**MEMORANDUM**

To: Senior Partner

From: Kelly Ganci

Date: March 16, 2015

Re: Dog Sniff A Potential Fourth Amendment Search, Evidence Permissible in Trial

**Question Presented**

Did the dog sniff constitute an unreasonable search under the Fourth Amendment, thus excluding the narcotics found in Penny’s storage unit from her trial?

**Short Answer**

No, the drug dog sniff was not an unreasonable search under the Fourth Amendment, weighing heavily on the assumption that her storage unit was outside the curtilage of her home. It appears that there was not a physical intrusion nor did the sniff violate Penny’s reasonable expectation of privacy or fail to establish probable cause, therefore the evidence found against her would be permissible in trial.

**Facts**

Officer Wallander and his drug and diabetes detection dog Violet were taking a leisurely walk around his neighborhood. As he approached Penny’s residence, he noticed a Mob-U mobile storage unit in her driveway, and continued to walk on. Penny, at that moment, came around from the side of the storage unit and when she did so, Violet lurched forward and ran up to Penny. Penny was standing within a half a foot of the storage container’s door, which was padlocked and closed. Violet then gave the alert consistent with both low blood sugar and drugs, and because Wallander interpreted this alert as a detection of drugs, he used the sniff to obtain a warrant and arrest Penny for possession of a controlled substance. Penny is seeking legal advice to exclude the evidence from her trial on grounds that the officer performed an illegal search under the Fourth Amendment.

**Analysis**

**A Search Violates The Fourth Amendment If There Is A Physical Intrusion, If There Is No Reasonable Expectation Of Privacy, And If There Is No Justifiable Probable Cause For Said Search To Occur.**

A legal search under the Fourth Amendment requires that the object in question be within the curtilage of the home, thus being under the scope of the warrant. U.S. Const. amend. IV. In addition, there must be no physical intrusion on the Penny’s residence. It also requires that the dog sniff not be a violation of Penny’s reasonable expectation of privacy, and that the sniff was enough to establish probable cause against Penny. *Id*.

At this time, it has been found that the object in question resides outside of the curtilage, which makes deciding whether the search was a physical intrusion and whether it was a violation of Penny’s reasonable expectation of privacy unnecessary. *United States v. Gilman*, No. 06-00198, 2007 U.S. Dist. LEXIS 32524 (Dist. Ct. Haw. May 2, 2007). However, in the event that the court finds Penny’s storage unit is in the curtilage, the memorandum will address them, as well as the probable cause element to determine that the search was legal under the Fourth Amendment, thus allowing the evidence against her to be used in trial.

1. ***Was Violet’s Sniff A Physical Intrusion On Penny’s Property?***

To determine whether the sniff was a physical intrusion, the element of curtilage must first be established. A dwelling falling within the curtilage of the home protects that property from a warrantless search, with any evidence coming from a search being suppressed. *Gilman*, 2007 U.S. Dist. LEXIS at \*9. Curtilage expands the constitutional boundaries beyond the four walls of the house, and it extends to any immediate area surrounding the home. *United States v. Cannon*, 264 F. 3d 875, 880 (9th. Cir. 2001). In *United States v. Dunn*, the Supreme court decided that “determining whether something falls within the curtilage of the home can be resolved using four factors: the proximity of the claimed area to the home, whether the area is in an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation”. 480 U.S. 294, 301 (1987). They will be applied in Penny’s case to determine whether her mobile storage unit resided in the curtilage of her home, which is essential in deciding whether there was a physical intrusion.

The first *Dunn* factor acknowledges that there isn’t any fixed distance in which curtilage ends, but rather depends on how far away the object in question is from the home and whether it is in an urban or rural setting. *United States v. Johnson*, 256 F.3d 895, 902. In *Cannon*, the court found that the urban dwelling in question was within the curtilage, in part because it was only a few feet from the home. 264 F. 3d 875 at 880. When this proximity factor is applied to our case, it appears that Penny’s storage unit does fulfill the requirements of being within the curtilage, as her storage unit was just beyond her house on her driveway. The driveway on her residence is only a few feet from her home and is also short enough to be considered in close proximity to the home. However, these factors, “cannot be applied mechanically and each case stands on its own set of facts”, and the other three factors serve as contrast to this one and are significantly more persuasive in finding that the storage unit resides outside the curtilage *Gilman,* 2007, U.S. Dist. LEXIS 32524 at \*11.

