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Criminal Law - Have Drug Dogs Taken a Bite out of the Fourth Amendment - Illinois v. Cabelles

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CRIMINAL LAW—Have Drug Dogs Taken a Bite out of the Fourth Amendment? *Illinois v. Caballes*, 543 U.S. 405 (2005).

INTRODUCTION

On November 12, 1998, Illinois trooper Daniel Gillette stopped defendant Roy I. Caballes on Interstate 80 in LaSalle County for driving seventy-one miles per hour in a sixty-five miles per hour zone.[1] Gillette did not request assistance; however, a second trooper, Craig Graham of the Illinois State Drug Interdiction Team, learned of the stop over the radio and expressed to the dispatcher that he would proceed to the stop and use his trained drug dog to conduct a sniff of the outside of Caballes' vehicle.[2]

Gillette approached the vehicle, told Caballes he was speeding and asked to see Caballes' driver's license, registration papers, and proof of insurance.[3] Caballes complied.[4] After Gillette observed the vehicle's interior through the windows, the trooper became suspicious that Caballes carried contraband.[5] The trooper asked the defendant to reposition his vehicle off the road and out of traffic, then to come back to the cruiser out of the rain.[6] Once Caballes seated himself in the cruiser, Gillette told the defendant that he would receive a warning for speeding.[7] The trooper then contacted the dispatcher to verify the validity of the defendant's license and to request a check for outstanding warrants.[8]

During the two minutes it took for dispatch to run the license, Gillette asked the defendant why he was "dressed up."[9] Caballes explained he was moving from Las Vegas to Chicago and was accustomed to dressing up because he worked as a salesman, but he was currently unemployed.[10]

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1. People v. Caballes, 802 N.E.2d 202, 203 (Ill. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* The Illinois Appellate Court noted four observations by the officer during the stop which indicated Caballes could be carrying contraband: "(1) defendant said he was moving to Chicago, but the only visible belongings were two sport coats in the backseat of the car, (2) the car smelled of air freshener, (3) defendant was dressed for business while traveling cross-country, even though he was unemployed, and (4) defendant seemed nervous." *Id.* at 204-05. Reversing the appellate court's decision, the Illinois Supreme Court noted that these observations could have innocent explanations; therefore, the court held the indicators insufficient to support a dog sniff. *Id.* at 205.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

While still waiting for a determination on the validity of the driver's license, the trooper asked dispatch to check Caballes' criminal history.[11] The trooper then asked Caballes for permission to search the vehicle for drugs, but Caballes refused.[12] Dispatch came back and reported that Caballes' record included two arrests for distributing marijuana.[13] Gillette began writing the warning, but a call on the radio from another trooper interrupted him.[14] The defendant remained nervous throughout the stop, which the trooper found unusual.[15]

Gillette was still writing the ticket when Graham, the second trooper, arrived and used his drug dog to sniff the outside of the vehicle.[16] In less than a minute, the dog "alerted" to the vehicle's trunk, indicating the presence of illegal drugs.[17] Acting on the dog alert, the troopers opened the trunk and found marijuana, then took Caballes to the police station.[18] The defendant was subsequently charged with one count of cannabis trafficking.[19]

At a bench trial, the district court rejected a motion to suppress the evidence and to quash the arrest.[20] The court sentenced Caballes to twelve years in prison and fined him $256,136.[21] The Illinois Appellate Court upheld this ruling, finding that under the Fourth Amendment the officer did not

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* The Supreme Court of Illinois never explained the significance of this observation. *Id.* However, an inappropriate delay can cause a traffic stop to exceed the stop's permitted scope. Lindsay v. State, 108 P.3d 852, 857 (Wyo. 2005) (holding that during a traffic stop an officer may detain the driver and the vehicle "only for the period of time reasonably necessary to complete routine matters" within the scope of the stop (citations omitted)).
15. *Caballes*, 802 N.E.2d at 203.
16. *Id.*
17. *Id.*
18. *Id.* The amount of marijuana discovered was never revealed in the published documents. *Id.* However, Caballes was charged under 720 ILL. COMP STAT. 550/5.1(a) (1997), which reads,

> Except for purposes authorized by this Act, any person who knowingly brings or causes to be brought into this State for the purpose of manufacture or delivery or with the intent to manufacture or deliver 2,500 grams or more of cannabis in this State or any other state or country is guilty of cannabis trafficking.

Id.
19. *Caballes*, 802 N.E.2d at 203.
20. *Id.*
21. *Id.*

need a reasonable and articulable suspicion before conducting a dog sniff on the outside of the vehicle.[22] The appellate court also found that although the criminal-history check improperly delayed the stop, the delay was *de minimis*.[23] The Illinois Supreme Court overturned the lower court, holding that prior to conducting drug-dog sniffs, authorities must have a reasonable and articulable suspicion that illegal activities are afoot.[24]

The United States Supreme Court disagreed with the Illinois Supreme Court, holding that sniffs by properly trained narcotics dogs reveal nothing about the defendant except the presence of illegal drugs.[25] Because the Fourth Amendment does not grant protection for the possession of contraband, properly conducted dog sniffs are not a "search," and officers can conduct sniffs on the outside of legally stopped vehicles without upsetting the balance between the individual's rights and the government's interest in drug interdiction.[26] Therefore, the Court held that a sniff can be conducted during a lawful traffic stop even if the officer has no reasonable and articulable suspicion, so long as conducting the sniff does nothing to extend the stop or inconvenience the defendant.[27]

This case note will explore the limits of Fourth Amendment protections as they relate to drug-dog searches. The note will also examine the need for the Court to pay closer attention to issues raised by the dissents in *Caballes*, including Justice Souter's concern that drug dogs are less than reliable and undeserving of special treatment, and Justice Ginsburg's belief that the *Caballes* holding could be applied inappropriately in circumstances other than traffic stops. Finally, this case note will pay particular attention to how the precedent set in *Caballes* might affect Wyoming, where Fourth

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22. *Id.* at 203-04.
23. *Id.*
24. *Id.* at 204-05 (citing Terry v. Ohio, 392 U.S. 1 (1965)). The Illinois Supreme Court followed the precedent of People v. Cox, 782 N.E.2d 275 (Ill. 2002), which held that 1) an officer must justify a request for a drug dog during a traffic stop with specific and articulable facts; and 2) the defendant's detention in *Cox* exceeded the scope of a traffic stop by being overly long. *Id.* at 281. The arrest in *Cox* occurred after a police officer stopped the defendant's vehicle for being improperly lighted. *Id.* at 277. The officer smelled no marijuana in the vehicle and had no reason to request the assistance, but he asked another officer to bring a dog to the scene. *Id.* The deputy arrived fifteen minutes after the defendant was stopped and while the first officer was still writing the ticket. *Id.* The deputy walked the dog around the defendant's car, and the dog alerted to possible drugs. *Id.* When officers searched the car, they found marijuana on the suspect and traces of it in the car. *Id.* at 277-78.
25. Illinois v. Caballes, 543 U.S. 405, 408-09 (2005).
26. *Id.*
27. *Id.*

Amendment-type protections under the Wyoming State Constitution remain unsettled.[28]

BACKGROUND

The Fourth Amendment to the United States Constitution ensures,

> 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.[29]

In interpreting this amendment, courts place official actions which could constitute searches and seizures into roughly three categories, depending upon their intrusiveness: 1) Full-blown arrests and full searches, 2) brief investigatory stops and less intrusive forms of protective sweeps, and 3) activities which do not implicate the Fourth Amendment, including searches conducted with the suspect's consent.[30] The most intrusive of these, arrests and full searches, require justification by "probable cause to believe that a person has committed or is committing a crime."[31] Brief investigatory stops represent searches and seizures which invoke "Fourth Amendment safeguards, but, by [their] less intrusive character" they require "only the presence of specific and articulable facts and rational inferences which give rise to a reasonable suspicion that a person has committed or may be committing a crime."[32] The least intrusive contacts between authorities and citizens involve no restraint of liberty and elicit "the citizen's voluntary cooperation with non-coercive questioning."[33]

The dog sniff in *Caballes* occurred at a traffic stop when officers have less than probable cause for arrest or full search.[34] Therefore, considerations germane exclusively to the most intrusive category are irrelevant, and this analysis will focus on the other two categories: consensual encounters and investigative detention.

