No. 21-7024

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Edgar Sierra-Serrano - PETITIONER

VS.

United States of America - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Edgar Sierra-Serrano

Federal Correctional Institution

P.O. Box 1000

Sandstone, MN 55072

QUESTION(S) PRESENTED

1. Has the progeny of 'probable cause' and the innovations of 'exceptions' to the Fourth Amendment concerning the justification to advance in a warrantless search and seizure circumstance been diminished to a lesser standard than what the Amendment intended?

2. Does the defendant have (a) the expectation of review of the appeal as it challenges the procurement of judgment by the District Court when the higher court does not address the merits because they have found their own judgment based on a separate standard of review, and (b) if they do maintain such right, then by what means does the Petitioner have for review of the judgment in the first?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner humbly prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and

[ ] is reported at

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and

[x] is reported at: 2019 US DIST LEXIS 159858, no. 0:19-cr-00061-ECT-KMM
United States District Court for the District of Minnesota

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts**:

[ ] The opinion of the highest state court to review the merits appears at Appendix ___ to the petition and

[ ] is reported at

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix ___ to the petition and

[ ] is reported at

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 3, 2021.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 28, 2021, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ on _____ in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix ___.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ___.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ on _____ in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

- Totality of Circumstances Doctrine
- Probable Cause Standard
- Warrantless Search and Seizure
- Automobile Exception
- Fair Probability Standard
- Arrest-incident-Search
- Operative Modifiers

STATEMENT OF THE CASE

The District Court in Sierra-Serrano, No. 19-mj-102; ("Serrano") accepted, in its entirety the "Report and Recommendation" ("R&R", Doc. 93) of the magistrate. The report provides for a detailed account of events, summarized as follows: a Kansas State Trooper conducted a "CVSA" traffic stop of a truck hauling vehicles on February 17, 2019. The inspection evolved into a series of warrantless and progressive searches into one of the vehicles in 'haul' that resulted in the discovery of hidden contraband. The authorities, upon the discovery, replaced the substance with "dupes" and tracked (with warrant to track) the vehicle in order to execute a 'sting' operation at or near delivery. The defendant, Serrano, was arrested on February 19, 2019, and on February 25, 2019, the government, in a preliminary hearing, made an oral argument to amend the charges from "possession" to "conspiracy". The court granted the amendment, but dismissed the case against Serrano for lack of probable cause. US v. Sierra-Serrano, 19-mj-102, US DIST LEXIS 33361 (D. Minn. March 2019).

Months later, the government tried again. This time however, instead of focusing on the arrest at receipt of the vehicle, they indicted Serrano based on the evidence that was seized during the multi-stage warrantless search while the vehicle was in transit - was 'in haul'.

The Petitioner concedes that searches are not all stageless, or consisting of one big stage, but contends that under a multiple stage warrantless search circumstance, there is a standard that applies to the justification of the advancement of the search in order to protect against those that are unreasonable, unwarranted, or not justified. See Herring v. US, 129 S. Ct. 695; 172 L.Ed.2d 496; 4th Amendment, US Constitution.

The Petitioner challenges that the District Court did not adhere to the standard established by the High Court and took great latitude and flexibility in the procurement of judgment through a misinterpretation and misconstruing of the requirement of probable cause and the invention of the 'automobile exception' to justify the advancement of a warrantless search and seizure.

These problems have wide-sweeping effects across a great spectrum of offense and circumstances that give rise to 4th Amendment protections. Addressing the issue and offering the interpretation from which to follow as a guide may serve as a root to a wide range of remedies, or serve as a continued defect in the integrity of proceedings if an action is not taken. The court in Serrano has demonstrated that the effects of misconstruing the inventions of exceptions, like the 'automobile exception', and misinterpreting the progeny of 'probable cause' can create a defect in the integrity of the procurement of the judgment.

