

No. _____

In the Supreme Court of the United States

STEPHEN DUDLEY BRUNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**Petition for Writ of Certiorari
to the
United States Court of Appeals for the Fifth Circuit**

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QUESTION PRESENTED FOR REVIEW

Texas DPS Troopers stopped Stephen Brunson because his license plate was expired. They had planned, due to a tip they received, to ask for consent to search. Brunson denied consent. They tried to get a drug-detecting dog to their location; one was not available before the traffic stop would reasonably conclude. The troopers discussed a plan to arrest Brunson for displaying an expired license plate. They did not execute the plan until after the dog arrived and failed to alert. When they finally arrested Brunson for displaying an expired license plate, they searched him incident to the arrest, and discovered methamphetamine.

Whether officers may cure an unlawfully prolonged traffic stop by arresting the motorist for the traffic violation or claiming inevitable discovery based on an earlier, unexecuted plan to arrest the motorist.

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PETITION FOR WRIT OF CERTIORARI

Stephen Brunson asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 22, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on September 22, 2023. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” U.S. Const. amend. IV.

STATEMENT OF THE CASE

Petitioner Stephen Brunson was found guilty of possession with intent to distribute methamphetamine and sentenced to 57 months' imprisonment. In the district court and on appeal, Brunson argues that the search that led to the discovery of the methamphetamine was unconstitutional as the result of an unlawfully prolonged stop.

Three Texas Department of Public Safety Troopers stopped Stephen Brunson for driving with an expired license plate. They discovered, almost immediately, that his car was properly permitted; he had a temporary plate in his rear window. But, he had erroneously left his expired permanent plate and registration sticker attached to his vehicle. The Troopers believed he had violated Texas laws that criminalize displaying an expired license plate and registration sticker.

The troopers approached Brunson to address the violation. When he pointed to the temporary plate, they told him, "Whenever you get a chance, just go ahead and take the [expired, extra-neous] plates off of the car." After checking Brunson's license and registration, the troopers asked him for consent to search.

Brunson denied consent. One of the troopers testified that he

formed a mental plan to arrest Brunson after identifying him, but he did not verbalize that plan in any way.

This was not a chance encounter. The troopers had discussed the stop of Brunson and planned to ask for consent to search because they were aware of a tip that he would be transporting drugs. After Brunson denied consent, two of the troopers returned to their cruiser while one stayed outside, talking with Brunson.

The two troopers in the cruiser discussed Brunson's denial of consent and the need to seek a drug-detecting dog. There was an issue getting a dog to the location quickly. The troopers learned that their agency did not have a dog available. When they contacted Border Patrol, they learned that it would take Border Patrol about ten minutes to get to their location. Familiar with this Court's decision in, *United States v. Rodriguez*, 575 U.S. 348 (2015), they discussed how to proceed:

Trooper Rojo: Um, can we call Presidio [County Jail], see if they'll take a Class C[, arrest for displaying an expired license plate and registration sticker]? Worst case scenario.

Trooper Staton: Yeah. Um, the doing that for a inventory and or search of his person. Is that what you were thinking? That's not an inventory because an inventory's not a search. But.

Trooper Rojo: Well, its an inventory of the vehicle, a search of his person.

Trooper Staton: Yeah.

The troopers then called the jail, informed them that they had detained Brunson during a traffic stop, asked whether they had space, and planned to arrest him. After calling the jail, they confirmed their plan:

Trooper Staton: Um, okay so canine gets here. Canine hits on car. Search the car.

Trooper Rojo: He's still going to be arrested on the Class C. And then we got PC because of the canine. ...

Trooper Staton: But if nothing in the vehicle is found, Class C.

Trooper Rojo: Class C.

The troopers informed Brunson that they had called for a drug-detecting dog. They still did not arrest him or inform him that they planned to. Instead, they waited for the dog, and when the dog did not alert, they arrested Brunson for displaying an expired license plate and registration sticker.

During that arrest, the troopers searched Brunson's pockets and discovered 27.62 grams of methamphetamine.

