person's expectation of privacy in a common area of a motel, as the State disregards that Lindsey's reasonable expectation of privacy in his room was implicated when the police brought a drug-sniffing dog to the door of his dwelling unit. *See* discussion *supra* Section B. Recently, this Court found that the use of a drug-detection dog was distinct from overhearing an audible conversation in one of the units. *Bonilla*, 2018 IL 122484, ¶¶ 41–42. While *Bonilla* was decided after the dog sniff of Lindsey's room (St. Br. at 18), the same reasoning should apply here.

The State's misapprehension is further borne out in its application of *Agapito* (St. Br. at 17). The State contends that *Agapito* demonstrates a motel guest's reduced expectation of privacy because in that case, the police did not conduct a search where they rented a hotel room adjoining the defendant's room, pressed their ears to the door, and overheard the defendant's audible conversation (St. Br. at 16–17). *Agapito*, 620 F. 2d at 331. But the State fails to acknowledge that the *Agapito* court's analysis relied on two distinct grounds. First, the police used only the "naked human ear" to listen to the defendant's conversation, and did not use any sense-enhancing device. *Agapito*, 620 F. 2d at 330. Second, because the police rented

the room next door, the court declined to restrict the officers' movements and found that the government did not violate any reasonable expectation of privacy. *See Id.* at 330–31 ("What can be heard by the naked ear, when the ear is where it has a right to be, is not protected by the Fourth Amendment."). Thus, the police conduct in *Agapito* was not a search because the defendant did not have a reasonable expectation of privacy that people in the adjoining rooms would not overhear his audible conversation. The facts and holding in *Agapito* are thus quite distinct from the instant case. What is more, this Court rejected a similar argument in *Bonilla*, wherein the State argued that the police could have relied on *People v. Smith*, 152 Ill. 2d 229 (1992), for the holding that apartment residents have no reasonable expectation of privacy in common areas. *Bonilla*, 2018 IL 122484, ¶¶ 41–42. This Court held that *Smith* was not applicable because it did not hold that residents have no expectation of privacy in common areas of apartment buildings, but concerned a person's reasonable expectation of privacy in what police overheard while standing in a common area of a multi-unit building. *Id.*

The Appellate Court here also found that under *Kyllo*, a reasonably well-trained officer would have known that where the government uses sense-enhancing technology not available to the general public, in order to gain information about the inside of a dwelling that was otherwise undetectable absent a physical intrusion, it is a Fourth Amendment search. *Lindsey*, 2018 IL App (3d) 150877, ¶ 33; *Kyllo*, 533 U.S. at 40; *see* discussion *supra* Section A. The State asserts that an officer would not have relied on *Kyllo* because the Supreme Court in *Caballes* rejected that argument (St. Br. at 20). As detailed in section B, the Court in *Caballes* did not hold that a dog sniff of a residence was not a search; rather, the Court distinguished the detection of contraband in an object in public (in that case, the

trunk of a car), from the detection of lawful activity in a home. *Caballes*, 543 U.S. at 409–10; *see also Caballes*, 543 U.S. at 417 ("The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car . . ."). (Souter, J., dissenting); *see also* discussion *supra* Section B. The Court described its holding as "entirely consistent" with *Kyllo* (*Caballes*, 543 U.S. at 409), wherein the Court did not distinguish which activities in a residence have Fourth Amendment protection because "[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37. The State's argument is therefore meritless.

For similar reasons, the State's assertion that a reasonably well-trained officer would have relied on precedent that a dog sniff of objects in public are not Fourth Amendment searches also fails (St. Br. at 17–18). As detailed in Section B, these cases are distinct because the Supreme Court in *Jardines* definitively held that police use of a drug-detection dog on a residence is indeed a Fourth Amendment search. *Jardines*, 569 U.S. at 9–11; *see* discussion *supra* Section B. The Appellate Court found that a reasonably well-trained officer would have known that police use of a drug-detection dog to sniff the area outside of a defendant's dwelling was a Fourth Amendment search. *Lindsey*, 2018 IL App (3d) 150877, ¶ 34; *Jardines*, 569 U.S. at 9–11. The Appellate Court also noted that while *Jardines* was decided under the property-based legal theory of assessing Fourth Amendment searches, three of the five majority justices would have also applied the privacy-based

legal theory, which is applicable to the instant case. *Lindsey*, 2018 IL App (3d) 150877, ¶ 34; *Jardines*, 569 U.S. at 12–16.

The State contends that the Appellate Court improperly faulted the police for failing to follow *Jardines* because the majority decided the case using a property-based approach, and the officers would not have relied on the privacy-based approach that was discussed in the concurrence (St. Br. at 20). But the State's argument strains what is meant by reasonable reliance. A reasonably well-trained officer would have known the essential holding of *Jardines*—that a dog sniff of a residence is a Fourth Amendment search—and not the intricate nuances and distinctions between the property-based and privacy-based approaches. *Cf. United States v. Katzin*, 769 F.3d 163, 176 (3d Cir. 2014) ("While reliance is likely reasonable when the precise conduct under consideration has been affirmatively authorized by binding appellate precedent, it may be no less reasonable when the conduct under consideration clearly falls well within rationale espoused in binding appellate precedent, which authorizes nearly identical conduct."). The relevant case law discussed in this brief makes evident that both approaches intersect and overlap by their nature, but ultimately culminate in the same determination of whether the dog sniff violated a person's Fourth Amendment rights. *See*, *e.g.*, *Jardines v. State*, 73 So. 3d 34, 55–56 (Fla. 2011), *aff'd sub nom. Fla. v. Jardines*, 569 U.S. 1 (2013) (decision below in *Jardines* held that dog sniff of defendant's front door violated his reasonable expectation of privacy under both *Kyllo* and *State v. Rabb*, 920 So. 2d 1175, 1190–91 (Fla. Dist. Ct. App. 2006)).

Moreover, a reasonably well-trained officer also would have known that the Illinois Appellate Court applied the holding of *Jardines* to a multi-unit apartment building and held that a dog sniff of the door of that dwelling was a Fourth

Amendment search. *See People v. Burns*, 2015 IL App (4th) 140006, ¶¶ 46–49, *aff'd*, 2016 IL 118973 (case decided on January 30, 2015, or three months before dog sniff of Lindsey's door in April of 2015). A reasonably well-trained officer would have known that a dog sniff of *two* types of residences is a Fourth Amendment search. If an officer continued to rely on *Caballes* and other precedent authorizing dog sniffs of objects in public, in order to conduct a dog sniff of yet another type of residence, that officer would be "testing the waters" of what was allowable under the Fourth Amendment and *not* reasonably relying on precedent authorizing his conduct. *Burns*, 2016 IL 1158973, ¶ 68; *Whitaker*, 820 F.3d at 854–55.

The State nonetheless asserts that under the "legal landscape," a reasonably well-trained officer would have no reason to suspect that a dog sniff of a motel room door was wrong (St. Br. at 18–19). The State cites *United States v. Roby*, 122 F. 3d 1120, 1124 (8th Cir. 1997), which held that a dog sniff of the hotel hallway did not violate the defendant's reasonable expectation of privacy, but was decided well before *Jardines* (St. Br. at 18).[11] As detailed above, *Stoner*, *Eichelberger*, *Kyllo*, *Jardines*, and *Burns* were the applicable precedent on which a reasonably well-trained officer would have relied. In light of that precedent, such an officer would not have reasonably relied on an Eighth Circuit opinion issued before *Jardines*, but on the Appellate Court's application of *Jardines* to a multi-unit residence in *Burns*. The State otherwise cites to two appellate cases from other states that

