

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

JOSE SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Respectfully submitted,

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## **QUESTION PRESENTED FOR REVIEW**

When an improperly performed drug-dog sniff of a vehicle fails to provide probable cause to search for contraband, but law enforcement officers search the vehicle anyway, does the unlawful search constitute an unreasonable extension of the traffic stop?

## **LIST OF PARTIES**

The only parties to the proceeding are those appearing in the caption to this petition.

## **LIST OF DIRECTLY RELATED PROCEEDINGS**

*United States v. Jose Sanchez*, No. 6:16-cr-60027-1, U.S. District Court for the Western District of Arkansas. Judgment entered April 10, 2018.

*United States v. Jose Sanchez*, No. 18-1890, U.S. Court of Appeals for the Eighth Circuit. Judgment entered April 3, 2020; panel rehearing denied by order entered May 29, 2020.

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## PETITION FOR A WRIT OF CERTIORARI

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### OPINION BELOW

On April 3, 2020, the court of appeals entered its opinion and judgment affirming the district court's denial of the motion to suppress filed by Jose Sanchez. *United States v. Sanchez*, 955 F.3d 669 (8th Cir. 2020). Petitioner's Appendix ("Pet. App.") 1a-12a. The Eighth Circuit's order denying rehearing is not reported. *Id.* at 28a.

### JURISDICTION

The judgment of the court of appeals was entered on April 3, 2020. On April 16, 2020, an order was entered extending the deadline for filing a petition for rehearing to May 1, 2020. A petition for panel rehearing was timely filed by Mr. Sanchez on May 1, 2020. On May 29, 2020, an order was entered denying the petition for rehearing. *See* Pet. App. 28a. Pursuant to the order of this Court entered on March 19, 2020, in light of the COVID-19 pandemic, the deadline to file any petition for a writ of certiorari due on or after March 19, 2020 has been extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Accordingly, this petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISION INVOLVED

The Petitioner refers this Honorable Court to the following constitutional provision:

### U.S. Const. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

1. Jose Sanchez was charged with, and entered a conditional plea of guilty to, possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii). Shortly after midnight on May 26, 2016, Mr. Sanchez was driving a Dodge Ram pickup truck with expired paper tags when he was stopped by Arkansas State Police Trooper Derek Nietert on the interstate near Malvern, Arkansas. Sanchez was traveling along with his co-defendant, Vanessa Fuentes, and their two young children. Trooper Nietert had difficulty communicating with Sanchez (because Sanchez does not speak English), so he communicated mostly with Ms. Fuentes. Nietert was informed that the vehicle belonged to a friend of Sanchez's and that they were borrowing it to travel to Little Rock, Arkansas, so that Sanchez could perform a job painting a house.

Trooper Nietert called in for a criminal history search on Mr. Sanchez. Sanchez told Nietert that his name was "Jimmy Sanchez," and Nietert asked Ms. Fuentes about this when she told him Sanchez's name was "Jose." Fuentes

apparently explained that “Jimmy” was a nickname, and Nietert did not ask any more questions about Sanchez’s name. The criminal history check came back with “no results.”

2. Trooper Nietert requested permission to search the vehicle, but Ms. Fuentes declined. Corporal Mike Bowman, who had already responded to the scene, lowered the tailgate of the truck and deployed Ringo, his drug-sniffing canine. While the Government later admitted that Corporal Bowman had not followed proper procedure in conducting the dog sniff and conceded that the sniff did not provide probable cause supporting a search (*see* Pet. App. 16a), Bowman indicated that Ringo had alerted to the presence of narcotics and the officers began to search the truck. After the officers searched the bed of the truck, the space between the bed and the cab, and inside the cab, Bowman eventually checked underneath the back of the truck. After a brief moment, Bowman informed Nietert that he had discovered suspected drugs. Nietert testified that he saw a black plastic bag above the spare tire underneath the truck, and Sanchez and Fuentes were placed under arrest. The black plastic bag was later found to contain several Tupperware containers filled with suspected methamphetamine.

