Search and Seizure Cases in the October 2012 Term of the Supreme Court

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Summary

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

This term, the Supreme Court decided that (1) deploying a drug-detecting dog at the front door of a house qualifies as a Fourth Amendment search (*Florida v. Jardines*); (2) the positive reaction of a trained, drug-detecting dog constitutes probable cause per se (*Florida v. Harris*); (3) the rationale which permits the warrantless, suspicionless detention of individuals found in a place covered by a search warrant also permits the warrantless, suspicionless off-site apprehension and return of individuals who have recently left a place covered by a search warrant (*Bailey v. United States*); and (4) the body's capacity to absorb blood alcohol, without more, does not constitute a "destruction of evidence" exigency justifying a per se exception to the warrant requirement (*Missouri v. McNeely*).

The Supreme Court has said in the past that walking a drug-detecting dog around a car pulled over on the highway or around luggage in an airport is not a Fourth Amendment search. Nevertheless, the Court in *Jardines* noted that those cases were decided under the "expectation of privacy" rationale. Under the alternative "property intrusion" rationale, a Fourth Amendment search occurred when police used a trained dog to test for the smell of marijuana on Jardines's porch.

Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in the place to be searched. The Supreme Court has held that informers' tips, used to establish probable cause, need not be subjected to uniform, rigid reliability standards. The Florida Supreme Court in *Harris* held that the prosecution had not established the existence of probable cause because it had failed to satisfy court-mandated standards for the reliability of drug-detecting dogs and their handlers. The U.S. Supreme Court declared in *Harris* that the Florida court was in error for failure to apply the traditional common sense, totality-of-the-circumstances standard.

In order to minimize the risk of harm to the officers, the destruction of evidence, or the flight of suspects, officers executing a search warrant for contraband may detain individuals found on the premises to be searched. They may do so though they have no probable cause to arrest the individuals. The Supreme Court in *Bailey* held that this exception to the Fourth Amendment's usual requirements does not permit officers to allow individuals to leave the premises to be searched before apprehending them off-site and returning them to the place being searched.

Exigent circumstances will sometimes excuse strict compliance with Fourth Amendment requirements. One such instance arises when the evidence sought will likely be lost by the time officers secure a search warrant. The Supreme Court in *McNeely* held destruction of the evidence exceptions are judged using a totality of the circumstances standard. The natural dissipation of alcohol from the blood, by itself, does not permit warrantless blood tests in drunk driving cases.

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Introduction

The Supreme Court decided four search and seizure cases during its October 2012 term. *Florida v. Jardines* involved the question of "[w]hether a trained narcotics-detection dog's sniff at the front door of a suspected [marijuana] grow house is a Fourth Amendment search." *Florida v. Harris* related to whether an alert by a trained drug-detection dog is sufficient to establish probable cause for a search of a vehicle. *Bailey v. United States* concerned the question of whether "the detention of an individual who has just left premises to be searched under warrant is permissible when the individual is detained out of view of the house as soon as possible." *Missouri v. McNeely* addressed whether "the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."

Florida v. Jardines

> Is a dog sniff at the front door of a suspected grow house by a trained narcotics-detection dog a Fourth Amendment search requiring probable cause?

Last term in *Jones*, five Justices declared that a Fourth Amendment "search" occurs when "the Government obtains information by physically intruding on a constitutionally protected area."[1] This term, the Court declared that a search occurs when the police obtain information on the basis of the performance of a drug-sniffing dog on the front porch of a private house.[2] Although the answer might seem something of a departure from the Court's past treatment of dog sniffing cases,[3] those cases relied upon the "expectation of privacy rationale" rather than the alternative *Jones* "property intrusion" rationale.

Background

On November 3, 2006, Miami-Dade Police received an unverified "crime stoppers" tip that Jardines was growing marijuana in his house.[4] A month later, as part of an elaborate multi-agency enterprise, authorities descended on Jardines's house at dawn. They saw no activity in the house. The blinds were drawn. The driveway was empty. The air conditioning was running. An officer and a trained drug-sniffing dog entered the front porch, where the dog "alerted" for the presence of drugs, most emphatically at the front door. A second officer then stepped to the front door to conduct a "knock and talk."[5] He received no response. He used the dog's reaction to obtain a search warrant. A subsequent search turned up marijuana growing in the house.

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[1] *United States v. Jones*, 132 S.Ct. 945, 950 n.3 (2012); *id.* at 923 (Sotomayor, J., concurring).

[2] *Florida v. Jardines*, No. 11-564, slip op. at 3 (March 26, 2013) So.3d 34 (Fla. 2011).

[3] See e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983).

[4] The information in this paragraph was gathered from *Jardines v. State*, 73 So.3d at 37-8.

[5] The courts recognize a "knock and talk" exception to the Fourth Amendment's warrant requirement under which law enforcement officers may enter the curtilage of home for the limited purpose of speaking to any occupant who responds to the knock, e.g., *Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011); *United States v. Robbins*, 682 F.3d 1111, 1115-116 (8th Cir. 2012); *United States v. Perea-Rey*, 680 F.3d 1179, 1187-188 (9th Cir. 2012). Moreover, the Supreme Court has limited the extent to which the federal courts may find a Fourth Amendment violation when they believed law (continued...)

