

No. 15-10226

IN THE

**United States Court of Appeals**

FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

JOHNNY DAVID JOHNSON,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION  
THE HONORABLE TERRY R. MEANS PRESIDING

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**Initial Brief for Johnny David Johnson**

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## Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of the case. These representations are made so that this Court's judges may evaluate possible disqualification or recusal.

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## **Recommendation on Oral Argument**

Oral argument isn't requested. This appeal concerns the single issue of whether the district court reversibly erred in denying his motion to suppress. The record is short and the issue is uncomplicated so oral argument isn't needed unless the Court desires it.

## Table of Contents

Certificate of Interested Persons .....	ii
Recommendation on Oral Argument .....	iv
Table of Contents .....	v
Index of Authorities .....	vii
Statement of Jurisdiction .....	1
Statement of the Issue .....	3
Statement of the Case .....	4
Summary of the Argument .....	10
Argument .....	11
The district court reversibly erred in denying Johnson’s motion to suppress because the open-air dog sniff exceeded the time to handle the traffic stop, thus violating the Constitution’s shield against unreasonable seizures.	
<i>Standard of Review</i> .....	11
<i>Johnson Had Standing to Contest the Search</i> .....	11
<i>The Mission of the Stop</i> .....	12
<i>Reasonable Suspicion Was Cabined to the Traffic Violation</i> .....	13

<i>An Unreasonably Prolonged Detention</i> .....	16
Without the illegally seized contraband, the conviction is supported by legally insufficient evidence.	
<i>Standard of Review</i> .....	17
<i>An Uncorroborated Confession</i> .....	17
Conclusion .....	21
Certificate of Service .....	23
Certificate of Compliance .....	24
ECF Certifications .....	25

## Index of Authorities

<i>Brendlin v. California</i> , 551 U.S. 249 (2007) .....	11
<i>Illinois v. Cabelles</i> , 543 U.S. 405 .....	12
<i>Opper v. Illinois</i> , 348 U.S. 84 (1954) .....	17
<i>Rodriguez v. United States</i> , 135 S. Ct. 1609(2015) .....	11, 12, 13, 15
<i>United States v. Abigando</i> , 439 F.2d 827 (5th Cir. 1971) .....	17
<i>United States v. Cherry</i> , 759 F.2d 1196 (5th Cir. 1985) .....	19
<i>United States v. Deville</i> , 278 F.3d 500 (5th Cir. 2002) .....	17
<i>United States v. Dortch</i> , 199 F.3d 193 (5th Cir. 1999) .....	15, 20
<i>United States v. Estrada</i> , 459 F.3d 627 (5th Cir. 2006) .....	13
<i>United States v. Jacquinot</i> , 258 F.3d 423 (5th Cir. 2001) .....	11
<i>United States v. Jacquez</i> , 421 F.3d 338 (5th Cir. 2005) .....	11
<i>United States v. Jenson</i> , 462 F.3d 399 (5th Cir. 2006) .....	12

<i>United States v. Jones</i> , 234 F.3d 234 (5th Cir. 2000) .....	13
<i>United States v. Khanalizadeh</i> , 493 F.3d 479 (5th Cir. 2007) .....	12
<i>United States v. Pack</i> , 612 F.3d 341 (5th Cir. 2010) .....	11
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985) .....	12
<i>United States v. Sterling</i> , 555 F.3d 452 (5th Cir. 2009) .....	17
<i>United States v. Sokolow</i> , 490 U.S. 1 (1989) .....	16
<i>United States v. Thibodeaux</i> , 276 Fed. Appx. 372 (5th Cir. 2008) .....	12
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963) .....	17
<b>Statutes</b>	
18 U.S.C. § 1291 .....	1
18 U.S.C. § 3231 .....	1
18 U.S.C. § 3742 .....	1
21 U.S.C. § 841 .....	7

**Rules**

Fed. R. Crim. P. 4(b) ..... 2

**Sentencing Guidelines**

U.S.S.G. § 4B1.1 ..... 8

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**Initial Brief for Johnny David Johnson**

---

**Statement of Jurisdiction**

The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231. The jurisdiction of this Court is invoked under 18 U.S.C. § 1291 as this is an appeal from a final judgment entered by the United States District Court for the Northern District of Texas. Jurisdiction is also had under 18 U.S.C. § 3742.

