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CONSTITUTIONAL LAW-FOURTH AMENDMENT-POLICE DOG SNIFFS AND "COMPLETING THE MISSION"

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—POLICE DOG SNIFFS AND "COMPLETING THE MISSION"

Rodriguez v. United States, 135 S. Ct. 1609 (2015).

J. SCOTT WHITE*

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INTRODUCTION

After midnight on March 27, 2012, a Mercury Mountaineer, driven by defendant Dennys Rodriguez, drifted onto the shoulder of Nebraska Highway 275 before shifting back into the proper lane.[1] Officer Morgan Struble observed the maneuver while driving with his drug-sniffing dog[2] and initiated a traffic stop at 12:06 A.M.[3] Officer Struble noticed the strong scent of air freshener as he began

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1. Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609, 1612 (2015).

2. *Id.* at 1612-13. "[Officer] Struble is a K-9 officer with the Valley Police Department in Nebraska, and his dog Floyd was in his patrol car that night." *Id.* at 1612.

3. *Id.* Driving on highway shoulders is illegal in Nebraska. *See* NEB. REV. STAT. § 60–6,142 (2010). The line on the right side of the road separating the lane of travel from the shoulder is called the "fog line," and some scholars argue that this type of traffic stop is pretextual in nature. *See generally* Melanie Wilson, *"You Crossed the Fog Line!"—Kansas, Pretext, and the Fourth Amendment*, 58 KAN. L. REV. 1179, 1180-81 (2010) (arguing that some police officers use crossing the fog line as justification for making otherwise unwarranted traffic stops). Here, the defendant told the officer that he swerved to avoid a pothole. *Rodriguez*, 135 S. Ct. at 1613.

talking to the defendant and his passenger Scott Pollman.[4] Officer Struble gathered their licenses and registration, and asked the defendant to join him in the patrol car while he conducted a records check.[5] The defendant indicated that he preferred to wait in his own vehicle, and Officer Struble allowed him to do so.[6] After conducting a background check, Officer Struble returned to the vehicle to question the defendant and Pollman regarding where they were going.[7] Pollman stated that they were on their way to Norfolk, Nebraska, after looking at a Ford Mustang that they were interested in purchasing in Omaha, Nebraska.[8]

At 12:28 A.M., Officer Struble issued a written warning and returned the defendant's documents.[9] The officer then asked the defendant if he would consent to a dog search around his vehicle, which the defendant refused.[10] Nevertheless, Officer Struble called for backup, because of safety concerns, before conducting a dog sniff.[11] Another unit arrived seven to eight minutes later, and Officer Struble walked his dog around the car.[12] The dog alerted to the presence of drugs a minute or two later.[13] A search of the vehicle revealed a large bag of methamphetamine, and the defendant was arrested.[14]

"Rodriguez was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 50 grams or more of methamphetamine . . . ."[15] The defendant moved to suppress the evidence from the car search on the grounds that Officer Struble unreasonably "prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff."[16] The

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4. *Rodriguez*, 135 S. Ct. at 1622 (Thomas, J., dissenting).

5. *Id.* at 1612-13.

6. *Id.* at 1612.

7. *Id.*

8. *Id.* Officer Struble believed this explanation was suspicious, given the time of day and distance between the two locations. *Id.* at 1622-23 (Thomas, J., dissenting).

9. *Id.* at 1613.

10. *Id.*

11. *Id.* at 1624-25 (Alito, J., dissenting). Struble acknowledged that he could have conducted the dog sniff before he gave the ticket, but chose to wait for backup because of safety concerns. *Id.*

12. *Id.* at 1613.

13. *Id.*

14. *Id.*

15. *Id.* Intent to distribute fifty grams or more of methamphetamine is punishable by no less than ten years in jail. 21 U.S.C. § 841(a)(1),(b)(1)(A)(viii) (2010).

16. *Rodriguez*, 135 S. Ct. at 1613.

magistrate judge denied the motion, holding that while "Officer Struble had [no]thing other than a rather large hunch," the eight-minute extension of the traffic stop was a de minimis intrusion on the defendant's "Fourth Amendment rights and was therefore permissible."[17] Adopting this analysis, the district court denied the motion to suppress.[18] The Eighth Circuit Court of Appeals affirmed, noting that a seven- to eight-minute delay was consistent with delays that the court had previously held permissible.[19] On certiorari to the United States Supreme Court, *held*, reversed.[20]

The use of a dog search on a suspect's vehicle that prolongs the "time reasonably required to complete [the stop's] mission" is unlawful absent reasonable suspicion.[21] The Supreme Court thus concluded that a seven- to eight-minute seizure of the defendant's vehicle after the officer issued the warning was an unreasonable detention under the Fourth Amendment, and remanded the case to determine whether the officer had reasonable suspicion to initiate a dog sniff.[22] *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

I. THE FOURTH AMENDMENT AND TRAFFIC STOPS

The Fourth Amendment provides protection against unreasonable searches and seizures.[23] The touchstone of Fourth Amendment analysis is 'reasonableness.'[24] In the context of a traffic stop, police are permitted to gather licenses[25] and ask drivers about their destination because these intrusions are not unreasonable.[26] On the other hand, more intrusive behaviors, like performing a full search of a vehicle because of a traffic violation,[27] or detaining a car

