IN THE SUPREME COURT OF THE UNITED STATES

No. _____

FELIPE NORIEGA, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTRIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment allows a police officer to extend a concluded traffic stop based on minimal, if any, suspicious factors.
2. Whether the determination of a seizure, as applied in this case, is constitutional and whether it should be or should not be.

STATEMENT OF RELATED PROCEEDINGS

The decision of the United States Court of Appeals affirming Noriega's conviction can be found at *United States v. Noriega*, 35 F.4th 643 (8th Cir. 2022). A copy of the Eighth Circuit's opinion is appended to this petition. (Pet. App. A). The denial of Noriega's petition for rehearing and rehearing en banc was not reported in the Federal Reporter but can be found at *United States v. Noriega*, 21-1211, 2022 WL 2557471 (8th Cir. July 8, 2022). A copy of that Opinion is included in the appendix of this petition. (App. B). The District Court's Order is unpublished, but a copy of that Order is contained in the appendix. (App. C). The Magistrate Judge issued its Report and Recommendation from the bench. Its findings, and the Order accompanying it, are attached to this petition. (App. D).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Felipe Noriega Jr., by counsel, Erin M. Carr, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This matter was filed in the United States District Court for the Southern District of Iowa on November 11, 2019. The Court issued its judgment on January 21, 2021. A copy of that Opinion is included in Appendix C. Petitioner filed his appeal to the Eighth Circuit Court of Appeals on January 27, 2021. On May 26, 2022, the Eighth Circuit ordered its opinion affirming the District Court's decision, which is reproduced in Appendix A. On July 8, 2022, the Eighth Circuit denied Petitioner's Petition for Rehearing En Banc. That Order is included in Appendix B.

BASIS OF JURISDICTION

The Eighth Circuit Court of Appeals issued its opinion affirming the judgment of the District Court on May 26, 2022. The Petition for Rehearing En Banc was timely filed on June 9, 2022, within 14 days of the Eighth Circuit opinion. The Eighth Circuit denied the Petition on July 8, 2022. This Petition is filed within 90 days of that order. Jurisdiction over this matter is proper under 28 U.S.C. §1254(a) because it seeks review of a final judgment of a United States Court of Appeals, to wit, the United States Court of Appeals for the Eighth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

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

STATEMENT OF THE CASE

This case arose on November 15, 2019, when Law Enforcement Officer (LEO) M. Miller observed a vehicle traveling in the left-hand passing lane traveling westbound on I-70 in Mesa County, Colorado.[1] (4:19-cr-219, Doc. 372, p. 24). LEO Miller approached the passenger side of Petitioner's vehicle and Petitioner rolled down both his front and back passenger side windows. (*Id.* at p. 28). LEO Miller allegedly smelled a strong odor of perfume inside the vehicle upon initial approach. (*Id.*).

Subsequently, Petitioner handed his license to LEO Miller. (*Id.* at p. 29). LEO Miller allegedly observed Petitioner's hand trembling and face twitching. (*Id.* at p. 29). At that time, LEO Gosnell arrived to assist on scene. (*Id.* at p. 38). LEO

[1] No recording, audio or visual, was made of the traffic stop and seizure of the Petitioner.

Gosnell took a cover position at the front passenger side of LEO Miller's patrol vehicle. (*Id*.).

During Petitioner's encounter with LEO Miller, he asked "I can't drive in the left lane?" (*Id.* at p. 31). LEO Miller told him he could not as Colorado Code prohibits him from illegally using the passing lane. (*Id.*); *See* Colorado Code, Ch. 39, Art. 4, title 42-4-1013. LEO Miller began questioning Petitioner about his travel plans. (*Id.*). Petitioner informed LEO Miller he was traveling to his brother's house, "maybe for the weekend" and showed LEO Miller a picture he sent his brother depicting him traveling past a semi-tractor on I-70. (*Id.* at p. 31-34).

LEO Miller described Petitioner as increasingly nervous.[2] (*Id.* at p. 31). LEO Miller subjectively believed Petitioner's nervousness was more than what he would normally observe during a traffic stop for a simple traffic violation. (*Id.* at p. 37). Notably, LEO Miller admitted he had never met Petitioner before so has no baseline knowledge of Petitioner's normal demeanor. (*Id.* at p. 36; p. 60-61).

LEO Miller returned to his patrol car and discovered Petitioner's license was valid and that he did not have any active warrants. (*Id.* at p. 38). LEO Miller returned to Petitioner's vehicle and allegedly noticed the perfume smell was not as strong.