REASONS FOR GRANTING THE PETITION

The invention of 'exceptions' and the redefining of operative modifiers in the application of probable cause have advanced to such a degree that we are far removed from the language, intent, and spirit of the original. So much so, that it threatens the very protection that the Fourth Amendment was designed to provide. The circumstance of 'search and seizure' appreciates an extensive lineage and in its progeny we have been witness to the misinterpretation of inventions such as the 'automobile exception' and the misconstruing of the meaning and standard of probable cause.

The exceptions and innovations exercised without critique have led to a diminished version of a standard that was intended to protect members of the collective from unjustified intrusive advances of search and seizure without probable cause; of substance. A balance must be struck between the protection of the rights of citizens and the enforcement of those laws that protect against the very things that threaten our way of life. In this effort however, we must avoid a result that provides a 'cloak of evasion' for those that may aim to take advantage of ambiguities in the language to avoid prosecution of their nefarious endeavors, just as we need not provide a blanket of flexibility in authority that serves to justify the advancement of encroachments into privacy that are unreasonable.

The analysis in Serrano is an example of how, with an implied authority of 'flexibility' under the auspices of a "totality of circumstances" doctrine, great latitude can be taken that results in a misinterpretation and misconstruing of the operative modifiers that define the requirements, affectuating a diluted protection of the Amendment or statute.

The District Court provided, in this sequence, the following as the guiding hand of its analysis:

> 1. Probable cause, under the 'automobile exception' is when, "based on the totality of circumstances, there is a 'fair probability' that contraband or evidence of a crime will be found in a particular place" and cited US v. Cortez-Palomino, 438 F.3d 910, 913 (8th Cir. 2006),
>
> 2. Probable cause is determined by a court based on common sense and a totality of circumstances, citing US v. Vore, 743 F.3d 1175, 1179 (8th Cir. 2014),
>
> 3. That the 'fair probability' standard does not require absolute certainty that contraband will be discovered, citing Illinois v. Gates, 462 U.S. 213, 232-232 (1983),
>
> 4. Instead, probable cause requires only a "probability or substantial chance" of criminal activity, citing US v. Neumann, 183 F.3d 753, 756 (8th Cir. 1999),
>
> 5. Because the 'automobile exception' applies, the court looks to the totality of the circumstances known to law enforcement to discern whether they had "probable cause" to completely search (emphasis added) (Doc. No. 93, p. 25 @ lines 4-16).

The Fourth Amendment forbids unreasonable search and seizure and as such, usually requires a warrant or the invention of exception with probable cause. See US v. Williams, 955 F.3d 734, 737 (8th Cir. 2020). This implies that the scope of the search is a factor, as the nature of a warrant is to create specificity in order to safeguard against the impediment on another's privacy or property without the proper justification - without having met the standard of probable cause to advance in the procedures of searching and seizing. See Arizona v. Hicks, 475 U.S. 1107; 106 S. Ct. 1512; 89 L.Ed.2d 912 (1987) - dispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e. the standard of probable cause, and there is no apparent reason why an object would be seized on lesser grounds than would have been needed to obtain a warrant, if it had been known to be on the premises. Id.

In Serrano, the trooper, certified in Level II "CVSA" inspections, initiated a traffic stop of a 'hauler' that he had observed earlier in the day that appeared aged, giving him suspicion to inspect for compliance with safety

regulations consistent with "CVSA" (see "R&R" p. 14 (B)). According to US v. Houston, 548 F.3d 1151, 1153 (8th Cir. 2008), this began the 'search and seizure' circumstance and must be supported by reasonable suspicion or probable cause. The Court in Serrano cited US v. Neumann, 183 F.3d 753, 756 (8th Cir. 1999) to establish for analysis; "probable cause requires 'probability or substantial chance' of criminal activity. See also D.C. v. Wesby, 138 S. Ct. 577; 199 L.Ed.2d 453 (2018).

