



Canine Constables and

Earlier this year, the Supreme Court issued two opinions regarding police officers' use of drug detection dogs. In doing so, the Court not only weighed individual privacy rights against the government's interest in law enforcement, it also revisited the analytical approaches underpinning its still-evolving Fourth Amendment jurisprudence.

BY BRIAN R. DEMPSEY

The Fourth Amendment

Across the nation, law enforcement officers rely upon dogs to detect contraband, such as bombs and illegal drugs. The wide use of detection canines is due not only to their effectiveness, but also to the courts' broad approval of their use. Indeed, federal courts have repeatedly held, in a variety of contexts, that a dog's sniff does not even amount to a search that is subject to scrutiny under the Fourth Amendment. These settings include canine sniffs of luggage in airports,¹ of vehicles on traffic stops,² and of packages shipped on common carriers,³ just to name a few. Because the Fourth Amendment does not apply in these contexts, officers are not required to obtain either a warrant or the suspect's consent. In fact, they do not even have to have an articulable suspicion that such a sniff will reveal contraband.

What begins as a suspicionless sniff can easily blossom into a full-blown search. Once a dog "alerts" by signaling its handler that contraband is detected,⁴ there is sufficient probable cause to search areas which otherwise would have been off-limits. On the strength of the dog's alert, an officer may examine the interior of a vehicle, unwrap packages, and open luggage.

There is an old Arabian proverb that expresses the concerns of those who might question the courts' deference to dog sniffs: "If the camel once gets his nose in the tent, his body will soon follow." This was illustrated recently in *Florida v. Harris*, a case in which the Supreme Court considered whether the "alert" of a drug-detection dog during a traffic stop provides probable cause to search a vehicle's interior for evidence of illegal drugs.⁵

In a unanimous decision, the Court concluded that it does.

In *Harris*, K-9 officer William Wheatley made a routine stop of a truck because it had an expired license plate. When Wheatley approached the driver's side of the truck, he observed that Clayton Harris was nervously shaking and breathing rapidly. Wheatley asked Harris for his consent to search the truck, but Harris refused. Wheatley then retrieved his canine, Aldo, from his patrol car and conducted a "free air sniff" around the truck. When Aldo alerted on the drivers-side door, Wheatley concluded that he had probable cause to search the interior of the truck, which he proceeded to do. While the search did not reveal any of the drugs Aldo was trained to detect, it did turn up all of the ingredients for making methamphetamine, which Harris later admitted making regularly.

Harris moved to suppress the evidence on the ground that Aldo's alert did not give rise to probable cause for an interior search of the truck. At the hearing on the motion, Wheatley testified that Aldo completed regular training exercises to maintain his detection skills and that Aldo always performed well. While Harris's attorney did not challenge the quality of Aldo's training, she questioned Aldo's performance in the field. After all, Aldo had alerted upon a vehicle that apparently contained none of the narcotics he had been trained to find. Nevertheless, the trial court concluded that Aldo's alert gave Wheatley probable cause to search the truck.

After an intermediate appellate court summarily affirmed the ruling, the Florida Supreme Court reversed, holding that the state had not produced sufficient evidence that Aldo's alerts could be relied upon.⁶ The Florida court was particularly concerned with the possibility of false alerts, which, it reasoned, could result from a handler's tendency to "cue [a] dog to alert" and a "dog's inability to distinguish between residual odors and actual drugs."⁷ Based on these concerns, the court concluded that evidence of a canine's reliability must include records showing "how often the dog has alerted in the field without illegal contraband having been found."⁸

Emphasizing that probable cause is a practical, common-sense standard, the Supreme Court rejected the Florida court's rigid requirement that the government produce specified elements of proof in order to show that a canine's sniff and alert

is sufficiently reliable to constitute probable cause. The opinion, authored by Justice Elena Kagan, allows a court to presume that a dog's alert is reliable, so long as there is some evidence that the dog is certified after being tested in a controlled setting or that the dog has recently and successfully completed a training program which included such an evaluation. The Court noted that as with any presumption, it can be rebutted by evidence showing that the training or evaluation was faulty or insufficient. In sum, the Court instructed that the "question is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test."

Special Deference for Dogs

The Fourth Amendment provides:

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.