[2] Notably, LEO Gosnell was now positioned at the front of LEO Miller's patrol car which would be visible to Petitioner.

(*Id.*). LEO Miller alleges this is because an aerosol deodorizer spray had likely been used during or just prior to the stop. (*Id.* at p. 39). However, Petitioner had two (2) passenger-side windows open during the entirety of their initial encounter. (*Id.* at p. 67). Additionally, the two (2) windows were down the entire time LEO Miller was in his patrol car searching the validity of Petitioner's license and for active warrants. (*Id.*). LEO Miller also testified the air circulating in and out of Petitioner's vehicle would have dissipated the smell as Petitioner's windows were up when LEO Miller initiated the traffic stop. (*Id.*; p. 1-8).

LEO Miller returned Petitioner's license and vehicle documents. (*Id.* at p. 67). LEO Miller told Petitioner to stay in the right lane and that he was "good to go." (*Id.* at p. 39). Petitioner thanked LEO Miller. Next, Petitioner put his car in gear. (*Id.*).

It was not until this time that LEO Miller first began inquiring about narcotics. (*Id.*). Petitioner denied any illegal activity. (*Id.* at p. 40). LEO Miller asked to search Petitioner's car. (*Id.* at p. 41). Petitioner replied to LEO Miller, "I thought you said I was good to go?" (*Id.*). LEO Miller allegedly stated he appreciates Petitioner's cooperation but there were some things he was suspicious of. (*Id.*). At no point did LEO Miller answer Petitioner's question or confirm that Petitioner was free to leave or not.

Next, Petitioner asked if he had to consent to the search. (*Id.*). LEO Miller replied that he has a drug dog. (*Id.* at p. 42). With no response from Petitioner, LEO Miller asked if he could run his drug dog around Petitioner's car. (*Id.*). Petitioner continuously offered no consent to search his vehicle and LEO Miller affirmatively testified that no consent had been given at this point. (*Id.*).

Unsatisfied with Petitioner's lack of consent, LEO Miller directed LEO Gosnell to get his canine, which he did. (*Id.* at p. 43). LEO Gosnell walked to the back of Petitioner's vehicle with the drug dog. (*Id.*). At this time, there were two (2) officers in Petitioner's view, Petitioner had knowledge there was a drug dog, and the drug dog was walked to the rear of his vehicle. (*Id.* at p. 44). LEO Miller alleges this is when Petitioner said he could walk the canine around his vehicle. (*Id.*). Petitioner exited his vehicle and was directed to the shoulder of the interstate. (*Id.* at p. 45). LEO Miller alleges KJ, his drug dog, indicated to the odor of drugs coming from the driver's side lower rear door seam of Petitioner's vehicle. (*Id.* at p. 46). Subsequently, LEO Miller performed a warrantless search on Petitioner's vehicle which yielded a large quantity of methamphetamine. (*Id.* at p. 27).

Petitioner was ultimately charged with Conspiracy to Distribute a Controlled Substance in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A). (4:19-cr-219, Doc. 59) On May 7, 2020, Petitioner filed a Motion to Suppress, arguing he was subjected to an unlawfully extended traffic stop and there was no reasonable suspicion to

extend the traffic stop past its completion. (4:19-cr-219, Doc. 90). On July 31, 2020, the district court denied the Motion to Suppress. (4:19-cr-219, Doc. 160). Petitioner pleaded guilty to Count 1 – Conspiracy to Distribute a Controlled Substance on September 2, 2020. (4:19-cr-219, Doc. 186). Petitioner was sentenced to a 72-month term of incarceration on January 21, 2021. (4:19-cr-219, Doc. 316). Petitioner appealed the denial of the Motion to Suppress to the Eighth Circuit Court of Appeals on January 27, 2021. (4:19-cr-219, Doc. 322). That appeal was denied on May 26, 2022. (8th Cir., No. 21-1211).

Following the Eighth Circuit's ruling, Petitioner timely petitioned for rehearing en banc. (*Id.*). In his Petition he argued that he was illegally seized during the unlawful extension of the traffic stop. That Petition was denied on July 8, 2022. (*Id.*).

REASONS FOR GRANTING THE PETITION

The Constitution is meant to protect citizens' rights from being infringed upon by the Government. Traffic stops have become a constitutional issue due to the risk of potential Fourth Amendment violations. Both the United States Supreme Court and the Eighth Circuit have established the boundaries of a constitutional stop and seizure. However, the Eighth Circuit in this case has pushed the line too far and has allowed for Petitioner's Fourth Amendment right to be infringed upon. Thus, the conflicting opinion needs to be considered in order to clarify what the law is.

