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Supreme Court Update

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SUPREME COURT UPDATE

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I. Scope of This Outline

This outline contains all criminal cases heard by the Supreme Court in its 2012 Term, and all those on which certiorari has been granted for the upcoming 2013 Term. As to those cases that pertain solely to federal practice – because, for instance, the issue presented concerns interpretation of a federal criminal law or rule – only the question or questions presented are provided, with the holding if the case has already been decided. Cases that concern either constitutional criminal procedure or federal habeas are covered in greater depth. In each section, cases already decided are discussed first, followed by those still awaiting decision at the time of writing.

A terrific resource for all of these cases, and to track the Supreme Court's jurisprudence in general, is SCOTUSblog.com, which for each case on which certiorari is granted compiles the briefs, transcript of oral argument, and decision from the Court, as well as commentary on the cases.[1]

II. The Fourth Amendment

A. The Dog Sniff Cases – *Florida v. Harris*[2] and *Florida v. Jardines*[3]

Dogs trained to sniff out the odors of illegal substances or contraband – frequently drugs – are now commonplace in the work of law enforcement. Indeed, the Court has weighed in on several occasions to decide how the Fourth Amendment governs this type of policing *technology*. Two cases this Term asked the Court to once again assess the constitutional parameters for the use of trained drug sniff dogs. The outcome: Dogs 1, Defendants 1.

Dogs claimed an overwhelming victory in *Florida v. Harris*, which presented the question of what test governs determination of whether a dog's alert establishes probable cause to search. In *Harris* the existence of probable cause was challenged on the basis that the state failed to support the reliability of dog Aldo's alert with any training or proficiency records (offering only the testimony of Aldo's police handler), and the Florida Supreme Court ultimately adopted a test requiring the proponent of a dog's reliability to provide such documentation to satisfy the Fourth Amendment.[4] The Supreme Court unanimously reversed, holding that such a rule flew in the face of the "practical and common-sensical standard" of probable cause,

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[1] *See*, *e.g.*, SCOTUSblog, October Term 2012, http://www.scotusblog.com/case-files/terms/ot2012.

[2] 133 S. Ct. 1050 (2013).

[3] 133 S. Ct. 1409 (2013).

[4] *See Harris v. State*, 71 So. 3d 756 (Fla. 2011).

governed by a "totality of the circumstances" test.[5] Trained dogs, the Court ruled, are no different from any other type of evidence for purposes of assessing probable cause to believe that crime is afoot – just as the Court had in the past rejected distinctive and inflexible measures of reliability for other categories of evidence such as informant testimony.[6] Moreover, the Court held, the particular metric selected by the Florida Supreme Court was a bad one: Training and proficiency records are no "gold standard" in evidence, as they might both over- and under-state a canine's competence.[7] The probative weight of Aldo's alert, enhanced or diminished by whatever evidence of reliability might be presented at a probable cause hearing, must be assessed in light of "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 . . . evidence of a crime. A sniff is up to snuff when it meets that test."[8]

Defendant snatched victory from the jaws of dog, however, with a five-four victory and an unusual alignment of justices in *Jardines*. Joelis Jardines's home was searched pursuant to a warrant that was obtained after police used Franky the dog to sniff around the home's perimeter and observed the dog alerting to the smell of narcotics; the ultimate search revealed marijuana plants, and Jardines was charged with drug trafficking. The question before the Supreme Court was whether the use of a drug-sniffing dog on a homeowner's porch in order to investigate the contents of the home was a "search" within the meaning of the Fourth Amendment. Writing for himself and Justices Thomas, Ginsburg, Sotomayor, and Kagan, Justice Scalia authored the majority opinion holding that it was. Reaffirming the Court's decision last Term in *United States v. Jones* ("the GPS case"),[9] the majority began with the premise that the common law of trespass provides a constitutional *floor* for the concept of "search," and that therefore the protections of the Fourth Amendment apply where the government engages in a "physical intrusion of a constitutionally protected area" without license (express or implied) to do so.[10] "That principle," the Court held, "renders this case a straightforward one": Police gathered information by locating themselves immediately outside Jardines's house – within the protected "curtilage"; and they had no implied license to gather information as they did, because using a trained police dog to search for evidence (in contrast to, say, simply knocking on a door) is not an activity that enjoys any "customary invitation." Justice Kagan wrote separately to offer her view (joined by Justices Ginsburg and Sotomayor) that this case was *also* clearly governed by *Kyllo v. United States*, in which the Court held that the use of a thermal-sensing device to detect heat coming from a home (an indicator that drugs were being grown inside) was a search within the meaning of the Fourth Amendment; the dog was a perfectly analogous device.[11] Dissenting were Justice Alito joined by Chief Justice Roberts and Justices Kennedy and Breyer, who rejected the majority's analysis based on the absence of any common law precedent for considering the

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[5] *Harris*, 133 S. Ct. at 1055.

[6] *Id.* at 1056—58; Illinois v. Gates, 462 U.S. 213, 239 (1983).

[7] *Id.* at 1056—57.

[8] *Id.* at 1058.

[9] *See* United States v. Jones, 565 U.S. ——, ——, n. 3 (2012).

[10] *Jardines*, 133 S. Ct. at 1414.

[11] *Id.* at 1418—19 (Kagan, *J.*, concurring); *see Kyllo v. United States*, 533 U.S. 27 (2001).

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