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

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 20-1398

United States of America

Plaintiff - Appellant

v.

David A. Callison

Defendant - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: January 15, 2021
Filed: July 2, 2021

Before LOKEN, GRASZ, and KOBES, Circuit Judges.

GRASZ, Circuit Judge.

The district court granted David A. Callison's motion to suppress drug-related evidence that the Des Moines police uncovered during a traffic stop. The government appeals that decision. We reverse.

I. Background

In the middle of the night, Officer Andrew Kilgore saw a car driving through a residential area with a broken license-plate light. He followed the car for several blocks and activated his emergency lights after the car pulled into a driveway. After boxing the car in, he briefly turned off his headlights to confirm that the license plate was not lit. It wasn't. And that violated Iowa law.[1]

Officer Kilgore then walked to the driver's side. Three people sat inside: (1) Timothy Rios was driving; (2) Kelly Shannon was the front passenger; and (3) Callison was in the backseat. Officer Kilgore mentioned the broken light and asked Rios for his license, registration, and insurance. He then asked Rios who owned the car and why Rios was stopped at this particular house. "Dropping off a friend," Rios responded. He gave Officer Kilgore his license but could not find proof of registration or insurance. Officer Kilgore returned to his cruiser to check the police records. As it turned out, Rios had a valid license, a properly registered car, and no outstanding warrants.

When Officer Kilgore returned to the car several minutes later, Rios still had not found proof of insurance. Officer Kilgore then shined his flashlight in the backseat and asked Rios a series of questions around five minutes into the encounter. He first asked Rios, "What's the address here? Tell me what's the address here, without looking?" Rios couldn't. Officer Kilgore next asked, "Then why did you stop here? Why are you sweating profusely?" Rios answered that they were "dropping off a friend." Officer Kilgore then asked, "What is the friend's name?" Simultaneously, Callison said, "Neil," while Shannon said, "Rob." After making further comments about Rios's perspiration, the temperature, and the unknown

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[1]Section 321.388 of the Iowa Code provides: "Either the rear lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty feet to the rear."

address, Officer Kilgore asked—around six minutes into the encounter—what was "illegal in the car or on [Rios] that [Kilgore] need[ed] to know about?"

Officer Kilgore called for backup. He continued the questioning and then ordered Rios out of the car. When asked again why he was sweating, Rios said, "Because I'm nervous, maybe."

When backup arrived, the officers ordered Shannon and Callison out of the car. Shannon dropped a cigarette pack as she got out. Officer Kilgore picked it up and found a substance inside that field tested as methamphetamine. He then searched the car and found a duffle bag inside that contained methamphetamine, digital scales with methamphetamine residue, two prescription-drug bottles, and a large amount of cash. The officers arrested Callison along with the other two, got a warrant for Callison's home after interviewing him, and then searched his home.

Callison moved to suppress the drug-related evidence from the vehicle, as well as his statements and other evidence later found at his home. He argued that Officer Kilgore unlawfully prolonged a routine traffic stop without reasonable suspicion and argued that the evidence against him should be excluded as fruit of the poisonous tree. The district court granted the motion, concluding that Officer Kilgore unlawfully extended the traffic stop when he began asking travel-related questions without reasonable suspicion. The government now appeals.

II. Analysis

The government first argues that Officer Kilgore did not extend the traffic stop until he asked Rios if there was anything illegal in the car roughly six minutes into the encounter. We agree.

In the motion-to-suppress context, we review a district court's legal conclusions de novo and its factual findings for clear error. *See United States v. Murillo-Salgado*, 854 F.3d 407, 414 (8th Cir. 2017). The Fourth Amendment makes

"unreasonable searches and seizures" unlawful. U.S. Const. amend IV. A traffic stop is a Fourth Amendment seizure and requires probable cause of a traffic violation. *See United States v. Washington*, 455 F.3d 824, 826 (8th Cir. 2006). "[A]ny traffic violation, regardless of its perceived severity, provides an officer with probable cause to stop the driver." *United States v. Jones*, 275 F.3d 673, 680 (8th Cir. 2001). Here, the district court concluded that Officer Kilgore had probable cause to initiate the traffic stop because he observed that Rios's license plate was unlit in violation of Iowa law. *See* Iowa Code § 321.388. The initial stop itself was therefore lawful.

But a lawfully-initiated traffic stop can become unlawful if it is unreasonably extended. "A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Rodriguez v. United States*, 575 U.S. 348, 350–51 (2015) (alterations in original) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). In *Caballes*, the Supreme Court held that using a drug dog to sniff around a car during a lawful traffic stop did not violate the Fourth Amendment when the stop *did not* last longer than needed to issue a warning ticket and conduct ordinary inquiries. 543 U.S. at 407, 410. A decade later, adhering to *Caballes*'s principle, *Rodriguez* expressly held "that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." 575 U.S. at 350 (rejecting reasoning then followed in this circuit that *de minimis* extensions to traffic stops are acceptable to allow for dog sniffs or other investigative measures).

