No. 18-5509

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

RANDY DAVID MAKELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

JAMES WYDA
Federal Public Defender
for the District of Maryland

JOANNA SILVER
Assistant Federal Public Defender
6411 IVY LANE
GREENBELT, MD 20770
(301) 344-0600
Counsel of Record for Randy Makell

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

No. 18-5509

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

RANDY DAVID MAKELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ARGUMENT

I. No additional evidence is necessary for this Court to consider whether the use of a trained drug dog to sniff the doorway of a residence violates the resident's reasonable expectation of privacy.

The government concedes that there is a split amongst the federal circuits regarding whether this Court's holdings in *Illinois v. Caballes*, 543 U.S. 405 (2005) and *United States v. Place*, 462 U.S. 696 (1983) apply to dog-sniffs of residences. Brief for the United States in Opposition (hereinafter, "Gov. Br.") at 15-16; *see also*, *United States*

v. Thomas, 757 F.2d. 1359 (2nd Cir. 1985) (holding that a dog-sniff of the door to an apartment violates the occupant's reasonable expectation of privacy); *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016) (distinguishing both *Place* and *Caballes* by noting that neither case "implicated the Fourth Amendment's core concern of protecting the privacy of the home."); *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010) (a dog sniff of a hotel room doorway does not compromise any legitimate expectation of privacy); *United States v. Reed*, 141 F.3d 644 (6th Cir. 1998) (the use of a drug dog to sniff a dresser located inside an apartment does not unreasonably intrude upon the occupant's reasonable expectation of privacy). The government also recognizes that two previously published decisions by the Fourth Circuit cast doubt on the future position that circuit will take on the issue, despite the holding in its unpublished decision in Mr. Makell's case. *See United States v. Hill*, 776 F.3d 243, 248-251 (4th Cir. 2015) (a dog sniff of the interior of the residence of a supervisee, conducted by an officer with permission to be inside the residence as a condition of supervision, is a search requiring probable cause and a warrant); *United States v. Whitehead*, 849 F.3d 849, 857 (4th Cir. 1988) ("[*United States v.] Place* obviously did not sanction the indiscriminate, blanket use of trained dogs in all contexts.").

However, the government insists that this Court should not resolve this conflict now because of Mr. Makell's "failure to develop a record below." Gov. Br. at 16. It claims that more evidence is necessary regarding the fallibility of drug-sniffing dogs and regarding whether drug-sniffing dogs constitute "sense-enhancing technology not in

general public use." Gov. Br. at 16. Additional factual development is not necessary in either of these areas.

First, the fallibility of drug-dogs is not critical to Mr. Makell's petition. The petition is based primarily on the heightened protection of the home under the Fourth Amendment and the need to limit this Court's holding in *Illinois v. Caballes* in recognition of the distinction between homes and other spaces.

Nevertheless, the fallibility of drug-dogs should inform this Court's assessment of whether it believes the use of a drug-dog may inadvertently reveal intimate details from within the home. For this purpose, this Court does not need to identify a national error-rate, or identify the error-rate of the dog used in Mr. Makell's case. This Court and many lower courts have identified a wide-range of error-rates over the years. For example, this Court issued its decision in *Caballes* with a consideration of data contained in a 2001 study submitted by the State of Illinois, as well as a long string of judicial opinions in which lower courts noted significant rates of error by the dogs used in those cases. *See Caballes*, 543 U.S. at 412, Souter, J., dissenting. And, the search in Mr. Makell's case took place within the jurisdiction of the Fourth Circuit Court of Appeals, which, only a year earlier, had sanctioned the use of a drug-dog with a field success rate of only 25.88%. *See United States v. Green*, 740 F.3d 275, 283-284 (4th Cir. 2014). Without any further factual development, this Court can certainly conclude that the range of error rates that may be acceptable for searches of automobiles, should not be for homes.

Second, there is evidence in the record below to support a factual conclusion that Antra, the dog that sniffed Mr. Makell's door, is a sensory-enhancing device not in general public use. Specifically, the affidavit submitted in support of the search warrant for Mr. Makell's apartment states that Antra and her handler have completed a 400-hour drug detection canine course, an annual re-certification through the North American Police Working Dog Association, and weekly training sessions with the Prince George's County Police Department. Joint Appendix (hereinafter J.A.) at 30.

