No. 122484

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. DERRICK BONILLA, Defendant-Appellee.	))))))))))	On Petition for Appeal from the Appellate Court of Illinois, Third District, No. 3-16-0457 There on Appeal from the Circuit Court of the Fourteenth Judicial Circuit, No. 15-CF-225 Hon. Frank R. Fuhr, Judge Presiding

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

/s/ Katherine M. Strohl
KATHERINE M. STROHL
Counsel for Defendant-Appellee

Katherine M. Strohl
514 E Main St.
Ottawa, IL 61350
(312) 882-8844
Katherine.m.strohl@gmail.com
ARDC: 6322285

Counsel for Defendant-Appellee

/s/ Hector Lareau
HECTOR LAREAU
Counsel for Defendant-Appellee

Hector Lareau
1515 4th Avenue, Suite 301
Rock Island, IL 61201
(309) 764-0775
hector@lareaulaw.com
ARDC: 6220378

Counsel for Defendant-Appellee

ORAL ARGUMENT REQUESTED

E-FILED
3/16/2018 12:29 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

I. The warrantless dog-sniff of the threshold of Defendant's apartment for the purpose of detecting otherwise undetectable contraband inside of Defendant's apartment was a search under the Fourth Amendment.

ISSUES PRESENTED FOR REVIEW

I. Whether the warrantless dog-sniff of the threshold of Defendant's apartment for the purpose of detecting otherwise undetectable contraband inside of Defendant's apartment was a search under the Fourth Amendment.

II. Whether the good faith exception saves the warrantless search.

STATEMENT OF FACTS

The facts in this case are not in dispute. Where additional facts are necessary for an understanding of the issues raised in this appeal, they will be included, together with appropriate record references, in the argument portion of this brief.

ARGUMENT

I. The warrantless dog-sniff of the threshold of Defendant's apartment for the purpose of detecting otherwise undetectable contraband inside of Defendant's apartment was a search under the Fourth Amendment.

The Appellate Court correctly held that Officer Genisio's actions in this case – bringing a trained drug-detection dog to the threshold of Defendant's apartment without a warrant and for the purpose of detecting otherwise undetectable contraband inside of Defendant's apartment – constituted an unlawful Fourth Amendment search of Defendant's home. *People v. Bonilla*, 2017 IL App (3d) 160457, ¶ 20. The Appellate Court's reasoning and result are correct because a citizen's home is first among equals in Fourth Amendment jurisprudence, and the threshold is part of the home as a matter of law.

The Fourth Amendment to the United States Constitution ensures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *People v. Anthony*, 198 Ill.2d 194, 201 (2001) (noting that state constitutional provision is construed consistently with the Fourth Amendment). A warrantless search of a person's home is "presumptively unreasonable." *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) (describing this as a "basic principle of Fourth Amendment law"); *People v. Wilson*, 228 Ill.2d 35, 40 (2008) ("Generally, the Fourth Amendment requires the government to possess a warrant supported by probable cause for a search to be considered reasonable.").

The Amendment establishes a simple baseline: when "the Government obtains information by physically intruding" on a citizen's home, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *Florida v. Jardines*, 569

U.S. 1, 133 S.Ct. 1409, 1414 (2013) (citing *United States v. Jones*, 132 S. Ct. 945, 950 (2012)).

At the core of the Fourth Amendment is "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Jardines*, 133 S.Ct. at 1414 (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *People v. Wear*, 229 Ill.2d 545, 562 (2008) (the "chief evidence against which the Fourth Amendment to the United States Constitution is directed is the physical entry of the home."). Absent a warrant, the Fourth Amendment protects residences by requiring police to have probable cause coupled with exigent circumstances before intruding. *People v. Shanklin*, 367 Ill. App.3d 569, 574 (1st Dist. 2006).