[11] *Roby* is otherwise distinguishable because the court focused its analysis on the defendant's reasonable expectation of privacy in the hotel hallway instead of inside his room and its relationship to the police presence in the hallway. *Roby*, 122 F. 3d at 1124–25. The court also reasoned that the dog sniff was akin to plain smell, which is unsound because the police could not detect the odor of contraband here without the aid of the trained drug-detection dog (R32–37). *Id.*

were decided *after* the dog sniff of Lindsey's room occurred, and two unpublished cases (St. Br. at 18–19). *Foncette*, 356 P. 3d at 331 (Arizona state appellate decision issued in August 2015); *Sanders*, 772 S.E.2d at 22–23 (Virginia state appellate decision issued in May 2015); *Lewis*, No. 1:15-CR-10-TLS, 2017 WL 2928199, at *7–8 (unpublished and issued in 2017); *Legall*, 585 F. App'x at 5–6 (unpublished). Needless to say, a reasonably well-trained officer would not have relied on any of the cases listed in the State's proposed "legal landscape."[12]

The Appellate Court also found that the evidence here should be suppressed because the police conduct at issue was not the "simple isolated negligence," discussed in *LeFlore*, but "a deliberately executed attempt to find drugs inside Lindsey's motel room," and should be deterred under the circumstances. *Lindsey*, 2018 IL App (3d) 150877, ¶ 37 (citing *LeFlore*, 2015 IL 116799, ¶ 24). The Court reasoned that the facts of the police investigation showed the police suspected Lindsey of selling narcotics, and after conducting surveillance and arresting him, they inquired about Lindsey's room from motel staff and thereafter had an officer conduct a dog sniff of his room to detect narcotics. *Id*. Without the drug-detection dog's positive alert of Lindsey's room, the warrant application lacked probable cause because it failed to specify any information about the confidential informant or the timing of his/her alleged information, as well as the nature of the failed controlled buy or when and where it occurred (C15–18). *Lindsey*, 2018 IL App

[12] The State's citation of the application of the good-faith exception to the dog sniff of a hotel hallway in *Blankenship v. State*, 5 N.E.3d 779, 784–85 (Ind. Ct. App. 2014), is inapposite because the court in that decision reserved judgment on whether the dog sniff was a search, but found that the good-faith exception applied where the officers could reasonably rely on the search warrant (St. Br. at 19). Since the State did not make that argument here, the argument is waived. *People v. Carter*, 208 Ill. 2d 309, 319 (2003).

(3d) 150877, ¶ 37. Given that a reasonably well-trained officer would have known that conducting a dog sniff of a motel room door was "testing the waters" of Fourth Amendment law, this Court should deter the "sufficiently deliberate" and "sufficiently culpable" police conduct that occurred in this case. *LeFlore*, 2015 IL 116799, ¶ 24.

For these reasons, the good-faith exception to the exclusionary rule is not applicable to the dog sniff of Lindsey's motel room door. *Burns*, 2016 IL 1158973, ¶¶ 52, 68; *LeFlore*, 2015 IL 116799, ¶ 24–31; *Whitaker*, 820 F.3d at 854–55.

Accordingly, Jonathan Lindsey respectfully asks that this Honorable Court affirm the Appellate Court's decision granting Lindsey's motion to suppress the evidence seized as the result of the warrantless dog sniff of his motel room door, and vacate Lindsey's conviction.

If this Court should find that the police use of a drug-detection dog here was not a Fourth Amendment search, or that the good-faith exception should apply, Lindsey asks this Court to affirm the Appellate Court's unanimous decision to vacate his court fines and DNA analysis fee. *Lindsey*, 2018 IL App (3d) 150877, ¶¶ 39–50.

CONCLUSION

For the foregoing reasons, Jonathan Lindsey, respondent-appellee, respectfully requests that this Honorable Court affirm the Appellate Court's well-reasoned decision that the government's use of a drug-detection dog on his motel door constituted a warrantless search in violation of the Fourth Amendment, and that the good-faith exception does not apply.

Respectfully submitted,

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Deputy Defender

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COUNSEL FOR RESPONDENT-APPELLEE

CERTIFICATE OF COMPLIANCE

I, Editha Rosario-Moore, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 43 pages.

/s/Editha Rosario-Moore
EDITHA ROSARIO-MOORE
Assistant Appellate Defender

APPENDIX

Jonathan Lindsey, Respondent Appellee

Judgment A-1

Notice of Appeal A-4

Appellate Court Decision A-5

Warrant Application A-23

Photo exhibits A-27

E-FILED
8/22/2019 2:39 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

IN THE CIRCUIT COURT OF ROCK ISLAND COUNTY, ILLINOIS
FOURTEENTH JUDICIAL CIRCUIT
CRIMINAL DIVISION

Date of Sentence: 11-16-2015

THE PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff,)
vs.)
JONATHAN A. LINDSEY,)
DOB: 05-24-1986)
Defendant.)

FILED In the CIRCUIT COURT of ROCK ISLAND COUNTY CRIMINAL DIVISION
NOV 19 2015
Clerk of the Circuit Court

NO. **15-CF-00290**
CT 1 UNLAWFUL POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE (Class - X Felony)

JUDGEMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant **Jonathan A. Lindsey**, **DOB: 05-24-1986** has been adjudged guilty of the offenses enumerated below,

IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months for each offense

CNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	UNLAWFUL POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE	04-27-2015	720 ILCS 570/407(b)(1)	X Felony	7 YEARS	3 YEARS

THE COURT FINDS that the defendant is entitled to receive credit for time actually served in custody of Rock Island County Sheriff's Department from **4/27/15 until the arrival to the Department of Corrections.**

IT IS FURTHER ORDERED that the Clerk of the Court deliver a copy of this order to the Sheriff

IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver the defendant to the Department of Corrections which shall confine said defendant until expiration of the defendant's sentence or until the defendant is otherwise released by operation of law.

IT IS FURTHER ORDERED that the defendant's MSR shall run concurrent with MSR violation in 12CF270

This order is effective immediately.

ORDERED: 11/19/15

F. Michael Meersman

HONORABLE F. MICHAEL MEERSMAN

JJU/jc

C000057

IN THE CIRCUIT COURT OF ROCK ISLAND COUNTY, ILLINOIS
FOURTEENTH JUDICIAL CIRCUIT
CRIMINAL DIVISION

Date of Sentence: 11-16-2015

THE PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff,) NO. **15-CF-00290**
vs) CT 1 UNLAWFUL POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE (Class - X Felony)
JONATHAN A. LINDSEY,)
DOB: 05-24-1986)
Defendant.)

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY CRIMINAL DIVISION
NOV 19 2015
Clerk of the Circuit Court

JUDGEMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

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IT IS FURTHER ORDERED that the Clerk of the Court deliver a copy of this order to the Sheriff.

IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver the defendant to the Department of Corrections which shall confine said defendant until expiration of the defendant's sentence or until the defendant is otherwise released by operation of law.

1. That the defendant shall pay a $100.00 Laboratory Analysis fee to the Illinois State Police pursuant to 730 ILCS 5/5-9-1 4
2. That the defendant shall pay a mandatory drug assessment in the amount of $3000.00 pursuant to 720 ILCS 570.411.2.
3. That the defendant shall pay a Drug Street Value Fine in the amount of $500.00, pursuant to statute, $62.50 shall be forwarded to the Illinois Juvenile Drug Abuse Fund, $250.00 forwarded to Rock Island Police Department, and $187.50 forwarded to the County General Fund.
4. IT IS FURTHER ORDERED that specimens of the defendant's blood, saliva, or other tissue, as directed by the Illinois State Police, shall be collected within 45 days at a place and time designated by the Illinois State Police for genetic marker analysis pursuant to 730 ILCS 5/5-4-3(b). The defendant shall pay an analysis fee of $250 00.
5. IT IS FURTHER ORDERED that the defendant is ordered to pay the costs of prosecution herein. These fees, costs, and restitution (if applicable) are reduced to judgement against the defendant and are declared a lien upon the defendant's property.

IT IS FURTHER ORDERED that the defendant's MSR shall run concurrent with MSR violation in 12CF270.

C000058

This order is effective immediately.