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28. *See infra* notes 100-112 and accompanying text.
29. U.S. CONST. amend. IV.
30. Brown v. State, 944 P.2d 1168, 1171 (Wyo. 1997) (citing Wilson v. State, 874 P.2d 215, 220 (Wyo. 1994)).
31. *Brown*, 944 P.2d at 1171.
32. *Id.*
33. *Id.*
34. Lindsay v. State, 108 P.3d 852, 856-57 (Wyo. 2005).

Expectation of Privacy

Information-gathering becomes a search when it intrudes upon an interest the person believes should be private, and only when that expectation is one that society willingly accepts—a notion first advanced in Justice Harlan's concurrence to *Katz v. United States*.[35] In *Katz*, the government obtained evidence by using electronics to hear the suspect speak over the telephone from a phone booth.[36] The question was whether the eavesdropping violated the Fourth Amendment, even though authorities did not trespass into the phone booth during the conversation.[37] The United States Supreme Court held that the Fourth Amendment protected "people, not places," stating that the real question was not whether the government trespassed into the phone booth, but whether the subject had an expectation that the conversation was private.[38] The Court ruled that the government should have had a warrant before eavesdropping.[39] Justice Harlan in his concurrence stated that determining what is protected requires a two-part analysis: 1) whether the person has "exhibited an actual (subjective) expectation of privacy," and 2) whether the expectation in question is "one that society is prepared to recognize as reasonable."[40]

The holding of *Katz* recognized that protected interests can include intangible aspects of a person's life, such as communications from a closed phone booth.[41] But a person who exposes property and activities to the plain view of the world demonstrates no expectation of privacy; observations of these interests are not searches and receive no protection under the Fourth Amendment.[42]

Investigative Detentions

Brief detentions conducted for investigatory purposes are governed by *Terry v. Ohio*.[43] In *Terry*, a police officer stopped two men on the street he suspected of planning a robbery.[44] Believing one of the men was armed, he patted the suspect down and found a gun.[45] Based on these facts, the United States Supreme Court held that pat downs are allowed when an officer reasonably believes that a suspect possesses a dangerous weapon, pro-

35. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
36. *Id.* at 348.
37. *Id.* at 353.
38. *Id.*
39. *Id.*
40. *Id.* at 361 (Harlan, J., concurring).
41. *Id.* (Harlan, J., concurring).
42. *Id.* (Harlan, J., concurring).
43. Terry v. Ohio, 392 U.S. 1 (1968).
44. *Id.* at 6-7.
45. *Id.*

vided that the search remains consistent with officer safety.[46] The Court explained,

> A search for weapons in the absence of probable cause to arrest . . . must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.[47]

Therefore, the two-part test of *Terry* requires officers to justify investigatory stops at their inception with a reasonable and articulable suspicion, and to keep the stop within the scope of the original justification.[48]

To determine whether an intrusion is reasonable, the Court examines the "dangers and demands" of the specific situation.[49] To do this the Court weighs the government's interest against the intrusiveness of the search or seizure.[50] Some interests warrant more intrusion than others; for example, safety creates a higher interest than the enforcement of laws.[51] Therefore, the Court found it reasonable for the officer to pat down the outside of Terry's clothing in search of weapons, even though a pat down would have been impermissible if conducted merely to investigate the suspect's suspicious behavior.[52] When the government invades a protected interest, *Terry* holds that the only test for reasonableness is whether the action's intrusiveness outweighs the government's need to search.[53]

The Sui Generis *Classification*

In *United States v. Place*, the Court first recognized the drug dog's special role in the Fourth Amendment balance.[54] In *Place*, Drug Enforcement Agency officials in New York confronted an airport traveler and asked permission to search his bag, but the traveler refused.[55] The agents seized

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46. *Id.* at 25-26.
47. *Id.* (citations omitted).
48. *Id.* at 19-20.
49. *Id.* at 19.
50. *Id.* at 20-21.
51. *Id.* at 23 (noting that the officer's safety was a higher interest than the enforcement of laws).
52. *Id.*
at 20-21.
54. United States v. Place, 462 U.S. 696 (1983).
55. *Id.* at 20-21.

the bag, stating they wanted to get a search warrant for it.[56] The defendant was told he could depart and they would return the bag to him later, or he could accompany the agents until they completed the search.[57] The defendant opted to leave.[58] The officers took the bag to another airport, where ninety minutes later the dog sniffed the bag and indicated it contained drugs.[59] The time was late Friday afternoon, and the officers decided to hold the bag so they could contact a judge for a warrant on Monday morning.[60] The United States Supreme Court declared the dog sniff *sui generis*, which means in a class of its own, because the dog could discover nothing about the contents of the bag other than the presence of illegal drugs—a contraband.[61] Therefore, under the Fourth Amendment the sniff was not a search.[62] However, the officers improperly seized the bag by holding it an unreasonable length of time.[63]

Place illustrates the advantages and limitations of dog sniffs for authorities. While the dog sniff in itself was weightless in the Fourth Amendment balance, the duration of the confiscation exceeded the scope allowed by the two-part test of *Terry*.[64] The temporary confiscation interfered with Place's possessory interest of the luggage and subjected the defendant to the "possible disruption of his travel plans."[65] Therefore, the stop as a whole upset the Fourth Amendment equilibrium.[66]

In *United States v. Jacobsen*, the Court extended the analysis applied to dog sniffs in *Place* to a chemical test for determining the presence of an

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56. *Id.* at 699.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 707 ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.").
62. *Id.* The Court found dog sniffs very unintrusive,

> A "canine sniff" by a well-trained narcotics detection dog . . . does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search.

Id.
63. *Id.* at 709-10.
64. *Id.* at 708-09.
65. *Id.*
66. *Id.* at 709.

illegal drug.[67] The United States Supreme Court found that the test uncovered nothing except the presence or absence of cocaine and, therefore, conducting the test without a warrant did nothing to upset the Fourth Amendment.[68] Authorities discovered powder in a package after the package became damaged during shipping.[69] A warrantless field test of the powder showed that it was cocaine.[70] Relying upon *Place*, the Court held that the test did not violate the Fourth Amendment because it could reveal nothing except whether the powder was an illegal substance.[71] Citing Justice Harlan's concurrence in *Katz*, the Court held that even though a wrongdoer has a subjective interest in keeping private his possession of a contraband, his "expectation of privacy is not one society is prepared to recognize as reasonable."[72]

The United States Supreme Court limits the principle in *Place* to information-gathering that cannot reveal protected privacy interests. In *Kyllo v. United States*, the Court refused to extend the principle to thermal imaging, holding that the very limited information revealed through the technology about the person's life has Fourth Amendment protections.[73] A lower court granted a search warrant for a residence based on a thermal image that provided evidence that the house contained heat lamps for growing marijuana.[74] The thermal imager revealed only that one room of the house had a higher temperature than other rooms.[75] Although the thermal image showed very little about the subject's life, the United States Supreme Court declared that a technique is a "search" if it has the potential of exposing any legitimate activity going on inside.[76] Therefore, the Court required that authorities have justification before using thermal imaging.[77]

Wyoming Traffic Stops and the Fourth Amendment

Because traffic stops are brief and limited in scope, courts equate them with investigative detention and analyze them using the principles of *Terry*.[78] Therefore, the initial stop must be justified, and actions of the officer must remain consistent with the initial purpose—in *Caballes* the issuing

67. United States v. Jacobsen, 466 U.S. 109 (1984).
68. *Id.* at 123.
69. *Id. at 111.*
70. *Id.*
71. *Id.* at 123-24.
72. *Id.* at 122 n.22 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (internal quotations omitted).
73. Kyllo v. United States, 533 U.S. 27, 40 (2001).
74. *Id.* at 29-31.
75. *Id.* at 30.
76. *Id.* 35-36.
77. *Id.* 36-37.
(Wyo. 2003) (citing Terry v. Ohio, 392 U.S. 1, 19 (1968)).

of a traffic ticket.[79] Traffic stops must be "temporary, lasting no longer than necessary to effectuate the purpose of the stop," and the officer must carefully tailor the stop to "its underlying justification."[80] An officer may request the driver's proof of insurance, operating license, and vehicle registration, and may run a computer check and issue a citation.[81] Once the officer issues the citation and checks the documentation, the traveler "must be allowed to proceed without further delay."[82]

To justify any "searches" other than these actions, the officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[83] Therefore, to the extent that his actions trigger Fourth Amendment protections, an officer cannot pursue drug interdiction without evidence to weigh against the additional intrusion.[84]

However, some unobtrusive information-gathering is not a search and, therefore, does not trigger Fourth Amendment protections.[85] For example, an officer can observe details for which the subject has no reasonable expectation of privacy (i.e., view objects left in plain view or note odors emitting from the vehicle).[86] If through these means the officer gathers ar-

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79. *Damato*, 64 P.3d at 704-05.

