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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
ILLINOIS, :
Petitioner :
v. : No. 03-923
ROY I. CABALLES. :
- - - - -X

Washington, D.C.
Wednesday, November 10, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

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supporting the Petitioner.

RALPH E. MECZYK, ESQ., Chicago, Illinois; on behalf of the
Respondent.

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3 JUSTICE STEVENS: We will now hear argument in
4 Illinois against Caballes.

5 General Madigan.

6 ORAL ARGUMENT OF LISA MADIGAN

7 ON BEHALF OF THE PETITIONER

8 MS. MADIGAN: Thank you, Justice Stevens, and
9 may it please the Court:

10 This Court has made clear on several occasions,
11 including 21 years ago in Place and 4 years ago in Edmond,
12 that a sniff by a drug-detection dog is not a Fourth
13 Amendment search, and if something is neither a search nor
14 a seizure, then it requires no Fourth Amendment
15 justification.

16 JUSTICE SOUTER: Well, we've held that it's
17 certainly not a -- a full-blown search. It's not a search
18 in the classic sense, but a Terry stop isn't an arrest in
19 -- in the classic sense either. We -- we have said that
20 that is a kind of seizure.

21 Why do -- I think your -- your argument assumes
22 that this for -- for purposes of search analogies that
23 something is either a -- a full-dress search or it's not a
24 search at all. Why isn't there a -- a possibility of --
25 of a kind of middle ground on searches just as there is on

1 seizures?

2 MS. MADIGAN: Well, this Court made clear in
3 Arizona v. Hicks that it did not want to go down the road
4 of creating something known as a quasi-search so that
5 courts and police officers would be in the position of
6 trying to determine whether or not something was a search
7 or not.

8 JUSTICE SOUTER: Oh, I -- I can -- I can just
9 imagine the problems, but I mean, what -- I think what's
10 -- what the -- what's bothering me about the case is that
11 if we persist in -- in saying that -- that it's -- that
12 it's an either and or question with no question with no
13 possible gradation, then I assume nothing prevents the
14 police from taking the dogs through every municipal garage
15 in the United States and I suppose there's nothing that
16 prevents the police from taking the dogs up to any
17 homeowner's door, ringing the bell, and seeing if the dog
18 gets a sniff of something when the door is opened. We're
19 -- we're opening rather a -- a large vista for -- for dog
20 intrusions, and -- and that's what's -- that's what's
21 bothering me. Why -- why should we -- why should we open
22 that vista if there is a possibility of a -- of a middle
23 ground that would prevent it?

24 MS. MADIGAN: Well, I would start with the
25 reality that dog sniffs by their very nature, as this

1 Court recognized in both Place and Edmond, are very unique
2 both in terms of the manner in which the sniff is
3 conducted, as well as the content of -- of the information
4 that the sniff reveals, so that a dog sniff is only going
5 to be able to reveal the presence or absence of
6 contraband. And this Court has recognized that
7 individuals have no privacy interest in the possession of
8 contraband.

9 JUSTICE GINSBURG: Does that imply that your
10 answer is yes to the question? If we say, as you urge, a
11 dog sniff is not a search, then the police are free to
12 parade up and down every street in the country with dogs
13 sniffing car trunks.

14 MS. MADIGAN: Yes. Because a sniff is not a
15 search, a police officer would be able to take a
16 narcotics-detection dog down the street with him or her.
17 I can tell you that because of the limited resources --
18 and this is a point brought up in the Illinois Association
19 of Chiefs of Police amicus brief -- that that is not
20 likely to occur.

21 In addition, I can also tell you that in the
22 State of Illinois, the Illinois State police do not train
23 their dogs nor do they use their dogs on people. They
24 only use them on objects.

25 But yes, in answer to both of your questions,

1 because a dog sniff does not constitute a search, dogs
2 could be used to walk down streets. They could,
3 hypothetically, be used in parking lots, and at times they
4 are used in parking lots.

5 JUSTICE SCALIA: But they are used. I mean, we
6 don't have to make it up. From cases we've had here, we
7 know that they're used in places like bus depots to -- to
8 sniff luggage that -- that passengers have carried through
9 on -- on buses.

10 MS. MADIGAN: Yes, they are.

11 JUSTICE SCALIA: And the republic seems to have
12 survived.

13 MS. MADIGAN: I agree.

14 JUSTICE GINSBURG: One could characterize those
15 episodes under the, quote, special needs doctrine. I
16 mean, we are exposed to searches at airports that we would
17 not put up with walking up and down an ordinary street.
18 So the dogs at the terminals one expects nowadays.

19 JUSTICE SCALIA: No. These aren't sniffs for --
20 for explosives. These are sniffs for drugs and -- and
21 these -- these are not buses that are coming in from
22 France. They're coming in from one American city to
23 another. And -- and there's no more need in -- in that
24 case than there was in this case. It was just a good -- a
25 good place to find criminals who were carrying unlawful

1 drugs.

2 MS. MADIGAN: In the present case, Mr. Caballes
3 was traveling from Las Vegas, Nevada apparently on his way
4 to Chicago, Illinois. He was pulled over for speeding.
5 Another officer overheard when Master Sergeant Gillette
6 called in to dispatch that he effected --

7 JUSTICE STEVENS: May I interrupt, General
8 Madigan?

9 MS. MADIGAN: You may.

10 JUSTICE STEVENS: He was pulled over for
11 speeding at 71 miles an hour in a 65 miles an hour zone on
12 I-80. Right?

13 MS. MADIGAN: Yes, that is correct, Justice
14 Stevens.

15 JUSTICE STEVENS: Did they know in advance that
16 he was someone to look for? Because I don't imagine you
17 arrest everybody on I-80 that goes 70 miles an hour. I've
18 done it many times myself is why --

19 (Laughter.)

20 JUSTICE SCALIA: Inadvertently.

21 JUSTICE STEVENS: Inadvertently.

22 (Laughter.)

23 MS. MADIGAN: We always like to have you in
24 Illinois.

25 Obviously, the Illinois State Police have the

1 ability to pull somebody over whether they're going 1 mile
2 over the speed limit or 26 miles over the speed limit, but
3 there is nothing in the record to indicate that they were
4 looking for Mr. Caballes as he was traveling eastbound on
5 I-80 towards Chicago.

6 JUSTICE STEVENS: Does the record tell us what
7 time of day it was?

8 MS. MADIGAN: Yes. It was approximately 5:10
9 p.m.

10 JUSTICE STEVENS: Thank you.

11 JUSTICE KENNEDY: You -- you answered one of the
12 earlier questions about the possible intrusiveness of dogs
13 everywhere by saying, well, you don't have a privacy
14 interest in contraband, but that's never true. You don't
15 have a privacy interest in the murder victim's body, but
16 you still have to have a warrant to go in and get it. So
17 that -- that just doesn't work unless I missed something.

18 MS. MADIGAN: You do not have a privacy interest
19 in contraband, as this Court has recognized in the
20 Jacobsen case.

21 JUSTICE KENNEDY: Yes, but you have a privacy
22 interest in your person and in your place, and that's what
23 we're talking about. So that seems to me that that just
24 doesn't help us.

25 MS. MADIGAN: Well, there is a distinction

1 that's made in terms of Fourth Amendment protections that
2 are given to homes and people versus cars. Ever since the
3 Carroll case, it has been recognized that a warrantless
4 search of a car can be done if they found probable cause.