The Level II inspection includes such things as a walk-around, tire and wheel hub inspection, lighting, and load securement of the vehicle in question; in this instance the 'hauler' (Doc. No. 93, p. 2 and TRL 28:2-10). Upon this inspection, the trooper found nothing in violation of regulations of the 'hauler', but did observe in plain view that one of the cars in haul was aged and had California plates that gave him suspicion to advance his search. Accordingly, he advanced to a Level III inspection, which he was not certified to perform (footnote 2, p. 2 of Doc. 93). The inspection involved the review of paperwork, DMV registrations of all vehicles, and the Bill of Lading. Based on the agedness of one of the vehicles that had a higher numbered plate series and a registration that had not yet been updated, along with its having more than one air freshener, the trooper advanced again, all the while under the purview of the 4th Amendment.

The District Court, upon review and analysis, determined that the advancement was warranted; not by the presence of probable cause, but by consent of the driver of the 'hauler' (R&R, Doc. 93, p. 21 @ lines 1-4). The advancement meant the administering of various field tests, including a 'Density Meter Reading' of compartments. The trooper reported that the field test proved positive, so he advanced again by instructing the driver to relocate the truck and all of its cargo to another location for further investigation, whereupon a dog sniff was conducted.

1. The trooper would eventually admit that his meter test did not actually test positive and that he had used the results from a different test from a different case.

2. The dog was not registered, giving the Court cause to question its credibility.

Because of the dog sniff alert and the other factors, the trooper proceeded to conduct an absolutely invasive search of the entire vehicle, including the dismantling of the interior, which resulted in the discovery of hidden contraband. The Court ultimately decided that the series of events concerning the aggressive advancement of the warrantless search to such an extent was justified because, "by the time the trooper had conducted a full search he had probable cause" (Doc. 93, p. 25).

The Supreme Court has held that the 'probable cause' standard is incapable of precise definition or quantification into percentages because it is based on probability and depends on the totality of circumstances. See Maryland v. Pringle, 540 U.S. 366; 124 S. Ct. 795; 157 L.Ed.2d 769 (2003). The protections of Constitutional Amendments however, are not to be threatened by inventions of 'exception' by man or to reach a point where each generation of definition lends itself to a continual lessened variation of the original standard in order to fit each circumstance, in the process diluting the very protection the Amendment was meant to provide.

In Serrano, the Court justified the advancement of the search not by the standard of probable cause that is suggested it should, but by a "potentially incriminating" categorization. This presumably was to get them to a 'fair probability' standard (Doc. 93, p. 25). This proves problematic, as is evident in their listing of basis: the implication that "potentially incriminating" and "fair probability" are equivalent to "probability and substantial chance" in justification of advancement of a warrantless search analysis. "Probability and substantial chance" in this context implies, at a minimum, a parameter of some quantity, and are of equal criteria; for 'probability' and 'substantial chance' are used synonymously with the conjunctive **"OR"**. They are not to serve as substitute of a lesser for the other, and it is because of this issue that caution has been expressed when their is a reliance or exercise of application of the categorical approach of "potentially incriminating". See Rhode Island v. Innis, 446 U.S. 291, 300; 100 S. Ct. 1682; 64 L.Ed.2d 297 (1980).

While 'substantial' is not quantitatively specific, it is clear enough as to the suggested degree - one greater than 'by chance', 'hunch', 'fair', or 'maybe'. "Substantial" is of a considerable amount, of a majority; ample. Yet, the Court in Serrano relies on a lesser standard to justify the advancement of the warrantless search. The Court chose to apply a lesser standard that was presumably allowed by its misinterpretation of the "totality of evidence" doctrine that posits that the magistrate is required to take all of the evidence and decide that there was 'fair probability' (but actually referred to a "potentially incriminating" review).