80. Campbell v. State, 97 P.3d 781, 784 (Wyo. 2004) (quoting United States v. Wood, 106 F.3d 942, 945 (10th Cir. 1997)).

81. *Campbell*, 97 P.3d at 785 (quoting *Damato*, 64 P.3d at 700, 707 (Wyo. 2003)).

82. *Campbell*, 97 P.3d at 785.

83. Terry v. Ohio, 392 U.S. 1, 21 (1968). Federal circuit courts differ over what is allowable during a traffic stop. For example, the Tenth Circuit held that the officer cannot ask the traveler directly about suspected illegal activities without expanding the scope of the traffic stop, unless the questions concern issues pertinent to officer safety. United States v. Holt, 264 F.3d 1215, 1221 (10th Cir. 2001). However, the Fifth Circuit held such questions allowable in any case. United States v. Shabazz, 993 F.2d 431, 436 (5th Cir. 1993). *See* United States v. Flowers, 2004 U.S. Dist. LEXIS 10111 (D. Fla. 2004) (comparing the rules in the Tenth and Fifth circuits).

84. *See Campbell*, 97 P.3d. at 785 (stating that the officer must not detain the traveler for longer than the "period of time reasonably necessary to complete . . . routine matters" within the scope of the traffic stop).

85. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

86. *Id.* (Harlan, J., concurring) ("Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.").

ticulable facts sufficient to conclude something illegal may be under way, the officer can expand the traffic stop into a drug investigation.[87]

To sum up, traffic stops are short in duration and limited, and an investigation into whether a traveler carries drugs exceeds that scope.[88] Unless the officer has a reasonable suspicion that the traveler carries drugs, the officer must allow the traveler to continue.[89]

Wyoming's Drug-dog Rule

Five months prior to the United States Supreme Court's ruling in *Caballes*, the Wyoming Supreme Court used the United States Constitution to reach a holding nearly identical to that of *Caballes*.[90] Unlike Illinois' precedent, which required that dog sniffs meet the two-prong test of *Terry*, Wyoming's *Morgan v. State* foreshadowed *Caballes*, holding that sniffs at traffic stops by well-trained dogs, when properly conducted, can be done without officers having a reasonable suspicion of wrongdoing.[91] As a result, the immediate impact of *Caballes* within Wyoming was minimal.[92]

Although the facts of *Morgan* are unique, they can be analogized to the typical traffic stop. On November 18, 2001, two travelers stalled their vehicle while headed north on Interstate 25 in Laramie County.[93] They pulled to the side of the road, and a trooper proceeded to their location to lend assistance.[94] The trooper, who transported the travelers to a truck stop, recognized one of the traveler's names from a drug-intelligence report.[95] He then arranged to meet a second officer at the vehicle, still parked along the highway, to conduct a drug-dog sniff of the outside of the disabled vehicle.[96] The dog alerted to the presence of drugs, and the officers returned to the

87. Meadows v. State, 65 P.3d 33, 39 (Wyo. 2003) (finding that articulable facts can include information that is consistent with innocent behavior: "We must look at the circumstances in their entirety and when we do so, factors that could be indicative of innocent behavior, if considered in isolation, may well support a reasonable suspicion of illegal activity when considered in totality.") (quotations omitted).

88. *Campbell*, 97 P.3d at 784-85.

89. *Id.* at 785.

90. Morgan v. State, 95 P.3d 802 (Wyo. 2004).

91. *Id.* at 809. *See* People v. Caballes, 802 N.E.2d 202, 203 (Ill. 2003) (discussing the Illinois precedent People v. Cox, 782 N.E.2d 275 (2002)).

92. Significantly, the Wyoming Supreme Court has yet to cite *Caballes*. However, the Wyoming court has cited *Morgan* four times, once in reference to the drug-dog issue. *See* Lindsay v. State, 108 P.3d 852, 855 (Wyo. 2005); Finch v. Farmers Co-op Oil Co., 109 P.3d 537, 543 (Wyo. 2005); Rice v. State, 100 P.3d 371, 379 (Wyo. 2004); Cambpell v. State, 97 P.3d 781, 787 (Wyo. 2004).

93. *Morgan*, 95 P.3d at 804.

94. *Id.*

95. *Id.*

96. *Id.*

truck stop to confront the travelers.[97] Even though *Morgan* did not involve a traffic stop, the sniff in *Morgan* can be analogized to a reasonable dog sniff on a vehicle during a traffic stop: The sniff was conducted on the outside of the vehicle, and it in no way inconvenienced the suspects because the vehicle was disabled.[98] Like the United States Supreme Court, the Wyoming Supreme Court held that a properly conducted sniff on the outside of the vehicle did not upset the balance of the Fourth Amendment.[99]

Search and Seizure Under the Wyoming State Constitution

The Wyoming Supreme Court refused to consider *Morgan* under the Wyoming Constitution because the defense's analysis failed to articulate an argument based upon the state constitution's unique text and history.[100] However, the Wyoming Supreme Court expressed willingness to consider dog sniffs under the Wyoming Constitution at a later date.[101] In another recent case, *O'Boyle v. State*, the Wyoming Supreme Court indicated what factors an analysis of drug-dog sniffs under the Wyoming Constitution might include.[102]

In *O'Boyle*, the central issue was whether questions asked during the stop were reasonable.[103] However, the case is suggestive of how the Wyoming Supreme Court might decide a case such as *Caballes* under the Wyoming Constitution for two reasons. First, the arrival of an officer with a drug dog at the scene of the stop in *O'Boyle* creates a common set of facts between *O'Boyle* and *Caballes*, making it possible to draw comparisons.[104] Second, the Wyoming Supreme Court and the United States Supreme Court

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97. *Id.*
98. *Id.*
99. *Id.* at 809.
100. *Id.* at 808. Morgan relied upon decisions from other states when arguing for "a broad interpretation of Wyoming's constitutional protections against unreasonable searches and seizures." *Id.* The Wyoming Supreme Court has said it will not accept that approach, refusing any argument for interpreting the Wyoming Constitution that fails to provide "a precise and analytically sound approach" based upon the state constitution's unique text and history. *Id. See* Vasquez v. State, 990 P.2d 476, 485-88 (Wyo. 1999).
101. *Morgan*, 95 P.3d at 808.
102. O'Boyle v. State, 117 P.3d 401 (Wyo. 2005).
103. *O'Boyle*, 117 P.3d at 419-20 (holding that the detention and search of the defendant were unreasonable under article 1, section 4 of the Wyoming Constitution, and that under the Fourth Amendment the questioning of the defendant inside the cruiser improperly extended the scope of the stop).
104. *Compare O'Boyle*, 117 P.3d at 405 *and* Illinois v. Caballes, 543 U.S. 405, 406-08 (2005).

both put dog sniffs and the questioning of people during investigative detention on comparable theoretical footings.[105]

The circumstances of *O'Boyle* unfolded on February 1, 2003, after trooper Ben Peech stopped Kevin O'Boyle on Interstate 80 near Cheyenne for driving seventy-nine miles per hour in a seventy-five mile per hour zone.[106] The trooper asked the defendant to sit with him in his cruiser while he issued a warning for speeding.[107] The trooper then began questioning the defendant concerning his travels and personal life.[108] The court noted that

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105. *Compare O'Boyle*, 117 P.3d at 415 *and* Muehler v. Mena, 125 S.Ct. 1465, 1471-72 (U.S. 2005). In *O'Boyle*, the Wyoming Supreme Court equated the questioning of suspects during traffic stops with the deployment of drug dogs: "'[R]outine' traffic stops are commonly turned into drug investigations through a variety of techniques, including questioning about drugs, grilling about the minute details of travel plans, seeking consent for a full roadside exploration of the motorist's car, or parading a drug dog around the vehicle." *O'Boyle*, 117 P.3d at 415 (citations and quotations omitted). While in *Muehler*, the United States Supreme Court relied upon *Caballes'* drug-dog analysis in its decision that the questioning of a person during an investigative detention was reasonable. *Muehler*, 125 S.Ct. at 1471-72. *See infra* note 184.

