STATE V. GUILLEN: HOME PRIVACY PROTECTION DISAPPEARING IN THE DESERT

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INTRODUCTION

After waiting for occupants to leave their home, an officer approached the front door and garage with a drug-detection dog, which alerted the officer to the presence of contraband. Surprisingly, in *State v. Guillen*,[1] Division Two of the Arizona Court of Appeals, with one dissenting judge, held that this evidence-gathering activity was not a search under the Fourth Amendment to the U.S. Constitution.[2] Because article II, section 8 of the Arizona Constitution provides greater privacy protection in the home than the Fourth Amendment, the court held that the state constitution requires an officer to have reasonable suspicion of criminal activity before approaching a home to conduct a dog sniff.[3] Despite summarily concluding that its holding is in accord with the majority of federal and state courts, the court radically departs from other jurisdictions by not limiting its holding by the lawfulness of the officer's intent to be on the property and by the reasonable expectation of privacy in the curtilage immediately outside the home.

I. FACTS

In March 2006, officers received information that Jose Salvador Guillen was storing marijuana inside his residential garage.[4] Eight months later, two officers surveyed Guillen's residence. After Guillen's wife left the home, a third officer, a canine handler and narcotics investigator, conducted an investigation at the front of the house and garage.[5] With no fence or sign to deter public access, the officer walked directly onto Guillen's property, crossed the driveway, and directed the canine to sniff around the front and garage doors.[6] At the garage, the drug-

1. 213 P.3d 230 (Ariz. Ct. App. 2009), *review granted*, No. CCR-09-0188-PR (Ariz. Oct. 27, 2009).
2. *Id.* at 234–35.
3. *Id.* at 239.
4. *Id.* at 231.
5. *Id.*
6. *Id.*

detection dog alerted to the odor of contraband.[7] The officers later returned and gained consent from Guillen's wife to search the house and garage, where they found four pounds of marijuana.[8]

A jury convicted Guillen of possession of more than four pounds of marijuana for sale, a class two felony, and possession of drug paraphernalia, a class six felony.[9] Guillen appealed the trial court's denial of his motion to suppress the marijuana.[10] He argued that the canine officer violated the Fourth Amendment of the U.S. Constitution and article II, section 8 of the Arizona Constitution by searching and walking "on areas which are not public . . . up to the garage."[11] The Arizona Court of Appeals held that the Arizona Constitution requires an officer to have reasonable suspicion before conducting a canine investigation of the "seams of a residence," and remanded the case for the trial court to determine if the officer had the requisite reasonable suspicion.[12]

II. COURT'S ANALYSIS

Search and seizure law in Arizona is bifurcated: a search is lawful if conducted according to both the Fourth Amendment of the U.S. Constitution and article II, section 8 of the Arizona Constitution. While Arizona courts generally view section 8 as an analogue to the Fourth Amendment,[13] the Arizona Supreme Court has twice interpreted section 8 as providing greater privacy protection to the home.[14] This difference was critical for the *Guillen* majority. The court found that the search satisfied the Fourth Amendment,[15] but section 8's greater protection for the home required that officers have reasonable suspicion to conduct a dog sniff around a home's exterior.[16] The dissent found no applicable difference between the federal and state constitutions[17] and criticized the majority for addressing the issue when the defendant had failed to brief his state constitutional argument.[18]

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7. *Id.*
8. *Id.* at 231–32.
9. *Id.* at 231.
10. *Id.*
11. Appellant's Opening Brief at 9, State v. Guillen, 213 P.3d 230 (Ariz. Ct. App. 2009) (No. 2CA-CR 2007-0365) 2008 WL 2199321.
12. *Guillen*, 213 P.3d at 239–40.
13. Malmin v. State, 246 P. 548, 549 (Ariz. 1926) ("[A]lthough different in its language, [section 8] is of the same general effect and purpose as the Fourth Amendment . . . .").
14. *See* State v. Bolt, 689 P.2d 519, 523–24 (Ariz. 1984) (distinguishing Segura v. United States, 468 U.S. 796 (1984)) (officers may only secure a residence from outside to preserve the status quo while waiting for a search warrant); State v. Ault, 724 P.2d 545, 552 (1986) ("Our decision not to extend the inevitable discovery doctrine into defendant's home in this case is based on . . . art. 2 § 8 of the Arizona Constitution regardless of the position the United States Supreme Court would take on the issue.").
15. *Guillen*, 213 P.3d at 234–35.
16. *Id.* at 239.
17. *Id.* at 248.
18. *Id.* at 241–42.

A. The Fourth Amendment Does Not Protect a Homeowner from Dog Sniffs Around the Home's Exterior

"The Fourth Amendment provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'"[19] The degree of protection turns on whether society recognizes an individual's subjective expectation of privacy as reasonable.[20] If an expectation of privacy is reasonable, then law enforcement, absent exigent circumstances, must procure a warrant before intruding to search.[21] If the expectation is not reasonable, then the government conduct is not a search within the meaning of the Fourth Amendment.[22]

Whether a dog sniff is a "search" deserving of constitutional protection depends whether a reasonable expectation of privacy existed in the object sniffed and the place in which the sniff occurred.[23] Noting that the U.S. Supreme Court has not addressed the constitutionality of dog sniffs around the seams of a residence,[24] the *Guillen* court attempted to harmonize two lines of U.S. Supreme Court precedent: cases involving dog sniffs in several non-residential settings (which "do not implicate reasonable expectations of privacy because they reveal only contraband")[25] with cases involving the home ("*any* intrusion into a home categorically implicates a reasonable expectation of privacy, regardless of the nature of the information sought or collected").[26] The majority resolved the tension between these lines of cases by summarily concluding that "a dog sniff reaching into a home does not rise to the level of a 'cognizable infringement' under the Fourth Amendment to the United States Constitution."[27]

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19. Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting U.S. CONST. amend. IV) (alteration in original).

20. *Id.* at 33 (quoting California v. Ciraola, 476 U.S. 207, 211 (1986)).

21. *See id.* at 31.

22. *Id.* at 33.

23. *See* United States v. Colyer, 878 F.2d 469, 475 (D.C. Cir. 1989) ("[T]he ascertainment of the scope of the protection it [the Fourth Amendment] affords to those people . . . requires reference to a 'place.'" (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (alteration in original).

