HOW THE SEARCH BECAME THE "SEARCH": THE EVER CHANGING EVOLUTION OF THE SEARCH UNDER THE FOURTH AMENDMENT

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I. INTRODUCTION

The area surrounding Fourth Amendment law and the use of certain tactics to gain evidence and insight as to what occurs within a home without a warrant has long been in debate, and recently further clarified by the Supreme Court in *Florida v. Jardines*.[1] What constitutes a search and seizure within the rights of an individual is something that has been clearly outlined within the United States Constitution in the Fourth Amendment, or so the public seems to think.[2] The rights are those that the people have to be free of such unreasonable searches and seizures in their houses, and persons, without a warrant that establishes probable cause.[3] However, understanding the actual concept of when you are searched and if it is protected under the Fourth Amendment can be confusing. There are tests that have been developed by the courts to determine when a search under the Fourth Amendment has been conducted. If a "search" does not meet one of the tests that courts use, there can be no violation of an individual's afforded protections under the Fourth Amendment. Understanding these tests and when to apply them based on certain criteria and facts surrounding a search would mean understanding the origin and development of the cases. One of the first decisions that instituted a test to determine when a search under the Fourth Amendment was being conducted was *Katz v. United States*.[4] Then, with *United States v. Jones* and later cases, the Court reintroduced the trespass rationale to the reasonable expectation of privacy test.[5] What *Jardines*, the most recent of these Fourth Amendment cases to be decided did, was solidify the limitations that have been placed on police

[1] Leading Case, *Fourth Amendment – Trespass Test – Florida v. Jardines*, 127 HARV. L. REV. 228, 228 (2013).
[2] U.S. CONST. amend. IV.
[3] *Id.*
[4] Katz v. United States, 389 U.S. 347, 359 (1967).
[5] United States v. Jones, 132 S. Ct. 945, 952 (2012).

officers regarding when they have the ability to gather information about a person, or their home, without a warrant and/or probable cause.[6]

Katz, when decided by the Supreme Court, helped to determine a limitation on police based on the reasonable-expectation-of-privacy analysis.[7] With this landmark decision, came the notion that the Fourth Amendment protects people and not particular places or locations when conducting searches.[8] Later on when the Supreme Court decided *Jones*, they determined that the *Katz* test simply "added to" but did not "substitute for the then common law trespassory test" and that the Fourth Amendment protected against those same privacy expectations.[9] The decision in *Jones* reminded us that even though *Katz* provided us with the reasonable expectation of privacy test, we should not lose sight of one of the fundamental rights covered under Fourth Amendment searches – freedom from unreasonable intrusion. Finally, in *Jardines,* the Supreme Court further solidified that even though there may be implied permission for a police officer to come to the front door of a person and knock, there was no indication that it would be ok for that police officer to abuse such implied permission by taking that knock as an indication to conduct a search on the person's property.[10] This article will take you through these landmark cases, what they stand for, and how they have brought us to the debate that we now continue to hold on the unconstitutional searches and seizures in violation of the Fourth Amendment. Although it may seem that the courts are moving in the right direction by continuing to find ways to limit the police's ability to conduct searches under the Fourth Amendment by the use of certain tactics, there are still issues that some of these decisions leave unanswered.

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[6] Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2d 361, 366 (Summer 2013).
[7] Kit Kinports, *The Dog Days of Fourth Amendment Jurisprudence*, 108 NW. U. L. REV. 64, 77 (2013).
[8] *Katz*, 389 U.S. at 351.
[9] Kinports, *supra* note 7, at 70.
[10] *Id.*

II. KATZ V. UNITED STATES

A. Factual and Procedural History

In 1967, the Supreme Court reversed a conviction against the petitioner in this case, Katz, who was suspected of being a bookie and for transmitting wagering information via telephone in violation of a federal statute.[11] In 1965, Katz was always seen making telephone calls from the same bank of public phone booths and always within the same time frames.[12] Shortly after this time, agents placed microphones atop two of the phones that they were aware of Katz would be using and labeled the other one as out of order.[13] FBI agents attached the electronic recording device, which would listen to the phone conversations, outside of a public booth where they knew that Katz would go to make his calls.[14] The FBI agents attached the device to the outside of the public phone booth, but only after they had done enough investigation to have a high probability that Katz was using that particular phone booth to transmit the gambling information.[15] The FBI agents also limited the surveillance that they received from the electronic device to those belonging only to Katz and only in reference to the calls he was making regarding the gambling information.[16] The FBI agents further ensured that they were only picking up the conversation end of Katz himself and not whoever was on the other line with him.[17] Aside from this evidence, there was also evidence obtained through the use of setting up surveillance in a room next to Katz's apartment and listened to the phone conversations through

