

In The
Supreme Court of the United States

FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

**BRIEF OF THE RUTHERFORD INSTITUTE,
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

1. Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

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INTEREST OF *AMICUS*¹

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because we are committed to ensuring the continued vitality of the Fourth Amendment. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many have ignored in their desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

A decision reversing the court below would constitute a major step toward the establishment of a police state by allowing police to use trained narcotics detection dogs to invade the sanctity of the home without a warrant.

¹ Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

Important policy considerations militate against the sanctioning of warrantless “sniffs” by narcotic detection dogs at the perimeter of private homes. In light of the demonstrated lack of reliability of dog sniffs in this context, this Court’s ruling should ensure that dog sniffs do not become proxies for findings of probable cause to search private homes—the most sacrosanct enclave of privacy known to man.

Moreover, an understanding of contemporary research and analysis of dog sniffs in this context reveals that such sniffs do constitute “searches” under the Court’s existing Fourth Amendment jurisprudence for at least two reasons. First, studies show that this kind of dog sniff is likely to reveal private information about residents apart from the mere presence of contraband inside the home. Second, the amount of time typically required for a dog to complete this type of search exceeds the length of time during which a form of implied consent allows members of the public to attend one’s front door for the purpose of making deliveries or inquiries of the owner. Thus, a typical dog sniff will necessarily convert an officer’s presence on private property into a trespass and therefore violate Fourth Amendment norms.

ARGUMENT

- I. Important policy considerations militate against warrantless “sniff” searches of the perimeter of private homes by narcotic detection dogs.**

Data indicate that dogs cannot be expected to reliably detect the presence of narcotics inside a home from a sniff of the perimeter. Both anecdotal evidence and research show, rather, that dogs frequently signal false alerts and show sensitivity to handler bias. In light of the likelihood that a perimeter dog sniff will produce a false positive that results in a search warrant, the Court should require police to obtain a warrant prior to the inception of the perimeter sniff.

Anecdotal Evidence

In 2002, Indiana state police employed a narcotics detection dog after arresting a suspected drug dealer outside a private home. *United States v. Jackson*, 2004 WL 1784756 (S.D. Ind. 2004). Detective Mike Morris led his dog around parked vehicles and the exterior of the residence, and the canine signaled a positive alert for drugs outside the back door of the residence and on a truck that was parked in the driveway. *Id.* at *2. Police then procured a warrant to search the home and the vehicle for drugs, but found no drugs or evidence of drugs. *Id.*

In 1979, 2,780 junior high and high school students were subjected to warrantless sniffs by 14 trained drug detection dogs over the span of two to three hours. *See Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. Ind. 1979). The dogs ran their noses along pupils' legs, actually touching the bodies of the students. Canine alerts identified 50 students, some of whom were subjected to either a pocket search or secondary nude examinations by adults of the same sex. In these 50 searches, 35 students were found to

be innocent, the victims of false positive alerts. In one case, the false alert was later revealed to have resulted from the student's earlier contact with her pet canine, which was in "heat."

These are examples of canine fallibility. As Justice Souter once warned, "The infallible dog . . . is a creature of legal fiction." *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting). Unfortunately, this Court's decisions in *Cabelles*, *supra*, and *United States v. Place*, 462 U.S. 696 (1983), have perpetuated the myth of the utterly reliable canine drug sniff. Prosecutors advocate and some judges rule that a dog sniff is not a search for Fourth Amendment purposes because it discloses only the presence or absence of narcotics. But as the examples above and studies examined below demonstrate, this binary theory is mistaken.

Research Data About Canine Narcotics Detection

False alerts are likely to occur when trained canines are given tasks that they are not able or adequately trained to perform. Perimeter sniff searches are immediately problematic, then, because dogs are not naturally suited to detect odors in this manner. Dogs are naturally suited to follow odor trails in a number of ways: by following airborne trails with their heads up in an upwind direction (air scenting dogs); with their heads up when moving into the wind and heads down when following in the same direction as the wind (trailing dogs); or with their heads down and noses on the path, following

footsteps (tracking dogs).² However, a drug detection canine has no odor trail to follow when asked to sniff at the front door to a house or when asked to sniff a human being.

