No. 21-6628

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK PHILLIP McNABB - PETITIONER

vs.

THE STATE OF TEXAS - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Court of Appeals for the Seventh District of Texas

PETITION FOR WRIT OF CERTIORARI

FRANK PHILLIP McNABB #2260975
JOHN M. WYNNE UNIT
810 FM. 2821
Huntsville, Texas, 77349

QUESTIONS PRESENTED

1. During a traffic stop, CONSENT TO SEARCH is the exception to the 4th Amendment Warrant Rule; Is it also retroactive forgivenss for any and all violations made by police prior to consent?

2. Such as extending a stops detention beyond it's legal conclusion?

3. To conduct a fishing expedition for unrelated criminal activity?

4. While admitting to having no suspicion whatsoever, fitting the precise definition of "Official Coercion" ?

5. Does "Official Coercion" taint consent?

LIST OF PARTIES

PETITIONER

FRANK PHILLIP McNABB
2260975
JOHN M. WYNNE UNIT
810 FM 2821
Huntsville, Texas 77349

RESPONDENTS

BOBBY LUMPKIN Director
TEXAS DEPT. of CRIMINAL JUSTICE
INSTITUTIONAL DIVISION, P.O. [illegible]
BOX 99, Huntsville, Texas 77342

STATE OF TEXAS
DON SCHNELBLY, District Attorney
117 Fort Worth, Hwy.
Weatherford, Texas, 76086

COURT OF APPEALS FOR THE SEVENTH
DISTRICT OF TEXAS
P.O. BOX 9540
Amarillo, Texas, 79105-9540

RELATED CASES

State of Texas v. Frank Phillip McNabb, Cause No.CR18-0455
Motion to Suppress Evidence **DENIED** September 13, 2018.

Frank Phillip McNabb v. State of Texas, Cause No.07-19-00225-CR
AFFIRMED August 12, 2020.

Petitioner filed an application for a WRIT OF HABEAS CORPUS, [illegible]
March 2, 2021 for **OUT OF TIME** Petition for Discretionary Review.
The 415th District Court of Parker County, Texas **CONCEDED** and
on April 14, 2020 The Texas Court of Criminal Appeals **GRANTED**
petitioner's Leave To File. No.WR-40.402-02.

June 16, 2021. Texas Court of Criminal Appeals **REFUSED** review.
PD-0334-21.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Oral argument is requested.

CONSTITUTION AND STATUTORY PROVISIONS

U.S. CONSTITUTION

FOURTH AMENDMENT:

> 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 person or things to be seized.

TEXAS CONSTITUTION

ARTICLE I., § 9:

> The people shall be secure in their persons, houses, papers, and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation.

STATUTORY

TEXAS CODE OF CRIMINAL PROCEDURE

Article 38.23:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any criminal case where the legal evidence raises an issue hereunder ... that the evidence was obtained in violation of the provisions of this article, the jury will disregard any such evidence obtained.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FRANK PHILLIP MCNABB,	§
Petitioner,	§
VS.	§
STATE OF TEXAS,	§
Respondent£s·.	§

WRIT OF CERTIORARI

COMES NOW, Frank Phillip McNabb, Petitioner Pro-se, in the above numbered-styled cause and presents this his Writ of Certiorari to the United States Supreme Court in a challenge to his Constitutional Rights to be free from unreasonable search & seizures, Petitioner would show this Honorable Supreme Court of The United States of America the following in support:

JURISDICTION

The Seventh Court of Appeals of Texas at Amarillo confirmed my case August 12, 2020. A Petition for Discretionary Review, presented to The Texas Court of Criminal Appeals of Texas at Austin was Denied , June 16, 2021. This Writ of Certiorari to the Supreme Court of The United States has jurisdiction pursuant to U.S.C. § 1257.

This Petition was timely filed.

STATEMENT OF THE CASE

Petitioner was indicted for possession of a controlled substance with the intent to deliver, namely methamphetamine, of more than four grams but less than two hundred grams. (C.R. 14).

Petitioner and a passenger had been pulled over in petitioner's vehicle, for not having a front license plate. The investigating officer Deupty Vaughn, ran the driver's license plate, and insurance check. Vaughn then gave petitioner a verbal warning, but before petitioner could leave, Vaughn told him, "One thing I want to talk to you about before I let you go." After which Vaughn asked for consent to search petitioner's vehicle.

Upon a search, Vaughn located roughly 54 grams of methamphetamine in petitioner's vehicle.

Petitioner filed and had a hearing on a pre-trial motion to suppress the methamphetamine based upon the Fourth Amendment of the U.S. Constiution and Article I § 9 of the Texas Constitution. Petitioner asked that the trial court suppress all evidence discovered as a result of that illegal search pursuant to the Texas Code of Criminal Procedure Article 38.23 (C.R. 26). The trial court denied petitioner's motion to suppress (RR11:26).