The Fourth Amendment draws a firm line at the entrance to the home, whatever the home's configuration (*Kyllo v. United States*, 533 U.S. 27, 40 (2001)) since, "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 133 S.Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). See *People v. Bonilla*, 2017 IL App (3d) 16045, ¶ 18 ("the [F]ourth [A]mendment does not differentiate as to type of home involved."); *State v. Rendon*, 477 S.W.3d 805, 812 (2015) (Richardson, J., concurring) ("When discussing the Fourth Amendment's protections, the Supreme Court does not differentiate between types of residences and whether they are owned or rented."). In *People v. Burns*, 2015 IL App (4th) 140006, the Fourth District reiterated this fundamental premise of Fourth Amendment jurisprudence:

> "The reasoning behind the Court's use of a generic term when discussing the scope of the Fourth Amendment is obvious: **homes come in different shapes, sizes, and forms**. Some homes afford greater privacy from prying eyes (and noses) than others. One individual may live on a vast estate secluded from the public while another may live in a high-rise apartment building in the middle of a busy city. The [F]ourth [A]mendment protects both individuals' right 'to

> retreat into his own home and there be free from unreasonable government intrusion.'" *Id.* at ¶ 42 [Citations] (emphasis added).

Fourth Amendment protections attach to dwellings and spaces other than detached single family homes. In *McDonald v. United States*, 335 U.S. 451, 454-456 (1948), the Supreme Court held unconstitutional a search of a room in a rooming house. In his concurrence, Justice Jackson was particularly adamant: "It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it." Similarly, in *Miller v. United States*, 357 U.S. 301, 313 (1958), the Court held unconstitutional the warrantless entry of an apartment, equating an apartment to a house: "Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house." And, in *Stoner v. California*, 376 U.S. 483, 484 (1964), the Court asserted, "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."

In applying Fourth Amendment analysis to a set of facts, the threshold question is whether the police intruded upon a constitutionally protected area. *People v. Burns*, 2016 IL 118973, ¶ 24 (2016). Fourth Amendment protections of the home extend to the home's curtilage—the area "immediately surrounding and associated with the home" *id.*— since curtilage is "'part of the home itself for Fourth Amendment purposes.'" *Jardines*, 133 S.Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). Indeed, curtilage is "'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" *Id*. at 1414-15 (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). While curtilage varies by type of home, such that a rural farmhouse will have

more curtilage than an urban high-rise apartment, every home has curtilage, and all curtilage is constitutionally protected. *Rendon*, 477 S.W.3d at n. 8 (Richardson, J., concurring).

Several factors, known as the *Dunn* factors, help to determine whether an area is within the home's curtilage: "(1) the proximity of the area claimed to be the home's curtilage; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by." *Burns*, 2016 IL 118973, ¶ 24 (2016) (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987)).

In *Jardines*, the Supreme Court analyzed the issue of curtilage when it considered whether the use of a drug-detection dog on a porch to investigate the contents of a home constituted a search within the meaning of the Fourth Amendment. *Jardines*, 133 S.Ct. at 1413 (2013). Following a tip, the police approached Jardines' front porch with the dog which, after sniffing around the front door, gave a positive alert for narcotics. *Id*. On the basis of the dog sniff, police received a warrant to search the residence. *Id*. When the warrant was executed, the police discovered marijuana plants. *Id*. The Supreme Court held that a warrantless "dog sniff" of an individual's front porch was a search for purposes of the Fourth Amendment and suppressed the evidence. *Jardines*, 133 S.Ct. at 417-18.

In arriving at its holding, the Supreme Court explained that a home's porch is a "classic exemplar" of curtilage and thus constituted a constitutionally protected area. *Id.* at 1415. The Court then considered whether the dog sniff was "an unlicensed physical intrusion." *Id.* at 1414. The Court stated:

> "A license may be implied from the habits of the country, notwithstanding the strict rule of the English common law as to entry upon a close. [Citation.] We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by

> solicitors, hawkers and peddlers of all kinds. [Citation.] **This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave**. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do. [Citation]." (emphasis added).
>
> Significantly, for purposes of analyzing the case at hand, the Court continued:
>
> "But **introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that.** An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to-well, call the police. The scope of a license--express or implied--is limited not only to a particular area but also to a specific purpose... Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search." (Internal quotation marks omitted.) *Jardines*, 133 S.Ct. at 1415-17 (emphasis added); *People v. Burns*, 2016 IL 118973, ¶¶ 25-26 (2016) (citing same).

Since the officers' use of a trained police dog exceeded the scope of the implied license to approach the defendant's front door, the Court concluded that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Jardines*, 133 S.Ct. at 1416-18, and n.3.