The District Court in Serrano is apparently interpreting that the progeny of 'search and seizure' found in Aguilar v. Tx, 378 U.S. 108; 84 S. Ct. 1509; L.Ed.2d 723 (1964) and Spinelli v. US, 393 U.S. 410; 89 S. Ct. 384; 21 L.Ed.2d 637 (1969), for example, redefined probable cause to a lesser standard by way of interpretation of Illinois v. Gates, 462 U.S. 213, 231; 103 S. Ct. 2317; 76 L.Ed.2d 527 (1983), that while various characteristics such as veracity, reliability, and base of knowledge are intertwined to illuminate common sense, they are not to be rigid exactitudes. In doing so, this reduces the standard of probable cause to a modifier of 'fair' rather than 'substantial'. It seems the wiser course would be to emphasize a manner of analysis that informs probable cause determinations while also maintaining its integrity. Gates actually contends that, "the magistrate must determine probable cause, and that his action cannot be a mere ratification of the bare conclusions of others" (emphasis added).

The flexibility now interpreted from the progeny manifests in cases like Jones and Brinegar (citation below), for example, and are to better serve the purpose of the 4th Amendment. But it is not to be interpreted as a new establishment of probable cause as the Court in Serrano acts. See US v. Jones, 132 S. Ct. 945; 181 L.Ed.2d 911 (2012) - the issue of privacy and the "search" is part of a 'monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law' (citing Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765)), treading upon another's ground is sacred and if one treads, [he] must be justified by law; and

Brinegar v. US, 338 U.S. 160, 176 (1949) - the long prevailing standard of probable cause protects citizens from rash and unreasonable interferences of privacy and with unfounded charges of crime while giving fair leeway for enforcing the law.

Furthermore, Maryland v. Pringle stipulates that the "substance of all definitions of probable cause is a reasonable grounds for belief of guilt", 540 U.S. 366; 124 S. Ct. 795; 157 L.Ed.2d 769 (2003), and to what degree of belief is consistent across all circuits; that of "substantial belief", the operative modifier. A magistrate's decision and its review must be made with great deference, and the reviewing court must examine whether the magistrate had 'substantial basis' for concluding that probable cause existed.

The exercise of this doctrine is appreciated by all circuits with the modifier "substantial", not "fair" or "potentially". Probable cause to advance a warrantless search exists when the knowledge of facts and circumstances are grounded reasonably by obtained information that warrant a belief that an offense has occurred, see Beck v. Ohio, 379 U.S. 89, 91 (1964), and what kind of belief is shared; "substantial belief"; see US v. Woodbury, 511 F.3d 93, 98 (1st Cir. 2007); US v. Singh, 390 F.3d 168, 181 (2nd Cir. 2004); US v. Ritter, 416 F.3d 256, 261 (3rd Cir. 2005); US v. Hurwitz, 459 F.3d 463, 473 (4th Cir. 2006); US v. Perez, 484 F.3d 735, 740 (5th Cir. 2007); US v. Smith, 510 F.3d 641, 652 (6th Cir. 2007); US v. Hill, 459 F.3d 966, 970 (9th Cir. 2006); US v. Grimmett, 439 F.3d. 1263, 1268-1270 (10th Cir. 2006); US v. Gonzalez, 940 F.2d 1413, 1419 (11th Cir. 1991).

In Serrano, the trooper did not have a warrant and was operating on mere suspicion to initiate a safety inspection that lead him to exceed the bounds of his authority and violate those protections afforded him by the 4th Amendment, by means of invention and exception.

The "Report and Recommendation" in fact, drew the same conclusion, albeit via a different route, that the trooper's last stages exceeded his authority:

> **"The Court does not conclude that the [hauler's] consent justified the more intrusive search after the car was transported."**

However, the Court was somehow not satisfied with its own findings, so it continued:

"Therefore, further exploration of the legality of the search is required."

In the Court's efforts to further investigate the legality of the search, it assessed the appropriateness of applying the 'automobile exception' and its implications. The Court concluded that the exception applied, thereby changing the requirements to satisfy probable cause.