ORDERED: 11/18/15

HONORABLE F. MICHAEL MEERSMAN

JJU/jc

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS
GENERAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. 15 CF 290
	)	
JONATHAN LINDSEY,	)	
	)	
Defendant.	)	

FILED in the CIRCUIT COURT of ROCK ISLAND COUNTY CRIMINAL DIVISION
DEC 14 2015
Clerk of the Circuit Court

NOTICE OF APPEAL

An appeal is taken from the Order of Judgment and sentence as described below:

1. Court to which appeal is taken:
   Third Judicial District
   1100 Columbus Street
   Ottawa, Illinois 61350

2. Name of Appellant and address to which Notices shall be sent:
   JONATHAN LINDSEY #M31694
   Stateville Correctional Center
   16830 IL-53
   Crest Hill, Illinois 60403

3. Name and address of Appellant's attorney on appeal:
   Peter A. Carusona
   Deputy Defender
   Office of the Illinois Appellate Defender
   Third Judicial District
   1100 Columbus Street
   Ottawa, Illinois 61350
   (815) 434-5531, Ext. 202

If Appellant is indigent and has no attorney, does he/she want one appointed? YES

4. Date of Judgment or Order: Sentencing 11/16/2015

5. Offense of which convicted: Guilty: Unlawful Possession with Intent to Deliver a Controlled Substance

6. Sentence: 7 years in the Illinois Department of Corrections

7. Appellant is appealing: 1) the denial of defendant's motion to suppress evidence
   2) the conviction

LOGAN LEWIS
ASSISTANT PUBLIC DEFENDER

IMAGED
C000062

2018 IL App (3d) 150877

Opinion filed October 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois.
	)	
v.	)	Appeal No. 3-15-0877
	)	Circuit No. 15-CF-290
JONATHAN LINDSEY,	)	
	)	The Honorable
Defendant-Appellant.	)	Michael F. Meersman,
	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court, with opinion.
Justice O'Brien concurred in the judgment and opinion.
Justice Schmidt concurred in part and dissented in part, with opinion.

OPINION

¶ 1 In April 2014, the police used a trained drug-detection dog to conduct a free air sniff of the door handle and seams of defendant Jonathan Lindsey's motel room. The dog alerted to the presence of drugs inside the room, and the police obtained a search warrant. During their search, they found 4.7 grams of heroin, and Lindsey was charged with unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school. Lindsey filed a motion to suppress evidence, arguing that the dog sniff violated his fourth amendment rights. The trial court denied the motion. Ultimately, the court found Lindsey guilty and entered a judgment of

conviction and a separate second judgment ordering Lindsey to pay a $3000 drug assessment fee, a $500 drug street value fine, and a $250 DNA analysis fee and to submit a DNA sample. Lindsey appealed, arguing that (1) the trial court erred when it denied his motion to suppress evidence and (2) this court should vacate his fees and fine. We reverse and remand.

¶ 2 FACTS

¶ 3 On April 27, 2014, Lindsey was arrested for driving while his license was suspended. While Lindsey was in custody, he told police he was staying in a motel room at American Motor Inn. He did not give the officers consent to search the room. Rock Island County sheriff deputy Jason Pena arrived at the American Motor Inn with a drug-detection dog and performed a free air sniff on the exterior of Lindsey's motel room door. The dog alerted to the presence of drugs in the room. Rock Island Police Department Detective Timothy Muehler obtained a search warrant and found 4.7 grams of a powdery substance later determined to be heroin. After the search, Lindsey admitted that he possessed the heroin. Lindsey was charged with one count of unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school (Class X felony).

¶ 4 In July 2015, Lindsey filed a motion to suppress evidence. In the motion, he argued that the dog sniff violated his fourth amendment rights because it constituted an unreasonable search of the corridor of his motel room. He, therefore, claimed that any evidence seized and any statements made to the officers subsequent to the search should be suppressed.

¶ 5 A hearing on the motion was held in September 2015. Rock Island Police Department Sergeant Shawn Slavish testified that a dog sniff was conducted on the door of room 130 at the American Motor Inn. He explained that "the door itself set back in a little alcove and as you stepped into the alcove to the right was Room 130 and I believe across the hall to that would be

Room 131." The door to the alcove was propped open and the area was open to the public. Pena informed Slavish that the dog had alerted the presence of drugs at the door. Afterward, the officers obtained a search warrant and searched the room.

¶ 6 Officer Pena testified that, on April 27, the Rock Island Police Department requested him to conduct a free air sniff of motel room 130. During the dog sniff, Pena explained,

> "I let him off lead and basically had him go to that side of the building actually checking for free air sniffs alongside that building. Once you reach Room 130, he changed his behavior, alerting to the odor of narcotics. In this particular instance what he did is he came up around the door handle and its seams and he—an alert would be that he would actually sit and lay down, which he did, indicating that he is in the odor of narcotics."

The dog was "within inches" of the door when he sniffed the handle and seams. The dog also searched the general area around the room but did not alert the officer about the presence of drugs until he reached room 130.

¶ 7 Kylinn Ellis testified that Lindsey was her son's father. On April 27, Ellis was in the passenger seat of her car while Lindsey was driving. The police pulled the car over, arrested Lindsey for driving without a license, and took possession of the car. Afterward, Ellis walked to American Motor Inn to charge her phone in Lindsey's motel room. When she arrived, she saw a black Suburban with tinted windows in front of the motel. She also believed someone was in the motel room because "the curtains were moving, and you can see like somebody in there" but she did not actually see a person in the room. She did not know if anyone besides Lindsey had stayed

in the motel room but she had seen clothes that were not Lindsey's in the room. As she walked up to the motel room, she was stopped by a detective who told her she could not enter the room.

¶ 8 The trial court did not find Ellis's testimony that she believed someone was in the motel room after Lindsey was arrested credible because she had testified that she did not see a person in the room and there could have been other causes, such as an air conditioning or heating unit, for the movement of the curtains. It also stated that the police had a right to bar Ellis from the motel room to secure the scene. Relying on the Eighth Circuit's decision in *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997), the court determined that Lindsey did not have a reasonable expectation of privacy in the corridor of his motel room because, unlike an apartment or house, the corridor of a motel room "was a public place of accommodation, and it was a public access area." The trial judge explained that there were no Illinois cases that addressed this issue, and although he agreed with some of the points discussed in the *Roby* dissent, he was not going to create new case law. Ultimately, the court denied the motion to suppress.

¶ 9 In October 2015, a stipulated bench trial was held. The court found Lindsey guilty and sentenced him to seven years' imprisonment and three years of mandatory supervised release. At sentencing, the court commented on his fines and fees, stating "I note that there's still monies owing there. The clerk is to take all the monies that is showing [*sic*] owing in these cases and reduce everything to judgment, including the costs here, because obviously, he doesn't have the ability to pay any of them and it's just silly to keep these files open just for money issues in relation to that."

¶ 10 In November 2015, the court entered two separate judgments. The first judgment did not list any fines or fees. The second judgment ordered Lindsey to pay a $3000 drug assessment and a $500 drug street value fine. It also ordered him to submit a specimen of his blood, saliva, or

other tissue and pay a $250 DNA analysis fee. The Illinois State Police DNA indexing lab system shows that Lindsey had submitted a swab sample on October 16, 2012. Lindsey appealed both his conviction and the imposition of fines and fees.

¶ 11 ANALYSIS

¶ 12 I. Fourth Amendment

¶ 13 A. Reasonable Expectation of Privacy

¶ 14 Lindsey argues that the trial court's denial of his motion to suppress evidence was error because the police officer's use of a drug-detection dog near his motel room door constituted a warrantless search and, therefore, violated his fourth amendment rights. He claims that case law established that a guest in a motel room is constitutionally protected under the fourth amendment and that this rule also applies to his motel door, which is a part of the structure of the motel room. He also alleges that, pursuant to *Kyllo v. United States*, 533 U.S. 27 (2001), the dog sniff violated his fourth amendment rights because a drug-detection dog was used to explore details of the motel room not previously discernible without physical intrusion.

¶ 15 To begin, Lindsey references *Stoner v. California*, 376 U.S. 483 (1964), and *People v. Eichelberger*, 91 Ill. 2d 359 (1982), to support his argument that a guest in a motel room is entitled to constitutional protections under the fourth amendment. In *Stoner*, the United States Supreme Court established that "[n]o less than a tenant of a house, or the occupant of a room in a boarding house, [citation], a guest in a hotel room is entitled to constitutional protections against unreasonable searches and seizures." *Stoner*, 376 U.S. at 490.