[11] David A. Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 882 (2008).
[12] Katz v. United States, 369 F.2d 130, 131 (9th Cir. 1966).
[13] *Id.*
[14] Katz v. United States, 389 U.S. 347, 348 (1967).
[15] *Id.* at 354.
[16] *Id.*
[17] *Id.*

the common wall.[18] The Court found that from the evidence, they were able to convict Katz of engaging in the business of wagering or betting money.[19]

Katz objected to the introduction of the evidence that was collected through the use of the surveillance device placed outside of the phone booth because he asserted that it violated his Fourth Amendment right to be free from unreasonable searches and seizures.[20] The trial court allowed the government to introduce the evidence, despite Katz's objections, and he was convicted of the crimes he had been charged with.[21] The Court of Appeals affirmed the decision by comparing it to similar facts and actions taken by police in *Olmstead v. United States* and *Goldman v. United States*, where the search and seizure was found to be in accordance with the Fourth Amendment because there was no physical invasion into the phone booth.[22] The Court of Appeals also indicated that since Katz insisted on using a public phone booth, he impliedly consented to the search and therefore it could not be held to be an unreasonable search and seizure of evidence.[23] Justice Powell rejected Katz's notion that when he stepped into the phone booth and closed the door, he was essentially treating the phone booth as he would his own home.[24] So too was Katz's contention that by paying the toll to use the phone booth, he should be entitled to expect the same protections as he would from unreasonable searches in the booth as in his home.[25] The Court of Appeals' affirmation came firmly founded on a previous decision

[18] *Katz*, 369 F.2d at 131.
[19] *Id.* at 132.
[20] *Id.* at 348.
[21] *Id.*
[22] *Id.* at 133 (citing Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942)).
[23] *Id.* at 133.
[24] *Katz*, 369 F.2d 134.
[25] *Id.* at 133.

that so long as there was no physical intrusion into the area that was being occupied by Katz, the search and seizure was valid and constitutional.[26]

B. The Majority Opinion

One of the momentous levels that the decision in *Katz* saw was a new understanding for what the scope and purpose of protection afforded to people by the Fourth Amendment was.[27] A view that was previously decided in *Olmstead*, and adopted by the courts, was now being abandoned and replaced.[28] The view that came from the *Olmstead* case was that the Fourth Amendment did not forbid the searching and seizing of evidence if such evidence was secured by the mere sense of hearing and only that.[29] Because there was no physical intrusion into the house, the subject of the *Olmstead* case, the defendant's constitutional rights were not violated.[30] This long time adopted test was now replaced with a reasonable expectation of privacy test.[31] Before *Katz*, trespass was something of a necessity and requirement to render a "search" an actual search under the Fourth Amendment.[32] The Supreme Court begins their opinion by pointing out that the Fourth Amendment "protects people, not places" and that what a person seeks to preserve as private, even if in a public place and accessible to the public eye, is sometimes still constitutionally protected.[33] The opinion points out that even though Katz did use a public booth, what he was seeking to conceal when using the booth was what a person could hear and not what they could see.[34] Justice Stewart states that it was evident that in a place where Katz justifiably relied upon privacy, what the Government did by recoding and listening

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[26] *Id.* at 135.
[27] Sklansky, *supra* note 11, at 882.
[28] *Id.*
[29] Olmstead v. United States, 277 U.S. 438, 464 (1928).
[30] *Id.*
[31] Brian Sawers, *Keeping up with the Joneses: Making Sure Your History is Just as Wrong as Everyone Else's*, 111 MICH. L. REV. FIRST IMPRESSIONS 21, 21 (2013).
[32] *Id.*
[33] Katz v. United States, 389 U.S. 347, 350-51 (1967).
[34] *Id.* at 352.

to his conversations was a violation of his constitutional right to be free from search and seizures.[35] The majority opinion holds that wherever a man may have a justifiable expectation of privacy, he may be entitled to know that he will be free from unreasonable search and seizures, thereby no longer requiring a physical intrusion.[36]