Brunson challenged the search in the district court. He argued that the search was unlawful because the officers unlawfully prolonged the traffic stop and their plan to arrest him did not cure the unlawful extension of the traffic stop. The district court denied the motion because "Trooper Rojo decided to arrest Defendant for

the traffic violations before the canine arrived. He communicated his decision to FTO Staton after he confirmed with the Presidio County Jail that it could hold an arrest for traffic violations” Alternatively, the district court found that the decision to arrest Brunson regardless of the dog’s alert showed that the search of Brunson, and discovery of the methamphetamine, was inevitable.

Brunson appealed. The Fifth Circuit held that, “[e]ven if Brunson’s detention had been unconstitutionally prolonged ... , the inevitable discovery doctrine renders the exclusionary rule inapplicable Brunson concedes that the troopers were justified in stopping his vehicle to investigate misdemeanor traffic violations. The record and relevant Texas statutory provisions support the district court’s determination that there was probable cause to arrest Brunson for those misdemeanor offenses.”

REASONS FOR GRANTING CERT

Here, the Fifth Circuit permitted officers to cure an unlawfully prolonged stop by arresting the motorist for the violation that gave rise to the initial detention, based on an earlier, unexecuted plan to arrest him. This was not the first time. *See also United States v. Henry*, 37 F.4th 173, 176 (5th Cir. 2022) (relying, in part, on the officer’s ability to arrest motorist “for driving with a suspended license” to justify the continuation of the traffic stop). Under the reasoning used by the Fifth Circuit, when officers have probable cause to arrest, they may extend a traffic stop based on the ability to arrest. Or, even if they cannot, an officer’s statement that he intended to arrest the motorist from the outset will show that the discovery of any item found incident to the arrest was inevitable.

The Fifth Circuit’s holding is incompatible with this Court’s holding in *Rodriguez v. United States*, 575 U.S. 348, 350 (2015), and splits with the Eighth and Ninth Circuits’ application of *Rodriguez* in *United States v. Betts*, __ F.4th __, 2023 WL 8637800 (8th Cir. December 14, 2023), and *United States v. Evans*, 786 F.3d

779, 782 (9th Cir. 2015). It is further irreconcilable with the inevitable discovery test set out by this Court in *Nix v. Williams*, 467 U.S. 431, 441 (1984).

By permitting pretextual stops that are objectively justified, in *Whren*,¹ this Court did not “abandon the traveling public to the arbitrary exercise of discretionary police power” because it enforced, in *Rodriguez*,² the restrictions in “the second prong of the *Terry*³ analysis—[that] the police officers’ actions [must be] reasonably related in scope to the circumstances that justified the interference in the first place.” *United States v. Bostero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995). The Fifth Circuit’s approach—if permitted to stand, will degrade *Terry*’s second prong by permitting officers to arrest anytime the reasonably-related-actions fail to advance their investigation.

¹ *Whren v. United States*, 517 U.S. 806 (1996) ([T]he constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved.”).

² *Rodriguez*, 575 U.S. at 354 (“Authority for the [traffic stop] seizure ... ends when tasks tied the traffic infraction are—or reasonably should have been—completed.”).

³ *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

The Fifth Circuit’s holding in this case permits an officer to cure an unreasonably prolonged stop by arrest.

The Fifth Circuit has given two justifications for permitting officers to arrest a motorist when it becomes clear that their investigation will require them to unreasonably extend a traffic stop: (a) by arresting him for a traffic violation they have probable cause he committed or (b) by testifying that they intended to arrest him for the traffic violation from the outset. Either method is incompatible with *Rodriguez* and splits with other appellate courts’ application of that case as well as the inevitable discovery rule.

1. *Troopers cannot cure the unlawful prolongation of a traffic stop by arresting the motorist for the traffic violation.*

This Court has held that “a seizure justified only by a police-observed traffic violation ... becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. *Rodriguez*, 575 U.S. at 350-51.

In *Rodriguez*, an officer stopped Rodriguez for driving on the highway shoulder in violation of Neb. Rev. Stat § 60-6,142 (2010). *Id.* at 351. “Had Officer Struble arrested, handcuffed, and taken Rodriguez to the police station for his traffic violation, he would have complied with the Fourth Amendment.” *Id.* at 367 (Thomas,

J., dissenting).⁴ This Court, however, held that “[t]he reasonableness of a seizure ... depends on what the police in fact do.” *Id.* at 357.