¶ 16 Our supreme court in *Eichelberger* concluded that a hotel occupant's reasonable expectation of privacy is *reduced* with regard to the area immediately adjoining the room and cites *United States v. Burns*, 624 F.2d 95 (10th Cir. 1980), and *United States v. Agapito*, 620

F.2d 324 (2nd Cir. 1980), to support its reasoning. In *Burns*, the Tenth Circuit stated that, in the context of conversation,

> "[m]otel occupants possess the justifiable expectation that if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear, that it will go unintercepted. Contrarily, to the extent they converse in a fashion insensitive to the public, or semipublic, nature of walkways adjoining such rooms, reasonable expectations of privacy are correspondingly lessened." *Burns*, 624 F.2d at 100.

¶ 17 In *Agapito*, the Second Circuit stated that a person has a different expectation of privacy in the corridor of a hotel room than in the curtilage of a private residence. The court explained:

> " '[D]espite the fact that an individual's Fourth Amendment rights do not evaporate when he rents a motel room, the extent of privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attributes of privacy of a home, it also possesses many features which distinguish it from a private residence: "A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of

> public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home." ' " *Agapito*, 620 F.2d at 331 (quoting *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir. 1979), quoting *Marullo v. United States*, 328 F.2d 361, 363 (5th Cir. 1964)).

¶ 18 Lindsey also cites multiple cases with varying fact patterns to support the proposition that the use of a drug-sniffing dog in the common area of a motel constitutes a fourth amendment search. In *Florida v. Jardines*, 569 U.S. 1, 3-4 (2013), the police conducted a dog sniff on the front porch of Jardines's private home. When the dog sniffed the front door, he gave a positive response for drugs, and the police obtained a search warrant. *Id.* at 4. The officers found marijuana during the search, and Jardines was charged with trafficking. *Id.* Our Supreme Court stated that the curtilage, or area immediately surrounding and associated with the home, was the "constitutionally protected extension" of the home and determined that Jardines's front porch was considered curtilage. *Id.* at 6-8. It also found that, although a visitor would have an implied license to approach the home for a brief moment, a resident does not give a police officer a "customary invitation" to use a trained police dog to investigate the area to find incriminating evidence. *Id.* at 8-9. The court declined to discuss whether the dog sniff violated Jardines's reasonable expectation of privacy. *Id.* at 11 ("The *Katz* [*v. United States*, 389 U.S. 347 (1967)] reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." (Emphases in original and internal quotation marks omitted.)).

¶ 19 Justice Kagan concurred, stating that if the case had reviewed Jardines's reasonable expectation of privacy, the Court's decision in *Kyllo*, would provide guidance. *Id.* at 14 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). In *Kyllo*, wherein the Court held that the police officers' use of a thermal-imaging device to detect heat from a private home constituted a search, the Court established that " 'Where, as here, the 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.' " *Id.* at 14 (quoting *Kyllo*, 533 U.S. 27 at 40). Justice Kagan opined that the police officers conducted a search because the officers used a trained drug-detection dog, or a "device that is not in general public use," to explore details of Jardines's home they would not have otherwise discovered without entering the home. *Id.* at 14-15.

¶ 20 In *United States v. Whitaker*, 820 F.3d 849, 850 (7th Cir. 2016), police officers obtained permission from an apartment manager to conduct a dog sniff in a locked, shared hallway of an apartment building. The dog alerted the presence of drugs at Whitaker's apartment. *Id.* The officers obtained a search warrant, found incriminating evidence, and charged Whitaker with various drug and firearm offenses. *Id.* On appeal, Whitaker argued that the use of a drug-detection dog violated his privacy interests under *Kyllo*. *Id.* at 852. The Seventh Circuit determined that, under the *Kyllo* rule, a "trained drug-sniffing dog is a sophisticated sensing device not available to the general public." *Id.* at 853. "The dog here detected something (the presence of drugs) that otherwise would have been unknowable without entering the apartment." *Id.* The court noted that Whitaker did not have "complete" reasonable expectation of privacy in his apartment hallway. *Id.* However, "Whitaker's lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy

against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Id.* The court also stated:

> "Whitaker's lack of a right to exclude did not mean he had no right to expect certain norms of behavior in his apartment hallway. Yes, other residents and their guests (and even their dogs) can pass through the hallway. They are not entitled, though, to set up chairs and have a party in the hallway right outside the door. Similarly, the fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean he could put a stethoscope to the door to listen to all that is happening inside. Applied to this case, this means that because other residents might bring their dog though the hallway does not mean the police can park a sophisticated drug-sniffing dog outside an apartment door, at least without a warrant." *Id.* at 853-54 (citing *Jardines*, 569 U.S. at 9).

The court concluded that the facts presented constituted a search under the fourth amendment and that Whitaker's rights were violated when the officers conducted a warrantless search in the hallway of his apartment. *Id.* at 854.

¶ 21 In a similar analysis, our supreme court in *People v. Burns*, 2016 IL 118973, found that the police officers' warrantless use of a sniff dog at the defendant's apartment door in a locked apartment building violated the defendant's fourth amendment right because the locked apartment building was a constitutionally protected area pursuant to *Jardines*. In *People v. Bonilla*, 2017 IL App (3d) 160457, *pet. for leave to appeal allowed*, No. 122484 (Sept. 27, 2017),

this court determined that the police officer's actions constituted a search under the fourth amendment when he entered the common area hallway of an unlocked apartment building and conducted a dog sniff of the defendant's front door. The court reached that conclusion because the common area hallway constituted curtilage under *Jardines* and *Burns*. However, both courts declined to apply the privacy-based approach because the government in both cases intruded onto constitutionally protected areas.

¶ 22 The State argues that case law establishes that a guest in a motel room is entitled to a reduced expectation of privacy. Furthermore, it claims that this court should adopt the ruling in *Roby*, 122 F.3d 1120 , as the trial court did in its decision. In *Roby*, police officers conducted a dog sniff on the floor of Roby's hotel room. *Id.* at 1122. The officers walked the dog down the hall two or three times, and the dog alerted to Roby's room. *Id.* The officers obtained a search warrant and found cocaine, and Roby was charged with possessing cocaine with intent to distribute. *Id.* at 1123. On appeal, Roby challenged the denial of his motion to suppress evidence obtained during the search of his hotel room because, *inter alia*, the dog sniff violated his fourth amendment rights. *Id.* The Eighth Circuit held that a trained dog's detection of odor in a common corridor did not violate the fourth amendment. *Id.* at 1125. It reasoned that Roby's expectation of privacy was limited in a hotel corridor because people can access the area and "[n]either those who stroll the corridor nor a sniff dog needs a warrant for such a trip." *Id.* It further noted that the fact that the dog was more skilled than a human at detecting odor does not make the dog sniff illegal. *Id.* at 1124-25. Furthermore, it stated that evidence of plain smell—similar to evidence in plain view—may be detected without a warrant. *Id.* at 1125.

¶ 23 We find that the reasoning in *Whitaker* and *Jardines* is more persuasive. Similar to a sense-enhancing technology, a trained drug-detection dog is a sophisticated sensing device not

available to the general public. See *Jardines*, 569 U.S. at 14-15 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.); *Whitaker*, 820 F.3d at 853. In this case, the drug-detection dog was used to explore the details previously unknown in Lindsey's motel room, which the Supreme Court established was entitled to constitutional protections. See *Stoner*, 376 U.S. at 490.

¶ 24 The State argues that Lindsey's reasonable expectation of privacy is reduced with regard to the area immediately adjoining the motel room. In *Whitaker*, the court recognized that the defendant did not have a complete expectation of privacy in his apartment hallway; however, this did not mean he had "no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Whitaker*, 820 F.3d at 853. Furthermore, in *Burns*, 624 F.2d at 100—the case our supreme court in *Eichelberger* relies on—the court stated that a motel guest has a *justifiable* expectation that "if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear, that it would go unintercepted." Lindsey had a justifiable expectation of privacy because, until Pena focused the free air sniff on the motel door and seams to detect the odor of drugs inside Lindsey's motel room, the smell was undetectable outside of the room. Therefore, we reject the State's argument and find that the dog sniff constituted a warrantless search in violation of Lindsey's fourth amendment rights.