106. *O'Boyle*, 117 P.3d at 404. Justice Voigt in his concurrence cited the fact that the defendant exceeded the speed limit by only four miles per hour as evidence that this stop was a pretext for drug interdiction. *Id.* at 421-22 (Voight, J., concurring). He expressed his belief that drug-interdiction stops should not be treated the same as traffic stops:

> It is intellectually dishonest in writing judicial opinions to pretend that something is what it is not. Any credible law enforcement officer will admit that the interrogation of motorists and their passengers has absolutely nothing whatever to do with the speeding violation or other reason for the "traffic" stop. The purpose behind the interrogation is to uncover discrepancies or other information that may eventually justify a search of the vehicle for controlled substances. These cases are not traffic cases; they are drug interdiction cases. Perhaps if the appellate courts of America would treat them as such, the discussion would be less phony. The real question should be, given the major drug problem facing this country and the huge amount of drugs being transported on our nation's highways, what investigatory steps directed at drug interdiction are constitutionally reasonable in a traffic stop situation.

Id. at 422 (Voight, J., concurring) (citations omitted).

107. *Id.* at 404.

108. *Id.* The court found that the number and type of questions asked by the trooper exceeded what is allowed under the Fourth Amendment and under the state constitution. *Id.* at 410-11. While O'Boyle sat in the cruiser, the trooper asked him more than thirty questions, including what the defendant did for a living, how long

four minutes into the stop, Peech called for a second officer to bring his drug dog, though he had no articulable reason for suspecting the defendant carried contraband.[109] The second trooper arrived within two minutes of the call, positioning his cruiser "behind and to the right of trooper Peech's patrol car."[110]

The Court included the dog's presence and the presence of a second officer in a list of factors that rendered the trooper's treatment of the defendant unreasonable under the Wyoming Constitution.[111] The dog's arrival and the presence of an armed second officer on the scene increased the police pressure upon the defendant, making it more likely that the defendant's permission to search was coerced, rather than freely given.[112]

Stating that it perceived no difference between the "independent protection" provided by the Wyoming Constitution and the Fourth Amendment, the Wyoming Supreme Court also found Officer Peech's actions unreasonable under the United States Constitution.[113] The officer's numerous

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he had been making his living that way, who was filling in for him while he was gone, what college his son attended in Boston, what courses his son was taking, whether his son lived on campus, where he would stay while visiting his son, why he was driving rather than flying, where his daughter was, how many daughters he had, and the price of airfare from San Francisco to Boston. *Id.* at 410-11.

109. *Id.* at 405 n.1. The court noted that the trooper gave inconsistent testimony regarding the timing of the call for backup. *Id.* Originally, the trooper testified that he made the call "sometime during the time I asked for the criminal history and [when] the criminal history returned." *Id.* Upon cross examination and after refreshing his memory by looking at his report, the trooper testified he made his call four minutes into the stop prior to his request for the criminal history. *Id.*

110. *Id.* at 405. While the court never stated why it found this detail significant, parking the second cruiser behind and to the right of Peech's vehicle would place it near the driver-side door of the first cruiser, where it would be very visible to the defendant, possibly contributing to other pressures the court cited as coercive. *See Id.* at 410-11.

111. *O'Boyle*, 117 P.3d at 410-11. Other factors included the extensive questioning, the call for backup, and the presence of an armed second officer. *Id.*

112. *Id.*

113. *Id.* at 414. The Wyoming Supreme Court defined the scope of the traffic stop as follows,

> In making this determination, we are guided by the following principles: 1) a detention must be carefully tailored to the reason for the stop; 2) an officer may request the detainee's driver's license, proof of insurance, and vehicle registration or rental papers, run a computer check and issue a citation or warning; 3) an officer may make reasonable inquiry into travel plans to the extent necessary to put the traffic violation in context; 4) absent reasonable suspicion of other illegal activity or that a detainee is armed, the officer may not ask questions unrelated to the stop; and 5) an offi-

and aggressive questions exceeded the scope of a traffic stop, as defined under the two-part test of *Terry*.[114] Therefore, the Wyoming Supreme Court found the questioning unreasonable under both the Wyoming Constitution and the Fourth Amendment.[115]

The Wyoming Supreme Court went further, expressing issues of "local and state concern" that differentiate Wyoming and create a need for a search-and-seizure standard for traffic stops unique to the state.[116] The Wyoming court observed that the state's central location makes it a conduit for drugs headed to other areas of the country.[117] In response, a state and national law-enforcement effort has subjected travelers on the state's highways to aggressive drug interdiction tactics that impact the innocent and the guilty, and Wyoming citizens have had rights impinged upon for the benefit of people living in other areas.[118] The majority objected to stops initiated as

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> cer may expand the scope of the detention only with valid consent or a reasonable suspicion of other illegal activity or that the detainee is armed.

Id. at 416 (citations omitted).

114. *Id.*

115. *Id.* at 416-17.

116. *Id.* at 411.

117. *Id.* The court stated,

> The State of Wyoming is bisected north and south and east and west by two major interstate highways. Interstate 80 provides drug traffickers with easy west to east access across the United States and is a well-known route for transporting drugs. The annual average daily traffic on I-80 near Cheyenne, where Mr. O'Boyle was stopped, is over 20,000 vehicles. Wyoming citizens operate a significant number of these vehicles. Traffic stops along I-80 are a routine part of the national drug interdiction program. Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year.

Id. (quotations and citations omitted).

118. *Id.* The court stated,

> Our location along a nationally recognized drug trafficking corridor likely results in a disproportionately large percentage of Wyoming's comparatively small population being subjected to what have become routine requests to relinquish their privacy rights by detention, invasive questioning and searches—all without reasonable suspicion of criminal activity other than the offense giving rise to the stop.

pretexts to searches for drugs and their "resulting intrusion upon the privacy rights of Wyoming citizens," and it criticized troopers who routinely ask travelers aggressive questions about travel plans without articulable reasons to suspect the travelers carry contraband.[119]

THE PRINCIPAL CASE

The Majority

The majority in *Illinois v. Caballes* described the issue presented as "narrow": "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."[120] The majority first stated its assumption that the officer at the time of the stop had no information regarding the defendant other than the defendant's speeding; consequently, the Court's opinion avoided facts "that might have triggered a modicum of suspicion" for the officer.[121] The Court recognized the lower courts' approval of other aspects of the traffic stop, including the validity of the stop at its initiation, the length of the stop, and the questioning of the defendant.[122]

Next, the majority asserted that an official action that does nothing to compromise a "legitimate interest in privacy" is not a "search subject to the Fourth Amendment."[123] The possession of contraband cannot be legitimate; therefore, an investigatory procedure that reveals only possession of contraband does not raise Fourth Amendment concerns.[124] The majority recognized its previous holding in *United States v. Place*, which established that information uncovered by a "well-trained narcotics-detection dog" discloses only the presence of illegal drugs—a contraband.[125] Therefore, properly conducted drug-dog sniffs are classified not as "searches," but are *sui generis*, or in a class of their own.[126] The majority continued by challenging the argument that erroneous dog sniffs can cause legitimate privacy interests to be revealed:

Id.