Here, the district court held that Officer Kilgore unlawfully extended the traffic stop roughly five minutes into the encounter when he first began asking travel-related questions. But it is clear from the facts that Rios was still searching for proof of his insurance at that point. So, when Officer Kilgore asked his initial series of travel-related questions between five and six minutes into the encounter, he was still "handl[ing] the matter for which the stop was made"—here "issuing a ticket for the [unlit-license-plate] violation." *Id.* at 350–51. Just like in *Caballes*, where the

Supreme Court upheld a dog sniff that did not extend a traffic stop, 543 U.S. at 407, 410, here Officer Kilgore's initial questions between five and six minutes into the encounter did not extend the stop either.

We therefore conclude that the district court erred in holding that Officer Kilgore needed reasonable suspicion of another crime to extend the stop when he began asking travel-related questions five minutes into the encounter. Because Officer Kilgore was still "handl[ing] the matter for which the stop was made" at that point, *Rodriguez*, 575 U.S. at 350, his questions between five and six minutes into the encounter did not extend the stop.[2]

2. Reasonable Suspicion to Extend the Stop

The government next argues that by the time Officer Kilgore asked if there was anything illegal in the car (around six minutes into the encounter), he had the reasonable suspicion required to extend the stop. Again, we agree.

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[2]Because Rios was still searching for his insurance information (and had not indicated he did not have it) when Officer Kilgore asked his initial series of travel-related questions, the stop was not extended by the officer's questions. As a result, we do not reach the more difficult question of the extent to which officers may ask travel-related questions during a routine traffic stop after *Rodriguez*. 575 U.S. at 350–51, 354 (limiting the acceptable activities during a traffic stop to those "reasonably required to complete the mission of issuing a ticket for the violation" and "attending to related safety concerns" (cleaned up)). It is clear under *Rodriguez* that investigating general criminal wrongdoing is outside a routine traffic stop's purposes. *Id.* at 355. In some post-*Rodriguez* cases we have at least suggested that travel-related questions remain a "permissible" part of routine traffic stops in the Eighth Circuit. *See, e.g.*, *Murillo-Salgado*, 854 F.3d at 415; *United States v. Englehart*, 811 F.3d 1034, 1040 (8th Cir. 2016). This is not surprising. As the district court held below, after *Rodriguez* an officer may ask travel-related questions that are rationally related to the purposes of the traffic stop—issuing a traffic citation and ensuring roadway safety. Under the facts here, though, where there was no extension of the stop, we need not decide whether the questions asked by Officer Kilgore were permissible under the *Rodriguez* standard.

To extend a routine traffic stop, an officer needs reasonable suspicion of additional criminal activity. *See Rodriguez*, 575 U.S. at 355. Reasonable suspicion requires "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a brief investigative stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). This standard is "less demanding" than probable cause and much lower than preponderance of the evidence. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). In the traffic-stop context, actions that characterize "a very large category of presumably innocent travelers" will not meet the standard. *Reid v. Georgia*, 448 U.S. 438, 441 (1980).

We have held in the past that each of the following factors, in combination with others, can help support reasonable suspicion: (1) unusual driving behavior, *see United States v. Walker*, 555 F.3d 716, 720 (8th Cir. 2009); (2) attempts to evade officers, *see United States v. Noonan* , 745 F.3d 934, 936 (8th Cir. 2014); (3) indirect or incomplete answers to officer questions, *see Murillo-Salgado*, 854 F.3d at 416; (4) nervousness and lack of eye contact, *see United States v. Foley*, 206 F.3d 802, 804, 806 (8th Cir. 2000); and (5) "seeming implausibilities and inconsistencies in the responses to [an officer's] routine questions" about travel plans. *See United States v. Hogan*, 539 F.3d 916, 919, 921 (8th Cir. 2008).

Here, we conclude that the following facts, taken together, supported reasonable suspicion for Officer Kilgore to extend the stop around the six-minute mark: (1) the car pulled into a residential driveway after Officer Kilgore followed it for a brief time without activating his lights; (2) it was the middle of the night; (3) Rios was avoiding eye contact and behaving nervously during the encounter; (4) no one in the car knew the address or street where they stopped; and (5) the driver said they were dropping off a friend, but the two passengers gave different names for that friend.