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17. *Id.*
18. *Id.* at 1613-14.
19. *Id.* at 1614.
20. *Id.* at 1617.
21. *Id.* at 1616 (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)). The Court used language taken from *Caballes*, which provided the basis for the decision in *Rodriguez*. *Id.*
22. *Id.* at 1616-17.
23. *See* U.S. CONST. amend. IV. The Fourth Amendment provides, in pertinent part, 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." *Id.*
24. Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (citing Flippo v. West Virginia, 528 U.S. 11, 13 (1999); Katz v. United States, 389 U.S. 347, 357 (1967)).
25. *See* Delaware v. Prouse, 440 U.S. 648, 658-60 (1979).
26. *See* Arizona v. Johnson, 555 U.S. 323, 333 (2009).
27. *See* Knowles v. Iowa, 525 U.S. 113, 117-19 (1998).

for an unreasonable period of time, are prohibited by the Constitution, absent reasonable suspicion.[28]

The Supreme Court granted certiorari to resolve a dispute in the lower courts regarding a common police practice.[29] The question was "whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff."[30] The Supreme Court held that, absent reasonable suspicion, an eight-minute delay in a traffic stop to perform a dog sniff is not permissible.[31]

II. THE DEVELOPMENT OF THE FOURTH AMENDMENT AND AUTOMOBILE SEARCHES

At its inception, the Fourth Amendment was a response to the "writs of assistance" and "general warrants" of the colonial era, which gave British officers the ability to search homes without restraint in hopes of discovering criminal activity.[32] While the warrant requirement traditionally applied to searches of the home, in *Katz v. United States*, the Supreme Court recognized that the Fourth Amendment protects people, not simply areas, against unreasonable government intrusion.[33] The question then remained regarding what protections the Fourth Amendment affords people in different situations.[34]

*A. Pre-*Caballes *Development:* Carroll *and* Terry

Warrantless automobile searches first came before the Court in the prohibition–era case of *Carroll v. United States*.[35] In *Carroll*, two federal agents had probable cause to believe that a moving car

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28. *See* Illinois v. Caballes, 543 U.S. 405, 407 (2005).

29. Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609, 1614 (2015).

30. *Id.*

31. *Id.* at 1616.

32. *See* Riley v. California, 573 U.S. ___, 134 S. Ct. 2473, 2494 (2014) (discussing how writs of assistance were at the root of unrest during the Revolutionary War); *see also* Mapp v. Ohio, 367 U.S. 643, 649 (1961); Boyd v. United States, 116 U.S. 616, 625 (1886); Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 247-48 (C. Adams ed., 1856).

33. Katz v. United States, 389 U.S. 347, 359 (1967).

34. *Id.* at 360-62 (Harlan, J., concurring).

35. Carroll v. United States, 267 U.S. 132, 132 (1925); *see also* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §7.2(a) (2014).

contained illegal liquor.[36] The agents pulled the car over, discovered bottles of liquor in the upholstery, and arrested the owner.[37] The Court held that the search was legal and stressed the difference between places like a home, where a warrant may be practicably obtained and served, and a vehicle, which may be moved out of the corresponding jurisdiction before warrant is issued.[38]

As previously articulated by the Supreme Court, use of a warrant is appropriate when practicable.[39] *Carroll* demonstrated that acquiring a warrant to search a movable vehicle is impracticable, unless the driver is in police custody.[40] While *Carroll* illustrates that the movable vehicle exception first requires probable cause that a crime was being committed, subsequent cases expanded the scope and protections of warrantless searches.[41]

In *Terry v. Ohio*, for example, the Supreme Court held that an officer must have reasonable suspicion to conduct a pat down search of a pedestrian.[42] Specifically, when an officer has reason to suspect an individual is armed, use of a pat down search to check for weapons is permissible.[43] According to *Terry*, when the warrant process is not practicable, "[police] conduct . . . must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[44] In determining whether an officer's invasive search is reasonable, *Terry* instructed courts to balance the governmental interest that allegedly justified the search against the intrusion upon the citizen's constitutionally protected rights.[45] To justify the government's interest, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

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36. *Carroll*, 267 U.S. at 161-63. The agents observed the driver of the vehicle for days and noticed him entering places known to harbor alcohol. *Id.* at 160.

37. *Id.* at 136.

38. *Id.* at 153.

39. *See id.*; *see also* Terry v. Ohio, 392 U.S. 1, 20 (1968) (finding that search warrants for suspicious pedestrians were impracticable); Katz v. United States, 389 U.S. 347, 357-59 (1967) (finding that search warrants for wiretaps in telephone booths were practicable); Chapman v. United States, 365 U.S. 610, 615-16 (1961) (holding that a search warrant was required for the apartment occupied by the defendant).

40. *See* LAFAVE, supra note 35, §7.2(a) (describing the movable vehicle exception articulated in *Carroll*).

41. *See supra* note 39 and accompanying text.

42. *Terry*, 392 U.S. at 20-21, 37.