The Court’s determination that unreasonable-traffic-stop-extension cases should be decided by what the police did, instead of what they could have done, corrected a lower court trend. In *United States v. Childs*, the Seventh Circuit held that an officer’s “probable cause to believe that the [defendant] had committed traffic offenses” justified his arrest, which made “it unnecessary for [the Seventh Circuit] to decide whether, and if so, how the ‘scope’ limitation for *Terry* stops differs from the ‘duration’ limitation.” 277 F.3d 947, 946 (7th Cir. 2002) (en banc).

Those cases appeared in tension with this Court’s holding in *Knowles v. Iowa*, that an officer, authorized to arrest a motorist based on probable cause that he violated a traffic law, could not

⁴ “Under Nebraska law, a person may be arrested without a warrant when an officer has probable cause to believe the person either has committed a felony or has committed a misdemeanor in the officer’s presence.” *State v. Perry*, 292 Neb. 703, 714 (2016) (citing Neb. Rev. Stat. § 29–404.02)

search him incident to issuing a citation. 525 U.S. 113 (1998). Accordingly, in *Rodriguez*, the majority “summarily rejected the notion that the fact that the officer *could have* arrested the driver made any difference, insisting that ‘a routine traffic stop is more analogous to a so-called *Terry* stop—than to a formal arrest.’” 4 W. LaFare, Search and Seizure § 9.3(b) (6th ed. September 2020).

Here, the troopers could have arrested Brunson from the outset. They did not. Instead, they verbally contemplated arresting Brunson only after he had denied consent to search and they had learned it was going to take 10 minutes for a drug detecting dog to arrive. Then, after planning to arrest him, they still did not effect the arrest until after the drug dog had arrived and failed to alert. Their decision to arrest Brunson could not cure the unlawful extension of the traffic stop.

The Eighth and Ninth Circuits follow *Rodriguez*, questioning whether the stop was unlawfully prolonged, even in situations where an arrest would be justified. In *De La Rosa v. White*, a Nebraska state trooper saw De La Rosa’s vehicle follow another too closely. 852 F.3d 740, 742-43 (8th Cir. 2017). The trooper issued a citation, called for a drug detection dog, and detained De La Rosa for fifty minutes to wait for its arrival. *Id.* The Eighth Circuit did not

analyze whether the detention could be justified by the officer's ability to arrest De La Rosa for the traffic violation; rather, it rested its analysis on the officer's reasonable suspicions to justify the prolonged stop. *Id.* at 743-46; *see also Betts*, 2023 WL 8637800, at *4 (relying on reasonable suspicion, not power to arrest, to justify extended traffic stop for unsafely passing another vehicle).

In *Evans*, a Nebraska officer who suspected Evans of smuggling drugs stopped him for unsafely changing lanes and following a vehicle too closely. 786 F.3d at 782. The Ninth Circuit did not analyze whether Evans's eventual arrest was justified by the traffic infraction;⁵ rather, it relied on *Rodriguez* to find that the officer's ex-felon records check and dog sniff unreasonably prolonged the traffic stop. *Evans*, 786 F.3d at 786.

Finally, an array of district courts that have addressed squarely whether probable cause for a traffic violation authorizes a larger investigation post-*Rodriguez* have unanimously rejected the Fifth Circuit's view. *See Molina v. Latronico*, 430 F. Supp.3d 420, 436

⁵ Nebraska law authorized the officer to arrest, instead of issuing a citation, when certain conditions, including probable cause to believe other criminal misconduct offense was afoot, were present. *State v. Bayard*, 119 Nev. 241, 247 (2003).