Importantly, in issuing its holding, the Supreme Court explicitly rejected the State's framing of the issue that investigation by a forensic narcotics dog does not constitute a search since it does not violate the "'reasonable expectation of privacy' described in *Katz*." 133 S.Ct. at 1417. The Court rejected that proposition since "[t]he *Katz* reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment, and so [it] is unnecessary to consider when the government gains

evidence by physically intruding on constitutionally protected areas." *Jardines*, 133 S.Ct. at 1417 (citing *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945 (2012)) (original emphasis omitted); *People v. Burns*, 2016 IL 118973, ¶¶ 27, 45 (2016) (describing how the *Jardines* Court found it unnecessary to decide whether the investigation violated the defendant's reasonable expectation of privacy under *Katz*, and stating: "Our application of *Jardines* . . . makes it unnecessary to address the merits of whether the use of the drug-detection dog violated defendant's reasonable expectation of privacy."); *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) (while *Katz* may add to the baseline property rights protected by the Fourth Amendment, it does not subtract anything from the Amendment's protections "when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.") (emphasis in original). The Court continued: "Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz* . . . That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Jardines*, 133 S.Ct. at 1417.

This Court recently discussed *Jardines* and curtilage in the context of apartment buildings in *People v. Burns*, 2016 IL 118793. In *Burns*, police officers entered a locked, three story, twelve-unit apartment building after 3:00 a.m. and brought a drug-sniffing dog to the defendant's third floor apartment door without a warrant. *Id*. ¶¶¶ 3, 6-7. The dog signaled a positive alert for illegal drugs which became the basis of the warrant later obtained by the officers to search the defendant's apartment. *Id*. ¶¶ 7-8. A subsequent search recovered cannabis and the defendant was charged with unlawful possession with intent to deliver. *Id*.

¶¶ 9-10. The trial court granted the defendant's motion to suppress the recovered drugs and the Appellate Court affirmed.

After summarizing *Jardines*, this Court considered whether the area in front of the defendant's door constituted curtilage by applying the four *Dunn* factors (*United States v. Dunn*, 480 U.S. 294, 301 (1987)), and found that all four factors supported a determination that the landing area outside the defendant's apartment was curtilage. *People v. Burns*, 2016 IL 118793 ¶¶¶ 35-37. This Court first noted that the area searched by the police dog was in direct proximity to the defendant's apartment. Thus, the landing was curtilage under the first *Dunn* factor. *Id*. at ¶ 35. Although the first of the *Dunn* factors was essentially outcome-determinative, this Court's conclusion was bolstered by the remaining three factors. This Court explained:

> "Here, the landing to defendant's apartment is in an area located within a locked structure intended to exclude the general public. The third-floor landing is located directly outside of defendant's apartment door and the nature of its use is generally limited to defendant, the tenant of unit No. 9, and their invitees. The third-floor landing is an area with limited access, located within a locked building and not observable by 'people passing by.' We find the last three *Dunn* factors weigh in favor of finding that the landing to defendant's apartment is curtilage and reject the State's argument to the contrary." *Id*. ¶ 37.

After determining that the area immediately outside of Burns's door was curtilage, this Court further explained that "the police conduct in this case certainly exceeded the scope of the license to approach defendant's apartment door." *Burns*, 2016 IL 118793 at ¶ 43 (citing *Jardines*, 133 S.Ct. at 1423 (Alito, J., dissenting, Roberts, C.J., Kennedy and Breyer, JJ.)). This Court thus concluded that the defendant's Fourth Amendment rights were violated where the officers used a drug-detection dog to conduct an unlicensed and warrantless search of the defendant's apartment door, a constitutionally protected area. *Id*. ¶ 44.

A. The threshold of Defendant's apartment is constitutionally protected curtilage.

Here, as in *Burns*, an analysis of the four *Dunn* factors compels the conclusion that the area immediately outside of Defendant's apartment is curtilage. For one, the third-floor, 4-unit, common area landing outside of Defendant's apartment is functionally identical to the third-floor, 4-unit, common area landing considered in *Burns*. As in *Burns*, the proximity of the threshold of Defendant's apartment (i.e., the front door of Defendant's apartment) strongly supports an inference that the door be treated as curtilage under the first *Dunn* factor. *Burns*, 2016 IL 118973 at ¶ 35. Likewise, the other three *Dunn* factors weigh in favor of finding the threshold of Defendant's home curtilage since: (factor 2) it was enclosed within the walls of the building itself; (factor 3) the nature of the use to which the threshold of Defendant's apartment was put was for ingress and egress by only Defendant and his invitees; and (factor 4) it was not readily visible, or visible at all, to passers-by on the street, the way the porch in *Jardines* was. See *Id.* at ¶¶ 35, 37 (describing how all four *Dunn* factors supported a conclusion that the common area hallway outside of Burns's apartment was curtilage).

