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Supreme Court considers extending a traffic detention for a dog sniff

The U.S. Supreme Court heard arguments in *Rodriguez v. United States* last week. An officer stopped Rodriguez late one night for questionable lane drifting. An overwhelming air freshener odor, coupled with Rodriguez's extreme nervousness, aroused the officer's suspicion. He called for a second officer. A conversation with the passenger only added to his suspicion.

The officer happened to have a drug detector dog with him. Once he had issued a warning citation and the backup officer arrived, the officer asked Rodriguez to consent to a dog sniff of the car. Rodriguez refused. The officer directed Rodriquez to get out of the car. Within seven or eight minutes of issuing the warning citation, the dog had completed a sniff and given a positive final response. The car contained methamphetamine.

The trial court and the Court of Appeals both viewed the sniff as a *de minimis* extension of the traffic stop. Rodriguez's counsel argued to the Supreme Court that any detention beyond completion of the traffic investigation is a seizure that must be supported by reasonable suspicion. In contrast, the prosecution argued that the "completion of a traffic investigation" is an artificial distinction and that officers should be able to continue investigation beyond the initial reason for the traffic stop so long as they do not "unreasonably prolong" the detention.

The Supreme Court questions at oral argument suggest that the Court is not willing to view dog sniffs as routine incidents of a traffic stop. Nor does the Court seem inclined to revisit its holding that a sniff is not a search. Recognizing that the lower court decisions did not resolve whether there was reasonable suspicion for the dog sniff (the case was presented on the question of prolonging the detention for the sniff), Justice Ginsburg pondered whether the Court should remand for resolution of the reasonable suspicion question. She seemed to gather no support for that suggestion.

Justice Breyer may have outlined the Court's ultimate course on *Rodriguez*. "What an original idea I had," he quipped. "After we cite these two cases …, [we] reverse. …, QED goodbye." He was referring to prior holdings that a traffic detention "cannot last longer than is necessary to effectuate the purpose of the stop," and cannot be "unnecessarily prolonged." Questions and comments by Chief Justice Roberts and Justices Kagan and Scalia suggest that they may well follow that reasoning.

A decision is not expected until near the end of the Court's term. *Rodriguez v. United States*, No. 13-9972

Dog nuzzles open bag to expose marijuana

Police responded to an intrusion alarm at Miller's home. An officer saw a broken window with an opening large enough for a person to crawl through. The officer called for police service dog Jack to assist with a protective sweep. Miller's mother arrived with a key to the home. She gave officers the key and consented to entry to check for intruders.

Jack and his handler entered the home and began to search for intruders. In one of the bedrooms, Jack sat and stared at a dresser drawer. Recognizing a positive final response to the odor of contraband, the handler opened the drawer and saw a brick of marijuana. He directed Jack to continue the search for intruders.

Jack reached a closet and began to bark excitedly, suggesting to the handler that someone was hiding in the closet. The handler opened the closet door. Jack immediately stuck his nose on one of two large black trash bags, opening the bag. The handler could see marijuana in the bag.

Miller arrived at the home. No intruder was found. Based on their observations, the officers obtained a search warrant for the home. Miller claimed that the discovery of the marijuana in the bag nuzzled open by Jack was unconstitutional, and thus the warrant was improperly granted.

The court noted that "Man's best friend is no stranger to Fourth Amendment jurisprudence. The Supreme Court of the United States has decided several cases involving police dog sniffs that indicate the extent to which police may use these four-legged crime-fighters without running afoul of constitutional safeguards." In this case, the court characterized Jack's action not as a dog "sniff," but rather a dog "nuzzle." The court held that Jack's instinctive action, unguided and undirected by the handler, was not a search. The nuzzling brought the marijuana into plain view and it was proper to base the warrant on the officer's plain view observation. *State v. Miller*, 766 S.E.2d 289 (N.C. 2014)

Supreme Court applies RLUIPA to Muslim inmate's beard request

The U.S. Supreme Court held that Gregory Houston Holt, also known by his Muslim name Abdul Maalik Muhammad, has the right to wear a short beard while in prison. Holt sued the Arkansas Department of Corrections (Arkansas DOC) under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Court held that the Arkansas DOC had not offered any compelling reason forbidding Holt from growing his beard. The Arkansas DOC does allow trimmed beards for medical reasons.

The Arkansas DOC prevailed at the trial court and the 11th Circuit Court with its claim that the prison had a legitimate security interest in preventing inmates from hiding something in a beard and in preventing an inmate from changing appearance by growing (then shaving) a beard. Justice Alito brought laughs at oral argument last fall when he suggested that correctional officers could require an inmate to run a comb his beard "to see if a SIM card—or a revolver—falls out." As for the identification problem, Justice Alito wondered aloud how likely it would be that a bearded inmate would leave a cell

block for work, shave, switch identification cards with an inmate of similar appearance and fool corrections officers.

