

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID ALAN CALLISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the 8th Circuit erred by refusing to perform a *Rodriguez* analysis on whether or not a traffic stop was improperly extended because it misconstrued the trial record by erroneously finding that the law enforcement officer did not extend the stop because the driver failed to produce proof of insurance.

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All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

David Callison respectfully prays that a writ of certiorari issue to review the judgment of the 8th Circuit Court of Appeals in Case No. 20-1398, entered on July 2, 2021, made final with its denial of rehearing and rehearing en banc on August 30, 2021. The opinion of the 8th Circuit Court of Appeals appears in the Appendix to the petition and is reported at *United States v Callison*, 2 F 4th 1128 (8th Cir. 2021). The appeal stemmed from the Government's appeal of an Order suppressing evidence entered by the Honorable Robert W. Pratt for the United States District Court in the Southern District of Iowa on January 29, 2020, *United States v Callison*, case number 4:19-cr-00081. *United States v Callison*, 436 F Supp 3d 1218 (S.D. Iowa 2020).

JURISDICTION

The United States Court of Appeals for the 8th Circuit entered judgment on July 2, 2021. A petition for rehearing en banc and petition for rehearing by the panel was denied on August 30, 2021.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS

4th Amendment to the United States Constitution

STATEMENT OF THE CASE

On June 20, 2019, an amended superseding indictment charged Callison

with conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine. The amended superseding indictment also provided Callison with Notice pursuant to 18 USC Section 851. (DCD 57). The indictment was obtained as a result of methamphetamine and cash seized from an automobile in which Callison was a passenger on April 25, 2019. Subsequent to the stop and search of the automobile, LEO obtained a search warrant for Callison's residence which led to the seizure of additional methamphetamine and cash. Callison filed a Motion to Suppress the drugs and other evidence found in the vehicle as well as the items seized as a result of the execution of the search warrant on Callison's residence and after an evidentiary hearing, the district court issued a written Order granting the Motion to Suppress. (DCD 202, 233).

The Court determined that the traffic stop was supported by reasonable suspicion to believe that the vehicle had an improperly lit license plate light. (DCD 233, p. 4-5). The Court found that the officer's continued prolong of the stop violated the limits on stop extensions contained in *Rodriguez v United States*, 575 US 348 (2015) and *United States v Campbell*, 912 F 3d 1340 (11th Cir. 2019). (DCD 233, p. 9-11).

On April 25, 2019 at approximately 12:51 a.m. DMPD Officer Kilgore observed a 2009 Chevrolet Impala around the 2600 block of E Garfield Ave., in Des Moines, Iowa. Officer Kilgore observed that the car did not have a working

license plate and followed the car for a couple blocks, noticing that the license plate went dim when the car turned beyond his headlights. Prior to coming into contact with any of the vehicle's occupants, Kilgore entered the plate number in his squad car's computer. (DCD 202, GX 1, 2, DCD 233 p. 1). When the car pulled into a driveway, Kilgore activated his emergency lights and boxed-in the vehicle. Kilgore also turned off his headlights, briefly, to confirm the license plate/plate light was unlit. He also examined police records further. (DCD 233, p. 1).

Kilgore approached the car's driver, Timothy Rios. Callison was in the backseat and another occupant, Kelly Shannon, sat in the front seat. Kilgore told Rios about the broken light- Rios professed ignorance, and Kilgore asked for the customary license, registration, and insurance documentation. Kilgore then pivoted to other topics. He asked if Rios owned the car. He asked what Rios was "doing here". Rios said, "dropping off a friend". Rios then provided his driver's license but could not find proof of registration or insurance. Kilgore then returned to his car to view records that showed that Rios had a valid license, valid registration and no outstanding warrants. (DCD 233, p. 1-2). At that time the driver informed Kilgore that he could not find his insurance proof because he had lost his wallet. (Gov. Ex. 1, 4:00-4:45; Supp. Tr. p. 30-31). Ignoring that statement the officer then shifted his questions to travel-plan and contraband questions which

exceeded the stop's mission because they lacked a rational relationship to roadway safety or the observed violation.

Rios gave Officer Kilgore, as he put it, the "heebie-jeebies". Kilgore examined the car's backseat with his flashlight and then began to ask Rios, Shannon, and Callison a series of questions. (DCD 233, p. 2).