We have concluded that reasonable suspicion was present in similar cases. *See Murillo-Salgado*, 854 F.3d at 416; *Walker*, 555 F.3d at 720; *Hogan*, 539 F.3d at 919, 921; *Foley*, 206 F.3d at 804, 806. In *Hogan*, for example, we held that

nervousness and inconsistent answers to questions were enough for reasonable suspicion. 539 F.3d at 919, 921. Similarly, in *Foley*, we held that officers had reasonable suspicion to extend a stop where the driver could not remember the name of his daughter-in-law, gave inconsistent answers about travel plans, was nervous, and did not make eye contact. 206 F.3d at 804, 806. Thus, we hold that by the time Officer Kilgore extended the stop, he had developed reasonable suspicion of another crime.

III. Conclusion

For these reasons, we vacate the district court's suppression order and remand for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1398

United States of America

Appellant

v.

David A. Callison

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:19-cr-00081-RP-3)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 30, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	*	
	*	4:19-cr-00081-3
Plaintiff,	*	
v.	*	
DAVID ALAN CALLISON,	*	ORDER
Defendant.	*	

Before the Court is Defendant David Alan Callison's Motion to Suppress, filed on January 14, 2020. ECF No. 202. The Government filed its resistance on January 21. ECF No. 220. The Court held a suppression hearing on January 23. *See* ECF No. 226. The matter is fully submitted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Des Moines Police Officer Kilgore spotted a broken license-plate light just before 1 a.m. on April 25, 2019. ECF No. 202-1 at 2. He entered the plate number in his squad car's computer. ECF No. 230 Ex. 1 at 0:26. He followed the car for a couple of blocks and noticed the plate went dim when the car turned beyond his headlights. ECF No. 230 Ex. 2 at 0:25–50. When the car entered a driveway, he activated his emergency lights and boxed-in the vehicle. *Id.* at 1:02. He also turned off his headlights, briefly, to confirm the license-plate light was unlit. *Id.* at 1:05. He examined police vehicle records further. ECF No. 230 Ex. 1 at 1:03.

Officer Kilgore then approached the car's driver, Timothy Rios. ECF No. 202-1 at 2. Defendant sat in the back seat and Kelly Nicole Shannon sat in the front passenger seat. *Id.* Officer Kilgore told Rios about the broken light—Rios professed ignorance—and asked for the

customary license, registration, and insurance. ECF No. 230 Ex. 1 at 1:50–58. Officer Kilgore then pivoted to other topics. He asked if Rios owned his car. *Id.* at 1:55. He asked what Rios was "doing here." *Id.* at 2:08. "Dropping off a friend," Rios said. *Id.* at 2:10. Rios provided his driver's license but could not find proof of registration or insurance. *Id.* at 2:40–53. Officer Kilgore returned to his car to view records that, as he later testified, showed Rios had a valid license, valid registration, and no outstanding warrants.

When Officer Kilgore returned, Rios still had not found proof of insurance. *Id.* at 4:45. Regardless, Rios gave Officer Kilgore, as he put it later, the "heebie-jeebies." *Id.* at 10:59. So, he examined the car's backseat with his flashlight and then began to ask Rios, Shannon, and Defendant a series of questions. *Id.* at 4:53.

"What's the address here? Tell me what's the address here, without looking," Officer Kilgore said. *Id.* at 5:00. Rios said he could not do this. *Id.* at 5:02. Officer Kilgore responded: "Then why did you stop here? Why are you sweating profusely?"[1] *Id.* at 5:05. "I'm dropping off a friend," Rios said as he calmly nodded his head. *Id.* at 5:10. Officer Kilgore asked for the friend's name. *Id.* at 5:18. Defendant said, "Neil." *Id.* at 5:22. Shannon said, "Rob." *Id.* 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?" *Id.* at 6:04. Officer Kilgore asked for backup and for permission to search the car. *Id.* at 6:16–45. The questioning continued, leading Shannon to note that this seemed a bit extensive for a license-plate light. *Id.* at 7:20. Officer Kilgore then ordered Rios out of the car

[1] To the extent Rios was sweating at this point, such sweat was not visible in Officer Kilgore's body-camera footage. ECF No. 230 Ex. 1 at 5:03.

and continued to ask him why he was sweating. *Id.* at 8:30, 10:02. "Because I'm nervous, maybe," Rios said.[2] *Id.* at 9:55. More and more officers continued to arrive. *Id.* at 10:00, 14:00. Officer Kilgore ordered the two passengers out, too. ECF No. 225 at 1.

After Shannon exited the vehicle, Officer Kilgore said he saw her drop a cigarette pack on the ground. *Id.* at 1–2. Inside, he found a small bag containing a substance that field-tested positive for methamphetamine. *Id.* at 2. He then searched the vehicle and found a red duffle bag in the back seat. *Id.* 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. *Id.*

Police took Defendant into custody. *Id.* Another officer then included many of the facts described above into a search warrant application for Defendant's home. *Id.* at 1–2. A magistrate judge approved that warrant, although it is unclear what evidence police found during the search.