On appeal, the Florida district court overturned the trial court's suppression of the evidence seized at Jardines's house.[6] The Florida Supreme Court in turn reversed the district court's decision, concluding that the dog's use under the circumstances constituted a warrantless search.[7] It also endorsed the trial court's determination that without the dog-sniffing evidence, authorities had presented insufficient evidence to establish the probable cause necessary for issuance of the search warrant.[8]

Supreme Court Precedent

Drug-sniffing dogs first appear in the Court's jurisprudence in *Place*.[9] There, federal agents, suspicious of Place's conduct when he arrived in New York on a flight from Miami, stopped him, questioned him, and seized his luggage. A trained dog eventually alerted to the presence of drugs in one of the bags. Place sought to suppress evidence found in the bag. The Court concluded that the 90-minute delay between when the luggage was seized and when it was sniffed by the dog exceeded the delay permissible under *Terry* for detention of the luggage detained solely on reasonable suspicion.[10] In doing so, however, the Court observed that "the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."[11]

Again in *Edmond*, the use of dogs was not an issue.[12] But again, the Court noted in passing that use of drug-sniffing dogs in a public area was something less than a typical Fourth Amendment search. Edmond objected to the City's suspicionless drug checkpoint program that had ensnarled him. The program featured a drug-sniffing dog walking around each of the cars stopped at the checkpoint. The Court held the drug-interdiction, law enforcement purpose precluded the program's claim to the "special needs" exception necessary to excuse the checkpoint seizures without either probable cause or a warrant.[13] In the course of its opinion, the Court pointed out that "[i]t is well established that a vehicle stop at a highway checkpoint effectuates a seizure

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enforcement officials had used the knock and talk exception as a pretext to stimulate exigent circumstances (flight or the destruction of evidence) in order to circumvent the warrant requirement, *United States v. Aguirre*, 664 F.3d 606, 611 n.13 (5th Cir. 2011)(some internal citations omitted)("Heretofore, we would precede this discussion by analyzing the threshold issue of whether the law enforcement officers' decision to conduct a knock and talk was a reasonable investigatory tactic, or whether it impermissibly provoked the exigent circumstance. If we determined that the officers could have obtained a warrant in lieu of conducting the knock and talk or that it was reasonably foreseeable that the knock and talk would create an exigent circumstance, we would not allow the government to use the exigent circumstance doctrine to justify the officers' entry and bypass the warrant requirement. However, this inquiry is no longer proper after the United States Supreme Court's decision in *Kentucky v. King*, 131 S.Ct. 1849 (2011). That decision narrowed the police-created exigency doctrine adopted by this and other circuits, holding that it may apply only so long as 'the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment'").

[6] *State v. Jardi*nes, 9 So.3d 1 (Fla. App. 3d 2008).

[7] *Jardines v. State*, 73 So.3d at 55-6.

[8] *Id*. at 54-5.

[9] *United States v. Place*, 462 U.S. 696 (1983).

[10] *Id*. at 710.

[11] *Id*. at 707.

[12] *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

[13] *Id*. at 48.

within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car ... does not transform the seizure into a search, see *United States v. Place*." Nevertheless, the Court went out of its way to emphasize that the case was not about the use of dogs: "The Chief Justice's dissent also erroneously characterizes our opinion as holding that the 'use of a drug-sniffing dog ... annuls what is otherwise plainly constitutional under our Fourth Amendment jurisprudence.' Again, the constitutional defect of the program is that its primary purpose is to advance the general interest in crime control."[14]

In *Caballes*, the dog sniff was the issue, that is, "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detecting dog to sniff a vehicle during a legitimate traffic stop."[15] The Court said no: "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."[16] The proposition that the use of a dog, trained to detect drugs, carries no Fourth Amendment implications seemed to bode ill for Jardines's claim.

Florida Supreme Court

The Florida Supreme Court held that the use of a drug-sniffing dog on Jardines's front porch constituted a search and that such a search required probable cause before it could be conducted.[17] The court distinguished the case at hand from the United States Supreme Court precedents on several grounds.

It noted that the sniff tests conducted in *Place*, *Edmond*, and *Caballes* were all conducted in a "minimally intrusive manner upon objects ... that warrant no special protection."[18] The *Jardines* sniff test was a "public spectacle" conducted at a private home, an area entitled to the highest level of Fourth Amendment protection.[19]

Then, the court pointed out that "[a]ll the tests were conducted in an impersonal manner that subjected the defendants to no untoward level of public opprobrium, humiliation or embarrassment."[20] The *Jardines* sniff test involved the presence of multiple police vehicles and many officers that produced a spectacle "in a residential neighborhood [that would] invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident ... for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—[would] be viewed as an official accusation of crime."[21]

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[14] *Id*. at 44 n.1.

[15] *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

[16] *Id.* at 410.

[17] *Jardines v. State*, 73 So.3d 34, 54, 55 (Fla. 2011)("Accordingly, we conclude that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make under the Fourth Amendment prior to conducting a dog 'sniff test' at a private residence.... Given the special status accorded a citizen's home in Anglo-American jurisprudence, we hold that the warrantless 'sniff test' that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment").

[18] *Id*. at 45.

[19] *Id*. at 48.

[20] *Id*. at 45.

[21] *Id.* at 48.