3. Mr. Sanchez and Ms. Fuentes were subsequently named in a two-count indictment charging them with conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846, possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii), and traveling in interstate commerce with the intent to promote an



unlawful activity in violation of 18 U.S.C. § 1952(a)(3)(A). Sanchez filed a motion to suppress the evidence seized during the search of the pickup truck, along with any evidence or statements obtained as a result of any unlawfully seized evidence. A hearing was held on this motion, after which Sanchez and the Government were permitted to submit supplemental briefing. The motion was ultimately denied, and Sanchez entered into a conditional plea agreement. He pleaded guilty to one count of possession with intent to distribute 50 grams or more of methamphetamine and was sentenced to 63 months imprisonment, 3 years of supervised release, and a \$100 special assessment.

4. Mr. Sanchez appealed the denial of his motion to suppress to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. On appeal, Sanchez argued that the district court erred in finding that the extension of the traffic stop was reasonable and that the suspected contraband had not been discovered as the result of an unconstitutional search. Sanchez argued that the troopers unreasonably extended the traffic stop without reasonable suspicion, unreasonably conducted an improper canine sniff of the vehicle, and unreasonably performed an unconstitutional search of the vehicle, all in violation of his rights under the Fourth Amendment.

5. In a 2-1 panel decision, the Eighth Circuit Court of Appeals affirmed the district court's denial of Mr. Sanchez's motion to suppress. *United States v. Sanchez*,

955 F.3d 669 (8th Cir. 2020). The panel majority found that reasonable suspicion existed to extend the traffic stop to perform a canine sniff of the vehicle. *Id.* at 673. The dissent disagreed. *Id.* at 678-80 (Kelly, J., dissenting). The majority also went on to conclude that probable cause was not necessary to justify the troopers' examination of the undercarriage of the vehicle. *Id.* at 673. As the majority noted in its opinion, prior to the suppression hearing, "the government conceded that the canine sniff did not provide troopers with probable cause to search the vehicle because Bowman had not followed proper canine handling procedures." *Id.*

Mr. Sanchez filed a timely petition for rehearing that was denied on May 29, 2020. Pet. App. 28a. This petition for a writ of certiorari follows.

### **REASONS FOR GRANTING THE PETITION**

**This Court should consider the important question of whether an unlawful search of a vehicle performed by law enforcement after an improperly conducted dog sniff constitutes an unreasonable extension of the traffic stop.**

While Mr. Sanchez argued on appeal to the Eighth Circuit (and the dissent agreed) that law enforcement did not possess reasonable suspicion to extend the traffic stop in order to perform a canine sniff, there was an additional aspect to Sanchez's argument about the unreasonableness of the seizure that was overlooked by the appellate court: in light of the Government's concession that the canine sniff was performed improperly and did not provide probable cause to search the vehicle, the further extension of the traffic stop while the improper dog sniff and the unconstitutional search were being conducted transformed it into an unreasonable seizure. "The reasonableness of a seizure . . . depends on what the police in fact do."

*Rodriguez v. United States*, 575 U.S. 348, 357 (2015). Even if Trooper Nietert had possessed reasonable suspicion to justify extension of the traffic stop to perform a dog sniff, the court should have also scrutinized what the officers in fact did next—they failed to follow proper procedure, conducted an invalid canine sniff that did not provide probable cause to search, and then proceeded to spend about ten minutes searching the vehicle anyway before finally locating the contraband. What the officers did in this case was flatly unreasonable.

When law enforcement develops reasonable suspicion to extend a traffic stop to investigate potential drug activity, they are permitted to ask additional questions of the vehicle’s occupants or to call in a K9 unit to perform a sniff of the vehicle. *See United States v. Mendoza*, 677 F.3d 822, 828 (8th Cir. 2012) (“It is well settled that a drug-dog sniff, without more, is not a search within the meaning of the Fourth Amendment.”) (internal quotation marks omitted). Reasonable suspicion, however, only goes so far. It is not the same as probable cause, and does not justify a search of the vehicle. Only when the threshold of probable cause is reached—whether by additional evidence discovered as the result of further lawful investigation or by a positive indication by a drug dog after a valid sniff—is law enforcement justified in proceeding with a warrantless search of a vehicle.