24. State v. Guillen, 213 P.3d 230, 232 (Ariz. Ct. App. 2009), *review granted*, No. CCR-09-0188-PR (Ariz. Oct. 27, 2009).

25. *Id.* at 234 (citing Illinois v. Caballes, 543 U.S. 405, 410 (2005) (analyzing dog sniff of car's exterior during lawful traffic stop)); *see also* United States v. Place, 462 U.S. 696 (1983) (analyzing dog sniff of luggage at an airport).

26. *Id.* (citing Kyllo v. United States, 533 U.S. 27, 37 (2001)).

27. *Id.* at 234–35 (citing *Caballes*, 543 U.S. at 409; United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998); United States v. Roby, 122 F.3d 1120, 1124–25 (8th Cir. 1997); United States v. Lingenfelter, 997 F.2d 632, 638–39 (9th Cir. 1993); United States v. Colyer, 878 F.2d 469, 475–77 (D.C. Cir. 1989); Fitzgerald v. State, 837 A.2d 989, 1035 (Md. Ct. Spec. App. 2003); People v. Dunn, 564 N.E.2d 1054, 1056 (N.Y. 1990)). The court acknowledged three jurisdictions that held otherwise. *Id.* at 235 (citing United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985); State v. Rabb, 920 So.2d 1175, 1188 (Fla. Dist. Ct. App. 2006); State v. Ortiz, 600 N.W.2d 805, 817 (Neb. 1999)).

The U.S. Supreme Court has upheld the use of dog sniffs of luggage at an airport[28] and of a car's exterior during a lawful traffic stop.[29] In *United States v. Place*, the Court found that canine detection was *sui generis*—a unique investigative technique that is "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[30] Despite the minimal intrusion of a dog sniff, the Court did not announce a bright-line rule regarding all dog sniffs. Instead, it narrowly held that dog sniffs of luggage located in a public place "did not constitute a 'search' within the meaning of the Fourth Amendment."[31] Later, *Illinois v. Caballes*[32] further expanded the legality of using a canine to detect contraband: "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'—during a lawful traffic stop, generally does not implicate legitimate privacy interests."[33] The Court re-emphasized the distinction first announced in *Place*[34] that possession of contraband does not implicate a legitimate privacy interest.[35]

After determining that the U.S. Supreme Court has consistently treated a dog sniff as "not a constitutionally relevant intrusion"—due to its unique, minimally invasive nature[36]—the *Guillen* court recognized that "there are aspects of home privacy implicated by canine sniff searches that the [U.S. Supreme] Court has not yet contemplated."[37] Dog sniffs involving the home may be unique because "the right to be free from unreasonable searches and seizures in the home [i]s 'the chief evil against which the wording of the Fourth Amendment is directed.'"[38] The court then compared dog sniffs to thermal-imaging of a residence, which the Supreme Court addressed in *Kyllo v. United States*.[39]

In *Kyllo*, the officer using the thermal-imaging device was lawfully on a public street.[40] The more difficult question was whether heat emanations from inside the house were private once they left the home. The Court rejected the government's contention that imaging was "constitutional because it did not 'detect private activities occurring in private areas,'" holding that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. . . . *[A]ll* details are intimate details,

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28. *See Place*, 462 U.S. at 707.
29. *See Caballes*, 543 U.S. at 410.
30. *Place*, 462 U.S. at 707; *see also* United States v. Jacobsen, 466 U.S. 109, 123 (1984) ("[G]overnmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest.").
31. *Place*, 462 U.S. at 707.
32. 543 U.S. 405 (2005).
33. *Id.* at 409 (quoting *Place*, 462 U.S. at 707) (internal citation omitted).
34. 462 U.S. at 707.
35. *Caballes*, 543 U.S. at 408.
36. State v. Guillen, 213 P.3d 230, 233 (Ariz. Ct. App. 2009), *review granted*, No. CCR-09-0188-PR (Ariz. Oct. 27, 2009).
37. *Id.* at 234.
38. *Id.* at 233 (quoting Welsh v. Wisconsin, 466 U.S. 740, 748 (1984)).
39. *See* 533 U.S. 27 (2001).
40. *Id.* at 33.

because the entire area is held safe from prying government eyes."[41] Based on this expectation of privacy, the Court announced the general rule that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where (as here) the technology in question is not in general public use."[42]

In light of *Kyllo*, the *Guillen* majority concluded that, while a dog sniff and thermal-imaging device are similar as "sense-enhancing" tools, they differ in that "the canine sniff yield[s] information exclusively about the presence or absence of contraband, while the thermal-imaging equipment could potentially reveal private information from the inside of the defendant's home that was unrelated to any illegal activity."[43] *Caballes* also noted a similar distinction, distinguishing dog sniffs from the much broader privacy protection in *Kyllo* because a dog sniff during a lawful traffic stop was only capable of detecting unlawful activity.[44]

The *Guillen* majority found it a "vexingly close question" whether the *Caballes*-line of dog-sniff cases or *Kyllo*'s broad protection of home privacy should control the outcome for dog sniffs of a home's exterior. To resolve this apparent tension, the court noted that *Caballes* was decided after *Kyllo* and was not expressly limited to dog sniffs unrelated to the home.[45] The appellate court then summarily announced that it "join[ed] the majority of jurisdictions in concluding that . . . a dog sniff reaching into a home does not rise to the level of a 'cognizable infringement' under the Fourth Amendment."[46] Of the nine cases cited, four involved dog sniffs in high-traffic areas,[47] such as common hallways in multi-dwelling structures or a train corridor outside a roomette. One involved a dog sniff inside an apartment when the police had lawful consent and probable cause to

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41. *Id.* at 37 (quoting Brief for the United States at 22, Kyllo v. United States, 533 U.S. 27 (2001) (No. 99-8508), 2000 WL 1890949).

42. *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)) (internal citation omitted).

43. *Guillen*, 213 P.3d at 233.

44. *Caballes*, 543 U.S. at 409; *see also* United States v. Brock, 417 F.3d 692, 696 (7th Cir. 2005) (distinguishing a dog sniff of the home from *Kyllo*: "[The dog sniff] detected only the presence of contraband and did not provide any information about lawful activity over which [the defendant] had a legitimate expectation of privacy.").

