No. 18-1157

In The
Supreme Court of the United States

EDWIN A. VEGA,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In its decision in the above captioned matter did the Ohio Supreme Court reverse this Honorable Court's decision in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) by permitting the unlawful and lengthy detention of appellant herein absent a reasonable suspicion of criminal activity prior to unlawfully searching sealed U.S.P.S. packages located in the passenger compartment of his lawfully stopped vehicle in violation of his Fourth Amendment rights?

2. In its decision in the above captioned matter did the Ohio Supreme Court reverse this Honorable court's long-standing decision in *United States v. Ross*, 456 U.S. 798 (1982) by holding that probable cause did exist to open sealed U.S.P.S. packages located in the passenger compartment of appellant's lawfully stopped vehicle in violation of his Fourth Amendment rights?

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JURISDICTION

Petitioner Edwin Vega seeks a writ of certiorari. Petitioner's claim is premised upon a self-serving description of the facts, without regard to other portions of the record which were filed with this Honorable Court, and a dubious claim that the Ohio Supreme Court's decision conflicts with *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) and *United States v. Ross*, 456 U.S. 798 (1982).

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourth Amendment

> 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 places to be searched, and the persons or things to be seized

United States Constitution, Fourteenth Amendment

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

I. Factual Background

Respondent disagrees with the characterization of facts that serve as the basis for Petitioner's arguments.

Cleveland State University Police Officer Jeffrey Madej was observing traffic at the corner of E. 18th Street and Euclid Avenue in Cleveland, Ohio. A traffic stop was initiated after Petitioner was observed turning left through a solid red light. (App. 51a-55a). Officer Madej approached the vehicle, informed Petitioner of the nature of the stop and asked for Petitioner's driver's license and insurance information. At the same time, Officer Madej smelled a strong odor of marijuana emanating from Petitioner's vehicle and a decision was made to conduct a warrantless search based upon the odor of raw marijuana. (App. 56a). At this point in time less than 10 minutes had elapsed and Petitioner was asked to step out of the vehicle. (App. 57a). During the initial search, Officer Madej found a cell phone in the cup holder, another cell phone in the front door and a third cell phone in the center console. (App. 57a). Within the center console, Officer Madej found several raw buds of marijuana and a package of "Sweet Hard Candy". (App. 57a). At this point Officer Madej informed Petitioner that marijuana was found and was placed in the back of Officer

Madej's vehicle and was informed of his rights. (App. 57a). The search continued based upon the odor of marijuana and Officer Madej found a substantial amount of rolling papers, a box containing aerosol canisters that could be used to mask the odor of marijuana and in the backseat were two white packages contained in an open USPS box. (App. 58a).

Officer Madej felt the packages and believed it to contain individually packaged drugs. (App. 58a-59a). Officer Madej asked Petitioner about the packages, and Petitioner stated that the unlabeled packages contained stickers. (App. 59a). Officer Madej did not believe that the packages were consistent with stickers. (App. 59a).

At this point in time, approximately 23 minutes had elapsed. (App 76a). The focus was now on the packages. Officer Madej conferred with officers, including his supervisor, about what to do with the packages. (App. 59a). Unsuccessful attempts were made to secure the services of a narcotics K-9; however, none were available. (App. 59a-60a). The next 38 minutes were spent with law enforcement conferring about the legality of conducting a warrantless search of the packages. (App. 60a) During the same time period, Officer Madej issued a traffic citation which was observed to have occurred at 53 minutes from the initial stop. (App. 32a-33a).

After explaining the ticket, the decision was made to search the packages. (App. 60a). The decision to open the packages were based upon the strong odor of

marijuana coming from the vehicle that could not be explained from the marijuana buds coming from the center console, as well as other indicators such as the odor-masking agent, cell phones, rolling paper and the Sweet Candy. (App. 60a).

Officer Madej found inside the packages, three large Ziplock clear bags containing a large amount of SweetStone Candy, the same as what was found in the center console and found to contain THC. (App. 66a).