"What's the address here? Tell me what's the address here, without looking," Officer Kilgore said. (GX-1 at 5:00). Rios said he could not do this. (GX-1 at 5:02). Officer Kilgore responded: "Then why did you stop here? Why are you sweating profusely?"¹ (GX-1 at 5:05). "I'm dropping off a friend," Rios said as he calmly nodded his head. (GX-1 at 5:10). Officer Kilgore asked for the friend's name. (GX-1 at 5:18). Callison said, "Neil." (GX-1 at 5:22). Shannon said, "Rob." (GX-1 at 5:26).

Officer Kilgore continued to comment on Rios's sweat, the temperature, and the unknown address while asking what was "illegal in the car or on [Rios] that [he] need[ed] to know about?" (GX-1 at 6:04). Officer Kilgore asked for backup and for permission to search the car. (GX-1 at 6:16—45). The questioning continued, leading Shannon to note that this seemed a bit extensive for a license-plate light. (GX-1 at 7:20). Officer Kilgore then ordered Rios out of the car and continued to ask him why he was sweating. (GX-1 at 8:30,

¹ To the extent Rios was sweating at this point, such sweat was not visible in Officer Kilgore's body-camera footage. (GX-1 at 5:03).

10:02). "Because I'm nervous, maybe," Rios said.² (GX-1 at 9:55). More and more officers continued to arrive. (GX-1 at 10:00, 14:00). Officer Kilgore ordered the two passengers out, too. (DX-D at 1).

After Shannon exited the vehicle, Officer Kilgore said he saw her drop a cigarette pack on the ground. (DX-D at 1-2). Inside, he found a small bag containing a substance that field-tested positive for methamphetamine. (DX-D at 2). He then searched the vehicle and found a red duffle bag in the back seat. (DX-D at 2). Inside that bag, he found two prescription bottles that listed Defendant's name; five small plastic bags with a substance that also field-tested positive for methamphetamine; a lot of U.S. currency; digital scales with methamphetamine residue; and male clothing. (DX-D at 1,2).

Police took Defendant into custody. (DX-D at 1,2). Another officer then included many of the facts described above into a search warrant application for Defendant's home. (DX-D at 1-2). A magistrate judge approved that warrant and the search of the residence yielded additional methamphetamine and cash. (DCD 202, p. 1, DCD 233, p. 3-4).

The government appealed the district court Order suppressing evidence. (DCD 233). The government's appeal was certified by the Attorney General's Office. (DCD 242).

² Rios's sweat, at this point, appeared to be visible on his shirt collar. GX-1 at 10:31.

On appeal, the government first argued that Kilgore did not extend the traffic stop until he asked the driver if there was anything illegal in the car approximately 6 minutes into the encounter. The 8th Circuit agreed, but in doing so they misinterpreted the record about what happened after Kilgore checked the police records after the stop and found that the driver had a valid license, a properly registered car, and no outstanding warrants. (8th Cir. Opinion, p. 2). The 8th Circuit found that when Officer Kilgore returned to the car several minutes later, the driver still had not found proof of insurance and that he failed to tell the officer he could not find it. (8th Cir. Opinion, p. 2, 5 fn. 2). The suppression record clearly established that when Kilgore returned to the driver's vehicle after performing a records check, the driver informed the officer that he could not find his insurance proof because he lost his wallet. (Gov. Ex. 1 at 4:45; Supp. Tr. p. 30-31). The 8th Circuit concluded that the district court erred in holding that Kilgore needed reasonable suspicion of a noted crime to extend the stop when he began asking travel-related questions 5 minutes into the encounter because Kilgore was still "handling the matter for which the stop was made" such that his questions between minutes 5 and 6 into the encounter did not extend the stop. (8th Cir. Opinion, p. 5).

The 8th Circuit went on to conclude that by the time that Kilgore had extended the stop, he had developed reasonable suspicion of another crime to justify the stop's extension. (8th Cir. Opinion, p. 7).

REASONS FOR GRANTING THE WRIT

I. RODERIGUEZ DEMANDS REVERSAL OF THE 8TH CIRCUIT'S FINDING THAT OFFICER KILGORE DID NOT EXTEND THE TRAFFIC STOP BECAUSE THE DRIVER FAILED TO PRODUCE PROOF OF INSURANCE AND THAT NO ANALYSIS UNDER RODRIGUEZ WAS NECESSARY.