45. *Guillen*, 213 P.3d at 234.

46. *Id.*

47. *Id.* (citing United States v. Roby, 122 F.3d 1120, 1124–25 (8th Cir. 1997) (common corridor of a hotel); United States v. Colyer, 878 F.2d 469, 475–77 (D.C. Cir. 1989) (corridor outside train roomette); Fitzgerald v. State, 837 A.2d 989, 1035 (Md. Ct. Spec. App. 2003) (common hallway outside apartment); People v. Dunn, 564 N.E.2d 1054, 1056 (N.Y. 1990) (common hallway outside apartment)).

enter.[48] Another involved a search of a commercial warehouse.[49] The three other cases found that similar dog sniffs were searches under the Fourth Amendment.[50]

B. Arizona's Constitution Requires that the Officer First Have Reasonable Suspicion of Criminal Activity Before Bringing a Drug-Detection Dog to the Home's Exterior

Article II, section 8 of the Arizona Constitution provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Although section 8 generally parallels the Fourth Amendment, in the context of home searches the Arizona Supreme Court has ruled that section 8 gives greater privacy protection than "its federal counterpart in 'preserving the sanctity of homes and in creating a right of privacy.'"[51] Following the Arizona Supreme Court's lead in affording a greater "sense of security"[52] within the home, the *Guillen* majority announced its new rule: "canine sniff searches of a residence, conducted from the threshold of a home, interfere with reasonable expectations of privacy and violate article II, § 8 of the Arizona Constitution to the extent they are conducted in the absence of reasonable suspicion to believe contraband may be found."[53]

A dog sniff of a home's exterior is a cognizable intrusion into a reasonable expectation of privacy because a citizen could "perceive the specter of a uniformed police officer deploying a trained narcotics dog along the seams of his or her home as an unsettling and embarrassing event."[54] Even for a law-abiding citizen, "a canine sniff carries a worrisome possibility that officers may later appear with a search warrant, based on an erroneous, false-positive response."[55] Further, an officer coming alone to the door, which is a "benign approach," is different than an officer with a canine.[56] "Indeed, when an officer deploys a dog to sniff the seams of a house, the officer has unmistakably targeted the residents of the home for criminal investigation."[57]

Finding dog sniffs intrusive, the court reasserted its earlier reading of federal Fourth Amendment jurisprudence, but noted that state courts with state

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48. *Id.* at 234 (citing United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998) (upholding dog sniff where officers were in pursuit of burglar and had consent to enter)).

49. *Id.* at 235 (citing United States v. Lingenfelter, 997 F.2d 632, 638–39 (9th Cir. 1993)).

50. *Id.* at 235 (citing United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985); State v. Rabb, 920 So. 2d 1175, 1188 (Fla. Dist. Ct. App. 2006); State v. Ortiz, 600 N.W.2d 805, 817 (Neb. 1999)).

51. *See id.* (quoting State v. Bolt, 689 P.2d 519, 523–24 (Ariz. 1984) (officers may only secure a residence from outside to preserve the status quo while waiting for a search warrant)). *See also supra* note 14.

52. *Guillen*, 213 P.3d at 238 (quoting *Bolt*, 689 P.2d at 524) (internal quotation marks omitted).

53. *Id.* at 236.

54. *Id.* at 237.

55. *Id.*

56. *Id.*

57. *Id.*

constitutions similar to Arizona's have found dog sniffs "cognizable intrusions requiring some reasonable justification."[58] For Arizona, however, the "reasonable justification" did not require a warrant because the text of the Arizona Constitution does not necessarily require warrants for limited intrusions.[59]

Instead of a warrant, the "reasonable justification" for a canine investigation of a home's exterior is reasonable suspicion.[60] The court analogized the limited intrusion of a dog sniff to a *Terry* stop—a brief, investigatory detention of a person in public—rather than a physical intrusion into the house.[61] Reasonable suspicion requires something more than a hunch but less than probable cause that the suspect is engaging in criminal activity.[62] As in its Fourth Amendment analysis of other jurisdictions, the court bolstered this conclusion by pointing to state cases that it interpreted as agreeing.[63] With only one exception, none of the cited cases dealt with a dog sniff of the exterior of a single-family residence.[64] Instead, these cases addressed dog sniffs of luggage at the airport,[65] a car's exterior during a lawful traffic stop,[66] or a search within a residence after the resident consents to entry.[67] The one case factually on point and with a state constitution with identical wording to section 8 held that a dog sniff of a garage's exterior required a warrant.[68]

After establishing the reasonable suspicion requirement for dog sniffs of a home's exterior, the court directed the trial court to consider whether to exclude the marijuana as "fruit of the poisonous tree" should it find the officer lacked reasonable suspicion or deny suppression if consent by Guillen's wife, as a "independent source," separately justified the ultimate warrantless discovery of the marijuana.[69]

C. Dissent

Judge Espinosa, in his dissent, would hold that under the Arizona Constitution and Fourth Amendment of the U.S. Constitution, a dog sniff of a

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58. *Id.* at 238.
59. *Id.* at 239.
60. *Id.* at 238.
61. *Id.* at 239 (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).
62. *See, e.g.*, United States v. Johnson, 256 F.3d 895, 905–06 (9th Cir. 2001) (hunch insufficient to establish reasonable suspicion or the probable cause necessary for officer to "rummage around [the defendant's] yard") (per curiam).
63. *Guillen*, 213 P.3d at 238–39 (citing Pooley v. State, 705 P.2d 1293, 1310–11 (Alaska Ct. App. 1985); People v. Boylan, 854 P.2d 807, 810–11 (Colo. 1993); State v. Wiegand, 645 N.W.2d 125, 132, 135 (Minn. 2002); State v. Pellicci, 580 A.2d 710, 715–16 (N.H. 1990); People v. Dunn, 564 N.E.2d 1054, 1057–58 (N.Y. 1990); Commonwealth v. Johnston, 530 A.2d 74, 79–80 (Pa. 1987); State v. Dearman, 962 P.2d 850, 852, 853 n.5, 854 (Wash. Ct. App. 1998)).
64. *See id.*
65. *Id.* (citing *Pooley*, 705 P.2d at 1310–11).
66. *Id.* at 238 (citing *Wiegand*, 645 N.W.2d at 132, 135; *Pellicci*, 580 A.2d at 715–16).
67. *Id.* (citing *Johnston*, 530 A.2d at 79–80).
68. *Id.* at 239 (citing *Dearman*, 962 P.2d at 852, 853 n.5, 854).
69. *Id.* at 240.

