

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ENRIQUE SERRATO-NAVARRO,

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether law enforcement's retention of immigration identification documents obtained during an initial consensual encounter for purposes of records checks and questioning by other officers without reasonable suspicion runs afoul of the Fourth Amendment and this Court's decisions in *Florida v. Royer*, 460 U.S. 491 (1983), *United States v. Drayton*, 536 U.S. 194, 201 (2002) and their progeny.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner, Enrique Serrato-Navarro, respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 23, 2018 and the Order denying Panel Rehearing entered on March 9, 2018.

OPINIONS BELOW

The court of appeal's order denying panel rehearing/rehearing en banc; the court of appeal Memorandum affirming the conviction; and the district court's Judgment are unreported and are reproduced in Appendix A, B, and C, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 23, 2018. The court of appeals denied timely petition for panel rehearing and rehearing en banc on March 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY & CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution holds:

“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 particularity describing the place to be searched, and the persons or things to be seized.”

(U.S. Const. Amend. IV.)

STATEMENT OF THE CASE

Petitioner Enrique Serrato-Navarro, a permanent U.S. resident, was charged along with his co-defendant Mr. Jose Cortez-Luna with one count of conspiracy to possess with intent to distribute and one count of possession with intent to distribute, methamphetamine. 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 846. After the denial of their motion to suppress evidence, petitioner was convicted as charged pursuant to a bench trial. Petitioner contended on appeal that the district court erred in denying his motion to suppress evidence. The Court of Appeals affirmed. Petitioner timely filed petitions for panel rehearing and rehearing en banc which were denied on March 9, 2018.

The pertinent facts adduced at the hearing on the motion to suppress were as follows: On December 27, 2015, Border Patrol Agent Gatewood was on patrol in the agricultural Dome Valley area outside of Yuma, Arizona trying to apprehend human and narcotic smugglers that are trying to circumvent or bypass the nearest law enforcement checkpoint. At about 10:13

a.m., Border Patrol Agent Novales, notified Agents Gatewood and White that he observed a green sedan with Colorado plates and two male occupants. Agent Gatewood followed the green sedan down several rural roads until it entered a parking area off a field access road and parked at 10:30 a.m.. Gatewood parked his patrol car behind and perpendicular to the green sedan. As the men were walking away, Gatewood addressed them in English and asked them how they were doing or if he could help them find anything. The two men turned and walked back toward him speaking Spanish, but Gatewood did not know what they were saying. Gatewood is not fluent in Spanish but asked Mr. Cortez-Luna if it was his car and could make out that Mr. Serrato-Navarro (who had exited the passenger side) was saying he worked out there. A farmer pulled up and confirmed to Gatewood that Mr. Serrato-Navarro worked in the fields and then left. Gatewood asked the men if they had any weapons, then asked “if they have any identification or anything on them so he could check them, do records checks and immigration checks. The men gave their I-551 (permanent resident immigration) forms to Gatewood.

At about the same time, at 10:40 a.m., Agent White arrived and stayed with the men while Gatewood called in their information. Agent White, who speaks better Spanish than Agent Gatewood, questioned the men more in depth for about 10 minutes and the “responses he got were somewhat

different.” Gatewood’s record check came back that co-defendant Cortez-Luna had a suspended license and that the car was registered to a third party. Thereafter, the agents continued their investigation, calling more law enforcement officers to the scene as well as a canine unit that alerted to drugs in the trunk.

Petitioner contended on appeal that the district court erred in denying his motion to suppress evidence because his Fourth Amendment Constitutional right to be free from unreasonable searches and seizures had been violated. Specifically that the motion to suppress should have been granted because petitioner was initially detained without reasonable suspicion and subsequently seized without probable cause when a border agent followed his vehicle until it parked in a clearing, initiated conversation, requested identification and retained such for records and immigrations checks until more officers arrived and reasonable suspicion later arose. The Court of Appeals affirmed and denied rehearing.

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REASONS FOR GRANTING THE WRIT

1. Law enforcement's retention of immigration identification documents obtained during an initial consensual encounter for purposes of records checks and questioning by other officers without reasonable suspicion runs afoul of the Fourth Amendment and this Court's decisions in *Florida v. Royer*, 460 U.S. 491 (1983), *United States v. Drayton*, 536 U.S. 194, 201 (2002) and their progeny.

Authoritative decisions of this Court and other United States Courts of Appeals hold that when law enforcement retains the identification of a citizen, even for the limited time it requires to run a warrant check, a seizure has occurred requiring reasonable suspicion to justify the intrusion. *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Guerrero*, 472 F.3d 784 (10th Cir.2007); *United States v. Chan-Jimenez*, 125 F.3d 1324 (9th Cir.1997); *United States v. Villa-Gonzalez*, 623 F.3d 526 (8th Cir. 2010); *United States v. Tyler*, 512 F.3d 405 (7th Cir.2008).

In this case, the Ninth Circuit held in pertinent part that:

The district court did not err in denying Defendants' motion to suppress. The district court plausibly found that the initial encounter between Agent Gatewood and Defendants, including Gatewood's request to examine Defendants' identification was voluntary. See *United States v. Drayton*, 536 U.S. 194, 201 (2002)(explaining that a law enforcement officer may pose questions and ask for identification without implicating any Fourth Amendment interest, so long as the officer does not induce cooperation by coercion). The district court also properly concluded that defendants' responses during their encounter with Agents Gatewood and White, combined with the result of Agent Gatewood's record checks, gave rise to reasonable suspicion to seize Defendants' at approximately 10:50 a.m., when Gatewood retained control of Defendants' identification documents. See *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir.