The extent of a property search has long been an issue of debate with a progeny of Supreme Court cases. The circumstances in Serrano would appear to fall squarely in the debate of the extent of searches and the standard that is required to justify the advancement of the warrantless search. The extent of the lineage has addressed certain dynamics of the search, but has lacked specificity on where a line is going from one stage of intrusiveness to another, and where "arrest" or "search" may begin under the Fourth Amendment. See Chimel v. California, 395 U.S. 752; 89 S. Ct. 2034; 23 L.Ed.2d 685 (1969) - laying a foundation for search-incident-to-arrest doctrine, whereby an extensive warrantless search is not proper when the officer's safety is not in question or the preservation of evidence is a concern; see also US v. Robinson, 414 U.S. 218; 94 S. Ct. 467; 38 L.Ed.2d 427 (1973) - applying the Chimel analysis to the context of the search of the 'arrested' person and finding that a custodian's arrest of a (suspect) based on probable cause is a reasonable intrusion under the Fourth Amendment. The courts however, have not drawn a line of distinction between the person and the further inspection of his property. US v. Sharpe, 470 U.S. 675 (1985), limited by US v. Chadwick, 433 U.S. 1, 15; 97 S. Ct. 2476; 53 L.Ed.2d 538, to "personal property...immediately associated with the person"; see also AZ v. Gant, 129 S. Ct. 1710; 173 L.Ed.2d 485 (2009) in this trilogy, as Gant, like Robinson, recognized the Chimel concerns for officer safety and evidence preservation, but added that, "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." (quoting Thornton v. US, 541 U.S. 615, 632; 124 S. Ct. 2127; 158 L.Ed.2d 905 (2004) - and that the exception stems not from Chimel, but from 'circumstances unique to the vehicle context'.

In application then, in the context of a vehicle, who is the arrested? And then what property is 'incident to the arrested'? In Serrano, the instigating cause was the 'hauler' condition and the conducting of a safety inspection.
This however, led to the search of property on that 'hauler'. How does the progeny separate the 'hauler' and what it 'hauls' and a 'person' and what he 'possesses'? Gant is an extension of Robinson and Chimel, implying they share a similar foundation in principle - as to determining the extent of search and seizure, and certainly impacts in particular those that are conducted without a warrant. See US v. Zapata, 18 F.3d 971, 975 (1st Cir. 1996); see also Berkemer v. McCarty, 468 U.S. 420, 441; 104 S. Ct. 3138; 82 L.Ed.2d 317 (1984); and Katz v. US, 389 U.S. 347, 357 (1967) - warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. Terry v. Ohio, 392 U.S. 1; 88 S. Ct. 1868; 20 L.Ed.2d 889 (1968) (emphasis added).

Despite this, the District Court in Serrano appears to determine that the 'automobile' has additional attributes that makes it distinguishable from a 'person', and so then qualifies for its own exception. This may be true, however, the exception focuses on the need for a warrant, but does not remove the requirement of probable cause. See California v. Acevedo, 500 U.S. 565, 579-80; 111 S. Ct. 1982; 114 L.Ed.2d 619 (1991).

When there is a question of probable cause, it should largely be deferred by a preference for a warrant. See Mass v. Upton, 466 U.S. 727, 734 (1984). The case of Serrano is not void of such occurrence even in the first, for it was originally dismissed due to a lack of probable cause (US v. Sierra-Serrano, No. 19-mj-102, US DIST LEXIS 33361, March 2019). Probable cause, while suggested to be flexible, is subject to no less than a twofold review at each stage: 1) the determination of historical facts leading to each stage, and 2) the decision whether these facts viewed objectively amount to probable cause. See Ornelas v. US, 517 U.S. 690, 695 (1996); see also Brinegar v. US, 338 U.S. 160, 175-77 (1949) - for a search must stand on firmer ground than mere suspicion.

The 'automobile exception' demands probable cause just as the plain view doctrine does, but that was not the auspices under which the Court could have justified the trooper's advancements. In Serrano, the analysis turns then on the presence of probable cause. Therefore the definition of probable cause is critical in relevance whereby any replacement, substitute, or redefining should not be made without proper scrutiny, so as to protect those rights afforded under the 4th Amendment and the application of the probable cause standard. See Coolidge v. New Hampshire, 403 U.S. 443; 91 S. Ct. 2022; 29 L.Ed.2d 564 (1971); and Arizona v. Hicks, 480 U.S. 321; 107 S. Ct. 1149; 94 L.Ed.2d 347 (1987) - while a cursory inspection may require a 'reasonable suspicion', a full blown search requires probable cause. Further, Acevedo suggests that 'probable cause' for search exists when under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found. See California v. Acevedo, 500 U.S. 565, 579-80; 114 L.Ed.2d 619 (1991).