It is important to protect the rights of individuals, which is why this Court should find the Eighth Circuit erred in concluding there was no constitutional violation of Petitioner's rights. Only this Court can decide what the constitutional limits of traffic stops are and how they can be applied in order to protect individuals from unlawful searches and seizures.

I. STANDARD OF REVIEW

"A mixed standard of review applies to the denial of a motion to suppress evidence." *United States v. Williams*, 777 F.3d 1013, 1015 (8th Cir. 2015). The district court's findings of facts are reviewed for clear error; however, the denial of the suppression motion is de novo. *Id*.; *United States v. Orozco*, 700 F.3d 1176, 1178 (8th Cir. 2012). The United States Supreme Court held without a de novo review of the denial of a motion to suppress, would permit "in the absence of any significant difference in the facts," "the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Ornelas v. United States*, 517 U.S. 690, 697 (1996). The Court found this result would be unacceptable, instead, finding appellate courts must "maintain control of, and to clarify, the legal principles." *Id*. Additionally, the Court found a de novo review will unify precedent and provide more guidance to law enforcement prior to an invasion of privacy. *Id*.

II. THE EIGHTH CIRCUIT ERRED IN CONCLUDING THE TRAFFIC STOP WAS LAWFULLY EXTENDED.

The Eighth Circuit's decision, respectfully, went against longstanding Eighth Circuit and United States Supreme Court precedent determining when a traffic stop becomes unlawfully extended. The Court found there was no unlawful extension of Petitioner's traffic stop despite well-established precedent. (8th Cir., No. 21-1211). Although the Court cited to proper and applicable law it failed to consider relevant case law and thus wrote a conflicting opinion that can only be resolved by this Court. Additionally, the decision confuses the law on where the line is to be drawn for what constitutes an unlawful extension and has the potential to infringe on citizens' rights.

The Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. A traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979). This Court has set forth the principles for a traffic stop in *Terry v. Ohio,* 392 U.S. 1 (1968). Such stops must be supported by at least a reasonable, articulable suspicion that criminal activity is afoot. *Prouse*, 440 U.S. at 663.

A traffic stop is limited in duration by the seizure's mission- "to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). Once an officer lawfully stops

a defendant, the officer is only entitled to an investigation "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. Furthermore, the Fourth Amendment intrusion "must be temporary and last no longer than is necessary to effectuate the purpose of the stop" and the officer must employ the least intrusive means available to dispel of the suspicion. *Florida v. Royner*, 460 U.S. 491, 500 (1983). Once the suspicion is dispelled there is no reason for the officer to continue the detention. *See id.; see also United States v. Lopez*, 849 F.3d 921, 927-28 (10th Cir. 2017).

The investigation may include requesting the driver's license and registration, requesting the driver step out of his vehicle, request the driver sit in the patrol vehicle, conduct inquiries to determine validity of the license and registration, run a criminal history check on the driver, determine if the driver has outstanding warrants, and make inquiries into the motorist's destination and purpose. *United States v. Beck*, 140 F.3d 1129, 1134 (8th Cir. 1998). Authority for a seizure ends when the tasks tied to the traffic infraction are, or reasonably should have been, completed. *Rodriguez*, 575 U.S. at 354.

In this case, LEO Miller completed the initial investigation when he returned to Petitioner's vehicle and handed him his license and documents back. LEO Miller had determined Petitioner's license was valid and that he had no active warrants and thus told Petitioner he was "good to go," reminding him to stay in the right lane

unless he was passing. (4:19-cr-219, Doc. 372, p. 39); *see also* Colorado Code, Ch. 39, Art. 4, title 42-4-1013. Petitioner thanked LEO Miller and put his car in gear. (*Id.*). At that time, the legitimate investigative purpose of the stop was completed. *See, e.g., United States v. Bloomfield*, 40 F.3d 910, 916 (1994) (stating that reasonable scope of the initial traffic stop extends to the moment after the return of documents when officer asked if he could search the vehicle, *cert denied*, 514 U.S. 1113 (1995)). With the purpose of the traffic stop completed, it was unreasonable for LEO Miller to further the scope of his investigation and detain Petitioner, "unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *See Rodriguez*, 575 U.S. at 354.