119. *Id.* ("We previously have expressed disapproval of the use of traffic violations as a pretext to conduct narcotics investigations.") (citing Damato v. State, 64 P.3d 700, 706 (Wyo. 2003)).

120. Illinois v. Caballes, 543 U.S. 405, 407 (2005).

121. *Id.*

122. *Id.* at 408.

123. *Id.* at 408-09 (quotations omitted).

124. *Id.* (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)). *See supra* notes 67-72 and related text.

125. *Caballes*, 543 U.S. at 409 (citing United States v. Place, 462 U.S. 696, 707 (1983)).

126. *Caballes*, 543 U.S. at 409 (quoting United States v. Place, 462 U.S. 696, 707 (1983)).

> [T]he record contains no evidence or findings that support this argument . . . . [R]espondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.[127]

The Court held the sniff in *Caballes* permissible because it was conducted on the outside of the vehicle during a lawful traffic stop, and it revealed no legitimate privacy interests; therefore, it was not a search under the Fourth Amendment.[128]

Finally, the Court found its holding in *Caballes* consistent with its ruling in *Kyllo v. United States*.[129] In *Kyllo*, the Court suppressed evidence gathered through thermal imaging of the outside of a building because the imaging could potentially reveal protected information.[130] The majority differentiated *Kyllo* from *Caballes* because drug-dog sniffs of the outside of vehicles can only discover the presence of illegal substances that the individual has no right to possess.[131]

Justice Souter's Dissent

Calling the infallibility of drug dogs a "creature of legal fiction," Justice Souter asserted that since the United State Supreme Court's ruling in *Place*, considerable information has emerged that puts the reliability of drug dogs into question.[132] Because drug dogs are less reliable than the majority stated, they can inadvertently reveal information with legitimate privacy interests by giving false positives, leading to searches where officers have no probable cause.[133] Therefore, Justice Souter said dog sniffs should follow *Terry*, and officers should have an articulable suspicion before using a dog to sniff the outside of a vehicle.[134] He concurred with Justice Ginsburg and would have upheld the Supreme Court of Illinois' decision.[135]

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127. *Id.*
128. *Id.*
129. *Id.* at 409-10.
130. Kyllo v. United States, 533 U.S. 27 (2001). *See supra* notes 73-77 and accompanying text.
131. *Caballes*, 543 U.S. at 410.
132. *Id.* at 410-11 (Souter, J., dissenting) (referring to United States v. Place, 462 U.S. 696, 707 (1983) (holding that drug dogs do not implicate the Fourth Amendment when properly trained and handled)).
133. *Caballes*, 543 U.S. at 410 (Souter, J., dissenting).
134. *Id.* (Souter, J., dissenting). The two-part test of *Terry* requires that an officer's actions during investigative detention be justified at the inception with a reasonable suspicion of wrongdoing, and that any following actions be "reasonably

Justice Souter cited a string of cases where drug dogs falsely indicated the presence of drugs as well as expert opinions that evaluated the performance of drug dogs as less than perfect, summing up with the assertion, "[i]n practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."[136] Justice Souter concluded that dog sniffs are as intrusive as other forms of information-gathering the Court has deemed "searches," such as thermal imaging, stating the holding in *Place* should be re-examined, as well as the drug-dog's classification as *sui generis*.[137]

Justice Souter then distinguished *Caballes* from *Jacobsen*, stating dog sniffs reveal more about a person's private affairs than a chemical test used to discover the legality of a substance.[138] A false dog alert upon a closed container can lead to a search without probable cause and exposure of the container's contents.[139] In the case of a chemical test to determine if a substance is illegal, however, "either the powder was cocaine, a fact the owner had no legitimate interest in concealing, or it was not cocaine, in which case the test revealed nothing that was not already legitimately obvious to the police."[140] Therefore, Justice Souter concluded that the Court's holding in *Jacobsen* should not be applied to dog sniffs.[141]

Justice Souter did not go so far as to agree with Justice Ginsberg and say that *Caballes* opens the door to unfettered dog searches outside of traffic stops.[142] While observing that the majority reserved the option of weighing the legitimacy of sniffs employed outside of traffic stops, he added that the holding provides "no apparent stopping point."[143] To provide a "workable framework" for these outside cases, he stated that sniffs should be treated

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related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

135. *Caballes*, 543 U.S. at 411 n.1 (Souter, J., dissenting). The Supreme Court of Illinois would have required Officers to follow the dictates of *Terry* when conducting drug-dog sniffs. People v. Caballes, 803 N.E.2d 202, 204-05 (Ill. 2003). Therefore, an officer would need a reasonable and articulable suspicion before employing a drug dog. *Id.*

136. *Caballes*, 543 U.S. at 411-12 (Souter, J., dissenting).

137. *Id.* at 415 n.5 (Souter, J., dissenting) (comparing *Caballes*, 543 U.S. at 406-07 and United States v. Place, 462 U.S. 696, 697-99 (1983)). Justice Souter noted that *Place* is distinguished from *Caballes* because in *Place* the officers had "independent grounds" to suspect the presence of contraband prior to the dog sniff. *Caballes*, 543 U.S. at 415 n.5 (Souter, J., dissenting).

138. *Caballes*, 543 U.S. at 415-16 (Souter, J., dissenting)(referring to United States v. Jacobsen, 466 U.S. 109 (1984)).

139. *Caballes*, 543 U.S. at 416 (Souter, J., dissenting).

140. *Id.* at 416 (Souter, J., dissenting).

141. *Id.* (Souter, J., dissenting).

142. *Id.* (Souter, J., dissenting).

143. *Id.* at 417 (Souter, J., dissenting).

like the "familiar search" that they are, and receive scrutiny under the Fourth Amendment.[144]

Justice Ginsburg's Dissent, with Justice Souter Joining

Justice Ginsburg in her dissent explored the notion that drug dogs are, by their nature, intimidating, and therefore the act of using a drug dog exceeds the scope of a traffic stop by increasing its intensity.[145] Therefore, a dog sniff is a search under the Fourth Amendment, and the majority's opinion undermines the second prong of the two-part test in *Terry*, which requires reasonable suspicion to authorize an expansion in scope from the detention's original justification.[146] Justice Ginsburg stated that dog sniffs may be "well calculated to apprehend the guilty," but that is no reason to relax Fourth Amendment protections.[147] Use of drug dogs at traffic stops subjects the innocent as well as the guilty to the embarrassment of having a narcotics dog search their vehicle on a crowded highway.[148] Justice Ginsburg asserted that lowering the standard turns every traffic stop into a drug investigation, "to the distress and embarrassment of the law abiding population."[149]

According to Justice Ginsburg, the lower standard opens the gateway for unsupervised use of dog sniffs in circumstances other than traffic stops and undermines Fourth Amendment protections already in place.[150] Justice Ginsburg added that nothing in the majority opinion prevents using drug dogs to sniff the outside of vehicles in parking lots or prevents police from running dogs around cars during long stops at traffic lights.[151] Additionally, bus passengers, who under the current rule can say "No" to a request from a police officer to search a bag on an overhead rack, cannot refuse a drug-dog sniff under *Caballes*.[152] Therefore, the opinion "undermines the Court's situation-sensitive balancing of Fourth Amendment interests."[153]

ANALYSIS

In *Caballes*, the court faced the same challenge as in *Terry*: How to allow the pursuit of legitimate law-enforcement interests without trampling

144. *Id.* (Souter, J., dissenting).
145. *Id.* at 421 (Ginsburg, J., dissenting) (quoting United States v. Williams, 356 F.3d 1286, 1276 (10th Cir. 2004)) ("[D]rug dogs are not lap dogs.").
146. *Id.* (Ginsburg, J., dissenting).
147. *Id.* at 422 (Ginsburg, J., dissenting).
148. *Id.* (Ginsburg, J., dissenting).
149. *Id.* (Ginsburg, J., dissenting).
150. *Id.* at 423 (Ginsburg, J., dissenting).
151. *Id.* at 422 (Ginsburg, J., dissenting).
152. *Id.* at 423 (Ginsburg, J., dissenting).
153. *Id.* (Ginsburg, J., dissenting).

citizens' Fourth Amendment rights.[154] The Court met the challenge of *Terry* by creating the two-part test now used to govern all investigative detentions, balancing the legitimate need to investigate crime against the resulting intrusion.[155] *Caballes* provides a solution different in kind, but it too extends a means to investigate designed to avoid trampling the Fourth Amendment.[156] Because of the drug dog's ability to find illegal drugs without revealing protected aspects of a person's life, the sniff becomes a tool that allows law enforcement to check for contraband while honoring the rights of the innocent.[157] A well-trained and properly employed dog produces reasonable results, causing no inconvenience and revealing nothing that the traveler has a legitimate reason to keep secret.[158] Yet issues raised in the two dissents demonstrate the case's vulnerabilities and indicate that courts must apply the holding rigorously; otherwise, *Caballes*' progeny could weaken the Fourth Amendment.