The district court entered written judgment on 12 March 2015. ROA.242–44. Johnson filed a notice of appeal on 16 March 2015, ROA.245, which was timely under Federal Rule of Appellate Procedure 4(b).

## **Statement of the Issue**

The district court reversibly erred in denying Johnson's motion to suppress because the open-air dog sniff exceeded the time to handle the traffic stop, thus violating the Constitution's shield against unreasonable seizures.

## Statement of the Case

On February 13, 2015 the Tarrant County Sheriff's Office (TCSO) sought to execute a narcotics search warrant at 6222 Post Oak Terrace in Fort Worth, Texas.

ROA.383. This was Johnny David Johnson's house. ROA.384. Eric Curtis, a narcotics investigator with the TCSO, was surveilling the house that morning from his unmarked truck. ROA.383. He saw a couple of other cars parked in the driveway, including a white Jeep and a silver Ford pickup. ROA.383.

He was already familiar with Johnson, and saw him come out of the house and walk over to the Jeep. ROA.384. Johnson didn't have anything in his hands coming out of the house, and Curtis didn't see him take anything out of the Jeep. ROA.394-95. Johnson walked over to the Ford truck and got in. ROA.385. The truck backed out and Curtis followed it as it left the house. ROA.385.

He observed the driver commit two moving violations while following him: speeding and failure to signal a left-hand turn. ROA.385. He radioed Deputy Jeff Tindle, a canine officer who was going to assist with the search of the house, about the driver's failure to signal a left-hand turn. ROA.386, 402. He told Tindle to make a traffic stop because Tindle was in a marked unit. ROA.386, 403. He instructed Tindle to positively identify Johnson and to pull all the occupants out of the truck to ensure they didn't have a chance to tip anyone off about the search warrant. ROA.386-87.

Tindle made the stop in a residential neighborhood, had the three occupants identify themselves, and had them exit the truck. ROA.403–04. He radioed Curtis about who the subjects were, and Curtis thereafter drove up on the scene. ROA.405. Curtis went to speak to Jon Berg, the driver, while Tindle checked for warrants on his vehicle's computer. ROA.405.

Curtis asked Berg for consent to search the truck, and Berg said no. ROA.388. After Berg denied consent and Tindle had finished checking for outstanding warrants, Curtis asked Tindle to conduct a free-air sniff around the truck. ROA.388, 405. Tindle took his Belgian Malinois, Duke, out of his vehicle, and led him around the outside of the truck. ROA.388, 406. Duke alerted by sitting and staring at the passenger side door. ROA.407. Both Tindle and Curtis then searched the truck. ROA.407.

Tindle started off on the back seat and spied a blue eyeglass case sitting atop a black backpack. ROA.407. He opened the case, and discovered a zip-lock baggie containing methamphetamine. ROA.407–08. He also found a Ruger .9mm handgun in between the driver and passenger seats, and a black lockbox on the black floor on the driver's side of the pickup. ROA.411, 413. When he opened the lockbox, he found it contained a large zip-lock baggie with methamphetamine in it, along with five smaller baggies containing methamphetamine within them. ROA.413.

Curtis searched the backpack. ROA.389. In it he found a gun magazine, and a black Ruger case with another gun magazine in it. ROA.389. Both were loaded with ammunition. ROA.389.

After the search, Johnson was arrested and Tindle transported him, along with Berg back to Johnson's house. ROA.390–91, 416.

At his house, TCSO narcotics investigator Jeffrey Jones interviewed Johnson in the driveway. ROA.433. Jones was aware that Johnson was in custody as a result of the traffic stop, and read him his *Miranda* rights. ROA.434–35. Jones testified that Johnson agreed to waive those rights, but then said that nothing in the truck was his. ROA.435. But he later said, "I will take all of it." ROA.436. Jones asked Johnson what "all of it" meant, and he answered whatever was there, but that he didn't know what was there. ROA.437.

