FLORIDA V. JARDINES: WHY THE SUPREME COURT DID NOT SAY TRESPASS

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INTRODUCTION

The Supreme Court recently handed down its decision in *Florida v. Jardines*,[1] affirming by a 5-4 vote the Florida Supreme Court's ruling[2] that the police's use of a trained narcotics detection dog on the front porch of a home is a "search" within the meaning of the Fourth Amendment. This case is the first time the Court has applied the non-*Katz*-based search doctrine articulated in *United States v. Jones*.[3] As will be more fully elaborated below, it is my claim that the Court purposely avoided using the word "trespass" so as not to reverse the Florida state courts, which had decided that the police were lawfully present on the defendant's property at the time of the dog sniff, on an issue lying at the heart of state court competence—that is, application of the common law of trespass.

Recall that in *Katz v. United States*,[4] the Court overruled *Olmstead v. United States*.[5] The Court in *Olmstead* held that wiretapping was not a Fourth Amendment search because there was no physical police invasion of property that would constitute a trespass—there was no "entry of the houses or offices of the defendants."[6] Justice Harlan authored a concurring opinion in *Katz* that was to become the dominant formulation of the test for a search under the Fourth Amendment[7]—if the individual has manifested a subjective expectation of privacy and

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1. 133 S. Ct. 1409 (2013).

2. *See* Jardines v. Florida, 73 So. 3d 34 (Fla. 2011). The Florida Supreme Court held that the Fourth Amendment draws a "firm line at the entrance of the house" and that the "sniff test" undertaken by the police and K9 partner was a search requiring probable cause and a warrant. *Id.* at 55–56. Since the dog sniff was conducted without a warrant, the search was held unreasonable and the evidence of drug activity was suppressed. *See id.*

3. 132 S. Ct. 945 (2012). The Court held that Fourth Amendment protections do not "rise or fall" with the *Katz* formulation, and that the Amendment is also concerned with government trespass. *Id.* at 950.

4. 389 U.S. 347 (1967).

5. 277 U.S. 438 (1928).

6. *Id.* at 464.

7. *See, e.g.*, Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 820 (2004) (noting, in this pre-*Jones* article, that the touchstone of the Fourth Amendment is the "reasonable expectation of privacy" test which first appeared in Justice Harlan's *Katz* concurrence).

society is prepared to accept that expectation as reasonable, then there is a right to privacy protected by the Fourth Amendment in those circumstances.[8]

Justice Scalia, writing for the Court in *Jones*, reasoned that the "persons, houses, papers and effects" portion of the Fourth Amendment would be rendered superfluous if the Fourth Amendment were not closely tied to property rights.[9] According to Justice Scalia's opinion, and much to the surprise of many observers, *Katz*'s reasonable expectation of privacy ("REOP") standard "added to"—but did not "substitute[] for"—the common law trespassory test used by the Court for decades prior and embodied in *Olmstead*.[10] As the Court put it, "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding."[11] As a result, information gained by the government's trespassory activity would be the product of a search within the meaning of the Fourth Amendment.[12] Five members of the Court saw the police's placement of a GPS device on the defendant's car as a governmental trespass on private property, therefore constituting a Fourth Amendment search.[13] Four others concurred in the judgment, but rejected the trespass rationale.[14]

I. DISSECTING JARDINES: RATIONALIZING THE COURT'S OPTIONS

It is quite clear that in *Jardines*, Justice Scalia did not rely on the REOP strand of *Jones*. But what is curious is that he did not use the word "trespass" once in his majority opinion.[15] Instead, Justice Scalia conspicuously referred to that portion of the *Jones* opinion as holding that "'when the Government obtains information by *physically intruding*' on persons, houses, papers or effects," a search has occurred.[16] Because, according to the majority, that occurred when the police brought a narcotics-sniffing dog to the defendant's front door to search for drug

8. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
9. *Jones*, 132 S. Ct. at 950.
10. *Id.* at 952.
11. *Id.* at 950 (citation omitted).
12. A "search" requires probable cause and a warrant. So the syllogism continues: if the government is trespassing, it quite obviously does not have a warrant, and is thus committing an *unreasonable* search within the meaning of the Fourth Amendment.
13. *Jones*, 132 S. Ct. at 954.
14. *Id.* at 957 (Alito, J., concurring). Justice Alito's analysis began: "I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." *Id.* at 958.
15. Professor Kerr first identified this issue in an article in *The Volokh Conspiracy*. *See* Orin Kerr, *Supreme Court Hands Down* Florida v. Jardines, VOLOKH CONSPIRACY (Mar. 26, 2013 10:38 AM), http://www.volokh.com/2013/03/26/supreme-court-hands-down-florida-v-jardines/.
16. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (quoting *Jones*, 132 S. Ct. at 950–51 n.3 (emphasis added)).

activity, there was no reason to reach the question of whether the defendant's reasonable expectation of privacy was violated.[17]

In my view, the "trespass" test articulated in *Jones* and the "physical intrusion" application in *Jardines* are identical in content. Indeed, Justice Kagan's concurring opinion understands the majority opinion to have found that the police conduct constituted a trespass.[18] The dissent reached a similar conclusion (though it obviously did not agree that one had occurred).[19] What is more difficult to discern is whether or not this branch of Fourth Amendment doctrine relies on common law trespass—as the *Jones* majority articulated it—or on some notion of constitutional common law, under which the federal and state courts are to decide if the police committed a "physical intrusion" having constitutional significance. But in my view, there is little reason to think it is the latter. Aside from the understanding evidenced by the concurring and dissenting justices, the remainder of this Article offers another reason to think that the *Jones* test is alive and well as articulated in that opinion, and that there were other, more deeply-rooted reasons for the Court to avoid using the magic word "trespass" in *Jardines*, and instead rely on a notion of "physical intrusion."

It will be interesting to see how this issue plays out in the lower courts, but for the sake of observation, I suspect that the majority in *Jardines* had a particular reason for not using the word "trespass" despite the strong expectation that it would do so based on the opinion in *Jones*. My theory is that Justice Scalia did not want to intrude upon the Florida courts' handling of the trespass issue. As the dissent in the Florida Supreme Court decision points out, it was undisputed that the police were lawfully present at Jardines' front door.[20] There was no trespass under state law—that much was clear for the remainder of litigation in the Florida courts[21]—and the United States Supreme Court.[22] Conversely, the Florida Supreme Court had found a search under the more traditional *Katz*/REOP test.[23] It decidedly did not revisit the trespass issue, and let stand the Florida Court of Appeals' ruling that the police were lawfully present at the defendant's front door.[24]

Thus, in order for the U.S. Supreme Court to affirm the finding of a "search," I think it had three main options: 1) affirm that a search had occurred on the REOP rationale, 2) vacate on the REOP analysis and remand to the state courts for consideration in light of *Jones* and the

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17. *See id.* at 1417.
18. *See id.* at 1418 (Kagan, J., concurring).
19. *See id.* at 1420 (Alito, J., dissenting).
20. Jardines v. Florida, 73 So. 3d 34, 61 (Fla. 2011) (Polston, J., dissenting) ("[I]t is undisputed that one dog and two officers were lawfully and briefly present near the front door of Jardines' residence when the dog sniff at issue in this case took place.").
21. State v. Jardines, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008) ("[T]he officer and the dog were lawfully present at the defendant's front door . . .").
22. *See supra* text accompanying note 16.
23. *See Jardines*, 73 So. 3d at 46.
24. *See supra* note 21.

trespass rationale (decided after the Florida Supreme Court decided *Jardines*), or 3) find a search based on the *Jones* trespass test and commit a blunder of judicial federalism.[25]

The first option would seem the easiest, and it is what I thought the Court was poised to do. However, the majority turned out to be much more eager to apply the "new" *Jones* rationale (that Justice Scalia claimed was actually an old rationale) instead of traditional REOP doctrine from *Katz*.[26] The second option would be unsatisfactory, since it would leave the ultimate disposition of an important Fourth Amendment issue (dog sniffs as searches) unresolved during more litigation in the state courts, and even then, the Florida courts' resolution of the Fourth Amendment question would not necessarily be binding in other states. Furthermore, if the Supreme Court reversed the state courts on the REOP rationale, the judgment entered on remand would probably be one finding "no search" since there is no reason to believe the issue of trespass would be decided any differently by the state courts the second time around.[27] This option would accomplish little, save for virtually requiring the state courts to find that no search occurred and, perhaps more cynically, would only be useful if that is the result the justices wanted.