Implicit in the *Caballes* holding is the notion that evidence gathered through a dog sniff becomes tainted if the entire traffic stop fails to remain within its proper scope.[159] Courts have clearly defined what this scope encompasses.[160] Before the officer can extend the duration of the stop, or oth-

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154. Terry v. Ohio, 392 U.S. 1, 27 (1968). The primary interest in *Terry* was officer safety, providing a way for the officer to search for weapons even when the officer lacks probable cause. *Id.* However, the reasoning of the case recognized other interests, such as the investigation of suspected crimes or suspicious activity: "One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22.

155. *Id.* at 19-20.

156. Illinois v. Caballes, 543 U.S. 405, 408 (2005) ("In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy.").

157. *Id.*

158. *Id.* at 409.

159. *Id.* at 407-08. The court stated,

> In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure. We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.

Id. (citations omitted).

160. Lindsay v. State, 108 P.3d 852, 856-57 (Wyo. 2005).

erwise exceed the traffic stop's scope, the officer must have reasonable and articulable suspicion that a crime is afoot, even when the extension occurs in support of a dog sniff.[161] Therefore, the notion that *Caballes* somehow releases dog sniffs from rigorous Fourth Amendment analysis is untrue.[162] The dog sniff only benefits from its *sui generis* classification if all aspects surrounding the sniff properly balance the official intrusion against the subject's rights.[163]

However, not all drug dogs are created equal, and even reliable dogs are not reliable 100% of the time.[164] A Wyoming trooper's testimony during a suppression hearing in Carbon County Circuit Court illustrates that reliability depends, to a degree, on the handler's ability to provide suitable experiences designed to keep the dog's skills sharp.[165] Logically, the dog's reliability depends not only upon its natural ability and training, but upon the skill of its handler.[166] Therefore, the drug dog's reliability cannot be guaran-

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161. *Id.*

162. *Caballes*, 543 U.S. at 407-08.

163. *Id.*

164. *Id.* at 411-12 (Souter, J., dissenting).

165. State v. Kelsey, Docket No. CT-2005-0008221, Carbon County Circuit Court (D. Wyo. July 28, 2005). A trooper testified that he must "proof" his certified drug dog, meaning he must maintain the dog through regular training sessions. *Id.* This involved exposing absorbent material to a contraband, hiding the material and releasing the dog to locate it. *Id.* Dog handlers from various agencies frequently came together to cooperate in these exercises. *Id.* "Handler issues" occasionally arose, and the dogs needed to be "proofed" away from these. *Id.* For example, this handler discovered his dog was alerting to cotton because that was a standard medium used to carry the contraband. *Id.* To address this, the dog handlers switched to a variety of absorbent materials, so the only thing in common from one exercise to the next was the contraband itself. *Id.*

To ensure reliability, the dog received annual certification. *Id.* This particular drug dog had located methamphetamine and "different strains of marijuana," and the trooper testified that he "deployed" the dog well over 1000 times. *Id.* The trooper sought explanations for erroneous alerts, and he expressed confidence that when the dog alerted positively, drugs were involved in some fashion. *Id.* For example, the dog once alerted to the liner in a pickup bed, but no drugs were found. *Id.* The trooper later learned that the truck hauled marijuana on a previous trip. *Id.*

166. State v. Nguyen, 811 N.E.2d 1180, 1185-93 (Ohio Ct. App. 2004) (recognizing training as one of numerous factors affecting a drug dog's performance). *Accord* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY.L.J. 405, p. 423 (1996-1997). The author emphasizes that the handler's training is as important as the dog's:

> Performing a canine narcotics search requires much more than a person to keep the dog on the leash while it sniffs for drugs. Rather, dog and trainer work closely together as a team. . . . The dog is the sensor, and the handler is the trainer and interpreter. The handler's performance in both roles is inseparably intertwined

teed.[167] The United States Supreme Court should require that a sufficient showing be made concerning the drug dog's reliability in detecting a particular substance before a trial court grants there was a probable cause for a search.[168]

Nothing in *Caballes* requires judges to examine the reliability of drug dogs. However, the case specifies that the dogs should be "well-trained." Therefore, logically, an alert by a poorly trained dog cannot create probable cause to search. [169] The need to establish reliability has been recognized in some courts, which have specified that a judge at a suppression hearing must find the drug dog reliable before granting that the dog's alert created probable cause.[170] Requiring this would shore up one weakness of

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> with the dog's overall reliability rate. And since the net result is the product of the interaction between two living beings, both roles of the handler are highly subjective.

Id. at 422 (citations and ellipsis omitted).

167. *See id.*

168. *See* Bird, *supra* note 166, at 407. Bird notes that judges and commentators have, largely, neglected the accuracy of drug dogs:

> Few address in any detail the training and reliability required to initially serve as a drug detection dog. Most evaluations are cursory at best. When courts do look more closely, they overemphasize some factors and neglect others. As a result, courts approve inferior dogs, and their erroneous alerts may result in unnecessary invasions of privacy.

Id. (footnotes omitted). *See also* 1 WYANE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 2.2(g) (4th ed. 2004) *and* 4 *id.* § 9.3(f) n.6.

169. Illinois v. Caballes, 543 U.S. 405, 409 (2005). *See* 1 LAFAVE, *supra* note 167, § 2.2(g) (4th ed. 2004) (stating that dog sniffs are not infallible, and false alerts can lead to searches without probable cause, violating citizens' rights). In *Morgan*, the Wyoming Supreme Court refused to consider questions about the reliability of the drug dog because the defense failed to properly preserve the issue at trial. Morgan v. State, 95 P.3d 802, 808-09 (Wyo. 2004).

170. State v. England, 19 S.W.3d 762, 768 (Tenn. 2000). The Supreme Court of Tennessee affirmed a decision from the Tennessee Court of Criminal Appeals that a drug dog's alert on a pickup provided probable cause to search for drugs while adopting a rule that required the trial court to establish the dog's reliability: "We believe . . . that the finding of probable cause should turn on the reliability of the canine and that the trial court should ensure that the canine is reliable by an appropriate finding of fact." *Id.* The trial court should consider the canine's track record, including "false negatives and false positives" and the officer's training and experience. *Id.*

Caballes— that the dog's reliability is a matter of fact lying outside of the court's control.[171]

The notion that *Caballes* might lead to unfettered dog sniffs in a variety of circumstances becomes less worrisome upon a close reading of the holding, which limits itself to dog sniffs conducted at "lawful" traffic stops.[172] Recognizing the holding's limitations, Justice Souter varied from Justice Ginsburg's concern that *Caballes* signaled "recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car . . . or on the person of any pedestrian minding his own business on the sidewalk."[173] Any application outside of a traffic stop would require a reanalysis.[174] That analysis should not only consider the dog's *sui generis* classification, but the entirety of the circumstances related to the search surrounding the dog sniff as specified in *Terry*—whether reasonable and articulable suspicion justifies intrusions on protected interests, including the individual's person, liberty, or private information.[175] However, the majority's "stated reasoning provides no apparent stopping point short of . . . excesses."[176] The

171. Most jurisdictions permit the defense to attack the reliability of the drug dog. State v. Nguyen, 811 N.E.2d 1180, 1185 (Ohio Ct. App. 2004). In some jurisdictions, the defense is burdened with a presumption that the dog sniff is accurate once the prosecution establishes the dog has been trained. State v. Knight, 679 N.E.2d 758, 762 (Ohio 1997). Factors courts have found relevant in determining the dog's accuracy include the dog's health, training and certification. *Nguyen*, 811 N.E.2d at 1186. A minority of courts have also allowed "real world reports" providing information concerning the dog's performance in the field. *Id.* at 489. *See Nguyen*, 811 N.E.2d at 1185-93, for a comprehensive survey of how courts handle evidence related to drug-dog reliability.

