

Coming Attractions: The Criminal Cases

by Sophia M. Stadnyk, Senior Associate Counsel

The Supreme Court's October 2012 Term begins on September 24, 2012, with oral arguments set to begin on October 1st. This column will look at three criminal cases on the Court's upcoming docket; the next issue will review the civil cases, including *Fisher v. University of Texas at Austin* (No. 11-345) (Equal Protection Clause and race in university admissions); *Vance v. Ball State University* (No. 11-556) (Title VII and whether the "supervisor" liability rule applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work); and *Lozman v. City of Riviera Beach, Florida* (No. 11-626) (whether a floating structure indefinitely moored, receiving power and other utilities from shore, and not intended to be used in maritime transportation or commerce, constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction).

In *United States v. Bailey*, 652 F.3d 197 (2d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3667 (U.S. June 04, 2012) (No. 11-770), the question presented is whether, pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981) (warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed. Detectives had obtained a search warrant for the "basement apartment of 103 Lake Drive," and saw two men, including Bailey, exiting the gate at the top of the stairs that led down to the basement. Both got into a car and drove away. The officers, out of concern for their own safety and to prevent alerting other possible occupants, did not detain the men on-site. After the car traveled about a mile from the house, the officers pulled the car over and conducted a "pat-down" of Bailey and his passenger. Bailey told officers he was coming from his home at 103 Lake Drive. Both men were handcuffed and told they were being detained, but not arrested, incident to the execution of a search warrant at the basement of 103 Lake Drive. Bailey then responded, "I don't live there. Anything you find there ain't mine." A gun and drugs in plain view were found in the apartment and Bailey was arrested. Less than ten minutes had elapsed between his stop and his formal arrest. He claimed he had been unlawfully detained and searched in violation of the Fourth Amendment. The Second Circuit joined the Fifth, Sixth, and Seventh Circuits in extending *Summers* to permit the detention of occupants who had been seen leaving a residence subject to a search warrant.

Two police-dog sniff cases are on the docket: *Florida v. Harris*, 71 So. 3d 756 (Fla. 2011), *cert. granted*, 80 U.S.L.W. 3545 (U.S. Mar. 26, 2012) (No. 11-817) and *Florida v. Jardines*, 73 So. 3d 34 (Fla. 2011), *cert. granted*, 80 U.S.L.W. 3392 (U.S. Jan. 06, 2012) (No. 11-564). In *Harris*, a drug detection dog to, Aldo, alerted to Harris's truck after Harris had been stopped by police for having expired tags. A search revealed 200 pseudoephedrine pills and other precursors to cooking methin the truck. There was no evidence on whether a dog trained to detect and alert to meth would also detect and alert to pseudoephedrine. Moreover, Aldo's handler did not keep records of Aldo's "misses" (failed alerts), only Aldo's successful alerts. In fact, Aldo again alerted to Harris and his truck some time after the stop at issue, and no drugs were found.

The Florida court concluded that, to meet its burden of establishing that the officer had a reasonable basis for believing the dog to be reliable in order to establish probable cause for the warrantless search of the truck, the State was required to present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle. In the absence of a uniform standard, the reliability of the dog could not be established by demonstrating only that a dog was trained and certified. The State failed to meet its burden of establishing probable cause in this case. The issue before the Supreme Court is whether an alert by a well-trained narcotics detection dog, certified to detect illegal contraband, is insufficient to establish probable cause for the search of a vehicle.

The question presented in *Florida v. Jardines* is whether a dog sniff at the front door of a suspected grow house, a private residence, by a trained narcotics detection dog, is a Fourth Amendment search requiring probable cause. Police received an unverified tip that Jardines' home was being used to grow marijuana. Franky, a drug detection dog, was taken to the front door at 7:00 a.m. and alerted to the presence of drugs. A detective then went up to the front door for the first time, and smelled marijuana. He also noticed the air conditioner was running constantly, which suggested unusual heat inside, like that created by high-intensity light bulbs. A search warrant was obtained, and the resulting search confirmed that the marijuana was being grown inside the home. Jardines claimed that the war-

