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LITIGATION

Justices deal blow to warrantless dog sniffs

By Allison B. Margolin

This week, the U.S. Supreme Court dealt a firm blow to the admissibility of warrantless dog sniffs that take place in the area immediately surrounding a person's home. Before the ruling, under California law (which, for Fourth Amendment purposes, follows federal law) the use of a drug dog to detect the presence of odors of contraband was considered not to be a "search" that would implicate legal requirements such as warrants or exigent circumstances to pass muster.

In a 5-4 decision handed down March 26, the court in *Florida v. Jardines*, No. 11-564, ruled that a drug dog alerting on the porch of a residence — for which police lacked a search warrant and exigent circumstances to enter — was an illegal search. However, the majority opinion suggests that the dog sniff alone is not the source of illegality. Rather, the court said that the implicit permission that a homeowner gives for mail persons and others to knock and talk cannot be extended to allowing a drug-sniffing dog to sit on one's porch and smell odors that are undetectable outside the home to the human nose. The court indicated that the set of facts at issue in *Jardines* were distinguishable from those in knock-and-question cases based on this reasoning.

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The facts at issue in *Jardines* took place in 2006, when Miami Dade police received an uncorroborated tip that the defendant was growing marijuana in his home. The Drug Enforcement Administration joined the local police and conducted surveillance on the home. Seeing nothing suspicious, Deputy Pedraja approached the home anyway with another deputy dog handler, accompanied by a K-9 trained to detect the smell of marijuana and other drugs. Apparently, as the dog approached Jardines' front porch, it began to sense the odor of drugs. Ultimately, the deputy allowed the dog (on a six foot leash) to approach the porch and front door, and the dog sat, which was the cue that he had detected an illegal odor. Based upon the dog's reactions, Detective Pedraja applied successfully



Police dog Max sniffs the trunk of a car at LAX.

Associated Press

for a search warrant. After the execution of the warrant, marijuana plants were discovered.

At trial, *Jardines* successfully suppressed the evidence. The Florida 3rd District Court of Appeal reversed the trial court, and the Florida Supreme Court ultimately sided with *Jardines*. Certiorari was granted by the U.S. Supreme Court.

Framing the issue in question, Justice Antonin Scalia, writing for the majority, said the *Jardines* case concerned "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is 'search' within the meaning of the Fourth Amendment."

The court said the dog's sense of smell undermined the application of the knock-and-question cases, which upheld officers' right to approach a residence, knock on the door, and ask questions of the occupant. A dog's superior sense of smell distinguished the K-9 from other visitors in a legally relevant way. The court discussed the rationale of the knock-and-question cases, and distinguished *Jardines* from those lines of cases because the customary permission of homeowners to allow visitors to knock on the door and slip mail through a mailbox could not be extended to an implicit permission to allow a dog with super-human olfactory powers to trespass upon the house's porch.

The court relied on a line of cases including *Oliver v. United States*, 466 U.S. 170, 180, for the proposition that the area considered the "curtilage of the home"

(the area immediately surrounding and associated with the home) is considered "part of the home for Fourth Amendment purposes."

Summarizing the decision, Justice Scalia said that the principle that citizens have a reasonable expectation of privacy in their homes and the curtilage around them makes this "case a straightforward one." The officers were "gathering information in an area belonging to *Jardines* and immediately surrounding his house — in the curtilage of the house, which we have held enjoys protection as part of the home itself."

Scalia says that the fact that the officers and dog were in a constitutionally protected area leaves open only whether "he had give his leave (even implicitly) for them to do so." "[A] police officer not armed with a warrant may approach a home and knock, because that is 'no more than any private citizen might do'" (citing *Kentucky v. King*, 131 S. Ct. 1849 (2011)). Scalia writes, however, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that." He went on to say that the scope of a home owner's implied permission for visitors to knock on the door extends not only to an area, but also to a specific purpose for the visit. The dog's visit exceeded the purpose any implied license a homeowner gives to visitors. As Scalia wrote, "the background social norms that invite a visitor to the front

door do not invite him there to conduct a search."

Justice Elena Kagan concurred in the decision, but said she would have gone further by saying that the use of the dog in and of itself constituted an illegal search, not simply the trespass upon the defendant's property. She was joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor. Kagan, agreeing with the holding, noted that she and the justices concurring with her also believe that the case could have been decided based on privacy interests in addition to the property rubric under which the majority relied.

Justice Samuel Alito, joined by Justices John Roberts, Anthony Kennedy and Stephen Breyer, dissented. Writing for the dissent, Justice Alito stated that the court failed to mention that Detective Pedraja also noticed the odor after the dog alerted. Alito says that this case is not distinguishable from knock-and-question cases, and notes that the deputy and dog did not exceed the implied license for which the Supreme Court had given protection in numerous cases.

As Alito observed, the deputy in *Jardines* did not approach in the middle of the night, remained at the front door for only a minute or two, and stayed along a customary path. Alito disputes the majority's conclusion that the search was an illegal search because the officer's objective was to conduct a search. Finally, the dissent indicates that the law of trespass provides no support for the majority's reasoning, and that Kagan's theory that reasonable expectation of privacy interests are at play is off base because of the court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005) — holding that using a drug-sniffing dog at a traffic stop does not violate the Fourth Amendment if it does not unreasonably prolong the stop.

Allison B. Margolin is a partner in Margolin & Lawrence. She graduated from Harvard Law School in 2002 and practices criminal defense and civil litigation in Beverly Hills. She graduated from Columbia University with a B.A. in Political Science and was a teaching fellow in Judicial Politics.



Photo courtesy of Jeffrey Sklan