CRIMINAL PROCEDURE — FOURTH AMENDMENT SEARCHES — SEVENTH CIRCUIT HOLDS WARRANTLESS DOG SNIFFS OUTSIDE DEFENDANT'S APARTMENT DOOR VIOLATE FOURTH AMENDMENT. — *United States v. Whitaker*, 820 F.3d 849 (7th Cir.), *reh'g denied*, Nos. 14-3290, 14-3506, 2016 BL 198828 (7th Cir. June 10, 2016).

Apartment living can be tough; when the police come knocking, tougher still. Can the apartment dweller rely on the Fourth Amendment[1] in such instances? Most relevant Supreme Court precedents address single-family homes. In *Kyllo v. United States*,[2] the Court held that the warrantless use of a thermal-imaging device to detect heat emanating from a private home violated the amendment.[3] In *Florida v. Jardines*,[4] it held that the warrantless use of a drug-sniffing dog to investigate the defendant's porch — part of the "curtilage" of his home — was unconstitutional as well.[5] Recently, in *United States v. Whitaker*,[6] the Seventh Circuit claimed to extend *Jardines* to the apartment context, holding that the Fourth Amendment prohibited the warrantless use of a drug-sniffing dog to detect the presence of drugs in an apartment from the hallway outside.[7] But it based its rationale on the privacy interests in *Kyllo* rather than the property interests in *Jardines*. By extending the *Jardines* majority's holding while eliding its reasoning, the court may have compromised its stated goal of ensuring equal Fourth Amendment protections for all.

In October 2013, Dane County Sheriff's Deputy Joel Wagner received word from an informant that an individual was dealing drugs out of 6902 Stockbridge Drive, Apartment 204, in Madison, Wisconsin.[8] Upon visiting the building, Wagner met with the property manager and observed a black Cadillac Escalade parked in the spot for Apartment 204.[9] The following month, the same informant contacted Wagner again, informing him that the alleged drug dealer was back in town and claimed to have a large quantity of heroin at his

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[1] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[2] 533 U.S. 27 (2001).

[3] *Id.* at 40.

[4] 133 S. Ct. 1409 (2013).

[5] *Id.* at 1417–18.

[6] 820 F.3d 849 (7th Cir.), *reh'g denied*, Nos. 14-3290, 14-3506, 2016 BL 198828 (7th Cir. June 10, 2016).

[7] *Id.* at 853–54.

[8] *Id.* at 851.

[9] *Id.*

apartment.[10] Wagner contacted the property manager, who executed a consent form authorizing a K9 search of the building.[11]

Following a subsequent complaint about drug sales at the building, Wagner and another officer brought their "drug-sniffing K9 partner," "Hunter," to conduct a search.[12] Hunter first alerted (signaled the presence of drugs) on the black Escalade parked in the Apartment 204 spot.[13] Then the officers brought Hunter up to the locked hallway of the second floor, where he alerted on Apartment 204 itself.[14] The officers obtained a search warrant on the basis of Hunter's observations and found cocaine, heroin, and marijuana inside the unit.[15] They then arrested the apartment's sole occupant: Lonnie Whitaker.[16]

Whitaker filed a motion to suppress the evidence uncovered by the search, arguing that *Jardines* implied Fourth Amendment protections for the common areas of apartment buildings.[17] A magistrate judge recommended denial of the motion.[18] Citing Seventh Circuit precedent, he concluded that "the law of this circuit has been clear for decades: a renter does not have a reasonable expectation of privacy in the common areas of his apartment building."[19] The district court agreed, reiterating the magistrate's account of the law and adding that "nothing in *Jardines* suggests any reason to believe that the law has changed on this issue . . . or that society's expectations in this area have changed."[20] The district court adopted the magistrate's recommendation and denied the motion to suppress.[21] Whitaker appealed.[22]

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[10] *Id.*

[11] *See id.*

[12] *Id.*

[13] *Id.* A subsequent search of the Escalade did not recover any drugs. *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See* United States v. Whitaker, No. 14-cr-17, slip op. at 1–2 (W.D. Wis. June 16, 2014). Whitaker also made motions requesting a *Franks* hearing and the production of Hunter's training records. *Id.* at 1.