5 JUSTICE KENNEDY: But that's because of the
6 nature of the place being searched not because of the
7 nature of what you're searching for.

8 MS. MADIGAN: Correct.

9 JUSTICE SCALIA: Not necessarily.

10 JUSTICE KENNEDY: So it just can't be that -- so
11 the fact that you don't have a privacy interest in
12 contraband, it doesn't seem to me -- I -- I don't think
13 you need that argument.

14 JUSTICE SCALIA: I think you should use it.

15 (Laughter.)

16 MS. MADIGAN: I -- I plan on continuing to use
17 it.

18 JUSTICE SCALIA: Why -- why do you -- are you
19 sure that *Kyllo*, you know, the -- the imaging case, would
20 have come out the same way if the only thing -- the only
21 thing -- that the imaging could pick out is not any of the
22 other private activities in the home, but the only thing
23 it could possibly discern is a dead body with a knife
24 through the heart? Are you sure the case would have come
25 out the same way? I'm not at all sure.

1 MS. MADIGAN: I would hope the case would come
2 out differently than --

3 JUSTICE O'CONNOR: Well, what --

4 JUSTICE KENNEDY: Do you have any authority for
5 that other than Justice Scalia's speculation about how
6 this --

7 (Laughter.)

8 JUSTICE KENNEDY: -- how his Kyllo case might
9 have been written?

10 JUSTICE O'CONNOR: What about a house and -- and
11 the use of a dog to sniff around a door access or a house
12 just because the police think, you know, it's possible
13 this is somebody growing marijuana in the basement or
14 something? Is that all right?

15 MS. MADIGAN: I would argue that, yes, it is all
16 right to walk a dog around a house, but then as Justice --

17 JUSTICE O'CONNOR: How do you -- how do you
18 reconcile that with the heat sensor case then?

19 MS. MADIGAN: The thermal imager that was used
20 in the Kyllo case was able to reveal intimate details of
21 the house. A dog sniff is only going to reveal the
22 presence or absence of contraband, and because of that,
23 that's where we suddenly get into the tension between
24 Kyllo and Place and --

25 JUSTICE STEVENS: What if the dogs get a little

1 more sophisticated in the future and can also smell a
2 certain kind of perfume, something like that? Would then
3 the whole analysis change?

4 MS. MADIGAN: Well, then you would end up in a
5 situation as to whether or not an officer had probable
6 cause when a dog, in fact, alerted. If he was alerting to
7 the presence of perfume as opposed to narcotics, there
8 would be--

9 JUSTICE STEVENS: How would you know whether
10 the -- the dog -- I don't think the dog alerts, as I'm
11 alerting, for one reason or another. He just alerts.

12 MS. MADIGAN: Well, they're very well trained
13 dogs. In fact, in the State of Illinois, the dogs and
14 their handlers go through 320 hours of training, and
15 they're specifically trained to only alert to narcotics.

16 JUSTICE STEVENS: I just learned this morning
17 that some very well trained dogs that are trained to alert
18 for explosives will also alert for certain kinds of rubber
19 in a tire. They didn't realize that. And I think it's
20 entirely possible that dogs would -- there will be false
21 alerts by -- by dogs because it's triggered by something
22 that -- that is not really anticipated.

23 MS. MADIGAN: One of the things that does take
24 place during the training of these narcotics-detection
25 dogs is to make sure that they are not alerting to things

1 that are not narcotics or -- I don't know exactly how the
2 explosive training is conducted because we don't train our
3 dogs in Illinois for explosives, but they purposely train
4 them on narcotics not to alert to plastic wrap that is
5 frequently the container used for narcotics, not --

6 JUSTICE STEVENS: So you would agree the
7 analysis would be different if there could be an innocent
8 cause of the alert as well as the contraband being the
9 cause of the alert.

10 MS. MADIGAN: It depends. The analysis would be
11 different if the dog was known to or had been trained to
12 actually alert to the non-contraband.

13 JUSTICE SCALIA: Or if that happened a large
14 percentage of the time. I mean, surely you'd concede that
15 the search is unreasonable if, for every -- every one
16 time, you -- you make somebody open his bag because the
17 dog actually smells narcotics, 99 times you make somebody
18 open his bag because he has apples in it. I mean,
19 wouldn't that go to the reasonableness of --

20 MS. MADIGAN: Well, it would actually go to
21 whether or not that dog provided -- that dog's alert
22 provided probable cause to conduct a search.

23 JUSTICE KENNEDY: Well, do we -- we don't have
24 the probable cause question before us, do we?

25 MS. MADIGAN: You do not have the probable cause

1 question before you. This dog was determined to be
2 reliable by the trial court and the Illinois Appellate
3 Court, and it was not part of the Illinois Supreme Court's
4 decision.

5 JUSTICE BREYER: So what again in your view is the
6 best distinction from *Kyllo*?

7 MS. MADIGAN: Two things. One, the thermal
8 imager used in *Kyllo* was able to reveal intimate details
9 that individuals --

10 JUSTICE O'CONNOR: Like what? I thought it was
11 just heat?

12 JUSTICE SCALIA: Yes.

13 MS. MADIGAN: There was some disagreement on the
14 Court about exactly what it revealed, but in terms of
15 intimate details, it then allowed somebody --

16 JUSTICE O'CONNOR: Excuse me. What details? It
17 is a device that measures heat.

18 MS. MADIGAN: Because it could measure heat, it
19 could also potentially determine when somebody was taking
20 a bath, taking a sauna, and doing other intimate things in
21 the house.

22 JUSTICE GINSBURG: I think there was a reference
23 to my lady's bath in the opinion.

24 JUSTICE SCALIA: A nice turn of phrase, as I
25 recall.

1 (Laughter.)

2 JUSTICE BREYER: What was -- and what was the
3 second?

4 MS. MADIGAN: The second one would be the
5 distinction between houses and cars and the protections
6 that houses are given under the Fourth Amendment, which
7 are far greater than the protections that people have in
8 their cars.

9 JUSTICE KENNEDY: Well, so you think if this
10 were a house, that the Kyllo case would apply?

11 MS. MADIGAN: If this were a house in the
12 situation, it would certainly bring out the tension
13 between Kyllo and Place --

14 JUSTICE SCALIA: Wasn't there -- didn't Kyllo --
15 wasn't what -- what the Court was worried about in Kyllo
16 not just the relatively crude heat imaging that existed in
17 the case before it, but the prospect of more and more
18 sophisticated heat imaging which -- which we had evidence
19 was already in development that would enable you to see
20 people moving around a room? I thought the case referred
21 to that. Now, are we going to have more and more --
22 what's going to happen with dogs? I -- I can't imagine
23 that -- that this thing is going anywhere other than
24 smelling narcotics and smelling bombs.

25 JUSTICE STEVENS: Well, but you would argue that

1 the same rationale should apply if, instead of using dogs,
2 you had some sophisticated device that would buzz or ring
3 a bell or something whenever the odor of -- of narcotics
4 was present, wouldn't you?

5 MS. MADIGAN: I would argue that. So if there
6 was an ability to create a -- a mechanical dog, for
7 instance, we would again say that the use of a mechanical
8 dog sniff would not be a search and therefore would not --

9 JUSTICE STEVENS: There's nothing magical about
10 the fact that it's an animal rather than a sophisticated
11 device. It has better detection capacity than a human
12 being does. That's the only difference.