Defendant now seeks suppression of (1) any incriminating evidence found inside Rios's vehicle; (2) any incriminating evidence found in his home; and (3) any incriminating statements he made to police. ECF No. 202-1 at 4.

II. ANALYSIS

A. *Initiation of Stop*

The Constitution's Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

[2] Rios's sweat, at this point, appeared to be visible on his shirt collar. *Id.* at 10:31.

be violated." U.S. Const. amend. IV. A traffic stop is a Fourth Amendment seizure. *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001).

That seizure is a reasonable one "if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred." *United States v. Washington*, 455 F.3d 824, 826 (8th Cir. 2006). "[*A*]*ny* traffic violation, regardless of its perceived severity, provides an officer with probable cause to stop the driver." *United States v. Jones*, 275 F.3d 673, 680 (8th Cir. 2001), *as corrected* (July 25, 2001). The actual motivations of the officer matter not. *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1109 (8th Cir. 2007) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)). Like a car's driver, a "passenger is seized as well and so may challenge the constitutionality of the stop." *Brendlin v. California*, 551 U.S. 249, 251 (2007).

On any passenger vehicle, Iowa law requires that:

> Either the rear lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty feet to the rear. When the rear registration plate is illuminated by an electric lamp other than the required rear lamp, the two lamps shall be turned on or off only by the same control switch at all times when headlamps are lighted.

Iowa Code § 321.388.

There are at least two ways to violate § 321.388. *State v. Lyon*, 862 N.W.2d 391, 398 (Iowa 2015). First, the motorist's license plate may be illuminated, but not clearly legible at fifty feet. *Id.* Alternatively, the vehicle's license plate may be legible but nonetheless lack the requisite working lamp. *Id.* This case involves the latter violation.

Here, Officer Kilgore reasonably initiated the traffic stop because he had at least "an articulable and reasonable suspicion that a traffic violation ha[d] occurred." *Washington*, 455 F.3d at 826. As Officer Kilgore tailed Rios, the officer's headlights made his license plate

clearly legible. However, as the Government demonstrated at the suppression hearing, dashboard camera footage shows the plate appeared dim when Rios turned beyond the scope of police headlights. Officer Kilgore also testified—and the dashboard footage confirms—that he briefly turned his own headlights off to confirm Rios lacked a working license plate lamp.

To be sure, Defendant offered three witnesses to show this cannot be so. First, Rios testified that he checked the light the day after the stop and saw that it worked.[3] Second, Rios's sister testified that she took possession of her brother's car in August 2019, when police arrested her brother. She also testified that no one used the car until Jonathan Stewart, Defendant's private investigator, examined the car in January 2020. Finally, Stewart, a former U.S. Marshal, testified that the license-plate lamp worked when he examined the car. Even so, taking the credibility of all witnesses into account, the Court is not willing to look past the dashboard camera footage showing an unlit license plate. For these reasons, the Court concludes Officer Kilgore's initiation of the stop complied with the Fourth Amendment.

B. *Extension of Stop*

Yet a traffic stop initiated lawfully can become unlawful. As with any seizure, the Fourth Amendment preordains no quantified time limits. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985). Rather, circumstances dictate a given traffic stop's permissible length. *See id.* "A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for

[3] On the other hand, Rios acknowledged on cross-examination that his taillights sustained damage in December 2018 and that he repaired them himself.

the violation."[4] *Rodriguez v. United States*, 575 U.S. 348, 350–51 (2015) (alterations in original) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

1. *Rodriguez v. United States*

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 Eighth 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 Eighth 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 atten[tion] to *related* safety concerns." *Id.* (emphasis added). By contrast, "on-scene

[4] A passenger may challenge fruits of a vehicle search when that search was the product of a prolonged detention. *See United States v. Peralez*, 526 F.3d 1115, 1117, 1121 (8th Cir. 2008).

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 parred 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).

