UNDERSTANDING CRIMINAL PROCEDURE

VOLUME 1: INVESTIGATION
SIXTH EDITION

VOLUME 2: ADJUDICATION
FOURTH EDITION

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PREFACE

This Supplement includes all relevant United States Supreme Court decisions handed down since the most recent editions of *Understanding Criminal Procedure* (Vol. 1, 5th ed.; Vol. 2, 4th ed.) went to press. It also includes selected citations to recently published literature in the field and, where pertinent, to state and lower federal court decisions.

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June 2013

VOLUME 1

Chapter 2 (Vol. 1)

OVERARCHING POLICY ISSUES IN CRIMINAL PROCEDURE

§ 2.07 FORMULATING THE RULES OF CRIMINAL PROCEDURE: SOME OVERARCHING CONTROVERSIES

Page 35: second full paragraph, line 7, add new footnote 73.1

The quoted language . . . of the arrestee.[73.1]

[73.1] *See also* Missouri v. McNeely, 133 S. Ct. 1552, 1559 & 1559 n.3 (2013) (stating that "[t]o determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances"; and "the general exigency exception [to the warrant requirement], which asks whether an emergency existed that justified a warrantless search, naturally calls for case-specific inquiry").

Chapter 6 (Vol. 1)

FOURTH AMENDMENT TERMINOLOGY: "SEARCH"

§ 6.09 USE OF DOGS AND OTHER "LIMITED" INVESTIGATIVE TECHNIQUES TO DISCOVER CONTRABAND

Page 94: after line two, add the following new text:

You will notice that the Court applied reasonable-expectation-of-privacy analysis in *Place* and *Caballes*. However, as noted earlier (p. 71 of the main text), and more fully explained in Section 6.10[D] of the text, the Supreme Court now (since 2012) applies both *Katz*-ian reasonable-expectation-of-privacy doctrine *and* pre-*Katz* trespass analysis in determining whether police activity constitutes a Fourth Amendment search. If the activity is a "search" under *either* approach, it triggers Fourth Amendment scrutiny. This dual approach is seen in the Supreme Court's recent treatment, in *Florida v. Jardines*,[118.1] of a "dog sniff" outside a person's home.

In *Jardines*, the police responded to an unverified tip that marijuana was being grown in the Jardines home by approaching the front porch with a dog trained to detect the scent of marijuana, cocaine, heroin, and several other drugs. The dog's behavioral changes alerted his handler to the presence of illegal narcotics inside the home.

Did this use of the dog constitute a "search," although the use of trained dogs in *Place* and *Caballes* did not? Justice Scalia, writing for a five-justice majority, held that this police activity *did* constitute a search, but he reached this conclusion on "trespass" rather than expectation-of-privacy grounds. Applying pre-*Katz* language and reasoning, Justice Scalia held that the police conduct constituted a physical intrusion of a constitutionally protected area. The front porch was within the "curtilage"[118.2] of the house. According to the Court, "when it comes to the Fourth Amendment, the home is first among equals. At the 'very core' stands 'the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.' " And, the Court reasoned, that right "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity."

But, how was this an "intrusion"? People—neighbors, mail carriers, Girl Scout cookie-sellers, trick-or-treaters, peddlers, and even police—come to the front doors of homes all the time. Are *they* trespassing? Justice Scalia stated that such people ordinarily have an implicit license to come to the door, "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Here, however, "introducing a trained police dog to explore the areas around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*."

Justice Kagan, joined by Justices Ginsburg and Sotomayor, while joining the Scalia opinion, wrote a concurring opinion. They stated that the same result would

apply using reasonable-expectation-of-privacy analysis. Justice Kagan asked us to hypothesize a stranger coming to our front door carrying "super-high-powered binoculars," not knocking but instead using the binoculars to peer through the window "into your home's furthest corners. . . . In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one." To the concurring justices, this conduct is not only a trespass but an invasion of our reasonable expectations of privacy. For the concurring justices, therefore, *Place* and *Caballes* do not apply here because this was Jardines' home and not luggage in a public airport or a car on a public road.

Justice Alito, writing for the Chief Justice, and Justices Kennedy and Breyer, dissented. He reasoned that dogs have been domesticated for "about 12,000 years," were "ubiquitous" in this country and Britain at the time of the adoption of the Fourth Amendment, and "their acute sense of smell has been used in law enforcement for centuries. Yet the Court has been unable to find a single case . . . that supports the rule on which its decision is based." Alito observed that the police activity took only "a minute or two" and occurred on the front porch, not in the backyard or in an another presumably forbidden area. According to the dissenters, trespass analysis is not based on whether the person knocks at the door (mail carriers frequently don't) or whether the person on the front porch is, for example, a tolerable or intolerable peddler ("Girl Scouts selling cookies versus adults selling aluminum siding").

As for the concurring opinion's privacy analysis, Justice Alito stated that "I see no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand."