¶ 25 B. Exclusionary Rule

¶ 26 Next, we address whether Pena's violation meets the good faith exception to the exclusionary rule. The State contends that it has met the good faith exception because the officer had no reason to believe that he was violating Lindsey's fourth amendment rights. Although the State acknowledges that the police could not rely on any binding precedent to *authorize* the dog

sniff or the search warrant, it argues, however, there is no precedent *prohibiting* the officers' actions in a hotel hallway and, if anything, the officers would have relied on *Roby* and similar cases as guidance.

¶ 27 Generally, courts will not admit evidence obtained in violation of the fourth amendment. *Burns*, 2016 IL 118973, ¶ 47. "The fruit-of-the-poisonous-tree doctrine is an outgrowth of the exclusionary rule providing that the fourth amendment violation is deemed the poisonous tree, and any evidence obtained by exploiting that violation is subject to suppression as the fruit of that poisonous tree." (Internal quotation marks omitted.) *Id.* The main purpose of the exclusionary rule is to deter future unlawful police conduct and fulfill the guarantee of the fourth amendment against unreasonable searches and seizures. *Id.*

¶ 28 The exclusionary rule is applied only in unusual cases when its application will deter future fourth amendment violations. *Id.* ¶ 49 (citing *People v. LeFlore*, 2015 IL 116799, ¶ 22). Exclusion of evidence is a court's last resort, not its first impulse. *Id.* In considering the good faith exception to the exclusionary rule applies in any case, the inquiry is "whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." (Internal quotation marks omitted.) *Id.* ¶ 52 (quoting *LeFlore*, 2015 IL 116799, ¶ 25). "The Supreme Court expanded the good-faith exception to the exclusionary rule to include good-faith reliance upon binding appellate precedent that specifically authorized a particular practice but was subsequently overruled." *Id.* ¶ 49 (citing *Davis v. United States*, 564 U.S. 229, 241 (2011)).

¶ 29 Illinois courts have addressed the good faith exception in the context of binding authority. *Bonilla*, 2017 IL App (3d) 160457, ¶ 24 (finding that, similar to *Burns* and *Whitaker*, United States Supreme Court and Illinois Appellate Court already ruled that a dog sniff of the front door

of a residence was a fourth amendment search, and therefore, police could not rely on the good faith exception); *Burns*, 2016 IL 118973, ¶ 68 (holding that the good faith exception does not apply because there was no binding precedent authorizing officers' conduct except for a Fourth District case prohibiting the conduct); See also *Whitaker*, 820 F.3d at 854-55 (ruling that "no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant," and therefore, good faith exception did not apply).

¶ 30 Here, the parties concede, and we agree, that there was no binding appellate precedent in effect at the time but subsequently overruled that Pena could have relied on to justify the dog sniff. In fact, there *was* sufficient binding precedent for him, as a reasonably well-trained officer, to know the dog sniff required a warrant. The dog sniff in this case occurred on April 27, 2015. At least four, and arguably five, cases decided prior to this dog sniff establish the proposition sufficiently that a reasonably well-trained officer should have known that conducting a warrantless air sniff to detect contents *inside* a hotel room violates the fourth amendment.

¶ 31 Fifty-one years prior to the search in this case, the United States Supreme Court decided, in *Stoner*, 376 U.S. at 490, that guests in hotel rooms, tenants in apartments, and residents in homes all have the same expectation of privacy in their personal space and are all entitled to the same constitutional protections against unreasonable search and seizure under the fourth amendment.

¶ 32 Thirty-three years prior to this search, the Illinois Supreme Court decided *Eichelberger*, 91 Ill. 2d 359, recognizing a hotel occupant's reasonable expectation of privacy in the hotel room—as had *Stoner*—but explicitly finding that expectation reduced with regard to the common area adjoining the room. In reaching that conclusion, our supreme court expressly relied

on two federal appeals court decisions, *Burns*, 624 F.2d at 100 ("Motel occupants possess the justifiable expectation that *if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear*, that it would go unintercepted." (Emphasis added.)), and *Agapito*, 620 F.2d at 331 ("*Granted that a tenant has standing to protect the room he occupies*, there is nevertheless an element of public or shared property in *motel surroundings* that is entirely lacking in the enjoyment of one's home." (Emphases added and internal quotation marks omitted.))

¶ 33 Fourteen years prior to Pena's search, in *Kyllo*, the Supreme Court, in a case involving the use of thermal imaging to detect activity inside a home, decided that the use of a sense-enhancing technology not available to the general public to obtain information about activities inside a home that are not visible to the naked eye and that could not be obtained without physical intrusion into the home is a search entitled to fourth amendment protection.

¶ 34 Two years prior to the Pena search, the United States Supreme Court decided in *Jardines*, 569 U.S. at 9-11, that the use of a trained drug-detection dog to sniff the area outside the defendant's private home was a fourth amendment search entitled to fourth amendment protections. The *Jardines* majority decided the case on property grounds. However, as three concurring judges noted, a trained drug-detection dog is also a sense-enhancing detection tool and its use to detect details of and activities inside a protected space that would not have been discovered without entering the home violated the defendant's reasonable expectation of privacy and would similarly constitute a fourth amendment search under a privacy analysis. *Jardines*, 569 U.S. at 14-15 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). Privacy is the basis of Lindsey's argument in this case.

¶ 35 Finally, in *People v. Burns*, 2015 IL App (4th) 140006, the appellate court opinion, issued shortly before Pena's search, found that a dog sniff of the frame around an apartment door—the same type of sniff as that in this case—was a search under the fourth amendment entitled to constitutional protection.

¶ 36 In sum, these decisions had clearly established at the time of Pena's dog's sniff of the door to Lindsey's motel room that the sniff violated his reasonable expectation of privacy in his motel room and could not have been undertaken without a warrant. The fact that subsequent decisions of the Illinois Supreme Court and our appellate courts have restated this fact with additional specificity and clarity does not undermine the fact that the earlier cases were quite sufficient to have apprised a reasonably well-trained officer that the execution of the Pena dog sniff without a warrant violated the fourth amendment. The evidence seized as a result of the sniff should have been suppressed on this basis.

¶ 37 Second, the evidence shows that the dog sniff was not merely "simple, isolated negligence," as argued by the State, but was a deliberately executed attempt to find drugs inside Lindsey's motel room. See *LeFlore*, 2015 IL 116799, ¶ 24 ("[w]here the particular circumstances of a case show that police acted with an objectively reasonable good-faith belief that their conduct was lawful, or when their conduct involved only simple, isolated negligence, there is no illicit conduct to deter" (internal quotation marks omitted)). The police were suspicious of Lindsey's activities because a confidential informant stated that Lindsey was selling drugs in the motel and that Lindsey had a criminal history. Subsequently, the police conducted a surveillance of Lindsey's motel. After Lindsey was arrested, the police spoke with motel staff to inquire about Lindsey's motel room. Pena and his K-9 arrived at the motel and conducted an air sniff of the door handle and seam of Lindsey's motel room to detect narcotics. Under these

circumstances, Pena's conduct, as required by *LeFlore*, was "sufficiently deliberate that deterrence is effective and sufficiently culpable that deterrence outweighs the cost of suppression." (Internal quotation marks omitted.) *Id.* We, therefore, hold that suppression of the evidence was necessary. The denial of defendant's motion to suppress is reversed, the evidence is suppressed, his conviction is vacated, and the matter is remanded for further proceedings consistent with this decision.

¶ 38 II. Court Fines

¶ 39 Because Lindsey's conviction has been vacated and this case is being remanded, the fines and fees issues raised by the defendant are moot. However, in the event that a petition for leave to appeal is filed and granted, we briefly address those issues. Lindsey argues that the trial court erred when it assessed a $3000 drug assessment and $500 street value fine in its written judgment because the court stated that it would not impose any fines at sentencing. He asks this court to vacate the drug assessment and street value fine. The State concedes that both fees should be vacated.

