No. 20-564

In the Supreme Court of the United States

RODNEY CARLISLE, JR., PETITIONER
v.
COMMONWEALTH OF KENTUCKY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Kentucky makes no meaningful attempt to reconcile the Supreme Court of Kentucky's decision below with this Court's decision in *Rodriguez v. United States*, 575 U.S. 348 (2015). Instead, it disputes the Supreme Court of Kentucky's assertion that "the federal circuits are split" on the question presented, and it argues certiorari is unwarranted because the exclusionary rule might ultimately not apply.

Those arguments lack merit. First, the decision of the Supreme Court of Kentucky misreads this Court's decision in *Rodriguez*, which excluded historical criminal-records checks from its list of ordinary inquiries permitted at every stop, and contrasted that list with other measures an officer "*may* need" to take "in order to complete his mission safely." 575 U.S. at 355–56 (emphasis added). Second, as the Supreme Court of Kentucky observed, there is a split of authority on the question presented. And third, the government's predictions about the eventual outcome on remand do not warrant denial of certiorari.

A. The Decision Below Is Wrong.

Rodriguez held that, absent reasonable suspicion, law enforcement may not prolong a traffic stop to take steps that are outside the officer's traffic mission. *Id.* at 355–57. This Court distinguished between two types of measures in the traffic-stop context: those "ordinary inquiries" that are "authorized incident to every traffic stop"; and those measures that an officer "may need" to conduct "in order to complete his mission safely." *Id.* at 355–56.

The first, always-permitted category included "checking the driver's license, determining whether

there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *See id.* at 355. All of those measures are squarely within the mission of the traffic stop itself. *Rodriguez*, however, "omitted criminal background checks from [that] list," indicating that such checks for historical criminal activity are not authorized at every traffic stop. *See United States v. Palmer*, 820 F.3d 640, 655 (4th Cir. 2016) (Wynn, J., concurring). Instead, those searches fall within the second category of measures that may or may not be permissible depending on whether the search is appropriate in the circumstances to address concerns about officer safety.

Kentucky does not argue that the court below faithfully applied *Rodriguez*. Instead, it defends the decision below by invoking the government's "legitimate and weighty" interest in officer safety. *See* Opp. 20. But there is no dispute that officers may conduct a criminal-records check when their safety justifies such a search; no jurisdiction prevents law enforcement from conducting a criminal-records check in those circumstances. And the case-by-case approach appropriately accounts for the circumstances in which prolonging a traffic stop actually diminishes officer safety and therefore cannot be valid. *See United States v. Evans* 786 F.3d 779, 787 (9th Cir. 2015) ("The check thus was inversely related to officer safety; that is, [the officer] would have been safer had he let [the suspect] go once he determined there was no reason to cite him.")

The case-by-case approach also minimizes the prospect of turning traffic stops into full-blown drug investigations. *See* 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 9.3(c) (6th ed. 2020) ("[I]n this 'war on drugs' via traffic

stops the criminal history check serves to identify drivers who deserve (at least in the officer's mind) more intense scrutiny."). "On-scene investigation into other crimes . . . detours from [the traffic stop] mission. So too do safety precautions taken in order to facilitate such detours." *Rodriguez*, 575 U.S. at 356. Criminal history checks can easily facilitate such detours and their reasonableness is therefore appropriately subject to justification.

B. There Is a Split of Authority on the Question Presented.

Kentucky fights its Supreme Court's observation that "the federal circuits are split" "[a]s to whether a criminal history check extends the duration of a stop." *See* Pet. App. 14a. But that court was correct: there is a split of authority on the question presented.

As Kentucky concedes, multiple courts have adopted the Supreme Court of Kentucky's categorical rule allowing law enforcement to prolong every traffic stop by performing a criminal-records check. *See* Opp. 8–12. But there is authority on the other side of the split as well. For example, the Ninth Circuit has squarely rejected the Supreme Court of Kentucky's approach. *See Evans*, 786 F.3d at 787. In *Evans*, an officer first performed a "records check, which reveals whether the driver's license is valid and whether any warrants are outstanding for the holder's arrest." *Id.* at 782. The "[officer] then requested an ex-felon registration check," which "entailed inquiring into [the suspect's] criminal history and then determining whether he was properly registered at the address he provided." *Id.* at 783.