Vehicles, luggage, and shipped packages all constitute "effects" which are within the scope of the Fourth Amendment. Although a search is generally unreasonable in the absence of individualized suspicion of wrongdoing,⁹ courts have been increasingly willing to remove dog sniffs from the confines of the Fourth Amendment because of the perception that police dogs are trained only to alert on contraband, and not on lawful items. In *United States v. Place*, the Supreme Court lauded trained detection dogs as uniquely reliable, efficient, and minimally intrusive tools of crime detection:

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. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. In these respects, the canine sniff is sui generis. 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.¹⁰

It is this precision of a canine sniff that places it outside of Fourth Amendment scrutiny, because "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.'"¹¹

It stands to reason, then, that other detection techniques used in

similar settings are subject to Fourth Amendment scrutiny for the very reason that they do not limit their revelations to contraband or illegal activity. Last year, for instance, the Supreme Court held in *United States v. Jones* that the warrantless attachment of a Global Positioning System (GPS) tracking device to a vehicle, and officers' subsequent use of that device to monitor the vehicle's movements on public streets, constituted a search within the meaning of the Fourth Amendment.¹² Similarly, in *Bond v. United States*, the Court concluded that a border patrol agent violated the Fourth Amendment when he physically manipulated a carry-on bag that a bus passenger had placed in an overhead bin.¹³ While courts expect that a dog will alert only on contraband, these techniques gather much more information, and they do so in a way that humans can readily perceive.

While it is true that a mere sniff by a trained canine should not disclose legitimately private information, (and the Supreme Court has observed that an erroneous alert, in and of itself, reveals nothing private, either¹⁴), there is no denying the fact that when a dog alerts, the revelation of private information becomes imminent. After all, an erroneous alert will inevitably be used by officers to justify a search of an automobile where there is no contraband. Although litigants have questioned the reliability of canines and their handlers, the Court has not yet been presented with a factual record that has led it to conclude that an alert was insufficient to provide probable cause for a more intrusive inspection.¹⁵

"Tiny Constables" and the Trespass Analysis

Florida v. Harris involved a canine sniff of the exterior of a vehicle during a lawful traffic stop. As noted above, the Court held that such activity does not amount to a "search" under the Fourth Amendment. Several circuits, however, have gone one step further, holding that a trained canine's sniff inside of a car after instinctively leaping into the vehicle likewise is not a search, so long as officers did not encourage or facilitate the dog's jump.¹⁶ Under these limited circumstances, courts have allowed a police dog to intrude into private space that its handler would not have been privileged to breach.¹⁷

Given the extensive training which canine teams complete to become detectors of contraband, it seems reasonable to expect that the dogs could be conditioned to resist the urge (instinctive or otherwise) to leap into a vehicle without clear instruction from their handlers. In any event, by distinguishing between vehicle incursions that were caused by canine instinct and those which were encouraged by their handlers, these courts seemingly injected a subjective element into the Fourth Amendment analysis.

Because the Supreme Court has admonished that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,"¹⁸ a better approach may be to evaluate these canine indiscretions under the same trespass analysis employed in *United States v. Jones*. The *Jones* opinion, authored by Justice Scalia, first underscored that a vehicle is an "effect" within the scope of Fourth Amendment protection.¹⁹ By then drawing from traditional Fourth Amendment jurisprudence, the Court characterized the placement of a GPS device on a vehicle as an unauthorized trespass: "It is important to be clear about what occurred in this case: The government physically occupied private property for the purpose of obtaining information."²⁰

The majority analogized the officers' placement of the GPS

device to “a constable’s concealing himself in the target’s coach in order to track its movements.”²¹ Viewed in this light, the majority had little trouble concluding that this invasion upon private property violated the Fourth Amendment.²² If this traditional, objective Fourth Amendment analysis were used, it would not matter whether a canine handler cued, encouraged, or facilitated the dog to enter a vehicle without probable cause. Under any of these circumstances, a trespass would have occurred.