Finally, the court emphasized that the *Place*, *Edmond*, and *Caballes* tests were conducted under circumstances in which they "were not susceptible to being employed in a discriminatory or arbitrary manner."[22] In contrast, "if government agents can conduct a dog 'sniff test' at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen."[23]

The concurring justices offered another factor: "the lack of a uniform system of training and certification for drug-detection canines ... [:] conditioning and certification programs vary widely in their methods, elements, and tolerances of failure ... [; and] dogs themselves vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments and circumstances."[24]

In the absence of exigent circumstances or non-law enforcement special needs, the court concluded that the dog sniff searches such as the one that occurred in *Jardines* may only be conducted on the basis of probable cause.[25]

The dissenters contended that the majority opinion flew in the face of binding United States Supreme Court precedent.[26] Beyond *Place*, *Edmond*, and *Caballes*, they mention the Court's observation in *Kyllo* to the effect that "'a Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless the individual manifested a subjective expectation of privacy in the object of the challenged search and society is willing to recognize that expectation as reasonable.'"[27] Couple this with the Court's statement "that government conduct that only reveals the possession of contraband compromises no legitimate privacy interest," and the position of the majority opinion becomes untenable, the dissenters suggested.[28]

The justices of the Florida Supreme Court, however, did not have the advantage of the United States Supreme Court's *Jones* decision. There, a majority of the Court made clear that a Fourth Amendment search occurs whenever the government physically intrudes upon constitutionally protected property.[29] The "expectation of privacy" concept, born of *Katz*, supplements, it does not condition, the traditional protection of the Amendment.[30] The United States Supreme Court may have had *Jones* in mind when it agreed to hear *Jardines*.[31]

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[22] *Id*. at 45.

[23] *Id.* at 49.

[24] *Id.* at 60 (Lewis, J., with Pariente and Labarga, JJ. concurring).

[25] *Id.* at 54 ("Accordingly, we conclude that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make under the Fourth Amendment prior to conducting a dog 'sniff test' at a private residence").

[26] *Id*. at 61 (Polston, J., with Canady, Ch. J. dissenting).

[27] *Id.* at 64, quoting, *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

[28] *Id*. at 67-8, quoting, *Illinois v. Caballes*, 545 U.S. 405, 408 (2005).

[29] More precisely, where "the Government obtains information by physically intruding on a constitutionally protected area, such a [Fourth Amendment] search has undoubtedly occurred," *United States v. Jones*, 132 S.Ct. 945, 950 n.3 (2012); *id.* at 923 (Sotomayor, J., concurring).

[30] "[T]he *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test," *id.* at 952.

[31] The final slip opinions were back from the Public Printer and the Court announced its decision in *Jones* on January (continued...)

Supreme Court's *Jardines* Decision

In any event, for five Justices, the principle announced in *Jones* dictated the result in *Jardines*.[32] If anything, *Jardines* seems to present a clearer example of the *Jones* principle than does *Jones*. *Jones*, after all, involved placing a tracking device on a car parked in a public parking lot, while *Jardines* involved a home. On the other hand, *Jardines* did not involve an intrusion into the home itself, but rather the use of a drug-detecting dog at the front door and on the porch of the home.

Justice Scalia began the opinion for the Court with the observation that a Fourth Amendment search occurs when the government "obtains information by physically intruding" upon constitutionally protected areas of person, houses, papers, or effects.[33] He pointed out that the curtilage—the area immediately surrounding the house, including any porch—is afforded the same protection as a house.[34]

In the case of the front door, however, the Court stated that the householder is thought to have granted an implicit license for some level of intrusion by the public and government alike.[35] Yet the license is limited as to place and purpose.[36] A license to knock and talk is not a license to conduct a search at the front door and certainly not on the porch.[37]

The suggestion that the Court's earlier dog sniff cases demanded a different result were unavailing. Justice Scalia explained that "The *Katz* reasonable-expectations test has been added to, not substituted for, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas."[38] Consequently, "[t]he government's use of trained police dogs to investigate the home and its immediate surrounding [was] a search within the meaning of the Fourth Amendment, [and] [t]he judgment of the Supreme Court of Florida [was] therefore affirmed."[39]

Although they joined the opinion for the Court in full, Justice Kagan with Justices Ginsburg and Sotomayor would also have affirmed the judgment of the Florida Supreme Court on "expectation of privacy grounds."[40] From their perspective, the Court's thermal imaging *Kyllo* case controlled the expectation of privacy analysis.[41] Applying the *Kyllo* rule, "[t]he police officers [in Jardines] conducted a search because they used a 'device ... not in general public' (a trained drug-detection

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23, 2012, *id.* The Court granted certiorari in *Jardines* on January 6, 2012, 132 S.Ct. 995 (2012).

[32] *Florida v. Jardines*, No. 11-564, slip op. at 3 (March 26, 2013).

[33] *Id*. Justices Thomas, Ginsburg, Sotomayor, and Kagan joined Justice Scalia's opinion.

[34] *Id*. at 4-5.

[35] *Id*. at 5-6.

[36] *Id*. at 7.

[37] *Id.*

[38] *Id*. at 9 (internal citation and quotation marks omitted).

[39] *Id*. at 10.

[40] *Florida v. Jardines*, No. 11-564, Kagan, J. (with Ginsburg and Sotomayor, JJ., concurring), slip op. at 5.

