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## VI. Criminal

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## ***Florida v. Jardines***

**11-564**

**Ruling Below:** *Jardines v. State*, 73 So.3d 34 (Fla. 2011), *cert. granted in part*, *Florida v. Jardines*, 11-564 (132 S.Ct. 995).

In 2006, police received a tip that Joelis Jardines was using his home as a place to grow marijuana. The police took a drug-sniffing dog to his door and when it had indicated that it smelled drugs a police officer approached the door and smelled marijuana. The police obtained a search warrant and later found several marijuana plants inside Jardines' home. Jardines was charged with drug trafficking and other charges. In 2007, Jardines filed a Motion to Suppress Items Seized from His Home arguing that the use of the dog was an unreasonable search. The court granted the motion and the State appealed. The District Court of Appeals reversed, holding that the use of the dog did not constitute a search.

**Question Presented:** Whether a “sniff test” by a drug detection dog conducted at the front door of a private residence is a “search” under the Fourth Amendment.

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**Joelis JARDINES, Petitioner,**  
**v.**  
**STATE of Florida, Respondent.**

Supreme Court of Florida

Decided April 14, 2011

[Excerpt: Some footnote and citation omitted.]

PERRY, J.

contraband.

### **I. BACKGROUND**

On November 3, 2006, Detective Pedraja of the Miami–Dade Police Department received an unverified “crime stoppers” tip that the home of Joelis Jardines was being used to grow marijuana. One month later, on December 6, 2006, Detective Pedraja and Detective Bartlet and his drug detection dog, Franky, approached the residence.

The handler placed the dog on a leash and accompanied the dog up to the front door of the home. The dog alerted to the scent of

The handler told the detective that the dog had a positive alert for the odor of narcotics. The detective went up to the front door for the first time, and smelled marijuana.

The detective prepared an affidavit and applied for a search warrant, which was issued. A search was conducted, which confirmed that marijuana was being grown inside the home. The defendant was arrested.

The defendant moved to suppress the evidence seized at his home. The trial court

conducted an evidentiary hearing at which the detective and the dog handler testified. The trial court suppressed the evidence on authority of *State v. Rabb*.

The State appealed the suppression ruling, and the district court reversed based on the following reasoning:

In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in *Rabb*, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed. Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with *Rabb*, we certify direct conflict.

Jardines sought review in this Court based on certified conflict with *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006), which we granted.

## II. THE APPLICABLE LAW

The Fourth Amendment to the United States Constitution contains both the Search and Seizure Clause and the Warrant Clause and provides as follows in full:

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. With respect to the meaning of the amendment, the courts have come to accept the formulation set forth by Justice Harlan in *Katz*:

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." *My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."*

### A. Federal "Dog Sniff" Cases

The United States Supreme Court has addressed the issue of "sniff tests" by drug detection dogs. First, in *United States v. Place*, 462 U.S. 696 (1983), that Court addressed the issue of whether police, based on reasonable suspicion, could temporarily seize a piece of luggage at an airport and then subject the luggage to a "sniff test" by a drug detection dog. After Place's behavior at an airport aroused suspicion, police seized his luggage and subjected it to a "sniff test" by a drug detection dog at another airport and ultimately discovered cocaine inside. The federal district court denied Place's motion to suppress, and the court of appeals

reversed. The United States Supreme Court affirmed, concluding that the seizure, which lasted ninety minutes, was an impermissibly long *Terry* stop, but the Court ruled as follows with respect to the dog “sniff test”:

The Fourth Amendment “protects people from unreasonable government intrusions into their legitimate expectations of privacy.” We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A “canine sniff” by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude 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.

Second, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the United States Supreme Court addressed the issue of whether police could stop a vehicle at a drug interdiction checkpoint and subject the exterior of the vehicle to a “sniff test” by a drug detection dog. Police stopped Edmond and other motorists at a dragnet-style drug interdiction checkpoint, and a drug detection dog was walked around the exterior of each vehicle. Later, Edmond filed a class action lawsuit against the city, claiming that the checkpoints violated his Fourth Amendment rights, and he sought a preliminary injunction barring the practice. The federal district court denied the injunction, and the court of appeals reversed. The United States Supreme Court affirmed, explaining that “[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” *Edmond*, 531 U.S. at 41, 121 S.Ct. 447. With respect to the dog “sniff test,” the Court stated as follows:

It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is “much less intrusive than a typical search.”

## **B. Two Additional Federal Cases**

In two additional cases, the United States

Supreme Court has addressed Fourth Amendment issues that are relevant here. First, in *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court addressed the issue of whether police, without a showing of probable cause, could temporarily seize and inspect a small portion of the contents of a package, which had been damaged in transit and was being held by a private shipping company, and then subject the contents to a field test for cocaine. After employees of a private freight carrier discovered a suspicious white powder in a damaged package and notified federal agents, the agents conducted a field chemical test on the powder and determined that it was cocaine. The federal district court denied Jacobsen's motion to suppress, and the court of appeals reversed. The United States Supreme Court reversed, reasoning as follows:

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in “privately” possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably “private” fact, compromises no

legitimate privacy interest.

This conclusion is dictated by *United States v. Place*, 462 U.S. 696 (1983), in which the Court held that subjecting luggage to a “sniff test” by a trained narcotics detection dog was not a “search” within the meaning of the Fourth Amendment. . . .

Here, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.

And second, in *Kyllo v. United States*, 533 U.S. 27 (2001), the United States Supreme Court addressed the issue of whether police, without a warrant, could use a thermal-imaging device to scan a private home to determine if the amount of heat generated by the home was consistent with the use of high-intensity lamps used in growing marijuana. After federal agents became suspicious that Kyllo was growing marijuana in his home, agents scanned the outside of the triplex with a thermal-imaging device, which showed that the garage roof and side of the residence were inordinately warm. The agents obtained a warrant and searched the residence and found live marijuana plants inside. The federal district court denied Kyllo's motion to suppress, and the circuit court affirmed. The United States Supreme Court reversed, reasoning as follows:

The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. While it may be difficult to refine *Katz* when the search of areas such as

telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area” constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search. . . .

We have said that the Fourth Amendment draws “a firm line at the entrance to the house.” That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no “significant” compromise of the homeowner’s privacy has occurred, we must take the long view, from the original meaning of the Fourth

Amendment forward.

“The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.

### III. ANALYSIS

As noted above, the issue raised in the present case is whether a “sniff test” by a drug detection dog conducted at the front door of a private residence is a “search” under the Fourth Amendment.

#### A. The Federal “Dog Sniff” Cases Are Inapplicable to the Home

For reasons explained below, we conclude that the analysis used in the above federal “dog sniff” cases is inapplicable to a “sniff test” conducted at a private home. First, we recognize that the United States Supreme Court has ruled that because a “sniff test” conducted by a drug detection dog is “*sui generis*,” or unique, in the sense that it is minimally intrusive and is designed to detect only illicit drugs and nothing more, *Place*, 462 U.S. at 707, a dog “sniff test” does not implicate Fourth Amendment rights when employed in the following settings: (i) when conducted on luggage that has been seized at an airport based on reasonable suspicion of unlawful activity, where the luggage has been separated from its owner and the “sniff test” is conducted in a public place, (ii)



when conducted on the exterior of a vehicle that has been stopped in a dragnet-style stop at a drug interdiction checkpoint, and (iii) when conducted on the exterior of a vehicle that has been subjected to a lawful traffic stop. Further, the United States Supreme Court has applied a similar analysis to a chemical “field test” for drugs when conducted on the contents of a package that has been damaged in transit and is being held by a private shipping company.

We note, however, that in each of the above cases, the United States Supreme Court was careful to tie its ruling to the particular facts of the case. Nothing in the above cases indicates that the same analysis would apply to a dog “sniff test” conducted at a private residence.

Significantly, all the sniff and field tests in the above cases were conducted in a minimally intrusive manner upon objects—luggage at an airport in *Place*, vehicles on the roadside in *Edmond* that warrant no special protection under the Fourth Amendment. All the tests were conducted in an impersonal manner that subjected the defendants to no untoward level of public opprobrium, humiliation or embarrassment. There was no public link between the defendants and the luggage as it was being tested in *Place* and the defendants retained a degree of anonymity during the roadside testing of their vehicles in *Edmond*. Further, and more important, under the particular circumstances of each of the above cases, the tests were not susceptible to being employed in a discriminatory or arbitrary manner—the luggage in *Place* had been seized based on reasonable suspicion; the vehicle in *Edmond* had been seized in a dragnet-style stop. All these objects were seized and tested in an objective and nondiscriminatory manner, and there was no

evidence of overbearing or harassing government conduct. There was no need for Fourth Amendment protection. As explained below, however, such is not the case with respect to a dog “sniff test” conducted at a private residence.

## **B. “Sniff Test” at a Private Home**

As noted above, the United States Supreme Court has held that “wherever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable government intrusion.” *Terry*, 392 U.S. at 9. Nowhere is this right more resolute than in the private home: “‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” *Kyllo*, 533 U.S. at 31.

Although police generally may initiate a “knock and talk” encounter at the front door of a private residence without any prior showing of wrongdoing, a dog “sniff test” is a qualitatively different matter. 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. Quite the contrary. In the present case, for instance, on the morning of December 5, 2006, members of the Miami–Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, conducted a surveillance of Jardines’ home. As Detectives Pedraja and Bartlet and the drug detection dog, Franky, approached the residence, Sergeant Ramirez and Detective Donnelly of the Miami–Dade Police Department established perimeter positions

around the residence and federal DEA agents assumed stand-by positions as backup units.

The “sniff test” conducted by the dog handler and his dog was a vigorous and intensive procedure.

After the “sniff test” was completed, Detective Bartlet and Franky left the scene to assist in another case. Detective Pedraja, after waiting at the residence for fifteen or twenty minutes, also left the scene to prepare a search warrant and to submit it to a magistrate. Federal DEA agents, however, remained behind to maintain surveillance of Jardines’ home. Pedraja obtained a search warrant later that day and returned to the scene. About an hour later, members of the Miami-Dade Police Department, Narcotics Bureau, and DEA agents executed the warrant by gaining entry to Jardines’ home through the front door. As agents entered the front door, Jardines exited through a sliding glass door at the rear of the house. He was apprehended by Special Agent Wilson of the DEA and was turned over to the Miami-Dade Police Department. He was charged with trafficking in marijuana and theft of electricity.

Based on the foregoing, we conclude that the dog “sniff test” that was conducted here was an intrusive procedure. The “sniff test” was a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments. On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and

federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity—i.e., the preparation for the “sniff test,” the test itself, and the aftermath, which culminated in the full-blown search of Jardines’ home—lasted for hours. The “sniff test” apparently took place in plain view of the general public. There was no anonymity for the resident.

Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, whether or not he or she is present at the time of the search, for such dramatic government activity in the eyes of many-neighbors, passers-by, and the public at large will be viewed as an official accusation of crime. And if the resident happens to be present at the time of the “sniff test,” such an intrusion into the sanctity of his or her home will generally be a frightening and harrowing experience that could prompt a reflexive or unpredictable response.

Further, all the underlying circumstances that were present in the above federal “dog sniff” and “field test” cases that guaranteed objective, uniform application of those tests—i.e., the temporary seizure of luggage based on reasonable suspicion of criminal activity in *Place*; the temporary seizure of a vehicle in a dragnet-style stop at a drug interdiction checkpoint in *Edmond*. Unlike the objects in those cases, a private residence is not susceptible to being seized beforehand based on objective criteria. Thus, 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. Such an open-ended policy invites overbearing and harassing conduct.

In sum, a “sniff test” by a drug detection dog conducted at a private residence does not *only* reveal the presence of contraband, as was the case in the federal “sui generis” dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen’s home under the Fourth Amendment, we conclude that a “sniff test,” such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a “search” within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment—specifically, the search must be preceded by an evidentiary showing of wrongdoing. We note that the rulings of other state and federal courts with respect to a dog “sniff test” conducted at a private residence are generally mixed, as are the rulings of other state and federal courts with respect a dog “sniff test” conducted at an apartment or other temporary dwelling.

#### IV. THE SUPPRESSION RULING

A magistrate’s determination that probable cause exists for issuance of a search warrant is entitled to great deference when a trial court is considering a motion to suppress. *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) And a trial court’s ruling on a motion to suppress in such a case is subject to the following standard of review: the reviewing court must defer to the trial court’s factual findings if supported by competent, substantial evidence but must review the trial court’s ultimate ruling independently,

or de novo. *State v. Glatzmayer*, 789 So.2d 297, 301 n. 7 (Fla.2001).

With respect to the fact that Detective Pedraja testified that he smelled the odor of live marijuana plants as he stood outside the front door of Jardines’ house, the trial court stated as follows in a footnote: “There was evidence that after the drug detection dog had alerted to the odor of a controlled substance, the officer also detected a smell of marijuana plants emanating from the front door. However, this information was only confirming what the detection dog had already revealed.”

A warrantless “sniff test” by a drug detection dog conducted at the front door of a private residence is impermissible under the Fourth Amendment. Thus, the trial court properly excluded the results of the “sniff test” from its review of the magistrate’s probable cause determination. The remaining evidence consisted of the following: the unverified “crime stoppers” tip, the closed window blinds, and the constantly running air conditioner. As for Detective Pedraja’s statement that he detected the odor of live marijuana plants as he stood outside the front door, we note that the trial court had the opportunity to observe Detective Pedraja’s testimony first-hand at the suppression hearing. Further, the district court in *Rabb* addressed an identical situation and concluded as follows:

[B]ecause the chronology of the probable cause affidavit suggests that the dog alert to marijuana occurred prior to law enforcement’s detection of its odor, we cannot assume that law enforcement detected the odor of marijuana before the dog alerted. . . . As such, this is not a case in which a law enforcement officer used his senses to detect something within his

plain smell; rather, a law enforcement officer used enhanced, animal senses to detect something inside a home that he might not otherwise have detected.

*Rabb*, 920 So.2d at 1191. Based on our review of the present record, we conclude that the trial court's factual findings are supported by competent, substantial evidence and the trial court's ultimate ruling is supported in the law. The district court erred in reversing the suppression ruling.

## V. CONCLUSION

"We have said that the Fourth Amendment draws 'a firm line at the entrance to the house.' That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant." *Kyllo*, 533 U.S. at 40. 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.

We quash the decision in *Jardines* and approve the result in *Rabb*.

It is so ordered.

### **POLSTON, J., dissenting.**

Because the majority's decision violates binding United States Supreme Court precedent, I respectfully dissent.

Despite the majority's focus upon multiple officers and the supposed time involved in surveillance and in execution of the search warrant, it is undisputed that one dog and

two officers were lawfully and briefly present near the front door of Jardines' residence when the dog sniff at issue in this case took place. And despite statements about privacy interests in items and odors within and escaping from a home, the United States Supreme Court has ruled that there are no legitimate privacy interests in contraband under the Fourth Amendment.

Contrary to the majority's position, the United States Supreme Court has ruled that a dog sniff is not a search within the meaning of the Fourth Amendment because a dog sniff only reveals contraband in which there is no legitimate privacy interest. Accordingly, the dog sniff involved in this case, which occurred while law enforcement was lawfully present at the front door, cannot be considered a search in violation of the Fourth Amendment.

## I. ANALYSIS

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The similar right contained in the Florida Constitution is "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. Therefore, this Court's jurisprudence in this area must conform to the United States Supreme Court's precedent interpreting the Fourth Amendment.

In this case, it is undisputed that law enforcement was lawfully present at Jardines' front door. While the Fourth Amendment certainly protects "the right of a man to retreat into his own home and there be free from unreasonable governmental

intrusion,” *Silverman v. United States*, 365 U.S. 505, 511 (1961), the publicly accessible area around the front door of the home is not accorded the same degree of Fourth Amendment protection. In fact, the majority acknowledges that “one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time.” Majority op. at 46.

Furthermore, there are no allegations here that an officer’s detection of the scent of marijuana while lawfully present at Jardines’ front door would have violated the Fourth Amendment. There are no such allegations because “the police may see what may be seen ‘from a public vantage point where [they have] a right to be.’” *Florida v. Riley*, 488 U.S. 445, 449 (1989). Or, as the Ninth Circuit plainly put it with regard to the sense of smell, one does not have “a reasonable expectation of privacy from drug agents with inquisitive nostrils.” *United States v. Johnston*, 497 F.2d 397, 398 (9th Cir.1974).

Accordingly, the only remaining question at issue in this case is whether a law enforcement officer, who is lawfully present at the front door of a private residence, may employ a dog sniff at that front door. Based upon binding United States Supreme Court precedent, the answer is quite clearly yes.

The United States Supreme Court has explained 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.’” *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

Additionally, and of great importance here,

the United States Supreme Court has held that a dog sniff does not constitute a search within the meaning of the Fourth Amendment because it only reveals contraband and there is no legitimate privacy interest in contraband that society is willing to recognize as reasonable.

First, in *Place*, 462 U.S. at 707, the United States Supreme Court stated the following regarding the unique and very limited nature of a dog sniff when holding that a dog sniff of a passenger’s luggage in an airport was not a search under the Fourth Amendment:

We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A “canine sniff” by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sniff*

*generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude 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.

Then, the United States Supreme Court further explained its decision in *Place* when holding in *Jacobsen*, 466 U.S. at 123, that a chemical test of a package did not constitute a search because “governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.” The Court stated that this holding was “dictated” by *Place* because, “as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.” *Jacobsen*, 466 U.S. at 124. The Court explained that “the reason [the dog sniff in *Place*] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items.”

Thereafter, in *Edmond*, 531 U.S. at 40, the United States Supreme Court reaffirmed *Place* when briefly discussing why a dog sniff of the exterior of a car stopped at a checkpoint did not constitute a search:

It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a

narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is “much less intrusive than a typical search.”

To summarize, in *Place*, *Jacobsen*, *Edmond*, the United States Supreme Court held that dog sniffs are not searches within the meaning of the Fourth Amendment because they only detect contraband and there is no legitimate privacy interest in contraband that society recognizes as reasonable. A vast majority of federal and state courts have interpreted the United States Supreme Court’s decisions as holding that dog sniffs are not searches under the Fourth Amendment, even in the context of private residences.

In this case, Franky the dog was lawfully present at Jardines’ front door when he alerted to the presence of marijuana. And because, under the binding United States Supreme Court precedent described above, a dog sniff only reveals contraband in which there is no legitimate privacy interest, Franky’s sniff cannot be considered a search violating the Fourth Amendment.

The majority concludes that the United States Supreme Court’s precedent regarding dog sniffs does not apply here because those dog sniff cases did not involve dog sniffs of a home. *See* majority op. at 44. However, the United States Supreme Court did not limit its reasoning regarding dogs sniffs to locations or objects unrelated to the home.

There is no language in *Place*, *Jacobsen*, or *Edmond* that indicates the reasoning that dog sniffs are not searches would change if the cases involved private residences. Therefore, the very limited and unique type of intrusion involved in a dog sniff is the dispositive distinction under United States Supreme Court precedent, not whether the object sniffed is luggage, an automobile, or a home. Accordingly, the majority's holding based upon the object sniffed is contrary to the United States Supreme Court's precedent.