¶ 40 "When the oral pronouncement of the court and the written order conflict, the oral pronouncement of the court controls." *People v. Roberson*, 401 Ill. App. 3d 758, 774 (2010). Illinois Supreme Court Rule 615(b) allows a court to modify a written judgment to bring it into conformity with the oral pronouncement of the trial court. *People v D'Angelo*, 223 Ill. App. 3d 754, 784 (1992). Questions regarding the appropriateness of fines, fees, and costs imposed by a sentencing court are reviewed *de novo*. *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 41 At sentencing, the trial court instructed the clerk to remove Lindsey's fines. However, the second judgment showed that the court assessed a $3000 drug assessment and $500 street value

fine. Based on the evidence presented, we vacate the $3000 drug assessment and $500 street value fine.

¶ 42 III. DNA Analysis Fee

¶ 43 Lindsey also alleges that the trial court erred when it ordered him to submit a DNA sample and pay a $250 DNA analysis fee although he previously submitted a DNA sample and paid the fee. He asks this court to vacate the DNA analysis fee. The State concedes that this fee should be vacated.

¶ 44 Section 5-4-3(a) of the Unified Code of Corrections provides that any person convicted of felony offense must submit specimens of blood, saliva, or tissue to the Illinois Department of State Police. 730 ILCS 5/5-4-3(a) (West 2016). Section 5-4-3(j) states that if someone submits specimens of blood, saliva, or tissue, he must pay a $250 analysis fee. *Id.* § 5-4-3(j). Our supreme court has established that section 5-4-3 authorizes the $250 analysis fee only when the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Questions regarding the appropriateness of fines, fees, and costs imposed by a sentencing court are reviewed *de novo*. *Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 45 Lindsey states that he failed to preserve this issue for review. However, the State does not argue that he waived this issue and concedes to the vacatur of the analysis fee. *People v. Williams*, 193 Ill. 2d 306, 347 (2000) ("the State may waive an argument that the defendant waived an issue by failing to argue waiver in a timely manner"). Based on the Lindsey's Illinois State Police DNA form and prior convictions, it is presumed that he was previously ordered to submit a DNA sample and pay the $250 analysis fee, and therefore, the subsequent order is improper. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (determining that because a

convicted felon is required to submit a DNA sample, it is presumed that the trial court imposed the requirement on a prior conviction). Therefore, we vacate the DNA analysis fee.

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of Rock Island County is reversed and remanded.

¶ 48 Reversed and remanded; fines and fees vacated.

¶ 49 JUSTICE SCHMIDT, concurring in part and dissenting in part:

¶ 50 Even assuming that the majority correctly determined that the dog sniff in this case violated the fourth amendment (it did not), the good faith exception to the exclusionary rule applies.

¶ 51 Up to this point, courts have determined that canine sniffs of residential and apartment doors constitute fourth amendment searches. See *Jardines*, 569 U.S. 1; *Burns*, 2016 IL 118973; *Bonilla*, 2017 IL App (3d) 160457; *Whitaker*, 820 F.3d 849. No similar holding has been made regarding canine sniffs of hotel room doors. In fact, until now the relevant authority indicates that canine sniffs in the common corridors of hotels are not fourth amendment searches because a hotel tenant possesses a reduced expectation of privacy. See *Roby*, 122 F.3d 1120 (8th Cir. 1997); *Eichelberger*, 91 Ill. 2d 359; *Agapito*, 620 F.2d 324. Based on the facts of this case and the state of the law, no one can reasonably argue that the officers acted in bad faith. Accordingly, I would find the good faith exception to the exclusionary rule applies.

¶ 52 With respect to the fines and fees issues, I agree that we should accept the State's concession and vacate them. Otherwise, I would affirm.

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

COMPLAINT FOR SEARCH WARRANT

15 of 290

The Complaint and Affidavit of **Tim Muehler** working for the City of **Rock Island Police Department**, State of Illinois, made before Carol Pentuk Presiding Judge of the Circuit Court, on the 27th day of April, 2015 the said Affiant being first duly sworn upon his oath, says that he has probable and reasonable grounds to believe and does believe that the residence of a male, black known as Jonathan A. Lindsey being approximately 5'10" ft. tall and approximately 145 lbs, having brown eyes and black hair with a date of birth of 05/24/1986, now unlawfully possess **a quantity of Cannabis and/or Controlled Substance, packaging materials, U.S. currency, drug records, drug paraphernalia, indicia of residency, firearms, firearm ammunition, cell phones, police scanners, scales, and proceeds derived from the sale of Cannabis and/or Controlled Substance** on the premises located at 4300-11th St. room #130 Rock Island, Rock Island County, Illinois **being a tan with blue trim, single story, multi-unit hotel complex with room #130 being a single unit of the multi-unit complex known as American Motor Inn with the numbers "130" affixed to the west side of the south-facing door which is located in Rock Island, Rock Island County, Illinois.**

and that his belief is based on the facts stated in the Affidavit attached hereto, incorporated herein and made a part of this Complaint.

WHEREFORE, he prays that a Search Warrant may issue according to law.

Subscribed and sworn to before me
this 27th day of April, 2015.

AFFIANT

JUDGE

FILED in the CIRCUIT COURT
OF ROCK ISLAND COUNTY
CRIMINAL DIVISION

MAY – 6 2015

Lisa L. Durman
Clerk of the Circuit Court

C000015

124289
FILED in the CIRCUIT COURT
OF ROCK ISLAND COUNTY
CRIMINAL DIVISION

MAY - 6 2015

Lisa L. Dumas
Clerk of the Circuit Court

15SW203

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

AFFIDAVIT

15CF290

Now comes Tim Muehler, hereafter referred to as your Affiant, who doth state and depose as follows.

1) That your Affiant is a police officer, with over 8 years of law enforcement experience. Your Affiant is currently employed as a police officer with the Rock Island Police Department, whose duties include the identification of narcotics and investigation of the illegal sale, distribution, possession, and trafficking of Cannabis and controlled substances and that your Affiant has received drug training from federal, state, and local agencies.

2) That your Affiant received information from a confidential source that Jonathan A. Lindsey (M/B, DOB – 5/24/1986, approximately 5'10" tall, approximately 145 lbs, with black hair and brown eyes) is selling narcotics from the American Motor Inn (4300-11th St.) in the City of Rock Island, Rock Island County, Illinois.

3) That your Affiant checked Rock Island Police Department computer records and found Jonathan A. Lindsey to have involvements for Manufacture/Delivery of a Controlled Substance, Contempt of Court, Driving Suspended, Endangering the Life and Health of a Child, Criminal Trespass to Land, Domestic Battery, No Valid Driver's License, Violation Orders of Protection, and Aggravated Battery . That your Affiant also checked the State of Illinois and the National Repository for Criminal History for Jonathan A. Lindsey and found to include but not limited to an arrest on 03/30/2012 for Violation Illinois Controlled Substance Act with a Guilty disposition for Manufacture/Delivery Controlled Substances on 07/18/2012. Jonathan was arrested on 07/15/2010 for Aggravated Battery and Criminal Trespass to Land with a disposition of Guilty on 08/23/2010 for Aggravated Battery/Public Place. Jonathan was arrested on 06/12/2010 for Domestic Battery and Interference Reporting Domestic Violence with a disposition of Guilty on 08/31/2010 for Domestic Battery. Jonathan was arrested on 05/03/2010 for Battery, Aggravated Assault, Resist Peace Officer with a decision of Not Filed on 06/29/2010. Jonathan was arrested on 12/13/2009 for Violation Order of Protection with a decision of Not Filed on 02/05/2010. Jonathan was arrested on 09/15/2008 for Aggravated Battery with an unknown disposition.