The second *Dunn* factor analyzes whether the area searched was within an enclosure, the bounds of which being clearly marked. *Johnson* 256 F.3d at 902. For most homes, the boundaries of curtilage will be clearly marked with either a natural boundary or a fence of some kind. *Gilman,* 2007 U.S Dist. LEXIS 32524 at \*15*.*  In *Gilman*, there was no man made fence enclosing the home with the shed, but rather a forest and a mow line, both perceived by the court as natural boundaries. *Id*. The court reasoned that a natural boundary or mowing pattern doesn’t weigh as heavily as a fence would in determining this factor and that the shed was outside of the curtilage. *Id.* Additionally, in *Cannon*, the storage units were clearly surrounded by a fence, a much more decisive boundary. 264 F. 3d 875 at 881. The court agreed, stating that the second *Dunn* factor was fulfilled as the fence clearly demarcated the curtilage. *Id.* Regarding Penny’s case, her mobile storage unit is on her driveway, which is surrounded on both sides by a mowing pattern. There is no fence wrapping around the house that would suggest that the storage unit and the home are lumped together. Applying these two cases to Penny’s, the pattern emerges that her storage unit does not fulfill the second *Dunn* factor, as there is no decisive enclosure surrounding her residence.

For the third factor, an analysis of the nature of the sheds uses is necessary. A dwelling falls in the curtilage if it housed intimate activities of domestic life. *Gilman,* 2007 U.S. Dist. LEXIS 32524 at \*20. In *Gilman*, it was clear that there were no activities intimately associated with the home happening in the shed, as it was used primarily to house garden tools. *Id* at \*27. The concurring opinion in *United States v. Johnson* also concluded that, “ a shed is not generally known for housing the intimate activities of the home”. 256 F.3d at 918. These two cases are persuasive when applied to the nature of Penny’s storage unit’s uses. Penny’s Mob-U storage unit is primarily used to store things that are not in current use. Things that aren’t in current and immediate use aren’t usually considered being intimately associated with the home, thus Penny would not fulfill the third factor and her unit would fall outside the curtilage. However, in *Cannon*, the courts stated that the officers had no right to access the storage room because they did not know what it contained and because there was no objective information regarding the contents. 264 F. 3d 875. Penny could argue that Wallander had no objective information before she was arrested or before Violet sniffed her storage unit. Officer Wallander in fact did have objective information about her shed, assuming it was used for its intended storage purpose rather than drugs until Violet alerted. This alert was enough for Wallander to have both objective and subjective information regarding the storage unit, thus the sniff is not a Fourth Amendment violation under the third *Dunn* factor.

The final *Dunn* factor assesses the steps to which the owner prevented observation by passersby. *Gilman*, 2007 U.S. Dist. LEXIS 32524 at \*28. In *Gilman*, the Penny’s storage unit had windows and was visible on all four sides by any passersby; anybody who looked for it could easily find it. *Id*. Although it was indeed locked, there was nothing to stop anybody, including the officers from observing the area. *Id.* at \*29. This is analogous to our case, as Penny did lock her mobile storage unit with a padlock, which as in *Gilman*, could be considered as a step to prevent observation. Additionally, unlike the shed in *Gilman*, Penny’s storage unit does not have windows or any way for passersby to see inside. While this is significant to note, what weighs more heavily is the fact that it was in plain view on her driveway, almost impossible for passersby to miss. A court analyzing these factors as they apply to our case will most likely find that Penny’s mobile storage unit falls outside the curtilage of the home, and therefore is not protected against warrantless searches. In the event that the court finds that this is false and that the storage unit indeed falls within the curtilage of the home, we must also discuss the officer’s scope of license in order to determine whether or not Violet’s sniff was a physical intrusion on Penny’s property.