In addition, the majority distinguishes the binding precedent regarding dog sniffs based upon what it terms "public opprobrium, humiliation and embarrassment." Majority op. at 36, 45, 48, 49–50. By focusing upon the multiple officers and the supposed time involved in surveillance and the execution of the search warrant, the majority concludes that the sniff here was more intensive and involved a higher level of embarrassment than the sniffs involved in *Place* and *Edmond*. See majority op. at 46–47, 48–49. However, *Place* and *Edmond* all involved law enforcement activity by multiple officers. And although the majority states that the law enforcement activity in this case "lasted for hours," majority op. at 36, 48, there is no evidence in the record to support that supposition. To the contrary, when asked during the suppression hearing how long he and the dog "remain[ed] on the scene that day," Detective Bartlet responded, "That was a day we were doing multiple operations and I had probably two other people waiting for the dog. So I couldn't have been there much more than five or ten minutes, just enough to grab the information on the flash drive, hand it over and leave." The other specific testimony regarding time in the record is Detective Pedraja's testimony during the suppression hearing

explaining that he conducted surveillance for fifteen minutes before approaching the residence with Detective Bartlet and the dog and that it was "approximately 15 to 20 minutes from the time that [he] went to the front door, was standing at the threshold, went to the front door and then came back." Furthermore, as explained above, there are no allegations here that the multiple officers near Jardines' residence violated the Fourth Amendment, regardless of the level of "public opprobrium, humiliation, and embarrassment" that the presence of these officers may have caused Jardines. Therefore, distinguishing this case from the United States Supreme Court's dog sniff cases based upon the level of embarrassment the majority presumes to be present here is improper.

Finally, it is critical to note that the majority's (and the special concurrence's) assumption that Jardines had a reasonable expectation that the smell of marijuana coming from his residence would remain private is contrary to the explicit pronouncements in *Jacobsen* that the possessor of contraband has no legitimate expectation of privacy in that contraband. Indeed, the fact that one has no reasonable expectation of privacy in contraband is precisely why a dog sniff is not a search under the United States Supreme Court's precedent interpreting the Fourth Amendment. Because the dog sniff is only capable of detecting contraband, it is *only* capable of detecting that which is not protected by the Fourth Amendment.

### III. CONCLUSION

As held by United States Supreme Court, a dog sniff is not a search within the meaning of the Fourth Amendment because it only reveals contraband and there is no legitimate expectation of privacy in contraband that

society is willing to recognize as reasonable. Given this binding precedent, Franky's sniff, while lawfully present at Jardines' front door, cannot be considered a search under the Fourth Amendment. Therefore, I would

approve the Third District's decision in *Jardines* and disapprove the Fourth District's contrary decision in *Rabb*.

Accordingly, I respectfully dissent.



## “Does the War on Drugs Affect Your Privacy Rights?”

*Huffington Post*

May 22, 2012

Jane Yakowitz Bambauer

Do the police need a warrant to bring a drug-sniffing dog to your front door? The U.S. Supreme Court will soon answer that question. The case, *Florida v. Jardines*, may even prompt the Court to reconsider its previous Fourth Amendment dog sniff cases, *United States v. Place* and *Illinois v. Caballes*. These two decisions had held that police don't need a warrant for a dog to sniff your luggage in an airport, or your car by the side of the road, finding that the sniffs are not “searches” under the Fourth Amendment. The logic is straightforward: since a sniff “discloses only the presence or absence of narcotics, a contraband item,” a search after a dog's alert cannot offend reasonable expectations of privacy. Of course, the logical flaw is equally obvious: police dogs often alert when drugs are not present, resulting in unnecessary suspicionless searches.

But do these cases track our intuitions about privacy? I recently conducted qualitative research based on the facts of *Florida v. Jardines*. The complete results appear in a new Stanford Law Review Online essay. I asked 187 law students whether contraband-detecting dog sniffs should be considered an invasion of privacy under a variety of false alert rates. Not surprisingly, the dogs' accuracy rates mattered significantly. Fewer than half believed that a perfectly accurate dog's sniff of a car constituted an invasion of privacy that should require a warrant or some reasonable suspicion. By comparison, two-thirds believed the sniff by the dog with a 10 percent false alert error rate needed a

warrant.

But accuracy was not the only important factor; in fact, it wasn't even the most important factor. Unbeknownst to the students, the surveys randomly varied the type of contraband the dogs were trained to detect. Roughly one-third of the students responded to a hypothetical scenario involving a drug-sniffing dog, one-third responded to a bomb-sniffing dog, and one-third responded to a human cadaver-sniffing dog. Students' instincts about privacy were very sensitive to the type of criminal investigation. Those assigned to react to the drug-sniffing dog were much less tolerant of police practices. Fifty-six percent of respondents believed even the mythical perfectly accurate drug sniff constituted a Fourth Amendment search, while the corresponding rates for cadavers and bombs were 30 percent and 36 percent, respectively. The results probably reflect a shared skepticism about the efficacy and legitimacy of the “war on drugs.” If the police use a dog to see if you're smoking marijuana at home, students think they should get a warrant -- but not if they're checking for dead bodies, or pipe bombs.

At present, courts do not consider the type of criminal investigation when deciding whether police conduct constitutes a search, and as a practical matter the distinction is futile. The contraband-sniffing dog is just a first-generation information-gathering tool. In time, a single instrument (possibly a drone) will detect drugs and bombs. If police

conduct is sufficiently intrusive, it should not evade designation as a search simply because it is employed to achieve more worthwhile criminal enforcement goals. Conversely, unobtrusive investigatory practices should not be dismissed too quickly. Our implicit reaction to drug enforcement policies may prompt us to welcome a reversal of the previous dog sniff cases, but we may be overlooking the value of contraband-detecting technologies. Traditional suspicion-based policing is dependent on the discretion of police officers, which is prone to error and bias. Suspicionless screens, if they are used properly, redistribute the burdens of criminal investigation and punishment more equitably across the population. Our crime control policies are more likely to be carefully designed when they will apply to all of us. Police techniques that detect contraband can simultaneously improve crime detection and reduce law enforcement

discretion (and, hence, potential abuse).

The Supreme Court should use the *Jardines* case to reconfigure Fourth Amendment analysis to accommodate both the old model of individualized suspicion and new models designed to decrease discretion. To be legitimate, these “suspicionless non-searches” should meet three criteria. The tool must have low error, be applied uniformly, and have negligible interference (that is, the tool itself should not cause adverse effects.) The dog sniff in *Jardines* fails all three of these elements, and there is little reason to believe dogs will ever produce a sufficiently low rate of error. But other processes and technologies have the potential to be what dogs never were—accurate and fair. With luck, the Court will recognize a Fourth Amendment search in *Jardines* without creating a rule that reflexively obstructs the use of new technologies.

## **“Florida Says Drug-Sniffing Dogs in Front of Private Homes Do Not Invade Privacy”**

*Gant Daily*  
December 30, 2011  
Tom Ramstack

The Supreme Court is being asked to decide whether a drug-sniffing dog that detects marijuana through the door of a house is violating the privacy of the homeowner.

Miami police say a dog sniffing the air outside a house doesn't trample anyone's privacy. It's a matter of discretion for police.

The homeowner, Joelis Jardines, said the sniffing was a “search” that first requires probable cause to believe a crime has been committed on the site. Otherwise, the police violate the homeowner's Fourth Amendment rights of privacy.

Jardines was charged with felony marijuana offenses but appealed.

The Fourth Amendment says that “[t]he 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.”

The case began Nov. 3, 2006, when Miami-Dade police received a Crime Stoppers tip that Jardines' home was being used to grow marijuana.

Police went to the house on Dec. 6, 2006, with a drug detection dog named Franky. They observed the house for 15 minutes but saw no activity inside. They then stepped onto the porch with the dog and stopped at the front door.

The dog handler said Franky indicated a “positive alert” for the odor of drugs.

A detective noticed the air conditioning unit was running without stopping, which he said often happens in houses where marijuana is grown hydroponically under high intensity lights that create heat.

The detective then applied for a search warrant, which a local judge granted. Police raided the home and found marijuana. They arrested Jardines as he fled.

Jardines's defense relied on a ruling in a 2004 federal case in which a judge said a police dog's sniffing near a house was the same as searching the home.

For private homes, “a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life,” the federal court ruling said.

A trial court agreed and threw out the evidence against Jardines.

Prosecutors appealed to Florida's 3rd District Court of Appeal in Miami, which reinstated the case against Jardines.

No warrant is needed for a dog to sniff around a house, the state appeals court said.

The court's ruling against Jardines relied on a 2005 U.S. Supreme Court decision that

said police dogs are trained to search only for illegal items, such as drugs. No one has a privacy right in illegal drugs, which means a dog sniff could not violate anyone's Fourth Amendment rights.

Unlike wiretaps and surveillance cameras that capture all conversations and images on a telephone or a place being monitored, dogs target their sniffs only at illegal items, the Supreme Court said.

However, the Florida Supreme Court sided with the homeowner, saying a dog sniff of a house without a warrant is "an unreasonable government intrusion into the sanctity of the home."

In the state's appeal to the Supreme Court, Attorney General Pam Bondi's petition says "Florida courts are now alone in refusing to follow" rules of law that would allow drug-sniffing dogs to be used without warrants outside private homes.

Without using the dogs, the state might not be able to get the evidence needed for a search warrant, thereby impairing the ability of police to enforce drug laws, the petition says.

In addition, dogs are low-tech aids to police that do not represent the same degree of intrusion as sophisticated electronic eavesdropping.

"Chocolate Labrador retrievers are not sophisticated systems," the attorney general's petition to the Supreme Court says. "Rather, they are common household pets that possess a naturally strong sense of smell; Nor was there a 'vigorous search effort' at the front door; all Franky really did was breathe."

The Supreme Court could decide as soon as next week whether to hear the case of Florida.

## **“Florida High Court Rules on Drug Dog Sniff Tests”**

*The Ledger*  
April 14, 2011

The Florida Supreme Court has ruled that police must get a warrant before they can do a “sniff test” by a drug-detection dog at the front door of a home.

The court released its 5-2 opinion Thursday. Police went to a Miami-Dade home in 2006 with a drug-sniffing dog on a tip, later arresting the resident and seizing marijuana.

The court’s majority said police should have gotten a warrant first because a drug dog’s sniffing outside at a private residence

constitutes a search.

But dissenters said there’s no expectation of privacy regarding illegal substances in one’s home.

Attorney General Pam Bondi says the ruling hinders law enforcement and plans to appeal it to the U.S. Supreme Court.

The case is SC08-2101, *Joelis Jardines v. State of Florida*.

## **“The Dog-Sniffing Cases: Made Simple”**

*SCOTUSblog*

July 26, 2012

Lyle Denniston

Police forces across the country have found that dogs, which have a highly developed sense of smell, can be trained to detect specific odors, such as scents from a human body, or the odors given off by illegal drugs. This makes police dogs highly valued partners to police as they search for missing persons, or for illegal narcotics. When a trained dog's capacity to detect a certain odor has been formally certified by an expert, the evidence that police gain from dog searches frequently is permitted in criminal cases in court. But the Supreme Court several times has had to rule on whether a search by a trained police dog is the kind of inspection that must be done so that it does not violate the constitutional right to privacy of the individual targeted. The Court will give further constitutional guidance in two new cases, both originating in Florida.

The Fourth Amendment is one of the Constitution's strongest guarantees of personal privacy, especially for the privacy of the home. The Supreme Court has made clear that the protection given by the Amendment is intended to protect people, rather than physical space. But its protection does extend beyond the individual's own body, to places and things which the owner and society in general would recognize as intended to be free from government intrusion. Thus, the protection can apply to houses, documents, and personal belongings. Searches by police or other government agents, however, are generally barred only if they are “unreasonable.” That is a sufficiently flexible word that courts have traditionally

had to fill in meaning on how to apply it in specific situations. The Amendment also provides that, as a general rule, police cannot carry out a search unless they have the permission of a judge, through a “warrant.” Police can obtain a warrant to carry out a search only if they have a fairly strong reason to believe that the search will turn up evidence of crime. Police do not have to be absolutely certain that the search will lead to evidence, but rather that prospect must be “probable.” In some situations, a warrant is not needed, but police still need to show that a search “probably” will turn up criminal evidence.

But, before Fourth Amendment protection comes into play, police activity must actually be found to be a “search” in a legal sense. For example, if one puts the family trash out on the curb, police can inspect it without getting a warrant because the family has given up any expectation that the contents of the trash bags are private. But, if the trash is still in the can inside the house, perhaps in the kitchen, police could search it only if they got a warrant allowing them to do so; that would be a search in a place that the homeowner considers to be private, and so does society in general. For another example, if one keeps drugs in the glove compartment of a car or truck, and police pull over that vehicle for a traffic violation, police are not allowed to search the glove compartment unless they have some reason to think that the search will turn up evidence related to the reason the vehicle was stopped. But if the individual, on getting out of the vehicle, drops a package of drugs on the ground, police can gather that up and use

it as evidence, because they were not searching for it when it just turned up.

It is clear, then, that the factual situation can make a difference constitutionally. And that is why the Supreme Court has had to return periodically to define the situations in which the police may use a drug-sniffing dog, without violating someone's right to privacy under the Fourth Amendment. That issue arises, of course, because a well-trained drug-sniffing dog, by giving an "alert" to its police handler when the animal smells a specific drug, may actually lead the police to the discovery of evidence of a crime. If the Fourth Amendment does not apply at all, police may hand over that evidence to a prosecutor who pursues criminal charges. But if the Fourth Amendment might apply, the evidence might be valid or it might not be, depending upon the factual situation.

Police and prosecutors have generally argued in court cases that the use of a drug-sniffing dog is not a "search" at all, because the only thing that a dog's "alert" identifies is something that is illegal anyway, and no one has any privacy right in illegal items or substances. The Supreme Court has sometimes embraced that argument.

For example, the Court has ruled that it is not a "search" under the Fourth Amendment if police use a dog to sniff the exterior of luggage that police have temporarily seized in an airport terminal, believing that it is likely to contain something illegal. It also has allowed police to check the outside of a vehicle that police have legitimately stopped at a highway checkpoint set up to search for illegal drugs, or to check the outside of a vehicle that police have legally stopped for a suspected traffic violation. In each of those situations, the impact on privacy was considered to be very slight, because the intrusion was minimal, so the use of the dog did not violate the Fourth Amendment.

Suppose, though, that police use a dog to check for narcotics on the exterior of a home that they suspect is being used for drug trafficking. Does the fact that the site of the search is a private home make a constitutional difference? That is one of the new factual situations that the Supreme Court is now preparing to confront. In the case of *Florida v. Jardines*, Florida's state supreme court ruled that the U.S. Supreme Court's past rulings on the use of drug-sniffing dogs did not apply at all when a dog was used at a home, even if the dog only sniffed exterior surfaces of a house. Nowhere is the right of privacy stronger than in a private home, the state court said.

That case originated when police in Miami got a tip from a "crime stopper" source that the home of Joelis Jardines was being used to grow marijuana. Police went to the home, based on that tip alone, and used a trained detection dog named Franky to check out the front porch of the house. After circling for a few minutes, Franky sat down, near the front door. That indicated to his police handler that the dog had detected an odor of marijuana coming from under the front door. At that point, the officers obtained a search warrant, which the officers then carried out, finding a marijuana-growing operation inside the house. Jardines was charged with growing illegal marijuana plants, but his lawyer contended that the search was unconstitutional because it intruded on the privacy of the home.

The state's highest court relied primarily upon a 2001 Supreme Court decision, in the case of *Kyllo v. United States*, a ruling that it is unconstitutional for police to use a heat-sensing device aimed at the outside walls of a house, to check to see if marijuana was being grown inside with the use of high-intensity lamps. When the government uses a device that the general public does not employ, and the police use it to explore the

details of a home, the state court said, that is a “search” under the Fourth Amendment. A trained dog’s sniff test fits into that category, it concluded, adding that such a test reveals not only the presence of something illegal, but it also is capable—when carried out in public view—of exposing the homeowner to public humiliation and embarrassment, and further is capable of being used in a discriminatory way. Before police may conduct such a sniff test, it ruled, they must be able to show in court—after the fact—that they had more than mere suspicion that a crime was being committed in the home; they had to have information indicating that it was “probable” that there was such criminal wrongdoing taking place in the home. The bottom line of the ruling: the use of Franky at the Jardines home was “unreasonable,” so the marijuana evidence could not be used against him.

That ruling is being challenged by state officials of Florida in their appeal to the Supreme Court. They have the support of the federal government for their challenge. Their basic claim is that a sniff test by a drug is not a search at all, at a home or elsewhere.

In the other Florida case that the Justices will be reviewing (*Florida v. Harris*), state officials have persuaded the Court to return to the issue of a dog sniff test on a car or truck, not a home. But this time, the sniff test was done on the inside of a private truck. The Florida Supreme Court, finding that the U.S. Supreme Court’s prior rulings involving sniff tests and vehicles only involved checking the exterior of a vehicle, decided that the Fourth Amendment provided greater protection when the dog’s “alert” led police to search the interior of a vehicle. But the decision also is important because the state court spelled out the information that police must have in order to convince a court that a drug-sniffing dog can

be trusted to make a reliable “alert” indicating that illegal drugs were present.

A Liberty County sheriff’s deputy with a drug-detecting dog named Aldo, who had been trained to detect the illegal drug methamphetamine, was on patrol in Blountstown, Florida. The deputy pulled over a truck driven by Clayton Harris because the license plate on the vehicle had expired. The officer noticed that Harris was shaking badly, and was breathing rapidly—telltale signs, for the officer, that Harris might be on drugs. The officer asked for permission to search the truck, but Harris refused. The dog then “alerted” to a drug on the door handle of the driver’s side of the truck. With that “alert” as legal justification, the officer searched the interior of the truck’s cab, and found ingredients for making methamphetamine.

Harris was charged with possessing materials for making the illegal drug, and his defense lawyer challenged the use of the evidence found in the truck’s cab, arguing that the search of the truck’s interior violated the Fourth Amendment because the deputy had no legal basis for conducting such a search. The Florida Supreme Court agreed, concluding that Aldo’s “alert” to a substance on the truck door handle was not sufficient to justify searching the cab. A police dog’s “alert,” the state court said, is not enough by itself to satisfy a court that the dog is properly trained and certified for the detection of a specific illegal drug. A court can accept an “alert” as a basis for a search only if the evidence shows how the particular dog was trained, what was done to satisfy an expert that the dog was adequately trained, how the dog had actually performed in “alerting” to drugs in other situations, and how well trained and how experienced was the dog’s police handler.

The state court remarked that it appeared



that, in dog-sniffing drug cases, “the courts often accept the mythic dog with an almost superstitious faith. The myth so completely has dominated the judicial psyche in these cases that the courts either assume the reliability of the sniff or address the question cursorily; the dog is the clear and consistent winner.”

Finding in the *Harris* case that there was not enough proof that Aldo was a reliable drug detector, the state court overturned Clayton

Harris’s no-contest plea to the criminal charge, because the evidence taken out of the truck cab should not have been allowed in court.

State officials, with the support of the federal government, have asked the Supreme Court to rule that the fact that a trained and certified dog does make an “alert” should be enough to justify a police officer’s further search of a vehicle for illegal drugs.

## ***Florida v. Harris***

11-817

**Ruling Below:** *Harris v. State*, 71 So. 3d 756 (Fla. 2011), as revised on denial of reh’g (Sept. 22, 2011), *cert. granted*, 2012 WL 986836 (U.S. 2012).

