

MEMO

DATE: March 29, 2013  
TO: instructor staff  
FROM: J.H.B. Wilson, General Counsel  
RE: Florida v. Jardines (SCOTUS, 2013)

A new Supreme Court case issued March 26, 2013.

Really short version:

1. Taking a drug detection dog to the doorway to sniff for contraband is a 'search' for purposes of the Fourth Amendment.
2. This means that the usual standard for searches applies: If there is no search warrant, the court will presume that the search was unreasonable. The burden will then be on the State to show that one of the recognized exceptions applies, and that the search was reasonable.
3. In general, a homeowner grants an 'implied license' to approach the door for things like delivering mail and packages, and for distributing pamphlets, and for trying to sell stuff like, for example, girl scout cookies.
4. This case raises many questions, most of them left unresolved, at least for now.
5. There is actually some humor in the opinions. Humor in Supreme Court opinions is rare.
6. An abridged version of the Opinions can be found at the end of this memo.

Longer discussion.

There has not been a lot of newspaper coverage of this opinion. The coverage I have seen, as usual, is not very accurate. The purpose of this memo is to give you a little better idea of what the Supreme Court decided.

1. This case was decided on very narrow grounds. As presented by Justice Scalia, the issue is "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment". Look at all the qualifiers in that sentence: It specifically talks of the 'homeowner' leaving the possibility for a different result if the person is not the homeowner. It references the 'porch' leaving room to consider whether taking a drug-sniffing dog to another part of the property will be treated differently. This very narrow approach leaves a lot of room for deciding future cases.
2. The traditional analysis is that a 'search' must be 'reasonable' to satisfy the Fourth Amendment ('unreasonable searches and seizures'). The best way for a peace officer to conduct a 'reasonable' search is to have a search warrant. Another way to have a 'reasonable' search is to fit within one of the recognized exceptions to the search warrant requirement. 'Consent' is an exception. 'Exigent circumstances' is an exception. There are several other exceptions and I

don't want to take the time to type them all here. By deciding the case on the narrow ground of 'whether it is a search' the Court leave open the possibility of applying one of the exceptions to a drug-dog 'inspection' of the door of a house.

3. When you have a front door, there is an 'implied license' or 'implied invitation for folks like mail carriers, and UPS delivery folks. This implied license 'typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave'. This means a 'police officer not armed with a warrant may approach the home and knock, precisely because that is no more than any private citizen might do'. However, 'introducing a trained police dog to explore the area the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that.'
4. There are a lot of unresolved questions. Remember that the Supreme Court usually tries to decide only questions that have to be decided. This leaves them room to consider new cases without being bound to a particular decision. Some of the unanswered questions:
  - a. What about using a drug dog in apartment complexes that have common areas instead of 'porches'? Not answered.
  - b. What about the homeowner who clearly marks the property with no trespass and no soliciting signs? Since the 'implied license' to enter the property is similar to that of the delivery person, would an express revocation of that 'implied license' mean an officer is not even allowed to knock on the door? Not answered.
  - c. What about using the drug dog as part of investigation, and then using the information to gain other information to use for a warrant? Not answered.

Justice Kagan (who was joined in a concurring opinion by Justices Sotomayor and Ginsburg) says this is an easy case to decide. *'For me, a simple analogy clinches this case – and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high powered binoculars. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too.'*

Also of importance is that courts traditionally zealously protect homes. Courts don't protect cars much. As far back as 1765 the English courts held that 'the property of every man (is) so sacred, that no man can set his foot upon his neighbors close without his leave'.

5. Humor in a Supreme Court Opinion

a. 'The detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardine's home.'

b. *'To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to – well, call the police.*

c. *'drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners. They are to the poodle down the street as high-powered binoculars are to a piece of plain glass.'*

d. 'Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.'

e. (from the dissent) *'If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 800 years. But the Court has found none.*

**Please note: this is an abridged version for use in a class on search and seizure. All *emphasis* has been supplied. The serious student is encouraged to read the entire opinion.**

**SUPREME COURT OF THE UNITED STATES**

**FLORIDA *v.* JARDINES**

**CERTIORARI TO THE SUPREME COURT OF FLORIDA**

**Decided March 26, 2013**

JUSTICE SCALIA delivered the opinion of the Court.