43. *Id.* at 8, 30.

44. *Id.* at 20.

45. *Id.* at 20-21.

intrusion."[46] In constructing this balancing test to determine reasonable suspicion, *Terry* provided a modern framework for analyzing typical interactions between police and civilians.

Building upon the *Terry* Court's framework, *United States v. Place* applied the reasonable suspicion standard to a then novel form of police investigation—the use of a police dog "sniff test."[47] In *Place*, a suspicious traveler at the Miami Airport was detained by DEA agents and subjected to a dog sniff.[48] The passenger's bags were seized, and the agents failed to inform the passenger when he would see his luggage again.[49] The results of the search were suppressed at trial because the Court held that a ninety-minute seizure of the defendant's luggage was unreasonably long, and the agents failed to keep the traveler adequately and accurately informed throughout the process.[50]

Place is notable for a few reasons. First, the Court held that a dog sniff test did not constitute a search, and therefore did not require a warrant,[51] potentially giving law enforcement officers the option to use drug dogs to obtain probable cause without violating the Fourth Amendment.[52] Second, "the inherently transient nature

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46. *Id.* at 21.

47. *See* United States v. Place, 462 U.S. 696, 699 (1983).

48. *Id.* at 698-99.

49. *Id.* at 699.

50. *Id.* at 710. More specifically, the Court held that "the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion." *Id.*

51. Accordingly to Justice O'Connor,

> A 'canine sniff' by a welltrained 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.

Id. at 707.

52. *Id.*

of drug courier activity at airports," coupled with governmental interest in "preventing the flow of narcotics into distribution channels," was enough to establish reasonable suspicion, which allowed the initial seizure of the luggage.[53] And perhaps most significantly, *Place* provides an example of how an unreasonably long seizure can render unconstitutional an otherwise lawful stop.[54]

The *Place* Court later stated in *Berkemer v. McCarty* that traffic stops are more analogous to *Terry* stops than they are to formal arrest.[55] The need for officer safety is a "legitimate and weighty" governmental interest,[56] which permits police officers to order the driver[57] and any passengers to step out of the car after a traffic stop has been initiated.[58] Such actions are de minimis intrusions when compared to the need for officer safety.[59] Other cases have seen the Court expand the officer inquiry process, and in particular the ability of officers to perform actions related to the traffic stop, such

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53. *Id.* at 704 (finding that "[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels").

54. *Id.* at 709-10. Though the length of the seizure alone precluded a finding of reasonableness, the Court also questioned the agents failure to diligently pursue their investigation: "the New York agents knew the time of Place's scheduled arrival at La Guardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests." *Id.* at 709.

55. Berkemer v. McCarty, 468 U.S. 420, 439 (1984). In *Terry*, for example, a police officer lacking probable cause, but with reasonable suspicion that a citizen is acting in furtherance of a crime, may briefly detain and question said citizen, provided the officer's inquiry is "reasonably related in scope to the justification for their initiation." *Terry*, 392 U.S. at 20. The *Berkemer* Court explained that this inquiry should typically entail "a moderate number of questions" aimed at "dispelling the officer's suspicions," but added that a citizen is under no obligation to respond. *Berkemer*, 468 U.S. at 439. Thus, the Court concluded that *Miranda* warnings are unnecessary in the event of a traffic stop as they possess a "comparatively nonthreatening character of detention." *Id.* at 440.

56. Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977).

57. *See id.* at 111.

58. Maryland v. Wilson, 519 U.S. 408, 414 (1997) (explaining that officer safety is increased because "passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment"); *see also* Brendlin v. California, 551 U.S. 249, 255 (2007) (holding that for the duration of a traffic stop, a police officer effectively seizes "everyone in the vehicle," including the driver and all passengers).

59. *Mimms*, 434 U.S. at 111.

as checking for licenses, registration,[60] outstanding warrants,[61] and questioning the driver about his destination.[62]

On the other hand, the Court developed other protections for motorists.[63] Since the *Berkemer* Court explained that a traffic stop is not considered a formal arrest, officers have been prohibited from certain conduct that would escalate a routine stop into a formal arrest.[64] Additionally, *Place* laid the foundation for a series of rulings which prohibited police from conducting full vehicle searches on the basis of a minor traffic infraction,[65] instead requiring police to show probable cause that contraband would be obtained during a potential search.[66] Moreover, *Colorado v. Bannister* established that probable cause can be obtained through an officer's observation of objects in plain sight, or other actions, provided they do not unreasonably infringe upon the privacy interests of the driver.[67]

B. The Modern Doctrine of Dog Sniffs

Whren v. United States was the first in a line of modern cases attempting to delineate between acceptable and unacceptable searches and seizures of automobiles.[68] Prior to *Whren*, the Court addressed some issues surrounding what an officer can do during a routine traffic stop, but a growing police practice of pulling over drivers for minor traffic infractions and turning the stop into a drug search forced the Supreme Court to consider the validity of these "pretextual" stops.[69] Scholars have argued that the rise of pretextual

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60. *See* Delaware v. Prouse, 440 U.S. 648, 658-60 (1979).