This Court should reject the government's attempt to create an additional requirement that trial courts make a factual finding that the device used to ascertain information from within the home is a form of "new technology," in order for the holding in *Kyllo v. United States*, 533 U.S. 347 (2001) to apply.[1] Gov. Br. at 16. The *Kyllo* majority concluded its opinion with the following clear and unequivocal statement: "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant." 533 U.S. at 40. This holding contains no reference to a requirement that the device constitute "new technology."

A comparison between the device employed in *Kyllo* and a trained drug-dog

[1]Contrary to the government's assertion, Mr. Makell did not need to cite to *Kyllo* in the District Court to preserve his reasonable expectation of privacy claim. *Kyllo* is simply an application of *Katz v. United States*, 389 U.S. 347 (1967), which Mr. Makell cited below. J.A. at 21-22.

illustrates one of the many problems with a "new technology" standard. A wide variety of thermal imaging devices, the "new technology" employed in *Kyllo*, are currently available for purchase by the public on Amazon;.[2] yet it is doubtful that any court would approve of the use of such a device to gather evidence of heat use from within a residence today, without a warrant. On the other hand, drug-detection dogs remain within the unique province of law enforcement. Additionally, while most dogs are born with enhanced sensory abilities and may not, on their own, appear to be the type of "device[3]" contemplated in *Kyllo*, dogs are not born with the ability to seek out *specific* odors and then communicate the presence of those odors to a person who can interpret that communication; they must be specifically trained to do so. Thus, a dog who has been specially-trained to do this is clearly a "device that is not in general public use." *Kyllo*, 533 U.S. at 40. Both common-sense and the significant amount of past and ongoing training that Antra received in this case supports this conclusion; no further factual development is necessary.

[2]*See* https://www.amazon.com/s/ref=nb_sb_noss_1?url=search-alias%3Daps&field-keywords=thermal+imaging+devices, last accessed on November 7, 2018.
[3]Mirriam Webster defines device as: a piece of equipment or a mechanism *designed to serve a special purpose or perform a special function*. https://www.merriam-webster.com/dictionary/device, last accessed on November 7, 2018, emphasis added.

II. Whether the doorway of an apartment constitutes the apartment's curtilage is not a factbound question; it is a question of law that this Court can and should address.

The government asserts that the second question Mr. Makell presents is a "factbound claim, which does not warrant this Court's review." Gov. Br. at 17. This Court has indeed established a fact-based inquiry to guide courts in determining whether an area is "so intimately tied to the home itself" that it should be considered within its curtilage and "placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987). However, the question Mr. Makell presents is narrow and not factbound at all. The question arises from the facts of Mr. Makell's case, in which officers brought a drug-sniffing dog to the door of Mr. Makell's apartment. *See* J.A. at 30 ("Later that day, one of the officers brought his 'canine partner,' Antra, to 1101 Kennebec Street where it 'scanned multiple doors . . . [d]uring the scan, Antra alerted on the door of Apartment 412."); *see also*, J.A. at 111 ("they took him to each door in the apartment hallway, including apartment 412.").

Every apartment, located within every apartment building, has a door, defined by Mirriam Webster as "a usually swinging or sliding barrier by which an entry is closed and opened." *See* https://www.merriam-webster.com/dictionary/door, last accessed on November 8, 2018. And every door, of every apartment, is located within a doorway, defined by Mirriam Webster as "the opening that a door closes." *See* https://www.merriam-webster.com/dictionary/doorway, last accessed November 8, 2018. While the record below contains discussions about the hallway

within which Mr. Makell's apartment is located, the proximity of Mr. Makell's apartment to an adjacent stairwell, and the distance from which his doorway is set back from the hallway, none of these facts is relevant to the limited question Mr. Makell presents to this court: is the door and the doorway itself considered the curtilage of an apartment, regardless of the surrounding environment?

For all of the reasons stated in his opening petition, Mr. Makell believes that it is. The threshold through which a person must pass to enter and exit his home is "intimately linked to the home, both physically and psychologically." *Jardines,* 133 S. Ct. at 1415, citing, *California v. Ciraolo*, 476 U.S. 207, 213 (1986). The trespass theory of the Fourth Amendment, as applied by this Court in *Jardines*, does not permit law enforcement officers to walk through an apartment building and instruct their trained drug-dogs to smell every doorway inside.

III. The good-faith exception to the exclusionary rule does not justify the unlawful dog-sniff.

As the government acknowledges, the Court of Appeals did not reach the issue of good-faith in this case. In the district court, the only finding made as to good-faith was as follows:

> I conclude, therefore, that this was not within anything that would qualify as curtilage under the Jardines case, and I find that the application for the search warrant was fully justified by probable cause of the existence of criminal activity going on within the apartment. I also find that the search was conducted by the officers in good faith and that their search would in any event be protected by U.S. versus Leon.