Johnson later on agreed to work as a confidential informant for the investigators. ROA.437. They transported him away from his house so as not to arouse any suspicions, and while he was in the car with them, Johnson mentioned the lockbox found in the truck and said the three ounces of methamphetamine in it were his. ROA.438. He had bought them the day before. ROA.438. He added that he had been selling about four ounces of methamphetamine a week for the past several months. ROA.439. His confidential-informant efforts, however, didn't result in any deals. ROA.439.

About six weeks after the traffic stop, Chris Smith, an ATF agent, and Investigator Curtis interviewed Johnson. ROA.457. In that interview, Johnson said that the methamphetamine found in the lockbox behind the driver's seat was his. ROA.459. He said that he had re-upped from his supplier the day before, meaning that he had obtained an additional supply from his dealer. ROA.459. He confessed that he resold methamphetamine for a profit, and that he had started dealing in December 2012. ROA.460. He described how he made his profits by using a cutting agent, and that he bought and resold anywhere from two to eight ounces per week from August 2013 to the date of his arrest. ROA.461. He also stated that the methamphetamine found in the blue eyeglasses case was not his, but Berg's. ROA.461.

### **Procedural History**

Johnny David Johnson was indicted for knowingly and intentionally possessing with intent to distribute a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). ROA.12.

He pleaded not guilty to the charge. ROA.21.

He moved to suppress evidence obtained as a result of the traffic stop, arguing that he had a reasonable expectation not to be detained beyond the purpose of the initial traffic stop. ROA.51–54, 87–90. The Government countered that there was no legal basis to suppress the physical evidence obtained during the search of Berg's vehicle pursuant to a positive alert by a trained controlled substance K-9.

ROA.67; 103–13. The district court denied the motion without a hearing. ROA. 124–27.

Johnson was subsequently indicted on a superseding indictment, charging him with intentionally and knowingly possessing with intent to distribute fifty grams or more of methamphetamine. ROA.144–45.

The case proceeded to trial. Johnson asked that he be allowed to represent himself *pro se*, but that request was denied. ROA.300–02. A jury found him guilty of the offense after one day of testimony.

Upon conviction, the district court ordered that a PSR be completed for sentencing. ROA.186. Johnson petitioned the court to represent himself *pro se* yet again for sentencing. ROA.206-07. The matter was referred to the magistrate judge, who granted his motion, allowing him to continue his defense *pro se*. ROA.209, 214–15.

The PSR calculated his Base Offense Level at 32, based upon his admission that he had distributed methamphetamine for approximately 26 weeks. ROA.544. A two-point upward adjustment was added for the Ruger semiautomatic pistol found in the search. ROA.545. The PSR also calculated an offense level of 37 based upon the career-offender provisions of U.S.S.G. § 4B1.1 because the instant offense was a controlled substance offense and Johnson had two prior felony convictions for crimes of violence. ROA.546. No reduction was given for acceptance of responsibility because he had contested the Government's case at trial. ROA.546. His crim-

inal history score was calculated to be 12, ROA.552, which prescribed a Guideline Imprisonment Range of 360 months to life. ROA.560.

Johnson filed 33 objections to the PSR, ROA.567–77, and the Government filed responses. ROA.578–96. The probation officer accepted Johnson’s objection that he was not a Career Offender, ROA.601, and reduced his Guideline calculation to a Total Offense Level of 34 with a prescribed range of 262 to 327 months. ROA.602.

The district court overruled Johnson’s renewed objections at sentencing, and adopted as its final findings of facts the statements of fact made in the PSR and its addenda. ROA.531. It determined that the appropriate guideline calculations were: Total Offense Level 34; Criminal History Category VI; and Imprisonment Range 262 to 327 months. ROA.531. It also determined that the range for supervised release was five years, and a fine range of \$17,500 to \$10 million. ROA.531. It amended the drug amounts, but noted that the changes did not affect the total offense level. ROA.532. It sentenced Johnson to 262 months’ imprisonment and a term of supervised release of five years, but did not order a fine. ROA.533. It also ordered him to pay a mandatory special assessment of \$100. ROA.535.