If the government “obtains information by physically intruding on persons, houses, papers, or affects, a ‘search’ within the original meaning of the Fourth Amendment has undoubtedly occurred.” *United States v. Jones, 565 U.S.* (2012). In order to establish whether a physical intrusion has occurred, we look to the persuasive decision in *Florida v. Jardines* 185 L. Ed. 2d 495 (2013). When entering a residence, society generally accepts the action of standing on the front porch and knocking implicitly allowed by the homeowner, as any citizen might do that. *Kentucky v. King*, 563 U.S.\_\_,\_\_, (2011). However, in *Jardines*, the scope of license is limited to a particular purpose, and bringing a drug detection dog to a residence is not implicitly or explicitly permitted. 185 L.Ed 2d at 503. Social norms invite a person to the front door, but they do not welcome a search. Additionally, the court in *United States v. Gutierrez*760 F.3d 750, 754 (7th Cir. 2014), stated that the use of a dog trained in drug detection to investigate a home with no implicit or explicit permission, before a warrant is issued is a regarded as a Fourth Amendment search and is considered a physical intrusion.

Officer Wallander had implicit permission by the homeowner to approach her house and pause to look at the storage unit, as any passerby might do the same. What is outside of his license is bringing Violet with him. It is acknowledged in these two cases that bringing a dog in hopes of discovering incriminating evidence is not implicitly or explicitly permitted by the homeowner and thus not included the scope of license. *Jardines*, 185 L.Ed 2d at 503. However, Wallander brought the dog to the residence with no purpose in mind, but that doesn’t matter because the important thing to note here is that the intent of the officer is irrelevant. *Whren v. United States*, 517 U.S. 806 (1996). Regardless of why Wallander was there, Violet’s sniff is still considered a physical intrusion. The pattern emerging through these cases is persuasive in determining that because having the dog on the property was not implicitly or explicitly permitted by Penny and his subjective intent is not relevant, the dog sniff was in fact a physical intrusion on Penny’s property.

Ultimately, although the dog sniff would be considered a physical intrusion, Penny’s storage unit falls outside the curtilage of her home. The proximity factor is heavily outweighed by the other three *Dunn* factors and because of this, Penny’s storage does not enjoy Fourth Amendment protection and Wallander did not need a warrant search her storage unit. Because he doesn’t need a warrant to search the unit, the scope of license element doesn’t apply and therefore bringing a dog on the property is not regarded as a physical intrusion. Had the storage unit been inside the curtilage of the home however, it would have been an illegal search under the Fourth Amendment and Penny’s evidence might have been excluded in trial.

***B. Did Violet’s Sniff Intrude On Penny’s Reasonable Expectation Of Privacy?***

A reasonable expectation of privacy exists when the individual has sought to preserve something as private and when the person’s expectation is one that society is prepared to recognize as legitimate and deserving. *Cannon*, 264 F. 3d 875. A significant part of determining if someone has a reasonable expectation of privacy is whether the object in question falls within the curtilage of the home. If it does fall within the curtilage, the Penny has a right to expect a reasonable amount of privacy since it is part of his constitutionally protected area. It is likely that the court will find that Penny’s storage unit will fall outside the curtilage of her home, therefore not demanding a reasonable expectation of privacy, but in the event that they disagree, we discuss legitimate privacy interests and limited disclosure.

A canine sniff is considered to have a limited disclosure effect because it doesn’t expose non-contraband items that otherwise would remain hidden, like an officer rummaging through luggage. *United States v. Sherwin*, A137075, 2013, Cal App. Unpub. LEXIS 8528, \*13 (Cal Ct. App. November 25, 2013). In *Sherwin*, the contents of the storage container in question weren’t exposed to the public, which means the owner of the unit wasn’t subject to the embarrassment that comes with more intrusive methods. *Id*. The court argues that because a dog sniff is much less intrusive than a typical police search, there is still a considerable amount of an individual’s privacy being preserved, thus the dog sniff doesn’t violate the owner’s reasonable expectation of privacy. *Id.* In Penny’s case, the court’s reasoning in *Sherwin* is important in determining that under the element of limited disclosure, the dog sniff did not violate Penny’s reasonable expectation of privacy. The dog stayed on the exterior of the storage unit the entire time and there were no non-contraband items from the shed that were revealed upon Violet’s search. Also, much like the Penny in *Sherwin*, the contents of Penny’s storage unit were not made public by way of Violet’s search.