J.A. at 145. Because the district court appeared to be addressing the execution of the search warrant and referred only to *United States v. Leon*, 468 U.S. 897 (1984), Mr. Makell's opening brief in the Court of Appeals argued that *Leon* protects only those officers who innocently rely on a magistrate's probable cause determination; it does not reach cases, like Mr. Makell's, where the violation of the defendant's rights "*preceded the magistrate's involvement.*" *United States v. Mowatt*, 513 F.3d 395, 405 (4th Cir. 2008), *emphasis in original.*

In its responsive brief in the Court of Appeals, the government conceded that *Leon* did not apply and argued instead that officers conducted the dog sniff in reasonable reliance on binding judicial precedent and that its fruits (the search warrant) are therefore not subject to the exclusionary rule pursuant to *Davis v. United States*, 564 U.S. 229 (2011). The government now repeats this argument as an additional reason for this Court to deny Mr. Makell's petition. Gov. Br. at 19-21. However, the *Davis* good-faith analysis does not prevent application of the exclusionary rule in this case because, on the date that the officers brought a drug-sniffing dog to Mr. Makell's apartment, the law governing dog-sniffs of apartment doors was unclear and in a state of flux. The case law existent at that time does not meet the narrow standard for binding precedent that this Court set forth in *Davis*.

A. *Davis v. United States* is a narrow decision applying only to objectively reasonable reliance on binding appellate precedent.

In *Davis*, this Court analyzed the effect of *Arizona v. Gant*, 129 S.Ct. 1710 (2009)

on a search carried out prior to *Gant*'s issuance. 564 U.S. 229. This Court narrowly framed the question before it as follows: "whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent." *Id.* at 239.

In answering this question, this Court noted that the search in *Davis* "followed the Eleventh Circuit's . . . precedent to the letter," and that the officers' conduct was "in strict compliance with then-binding Circuit law." *Id.* Thus, the officers were not culpable "in any way." *Id.* Additionally, this Court opined that the situation that it was creating—in which it would be prevented from remedying a Fourth Amendment violation because officers relied on binding precedent—would apply to "an exceedingly small set of cases." *Id.* at 247. Moreover, this Court noted, "as a practical matter," defense counsel in many cases could still test prior Fourth Amendment precedent by arguing that the precedent is distinguishable. *Id.* at 248.

This Court concluded its opinion by stating that while "[i]t is one thing for the criminal 'to go free because the constable has blundered," . . .[i]t is quite another to set the criminal free because the constable has scrupulously adhered to governing law." *Id.* at 249, quoting, *People v. Defore*, 242 N.Y. 13, 21 (1926). There was no scrupulous adherence to binding law by the officers who conducted the dog sniff of Mr. Makell's apartment.

B. No binding Maryland state court precedent excused the search of Mr. Makell's home.

In the Court of Appeals, the government argued that there were two Maryland state court cases that were binding on the officers when they conducted their search: *Lindsey v. State*, 226 Md. App. 253 (2015) and *Fitzgerald v. State*, 384 Md. 484 (2004). Mr. Makell pointed out in his reply brief that the court should disregard *Lindsey v. State* because it was decided in December, 2015, several months *after* the search of Mr. Makell's home. 226 Md.App. 253. As a result, the government now points only to *Fitzgerald* in arguing that binding Maryland state court precedent justified the officers' conduct.

The Maryland Court of Appeals decided *Fitzgerald v. State* in 2004. 384 Md. 484. However, this Court's 2011 decision in *Jardines* called into question the applicability of *Fitzgerald*'s holding to the search of Mr. Makell's residence in a number of ways. First, while *Fitzgerald* involved a dog sniff of the exterior of an apartment, the state court chose to rule more broadly that "a dog sniff of the exterior *of a residence* is not a search under the Fourth Amendment." *Fitzgerald,* 384 Md. at 503, emphasis added. So stated, the holding of *Fitzgerald* had a questionable precedential effect at the time of the search in this case because *Jardines* held that a dog-sniff of a residence *is* a search under the Fourth Amendment. 133 S.Ct. at 1417.

Second, the *Fitzgerald* court relied on *United States v. Place* in issuing its holding, but in *Jardines*, this Court chose not to decide whether *Place*'s holding extended to dog-

sniffs of residences. *Fitzgerald* 384 Md. at 491-504, citing *Place*, 462 U.S. 696; *Jardines*, 133 S. Ct. at 1417. Thus, since *Jardines*, this area of law has not been settled.