*We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.*

In 2006, Detective William Pedraja of the Miami-Dade Police Department received *an unverified tip that marijuana was being grown in the home* of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. *He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn.* Detective Pedraja then approached Jardines' home *accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived at the scene with his drug-sniffing dog.* The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt *had the dog on a six-foot leash, owing in part to the dog's "wild" nature, and tendency to dart around erratically while searching.* As the dog approached Jardines' front porch, *he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor.* As Detective Bartelt explained, the dog "began tracking that airborne odor by. . . tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source.

*After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point.* Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

*On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence.* When the warrant was executed later that day, Jardines attempted to flee and was arrested; *the search revealed marijuana plants, and he was charged with trafficking in cannabis.*

*At trial, Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable search. The trial court granted the motion, and the Florida Third District Court of Appeal reversed. On a petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved the trial court's decision to suppress, holding (as relevant here) that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search.*

*We granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment.*

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred."* By reason of our decision in *Katz v. United States*, 389 U. S. 347 (1967), property rights "are not the sole measure of Fourth Amendment violations," but *though Katz may add to the baseline, it does not subtract anything from the Amendment's protections "when the Government does engage in [a] physical intrusion of a constitutionally protected area."* *That principle renders 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. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.*

The Fourth Amendment “indicates with some precision the places and things encompassed by its protections”: persons, houses, papers, and effects. *Oliver v. United States*. The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may gather information in what we have called “open fields”—even if those fields are privately owned—because such fields are not enumerated in the Amendment’s text. *But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s “very core” stands “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”* This right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity; *the right to retreat would be significantly diminished if the police could enter a man’s property to observe his repose from just outside the front window.* We therefore regard the area “immediately surrounding and associated with the home”—what our cases call the curtilage—as “part of the home itself for Fourth Amendment purposes.” *That principle has ancient and durable roots.* Just as the distinction between the home and the open fields is “as old as the common-law,” so too is the identity of home and what Blackstone called the “curtilage or homestall,” for the “house protects and privileges all its branches and appurtenants.” (The Home) is where “privacy expectations are most heightened.”

While the boundaries of the curtilage are generally “clearly marked,” the “conception defining the curtilage” is at any rate familiar enough that it is “easily understood from our daily experience.” *Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and “to which the activity of home life extends.”*

*Since the officers’ investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion.* While law enforcement officers need not “shield their eyes” when passing by the home “on public thoroughfares,” *an officer’s leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment’s protected areas.* In permitting, for example, visual observation of the home from “public navigable airspace,” we were careful to note that it was done “in a physically nonintrusive manner.” *Entick v. Carrington*, 2 Wils. K. B. 275, 95 Eng. Rep. 807 (K. B. 1765), a case “undoubtedly familiar” to “every American statesman” at the time of the Founding, states *the general rule* clearly: “[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave.” As it is undisputed that *the detectives had all four of their feet and all four of their companion’s firmly planted on the constitutionally protected extension of Jardines’ home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.*

“A license may be implied from the habits of the country,” notwithstanding the “strict rule of the English common law as to entry upon a close.” *We have accordingly recognized that “the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.” This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.* Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters. *Thus, a police officer*

*not armed with a warrant may approach home and knock, precisely because that is “no more than any private citizen might do.”* With this much, the dissent seems to agree—it would inquire into “ ‘ But their answers are incompatible with the dissent’s outcome, which is presumably why *the dissent does not even try to argue that it would be customary, usual, reasonable, respectful, ordinary, typical, no alarming, etc., for a stranger to explore the curtilage of the home with trained drug dogs.*

But *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.* An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. *To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.*

The dissent insists that our argument must rest upon “the particular instrument that Detective Bartelt used to detect the odor of marijuana”—the dog. *It is not the dog that is the problem, but the behavior that here involved use of the dog.* We think a typical person would find it “ ‘a cause for great alarm’ ” to find a stranger snooping about his front porch with or without a dog.

Here, however, *the question before the court is precisely whether the officer’s conduct was an objectively reasonable search.* As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. *Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.*

The State argues that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest. The State cites for authority our decisions in *United States v. Place*, (1983), *United States v. Jacobsen*, (1984), and *Illinois v. Caballes*, (2005), which held, respectively, that canine inspection of luggage in an airport, chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the “reasonable expectation of privacy”.