home's exterior is not a search.[70] He distinguished earlier Arizona Supreme Court decisions that gave greater privacy protections in the home as attempts to "harmonize Arizona and federal law," as opposed to the majority's decision to affirmatively reject what it predicted would be "the likely outcome under federal analysis."[71]

His greatest criticism of the majority was for "reaching out to decide a case on a basis that was never argued below."[72] Because the defendant had only made "passing references" to section 8 and the State had not responded to this argument, the trial court never had the opportunity to rule on whether the dog sniff was valid under the Arizona Constitution.[73]

III. *GUILLEN* FALLS SHORT: THE OFFICER MOST LIKELY VIOLATED GUILLEN'S PRIVACY RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS

The *Guillen* majority failed to address critical aspects of Fourth Amendment and article II, section 8 jurisprudence involving searches of a home's exterior. Under both constitutions,[74] any discussion of reasonable privacy expectations at a home's exterior must include the lawfulness of an officer's presence by determining whether the areas searched were within the curtilage and whether the officer had a lawful purpose for entering the curtilage. Because the officer in *Guillen* was within the curtilage without the lawful purpose of engaging a resident, he violated both the federal and state constitutions. Even more surprisingly, in both its federal and state constitutional analyses, the majority cited federal and state cases for support when those cases address constitutionally distinguishable contexts. The court's strained logic under the Arizona Constitution most likely resulted from the majority "reaching out" and deciding an issue that the parties did not fully brief.[75]

70. *Id.* at 248.

71. *Id.* at 243.

72. *Id.* at 241.

73. *Id.* Judge Espinosa cited several Arizona cases for the proposition that appellate courts should analyze a violation exclusively under the Fourth Amendment unless a defendant argues the Arizona Constitution demands a different result. *Id.* (citing State v. Dean, 76 P.3d 429, 432 n.1 (Ariz. 2003); State v. Rojers, 169 P.3d 651, 654 (Ariz. Ct. App. 2007); State v. Carr, 167 P.3d 131, 134 n.2 (Ariz. Ct. App. 2007); *In re* Leopoldo L., 99 P.3d 578, 581 n.1 (Ariz. Ct. App. 2004)).

74. To be enforceable, a state constitution may provide more but not less protection than the Fourth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying Fourth Amendment to states); *see also* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 227–28 (2008).

75. *Guillen*, 213 P.3d at 241–42.

A. Curtilage Is Not a Magic Word—Fourth Amendment Protection Turns on a Fact-Intensive Inquiry into Whether There Is a Reasonable Expectation of Privacy in the Searched Area

In reaching its conclusion that a dog sniff of a home's exterior is not a search under the Fourth Amendment, the majority pitted two broad constitutional principles against each other: dog sniffs in other contexts are not searches,[76] and the general right to privacy in the home free from any governmental intrusion.[77] Fourth Amendment law is more nuanced than this. Protection turns on whether the defendant could reasonably expect privacy from the officer's intrusion into the area searched.[78] The dog sniffs in *Place* and *Caballes* involved searches of public places and have little application to a search of a home where the officer must first be lawfully present before searching.[79] When the alleged search involves a home's exterior, the proper focus is whether the specific location searched was within the curtilage or areas "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."[80] The majority, however, declined to address whether the officer was lawfully present at the garage door, and instead treated the home as a single constitutional category, rather than focusing on the more relevant subcategory: the curtilage. The court further supported its questionable analysis by relying on cases involving dog sniffs in shared, high-traffic areas in multi-dwelling structures to justify a dog sniff outside a single-family residence. Courts uphold searches in the former precisely because a tenant has little expectation of privacy in a shared, high-traffic area—such as a common corridor in an apartment building.[81]

The majority avoided the curtilage issue because Guillen did not specifically argue "the officer exceeded the scope of his implied invitation to be on the curtilage of Guillen's property by bringing the drug-detection dog."[82] Yet, curtilage is impossible to separate from the constitutionally required analysis of whether a reasonable expectation of privacy existed in the area searched. The term "curtilage" is merely a common law distinction that has no independent significance in Fourth Amendment law other than signifying a court's conclusion that a resident justifiably has the same reasonable expectation of privacy in a

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76. *Id.* at 234 (citing Illinois v. Caballes, 543 U.S. 405, 410 (2005) (analyzing dog sniff of car's exterior during lawful traffic stop)); *see also* United States v. Place, 462 U.S. 696 (1983) (analyzing dog sniff of luggage at an airport).

77. *Id.* (citing Kyllo v. United States, 533 U.S. 27, 37 (2001)).

78. *See* United States v. Colyer, 878 F.2d 469, 475 (D.C. Cir. 1989).

79. *See Place*, 462 U.S. at 707; *Caballes*, 543 U.S. at 409.

80. United States v. Dunn, 480 U.S. 294, 301 (1987). In the court's analysis of the Arizona Constitution, the court cursorily addresses the concept of curtilage in a footnote because Guillen did not specifically argue using the word "curtilage" or "scope of consent" in his brief. *Guillen*, 213 P.3d at 240 n.11.

81. *See, e.g.*, United States v. Brown, 169 F.3d 89, 92 (1st Cir. 1999) ("'[A] tenant lacks a reasonable expectation of privacy in the common areas of an apartment building.'") (quoting United States v. Hawkins, 139 F.3d 29, 32 (1st Cir. 1998)) (footnote omitted).