Third, *Fitzgerald* held that neither *United States v. Karo,* 468 U.S. 705 (1984) nor *Kyllo v. United States* apply to dog sniffs because their holdings are based on the use of technological devices and, in the state court's opinion, drug dogs are not technological devices. *Fitzgerald,* 384 Md. at 495-96, citing, *Karo*, 468 U.S. 705; *Kyllo*, 533 U.S. 27. However, *Jardines* raised questions about the validity of this holding as well through its decision not to embrace the very same theory, posited by the state of Florida. *Jardines*, 133 S. Ct. at 1417. Instead, this Court concluded that "when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant." *Id.*

Thus, at the time of the search of Mr. Makell's apartment, *Jardines* provided a clear basis for a Fourth Amendment objection to dog sniffs of residences generally under the trespass theory and it left open the possibility that the reasonable expectation of privacy theory would apply to dog-sniffs of residences, regardless of the curtilage question. This state of play makes any reliance on *State v. Fitzgerald* by the police officers searching Mr. Makell's home objectively unreasonable.

C. *United States v. Hill*, an opinion issued by the Fourth Circuit Court of Appeals two months prior to Mr. Makell's dog sniff, eliminates any claim of good faith reliance under *Davis*.

A consideration of the Fourth Circuit's decision in *United States v. Hill*, 776 F.3d 243 (4th Cir. Jan 13, 2015) eliminates any remaining question regarding good faith

reliance on binding judicial precedent at the time officers brought a drug-sniffing dog to Mr. Makell's door. Decided only two months prior to the search of Mr. Makell's home, *Hill* holds that a dog sniff of the interior of a residence is a search and that neither *Place,* nor any other judicial precedent, sanctioned dog sniffs of residences at that time. *Hill*, 776 F.3d at 248-251.

In *Hill*, officers were lawfully inside the defendant's residence to arrest him for a violation of supervised release. *Id.* at 246. After performing a protective sweep and observing indicia of drug use, officers brought in a drug-sniffing dog which alerted in a variety of places throughout the apartment, leading the officers to obtain a warrant to search the apartment. *Id.* at 246. The government conceded that the dog sniff was a search, but argued that officers only needed reasonable suspicion to conduct it given the diminished expectation of privacy of a supervisee. *Id.* at 247.

The Court of Appeals disagreed, holding that law enforcement may not search the home of a person on supervised release who is not subject to a warrantless search condition unless they have a warrant supported by probable cause. *Id.* at 249. Thus, the court held, the dog sniff, a search that was conducted without a warrant, was unlawful. *Id.* at 249-250.

The court then rejected the government's argument that the exclusionary rule should not apply because the search in *Hill* took place prior to this Court's decision in *Jardines*. *Id.* at 250, citing, Jardines, 133 S. Ct. 1409. The court explained that it did not base its holding on *Jardines*. *Id.* at 250. It then noted that none of the Fourth Circuit

Court of Appeals cases relied on by the government in its *Davis,* good-faith argument involved searches of homes, and noted further that there was no Fourth Circuit case holding that dog sniffs could *never* be searches. *Id.* at 250-251, citing, *United States v. Jeffus*, 22 F.3d 554 (4th Cir. 1994); *United States v. Whitehead*, 849 F.3d 849 (4th Cir. 1988). More important, the court reiterated a statement from one of its prior decisions in which it "made clear" that "*Place* obviously did not sanction the indiscriminate, blanket use of trained dogs in all contexts." *Id.* at 251, quoting, *Whitehead*, 849 F.3d at 857.

Given the strength of the Fourth Court's rejection of a *Davis* good-faith argument in *Hill* and its stated position regarding *Place* and dog sniffs, made only two months prior to the dog sniff in this case, binding judicial precedent cannot excuse the officers' conduct in this case. A consideration of *Hill*, *Fitzgerald*, and *Jardines*, reveals that this is not one of the "exceedingly small set of cases," this Court contemplated when it recognized a good-faith exception to the exclusionary rule in *Davis.* 564 U.S. at 247. Good-faith should not bar this Court's consideration of the important substantive issues Mr. Makell presents in his petition.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Makell's petition for a writ of certiorari.

Respectfully submitted,

JAMES WYDA
Federal Public Defender

/s/

JOANNA SILVER
Assistant Federal Public Defender
6411 IVY LANE
GREENBELT, MD 20770
(301) 344-0600
Counsel of Record for Randy Makell