Significantly, the Appellate Court explained that there was no need for it to "perform an extensive analysis of the *Dunn* factors in the present case because [its] analysis would be only slightly different from [this] [C]ourt's analysis of the *Dunn* factors in *Burns.*" *People v. Bonilla*, 2017 IL App (3d) 160457, ¶ 19. The court described that "[t]he only difference in this case would be that we would note… that the apartment building in the present case was unlocked, but we would still reach the same conclusion—that the common-area hallway just outside of [D]efendant's apartment door constituted curtilage for the purposes of the [F]ourth [A]mendment." *Id.*

Defendant acknowledges that this court noted in *Burns* that the outer building door was locked (*id*. ¶ 41), in contrast to the unlocked outer door in the case at hand. The State asserts that this fact alone is decisive and thus transforms the protected curtilage in *Burns* to unprotected non-curtilage in the case at bar. (St. Br. 10). But, as the Appellate Court specifically found, this distinction does not create a difference: the common area hallway immediately outside of Defendant's apartment door is curtilage. *People v. Bonilla*, 2017 IL App (3d) 160547, ¶ 19. See *People v. Burns*, 2016 IL 118973, ¶ 97 (Garman, J., concurring) ("The fact that defendant lived within a locked apartment building is helpful to her argument that her front door and landing were curtilage but not dispositive.").

What's more, not only do all four *Dunn* factors weigh in favor of finding the threshold of Defendant's apartment to be constitutionally-protected curtilage, but the porch in *Jardines* similarly bore no lock. See *Burns*, 2016 IL 118973, ¶ 95 (Garman, J., specially concurring) ("In every relevant sense, defendant's front door and landing appear indistinct from Jardines's front door and porch.").

The Appellate Court acknowledged that, "the [F]ourth [A]mendment does not differentiate as to type of home involved." *People v. Bonilla*, 2017 IL App (3d) 16045, ¶ 18. See *United States v. Roby*, 122 F.3d 1120, 1127 (8th Cir. 1997) (Heaney, J. dissenting) ("I do not believe that the Fourth Amendment protects only those persons who can afford to live in a single-family residence with no surrounding common space."); *Burns*, 2016 IL 118973, ¶ 97 (Garman, J., specially concurring) ("Were this court to hold that an apartment uniformly lacks [F]ourth [A]mendment curtilage, we would additionally hold that those who live in apartments have less property-based [F]ourth [A]mendment protection within their homes than those who live in detached housing." (emphasis in original)).

Here, the Appellate Court agreed with the trial court that "to reach the opposite conclusion would be to draw a distinction with an unfair difference." *Bonilla,* 2017 IL App (3d) 16045, ¶ 18. See *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016) (recognizing that to distinguish *Jardines* based upon the differences between a front porch of a single family home and the closed hallway of an apartment building would be to draw an arbitrary line that would apportion Fourth Amendment protections on grounds that correlate with income, race and ethnicity).

Permitting a dog to sniff Defendant's front door—which was enclosed in a building with an unlocked outer door—while prohibiting a dog from sniffing a hallway with a locked outer door has no sound basis in law or reason. In addition to being arbitrary, the distinction is unworkable in practice. Many apartment buildings have front doors that open into common hallways that also have patio doors that open to the outside. There is no question that the patio doors—even though not enclosed within the building—would be treated exactly as the porch in *Jardines*. To give less protection to the more shielded entry tests reason, at best. Further, consider an outer door that has a lock but is propped open or has a broken lock. The threshold of a dwelling, be it of a house or of an apartment, is always curtilage regardless of the relative ease of access afforded to visitors. See *Burns*, 2016 IL 118973, ¶ 97 (Garman, J., specially concurring) ("Recognizing that the [F]ourth [A]mendment 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.").

Accordingly, Defendant respectfully submits that the threshold of his apartment and the area immediately outside his apartment door, the area where a doormat is placed, is curtilage.

B. The officer had no express or implied license to intrude into the curtilage and conduct a search.

Since it is undisputed that Officer Genisio had both of his feet, and all four of his drug-sniffing canine companion's paws, firmly planted on the constitutionally protected curtilage, the question that remains is whether Defendant had given his leave, even implicitly, for him to do so. *Jardine*s, 133 S.Ct. at 1415.

He had not.