4) That within the last 30 days, your Affiant's Fellow Officer contacted Jonathan A. Lindsey via telephone and your Affiant's Fellow Officer asked to purchase an amount of narcotics from Jonathan Lindsey. Jonathan Lindsey informed your Affiant's Fellow Officer that he had narcotics for sale and a pre-determined meeting location for the drug deal was made. Your Affiant's Fellow Officer arrived at the pre-determined location and met with Jonathan Lindsey. Your Affiant's Fellow Officer spoke with Jonathan about drugs, however Jonathan would not sell to your Affiant's Fellow Officer. After the meeting, your Affiant and your Affiant's Fellow Officers conducted surveillance on Jonathan Lindsey as he walked directly from the meeting location to the main parking lot of American Motor Inn (4300-11th St. Rock Island, Rock Island County, Illinois). Your Affiant and your Affiant's Fellow Officers lost sight of Jonathan Lindsey as he reached the southwest corner of the hotel complex.

5) On 04/27/2015 at approximately 1643 hours, your Affiant was performing surveillance at American Motor Inn and observed Jonathan Lindsey leave the parking lot of the American Motor Inn traveling north on 11th St. driving a gray 2010 Kia sedan bearing Illinois registration E424646. Your Affiant knew Jonathan Lindsey to have a suspended Illinois driver's license and your Affiant followed Jonathan Lindsey. A patrolman was dispatched to aid your Affiant and a traffic stop was conducted on Jonathan Lindsey in the area of 12th St./25th Av. Rock Island, Illinois. Lindsey was subsequently arrested for driving while suspended and transported to the Rock Island Police Department to be interviewed.

6) Your Affiant spoke with Jonathan Lindsey and Lindsey signed the Rock Island Police Department waiver of rights form and advised he would speak with your Affiant. During the interview, Jonathan Lindsey admitted to staying at the American Motor Inn #129. Your Affiant's Fellow Officer arrived at American Motor Inn and spoke with hotel staff who advised Jonathon Lindsey is currently registered to room #130. Rock Island County Deputy Pena and his K-9 partner conducted a free air sniff of 4300-11th St. room #130 with a positive alert. Your Affiant was advised by your Affiant's Fellow Officer that room #130 is located in the southwest corner of the hotel complex. Your Affiant then spoke with Jonathan Lindsey again who advised he is currently staying at room #130, not #129 as previously stated, at the American Motor Inn (4300

11th St.) **with 4300-11th St. being a tan with blue trim, single story, multi-unit hotel complex with room #130 being a single unit of the multi-unit complex known as American Motor Inn with the numbers "130" affixed to the west side of the south-facing door which is located in Rock Island, Rock Island County, Illinois.**

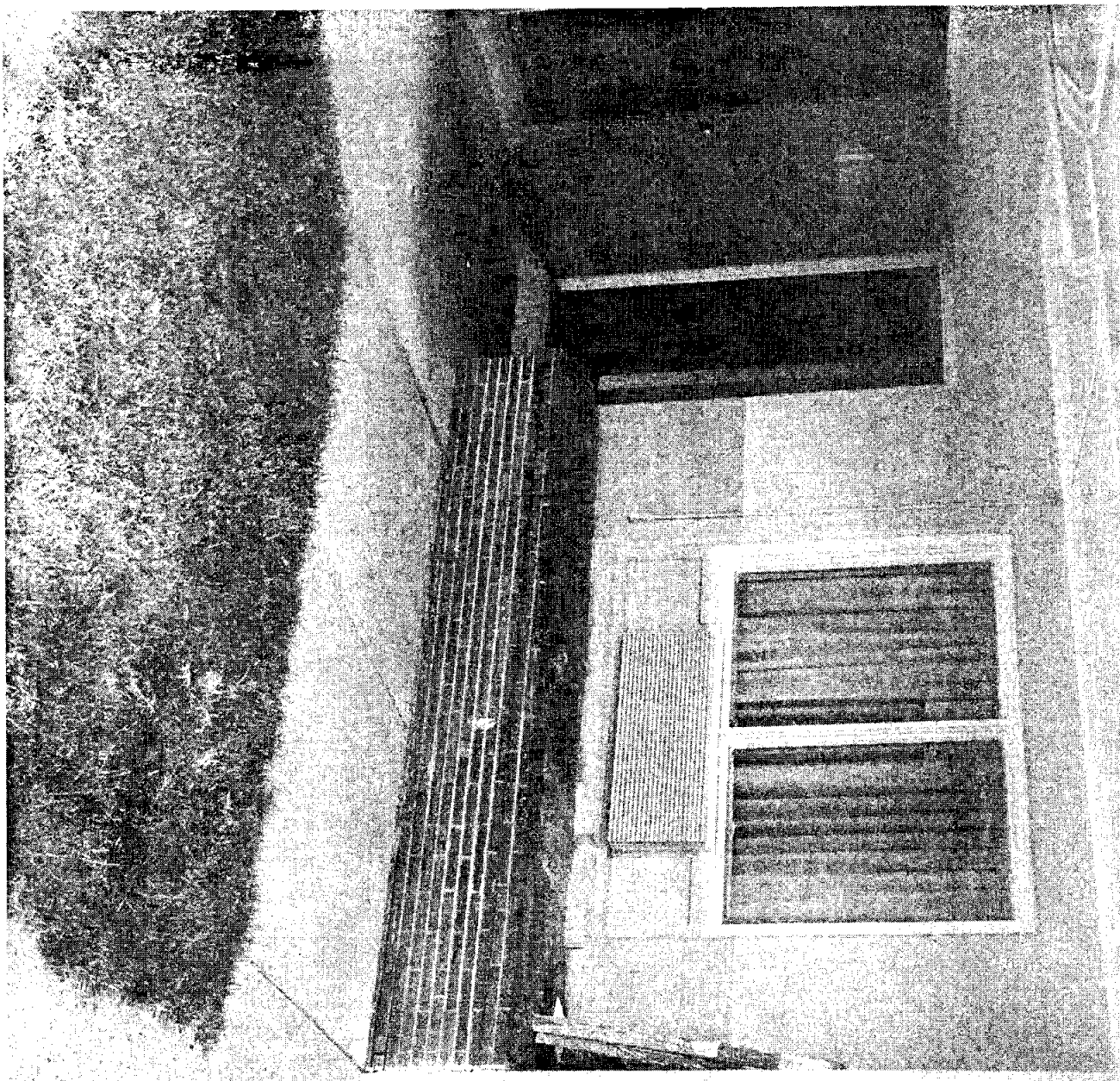
7) WHEREFORE, your Affiant believes he has shown that there is probable cause to believe that the items stated in the complaint for Search Warrant are on the premises located at 4300-11th St. #130 **being a tan with blue trim, single story, multi-unit hotel complex with room #130 being a single unit of the multi-unit complex known as American Motor Inn with the numbers "130" affixed to the west side of the south-facing door which is located in Rock Island, Rock Island County, Illinois.**

Further Affiant saith not.