During a traffic stop in 2006, Clayton Harris’s truck was searched by the Liberty County Sheriff after police dog Aldo alerted the police to drugs in Harris’s vehicle. The police found pseudoephedrine pills, matches, and muriatic acid, all materials used to make methamphetamine (“meth”). Two months later, Harris was stopped for another traffic infraction and was searched after another alert by Aldo, but no illegal drugs were found during this second search. Harris was charged with possession of pseudoephedrine with intent to use it to manufacture methamphetamine, violating Florida Statutes § 893.149(1)(a) (2006). Harris moved to suppress the seized evidence, including the pseudoephedrine, arguing that it was found pursuant to an illegal search of his truck. The trial court denied the motion to suppress, finding that there was probable cause to search Harris’s truck, and admitted the physical evidence seized. Harris then entered a plea of no contest, reserving the right to appeal the denial of the motion, and was sentenced to two years in jail and five years of probation. The First District affirmed, again finding probable cause for the searches. The Supreme Court of Florida held that the trial court should have granted Harris’s motion to suppress and remanded the case. The Supreme Court of Florida applied a totality of the circumstances approach, requiring the State present evidence and explanation of training and certification, field performance records, and evidence concerning the experience and training of the officer handling the dog.

**Question Presented:** 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.

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**Clayton HARRIS, Petitioner,**  
v.  
**STATE of Florida, Respondent**

Supreme Court of Florida

Decided April 21, 2011; Revised on Denial of Rehearing September 22, 2011

[Excerpt; some text, footnotes, and citations omitted.]

### **PARIENTE, Judge**

When will a drug-detection dog’s alert to the exterior of a vehicle provide an officer with probable cause to conduct a warrantless search of the interior of the vehicle? That is the question in this case, and the answer is

integral to the constitutional right of all individuals in this state to be protected from unreasonable searches and seizures.

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 the 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. Because a dog cannot be cross-examined like a police officer on the scene whose observations often provide the basis for probable cause to search a vehicle, the State must introduce evidence concerning the dog's reliability. In this case, we specifically address the question of what evidence the State must introduce in order to establish the reasonableness of the officer's belief—in other words, what evidence must be introduced in order for the trial court to adequately undertake an objective evaluation of the officer's belief in the dog's reliability as a predicate for determining probable cause.

The appellate courts addressing the issue in this state have differed on what evidence the State must present to meet its burden. The decision of the First District Court of Appeal in *Harris v. State*, 989 So.2d 1214 (Fla. 1st DCA 2008), expressly and directly conflicts with the decisions of the Second District Court of Appeal in *Gibson v. State*, 968 So.2d 631 (Fla. 2d DCA 2007), and *Matheson v. State*, 870 So.2d 8 (Fla. 2d DCA 2003). In *Harris*, the First District without elaboration cited *State v. Laveroni* 910 So.2d 333 (Fla. 4th DCA 2005), and *State v. Coleman*, 911 So.2d 259 (Fla. 5th DCA 2005), as authority in support of affirming the trial court, which upheld the search at issue. The First District also cited *Gibson*, which followed *Matheson*, as contradictory authority.

The reliability of a dog as a detector of illegal substances is subject to a totality of the circumstances analysis. Thus, the trial court must be presented with the evidence

necessary to make an adequate determination as to the dog's reliability. For the reasons explained below, we hold that 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 and certification in this state are not standardized and thus each training and certification program may differ with no meaningful way to assess them.

Accordingly, we conclude 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, 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 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. Accordingly, we quash *Harris* and disapprove *Coleman* and *Laveroni*. We approve *Gibson* and *Matheson* to the extent they are consistent with this opinion.

## FACTS

In July 2006, the State charged Clayton Harris with possession of the listed chemical pseudoephedrine with intent to use it to manufacture methamphetamine, more commonly known as meth, in violation of section 893.149(1)(a), Florida Statutes (2006). Harris subsequently moved to suppress seized evidence, including the pseudoephedrine, arguing that it was found pursuant to an illegal search of his truck.

At the hearing on the motion to suppress, the evidence established that on June 24, 2006, Liberty County Sheriffs Canine Officer William Wheatley and his drug-detection dog, Aldo, were on patrol. Officer Wheatley conducted a traffic stop of Harris's truck after confirming that Harris's tag was expired. Upon approaching the truck, Officer Wheatley noticed that Harris was shaking, breathing rapidly, and could not sit still. Officer Wheatley also noticed an open beer can in the cup holder. When Officer Wheatley asked for consent to search the truck, Harris refused. Officer Wheatley then deployed Aldo. Upon conducting a "free air sniff" of the exterior of the truck, Aldo alerted to the door handle of the driver's side.

Underneath the driver's seat, Officer Wheatley discovered over 200 pseudoephedrine pills in a plastic bag wrapped in a shirt. On the passenger's side, Officer Wheatley discovered eight boxes of matches containing a total of 8000 matches. Officer Wheatley then placed Harris under arrest. A subsequent search of a toolbox on the passenger side revealed muriatic acid. Officer Wheatley testified that these chemicals are precursors of methamphetamine. After being read his *Miranda* rights, Harris stated that he had been cooking meth for about one year and

most recently cooked it at his home in Blountstown two weeks prior to the stop. Harris also admitted to being addicted to meth and needing it at least every few days.

As of the day that Officer Wheatley searched Harris's truck, Officer Wheatley had been a law enforcement officer for three years and had been a canine handler since 2004. In January 2004, Aldo completed a 120-hour drug detection training course at the Apopka Police Department with his handler at the time, Deputy Sherriff William Morris. In February 2004, Aldo was certified with Morris as a drug-detection dog by Drug Beat K-9 Certifications. Aldo is trained and certified to detect cannabis, cocaine, ecstasy, heroin, and methamphetamine. Aldo is not trained to detect alcohol or pseudoephedrine. Although Officer Wheatley testified that pseudoephedrine is a precursor of meth, there was no testimony on whether a dog trained to detect and alert to meth would also detect and alert to pseudoephedrine.

In July 2005, Aldo and Officer Wheatley became partners. In February 2006, they completed a forty-hour training seminar with the Dothan Police Department. Officer Wheatley testified that he and Aldo complete this seminar annually. Additionally, Officer Wheatley trains Aldo four hours per week in detecting drugs in vehicles, buildings, and warehouses. For example, Officer Wheatley may take Aldo to a wrecker yard and plant drugs in six to eight out of ten vehicles. Officer Wheatley then takes Aldo and performs a "W pattern, up, down, up, down."

Aldo must alert to the vehicles with drugs, and he is rewarded for an accurate alert. Officer Wheatley described Aldo's success rate during training as "really good." Aldo's training records, which Officer Wheatley

began keeping in November 2005, were introduced in evidence. These records reveal that on a performance level of either satisfactory or unsatisfactory, Aldo performed satisfactory 100% of the time. However, Officer Wheatley did not explain whether a satisfactory performance includes any alerts to vehicles where drugs were not placed.

Officer Wheatley also testified that in Florida a single-purpose dog, such as one trained only to detect drugs, is not required by law to carry certification. These dogs are required to show proficiency only in locating drugs. By contrast, a dual-purpose dog, such as one trained in apprehension and drug detection, must carry Florida Department of Law Enforcement (FDLE) certification. Florida does not have a set standard for certification for single-purpose drug dogs, such as Aldo.

With regard to Aldo's performance in the field, Officer Wheatley testified that he deploys Aldo approximately five times per month. Officer Wheatley maintains records of Aldo's field performance only when Officer Wheatley makes an arrest. Officer Wheatley testified that he does not keep records of Aldo's alerts in the field when no contraband is found; he documents only Aldo's successes. These records were neither produced prior to the hearing nor introduced at the hearing. Thus, it is impossible to determine what percentage of time Aldo alerted and no contraband was found following a warrantless search of the vehicle.

Harris introduced evidence of a specific instance of Aldo's field performance to support his position that Aldo is unreliable involving this same vehicle and same defendant. About two months after the June 24 stop, Officer Wheatley stopped Harris

again for a traffic infraction. On this stop, Officer Wheatley again deployed Aldo, who alerted to the same driver's side door handle. A subsequent search of the truck revealed only an open bottle of liquor and no illegal substances.

Officer Wheatley testified to the issue of residual odors. According to Officer Wheatley, Aldo can pick up residual odors of illegal drugs on an object when, for example, someone has the odor on his or her hand and touches a door handle. When asked how long a residual odor can remain on the handle, Officer Wheatley stated that he was not qualified to answer that question.

Regarding the alert in this case, Officer Wheatley testified that Aldo presumably alerted to residual odor of meth on the door handle, indicating that Officer Wheatley did not believe that Aldo alerted to any of the substances found in the vehicle. . . .

[T]he State argued that Officer Wheatley had probable cause based on the totality of the circumstances, which included the expired tag, open container, nervousness, and an alert by a trained and certified drug-detection dog. In challenging the issue of probable cause, the defense argued that the State failed to establish Aldo's reliability. According to the defense, any dog can be trained, but what matters most is that the dog obtains positive results in the field. The defense focused on the fact that on two occasions (once on June 24, the stop at issue, and once after the stop at issue) Aldo alerted to Harris's truck and no drugs were found that Aldo was trained to detect.

In an oral ruling, the trial court denied the motion to suppress, found that there was probable cause to search Harris's truck, and admitted the physical evidence seized. The trial court did not make a finding as to the

dog's reliability or any other factual findings.

Harris then entered a plea of no contest, reserving the right to appeal the denial of the motion. He was sentenced to twenty-four months' incarceration and five years of probation. On appeal, the First District affirmed. Harris subsequently petitioned this Court for discretionary review, which we accepted based on express and direct conflict between the First and Second Districts.

### THE CONFLICT ISSUE

The question presented to the First District—and now to this Court—concerns the evidence that the State must introduce to establish that probable cause existed for the warrantless search of a vehicle based on a drug-detection dog's alert to the vehicle. To clarify the conflict, we will outline the approaches adopted by the First, Second, Fourth, and Fifth District Courts of Appeal, which have all addressed this issue.

The First, Fourth, and Fifth Districts agree that the State can establish probable cause to search a vehicle by demonstrating that a dog is properly trained and certified to detect illegal drugs. *See Harris*, 989 So.2d at 1215; *Laveroni*, 910 So.2d at 336; *Coleman*, 911 So.2d at 261. None of the courts address what would constitute "proper training and certification," nor do they address the fact that there is no statewide certification for single-purpose drug-detection dogs. These districts do not consider field performance records to be irrelevant; their position is that if the defendant wishes to challenge the reliability of the dog, it is the defendant's burden to introduce field performance records of the dog or other evidence, such as expert testimony. . . .

The Second District has reached the opposite conclusion on similar facts. According to the Second District in *Matheson*, "the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert." The Second District reasoned that "[a]n officer who knows only that his dog is trained and certified, and who has no other information, at most can only suspect that a search based on the dog's alert will yield contraband. Of course, mere suspicion cannot justify a search." *Id.* at 13. Thus, the Second District concluded that "the most telling indicator of what the dog's behavior means is the dog's past performance in the field." *Id.* at 15.

The Second District also discussed the issue of residual odors:

[I]n this case Razor's trainer acknowledged the tendency of narcotics detection dogs to alert on the residual odors of drugs that are no longer present.

This underscores one of three central reasons why the fact that a dog has been trained, standing alone, is not enough to give an officer probable cause to search based on the dog's alert. Razor's trainer acknowledged that a trained dog, doing what he has been conditioned to do, imparts to the officer merely that he detects the odor of contraband. To be sure, as the trainer maintained, this may not be a false alert when assessing the success of the dog's conditioning. But for Fourth Amendment purposes it is neither false nor positive. The presence of a drug's odor at an intensity detectable by the dog, but not by the officer, does not mean that the drug itself is present.

*Id.* at 13. The Second District then enunciated concerns with relying solely on evidence that the dog was trained or “conditioned” to respond in particular ways to particular stimuli. . . .

In this regard, the Second District highlighted that “conditioning and certification programs vary widely in their methods, elements, and tolerances of failure.” *Id.* at 14. . . . In rejecting the proposition that evidence of training and certification alone is sufficient to give probable cause to search based on the dog’s alert, the Second District held that multiple factors should be considered, including the exact training received, the criteria for selecting the dogs in the program, the standards the dog was required to meet to successfully complete the training program, and the “track record” of the dog in the field, with an emphasis on the number of mistakes the dog has made. *See id.* at 14-15).

In *Gibson*, 968 So.2d at 631, the Second District held that the State had failed to establish that the drug-detection dog’s alert provided probable cause for the search. . . . The Second District concluded that, under *Matheson*, the officer’s testimony was inadequate to establish the dog’s reliability. *Id.*

As explained in our analysis below, we agree with the Second District’s bottom-line conclusion that the State cannot establish probable cause by introducing evidence only that the dog was trained and certified. We disapprove of the conclusions of the First, Fourth, and Fifth Districts that the State can meet its burden of establishing probable cause by presenting evidence that the dog is trained and certified to detect illegal drugs and then shifting the burden to the defendant to counter this evidence.

## ANALYSIS

As previously stated, the question presented concerns the showing that the State must make to establish probable cause for a warrantless search of a vehicle based on a drug-detection dog’s alert to the vehicle. This issue involves a trial court’s determination of the legal issue of probable cause, which we review de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). However, we defer to a trial court’s findings of historical fact as long as they are supported by competent, substantial evidence. *See Connor v. State*, 803 So.2d 598, 608 (Fla. 2001).

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV; *see also* art. I, § 12, Fla. Const. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347 (1967).

One such exception to the warrant requirement is the “automobile exception,” first established by the United States Supreme Court in *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, the United States Supreme Court held that a warrantless search of a vehicle based upon probable cause to believe that the vehicle contains contraband is not unreasonable within the meaning of the Fourth Amendment. *Id.* at 149. The automobile exception of not requiring a warrant is based on the inherent mobility of vehicles, as well as the reduced

expectation of privacy in a vehicle. *Pennsylvania v. Labron*, 518 U.S. 938 (1996). Although an individual has a “reduced expectation of privacy in an automobile, owing to its pervasive regulation,” *id.*, he or she “does not surrender all the protections of the Fourth Amendment by entering an automobile,” *New York v. Class*, 475 U.S. 106 (1986). . . . The cases make clear that probable cause to search a vehicle is based on the same facts that would justify the issuance of a warrant. *See Dyson*, 527 U.S. at 467. . . .

The United States Supreme Court has explained that the probable cause standard “depends on the totality of the circumstances.” *Maryland v. Pringle*, 540 U.S. 366 (2003). “Probable cause exists when ‘there is a *fair probability* that contraband or evidence of a crime will be found in a particular place.’” *United States v. Grubbs*, 547 U.S. at 95, (2006). . . . Probable cause is a “‘practical, nontechnical conception’ that deals with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Id.* at 370.

This Court, obliged to follow precedent from the United States Supreme Court, has explained:

An examination of Supreme Court jurisprudence reveals a decidedly broad definition of when law enforcement officers have the authority to engage in a warrantless search: Probable cause exists where “the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the

belief that” an offense has been or is being committed.

*State v. Betz*, 815 So.2d 627 (Fla. 2002). The burden is on the State to demonstrate that the police had probable cause to conduct a warrantless search. *See Doctor v. State*, 596 So.2d 442, 445 (Fla. 1992).

When it comes to the use of drug-detection dogs, the United States Supreme Court has explained that “the use of a well-trained narcotics-detection dog—one that ‘does not expose noncontraband items that otherwise would remain hidden from public view,’—during a lawful traffic stop, generally does not implicate legitimate privacy interests.” *Caballes*, 543 U.S. at 409. *Caballes* and *Place* considered the issue of whether the use of a “well-trained” drug-detection dog constitutes a search and not the circumstances of how the trial court determines whether the drug-detection dog is well-trained and when the dog’s alert will constitute probable cause to believe that there are illegal substances within the vehicle.

Because the dog cannot be cross-examined like a police officer whose observations at the scene may provide the basis for probable cause, the trial court must be able to assess the dog’s reliability by evaluating the dog’s training, certification, and performance, as well as the training and experience of the dog’s handler. Similar to situations where probable cause to search is based on the information provided by informants, the trial court must be able to evaluate the reliability of the dog based on a totality of circumstances. *See Gates*, 462 U.S. at 230-31. A critical part of the informant’s reliability is the informant’s track record of giving accurate information in the past.



Like the informant whose information forms the basis for probable cause, where the dog's alert is the linchpin of the probable cause analysis, such as in this case, the reliability of the dog to alert to illegal substances within the vehicle is crucial to determining whether probable cause exists. If a dog is not a reliable detector of drugs, the dog's alert in a particular case, by itself, does not indicate that drugs are probably present in the vehicle. In fact, if the dog's ability to alert to the presence of illegal substances in the vehicle is questionable, the danger is that individuals will be subjected to searches of their vehicles and their persons without probable cause. Conversely, if a dog is a reliable detector of drugs, the dog's alert in a particular case can indicate that drugs are probably present in the vehicle. In those circumstances, the drug-detection dog's alert will indicate to the officer that there is a "fair probability that contraband" will be found. *Gates*, 462 U.S. at 238. Thus, to determine whether the officer has a reasonable basis for concluding that the dog's alert indicates a fair probability that contraband will be found, the trial court must be able to adequately make an objective evaluation of the reliability of the dog.

We conclude that when a dog alerts, the fact that the dog has been trained and certified is simply not enough to establish probable cause to search the interior of the vehicle and the person. 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, 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.

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. "[S]imply 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." *Matheson*, 870 So.2d at 14. In other words, whether a dog has been sufficiently trained and certified must be evaluated on a case-by-case basis. . . .

One commentator has described the "mythic infallibility" of the dog's nose:

In cases involving dog sniffing for narcotics it is particularly evident that the courts often accept the mythic dog with an almost superstitious faith. The myth so completely has dominated the judicial psyche in those cases that the courts either assume the reliability of the sniff or address the question cursorily; the dog is the clear and consistent winner.

Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 *Hastings L.J.* 15, 22, 28 (1990). Another commentator has noted that "not all dogs are well-trained and well-handled, nor are all dogs temperamentally suited to the demands of being a working dog. Some dogs are distractible or suggestible, and may alert improperly. Many factors may lead to an unreliable alert." Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 *Geo. Mason L. Rev.* 1, 4 (2006).

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. As the Second District aptly observed, “[a]n officer who knows only that his dog is trained and certified, and who has no other information, at most can only suspect that a search based on the dog’s alert will yield contraband. Of course, mere suspicion cannot justify a search.” *Matheson*, 870 So.2d at 13.

“A false [alert] is an alert by the dog in the absence of the substance it is trained to detect.” Myers, *supra*, at 12. False alerts may lead to the search of a person who is innocent of any wrongdoing. *Id.* Cases demonstrate that the false-alert rate among certified detection dogs varies significantly. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735 (2007).

Coupled with the concern for false alerts is the potential for handler error and handler cuing. “Handler error affects the accuracy of a dog. The relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog’s behavior.” *Id.* at 762. Therefore, the trial court must also focus on the training of the handler. “Handlers interpret their dogs’ signals, and the handler alone makes the final decision whether a dog has detected narcotics. Practitioners in the field reveal that handler error accounts for almost all false detections.” Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 425 (1997).