Just last Term, we considered an argument much like this. *Jones* held that tracking an automobile’s whereabouts using a physically-mounted GPS receiver is a Fourth Amendment search. The Government argued that the *Katz* standard “show[ed] that no search occurred,” as the defendant had “no ‘reasonable expectation of privacy’” in his whereabouts on the public roads, But because the GPS receiver had been physically mounted on the defendant’s automobile (thus intruding on his “effects”), we held that tracking the vehicle’s movements was a search. The *Katz* reasonable expectations test “has been *added to*, not *substituted for*,” the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.

Thus, we need not decide whether the officers’ investigation of Jardines’ home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by

physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.

*The government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the Fourth Amendment.* The judgment of the Supreme Court of Florida is therefore affirmed.

*It is so ordered.* \_\_\_\_\_

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, concurring.

*For me, a simple analogy clinches this case—and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high powered binoculars. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too.*

Detective Bartelt's dog was not your neighbor's pet, come to your porch on a leisurely stroll. As this Court discussed earlier this Term, *drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners. They are to the poodle down the street as high-powered binoculars are to a piece of plain glass.*

Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well.

*That "firm" and "bright" rule governs this case: The police officers here conducted a search because they used a "device . . . not in general public use" (a trained drug detection dog) to "explore details of the home" (the presence of certain substances) that they would not otherwise have discovered without entering the premises.*

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

*The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence.*

The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. This license is not limited to persons who intend to speak to an occupant or who actually do so. (Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without intending to converse.) Nor is the license restricted to categories of visitors whom an occupant of the dwelling is likely to welcome; as the Court acknowledges, this license applies even to "solicitors, hawkers and peddlers of all kinds." And the license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions).

The Court's decision is also inconsistent with the reasonable-expectations-of-privacy test. *A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human.*

*For these reasons, I would hold that no search within the meaning of the Fourth Amendment took place in this case, and I would reverse the decision below.*

Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.

Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm").

Similarly, a visitor may not linger at the front door for an extended period. ("[T]here is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows"). The license is limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave.

As I understand the law of trespass and the scope of the implied license, a visitor who adheres to these limitations is not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant. For example, mail carriers, persons making deliveries, and individuals distributing flyers may leave the items they are carrying and depart without making any attempt to converse. A pedestrian or motorist looking for a particular address may walk up to a front door in order to check a house number that is hard to see from the sidewalk or road. A neighbor who knows that the residents are away may approach the door to retrieve an accumulation of newspapers that might signal to a potential burglar that the house is unoccupied.

As the majority acknowledges, this implied license to approach the front door extends to the police. ("It is not objectionable for an officer to come upon that part of the property which has been opened to public common use" (internal quotation marks omitted)). Even when the objective of a "knock and talk" is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point.

*Detective Bartelt did not exceed the scope of the license to approach respondent's front door.*

What the Court must fall back on, then, is the particular instrument that Detective Bartelt used to detect the odor of marijuana, namely, his dog. But in the entire body of common-law

decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash.

The Court responds that “[i]t is not the dog that is the problem, but the behavior that here involved use of the dog.” But where is the support in the law of trespass for *this* proposition? Dogs’ keen sense of smell has been used in law enforcement for centuries. *If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 800 years. But the Court has found none.*

Consider the situation from the point of view of the occupant of a building in which marijuana is grown or methamphetamine is manufactured. *Would such an occupant reason as follows? “I know that odors may emanate from my building and that atmospheric conditions, such as the force and direction of the wind, may affect the strength of those odors when they reach a spot where members of the public may lawfully stand. I also know that some people have a much more acute sense of smell than others, and I have no idea who might be standing in one of the spots in question when the odors from my house reach that location. In addition, I know that odors coming from my building, when they reach these locations, may be strong enough to be detected by a dog. But I am confident that they will be so faint that they cannot be smelled by any human being.” Such a finely tuned expectation would be entirely unrealistic, and I see no evidence that society is prepared to recognize it as reasonable.*

The conduct of the police officer in this case did not constitute a trespass and did not violate respondent’s reasonable expectations of privacy. *I would hold that this conduct was not a search, and I therefore respectfully dissent.*