Accordingly, the lawfulness of the continued encounter between LEO Miller and the Petitioner after LEO Miller returned Petitioner's license and registration hinges on two determinations: whether the Petitioner was "seized" within the meaning of the Fourth Amendment, and, if so, whether the seizure was founded on reasonable suspicion that criminal activity was afoot. *United States v. Jones,* 269 F.3d 919, 925 (8th Cir. 2001).

III. PETITIONER WAS "SEIZED" AFTER THE COMPLETION OF THE INITIAL TRAFFIC STOP.

While the Eighth Circuit declined to rule on whether a seizure occurred because it erroneously found there was no unlawful extension, Petitioner was

"seized" after the initial traffic investigation for purposes of the Fourth Amendment. (8th Cir., No. 21-1211). While "not all encounters between law enforcement officials and citizens fall within the ambit of the Fourth Amendment," *Terry*, 392 U.S. at 19 n. 16, a detention becomes unreasonable when no reasonable suspicion existed for the extension of the stop. *Beck*, 140 F.3d at 1134. However, as the Court noted, if the police encounter is consensual, the Fourth Amendment is not implicated. *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984). Determining whether the police-citizen encounter falls within the Fourth Amendment is fact intensive, which turns upon the unique facts of each case. *Beck*, 140 F.3d at 1135.

A seizure occurs when, viewing all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). When the officer's conduct and questioning "is so intimidating threatening, or coercive" that a reasonable person would not feel free to leave, then the individual is seized. *United States v. Hathcock*, 103 F.3d 715, 718 (8th Cir. 1997). "Circumstances that might indicate when an encounter becomes a seizure include 'the threatening presence of several officers … or the use of language or tone of voice [which] indcat[es] that compliance with the officer's request [will] be compelled.'" *Id*. at 718-19. (citation omitted).

The Eighth Circuit dealt with this issue in *Beck*, 140 F.3d at 1135. In *Beck*, the encounter between the defendant and officer was initially characterized as

consensual. *Id*. Specifically, the court found the defendant was told he was free to go, had his driver's license returned, and had his rental agreement returned. *Id*. Thus, the court found the defendant was free to go as he had everything in his possession "which he needed to continue his trip." *Id*.

However, this encounter turned nonconsensual when the defendant asked the officer what would happen if he refused to permit a search of his automobile. *Id*. "At that point Officer Taylor informed Beck that if he refused to consent to a search" he would "have a canine unit conduct a drug sniff of his automobile." *Id*. The court found a person in Beck's position – "who had been present when a canine unit had been summoned to the scene and was then told by Officer Taylor that he was going to have a canine unit conduct a drug sniff of Beck's car, would not have reasonably felt free to leave." *Id*. (citing *United States v. Place*, 462 U.S. 696, 707, 77 L.Ed. 110 (1983)) (holding consensual encounters can become an investigatory detention as a result of police conduct).

Moreover, the Eighth Circuit dealt with the same issue in *Jones*. 269 F.3d at 922. In *Jones*, the court found the initial investigative purpose of the traffic stop was complete. *Id*. at 922-23. Specifically, the officer had given the defendant his warning and returned his license and insurance card. *Id*. at 923. "Upon receipt of his documents, Jones exited the vehicle." *Id*. The officer followed the defendant and began to ask him if he had any narcotics on him, which defendant answered in

the negative. *Id*. The officer proceeded to ask the defendant for permission to search his vehicle and camper. *Id*. The defendant stated he had always been taught not to let police into his home. *Id*. In response, the officer told the defendant that he was going to call in a canine unit to inspect the defendant's camper. *Id*. Defendant responded, "fine." *Id*. Subsequently, the officer radioed for the canine unit. *Id*. The officers did not find anything illegal on the outside of the camper and directed defendant to unlock the door so they could gain access. *Id*. The defendant complied and eventually child pornography was discovered. *Id*.

The Eighth Circuit found this encounter to be nonconsensual, even more so than in *Beck*. *Id*. at 926. In *Jones*, the defendant refused the initial search, indicating his unwillingness to cooperate. *Id*. The officer chose to the ignore the response, instead telling the defendant "that he was going to call in a canine narcotics unit to examine Jones's vehicle." *Id*. Defendant was present when this call occurred, and the officer told the defendant "that the drug dog would inspect his vehicle." *Id*. The court found the officer used declarative language and "his unresponsiveness to the [defendant's] desire to not have his camper/home inspected would lead a reasonable person to conclude this encounter was nonconsensual, and that compliance with the officer's wishes would be compelled." *Id*.