A related problem is the possibility of handler cuing. “Even the best of dogs, with the best-intentioned handler, can respond to subconscious cuing from the handler. If the handler believes that contraband is present,

they may unwittingly cue the dog to alert regardless of the actual presence or absence of any contraband. Finally, some handlers may consciously cue their dog to alert to ratify a search they already want to conduct.” Myers, *supra*, at 5.

An alert to a residual odor is different from a false alert, although both types of alerts may result in subjecting the person and vehicle to an invasive search when no contraband is actually present. Because of the sensitivity (or hypersensitivity) of a dog’s nose, a dog may alert to a residual odor, which may not indicate the presence of drugs in the vehicle at the time of the sniff:

Given the level of sensitivity that many dogs possess, it is possible that if the person being searched had attended a party where other people were using drugs, the dog would alert because of the residue on clothing or fabric. It is possible that in a vehicle that had formerly been used to transport drugs, the dog would alert, despite the fact that drugs were no longer present. Or it is possible that some sort of residue normally associated with drugs was present.

Myers, *supra*, at 4-5. Therefore, the alert may not even mean that drugs were ever present in the vehicle or on the person.

Because of these variables, a necessary part of the totality of the circumstances analysis in a given case regarding the dog’s reliability is an evaluation of the evidence concerning whether the dog in the past has falsely alerted, indicating that the dog is not well-trained, or whether the alerts indicate a dog who is alerting on a consistent basis to residual odors, which do not indicate that drugs are present in the vehicle.

Accordingly, evidence of the dog's performance history in the field—and the significance of any incidents where the dog alerted without contraband being found—is part of a court's evaluation of the dog's reliability under a totality of the circumstances analysis. In particular, when assessing the factors bearing on the dog's reliability, it is important to include, as part of a complete evaluation, how often the dog has alerted in the field without illegal contraband having been found.

The State argues that records of field performance are meaningless because dogs do not distinguish between residual odors and drugs that are present and, thus, alerts in the field without contraband having been found are merely unverified alerts, not false alerts. This assertion, if correct, raises its own set of concerns as it relates to a probable cause determination of whether the dog's alert indicates a fair probability that there are drugs presently inside the vehicle.

In any event, the record in this case does not contain any testimony as to whether dogs can be trained to distinguish between residual odors and drugs and, further, there were no field records or testimony presented in this case in order to allow for a careful examination of the significance of field performance. Officer Wheatley was unable to testify as to a complete picture of Aldo's performance in the field. In future cases, the State can explain the significance of the percentage of unverified alerts in the field. The trial court would then be able to evaluate how any inability to distinguish between residual odors and drugs that are actually present bears on the reliability of the alert in establishing probable cause.

Finally, to adopt the view of the First, Fourth, and Fifth Districts would be to place the burden on the defendant to uncover all

records and evidence that might challenge a presumption of reliability—evidence that is exclusively within the control of law enforcement authorities and, further, evidence that law enforcement agencies may choose not to record, such as in this case. Placing this burden on the defendant is contrary to the well-established proposition that the burden is on the State to establish probable cause for a warrantless search. *See Doctor*, 596 So.2d at 445. Because the State must establish that the officer has a reasonable basis for believing that his or her dog is reliable in order to prove probable cause based on the dog's alert, the State carries the burden of presenting the necessary records and evidence for the trial court to consider in adequately evaluating the dog's reliability.

Some courts have adopted a similar totality of the circumstances approach to determining a dog's reliability. *See, e.g., State v. Nguyen*, 726 N.W.2d 871 (S.D. 2007). . . .

Further, other courts have endorsed the trial court's consideration of multiple factors, with emphasis on the number of "false alerts" by the dog. For instance, in *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000), the Tennessee Supreme Court rejected a *per se* rule that probable cause may be established through a positive alert by a trained narcotics detection dog. The court reasoned that the probable cause determination should turn on the dog's reliability and that the trial court should ensure that the dog is reliable by making factual findings. *Id.* The court set forth the following framework for this required reliability determination:

Accordingly, in our view, the trial court, in making the reliability determination may consider such

factors as: the canine's training and the canine's "track record," with emphasis on the amount of false negatives and false positives the dog has furnished. The trial court should also consider the officer's training and experience with this particular canine. *Id.*

Additionally, in *United States v. Florez*, 871 F.Supp. 1411 (D.N.M. 1994), the United States District Court for the District of New Mexico observed that certified dogs have falsely alerted and found the fact that a dog is certified should not be sufficient to establish probable cause. While analogizing to an informant's tip, the court set forth the following framework for a probable cause analysis:

In summary, where adequate and comprehensive records are maintained on a particular narcotics dog, and include results of controlled alerts made in training, as well as actual alerts in the field, the dog's reliability could be sufficiently established either through the records themselves or testimony from the dog's trainer who maintained the records. In this respect, the dog's alert is analogous to information provided by a reliable informant, and his alert without more could establish probable cause.

However, where records are not kept or are insufficient to establish the dog's reliability, an alert by such a dog is much like hearsay from an anonymous informant, and corroboration is necessary to support the unproven reliability of the alerting dog and establish probable cause. To accept less would compromise the very principles that

the requirement of probable cause was designed to protect.

*Id.* at 1424. The court found support for this position from *United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993). . . . In sum, if the court relies only on training and certification records and fails to consider other factors concerning the dog's performance, then the court does not have a complete picture of the numerous circumstances that necessarily bear on the reasonableness of the officer's belief in the dog's reliability and whether the dog's alert in a particular case indicates a fair probability that there were drugs present inside the vehicle.

For the above reasons, we adopt a totality of the circumstances approach and hold that the State, which bears the burden of establishing probable cause, must present all records and evidence that are necessary to allow the trial court to evaluate the reliability of the dog. The State's presentation of evidence that the dog is properly trained and certified is the beginning of the analysis. Because there is no uniform standard for training and certification of drug-detection dogs, the State must explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors. Finally, the State must present evidence of the

experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

Contrary to the dissent's assertion that we "impose[] 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," dissenting op. at 776, we do not hold in this case that the dog must be shown to be "virtually infallible." Just as it would be entirely relevant to know how many times an informant's tip resulted in contraband being discovered, the reason that the State should keep records of the dog's performance both in training and in the field is so that the trial court may adequately evaluate the reasonableness of the officer's belief in the dog's reliability under the totality of the circumstances. Because the State bears the burden of establishing probable cause, if the courts are to make determinations of probable cause based on the alerts of dogs, who can neither be cross-examined nor otherwise independently assessed as to their reliability, it is appropriate to place the burden on the State to ensure uniformity in the way dogs are evaluated for reliability of their alerts. Nothing less than the sanctity of our citizens' constitutional rights to be secure from unreasonable searches and seizures in their homes, their vehicles, and their persons is at stake.

### **THIS CASE**

In applying these standards to Harris's case, we hold that the trial court erred in concluding that the State presented sufficient evidence to establish probable cause to conduct a warrantless search of Harris's truck. We defer to a trial court's

findings of fact as long as they are supported by competent, substantial evidence, but we review de novo a trial court's application of the law to the historical facts. *See Connor*, 803 So.2d at 608; *Pagan*, 830 So.2d at 806. However, in this case, the trial court did not make findings of historical fact.

The State presented the following evidence: Aldo had been trained to detect drugs since January 2004 and certified to detect drugs since February 2004; Officer Wheatley trains Aldo for approximately four hours per week, deploys Aldo approximately five times per month, and attends a forty-hour annual training seminar; and Aldo's success rate during training is "really good." Aldo's weekly training records reveal that from November 2005 to June 2006, Aldo performed satisfactorily 100% of the time. However, there was no testimony as to whether a satisfactory performance includes any false alerts. The record is also scarce on the details of Aldo's training, including whether the trainer was aware of the locations of the drugs and whether the training simulated a variety of environments and distractions.

The State also did not introduce Aldo's field performance records so as to allow an analysis of the significance of the alerts where no contraband was found. In fact, Officer Wheatley testified that he does not keep records of Aldo's unverified alerts in the field; he documents only Aldo's successes. If an officer fails to keep records of his or her dog's performance in the field, the officer is lacking knowledge important to his or her belief that the dog is a reliable indicator of drugs. *Cf. Florida v. J.L.*, 529 U.S. 266 (2000).

The State asserts that the only relevant records are the training records—not field records—since there is no such thing as a

false alert in the field because a dog alerts to both actual drugs and residual odors. Thus, the State argues, when a dog alerts in the field and no contraband is found, there is no way to determine whether the dog was alerting to a residual odor or whether the dog falsely alerted. This is also of concern when probable cause for the search hinges on the dog's demonstrated reliability and thus the probability that the dog's alert indicates that contraband was present in the vehicle at the time of the alert. Because the State did not introduce field performance records, the State was not able to explain the significance of any unverified alerts in the field.

Further, the State failed to present any evidence regarding the criteria necessary for Aldo to obtain certification through Drug Beat K-9 certifications. This case is unlike *Coleman*, where evidence was introduced outlining the details of the training program, the criteria for choosing which dogs to use as drug dogs, and the criteria necessary for the dog and handler to pass the course and obtain "certification." 911 So.2d at 260. By contrast, the only evidence regarding the criteria used in Aldo's certification is a document simply stating that Aldo successfully found twenty-eight grams of marijuana, five grams of methamphetamine, twenty-eight grams of cocaine, seven grams of heroin, seven grams of crack cocaine, and fifty grams of ecstasy. However, the record is silent on the circumstances of the certification, such as whether these drugs were hidden, whether the trainer was aware of the locations of the drugs, or whether the certification simulated the variety of environments and distractions found in the field. In the absence of uniform, standard criteria for certification, the State must do more than simply introduce evidence that the dog has been certified.

In this case, there are several other factors that call into question Aldo's reliability. First, the State failed to present any testimony regarding Aldo's ability to detect residual odors. When asked how long a residual odor can remain on the driver's side door handle, Officer Wheatley stated that he was not qualified to answer that question. While such testimony is not required, without this information, it is difficult to determine how this factor should apply, if at all. For example, in *State v. Cabral*, 159 Md.App. 354 (2004), the Maryland Court of Special Appeals held that even though testimony was presented that the dog could have alerted to a residual odor that was seventy-two hours old, "such an ability serves to strengthen the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause." Alternatively, a trial court may find, after evaluating the testimony and other evidence, that a dog's inability to distinguish between residual odors and actual drugs undermines a finding of probable cause.

Second, the State has failed to explain why an alert to a residual odor on the door handle would give rise to probable cause in this case. Officer Wheatley testified that Aldo alerted to the door handle and that, in his experience, this meant that somebody had touched or smoked narcotics and then transferred the odor to the door handle. Officer Wheatley further indicated that Aldo's alert led him to believe that the odor of narcotics was present on the door handle. However, neither Officer Wheatley nor the State has explained in this case why evidence of residual odor of narcotics on the vehicle's door handle gave rise to probable cause that there were drugs actually present in the vehicle at the time of the alert. Aldo's alert to the door handle in this case, standing alone, provides no basis for an objective

probable cause determination that drugs were present inside the vehicle.

Thus, we conclude that the State did not meet its burden in demonstrating that Officer Wheatley had a reasonable basis for believing that Aldo was reliable at the time of the search and, thus, that Aldo's alert, the linchpin of the probable cause analysis in this case, indicated a fair probability that drugs would be found in the vehicle. Although the trial court found probable cause, the trial court did not make a specific finding as to Aldo's reliability. The failure to make a finding on Aldo's reliability makes it difficult to determine how much weight to give Aldo's alert in the probable cause analysis.

Although not part of the determination of whether probable cause to conduct the search existed at that time, two additional facts in this case are illustrative of why it is important to engage in an inquiry of a dog's reliability, including an evaluation of the dog's performance in the field. First, as to the search in question, the police officer did not discover any drugs that Aldo was trained to detect. In other words, there is a chance that this case may have involved a false alert. Second, Harris introduced evidence in this case that Aldo alerted to the same door handle on the same vehicle subsequent to this arrest and no drugs were found.

The State argues that the alert at issue in this case and the subsequent alert were not false alerts because Aldo was alerting to residual odor on the door handle; Officer Wheatley also testified that when a dog alerts to a door handle it usually means that residual odor was transferred to the door handle by someone who had handled drugs. However, an alert to residual odor on the door handle, by itself, indicates only that someone who

has come into contact with drugs touched the door handle at some point.

In sum, we conclude that the State has failed to meet its burden of establishing probable cause. In the absence of a reliable alert, the other factors considered in the totality of circumstances analysis—Harris's expired tag, Harris's shaking, breathing rapidly, and inability to sit still, and Harris's open beer can—do not rise to the level of probable cause that there were illegal drugs inside the vehicle. Accordingly, the search of the vehicle violated the Fourth Amendment's prohibition on unreasonable searches and seizures.

## CONCLUSION

For the above reasons, we quash *Harris* and disapprove *Coleman* and *Laveroni*. We approve *Gibson* and *Matheson* to the extent that they are consistent with this opinion. We hold 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. To demonstrate that an officer has a reasonable basis for believing that an alert by a drug-detection dog is sufficiently reliable to provide probable cause to search, the State must present evidence of the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), 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. The trial court must then assess the reliability of the dog's alert as a basis for probable cause to search the vehicle based on a totality of the circumstances. Because in this case the totality of the circumstances does not

support a probable cause determination, the trial court should have granted the motion to suppress. We remand for proceedings consistent with this opinion.

It is so ordered.

**LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur. CANADY, C.J., dissents with an opinion. POLSTON, J., recused.**

**CANADY, C.J., dissenting.**

Because the majority imposes an evidentiary burden on the State which is based on a misconception of the federal constitutional requirement for probable cause, I dissent. I would affirm the decision of the First District Court of Appeal on review.

In brief, the elaborate and inflexible evidentiary requirements the majority adopts are inconsistent with the proper understanding of probable cause as a “‘practical, non-technical conception’ that deals with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Maryland v. Pringle*, 540 U.S. 366 (2003). In its effort to manage the conduct of law enforcement, the majority strays beyond what is necessary to determine if the Fourth Amendment’s proscription of “unreasonable searches and seizures” has been violated. In establishing requirements for determining the lawfulness of a search based on the alert of a drug detection dog, the majority demands a level of certainty that goes beyond what is required by the governing probable cause standard.

The process of determining whether a search was reasonable because it is based on probable cause “does not deal with hard

certainties, but with probabilities.” *Texas v. Brown*, 460 U.S. 730, 742 (1983). The probable cause standard “merely requires that the facts available to the officer would ‘warrant a man of reasonable caution in the belief’” that “‘evidence of a crime’ may be found. *Id.* “[I]t does not demand any showing that such a belief be correct or more likely true than false.” *Id.* Instead, the probable cause standard requires simply that the search be justified by what the officer reasonably believes to be “reasonably trustworthy information.” *Brinegar v. United States*, 338 U.S. 160 (1949). The majority here, however, 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.

The record shows that the searching officer had an objectively reasonable basis for crediting the dog’s alert. The State presented uncontroverted evidence that Aldo had been trained to detect drugs since January 2004 and certified to detect drugs since February 2004. Officer Wheetley testified that he trained Aldo approximately four hours per week, deployed Aldo approximately five times per month, and attended a forty-hour annual training seminar. Wheetley described Aldo’s success rate during training as “really good.” Aldo’s weekly training records reveal that from the November 2005 to June 2006, Aldo performed satisfactorily 100 percent of the time. Harris failed to present any evidence challenging Aldo’s training or certification. Based on this record of historical facts, the majority’s conclusion that the officer acted unconstitutionally is totally unwarranted. *See Jones v. Commonwealth*, 277 Va. 171 (2009).

Since there was no violation of the Fourth Amendment, the decision of the First District should be affirmed.



## **“Justices to Decide Whether Detailed Proof is Needed in Court on Drug Dog’s Effectiveness”**

*The Washington Post*

March 26, 2012

Associated Press

The Supreme Court will decide whether detailed documentation is necessary in court to prove that drug-sniffing dogs are effective at finding contraband and drugs.

The high court decided Monday to hear an appeal by Florida officials of the work done by Aldo, a drug-sniffing dog used by the Liberty County sheriff.

The Florida Supreme Court threw out drug evidence obtained against Clayton Harris

during a 2006 traffic stop. Aldo alerted his officer to drugs used to make methamphetamine inside the truck. But two months later, Harris was stopped again, Aldo again alerted his officer to the presence of drugs but none were found.

The state court ruled that saying a drug dog has been trained and certified to detect narcotics is not enough to establish the dog’s reliability in court.

## **“Florida Supreme Court Tosses Evidence Detected by Drug-Sniffing Dogs”**

*The Tampa Bay Times*  
April 22, 2011

Citing a lack of state standards for drug-sniffing dogs, the Florida Supreme Court on Thursday tossed out evidence a canine detected against a Panhandle man.

The 5-1 decision will make it more difficult for prosecutors to get court approval to use evidence sniffed out by trained dogs. But it shouldn't hamper the ability of police to use the animals, said Assistant State Attorney Ted Daus, who specializes in drug cases in Broward County.

“Because a dog cannot be cross-examined like a police officer on the scene whose observations often provide the basis for probable cause to search a vehicle, the state must introduce evidence concerning the dog's reliability,” Justice Barbara Pariente wrote for the court.

Given the lack of statewide standards for single-purpose, drug-detecting dogs, training certificates and records aren't enough, Pariente wrote.

Prosecutors also must present evidence including field performance records and an explanation of each dog's training. Proof of the experience and training of the officer handling the dog also is needed. Further, it's the state's responsibility to prove a dog is reliable, not the defendant's burden to show otherwise, but Daus said that's not really a change.

The prosecutor said the high court has not changed the standards for the dogs, but it has increased the proof needed to verify their reliability. He said it will turn what has

been a 15- to 20-minute procedure into one that may take a couple of hours.

“Now, I have to put the proof in the pudding,” Daus said.

Chief Justice Charles Canady dissented.

“The majority demands a level of certainty that goes beyond what is required by the governing probable cause standard,” Canady wrote. He added the dogs will need “to be virtually infallible.”

The U.S. Supreme Court approved drug-sniffing dogs to check vehicles during routine traffic stops in 2005, but their accuracy has remained an issue.

The Oregon Supreme Court also set reliability criteria in a pair of rulings earlier this month, and a *Chicago Tribune* analysis of Illinois data in January showed the dogs are wrong more often than they are right.

Last week, the Florida Supreme Court ruled in another case that police must get a warrant before using drug-sniffing dogs at the front door of a home.

Attorney General Pam Bondi said she would appeal that ruling to the U.S. Supreme Court. Her office had no immediate comment on the latest decision.

It reversed a 1st District Court of Appeal ruling that had upheld a judge's refusal to suppress drug evidence obtained against Clayton Harris during a 2006 traffic stop in Liberty County.

Sheriff's Deputy William Wheatley's dog Aldo alerted to the driver's side door handle after Harris refused to consent to a search of his truck. Wheatley found more than 200 pseudoephedrine pills under the driver's seat and 8,000 matches in eight boxes on the passenger's side. A later search turned up

muratic acid in a toolbox. All three items are used to make methamphetamine. Two months later, Wheatley again stopped Harris for a traffic infraction and Aldo again alerted to the door handle, but this time no illegal drugs were found.

