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High court showing new interest in Fourth Amendment's warrant clause

The U.S. Supreme Court's current term is shaping up as a significant one for the Fourth Amendment. And what's surprising is the court's renewed interest in the warrant clause.

Last month, I wrote about *U.S. v. Jones*, in which the court held during its last term that the government's installation of a GPS device on a car constituted a search requiring a warrant and probable cause under the Fourth Amendment.

And two more cases decided within the past few weeks have increased the situations in which police will need to obtain warrants.

In March, the court decided *Florida v. Jardines*, popularly known as the "pooch on the porch" case, No. 11-564. Based on an unverified tip that Jardines was growing marijuana in his home, the police brought Franky, the drug-sniffing dog, to Jardines' home. Franky sniffed the base of the front door and indicated the presence of marijuana. The police then obtained a warrant, searched the house and found marijuana.

Jardines argued that the police violated the Fourth Amendment by allowing the dog to sniff on his porch without a warrant. The government responded that the court had previously held that the use of a drug-sniffing dog was not a search because the sniff could only determine whether or not there was evidence of contraband; therefore, whatever answer the sniff provided would not violate a person's "reasonable expectation of privacy" under the rule of *Katz v. U.S.*, 389 U.S. 347 (1967). See *Illinois v. Caballes*, 543 U.S. 405 (2005) (sniff of car on road); *U.S. v. Place*, 462 U.S. 696 (1983) (sniff of bag in airport).

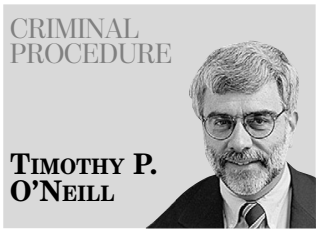
But the court distinguished these cases in a 5-4 decision. Justice Antonin G. Scalia reiterated what he also said in his opinion last year in *Jones*: The Katz "reasonable expectation of privacy" test adds to, but does subtract from, the traditional "baseline" protection provided by the Fourth Amendment. The "baseline" is this: "When the government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred."

And the use of the dog at the house was a search. First, Scalia notes that under the Fourth Amendment "the home is first among equals." Second, the porch is part of the curtilage, which is part of the home itself for Fourth Amendment purposes. Third, although strangers in general may have an "implied license" to approach a house and knock on the door, Scalia emphasized that the scope of a license "is limited not only to a particular area but also to a specific purpose."

And there is no "customary invitation" to the police to bring a trained dog to your front door to sniff for contraband. Thus, the police needed a warrant and probable cause to use the dog at Jardines' home.

Three of the five justices in the majority filed a separate concurrence making an additional finding that the use of the dog violated Jardines' reasonable expectation of privacy under *Katz*. But Scalia's majority opinion pointedly refused to decide whether or not this occurred. The majority opinion simply holds that the Fourth Amendment was violated because the police physically intruded on Jardines' curtilage in order to gather incriminating evidence. It concludes that the use of this "Fourth Amendment property rights baseline ... keeps easy cases easy."

Three weeks later, the court considered warrantless blood draws of drunken-driving suspects in *Missouri v. McNeely*, No. 11-1425, decided April 17. McNeely was stopped by the police for speeding. After he failed several field sobriety tests, he was arrested for driving while intoxicated. When he refused a breath test, he was taken to a hospital for a blood draw. The test showed his blood alcohol to be above the legal limit.



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McNeely moved to suppress the results because the blood draw was done without a warrant. The government argued that the Supreme Court had established a categorical rule in *Schmerber v. California* in 1966 that warrantless blood draws of DUI suspects were always allowed because of the dissipation of alcohol in the blood.

The *McNeely* court disagreed, in an opinion joined by five justices. The court viewed *Schmerber* as merely an example of a totality of circumstances supporting a finding of exigent circumstances that a warrant was not needed in that particular case. In *Schmerber,* the police were busy securing and investigating an accident scene and reasonably believed they had no time to secure a warrant.

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McNeely, however, held that the mere fact that alcohol gradually dissipated in the blood would not per se excuse a warrant. The reason the possible destruction of evidence usually supports a finding of exigency is that police are faced with a "now-or-never" situation in which evidence can be easily and suddenly destroyed.

With alcohol in the blood, on the other hand, the destruction is both gradual and predictable. Thus, in all cases, if "police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."

Although joining the majority opinion, Scalia mused during oral argument that the issue may ultimately be just "a lot of sound and fury," because magistrates would always comply with police requests.

But the larger gain for criminal justice may go well beyond drunken-driving cases. *McNeely* may more generally spur a movement to make warrants of all kinds quicker and easier to obtain. In an era of iPhones and Androids, it should be much easier to transmit requests to obtain search warrants in general.

It should be possible to have at least one judge on duty 24/7 to issue warrants. And the very speed that technology fosters could eliminate the "exigent circumstances" that currently support so many situations in which warrants are excused.

For decades, the Supreme Court has increased the number of warrant exceptions under the Fourth Amendment. But *Jones*, *Jardines* and *McNeely* may signal a swing back toward warrants that is worth watching.

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