13 MS. MADIGAN: You are correct.

14 JUSTICE SOUTER: In -- in discussing the -- the
15 answer to the -- the Kyllo issue, you've -- you place an
16 emphasis on the protection given to a house. Would you go
17 back to Justice O'Connor's question and my earlier
18 example? Is it still your answer that the police can walk
19 dogs around the foundation of the house or take a dog to
20 the front door and ring the bell and see what it -- what
21 it sniffs when the door is opened --

22 MS. MADIGAN: I would --

23 JUSTICE SOUTER: -- without there being a search
24 and hence no Fourth Amendment concern?

25 MS. MADIGAN: Yes, Justice Souter, I would say

1 that that is possible because the sniff itself is not a
2 search and it only reveals the presence or absence of
3 contraband, which is something that the individual does
4 not have privacy expectations --

5 JUSTICE SOUTER: Okay. But then -- then the --
6 then there is no significance in the house.

7 MS. MADIGAN: There is potentially significance
8 in the house because the --

9 JUSTICE SOUTER: Well, when does -- when does it
10 occur? I mean, if -- if -- first you say the -- the house
11 is -- is a matter of significance for Kyllo analysis.
12 We're trying to draw a distinction, if there is one,
13 between Kyllo and this, and you say they can go to the
14 house. They can sniff the foundations. They can go to
15 the front door, et cetera. I don't see that the house, in
16 fact, is functioning as a distinction at all.

17 MS. MADIGAN: This Court's precedents have shown
18 us that in fact Fourth Amendment protections are higher in
19 the home than they are in the car.

20 JUSTICE SOUTER: Oh, I realize that, but it
21 seems to me your basic argument, if I understand it, is
22 there is simply no search here, and because there is no
23 search here, it doesn't matter whether you're dealing with
24 a house or a parking lot or a car on the road. No search
25 is no search. So for purposes of -- if I -- I want to

1 understand your case, and as I understand it, for purposes
2 of your case, there is no significance in the house
3 because there doesn't have to be. The question doesn't
4 arise because there's no search. Is that --

5 MS. MADIGAN: Justice Souter, that is absolutely
6 correct. A search, as far as we are concerned -- and I
7 believe it's based on the precedents of this Court -- is a
8 sniff is not a search, and therefore it requires no Fourth
9 Amendment justification.

10 JUSTICE GINSBURG: You said there's no
11 disturbance of one's privacy and so that distinguishes the
12 dog sniff from some other governmental intrusions. But
13 dogs can be frightening, humiliating. It seems to me that
14 there is some association with the idea that I have a
15 right to be let alone by my government and having a large
16 dog circle my car.

17 MS. MADIGAN: There are in this country millions
18 of dogs, many of the types of dogs that are used by
19 narcotics detection teams, such as Labrador retrievers and
20 shepherds, are identical to the pets that people own. We
21 encounter them in the parks, on the streets, and I would
22 contend that an officer cannot be in the position of
23 making a determination as to whether or not the individual
24 that he encounters is going to be frightened by the dog.

25 Mr. Justice Stevens, if I may, I'd like to

1 reserve the remainder of my time.

2 JUSTICE STEVENS: Yes, you may save your time.

3 MS. MADIGAN: Thank you.

4 JUSTICE STEVENS: Mr. Wray.

5 ORAL ARGUMENT OF CHRISTOPHER A. WRAY

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

8 MR. WRAY: Justice Stevens, and may it please
9 the Court:

10 There's no dispute that respondent here was
11 lawfully stopped based on probable cause. There's also no
12 dispute that the entire stop took less than 9 minutes.
13 The question is whether a second officer's use of a drug
14 dog to sniff outside of that car during those 9 minutes
15 required some separate Fourth Amendment justification.

16 JUSTICE SCALIA: Do you agree with -- with
17 General Madigan that it doesn't make any difference
18 whether the -- the dog is a -- is a mechanical instrument
19 or not? Do you agree it makes no difference?

20 I thought that one of the -- one of the points
21 in -- in the imaging case was that this was a new
22 technology which didn't exist and that although the
23 ordinary rules in 1791 was that there was no search unless
24 -- you know, unless you enter the house or unless you --
25 you physically intrude upon the person's -- at least the

1 person's clothes, we made an exception to that rule
2 because of this new technology that enabled you to find
3 out things without having to intrude into the home or into
4 the person. Now, but -- but this is not a new technology.
5 This is a dog and -- and they had that ability in 1791
6 just as they had it today. And the rule that when there's
7 no intrusion, there's no search -- there's no reason to
8 depart from that rule with respect to a dog although there
9 would be with respect to some sophisticated new technology
10 that would enable you to find out all sorts of things.

11 MR. WRAY: That's correct.

12 JUSTICE SCALIA: It seems to me you shouldn't --
13 you shouldn't assume that -- that the fact that this is a
14 canine makes no difference.

15 JUSTICE STEVENS: Are you going to rely on the
16 fact that dogs were trained to do this sort of thing back
17 in the 18th century?

18 MR. WRAY: I'm going to rely on -- on three
19 distinctions between this case and Kyllo, Justice Stevens.

20 The first is that the three points that the
21 Court looked at in Kyllo were: one, as has already been
22 referenced, the fact that it's a home, the most sacred
23 place under the Fourth Amendment; second, that it revealed
24 certain intimate details; and third, that that was a
25 technology --

1 JUSTICE STEVENS: It was potentially revealed.
2 It did not actually reveal any details.

3 MR. WRAY: As -- as General Madigan referenced,
4 there is obviously some disagreement within the Court on
5 that issue, but the -- the fact was that the technology in
6 Kyllo revealed information about heat in the house which
7 could be thought to reveal intimate details about the
8 house.

9 The third point in Kyllo, which I think Justice
10 Scalia is referring to, is that that was technology that
11 was not in general public use. Dogs have been used by law
12 enforcement across the country since Place and before to
13 sniff everything from --

14 JUSTICE STEVENS: But not in 1790.

15 MR. WRAY: Not --

16 JUSTICE KENNEDY: Did you come here --

17 JUSTICE SCALIA: You don't know that, do you?

18 JUSTICE KENNEDY: Did you come here having
19 researched all about dogs in 1790?

20 (Laughter.)

21 MR. WRAY: Justice Kennedy, I cannot, I regret
22 to say, tell you what dogs were doing in 1790. I can tell
23 you -- and this is maybe a factual thing that might be of
24 interest to the Court -- that the dogs who train -- who
25 are trained to alert to detect things -- it's not that

1 they are sniffing things that all dogs can't already
2 smell. It's rather that they are trained to let the
3 handler know that they've smelt whatever it is they've
4 been trained to smell. So the smells that are coming out
5 of Respondent Caballes' car are exposed to every dog.

6 JUSTICE STEVENS: Do you really think this would
7 be a different case if the officer had a device that did
8 exactly what the dog -- dog did?