118.1 569 U.S. ___, 133 S. Ct. 1409, 185 L.Ed.2d 495 (2013).

118.2 *See* § 6.06[B], *supra*, for the definition of "curtilage."

Chapter 8 (Vol. 1)
FOURTH AMENDMENT: "PROBABLE CAUSE"

§ 8.05 THE *GATES* "TOTALITY OF THE CIRCUMSTANCES" TEST

Page 131: end of the second paragraph, add new footnote 68.1:

According to *Gates*, . . . developed under *Aguilar*.[68.1]

[68.1] *See also* Florida v. Harris, 133 S. Ct. 1050, 1055–1056 (2013) ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.").

Chapter 10 (Vol. 1)
SEARCH WARRANTS: IN GENERAL

§ 10.02 THE WARRANT APPLICATION PROCESS

Page 165: add to footnote 58:

[58] . . . Also, "[w]ell over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." Missouri v. McNeely, 133 S. Ct. 1552, 1562 (2013).

§ 10.04 EXECUTION OF SEARCH WARRANTS

Page 176: at the end of the first full paragraph, add the following new text:

. . . This right of detention "does not require law enforcement to have particular suspicion than an individual [seized under the rule] is involved in criminal activity or poses a specific danger to the officers."[110.1] The right of seizure is automatic. On the other hand, because the right of detention is automatic and can result in a relatively lengthy detention while a search is conducted, the *Summers* rule is limited to the detention of occupants of the residence and ones discovered "immediately outside a residence at the moment the police officers executed the search warrant. . . . Once an individual has left the immediate vicinity of the premises to be searched, detentions must be justified by some other rationale" than the *Summers* rule.[110.2]

[110.1] Bailey v. United States, 133 S. Ct. 1031, 1037–1038 (2013).

[110.2] *Id.* at 1042, 1043. In *Bailey*, *B* left the residence that the police had a warrant to search, but he was not detained until he was about a mile away from the residence. Because this detention was beyond "any reasonable understanding" of the term "immediate vicinity" of the premises, his seizure fell outside the scope of *Summers*.

Chapter 11 (Vol. 1)
WARRANTLESS SEARCHES: EXIGENT CIRCUMSTANCES

§ 11.02 INTRUSIONS INSIDE THE HUMAN BODY

Page 181: end of second paragraph, add new footnote 10.1:

In short, an . . . the warrant requirement.[10.1]

[10.1] The Supreme Court recently made clear that the right of the police to conduct a warrantless blood test in a drunk-driving investigation is not automatic. That is, the fact that there is a natural dissipation of alcohol in the bloodstream—and, thus, that there is an inevitable gradual destruction of evidence in the bloodstream—does not justify a categorical right of the police to dispense with the warrant requirement. Missouri v. McNeeley, 133 S. Ct. 1552 (2013). In *McNeeley*, the trial court ruled that, based on the facts of that case, "there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant." The Court, per Justice Sotomayor, concluded that because a blood test involves "a compelled physical intrusion beneath [a person's] skin and into his veins," courts should conduct a "finely tuned approach" to the warrant issue by looking to the totality of the circumstances. The Court agreed that a "significant delay in testing will negatively affect the probative value of . . . [blood test] results" and, therefore, there are circumstances when securing a warrant will be impractical, but it determined that each case should be decided on its own facts.

Page 182: at the end of the section, add the following new text:

On the other hand, when the intrusion is nonsurgical it may more easily be found to be reasonable. In *Maryland v. King*,[11.1] the Court approved a process of taking a "buccal swab," which "involves wiping a small piece of filer paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells," from *all* arrestees booked on "serious offenses" in order to obtain a DNA identification.

[11.1] 133 S. Ct. ___, 2013 LEXIS 4165 (discussed more fully § 12.02, *infra* this supplement).

Chapter 12 (Vol. 1)
SEARCHES INCIDENT TO LAWFUL ARRESTS

§ 12.02 WARRANT EXCEPTION IN GREATER DETAIL

Page 193: add the following new text at the end of subsection [C]:

[D] DNA Swabs: *Maryland v. King*[40.1]

In *Maryland v. King*, the Court held that the police may take and analyze a DNA sample from an arrestee as part of a standard booking procedure, provided the arrest was for a "serious offense" supported by probable cause. In *King*, *K* was arrested and charged with first-degree assault for menacing a group of people with a shotgun. On the day of his arrest, as part of processing *K* for detention, the police used a "cheek swab" to take a DNA sample from *K*, pursuant to the state's DNA collection statute, which authorized collection of DNA samples from anyone charged with a crime of violence. After *K*'s arraignment, his DNA was uploaded to a database, and it was discovered that his DNA tied him to an unsolved rape case from six years earlier. *K* was subsequently convicted for that rape and sentenced to life in prison without the possibility of parole.

In considering the constitutionality of taking and using *K*'s DNA, every member of the Court agreed that the cheek swab procedure constituted a "search" for the purposes of the Fourth Amendment, but the agreement ended there.