The 'automobile exception', misinterpreted to mean there is less of a protection under the 4th Amendment, can advance a diminishment of privacy that has now regressed to such a lowered standard that, even that which is reasonable relative to 'police' or 'community caretaking'. See US v. O'Bryant, 775 F.2d 1528, 1534 (11th Cir. 1988) and US v. Laing, 708 F.2d 1568, 1571 (11th Cir. 1983).

This apparent slide in standard is made evident as one journeys from 'certainty' to 'probability or substantial chance' to 'fair probability' to 'potentially' to 'reasonable suspicion' to 'reasonable probability', and eventually to 'a hunch'. The distinction between looking at a suspicious object in plain view and moving things even just a few inches is much more than trivial for the purposes of the 4th Amendment, Arizona v. Hicks, 475 U.S. 1107, 1156 (1987), and a warrantless search must be strictly circumscribed by the exigencies which justify its initiation. Coolidge v. New Hampshire, 403 U.S. 443; 91 S. Ct. 2022; 29 L.Ed.2d 564 (1971).

The ultimate touchstone of the 4th Amendment is "reasonableness", and although searches and seizures without warrant are presumably unreasonable, it can be overcome by the exigencies of the situation that may make the needs of law enforcement so compelling that the warrantless search may be objectively reasonable. See Michigan v. Fisher, 130 S. Ct. 546; 175 L.Ed.2d 410 (emphasis added).

In this instance, 'compelling' is operative, for it means the presence of evidence to give cause to proceed (ergo, to compel). However, in Serrano, in the review of the decision by the District Court, the Appellate Court applied a different measure to justify advancement, a type of 'not dispel' doctrine;

"The officer's suspicions were not dispelled."

Therefore, the advancement did not violate the 4th Amendment. US v. Sierra-Serrano, No. 20-1340, US APP (8th Cir.), p. 2 @ lines 12-14. In this context, to 'dispel' is to prove by the absence of something, but that falls short of the requirement at this stage to justify a much more intrusive and aggressive warrantless investigation. See Terry v. Ohio, 392 U.S. 1; 88 S. Ct. 1868; 20 L.Ed.2d 889 (1968) - where an officer makes reasonable attempts of investigation and when nothing seems to 'dispel' his reasonable suspicion, he is entitled to conduct a carefully limited search in his attempts. See US v. Muhammad, 463 F.3d 115 (2nd Cir. 2006) (emphasis added).

The trooper's advancement to the next stage consisted of degrees well beyond "careful" and "limited", including a dog sniff test by a non-certified dog that even gave cause for concern of the Court (Doc. 93, p. 27). See Ontario v. Quon, 130 S. Ct. 2619; 177 L.Ed.2d 216 (2010) - an officer's contemplations are not free to disregard exculpatory evidence even if substantial inculpatory evidence suggest probable cause may exist; see also Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999) - and there is a measure to 'reasonableness' and too much intrusiveness.

The Court in Serrano apparently relies on a 'not dispel' justification derived from Muhammad, "where an officer makes reasonable inquiries, and when nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety", but in doing so parallels the 'vehicle' in question to the 'person' in question. US v. Muhammad, 463 F.3d 115 (2nd Cir. 2006); and Terry v. Ohio, 392 U.S. @ 30; 88 S. Ct. 1868. Since the Court did not cite its position, this substitution of 'person for vehicle' or 'vehicle for person' may lead then to a challenge of guilt-by-association:

> **"A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibren v. NY, 392 U.S. 40, 62-63 [88 S. Ct. 1889; 20 L.Ed.2d 907] (1968). Where the standard is probable cause, a search or seizure must be supported by probable cause particularized with respect to that [object] person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person [or thing] may happen to be."** See Ybarra v. Illinois, 444 U.S. 85, 91; 100 S. Ct. 338; 62 L.Ed.2d 238 (1979) and US v. Di Re, 332 U.S. 581; 68 S. Ct. 222; 92 L.Ed. 210 (1948).