9 MR. WRAY: We -- our position would still be,
10 Justice Stevens, that as long as the device only revealed,
11 as this does --

12 JUSTICE STEVENS: I would think you'd take --

13 MR. WRAY: -- the absence or presence of
14 contraband, it would still be constitutional.

15 JUSTICE SOUTER: Why do you rely on the -- in --
16 in distinguishing *Kyllo*, why do you rely on the house if
17 there's no search? Why do you have to rely on the fact
18 that there was a house involved there? You -- you listed
19 that as one of your three distinctions.

20 MR. WRAY: We don't believe we have to rely on
21 it, Justice Souter. We do believe that there were three
22 things that were important in *Kyllo*. The fact that it was
23 a home was one of those things. Again, the -- the fact of
24 a home, the fact that it was technology not in general
25 public use, and --

1 JUSTICE SCALIA: But that didn't go to whether
2 it was a search or seizure. I think it goes to whether it
3 was an unreasonable search or seizure. Don't you think
4 so? That what -- what might be unreasonable with respect
5 to a home would not be unreasonable with respect to a
6 suitcase?

7 MR. WRAY: Yes, Justice Scalia, that's correct.

8 JUSTICE SOUTER: But -- but your -- is -- is it
9 -- I understand it to be your position that there simply
10 is no search here. Period.

11 MR. WRAY: That is correct, Justice Souter.

12 JUSTICE SOUTER: It's because it's a dog sniff.

13 MR. WRAY: We would -- we would submit this is
14 not a search because, as this Court recognized in both
15 Place and Edmond -- and the Jacobsen case is also
16 significant because the Court said that the reason this is
17 not a search, there using the dog sniff by analogy, is
18 because it compromises no legitimate privacy interest.

19 The language of the Court in Place is
20 significant because it says that we are aware of no other
21 investigative procedure that is so limited in both the
22 manner in which the information is obtained and in the
23 content of the information revealed. That language goes
24 not only to why it's not a Fourth Amendment search but why
25 the use of the dog sniff during a probable cause traffic

1 stop here, where it doesn't prolong the duration, does not
2 transform an otherwise lawful seizure into an unlawful
3 one.

4 JUSTICE SOUTER: All right. Do you -- do you
5 think it's -- it's reasonable to say that if the police
6 take dogs simply onto private property to sniff the
7 foundations of houses, if they take dogs to the front door
8 and ring the bell so that they hope the door will open,
9 that there is -- there is no compromise of a privacy
10 interest?

11 MR. WRAY: Well, there would be a question as to
12 whether the officer, the human officer, that is, could be
13 on private property -- I take it from your hypothetical,
14 Justice Souter -- in the first place. But --

15 JUSTICE SOUTER: Well, I mean, the Fourth
16 Amendment analysis after Katz doesn't -- doesn't depend on
17 trespass, and -- and you have said up to this point that
18 there is no search. And then you have quite rightly said
19 that we have had as a consideration in our minds
20 analytically whether it's fair to say that what the police
21 were doing involved any compromise of a privacy interest.

22 So I'm assuming -- I'm assuming that the police
23 can at least get to the foundation with a dog and they can
24 certainly walk up to the front door and ring the bell.
25 And if they do that with a dog, for the purpose of letting

1 the dog sniff and alert, if there's anything to alert to,
2 is it fair to say that there is no compromise of the
3 privacy interests of the people who own the house?

4 MR. WRAY: Our position would be -- the answer
5 to that question is yes. The Court does not have to
6 resolve that issue to decide this case.

7 JUSTICE SCALIA: Of course, we could separate
8 the home from the -- from what happened here and still
9 validate the search here if we held that it was a search,
10 but was a reasonable one since all you find is that the
11 person was carrying contraband. It's the only thing
12 that's disclosed. Whereas, if you -- if you did the same
13 thing with -- with regard to a house, which is a more
14 sacrosanct part of one's privacy, it might be an
15 unreasonable search. We -- we could reach that result if
16 we wanted to, couldn't we?

17 MR. WRAY: I think you could, Justice Scalia.
18 It's important to distinguish --

19 JUSTICE O'CONNOR: On the other hand, if it were
20 a drug-selling neighborhood or around a park where drugs
21 are frequently sold, would it be legitimate in your view
22 for the police to take drug-sniffing dogs and walk around
23 the public street where cars are parked around that known
24 drug-selling area and see if they could sniff out some
25 contraband in the cars? Is that okay?

1 MR. WRAY: We believe it would be okay, Justice
2 O'Connor. It would be important not to use the dogs in a
3 way to constitute a new seizure because in that case,
4 you're not talking --

5 JUSTICE O'CONNOR: I'm -- I'm assuming parked
6 cars. You haven't interrupted anybody. Nobody is in the
7 car, parked on a public street.

8 MR. WRAY: In that instance, we believe that
9 would be acceptable under the Fourth Amendment.

10 JUSTICE KENNEDY: So you -- you give no
11 significance to the fact that this dog sniff was in the
12 course of a lawful stop where the citizen's rights had
13 already been curtailed to a significant extent?

14 MR. WRAY: We believe, Justice Kennedy, that the
15 -- that that context here makes this an even easier case
16 under the Fourth Amendment, that is, the dog sniff not
17 being a search compromising no legitimate privacy
18 interests during the course of a lawful probable cause
19 stop, which we know from Atwater -- the officer could have
20 simply placed the woman under full custodial arrest and
21 taken her down to jail -- was not an activity that
22 transformed the seizure into an unlawful one.

23 The Illinois Supreme Court's concern and where
24 we think they got off track was that they were concerned
25 that the use of the dog sniff during this 9-minute traffic

1 stop was that it transformed it -- it used the language
2 that it transformed the sniff into a drug investigation.
3 We would submit that the Fourth Amendment is about the
4 reasonableness of searches and seizures and not about what
5 the scope of the government's investigation is. And in
6 that sense, the court got off track.

7 These -- this is a -- this is a means that law
8 enforcement has been using properly in reliance on this
9 Court's decision in Place, reinforced just 4 years ago in
10 Edmond, for more than 21 years to detect everything from
11 drugs to bombs to smuggled -- we have beagles in the
12 airports that smuggle produce that's being smuggled in.
13 Dogs are used all over the country with great
14 effectiveness in law enforcement, and the -- we -- that is
15 a -- a technique that we want to encourage law enforcement
16 to pursue.

17 JUSTICE GINSBURG: Are there -- are there any
18 manuals for law enforcement officers with respect to the
19 time and place of using dogs, or it's just open season?

20 MR. WRAY: Justice Ginsburg, there is extensive
21 training of law enforcement to use dogs. It's a multi-
22 week program that requires --

23 JUSTICE GINSBURG: I don't mean the training to
24 make the dog alert properly. How the police will use
25 them, when, under what circumstances.

1 MR. WRAY: Justice Ginsburg, each agency has
2 different policies about when they use dogs and what
3 purpose they're trained for. In this case, as you heard,
4 they're being used in the context of highway interdiction,
5 and so they're trained to sniff around vehicles
6 specifically.

7 JUSTICE STEVENS: Thank you, Mr. Wray.

8 MR. WRAY: Thank you.

9 JUSTICE STEVENS: Mr. Meczyk.

10 ORAL ARGUMENT OF RALPH E. MECZYK

11 ON BEHALF OF THE RESPONDENT

12 MR. MECZYK: Justice Stevens, and may it please
13 the Court:

14 The State does not offer any Fourth Amendment
15 justification whatsoever in regards to -- in this case.
16 It argues instead that there -- there was no need for any
17 justification, and that is incorrect for two reasons.