Second, and alternatively, "a police officer may conduct checks unrelated to a traffic stop . . . in a manner that prolongs the stop," so long as she establishes "the reasonable suspicion ordinarily demanded to justify detaining an individual." *United States. v. Walker*, 840 F.3d 477, 483 (8th Cir. 2016) (quoting *Rodriguez*, 575 U.S. at 355.). Otherwise, if the extracurricular

investigation "'prolongs'—*i.e.*, adds time to—'the stop,'" suppression is warranted. *Rodriguez*, 575 U.S. at 357. The Court did not say "adds material time" or "adds unreasonable time" or "adds less-than-a-minute of time." It said adds time.[5]

Numerous appellate courts thus have read *Rodriguez* to proscribe any extension of a traffic stop beyond its bare necessities without a reasonable suspicion.[6] *United States v. Glenn*, 931 F.3d 424, 429 (5th Cir. 2019) ("[A]n officer has the time needed to issue a traffic citation, examine the driver's license, insurance, and registration, and ascertain if there are outstanding warrants."); *United States v. Landeros*, 913 F.3d 862, 867 (9th Cir. 2019) (holding that *Rodriguez* effectively overruled circuit precedent that permitted "slight" delays for off-mission questioning) (quoting *United States v. Cornejo*, 196 F. Supp. 3d 1137, 1151 (E.D. Cal. 2016)); *United States v. Clark*, 902 F.3d 404, 411 (3d Cir. 2018) (holding that authority for the stop ended once the officer completed a "computerized check confirm[ing the motorist's] authority to drive the vehicle"); *United States v. Rodriguez-Escalera*, 884 F.3d 661, 668 (7th Cir. 2018) (stating *Rodriguez* stands for the proposition that a "prolonged detention of [a] vehicle, even if . . . slight, [i]s unlawful" without a reasonable suspicion). Or as the Eleventh Circuit succinctly put

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[5] "[F]ederal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement." *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (second and third alterations in original) (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992)).

[6] The Eighth Circuit has declined to resolve the "extent that *Rodriguez* may be read to impose limitations greater than those reflected in [its] cases." *United States v. Murillo-Salgado*, 854 F.3d 407, 416 (8th Cir. 2017); *see also United States v. Mosley*, 878 F.3d 246, 254 (8th Cir. 2017) (suggesting that *Rodriguez* did not apply when "the mission of the stop was not to investigate a traffic violation . . . but rather to determine whether and to what extent the [car] was involved in the bank robbery"); *United States v. Ahumada*, 858 F.3d 1138, 1140 (8th Cir. 2017) (holding that the good-faith exception, and not *Rodriguez* applied); *United States v. Woods*, 829 F.3d 675, 680 (8th Cir. 2016) (holding that police had the required reasonable suspicion to extend the stop); *United States v. Englehart*, 811 F.3d 1034, 1040 n.1 (8th Cir. 2016) (holding that the good-faith exception, and not *Rodriguez*, applied).

it, "to unlawfully prolong, the officer must (1) conduct an unrelated inquiry aimed at investigating other crimes (2) that adds time to the stop (3) without reasonable suspicion." *United States v. Campbell*, 912 F.3d 1340, 1353 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 196 (2019), *and reh'g denied*, No. 18-9631, 2019 WL 6689916 (Dec. 9, 2019). In *Campbell*, the panel unanimously agreed police violated the Fourth Amendment when they extended a stop by *twenty-five seconds* with questions about contraband.[7] *Id.* at 1355. In sum, courts generally agree *Rodriguez* further restricted an officer's ability to investigate other crimes during a routine traffic stop.

2. Travel-Plan Questions

More specifically, several courts and commentators agree that *Rodriguez* calls into question a long-used police technique: (1) stop a motorist for a minor infraction; (2) ask detailed travel-plan questions; and (3) find grounds for a broader investigation after the motorist gives suspicious answers to those questions.[8] *United States v. Cone*, 868 F.3d 1150, 1154 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 707 (2018); *Cornejo*, 196 F. Supp. 3d at 1152; *State v. Jimenez*, 420 P.3d 464, 474 (Kan. 2018); 4 Wayne R. LaFave, *Search and Seizure* § 9.3(d) (5th ed. 2019 update). After all, such questions certainly "add[] time," however slight, to the stop. *Rodriguez*, 575 U.S. at 357. They also are not inherently part of writing a ticket or checking a license, insurance, registration, and outstanding warrants.[9]

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[7] The *Campbell* majority held suppression was inappropriate under the good-faith exception. 912 F.3d at 1356.

[8] *E.g.*, Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651, 685 (2002).

[9] Indeed, such travel-plan questions appeared to be involved in the traffic stop at issue in *Rodriguez*, yet the Supreme Court did not include them in the list of sanctioned inquiries related to a stop's mission. *Compare* 575 U.S. at 351, *with id.* at 355; *see also* LaFave, *supra*, § 9.3(d).

Furthermore, travel-plan questions often lack a rational relationship to the *Rodriguez* decision's lodestar: does the additional inquiry further the stop's mission of investigating the observed traffic inquiry? Such a relationship is "much harder to justify when the stop is 'for a . . . burned-out license plate light'" and the questions are about where a motorist has stopped or been.[10] *Jimenez*, 420 P.3d at 476 (quoting LaFave, *supra*, § 9.3(d)).