[18] Report & Recommendation at 22, *Whitaker* (No. 14-cr-17), ECF No. 46.

[19] *Id.* at 16 (citing Harney v. City of Chicago, 702 F.3d 916, 925 (7th Cir. 2012); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991)).

[20] *Whitaker*, slip op. at 3.

[21] *Id.* at 5. By adopting the recommendation, the district court denied Whitaker's other motions as well. *Id.* at 3–5.

[22] *Whitaker*, 820 F.3d at 850. On appeal, in addition to pressing his Fourth Amendment challenge, Whitaker also argued (1) that the court should have granted him the *Franks* hearing, (2) that it should have ordered the government to turn over Hunter's training records, and (3) that it should not have sentenced him after revoking his preexisting term of supervised release because that term had already expired. *Id.* at 850–51. Because the Seventh Circuit reversed on the Fourth Amendment issue, it held that the other three issues were moot. *Id.* at 851.

The Seventh Circuit reversed and remanded. Writing for the panel, Judge Darrah[23] first addressed Whitaker's theory "that *Jardines* should be extended to the hallway outside his apartment door because the law enforcement took the dog to his door for the purpose of gathering incriminating forensic evidence."[24] In *Jardines*, Judge Darrah explained, the Court found that the government's use of a trained police dog to investigate the defendant's porch was a Fourth Amendment search because a porch is "part of the home's curtilage and 'enjoys protection as part of the home itself.'"[25] The Court's holding was "based on the trespass to the defendant's curtilage, not a violation of the defendant's privacy interests."[26]

But before answering whether *Jardines*'s property-based analysis applied to apartment hallways, Judge Darrah noted that Whitaker also challenged the constitutionality of the search under the privacy-based analysis from *Kyllo*.[27] The government's use of a thermal-imaging device in *Kyllo* involved no trespass on the defendant's property; instead, the Court held that "[w]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 . . . presumptively unreasonable without a warrant."[28] Invoking Justice Kagan's concurrence in *Jardines*, Judge Darrah argued that the rule in *Kyllo* could have controlled *Jardines* as well: just as police could not lawfully peer inside a house with binoculars, they could not use a "super-sensitive dog" to glean information from inside it.[29] Whitaker's case likewise came "within [*Kyllo*]'s ambit," he argued, because a drug-detection dog is a super-sensitive device not in general public use and the presence of drugs within the apartment would have been otherwise unknowable without physical entry.[30]

Next, Judge Darrah contextualized the privacy rights at issue. The case "implicated the Fourth Amendment's core concern of protecting the privacy of the home."[31] While Whitaker did not have a "reasonable expectation of complete privacy in his apartment hallway," he did have such an expectation "against persons in the hallway snooping into his apartment using sensitive devices not available to the general pub-

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[23] Judge Darrah, a district judge for the Northern District of Illinois, was sitting by designation. He was joined in his opinion by Chief Judge Wood and Judge Hamilton.

[24] *Whitaker*, 820 F.3d at 852.

[25] *Id.* (quoting Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013)).

[26] *Id.*

[27] *Id.*

[28] Kyllo v. United States, 533 U.S. 27, 40 (2001).

[29] *Whitaker*, 820 F.3d at 853 (discussing *Jardines*, 133 S. Ct. at 1418–19 (Kagan, J., concurring)).

[30] *Id.*

[31] *Id.*

lic."[32] As a result, police could take some actions within the building, but not others. For instance, a police officer walking down the hallway could lawfully overhear a disturbance from a nearby apartment, but could not "put a stethoscope to the door to listen to all that is happening inside."[33] So too in Whitaker's case: while other residents could walk their dogs down the hallway, that did not authorize police to bring a drug-sniffing dog to the threshold of Whitaker's unit.[34]

Finally, Judge Darrah asserted that "[t]he practical effects of *Jardines* also weigh in favor of applying its holding to dog sniffs at doors in closed apartment hallways" because "[d]istinguishing . . . between the front porch of a stand-alone house and the closed hallways of an apartment building draws arbitrary lines."[35] First, he noted that intermediate housing arrangements — like split-level duplexes, garden apartments, or other multiunit buildings — would confound such a distinction.[36] Second, he argued that such a distinction "would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity."[37] Citing the Census's American Housing Survey, he observed that wealthier households and white households were more likely to live in single-unit, detached homes (protected under *Jardines*) than were poor or minority households, respectively.[38]