18 The dog sniff in this case invaded a Fourth
19 Amendment interest of Mr. Caballes in the context of a
20 routine traffic search. The sniff in this case was, in
21 fact, a search. Albeit it was a limited intrusion, it was
22 still a search nonetheless.

23 JUSTICE SCALIA: Why -- why do you say that? I
24 mean, is -- is anything that I observe a search? I mean,
25 suppose I -- I'm a policeman and -- and I'm looking out

1 for, I don't know, people with a nervous tic because I
2 think that that might be somebody who's about to commit a
3 crime or has committed a crime. Have I searched that
4 person because I -- I observe something external?

5 MR. MECZYK: Any observation I think --

6 JUSTICE SCALIA: Is there no difference between
7 an investigation and a search?

8 MR. MECZYK: There is in this case -- see if I
9 understand you correctly.

10 JUSTICE SCALIA: No. It seems to me your brief
11 and -- and your statement here both seem to assume that
12 there's a search whenever the police investigate.

13 MR. MECZYK: Well --

14 JUSTICE SCALIA: But that's not so. They -- one
15 can investigate without searching.

16 MR. MECZYK: Well, to -- see if I understand
17 your question correctly. If you're looking with someone
18 with that nervous tic, that would be something in open
19 view or plain view. That's not the type of investigation
20 I'm talking about. There is in fact, most respectfully,
21 an investigation technique here. There's an investigation
22 measure.

23 JUSTICE BREYER: Yes, but that isn't the --

24 JUSTICE KENNEDY: What about a policeman who
25 smells marijuana coming out of a car or a residence. He's

1 walking down the street, public street, and he smells
2 marijuana.

3 MR. MECZYK: The only way I can analogize that,
4 Justice Kennedy, is that it -- that is akin to a plain
5 smell or plain view.

6 JUSTICE BREYER: All right. So once you say
7 that, you realize that there are billions and billions of
8 searches that go on every day that the police don't have
9 to justify at all. They just look around.

10 MR. MECZYK: I don't --

11 JUSTICE BREYER: Okay? There are billions of
12 them. So the real question is do they have to give a
13 justification for this. And the argument that they don't
14 is simply that it's not in the person's house. When you
15 go out in a public place, even in your car, you might run
16 into people or animals with sharp noses. And a lot of
17 them can detect marijuana. And you know, maybe it's a
18 Limburger cheese. I don't know.

19 (Laughter.)

20 JUSTICE BREYER: But people are sniffing things
21 that they don't sniff through windows into your house, but
22 they do get odors in your car on the street. So this is
23 the kind of search. Yes, it's a search, but one that the
24 police don't have to justify.

25 MR. MECZYK: But this is with a specific

1 investigative tool.

2 JUSTICE BREYER: Well, it's a specific
3 investigative tool when I put on my glasses to look
4 through a window.

5 MR. MECZYK: Well, this is --

6 JUSTICE BREYER: I don't see why it has to --
7 why that matters if in fact all -- if you go into a car, a
8 police car, and you have -- drive through the neighborhood
9 and look around, you are using a specific investigative
10 tool, the police car, to look around and find out what's
11 going on.

12 MR. MECZYK: This is a far more -- most
13 respectfully, this is a far more sophisticated
14 investigative tool.

15 JUSTICE BREYER: What I'm trying to get to is in
16 my own mind it's not a question of the tools. It's a
17 question of the expectation of privacy.

18 MR. MECZYK: Then maybe I can see if I could
19 answer your question. Mr. Caballes in this case indeed
20 had an expectation of privacy. When he was asked by the
21 police officer in this case if he can consent to the
22 search, he said no. He did not want that law enforcement
23 officer looking in --

24 JUSTICE KENNEDY: But that never --

25 JUSTICE O'CONNOR: Yes, but both Place and

1 Edmond, opinions from this Court, said sniffs are not
2 searches.

3 MR. MECZYK: Well, I --

4 JUSTICE O'CONNOR: Do you want us to reverse
5 that?

6 MR. MECZYK: Justice O'Connor, I do not -- I do
7 not want you to reverse Place. Place, no pun intended --

8 JUSTICE O'CONNOR: Well, and Edmond also said
9 it's not a search.

10 MR. MECZYK: Well, there were --

11 JUSTICE O'CONNOR: It was the stop of the cars
12 in that case that caused the result.

13 MR. MECZYK: The way I understand Place it was
14 contextually limited. In Place, the whole purpose of the
15 seizure, the taking of the luggage, was to submit it to a
16 drug-detection sniff. That is the opinion authored by
17 Your Honor, that specifically stated -- I'm not going to
18 say took for granted, but it specifically stated that the
19 -- the context -- and that's what we have to look at Place
20 -- the --

21 JUSTICE O'CONNOR: Fine. We had a context there
22 where we supported it, but in the process said the sniff,
23 the dog sniff, was not a search.

24 MR. MECZYK: Well, I -- I --

25 JUSTICE O'CONNOR: So you want us to say

1 something else here.

2 MR. MECZYK: Well, I think that first in -- in
3 that case, in Place, the -- the Court --

4 JUSTICE O'CONNOR: The context here was a
5 legitimate traffic stop.

6 MR. MECZYK: But it was -- unlike Place, the
7 legitimate traffic stop here was completely unrelated to
8 the purpose of the dog sniff. There was an absolute --

9 JUSTICE O'CONNOR: The dog sniff is not a
10 search. What difference does it make?

11 MR. MECZYK: Well, again, I would again
12 respectfully assert that the dog sniff is a search and the
13 way Place was decided, first, the decision had to be made,
14 in the context of -- of that case, what was worse. What
15 were they going to do with the luggage? Were they going
16 to open the luggage first? So, of course, the Court had
17 to decide in that case that it wasn't that kind of a -- a
18 search. It wasn't as egregious a search as actually
19 opening the luggage.

20 Then you --

21 JUSTICE O'CONNOR: This -- the trunk of the car
22 didn't have to be opened here.

23 MR. MECZYK: I'm sorry, Your Honor.

24 JUSTICE O'CONNOR: The trunk of the vehicle did
25 not have to be opened here. You're talking about a dog

1 sniffing on the exterior of the vehicle that was
2 legitimately stopped for a traffic violation.

3 MR. MECZYK: Again, in this context, unlike in
4 Place, there was absolutely no relationship between the --
5 the dog sniff and the dog sniff of Caballes' trunk and the
6 sniff of the luggage that was placed at LaGuardia Airport
7 in Place. There's a great distinction. Moreover --

8 JUSTICE SCALIA: Suppose a policeman follows me
9 around. He just -- just follows me around, observing with
10 his -- with plain eyes, nothing else. Now, is that a
11 search? Does he need probable cause to do that? Now, he's
12 wasting his time and he's wasting public money and maybe he
13 should get fired for doing it, if he has no reason to follow
14 me.

15 MR. MECZYK: It's not a search.

16 JUSTICE SCALIA: And maybe -- maybe I'd have a
17 harassment action against him if he does it, you know,
18 blatantly. But is that a search?

19 MR. MECZYK: It is not a search. If he follows
20 you --

21 JUSTICE SCALIA: Okay. So -- so the mere fact
22 that one is investigating something doesn't make it a
23 search. What does make it a search?