(N.D. Ill. 2019) (officer not permitted to extend traffic stop beyond what was necessary to write a ticket or effect a custodial arrest); *People v. Espino*, 247 Cal. App. 4th 748, 765 (Cal. App.—6th 2016) (holding that “police may not use probable cause for a traffic violation to justify an arrest for an unrelated offense where, under the facts known to the police, they have no probable cause supporting the unrelated offense.”); *United States v. Morganstern*, 2020 WL 7588576, at *5 (D. Me. Dec. 22, 2020) (citing *Rodriguez* and rejecting argument that, because the officer could have arrested the defendant for illegal plates, he was then entitled to detain her for a drug investigation); *United States v. Ramirez-Solis*, 2021 WL 186481, at *6-7 (W.D. Va. Jan. 19, 2021) (officers unlawfully extended traffic stop when they chose not to investigate traffic offense in a timely manner and instead focused on a drug investigation); *United States v. Holston*, 2019 WL 3574613, at *6 (E.D. Tenn. Jul. 15, 2019), *report and recommendation adopted*, 2019 WL 3558592 (E.D. Tenn. Aug. 5, 2019) (officer’s discovery of open container violation, which he did not diligently pursue, did not justify prolonging detention for drug investigation).

The troopers prolonged Brunson’s traffic stop for displaying an expired license plate and registration. They attempted to cure that

by arresting him. The Fifth Circuit approved the prolonged stop, as it did in *Henry*, where it wrote that it agreed with a district court’s finding that “the continuance of the traffic stop was justified because Henry drove with a suspended license and was a suspect in an ongoing drug trafficking investigation.” 37 F.4th at 176.

2. *The inevitable discovery doctrine does not apply when officers form a plan to resolve an investigation’s dead end.*

The Fifth Circuit held that “[e]ven if Brunson’s detention had been unconstitutionally prolonged, ... the inevitable discovery doctrine renders the exclusionary rule inapplicable” *Appendix* at 2. The Fifth Circuit’s application of the inevitable discovery rule here, where the officers testified that they planned to arrest Brunson before unlawfully extending the stop, would emasculate the exclusionary rule.

This Court has explained that the inevitable discovery rule permits the introduction of illegally-obtained evidence when the prosecution can “establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.” *Nix*, 467 U.S. at 441.

Many courts to evaluate the inevitable discovery doctrine have rejected reliance on the plans of law enforcement. *See, e.g., United*

States v. Griffin, 502 F.2d 959, 961 (10th Cir. 1974) (rejection of “assertion by police (after an illegal entry and after finding evidence of crime) that the discovery was ‘inevitable’ because they planned to get a search warrant”); *see also United States v. Camou*, 773 F.3d 932 (9th Cir. 2014) (inevitable discovery exception not applicable to “excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant”); *State v. Stewart*, 851 N.W.2d 152 (2014) (inevitable discovery claim as to warrantless search because it was made on probable cause rejected, as “gist of the State’s argument appears to be the warrantless search is legal because the officer had probable cause to obtain a warrant. This rational turns the warrant requirement on its head.”).

Other courts, however, have accepted testimony about officers’ plans, but only when they establish that the plans were to follow “routine, established steps resulting in the issuance of a warrant.” *United States v. Pelletier*, 700 F.3d 1109, 1117 (7th Cir. 2012) (government “need only show that it would be unreasonable to conclude that, after discovering all of the information, the officers would have failed to seek a warrant.”).

Here, the evidence suggested that one of the troopers, upon identifying Brunson, mentally formed a plan to arrest Brunson, and that two of the troopers, when they realized they would have to unreasonably prolong the stop to get a drug-detecting dog in time, verbalized a plan to arrest Brunson. The Fifth Circuit does not identify which plan met the government's burden to show inevitability, but both fail.

Accepting an officer's plans as sufficient to show inevitability "would as a practical matter be beyond judicial review." *Griffin*, 502 F.2d at 691. To search incident to arrest, officers are required to arrest, not merely cite. *Knowles*, 525 U.S. at 119. To permit officers to search incident to arrest, only after permissible traffic-stop related tasks are completed, would, as a practical matter, obviate the protections that circumscribe traffic stops by permitting officers to claim, after the fact, an unreviewable intention to arrest from the outset.

This Court should grant a writ of certiorari to bring the Fifth Circuit's rulings on inevitable discovery in line with the requirements of *Nix* as well as that of other appellate courts.

CONCLUSION

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
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Dated: December 21, 2023