What Justice Stewart was alluding to with this opinion was that the previous holdings, specifically those that were decided in *Olmstead*, were based on the trespass doctrine and therefore did not afford people the proper amount of protection which is guaranteed by the Fourth Amendment.[37] With this opinion, Fourth Amendment issues were now approached by the courts in discussing two very important and distinct questions: (1) was the expectation of privacy that the individual had reasonable to warrant protection under the Fourth Amendment; and (2) was the search and any evidence seized as a result conducted in a reasonable way?[38] Many have disagreed with the opinion reached in *Katz* and view it as much of a failure.[39] Instead of solidifying what actually is protected by the Fourth Amendment, and when those protections are properly afforded to individuals, the opinion, to many, is circular in that it is saying that an individual can have a "reasonable" expectation of privacy if the Court is willing to protect it as such.[40] Finally, there are those that just plainly disagree with the fact that privacy, whether or not the expectation is reasonable, is related to what the framers of the Fourth Amendment meant and therefore should not be considered when deciding Fourth Amendment

[35] *Id.* at 353.
[36] *Id.* at 359.
[37] Michelle Hess, *What's Left of the Fourth Amendment in the Workplace: Is the Standard of Reasonable Suspicion Sufficiently Protecting Your Rights?*, 15 FED. CIR. B.J. 255, 257 (2006).
[38] *Id.* at 259-60.
[39] Sklansky, *supra* note 11, at 883.
[40] *Id.* at 885-86.

cases.[41] Other scholars have recognized that although there are many critics of the *Katz* holding and test that derived from such, there has been no new workable test offered.[42]

The *Katz* opinion as a whole may not have afforded many answers and may even have opened the door to a lot of new foreseeable issues, but it was a move in the right direction. The Court showed through the delivery of this opinion that the expectations of individuals were being granted higher interests then those that the government may have behind the desire and need to arrest criminals. Before this case it was a lot easier to identify when a search under the Fourth Amendment was conducted, which heavily relied on a physical intrusion. The expansion that was added by the *Katz* test evolved that idea. This case was just the beginning of the limitations placed on police and a small glimpse into a test and concept that would be used in cases to follow to determine the meaning of a "search" under the Fourth Amendment.

III. UNITED STATES V. JONES

A. Factual and Procedural History

Jones was the owner of a nightclub called "Levels" in the District of Columbia and, in 2004, along with other co-conspirators, came under investigation for a couple of narcotics violations.[43] As part of the ongoing investigation that the agents had, they used various tactics such as surveillance of the nightclub, informants, and even attaching an electronic tracking device on one of Jones' vehicles.[44] Over the next 4 weeks, the Government agents were able to track the exact location of the vehicle within 50 to 100 feet and then send that data to a Government computer via a cellular phone.[45] Using all of this data, the Government was able to

[41] *Id.* at 886.
[42] Mary G. Leary, *Katz on a Hot Tin Roof--Saving the Fourth Amendment from Commercial Conditioning by Reviving Voluntariness in Disclosures to Third Parties*, 50 AM. CRIM. L. REV. 341, 371 (2013).
[43] United States v. Maynard, 615 F.3d 544, 549 (D.C. Cir. 2010).
[44] United States v. Jones, 451 F. Supp. 2d 71, 74 (D.D.C. 2006).
[45] United States v. Jones, 132 S. Ct. 945, 948 (2012).

arrest Jones and the other co-conspirators and obtain an indictment for conspiracy to distribute and possession with intent to distribute cocaine.[46] Jones filed a motion to suppress the evidence that the Government obtained through the GPS device attached to his car.[47]

The District Court granted Jones' motion to suppress in accordance only with the data that the Government collected while the vehicle was parked in the garage.[48] The Government argued that, at this level, there was no way that Jones could have a reasonable expectation of privacy while in his vehicle and its whereabouts while on the open road.[49] The District Court held that the data that was collected while the vehicle was on the road was admissible since a person who travels on the open road, voluntarily exposes themselves and their actions to anyone who wants to look; therefore having no reasonable expectation of privacy.[50] The Court also compared the holding from *United States v. Karo* to the facts of this case as they encompassed a lot of similarities.[51] The holding from *Karo* stated that data that was obtained from a "beeper" device that was placed on a vehicle was admissible so long as the data was only that from when the vehicle was on the public roads.[52] Once the vehicle was back at the private residence however, the individuals had justifiable interest in privacy, and therefore a reasonable expectation of privacy, which must be protected by the Fourth Amendment.[53] The trial ended with a hung jury, but in 2007 the Government was able to get another indictment against Jones, which resulted in a guilty verdict.[54]

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[46] *Id.*
[47] *Id.*
[48] *Jones*, 451 F. Supp. at 88.
[49] *Id.*
[50] *Id.* (quoting the holding in United States v. Knotts, 460 U.S. 276 (1983)).
[51] *Id.* (referencing the holding in United States v. Karo, 468 U.S. 705 (1984)).
[52] *Id.*
[53] *Id.*
[54] United States v. Jones, 132 S. Ct. 945, 948 (2012).