The officer's behavior assuredly exceeded the scope of any implied license when he searched not only the threshold of Defendant's apartment, but both the second- and third-floor common area hallways as well, with a drug-sniffing dog specifically trained to locate illegal contraband undetectable to an officer's natural senses. (See C25) (motion to suppress, quoting affidavit executed in support of search warrant).

There is neither an implicit license nor customary invitation to introduce a trained police dog to explore the area surrounding the home in hopes of discovering incriminating evidence. *Id*. at 1416. Thus, if consent to search the home is not given, "the proper course of action is for officers to end the encounter and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance." *People v. Kofron*, 2014 IL App (5th) 130335, ¶ 26.

In *Jardines*, the Supreme Court framed the question before it as "*whether* the officers' conduct was an objectively reasonable search," a question, the Court explained, that "depends upon whether the officers had an implied license to enter the porch, which in turn depends

upon the purpose for which they entered." *Jardines*, 133 S.Ct. at 1417 (emphasis in original). The Court found that the officers' "behavior objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had a license to do." *Id*. See *People v. Burns*, 2016 IL 118973, ¶ 99 (Garman, J., concurring) ("Police here exceeded any license offered to the public or that might have been offered by one of defendant's fellow tenants. Defendant herself neither granted nor implied any license to approach with a drug-detection dog. Her front door and landing are, in all relevant respects, identical to the front door and porch in *Jardines*.).

Officer Genisio's conduct of warrantlessly parking a trained police dog at the threshold of Defendant's apartment for the purpose of detecting illegal contraband inside of Defendant's home is the precise activity the Supreme Court condemned in *Jardines*. Officer Genisio—without his trained dog—could have entered the apartment building, knocked on the door in a fashion that could be expected of any private citizen, briefly waited to be received, and then left after a short period of time. But, by bringing a drug dog onto Defendant's curtilage for the purpose of detecting contraband, without either an implied license or a warrant, Officer Genisio committed an illegal search.

C. Defendant's reasonable expectation of privacy was violated when the officer used a highly trained drug-sniffing police dog to detect contraband within his apartment.

Assuming *arguendo* that the threshold of Defendant's apartment is not curtilage—a proposition contrary to law, as described above—this Court should still find that the dog-sniff was an illegal search under Fourth Amendment privacy jurisprudence. See *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) ("Contemporary concepts of living such as

multi-unit dwellings must not dilute [an individual's] right to privacy any more than is absolutely required.").

While the majority in *Jardines* took a property-interest approach, the three concurring Justices would also have found a Fourth Amendment violation under the privacy-interest analysis since the "uncommon behavior" of coming to the door of a home with a "super-sensitive instrument [the drug-sniffing canine]" not only exceeded the license granted to members of the public but, "by nosing into intimacies [one] sensibly thought protected from disclosure, also invaded one's 'reasonable expectation of privacy.'" *Id*. at 1418 (citation omitted) (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). As Justice Kagan explained, viewed through a privacy lens, *Jardines* was controlled by *Kyllo v. United States*, 533 U.S. 27 (2001), which held that officers conducted an illegal search by using a thermal-imaging device to detect heat emanating from within the home, even without trespassing on the property. 133 S. Ct. at 1419. *Kyllo* stated that where "Government uses a device that is not in general public use, to explore the 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." 533 U.S. at 40.

The privacy analysis here is indistinguishable from *Kyllo* in that a trained drug-sniffing dog is a sophisticated sensing device that qualifies as a "super sensitive instrument." See *Jardines*, 133 S.Ct. at 1418-19 (Kagan, J., concurring). Further, the dog employed to sniff the threshold of Defendant's door is not an instrument available to the general public, and it detected something (the presence of drugs) that otherwise would have been unknowable without entering the apartment. Finally, as the Appellate Court described:

> "That [D]efendant lacked a reasonable expectation of complete privacy in the hallway or that he lacked an absolute right to exclude all others from the

> hallway does not mean that [D]efendant had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public or that the police could park a trained drug-detection dog directly in front of his apartment door." *People v. Bonilla*, 2017 IL App (3d) 160457, ¶ 19. See *U.S. v. Whitaker*, 820 F.3d 849, 653-854 (2016)

In sum, the warrantless use of a specialized police dog not available to the general public violated Defendant's reasonable expectation of privacy as a matter of law.