AFFIANT

Subscribed and sworn to before me this 27th day of April, A.D. 2015

JUDGE



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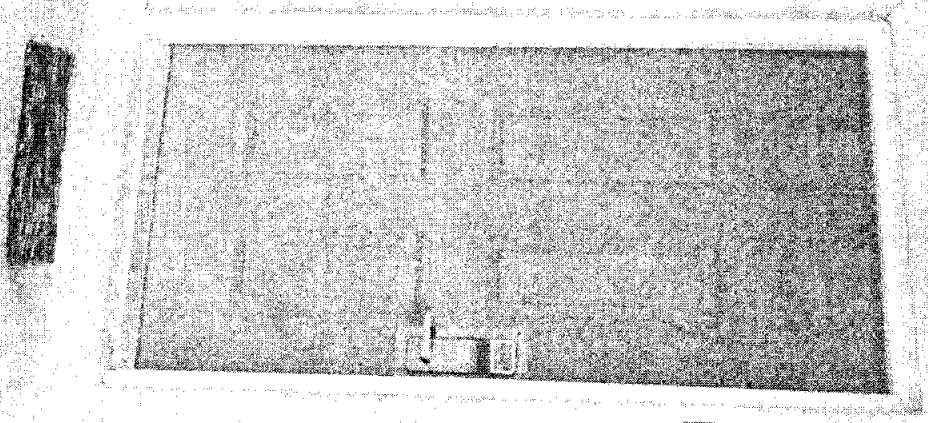
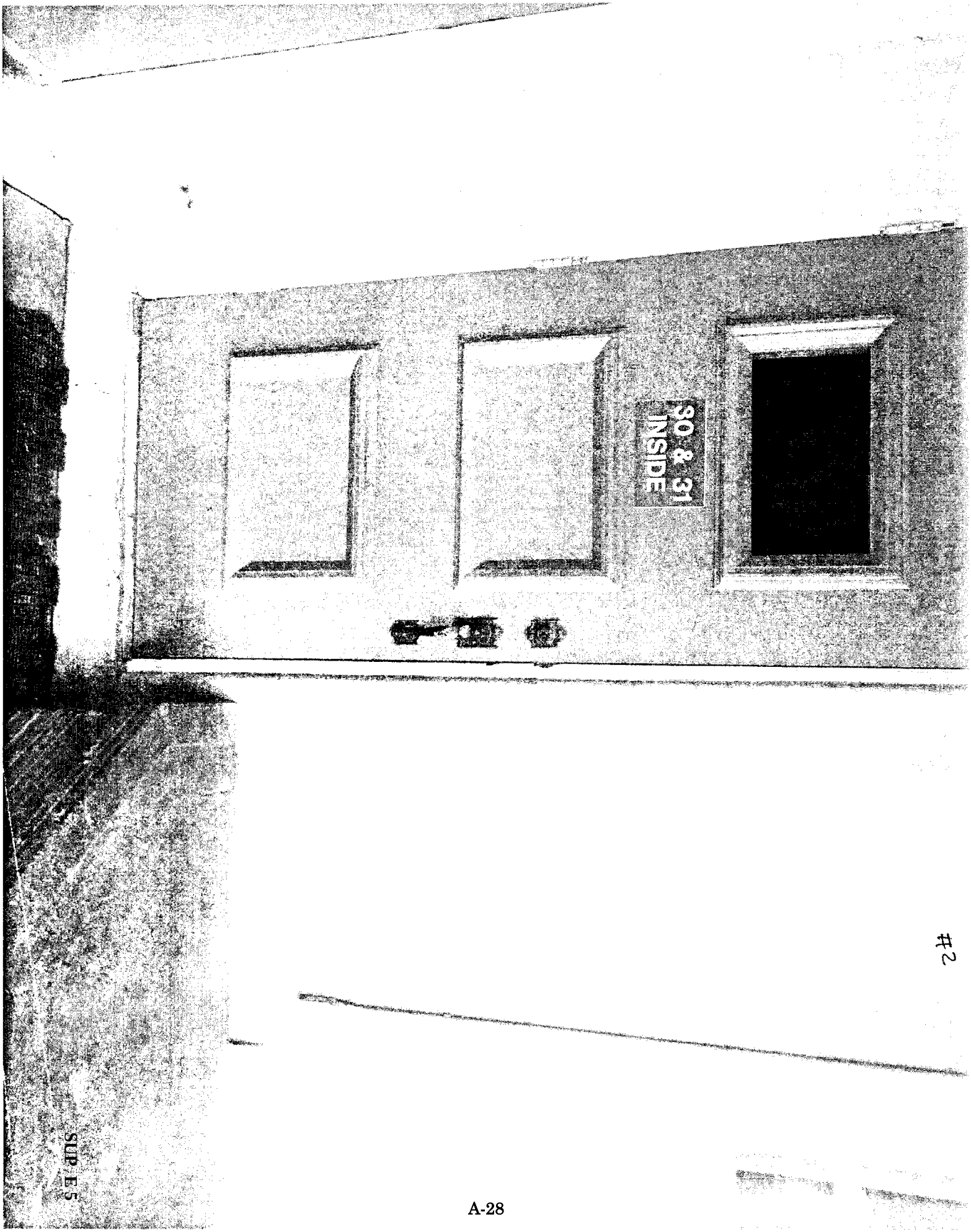


SUB P 4



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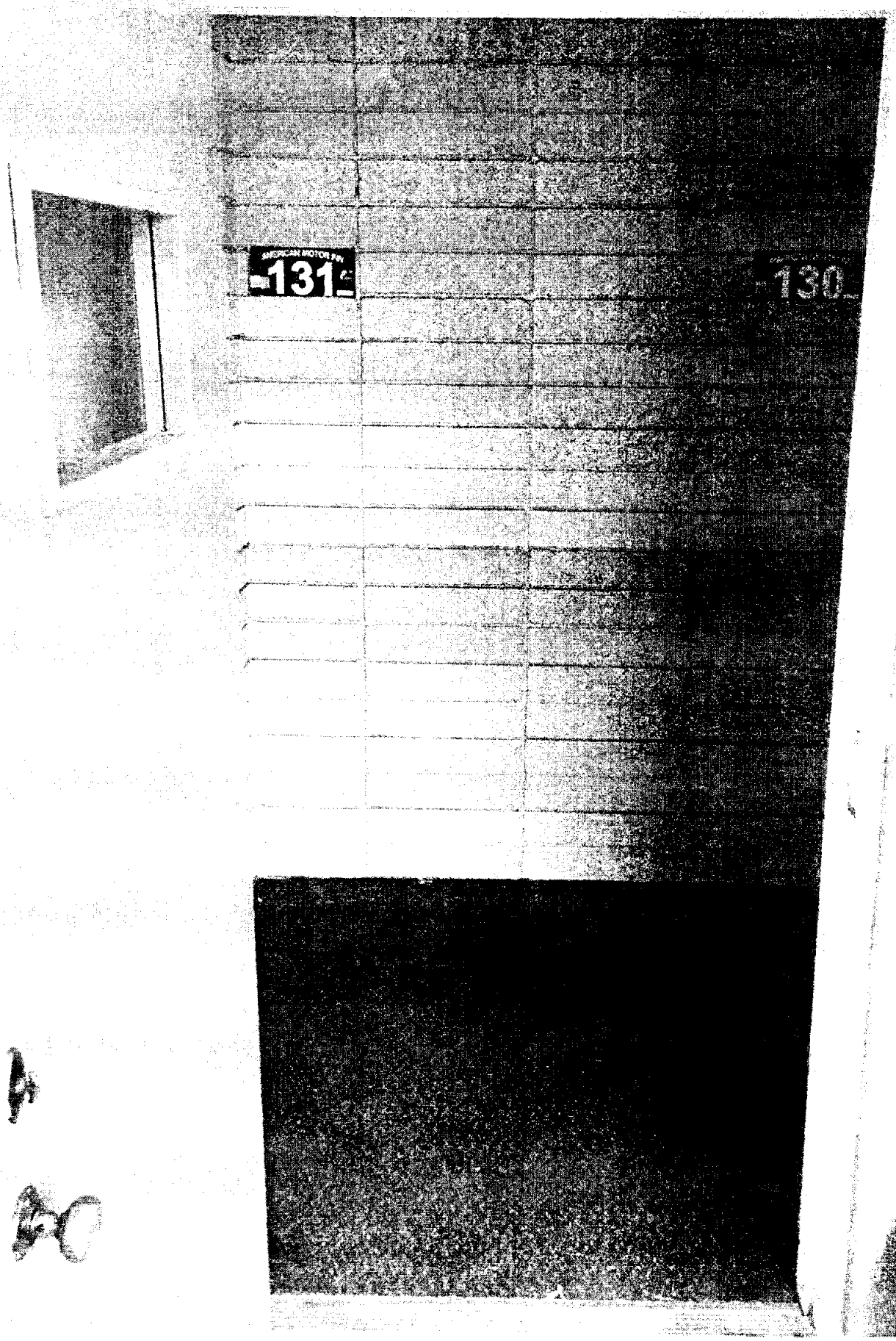

SUP E 6

No. 124289

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- JONATHAN LINDSEY Respondent-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0877. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, No. 15-CF-290. Honorable F. Michael Meersman, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

Mr. John L. McGehee, Rock Island County State's Attorney, 210 15th St., 4th Floor, Rock Island, IL 61201, StatesAttorneysOffice@co.rock-island.il.us;

Mr. Jonathan Lindsey, 2930 W. Fulton Street, Chicago, IL 60612

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 22, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the respondent-appellant in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Esmeralda Martinez
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