82. *Guillen*, 213 P.3d at 240 n.11. The court also declined to address curtilage because the court provided alternative relief, the new reasonable suspicion standard for dog sniffs outside of homes. *Id.*

specific area outside the home as the resident has inside the home.[83] Requiring a defendant to argue with the words "scope of invitation" and "curtilage" seems misplaced when Guillen explicitly claimed the officer and dog violated federal and state constitutions by entering "areas which are not public."[84] By claiming that the seam of the garage door is not public, Guillen clearly expected privacy from intrusion, absent a specific invitation. At a minimum, the *Guillen* majority had the obligation to assess whether this expectation was reasonable. By recognizing the embarrassment and threat of having armed men with dogs walking along the seams of the house, the court suggests that Guillen's expectation of privacy was reasonable.[85]

1. Under Place *and* Caballes*, the Officer Must Be Lawfully Present Before Searching*

Comparing the dog sniffs in *Place* and *Caballes* to home searches is problematic because both expressly dealt with searches in public places. The U.S. Supreme Court specifically limited those holdings to dog sniffs in "a public place,"[86] and of a car's exterior "during a lawful traffic stop."[87] Underlying both these limitations is that the officer must be lawfully present. Applying this principle, the majority of courts have held that when an officer is lawfully present, a dog sniff is not a search because a suspect has no legitimate expectation of privacy in possessing contraband.[88]

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83. *See* United States v. Magana, 512 F.2d 1169, 1170 (9th Cir. 1975) ("'[A] reasonable expectation of privacy,' and not common-law property distinctions, now controls the scope of the Fourth Amendment.") (citing Katz v. United States, 389 U.S. 347 (1967)).

84. Appellant's Opening Brief at 9, State v. Guillen, 213 P.3d 230 (Ariz. Ct. App. 2009) (No. 2CA-CR 2007-0365), 2008 WL 2199321.

85. *Guillen*, 213 P.3d at 240 n.11.

86. United States v. Place, 462 U.S. 696, 707 (1983).

87. Illinois v. Caballes, 543 U.S. 405, 409 (2005). The *Guillen* majority did not explain how it came to the conclusion that the Supreme Court did not "limit its reasoning in *Caballes* to canine searches unrelated to the home." *Guillen*, 213 P.3d at 234. *Caballes* repeatedly anchored its conclusion to the factual scenario of a car's exterior during a lawful traffic stop:

> [T]he use of a well-trained narcotics-detection dog[] . . . *during a lawful traffic stop*, generally does not implicate legitimate privacy interests. . . . [T]he dog sniff was performed on the exterior of respondent's car *while . . . lawfully seized for a traffic violation*. . . . A dog sniff conducted during a concededly *lawful traffic stop* . . . does not violate the Fourth Amendment.

Caballes, 543 U.S. at 410 (emphasis added). Moreover, the U.S. Supreme Court has specified that a reduced expectation of privacy exists for automobiles. California v. Carney, 471 U.S. 386, 393 (1985).

88. *See, e.g.*, United States v. Brock, 417 F.3d 692, 696 (7th Cir. 2005) (dog sniff, pursuant to a search warrant, not a search inside defendant's residence because "it detected only the presence of contraband and did not provide any information about lawful activity over which [Defendant] had a legitimate expectation of privacy"); United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998) (upholding dog sniff where officers were in pursuit of burglar and had consent to enter). Even before *Caballes*, the Arizona Court of Appeals had taken the position that a dog sniff of a car's exterior during a lawful stop is not a Fourth

The lawfulness of the officer's presence requires very little analysis when she is in a public place or has probable cause to detain someone, as in a traffic stop. The opposite is true when her search involves a home—the home is at the "very core" of the Fourth Amendment, which "draws 'a firm line at the entrance to the house.'"[89] The legality of the dog sniff turns on a fact-intensive inquiry into whether the officer's intrusion violated a resident's reasonable expectation of privacy—an inquiry the *Guillen* majority neglected to conduct.

2. Single-Family Residences Versus Multi-Dwelling Structures

In sharp contrast to multi-dwelling structures, curtilage-privacy analysis involving a single-family residence or even a duplex is more likely to yield a reasonable expectation of privacy: residents do not share the areas outside the home with anyone else, and generally have the right to exclude others from their property. On the other hand, multiple tenants sharing common access in multi-dwelling structures, such as hotels, apartments, and train-sleeper cars, are much less likely to have a reasonable expectation of privacy.

In *United States v. Dunn*, the Court offered four factors relevant to determining whether an area exterior to a home is protected curtilage[90] and thus "should be placed under the home's 'umbrella' of Fourth Amendment protection."[91] The determination of whether a reasonable expectation of privacy exists depends on a fact-intensive inquiry, which yields conclusions that are inapplicable to other circumstances. Lower courts, for example, have found that searching an unattached garage located fifty yards from the house was a warrantless search of the curtilage,[92] but subjecting a garage to a dog sniff from a public alley was not.[93] The First Circuit Court of Appeals held that an officer standing next to a utility pole was within the curtilage, noting that homeowners would be "astonished to learn that they had abandoned all curtilage protection by allowing meters to be affixed to the sides of their houses."[94]

Amendment search. *See* State v. Box, 73 P.3d 623, 627–28 (Ariz. Ct. App. 2003) (citing *Place*, 462 U.S. 696). Presumably, a dog sniff outside a home that could detect lawful activity apart from possessing contraband could implicate the Fourth Amendment. The Arizona Court of Appeals recognized this possibility and distinguished the heat detections in *Kyllo* from the dog sniff at issue, because it "yielded information exclusively about the presence or absence of contraband." *Guillen*, 213 P.3d at 233.

89. Kyllo v. United States, 533 U.S. 27, 40 (2001) (quoting Payton v. New York, 455 U.S. 573, 590 (1980)).

90. 480 U.S. 294, 301 (1987) ("[T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.").

91. *Id.* Arizona courts have yet to apply *Dunn* or its factors.

92. *See* Daughenbaugh v. City of Tiffin, 150 F.3d 594, 601 (6th Cir. 1998).