[41] *Id.* at 3.

dog) to 'explore details of the home' (the presence of certain substances) that they would not otherwise have discovered without entering the premises."[42]

The dissenters, Justice Alito with Chief Justice Roberts as well as Justices Kennedy and Breyer, could not accept the notion that the officer's presence at Jardines's front door became a Fourth Amendment search simply because he was accompanied by his dog.[43] Nor did they believe that Jardines had a reasonable expectation of privacy with respect to the smell of marijuana escaping from the house and detectable at the front door, a place open to the public.[44]

Florida v. Harris

> Has the Florida Supreme Court decided an important question in a way that conflicts with established Fourth Amendment precedent of the U.S. Supreme Court by holding that an alert by a well-trained narcotics-detection dog certified to detect illegal contraband is insufficient to establish probable cause to search a vehicle?

The Florida Supreme Court's *Jardines* decision was perhaps not surprising in light of its earlier decision in *Harris*.[45] It refused to accept a trained drug-detection dog's positive reaction as per se probable cause in *Harris*. Instead, it listed a host of criteria under which a trained dog's alert might be considered probable cause. Neither the per se standard nor the Florida court's list seemed consistent with the "totality of the circumstances" standard that the United States Supreme Court had favored.

Background

A canine officer pulled Harris's truck over for a traffic violation.[46] His trained dog alerted to the presence of narcotics. A search of the truck, however, did not yield the drugs the dog had been trained to detect. Nevertheless, it did lead to the discovery of precursor chemicals. Two months later, the same canine team again pulled Harris over for a traffic violation with the same result. The dog reacted positively to the presence of drugs, but none were found. The trial court denied Harris's motion to suppress the evidence seized following the first search. The district court affirmed.[47] The Florida Supreme Court reversed, holding that "the fact that a drug-detection dog has been trained and certified to detect narcotics, standing alone, is not sufficient to demonstrate the reliability of the dog" and thereby establish probable cause to conduct a search.[48]

[42] *Id*. at 4.

[43] *Florida v. Jardines*, No. 11-564, Alito, J. (with Roberts, Ch.J. , Kennedy and Breyer, JJ., dissenting), slip op. at 1.

[44] *Id*. at 2.

[45] *Harris v. State*, 71 So.3d 756 (Fla. 2011).

[46] The information in this paragraph was gathered from *Harris v. State*, 71 So.3d at 759-62.

[47] *Harris v. State*, 989 So.2d 1214 (Fla.App. 1st 2008).

[48] *Harris v. State*, 71 So.3d at 774-75.

Supreme Court Precedent and Later Case Law

Probable cause to believe that the search will reveal contraband or evidence of a crime is a prerequisite for the issuance of a search warrant.[49] And probable cause permits police to search a car or truck without a warrant.[50] Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[51] Whether that standard has been met is a common sense assessment of all of the circumstances in a particular case.[52]

At one point, the Court held that bare, conclusionary statements to a magistrate that officers had reliable information from a credible source, without indicating why the tip was reliable or the source credible, did not constitute probable cause.[53] Shortly thereafter, the Court refused to find probable cause to secure a warrant in a case in which the informant's tip was offered without evidence of the information's reliability or of the tipster's credibility, even in the presence of some corroboration of the tip's accuracy.[54] The two cases, *Aguilar* and *Spinelli*, led some to believe that an informant's tip might serve as the basis for probable cause only with evidence of the information's reliability and tipster's credibility.[55] The Court found this too restrictive a test in *Illinois v. Gates*. Better instead, it held, to rely upon a "totality of the circumstances" standard that permits a common sense assessment of the individual facts presented in a particular case.[56]

Since *Gates*, the federal courts of appeals have usually held that the positive reaction of a reliable dog trained to detect the presence of narcotics is sufficient to establish probable cause.[57]

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[49] U.S. Const. Amend. IV.

[50] *Carroll v. United States*, 267 U.S. 132, 153 (1925); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

[51] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[52] *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003)("[T]he probable cause standard is a practical, nontechnical conception that deals with the factual and practical considerations everyday life on which reasonable and prudent men, not legal technicians, act.... The probable-cause standard ... depends on the totality of the circumstances").

[53] *Aguilar v. Texas*, 378 U.S. 108, 113-16 (1964).

[54] *Spinelli v. United States*, 393 U.S. 410, 415-16 (1969)("A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes Augilar's requirements when standing alone").

[55] See e.g., *Illinois v. Gates*, 462 U.S. 213, 229-30 (1983)(internal citations omitted)("The Illinois court, alluding to an elaborate set of legal rules that have developed among various lower courts to enforce the 'two-pronged test,' found that the test had not been satisfied. First, the 'veracity' prong was not satisfied because, '[there] was simply no basis [for] [concluding] that the anonymous person [who wrote the letter to the Bloomingdale Police Department] was credible.' The court indicated that corroboration by police of details contained in the letter might never satisfy the 'veracity' prong, and in any event, could not do so if, as in the present case, only 'innocent' details are corroborated. In addition, the letter gave no indication of the basis of its writer's knowledge of the Gateses' activities. The Illinois court understood *Spinelli* as permitting the detail contained in a tip to be used to infer that the informant had a reliable basis for his statements, but it thought that the anonymous letter failed to provide sufficient detail to permit such an inference. Thus, it concluded that no showing of probable cause had been made").

[56] *Id*. at 238-39(internal citations omitted)("[W]e conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... [concluding]' that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*").

[57] *United States v. Bowman*, 660 F.3d 338, 345 (8th Cir. 2011)("Assuming that the dog is reliable, a dog sniff resulting (continued...)