Petitioner than proceeded to trial, where a jury found him guilty of the charges in the indictment and sentenced him to 65 years incarceration pursuant to the enhanced indictment. (C.R. 107). On appeal the Seventh Court of Appeals affirmed the conviction.

A Petitioner for Discretionary Review to the Texas Court of Criminal Appeals followed and was refused on June 16, 2021.

REASONS FOR GRANTING PETITION

PLEASE NOTE. The trial court records of this September 13, 2018, Motion to Suppress hearing is submitted herein (see Appendix A). Petitioner regrets and apologizes to this Court for not being able to re-produce the opinions of the 7th court of appeals, absorbed by the Court of Criminal Appeals of Texas in time and copy-making issues related to moving through the courts while incarcerated.

Petitioner's single reference to that opinion demonstrates the trial court's abuse of discretion of the constitutional magnitude deciding federal cases far departed from the accepted and usual course of judicial proceedings and how the 7th court of appeals likewise abused its discretion and has sanctioned such a departure as to call for an exercise of this Court's supervisory power. (see pg. 8 At 8), Id. Appendix C.

During the Motion to Suppress hearing Deputy Vaughn admitted that by the time he asked for and obtained consent to search the truck, the purpose of the stop had been effectuated. He also admitted he had no reasonable suspicion that any crime was being committed and readily acknowledged his request for consent was a fishing expedition, but immediately after giving petitioner a verbal warning regarding the traffic violation, Deputy Vaughn told pettioner he wanted to talk to him about something. [1]. Here petitioner notes that 5 key words are ommitted. "Before I let you go", he then went on with a contrived spiel about crime in the area he admits for the sole purpose of obtaining consent to search.

---

1. This complete statement is in record of Motion To Suppress. (RR2:14, 25 - attached herein).

Petitioner will rely on Suppression Hearing record for remainder of this petition.

(RR2:14 @ 25)

Q."Now you did say one thing I want to talk to you about before I let you go. Alright now was that in your mind a continuation of the stop or just you having a conversation with him?"

A. "Just having a conversation."

Petitioner states that here the prosecutor is leading and feeding Vaughn the answer in a script not considering that it's after mid-night on the side of a busy highway, where reasonable people do not go for a casual conversation.

NOTE: Officer Vaughn states that he said: "One Thing Before I Let You Go."

Petitioner would like to advise the Court that the definition of the word **let** is in common language. The Webster's New World Dictionary, Fourth Edition, pg. 184 defines "let" 1. allow, permit. and/or The Oxford American Thesaurus, Oxford American Press, Third Edtition, 2016, pg. 522. Let. verb, allow to, permit to, give permission to, authorize to...at such a definition it would appear that a reasonable person would construe that they were not allowed, permitted, authorized, to leave until something specific happened. Petitioner believed and still believes that that specific thing was allowing Deputy Vaughn to search his vehicle...

Does this Court's standard hold for whats in the minds of police making such statements, or but for how its received by a reasonable person.

In Florida v. Bostick, this Court held:

> "A court must consider all of the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter.

Florida v. Bostick, 111 S,Ct. @ 2386.

During the reasonable person test the officer's conduct is the primary focus, but time, place, and attendent circumstances matter as well. A court must step into the shoes of the defendant and determine from a common objective perspective, whether the defendant would have felt free to leave. Id.

Petitioner maintains that this test was not done, as "Before I let you go" isn't an open ended statement with a multitude of variables. This stop was extended beyond its legal conclusion by that statement. See Terry v. Ohio, 392 U.S. 1 (1968). Terry dictates a two-prong analysis to determine reasonableness: First, whether the officer's action was justified at its inception; and second, whether it was reasonably related in scope to the circumstances that justified the interference in the first place. Id.

It's the second prong of Terry that was violated in the instant case. The scope of an investigative detention is limited by the second prong of Terry, both as to duration of the detention, and as to the manner in which the investigation is carried out.

An investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. see Florida v. Royer, 103 S.Ct. 1319, 1325-26 (1983); also see United States v. Hensley, 105 S.Ct. 675, 683 (1985)(Examining under Terry both the length and intrusiveness of the stop and detention. A detention that is not temporary nor reasonably

related in scope to the circumstances that justified the stop is unreasonable and thus violative of the Fourth Amendment.

In the instant case, Davis v. State, 947 S.W.2d 240, 242 (Tex.Crim.App. 1997), Petitioner contends that he was pulled over for a missing front license plate, not the fishing expedition Deputy Vaughn claims to have turned it into.