Katz and Dogs

Although the Court reached a unanimous decision in *Jones*, Justice Alito wrote a concurring opinion (joined by Justices Ginsburg, Breyer, and Kagan) that framed the issue as turning on whether “reasonable expectations of privacy” were violated by the GPS monitoring.²³ The concurrence rejected the trespass approach and chuckled at the majority’s “constable” analogy: “The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.”²⁴ Applying the modern expectation-of-privacy test set forth in *Katz v. United States*,²⁵ the concurrence concluded that the four-week GPS tracking violated the subject’s reasonable expectation of privacy under the Fourth Amendment.²⁶

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The *Katz* rule is twofold. First, a person must have “exhibited an actual (subjective) expectation of privacy.”²⁷ Second, that expectation “must be one that society is prepared to recognize as ‘reasonable.’”²⁸ In general, a warrantless entry into a vehicle is lawful only if probable cause exists to believe that the car contains articles that the officers are entitled to seize.²⁹ As a result, a canine’s unauthorized entry into a vehicle could well amount to a violation of a vehicle owner’s expectation of privacy. Admittedly, neither the trespass analysis nor the expectation-of-privacy test matters in jurisdictions where a canine’s unauthorized leap is not considered to be a “search” within the scope of Fourth Amendment scrutiny.

When a canine’s spontaneous jump into a car is triggered by its

detection of contraband, it would be tempting to anthropomorphize this response as the canine’s unilateral determination that probable cause existed for an interior search. Certainly, under *Florida v. Harris*, a canine’s alert on the exterior would authorize an interior search in any event. Viewed in that light, the canine’s failure to stop and alert its handler before entering the vehicle might be viewed as a harmless error. The problem, of course, is that probable cause is for the officer—not the canine—to determine. After all, the canine cannot later be cross-examined about the totality of circumstances that led it to initiate the interior search.

The Heightened Expectation of Privacy in the Home

If there is any setting in which dog sniffs are subject to Fourth Amendment scrutiny, it is the home. In *Florida v. Jardines*, decided just a few weeks after *Harris*, the Court concluded that a dog sniff at the front door of a suspected marijuana grow house by a trained drug dog is a search requiring probable cause and a warrant. Because of the enhanced privacy expectations which attach to a private home (as opposed to a vehicle being operated on public roads), the Court applied greater scrutiny to this conduct than it did in *Harris*, which was argued before the Court on the same day.

Justice Antonin Scalia, writing for the majority, applied traditional principles of trespass law by noting that the front porch where the officers deployed the canine was within the home’s “curtilage,” which encompasses the immediate surroundings of the home. As such, the front porch was part of the home for purposes of the Fourth Amendment analysis. With that, Scalia reasoned, this was an “easy” case. When the government uses a physical intrusion to explore the details of the home (including its curtilage), a “search” has taken place.

In *Jardines*, the Supreme Court brought its canine jurisprudence full circle by defining the outer limits of exterior dog sniffs that escape the Fourth Amendment requirement of probable cause and a warrant. Just as the installation of a GPS device on a vehicle constituted a search in *Jones* because the government “physically occupied private property for the purpose of obtaining information,” the sniff in *Jardines* took place on private property.³⁰ On this basis, *Jardines* is distinguishable from *Harris*, where the canine team conducted an exterior vehicle sniff on a public roadside.

For three concurring Justices, the sniff in *Jardines* also violated the *Katz* expectation-of-privacy test. In the concurrence, Justice Kagan wrote that *Jardines* was controlled by *Kyllo v. United States*, where the Court disapproved of the warrantless use of a thermal imaging device to examine the exterior of a triplex which was suspected to house a marijuana growing operation.³¹ There, agents had used the thermal imaging device because they surmised that the occupants might be using high-intensity lamps typically used for indoor marijuana growth. The *Kyllo* Court was unpersuaded by the government’s insistence that the thermal imager only captured heat signatures on the exterior of the home and did not reveal activities inside. “In the home,” the Court explained, “all details are intimate details, because the entire area is held safe from prying government eyes.”³²

In its briefing in *Jardines*, the State of Florida attempted to distinguish *Kyllo* by reminding the Court of its observation that dog sniffs are uniquely limited to reveal only the presence of contraband.³³ In contrast, thermal imagers “might disclose, for example, at what hour each night the lady of the house takes her daily sauna

and bath—a detail that many would consider ‘intimate.’³⁴ But even though the dog’s sniff in *Jardines* was arguably more focused to isolate criminal activity than the thermal imager was in *Kyllo*, this was not enough for the concurring Justices because the drug-detection dog used in *Jardines* was a “sense-enhancing” tool. As observed by the *Kyllo* Court: “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”³⁵ Although dogs are not a “device,” and they are in “general public use,” the detection canine in *Jardines* was perched at the front door with the express purpose of exploring details of the home which otherwise would have been unknowable.