Florida Supreme Court

The Florida Supreme Court concluded that in *Harris* the state had failed to show that, taking all the circumstances into account, the alert of a trained dog to the door of a truck entitled an officer to believe that there was a fair probability that the truck contained illicit drugs.[58] The suppression hearing featured apparently uncontradicted evidence that the dog had twice reacted positively to the door of the truck when in fact the truck had none of the drugs the dog was trained to detect.[59] The court did not feel that the state had offered sufficient evidence to explain away the factors that might have contributed to such a result: false alerts attributable to environmental factors, handler cuing or error, or the dog's inability to distinguish between odors attributable to the current presence of narcotics on the one hand, and residual odors attributable to the presence of narcotics minutes, hours, days, or weeks earlier, on the other.[60] It held that

> [T]o 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, the State must 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. To adopt the contrary view that the burden is on the defendant to present evidence of the factors other than certification and training in order to demonstrate that the dog is unreliable would be contrary to the well-established proposition that the burden is on the State to establish probable cause for a warrantless search. In addition, since all of the records

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in an alert on a container, car, or other item, standing alone gives an officer probable cause to believe that there are drugs present"); *United States v. Kitchell*, 653 F.3d 1206, 1222 (10th Cir. 2011)("Mr. Shigermura points to no authority undermining the well-established principle that positive alert from a reliable narcotics-detection dog gives rise to probable cause to search a vehicle"); *United States v. Pierce*, 622 F.3d 209, 213 (3d Cir. 2010)("[A] dog's positive alert while sniffing the exterior of the car provides an officer with the probable cause necessary to search the car without a warrant"); "); *United States v. Howard*, 621 F.3d 433, 447 (6th Cir. 2010)(emphasis added)("A positive indication by a *properly-trained* dog is sufficient to establish probable cause for the presence of a controlled substance"); *United States v. Brown*, 500 F.3d 48, 57 (1st Cir. 2007)("[A] reliable canine sniff outside a vehicle can provide probable cause to search the vehicle").

[58] *Harris v. State*, 71 So.3d at 758-59 ("The issue of when a dog's alert provides probable cause for a search hinges on the dog's reliability as a detector of illegal substances within a vehicle. We hold that the State may establish probable cause by demonstrating that the officer had a reasonable basis for believing the dog to be reliable based on the totality of the circumstances ... Evidence that the dog has been trained and certified to detect narcotics, standing alone, is not sufficient to establish the dog's reliability for purposes of determining probable cause—especially since training certification in this state are not standardized and thus each training and certification program may differ with no meaningful way to assess them").

[59] *Id*. at 762.

[60] *Id*. at 767-68 ("We first note that there is no uniform standard in this state or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs. In contrast to dual-purpose drug-detection dogs [(dogs trained both detect drugs and apprehend suspects)], which are apparently certified by FDLE, no such required certification exists in this state for dogs like Aldo, who is a single-purpose drug-detection dog [(a dog trained only to detect drugs)]. In the absence of a uniform standard, the reliability of the dog cannot be established by demonstrating only that a canine is trained and certified. Simply characterizing a dog as 'trained' and 'certified' imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.... Second, and related to the first concern, any presumption of reliability based only on the fact that the dog has been trained and certified does not take into account the potential for false alerts, the potential for handler error, and the possibility of alerts to residual odors").

> and evidence are in the possession of the State, to shift the burden to the defendant to produce evidence of the dog's unreliability is unwarranted and unduly burdensome.[61]

The dissent objected that the court demanded certainty where the Fourth Amendment required only probability: "[T]he majority demands a level of certainty that goes beyond what is required by the governing probable cause standard.... The majority here ... imposes evidentiary requirements which can readily be employed to ensure that the police rely on drug-detection dogs only when the dogs are shown to be virtually infallible."[62]

Supreme Court's *Harris* Decision

The United States Supreme Court unanimously reversed the judgment in the Florida Supreme Court's decision.[63] The Florida court had simply disregarded the common sense, ad hoc, totality-of-the-circumstances standard that the Supreme Court's Fourth Amendment precedents demanded.[64] The test "is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test."[65]

Justice Kagan, speaking for the Court, noted that a defendant must be afforded the opportunity to challenge a dog's reliability, but that the prosecution had presented substantial evidence of the dog's proficiency at detecting drugs, which Harris had chosen not to contest in the lower court.[66] Harris instead concentrated on the fact that the dog signaled the presence of drugs where they were not to be found.[67] Yet in the eyes of the Court, this confirmed rather than undermined the dog's reliability, since Harris regularly touched the truck's door handle and readily admitted that he regularly handled methamphetamine. The smell of drugs was there. The dog signaled that the smell of drugs was there. Consequently, the officer had probable cause to believe that a search would find drugs there.[68]

Bailey v. United States

> Whether, under *Michigan v. Summers*, 452 U.S. 692, 705 (1981), the detention of an individual who has just left the premises to be searched under warrant is permissible when the individual is detained out of view of the house as soon as practicable.

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[61] *Id.* at 759.

[62] *Id*. at 776 (Canady, Ch.J., dissenting).

[63] *Florida v. Harris*, 133 S.Ct. 1050, 1059 (2013).

[64] *Id*. at 1056.

[65] *Id*. at 1058.

[66] *Id*. at 1057-58.

[67] *Id*. at 1058.