## **“The Reliability of Drug Sniffing Dogs”**

*Concurring Opinions*

April 1, 2012

Erica Goldberg

Of the many things that make my Criminal Procedure students cynical about the Supreme Court, perhaps the most frustrating is that the Court has refused to quantify the probable cause standard. The Supreme Court’s grant of certiorari last week in *Florida v. Harris* gives the Court the perfect opportunity to at least place probable cause within some numerical band.

*Harris* is a particularly good vehicle for making the probable cause standard less fuzzy. In *Harris*, the Florida Supreme Court confronted the issue of when a dog’s positive alert gives the police probable cause to search a vehicle. Unlike in most assessments of probable cause, which involve informants or suspicious seeming individuals, police have data that quantifies the accuracy of drug sniffing dogs. A dog’s field history includes its rate of false positives, when a dog alerts to the smell of drugs that are not actually present in the vehicle. The Florida Supreme Court held that a dog’s field history must be introduced as part of the probable cause inquiry. If the lower court’s opinion is upheld, the Supreme Court should tell us what sort of false positive rate is too unreliable to permit a full search of a car.

Courts consistently and expressly eschew technical conceptions of probable cause in order to provide police officers with flexibility to exercise their judgment in unfolding situations. In addition, courts focus on whether an officer has a reasonable belief that a suspect has committed or is committing a crime. This metric allows for probable cause to be found in situations

where one reasonable officer might assess an 80% likelihood that a suspect is driving drunk, for example, even if another reasonable officer might think there is only a 40% likelihood. We might be tempted to assume the courts require that a reasonable officer be able to believe a crime has been committed by greater than a 50% likelihood, but this has not been made explicit. All officers must prove to a court assessing a vehicle search is a reasonable ground for belief of guilt. Further, when a court is making a probable cause determination for itself in determining if a warrant should issue, it must decide only if there is a “fair probability that contraband or evidence of a crime will be found in a particular place.” What is a fair probability?

In the context of drug detection dogs, where we have actual data on reliability, assigning a numerical value to probable cause—or at least to the maximum false positive percentage upon which an officer can rely—would add much needed clarity to Fourth Amendment law. It also does not undermine police officers’ ability to use their intuition, because the event precipitating a search is not an officer’s informed judgment, but the alert from a dog.

The use of a drug detection dog by itself is not considered a “search” that implicates Fourth Amendment protections, but if the dog alerts to the smell of drugs, the police presume that they have the probable cause required under the Fourth Amendment to conduct an actual search of your vehicle. However, if a particular dog is prone to false positives, it cannot be said that there is a

“fair probability” that contraband will be found. As is expected in Fourth Amendment law, the Florida Supreme Court opted to use a “totality of the circumstances” approach to assessing whether a dog’s positive alert yields probable cause, which the Florida court defined as whether “the officer had a reasonable basis for believing the dog to be reliable.” Florida courts now must consider the dog’s and the officer’s training, field performance records of the dog, and anything else that bears on the dog’s reliability.

The Supreme Court may have granted cert in *Harris* to overturn what it considers an unduly burdensome evidentiary requirement on the police. However, if the Florida Supreme Court’s decision is upheld, the Supreme Court should decide numerically what maximum false positive rate can still yield probable cause, given the totality of the circumstances. The Court should not require the introduction of a dog’s false positive rate and then not advise lower courts on what rates are permissible to

establish probable cause. If out of 100 positive alerts to cocaine by a particular dog, the drug is found in only 50 of the cars, the Court should decide whether a police officer may search that car. Or, the Court should at least tell lower courts what false positive rates are inconsistent with probable cause as a matter of law. (Complicating this issue is the fact that a dog may alert to the residual odor of a drug that is no longer present in the car, and may not even belong to the car’s owner. Should this be considered a false positive, since no contraband is presently in the car?)

It would be a significant service to police, individuals, and my inquiring law students if the Court committed to a number and required police to be at least that certain before searching a vehicle. The virtues and vices of rendering the law clearer and more precise will be a theme for my blog posts in April. I am so grateful for this opportunity to guest blog for *Concurring Opinions* and look forward to posting for the rest of the month.

***United States v. Bailey***

**11-770**

**Ruling Below:** *United States v. Bailey*, 652 F.3d 197 (2d Cir. 2012), *cert. granted*, *Bailey v. United States*, 11-770, 2012 WL 1969365.

In 2005 Chunon Bailey left his apartment building as police were awaiting a search warrant in the vicinity. An unmarked police car followed Bailey and then police detained him and brought him back to the building. After the warrant arrived, the police searched the apartment and found drugs and weapons. They arrested Bailey and charged with possession with intent to distribute, possession of firearm by felon, and possession of firearm in furtherance of drug trafficking crime. Bailey argued that police unconstitutionally detained him on the street and brought him back to the apartment. The trial judge ruled that if police could detain someone who was leaving a place during a search, then police could also follow someone who has left the place being searched and bring him back. Bailey filed a motion for to vacate his conviction, which was denied. Bailey appealed.

**Question Presented:** Whether 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.

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**UNITED STATES of America, Appellee,**

**v.**

**Chunon L. BAILEY, also known as Polo, Defendant–Appellant.**

United States Court of Appeals for the Second Circuit

Decided July 6, 2011

[Excerpt: Some footnotes and citations omitted.]

**CABRANES, Circuit Judge**

Chunon L. Bailey appeals from an August 23, 2007 judgment of conviction entered by the United States District Court for the Eastern District of New York (Joseph F. Bianco, *Judge*), sentencing him principally to concurrent terms of 300 and 120 months of imprisonment, a consecutive term of 60 months of imprisonment, and five years of supervised release. Bailey was convicted, following a jury trial, of possession with intent to distribute at least five grams of

cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii), possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). Bailey also appeals from a January 19, 2010 order by the District Court denying a motion to vacate his conviction pursuant to 28 U.S.C. § 2255 (“§ 2255”). *United States v. Bailey*, No. 06–cr–232, 2010 WL 277069 (E.D.N.Y. Jan. 19, 2010).

We are asked to decide: (1) whether the District Court erred in denying Bailey's motion to suppress evidence obtained during his detention because the search and seizure of Bailey's person and property were conducted in violation of his rights under the Fourth Amendment to the United States Constitution. We hold that Bailey's detention during the search of his residence was justified pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981). The District Court therefore did not err in denying his motion to suppress evidence obtained during that detention. The District Court's August 23, 2007 judgment of conviction and its January 19, 2010 order denying the § 2255 motion are affirmed.

## BACKGROUND

The following facts reflect the findings entered by the District Court in the proceedings below, and, unless otherwise indicated, are not in dispute.

### A.

At 8:45 p.m. on July 28, 2005, Detective Richard Sneider ("Sneider") of the Suffolk County Police Department ("SCPD") obtained a search warrant from the First District Court in the Town of Islip, New York for the "basement apartment of 103 Lake Drive" in Wyandanch, New York, on the basis of information from a confidential informant. The search warrant provided that the apartment was "believed to be occupied by an individual known as 'Polo', a heavy set black male with short hair," and identified a "chrome .380 handgun" as the principal target of the search. The search warrant also stated that the basement apartment at 103 Lake Drive is "located at the rear of the premises[.]" The search warrant did not specify that access to the basement door at the rear of the house at 103

Lake Drive is possible from both the basement apartment and from the house upstairs.

At approximately 9:56 p.m. that evening, Sneider and Detective Richard Gorbecki ("Gorbecki"), an eighteen-year veteran of the SCPD assigned to the special operations team for narcotics enforcement, observed two men—later identified as Chunon L. Bailey (the defendant) and Bryant Middleton ("Middleton")—exiting the gate at the top of the stairs that led down to the basement of 103 Lake Drive. Both Bailey and Middleton matched the description of "Polo" provided to Sneider by the confidential informant. They exited the yard of the house and entered a black Lexus parked in the driveway. Rather than confront Bailey and Middleton within view or earshot of the apartment, Sneider and Gorbecki watched as Bailey's car pulled out of the driveway and proceeded down the block.<sup>2</sup> After the car traveled about a mile from the house, the officers pulled the car over in the parking lot of a fire station. Approximately five minutes elapsed between Bailey's exit from the basement apartment at 103 Lake Drive and the stop.

After pulling over the vehicle, the detectives conducted a "pat-down" of the driver, Bailey, and passenger, Middleton, to check for hard objects that could be used as weapons. At Sneider's request, Bailey identified himself and produced a driver's license bearing a Bay Shore, New York address. Nevertheless, he told Sneider that he was coming from his house at "103 Lake Drive" in Wyandanch, New York.

Middleton also identified himself and told Gorbecki that Bailey was driving him home in order to comply with a 10:00 p.m. curfew imposed as a condition of Middleton's parole. Middleton stated that Bailey's

residence was 103 Lake Drive. At that point, the officers placed Bailey and Middleton in handcuffs and—in response to Bailey’s inquiry as to why they were being “arrested”—informed both men that they were being detained, but not arrested, incident to the execution of a search warrant in the basement apartment of 103 Lake Drive. To that, Bailey responded, “I don’t live there. Anything you find there ain’t mine, and I’m not cooperating with your investigation.”

Gorbecki drove Bailey’s Lexus back to 103 Lake Drive, while Bailey and Middleton were transported back in a patrol car. Upon arrival, Bailey and Middleton were informed that, during the search, the SCPD “entry team” had discovered a gun and drugs in plain view in the apartment. Bailey and Middleton were placed under arrest and Bailey’s house and car keys were seized incident to arrest. Later that evening, an SCPD officer discovered that one of the keys on Bailey’s key ring opened the door of the basement apartment. In total, less than ten minutes elapsed between Bailey’s stop and his formal arrest.

## **B.**

The evidence obtained during the search of Bailey’s home and his statements to detectives Sneider and Gorbecki provided the basis for the government’s indictment. Bailey moved, through counsel, to suppress the physical evidence (including his house and car keys) and his statements to detectives Sneider and Gorbecki, on the theory that he was unlawfully detained and searched in violation of the Fourth Amendment.

After holding an evidentiary hearing, the District Court found Bailey’s detention lawful under *Michigan v. Summers*, 452

U.S. 692 (1981). The District Court reasoned that the detectives’ authority under *Summers* to detain Bailey incident to a search of the apartment was not strictly confined to the physical premises of the apartment so long as the detention occurred as soon as practicable after Bailey departed 103 Lake Drive. *Id.* at 382. Moreover, the District Court concluded, in the alternative, that Bailey’s detention was lawful as an investigative detention supported by reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968). *Id.* at 383–85.

A nine-day trial with respect to Count One (possession with intent to distribute more than five grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii)) and Count Three (possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i)) commenced on October 30, 2006. On November 8, 2006, the jury returned a guilty verdict with respect to both Counts.

On December 5, 2008, Bailey filed a motion pursuant to § 2255 seeking to vacate his conviction and order a new trial. Bailey’s sole argument was that his trial counsel provided constitutionally ineffective assistance by failing to introduce evidence that access to the basement door at the rear of 103 Lake Drive could be gained from *either* the basement apartment or the house upstairs. Bailey asserted that when detectives Sneider and Gorbecki observed Bailey exit the gate at the back of the property on July 28, 2005, they could not have known whether he was leaving the basement apartment (for which they had a search warrant) or the house upstairs (for which they did not). Bailey argued that this distinction was determinative in the District Court’s adjudication of the suppression motion because the government could not



sustain his detention under *Summers* or provide the reasonable suspicion to sustain his detention under *Terry* without demonstrating conclusively that Bailey had emerged from the basement apartment.

The District Court concluded that, even if the detectives had known that access to the basement hallway was possible from an apartment other than the basement apartment, they still would have had a reasonable basis to believe that Bailey and Middleton might have emerged from the property for which they had a search warrant. The detectives therefore had the authority under *Summers* to briefly detain Bailey in order to ascertain whether he was an occupant of the premises being searched. Indeed, as it turned out, the “undisputed evidence at the trial [was] that this door to the main house was not accessible to the basement tenant and that the main house was sealed off from the basement area.” *United States v. Bailey*, 2010 WL 277069, at \*10 (E.D.N.Y. Jan. 19, 2010).

Because the evidence regarding the layout of the house had no effect on the lawfulness of Bailey’s detention, the District Court reasoned that Bailey had not demonstrated any prejudice from his counsel’s alleged failure to offer that evidence. Accordingly, Bailey had failed to satisfy the requirement of *Strickland* that a successful claim for ineffective assistance of counsel demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694.

Bailey appeals from the final judgment of conviction entered by the District Court on August 22, 2007, as well as from the January 19, 2010 order denying Bailey’s motion to vacate the conviction pursuant to

§ 2255. On appeal, he makes substantially the same claims he made before the District Court in his suppression and § 2255 motions. However, he limits his arguments on appeal to the lawfulness of his detention pursuant to *Summers* and *Terry* and the adequacy of his assistance at trial. Appellant Br. 31, 49, 55.

## DISCUSSION

### A.

Appeals from the denial of a motion to suppress evidence and a motion to vacate a conviction pursuant to § 2255 are both governed under the same standard of review: we review the District Court’s factual findings for clear error and its conclusions of law *de novo*. *United States v. Lucky*, 569 F.3d 101, 105–06 (2d Cir.2009). A finding is clearly erroneous when “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

### B.

The basic parameters of our inquiry into the lawfulness of a challenged seizure are well-known. The Fourth Amendment proscribes “unreasonable searches and seizures.” In the absence of probable cause, a limited and temporary detention is generally permissible only if law enforcement can establish reasonable suspicion based on “specific and articulable facts” as measured by an objective standard. *Terry*, 392 U.S. at 21–22. The Fourth Amendment, however, “imposes no irreducible requirement of such suspicion.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Instead, as in all questions under the Fourth Amendment, “the touchstone” of our

analysis “is reasonableness.” *Palacios v. Burge*, 589 F.3d 556, 562 (2d Cir.2009).

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Detroit police encountered George Summers descending the front steps of his house while they were preparing to execute a search warrant of the premises. Summers was detained during the search and subsequently arrested when narcotics were found in the house. *Id.* at 693. The Supreme Court upheld the initial detention, explaining that “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.” *Id.* at 705. That is, the Court concluded that the detention of “occupants” even without individualized suspicion during the execution of a valid search warrant is reasonable under the Fourth Amendment.

The *Summers* Court explained that compared with “the inconvenience [and] the indignity associated with a compelled visit to the police station,” *id.* at 702, the character of the “incremental intrusion” caused by detention is slight and the justifications for detention are substantial. *Id.* at 703. In particular, the Court justified the detention of George Summers by reference to the interests of law enforcement in (1) “preventing flight in the event that incriminating evidence is found”; (2) “minimizing the risk of harm to the officers”; and (3) facilitating “the orderly completion of the search.” *Id.* at 702–03. Moreover, the Court observed that once “[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime[,] . . . [t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that

suspicion of criminal activity justifies a detention of that occupant.” *Id.* at 703–04.

We are now asked to decide whether the same authority pursuant to which police officers may detain an occupant *at* the premises during the execution of a search warrant permits them to detain an occupant who *leaves* the premises during or immediately before the execution of a search warrant and is detained a few blocks away. While we have extended *Summers* to permit the detention of individuals entering a vehicle in the driveway of a house, the question presented here is a matter of first impression in our Circuit.

This question has divided the Courts of Appeals. Of the five courts to consider it, three have extended *Summers* on facts similar to those of this case. In *United States v. Cochran*, 939 F.2d 337 (6th Cir.1991), for example, police officers went to the defendant’s residence to execute a search warrant and observed the defendant leaving the premises. *Id.* at 338. The officers did not want to forcibly enter the premises knowing that there was a guard dog inside, and they therefore stopped the defendant shortly after he exited the house. *Id.* The Sixth Circuit, relying on *Summers*, held that the detention was reasonable, concluding that “*Summers* does not impose upon police a duty based on geographic proximity ( [*i.e.*,] defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence.” *Id.* at 339.

Similarly, in *United States v. Cavazos*, 288 F.3d 706 (5th Cir.2002), police officers were conducting pre-execution surveillance when the defendant and two others left the residence in a truck. *Id.* at 708. The officers followed. *Id.* After the driver of the truck

demonstrated his awareness that he was being followed, the officers stopped the vehicle, took the defendant back to the residence, and detained him during the search. *Id.* The Fifth Circuit observed that, because the defendant's conduct "warranted the belief that [the defendant] would have fled or alerted the other occupants of the residence about the agents nearby if he were released immediately after the stop and frisk," the detention was justified under *Summers*. *Id.* at 711. Moreover, the Court concluded that the nexus between the defendant and the residence gave officers an "easily identifiable and certain basis for determining that suspicion of criminal activity justify[ed] a detention of that occupant." *Id.* (quoting *Summers*, 452 U.S. at 703–04).

Most recently, in *United States v. Bullock*, 632 F.3d 1004 (7th Cir.2011), officers conducting pre-execution surveillance observed the defendant exit the house and enter a vehicle with the resident of the house and her children. *Id.* at 1009. Officers followed the vehicle and executed a stop about ten to fifteen blocks from the house, transporting all of the occupants of the vehicle back to the house after notifying the driver that a search was underway. *Id.* The Seventh Circuit concluded that—in the absence of anything "to suggest that the vehicle was not pulled over as soon as practicable"—the conduct of the officers was reasonable. *Id.* at 1020. The Court observed that "[o]nce aware of the warrant, [Bullock] became a flight risk and a potential risk to the officers' safety in executing the warrant given his suspected illegal association with the residence." *Id.*

Two circuits have declined to extend *Summers* to permit detention of occupants who have been seen leaving a residence subject to a search warrant. In *United States*

*v. Sherrill*, 27 F.3d 344 (8th Cir.1994), officers were conducting pre-execution surveillance when the defendant left the premises. *Id.* at 345. The officers stopped him a block away, informed him that they had a warrant to search the house, and detained him during the search. *Id.* at 345–46. The Eighth Circuit determined that, because the defendant had left the area and was unaware of the warrant, the officers did not have any interest in preventing his flight; the Court therefore held that *Summers* was inapplicable. *Id.* at 346. Nevertheless, the Court concluded that the police had probable cause to arrest the defendant; in light of the legal arrest, "the crack and cash discovered in a later search of his person was legally seized as a search incident to arrest." *Id.* at 347.

Second, in *United States v. Edwards*, 103 F.3d 90 (10th Cir.1996), police were conducting pre-execution surveillance of a "drug house" when the defendant, an ex-convict in a drug rehabilitation program, left the building. *Id.* at 91. The officers detained him on the street for forty-five minutes. *Id.* Like the Eighth Circuit in *Sherrill*, the Tenth Circuit concluded that because the defendant was unaware that a warrant was being executed, he had no reason to flee. *Id.* at 94. Furthermore, the Court reasoned that the defendant did not pose a risk of harm to the officers and his detention played no part in facilitating the orderly completion of the search. *Id.*

We agree with the District Court that the Fifth, Sixth and Seventh Circuits have the better of this argument. The guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the

preservation of evidence. *See Summers*, 452 U.S. at 701. We agree with the District Court that “[t]here is no basis for drawing a ‘bright line’ test under *Summers* at the residence’s curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away.” *Bailey*, 468 F.Supp.2d at 379.