The 8th Circuit disagreed with the district court that Officer Kilgore unlawfully extended the traffic stop roughly 5 minutes into the encounter when he began to ask travel-related and contraband questions. The 8th Circuit's opinion was based upon the conclusion that when Officer Kilgore returned to the car and the driver failed to provide proof of insurance that the original purpose of the stop was still valid when Officer Kilgore shifted his inquiry from traffic matters to travel related and contraband questions. The 8th Circuit specifically stated that because the driver was still searching for his insurance information and had not indicated that he did not have it, the stop was not extended by Officer Kilgore's questions relating to travel-related and contraband. (8th Circuit Opinion p. 4, 5, fn. 2). No citation by the 8th Circuit exists which supports the 8th Circuit's conclusion that the driver was still searching for his insurance information and had not indicated that he did not have it. A review of Government's Exhibit "1" clearly shows that Rios told Officer Kilgore prior to his initiating further questions related to travel and contraband that he couldn't find his proof of insurance because he had lost his wallet. (Gov. Ex. 1 at 4:45; Supp. Tr. p. 30, 31). As a result

of this misconception, the 8th Circuit found that it did not have to reach the more difficult question of the extent to which officers may ask travel-related questions during a routine traffic stop after *Rodriguez*. The 8th Circuit merely concluded that because there was no extension of the stop it need not answer whether the questions asked by Kilgore were permissible under *Rodriguez*.

When Officer Kilgore returned to the vehicle, he did not investigate, as he could have, the matter of no proof of insurance. The 8th Circuit confused the missions of Officer Kilgore in this case. His only valid mission was to investigate traffic related violations, i.e., the license plate lamp and the no insurance violation. When Officer Kilgore was told that the driver didn't have his proof of insurance because he had lost his wallet, he could have investigated that traffic violation but instead he chose to institute a new mission when he began peppering the driver and the passengers, including Callison, with the following questions and commands:

- “Tell me what’s the address here, without looking.” ECF No. 230 Ex. 1 at 5:01.
- “Why did you stop here?” Id. At 5:05.
- “What’s the address, without looking? Don’t look!” Id. At 5:33.
- “What’s illegal in the car on you that I need to know about?” Id. At 6:05.
- “Why are you sweating so bad?” Id. At 6:07.
- “If there is nothing illegal [in the car], then why can’t I take a look?” Id. 6:42.
- “What illegal, what, is there anything illegal in the car?” Id. At 8:50.

The facts and procedural history of *Rodriguez* show how the *Fourth Amendment* places firm but reasonable limits on an officer's ability to turn any

routine traffic stop into a full-blown narcotics investigation. In that case, Nebraska police stopped the defendant for driving on the shoulder and issued a mere written warning. *Id. at 351.* Regardless, police then delayed the defendant another seven-to-eight minutes so they could walk a drug-detection dog around his car. *Id. at 352.* They found drugs, and the government charged the defendant with drug possession. *Id.* He moved to suppress, arguing the drugs were the fruit of a detention prolonged without the required reasonable suspicion. *Id.* The 8th Circuit affirmed the district court's denial of suppression, concluding the slight delay qualified under the Circuit's then-valid "de minimis" doctrine to traffic-stop extensions. *Id. at 353.*

The Supreme Court vacated and remanded. *Id. at 358.* In doing so, the Court stated there is no such thing as a "de minimis" traffic-stop extension to investigate other crimes. *See id. at 356-57 (rejecting the 8th Circuit's rule that because police can order a motorist out of a car to ensure officer safety, so too can police take additional time to investigate other crimes).* Rather, no matter how short the delay, "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are-or reasonably should have been-completed." *Id. at 354* (emphasis added). In other words, "[a] seizure for a traffic violation justifies a police investigation of that violation ... and attention to related safety concerns." *Id.* (emphasis added). By contrast, "on-scene investigation into other crimes" and

safety precautions to facilitate such extra investigations "detour[] from that mission." *Id. at 356*. This is so because "[h]ighway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." *Id. at 357*.

The Court provided a pared down list of what tasks typically are "incident to [the traffic] stop." *Id. at 355* (*quoting Caballes*, 543 U.S. at 408). In addition to writing a ticket or warning, police can check (1) the driver's license, (2) police records for outstanding warrants, and (3) the vehicle's proof of registration and insurance. *Id.* Because of all the investigations an officer could perform with a detained motorist, these four tasks "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* (*citing Delaware v. Prouse*, 440 U.S. 648, 658-59 (1979)).

Police still can investigate other crimes during a traffic stop, but barring consent, one of two things must occur to do so constitutionally. First, police may investigate other matters "so long as [unrelated] inquiries do not measurably extend the duration of the stop." *Id. (alteration in original)* (*quoting Arizona v. Johnson*, 555 U.S. 323, 333 (2009)). In other words, if one officer "diligently pursue[s]" the traffic-stop mission, *id. at 354* (*quoting Sharpe*, 470 U.S. at 686), another can "conduct certain unrelated checks" concurrently, *see id.* (*citing cases in which one officer prepared a traffic ticket while another investigated other crimes*); *see also*

United States v. Fuehrer, 844 F.3d 767, 773 (8th Cir. 2016).