In this case, Petitioner was stopped for allegedly violating a Colorado statute prohibiting illegal use of the pass lane. *See* Colorado Code, Ch. 39, Art. 4, title 42-

4-1013. The two engaged in a colloquy to determine whether Petitioner violated the statute. (4:19-cr-219, Doc. 372, p. 29). Petitioner handed LEO Miller his license and registration. (*Id.*). Petitioner was the listed owner on the registration and thus his documents were handed back to him. (*Id.*). Subsequently, LEO Miller told Petitioner he was "good to go" and reminded him to stay in the right lane unless he was passing. (*Id.*). Petitioner thanked the officer and put his car into gear. (*Id.* at p. 39).

Rather than letting Petitioner leave at the conclusion of the stop, LEO Miller continued his investigation and asked Petitioner if he was carrying illegal narcotics, thus extending the stop. (*Id.*). Petitioner replied, "no." (*Id.*). Still not deterred, LEO Miller then asked if Petitioner would voluntarily consent to a search of his vehicle. (*Id.* at p. 41). Petitioner responded, "I thought [you] said I was good to go?" (*Id.*). LEO Miller responded, "I appreciate your cooperation but there are some things I am suspicious of." (*Id.*). Petitioner asked if he had to let law enforcement search. (*Id.*). LEO Miller responded it was voluntary. (*Id.*). Petitioner was confused with this statement given the circumstances and continued to waver on whether to give consent. (*Id.*). Instead of clearly stating to Petitioner, "you do not have to let me search your vehicle," LEO Miller persisted in coercive investigation tactics and never once answered Petitioner's question about whether he was free to leave. (*Id.*).

Frustrated with Petitioner's continued wavering, LEO Miller told Petitioner he had a drug dog and stated he could run his drug dog around the vehicle. (*Id.* at p.

42). Specifically, LEO Miller told Petitioner if he was worried about him searching the car, the dog could detect illegal narcotics and that he would not have to physically search the car. (*Id.*). Petitioner did not respond. (*Id.*).

LEO Miller – who still did not have consent to search Petitioner's vehicle – directed LEO Gosnell to get his canine, which he did. (*Id.* at p. 43). This was a further show of force and detention by LEO Miller. (*Id.*). LEO Gosnell then walked to the back of Petitioner's vehicle with the canine, which Petitioner could see through his rear-view mirror. (*Id.* at p. 44). As LEO Miller testified to, it was not until this moment that Petitioner stated the canine could walk around the car. (*Id*.); *See Jones*, 269 F.3d at 926 ("Jones's terse response, 'fine,' made with knowledge that a third officer and a narcotics-detecting dog would arrive shortly can hardly be considered consensual.").

According to the above-cited precedent, Petitioner was "seized" for purposes of the Fourth Amendment. Petitioner had his car in gear and stated he thought LEO Miller told him he was free to leave. Furthermore, Petitioner, after repeated requests to search his vehicle from LEO Miller, asked if he had to let him search. As Petitioner wavered on consent, LEO Miller became agitated and told him he had a drug dog, had another officer stand next to his patrol car, had that officer pull the canine from his patrol car, and then had the patrol officer walk the canine to the rear of Petitioner's vehicle where they were within his view before Petitioner ever

mentioned *anything* about consenting to the encounter. *See Mendenhall*, 446 U.S. at 554 (finding a seizure more likely to occur when the encounter includes "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."). In fact, it appears Petitioner was attempting to leave, by placing his car in gear, but felt as if he could not in the presence of two officers, a canine unit, and from the tone of LEO Miller.

Most troubling is when Petitioner inquired about whether he was free to leave and LEO Miller blatantly ignored the question, continuing to ask for consent to search. *See Hathcock*, 103 F.3d at 718 (finding when an officer uses intimidating, threatening, or *coercive* conduct, a reasonable person would not feel free to leave and thus, be "seized") (emphasis added). Choosing to ignore and deflect Petitioner's multiple inquiries into whether he was free to leave the scene makes this case analogous to *Jones*. *Jones*, 269 F.3d at 926 (noting the defendant had a stronger case for finding a "seizure" than in *Beck*, as the officer did not tell Jones he was free to leave). This encounter can hardly be characterized as consensual and clearly was beyond the scope of the initial traffic stop. Thus, when looking to the decisions of the Eighth Circuit and this Court, Petitioner was seized for purposes of the Fourth Amendment.