The Ninth Circuit held that the ex-felon registration check "was wholly unrelated to [the officer's] 'mission' of 'ensuring that vehicles on the road are operated safely and responsibly.'" *Id.* at 786 (quoting *Rodriguez*, 575 U.S. at 355). In so holding, the court explained that *Rodriguez* categorically authorized law enforcement to conduct a vehicle records or warrant check, but that the ex-felon registration check fell into the category of searches "that 'an officer *may* need to take . . . in order to complete his mission safely.'" *Id.* (quoting *Rodriguez*, 575 U.S. at 355). And because the circumstances did not justify the search, the court held it unconstitutional.

Kentucky dismisses *Evans* on the basis that the ex-felon registration check is distinguishable from a "general criminal history check" of the sort conducted in this case. *See* Opp. 12–14. Contrary to this hypertechnical reading of *Evans*, the "ex-felon registration check" *is* analogous to the criminal-records check conducted in this case: both went beyond checking for outstanding warrants by inquiring into a suspect's criminal history. *See Evans*, 786 at 786 (ex-felon registration check, among other things, "inquire[d] as to [the suspect's] criminal history"); Pet. App. 3a (officer "commented that he would 'see if they got any prior charges'"). The criminal-records checks at issue in *Evans* and in this case are precisely the sort of inquiry this Court omitted from *Rodriguez*'s "ordinary inquiries" "authorized incident to every traffic stop."

The Third Circuit has also adhered to this Court's indication that a criminal-records check is constitutional only where it is warranted. Kentucky highlights that in *United States v. Clark*, 902 F.3d 404 (3d Cir. 2018), the Third Circuit "did not question an officer's . . . check that provided the motorist's crimi-

nal history," and instead held that the subsequent interrogation about the suspect's criminal history was unlawful because the officer already knew about that history. *See* Opp. 15. But this approach actually confirms that an officer's inquiry into a suspect's criminal history is not categorically constitutional. It thus conflicts with the decision below.

C. This Case Is an Ideal Vehicle for Resolving the Split.

This case is an ideal vehicle. The question presented was briefed before, and decided by, the trial court and Supreme Court of Kentucky. The answer may resolve Carlisle's Fourth Amendment claim. And the evidence demonstrates that the officer searched Carlisle's criminal history because he considered Carlisle "shady" and hoped to find a basis to obtain consent to search the car. Pet. App. 3a.

Kentucky does not dispute this. Instead, it retreats to the argument that this case is a poor vehicle for resolving the question presented because there is no nexus between the prolonged traffic stop and the seizure of evidence, and because the exclusionary rule might not apply here. *See* Opp. 16, 18. But the government's predictions about the eventual outcome on remand do not warrant denial of certiorari. On remand, the trial court would first need to decide whether Kentucky could establish that the circumstances surrounding the traffic stop justified the criminal-records check here.

Carlisle has a strong argument that the criminal-records check was not justified here. The officer searched Carlisle's criminal history because he considered the occupants of the car "shady" and hoped to find a basis to obtain consent to conduct a search.

Pet. App. 3a. The criminal-records check was thus a "detour[]" designed to elicit a further basis to justify the officers' investigation into criminal activity unrelated to the purpose of the traffic stop. *See Rodriguez*, 575 U.S. at 356. The applicability of the exclusionary rule is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Hudson v. Michigan*, 547 U.S. 586, 591–92 (2006); *see also Clark*, 902 F.3d at 406 ("If the traffic stop was impermissibly extended to reach that point, however, any evidence seized after the stop should have ended may be suppressed per *Rodriguez*[.]"). That separate analysis will be conducted on remand and does not affect whether this case is suitable for certiorari.

Finally, Kentucky's opposition only highlights the need for this Court's review. "The most common reason for contact with the police is being a driver in a traffic stop." Dep't of Justice Bureau of Justice Statistics, *Traffic Stops*, available at https://www.bjs.gov/index.cfm?tid=702&ty=tp#:~:text=The%20most%20common%20reason%20for,during%20the%20previous%2012%20months. And indeed, the officer in this case "commonly ran criminal history checks to see if individuals had prior charges related to firearms." *See* Opp. 3, 21. Allowing this split to persist will mean that the meaning of the Fourth Amendment will vary from place to place—often in violation of this Court's decision in *Rodriguez*—in precisely the context in which the public's Fourth Amendment rights are most often implicated.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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