The United States Court of Appeals for the District of Columbia reversed the conviction based on its disagreement of the application of the *Katz* reasonable expectation of privacy test to the facts of this case.[55] Justice Ginsburg recognized in the opinion of the court that after monitoring an individual over a prolonged period of time through use of a GPS gives an "intimate picture" of that individuals life, which he expects no one to have.[56] The Appellate Court further goes on to indicate that according to the holding in *Katz*, society would recognize the intrusion of the GPS surveillance on Jones to be defeated by the reasonable expectation that Jones had in regards to the privacy of his whereabouts while in his vehicle.[57] The distinction that the Court draws between the facts of the *Knotts* case, referenced to by the District Court, was that the intrusion in the *Knotts* case was of a brief period of time, whereas the data collected on Jones extended for a period of four weeks.[58] Justice Ginsburg solidified the holding in *Katz* in this opinion by reiterating that a person does not leave his expectation of privacy at home once he steps out to the public.[59] He further goes on to quote *Katz* by saying "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[60]

B. The Majority Opinion

Many scholars recognize that the majority opinion in this case, delivered by Justice Scalia, veered away from linking the GPS collected data as a violation of the Fourth Amendment based on the *Katz* test as opposed to common-law trespassory test.[61] Justice Scalia makes a firm finding that the contentions made by the Government as to why Jones' expectations of privacy

[55] United States v. Maynard, 615 F.3d 544, 563 (D.C. Cir. 2010).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).
[61] Kinports, *supra* note 7, at 70.

are unreasonable and therefore the search constitutional need not be addressed in this case.[62] The foundation of the Fourth Amendment, according to Justice Scalia, is a particular concern for Government trespass upon areas that the framers specifically enumerated in the language of the amendment.[63] Accordingly, the Court held that the issue and facts surrounding the GPS placed on Jones' vehicle did not "rise or fall" within the *Katz* test.[64]

This opinion sets out the shift back to the principle fact that the reasonable expectation of privacy test of *Katz* supplemented previously held notions that a search and seizure, as recognized by the Fourth Amendment, could occur through a simple trespass.[65] Justice Scalia says, "the *Katz* reasonable-expectation-of-privacy test has been *added* to, not *substituted for*, the common–law trespassory test."[66] The opinion in this case sets out how *Jones* differs from the two previous cases mentioned in District and Appellate Courts.[67] The main difference that Justice Scalia points out, and is what the heart of the majority opinion discusses, is the fact that in both prior cases there was consent from an original owner.[68] In *Knotts*, as well as in *Karo*, at the time that the "beeper" or tracking devices were installed, the containers that they were installed on belonged to third party owners who gave the Government consent for the installation to take place.[69] The Court held that there could be no search or seizure where the containers having the tracking device installed previously with consent, were later delivered to someone who did not have knowledge of the beeper or tracking device.[70] The distinction with Jones was that he was in possession of the vehicle when the Government installed the GPS device, thereby

[62] United States v. Jones, 132 S. Ct. 945, 950 (2012).
[63] *Id.*
[64] *Id.*
[65] David H. Kaye, *The Genealogy Detectives: A Constitutional Analysis of "Familial Searching"*, 50 AM. CRIM. L. REV. 109, 133 (2013).
[66] *Jones*, 132 S. Ct. at 952.
[67] *Id.* at 952 (citing United States v. Knotts, 460 U.S. 276 (1983); United States v. Karo, 468 U.S. 705 (1984)).
[68] *Id.*
[69] *Id.*
[70] *Id.*

engaging in a physical intrusion of a constitutionally protected area, and in violation of the protected rights afforded to him by the Fourth Amendment.[71] Justice Scalia emphasizes that neither trespass nor the *Katz* test are exclusive in helping to determine when a search and seizure has occurred but instead work together and should be viewed on a case by case basis looking at the surrounding facts.[72]