While the Eighth and Tenth Circuits apparently concluded that once an occupant leaves a premises subject to search without knowledge of the warrant, *Summers* is inapplicable because he ceases to (1) be a threat to the officers’ safety, (2) be in a position to destroy evidence, or (3) be able to help facilitate the search, we conclude that it is the very interests at stake in *Summers* that permit detention of an occupant nearby, but outside of, the premises. Indeed, adopting the Eighth and Tenth Circuits’ view as the law of the Circuit would put police officers executing a warrant in an impossible position: when they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered). *Summers* does not necessitate that Hobson’s choice, particularly when “[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime.” *Summers*, 452 U.S. at 703. Indeed, to accept that argument would be to strip law enforcement of the capacity to “exercise unquestioned command of the situation,” *id.*, at precisely the moment when *Summers* recognizes they most need it.

The District Court was therefore correct when it noted that “*Summers* . . . appl[ies] 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.” *Bailey*, 468 F.Supp.2d at 381 n. 4.6 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. As the Fifth Circuit concluded in *Cavazos*, while “[t]he proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, . . . it is by no means controlling.” 288 F.3d at 712.

Against that standard, we have no trouble concluding that Bailey’s detention was lawful under the Fourth Amendment. The officers’ decision to wait until Bailey had driven out of view of the house to detain him out of concern for their own safety and to prevent alerting other possible occupants was, in the circumstances presented, reasonable and prudent. There is no question that because the target of the search warrant was a gun, Bailey—who matched the description of “Polo” provided by the confidential informant—posed a risk of harm to the officers. As the Supreme Court stated in *Summers*, “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.” 452 U.S. at 702. In light of the fact that the officers had reason to suspect that the occupant of 103 Lake Drive sold drugs out of the house and had a gun in his possession, it was reasonable for the officers to assume that detaining Bailey outside the house might lead to the destruction of evidence or unnecessarily risk the safety of the officers. These are precisely the concerns that justified the limited intrusion in *Summers*, 452 U.S. at 701–03.

Finally, Bailey's detention was not "unreasonably prolong[ed]." *United States v. Harrison*, 606 F.3d 42, 45 (2d Cir.2010). He was detained for less than ten minutes before he was taken back to 103 Lake Drive. By the time he returned to the site of the search, the search was underway and he was formally placed under arrest within five minutes of the entry team's execution of the warrant. Of equal importance, officers did not attempt to exploit the detention by trying to obtain additional evidence from Bailey during execution of the search warrant.

Because the officers acted as soon as reasonably practicable in detaining Bailey once he drove off the premises subject to search, we conclude that his detention during the valid search of the house did not violate the Fourth Amendment. The District Court did not err in denying Bailey's motion

to suppress the evidence obtained as a result of his detention. *Bailey*, 468 F.Supp.2d at 382.

## CONCLUSION

To summarize, we conclude that:

(1) Bailey's detention during the search of his residence was justified pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), because he was (a) an occupant of property subject to a valid search warrant, (b) seen leaving the premises during the execution of the warrant, and (c) detained as soon as reasonably practicable thereafter.

The District Court's August 23, 2007 judgment of conviction and its January 19, 2010 order denying Bailey's § 2255 motion are affirmed.

## **“Supreme Court to Decide Chunon Bailey Case on Whether Police Can Detain Without a Warrant”**

*USA Today*  
June 4, 2012  
Associated Press

The Supreme Court will decide whether police can follow and detain a suspect while they wait for a search warrant, even after the suspect leaves the area that the police want to search.

The high court on Monday agreed to hear an appeal from Chunon Bailey, who was sentenced to 30 years in prison on drug and weapons charges.

Bailey left a building with an apartment that police wanted to search for a gun before the warrant arrived. An unmarked police car followed Bailey for more than a mile, and police detained him and brought him back to the building. The warrant arrived, police found drugs and weapons and arrested

Bailey, who had an apartment key in his

pocket.

Bailey said police unconstitutionally stopped him on the street and brought him back to the apartment. But the trial judge ruled that if police could detain someone who was leaving a place during a search, then police could also follow someone who has left the place being searched and bring them back.

The 2nd U.S. Circuit Court of Appeals refused to throw out his conviction, but other federal appeals courts have ruled that police cannot follow and detain people just to bring them back to a place that has not been searched yet. The Supreme Court will hear arguments in the fall.

The case is *Bailey v. United States*, 11-770.

## **“Second Circuit Upholds Detention of Person Leaving Scene of Search Warrant”**

*Taking the Fifth*  
July 12, 2011  
C. Zadik Shapiro

In *Michigan v. Summers* the Supreme Court held that a search warrant for a residence allows officers to detain those in the residence during the search and that this right extended to a man leaving the residence as officers entered. In *United States v. Bailey* the Second Circuit Court of Appeals, last week, extended the permissible detention to an individual the officers saw drive away from the residence in order to allow them to follow and stop the individual. The officers then brought the individual back to the residence and detained him until the search was over.

With a search warrant for a basement apartment at 103 Lake Drive in Wyandanch, New York officers arrived at the residence. They saw two men, one of them Chunon Bailey leave the unit and drive away. They followed the vehicle, stopped it and brought the men back to the residence. Bailey was detained and he was arrested after guns and drugs were found in the residence.

In *Summers* the Supreme Court provided three reasons to justify the detention of someone leaving a residence: (1) “preventing flight in the event that incriminating evidence is found”; (2) “minimizing the risk of harm to the officers”; and (3) facilitating “the orderly completion of the search.” In a footnote the Second Circuit says that the first and second criteria apply. But it gives no facts to support this view. In another footnote it states that the police officers testified that the reason they didn’t immediately detain Bailey was that they were afraid that by

doing so they would alert anyone else in the house to the police presence and a dangerous situation may result.

It is one thing to follow the Supreme Court’s criteria. It is another to make a blanket holding. The Second Circuit held, “that *Summers* authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected as soon as reasonably practicable.”

This issue may come before the Supreme Court. The Circuit Courts are divided. The Fifth, Sixth, and Seventh Circuits, like the Second Circuit, upheld detentions of people after they left the scene. The Eighth and the Tenth Circuits ruled to the contrary. They held that once a person left the residence the *Summers* criteria are no longer applicable. If the person leaves the scene without knowing that a surveillance is in progress then the officers are not in danger. The Second Circuit’s response is that the officers are required to make a difficult decision: either to detain Bailey outside the residence and possibly notify those inside that the police are present or to let Bailey, who they call a “person of interest to leave without being detained. While the search warrant indicates that a judge found probable cause to believe that someone in the residence may have committed a crime at the time of the detention there was no individualized suspicion, as required by *Terry* that Bailey committed a crime and he should not have been detained. When you detain someone a

mile away from the house, return they to the house and require them to wait until the search is over it is no longer the minimal

intrusion found by the Supreme Court in *Summers*.



## ***King v. Maryland***

**No. 12A48**

**Ruling Below:** *King v. State*, 422 Md. 550 (2011).

Alonzo Jay King Jr., was arrested in 2009 on first- and second-degree assault charges. In accordance with §2-504(3) of the Maryland DNA Collection Act, King's DNA was collected, analyzed, and entered into Maryland's DNA database. King was convicted on the second-degree assault charge but while awaiting trial on that charge, his DNA profile generated a match to a DNA sample collected from a sexual assault victim in an unsolved 2003 rape. Maryland law enforcement authorities cited the DNA evidence as probable cause for a grand jury indictment of King on the rape charge. Later, a search warrant for collection from King an additional reference DNA sample, which matched the DNA profile from the 2003 rape. King was convicted of first-degree rape and sentenced to life in prison. King appealed, arguing that taking his DNA sample that linked him to the 2003 rape violated his Fourth Amendment right.

**Question Presented:** 1. Did the trial court err by denying Appellant's motion to suppress DNA evidence obtained through a warrantless search conducted without any individualized suspicion of wrongdoing? 2. Did the court below improperly shift the burden of proof to the defense to demonstrate that a search or seizure made without individualized suspicion is unreasonable?

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**Alonzo Jay KING, Jr.**

**v.**

**STATE of Maryland.**

Court of Appeals of Maryland

Filed April 24, 2012

[Excerpt: Some footnotes and citations omitted.]

**HARRELL, Judge**

### **I. Factual and Procedural Background**

The tale of this case began on 10 April 2009, when appellant was arrested in Wicomico County, Maryland, on first- and second-degree assault charges unrelated to the rape charge underlying the prosecution of the present case. Prior to the disposition of the assault charges, because King was charged with a crime of violence, the Act authorized collection of a DNA sample. Personnel at

the Wicomico County Central Booking facility used a buccal swab to collect a DNA sample from King on the day of his arrest. The sample was received and processed by the Maryland State Police Forensic Sciences Division and later analyzed by a private vendor laboratory. On 13 July 2009, the DNA record was uploaded to the Maryland DNA database. Detective Barry Tucker of the Salisbury Police Department received notice from the State Police, on 4 August 2009, that there had been a "hit" on King's DNA profile in an unsolved rape case.

The DNA database “hit” identified King’s DNA profile as a match to a profile developed from a DNA sample collected in a 2003 unsolved rape case in Salisbury, Maryland. In that case, on 21 September 2003, an unidentified man broke into the home of Vonette W., a 53-year-old woman, and raped her. Salisbury Police officers arranged for the victim to be transported to Peninsula Regional Medical Center, where she underwent a sexual assault forensic examination. Semen was collected from a vaginal swab. The swab was processed and the DNA profile uploaded to the Maryland DNA database. No matches resulted at that time. Vonette W. was unable to identify the man who attacked her other than to say that he was African-American, between 20 and 25 years old, five-foot-six inches tall, and with a light-to-medium physique.

Detective Tucker presented the 4 August 2009 DNA database “hit” to a Wicomico County grand jury which, on 13 October 2009, returned an indictment against King for ten charges arising from the crimes committed against Vonette W., including first-degree rape. The DNA database “hit” was the only evidence of probable cause supporting the indictment. On 18 November 2009, Detective Tucker obtained a search warrant and collected a second buccal swab from King. The second buccal swab matched also the sample collected from Vonette W. during the 2003 sexual assault forensic examination.

King filed in the Circuit Court for Wicomico County an omnibus motion that included a request to suppress evidence obtained through an illegal search and seizure. On 12 February 2010, the Circuit Court held a hearing on the motion.

On 26 February 2009, the hearing judge issued a memorandum opinion denying

King’s motion to suppress. The memorandum opinion upheld the constitutionality of the Maryland DNA Collection Act’s authorization to collect DNA from arrestees, citing to this Court’s holding in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), and concluded that the arrest of King on the 2009 assault charges and seizure of his DNA were presumed lawful; therefore, the defense bore the burden to prove that the warrant for the second DNA sample was invalid.

On 26 March 2010, the same judge presided over a second hearing on King’s motion to suppress in order to allow King to present evidence that the warrant was based on falsehood or reckless disregard for the truth. The hearing judge concluded that King failed to meet his burden and denied again the motion to suppress.

Ultimately, King plead not guilty to the charges arising from the 2003 rape of Vonette W., on an agreed statement of facts, in order to preserve his right to appeal the constitutional issues he raised. King was convicted and sentenced to life in prison, without the possibility of parole. On 12 October 2010, King filed timely a notice of appeal to the Court of Special Appeals, but we issued a writ of certiorari on our initiative, *King v. State*, 422 Md. 353, 30 A.3d 193 (2011), before the intermediate appellate court could decide the appeal.

We hold that § 2–504(3) of the Maryland DNA Collection Act, which allows DNA collection from persons arrested, but not yet convicted, for crimes of violence and burglary, is unconstitutional, under the Fourth Amendment totality of the circumstances balancing test, as applied to the relevant facts of this case because King’s expectation of privacy is greater than the State’s purported interest in using King’s

DNA to identify him for purposes of his 10 April 2009 arrest on the assault charges.

## **II. Standard of Review**

Reviewing a trial court's disposition of a motion to suppress evidence, we view the evidence presented at the hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party, which, in the present situation, was the State. The reviewing court defers to the fact-finding of the hearing court, unless the findings are erroneous clearly. We apply, however, a non-deferential standard of review when making the ultimate legal determination as to whether the evidence was seized properly under the Fourth Amendment.

## **III. Discussion**

Appellant argues that the Fourth Amendment protects mere arrestees, who are cloaked with the assumption of innocence until proven guilty, from unreasonable, warrantless, and suspicionless seizures and searches of their genetic material made pursuant to the Maryland DNA Collection Act.

### **A. The Fourth Amendment**

The Fourth Amendment to the United States Constitution 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to Maryland through the Fourteenth Amendment. We evaluate Fourth Amendment challenges under the reasonableness test articulated by Justice Harlan in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967), a standard adopted by this Court in *Venner v. State*, 279 Md. 47, 51–52, 367 A.2d 949, 952 (1977). The *Katz* reasonableness test requires first that the person have an “actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” A seizure or search will be upheld even if there is a reasonable expectation of privacy when the government has a “special need.” The State does little more than mention the special needs exception in the present case, for good reason, because its narrow confines do not embrace the case at bar.

The context for evaluating the Fourth Amendment challenges where a reasonable expectation of privacy competes with government interests was set forth by the Supreme Court in *United States v. Knights*, 534 U.S. 112 (2001). In *Knights*, the Supreme Court upheld a warrantless search of a probationer's apartment, using the “totality of the circumstances” approach set forth in *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Reasonableness in a Fourth Amendment analysis is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.

### **B. The Maryland DNA Collection Act**

The Maryland DNA Collection Act was enacted in 1994. The portions of the current statute challenged by Appellant were added

in 2008. The stated purpose of the statute is to “analyze and type the genetic markers contained in or derived from the DNA samples;” to assist an official investigation of a crime; to identify human remains; to identify missing persons; and for “research and administrative purposes,” including the development of a population database and to aid in quality assurance. The 2008 amendments affected primarily § 2-501(i), Definitions and § 2-504, Collection of DNA Samples. The amendments purport to allow the State to collect DNA samples from individuals arrested for crimes (or attempted crimes) of violence or burglary prior to being found guilty or pleading guilty. DNA samples are collected from arrestees when the individual is charged (or at a correctional facility if the arrestee is in custody) by an authorized collector trained in the collection protocols used by the Maryland State Police Crime Laboratory. Samples may be collected with reasonable force, if necessary, and are mailed to the Maryland State Police Crime Laboratory within 24 hours of collection. The samples are not tested or placed in the statewide DNA system until the first scheduled arraignment of the arrestee, or earlier if the arrestee gives consent.

If an arrestee is not convicted of the charge or charges which lead to his/her qualifying arrest(s), the DNA samples and records are required to be destroyed or expunged by the authorities. There is no expungement allowed, however, if the precipitating charge or charges against an arrestee are placed on the stet docket or the arrestee received probation before judgment. The Act provides also for penalties for misuse of DNA records, unauthorized testing of DNA samples, or wilful failure to destroy DNA samples.

In *Raines*, 383 Md. at 25, 857 A.2d at 33, a

plurality of this Court upheld the constitutionality, against a Fourth Amendment challenge, of the then-extant DNA collection statutory scheme, which, prior to the 2008 amendments, provided for collection of DNA samples only from individuals convicted of felonies, fourth-degree burglary, or breaking and entering into a vehicle. The Court, however, was divided deeply in reaching that result. The plurality opinion was authored by Judge Cathell. Two members of the four judge majority authored separate concurring opinions.

Raines was convicted of two separate robberies committed in 1996. In 1999, while serving a sentence in prison for a crime unrelated to the robberies, his DNA was collected pursuant to the Act as it then existed, because the 1996 robberies were qualifying felonies. In 2002, the DNA profile from a 1996 unsolved rape was uploaded to the statewide database and found to match Raines’s DNA profile collected in 1999. Using the DNA database hit as probable cause, the State obtained a search warrant to obtain a saliva sample from Raines in February 2003. As a result of the second DNA profile match and the testimony of the 1996 rape victim, a grand jury returned an indictment against Raines for first- and second-degree rape and robbery. Prior to his trial on the rape charges, Raines moved to suppress the DNA evidence, asserting that the original search was unconstitutional. The motions court agreed. The plurality opinion, on appeal, reversed the suppression of the evidence, noting that nearly every federal and state court that had decided an analogous question upheld against Fourth Amendment attack the collection of DNA from convicted felons. Using the balancing test for determining whether a search is reasonable under the Fourth Amendment, the plurality

upheld the constitutionality of the Maryland DNA Collection Act, as applied to convicted felons.

On the privacy interest side of the scales of the balancing test, the Court considered Raines's status as a convicted and incarcerated person as one with "severely diminished expectation of privacy." The plurality opinion diluted further Raines's expectation of privacy by crediting that the purpose of the DNA collection was to "identify" convicted felons; no incarcerated individual has an expectation of privacy in his or her identity. The Court distinguished the interest in searching for "identification" from searching "ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals." Using the *Knights* test, the Court concluded that there is no reason why a search cannot be reasonable absent an individualized suspicion in the limited circumstances of this case, where the individual's expectation of privacy was even more limited than in *Knights*, the government intrusion, a buccal swab, was minimal at most and the government objective is as strong as in *Knights*.

A government interest highlighted in *Raines* was to identify recidivists, persons involved with crimes, and unidentified bodies. Judge Raker's concurring opinion disagreed with the plurality opinion as to its conclusion of the severely limited expectation of privacy a convicted felon has in his/her bodily fluids, but upheld the statute based on her acceptance of the analogy between fingerprints and DNA profiles as providing purely identifying information. In a separate concurring opinion, Judge Wilner criticized the plurality opinion's characterization of the State's interest in the DNA as simply identification, calling it "misleading even to

suggest, much less hold, that this program is not designed for the predominant purpose of providing evidence of criminality." He conceded, however, that convicted criminals have a high rate of recidivism and that DNA's reliability serves the government's interest in identification in the same way as fingerprints and photographs do.

### C. The Present Case

We consider first whether King's constitutional challenge to the Maryland DNA Collection Act is as-applied, facially, or both. It is clear in the present case that King mounts both facial and as-applied Fourth Amendment challenges.

Under Maryland common law, there is a strong presumption that statutes are constitutional. To succeed in an as-applied constitutional challenge, King must show that "under [these] particular circumstances [he was] deprived . . . of a constitutional right."

To evaluate King's as-applied challenge, we analyze the totality of the circumstances, using the *Knights* balancing test that weighs King's expectation of privacy on one hand and the state's interests on the other, keeping in mind that the "touchstone" of Fourth Amendment analysis is reasonableness. Our analysis is influenced also by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable. As other courts have concluded, we look at any DNA collection effort as two discrete and separate searches. The first search is the actual swab of the inside of King's mouth and the second is the analysis of the DNA sample thus obtained, a step required to produce the DNA profile. Although some courts follow *Mitchell* in assessing the buccal swab technique as a quick and painless intrusion,

we shall not ignore altogether the gravity of a warrantless search and collection of biological material from a mere arrestee.

The State bears the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime. If application of the balancing test results in a close call when considering convicted felons, as our deeply divided decision in *Raines* suggests, then the balance must tip surely in favor of our closely-held belief in the presumption of innocence here. King's expectation of privacy is greater than that of a convicted felon, parolee, or probationer, and the State's interests are more attenuated reciprocally.

#### **i. King's Expectation of Privacy**

King must have a personal, subjective expectation of privacy in order for Fourth Amendment protections to apply.