[68] *Id.* at 1059 (internal citations omitted and emphasis in the original)("Harris cooked and used methamphetamine on a regular basis; so as [Officer] Wheetley later surmised, Aldo[, the dog,] likely responded to odors that Harris had transferred to the driver's-side door handle of his truck ... A well-trained drug-detection dog *should* alert to such odors.... And still more fundamentally, we do not evaluate probable cause in hindsight, based on what search does or does not turn up.... Wheetley had good cause to view Aldo as a reliable detector of drugs. And no special circumstances here gave Wheetley reason to discount Aldo's usual dependability or distrust his response to Harris's truck").

The Fourth Amendment prohibits unreasonable searches and seizures.[69] Searches and seizures are presumptively unreasonable, unless they are conducted pursuant to a warrant issued by a neutral magistrate upon a sworn showing of probable cause.[70] Nevertheless, there are circumstances under which authorities enjoy limited authority to detain an individual without a warrant and with less than probable cause to believe the individual has committed a crime. One such instance occurs when officers seek to execute a search warrant. Then, said the Supreme Court in *Michigan v. Summer*, "a 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."[71] Some of the lower federal courts had permitted detention only within the letter of the *Summers* rule;[72] others had permitted detention consistent with what they considered its spirit. The Supreme Court granted certiorari in *Bailey* to consider the question,[73] and held that under the *Summers* rule the occupants must be taken into custody in the immediate vicinity of the premises to be searched.[74]

Background

The First District Court of New York issued a warrant for the search of the basement apartment at 103 Lake Drive and for a "chrome .380 handgun" believed to be found there.[75] Shortly before execution of the warrant, narcotics detectives saw two men come up the stairs from the basement of the building and drive away. Both men, later identified as Bailey and a companion, matched the informant's general description of the resident of the apartment. The officers followed them, and pulled them over after they had travelled about a mile. They patted down the two men, handcuffed them, and seized Bailey's wallet and keys. The detectives called for a patrol car that carried Bailey and his companion back to the apartment. They returned Bailey's wallet, but used his keys to drive his car back to the apartment. Once there, officers, who had executed the warrant in the meantime, disclosed that they had discovered a handgun and drugs in plain view. Then, they arrested Bailey.

At some point, Bailey was turned over to federal authorities. He was charged with possession of cocaine, possession of a firearm by a felon, and possession of a firearm during and in furtherance of drug trafficking.[76] His pre-trial motion to suppress the evidence he claimed was seized in violation of the Fourth Amendment was denied.[77] He was convicted and sentenced to prison for 30 years and to five years of supervised release.[78] He unsuccessfully petitioned for relief in the

[69] U.S. Const. Amend. IV.

[70] *Terry v. Ohio*, 393 U.S. 1, 20 (1968).

[71] *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

[72] E.g., *United States v. Edwards*, 103 F.3d 90, 94 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994).

[73] *Bailey v. United States*, 132 S.Ct. 2710 (2012).

[74] *Bailey v. United States*, 133 S.Ct. 1031, 1045 (2013).

[75] The information in this paragraph was gathered from *United States v. Bailey*, 652 F.3d 197, 200-202 (2d Cir. 2011).

[76] *Id.* at 199 (21 U.S.C. 841(a)(1), (b)(1)(B)(ii)(possession with intent to distribute at least 5 grams of cocaine base); 18 U.S.C. 922(g)(1), 924(a)(2)(possession of a firearm by a previously convicted felon); 18 U.S.C. 924(c)(1)(A)(i) (possession of a firearm during and in furtherance of drug trafficking)).

[77] *Id.*

[78] *Id.* at 199.

nature of habeas corpus based on a claim of ineffective assistance of counsel.[79] The Second Circuit Court of Appeals considered the appeal of the denial of petition together with the appeal of his conviction.[80] It affirmed both his conviction and the denial of relief under Section 2255.[81]

Speaking with regard to the Fourth Amendment issue, the Second Circuit declared that

> "*Summers* applies with equal force when, for officer safety reasons, police do not detain the occupant on the curbside, but rather wait for him to leave the immediate area and detain him as soon as practicable." That is, *Summers* imposes upon police a duty based on both geographic and temporal proximity; police must identify an individual in the process of leaving the premises subject to search and detain him as soon as practicable during the execution of the search.[82]

The Supreme Court disagreed.

Supreme Court Precedent and Later Case Law

In *Summers*, the police arrived to execute a search warrant for narcotics as Summers was leaving the house to be searched and coming down the steps. They detained him until after they had entered the house and then brought him inside. When the search uncovered suspected narcotics in the cellar, they arrested him. They discovered a packet of heroin in his pocket in a search incident to his arrest. The Supreme Court held that "a warrant to search for contraband founded on probable cause carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[83]

Several considerations influenced the Court's decision. First, detaining Summers would reduce the risk of flight should the search reveal incriminating evidence.[84] Second, detaining Summers would reduce the risk that he or someone in the premises whom he might warn would destroy evidence.[85] Third, detaining Summers would reduce the risk of harm to the officers, particularly if incriminating evidence were discovered.[86] Last, Summers's presence during the execution of a search warrant might assist in the orderly completion of the search.[87]

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[79] *Id.* at 202 (28 U.S.C. 2255 affords federal prisoners relief if they can establish that they are being held in violation of the Constitution or other laws of the United States).

[80] *Id.* at 199 n.1.

[81] *Id.* at 208.

[82] *Id.* at 206, quoting the district court, *United States v. Bailey*, 468 F.Supp.2d 373, 381 n.4 (E.D.N.Y. 2006).

[83] *Michigan v. Summers*. 452 U.S. at 705.

[84] *Id.* at 702 ("Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found").