In addition to limited disclosure, the court concluded in *Sherwin* that a legitimate privacy interest does not extend to contraband, as society does not regard housing narcotics or other illegal beings as deserving any expectation of privacy*.*  2013. Cal. App. Unpub. LEXIS 8528 at \*8. The court in *Sherwin* argues that any interest in possessing contraband cannot be deemed legitimate, therefore governmental conduct of any means that only reveals contraband compromises no legitimate privacy interest. *Id.* Additionally, the courts in *Gutierrez* stated that, “a search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” 760 F.3d 750, 754 In these two cases, the house and the storage unit, respectively, were found to have contraband inside, so the court deemed both unworthy of any expectation of privacy. Therefore, a pattern emerges that while a person may have reasonable expectation of privacy with units housing legally permissible contents, the same is not true for units that house contraband. Applying the logic of the court to Penny’s case, we find that Penny’s storage unit did in fact house contraband. Since that is an unequivocal fact, her expectation of privacy would not be considered legitimate or reasonable and a court would likely find that she does not enjoy a reasonable expectation of privacy for her storage unit.

By contrast, *Gilman* offers an alternative argument to both of these elements, stating that the Fourth Amendment protects even an area falling outside the curtilage of the home if one has a legitimate expectation of privacy in the area. 2007, U.S. Dist. LEXIS 32524. Essentially, although we have concluded that it is highly likely that Penny’s storage unit falls outside the curtilage, *Gilman* would argue that she still has a right to demand a reasonable expectation or privacy*. Id.* While that might hold true, given the court’s influential ruling in *Sherwin* regarding the illegitimacy of a structure housing contraband, it is likely that a court will still conclude in our case that Penny would not enjoy the reasonable expectation of privacy. 2013, Cal. App. Unpub. LEXIS 8528.

***C.*** ***Was The Dog Sniff Enough To Establish Probable Cause?***

Courts usually find probable cause when there is a [reasonable](http://www.law.cornell.edu/wex/reasonable) basis for believing that evidence of the crime is present in the place to be [searched](http://www.law.cornell.edu/wex/search_0). In order for an officer to conduct a search, probable cause must first be determined. *Cannon*, 264 F.3d 875. The Florida Supreme Court suggested that the fact that a dog has been trained and certified is simply not enough to establish probable cause. *Florida v. Harris*, 133 S. Ct 1050, 1057 (2013). In *Jardines*, the officers acted on both a tip from an informant and a dog sniff to establish probable cause for the warrant. 185 L. Ed 2d at 498. Additionally, in *Gutierrez*, the dog sniff wasn’t enough for the courts to establish probable cause; the informant’s tip and the officer’s knock going unanswered were also crucial in determining probable cause. 760 F.3d 750, 752. Both of these cases hinge on the fact that multiple elements came together to establish probable cause and that a sniff alone didn’t justify the search. Because the Florida court’s decision determining that a dog sniff wasn’t enough to establish probable cause was reversed, this rule doesn’t have significant weight.

In contrast however, the court in *Sherwin* explicitly states that “a well-trained dog’s sniff alert establishes a fair probability—all that is required for probable cause—that either drugs or evidence of a drug crime will be found”. 2013, Cal. App. Unpub. LEXIS 8528 at \*13. They also make a point to note that Penny be afforded the opportunity to challenge the dog’s reliability and credibility, as the officer may have cued the dog or the dog may have been in unfamiliar conditions. *Id.* In Penny’s case, she could argue that Violet alerted to her confirmed low blood sugar at the time rather than the marijuana in her storage unit, which might seriously question Violet’s reliability as a drug dog. Violet’s signals for diabetes and drugs are the same, and Wallander interpreted Violet’s alert as an alert for narcotics rather than low blood sugar. However, because she is trained in drug detection and did make the alert associated with narcotics, the sniff is still valid and is sufficient in establishing probable cause. Ultimately, the courts in *Sherwin* are persuasive in establishing that Violet’s sniff alone would be considered probable cause because the facts that became available by way of the sniff make it abundantly clear that narcotics were present in Penny’s storage unit. *Id.*

**Conclusion**

In summary, the evidence against Penny would be permissible at trial and her request to suppress them would not be granted. Firstly and most importantly, Penny’s storage unit falls outside the curtilage of her home. Because of this, her home isn’t protected from warrantless searches, in this case a dog sniff. Since her storage unit falls outside the curtilage, the potential for the sniff to be considered a physical intrusion is eliminated. Additionally, since there is contraband in her storage unit, she doesn’t enjoy the reasonable expectation of privacy that she typically would under the Fourth Amendment. Finally, a dog sniff alone is enough to establish probable cause to obtain a warrant to formally conduct a search. It is for these reasons that Penny would ultimately fail to get the evidence excluded from trial.