61. *See* United States v. Simmons, 172 F.3d 775, 778 (11th Cir. 1999); United States v. Mendez, 118 F.3d 1426, 1429 (10th Cir. 1997); United States v. Shabazz, 993 F.2d 431, 437 (5th Cir. 1993).

62. *See* Arizona v. Johnson, 555 U.S. 323, 333 (2009).

63. United States v. Jacobsen, 466 U.S. 109, 124 (1984) ("[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'").

64. Illinois v. Caballes, 543 U.S. 405, 408 (2005) ("Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment.").

65. *See Johnson*, 555 U.S. at 333.

66. California v. Acevedo, 500 U.S. 565, 680 (1991) ("We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

67. Colorado v. Bannister, 449 U.S. 1, 3-4 (1980) (per curiam).

68. Whren v. United States, 517 U.S. 806, 813-15 (1996).

69. Pretextual stops are those where the officer uses a minor traffic violation to

stops, like many police practices recently analyzed by the Court, is a byproduct of the "War on Drugs."[70] The War on Drugs undermined Fourth Amendment protections,[71] and the decision in *Whren*, which gave police officers considerable leeway in determining whether to pull cars over, best exemplifies this.[72] In *Whren*, officers patrolling a high-intensity drug trafficking area noticed a truck with young occupants and temporary license tags stop for more than twenty seconds at a stop sign.[73] The officers pulled a U-turn, and the vehicle turned rapidly from the intersection and sped off.[74] Because of this behavior, the officers pulled the truck over and noticed two large bags of cocaine in the passenger's lap.[75]

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pull over and investigate drivers for more serious activities. *See* United States v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993). In *Roberson*, a state trooper saw a van containing four black occupants with out-of-state plates make mildly irregular vehicular maneuvers. *Id.* at 1089. The court held that the officer's subsequent stop was lawful despite the trooper's known "propensity for patrolling the fourth amendment's outer frontier" and his reputation for turning routine traffic stops into drug searches. *Id.* at 1092. *See also* United States v. Herrera Martinez, 354 F.3d 932, 933 (8th Cir. 2004) (involving an instance when a Hispanic motorist was pulled over after crossing the fog line); United States v. Lee, 73 F.3d 1034, 1036 (10th Cir. 1996) (discussing a case where a driver straddling the center line for a brief second was pulled over on suspicion of DUI).

70. *See* LAFAVE, *supra* note 35, § 9.3; *see also* Carla R. Kock, State v. Akuba*: A Missed Opportunity to Curb Vehicle Searches of Innocent Motorists on South Dakota Highways*, 51 S.D. L. REV. 152, 186-87 (2006) ("This historical and social context that surrounds a traffic stop, when combined with coercive elements inherent in the interaction, demand that some institution take responsibility to ensure that the Fourth Amendment rights of citizens are not trampled by police engaged in the war on drugs."). *See generally* Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 5-6 (2011) (describing the inception of President Nixon's "War in Drugs" in the 1970s, and its aftermath).

71. *See, e.g.*, Indianapolis v. Edmond, 531 U.S. 32, 34 (2000) (explaining that in 1998, the city of Indianapolis began operating vehicle checkpoints in an effort to intercept unlawful drugs).

72. Whren v. United States, 517 U.S. 806, 818 (1996) ("[P]robable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."). Since the decision was penned in 1996, *Whren* has been liberally applied. *See, e.g.*, United States v. Akram, 165 F.3d 452, 454 (6th Cir.1999) (permitting a U-Haul driver to be pulled over for going sixty-seven miles per hour, two miles per hour over the posted speed limit for most vehicles, and twelve miles per hour over the posted speed limit for trucks).

73. *Whren*, 517 U.S. at 808. The officers also noted that the driver looked into the passenger's lap while the truck was stopped at the stop sign. *Id.*

74. *Id.*

75. *Id.* at 808-09.

The defendant moved to suppress the evidence produced by the traffic stop, alleging that the officers' grounds for approaching the vehicle were a pretext for investigating drug related offenses for which the officers lacked probable cause or reasonable suspicion.[76] On appeal, the Supreme Court held that, while a traffic stop must be lawful at its inception, the officer needed only probable cause to believe that a traffic violation was being committed to initiate the stop, and the Court rejected the "reasonable officer" standard proposed by the defendant.[77] Therefore, regardless of ulterior motives, if an officer sees, or has reason to believe, that a motorist committed a traffic violation, the officer may initiate a traffic stop.[78] Given the vast array of potential traffic offenses, *Whren* allowed police officers great leeway in investigating individuals suspected of drug trafficking.[79]

Five years after *Whren*, however, the Supreme Court limited the power of police to conduct arbitrary stops of motorists in *Indianapolis v. Edmond*.[80] The Court held that Indianapolis' drug interdiction checkpoints were unconstitutional because they seized motorists for the general purpose of "crime control," and were not based on individualized suspicion.[81] Determining the constitutionality of such a broad search program requires "balancing of the competing interests at stake and the effectiveness of the program."[82] Here, casting a widespread net to stop passing motorists was too invasive for the general purpose of crime deterrence.[83] The dissent, however, criticized the holding, stating that the checkpoints would be legal if law enforcement simply offered different justification for conducting the checkpoints.[84]