[85] *Id*. ("[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence").

[86] *Id.* at 702-3 ("Less obvious, but sometimes of greater importance is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation").

[87] *Id*. at 703 ("Finally, the orderly completion of the search may be facilitated if the occupants of the premises are present. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand").

Two decades later, the Court pointed out in *Muehler v. Mena* that the *Summers* rule implies the authority to use reasonable force to detain occupants, including handcuffing them in some instances.[88] The use of handcuffs may be particularly appropriate when firearms are the object of the search and risk of violence is real.[89] The Court mentioned but placed no significance on the fact that, unlike *Summers*, *Muehler* involved a search warrant for evidence rather than for contraband.[90]

The Second Circuit acknowledged that the federal courts of appeals are divided over the question of whether the *Summers* rule may be extended.[91] Like the Second Circuit, the Fourth, Sixth, Seventh, and Eighth Circuits admit the possibility of some extension of the rule.[92] The Fifth and Tenth Circuits have declined to expand it.[93] The Second Circuit's *Bailey* decision would have permitted off-site detention incident to the execution of a search warrant under some conditions.[94] The Second Circuit understood that a decision must be supported by the *Summers* rule factors: officer safety, preservation of evidence, and prevention of flight.[95] It misunderstood how and when the factors should be weighed.

Supreme Court's *Bailey* Decision

Justice Kennedy, writing for six Justices, made three points: the Second Circuit misunderstood the *Summers* rule factors; it failed to recognize the limits the Fourth Amendment places on intrusions upon individual liberty; and the facts of the cases suggested that Bailey's detention or arrest may have been justified under rules other than the *Summers* rule.[96]

Summers rested in part on the risk of harm to officers posed by those present during the execution of the search warrant. The breadth of the authority that the Court confirmed in *Muehler* (handcuffing occupants for several hours) "counsel[ed] caution before extending the power to detain persons stopped or apprehended away from the premises where the search is being

[88] *Muehler v. Mena*, 544 U.S. 93, 98-9 (2005). Justice Kennedy joined in the 5-4 majority but penned a separate concurrence "to help ensure that police handcuffing during searches becomes neither routine nor unduly prolonged." *Id*. at 102 (Kennedy, J., concurring).

[89] *Id*. at 100 ("But this was no ordinary search. The government interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises").

[90] *Id*. at 95-6 ("Muehler obtained a search warrant for 1363 Patricia Avenue that authorized a broad search of the house and premises for among other things, deadly weapons and evidence of gang membership").

[91] *United States v. Bailey*, 652 F.3d at 204-205.

[92] E.g., *United States v. Montieth*, 662 F.3d 660, 668 (4th Cir. 2011); *United States v. Bullock*, 632 F.3d 1004, 1019 (7th Cir. 2011); *United States v. Cavazos*, 288 F.3d 706, 711 (5th Cir. 2002); *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991).

[93] E.g., *United States v. Edwards*, 103 F.3d 90, 94 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994).

[94] *United States v. Bailey*, 652 F.3d at 206 ("*Summers* applies with equal force when, for officer safety reasons, police do not detain the occupant on the curbside, but rather wait for him to leave the immediate area and detain him as soon as practicable").

[95] *Id*. at 206 n.6 ("Indeed, at least two of the law enforcement interests articulated in *Summers* apply here—namely, prevention of flight should incriminating evidence be found during the search and minimizing the risk of harm to the officers").

[96] *Bailey v. United States*, 133 S.Ct. 1031, 1038-42 (2013).

conducted."[97] The *Summers* observation that occupants might assist officers in the search hardly applied in the case of remote detention.[98] The *Summers* flight risk concern arose "not because of the danger of flight itself but because of the danger that potential flight can cause to the integrity of the search."[99]

Moreover, the *Summers* rule stands as a narrow exception to the Fourth Amendment's limit on intrusions on personal liberty. Detention within one's residence involves a minimum of public stigma and inconvenience; not so with off-site apprehension and transportation in public view.[100]

Finally, Justice Kennedy noted that after Bailey left his apartment he might have been followed, stopped, and questioned under the authority of *Terry*.[101] He might also have been arrested on probable cause based on the discovery of the gun and drugs in his apartment.[102] Justice Kennedy left for another day the determination of what constitutes the "immediate vicinity" for purposes of the *Summers* rule.[103]

Justice Scalia, joined by Justices Ginsburg and Kagan, endorsed the majority opinion, but wrote separately to emphasize that a *Summers* rule inquiry need go no further than to ask whether detention occurred in the immediate vicinity of the premises to be searched.[104]

The three dissenters, Justice Breyer with Justices Thomas and Alito, would have found the police conduct in Bailey reasonable based on the circumstances of the case and the Second Circuit's determination that "(1) the premises [were] subject to a valid search warrant, (2) the detained persons were seen leaving those premises, and (3) the detention [was] effected *as soon as reasonably practicable*."[105]

Missouri v. McNeely

> Whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases.

The Fourth Amendment insists that in most instances officials secure a search warrant before they search a person's house, papers, effects, or person. There are exceptions. The Supreme Court recognized one such exception in *Schmerber v. California*, a case that involved a warrantless

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[97] *Id*.at 1039.

[98] *Id.* at 1040.