IV. THE EIGHTH CIRCUIT ERRED IN HOLDING REASONABLE SUSPICION EXISTED TO EXTEND THE TRAFFIC STOP.

The extended investigative detention is unsupported by a reasonable, articulable suspicion that criminal activity was afoot and thus, contrary to the Eighth Circuit's holding, Petitioner's Fourth Amendment right to be free from unreasonable seizures has been violated. *See Beck*, 140 F.3d at 1136. As the Court correctly noted, the totality of the circumstances and officer experience needs to be considered in determining the reasonableness of an extension. *United States v. Pacheco*, 996 F.3d 508, 512 (8th Cir. 2021). However, an investigative detention must remain within the purpose of the traffic stop. *Beck*, 140 F.3d at 1134. While the court is permitted to consider any added meaning that certain conduct might suggest to experienced officers trained in observing criminal activity, an officer is prohibited from acting on a hunch or "on circumstances which 'describe a very broad category of predominantly innocent travelers.'" *Beck*, 140 F.3d at 1136. (*quoting Reid v. Georgia*, 448 U.S. 438, 440-41).

In *Jones*, the Government argued reasonable suspicion existed to extend a traffic stop past completion of the initial traffic stop because "Jones slowed while being passed, his camper wheels crossed traffic lines, he gave an inconsistent answer regarding his prior arrest record, and he acted nervously upon being detained and questioned inside Trooper DeWitt's patrol car." 269 F.3d at 927. The Eighth Circuit

noted there is "nothing suspicious about a driver … slowing down when he realizes a vehicle is approaching from the rear." *Id*. Furthermore, the court found the inconsistencies is Jones's answers were not the type of inconsistency which warrant an expansion of the initial scope of the stop. *Id*. at 928.

However, the Court noted nervousness combined with "several other more revealing facts can generate reasonable suspicion." *Id*. Moreover, extreme nervousness and "unusually nervous behavior observed in conjunction with only one or two other facts can generate reasonable suspicion that criminal activity is afoot." *Id*. The Eighth Circuit did find, however, "nervousness is of limited significance in determining reasonable suspicion." *Id*. "While a person's nervous behavior may be relevant, we are wary of the *objective* suspicion supplied by generic claims that a Defendant was nervous or exhibited nervous behavior after being confronted by law enforcement officials." *Id*. at 928-29. In fact, the Eighth Circuit held if the Government relies on nervousness as a basis for reasonable suspicion, "it must be treated with caution." *Id*. at 929.

The officer in *Jones* testified the defendant "yawned, his voice cracked, his thumb shook, and he failed to make eye contact." *Id*. The court found "it certainly cannot be deemed unusual for a motorist to exhibit signs of nervousness when confronted by a law enforcement officer." *Id*.; *Beck,* 140 F.3d at 1139. The court went on to note:

> Furthermore, Jones's behavior is rendered less suspect given that any nervous behavior he might have displayed was likely accentuated by the appearance of another officer at the scene. Moreover, Trooper DeWitt had never met Jones, and was unfamiliar with his usual demeanor, and thus DeWitt's evaluation of Jones's behavior lacks any foundation.
>
> *Jones*, 269 F.3d at 929.

The Court found "this is troubling where the alleged signs of nervousness are not the kind of 'unusual,' 'exceptional,' or more objective manifestations of nervousness that might, in combination with the limited other facts presented here, support a finding of reasonable suspicion." *Id*. Specifically, the Court stated:

> when an officer can only cite one or two facts, including a generic claim of nervousness, as supporting his determination of reasonable suspicion, then we may conclude that his suspicion was not reasonable … for it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such interpretation.
>
> *Id*.

Thus, the Eighth Circuit held the facts did not generate sufficient suspicion to warrant the defendant's detention and the evidence subsequently obtained must be suppressed. *Id*.

In this case, the Court relied on LEO Miller's testimony that Petitioner was travelling from a common origin point for narcotics, Petitioner's demeanor was allegedly suspicious, and a strong fragrance dissipated over the course of the stop. (8th Cir., No. 21-1211). The Court used these innocent facts to find that LEO Miller had reasonable suspicion. (*Id.*). However, even when combining the innocent factors

together, they fail to generate sufficient suspicion for an officer to extend Petitioner's traffic stop.