When officers develop reasonable suspicion and conduct a dog sniff, one of two things usually happens next: either (1) the dog gives a positive indication that narcotics are present and provides probable cause to support a search, and officers search the vehicle, or else (2) the dog fails to alert, the reasonable suspicion

dissipates, and the traffic stop is concluded. Here, a less common third path was taken—the dog sniff was performed improperly and did not provide probable cause to search, but the officers extended the stop to perform a search anyway. Although Corporal Bowman indicated that the dog had given a positive alert, he admittedly failed to follow proper procedure in conducting the sniff; law enforcement’s subsequent actions must be evaluated in light of the fact that the dog sniff was improper and did not provide probable cause to search. Viewed in that light, the further extension of the seizure was unreasonable.

As this Court has held, “[i]t is . . . clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution,” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), and “[t]he manner in which the seizure and search were conducted is . . . as vital a part of the inquiry as whether they were warranted at all,” *Terry v. Ohio*, 392 U.S. 1, 28 (1968). In *United States v. Place*, for example, although the initial seizure of luggage for the purpose of subjecting it to a dog sniff was found to be reasonable, this Court held that the seizure became unreasonable because its length unduly intruded upon constitutionally protected interests. 462 U.S. 696, 709-10 (1983). And in *Rodriguez*, the Court held that law enforcement may not extend an otherwise-completed traffic stop in the absence of reasonable suspicion of criminal activity. 575 U.S. at 350-51. In the instant case, even if the initial stop and the initial extension of the stop were warranted, the improperly conducted drug-dog sniff and the unconstitutional search that followed rendered the seizure unreasonable from

that point on, and therefore unconstitutional. Although the Eighth Circuit addressed the issue of whether the initial extension of the seizure was warranted, it failed to address the other “vital” issue—the manner in which the seizure continued to be conducted.

“[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *Florida v. Royer*, 460 U.S. 491, 500 (1983). “[A]n investigative stop must cease once reasonable suspicion or probable cause dissipates.” *United States v. Watts*, 7 F.3d 122, 126 (8th Cir. 1993). Here, even if the panel majority was correct that reasonable suspicion justified extending the stop in order to perform a dog sniff or other further investigation, when the sniff did not provide probable cause to search the vehicle, the stop should have concluded. *See United States v. Davis*, 430 F.3d 345, 356 (6th Cir. 2005) (“Once the drug-sniffing dog was brought to the scene and failed to alert positively to the presence of narcotics in the vehicle, the officers’ suspicions that Davis was in possession of narcotics were dispelled.”). Instead, the officers unlawfully searched the truck—they certainly did not use “the least intrusive means reasonably available to verify or dispel” their suspicions.

This additional, unconstitutional extension of the seizure is what led to the officers eventually searching under the truck and finding the suspected methamphetamine. Even if, as the panel majority held, officers did not need probable

cause to examine the undercarriage of the vehicle, the unconstitutional extension of the seizure was still the “but-for cause” of the discovery of the contraband. *See United States v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007). The improper canine sniff and resulting unconstitutional search further delayed the stop and, after ten minutes of searching, the contraband was finally located. If the officers had acted lawfully, they would have concluded the traffic stop after the dog sniff failed to provide probable cause to search. Instead, Mr. Sanchez’s constitutional rights were violated as a full-scale search of the truck was conducted, unsupported by probable cause. Accordingly, the evidence recovered should have been suppressed as fruit of the poisonous tree, as law enforcement “obtained evidence by exploitation of th[e] illegality”—i.e., the “constitutional violation [that] ha[d] occurred.” *See United States v. Alvarez-Manzo*, 570 F.3d 1070, 1077 (8th Cir. 2009) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)) (internal quotation marks omitted).

The instant case presents an opportunity for this Court to fill in a gap in its Fourth Amendment/exclusionary rule jurisprudence by examining the effect of an improperly performed dog sniff on the continuing legality of a seizure. Is the (arguable) presence of sufficient reasonable suspicion of criminal activity to warrant further investigation enough to sustain the continuation of a traffic stop past an intervening unconstitutional search? Or does the failure of law enforcement to follow proper procedure render the manner of the seizure unreasonable beyond the point of an improper dog sniff and justify exclusion of later-discovered evidence? This Court should grant certiorari to consider this unique and important question.

## CONCLUSION

For all of the foregoing reasons, Petitioner Jose Sanchez respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 23rd day of October, 2020.

Respectfully submitted,

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