The third option would be something of an intrusion into the routine workings of the state courts, since it would involve the United States Supreme Court resolving a basic question of state tort law that was settled below in the state courts.[28] Answering the question of whether a common law trespass occurred is an issue at the heart of state court decision making. In other words, if the Supreme Court disagreed that the dog sniff violated a reasonable expectation of privacy, but nevertheless thought that a trespass—and therefore a search—had occurred, it essentially would be telling the Florida state courts that they had misapplied the common law of trespass.[29]

While not inconceivable,[30] this approach would not comport with a reasonable sense of federal non-interference with state court adjudication. This is best understood as a question of jurisdictional discretion—while the Supreme Court could reverse a state court's resolution of a state law issue, it might decline to do so based on respect

25. At oral argument, Justice Alito explicitly asked counsel for the defendant why the Court should not accept as a statement of Florida law that no trespass occurred, indicating some uneasiness from the bench with re-deciding an issue of state tort law and causing friction between the federal and state courts in our system of dual sovereignty. *See* Transcript of Oral Argument at 59, Florida v. Jardines, 133 S. Ct. 1409 (2013) (No. 11-564), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-564.pdf.

26. *See Jardines*, 133 S. Ct. at 1417.

27. That is, there is no reason to think the finding of "no trespass" would be re-visited in any way.

28. *See supra* note 21.

29. To be clear, since there is no federal law of trespass, a judgment from the Supreme Court holding that a search had occurred due to a governmental trespass would effectively reverse the Florida courts on their resolution of an issue of common law.

30. *See infra* note 34.

for the state court. Similarly, it could simply resolve the case on other grounds to avoid the problem. Here, the Court could have simply affirmed on the REOP rationale and declined to apply the new *Jones* analysis.[31]

The way that the Court decided *Jardines* is substantively in line with the third option—it found that a search had occurred, but not on the traditional REOP framework. And this is what precipitated the fourth "option." The Court resolved the search issue on the new *Jones* rationale without saying it was actually finding a "trespass."

II. WHY THE COURT DIDN'T SAY "TRESPASS"

My claim is that Justice Scalia took this approach ("physical intrusion" instead of "trespass") in the first instance, and gained the support of four other justices in conference, in order not to offend the Florida state courts by re-working (i.e., reversing) their resolution of the common law trespass issue. I see no explanation in the majority opinion of how the *Jones* "trespass" test has changed in any way in *Jardines*, where it was described as a "physical intrusion" rationale.[32] Nor is an explanation provided by the other justices writing separately in concurrence or dissent.[33] Instead, I think Justice Scalia purposely minced his words in a way that allowed *de facto* application of the *Jones* trespass rationale without using the word "trespass." There is a strong background notion shared by many onlookers that, despite the Court's technical ability to do so, it should not (and in this case would not) re-visit an issue so central to the daily work of a state court.[34] The majority could, to some extent, blunt the resonance of such a move by carefully selecting its words.

To ground things a bit more in federal courts doctrine, consider the jurisdictional principles at play in the case. There is no doubt that the

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31. *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (outlining the various ways in which the Supreme Court could exercise discretion on review of state court cases and concluding the discretion is necessary to avoid undue interference with the states).

32. *See supra* note 16.

33. *See supra* text accompanying notes 18–19.

34. In conversations with Judge Raymond Lohier of the Second Circuit Court of Appeals, Judge John Koeltl of the District Court for the Southern District of New York, and Professor Helen Herhskoff of NYU Law, all told me that they had strong doubts that the Court would decide the *Jardines* case on anything but the REOP rationale, since going beyond that issue, and onto the new *Jones* test, would require a disagreement with the Florida courts on whether a common law trespass had occurred. They all echoed Justice Alito's concern of failing to accept the state courts' resolution as an authoritative statement of Florida law. Discussion with Judge Raymond Lohier, 2nd Circuit Court of Appeals and Judge John Koeltl, United States District Court for the Southern District of New York, in New York, N.Y. (Feb. 27, 2013) during New York University School of Law Constitutional Litigation Seminar, held at the United States District Court for the Southern District of New York, 500 Pearl Street, New York, N.Y.; Interview with Helen Hershkoff, Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University School of Law, in New York, N.Y. (Mar. 4, 2013).