The court reached the correct outcome in *Whitaker*, and its rationale for the decision was sound. The scenario fit clearly within the holding of *Kyllo*: the police used a super-sensitive device to obtain details of the apartment's interior that were otherwise unknowable. But *Whitaker*'s triumphant coda — regarding an equal apportionment of Fourth Amendment protections — may overstate its actual achievement. In particular, *Whitaker* claims to extend *Jardines* to the apartment context, but focuses on the privacy-based rationale from Justice Kagan's concurrence rather than the majority's property-based rationale. By applying the open-ended "reasonable expectations of privacy" standard from cases like *Kyllo*, *Whitaker* missed a chance to ex-

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 853–54.

[35] *Id.* at 854.

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing *American Housing Survey — Table Creator*, U.S. CENSUS BUREAU, http://sasweb.ssd.census.gov/ahs/ahstablecreator.html [https://perma.cc/U5FC-L5PL]). The court also addressed the government's argument that the good-faith exception should prevent suppression of the evidence. *See* Davis v. United States, 564 U.S. 229, 232 (2011) ("[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."). Judge Darrah dismissed this argument by noting that "[t]he logic of *Kyllo* should have reasonably indicated by the time of this search that a warrantless dog sniff at an apartment door would ordinarily amount to an unreasonable search." *Whitaker*, 820 F.3d at 855.

tend the latter property-based rationale and provide a stronger foundation for the equal allotment of Fourth Amendment protections.

The Fourth Amendment has often been interpreted to protect two distinct interests.[39] In one strain of doctrine, the Supreme Court has construed the amendment's protections to attach specifically to the forms of property — "persons, houses, papers, and effects"[40] — enumerated therein. *Jardines* is very much in this tradition. Justice Scalia regarded the case as "a straightforward one,"[41] easily resolved via the "Fourth Amendment's property-rights baseline."[42] By entering the porch uninvited, the officers gathered information from "an area belonging to Jardines and immediately surrounding his house — in the curtilage of the house, which we have held enjoys protection as part of the home itself."[43] A second doctrinal strain has understood the amendment to protect individual privacy more generally. Justice Harlan penned the canonical statement of this theory in *Katz v. United States*[44] when he claimed that the amendment's protections corresponded with a person's "reasonable expectations of privacy," regardless of the property interests involved.[45] *Kyllo* belongs firmly to the *Katz* tradition. *Kyllo* involved no physical intrusion onto the defendant's property,[46] but the thermal-imaging device nonetheless violated the Fourth Amendment because it obtained private information from inside the home, where "*all* details are intimate details, because the entire area is held safe from prying government eyes."[47]

In *Whitaker*, Judge Darrah relied principally on that second interest. Early in the opinion, he considered Whitaker's request to extend *Jardines* to the apartment context.[48] But rather than apply the *Jardines* majority's property-based rationale, Judge Darrah instead introduced Justice Kagan's concurrence, in which she had noted that while the "Court today treats this case under a property rubric," she

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[39] *See, e.g.*, William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 636 (1994).

[40] U.S. CONST. amend. IV.

[41] Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).

[42] *Id.* at 1417.

[43] *Id.* at 1414. The Court emphasized that the search exceeded the "implicit license" afforded passersby on private property, which "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 1415.

[44] 389 U.S. 347 (1967).

[45] *Id.* at 362 (Harlan, J., concurring). In *Katz*, the government had placed an electronic listening device on the outside of a public phone booth. *Id.* at 348 (majority opinion). The Court held that the government had violated the Fourth Amendment because Katz had "justifiably relied" on the privacy of the phone booth when using it. *Id.* at 353.

[46] Kyllo v. United States, 533 U.S. 27, 30 (2001). The scan was performed from the agent's vehicle, parked across the street from Kyllo's residence. *Id.*

[47] *Id.* at 37.

[48] *Whitaker*, 820 F.3d at 852.