The Eighth Circuit in *Beck* held while geography can be a relevant factor, mere residency in a "drug source state" still must be considered in light of all of the factors and cannot alone support suspicion of criminal activity. 140 F.3d at 1138. The court in *Beck* found that since a vast number of individuals come from a "source state," the suspicion based on the location of an origin state is relegated to a relatively insignificant role. *Id* at 1138. Further, the Court concluded there was no "specific, articulable basis warranting a reasonable belief" there was narcotics in the vehicle and the "circumstance is an extremely weak factor, at best, to suspect criminal activity." *Id*.

Moreover, when the defendant gives vague or confusing answers about travel plans, a reasonable suspicion arises. *Pacheco*, 996 F.3d at 512. However, if the account on travel plans are merely unusual, Courts have found that is not sufficient to constitute reasonable suspicion. *United States v. Simpson*, 609 F.3d 1140, 1151 (10th Cir. 2010). While inconsistent statements *may* create reasonable suspicion enough to extend the traffic stop, there are some inconsistencies which do not raise to this level. *See Jones*, 269 F.3d at 928 (finding the defendant's inconsistent statements about prior arrests and criminal history was not enough to raise reasonable suspicion to extend the stop, as it was consistent with innocent behavior).

Here, Petitioner's travel from Las Vegas to Iowa is not enough to find reasonable suspicion. Petitioner gave a logical reason for his travel with proof to corroborate his travel plans. (4:19-cr-219, Doc. 372, p. 33-34). Petitioner offered proof of his travel plans in order to prove to LEO Miller that his travel plans were legitimate and to dispel any suspicion about them. Further, it is improper to use an origin state as the main support for a suspicion when many innocent travelers come from Las Vegas each year. *See Jones*, 269 F.3d at 928. LEO Miller based his extension on his hunch that Petitioner was suspicious since he came from a location he deemed to be a common origin point for narcotics, subjecting Petitioner to an unreasonable investigative detention.

Regarding the strong perfume like odor coming from the vehicle, LEO Miller noted it was an initially strong perfume which dissipated during the stop. (4:19-cr-219, Doc. 372, p. 38). However, this would make sense as Petitioner had both of his passenger side windows down. (*Id*. at p. 28). Additionally, LEO Miller never observed any air fresheners or "mist" in the car which may evidence recent use of a masking agent. In fact, he searched Petitioner's entire vehicle after conducting the dog sniff, yet never mentioned observing an air fresher or "aerosol deodorizer spray." Yet LEO Miller used his extensive training as a shield to create an unbased speculation for the scent, concluding that Petitioner used a substance to mask the scent of narcotics.

Notwithstanding the factual issues with LEO Miller's alleged findings, the "'masking odor' factor could apply to millions of motorists who use car deodorizers." *Bloomfield*, 40 F.3d at 924 (McMillian, J., dissenting). In fact, one justice on the Eighth Circuit vehemently opposed the use of "masking odors" as a factor to support the existence of reasonable suspicion. *Id*. at 925 (Bright, J., dissenting). Specifically, the justice stated,

> [h]ow many millions of motorists who use car deodorizers are now at a greater risk of having their vehicles and persons detained for one or more hours as suspected drug carriers until the police can procure the services of a drug dog; and how many people would not demonstrate varying degrees of nervous behavior in the presence of police?
>
> *Id*.

Many innocent reasons exist for using a masking odor spray. Petitioner could have been using the strong perfume to cover the smell of food being present in his vehicle. Mateja, J., *Air Freshener Market Nothing to Sniff At*, CHICAGO TRIBUNE, https://www.chicagotribune.com/news/ct-xpm-2004-09-24-0409240322-story.html, (Sept. 24, 2004) (finding air fresheners may be used to mask fast food odor). Petitioner could be masking his own odor as he was driving from Nevada to visit family. *Id*. (finding people buy air fresheners when "the cabin starts to smell like a locker room."). Petitioner could have even been using the perfume to mask the odor of cigarette smoke. *Id*. (finding the number one reason people buy air fresheners is to eliminate the smell of smoke). Or he could have just like to wear a heavy dose

of cologne. LEO Miller failed to focus any of his attention on these possible explanations, instead noting, "the perfume odor wasn't as strong" after verifying Petitioner's license was valid and that he had no active warrants. The Eighth Circuit found LEO Miller's hypothesis as an explanation for the scent even though "an estimated 46 million folks purchase air fresheners for their car each year" which equates to "an estimated $228 million business." *Id*. LEO Miller did not inquire into these explanations yet notes the odor for pretextual purposes in order to unconstitutionally search Petitioner's vehicle.