To be reasonably related in scope the investigation must be limited by the justification for the stop. United States v. Sharp, 105 S.Ct. 1575 (1985). This Court rejected any rigid time limit on duration of a valid Terry stop. Sharp, 105 S.Ct. @ 1585. To determine whether the duration is reasonable "we look to the scope of the stop ..." United States v. Machuca-Barrera, 261 F.3d 425, 432 (5th Cir. 2001); Haas v. State, 172 S.W.3d 42, 50 (Tex.App. -Waco, pet.ref'd)(citing United States v Kelly, 981 F.2d 1464, 1470 (5th Cir. 1993)(noting under appropriate circumstances, extensive questioning about matters wholly unrelated to routine traffic stop violate Fourth Amendment).

A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Illinois v. Caballes, 125 S.Ct. 843, 847 (2005).

This account of deception is admittedly contrived by Deputy Vaughn for the sole purpose of consent to search.

Petitioner claims flagrant police misconduct, void of reason nor born of suspicion, in bad faith. Vaughn is sitting in his car talking to another deputy.

(RR2:18)

Q. And you said you were going to use the whole burglary theft, #2

to see if you could get consent?[2]

A. Yes.

Q. So at that time you had no suspicion whatsoever?

A. No.

Petitioner shows Vaughn never claims to have developed suspicion, and acknowledges such.

(RR2:20)

Q. And you had no -- you previously stated you had no reasonable suspicion of any other crime that was being committed; correct?

A. Correct.

Q. So the request for consent was purely a fishing expedition, wasn't it?

A. Yes.

The 5th Circuit held in United States v. Machuca-Barrera, 261 F.3d 425, 432 (5th Cir. 2005)(once a reason for a stop has been satisfied, detained individuals must be free to leave) The stop may not be used as a fishing expedition for unrelated criminal activity.

Again, petitioner did not feel free to leave when Vaughn stated: "Before I let you go."

The Texas Court of Criminal Appeals ruled in Davis v. State, 947 S.W.2d 240 (Tex.Crim.App. 2007). A detention may not be prolonged in hopes of finding evidence of some other crime.

This Court ruled in Rodriguez v. United States, 135 S.Ct. 1609 (2015). A seizure justified only by an officer observed traffic violation runs afoul of the Fourth Amenment when it is prolonged beyond the time reasonably required to complete the mission of issuing a citation for the original infraction.

2. The word spiel is omitted here, but was clearly heard in courtroom on dashcam evidence.

By this point in the hearing Vaughn's admitted to, prolonging the stops detention without suspicion for an illegal fishing expedition, and contriving a spiel in which to coerce consent. The defense reiterates on (RR2:25, 5). "Essentially, the officer had no reasonable suspicion to prolong the detention of Mr. McNabb." This to show that the detention of the stop was protested on the record. Finally prosecutor Mr. Fadler in his closing statement boasts Vaughn's "Official Coercion" as an undeniable fact. (RR2:25) Prosecution's closing

"Your Honor, consent is not required -- does not require any suspicion, reasonable or non-reasonable, does not require any probable cause. You can ask -- an officer can request anybody's consent for any reason. And if they gave consent, then this is a lawful search. The defense's argument that he had no suspicion is irrelevant to these proceedings because consent disolves that. So for that reason, the search was lawful."

The above statement boastingly taints consent to search. See State v. Garcia-Cantu, 253 S.W.3d 236, 243 (Tex.Crim.App. 2008). An encounter crosses the line to an investigative detention requiring reasonable suspicion if "Official Coercion" is present. Vaughn's investigation began while planning his fishing expedition or later when he told petitioner he couldn't go until they had a talk. At no time did Vaughn claim to have developed any suspicion whatsoever. Mr. Fadler promised and assured that suspicion was never needed.

This Court ruled in United States v. Mendenhall, 100 S.Ct. 1870, 1877 (1980) again, "as long as the person, to whom questions are put, remains free to disregard the questions and walk away,

there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

Petitioner has shown that this encounter crossed the line to an investigative detention without a reasonable suspicion or particularized and objective justification. The exact definition of "Official Coercion", where consent is given, should not have been considered and the suppression and motion thereof should have been granted.

If consent overwhelms the undeniable confirmation that these violations are true. The fact that they occurred is clear upon the record and cannot be erased from time. Texas has, at the very least, violated their own Constitutional Article I, § 9 and the Code of Criminal Procedure Article 38.23. But no matter, this is the Supreme Court of The United States of America and the Constitution thereof is governing in this cause and as such it is hoped that this Honorable Court will use that Constitutional Amendment, the Fourth, as a guideline in these proceedings.

CONCLUSION

Petitioner has shown on the record the violations committed by the State courts, he has shown that no coerced consent should have been allowed, that the officer by his own admittance was on a fishing expedition and without suspicion or probable cause denied the petitioner to leave, "Before I let you go", until, in the mind of the petitioner, consent to search was given.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Honorable Supreme Court of The United States of America grants this Certiorari and causes the acquittal of the Petitioner as his Constitutional Fourth Amendment rights regarding search & seizure have been violated.

Respectfully submitted,

Frank Phillip McNabb
Wynne Unit
810 FM 2821 W.
Huntsville, TX 77349