"could just as happily have decided it by looking to Jardines' privacy interests."[49] Justice Kagan's approach viewed *Jardines* as an application of *Kyllo* because the search used a super-sensitive device to garner private details from the interior of the home.[50] Judge Darrah adopted that framework in *Whitaker*: like the search of Jardines's porch, "[a] dog search conducted from an apartment hallway comes within [*Kyllo*]'s ambit."[51] That framework focused the inquiry not on the property interests outside the apartment but on the privacy interests within it.[52] *Whitaker* thus extends the bare holding of *Jardines*, barring the use of dog sniffs immediately outside a dwelling to detect drugs within it, but elides the majority's property-based rationale.

The failure to extend that rationale may leave apartment dwellers protected in the instant case but vulnerable to the many police investigations that never reach the dwelling's interior. The privacy-based Fourth Amendment rationale provides little protection from such searches. In *United States v. Eisler*,[53] for instance, the Eighth Circuit considered the admissibility of conversations overheard by a government agent while trespassing in an apartment building to investigate the defendants.[54] The court found the trespass irrelevant, reasoning that common areas of the building were "available for the use of residents and their guests, the landlord and his agents, and others," and thus the defendants had no reasonable expectation of privacy in such areas.[55] *Eisler* is representative of a general trend: the "reasonable expectations of privacy" framework has usually resulted in the absence of Fourth Amendment protections within the common areas of apartment buildings.[56] *Whitaker*, for its part, does little to change that trend. Given its reliance on Justice Kagan's *Kyllo*-based reasoning, *Whitaker* provides no protection for circumstances like *Eisler*'s, where the government employed no super-sensitive device and the overheard conversations occurred outside the apartment's inner sanctum.

Whitaker's reflexive application of the "reasonable expectations of privacy" standard may in fact perpetuate limited Fourth Amendment

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[49] Florida v. Jardines, 133 S. Ct. 1409, 1418 (2013) (Kagan, J., concurring).

[50] *Whitaker*, 820 F.3d at 853.

[51] *Id.*

[52] The officers made no physical intrusion on Whitaker's property; instead, they violated Whitaker's "reasonable expectation of privacy against persons in the hallway snooping *into his apartment* using sensitive devices not available to the general public." *Id.* (emphasis added).

[53] 567 F.2d 814 (8th Cir. 1977).

[54] *Id.* at 816. The DEA agent had entered the building by following another tenant inside.

[55] *Id.* ("That [the government agent] was a technical trespasser in a *common* hallway is of no consequence since appellants had no reasonable expectation that conversations taking place there would be free from intrusion.").

[56] *See, e.g.*, United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991); United States v. Holland, 755 F.2d 253, 255 (2d Cir. 1985); *Eisler*, 567 F.2d at 816. *But see* United States v. Carriger, 541 F.2d 545, 549–50 (6th Cir. 1976).

protections for apartment dwellers.[57] As Justice Harlan himself articulated the standard, it consists of a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[58] The subjective component means that the *Katz* standard can extend no further than people's real-world expectations of privacy, which can change in accordance with their living conditions.[59] While that doctrine protects contraband hidden within an apartment, it calls into question the privacy of those whose habitual interactions occur in hallways, stairwells, or other shared spaces, a plausible practice in an era of persistent urban overcrowding.[60] Rigorous scrutiny of the privacy expectations in such areas — located just outside one's dwelling but shared by many others — might well result in outcomes like *Eisler* more often than ones like *Whitaker*.[61] Such outcomes deepen the contrast between apartment dwellers and homeowners, who need worry less about the nebulous *Katz* standard given the concreteness of their own property-based protections.[62]

The *Jardines* majority's property-based reasoning carried the potential to provide a stronger foundation for equal Fourth Amendment protections. Unlike Justice Kagan's concurrence, the majority's reasoning did *not* rest on the use of a super-sensitive dog. Rather, the majority based its opinion on the police exceeding the "background social norms that invite a visitor to the front door [but] do not invite him there to conduct a search."[63] Under such a theory, it argued, "[i]t is not the dog that is the problem, but the behavior that here involved use of

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[57] *See, e.g.*, Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE RELIGION GENDER & CLASS 240, 240, 244 (2014) (critiquing the impact of *Katz* on the privacy rights of the urban poor).

[58] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267 (1999) (observing that Fourth Amendment privacy "has a positive definition: the kind of privacy protection citizens have vis-a-vis the police is tied to the kind of privacy the same citizens have with one another").