Criticisms of this opinion come from the fact that many have acknowledged that Justice Scalia, in the majority opinion, avoids decisions on the "thorny" and "vexing" problems that may have arisen had they construed the search to be unreasonable under the *Katz* test.[73] One of the main issues that critics have recognized is that the Court stated that surveillance through a tracking device is a search and seizure only after a certain period of time – but where exactly does the line fall that would be the distinguishing factor?[74] Justice Scalia foreshadows this point by posing the exact question that critics of this opinion are asking, but answers his own question by saying that there is "no reason for rushing forward" to answer them in this opinion when they are not at the heart of what he believes constituted the search.[75] The courts more recently have been posed with the question of search and seizures in regards to technological advances and how those boundaries will be applied to, and limit the police.[76] Rather then taking this as an opportunity to curb police power, which is the very essence of the Fourth Amendment, the Supreme Court maintained its focus within the less complex ideology of property rights, trespass, and privacy.[77]

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[71] *Id.*
[72] *Jones*, 132 S. Ct. at at 953.
[73] Kinports, *supra* note 7, at 70.
[74] Marc J. Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 34 (2013).
[75] *Jones*, 132 S. Ct. at 954
[76] *Id.*
[77] Dana Raigrodski, *Property, Privacy and Power: Rethinking the Fourth Amendment in the Wake of U.S. v. Jones*, 22 B.U. PUB. INT. L.J. 67, 78 (2013).

In this opinion it is apparent that Justice Scalia is avoiding having to answer theoretical questions posed, as they have not been put before the Court yet. But what is also apparent is that through the concurrent opinion, and even throughout the majority opinion, there is foreshadowing that these issues and questions may arise again, and at a point where they will have to be answered. Possibly due to the gap in time between the rendering of the *Katz* opinion and the delivery of this opinion we can see emerging issues that deal with technological advances and how these can affect the protected rights afforded to individuals against unreasonable searches under the Fourth Amendment.

IV. FLORIDA V. JARDINES

A. Factual and Procedural Background

In 2006, a detective of the Miami-Dade Police Department received a tip from "crime-stoppers" that the house belonging to Joelis Jardines was being used to grow marijuana.[78] One month later, Detective Pedraja, Detective Bartlet, and Franky, Detective Bartlet's drug detection dog set up for surveillance outside Jardines' home.[79] Franky had gone through substantial training and had certifications for detecting the odor of controlled substances.[80] Franky had received weekly maintenance trainings and had positively alerted to the odor of a narcotics substance nearly 400 times.[81] The detectives watched outside the home of Jardines for about fifteen minutes, and noticed that there was no movement within the home or vehicles in the driveway, at which point the dog handler arrived.[82] The dog handler took Franky on a leash to the front door of the home where Franky gave a positive alert for the scent of a controlled

[78] Jardines v. State, 73 So. 3d 34, 37 (Fla. 2011).
[79] *Id.*
[80] State v. Jardines, 9 So. 3d 1, 3 (Fla. Dist. Ct. App. 3d Dist. 2008).
[81] *Id.*
[82] *Jardines*, 73 So. 3d at 37.

substance.[83] After the handler returned to let the officers know that Franky had given a positive alert, Detective Pedraja approached the front door and smelled the odor of marijuana as well.[84] Since their arrival, the officer had also taken note that the air conditioning unit had been running non stop the entire time, which he had reason to make a correlation between this and the need to cool a room with high intensity light bulbs which are needed to grow marijuana.[85] The officer subsequently got a search warrant from where they got confirmation that marijuana was being grown inside the home.[86] Jardines moved to suppress the evidence found inside his house based on the fact that the dog sniff constituted an illegal search and therefore the protection afforded to him under the Fourth Amendment had been violated.[87] The trial court granted the motion, holding that the use of the drug detector dog did constitute an unreasonable and illegal search and therefore any evidence seized by that search was inadmissible.[88]

The Florida Third District Court of Appeals reversed the trial courts determination finding that a canine sniff is not considered a search under the Fourth Amendment, and that it was not unlawful for the officer and the dog to be present at Jardines' home.[89] Justice Wells, who delivered the opinion of the court, stated that because no one has a "legitimate privacy interest" in illegal items and dog sniffs are intended only to detect contraband, the dog sniff could therefore not be considered a search under the Fourth Amendment.[90] The distinction was made between the privacy interests that society would consider reasonable versus not.[91] Simply because an individual does not expect something to be discovered does not always make it a