## Summary of Argument

Investigators of the Tarrant County Sheriff's Department properly conducted a traffic stop after observing Jon Berg, the driver of a Ford pickup, commit two traffic violations. Their detention of both Berg and defendant Johnson that followed the stop immediately was also proper as they checked Berg's driver's license, determined whether there were any outstanding warrants, inspected the truck's registration and proof of insurance and even questioned the occupants about the traffic stop. But their authority for the seizure ended when the computer check was completed. The open-air dog sniff they initiated after their seizure's "mission" had ended violated Johnson's Fourth Amendment rights. Consequently, the contraband seized pursuant to the search of the truck was inadmissible against Johnson.

Because the illegally seized contraband was the only evidence corroborating Johnson's subsequent admissions, his conviction should be vacated and the case remanded for a trial without admission of the illegally obtained evidence.

## Argument

### Issue One

The district court reversibly erred in denying Johnson's motion to suppress because the open-air dog sniff exceeded the time to handle the traffic stop, thus violating the Constitution's shield against unreasonable seizures.

#### The Standard of Review

In reviewing the denial of a motion to suppress, the district court's factual findings are reviewed for clear error, and its legal conclusions are reviewed *de novo*. *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001). The Government bears the burden of showing the reasonableness of a warrantless search or seizure. *United States v. Jaquez*, 421 F.3d 338, 341 (5th Cir. 2005).

#### Johnson Had Standing to Contest the Search

Johnson moved to suppress the search of the truck before trial. He does not contest that Deputy Tindle's decision to stop Berg's vehicle was a violation of his *Fourth Amendment* rights. Nor does he argue that the detention immediately following the stop violated those rights, either.

His detention became illegal when Officer Tindle had completed the computer checks and the officers thereafter conducted an open-air dog sniff of the truck. He had standing to challenge the discovery of drugs and the gun in the Ford pickup

because he had standing to contest the seizure of his person after the mission of the traffic stop had ended. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015); see also *Brendlin v. California*, 551 U.S. 249, 257 (2007); *United States v. Pack*, 612 F.3d 341, 344 (5th Cir. 2010).

### **The Mission of the Stop**

Probable cause exists to justify a traffic stop under the *Fourth Amendment* when a law-enforcement officer observes a defendant committing a traffic violation. See, e.g., *United States v. Khanalizadeh*, 493 F.3d 479, 482 (5th Cir. 2007). The stop is more like a *Terry* stop than it is a formal arrest. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). Its tolerable duration is set on the seizure’s “mission”—the traffic violation that warranted the stop, *Illinois v. Cabelles*, 543 U.S. 405, 407 (2005), and attendant safety concerns. Consequently, an officer can conduct such inquiries incident to the traffic violation, such as checking the driver’s license, determining whether there are outstanding warrants against the driver and occupants, inspecting the vehicle’s registration and proof of insurance, and even questioning the vehicle’s occupants. *United States v. Thibodeaux*, 276 Fed. Appx. 372, 380 (5th Cir. 2008) (unpub.) (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). But authority for the seizure ends when the tasks tied to the traffic infraction are—or reasonably should have been—concluded. *Rodriguez*, 135 S. Ct. at 1615. In other words, the officer must terminate the detention once he has investigated the con-

cerns for the traffic stop unless he develops additional reasonable suspicion supported by articulable facts to warrant an extended time of detention. *Cf. United States v. Estrada*, 459 F.3d 627, 631 (5th Cir. 2006); *see also United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006) (“If all computer checks come back clean, then as a general matter reasonable suspicion disappears, and there is no legitimate reason for extending the stop.”); *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000) (finding that a three-minute detention after computer checks violated the Fourth Amendment).

A dog sniff is not an ordinarily incidental to a traffic stop, but a measure aimed at detecting evidence of criminal wrongdoing. *Rodriguez*, 135 S. Ct. at 1615. It can’t be characterized as part of the officer’s traffic mission because it lacks the same close connection to roadway safety as the regular inquiries. *Id.* Consequently, officers must have reasonable suspicion supported by objective and articulable facts to extend a traffic stop for a dog sniff.

The investigators didn’t have it here.