93. United States v. Vasquez, 909 F.2d 235, 238 (7th Cir. 1990).

94. United States v. Diehl, 276 F.3d 32, 39 (1st Cir. 2002). The First Circuit rejected the Government's argument that the metered pole was not curtilage, even if occasionally visited by a meter reader. *Id.*

The *Guillen* majority cited several multi-dwelling cases in support of its proposition that no search occurs outside a single-family residence, despite the fact that none of these cases actually addressed such a search.[95] The relevance of multi-dwelling jurisprudence to home searches is, at best, questionable. The vast majority, including those cited in *Guillen*, have concluded that a lesser expectation of privacy exists in shared spaces.[96] Common passages and hallways are not only normal access routes to the front door, they are also spaces in which a resident expects there to be a high degree of traffic.[97] The Tenth Circuit has further distinguished the "apartment cases" from home cases because a tenant does not have a right to exclude others from the common areas.[98] Even in these shared spaces, courts analyze the specific circumstances to determine how "shared" the space is.[99] For example, in *United States v. Nohara*, the Ninth Circuit Court of Appeals found no reasonable expectation of privacy in a high-traffic hallway, distinguishing an earlier case where the court found a reasonable privacy expectation in a hallway shared by only one other tenant.[100]

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95. State v. Guillen, 213 P.3d 230, 234–35 (Ariz. Ct. App. 2009), *review granted*, No. CCR-09-0188-PR (Ariz. Oct. 27, 2009) (citing United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998); United States v. Roby, 122 F.3d 1120, 1124–25 (8th Cir. 1997) (common corridor of a hotel); United States v. Colyer, 878 F.2d 469, 475–77 (D.C. Cir. 1989) (sniff outside train roomette); Fitzgerald v. State, 837 A.2d 989, 1035 (Md. Ct. Spec. App. 2003) (common hallway outside apartment); People v. Dunn, 564 N.E.2d 1054, 1056 (N.Y. 1990) (common hallway outside apartment)).

96. Post-*Caballes*, the Second Circuit Court of Appeals appears to stand alone in finding a dog sniff unconstitutional when directed towards the inside of an apartment from the threshold. United States v. Hayes, 551 F.3d 138, 144–45 (2d Cir. 2008) (reaffirming United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985)). The Second Circuit does not follow the legitimate-versus-illegitimate privacy expectations when the search involves a home: "Even if the only function of the sniff is to reveal illegal narcotics inside that apartment[,] . . . 'the defendant had a legitimate expectation that the contents of his closed apartment would remain private.'" *Id.* at 144 (quoting *Thomas*, 757 F.2d at 1367).

97. *See, e.g.*, United States v. Cephas, 254 F.3d 488, 494 (4th Cir. 2001) (officer moving "through an area common to the several separate apartments in the house, an area where any pollster or salesman could have presented himself"); United States v. Brown, 169 F.3d 89, 92 (1st Cir.1999) ("'[T]enant lacks a reasonable expectation of privacy in the common areas of an apartment building.'") (quoting United States v. Hawkins, 139 F.3d 29, 32 (1st Cir. 1998)) (footnote omitted); Commonwealth v. Thomas, 267 N.E.2d 489, 490–91 (Mass. 1971) (cellar washing area common with no expectation of privacy); Marullo v. United States, 328 F.2d 361, 364 (5th Cir.1964) (no expectation of privacy in brick that was part a pillar holding up the motel cabin); *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(b) (4th ed. 2004).

98. United States v. Anderson, 154 F.3d 1225, 1232 n.3 (10th Cir. 1998).

99. State v. Ortiz, 600 N.W.2d 805, 819 (Neb. 1999) ("[T]he degree of privacy society is willing to accord an apartment hallway may depend on the facts, such as whether there is an outer door locked to the street which limits access, . . . the number of residents using the hallway, . . . the number of units in the apartment complex, . . . and the presence or absence of no trespassing signage.") (internal citations omitted).

100. 3 F.3d 1239, 1242 (9th Cir. 1993) (distinguishing United States v. Fluker, 543 F.2d 709, 716–17 (9th Cir. 1976) (defendant had a reasonable expectation of privacy by living in only one of two basement units)).

The Fourth Amendment cases in the "majority of jurisdictions" that the *Guillen* majority claimed to have joined involved thresholds of apartments,[101] hotels,[102] and trains,[103] or dealt with situations inside a dwelling when the officer already had probable cause, exigency, and consent to be present.[104] As discussed above, these cases generally discount any expectation of privacy in shared, high-traffic areas. These cases are controlling in *Guillen* only if the area outside a garage door is public and subject to heavy traffic similar to multi-tenant hallways. Even if this was a reasonable suggestion, courts still analyze the specific circumstances involved in the search to determine if a reasonable expectation of privacy existed despite the shared access.

B. "If You Are Not Here to Talk to Me, Then Get Off My Curtilage!"

Courts often distinguish a sub-species of curtilage as having a lesser expectation of privacy when it involves a "normal access route" to the front door.[105] Because residents expect the public to approach via a "normal access route," it is unreasonable to expect that officers would not. Whether curtilage or a "normal access route," however, courts uniformly hold that an officer must approach with the intent of engaging residents, not of collecting evidence of criminality.[106] Because the majority acknowledged that the officer's purpose in

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101. State v. Guillen, 213 P.3d 230, 234–35 (Ariz. Ct. App. 2009), *review granted*, No. CCR-09-0188-PR (Ariz. Oct. 27, 2009) (citing Fitzgerald v. State, 837 A.2d 989, 1035 (Md. Ct. Spec. App. 2003) (common hallway outside apartment); People v. Dunn, 564 N.E.2d 1054, 1056 (N.Y. 1990) (common hallway outside apartment)).

102. *Id.* (citing United States v. Roby, 122 F.3d 1120, 1124–25 (8th Cir. 1997) (common corridor of a hotel)).

103. *Id.* at 235 (citing United States v. Colyer, 878 F.2d 469, 475–77 (D.C. Cir. 1989) (sniff outside train roomette)).

104. *Id.* at 234 (citing United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998) (upholding dog sniff where officers were in pursuit of burglar and had consent to enter)).

105. *See, e.g.*, Baker v. Clover, 864 P.2d 1069, 1071 (Ariz. Ct. App. 1993); Robinson v. Commonwealth, 612 S.E.2d 751, 760–62 (Va. Ct. App. 2005); State v. Maxfield, 886 P.2d 123, 134 (Wash. 1994); State v. Clark, 859 P.2d 344, 349 (Idaho Ct. App. 1993).