24 MR. MECZYK: Well --

25 JUSTICE SCALIA: The fact that you find out

1 something?

2 MR. MECZYK: I think here the most distinctive
3 point here is that Caballes had already been stopped
4 unlike the hypothetical that you just presented to me.
5 Caballes was already stopped for one -- for probable
6 cause. There's no question about that. But then now the
7 police launch into a wholly unrelated investigation
8 that's --

9 JUSTICE SCALIA: You think it would be better if
10 he hadn't been stopped? If -- if they just -- just
11 randomly walked up to somebody who was going through a
12 toll booth and had the dog sniff the car, you think that
13 would be a better case --

14 MR. MECZYK: I think --

15 JUSTICE SCALIA: -- for allowing it than -- than
16 yours?

17 MR. MECZYK: Even in that case, even in a
18 hypothetical where they used the dog for a toll booth, I
19 have a problem with that. That to me is a search. It's
20 different than -- I would assert it's different than if
21 they walked -- one of the hypotheticals that the Justices
22 asked my adversary in this case, when they asked, well,
23 what if they walked the dog instead around a -- parked
24 cars or parked cars at a stadium? It depends for what
25 purpose they want to walk those parked -- that dog around

1 those parked cars. My assertion is --

2 JUSTICE GINSBURG: Well, they said it's to find
3 out if there's any contraband.

4 MR. MECZYK: I'm sorry, Your Honor.

5 JUSTICE GINSBURG: The answer was they are at
6 liberty -- the police are at liberty to use dogs to find
7 contraband. And your -- Illinois I think was very candid
8 with the Court in saying we have taken from your decisions
9 that a dog sniff is not a search. So anything else is a
10 matter of police policy. It had nothing to do with the
11 Fourth Amendment.

12 MR. MECZYK: Well, I -- I strongly differ. I
13 have to look at the purpose that they are going to use the
14 dog for. This Court --

15 JUSTICE O'CONNOR: Well, does it matter if, for
16 instance, in today's world on Capitol Hill we're concerned
17 about terrorist attacks. What if the dog is trained to
18 alert to explosives? Now, can the police just decide
19 they're going to sniff any car that's parked on Capitol
20 Hill?

21 MR. MECZYK: Justice O'Connor, it depends on the
22 purpose.

23 JUSTICE O'CONNOR: Yes or no, in your view. The
24 purpose is to disclose potential explosives in a parked
25 vehicle.

1 MR. MECZYK: The answer is yes. I have no
2 problem whatsoever.

3 JUSTICE O'CONNOR: Wherever it is.

4 MR. MECZYK: Wherever it is because I look at it
5 as a public safety exception. And this Court in the
6 Edmond case specifically condemned a general search -- a
7 general crime -- let me use the exact words. General
8 interest in crime control, to quote the Edmond case. And
9 that's --

10 JUSTICE BREYER: I still want to go back to my
11 question because I think you may have an answer to it and
12 I want to focus you --

13 MR. MECZYK: I'm struggling, yes.

14 JUSTICE BREYER: I want to focus you on the
15 question. I think what you're doing, which is a
16 reasonable thing to do, but it isn't my approach, look to
17 the English definition of search. I say forget that.
18 Let's look to the Fourth Amendment because there are a
19 whole range of searches that don't even fall within the
20 Fourth Amendment in the sense that we don't need a
21 justification. And I take Place as saying that dog sniffs
22 is one of those, whether it does or doesn't use the word
23 English search.

24 So I want to know why it is that this dog search
25 is one of the ones that's a Fourth Amendment search, i.e.,

1 one of the ones that requires a justification in terms of
2 what the Fourth Amendment is about, privacy.

3 MR. MECZYK: It invades a public -- I'm sorry.
4 It invades a private space that in this particular case
5 the respondent Caballes had a privacy interest in, that he
6 wanted to exclude the whole world from going inside his
7 trunk. That's the difference.

8 JUSTICE STEVENS: Yes, but you don't respond to
9 one point in Place, if I remember correctly. It must be a
10 legitimate expectation of privacy, and if the only thing
11 the dog can detect is something illegitimate, how can you
12 say there's an invasion of a legitimate expectation in
13 privacy?

14 MR. MECZYK: Well, it is -- it's true that one
15 does not have an expectation of privacy in contraband, but
16 by the same token, I have an expectation or Mr. Caballes
17 had an expectation of -- of privacy of what's inside that
18 closed trunk, his car. The Carroll doctrine is still good
19 law. We still apply the Fourth Amendment in cars. It's
20 true that the home is sacrosanct, but just because it's a
21 home, it's not a talisman where -- where the Fourth
22 Amendment no longer applies.

23 JUSTICE GINSBURG: There was something you said
24 in -- in your brief that I thought was unclear. So may I
25 ask you --

1 MR. MECZYK: Of course.

2 JUSTICE GINSBURG: -- if Officer Gillette, the
3 one who did the arrest for speeding, had a dog in the back
4 of his car, instead of having the second officer come with
5 the dog, would it have been permissible? I thought you
6 had conceded that it would be a different situation if the
7 dog was already there when the car stopped.

8 MR. MECZYK: First of all, Justice Ginsburg, my
9 recollection is that Trooper Gillette, who was the officer
10 who stopped Caballes, did not have a -- a dog in the car.

11 JUSTICE GINSBURG: No, he didn't, but I'm asking
12 you to imagine that he did.

13 MR. MECZYK: I see. If he had a dog in the car
14 and the dog just happened to have alerted without his
15 cuing the dog or walking the dog -- and I'll answer that
16 in a moment too -- that would be pure serendipity. That
17 might happen. If -- if the dog just happened to have
18 alerted. But if the troopers deliberately drove the car
19 close by -- and in reality, that's not what happens.

20 JUSTICE GINSBURG: No. I would like to take
21 this scenario as it is except that when the officer gets
22 out of the car, his dog comes with him.

23 MR. MECZYK: Okay.

24 JUSTICE GINSBURG: This is very -- make no other
25 changes except that Gillette has the dog and Gillette with

1 the dog go to Mr. Caballes' car.

2 MR. MECZYK: My understanding of the way this
3 works, Justice Ginsburg, is that he just couldn't go up to
4 the car without -- and the dog would alert. My
5 understanding of the way these dogs are trained is that
6 they specifically -- that the officer has to walk the dog
7 around the car, the vehicle, first of all.

8 JUSTICE SCALIA: He does that. He does that.

9 MR. MECZYK: He does that.

10 JUSTICE SCALIA: Yes, in this case.

11 MR. MECZYK: He does that.

12 JUSTICE SCALIA: Right.

13 MR. MECZYK: To cue the dog. In other words,
14 tell him it's not playtime anymore, that he has to work.

15 JUSTICE SCALIA: Right.

16 MR. MECZYK: To trigger something in the -- in
17 the canine brain.

18 JUSTICE SCALIA: Right.

19 JUSTICE GINSBURG: But you -- I'm --

20 JUSTICE SCALIA: Would it be bad? Would it be
21 bad if that's what he did?

22 MR. MECZYK: It wouldn't be bad that's what --
23 well, yes. In this case it's very bad because it's a
24 search. There's no question. I'm not coming off of that.

25 JUSTICE GINSBURG: But I'm -- I'm trying to

1 understand what you meant in your brief when you said if
2 the dog had been in Gillette's car when Gillette stopped
3 Caballes, the situation would have been different.

