



Training Key® #693

Supreme Court Update: 2013

The following U.S. Supreme Court rulings have a bearing on how law enforcement officers conduct enforcement operations. Their implications for individual police agency and police officer operations should be taken into consideration.

Missouri v. McNeely, 133 S.Ct. 1552 (2013)

The United States Supreme Court rejected a per se rule that, in DUI investigations, the natural metabolism of alcohol in the bloodstream creates an exigency to justify conducting a nonconsensual blood test without a warrant to determine the suspect's blood alcohol concentration (BAC) level. Rather, the Court held that whether an exigency exists must be determined on a case-by-case basis, considering the totality of the circumstances.

Factual Background. While on patrol, a Missouri police officer stopped Tyler McNeely for speeding and repeatedly crossing the yellow, center line. During the stop, the officer noticed several signs indicating that McNeely was intoxicated, including slurred speech, bloodshot eyes, and the smell of alcohol on his breath. McNeely admitted to the officer that he had consumed a "couple of beers" at a bar, and failed the field sobriety tests. At the scene, McNeely refused to submit to the portable breath-test device to measure his BAC. The officer placed McNeely under arrest and began to transport him to headquarters. During transit, McNeely informed the officer that he would refuse to provide a breath sample at the station as well. At that point, the officer proceeded directly to the hospital for blood testing. The officer made no attempt to obtain a warrant. McNeely refused to consent to the blood test. The officer then directed the hospital lab technician to take a blood sample. The blood sample revealed that McNeely's BAC was well above the legal limit. McNeely was charged with a DUI.

At trial, McNeely moved to suppress the blood test results, arguing that taking his blood without first obtaining a search warrant was in violation of his Fourth Amendment rights. The trial court agreed and held that the exigency exception to the warrant requirement did not apply because, other than the natural dissipation of alcohol from the blood stream with the passage of time, the officer provided no other circumstances that revealed he was faced with an emergency and could not practicably obtain a warrant. The Missouri Supreme Court affirmed the trial court decision and concluded that "more than the mere dissipation of blood-alcohol evidence [is required] to support a warrantless blood draw."¹ The Missouri Supreme Court stated that this was a routine DUI case and there were no factors, other than the dissipation of alcohol levels in the blood stream, that suggested there was an emergency to justify a warrantless search. The Supreme Court granted certiorari to resolve a split of authority on the question of whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency to justify the exception to Fourth Amendment's warrant requirement for nonconsensual blood testing in DUI investigations.

Supreme Court Analysis. The Supreme Court began its analysis with an overview of the Fourth Amendment, which provides "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."² It stated that the physical intrusion of inserting a needle into a person's skin "implicates an individual's 'most personal and deep-rooted

expectations of privacy.”³ The Court stated, however, that the warrant requirement is subject to certain exceptions. One such exception provides that “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.”⁴ The Court also recognized that under certain circumstances, officers may conduct a warrantless search to prevent the imminent destruction of evidence. Courts look at the “totality of the circumstances” to determine whether a warrantless search is justified, resulting in a case-by-case analysis of the reasonableness of the warrantless search.

The Court recognized that in a DUI matter, a significant delay in testing an individual’s blood alcohol levels negatively affects the probative value of the results, as the alcohol levels in the blood begin to gradually dissipate after the individual stops consuming alcohol. Despite this fact, the Court found that “it does not follow that we should depart from careful case-by-case assessment of exigency” and adopt the per se rule that when an officer has probable cause to believe an individual has been driving under the influence, exigent circumstances exist and it is reasonable for an officer to obtain blood without a warrant.⁵

The Court held that “while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case...it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.”⁶

Florida v. Jardines, 133 S.Ct. 1409 (2013)

The Supreme Court held that bringing a police canine on to the porch of an individual suspected of growing marijuana inside the home, for the purpose of ascertaining whether there were narcotics in the house, was a “search” within the meaning of the Fourth Amendment.

Factual Background. Detective William Pedraja received an unverified tip that Joelis Jardines was growing marijuana in his home. Approximately one month later, the police department and the DEA sent a joint surveillance team, of which Pedraja was a member, to Jardines’ home. Pedraja watched the home for 15 minutes and found no cars in the driveway and no activity within the residence. Pedraja then approached Jardines’ home with Detective Douglas Bartelt, a trained canine handler, and his drug-sniffing dog. The canine was trained to detect marijuana, cocaine, and heroin, as well as other drugs. As the detectives approached the front porch, the canine sensed the odor of narcotics and began to energetically search the area and, upon sniffing the base of the front door, sat, indicating that he had located the strongest point source of the odor. Detective Bartelt pulled the canine away from the door and returned him to the vehicle. After telling Pedraja there had been a positive alert for narcotics, Bartelt left the scene. Upon the basis of the positive alert, Pedraja applied for and received a search warrant for the residence.