106. *See* United States v. Hammett 236 F.3d 1054, 1059–60 (9th Cir. 2001) (officers within purview of law to circle the house in an attempt to locate a resident); *see also* United States v. Troop, 514 F.3d 405, 410–11 (5th Cir. 2008) (citing United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001)); Hardesty v. Hamburg, 461 F.3d 646, 654 (6th Cir. 2006) (officers can take "reasonable steps" to enter the curtilage when those steps are "directed towards initiating a conversation with the person . . . in the house"); Estate of Smith v. Marasco, 318 F.3d 497, 520–21 (3d Cir. 2003) (authorizing brief entry into curtilage to locate the sought after person if officers have reason to believe that person will be there); United States v. Reyes, 283 F.3d 446, 467 (2d Cir. 2002) (probation officer's walk along driveway with purpose of conducting a "court-imposed home visit" with a parolee lawful); United States v. Raines, 243 F.3d 419, 422 (8th Cir. 2001) ("[Sheriff] did not violate the Fourth Amendment by proceeding into Raines's backyard in the good faith attempt to serve civil process."); United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990) (After trying the front door, "there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person").

approaching Guillen's home was to collect evidence of criminality, it should have concluded that the officers violated the Fourth Amendment.

The *Guillen* majority side-stepped a specific inquiry into whether the garage door was protected curtilage or a "normal access route" to the front door. Instead, the court offered a one-size-fits-all protection of all areas immediately around the house.[107] Under a broad interpretation, officers may lawfully conduct canine evidence-gathering investigations around all exterior areas of a home, as long as they have reasonable suspicion. As noted, this protection falls short of a factual inquiry into whether an officer's entry into the curtilage was justified given a resident's protected expectation of privacy. Despite *Guillen*'s coarsely broad rule, the majority does suggest that such an inquiry might be necessary.

In a footnote, the majority recognized that officers have the same right to the curtilage as the public,[108] but "question[ed] whether any category of visitor could claim the same implicit consent to such access, consistent with a resident's reasonable expectations of privacy, when the visitor is armed with equipment designed to probe the private portions of the residence."[109] Because this suggestion appears in a footnote, it is unclear whether Arizona courts will uniformly apply the *Guillen* rule or allow a defendant to argue the officer unlawfully entered the curtilage.

1. A Garage's Exterior Is Most Likely Protected Curtilage and Not a "Normal Access Route" to the Front Door

The *Guillen* majority in its curtilage footnote implied that the area along the door of an attached garage was curtilage. No Arizona appellate case has specifically analyzed curtilage under article II, section 8, rather than under the Fourth Amendment. Because the Fourth Amendment sets the constitutional floor, a court does not need to analyze curtilage under a state constitution unless it provides greater protection. In the context of the scope of a warrant's subject matter, the Arizona Supreme Court held that the driveway and garage are part of the curtilage.[110] This is not a per se rule applicable to all cases. While Arizona courts have yet to apply the *Dunn* factors to determine curtilage, the state's highest court has said that the test is "that of reasonableness, both of the possessor's expectations of privacy and of the officers' reasons for being [there]."[111]

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107. *See Guillen*, 213 P.3d at 239 ("[L]aw enforcement officers need only a reasonable suspicion that contraband may be found in a home in order to conduct a canine sniff search of the exterior of the home.").

108. *Id.* at 240 n.11 (citing Baker v. Clover, 864 P.2d 1069, 1071 (Ariz. Ct. App. 1993)).

109. *Id.*

110. *In re* One 1970 Ford Van, 533 P.2d 1157, 1158 (Ariz. 1975).

111. State v. Cobb, 566 P.2d 285, 290 (Ariz. 1977) (quoting United States v. Magana, 512 F.2d 1169, 1171 (9th Cir. 1975)) (internal quotation marks omitted); *see also* State v. Platt, 637 P.2d 1073, 1076 (Ariz. Ct. App. 1981) (not a reasonable expectation to keep visually private a backyard that can be viewed from neighbor's property); State v. Lopez, 563 P.2d 295, 297 (Ariz. Ct. App. 1976) (recognizing a reasonable expectation of privacy in carport from which officer smelled marijuana).

Baker v. Clover held that a limited expectation of privacy exists in a "normal access route to the residence, such as a walkway, which 'is only a semi-private area, admitting of a reasonable expectation that [the public, including officers] may use the walkway in . . . attending to personal or business pursuits with [residents].'"[112] The question then is whether the seams of the door to an attached garage are a "normal access route to the residence." The Washington Court of Appeals did not think so when it analyzed a similar factual scenario under the Washington Constitution, which has wording identical to article II, section 8 of the Arizona Constitution.[113] In *Dearman*—the single factually relevant case that the *Guillen* majority cited for support—the court commented that:

> While police used the normal, most direct access route to the house, they deliberately avoided contact with the residents on this visit, "spied" into the house by using a means other than their own senses to detect what could normally not be detected from outside, and arguably created an artificial vantage point (*an ordinary visitor approaching the front door would be highly unlikely to press his nose against the seams of the garage door*)."[114]

2. Whether Curtilage or a "Normal Access Route," Officers May Only Approach to Engage the Residents

Even if a court were to decide that walking along the seams of the door to an attached garage was a "normal access route to the residence," an officer would still be limited to the purpose of "attending to personal or business pursuits with residents."[115] In an unpublished opinion, the Arizona Court of Appeals recently stressed that "'[l]aw enforcement officers may encroach upon the curtilage of a home for the purposes of asking questions of the occupants.'"[116] Like Arizona before *Guillen*, federal and state courts also uniformly agree that, absent a warrant or probable cause, an officer may only enter the curtilage to engage a resident and not to collect evidence.[117] These cases also generally allow the officer to circle the

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112. 864 P.2d 1069, 1071 (Ariz. Ct. App. 1993) (quoting State v. Cloutier, 544 A.2d 1277, 1279–80 (Me. 1988)).

113. *See* State v. Dearman, 962 P.2d 850, 852–53 (Wash. Ct. App. 1998); c*ompare* WASH. CONST. art I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."), *with* ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). *Dearman* did not address the constitutionality of the dog sniff under the Fourth Amendment. *See* 962 P.2d at 852–53.