Petitioner conveys that the packages searched lacked any odor of marijuana. This is the basis of the second question presented to this Honorable Court. A closer review of the record demonstrates a different characterization of this claim. On cross-examination. During his testimony, Officer Madej agreed that with the strength of the odor of the marijuana, it was his opinion that marijuana was consistent with the package. (App. 116a). When asked on recross-examination whether Exhibit 10, the package retrieved from the back of Petitioner's vehicle, smelled of marijuana, Officer Madej testified it did not. (App. 118a). On further redirect examination, Officer Madej agreed that at the time he pulled the packages out of the car, he could not tell whether the smell was coming from the package or coming from the car. (App. 125a). The record does not convey, that at the time of the warrantless search, the packages in dispute entirely lacked a smell of marijuana. Any smell lacking at the time of the suppression hearing must account for the passage of time and maintenance of evidence.

Expanding beyond the facts articulated by Petitioner, Officer Madej opened the envelopes containing 150 individually wrapped packages of marijuana candy based upon factors other than the smell of marijuana. (App. 60a-61a). At the time Officer Madej could not rule out the envelopes from containing the source of the marijuana smell. (App. 125a). The Ohio Supreme Court agreed that the decision to open the envelopes were based upon much more than the odor of marijuana. (App. 33a).

II. Suppression of Evidence by the Trial Court

Petitioner was subsequently indicted. Petitioner filed a motion to suppress the evidence recovered and a suppression hearing was held. On January 25, 2016, the trial court suppressed granted the motion to suppress and suppressed the 150 individual packages of marijuana candy found in the envelopes that the trial court described were "opened during a constitutionally impermissible detention." (App 34a-35a).

The trial court appeared to find the search of the envelopes in violation of *United States v. Ross*, 456 U.S. 798 (1982). (App. 33a-34a). However, the trial court stressed that the additional detention of Petitioner after the initial stop and when the initial amount of marijuana was found was impermissible because the "resulting delay while waiting for an answer via either the 'sniff' of a trained K-9 officer or legal guidance from superiors exceeded constitutionally

permissible grounds to detain the [Petitioner] in this case." (App. 34a-35a).

III. Respondent's Appeal and Reversal by the Ohio Supreme Court

Respondent filed an appeal of right pursuant to Ohio Rev. Code §2945.67 and Ohio R. Crim. P. 12(K). The court of appeals affirmed the trial court's decision on February 23, 2017 in a 2-1 decision. Subsequently, the court of appeals rejected the government's Ohio App. R. 26(A) application for reconsideration. In reaching its decision, the Eighth District held that the length of the stop was not only unconstitutional but that Officer Madej lacked probable cause to search the envelopes which yielded the 150 packages of Sweet Stone candy. *Ohio v. Vega*, 79 N.E.3d 600, 603 (Ohio Ct. App. 2017), App. 14a-15a.

The court of appeals panel below disagreed regarding what *United States v. Ross*, 456 U.S. 798, 825 (1982) permits an officer to search. The majority found that any search must be limited to "every part of the vehicle and its contents that may conceal the object of the search," *Vega*, ¶17, App. 15a and concluded that because there was no smell of marijuana billowing from the packages, Officer Madej could not search it. *Id.* The dissent viewed *Ross* in the context of *Wyoming v. Houghton*, 526 U.S. 295 (1999) for the proposition that the ability to examine packages and containers during a traffic stop does not require an individualized showing of probable cause as to each container and that the

lack of smell of marijuana coming from a package does not vitiate probable cause that the package did not contain marijuana. *Vega*, 79 N.E.3d 600, 605 (Ohio Ct. App.) ¶24-25 (Stewart, J., dissenting), App. 19a. The dissenting judge further considered *Rodriguez v. United States*, 135 S.Ct. 1609 (2015) in determining that the length of detention was constitutional under the circumstances in this case. *Vega*, 79 N.E.3d 600, 606 (Ohio Ct. App.) ¶29-31 (Stewart, J., dissenting), App. 21a-22a.