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Occupy Movement *Cont'd from page 9*

lives/2011/12/27/gIQAwCtNRP_story.html (last accessed May 8, 2012).
31. Meghan Barr, *Occupy Wall Street: 6 Months Later, What Has Occupy Protest Movement Achieved?*, The Huffington Post, Mar. 16, 2012, at http://www.huffingtonpost.com/2012/03/16/occupy-wall-street-6-months-later_n_1352752.html (last accessed May 8, 2012).
32. Colin Moynihan, *Evicted From Park, Occupy Protestors Take to the Sidewalks*, The New York Times, Apr. 12, 2012, at http://www.nytimes.com/2012/04/13/nyregion/evicted-from-park-occupy-protesters-take-to-the-sidewalks.html (last accessed May 8, 2012).
33. Gene Policinski, *Government must be careful with tactics against Occupy camps*, First Amendment Center, Mar. 02, 2012, at http://www.firstamendmentcenter.org/government-must-be-careful-with-tactics-against-occupy-camps (last accessed May 13, 2012).
34. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650, (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). ML

Public Employer *Cont'd from page 13*

against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Age Discrimination in Employment Act of 1967 (prohibits age discrimination against workers 40 or older and also makes it illegal to retaliate against a person because the person complained about age discrimination), Title VII of the Civil Rights Act of 1964 (discrimination on the basis of race, color, religion, national origin, or sex prohbited; the law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Genetic Information Nondiscrimination Act of 2008 (this makes it illegal to discriminate against employees or applicants because of genetic information).
8. Macy v. Holder, Appeal No. 0120120821, April 20, 2012 at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (transgender complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status held cognizable under Title VII).
9. As an example, the Civil Service Reform Act of 1978, prohibits federal employees who have authority to take, direct others to take, recommend or approve any personnel action from discriminating against applicants and employees on the bases of race, color, sex, religion, national origin, age, disability, marital status or political affiliation and from discriminating against an applicant or employee on the basis of conduct which does not adversely affect the performance of the applicant or employee. The Office of Personnel Management has interpreted the prohibition of discrimination based on "conduct" to include discrimination based on sexual orientation. *See* U.S. Office of Personnel Management, Addressing Sexual Orientation Discrimination In Federal Civilian Employment, A Guide to Employee's Rights, at http://www.opm.gov/er/address2/Guide01.asp (last visited July 22, 2012) and U.S. Equal Employment Opportunity Commission, Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation, at http://www.eeoc.gov/federal/otherprotections.cfm (last visited July 22, 2012). ML

Supreme Court *Cont'd from page 23*

rantless "sniff test" violated his right against unreasonable searches under the Fourth Amendment.

The Florida court granted the motion to suppress. "Contrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle 'sniff test' and signals an 'alert' if drugs are detected." Instead, it was a "public spectacle," "a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments." Accordingly, given the special status accorded a citizen's home under the Fourth Amendment, the "sniff test" was a "substantial government intrusion into the sanctity of the home" and constituted a search within the meaning of the Fourth Amendment. As such, the search had to be preceded by an evidentiary showing of probable cause. ML

Code Enforcement *Cont'd from page 31*

I do believe in making the penalties as stiff as possible. The penalty provision should also include attacking municipally-issued licenses, such as a tobacco dealer's license. This provision would allow pursuing businesses, such as gas stations and convenience stores selling these substances, which would be the likely places for teens and young adults to purchase the drugs.

Folks, the war on drugs just got bigger and more problematic. If the thinking on the previous version of the war on drugs is that it is unwinnable, what position are we in now as we deal with synthetic drugs, a moving target? We all need to work in concert to wage this war, as best we can. ML

Ordinances *Cont'd from page 29*

"Legislature's intent to allow not only local regulation of the geographic placement of collectives and the manner in which they conduct operations, but also local regulation of the creation of collectives. The local power to regulate creation, by definition, carries with it the power to regulate the number of collectives in existence." The trial court's order granting the preliminary injunction was therefore reversed. *420 Caregivers, LLC v. City of Los Angeles*, No. B230436, 2012 Cal. App. LEXIS 780 (Cal. Ct. App. July 03, 2012). The League of California Cities and California State Association of Counties participated as Amici Curiae on behalf of the City in this case. ML

Cases *Cont'd from page 35*

intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement."

Regarding the reasonableness of the use of force, Nelson and his friends did not