For instance, in *Cone*, police tailed an Oklahoma man for driving without a functioning license-plate light. 868 F.3d at 1151. Police then stopped the defendant when he pulled into "a motel parking lot, near another motel well known for criminal activity." *Id.* The officer "asked a question along the lines of 'What are you doing here?' or 'Who are you visiting here?'" *Id.* at 1152. The defendant argued that this constituted an unlawful prolonging of the stop. *Id.* at 1154. The Tenth Circuit agreed this "contention is hardly frivolous."[11] *Id.* This was so because "the

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[10] To be sure, before *Rodriguez*, the Eighth Circuit assumed questions about "destination, route, and purpose" were constitutional because they were "routine" and "related" to traffic. *Murillo-Salgado*, 854 F.3d at 415 (quoting *Peralez*, 526 F.3d at 1119). But because the *Murillo-Salgado* panel declined to analyze the *Rodriguez* decision's impact on circuit precedent, *see supra* note 6, it is not clear if the court concluded such questions remain constitutional as a matter of course. In fact, the panel held that even if police had impermissibly prolonged the stop—presumably with off-mission questioning—suppression was inappropriate because the stop occurred before *Rodriguez*, and "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 854 F.3d at 416 (quoting *Davis v. United States*, 564 U.S. 229, 232 (2011)).

Regardless, circuit precedent loses its binding force when "an intervening expression of the Supreme Court is inconsistent with those previous opinions." *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). Other circuits have made similar conclusions. *E.g.*, *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that in cases of "clear irreconcilability [between circuit and Supreme Court precedents], a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled"). For reasons discussed above, the Court finds such irreconcilability here.

[11] The panel nevertheless concluded suppression was unwarranted because the defendant did not show a "factual nexus between the travel-plan question and the discovery of drugs within his vehicle." *Cone*, 868 F.3d at 1155. Rather, police searched the car after observing a gun in plain view. *Id.*

Defendant's reason for being at the hotel was not related to the [broken tag light] or vehicular travel." *Id.* (alteration in original) (quoting appellant's brief) (citing LaFave, *supra*, § 9.3(d)); *but see Campbell*, 912 F.3d at 1354 (holding that the officer's travel-plan questions were related to a malfunctioning turn signal because whether the defendant planned to travel for a long distance with that turn signal could impact roadway safety). In sum, *Rodriguez* may well allow police to quiz motorists about why they have exercised their right to travel.[12] But such quizzing must have either a rational relationship to that traffic stop's mission or must begin *after* the police already have developed a reasonable suspicion to justify further detention.

Here, Officer Kilgore's travel-plan and contraband questions went beyond the stop's mission because they lacked a rational relationship to roadway safety or the observed violation: a malfunctioning license-plate light on a parked vehicle. After Officer Kilgore completed the roadside checks that *Rodriguez* permits, he peppered Rios, Defendant, and Shannon 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 or 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.* at 6:42.
- "What illegal, what, is there anything illegal in the car?" *Id.* at 8:50.

[12] *See United States v. Guest*, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union.").

First, Officer Kilgore's questions about contraband were not about traffic or officer safety but instead "about 'crime in general [and] drug trafficking in particular.'" *Campbell*, 912 F.3d at 1355 (alteration in original) (quoting *Rodriguez*, 575 U.S. at 357); *see also Landeros*, 913 F.3d at 866–67. At the suppression hearing, Officer Kilgore made the remarkable admission that he asks most motorists he stops if they have anything illegal in the car even when he lacks "any reason" to suspect them. As courts increasingly agree, such questions do not relate to traffic safety.

And second, as in *Cone*, Officer Kilgore's questions about the address of the nearby house also were "not related to the [broken tag light] or vehicular travel." 868 F.3d at 1154. And unlike the malfunctioning turn signal in *Campbell*, there is no nexus here between knowledge of the address and future roadway safety. *See* 912 F.3d at 1354.[13] The Court finds Officer Kilgore's questions went beyond the stop's mission. And because Officer Kilgore detoured from his traffic-safety mission to ask these travel-plan and contraband questions, they added time to the stop. They thus violated *Rodriguez* unless Officer Kilgore had a reasonable suspicion to further detain the vehicle and its passengers.