### **Reasonable Suspicion Was Cabined to the Traffic Violation**

While surveilling Johnson’s house, Curtis observed Johnson come out of his house, but without anything in his hands. ROA.394–95. He saw him go to the Jeep parked in his driveway, but didn’t see him take anything out of it before he jumped in the

Ford pickup. ROA.394–95. Deputy Tindle testified that the only reason he effected the stop was for the alleged traffic infraction.

Q: So Investigator Curtis specifically asked you to try to get probable cause to make a traffic stop?

A: To assist him, yes, sir.

Q: Were you able to get probable cause to make a traffic stop?

A: Yes, I was.

Q: How?

A: Investigate [sic] Curtis had observed a violation and relayed it to me via radio.

Q: So you, yourself, did not see any traffic violation?

A: No, I did not.

Q: He [sic] relied solely on what Investigator Curtis told you?

A: That is correct.

Q: And Investigator Curtis told you that he observed the silver F-150 pickup make a turn without signaling?

A: That is correct.

Q: And he told you that that was the traffic violation that he observed and asked you to make a traffic stop?

A: That is correct.

Q: And that's all he told you about the probable cause to stop?

A: That is correct.

ROA.425–26.

Based on this evidence, the investigators' mission of the traffic stop was cabined just to the alleged traffic infraction. While the Government might argue that the open-air sniff was initiated within just moments of the completion of the computer check, that doesn't justify the extended detention and unreasonable search. *See Rodriguez*, 135 S. Ct. at 1616 (holding that an officer can't earn bonus time to pursue an unrelated criminal investigation if he has completed all his traffic-related tasks expeditiously).

In *United States v. Dortch*, computer checks were completed before the search of the vehicle. 199 F.3d 193, 197–98 (5th Cir. 1999). The basis for the stop was essentially completed when the dispatcher notified the officers of the defendants' clean records. *Id.* at 199. The officers should have ended the detention then, and allowed the defendant's to leave. *Id.* at 198. Instead they spent three minutes dillydallying with the defendants' identification papers before asking for consent to search the car. *Id.* at 198. This Court held the officers' failure to release the defendants after completion of the computer check violated the *Fourth Amendment*. *Id.* at 199. The investigators here likewise violated Johnson's *Fourth Amendment* rights by initiating the dog sniff after the computer check had been completed. *See id.* at 200 (“Any probable cause established as a result the canine search was subsequent to the unlawful seizure.”).

### **An Unreasonably Prolonged Detention**

An officer may temporarily detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The Government may argue that the officers had reasonable suspicion to justify the continued detention of Johnson because of the search warrant. But that argument would be without merit.

Investigator Curtis testified that he didn't see Johnson take anything outside of his house. He also testified that he didn't see him take anything out of the Jeep. Deputy Tindle testified that the only basis for the traffic stop was the alleged traffic infraction, and nothing else. Consequently, there is no evidence based upon articulable facts that supports further detention after the computer check had been concluded. Consequently, the Ford pickup was illegally searched and the methamphetamine and Ruger were illegally seized.

## Issue Two

Without the illegally seized contraband, the conviction is supported by legally insufficient evidence.

### **The Standard of Review**

A challenge to the corroboration requirement is treated as a challenge to the sufficiency of the evidence and is reviewed *de novo*. *United States v. Sterling*, 555 F.3d 452, 456 (5th Cir. 2009).

### **An Uncorroborated Confession**

A defendant may not be convicted solely on the basis of an uncorroborated confession. *Opper v. United States*, 348 U.S. 84, 89–90 (1954); *United States v. Deville*, 278 F.3d 500, 506 (5th Cir. 2002). The Government need not introduce independent evidence on every element of the crime, however. *United States v. Abigando*, 439 F.2d 827, 832 (5th Cir. 1971). If there is extrinsic evidence tending to corroborate the confession, the confession as a whole is admissible; and some elements of the offense may be proved entirely on the basis of a corroborated confession. *Deville*, 278 F.3d at 507. Additionally, where there is no tangible proof of injury to a person or property, the corroborative evidence must tend to connect the accused with the crime. *Wong Sun v. United States*, 371 U.S. 471, 491 n. 15 (1963); *United States v. Sterling*, 555 F.3d 452, 456 (5th Cir. 2009).