The search revealed marijuana plants and Jardines was charged with trafficking in cannabis. At trial, Jardines moved to suppress the marijuana plants on the basis that the use of the canine constituted an unreasonable search in violation of his Fourth Amendment rights, which the trial court granted. The Third District Court of Appeals reversed, but the Florida Supreme Court quashed the reversal and upheld the trial court’s decision to suppress the evidence. The Florida Supreme Court held that the search warrant was invalid because “the use of the trained narcotics dog to investigate Jardines’ home was a Fourth Amendment search unsupported by probable cause.”⁷ The Supreme Court granted certiorari, limited to the question on whether the use of the canine was a search within the meaning of the Fourth Amendment.

Supreme Court Analysis. The Supreme Court stated that an individual’s right to “retreat into his own home and there be free from unreasonable governmental intrusion” is a fundamental right under the Fourth Amendment.⁸ The Court regards the area “immediately surrounding and associated with the home” as curtilage, “part of the home itself for Fourth Amendment purpose.”⁹ The Court stated that the front porch of a home is a classic example of an area adjacent to the home.

Since the investigation, and use of the canine, took place in a constitutionally protected area, the Court turned to the question of whether “it was accomplished through an unlicensed intrusion.”¹⁰ The Court has held that while officers do not have to necessarily “shield their eyes” when passing a home on “public thoroughfares,” the officer’s ability to investigate is curtailed once he enters a Fourth Amendment protected area. While officers may approach a home without a warrant and knock on the door to speak with the occupant, the introduction of a trained police canine to explore the area in the hopes of discovering incriminating evidence is an entirely different scenario.

The Court stated that to determine whether the officer’s conduct was an objectively reasonable search depends upon whether the officer had an “implied license” to enter the porch. Generally, an “implied license” allows a visitor to approach a home up the front path, knock promptly, wait for a response, and then leave if no invitation to enter is given. Therefore, the determination here depends on the officer’s purpose for entering the porch. However, the officers brought the canine to the porch for the sole purpose of conducting a search to ascertain the presence of narcotics within the home, which they did not have an “implied license” to do.

The Court found that because the officers obtained their information by physically intruding upon Jardines’ home, a search had occurred. The Court held that “the 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 affirmed the judgment of the Florida Supreme Court.¹¹

***Florida v. Harris*, 133 S.Ct. 1050 (2013)**

In *Florida v. Harris*, the Supreme Court considered the standard courts should utilize when determining whether the alert of a drug detection dog during a traffic stop provides a law enforcement officer probable cause to search the vehicle. The Court held that courts must apply a flexible, practical, and “common-sensical” standard of probable cause, considering the totality of the circumstances, to determine the reliability of a drug detection dog.¹²

Factual Background. On June 24, 2006, K-9 Officer William Wheatley, of the Liberty County, Florida, Sheriff’s Office, was on patrol with his canine, Aldo, a German shepherd trained in the detection of certain narcotics. During his shift, Officer Wheatley pulled over Clayton Harris’s truck for an expired license plate. As he approached the vehicle, the officer observed Harris acting “visibly nervous, unable to sit still, shaking, and breathing rapidly.”¹³ Officer Wheatley asked Harris for consent to search his vehicle, but Harris refused. The officer returned to his vehicle and retrieved Aldo to walk around Harris’s truck for a “free air sniff.” Aldo alerted at the driver’s side door handle, signaling the detection of drugs. As a result, Officer Wheatley searched Harris’s vehicle, which did not reveal any of the drugs Aldo was trained to detect, but did reveal 200 loose pseudoephedrine pills, 8,000 matches, a bottle of hydrochloric acid, two containers of antifreeze, and a coffee filter full of iodine crystals – all ingredients for making methamphetamine. After receiving proper *Miranda* warnings, Harris admitted to routinely cooking methamphetamine at his house and that he could not go “more than a few days without using it.”¹⁴ The State charged Harris with possession of pseudoephedrine for use in manufacturing methamphetamine.