[99] *Id*. at 1041 ("The need to prevent flight, if unbounded, might be used to argue for detention, while a search is underway, of any regular occupant regardless of his or her location at the time of the search.... The interest in preventing escape from [the] police cannot extend this far without undermining the usual rules for arrest based on probable cause or a brief stop for questioning under standards derived from *Terry*.").

[100] *Id*.

[101] *Id*. at 1042, referring to *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny; see generally, *Constitution of the United States of America: Analysis and Interpretation*.

[102] *Id*. at 1042.

[103] *Id.*

[104] *Id*. at 1043.

[105] *Id*. at 1045 (internal quotation mark omitted)(emphasis in the original).

blood test ordered for a drunk driving suspect.[106] Later state courts were unable to agree on whether the rate at which alcohol disappears from the blood alone constitutes exception or whether other factors must be considered.[107]

Background

The police stopped Tyler McNeely for speeding and driving erratically.[108] He admitted he had been drinking. He smelled of alcohol. He slurred his speech, and he performed poorly on the roadside sobriety tests. After McNeely refused to take a breathalyzer test, the officer transported McNeely to the hospital for a blood test. No effort was made to secure a search warrant, although the officer knew that the necessary prosecutor and magistrate were both available. The test showed that McNeely's blood alcohol level was well above the legal limit, and he was charged with driving while intoxicated.

The trial court granted McNeely's motion to suppress the results of the blood test. The state appealed. The Missouri Supreme Court refused to accept a per se exception to the Fourth Amendment's warrant requirements.[109] It held that the officer had violated McNeely's Fourth Amendment rights when he ordered the blood test without first obtaining a warrant.[110] The Supreme Court granted certiorari to resolve the split among the state courts.[111]

Supreme Court's *McNeely* Decision

The United States Supreme Court agreed with the Missouri Supreme Court in a 5-4 decision in which only Justice Thomas would have endorsed a per se rule.[112] Three members of the Court who dissented and concurred in part—Chief Justice Roberts, Justices Breyer and Alito—would have endorsed a per se rule as long as there was insufficient time to obtain a search warrant before conducting the blood test.[113] The majority went no further than to reject a per se rule.[114]

Justice Sotomayor, the author of the opinion for the Court, explained that the general rule that a search can only be executed pursuant to a warrant is particularly compelling when the search

[106] *Schmerber v. California*, 384 U.S. 757 (1966).

[107] E.g., *State v. Shriner*, 751 N.W.2d 538, 545-46 (Minn. 2008)("The rapid, natural dissipation of alcohol in the blood creates a single-factor exigent circumstance that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that the defendant committed criminal vehicular operation.... *Schmerber* does not prohibit our conclusion that the rapid dissipation of alcohol in the bloodstream can create a single-factor exigent circumstance"); accord, *State v. Bohling*, 494 N.W.2d 399, 402-403 (Wis. 1993); *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989); contra, *State v. McNeely*, 358 S.W. 65,70 (Mo. 2012)("The evanescence of blood-alcohol was never special enough to create an exigent circumstance by itself"); *State v. Rodriguez*, 156 P.3d 771, 776 (Utah 2007)(same); *State v. Johnson*, 44 N.W.2d 340, 344 (Iowa 2008)(same).

[108] The facts contained in this paragraph can be found in the Missouri and United States Supreme Court opinions, *State v. McNeely*, 358 S.W.3d 65 (Mo. 2012), and *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), respectively.

[109] *State v. McNeely*, 358 S.W.3d at 73-4.

[110] *Id*. at 74.

[111] *Missouri v. McNeely*, 133 S.Ct. 98 (2012).

[112] *Missouri v. NcNeely,* 133 S.Ct. 1552, 1556, 1576 (2013).

[113] *Id.* at 1569.

[114] *Id*. at 1568-569.

involves an intrusion upon bodily integrity.[115] Nevertheless, the rule yields to exceptions when it encounters certain emergency circumstances.[116] One such exception exists when compliance with the warrant requirement would result in loss of the evidence that the warrant seeks.[117] The existence of this "destruction of the evidence" exception, however, can only be determined on a case-by-case basis, taking into account all the relevant facts presented in a specific case.[118]

So it was in *Schmerber*.[119] First, the "evidence could have been lost because 'the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.'"[120] Yet in addition in that case, because "'time had to be taken to bring the [injured] accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.'"[121]

Consistent with its understanding of *Schmerber*, the Court held "that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[122]

Four of the Justices who joined in the majority—Justices Sotomayor, Scalia, Ginsburg and Kagan—would have specifically rebutted, in the name of the Court, arguments raised by the dissenters. Nevertheless, Justice Kennedy, upon whose concurrence the majority depended, would go no further than to reject a per se exception.[123]

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[115] *Id*. at 1558.

[116] *Id*.

[117] *Id.*

[118] *Id*. at 1559 ("To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances").

[119] *Id*. at 1560 ("In finding the warrantless blood test reasonable in *Schmerber*, we considered all of the facts and circumstances of the particular case and carefully based out holding on those specific facts").

[120] *Id*., quoting, *Schmerber v. California*, 384 U.S. 757, 770 (1966).

[121] *Id*. at 1560, quoting, *Schmerber v. California*, 384 U.S. at 771.

[122] *Id*. at 1568.

[123] *Id.* at 1569 ("[T]he instant case, by reason of the way in which it was presented and decided in the state courts, does not provide a framework where it is prudent to hold any more than that always dispensing with a warrant for a blood test when a driver is arrested for being under the influence of alcohol is inconsistent with the Fourth Amendment").