[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 38.
[87] State v. Jardines, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 3d Dist. 2008).
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*

reasonable and justifiable expectation of privacy interest that society is going to readily recognize, especially in cases of possession of contraband.[92] Justice Wells distinguished the dog sniff in this case to the method used in the case that was relied upon by *Jardines* to suppress the evidence at the District Court.[93] *Kyllo* was a case in which a mechanical device was being used to detect heat waves coming from the walls of a home.[94] The Court in *Kyllo* recognized the increasing evolution in technological devices and therefore were weary about allowing the constitutionality of such a device, as it may evolve into not only detecting illegal activity going on inside the home but also legitimate activity, which individuals do have a reasonable expectation of privacy in and are protected by the Fourth Amendment.[95] The distinction was made between a mechanical device in *Kyllo* and a dog's nose to show that, where one has the ability to transform and evolve into something with more capabilities, a dog's nose cannot, and will continue to only pick up the scent of contraband.[96] Justice Wells held that a dog sniff is not a search under the Fourth Amendment so long as it was not unlawful for the dog to be present at the scene where the scent was detected.[97] The court further went to determine that both the officer and Franky were lawfully present at Jardines' door because, under Florida law, it had been determined that an individual does not hold an expectation of privacy on a front porch where a visitor may be present at any time.[98]

The Florida Supreme Court quashed the decision of the Florida Court of Appeals and approved the original holding by the District Court in suppressing the evidence found.[99] The Court, in this opinion, distinguished the three federal cases that have been decided by the United

[92] *Id.*
[93] Jardines, 9 So. 3d at 4 (referencing Kyllo v. United States, 533 U.S. 27 (2001)).
[94] *Id.* at 5.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 7.
[98] *Id.*
[99] Jardines v. State, 73 So. 3d 34, 35 (Fla. 2011).

States Supreme Court in regards to dog sniff cases from Jardines in that the three prior cases did not take place in a private residence.[100] The three cases that were previously decided were dealing with luggage at an airport, a vehicle stopped at a drug intersection checkpoint, and a vehicle that had been stopped for a lawful traffic stop.[101] The sniff tests that were conducted on the three previously decided cases were done so, according to Justice Perry, in a minimally intrusive manner and upon objects that do not have specially enumerated protection under the Fourth Amendment.[102] Justice Perry illustrated in this opinion how complex and sophisticated a dog sniff actually is, as opposed to just a casual visit from an officer and a dog to an individual's home.[103] Another distinction drawn by the Court from previous holdings and this case was the fact that in the previous cases those items were seized beforehand because there were some objective criteria, which warranted the search.[104] If the Court were to allow a dog sniff of a private residence, without a prior showing that there was probable cause, then that would potentially be opening the door for officers to perform a dog sniff on any and all houses that they wanted to without safeguarding against discrimination.[105] Because an individual's house is afforded special protection under the Fourth Amendment from unreasonable search and seizure, the Court held that the dog sniff performed by Franky in this case was an intrusion into the sanctity of Jardines' home where he had a reasonable expectation of privacy.[106]

[100] *Id.* at 45 (citing United States v. Place, 462 U.S. 696 (1983); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Illinois V. Caballes, 543 U.S. 405 (2005)).
[101] *Id.* at 44.
[102] *Id.* at 45.
[103] *Id.* at 46.
[104] *Id.* at 49.
[105] Jardines 73 So. 3d at 49.
[106] *Id.*

B. The Majority Opinion

The opinion in this case was limited to the question of whether the officer's actions, by taking the dog to the front door, actually constituted a search under the Fourth Amendment.[107] Justice Scalia calls this a straightforward ruling in his opinion, based on the history and evolution of what is considered a search under the Fourth Amendment.[108] The Court noted that the rights afforded to an individual under the Fourth Amendment to retreat to his home to be free from unreasonable searches and seizures would be moot if an officer would be allowed to stand just outside the front door or window looking for evidence to then prove up a search warrant.[109] Although officers are not required to close their eyes as they perform their duties on a day to day basis, they are held to a bit of a different standard when they set foot on an area that is enumerated as being protected under the Fourth Amendment.[110] Looking at the evolution of what is considered a search under the Fourth Amendment through the cases, and taking into account the holding in *Jones*, since it has already been established that Jardines had a reasonable expectation of privacy in his home, the Court turns to determine if Jardines' gave the officer and Franky consent to be on his property.[111]