At trial, Harris moved to suppress the evidence found in his vehicle on the grounds that Aldo’s alert did not provide Officer Wheatley probable cause to conduct the search. Officer Wheatley testified extensively about his and Aldo’s narcotics detection training course, certifications, and weekly training exercises. The training logs showed that Aldo always found the hidden drugs and that he performed “satisfactorily” (the higher of two possible marks) during the training. Officer Wheatley acknowledged, however, that he did not keep complete records of Aldo’s performance in all traffic stops or other field work; he kept records only of Aldo’s alerts that resulted in arrests.

The trial court concluded that Officer Wheatley had probable cause to search Harris’s vehicle and denied the motion to suppress. The intermediate state court affirmed the trial court’s ruling, followed by the Florida Supreme Court reversing the trial court’s decision, holding that Officer Wheatley did not have probable cause to search Harris’s truck. The Florida court held that the State must present an exhaustive collection of records, including a record of the dog’s performance in the field, to establish the dog’s reliability. This should include the dog’s performance history in-

dicating how often it alerted in the field without illegal contraband having been found.

Supreme Court Analysis. A police officer has probable cause to conduct a search when he or she has reasonable belief that contraband or evidence of a crime is present. The Supreme Court has stated that the “[t]he test for probable cause is not reducible to ‘precise definition or quantification.’”¹⁵ Further, when evaluating whether probable cause exists, the Court has consistently looked to the “totality of the circumstances.”¹⁶ The Court has rejected “rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach” in determining the existence of probable cause.¹⁷

The Court stated that specifically focusing on the dog’s field records of “hits” and “misses,” and stating that without these records, probable cause is always absent is “the antithesis of a totality-of-the-circumstances approach.”¹⁸ The Court further pointed out that just because a dog alerts to a vehicle that contains no evidence of narcotics does not mean the dog has made a mistake. Many times narcotics can be hidden in an area undetected by officers, present in quantities too small to detect, or the dog may have alerted to the residual odor of drugs previously in the vehicle or on the occupant.

The Court found that the better indicator of reliability is a drug detection dog’s performance in a controlled testing environment. The Court stated that “evidence of a dog’s satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert.”¹⁹ The Court pointed out that law enforcement agencies maintain a strong interest in adequately training and certifying their dogs, as only accurate dogs can locate contraband without “incurring unnecessary risks or wasting limited time and resources.”²⁰

The Court found that the determination of probable cause in this type of case is the same as any other inquiry into the existence of probable cause. The question 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 this test.”²¹

***Maryland v. King*, 133 S.Ct. 1958 (2013)**

The Supreme Court case, *Maryland v. King*, evaluated the constitutionality of taking a DNA sample from a person arrested, but not yet convicted, of a serious crime.²²

Factual Background. A 53-year-old woman was raped and robbed in Salisbury, Maryland, but the crime went unsolved for six years. In 2009, police arrested Alonzo J. King and charged him with second-degree assault, a felony unrelated to the rape. Taking advantage of the Maryland law that allows warrantless DNA tests following some felony arrests, police took a cheek swab from King, which matched a sample recovered as evidence from the 2003 Salisbury

rape. As a result, King was convicted of rape and sentenced to life in prison.

At trial, King argued that the taking of the DNA sample without a warrant violated the Fourth Amendment's prohibition on unreasonable searches and seizures. The Maryland Court of Appeals agreed, and ruled that the statute that permitted the taking of the sample was unconstitutional. The State of Maryland requested that the Supreme Court review that decision. The Supreme Court reversed the judgment of the Maryland Court of Appeals, and reinstated King's conviction for rape.

The issue before the Supreme Court was whether, when officers make an arrest for a serious offense that is based on probable cause, it is reasonable under the Fourth Amendment to require the arrestee to submit to a cheek swab as part of booking procedures for identification, including sending the sample to a database used for matching DNA of suspects to DNA recovered at crime scenes.

Supreme Court Analysis. The Fourth Amendment safeguards the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" by the government.²³ This means police need a warrant based on probable cause and particularized individual suspicion before searching a person or his or her property, with a few exceptions. Whether a governmental intrusion constitutes a "search" depends upon the reasonableness test originally described in *Katz v. United States*. The test considers whether the person has a subjective expectation of privacy in the area to be searched, and whether society is prepared to deem that expectation reasonable. In evaluating the constitutionality of the search, a court must balance the person's reasonable expectation against the government interest in conducting the search or seizure. Where the government's interest is compelling, or the expectation of privacy is not present, the warrant requirement is excused because the search is reasonable.