We do not embrace wholly the analogy between fingerprints and DNA samples advanced in Judge Raker's concurring opinion in *Raines* and by the State in the present case. As aptly noted, fingerprints are a physical set of ridges on the skin of a person's fingers that, when exposed to ink (or other medium) and the resultant imprint placed on paper or electronic records, can determine usually and accurately a person's identity by matching the physical characteristics to a known set of fingerprints. DNA, on the other hand, is contained within our cells and is collected by swabbing the interior of a cheek (or blood draw or otherwise obtained biological material). While the physical intrusion of a buccal swab is deemed minimal, it remains distinct from a fingerprint. We must consider that "[t]he importance of informed,

detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."

The information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but no more. A DNA sample, obtained through a buccal swab, contains within it unarguably much more than a person's identity. Although the Maryland DNA Collection Act restricts the DNA profile to identifying information only, we cannot turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State. As Judge Wilner noted in his concurring opinion in *Raines*,

A person's entire genetic makeup and history is forcibly seized and maintained in a government file, subject only to the law's direction that it not be improperly used and the prospect of a misdemeanor conviction if a custodian *willfully* discloses it in an unauthorized manner. No sanction is provided for if the information is non-willfully disclosed in an unauthorized manner, though the harm is essentially the same.

Although arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers. A judicial determination of criminality, conducted properly, changes drastically an individual's reasonable expectation of privacy. The expungement provisions of the Act recognize the importance of a

conviction in altering the scope and reasonableness of the expectation of privacy. If an individual is not convicted of a qualifying crime or if the original charges are dropped, the DNA sample and DNA profile are destroyed. The General Assembly recognized the full scope of the information collected by DNA sampling and the rights of persons not convicted of qualifying crimes to keep this information private. This right should not be abrogated by the mere charging with a criminal offense: the arrestee's presumption of innocence remains.

We agree with the Minnesota Court of Appeals in *C.T.L.* that “establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant.” A finding of probable cause for arrest on a crime of violence under the Maryland DNA Collection Act cannot serve as the probable cause for a DNA search of an arrestee.

## **ii. Government Interest**

This Court accepted the State's argument in *Raines* that the purpose of the Maryland DNA Collection Act is to identify individuals, rather than to collect evidence. While that may be true in the context of maintaining a record of inmates, felons, parolees, or probationers (as was the case regarding the scope of the Act at the time *Raines* was decided), in the present case, identification is not what King's DNA sample was used for or needed, and, in most circumstances, will likely not be the case with other arrestees. Solving cold cases, in the State's view, is an ancillary benefit of determining the proper identification of an individual, but for King it was the only State

interest served by the collection of his DNA. The State here cannot claim the same public safety interests present in cases addressing convicted felons, parolees, or probationers. There is no interest in prison safety or administration present.

Although we have recognized (and no one can reasonably deny) that solving cold cases is a legitimate government interest, a warrantless, suspicionless search can not be upheld by a “generalized interest” in solving crimes.

Courts upholding statutes authorizing DNA collection from arrestees rely on an expansive definition of “identification” to sweep-up “cold case” crime-solving as a government purpose recognized and approved previously by courts in other contexts.

The State argues that it has a legitimate purpose in identifying accurately arrestees. Accepting this argument *arguendo*, the State presented no evidence that it had any problems whatsoever identifying accurately King through traditional booking routines. King had been arrested previously, given earlier fingerprint samples, and been photographed. There is no claim that King presented false identification when arrested or had altered his fingerprints or appearance in any way that might increase the State's legitimate interest in requiring an additional form of identification to be certain who it had arrested.

The State's purported interests are made less reasonable by the fact that DNA collection can wait until a person has been convicted, thus avoiding all of the threats to privacy discussed in this opinion. DNA profiles do not change over time (as far as science “knows” at present), so there is no reasonable argument that unsolved past or

future crimes will go unresolved necessarily.

As regards to King's facial challenge to the Act, a party challenging facially the constitutionality of a statute "must establish that no set of circumstances exist under which the Act would be valid." In *Salerno*, the Supreme Court set out, in dictum, the "no set of circumstances" test that is used broadly to decide facial constitutional challenges; however, the over-arching distinction between facial and as-applied challenges, in the wake of *Salerno*, has been less than clear. The Supreme Court, post-*Salerno*, has not applied consistently the "no set of circumstances" test to facial challenges. Despite the unclear application of *Salerno* among the federal courts, we apply the test here according to *Koshko*. We conclude that King's facial challenge to the statute fails because there are conceivable, albeit somewhat unlikely, scenarios where an arrestee may have altered his or her fingerprints or facial features (making difficult or doubtful identification through comparison to earlier fingerprints or photographs on record) and the State may secure the use of DNA samples, without a warrant under the Act, as a means to identify an arrestee, but not for investigatory purposes, in any event.

As we conclude that the Maryland DNA Collection Act, as applied to King as an arrestee, was unconstitutional, and King's 10 April 2009 DNA sample was obtained illegally, we must conclude that the second DNA sample, obtained on 18 November 2009, pursuant to a court order based on probable cause gained solely from the "hit" from the first compelled DNA sample, is suppressible also as a "fruit of the poisonous tree." The "fruit of the poisonous tree" doctrine excludes evidence obtained in violation of the Fourth Amendment. Under the "fruit of the poisonous tree" doctrine, the

defendant bears the burden of showing 1) primary illegality and 2) "the cause and effect relationship between the primary illegality and the evidence in issue, to wit, that the evidence was, indeed, the identifiable fruit of that particular tree." Here, we have determined that the original DNA collection was illegal. The cause-and-effect relationship between King's original buccal swab and the court-ordered second buccal swab is not attenuated in any way. The first buccal swab provided the sole probable cause for King's first-degree rape grand jury indictment. There was no other evidence linking King to the 2003 unsolved rape. Were it not for the buccal swab obtained illegally after King's assault arrest, there would be no second DNA sample which could have been used as evidence in King's trial for the charges enumerated in footnote seven, *supra*. The DNA evidence presented at trial was a fruit of the poisonous tree.

**Judgment of the Circuit Court for Wicomico County reversed. Case remanded to that court for further proceedings consistent with this opinion.**

**BARBERA and WILNER, Justices dissent.**

I dissent. The Court decides today that the police violated King's Fourth Amendment right to be free from unreasonable searches, when the police, after arresting King based on probable cause that he had committed a violent crime, took a DNA sample via a buccal swab, pursuant to the Maryland DNA Collection Act, Maryland Code (2003, 2011 Repl.Vol.), § 2-504(a)(3) of the Public Safety Article (Act). The question, then, is whether this warrantless search complied with the strictures of the Fourth Amendment, the touchstone for which is "reasonableness." The test for ascertaining



the answer to the reasonableness inquiry is one adopted by the Supreme Court long ago, *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968), and followed by this Court ever since.

Under that test, whether a given warrantless search is reasonable requires balancing the privacy interests of the individual searched against the legitimate government interests promoted by the search. The test has been employed to uphold searches of persons in situations akin to the case at bar.

The majority recognizes that the balancing test is the appropriate test to determine the reasonableness, and hence the constitutionality, of the search at issue here. Regrettably, both for the present case and all other future cases like it, the majority's application of the test to the circumstances here could not be more wrong. Proper analysis of the competing privacy and governmental interests at stake exposes the error.

To repeat, “reasonableness” depends on a balance between the governmental interests and the individual's right to personal security free from arbitrary interference by law officers. In assessing, first, the interests at stake for King, I bear in mind that consideration of the privacy interest implicated by the buccal swab involves identifying both the nature of the privacy interest enjoyed by King at the time of the swab and the character of the intrusion itself.

The majority misstates the degree to which King's privacy was impinged by his arrest. Certainly, up to the moment of conviction, King enjoyed the presumption of innocence in connection with the crimes charged. Yet King's status as a presumed-innocent man has little to do with the reduced expectation of privacy attendant to his arrest, processing, and pre-trial incarceration (even if for but a

short time). For purposes of the Fourth Amendment analysis, King's privacy expectation at the time of the cheek swab was far more like a convicted felon, probationer, and parolee than an uncharged individual.

The majority's Fourth Amendment analysis also suffers from its mislabeling the character of the intrusion upon privacy and bodily integrity occasioned by the cheek swab, and the degree to which the arrestee's privacy interest is impinged as a result of the information obtained thereby. The buccal swab technique has been described as “perhaps the least intrusive of all seizures,” and a “relatively noninvasive means of obtaining DNA” that “pose[s] lowered risk for both the subject and laboratory personnel.”

Though surely a far more sophisticated and “new” means of identification than fingerprints, DNA analysis, when used solely for purposes of identification is, in the end, no different. Both are limited markers that can reveal only identification information.

In this way, the numbers of a DNA profile are identical to the ridges of a fingerprint—the information derived from both is, as the majority concedes, “related only to physical characteristics and can be used to identify a person, but no more.”

The Supreme Court has given, albeit impliedly, the constitutional “go ahead” for the fingerprinting procedure. Given the similarity of fingerprinting and the DNA collection authorized by the Act, there is little concern that the Act implicates a weighty privacy interest.

On the other side of the Fourth Amendment reasonableness balancing equation is the

State's interest in the use and retention of DNA evidence. I need not discuss here the significance of all the government interests at stake, although there are at least three: identifying arrestees, solving past crimes, and exonerating innocent individuals.

We emphasized in *Raines* that identifying perpetrators of crimes is a "compelling governmental interest." In responding to this strong law enforcement interest, the majority eludes faithful application of the case law on the subject of "identity," by carefully circumscribing its meaning. The majority reasons that "identity" includes only an individual's name, age, address, and physical characteristics, but does not include "what [the] person has done." Based on this reasoning, the majority notes that the government can claim no legitimate interest in identifying an individual for the purpose of uncovering past misdeeds. From that premise the majority holds that the Act is unconstitutional as applied to King because King's DNA collection was superfluous: the identification interest already was served by the fingerprinting and photographing of King.

On the majority's first point, nothing in the law supports the majority's restrictive definition of identity. In the context of the Fourth Amendment, the Supreme Court has made clear that law enforcement's interest in identity extends to knowing whether a person has been involved in crime. The majority's definition raises the rhetorical question: "Why law enforcement would want to know a person's name, if not to know whether that person is linked to

crime?"

On the second point, the majority essentially holds that DNA collection cannot displace traditional methods of identification because those traditional methods are less intrusive and in use effectively. The Court of Appeals for the Ninth Circuit in *Haskell* characterized such reasoning as "a Luddite approach" to Fourth Amendment interpretation. "Nothing in the Constitution compels us to . . . prevent the Government from using this new and highly effective tool [of identification] to replace (or supplement) older ones." Moreover, the Supreme Court has been clear in "repeatedly refus[ing] to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." Finally, as this Court recognized in *Raines*, "[i]t is not for us to weigh the advantages of one method of identification over another."

Even assuming that the government's strong interest in identifying perpetrators of crime is the only interest at stake in this case (which it is not), that interest, when balanced against the significantly diminished expectation of privacy attendant to taking a buccal swab of an arrestee, yields, in my view, an obvious answer to the question presented in this case. The swab of King's inner cheek to extract material from which 13 DNA "junk" loci are tested to identify him is a reasonable search, and therefore permitted by the Fourth Amendment. I therefore would affirm the judgment of the Circuit Court for Wicomico County.

## **“Chief Justice Lets Maryland Continue to Collect DNA”**

*The New York Times*

July 30, 2012

Adam Liptak

Law enforcement officials in Maryland may continue to collect DNA samples from people charged with violent felonies while the Supreme Court considers whether to hear an appeal on the constitutionality of the practice, Chief Justice John G. Roberts Jr. ruled on Monday in a brief order granting a stay of a state court decision.

In April, the Maryland Court of Appeals, the state’s highest court, ruled that a state law authorizing DNA collection from people arrested but not yet convicted violated the Fourth Amendment’s prohibition of unreasonable searches and seizures.

The case arose from the collection of DNA in 2009 from Alonzo Jay King Jr. after his arrest on assault charges. The DNA profile matched evidence from a 2003 rape, and he was convicted of that crime.

The April decision overturned the rape conviction. “King, as an arrestee, had an expectation of privacy to be free from warrantless searches of his biological material,” Judge Glenn T. Harrell Jr. wrote for the majority.

In dissent, Judge Mary Ellen Barbera wrote that collecting DNA “by rubbing and rotating a cotton swab on the inside of an individual’s cheek” is much less intrusive than searches that have been approved by the Supreme Court, including routine strip searches of people arrested for even minor crimes and held in the general jail population.

Chief Justice Roberts, reciting the usual standards for granting a stay of a lower-court decision, said there was “a reasonable probability” that the Supreme Court would agree to hear the case. The Maryland decision conflicted, he said, with ones from the Virginia Supreme Court and federal appeals courts in Philadelphia and San Francisco.

He added that collecting DNA from people accused of serious crimes is “an important feature of day-to-day law enforcement practice in approximately half the states and the federal government.”

The Maryland decision had consequences beyond its borders, Chief Justice Roberts wrote, because the samples the state collected might have been provided to a national database maintained by the Federal Bureau of Investigation. “The decision renders the database less effective for other states and the federal government,” he wrote.

There was a “fair prospect,” Chief Justice Roberts went on, that the Supreme Court will ultimately reverse the Maryland decision.

In the meantime, he said, the state would suffer irreparable harm if it could not use “a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population.

## “DNA Sampling Case Develops”

*SCOTUSblog*

May 4, 2012

Lyle Denniston

Maryland officials have set the stage for an appeal to the Supreme Court to revive their legal right to collect DNA samples from individuals who have been arrested, but not yet convicted of a crime—if the state’s highest court cannot be persuaded to reconsider its partial ban on that procedure. The issue has divided lower federal and state courts, and the case of *King v. Maryland* would appear to pose the issue in a simple and direct way—a rape conviction would fall, and getting a guilty verdict at a new trial could be in considerable doubt.

State Attorney General Douglas F. Gansler asked the state court at least to put its ruling on hold until after it could be tested in the Supreme Court.

Maryland’s DNA sampling law was originally passed in 1994, but was extended in 2008 to require sampling of those arrested and not yet convicted. The federal government and 25 of the 50 states have similar laws, and disputes over their constitutionality have arisen across the country. The Supreme Court on March 19 refused to hear a case involving a challenge to a DNA sample taken from a Pennsylvania man (*Mitchell v. United States*, docket 11-7603), but the sample was not used in that case to identify the individual as the perpetrator of a different crime.

Among the constitutional issues that have arisen over such DNA sampling laws, these are some of the most significant:

\* What level of privacy do arrested individuals have, compared to those actually

found guilty of crimes?

\* How intrusive is a DNA sample, both in terms of the physical procedure of swabbing inside the mouth, and in terms of the amount of private information gathered by such a swab?

\* Do constitutional limits on it apply both to the original swabbing, and also to the later interpretation of the personal markers found?

\* For constitutional purposes, is using the DNA result to tie an individual to other crimes simply another form of identification, or is it a form of investigation of another crime? (In other words, can such a sample be used constitutionally only if it helps identify that arrested individual as the person the police want for that particular crime, or can it also be used validly to link that individual to other crimes, such as unsolved offenses (“cold cases”)?

\* Is the constitutional equation different if a sampling law puts strict limits on what information from a sample may be used by prosecutors? (In other words, is there no constitutional problem if the sample reveals only what are called “junk” factors that really do not tell much about an individual’s biological profile?)

\* And, if such a sampling procedure is invalid in some particular factual situations, may it remain on the books for other situations? (In other words, should such a law be struck down as written—that is, facially—or only as applied to specific

scenarios?)

Maryland's highest court upheld the state's DNA sampling law in 2004, but only as it applied to those already convicted of serious crimes (felonies). But, in a 5-2 decision on April 24, the state tribunal found that the law could not be applied in the specific case of a Wicomico County man, Alonzo Jay King, Jr., and thus overturned his conviction for rape—a conviction that depended heavily upon a link to him provided by a DNA sample taken after his arrest earlier for a separate assault case. (The state court turned down King's plea to strike down the law as written—that is, his “facial” challenge to it; it said there might be instances where the sample could be validly used when an arrested person's identity might be in question.)

Under the state court ruling, King can be prosecuted at a new trial, but Attorney General Gansler has told the state court, in his reconsideration motion, that the DNA sample that the ruling bars as evidence is “the strongest piece of evidence linking” King to a rape. After his conviction for rape, King was sentenced to life in prison without parole.

King had been arrested in 2009 for an assault that was treated as a violent crime. Because of that designation of his alleged offense, state law required that, upon his arrest, a DNA sample be taken by using a cotton swab inside his mouth to collect cellular material. That was done when he was booked into the Wicomico County jail. He also was identified by photograph and by his fingerprints. He was later convicted of second-degree assault, and was given a four-year prison sentence, with three of those years suspended.

Later, scientific interpretation of that sample

linked King to a rape that occurred in September 2003. In that incident, which had remained a “cold case” for prosecutors, a 53-year-old woman was raped by an African-American man whom she could not otherwise identify. The intruder held a gun to the woman's head as he assaulted her. Later, a semen sample taken from her body was found, though a DNA database, to match the DNA sample taken from King during the arrest procedure in 2009. After his conviction, King challenged the use of the 2009 sample as evidence against him in the rape case.

In agreeing with his challenge, as the sampling law applied to him specifically, the state court majority ruled that arrested individuals have a higher level of privacy than those who have actually been convicted, that the sample in King's case was not necessary to identify him in the assault case and thus was used only as a basis for investigating him in the earlier rape incident, that an arrested individual's expectation of privacy in private biological information outweighed the state's interest in gathering information to solve other crimes, and that DNA sampling is more intrusive than merely taking a suspect's fingerprints so the long-standing legal permission to use fingerprint evidence did not control in the DNA context.

The state court majority said that its “analysis is influenced by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable. . . . The state bears the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches. . . .” It found that the expectation of privacy was greater for an arrestee than for a convicted person, and that the state had not overcome that privacy claim by its

interest in investigating other crimes.

The two dissenting judges argued that the majority had overstated the privacy interests of those arrested and detained in police stations. And, they concluded, the government's interest in solving crimes far outweighed any such privacy interests. A swab of the mouth to pick up cells, the dissenters said, is "perhaps the least intrusive of all seizures" by police.

The dissenters also accused the majority of exaggerating the amount of biological information that could be exposed by using a DNA sample to get a "hit" to help solve another crime. The state law at issue, the dissenting opinion said, puts strict limits on the use of DNA information, and the kind that can be used in criminal cases is only the

kind of "junk" data that does not disclose "intimate genetic information." What a DNA sample shows, the dissent said, is virtually identical to the ridges of a fingerprint that can only be used to identify a specific person, and nothing more.

The state attorney general, in asking the Court of Appeals to reconsider its ruling, or at least to stay it pending an appeal to the Supreme Court, said that the decision could affect state prosecutors' use of evidence that could help solve "190 unsolved cases." Moreover, that motion contended, DNA sampling is used not only to solve unsolved crimes, but also helps to exonerate those who have been convicted in error and helps to eliminate other suspects in an investigation.

## **“Highest Court in Maryland Bans Collection of DNA at Certain Crime Scenes”**

*AFRO*

May 2, 2012

Alexis Taylor

Police departments across Maryland were ordered to stop collecting DNA from suspects of certain crimes last week, the result of a ruling in the state’s highest court, the Maryland Court of Appeals.

The ban applies to cases involving attempted or committed violent crimes and burglaries, which voids part of the amendments made in 2008 to the Maryland DNA Collection Act. That law previously allowed suspects, not just convicted criminals, to have their DNA taken and saved in a database for use in later crimes.