114. *Dearman*, 962 P.2d at 853 n.7 (emphasis added). *Dearman* did not specifically rule on the lawful presence of the officers. *See id.* at 853 n.15 ("[I]t is unnecessary to [decide] . . . whether police had a legitimate investigative reason to be on the property even after they learned no one was home."). The court assumed the officers were lawfully present because the officers most likely had enough probable cause to get a search warrant. *Id.* ("[T]hey may well have had enough information to obtain a search warrant.").

115. *See, e.g.*, *Baker*, 864 P.2d at 1071; *see also infra* note 117.

116. State v. Bane, No. 1 CA-CR 06-0593, 2008 WL 2406233, *3 (Ariz. Ct. App. June 10, 2008) (quoting United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir. 2001)).

117. In addition to federal appellate decisions under the Fourth Amendment, see *supra* note 106, state courts also require an officer to approach a home for the purposes of

home in an attempt to locate the resident at the front and back doors.[118] The Fifth Circuit is more strict, holding that after not finding anyone at the front door, "the officers should end the knock and talk and 'change[] their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.'"[119] The common thread across the circuits is that after not finding anyone at a home's entry points, any police activity could become a warrantless intrusion.[120]

In its treatment of an officer's intent to enter the curtilage, the *Guillen* majority radically departed from previous Arizona cases and the rest of the United States. The court specifically required reasonable suspicion because an officer is not "approach[ing] a home's front door to conduct a consensual inquiry of a resident."[121] The majority claimed to join other states with similar constitutions that also require some "reasonable justification."[122] As discussed above, the only case that dealt with the unique constitutional circumstances of a home's exterior required a warrant to protect the resident's expectation of privacy at the garage door.[123] The other state cases dealt with constitutionally distinguishable contexts: luggage at an airport,[124] a car's exterior during a lawful traffic stop,[125] a package sent via private carrier,[126] the common area of a storage facility with consent of the facility's owner,[127] and a common hallway outside an apartment.[128] The court did not join any other jurisdiction and in fact isolated itself by ignoring the officer's intent to enter the curtilage.

CONCLUSION

Despite many of the above-discussed cases being much more nuanced in applying Fourth Amendment search law, *Guillen* ignored an essential element by

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engaging a resident. *See, e.g.*, State v. Fisher, 154 P.3d 455, 474 (Kan. 2007) ("[W]hile driving to and from the parking spot on the driveway, while walking to and from the front door, and while at the front door, the officer may make lawful observations."); State v. Hubbel, 951 P.2d 971, 977 (Mont. 1997) (police "well within their authority to proceed on the open walkway to the front door, where they saw yet more evidence in plain view"); State v. Lodermeier, 481 N.W.2d 614, 624 (S.D. 1992) (An "officer with legitimate business may enter a driveway and, while there, may inspect objects in open view."). State v. Bowling, 867 S.W.2d 338, 342 (Tenn. Crim. App. 1993) ("[G]etting on . . . hands and knees . . . and looking into the garage are not those actions which society would permit of a reasonably respectful citizen.").

118. *See supra* note 117.

119. United States v. Troop, 514 F.3d 405, 410 (5th Cir. 2008) (quoting United States v. Gomez-Moreno, 479 F.3d 350, 356 (5th Cir. 2007)) (alteration in original).

120. *See* Daughenbaugh v. City of Tiffin, 150 F.3d 594, 601 (6th Cir. 1998) ("[O]fficers . . . must observe the area being searched from a lawful vantage point.").

121. State v. Guillen, 213 P.3d 230, 237 (Ariz. Ct. App. 2009), *review granted*, No. CCR-09-0188-PR (Ariz. Oct. 27, 2009) (citing *Baker*, 864 P.2d at 1071).

122. *Id.* at 238. *See supra* note 63.

123. State v. Dearman, 962 P.2d 850, 853 (Wash. Ct. App. 1998).

124. Pooley v. State, 705 P.2d 1293, 1310–11 (Alaska Ct. App. 1985).

125. State v. Wiegand, 645 N.W.2d 125, 132, 135 (Minn. 2002); State v. Pellicci, 580 A.2d 710, 715–16 (N.H. 1990).

126. People v. Boylan, 854 P.2d 807, 810–11 (Colo. 1993).

127. Commonwealth v. Johnston, 530 A.2d 74, 79–80 (Pa. 1987).

128. People v. Dunn, 564 N.E.2d, 1054, 1057–58 (N.Y. 1990).

not analyzing whether the officer was lawfully present at the seams of Guillen's residence. Without this critical element, the court's conclusion is far reaching—essentially discarding the distinction between open fields and curtilage. Presumably, under the court's reading of Fourth Amendment jurisprudence, any dog sniff of the exterior of the residence is constitutional, regardless of the officer's intent for entering constitutionally protected curtilage. The *Guillen* majority is alone, even in its own state, in allowing officers to ignore residents and search for evidence of criminality outside a house. Diligent research revealed not a single circuit or state court allows officers entry into the curtilage or "normal access routes" to the front door unless their purpose is to engage the resident. Because the officer here specifically waited to approach the home when it was clear no one was home, the canine-detection unit's approach to the garage door violated Guillen's right to privacy.

Fourth Amendment and similar state constitution privacy provisions require a delicate balancing between the need to protect citizens from the Orwellian specter of unreasonable government intrusion and the need to facilitate effective law enforcement. The majority feared "sanctioning indiscriminate canine sweeps of residential thresholds,"[129]—a result the *Guillen* majority predicted the U.S. Supreme Court would enable should it address the issue. The court backed itself into a corner by inadequately analyzing the Fourth Amendment. It reached out to the Arizona Constitution to provide some modicum of restraint to law enforcement's use of dog sniffs. But, like most hasty solutions, it will only last until a higher court reconstructs the proper constitutional pieces that ensure the right to privacy in and around our homes: "[i]f the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, this most sacred of places under Fourth Amendment jurisprudence."[130]

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129. State v. Guillen, 213 P.3d 230, 238 (Ariz. Ct. App. 2009), *review granted*, No. CCR-09-0188-PR (Ariz. Oct. 27, 2009).

130. State v. Rabb, 920 So. 2d 1175, 1189 (Fla. Dist. Ct. App. 2006) (cited in *Guillen*, 213 P.3d at 234).