4 MR. MECZYK: I -- I think what I meant there --
5 there would have been -- it would have been purely
6 happenstance, almost like plain view. It would have been
7 -- without him even cuing the dog or starting to walk the
8 dog around, my answer to that Justice Ginsburg is that
9 that would have been all right.

10 Except now that -- the more I think about it,
11 I'm not so sure that it would be all right. And my answer
12 to -- and the reason for that is I think in that case the
13 officer, if he could do such a thing and the dog would
14 alert, would be exploiting the situation, would just be
15 taking the dog and walking him around the car and seeing
16 that the dog alerted. So in other words, there -- there
17 would be, I think, an exploitation of -- of the -- of the
18 traffic stop.

19 JUSTICE GINSBURG: So then it really makes no
20 difference whether it was Gillette who had the dog in his
21 car or whether the dispatcher called another officer who
22 had the dog.

23 MR. MECZYK: That is correct, Your Honor.

24 JUSTICE GINSBURG: It doesn't -- so you're
25 retracting that.

1 You, I think, were asked but I'm -- I'm not sure
2 you fully answered. Suppose the police, as Atwater would
3 allow, arrested, made a full arrest of Caballes, and then
4 they impound his car. In the place where they put it,
5 couldn't they have a dog go around the car there?

6 MR. MECZYK: Yes. Yes. I -- if we had an
7 Atwater situation -- in this case there wasn't an Atwater
8 situation because there was first a warning given. You're
9 correct. There was a warning given. I'm sorry. The
10 officer Gillette told Caballes he was going to give him a
11 warning. So unlike the Knowles --

12 JUSTICE GINSBURG: But he could have. He could
13 have. I mean --

14 MR. MECZYK: He could have, but he didn't.

15 JUSTICE GINSBURG: -- is -- is --

16 MR. MECZYK: But he didn't. He didn't.
17 Instead, he chose to treat this as more of a Knowles
18 situation. This case is -- is on all fours, no pun
19 intended, like Knowles. In other words, in the -- in
20 Knowles v. Iowa, the Court -- a case of this -- I'm sorry.
21 Let me untwist my tongue. In Knowles v. Iowa, you had a --
22 you had a traffic stop and after the traffic stop, there
23 was a statute that said unrelated to the traffic stop, you
24 can go in and search. And this is the same thing. This
25 officer here Gillette treated Caballes as the officer in

1 Knowles in -- treated Mr. Knowles in Iowa. It's the exact
2 same thing.

3 JUSTICE SOUTER: No, but the -- the difficulty
4 that I have with that argument is take the -- take the
5 case of -- of the arrestable offense in which it is
6 undoubtedly the case that although the police don't
7 normally arrest, they -- they can. Your -- if I
8 understand your argument, you're saying if they, in fact,
9 do arrest, they may then take the dog around the car, and
10 indeed, I presume you would agree, they could make an
11 inventory search because they've got to protect themselves
12 against claims that they lost property and so on. So
13 there's no question that in that case, as -- as you have
14 argued it, they could make a full-blown search and -- and
15 certainly can use the dog. But if they choose not to
16 arrest on the highway, they can't.

17 My problem is how can you say that there is a
18 reasonable expectation of privacy in case number two if
19 you admit that the police can search in case number one.
20 How does that affect the reasonable expectation of
21 privacy?

22 MR. MECZYK: To me, once a person is told that
23 he is not going to be under arrest, it changes the whole
24 complexion of the case. I think it's a completely
25 different -- a completely different scenario. We don't

1 have an arrest. It doesn't matter. Atwater --

2 JUSTICE GINSBURG: Could the officer change his
3 mind? I mean, he -- he did say I'm just going to give you
4 a citation, and then he said, mind if I search your car.
5 This is before the -- the dog showed up. And suppose the
6 person who had been speeding said, yes, I mind. Don't
7 search my car. And then the police said, well, in that
8 case I'm going to arrest you.

9 MR. MECZYK: It's a difficult question, but I
10 have to look at what -- I think reasonableness is judged.
11 Again, I'm going to remember what the -- those cases
12 taught. I think what Knowles taught, that reasonableness
13 is judged by what the police actually do as opposed to
14 what they might have done.

15 JUSTICE SCALIA: Mr. Meczyk, I assume that your
16 answer to whether it's lawful to have a -- a dog at a bus
17 depot just to sniff the bags of people who were coming
18 off, without stopping them, but just -- just to have the
19 dogs there, that's unlawful.

20 MR. MECZYK: It depends --

21 JUSTICE SCALIA: For narcotics, not for bombs,
22 not for -- just -- just for narcotics. The police think,
23 you know, a lot of narcotics goes on interstate buses.
24 We're going to put a dog in the bus depot.

25 MR. MECZYK: It's a little less problematic to

1 me, Justice Scalia, than the type of stop I'm talking
2 about here.

3 JUSTICE SCALIA: Why?

4 MR. MECZYK: It's a little less problematic.
5 One, because it's a public place and I -- I think --

6 JUSTICE SCALIA: Well, so is the road, for
7 Pete's sake.

8 MR. MECZYK: I know, but -- but here I think
9 there's a lesser expectation of privacy. Well, I don't
10 even want to go that far. I -- I have to answer your
11 question. I think that submitting the dogs without any --
12 submitting the luggage without any reasonable articulable
13 suspicion --

14 JUSTICE SCALIA: Right.

15 MR. MECZYK: -- unlike the case --

16 JUSTICE SCALIA: Right.

17 MR. MECZYK: -- unlike the case in -- in Place,
18 that that to me is still a search. So --

19 JUSTICE SCALIA: Okay. That's -- that's what I
20 think you should say.

21 MR. MECZYK: And I am saying it.

22 JUSTICE BREYER: Yes, but that isn't -- I take
23 it you don't --

24 MR. MECZYK: Sorry it took me so long.

25 JUSTICE BREYER: Is there anything wrong with

1 the policeman himself taking a sniff?

2 MR. MECZYK: It goes back to --

3 JUSTICE BREYER: It's the great Limburger cheese
4 robbery.

5 (Laughter.)

6 JUSTICE BREYER: He stopped the car and he walks
7 around. Anything wrong with that?

8 MR. MECZYK: There's nothing wrong if he can
9 detect Limburger cheese. That to me is like plain smell.

10 JUSTICE BREYER: All right.

11 MR. MECZYK: As awful as that --

12 JUSTICE BREYER: So plain --

13 MR. MECZYK: As awful as it might be --

14 JUSTICE BREYER: All right. So -- so what
15 you're saying is -- and this must tie back to reasonable
16 expectation of privacy. All right? Because it's okay for
17 the policeman to do it, and it's okay for dogs to do it in
18 the bus station, and it's okay to use a dog not in the bus
19 station with a car if in fact you actually are going to
20 put him under arrest, although here you had probable cause
21 to do so, I take it. And now you have to draw a pretty
22 fine line. But it's not okay where it's not the bus
23 station, but it is the car and in fact the dog is doing
24 the sniffing -- and there are a lot of dogs around that
25 can sniff -- and you did have probable cause but you

1 didn't say it. And in face of Justice O'Connor's case
2 which said that -- you see. Well, I mean, this is -- this
3 is --

4 MR. MECZYK: I guess you --

5 JUSTICE BREYER: I mean, I'm not saying you
6 couldn't draw that line, but I'm saying it's pretty tough
7 I think.

8 MR. MECZYK: I guess you're telling me I'm --
9 I'm the underdog in this case.

10 JUSTICE BREYER: Well, I don't know.

11 (Laughter.)