172. Illinois v. Caballes, 543 U.S. 405, 409 (2005). A predecessor of *Caballes* provided an illustration of the notion that dog sniffs must be conducted in reasonable circumstances. City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (holding that dog sniffs on the outside of vehicles at a random drug checkpoint did nothing to change the character of the stops and were not searches, but the checkpoint itself was unreasonable).

173. *Id.* at 417 (Souter, J., dissenting).

174. *Id.* (Souter, J., dissenting).

175. *See id.* (Souter, J., dissenting).

176. *Id.* (Souter, J., dissenting). *See* Bird, *supra* note 166, at 432. Not only can the surrounding circumstances affect the dog sniff's legality, but the dog's accuracy. *Id.* Dogs do better when employed in circumstances where the handler has reason to suspect the presence of drugs:

> The environment in which police conduct a sniff can significantly affect its success. Random sniffs of large numbers of people will inevitably result in many false positive alerts. Sniffs conducted at random but in a highly suspicious locale fare better. However, only the most highly-trained dog and handler teams can succeed in such an environment. The most successful sniffs are those conducted in conjunction with the expertise of law enforcement. Ac-

Court should expressly state the limits of *Caballes*; otherwise, a danger exists that lower courts might violate citizens' rights by expanding the *Caballes* holding in ways inconsistent with the Fourth Amendment.[177]

In summary, the holding of *Caballes* succeeds in balancing the interests of law enforcement against the rights of travelers, but there are issues that could cause *Caballes* to be applied in ways that damage citizens' rights.[178] Also, the United States Supreme Court should state expressly that a drug dog must be well trained to create a probable cause to search, and it should provide guidance to lower courts regarding what evidence is sufficient to establish a drug dog's reliability.[179]

Whether Wyoming authorities continue to enjoy the balance created by *Caballes* remains an open question. In *Morgan*, the Wyoming Supreme Court expressed a willingness to create a drug-dog rule under the Wyoming Constitution that could provide greater protections than the Fourth Amendment.[180] The Wyoming Supreme Court's comments regarding the need to limit law-enforcement excesses at traffic stops, and the findings in *O'Boyle* related to drug dogs, suggest that any drug-dog holding under the Wyoming Constitution will be less deferential to law enforcement than *Caballes*.[181] For example, the *O'Boyle* finding that the mere presence of the dog with its handler added to the stop's coerciveness is inconsistent with reasoning implicit in *Caballes* that a drug dog is weightless under the Fourth Amendment as long as the dog is well-trained and reliable.[182] If the presence of a second

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> cordingly, courts can most readily accept dog sniffs that are used to confirm police suspicions, and most readily reject sniffs that survey in a random manner.

Id.

177. *Caballes*, 543 U.S. at 417 (Souter, J., dissenting). False positives by drug canines can lead to searches without probable cause, resulting in violations of Fourth Amendment rights. 1 LAFAVE, *supra* note 167, § 2.2(g). The classic example is Doe v. Renfrow. *Id.* (citing Doe v. Renfrow, 475 Fed. Supp. 1012 (N.D. Ind. 1979)). In *Doe*, a drug dog alerted to a thirteen-year-old girl even after she emptied all of her pockets. *Doe*, 475 Fed. Supp. at 1017. She was subjected to a nude search by two women, but no drugs were found. *Id.* It was later discovered that she played with her own dog that morning, and her dog was in heat. *Id.* The dogs used in this search of a school alerted to some fifty students, but only seventeen were found with drugs. *Id.*

178. *See supra* notes 164-177.

179. *See* Bird, *supra* note 166, at 405-33 (asserting that courts should pay more attention to dog training, handler training, and histories of false and positive drug-dog alerts).

180. Morgan v. State, 95 P.3d 802, 808 (Wyo. 2004).

181. *See supra* notes 102-119 and related text.

182. *Compare* Illinois v. Caballes, 543 U.S. 405, 409 (2005) (holding that properly conducted drug-dog sniffs raise no Fourth Amendment implications) *and*

officer with a drug dog—or even a drug dog in the company of the principal officer—has a coercive effect under the Wyoming Constitution, the dog's mere presence reduces the chance an officer can obtain valid consent to search.[183] Even more significant, the Wyoming Supreme Court concluded that a police action having no Fourth Amendment significance (the asking of questions at traffic stops) is unreasonable under the Wyoming Constitution, and the court could reach the same conclusion for dog sniffs.[184]

The federal holding of *O'Boyle* may indicate how the Wyoming Supreme Court might decide the drug-dog issue under the Wyoming Constitution.[185] The Wyoming Supreme Court decides state constitutional issues solely on arguments growing from the state constitution's unique textual qualities and history.[186] However, the federal holding is relevant because in *O'Boyle* the court drew a connection between its historical position concerning Fourth Amendment issues related to traffic stops and any rule it might

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O'Boyle v. State, 117 P.3d 401,405 (Wyo. 2005) (holding that a drug dog at a traffic stop with an armed second officer increases the stop's intensity). Justice Ginsburg in her dissent objected to this notion that drug dogs are harmless under the Fourth Amendment. *Caballes*, 543 U.S. at 420-21 (Ginsberg, J., dissenting).

183. The intimidating effect of a police presence can also be coercive under the Fourth Amendment, but the Court has ruled an officer in uniform and carrying a gun is not so coercive as to render a consent to search invalid. United States v. Werking, 915 F.2d 1404, 1408, 1409 (10th Cir. 1990) (indicating a seizure that includes the "threatening presence of several officers, the display of a weapon by an officer, some physical touching" of the citizen, or use of language or tone indicating that compliance may be compelled is coercive; but a show of authority that includes only the presence of an armed police officer is not coercive).

184. *See supra* note 105. In its *O'Boyle* decision, the Wyoming Supreme Court relied extensively upon the reasoning of Wayne R. LaFave, a noted commentator on the Fourth Amendment and criminal procedure. *O'Boyle*, 117 P.3d at 414-16 (citing 4 LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (4th ed. 2004)). LaFave reasoned that while dog sniffs and the questioning of travelers have no Fourth Amendment implications, they are inconsistent with the two-prong test of *Terry* because they lack relevance to a traffic violation—the express purpose for the stop. 4 LAFAVE, *supra*, § 9.3(b). Therefore, LaFave would require that both dog sniffs and the questioning of travelers at traffic stops be justified with reasonable suspicion. *Id.* In a recent case, the United States Supreme Court drew a similar connection between questioning and dog sniffs, but reached a different conclusion. Muehler v. Mena, 125 S.Ct. 1465 (2005). The Court relied upon its drug-dog holding in *Caballes* to delineate what questioning is reasonable during an investigative detention. *Id.* at 1471 (reasoning that like dog sniffs, questions about immigration status have no Fourth Amendment implications and are legal during an investigative detention so long as they do nothing to extend the seizure).