3. Reasonable Suspicion

An officer needs the reasonable suspicion based on articulable facts required for a stop under *Terry v. Ohio*, 392 U.S. 1 (1968), to prolong a routine traffic stop. *Rodriguez*, 575 U.S. at 354–55. "[A] mere hunch" or a suspicion "based on circumstances which 'describe a very large category of presumably innocent travelers'" does not suffice. *Jones*, 269 F.3d at 927 (quoting *Reid v. Georgia*, 448 U.S. 438, 441 (1980)). Although the officer need not cite the exact

[13] The Government argues that Eighth Circuit precedent permits travel-plan questions as a matter of course. ECF No. 220 at 6 (citing *Jones*, 269 F.3d at 924); *id.* at 8–9 (citing *Murillo-Salgado*, 854 F.3d at 415). But, as discussed *supra* note 10, the Court is unable to reconcile permitting such questions with *Rodriguez*.

provision of the criminal code she fears has been violated, the fact an officer does not suspect someone of a specific crime cuts against her suspicion's reasonableness. *See, e.g.*, *United States v. See*, 574 F.3d 309, 314 (6th Cir. 2009) (noting that the officer "did not suspect the men of a specific crime"); *Johnson v. Campbell*, 332 F.3d 199, 210 (3d Cir. 2003) (same); *United States v. McKenzie*, 18-CR-1043-CJW-MAR, 2019 WL 503105, at *2 (N.D. Iowa Feb. 7, 2019) (quoting *United States v. Fields*, 832 F.3d 831, 834 (8th Cir. 2016)) (rejecting the argument that an officer need only have a "reasonable suspicion 'that criminal activity was afoot, not that the subject of the stop was actively engaged in a crime'").

The Court can find no case in which the Eighth Circuit allowed police to rest a reasonable suspicion solely on a driver's nervousness. There is a good reason for this: As Office Kilgore testified at the suppression hearing, many individuals are nervous during a roadside stop. And "when the officer's actions are such that any driver, whether innocent or guilty, would be preoccupied with his presence, then any inference that might be drawn from the driver's behavior is destroyed." *Jones*, 269 F.3d at 927 (quoting *United States v. Jones*, 149 F.3d 364, 370 (5th Cir.1998)).

Therefore, "[w]hen an officer can cite only one or two facts, including a generic claim of nervousness, as supporting his determination of reasonable suspicion, then [a court] may conclude that his suspicion was not reasonable." *Id.* at 929 (citing *United States v. Bloomfield*, 40 F.3d 910, 918 n.9 (8th Cir. 1994)). To be sure, "nervousness combined with *several* other more revealing facts can generate reasonable suspicion." *Id.* at 928 (emphasis added) (citing *United States v. Foley*, 206 F.3d 802, 804 (8th Cir. 2000)). And indeed, "extreme and unusually nervous behavior observed in conjunction with only one or two other facts can" suffice, too. *Id.* (citing *United States v. Lebrun*, 261 F.3d 731, 733 (8th Cir. 2001)).

For example, in *Lebrun*, the officer prolonged a traffic stop to conduct a drug dog sniff after noticing that (1) the driver "was sweating profusely even though the temperature was cold"; (2) the defendant "fidgeted and kept moving around in her seat"; (3) "the other passenger would not make eye contact with the officer and her hands trembled excessively"; and (4) "there were drink containers, food wrappers, a cellular telephone, a road atlas, pillows, and blankets in [the] vehicle," suggesting the occupants "were traveling without making any stops, a common practice . . . among drug traffickers." 261 F.3d at 733. So, while the *Lebrun* majority highlighted that the passengers were "exceptionally nervous," rather than just "nervous," it also noted the officer could articulate several other facts to support his reasonable suspicion that the defendant was drug trafficking.[14] *Id.* at 734. In sum, because the Government "repeatedly relies on nervousness as a basis for reasonable suspicion, 'it must be treated with caution.'" *Jones*, 269 F.3d at 929 (quoting *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994)).

Here, Officer Kilgore lacked such a reasonable suspicion because he could only cite Rios's nervousness before detouring from the stop's mission. As discussed above, Officer Kilgore needed to have a reasonable suspicion, based on articulable facts, to begin asking Rios and Defendant about the address, the reason for their stop, and "what's illegal in the car or on you that I need to know about?" But at the suppression hearing, when the Government asked Officer Kilgore what prompted the change in investigative focus, he responded that Rios "was exhibiting nervous behavior" by "sweating profusely."[15] During Officer Kilgore's lengthy

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[14] The *Lebrun* court did not explain the dividing line between the various degrees of nervousness. *Lebrun*, 261 F.3d at 735 (Tunheim, J., dissenting) ("It also seems beyond dispute that individuals manifest . . . nervousness in different ways.").