12 JUSTICE BREYER: I'm right? Am I -- I mean,
13 that --

14 MR. MECZYK: It is --

15 JUSTICE BREYER: And you're going to draw the --
16 well, I don't want you to repeat yourself necessarily.

17 MR. MECZYK: No. It --

18 JUSTICE GINSBURG: But you had already drawn the
19 line at a different place than Justice Breyer suggested
20 because in response to Justice Scalia, you said if it --
21 if it were going into the bus terminal just to sniff for
22 narcotics, unlike explosives, it would be an impermissible
23 search.

24 MR. MECZYK: Yes, correct, Justice --

25 JUSTICE GINSBURG: That would be --

1 MR. MECZYK: That is correct, Justice Ginsburg.

2 What makes this particular so --

3 JUSTICE SOUTER: But -- but is -- why -- why
4 don't you simply say, look -- have a very simple line. If
5 they can arrest, they can sniff. If they can't arrest,
6 they can't sniff without individualized suspicion going to
7 drugs or whatever.

8 MR. MECZYK: I would agree with that if I use an
9 -- if -- if you're referring to an Atwater type scenario.
10 If they have probable -- if they decide to arrest, even
11 though it's on a minor traffic case, such as Atwater,
12 which was a seat belt, as long as it's -- if -- if it's
13 minor and if the officer elects to choose to do a full-
14 blown arrest, then all the consequences that follow from
15 that arrest are -- it's going to happen. Excuse me. It's
16 going to happen.

17 JUSTICE SOUTER: But what -- what is the answer
18 to the reasonable expectation to privacy question in that
19 case? Isn't your expectation of privacy identical,
20 whatever it may be, or isn't the reasonable expectation of
21 privacy identical, whatever that may be, without regard to
22 the discretionary decision of the officer to arrest or
23 not?

24 MR. MECZYK: I -- I think that when the officer
25 does a full-blown arrest, as was envisioned in Atwater,

1 you know that you -- the person knows that he or she does
2 not have a reasonable expectation of privacy.

3 JUSTICE SOUTER: But you're saying that the --
4 the reasonable expectation of privacy depends upon the
5 officer's discretionary judgment whether or not to arrest.
6 Isn't that what you're saying?

7 MR. MECZYK: Essentially yes, because I think
8 that the officer takes a physical action. It's just more
9 than words. It's also his deeds. I think in Atwater,
10 unlike Knowles -- in Atwater, in that case, I think the --
11 the officer did make an election, and there was a full-
12 blown or a full-fledged arrest. And I think there your --
13 your reasonable expectation to privacy does, in fact, go
14 out the window.

15 But this is so different. This was just a
16 warning. Period. It was nothing worse than a warning.
17 What makes this stop so pernicious is that it takes place
18 in front of the whole world and is accusatory. It is
19 profoundly embarrassing, and it is humiliating to everyone
20 on the street. So if a person is stopped and the officer
21 just decides to stop you for a minor traffic offense,
22 that's the worst part about this case. Just a minor
23 traffic offense, really a frivolous offense, basically
24 what any law-abiding citizen would happen to -- it could
25 happen to anyone. And as this Court has said, even in

1 Whren, there are so many multiple technical violations of
2 -- of -- technical violations --

3 JUSTICE SCALIA: I mean, I think it's worse if
4 -- if you're subjected to it without having committed any
5 violation at all. Every time I travel abroad and come
6 back into the country, customs officers have dogs and --
7 and they parade the dogs through -- through the baggage
8 terminal. Do -- do I feel offended by that?

9 MR. MECZYK: No, Justice Scalia --

10 JUSTICE SCALIA: This isn't a public safety
11 matter. They're -- they're not smelling for bombs.
12 They're -- they're smelling for contraband. And according
13 to you, that is bad.

14 MR. MECZYK: That -- in that situation, when you
15 enter the country -- and this Court has said many times
16 again -- it's a border search. There's nothing that I can
17 argue against the border search. It's the -- or the
18 functional equivalent of the border. That is a border
19 search. I bring luggage to the airport, in today's world
20 I have a lesser expectation of privacy. If I know I'm
21 traveling abroad and coming into the United States, that's
22 different. That's different in an airport.

23 JUSTICE SCALIA: Okay. A bus station is
24 different, though.

25 MR. MECZYK: A bus station here inside the

1 United States is different I think. I -- I look at your
2 airport hypothetical as being -- as dealing with a border.
3 If it's not at a border and I use your hypothetical, it's
4 at O'Hare Airport or Reagan International Airport and they
5 bring a dog up to sniff for drugs at the carousel, that to
6 me is a search. It's like -- I think you said in one
7 opinion once if it -- you used the duck analogy, well, if
8 it walks like a duck or quacks like a duck. Here it's
9 still a search. It walks like a -- a dog and it acts like
10 a dog, but its specific function is in fact to search out
11 in public and humiliate people.

12 If there are any further questions.

13 I respectfully ask this honorable Court to
14 affirm the wise judgment of the Illinois Supreme Court.
15 Thank you.

16 JUSTICE STEVENS: Thank you, Mr. Meczyk.

17 General Madigan, you have I think about 3
18 minutes left.

19 REBUTTAL ARGUMENT OF LISA MADIGAN

20 ON BEHALF OF THE PETITIONER

21 MS. MADIGAN: Thank you, Justice Stevens.

22 Let me make three brief points.

23 Number one, Justice Ginsburg asked a question
24 about something that was in the respondent's brief,
25 whether or not it made a difference if a dog was with

1 Master Sergeant Gillette when he initiated the stop or if
2 the dog was later brought, as was the case here, by
3 Trooper Graham. Really what Mr. Caballes is arguing for
4 here is an inadvertence requirement which this Court very
5 clearly held in Horton, there is no such requirement of
6 inadvertence. And so a law officer, if they are at a
7 lawful vantage point, do have the ability to detect
8 incriminating facts. That is not something that has to
9 occur inadvertently. It can happen intentionally.

10 Second, Justice Scalia asked a question about
11 plain view, and similar to plain view, a dog sniff does
12 not effect an incremental search or seizure. And
13 therefore, similar to plain view, a dog sniff does not
14 require Fourth Amendment justification.

15 And let me finally acknowledge something that
16 Justice Souter brought up, which is whether or not, by
17 walking a dog around a house, you in fact would have a
18 search. Let me -- now, that is certainly a closer case
19 than whether walking a dog around a car constitutes a
20 search, which we say is not. But ultimately you would
21 reach a similar result because the principle is not going
22 to extend to cars in the same manner in -- in *Kyllo* as the
23 thermal imager did.

24 Finally, if there are no further questions, we
25 would ask that the judgment of the Illinois Supreme Court

1 be reversed.

2 JUSTICE STEVENS: Thank you, General Madigan.
3 The -- the case is submitted.

4 MS. MADIGAN: Thank you.

5 (Whereupon, at 10:57 a.m., the case in the
6 above-entitled matter was submitted.)

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