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76. *Id.* at 809.
77. *Id.* at 816.
78. *Id.* at 810, 817-19.
79. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001) ("The most potent combination of modern policing is the traffic offense and possession. Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn the ignition key, you have subjected yourself to intense police scrutiny. So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.").
80. Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000).
81. *Id.* at 47-49.
82. *Id.* at 47.
83. *Id.* at 48.
84. *Id.* at 55-56 (Rehnquist, C.J., dissenting) ("Conversely, if the Indianapolis police had assigned a different purpose to their activity here, but in no way changed what was done on the ground to individual motorists, it might well be valid. The

These decisions set the stage for one of the most important recent cases in Fourth Amendment jurisprudence: *Illinois v. Caballes*.[85] Roy Caballes was traveling seventy-one miles per hour in a sixty-five mile-per-hour zone when an Illinois State Trooper pulled him over.[86] When the trooper radioed in the stop, a State Police Drug Interdiction Team officer heard the call and proceeded to the scene with his drug sniffing dog.[87] The second officer walked his dog around the car while the first officer wrote the ticket.[88] The dog alerted to the trunk, and the officers commenced a search, which led to the discovery of marijuana.[89]

Caballes moved to suppress the evidence, arguing that the scope of the stop was impermissibly expanded by the use of the dog.[90] The trial court held that the dog sniff was permissible based on reasonable suspicion, but the Illinois Supreme Court reversed.[91]

On appeal, the United States Supreme Court addressed a narrower issue: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."[92] The Court answered no.[93] The framing of the issue, however, is significant for a variety of reasons. First, the phrase "during a legitimate traffic stop" raised a difficult question for lower courts—how long does a legitimate traffic stop last?[94] Second, the Court disregarded any

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Court's non-law-enforcement primary purpose test simply does not serve as a proxy for anything that the Fourth Amendment is, or should be, concerned about in the automobile seizure context.") (citation omitted).

85. Illinois v. Caballes, 543 U.S. 405 (2005).

86. *Id.* at 417-18 (Ginsburg, J., dissenting).

87. *Id.* at 406.

88. *Id.* (noting that the entire stop lasted less than ten minutes).

89. *Id.*

90. *See* People v. Caballes, 802 N.E.2d 202, 204 (Ill. 2003).

91. *Id.* at 205 ("[W]e hold that the trial court should have granted defendant's motion to suppress based on the unjustified expansion of the scope of the stop."). The officer stated four reasons he believed Caballes was suspicious: "(1) defendant said he was moving to Chicago, but the only visible belongings were two sport coats in the backseat of the car, (2) the car smelled of air freshener, (3) defendant was dressed for business while traveling cross-country, even though he was unemployed, and (4) defendant seemed nervous." *Id.* at 204-05. The Illinois Supreme Court held these reasons were "insufficient to support a canine sniff." *Id.* at 205.

92. *Caballes*, 543 U.S. at 407.

93. *Id.* at 409-10.

94. *See* United States v. Morgan, 270 F.3d 625, 632 (8th Cir. 2001) (finding that a ten-minute delay between completion of the ticket and dog sniff was permissible). *But see* State v. Baker, 229 P.3d 650, 658 (Utah 2010) ("[W]ithout additional reasonable suspicion, the officer must allow the seized person to depart once the

evidence of suspicion raised by the officer, meaning that *Caballes* provided no guidance for lower courts to determine what type of behavior makes a dog sniff permissible outside of a legitimate traffic stop.[95] Consequently, the Court rejected *Place*'s framework for analyzing dog sniffs.[96] While dog searches based on reasonable suspicion were still acceptable, any dog search was valid if it occurred during a legitimate traffic stop.

The Court in *Caballes* also added that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."[97] The phrase "completing the mission" raised questions that the Court struggled with in *Rodriguez*. How diligent does an officer have to be? What is "the mission"? How does one determine when the mission is completed?

Caballes allowed police departments and drug interdiction units more leeway in conducting searches for narcotics.[98] Some legal scholars praised the development,[99] but others joined in Justice Souter's fiery dissent,[100] which claimed that the majority's decision was mistakenly based on the assumption of an "infallible dog."[101] Subsequently, Circuit Courts granted law enforcement leeway under *Caballes* to use dog sniff searches during traffic stops, and officers

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purpose of the stop has concluded.").

95. *Caballes*, 543 U.S. at 407 ("Thus, we proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about respondent that might have triggered a modicum of suspicion.").

96. In *Place*, the majority clearly stated why the officers found the traveler's behavior suspicious. *See* United States v. Place, 462 U.S. 696, 698-99 (1983). However, this type of analysis was omitted from *Caballes*. *See Caballes*, 543 U.S. at 407.

97. *Caballes*, 543 U.S. at 407.

98. *See* Rob Shumaker, *A Freer Hand for Police at Illinois Traffic Stops*, 97 ILL. B.J. 624, 628 (2009) ("Those decisions effectively strengthen the hand of police to more broadly search and question motorists.").