[59] *See* Stuntz, *supra* note 58, at 1270 (explaining the privacy gap between the homes of the rich and those of the poor); *id.* at 1267 (noting that Fourth Amendment privacy "can be bought, so that people who have money have more of it than people who don't").

[60] *See* Kirk Semple, *When the Kitchen Is Also a Bedroom: Overcrowding Worsens in New York*, N.Y. TIMES (Feb. 29, 2016), http://www.nytimes.com/2016/03/01/nyregion/overcrowding-worsens-in-new-york-as-working-families-double-up.html [https://perma.cc/3KUE-2237].

[61] The district court's reasoning — that Whitaker's expectations of privacy in the common areas of his building were not violated by the presence there of the officers and their drug dog — exemplifies the former possibility. *See* United States v. Whitaker, No. 14-cr-17, slip op. at 2–3 (W.D. Wis. June 16, 2014).

[62] *See* Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013); *cf.* California v. Greenwood, 486 U.S. 35, 37, 40–41 (1988) (upholding a warrantless search of the defendant's garbage because it had been left on the curb outside the curtilage of his home).

[63] *Jardines*, 133 S. Ct. at 1416.

the dog."[64] *Jardines* thus took issue with the officers' investigative purpose, not their instrument of choice. In the apartment context, that reasoning would suggest that police are not entitled to seek evidence within the immediate vicinity of one's apartment, regardless of the means employed to do so. *Whitaker*'s narrow focus on the dog as a "sophisticated sensing device"[65] diminishes its claim to "apply[] [*Jardines*] to dog sniffs at doors in closed apartment hallways."[66] In reality, *Whitaker* shortchanges tenants, leaving them with less than what an equal application of *Jardines* would provide.

Some state court decisions give a glimpse of a doctrine that could provide property-based protections to apartment dwellers. In *People v. Burns*,[67] the Illinois Appellate Court considered a warrantless dog sniff outside the defendant's apartment. But instead of applying the privacy-based analysis from *Kyllo*, the Illinois court found the search unreasonable under the "property-based analysis . . . in *Jardines*," concluding that because the search "physically intrud[ed] on [a] constitutionally protected area[]," the court "need not consider whether [the] defendant had a reasonable expectation of privacy in the common areas of the apartment building."[68] As *Burns* illustrates, while tenants lack an absolute right to exclude in the common areas of their buildings, they do retain property interests in those areas that could serve as the basis for Fourth Amendment protections.[69] *Jardines* contained the seeds of such an approach, which would bring those areas within the tenant's Fourth Amendment–protected property and thus immunize them from warrantless police investigation. *Whitaker* could have continued down that path, formulating a doctrine that protects tenants from unreasonable searches regardless of whether the search penetrates the interior of a unit or whether the tenant typically expects privacy when she steps outside her door. By falling back upon "reasonable expectations of privacy" instead, the court missed a chance to lay a firmer foundation for the equal apportionment of Fourth Amendment protections it sought to achieve.

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[64] *Id.* at 1416 n.3. "We think a typical person would find it 'a cause for great alarm,'" Justice Scalia continued, "to find a stranger snooping about his front porch *with or without* a dog." *Id.* (quoting *id.* at 1422 (Alito, J., dissenting)).

[65] *Whitaker*, 820 F.3d at 853.

[66] *Id.* at 854.

[67] 25 N.E.3d 1244 (Ill. App. Ct. 2015).

[68] *Id.* at 1254 (quoting *Jardines*, 133 S. Ct. at 1417); *see also* Robertson v. State, 740 N.E.2d 574, 576 (Ind. Ct. App. 2000) ("[O]ne who lives in an apartment . . . treats the area immediately outside his or her apartment home as his or her curtilage."); State v. Rendon, 476 S.W.3d 77, 82 (Tex. App. 2014) (accepting defendant's argument that a warrantless dog sniff conducted at his apartment door occurred in the "curtilage" of his apartment and was thus unreasonable under *Jardines* and the Fourth Amendment).

[69] *See generally* Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. C.R. L.J. 297 (2005) (advocating for an expansion in the definition of curtilage to the context of apartment complexes, motels, and other similar multioccupant dwellings).