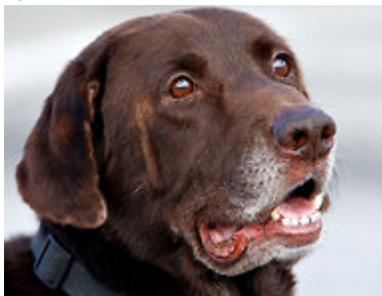


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## Question for Justices: Do Aldo and Franky's Noses Always Know?

By ADAM LIPTAK



Alan Diaz/Associated Press

The Florida Supreme Court threw out the evidence in a case involving Franky, a retired narcotics detector dog.

WASHINGTON — Every dog has its day, but not every dog has its day in court.

Aldo, a German shepherd, and Franky, a chocolate Labrador retriever, are exceptions. The Supreme Court plans to hear their cases on Wednesday.

The basic question in both cases, said [Orin S. Kerr](#), a leading expert on the Fourth Amendment right against unreasonable search, is this: “What do you think of a dog’s nose?”

It is surely a marvel. But is it also, as the Supreme Court has suggested in previous cases, essentially infallible?

The great thing about dogs trained to sniff out drugs and other contraband, the court has said, is that they cannot invade human privacy because their noses reveal, [as Justice John Paul Stevens put it in 2005](#), “no information other than the location of a substance that no individual has any right to possess.”

As [the prosecutors in Franky’s case wrote](#), “anything else that the dog smells remains private.”

But there is reason to doubt that dogs are, [as a brief for two groups of criminal defense lawyers put it](#), “binary contraband detectors.”

Justice David H. Souter, [in a dissent from the 2005 decision](#), cited a study showing “that dogs in artificial testing situations return false positives anywhere from 12.5 to 60 percent of the time.”

“The infallible dog,” he wrote, “is a creature of legal fiction.”

There is a growing body of evidence to support that view. Last year, [The Chicago Tribune analyzed three years of data](#) from suburban police departments and found that alerts from dogs

during roadside encounters led to drugs or paraphernalia just 44 percent of the time. For Hispanic drivers, the rate was 27 percent.

Prosecutors say that does not prove anything. The drugs may have been exceptionally well hidden, they say, or there may have been lingering odors from drugs no longer present.

“When you enter the kitchen and smell popcorn, the fact that some has already eaten all the popcorn and put the bag outside in the trash takes nothing away from the fact that you accurately smelled popcorn in the kitchen,” [they wrote in Aldo’s case](#), Florida v. Harris, No. 11-817.

The case illustrates the difficulty of separating false signals from real ones. In 2006, Aldo alerted his human partner to the presence of chemicals used to make [methamphetamines](#) in the pickup truck of Clayton Harris, who had been pulled over near Bristol, Fla., for driving with an expired license plate.

A few weeks later, the same law enforcement team pulled Mr. Harris over again, this time for a faulty brake light. Aldo again signaled the presence of drugs. But this time, the police officer found no contraband. It may be, of course, that Aldo may still smelled an old smell.

But there are more problematic possibilities.

“Some dogs are more accurate than others, and, like people, dogs have good days and bad days,” [Mr. Harris’s lawyers told the justices](#). Dogs sometimes issue false alerts when they smell other dogs, the brief said, or when they are prompted, perhaps subconsciously, by their handlers.

Most important, according to [a brief by some 50 law professors specializing in the Fourth Amendment](#), dogs do not smell drugs as such but rather molecules that are also present in the odors of lawful substances.

Cocaine, for instance, shares a component with snapdragons and petunias. Heroin shares one with vinegar and old aspirin. Ecstasy has something in common with lice repellent.

The Florida Supreme Court was not convinced that Aldo was reliable and [ordered that the evidence he found be suppressed](#).

The same court [also threw out the evidence](#) in Franky’s case, Florida v. Jardines, No. 11-564. The question there was whether police may use dogs to sniff for drugs outside of homes.

The sanctity of the home is at the core of what the Fourth Amendment protects. But there, too, the Supreme Court has drawn distinctions between methods that can only detect contraband and more general intrusions.

In 2001, for instance, the court [limited the use of thermal-imaging devices](#) to peer into homes. The problem, Justice Antonin Scalia wrote, was that the devices could detect not only heat

lamps used to grow [marijuana](#) but also “at what hour each night the lady of the house takes her daily sauna and bath.”

Perhaps dogs are different. Perhaps they really are binary contraband detectors capable of finding only illegal substances. Is that reason enough to let them sniff around our front doors?

In a [1984 dissent](#), Justice William J. Brennan Jr. foresaw a day when “canine cocaine connoisseurs” would “roam the streets at random, alerting the officers to people carrying cocaine.”

The date of the dissent was fitting, and Justice Brennan’s forecast was not fanciful. The authorities in [Virginia](#) and [North Dakota](#) have recently announced plans to sweep through housing complexes with dogs to sniff for drugs.