Written by **Jack Kenny** on November 2, 2012

High Court Holds "Dog Fight" Over Fourth Amendment.

There may have been more talk about dogs at the U.S. Supreme Court than at the American Kennel Club Wednesday, as the justices heard arguments in two cases involving the state of Florida and drug-sniffing police dogs. Each dealt with the question of whether the use of drug-detecting canines to obtain probable cause for a subsequent search is itself an unreasonable search and a violation of the Fourth Amendment. Attorney Gregory Garre, representing the state of Florida in both cases, argued it is not.

"Are you for or against the dog this time?" Justice Scalia asked when Garre returned for the second case, *Florida v. Harris*.

"For it again, Your Honor," Garre replied.

In *Florida v. Jardines,* heard earlier in the day, Garre argued in defense of a "drug sniff" used by police in the Miami area to obtain probable cause for a warrant to search the home of Joelis Jardines, where they discovered more than 25 pounds of marijuana. Acting on a tip from a citizen "Crime Stopper," police took a Labrador retriever named Franky onto the suspect's property and up to the door of the house, where the dog signaled he had detected the odor or marijuana. The Florida Supreme Court ruled the evidence obtained in the search that followed was inadmissible, finding the warrantless sniffing at the defendant's door to be an "unreasonable government intrusion into the sanctity of the home."

Both Garre and Assistant Solicitor General Nicole Sharasky, appearing on behalf of the U.S. Justice Department in support of Florida, began their arguments by asserting that even in the home there is no reasonable expectation of privacy regarding contraband. The claim did not sit well with Justice Anthony Kennedy, who branded it a "circular argument."

"The argument we're having [is] about whether there is a reasonable expectation in society generally," he told Sharasky. "But this idea that, oh, well, if there is contraband, then all the — all the rules go out the window, that's just circular, and it won't work for me, anyway. "

Garre said the police were trying to curb the production of marijuana in what he called an "epidemic of grow houses" that had become "a scourge to the community." He stressed that the sniffing was not a "physical invasion" of the home and argued that by walking with the dog up to Jardines's door, the police had no more violated Fourth Amendment rights than they do in a "knock and talk" procedure when seeking information about a crime in the neighborhood. Justice Ruth Bader Ginsburg asked if that meant police could take a drug-detecting dog to the door of every house on a street or every apartment in a building.

"Your Honor, they could do that, just like the police could go door to door and to knock on the doors and hope that they will find out evidence of wrongdoing that way," Garre replied. He added the police would effectively be prevented from doing that by "the restraint on resources and the check of community

hostility."

Much of the morning's argument centered on the question of a homeowner's "implied consent," as recognized in custom and common law, for someone to approach the door of a home. Garre suggested the police presence at Jardines' door was no more intrusive than that of a door-to-door salesman or someone selling Girl Scout cookies. Justice Antonin Scalia was not buying that argument. Both the house itself and the resident's property surrounding it are protected from unauthorized searches he said.

"I think you cannot enter the protected portion of a home, which is called the curtilage, with the intention of conducting a search, that that is not permitted. I think our cases establish that," Scalia said.

"The reason for the officer going onto protected property, if he's going on just to knock on the door to sell tickets to the Policeman's Ball, that's fine. If he's going on to conduct a search, that's something else." The justices raised questions as to whether the right to approach someone's door applied to dogs as well as humans. Garre answered that the policeman is entitled to bring a dog with him as long the dog is on a leash. What if, asked Justice Ginsburg, there is a "no dogs allowed" sign on the lawn?

"I think that would be different," Garre answered. "Homeowners can restrict access to people who come up to their front door by putting gates or a sign out front."

"So now we tell all the drug dealers, put up a sign that says 'No dogs,'" said Justice Sonia Sotomayor. The court seemed bogged down at times over dog questions, with Justice Elena Kagan asking Jardines' attorney, Howard Blumberg, if the size and breed would matter. Suppose, she said, "the dog is not a scary-looking dog, the dog is a Cockapoo. So just like, you know, your neighbor with his Cockapoo walks up to your door all the time, that's what this police officer has done."

"Well, whether it's a Cockapoo or Franky, who, from all the pictures, appears to be a very cute dog, it's not what the dog looks like, it's what the dog is doing on the front porch," said Blumberg, adding "the neighbor's dog does not search for evidence on your front porch. That's the key distinction."

Chief Justice John Roberts wondered if Blumberg would have the same objection if a human, rather than a canine, police officer were doing the sniffing.

"So what if there is some person who has, you know, the best sense of smell in the department," asked Roberts, "and they say, well, let's use him to go do the knock and talks when we suspect drugs; that way, he may discover the odor of marijuana when other people wouldn't. Is it wrong for them to select the person with the best sense of smell to do that?" Blumberg said that would be a case of trespass, since the officer would not be there for a "knock and talk," but to initiate a search.

"You're on a really slippery slope with that answer," warned Justice Sotomayor. "There's dual motives in everything police officers do."

Garre noted the presence of mothballs in plain view outside the house as evidence that the marijuana was being grown inside, since mothballs are often used to mask the odor coming out of a grow house. The two sides engaged in dueling precedents, with the attorneys for the state citing *Florida v. Riley* (1989), in which the court upheld as constitutionally permissible a warrantless helicopter surveillance of a home to discover evidence of marijuana on the site. Blumberg argued the relevant precedent is *Kyllo v. United States* (2001), when the court held that targeting a house with heat-sensing thermal imaging to detect the growing of marijuana inside was an unreasonable search, in violation of the Fourth Amendment.

Chief Justice Roberts asked Blumberg if he believed rights would be violated if a police officer were walking a drug-detecting dog past a row of townhouses with front doors abutting the public sidewalk.

“He’s walking the K-9 dog and the dog alerts on a house without any trespass,” said Roberts. “You think that’s still bad?”

“Yes,” Blumberg replied. “And I would submit that would basically be the same thing as a police officer walking up and down the street with a thermal imager that’s turned on.”

In *Florida v. Harris,* the state Supreme Court suppressed the evidence of drug use against Clayton Harris because the prosecution had not demonstrated that the dog that detected the contraband in Harris’ vehicle was trained and certified to be reliable in establishing probable cause. When asked during Wednesday’s oral arguments why the dog’s certification had been expired for 16 months at the time of the arrest, Garre said it was “a lapse” and that the dog had since been certified. He argued, however, that certification was not relevant to the constitutional challenge.

“Our position is that the Fourth Amendment doesn’t impose an annual certification requirement,” he said.

“Some states have it, some states don’t.” Garre argued that the quashing of evidence by the Florida court was based on “an extraordinary set of evidentiary requirements that, in effect, puts the dog on trial in any evidentiary hearing in which a defendant chooses to challenge the reliability of the dog.” Justice Scalia asked Harris’ attorney, Glen Gifford, why he would want to make that challenge.

“Why would a police department want to use an incompetent dog?” Scalia asked. “What — what incentive is there for a police department?”

“The incentive of the officer to be able to conduct a search when he doesn’t otherwise have probable cause is a powerful incentive,” Gifford said. “As the Court has said, ferreting out crime is a competitive enterprise.”