II. The good faith exception cannot save the illegal search.

Contrary to the State's assertion, the good faith exception does not apply. (St. Br. 11). Evidence obtained in violation of the Fourth Amendment should be suppressed unless, "the police conduct a search in objectively reasonable reliance on binding appellate precedent." *Davis v. United States*, 564 U.S. 229, 249-250 (2011). In deciding whether the good faith exception applies, the question is whether a reasonably well-trained officer would have known that the search in question was illegal in light of all of the circumstances. *People v. Burns*, 2016 IL 118973, ¶ 52 (citing *People v. LeFlore*, 2015 IL 116799, ¶ 25). Here, the circumstances compel the conclusion that a reasonably well-trained officer in Officer Genisio's position would have known the search was illegal.

In support of the contrary conclusion, the State cites three cases (*United States v. Place*, 462 U.S. 696 (1983), *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Illinois v. Caballes*, 543 U.S. 405 (2005) (St. Br. 15)) that this Court has already considered and rejected in *Burns*. *People v. Burns*, 2016 IL 118973, ¶¶ 54-56 (2016). This Court explained in *Burns* that, "contrary to the State's argument, United States Supreme Court precedent has long provided that the home has heightened expectations of privacy and that at the core of the [F]ourth [A]mendment is the 'right of a man to retreat into his home and there be free from unreasonable government intrusion.'" [Citation] *Id.* at ¶ 56. See *U.S. v. Whitaker*, 820 F.3d

849, 853 (2016) ("the fact that this was a search of a home distinguishes this case from dog sniffs in public places in *United States v. Place*, 462 U.S. 696, 698 (1983) (luggage at airport), and *Illinois v. Caballes*, 543 U.S. 405, 406 (2005) (traffic stop)," since, "[n]either case implicated the Fourth Amendment's core concern of protecting the privacy of the home.").

Equally unavailing is the State's argument that the officer relied on *People v. Smith*, 152 Ill. 2d 229 (1992) (St. Br. 14). For one, this argument has already been specifically rejected by this Court in *Burns*. This Court explained, "We reject the State's argument… *Smith* did not hold that tenants have *no* expectation of privacy in common areas of locked apartment buildings; rather, *Smith* concerned an individual's reasonable expectation of privacy in things overheard by the police while standing in a common area of an unlocked apartment building." *Burns*, 2016 IL 118973, ¶ 61 (emphasis in original). What's more, as the State itself acknowledges, "in *Smith* 'the officers used no artificial means to enhance their ability' to secure the evidence, *Smith*, 152 Ill. 2d at 246, whereas here the officers used a K9." (St. Br. 14). While the State seems to refer to the drug-sniffing dog used here as an insignificant and ancillary fact, the use of the dog is the precise—and dispositive—act that violated Defendant's privacy expectation.

The State goes on to assert that Seventh Circuit Court of Appeals precedent is binding on Illinois absent contrary state authority (St. Br. 17), yet contradictorily asserts that "The appellate majority (here) also cited *United States v. Whitaker*, 820 F.3d 849, 850 (7th Cir. 2016), but that case, too, is inapposite: it involved a locked exterior door and arose in a different jurisdiction (Wisconsin) governed by different local precedents." (St. Br. 17, n.2). First, *Whitaker* is a federal case and thus not governed by any local precedents. Second, the facts in *Whitaker* are a carbon-copy of the facts in *Burns*, and the *Whitaker* court reached the

same conclusion this Court did in *Burns*: the good faith exception does not save the illegal search.

The State argues that "the binding precedents for unlocked common areas were *Smith* and [*People v.*] *Carodine*, [374 Ill. App. 3d 16 (1st Dist. 2007)] upon which the officers could rely to believe in good faith that the unlocked common area was not constitutionally protected." (St. Br. 17). As discussed above, this Court already rejected the State's argument in *Burns* that the good faith exception should apply under *Smith*.

Additionally, the facts and holding in *Carodine,* that no search occurred when an officer reached inside a dryer vent since Carodine did not have an objective expectation of privacy in the vent that led from inside his apartment to the exterior wall of the apartment, are insufficiently analogous to offer any value to the analysis of the case at hand. *Carodine,* 374 Ill.App.3d at 23. And, *Carodine* was decided by the Appellate Court, First District.