“What the police departments were doing was taking this DNA and stockpiling it when there’s no probable cause for the extraction of the DNA. That is highly unconstitutional in terms of individual rights and illegal search and seizure,” said Baltimore attorney, A. Dwight Petit, who’s been practicing general law since 1973.

“In dealing with a very, very conservative Supreme Court, it is good to see that our state court is adhering to some of the Constitutional protections which we as citizens deserve. It was a very Constitutional ruling.”

The ban stems from the Alonzo Jay King Jr. v. State of Maryland case, which highlighted fourth amendment rights against illegal search and seizures. King’s DNA was taken from him in a 2009 assault arrest. That DNA became key in connecting King to a 2003 rape, a connection he says would never have been made had his DNA not been taken

before he was convicted of the 2009 assault. Though the evidence will be harder to obtain, it will still be available to investigators after the proper procedures have been followed.

“The court says you can still get the DNA, provided you take your facts to a neutral and detached magistrate, i.e. a judge, and get a warrant. In order to get a warrant you’re going to have to persuade the judge that this DNA is evidence of a certain crime,” said University of Baltimore, School of Law Professor, Byron Warnken.

Police departments are not in complete agreement with the ruling, but are adhering to the order, while Attorney General Douglas F. Gansler has already requested a stay of the decision.

“The court’s decision thereby undermines important public safety objectives,” said Gansler in his motion submitted May 1, asking the Maryland Court of Appeals to reconsider the decision before the Supreme Court is petitioned.

“The 2008 amendments have bolstered law enforcement efforts and have led to the apprehension of violent criminals who committed crimes that might otherwise have gone unsolved.”

Gansler also said that while the 2008 amendments could bring an end to nearly 190 unsolved cases, the DNA evidence collected also helps exonerate prisoners wrongly accused.

Whatever the effects of the reversal, Maryland State

Police say their main focus is keeping citizens out of harm's way.

"We're still able to collect upon conviction, what's been halted is collection upon

arrest," said Elena Russo, a spokesperson for the Maryland State Police Department.

"Our job is public safety and DNA collection is a tool. The effects are still to be determined," said Russo, when asked if the ruling will help or hurt officials pursuing justice in the future.



## **“Court of Appeals Holding Could Stop Arrestee DNA Collection by State and Local Governments”**

*Maryland Association of Counties*

April 27, 2012

Since the passage of the 2008 Maryland DNA Collection Act, it has been a common practice for State and local law enforcement and correctional agencies to take a DNA sample from arrestees charged with a violent crime or felony burglary. However, an April 24 Maryland Court of Appeals decision in *King v. State of Maryland*, has held that taking a DNA sample from an arrestee violates the arrestee’s Fourth Amendment right against unreasonable warrantless searches. The ruling has put law enforcement and correctional agencies in a quandary about whether to continue the practice pending appeal.

As reported by an April 25 *Baltimore Sun* article, some State and local jurisdictions have decided to continue the practice while the State decides whether to appeal the case.

Several law enforcement agencies, including the state Department of Public Safety and Correctional Services, were awaiting a decision on whether the state will appeal before they make changes. Gov. Martin O’Malley, Baltimore’s mayor and a chorus of state and local officials called for an appeal of what they see as a crucial tool that has linked suspects to other, unsolved crimes.

Opponents of the practice said the decision to continue taking samples shows disregard for the Court of Appeals and the laws the police are sworn to uphold. . . .

O’Malley was joined by Baltimore Mayor Stephanie Rawlings-Blake, Police Commissioner Frederick H. Bealefeld III

and others in pushing Attorney General Douglas Gansler to file a challenge before the U.S. Supreme Court. . . .

In Anne Arundel and Baltimore counties, police officials said they would not change their practices until the state police or Gansler’s office told them otherwise; in Howard County and Baltimore City, the samples are collected by the state public safety department, which will continue to do so.

It remained unclear what will happen to the nearly 16,000 samples already collected in a database, although a public defender said suspects whose DNA has been compiled may be able to take court action to get the samples destroyed. . . .

The collection of DNA at arrest has been the subject of national debate, because opponents point out that it takes place before a suspect is tried in court. Twenty-six states have laws similar to Maryland’s, and many have been upheld in state and federal court.

An April 25 *Baltimore Sun* editorial urges the State to appeal to decision. The editorial notes that the Maryland Court of Appeals has upheld in the past the taking of fingerprints from arrestees and the post-conviction collection of DNA.

The crux of the matter is this: Those charged with crimes have, for decades, been fingerprinted as a matter of routine, and those fingerprints are checked against evidence both in the crime at hand and in unsolved crimes. The use of DNA is more

powerful and more technologically advanced, but it is fundamentally the same thing. We hope the Supreme Court will be

given the chance to recognize that fact and uphold Mr. King's conviction—and the law that made it possible.

## **“Police Power to Use Stun Guns Left Unclear”**

*SCOTUSblog*  
May 29, 2012  
Lyle Denniston

The Supreme Court, choosing not to review a compromise decision of a federal appeals court, on Tuesday left police around the nation with no final guidance on the legality of their use of a Taser—a device that can stun an unruly or disobedient suspect into immobility, or at least inflict a considerable amount of temporary pain. Without comment, the Justices turned aside four separate petitions, raising both sides of the issue: whether such stun guns’ use is a kind of excessive force by police in violation of the Fourth Amendment, and whether police are entitled to legal immunity for their past use of such a device.

The Court’s action settles nothing on either question. Thus, police in various parts of the country will have to check what the federal or state courts in their area have ruled on the subject—if they have. As of now, the lower courts are split on the constitutionality of Taser technology as a method of police control.

In Tuesday’s orders, the Court voted to leave intact a Ninth Circuit Court ruling declaring that it violates the Fourth Amendment to use a Taser to subdue a suspect, at least when the crime the police are investigating is not a serious one, the suspect does not pose an immediate threat to the safety of officers or bystanders, and the

suspect is not “actively resisting arrest or attempting to evade arrest” by fleeing. Those are not exclusive factors, though, the Circuit Court said, and, in fact, it found the use of a Taser was excessive even in one case where the suspect did mildly resist arrest.

In one case before the Circuit Court, police officers in Seattle used three quick bursts of a Taser (in the non-demobilizing mode) to subdue a pregnant woman who had been stopped for driving too fast near a school. In the other case, police officers in Maui, Hawaii, used a stun gun in its strongest mode to disable a woman involved in a domestic dispute with her husband. In each case, the Circuit Court ruled that the use of the technology, in the specific circumstances of the two cases, was “unreasonable” in a Fourth Amendment sense.

But, the Circuit Court went on to conclude that the Fourth Amendment right was not clearly established at the time of these two incidents—November 2004 in the Seattle incident, August 2006 in the Maui incident. The Justices, without comment, denied review of *Daman v. Brooks* (11-898), *Agarano v. Mattos* (11-1032), *Brooks v. Daman* (11-1045), and *Mattos v. Agarano* (11-1165). . . .

## **“Ninth Circuit Lays Out Constitutional Limits on Use of Tasers”**

*Metropolitan News-Enterprise*  
October 18, 2011

The use of tasers to subdue persons suspected of minor offenses is subject to constitutional limits on the use of excessive force, the Ninth U.S. Circuit Court of Appeals ruled yesterday.

A sharply divided en banc panel of the court reversed two district court rulings that were argued together and consolidated for decision. The district judge in each instance ruled that the plaintiff had presented sufficient evidence for the case to go forward under 42 U.S.C. Sec. 1983, but the appellate court said the officers in both cases were protected by qualified immunity.

In a case from Seattle, a six-judge majority held that a seven-months pregnant woman tasered three times after a traffic stop had shown a prima facie violation of the Fourth Amendment, but that the law at the time of the 2004 incident was too unsettled for the plaintiff to show a violation of a clearly established right. Four judges said the plaintiff's bizarre conduct and refusal to follow instructions gave the officers no reasonable alternative to using the amount of force that they did.

The decision was a partial victory for plaintiff Malaika Brooks, however. Because the “clearly established right” analysis does not apply under Washington state law, the court held, she has a viable claim for assault and battery.

### **Maui Case**

In the second case, from Maui, the same

seven judges similarly concluded that a woman who allegedly interfered with police as they attempted to arrest her intoxicated husband for attacking her should not have been tasered without warning, but that the officer was entitled to qualified immunity.

Two of the other judges argued that Jayzel Mattos, like Brooks, left the officers devoid of reasonable alternatives to using the electric devices. But two judges who approved of the officer's conduct in Brooks' case argued that Mattos was entitled to a trial to determine whether the officer who tasered her in August 2006 breached constitutional standards that were well-established at that time.

The panel that decided the cases consisted of 10 judges, due to the recent death of Judge Pamela Ann Rymer.

Judge Richard A. Paez, writing for the majority, explained that Brooks was cited for speeding in a school zone after dropping off her 11-year-old for class. After refusing to sign the citation, she became involved in a heated argument, apparently because she disbelieved the officer's explanation that signing meant only that she acknowledged receipt and was not an admission of guilt.

After she reiterated to an arriving sergeant that she would not sign the citation, she was told she was going to jail. After she told the officers she was due to give birth in less than 60 days, and after an officer threatened her with the taser, she testified, an officer opened the driver's side door and twisted

her arm up behind her back, then removed the keys—which dropped to the floor—from her ignition.

Another officer then applied the taser, in drive-stun mode, to her left thigh.

In drive-stun mode, the taser is applied to the subject's body; it is a pain-compliance technique and is not intended to incapacitate the subject. In dart-mode, by contrast, the taser fires electrodes capable of incapacitating the subject by interrupting the ability of the brain to control the muscles in the body.

Brooks—who was convicted of failing to sign the ticket, but not of resisting arrest—sought damages for her injuries, including permanent burn scars.

### **Domestic Call**

In Mattos' case, the testimony was that police responded to the family residence after the couple's 14-year-old daughter called 911. Mattos claimed that she was trying to calm the situation, and avoid disturbing a younger child who was sleeping, when Officer Ryan Aikala moved toward her husband with her in the middle.

She claimed that the officer pushed up against her chest, and that she extended her arm to protect her breasts "from being smashed against" the officer's body. The officer then accused her of touching him, and as she tried to reason with another officer, she claimed, Aikala shot her with the taser in dart-mode.

All charges against Mattos and her husband were ultimately dropped. She and her husband alleged in their complaint that the warrantless entry into their residence and their arrests violated the Fourth, Fifth, and

Fourteenth amendments, but all claims except those relating to the use of the taser were dismissed by the district judge.

Paez concluded that in Brooks' case, viewing the evidence in the light most favorable to the plaintiff, the district judge was correct in concluding that there was sufficient evidence of excessive force. The violation, he reasoned, was relatively minor; there was no immediate threat to the safety of the officers or the public, at least not after the keys were removed from the ignition; and Brooks was not actively resisting or attempting to evade arrest.

There was, he added, no reason for the officer to use the taser against Brooks three times within a span of less than a minute. He also concluded, however, that Brooks is without a federal remedy because at the time, there was no Ninth Circuit law on the use of tasers and federal courts in other circuits had uniformly held that the use of the taser did not constitute a constitutional violation.

With respect to Mattos, Paez noted that the only offense she was accused of was interfering with the officer, that any such interference was—according to her version of the facts—relatively minor, that the officers could not have considered her a threat, and that while the situation was volatile, there was no evidence "that tasing the innocent wife of a large, drunk, angry man when there is no threat that either spouse has a weapon, is a prudent way to defuse a potentially, but not yet, dangerous situation."

The lack of a warning, he added, "pushes this use of force far beyond the pale."

But in concluding that Mattos, like Brooks, cannot pierce the police claim of qualified

immunity, Paez explained that as of August 2006, there was still no federal appellate case law holding the use of the taser unconstitutional. The Supreme Court, he said, has made it clear that a court cannot find a right to be clearly established without support in Supreme Court or federal appellate precedent.

Paez was joined by Judges Susan P. Graber, M. Margaret McKeown, Raymond C. Fisher, and Johnnie B. Rawlinson.

Judge Mary M. Schroeder concurred separately, emphasizing “the non-threatening nature of the plaintiffs’ conduct,” in contrast with the danger posed by taser, particularly the risk to Brooks’ child, although the child was ultimately born healthy.

Chief Judge Alex Kozinski, joined by Judge Carlos Bea, argued that the majority failed to appreciate the difficulty of police work and the superiority of the taser to other means of subduing suspects that are more dangerous to both the officer and the suspect.

The officers in Brooks’ case, he wrote, acted in a way that was “entirely reasonable,” “were endlessly patient,” and deserved

“commendations for grace under fire.” The plaintiff, he said, “is completely, wholly, 100 percent at fault” because she “risked harm to herself, her unborn daughter and three police officers because she got her dander up over a traffic ticket.”

Kozinski acknowledged that Mattos’ case was “considerably closer,” but argued that the decision to use the taser was reasonable in the context in which the officer found himself, the need to make a split-second judgment under a difficult and fast-moving situation.

Judge Barry Silverman, joined by Judge Richard Clifton, joined Kozinski’s analysis of the Brooks case, but said the district judge was correct in finding that Mattos had a triable case. “Precedent already on the books in August 2006 provided officers and courts with enough guidance to know that a taser in dart mode is not a toy and presents a level of force on par with other implements ‘used to subdue violent or aggressive persons.’”

Pasadena attorney John Burton authored an amicus brief in support of the plaintiffs.

The cases are *Mattos v. Agarano*, 08-15567, and *Brooks v. Daman*, 08-35536.

## **“Police Use of Stun Guns May Increase”**

*The Sun*  
June 10, 2008  
Sarah Garland

The New York City Police Department could expand greatly its use of electric stun guns, as Commissioner Raymond Kelly said yesterday he is prepared to accept recommendations from a new report spurred by the 2006 Sean Bell shooting.

The report, by a nonpartisan, California-based think tank, RAND Corp., was commissioned last year by Mr. Kelly to examine police firearms training.

Although mostly laudatory, the report listed more than 100 recommendations for improvements, including more hands-on instruction and stricter standards for how police are taught to handle their weapons.

The most prominent—and most likely to rile police critics—was a recommendation that the department launch a pilot study to examine whether its more than 27,000 uniformed officers on patrol should be armed with stun guns.

Of 455 police shootings examined for the report, researchers found 25—three of them fatal—where a stun gun may have diffused the situation.

“The expansion of the use of Tasers may well be in order,” the report’s lead author, Bernard Rostker, said at a news conference yesterday announcing the findings.

The police department had already announced it is deploying 500 Tasers to sergeants on patrol starting tomorrow, and Mr. Kelly said he was open to expanding the program.

Yet the commissioner also noted that the use of Tasers in New York has been limited in the past because they have been known to cause deaths.

“They’re controversial,” he said.

The guns shoot out metal barbs that lodge in the skin of suspects and the models used by the police department have the capacity to transmit 5,000 volts of electricity into the human body, according to Taser spokesman Steve Tuttle.

In its other main recommendation, the report called for rolling enrollment for the police academy, instead of the current system of two large classes of recruits a year, so that recruits can have more chances to practice firearms training.

Police officials said a new police academy due to open in the next few years would allow the police department to apply many of the report’s training recommendations.

The report was originally billed as a six-month study of the NYPD’s firearms training that would include a look at “contagious shooting” after Bell, an unarmed black man, was killed in a hail of 50 police bullets.

But on the subject of contagious firing—when police officers fire reflexively, often in response to the sounds of guns going off around them—the report said it had been nearly impossible to tabulate whether incidents had risen or fallen in recent years.

“It’s a very rare event,” Mr. Rostker said.

The associate legal director at the New York Civil Liberties Union, Chris Dunn, criticized the report’s treatment of contagious shootings as cursory, and also questioned its lack of a systematic analysis of the ethnic makeup of shooting victims and firing officers.

“It’s really silent on the issues that the Bell shooting raised,” Mr. Dunn said.

Mr. Rostker called the omission of race and ethnicity “an oversight,” adding that he was “sorry about that.”

Mr. Kelly said the issue of race was not in the purview of the report.

“This study was focused on what we could do. It was not a panacea; it wasn’t going to solve all issues,” he said.



## **“Shoot to Stun”**

*The New York Times*

July 2, 2008

Paul Robinson

A narrowly divided Supreme Court ruled last week that the Second Amendment gives Americans the right to keep a loaded gun at home for their personal use. Presumably, citizens can use these weapons to defend themselves from intruders. But given the growing effectiveness and availability of less lethal weapons, it is likely that state laws will increasingly keep people from actually using their guns for self-defense.

The states impose carefully defined limitations on the use of deadly force in self-defense. (These rules are fairly uniform, state to state; most are based on the American Law Institute’s Model Penal Code of 1962.) A person may use only as much force as is “immediately necessary.” If a less lethal means of defense is available, the use of deadly force is illegal. Firearms are by law deadly force. (The police are given somewhat greater authority to use force, even aggressive force.)

Guns have been considered a primary weapon for self-defense. But now there are nonlethal alternatives—some not yet on the market—that can quickly disable an attacker even more reliably than a firearm can.

The best known of these are Tasers, handgun-shaped devices that fire a dart that delivers a painful electrical shock. A hit from a Taser causes an instant muscular spasm that can disable any attacker, no matter how determined. And the Taser works no matter where on the attacker’s body the dart hits. A bullet, in contrast, instantly disables only if it hits a couple of vulnerable spots, like the space between the

eyes. A shot to the arm, the leg or even the torso may not stop an attacker.

A Taser works only within a limited distance, up to 35 feet for advanced models. But most firearm confrontations are at less than 10 feet. More important, the legal limitations on self-defense typically do not allow use of force at a distance. Defensive force is considered “immediately necessary” only when the defender can wait no longer, when the threat is “imminent.”

Newer kinds of hand-held weapons that are less lethal than guns—many already in prototype—may be even more effective than Tasers. These include light lasers, designed to blind temporarily, and microwave beams that instantly cause the skin to feel as if it is on fire, but cause no lasting harm.

Of course, anyone who uses a gun in self-defense may argue that he would have used a less lethal weapon if he had had one at hand, but there was only the firearm. The problem with this argument is that the limited option is the person’s choice, and the law may not be blind to that choice.

If you are a surgeon and you leave your glasses behind on the way to the operating room, then botch a delicate procedure, you can’t convince a judge that the resulting death wasn’t your fault because you couldn’t see well. If, on your way to confront an intruder, you choose your gun rather than your more effective but less lethal weapon, you can hardly complain later about your limited options.

Similarly, when a person shops for a weapon of self-defense, anticipating some day a confrontation with an attacker, his choice of a gun over something less lethal but more effective is a choice to limit his options in a confrontation.

Should we worry that by expecting people to use only nonlethal weapons in self-defense we would sacrifice our personal autonomy and safety? No. On the contrary, personal autonomy would be even more vigilantly protected.

The reason for this is a second limitation on the use of defensive force, what might be called the “proportionality” requirement.

Typically, a defender can lawfully use deadly force only to prevent death, rape, kidnapping or bodily injury serious enough to cause long-term loss or impairment of a body part or organ. But a nondeadly weapon can be used to defend against any threat of unlawful force.

As effective less-than-lethal weapons proliferate, the laws of self-defense may ultimately relegate last week’s court decision to the status of an odd little opinion, one that works mainly to ensure some special constitutional status for gunpowder technology. Gun collectors will be fond of it, but for most of society, it will have little practical effect.