99. *See id.*

100. *See* Michael Bell, Caballes, Place, *and Economic Rin-Tin-Tincentives: The Effect of Canine Sniff Jurisprudence on the Demand for and Development of Search Technology*, 72 BROOK. L. REV. 279, 314 (2006). ("[T]he *Caballes* Court's classification of the canine sniff as a non-search provides incentives for law enforcement agencies to maintain their use of canines as an investigatory device. This consequence is undesirable from a policy perspective in light of pervasive evidence indicating that canines, contrary to the prevailing legal wisdom, are not one hundred percent accurate.").

101. *Caballes*, 543 U.S. at 411-12 (Souter, J., dissenting).

operated under the assumption that small delays were reasonable if the dog sniff commenced promptly.[102]

III. THE *RODRIGUEZ* ANALYSIS

In *Rodriquez*, Justice Ginsberg, writing for the majority, began her analysis by repeating the rule laid down in *Caballes*: "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns."[103] However, as *Caballes* demonstrated, investigations unrelated to the initial traffic violation, such as questioning the driver or conducting a dog sniff, are only permissible if they do not measurably extend the duration of the stop.[104] Authority for the seizure therefore ends when tasks related to the traffic stop are, or should have been, completed.[105] In assessing whether a traffic stop should have been completed, "it [is] appropriate to examine whether the police diligently pursued [the] investigation."[106]

Therefore, issuance of a ticket is not necessarily dispositive of whether a stop has been completed.[107] For example, after completing all other tasks associated with the traffic stop, an officer could wait five minutes before issuing a ticket to conduct a dog sniff.[108] This delay, however, would be impermissible under the Fourth Amendment because, unlike a license or registration check, dog sniffs are not part of a routine traffic stop.[109] Dog sniffs are aimed at the general detection of wrongdoing rather than ensuring motorist safety.[110]

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102. *See, e.g.*, United States v. Alexander, 448 F.3d 1014, 1016-17 (8th Cir. 2006) (holding that, when a motorist was told he was "free to go" only after a dog sniff was completed, the delay was permissible); United States v. Morgan, 270 F.3d 625, 628, 631-32 (8th Cir. 2001) (holding that a dog sniff commenced after license and registration checks were completed was permissible); United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 646, 649 (8th Cir. 1999) (holding that a dog sniff performed before returning the driver's license and registration was permissible).

103. Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609, 1614 (2015) (citations omitted).

104. *Id.* at 1614-15.

105. *Id.* at 1614.

106. *Id.* (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).

107. *See id.* at 1615.

108. *See id.*

109. *Id.*

110. *Id.*

Next, the majority distinguished the government's interest in officer safety from the interests promoted by a dog sniff.[111] Because traffic stops are "especially fraught with danger to police officer[]" safety, steps taken to protect officer safety, such as asking a passenger to step out of a car or conducting a warrant check, are acceptable because they are "negligibly burdensome" actions taken to safely complete the mission.[112] Actions taken to investigate unrelated crimes, however, are "detours from that mission," as are the safety precautions that accompany these investigations.[113] Therefore, even though Officer Struble's dog was in the car when the traffic stop was initiated, his given reason for waiting—officer safety—was insufficient to justify extending the traffic stop for an unrelated investigation.[114]

Justice Ginsburg rejected the government's argument that an officer may receive "bonus time" to conduct a dog sniff if they expeditiously complete the traffic related inquiries.[115] Instead, an officer should always be "reasonably diligent," and the time required to complete the stop's mission is exactly as long it should take a diligent officer to issue the ticket.[116] Therefore, unrelated inquiries are impermissible if they prolong the stop.[117]

The majority criticized Justice Thomas's finding that reasonable suspicion existed to conduct the dog sniff, particularly since the appellate court failed to reach this issue.[118] Although Officer Struble testified that a number of the defendant's actions were suspicious,[119] the majority left this determination open on remand.[120] In doing so, the majority provided little guidance for what type of suspicion is necessary to conduct a dog sniff, instead assuming the district court's finding that reasonable suspicion did not exist was correct.[121]

Justice Alito's dissent heavily criticized this approach, arguing that, because reasonable suspicion existed, the holding was "unnecessary, impractical, and arbitrary."[122] The majority declined to analyze whether the stop was unreasonably prolonged, instead

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111. *Id.* at 1616.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*; *see also* Illinois v. Caballes, 543 U.S. 405, 407 (2005).
118. *Rodriguez*, 135 S. Ct. at 1615.
119. *Id.* at 1622 (Thomas, J., dissenting).
120. *Id.* at 1617.
121. *Id.* at 1615.
122. *Id.* at 1623 (Alito, J., dissenting).

depending on the arbitrary rule that, once the ticket was issued, the defendant could no longer be detained.[123] Justice Alito called the majority's decision "perverse" because Officer Struble only waited to conduct the dog sniff to protect his own safety.[124] Had Officer Struble chosen the riskier sequence of events—conducting the dog sniff without the aid of backup—Justice Alito opined that his actions would have been permissible under the majority's analysis.[125] Justice Alito also argued that the majority's decision would have little practical effect on traffic stops, since officers would simply adhere to the permissible sequence of events—even if they did not understand the reasoning.[126]