Lastly, the Court used LEO Miller's observation of Petitioner's allegedly nervous demeanor to conclude there was reasonable suspicion to extend the stop. LEO Miller initially observed Petitioner's hand trembling and face twitching. (*Id.* at p. 31). Here, there are less facts to objectively support nervousness than in *Jones*, where the defendant yawned, his voice cracked, his thumb shook, he failed to make eye contact, and he was misleading about his criminal record. *Jones*, 269 F.3d at 929. While the Court noted additional signs of alleged nervousness, such as having a shaking leg, a dry mouth, and kept licking his lips, LEO Miller did not observe these signs until *after* LEO Gosnell arrived and placed himself at the front of LEO Miller's patrol car, visible to the Petitioner. (8th Cir., No. 21-1211); *see Jones*, 269 F.3d at 929 (finding defendant's increased nervousness less suspect "given that any nervous behavior he might have displayed was likely accentuated by the appearance

of another officer at the scene."). Moreover, these alleged observations are merely subjective to LEO Miller. *See Id*. Similar to the officer in *Jones*, LEO Miller had no previous encounters with Petitioner and was unfamiliar with his usual demeanor. *See Id*. "This is troubling where the alleged signs of nervousness are not the kind of 'unusual,' 'exceptional,' or more objective manifestations of nervousness that might, in combination with other facts, support a finding of reasonable suspicion. *Cf.*, *United States v. Lebrun*, 261 F.3d 731, 733 (8th Cir. 2001) (giving the officer's observation of nervousness more weight when the defendant began sweating profusely in cold weather).

The Eighth Circuit in *Jones* held "the facts presented in this case - minimal nervousness and an inconsistent answer as to prior arrests - whether viewed alone or in combination, amount to little." 269 F.3d at 929. Here, Petitioner was allegedly observed acting nervous. However, less factors support this allegation than in *Jones*. *See Id*. Petitioner gave consistent answers, even corroborating his travel plans by showing LEO Miller a text between himself and his brother – whom he was traveling to visit. Furthermore, many reasons exist for there to be a perfume odor in Petitioner's vehicle. LEO Miller never inquired into why the vehicle smelled the way it did nor alleged he could smell illegal narcotics. All of these are wholly innocent factors the Court combined to create reasonable suspicion, which has been explicitly rejected by the Eighth Circuit. *See Beck*, 140 F.3d at 1137 ("it is impossible

for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation."). Contrary to the Court's holding, there is no concrete reasons for how these innocent factors would create reasonable suspicion. Thus, the facts presented do not generate the requisite suspicion to warrant Petitioner's detention. *See Jones*, 269 F.3d at 929.

As Justice Marshall once noted, "it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method." *Florida v. Bostick*, 501 U.S. 429, 440 (1991) (Marshall, J., dissenting). Further, in *Bloomfield*, Judge McMillian said:

> In some sense, the Fourth Amendment provides a right to be left alone. This understanding is consistent with our foundational principles of 'liberty' and 'the pursuit of happiness.' When examining a search and seizure question against the historical and constitutional background, courts must be Argus-eyed in the protection of innocent activity from unreasonable intrusion.
>
> *Bloomfield*, 40 F.3d at 924 (McMillian, J., dissenting).

LEO Miller violated Petitioner's Fourth Amendment guarantee to be free from unreasonable searches and seizures. Accordingly, because LEO Miller's renewed detention of Petitioner and his vehicle was without reasonable suspicion, the evidence of drug trafficking obtained during Petitioner's renewed detention and subsequent search and interrogation was tainted by the unlawfulness of that

detention and should therefore have been suppressed. *See United States v. Jefferson*, 906 F.2d 346, 348 (8th Cir. 1990).

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT OF THE UNITED STATES

Felipe Noriega, Jr., **Petitioner,** **v.** **United States of America,** **Respondent.**	**APPEAL NO. _____** **(8th Cir. No. 21-1211)** **Certificate of Compliance and of Virus-Free Disk**

I hereby certify that the Brief of Petitioner filed herein is 26 pages, excluding the question presented, the list of parties and the corporate disclosure statement, table of contents, table of authorities, the listing of counsel at the end of the document, or any appendix, as required by Rule 33.1(d). The brief otherwise complies with the type-volume requirements of Rule 33.2.

I further certify that the disks forwarded to the court and opposing counsel have been scanned for viruses and are virus free to the best of my knowledge.

Dated: October 6, 2022

RESPECTFULLY SUBMITTED,

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