There are other complications to consider as well. For instance, odor plumes emanating from cannabis plants within a residence do not disperse in a linear continuous gradient because their dispersal is subject to turbulence.³ Erratic distribution of odor plumes separated by clean air creates a very complex and dynamic task for a canine.⁴ Canine strategy to compensate for signal intermittency coming from an odor plume requires movement upwind to detect flow and odor and a strategy for either maintaining or regaining contact.⁵

In fact, it may simply exceed the capacity of canines to accurately and reliably determine the absence or presence of contraband in this fashion. At least one study has concluded that canines need the information present in five footsteps in order to correctly determine the direction from which an odor plume comes. This, of course, is impossible when the dog is obstructed by a closed front door.⁶

A new double-blind study recently sent shock waves throughout the law enforcement community,

² Peter G. Hepper; Deborah L. Wells, *How Many Footsteps Do Dogs Need to Determine the Direction of an Odor Trail?* Chem. Senses 30:4, 292 (2005) (herein the Queen's Belfast Study).

³ Queen's Belfast Study, 291-298

⁴ Id.

⁵ Id.

⁶ Id.

shaking pre-existing beliefs that dog alerts are generally reliable.⁷ Over the span of two days, 18 trained and certified drug detection canines and their handlers took part in a meticulously prepared experiment to study the influence of handler bias on narcotics detection dogs' performance.

Experimenters told the human handlers that drugs might be present at the testing site, but in fact, there were no contraband drugs in any of the test areas. Thus, any alerts would be false alerts, and zero alerts would be considered a perfect score. Each team completed two five-minute searches in each of four search areas. The results were astonishing. The correct response rate was only 15% (21 clean runs); the error rate was 85% (123 runs).⁸ Only one dog of the 18 trained drug detection dogs did not falsely alert.⁹

The Davis Study concluded that the enormous number of false alerts confirmed researchers' hypothesis that handler beliefs influenced the reliability of the trained drug detection dogs.¹⁰

⁷ Lisa Lit; Julie B. Schweitzer; Anita M. Oberbauer. *Handler Beliefs Affect Scent Dog Detection Outcomes*, *Anim. Cogn.* (2011) 14:387-394 ("the Davis Study").

⁸ Davis Study, p. 390.

⁹ Davis Study, Fig. 1, Team 6. Interestingly, no dogs alerted on or around doors where sealed scent containers of marijuana and gunpowder had briefly been placed in plain view of the humans to suggest to the human handlers that authentic contraband was planted for the test runs. Davis study, 393.

¹⁰ Id. at 391.

In general, a dog's performance is not solely dependent on olfactory acuity. Context matters, and the interaction between training paradigm and the nature of the detection problem are cognitive factors that can impact performance.¹¹ Dogs may thus be conditioned to respond to unintentional human cues. Human cues that direct dog responses without formal training include pointing, nodding, head turning, and gazing. Moreover, in the Davis Study, three handlers admitted to *intentionally* overly cueing their dogs to alert at certain locations.¹²

Courts must understand that even highly trained dogs will respond to both intentional and unintentional handler cues. This inevitability taints the objectivity of the alert performance and imbeds bias in the dog's decision-making and reasoning abilities.¹³ Other studies suggest that dog behavior is also affected by handler gender, personality and

¹¹ See I. Gazit; A. Goldblatt; J. Terkel, *The Role of Context Specificity in Learning: The Effect of Training Context on Explosives Detection in Dogs*, *Anim. Cogn.* 8: 143-150 (2005); L. Litt; C.A. Crawford, *Effects of training Paradigms on Search Dog Performance*, *Appl. Anim. Behav. Sci.* 98:277-292 (2006); L. Litt, *Evaluating Learning Tasks Commonly Applied in Detection dog Training*, in W. Helton (ed.), *Canine Ergonomics: The Science of Working Dogs* (CRC Press, Boca Raton 2009).

¹² Davis Study, at 392.