Justice Thomas also dissented, joined by Justice Alito and Justice Kennedy, concluding that the traffic stop was conducted in a reasonable manner when compared to other traffic stops of similar length.[127] The twenty-nine-minute total detention of Rodriguez was not unreasonable when compared to stops of vehicles with multiple occupants that did not involve a dog sniff.[128] According to Justice Thomas, instead of focusing on the reasonableness of the procedure, the majority depended on "trivialities," such as officer experience or the speed of technology used for processing licenses, which could either prolong or shorten the stop.[129] This contradicts precedent, which states that the protections offered by the Fourth Amendment do not vary depending on local police practices.[130] Justice Thomas argued that the government's interest in conducting a dog sniff is hardly distinguishable from that of conducting a warrant check aimed at detecting evidence of past criminal wrongdoing.[131]

Justice Thomas also argued that the majority ignored the distinction between traffic stops based on probable cause, such as seen in *Carroll*, and those based on reasonable suspicion.[132] Traditionally, traffic stops based on probable cause are given more leeway than *Terry* stops based on reasonable suspicion.[133] Here, even though Officer Struble had probable cause to detain the vehicle, the

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123. *Id.* at 1623-24 (Alito, J., dissenting).
124. *Id.* at 1624 (Alito, J., dissenting).
125. *Id.* (Alito, J., dissenting).
126. *Id.* (Alito, J., dissenting).
127. *Id.* at 1618 (Thomas, J., dissenting).
128. *Id.* (Thomas, J., dissenting).
129. *Id.* at 1618-19 (Thomas, J., dissenting).
130. *Id.* at 1619 (Thomas, J., dissenting).
131. *Id.* at 1620 (Thomas, J., dissenting).
132. *Id.* at 1620-21 (Thomas, J., dissenting); *see also* Carroll v. United States, 267 U.S. 132, 162 (1925).
133. *Rodriguez*, 135 S. Ct. at 1621 (Thomas, J., dissenting).

majority used *Terry* and its progeny to support its finding that the stop could not extend beyond the time required to complete the mission.[134]

While Justice Ginsberg's dissent in *Caballes* would have utilized a *Terry*-based analysis, the *Caballes* majority held that a dog sniff did not change the character of an otherwise reasonable traffic stop based on probable cause.[135] According to Justice Thomas, because Officer Struble had probable cause to detain the vehicle, and the stop was approximately the same length of other comparable stops, there was no Fourth Amendment violation.[136]

Ultimately, Justice Thomas agreed with Justice Alito's conclusion that, regardless of whether Officer Struble prolonged the stop, he had reasonable suspicion to do so.[137] Justice Kennedy declined to join in this part of the opinion, and agreed that the issue should be left open on remand.[138]

IV. THE CONSEQUENCES OF *RODRIGUEZ*

Rodriguez represents a change in direction from *Caballes* because it places a time limit on searches previously thought permissible.[139] This shift was likely intentional. In the ten years between *Caballes* and *Rodriguez*, the Court's composition changed, and dissenters in *Caballes*, particularly Justice Ginsburg, influenced the majority in *Rodriguez*.[140] Justice Ginsburg attempted to limit police power regarding K-9 searches, but had to do so within the parameters of *Caballes*.[141] The result was a desirable outcome reached for undesirable reasons.

Many steps taken by the majority create confusion. First, the Court states facts indicating that Rodriguez was engaged in

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134. *Id.* (Thomas, J., dissenting).

135. *Id.* (Thomas, J., dissenting) (citing Illinois v. Caballes, 543 U.S. 405, 408 (2005)).

136. *Id.* at 1621, 1623 (Thomas, J., dissenting).

137. *Id.* at 1622-23 (Thomas, J., dissenting).

138. *Id.* at 1617 (Kennedy, J., dissenting).

139. *See, e.g.*, United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 648 (8th Cir. 1999) ("[W]e believe the Supreme Court would not closely examine the time it takes a traffic officer to complete the traffic stop itself . . . .").

140. Justice Stevens authored the majority opinion in *Caballes*, and Justices O'Connor, Scalia, Kennedy, Thomas, and Breyer joined. Justice Souter wrote a dissenting opinion, and joined Justice Ginsburg's dissent. *See* Illinois v. Caballes, 543 U.S. 405, 405 (2005).