The difference between the license that was implicitly given to the officers and Franky, if that, by Jardines was the same that would allow any visitor the right to walk up to the front door and knock.[112] Customary societal norms tell us that as visitors, individuals are allowed to walk up to the front door of a house, knock, and pending they are not given permission to enter or stay longer, they leave.[113] It is quite the contrary however, as the Court points out, for an officer to

[107] Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1415.
[111] *Id.*
[112] *Id.*
[113] Jardines, 133 S. Ct. at 1415.

introduce a trained drug detecting dog to sniff around the house with the expectation, or hopes, that they would find some evidence; there cannot be found to be an invitation, even if implicitly, to take those actions.[114] The permission that an individual affords others to be on his property is limited to the area and scope of what the others can do on that individual's property.[115] Justice Scalia again chooses to decide the reasonableness of the search in this case just as he did in *Jones*, by looking at the fundamental issue of whether the officers were trespassing on Jardines' house.[116] Because the front door is an area that implicitly invites others, the Court here focuses on the intent for being on the front door, and if there was implied consent for that – the answer, according to Justice Scalia, is no.[117] Because Justice Scalia is able to tie in the same reasoning in *Jones*, he again finds no need to venture into the expectation of privacy test from *Katz*.[118] With this opinion, the Supreme Court solidified the idea of and expanded what can and would be considered a "search" under the Fourth Amendment.[119]

Once again, since the majority did not accurately address and missed the opportunity to apply the *Katz* test to the facts in this case, the concurring opinion touched upon it.[120] Justice Kagan found that, in addition to the trespass that the majority opinion spoke about, the dog sniff that was conducted by the officer and Franky infringed upon the reasonable expectation of privacy that Jardines had in regards to his home.[121] Critics see *Jardines* as a landmark case for moving in the right direction of limiting what police officers can do when it comes to properly

[114] *Id.* at 1416.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 1417.
[118] *Id.*
[119] Jardines, 133 S. Ct. at 1418.
[120] Charles D. Weisselberg, *DNA, Dogs, The Nickel, and Other Curiosities: Criminal Law Cases in the Supreme Court's 2012-2013 Term*, 49 CT. REV. 178, 180 (2013).
[121] *Id.*

conducting a search under the Fourth Amendment.[122] *Jardines* is the first Supreme Court case, which uses the analysis from *Jones* to further interpret the direction the courts are heading in with regards to the expansion of what is protected under the Fourth Amendment.[123] It is important to take note that although Justice Scalia used the same idea of trespass law from *Jones* in this opinion, he does not ever mention the word trespass at all.[124] *Jardines* may be a decision that some see as striking a balance of the underlying principle of the Fourth Amendment between the *Jones* test and the device test that was mentioned by the Florida Supreme Court.[125] This being the case, because instead of waiting until there is a decision to be made with regards to this subject on a horrendous violent crime, the Court used a crime such as drug trafficking to uphold the notion that everyone is afforded the same constitutional rights against unreasonable searches, not only when the Government has a higher interest in a particular type of case.[126]

V. CONCLUSION

As we continue to move into the future and venture into territory that is unfamiliar we will undoubtedly stumble upon situations where something as fundamental as rights guaranteed to individuals under the Constitution will be tested. Although there are yet many questions unanswered by the Courts, there has been an incremental shift towards the right direction. Some may view such decisions discussed above as failures and identify a lack of impact they have had on the scope of a "search" under the Fourth Amendment, but without these opinions we would not be able to refer to something concrete, to a bright line test, or for guidance when faced with similar factual situations.[127] Through these landmark cases, the days of the need for a physical

[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Leading Case, *supra* note 1, at 233.
[126] *Id.*
[127] *See* Sklansky, *supra* note 11, at 885; Kinports, *supra* note 7, at 79.

intrusion to constitute a violation of an individual's right to be free from unreasonable searches are over. Evolving from purely property-based rights, individuals are now afforded the right to be free from unreasonable searches and seizures under the Fourth Amendment where a reasonable expectation of privacy exists. And further employing these ideas are situations where property based rights intertwine with an individual's expectation of privacy in their home, and thereby solidifying the need to protect their constitutional rights against searches. So far The Court has established tests and laws for Fourth Amendment protected rights when it comes to eavesdropping, GPS tracking devices, and more recently, canines. It will be interesting to see what the upcoming year has in store for the United States Supreme Court, our society, and the Fourth Amendment.