The 8th Circuit's opinion failed to perform the required inquiry under *Rodriguez* because it incorrectly determined that the scope of Officer Kilgore's first mission was still in place and being observed because the driver was still looking for his insurance proof and didn't tell Kilgore he didn't have it. (8th Circuit Opinion p. 5, fn.2). The 8th Circuit's opinion blurs the line between the two missions of Officer Kilgore:

1. To investigate traffic violations;
2. To investigate other generalized suspicions including asking travel-related and contraband questions.

Rodriguez does not permit the second mission undertaken by Officer Kilgore. Even without *Rodriguez*, Officer Kilgore's questions relating to whether or not there are any drugs in the vehicle violates the Court's holding in *United States v Parelez, 526 F.3d 1115 (8th Cir. 2008)*. There, a South Dakota State Trooper stopped a vehicle for violating South Dakota's license plate law, which requires all vehicles to display license plates conspicuously, regardless of the vehicle's state of registration. After initiating the traffic stop the trooper requested that the driver accompany him back to his patrol car and in the car the trooper and the driver discussed the licensing requirements for vehicles and trailers. The trooper told him he would be issuing him a warning ticket for the vehicle's obstructed license plate and as he began to complete the warning ticket he asked

the driver general questions about his trip, his family, and his van. The trooper then shifted away from general conversation, asking the driver if he would be willing to answer some questions about the van and informing him that he did not have to answer the additional questions. It was undisputed at this point there was absolutely nothing about the driver's actions or comments causing the trooper to be concerned that any criminal activity was afoot. The trooper then began to engage the driver in discussions of topics related to drug trafficking, asking him if there were drugs or large amounts of cash in the van and if anyone had used drugs in his van recently. The driver denied any existence of drugs in the vehicle and before completing the warning ticket the trooper left the driver in the patrol car and walked to the van to speak with Parelez, the passenger. He asked him for his identification and asked Parelez about illegal drugs and large amounts of cash that might be in the van. The trooper had a drug dog in his vehicle and both the driver, and the passenger stated that there would be no reason that the drug dog would alert to any presence of drugs. He didn't call to check on the men's identification until 10 minutes after the trooper had told the driver he would only be receiving a warning ticket. Dispatch responded regarding the driver's DL after one minute but before dispatch responded on Parelez, the trooper took his dog out of the patrol car and walked him around the van. The drug dog detected an odor of illegal drugs and that sniff took about one minute. Thereafter, the trooper searched the van and

uncovered a digital scale with marijuana residue, a revolver with its serial number removed, and a box of bullets.

Parelez was indicted on one count of possession of a firearm with obliterated serial number and moved to suppress the evidence found in the van. District court adopted the Magistrate's recommendations and granted the Motion to Suppress. A government appeal followed.

On appeal the 8th Circuit found that the trooper engaged in a “blended process” of conducting a routine traffic stop and a drug interdiction investigation. The off-topic questions more than doubled the time that Parelez was detained. The video recording of the traffic stop makes clear that the questions unrelated to the traffic violation constitute the bulk of the interaction between the trooper and the van’s occupants. The court determined that the extent and duration of the trooper’s focus on non-routine questions prolonged the stop “beyond the time reasonably required” to complete its purpose in contradiction of *Illinois v Caballes*, 543 US 405 (2005) and violated Parelez’s 4th Amendment right to be free from unreasonable seizures.

The trooper’s off-topic questions and blended investigation disapproved in *Parelez* is very similar to the procedure employed by Officer Kilgore in this case. Kilgore testified that in almost all traffic citation stops he always asked occupants if there is anything illegal in the car even without any reason to base such a

question on. (Supp. Tr. p. 35, 36). This is important because Officer Kilgore believed he had every right to extend the stop for purposes of asking questions he thought he had the right to ask.

What happened here is exactly what *Rodriguez* strives to prevent. *Rodriguez* stands to the proposition that no matter how short the delay, “[a]uthority for the seizure thus ends when the tasks tied to the traffic infraction are/or reasonably should have been-completed”. *Rodriguez* at 354. (emphasis added). In other words, “[a] seizure for a traffic violation justifies police investigation of that violation...and atten[tion] to related safety concerns.” *Id.* (emphasis added). By contrast, “on-scene investigation into other crimes” and safety precautions to facilitate such extra investigations “detour [] from that mission.” *Id* at 356. This is so because “[h]ighway and officer safety are interests different in kind from the government’s endeavor to detect crime in general or drug trafficking in particular.” *Id* at 357.