Holt told the Court that he had offered to trim his beard to ½ inch. "We readily agree that the Arkansas DOC has a compelling interest in staunching the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a ½-inch beard is hard to take seriously," Justice Alito wrote in the unanimous opinion. "Since the Arkansas DOC does not demand that inmates have shaved heads or short crew cuts, it is hard to see why an inmate would seek to hide contraband in a ½-inch beard rather than in the longer hair on his head." The Court observed that the beard ban was not the "least restrictive means" of addressing the security concerns. The RLUIPA statutorily mandates strict constitutional scrutiny of any "substantial burden" on inmate religious activity.

Lexipol policy is consistent with the RLUIPA and provides that inmates may be required to trim facial hair if it poses a security or safety risk. Lexipol recommends that the custody facility manager carefully consider any request to wear a beard for religious reasons in light of the RLUIPA mandate and the *Holt* decision.

The Court's decision may well impact litigation in Texas, where a religious freedom advocacy group is suing corrections officials over the state's refusal to provide Jewish inmates with kosher food. The U.S. Department of Justice has filed similar litigation against Florida corrections officials. The *Holt* decision, coupled with the Court's recent decisions with a pronounced bent toward religious liberty, may prompt resolution of the kosher diet question at the lower courts. Lexipol recommends that, to the extent reasonably practicable, a custody facility provide special diets for inmates in compliance with the parameters of the RLUIPA. *Holt v. Hobbs*, No. 13-6827 (Jan. 20, 2015)

4th Circuit overturns warrantless search of probationer's home

Officers served an arrest warrant at Barker's home and arrested him for a probation violation. Officers found Hill and Dunigan in bedrooms of the home. Dunigan had a tourniquet on her arm and appeared to be using drugs. During a protective sweep, officers saw scales, drug packaging and intravenous drug paraphernalia.

The officers called for a drug detector dog. Following a sniff and a final positive response, officers searched behind a ceiling tile and found a plastic bag. An officer then obtained a search warrant. During the warrant execution, officers found unpackaged heroin, prescription pills, suspected LSD, synthetic marijuana and drug use paraphernalia.

Barker was subject to a probation condition requiring him to "permit a Probation Officer to visit him or her at any time, at home or elsewhere, and permit confiscation of any contraband observed in plain view of the Probation Officer." Hill claimed that this condition did not permit either the protective sweep or dog sniff. The appellate court agreed, noting "Officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless they

have a warrant supported by probable cause." The court remanded for determination of whether the information gained from the walk-through and dog sniff affected the decision to seek a warrant.

Other courts have followed a different approach in light of the U.S. Supreme Court decisions in *Samson v. California* (547 U.S. 843 (2006)) and *United States v. Knights* (534 U.S. 112 (2001)). In *Samson*, the Supreme Court upheld a *parole* agreement condition authorizing warrantless and suspicionless searches of a parolee's person. Similarly, in *Knights*, the Court upheld a *probation* agreement provision allowing warrantless searches of a probationer's home. Both the 5th Circuit and the 11th Circuit have relied on *Samson* and *Knights* to uphold warrantless searches of a probationer's home even without explicit authority stated in the probation agreement.

The 4th Circuit acknowledged that Barker and Hill were subject to probation agreements, but stressed that suspicionless searches were not explicitly authorized by the agreements. The 11th Circuit reached a contrary conclusion in *United States v. Carter* (566 F.3d 970 (11th Cir. 2009)), and emphasized that a probationer's expectation of privacy in his home was diminished by the probation condition "requiring him to submit to home visits by his probation officer." An outcome similar to the *Hill* decision could likely be avoided by a simple modification in the terms of a probation agreement. *United States v. Hill*, 2015 WL 151613 (4th Cir. 2015)

Circumstances of interrogation created custody for suspect not under arrest

An investigator assumed the online identity of a confidential informant who had been corresponding with Borostowski. Borostowski offered to trade child pornography images in exchange for a live Web camera session with a child. Borostowski sent illegal images and officers obtained a warrant for the home where Borostowski lived with his parents. Borostowski had previously spent substantial time in a federal prison for trafficking in child pornography.

An entry team of seven officers led by an officer equipped with a ballistic shield entered the home and found Borostowski asleep on the couch. He claimed that he shouted to a sister to obtain an attorney for him, though none of the officers heard this. After handcuffing and holding Borostowski outside for 25 minutes while the home was secured, officers took Borostowski inside, removed the handcuffs and began to question him. The court described the questioning as not becoming "hostile or combative." An officer told Borostowski that he was not under arrest.

During the questioning, Borostowski made two references to an attorney, though he did not explicitly invoke his right to counsel. Borostowski made several incriminating admissions during the questioning. After approximately three hours, officers asked Borostowski to go with them for a polygraph examination. He agreed. The officers told him that they would need to apply handcuffs and shackles for the transport. During the polygraph examination, Borostowski made further admissions.