141. *See Rodriguez*, 135 S. Ct. at 1612.

suspicious behavior,[142] yet the Court disregards these facts in its analysis.[143] This is in stark contrast to *Caballes*, where the Court disregarded any evidence of reasonable suspicion because it was not necessary to justify a dog sniff during a legitimate traffic stop.[144] The Court was given the opportunity to address the standard of suspicion required to conduct a dog sniff but declined, instead opting for another bright line approach.[145]

However, the majority's logic is inconsistent. The majority finds that dog sniffs that occur during traffic stops, and those that occur outside of traffic stops, are different, and that this difference is constitutionally significant. Yet there is no constitutionally-significant difference between a traffic stop in which the driver is subjected to a dog sniff, and one in which a dog sniff does not occur.[146] Practically, this distinction makes no sense; if a dog search is unreasonable the minute after a ticket is issued, it should be unreasonable in the minutes preceding the issuing of a ticket. Moreover, the notion that dog sniffs are not invasive because they only reveal the presence of contraband is a fiction based on the idea of the infallible dog.[147] However, empirical studies have shown that dogs are fallible, especially when the dogs are easily controlled by signals from handlers.[148]

Police departments, which strive for general crime deterrence, have incentives to use dogs in a way that maximize their ability to search motorists.[149] While all police techniques are subject to error, the dog sniff is more subjective than techniques such as drug tests because of the possibility of handler influence.[150] Few safeguards exist to stop police officers from making a pretextual stop,

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142. The majority notes that the two men claimed they were on their way back from looking at a car, despite it being after midnight. *Id.* at 1613. The opinion also notes that the defendant claimed to swerve to avoid a pothole, an explanation which was inconsistent with the movements observed by the officer. *Id.*

143. *See id.* at 1612-15.

144. *Caballes*, 543 U.S. at 407.

145. *See Rodriguez*, 135 S. Ct. at 1624-25 (Alito, J., dissenting).

146. *See id.* at 1612.

147. *See generally* Bell, *supra* note 100, 279-81 (discussing the legal fiction of canine infallibility).

148. *See* Lisa Lit et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION 387, 387-88 (2011) ("Dogs' biases for utilizing human movements or social cues impair decision-making and reasoning abilities. Dog behavior is further affected by owner/handler gender and personality. Moreover, dogs evaluate attentional cues of their owners through cues including eye contact and human eye, head and body orientation.") (citations omitted).

149. *See* Bell, *supra* note 100, at 303-04.

150. *See* Lit, *supra* note 148, at 393.

conducting a dog sniff, and commencing a full vehicle search after a positive indication from a dog. Justice Alito's dissent correctly suggests that police departments will work around this rule rather than let it limit their ability to search motorists.[151]

The majority's approach creates perverse incentives for police. First, police departments will redirect more resources to K-9 units so that a dog will be available on short notice, thus making it possible to complete a dog sniff during a traffic stop. Second, K-9 officers like Officer Struble will be compelled to begin a dog sniff before backup arrives, placing everyone involved in greater danger. Finally, it creates incentives for police to drag their feet (i.e. take slower, but not unreasonable, steps to process a ticket) when conducting traffic stops. The job of the Court in the future will then be to determine when these stalling efforts cross the line of constitutionality.

This is a difficult question with which the Justices wrestled during oral arguments.[152] For example, what happens if the officer takes a cigarette break in the middle of writing a ticket? What about two cigarettes? By drawing a line in the sand, the Court raises more questions than it resolves, most of them involving when the "mission" of a traffic stop is complete.

Additionally, *Rodriguez* sanctions an all-too-common practice in modern policing: using pretextual stops to investigate more serious narcotics offenses.[153] This results in an escalation of the War on Drugs, which many scholars note disproportionately affects minorities.[154] To combat this questionable practice, the Court should have reversed *Caballes* outright. Using a dog sniff changes the character of a traffic stop so much that reasonable suspicion should be required regardless of the circumstances. By choosing not to address the question of reasonable suspicion, the Court gave police the power to conduct systematic dog sniffs within regular traffic stops with little restriction. Such an outcome is undesirable from the perspective of motorists and society as a whole.

CONCLUSION

Rodriguez addressed an increasingly relevant question in a mobile society: what are the limits of police power when it comes to

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151. *Rodriguez*, 135. S. Ct. at 1624 (Alito, J., dissenting).

152. Transcript of Oral Argument at 48-50, Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609 (2015) (NO. 13-9972).

153. *See* Wilson, *supra* note 3, at 1180-81.

154. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing the criminal justice system's targeting of black men through the War on Drugs).

routine interactions with motorists? In ruling for the defendant, the Court made the right decision for the wrong reasons. Absent reasonable suspicion, Rodriguez should not have been subjected to a dog sniff. The majority, however, held that the search was a constitutional violation because the dog sniff occurred eight minutes after the written warning was issued.[155] Justice Thomas's dissent called this a "trivial" reason, inconsistent with the rule laid down in *Caballes*.[156] Moreover, Justice Alito's dissent emphasizes that the reasonableness of the delay is bolstered by the officer's statement that he waited for backup for safety reasons.[157]

Courts and police departments will struggle with interpreting *Rodriguez*. Instead of focusing on the time a stop takes, courts should focus on the nature of the traffic stop, a nature that changes dramatically when a dog is used to sniff the exterior of a vehicle. Instead of giving guidance regarding the level of suspicion needed to conduct a dog sniff, the Court held that all dog sniffs conducted within the duration of the legitimate traffic stop are permissible. The result is an uncertain standard that will cause hardship for motorists and policemen alike.

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155. *Rodriguez*, 135 S. Ct. at 1616.
156. *Id.* at 1617-19, 1621-22 (Thomas, J., dissenting).
157. *Id.* at 1624 (Alito, J., dissenting).

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