Justice Kennedy, writing for a 5-4 majority, placed the scrutiny of the search's constitutionality "within the category of cases this Court has analyzed by reference to the proposition that the 'touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.' "[40.2] Accordingly, the majority weighed the "legitimate government interest" served by taking a DNA sample from arrestees charged with serious crimes against the resulting intrusion on privacy. The Court highlighted identification, broadly understood, as a "critical" governmental interest. The Court cited a number of values of DNA identification: unambiguous knowledge of who the arrestee is, knowledge of the arrestee's criminal history (to assess his dangerousness and likelihood of flight), and, "in the interests of justice," determination of whether the arrestee is "the perpetrator of some [other] heinous crime." For these purposes, the Court described DNA identification as a contemporary analogue of fingerprinting, one that is already "superior . . . in many ways." Balanced against this "substantial interest," the Court found the intrusion of the swabbing procedure "minimal," particularly given the diminished expectation of privacy of an individual "arrested on probable cause for a dangerous offense," and the statutory limitation of the use of the DNA sample to identification purposes. So, the majority held, the Fourth Amendment permits the procedure.

Justice Scalia, writing for the four dissenters, described an ironclad rule: "[t]he Fourth Amendment forbids searching a person for evidence of a crime" without individualized suspicion. When the Court has allowed searches without suspicion, the dissent noted, it has always required a motive at least formally separate from investigation of a crime. Because the dissenters found it "obvious that no such noninvestigative motive" was present—in other words, that the whole point of the

DNA swab was to investigate whether *K* had committed some other crime for which he was not yet under suspicion—the dissenters would rule the "search" of *K* for DNA a violation of the Fourth Amendment.

King's impact beyond the immediate context of DNA testing of arrestees is uncertain. As the dissent points out at great length, the purpose of such programs is quite plainly to determine whether arrestees committed other crimes, and the Court had previously limited reasonableness balancing without individualized suspicion to searches, ostensibly conducted for *non*-criminal law purposes, usually called "special needs" searches.[40.3] If suspicionless searches for criminal investigation are now authorized whenever "reasonable," the expansion of state power would be substantial. On the other hand, and perhaps for this reason, the majority insisted on the "identification" rationale for the search—perhaps as distinct from criminal investigation—and placed great weight on those searched being arrestees, who are already subject to searches with only paper-thin non-criminal justifications, such as searches "incident to arrest," discussed in this Chapter, and "inventory searches."[40.4] So perhaps the power to take DNA samples will be limited to this specific context.

Even if so, that context itself is substantial: according to the Court, twenty-eight states and the Federal Government already have statutes similarly authorizing DNA searches of arrestees in certain circumstances, and, as the dissent points out, there is little in the opinion to suggest that the law could not be expanded to cover most arrestees. In 2011, there were more than half a million arrests for violent crimes in the United States, and a total of more than twelve million arrests for non-traffic offenses.[40.5] Apart from this broad scope, a troubling aspect of gathering evidence from arrestees without suspicion is the very strong evidence that, at least in some contexts, African-Americans are arrested disproportionately to their rate of offending relative to whites. The impact of such discrimination would be multiplied by the enhanced investigation of arrestees.

40.1 133 S. Ct. ___, 2013 LEXIS 4165.

40.2 *Id.* at *22 (quoting *Samson v. California*, 547 U.S. 843 (2006)).

40.3 These searches and their constitutional history are discussed in Chapter 18 of the text, *infra*.

40.4 *See* § 15.02 of the text, *infra*.

40.5 *Crime in the United States, 2011* 1 (U.S. Dep't of Justice 2012), available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested.

Chapter 15 (Vol. 1)
SEARCHES INCIDENT TO LAWFUL ARRESTS

§ 15.02 ARREST INVENTORIES

Page 243: at the end of the first paragraph, add new footnote 29.1.

Neither a search . . . an arrest inventory.[29.1]

[29.1] Relying on a different justification from the inventory decisions, the Court has also approved obtaining a DNA sample by swabbing the inside of an arrestee's cheek as part of the routine booking procedure for those charged with "serious offenses." *See* Maryland v. King, 133 S. Ct. ___, 2013 LEXIS 4165 (discussed more fully § 12.02, *supra* this supplement).

Chapter 18 (Vol. 1)

MORE "REASONABLENESS" BALANCING: SEARCHES AND SEIZURES PRIMARILY CONDUCTED FOR NON-CRIMINAL LAW PURPOSES

§ 18.01 OVERVIEW

Page 293: add to footnote 3:

[3] . . . *See also* Maryland v. King, 133 S. Ct. ___, 2013 LEXIS 4165, discussed more fully § 12.02, *supra* this supplement (approving "searching" for a DNA sample by swabbing the inside of an arrestee's cheek as part of the routine booking procedure for those charged with "serious offenses").