The Court concluded that obtaining a swab from the inside of a person's cheek is a "search" for Fourth Amendment purposes, but also noted that not all warrantless searches are unreasonable under the Constitution. Such situations are evaluated by weighing the reasonable expectation of privacy against the government's interest in conducting the search. The Court stated that "[i]n light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody." The Court found that "[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photograph-

ing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."²⁶

***Salinas v. Texas*, 133 S.Ct. 2174 (2013)**

The Supreme Court concluded in *Salinas v. Texas*, that a suspect or witness must expressly invoke the privilege against self-incrimination during a noncustodial interview to avail him of the protections provided therein. The Court reiterated that its cases have continually held that a witness may not invoke the privilege by simply remaining silent in the face of questioning from a government official. Rather, the witness must expressly state his intention to invoke the Fifth Amendment protection against self-incrimination.

Factual Background. In December 1992, two brothers were killed by a shotgun in their Houston home. An investigation into their death led police officers to the home of Genovevo Salinas, who had been a guest at a party the victims hosted the previous night. The police had recovered six shell gun casings at the scene of the shooting. When officers visited Salinas at his home, he agreed to hand over a shotgun for ballistic testing and voluntarily accompany the officers to the station for questions. All parties agreed that, at the time of the questioning, Mr. Salinas was not in custody, his presence at the station was completely voluntary, and he was free to leave at any time. Therefore, Salinas had not received Miranda warnings.

The officers interviewed Salinas for approximately one hour, during which time he answered the officers' questions. When asked, however, whether his shotgun "would match the shells recovered at the scene of the murder," Salinas declined to answer. Rather, Salinas "look[ed] down at floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up."²⁷ After Salinas remained silent for a few moments, the officer proceeded to ask additional questions, to which Salinas responded.

At the conclusion of the interview, the police officer arrested Salinas on outstanding traffic warrants, but released him after prosecutors determined there was insufficient evidence to charge him with the murders. A few days later, officers obtained a statement from a man who stated he heard Salinas confess to the murder of the two brothers. Based on the strength of this additional evidence, prosecutors decided to charge Salinas with the murders.

Salinas did not testify at trial. Over his objection, however, prosecutors used his reaction to the police questioning during the 1993 interview as evidence of his guilt. The jury returned a guilty verdict and Salinas received a 20-year sentence. Salinas appealed to the Texas Court of Appeals arguing that use of his silence during the interview as part of the prosecutor's case in chief violated his Fifth Amendment rights against self-incrimination. The Court of Appeals rejected this argument and found that Salinas' silence during his pre-arrest, pre-*Miranda* interview was not "compelled" within the meaning of the Fifth Amendment. The Texas Court of Criminal Appeals affirmed the de-

cision on the same ground.

The Supreme Court granted certiorari to “resolve a division of authority in the lower courts over whether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief.”²⁸ The Court stated, however, that because Salinas did not actually invoke the privilege during his interview, it was unnecessary to reach that question.

Supreme Court Analysis. The Court confirmed that a witness who “desires the protection of the privilege [against self-incrimination] . . . must claim it at the time he relies on it.”²⁹ The Court has previously recognized two exceptions to the requirement that the witness invoke the privilege: (1) a criminal defendant need not take the stand and assert the privilege at his own trial;³⁰ and (2) a witness’ failure to invoke the privilege must be excused where governmental coercion make his forfeiture of the privilege involuntary.³¹ The Court found, however, that neither exception applied here because Salinas’ interview with the police was entirely voluntary and that he was free to leave at any time. The Court found that Salinas was not deprived of the ability to invoke the Fifth Amendment privilege. Furthermore, there was no allegation that Salinas’ failure to invoke the privilege was involuntary, and “it would have been a simple matter for him to say that he was not answering the officer’s question on Fifth Amendment grounds. Because he failed to do so, the prosecution’s use of the noncustodial silence did not violate the Fifth Amendment.”³²

The Court reiterated that its cases establish “that a defendant normally does not invoke the privilege by remaining silent.” Additionally, the requirement to expressly invoke the privilege applies even when an officer suspects that the suspects answer to his question would be incriminating. The Court concluded that before Salinas could rely on the privilege against self-incrimination, he was required to invoke it. Since he failed to do so, the Court affirmed the judgment of the Texas Court of Criminal Appeals.