Johnson was arrested at the scene, and taken directly back to his residence. ROA.415–16. While officers were searching the residence, Investigator Jeffrey Jones interviewed Johnson while standing on the driveway. ROA.434. Jones was aware that Johnson had been arrested for possession of a controlled substance, ROA.434, and questioned him about the drugs found during the traffic stop. ROA.435. Johnson first replied that there was nothing in the vehicle that was his, but then said that he would take all of it. ROA.436. Johnson subsequently said that he had purchased the three ounces of methamphetamine found in the lockbox behind the driver's seat the day before the stop. ROA.438.

At trial, the Government called eight witnesses who were all government agents of one kind or another. Two—Curtis and Tindle—were the investigative agents who conducted the traffic stop and search. Chris Smith, an ATF agent, and Investigator Jeffrey Jones testified about Johnson's confessions. Jones testified that Johnson confessed that the methamphetamine in the lock box was his. ROA.436. Smith testified that he interviewed Johnson about six weeks after the traffic-stop arrest and Johnson told him that the methamphetamine discovered in the lock box in the truck was his, purchased the day before. ROA.459. He also testified that Johnson summarized his methamphetamine sales starting in December 2012, and that the methamphetamine found in the eyeglasses case was Jon Berg's, the driver of the pickup. ROA.460–61.

The rest of the Government's witnesses testified either about chain of custody or lab results. Lenora Vargas, a property and evidence specialist, testified about the chain of custody involving the seized contraband. ROA.440–44. Esther Gutierrez, an evidence technician, testified about the chain of custody of the contraband with regard to the Tarrant County Medical Examiner's Office. ROA.445–449. Christina Couke-Garza testified about her role as a senior forensic chemist and how she conducted tests to detect and identify methamphetamine in the seized evidence. ROA.449–453. Finally, Denise Williams testified. ROA.466. She testified as a forensic chemist and about the contraband seized from the traffic stop and how it contained methamphetamine. ROA.466–74.

In short, the Government did not produce any extrinsic evidence tending to corroborate Johnson's confession except the contraband evidence illegally seized from the traffic stop. Given that there is no other legal extrinsic evidence supporting the confession, the conviction must be vacated and Johnson given a new trial without the admission of the illegally seized evidence.

In the alternative, Johnson's confessions constitute fruit of the poisonous tree. Under the fruit-of-the-poisonous-tree doctrine, all evidence derived from the exploitation of an illegal search or seizure must be suppressed, unless the Government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was the product of the constitutional violation. *See United States v. Cherry*, 759 F.2d 1196, 1210–11 (5th Cir. 1985). Although Johnson

consented to waiving his *Miranda* rights, that consent was not valid. Berg had refused permission to search the pickup truck, yet Johnson was required to stand by and watch Deputy Tindle conduct an open-air dog sniff and then watch as both he and Investigator Curtis combed through the truck's interior. *Cf. United States v. Dortch*, 199 F.3d 193, 202 (5th Cir. 1999). He was then arrested, taken to his residence, and questioned in his driveway while agents combed through his house searching for narcotics. Investigator Jones's immediate questioning about the methamphetamine found in Berg's truck and Johnson's subsequent statements wouldn't have occurred except for the previous unlawful detention and illegal search. *Cf. id.* Consequently, the causal connection between the illegal detention and Johnson's driveway confession wasn't broken so the district court erred when it admitted the confession into evidence.

## **Conclusion**

For the foregoing reasons, this Court should vacate Johnson's conviction and remand the case for a trial without the admission of the illegally seized evidence or the confession he made on his driveway.

Dated: 15 September 2015

Respectfully submitted,

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## Certificate of Service

I certify that today, 15 September 2015, I served a copy of the brief for Appellant and a copy of the record excerpts in this case upon opposing counsel via email and to Mr. Johnson via first-class mail, postage pre-paid, to-wit:

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## Certificate of Compliance

### Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

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/s/ Peter C. Smythe

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Attorney for the Appellant

Dated: 15 September 2015

## ECF Certifications

This brief complies with ECF pleading requirements because we've made the required privacy redactions, the electronic submission is an exact copy of the paper document, and the electronic filing is free of viruses.

*/s/ Peter C. Smythe* \_\_\_\_\_

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Dated: 15 September 2015