¹³ A. Erdohegyi; J. Topal; A. Miklosi, *Dog-logic: Inferential Reasoning in a two-way Choice Task and Its Restricted Use*, *Anim. Beh.* 74: 725-737 (2007).

attentional cues such as eye contact and human eye, head and body orientation.¹⁴

There is no reported data concerning the reliability and accuracy of perimeter sniffs and alerts by drug detection dogs at private residences, specifically.¹⁵ However, Professor Richard E. Myers II argues that a dog alert should be considered insufficient to constitute probable cause because the “science” of alerting is simply not fully developed.¹⁶ He argues that the true success rate for drug detection dogs is only 16% when false positives are taken into consideration.¹⁷

Professor Meyers recommends the evaluation of comprehensive data on the use of dogs and their accuracy rates in the field, perhaps using the model used by the U.S. army.¹⁸ He suggests a rigorous national standard for certification and annual

¹⁴ See K. Kotrschal; I. Schoberl; B. Bauer; A.M. Thibeaut; M. Wendl, *Dyadic relationships and operational Performance of male and female owners and Their Male Dogs*, *Behav. Processes*, 81: 383-391 (2009); C. Schwab; L. Huber, *Obey or Not Obey? Dogs (Canine Familiaris) Behave Differently in Response to Attentional States of Their Owners*, *J. Comp. Psychol.* 120:169-175 (2006).

¹⁵ See Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs? Unreasonable Expansion of Canine Sniff Doctrine To Include Sniffs of the Home*, 88 *Or. L. Rev.* 829, 835-837 (2009) (“Lunney”).

¹⁶ See Richard E. Meyers II, *Detector Dogs and Probable Cause*, 14 *Geo. Mason L. Rev.* 1, 14-15 (2006) (“Meyers”).

¹⁷ *Id.*, 15

¹⁸ *Id.* at 33, citing Department of the Army, *Pamphlet 190-12: Military Working Dog Program* (1993).

recertification based on field results, including a consideration of the rate of false positives.¹⁹

At present, no known private agency specifically trains or certifies drug detection dogs to sniff for contraband located within a building while the animal is outside the building. Drug detection dogs can be trained and certified based upon interior walk-throughs and detection in open areas, such as fields, where drugs are hidden, but not for perimeter sniffs.

The doubt these data and studies cast upon the reliability of narcotics detection by dogs should give the Court great pause as it considers the potential implications of approving warrantless dog sniffs of private homes. A positive alert by a trained dog effectively constitutes a proxy for a finding of probable cause to issue a warrant. In light of the unreliability currently inherent in the type of sniff search at issue, the allowance of these searches absent some independent source of probable cause will result in baseless interference with the most basic privacy rights of countless innocent citizens. Therefore, this Court should ensure that a probable cause finding is required *prior to* the subjection of a citizen's privacy rights to the sort of Russian roulette that this form of dog sniff represents.

II. In light of their demonstrated unreliability and the way in which they are performed, dog sniffs of the perimeters of private homes constitute “searches” for purposes of the Fourth Amendment.

¹⁹ Id. at 33-34

C. Studies demonstrate that dog sniff searches are likely to reveal private information other than the presence of contraband.

This Court's holding in *Caballes*—that a sniff by a trained narcotics detection dog during a lawful traffic stop was not a search—hinged on the proposition that the dog only alerted to the presence of contraband and that an erroneous alert would not reveal any private information. 543 U.S. at 409. The Court noted that the subject had produced no evidence or findings to support a contrary position. But according to the research cited *supra*, dog sniffs at the perimeter of a home are likely to result in a flood of false positive alerts and the routine granting of search warrants of homes.²⁰ In fact, it may be impossible for a trained drug detection dog to distinguish the scent of contraband from lawful substances that contain a common ingredient.

For example, acetic acid that is found in pickles and some glue is also found in heroin. There are at least 32 legally prescribed medications that have opioid content. Exposure to air releases the

²⁰ In the Davis Study, for instance (conducted inside a building as opposed to outside its front door), the majority of the false alerts focused on an air conditioner, a first aid kit and a wall heater as the source of supposed illegal contraband. (See Davis Study, p. 393, Table 2). These three items are commonly found within private residences.

odor of acetic acid, which will cause a dog to alert, for the same odor emanates from opium.²¹

Methyl benzoate is found in large concentrations in cocaine, and is the ingredient that triggers an alert by a trained drug detection dog.²² Methyl benzoate dissipates quickly when it is exposed to air, and is reduced to low levels consistent with legal products commonly found in most American homes: solvents, insecticides, first aid kits and perfume.²³ It is not thought to be currently possible for a trained drug detection dog to alert to pure cocaine, because this drug deadens the sense of smell.²⁴

It is therefore likely that a trained drug detection dog will alert to the presence of methyl benzoate in any substance, whether legal or illegal. These include, for instance, stacks of circulated U.S. paper currency that is notorious for containing traces of the ingredients of cocaine.²⁵ Now that the U.S. Food and Drug Administration has approved the use of methyl benzoate in foods as a synthetic

²¹ See Lewis W. Katz and Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735, 755 (2007) (“Katz”).