[15] "Sweating profusely" is the turn-of-phrase used by the Eighth Circuit in *Lebrun*, too. 261 F.3d at 733.

testimony, he did not point to any other articulable facts or cite what crime he suspected Rios was committing.[16]

This is insufficient. First, as a factual matter, and weighing all the evidence, the Court finds Rios was not sweating profusely when Officer Kilgore began asking the off-mission questions. At this point, Rios was not visibly sweating in the body camera footage. ECF No. 230 Ex. 1 at 5:03; *see also Rodriguez-Escalera*, 884 F.3d at 669 (noting that "the video of the traffic stop [is] the most reliable evidence of the detainees' demeanor"). If Rios was indeed sweating profusely, one would expect at least some visible indicia. This is especially so because such indicia are visible *later* in the stop, following Officer Kilgore's repeated, confrontational, and off-mission questions about the address and contraband. ECF No. 230 Ex. 1 at 10:28. In other words, Officer Kilgore's body camera could observe sweat. The Court also finds that Rios was calm, at this juncture, given the circumstances. He appeared affable when he gave Officer Kilgore an outdated insurance card, spoke calmly, and did not appear to make any furtive movements. To be sure, Officer Kilgore said that Rios gave him the "heebie-jeebies." ECF No. 230 Ex. 1 at 10:59. But this observation more closely resembles an impermissible "hunch[]" rather than the required "articulable fact[]." *Terry*, 392 U.S. at 21–22.

Second, and as a legal matter, whether Rios was merely "nervous" or "unusually nervous," is a moot question. *Jones*, 269 F.3d at 928. This is so because even if Rios fell into the latter category, Officer Kilgore still had to point to at least "one or two other facts" to lawfully extend the stop. *Id.* Neither Officer Kilgore nor the Government have done so, and

[16] Later in the suppression hearing, Officer Kilgore also pointed to Rios's and his passengers' suspicious answers to various travel-plan questions. But even if the Court found these answers suspicious, they offer the Government no help. A reasonable suspicion cannot be based on a given answer unless Officer Kilgore could constitutionally ask the question.

based on this record, the Court does not see how they could. For these reasons, the Court finds Officer Kilgore did not have a reasonable suspicion to extend the traffic stop beyond its mission—investigating a broken license-plate light—and quiz Rios, Defendant, and Shannon about their travel plans and contraband.

Thus, the Court concludes police subjected Defendant to an unreasonably prolonged seizure that directly led to police finding drugs, cash, and other contraband in Defendant's red duffle bag. Such contraband and any incriminating statements Defendant made are "fruit of the poisonous tree" and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Furthermore, the Court must suppress any evidence police later found in Defendant's home. This is so because police predicated the warrant application for that search entirely upon the fruits of the unlawful seizure. *See* ECF No. 225. Therefore, any evidence taken from Defendant's home "has been come at by exploitation of that illegality." *Wong Sun*, 371 U.S. at 488. This Order does not affect the admissibility of any other evidence the Government may have against Defendant.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress (ECF No. 202) is GRANTED.

IT IS SO ORDERED.

Dated this 29th day of January 2020.

Robert W. Pratt

ROBERT W. PRATT, Judge
U.S. DISTRICT COURT

having a heart attack without knowing it?
A. Yes, sir.
Q. And you acknowledged that that was -- that could be a legitimate excuse for somebody sweating more than what you thought they should be sweating, correct?
A. Yes, sir.
Q. When you ordered -- well, you asked Mr. Rios to step out of the car, did you not, the driver?
A. Yes, sir.
Q. He's the first person you asked to get out of the car, right?
A. Yes, sir.
Q. And he didn't immediately respond, right?
A. No, sir.
Q. And you asked him to get out again, right?
A. Yes, sir.
Q. And then he said, "Is that an order?"
A. Yes, sir.
Q. And then you said, "Yes"?
A. Yes.
Q. So up to that point in time that you ordered him out of the vehicle, you had in your knowledge the fact that you had stopped him for a traffic violation, determined that he had a valid DL and a valid registration and he had not yet produced any insurance, but he told you that he didn't have it because he

lost his wallet, correct?
A. Correct, sir.
Q. So at that point in time when you ordered him out of the vehicle, that's all you knew, correct; that and he was sweating more than you thought he should have been sweating, right?
A. He was sweating and exhibiting nervous behavior, yes, sir.
Q. And he didn't know the address that he was at because you asked him, What address are you at, don't look; you did that twice, right?
A. I believe so.
Q. I mean, you asked him what address he was at and not to look, and you made that request two separate times, correct?
A. I believe I asked him once and the rear passenger once.
Q. I think the rear passenger said that -- as I remember it, that he didn't know the street address but he knows the house and he knows how to get there, right?
A. Something to that effect, yes, sir.
Q. Okay. And that was before you ordered the driver out of the car, right?
A. Yes.
Q. And the female passenger's comments about her ex-husband having a heart attack, that occurred before you ordered the driver out of the car, too, right?
A. Yes, sir.
Q. All right. I see that on the video it shows that a couple