Acknowledgment

Principal Eric P. Daigle practices civil litigation in federal and state courts, with an emphasis on municipalities and public officials. He acts as a legal advisor to police departments across the State of Connecticut, and as a Law Enforcement Consultant providing guidance and oversight to department command staff on operations, organizational structure and risk management.

Endnotes

- ¹ *Missouri v. McNeely*, 358 S.W.3d 65, 69 (2012).
- ² *United States v. Robinson*, 414 U.S. 218, 224 (1973), quoting U.S. Const. amend. IV.
- ³ *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013), quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985).
- ⁴ *McNeely*, 133 S.Ct. at 1570, quoting *Kentucky v. King*, 563 U.S. ___, ___ (2011).
- ⁵ *McNeely*, 133 S.Ct. at 1561.
- ⁶ *Id.* at 1563.
- ⁷ *Florida v. Jardines*, 133 S.Ct. 1409, 1413 (2013).
- ⁸ *Id.* at 1414, quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961).
- ⁹ *Jardines*, 133 S.Ct. at 1412, quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984).
- ¹⁰ *Jardines*, 133 S.Ct. at 1415.
- ¹¹ *Id.* at 1417–1418.
- ¹² *Florida v. Harris*, 133 S.Ct. 1050 (2013).
- ¹³ *Id.* at 1053.
- ¹⁴ *Id.* at 1054.
- ¹⁵ *Id.* at fn 1, 2, quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2009).
- ¹⁶ *Harris*, 133 S.Ct. at 1055, citing *Pringle*, 540 U.S. at 371, and *Illinois v. Gates*, 462 U.S. 213, 232 (1983).
- ¹⁷ *Harris*, 133 S.Ct. at 1055.
- ¹⁸ *Id.* at 1052.
- ¹⁹ *Id.* at fn 4, 5.
- ²⁰ *Id.* at fn 4, 5.
- ²¹ *Id.* at 1058.
- ²² It is important to note that the *King* decision is based on a Maryland statute that specifically provided for the taking of DNA evidence from persons arrested for serious crimes such as assault, rape, murder and burglary.
- ²³ U.S. Const. amend. IV.
- ²⁴ *Katz v. United States*, 389 U.S. 347 (1967).
- ²⁵ *Maryland v. King*, 133 S.Ct. 1958, 1980 (2013).
- ²⁶ *Id.*
- ²⁷ *Salinas v. Texas*, 133 S.Ct. 2174, 2178 (2013).
- ²⁸ *Id.* at 2179.
- ²⁹ *Id.* citing *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984).
- ³⁰ *Salinas*, 133 S. Ct. at 2176, citing *Griffin v. California*, 380 U. S. 609, 613–615 (1965).
- ³¹ See, e.g., *Miranda v. Arizona*, 384 U. S. 436, 467–468 (1966).
- ³² *Salinas*, 133 S. Ct. at 2180.

questions

The following questions are based on material in this *Training Key*®. Select the one best answer for each question.

1. Which of the following is false?

- (a) *Since alcohol is naturally metabolized in the bloodstream, officers can conduct a nonconsensual blood test without a warrant in all DUI cases.*
- (b) *A blood test is considered a search under the Fourth Amendment.*
- (c) *The front porch is considered part of the home for Fourth Amendment purposes.*
- (d) *An “implied license” allows a visitor to approach a home up the front path, knock, wait for a response, and then leave if no invitation to enter is given. Any actions beyond this may be considered an unlicensed intrusion.*

2. Which of the following is true?

- (a) *When determining if the alert of a drug detection dog at a traffic stop provides probable cause to search a vehicle, the Supreme Court stated that the totality of the circumstances should be considered.*
- (b) *According to the Supreme Court, the best indicator of a drug detection dog’s reliability is his or her performance in a controlled testing environment.*
- (c) *Obtaining a DNA sample via a cheek swab following arrest for a serious offense supported by probable cause is considered a legitimate and reasonable booking procedure.*
- (d) *All of the above.*

3. A suspect or witness can invoke the privilege against self-incrimination by simply remaining silent.

- (a) *True*
- (b) *False*

answers

- 1. (a) Exigencies may exist that justify certain exceptions to the warrant requirement when conducting searches. Whether an exigency exists must be determined on a case-by-case basis, considering the totality of the circumstances.
- 2. (d) All of the above.
- 3. (b) A suspect or witness must expressly state his or her intention to invoke the Fifth Amendment protection against self-incrimination.