Sniffing Out the Future of Fourth Amendment Jurisprudence

With the emergence of new investigative technologies and innovative uses of old ones (such as man’s best friend), it may be inevitable that Fourth Amendment jurisprudence is doomed to limp along from one new technology to the next with no universally applicable standards. Professor Erwin Chemerinsky of the University of California–Irvine School of Law echoes this concern in what might be called a “judicial expectation of privacy” test: “I long have thought that the Supreme Court’s Fourth Amendment decisions can be explained by a simple predictive principle: If the justices can imagine it happening to them, then it violates the Fourth Amendment.”³⁶

While all of these cutting-edge questions are grist for legal academics, the earnest law enforcement officer is left to sort out a matrix of rules and exceptions. As it turns out, an officer’s best friend might be the old-fashioned magistrate. ☉



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Endnotes

¹*United States v. Place*, 462 U.S. 696, 706-07, 103 S. Ct. 2637, 2644-45 (1983).

²*Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 838 (2005).

³See, e.g., *United States v. Daniel*, 982 F.2d 146, 151 (5th Cir. 1993) (finding no reasonable expectation of privacy in the airspace surrounding a package).

⁴An alert has been aptly described as “an interpretation of a change in the dog’s behavior by a human handler.” *United States v. Outlaw*, 134 F. Supp. 2d 807, 813 (W.D. Tex. 2001).

⁵568 U.S. ---, 133 S. Ct. 1050 (Feb. 19, 2013).

⁶*Harris v. State*, 71 So. 3d 756, 775 (2011).

⁷*Id.* at 769, 774.

⁸*Id.* at 769.

⁹*City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S. Ct. 447, 451 (2000).

¹⁰*Place*, 462 U.S. at 707, 103 S. Ct. at 2644-45.

¹¹*Caballes*, 543 U.S. at 408, 125 S. Ct. at 837.

¹²565 U.S. ---, 132 S. Ct. 945 (2012).

¹³529 U.S. 334, 338-39, 120 S. Ct. 1462, 1465 (2000) (“When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.”).

¹⁴*Caballes*, 543 U.S. at 409, 125 S. Ct. at 838.

¹⁵*Id.* (“Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument.”).

¹⁶See *United States v. Pierce*, 622 F.3d 209, 213-14 (3d Cir. 2010); *United States v. Sharp*, 689 F.3d 616, 619-20 (6th Cir. 2012) cert. denied, 133 S. Ct. 777 (2012); *United States v. Lyons*, 486 F.3d 367, 373 (8th Cir. 2007); *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989).

¹⁷See Jessica Alfano, *Interior-Vehicle Sniffs: Reining in the Leash on Drug-Dog Sniffs and Searching for the “Search” That Courts Have Yet to Find*, 46 NEW ENG. L. REV. 519 (2012).

¹⁸*Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774 (1996).

¹⁹*Jones*, 132 S. Ct. at 949.

²⁰*Id.*

²¹*Id.* at 950 n.3.

²²*Id.* at 952 (“By attaching the device to the Jeep, officers encroached on a protected area.”).

²³*Id.* at 958 (Alito, J., concurring).

²⁴*Id.* at 958 n.3 (Alito, J., concurring).

²⁵389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967) (“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”).

²⁶*Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

²⁷*Katz*, 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).

²⁸*Id.*

²⁹*Chambers v. Maroney*, 399 U.S. 42, 48, 90 S. Ct. 1975, 1979 (1970).

³⁰*Jones*, 132 S. Ct. at 949.

³¹533 U.S. 27, 40, 121 S. Ct. 2038, 2046 (2001).

³²*Id.* at 37, 121 S. Ct. at 2045.

³³Reply Brief for Petitioner at 4-5, *State of Florida v. Jardines*, No. 11-564 (2012), 2012 WL 3132158, at *4-5.

³⁴*Kyllo*, 533 U.S. at 38, 121 S. Ct. at 2045.

³⁵*Id.* at 40, 121 S. Ct. at 2046.

³⁶Erwin Chemerinsky, *It’s Now the John Roberts Court*, 15 GREEN BAG 2D 389, 397 (2012).