Borostowski asked the trial court to suppress his statements, arguing that he had invoked his right to counsel. The trial court determined that Borostowski was not in custody for purposes of *Miranda*. Borostowski was convicted and sentenced to nearly 25 years.

Borostowski appealed, arguing that he was in custody during the interrogation. The appellate court cited several factors in the analysis of whether a person—not yet formally arrested—is in custody. Those factors include:

- Location of the questioning.
- Duration of the questioning.
- Statements made during the questioning.
- Presence or absence of physical restraints during the questioning.
- Release of the suspect at the end of questioning.
- Whether the questioning occurred in a public place.
- Whether the suspect consented to speak with officers.
- Whether the officers informed the suspect that he was not under arrest.
- Whether the suspect was moved to another area.
- Whether there was a threatening presence of several officers and a display of weapons or physical force.
- Whether the officers' tone was such that their requests were likely to be obeyed.

The appellate court held that Borostowski was in custody and thus entitled to the full protections of *Miranda v. Arizona*. The court based its decision on the force used to execute the warrant and the nature of the detention: "This overwhelming display of force inside a single family home would have led a reasonable person to believe that he was not free to leave. The use of restraints for twenty-five minutes, followed by confinement in a small room with an armed officer blocking the door for the next three hours, followed by the use of handcuffs and leg shackles would lead a reasonable person to believe that he was not free to leave."

Factors weighing against a finding of custody included the friendly tone of the interrogation and the fact that Borostowski was in his own home. This case illustrates the occasional delicate balancing act of reasonable officer safety measures and conducting a non-custodial interrogation. The court remanded, directing the trial court to determine whether Borostowski had effectively invoked his right to counsel. *United States v. Borostowski*, 2014 WL 7399074 (7th Cir. 2014)

Officers properly searched computer after repair shop finds illegal images

Meister's computer failed and he took it to a repair shop to save and copy the files on his hard drive. The repair shop was able to copy the files, discovering in the process that Meister had a collection of child pornography images. The repair shop copied the files, notified police and turned over the images to officers. Officers obtained a search warrant for the hard drive and recovered the original images.

Meister asked the court to suppress the evidence taken from his hard drive. The court denied the request because a private computer repair person is not a government actor and thus cannot violate the Fourth Amendment. The fact that the officers saw the images prior to obtaining a warrant did not require suppression: "Once a private individual, acting of his own accord, conducts a search—even one that frustrates a defendant's reasonable expectation of privacy—the Fourth Amendment does not

forbid the government from replicating the search." *United States v. Meister*, 2015 WL 43643 (11th Cir. 2015)

Police need not sanitize and return computer infected with child pornography

Some courts have ordered that Pinterest entries, homework assignments, photos of children (clothed) and dinner recipes must be culled from the digital evidence of child abuse (in the form of child pornography) when digital devices are seized. Court rules and common law require that officers return non-contraband to the defendant at the conclusion of a case (see Fed. R. Crim. P. 41(g)).

Now the 9th Circuit breathes a welcome reality check into Fed. R. Crim. P. 41(g).

> "Many people store every aspect of their lives on electronic devices. Those devices are brimming with correspondence, schedules, photographs, and music. As a result, a crashing computer or a lost smartphone can lead to catastrophic results for a person who failed to back up that data; the only record for years of a person's life can be lost in an instant.
>
> Criminals who possess child pornography are no different. Those criminals may likewise store important aspects of their lives on their electronic devices. But along with the normal risks of losing their personal data, such criminals also risk losing that personal data when the government seizes their devices for evidence of child pornography."

Thus begins the sadding for Justin Gladding, who was indicted on two counts of possession of child pornography; three of his computers and other hard drives were seized. Gladding did not argue that the seizure was unlawful but rather that the government should have to return the non-contraband files that were also on the digital devices.

The 9th Circuit, however, held that the difficulty and cost of separating on a seized computer the files that are contraband or subject to forfeiture from those that are not can justify prosecutors' refusal to return a defendant's family photos and other non-contraband files. It supported this conclusion by relying on a comment in the Rules Advisory Committee's Note to 2009 amendment to Rule 41:

> "A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs."

Thus, according to the 9th Circuit decision, child pornography suspects who intermingle tainted and untainted digital information run the risk of *never* having their personal files returned. The court also left open the possibility that, on remand, the district could amend its rulings to hold that all of the files on the Gladding's digital devices were fortfeitable. *United States v. Gladding*, 2014 WL 7399113 (9th Cir. 2014)

Have you had the opportunity to participate in one of Lexipol's live webinars on body-worn camera pros, cons and legal issues? If not, contact Lexipol at the number below and ask to join the next available webinar. In February, Lexipol will present webinars on the resurgence of carotid control and proper policy guidance. *Connect with Ken Wallentine on LinkedIn for timely updates from Xiphos.*

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