Supreme Court possesses the jurisdiction to decide non-federal issues when they are antecedent to the resolution of an issue of federal statutory or constitutional right, as in these Fourth Amendment search cases.[35] The issue of whether a common law trespass occurred must be determined in order to decide whether a "search" occurred within the meaning of the federal Constitution—indeed, the answer to the "search" question is entirely answered by the "trespass question." But I think that larger issues of federal-state judicial relations were at play in this case, and that was what was driving the unexpected outcome. As Professor Shapiro has explained, "a court will often acknowledge that it has jurisdiction over the subject matter of a dispute yet, despite Marshall's dictum, will refrain from exercising it."[36] In other jurisdictional settings (i.e., not on review of a state court judgment), the Court has developed a set of abstention doctrines designed to promote equity, comity, and federalism—*Pullman*,[37] *Burford*,[38] and *Younger*[39] to name a few of the most prominent examples. Similarly, on direct review of state court judgments, the Court's decision in a given case not to visit certain issues resolved in the state courts may also be driven by concerns for comity and federalism. Leaving undisturbed a state court's ruling on an issue in a case is a vote of confidence for the state courts; on the other hand, a reversal of a state court's ruling on a run-of-the mill question may create

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35. The Supreme Court has certiorari jurisdiction to review state court judgments under 28 U.S.C. § 1257 (2012). It has been relatively clear since *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), that the Supreme Court, on review of a state court judgment, can review antecedent state law questions, which are those that must be decided in order to ultimately determine whether the state court properly decided an issue of federal law. However, the Supreme Courts (and federal courts more generally) has adopted a set of abstention doctrines under which jurisdiction—and competence to address a certain issue—may be declined for reasons of equity, comity, or federalism. The federal courts have not held fast to Justice Marshall's admonition in *Cohens v. Virginia*: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Cohens v. Virginia, 19 U.S. 264, 404 (1821).

36. Shapiro, *supra* note 31 at 547.

37. *See generally* Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). *Pullman* abstention involves staying a federal court action, but retaining jurisdiction, so that the state courts have an opportunity to interpret the constitutionally-suspect statute in question and thereby, potentially avoid the need for a constitutional decision.

38. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943). Under *Burford* abstention, a federal court sitting in diversity may stay its hand where the state courts have greater expertise in a question of state policy, and the question is of substantial importance to a state administrative scheme. The idea is that the federal court should hesitate before interfering in a state administrative scheme in which the state courts play a vital role.

39. *See generally* Younger v. Harris, 401 U.S. 37 (1971). *Younger* abstention is based on a rule of equity which forbids a court of equity from enjoining ongoing criminal proceedings, even where the individual being prosecuted is raising federal constitutional claims. Also at play is a principle of comity, which holds that the state court will give the federal constitutional defenses in the criminal case a fair shake.

friction between the federal and state judicial systems. By not using the word "trespass" and appearing to retreat from the repeated use of that word in *Jones*, Justice Scalia seems to have decided the case on an altered rationale. But on closer examination, it appears that he may have been trying to avoid the affront to the state courts that would have occurred had he explicitly second-guessed a common law question at the core of their competence by saying that a trespass took place. Calling the conduct at issue a "physical intrusion," at the very least, avoided this in name. How successful this attempt was at avoiding friction with the Florida state courts on a decidedly non-federal issue is another matter entirely.

CONCLUSION

In summary, the Court decided that the sanctity of the home was offended by the dog sniff in this case since the police entered this constitutionally protected area, but it did so in a roundabout way. The result is that the state of the *Jones* "trespass" test is in flux and will spawn more litigation over whether there must be a finding of a common law trespass in order to rely upon that branch of Fourth Amendment search doctrine, or if instead, state and federal courts are to rely upon some notion of an unconstitutional "physical intrusion" whose relationship to common law trespass is unclear at this point in time. Moreover, this case illustrates that the procedural posture of a case on *certiorari* from a state supreme court may affect the substantive content of the decision in the United States Supreme Court. Here, there is strong reason to believe—in light of judicial federalism—that the finding in the Florida Court of Appeals that the officer and dog were lawfully present on the property tied the hands of the Supreme Court ever so slightly. As a result, the Court's holding finding a search was less than straightforward and tiptoed around the word "trespass" while, in effect, holding that is precisely what occurred.