²² Katz, 755-56.

²³ Lunney 829-39

²⁴ Id. at 838.

²⁵ See National Institute of Justice, *U.S. Department of Justice, Guide for the Selection of Drug Detectors for Law Enforcement Applications: NIJ Guide 601-00*, at 6-7, 21(2000); Paul Waggoner et al., *Canine Olfactory Sensitivity to Cocaine Hydrochloride and Methyl Benzoate*, 2937 SPIE 216, 216-217 (1997) (“Waggoner”).

flavoring substance, any person with flavored food in their home may also become the victim of a canine false positive alert.²⁶

An additional basis for concerns about false positives in a household setting is the fact that experienced drug detection dogs often begin to associate the smells of legal products involved in the seizure of illegal drugs with illegal substances. These include, for instance, baking soda (used as an ingredient to reduce the potency of a drug); re-sealable plastic bags (used to package illegal drugs); air fresheners and coffee grounds (used to conceal the odor of contraband). A trained drug detection dog may therefore alert to baking soda used for cooking and cleaning, re-sealable plastic bags used for packaging lunches, air fresheners used to mask ordinary household odors, and coffee grounds used to make coffee.²⁷

Research demonstrates that perimeter dog sniffs are likely to result in false positives that, in turn, will reveal private details of the resident's life other than the existence of contraband. While these details may be as mundane as the location of a first-aid kit in the home or the type of coffee the citizen prefers, they are nonetheless details as to which every citizen has a reasonable expectation of privacy.

D. A perimeter dog sniff is a search because the amount of time required to complete it transforms police presence into a trespass on private property.

²⁶ See 21 C.F.R. § 172.515 (2009).

²⁷ See Meyers, 1-36, 4.

Earlier this year, in *United States v. Jones*, 132 S.Ct. 935 (2012), this Court held that the warrantless installation of a GPS tracking device on a motor vehicle and the use of that device to monitor the vehicle's movements constituted a search. In reaching this conclusion, the Court relied heavily on the fact that the government had "physically occupied private property for the purpose of obtaining information," observing the historically close relationship between Fourth Amendment values and common law property rights. *Id.* at 949-50.

The Court explained the principles at the root of the Fourth Amendment this way:

[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave; if he does, he is a trespassor, though he does no damage at all; if he will tread upon his neighbor's ground, he must justify it by law."

Id. (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)).

The case of *State v. Morsman*, 394 So.2d 408 (Fla. 1981) articulates the general proposition that an occupant of a home ordinarily does not have an expectation of privacy on a front porch where police officers, salesmen and visitors may appear at any reasonable time to make inquiries. But the arrival of a dog team at the front door to conduct a sniff search for contraband is another matter.

In general, an ordinary visitor enjoys implied permission to inquire at the front door of a private

residence. Such a legitimate visit is typically completed within approximately 30 seconds, after which the property owner either invites the visitor to remain, or the implied permission ends. Assuming that a trained drug detection dog needs more than 30 seconds to determine whether a building contains contraband (from outside the front door), this additional time transforms a lawful visit to an illegal trespass on private property. Because the prolonged presence of a drug detection dog team at a private residence offends constitutes a trespass, it, too, should be considered a search for Fourth Amendment purposes.

CONCLUSION

Trained drug detection dog sniffs, when done on the perimeter of a private residence, are known to be unreliable and inaccurate. This fact militates against their being used—at the absolute discretion of policy—as a proxy for a finding of probable cause that in turn results in a search warrant.

Moreover, because perimeter sniffs of citizens' homes are likely to reveal private information other than the presence of contraband, and because the time required to complete the sniffs converts police presence into a trespass, these sniffs must be considered searches under existing Fourth Amendment jurisprudence.

The specter of a police dog handler team with supporting armed backup at the front door of a private residence is a chilling scenario indicative of the entrenchment of a growing police state. If this Court permits warrantless dog sniffs of citizens' homes, it will unleash an Orwellian nightmare of

intimidation, leaving no one safe from the prying sniffs of the American Police State.

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