1997)(“When a law enforcement official retains control of a person’s identification papers . . . longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart.”)

Mem. at 2-3.

However, the lower court’s ruling runs afoul of the Fourth Amendment. While law enforcement may request to examine identification briefly during a consensual encounter, the retaining of the identification to run a warrants or other records checks converts the encounter into a seizure requiring reasonable suspicion. When scanning identification, police officers have “no longer than necessary to ascertain everything is in order” in order to maintain a consensual encounter. *United States v. Chan–Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997).

The Ninth Circuit affirmed the erroneous finding of the district court that the results of the records checks were one of the factors which gave rise to reasonable suspicion to seize Defendants at 10:50 a.m.. Mem. 2-3. This reasoning runs afoul of the Fourth Amendment’s prohibition against unreasonable searches and seizures. U.S. Const. Amend. IV. While law enforcement may retain identification for the brief time it takes to run records and warrants checks during a lawful traffic stop based on reasonable suspicion (*United States v. Villa*, 589 F.3d 1334, 1339 (10th Cir. 2009)), they may not do so during a consensual encounter without converting it to a Fourth Amendment seizure requiring reasonable articulable suspicion or probable cause.

“The Supreme Court has also made clear ... that an individual ‘may not be detained even momentarily without reasonable, objective grounds for doing so.’” *United States v. Lopez*, 443 U.S. 1280, 1285 (10th Cir. 2006) quoting *Florida v. Royer*, 460 U.S. 491, 498 (1983). Here, Agent Gatewood detained petitioner without reasonable grounds to do so when he took petitioner’s identification to perform records and immigrations checks, before reasonable suspicion had been established.

It has long been held that police officers may approach citizens and ask for identification without creating an instance of seizure. *United States v. Drayton*, 536 U.S. 194, 201 (2002) (“[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification ...”); *Florida v. Bostick*, 501 U.S. 428, 434 (1991) (“... no seizure occurs when police ask questions of an individual, ask to examine the individual's identification...”); *Florida v. Royer*, 460 U.S. 491, 504 (1983); *United States v. Mendenhall*, 446 U.S. 544, 555 (1980). Furthermore, if identification is presented, law enforcement may possess and quickly examine it without trespassing the parameters of a consensual encounter. *Royer*, 460 U.S. at 504 (“by returning [defendant's] ticket and driver's license, and informing him he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish”).

Here, up until the point that Gatewood approached Defendants, requested

their identification, and initially possessed them for a few seconds, the encounter was consensual. However, as soon as Agent White arrived and Gatewood stepped away to run the records and immigrations checks, the encounter turned into a seizure. When law enforcement retains the identification of a citizen, even for the limited time it requires to run a warrant check, a seizure has occurred. *Royer*, 460 U.S. at 503 n.9; *United States v. Tyler*, 512 F.3d 405, 410 (7th Cir. 2008); *United States v. Lopez*, 443 U.S. F.3d 1280, 1285 (10th Cir. 2006); *United States v. Chan–Jimenez*, 125 F.3d at 1326; *United States v. Lambert*, 46 F.3d 1064, 1069 n.3 (10th Cir. 1995).

The Ninth Circuit’s decision is also in conflict with decisions within its own circuit. In *United States v. Chan–Jimenez*, a tribal police officer followed a pickup truck, then pulled over and activated his emergency lights after the truck stopped and the driver raised the hood, ostensibly indicating a mechanical problem. The officer did not return the driver's license and registration after confirming that they were “in order,” but instead asked to search the truck. This Circuit held that a seizure occurred when the officer did not return the license and registration after finding that they were in order. Once law enforcement possesses a citizen's identification beyond this limited window of time, the citizen loses the ability to leave or otherwise terminate the encounter. 125 F.3d at 1326; see also *United States v. Lockett*, 484 F.2d 89 (1973) (continued detention of jaywalker to run warrants check after review of identification and issuance of

citation was unreasonable). This Court and other Circuit Courts of Appeal are in accord. When law enforcement retains the identification of a citizen, even for the limited time it requires to run a warrant check, a seizure has occurred. *Florida v. Royer*, 460 U.S. at 503 n.9 (1983); *United States v. Tyler*, 512 F.3d at 410 (defendant seized where officer “took his identification from him and retained it while they ran a warrant check”); *United States v. Lopez*, 443 U.S. F.3d at 1285; *Chan–Jimenez*, 125 F.3d at 1326; *United States v. Lambert*, 46 F.3d at 1069 n.3. Holding a person’s identification papers or other property converts a consensual encounter into a seizure requiring reasonable suspicion. *United States v. Villa-Gonzalez*, 623 F.3d 526 (8th Cir. 2010) (officer did not return defendant's identification card, without which “a reasonable person is much less likely to believe he can simply terminate a police encounter”); *United States v. Guerrero*, 472 F.3d 784 (10th Cir.2007) (where two suspects by car at gas station asked for identification and one provided driver's license and car registration and the other a Mexican identification card, all of which officer took to patrol car for 10–12 minutes for records check, this a seizure, as “once the officers take possession of that license, the encounter morphs into a detention”); *United States v. Johnson*, 326 F.3d 1018 (8th Cir.2003) (suspect was seized, as officer “took possession of his personal property—here, his driver's license”); *United States v. Jordan*, 958 F.2d 1085 (D.C.Cir.1992) (where police “continued to retain his license” when defendant about to leave in car, this is a seizure).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on June 7, 2018.

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