185. O'Boyle v. State, 117 P.3d 401, 415 (2005).

186. Lindsay v. State, 108 P.3d 852, 856 (2005) (holding that a party who neglects to present to the district court a "cogent independent state constitutional based argument" fails to preserve the issue for appellate review).

entertain under the Wyoming Constitution.[187] If the Wyoming Supreme Court stays its present course, any holding under the Wyoming Constitution related to traffic stops will be consistent with the court's historical Fourth Amendment position.[188]

In *O'Boyle*, the Wyoming Supreme Court criticized other jurisdictions for forsaking the strict application of the *Terry* two-part test to traffic stops, stating,

> Terry has been whittled away to the point that in some jurisdictions "routine" traffic stops are commonly turned into drug investigations through a variety of techniques, including "questioning about drugs, grilling about the minute details of travel plans, seeking consent for a full roadside exploration of the motorist's car, or parading a drug dog around the vehicle."[189]

Relying heavily upon the reasoning of eminent commentator Wayne R. LaFave, the Wyoming Supreme Court noted that questioning about travel plans or possible drug possession has nothing to do with a traffic violation, the stop's original justification.[190] Exceeding the stop's initial purpose is inconsistent with the *Terry* two-part test, which requires that all actions during an

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187. *O'Boyle*, 117 P.3d at 415. The court stated,

> These are the fundamental principles this Court has adhered to in the past in determining whether a traffic stop was constitutional under the Fourth Amendment and they are not significantly different than those applicable separately under article 1, § 4 of the Wyoming Constitution. We see no reason to depart from these standards today. In our view, continued application of these standards is consistent with the essential policy of balancing the individual right to privacy and the government's legitimate interests.

Id.

188. *Id.*

189. *Id.* (quoting 4 WYANE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.3(b) (4th ed. 2004)). For this reason, LaFave has expressed puzzlement at the holding of *Caballes*. *Id.* (Supp. 2006) ("Just why the Supreme Court would engage in such adnumbrated and oversimplified analysis is hard to comprehend . . . ."). He stated that *Caballes* is inconsistent with the high court's previous precedent, which required, in keeping with *Terry*, that dog sniffs and other non-Fourth Amendment actions by law enforcement remain within the scope of a traffic stop. *Id.*

190. *Id.* at 415-16. The Wyoming Supreme Court agreed with LaFave's characterization of the aggressive questioning, such as those posed in *O'Boyle*, as an "interrogation." *Id.*

investigative detention remain within the scope of the original purpose.[191] Therefore, the "grilling" of travelers about their itinerary and questions about drug crimes should not be allowed unless the officer has a reasonable and articulable suspicion of wrongdoing.[192] Significantly, LaFave reasons in a similar vein that dog sniffs are unrelated to traffic violations; therefore, a dog sniff conducted without a reasonable and articulable suspicion would be inconsistent with *Terry*'s two-part test and should not be allowed.[193]

To sum up, the Wyoming Supreme Court would probably not grant a holding similar to *Caballes* under the Wyoming Constitution for the following reasons. The Wyoming Supreme Court's treatment of the dog sniff in *O'Boyle* was inconsistent with *Caballes* in that the arrival of the dog increased the intensity of the stop, while under *Caballes* the dog's presence is a Fourth Amendment non-event.[194] A decision resembling *Caballes* would also be inconsistent with *O'Boyle*, and even though *O'Boyle* decided a question different from dog sniffs, in general, courts have placed dog sniffs and the questioning of travelers on a similar plane with regard to their intrusiveness and legal significance.[195] The Wyoming Supreme Court has indicated that its holding under the Wyoming Constitution would be consistent with its historic stance toward traffic stops, which the court has governed using a strict application of the two-prong test of *Terry*.[196] This approach requires that all actions during an investigative detention remain within the scope of the detention's initial justification, and under reasoning consistent with other holdings adopted by the court, dog sniffs lie outside the scope of a traffic stop.[197]

As the Wyoming Supreme Court attempts to protect the state's citizens, it ignores a legitimate need. While making clear its belief that the rights of Wyoming citizens are being trampled for the benefit of other parts

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191. *Id.* ("The objective [of the questioning] is not to gain some insight into the traffic infraction providing the legal basis for the stop, but to uncover inconsistent, evasive or false assertions that can contribute to reasonable suspicion or probable cause regarding drugs.").

192. *Id.*

193. 4 LAFAVE, *supra* note 189, §9.3(f).

194. *See supra* notes 182-184 and related text.

195. *See supra* note 184.

196. *See supra* notes 185-189 and related text. As indicated earlier, prior to the United States Supreme Court's adoption of *Caballes*, the Wyoming Supreme Court reached a holding in *Morgan v. State* that was nearly identical. Morgan v. State, 95 P.3d 802 (2004). However, the Wyoming Supreme Court indicated a willingness to break from this holding with the following proviso: "[T]his Court is certainly open to an argument that Article 1, § 4, of the Wyoming Constitution provides greater protection against unreasonable searches than the Fourth Amendment. . . ." *Id.* at 808.

197. *See supra* notes 189-191 and related text.

of the country by aggressive drug-interdiction tactics, the court fails to recognize that not all the drugs on Wyoming's highways are headed elsewhere.[198] Some drugs are consumed in Wyoming communities, as evidenced by the increasing number of drug cases in Wyoming courts.[199] Therefore, drug interdiction is not just a national concern, and the Wyoming Supreme Court should express how this legitimate local concern in drug interdiction enters into its calculus.[200] The court should present tools and provide guidance to law enforcement—similar to that of *Caballes*—aimed at balancing the need for drug interdiction against citizen's rights.[201]

CONCLUSION

Although the holding in *Caballes*, at first blush, appears to open the floodgate for unrestrained dog sniffs, ample Fourth Amendment protections remain in place to ensure that their use does not erode citizens' rights. However, concerns about the accuracy of the dogs, and the notion that *Caballes* might lead to unfettered use of dog sniffs, are both well placed. Therefore, courts should provide scrutiny to ensure proper use and training. When law

198. U.S. Dep't of Justice, Nat'l Drug Intelligence Cntr., *Wyoming Drug Threat Assessment*, Prod. No. 2002-SO389WY-001 December 2001, at 8, *available at* http://www.usdoj.gov/ndic/pubs07/712/712p.pdf (last visited April 16, 2006). The Department of Justice describes Wyoming as "both a destination and a transit area" for methamphetamine. *Id.* at 15 The primary method of transportation through Wyoming is by private vehicle using interstate highway. *Id.*

199. *Id.* at 9. Between 1999 and 2000, twenty-three sheriff's departments and forty-three police departments in Wyoming reported the following increases in drug arrests: arrests of female juveniles increased from 106 to 122; arrests of adult females from 254 to 301; arrests of adult males from 1381 to 1479; but arrests of juvenile males decreased from 448 to 362. Categories increased in related areas; for example, arrests of adult males for manufacturing and sale of illicit drugs increased from 173 to 195. *Id.*

200. Terry v. Ohio, 392 U.S. 1, 22-23 (1968) (recognizing that an officer who investigates a suspected wrongdoer in a reasonable manner is pursuing a legitimate governmental interest); Oliver v. United States, 466 U.S. 170, 181 (1983) (perceiving the necessity of providing "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment"); Kyllo v. United States, 533 U.S. 27, 38-9 (2001) (noting that holdings should be useful for law enforcement).

201. *Terry*, 392 U.S. at 22-23. Justice Voigt, in his concurrence to *O'Boyle*, chided courts in general for being intellectually dishonest, stating that in many cases traffic stops are really attempts to interdict drugs, and if treated as such, the discussion would be less "phony": "The real question should be, given the major drug problem facing this country and the huge amount of drugs being transported on our nation's highways, what investigatory steps directed at drug interdiction are constitutionally reasonable in a traffic stop situation." O'Boyle v. State, 117 P.3d 401, 422 (2005) (Voigt, J., concurring). However, Justice Voigt gave no indication as to what those "reasonable" drug interdiction steps might include. *Id.* (Voigt, J., concurring).

enforcement employs dogs in unique situations, a thorough analysis is needed to ensure that the sniffs do not encroach on some Fourth Amendment interest.

The Wyoming Supreme Court's current drug-dog rule is identical to that of *Caballes*. However, the Wyoming court indicates a willingness to establish an independent rule under the state constitution which is more restrictive than the Fourth Amendment, asserting that drug interdiction in Wyoming impacts the rights of local citizens for the benefit of other areas of the country. This reasoning fails to recognize that drugs are a problem for Wyoming citizens. The Wyoming court should provide guidance similar to that offered by the United States Supreme Court in *Caballes*, presenting legal tools that permit the pursuit of drug interdiction without trampling citizens' rights.

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