The 'automobile exception' may allow greater latitude to advance without a warrant, but it does not exempt the requirement of probable cause prior to completing his search, and certainly not "by the time he was done" as the Court in Serrano determined. See US. v. Smart, 393 F.3d 767, 770 (8th Cir. 2005) - a determination is not made with the vision of hindsight, but instead by what the officer reasonably knew at the time; US v. Watson, 423 U.S. 411, 424; 96 S. Ct. 820; 46 L.Ed.2d 598 (1976) - to be consistent with the 4th Amendment it is at the time and not in retrospect. See US v. Hensley, 469 U.S. 221, 232 (1985) - and while reasonable suspicion requires more than a hunch - but less than probable cause, when the authority does not posses the articulable evidence that is required for the degree of encroachment that the advancement of a more intrusive search will involve, the search may be improper and a judgment rising from it challenged. See US v. Duty, 204 Fed. Appx. 236 (4th Cir. 2006). See also US v. Ross, 456 U.S. 798, 824 (1982) - "a search of an entire vehicle is prohibited without probable cause".

The Court gave weight to 'potentially incriminating' evidence to 'help'. That would imply that there were other factors that needed help. Nothing standing alone, but the totality of circumstances, but there was no new evidence to 'compel' the trooper to advance, and his advancements up until the end were all justified by a lesser standard than 'probability' or 'substantial chance'. The Court deviated in favor of their own categorization and definition of standard, an abuse of discretion that the flexibility offered does not grant to such an extent, and therefore requires intervention of the Higher Court for clarity and interpretation. The 4th Amendment would otherwise be in jeopardy and threatened by such inventions.

In the review of the Appellate Court is summarized the events of advancements by the trooper in Serrano by way of consent and the aforementioned 'not dispel' doctrine. Serrano appealed the lower court's decision for review to determine if their interpretation of 'probable cause' and the application of the 'automobile exception' was correct as spelled out in the previous sections of this petition.

The higher court first determines if there is 'standing' of the defendant, an aspect the lower court assumes is present and furthers its review into probable cause. In the event the higher court finds there is no 'standing', then the defendant would not have a reasonable expectation of privacy. However, he would have a privacy interest if he proved he was the owner, sender, or the intended recipient of the vehicle (Case No. 20-1340, pp. 3 & 4). The Court found that Serrano did not.

In fact, of the three defendants, now serving more than thirty years combined behind bars, not a single one was found to have 'standing'. The charge of conspiracy was evidenced by the drugs found in a car in transport, that Serrano took possession of at delivery along with others, but no one had 'standing' or a privacy interest in the vehicle? This only goes to entice would-be smugglers to use their own vehicles. The standard of 'reasonableness' is used as a modifier everywhere in the 'search and seizure' context, but disappears behind the shroud of 'standing'.

If Serrano "introduced no reliable evidence showing that he shipped the Ford or was the intended recipient", then how could he be charged with a conspiracy to commit that offense? No drugs were ever found on Serrano - yet the charges imply that Serrano was part of a conspiracy to distribute something he could not prove he was intended to receive.

The defendant filed an appeal to address his rights and protections in the first instance, that which assessed probable cause and the automobile exception application in the advancement of a search. If the higher court does not review that first, then by what means can the defendant exercise his right to review that judgment, one that he contends was procured with an impropriety that resulted in a defect in the integrity of the proceedings.

So now the Petitioner pleads before this Court for intervention to allow him a right to review the judgment against him in the first.

CONCLUSION

For the foregoing reasons, the Petitioner asks that a writ of certiorari be granted.

Respectfully submitted,

Date: 1-16-22