In footnote 2 the 8th Circuit correctly recognized that so-called “travel-related” questions may not be routinely asked in every routine traffic stop. They must relate to the purpose of the stop and “mission” of the stop under *Rodriguez*; otherwise, they are outside the scope of the activities that an officer may conduct during the stop. This is actually the root of the 8th Circuit’s pre-*Rodriguez* caselaw on questions about destination and purpose of travel. *See U.S. v Barahona*, 990

F.2d 412 (8th Cir. 1993)(stop for erratic driving and weaving made questions of destination and purpose relevant to safety on roadway posed by observed violation that justified stop). Were the rule otherwise, a routine stop for any one of the myriad of traffic violations could become an investigation of the general “legality” or “lawfulness” of the motorist’s travel without prior particularized reasonable suspicion to do such a generalized investigation or inquiry. Once the officer steps outside the scope of appropriate questioning during the stop, the burden is on the government, who has the burden of proof, to establish that such activity did not prolong the stop. Only if the government can establish that the questioning did not prolong the stop beyond the time necessary for the officer to complete its “mission” can they escape the remedial *Fourth Amendment* suppression remedy. In evaluating that question, it is not the case that an officer may take time out of activities directed at diligently completing the mission of the stop, only to return to completing the stop later, because that is the very definition of prolongation as this court recognized in *Peralez*. In *Rodriguez* they specifically rejected the idea that an officer could do such a thing by earning “bonus time” for going about the legitimate stop activities quickly. Any activity outside the scope of the stop that extends the duration, and any suspicions claimed to have arisen from that outside the scope activity, cannot be relied upon as a basis to extend the stop to pursue an alternative or separate mission because that information was derived from and

during the *Fourth Amendment* violation.

In context it must be remembered that *Rodriguez* is a limitation on the Court's holding in *Whren v United States*, 517 US 806 (1996) that even if there was a demonstrated “pretext” for the stop that would not itself justify the stop, the officer could still be held to have lawfully stopped the vehicle if an actual traffic violation was observed. *Rodriguez* places a limit on what can happen once the motorist is detained or stopped and holds that the officer is restricted by the lawful basis for the stop in what the officer may do post-stop. An officer may not stop a motorist for a routine traffic violation and then use that opportunity to pursue an investigation of something else that did not justify the stop occurring, let alone the general lawfulness of a motorist's travel. In other words, an officer may not investigate a pretext during what is justified only by an observed traffic violation. If inquiry into the destination and purpose of travel was a proper subject of every routine stop, that rule would swallow the *Rodriguez* holding and fly in its face. Just as an example, an officer could profile motorists for criminal interdiction stops for say drugs, pull them over for speeding or some other violation like following too closely, and then use the traffic stop as an in road to an investigation of their travel as part of a surreptitious effort to detect possible drug trafficking when they could not have stopped the motorist for drug trafficking. *Rodriguez* prohibits that very thing.

And, in this particular case the officer was not investigating the lack of proof of insurance, and he was doing nothing to pursue issuance of a citation for it; in fact, he never did anything whatsoever about it. While it is true, he could have investigated and issued a citation for failure to have proof of insurance available, under *Rodriguez* the concern is with what actually occurred, not some hypothetical assessment of what an officer “could have” done. When the officer returned to the car after the initial records checks came back clean, he did not continue to detain them for the purpose of enforcement of the original mission of the stop, or for the lack of insurance proof; instead, he started a wholly suspicion less investigation of what the parties were doing, where they had been, where they were going, and so forth. There is no dispute but that the scope and extent of that questioning was beyond the scope of anything associated with a detention for an inoperable light or no insurance, that it consumed all the officer’s time, and that it extended the duration of the taillight stop.

Accordingly, the 8th Circuit’s opinion that because Kilgore was still investigating the proof of insurance violation, he could detour into other inquires is error. Kilgore was told that there was no proof of insurance that could be provided by the driver because he had lost his wallet and he choose to open another mission, starting a separate investigation into travel related and contraband questions.

The district court’s order granting suppression and excluding the evidence

seized as a result of the prolonged detention and violation of *Rodriguez* was correct. The 8th Circuit's opinion reversing the district court's suppression order which mischaracterized and misapplied the trial record in this case sets a dangerous precedent that should not be allowed to stand and, accordingly, this Court should reverse the 8th Circuit Court of Appeals and enter an order directing it to affirm the district court's order of suppression.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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