The Illinois case most on point—and available to Officer Genisio at the time of his warrantless search—is the Fourth District's opinion in *People v. Burns*, 2015 IL App (4th) 140006. The Appellate Court's holding in *Burns* (later affirmed by this Court) was that the warrantless dog-sniff of the common area landing outside of Burns's apartment door was an illegal search under the Fourth Amendment. The only difference between the facts in *Burns* and the facts here is that the exterior door in *Burns* was locked. No appellate decision, state or federal, was available to Officer Genisio that specifically authorized the warrantless use of a super-sensitive instrument, a drug-detection dog, outside an apartment door.

For the good faith exception to operate, the State would have to show that the drug-sniff search rested on a good-faith belief either (1) that the use of a drug-detecting dog as an exercise of implied license and the intrusion into the curtilage were authorized by binding

precedent, or (2) that the use of a drug-detecting dog did not infringe on Defendant's reasonable expectation of privacy within his apartment. The State cannot carry that burden. It therefore follows that it was unreasonable for officers to have relied on a search warrant that was issued on the basis of information that was obtained in violation of the Fourth Amendment. See *People v. Burns*, 2016 IL 118973 at ¶ 69 (in determining whether the good faith exception applied to an illegal drug-sniff search, it was unreasonable for officers to rely on a warrant issued on the basis of information obtained in violation of Fourth District precedent).

As discussed above, United States Supreme Court precedent has long provided that at the core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman*, 365 U.S. at 511. Curtilage, the area "immediately surrounding and associated with the home," is also regarded as "part of the home itself for Fourth Amendment purposes." *Oliver*, 466 U.S. at 180. Additionally, *Jardines* makes it clear that use of a drug-sniffing dog to conduct a search immediately outside an individual's home far exceeds the scope of any license that, express or implied, invites a visitor to the home's door for limited purposes. *Jardines*, 133 S.Ct. at 1416.

In sum, the good faith exception is inapplicable where the officer's conduct of engaging in the warrantless use of a drug-detection dog outside Defendant's apartment door cannot be supported by a reasonable good faith belief that such conduct was authorized under any United States or local precedent.

CONCLUSION

For the reasons stated above, Defendant respectfully requests that this Court affirm the Appellate Court, Third District's opinion affirming the trial court's granting of the motion to suppress.

Respectfully submitted,

KATHERINE M. STROHL
Counsel for Defendant-Appellee

HECTOR LAREAU
Counsel for Defendant-Appellee

Katherine M. Strohl
514 E Main St.
Ottawa, IL 61350
(312) 882-8844
Katherine.m.strohl@gmail.com
ARDC: 6322285

Hector Lareau
1515 4th Avenue, Suite 301
Rock Island, IL 61201
(309) 764-0775
hector@lareaulaw.com
ARDC: 6220378

CERTIFICATE OF COMPLIANCE

I, Katherine M. Strohl, 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 twenty (20) pages.

/s/ Katherine M. Strohl
KATHERINE M. STROHL
Counsel for Defendant-Appellee

No. 122484

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Appeal from
	)	the Appellate Court of Illinois,
Plaintiff-Appellant,	)	Third District,
	)	No. 3-16-0457
v.	)	
	)	There on Appeal from the Circuit
DERRICK BONILLA,	)	Court of the Fourteenth Judicial Circuit,
	)	No. 15-CF-225
Defendant-Appellee.	)	
	)	Hon. Frank R. Fuhr, Judge Presiding

PROOF OF FILING AND SERVICE

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. The undersigned further certifies that on March 16, 2018, an electronic copy of the Brief and Argument in the above-entitled cause was (1) filed with the Clerk of the above Court, using the Court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses listed below. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court via the United States Postal Service, with proper postage paid, upon receipt of the electronically submitted filed stamped brief.

TO: Lisa Madigan, Attorney General's Office, 100 West Randolph Street, 12th Floor, Chicago, IL 60601, emalamuth@atg.state.il.us

Lawrence M. Bauer, Gary Gnidovec, State's Attorney Appellate Prosecutor, 628 Columbus Street, Suite 300, Ottawa, IL 61350, ggnidovec@ilsaap.org

John McGehee, Rock Island County State's Attorney's Office, Rock Island County Courthouse, Fourth Floor 210 15th Street, Rock Island, Illinois 60432, StatesAttorneysOffice@co.rock-island.il.us

/s/ Katherine M. Strohl
KATHERINE M. STROHL
Counsel for Defendant-Appellee

/s/ Hector Lareau
HECTOR LAREAU
Counsel for Defendant-Appellee