The Respondent next sought discretionary review from the Ohio Supreme Court and raised a single proposition of law pursuant to Ohio Sup. Ct. Prac. R. 7.02. The government framed the proposition of law as follows:

> The Fourth Amendment's prohibition against unreasonable searches and seizures is not violated when police extend a traffic stop based upon probable cause that the vehicle contains contraband. Officers may extend the traffic stop and detain the driver for as long as necessary to reasonably complete the search of the vehicle and its packages and containers without a showing of individualized probable cause for each one. *Rodriguez v. United States*, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015) and *United States v. Ross*, 456 U.S. 798, 72 L.Ed. 2d 572 (1982) explained.

The appeal was accepted on December 20, 2017. Oral arguments were held on June 12, 2018. On October 3, 2018, the Ohio Supreme Court unanimously reversed

the suppression of evidence and remanded the case for further proceedings. *Ohio v. Vega*, 116 N.E.3d 1262 (2018).

REASONS FOR DENYING THE WRIT

I. The Length and Reason for Detention Was Constitutionally Permissible and Not Prohibited by This Court's Decision in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015).

The first issue focuses on whether the length of time occasioned by the officer's consultation on the scope of the vehicle search and attempts to obtain the services of a drug sniffing dog rendered the warrantless search of the package containing 150 individual packages of marijuana candy unconstitutional.

This Court held in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) that absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's prohibition against unreasonable seizures. In doing so, the *Rodriguez* implicitly contemplated that reasonable suspicion justifies police extension of a traffic stop. In this case, the original mission of issuing a traffic citation transformed itself once Officer Madej smelled marijuana billowing from Petitioner's vehicle. (App. 56a). Prolonging the traffic stop was further justified based upon the discovery of shake weed, three cellular phones, rolling papers, odor masking agents and envelopes which Petitioner claimed to contain stickers. (App. 60a-61a).

Despite Petitioner's claim that this is not contraband it certainly can be considered illegal within the context of Ohio Rev. Code Ann. §2923.24 and further indicative of illegal activity.

The Ohio Supreme Court agreed that nothing in *Rodriguez* limits an officer's ability to prolong a traffic stop for a reasonable time to conduct an investigation and found the Respondent's argument consistent with existing state precedent. *Ohio v. Vega*, 116 N.E.3d 1262, 1266 citing *Ohio v. Batchili*, 865 N.E.2d 1282, 1286-1287 (2007), App. 7a-8a. Although a drug sniffing K-9 was never secured in this case, the conduct of law enforcement was based upon the mission of issuing a traffic ticket transforming itself into a mission of investigating drug activity and was not unreasonable under the United States Constitution.

The Respondent's appeal in this case began with its argument that the trial court misconceived the underlying principles of *Rodriguez*, necessitating an appeal of right and review by the Ohio Supreme Court. This issue has been resolved by the Ohio Supreme Court in Respondent's favor. At this juncture, Petitioner has not demonstrated that the decision below conflicts with a federal court of appeals nor has he demonstrated that the decision below conflicts with a decision of this Court. Further, Petitioner has not demonstrated a conflict between Ohio's determination and a decision of the highest court in another state. Nor should there be any doubt in Ohio's interpretation and application of *Rodriguez* in this case as any

extension of the traffic stop was occasioned by the investigation into drug activity.

II. There Was Requisite Suspicion To Conduct A Warrantless Search of the Packages Based Upon the Totality of the Circumstances Present at the Time of the Traffic Stop

The Respondent argued that the warrantless search of the envelopes which ultimately yielded evidence of marijuana candy was appropriate under the automobile exception to the search warrant requirement. In its argument the Respondent relied upon this Court's jurisprudence and considered *Carroll v. United States*, 267 U.S. 132 (1925), *United States v. Ross*, 456 U.S. 798 (1982) and *Wyoming v. Houghton*, 526 U.S. 295 1999) as well as Ohio court of appeals decisions applying federal precedents.

The Ohio Supreme Court disagreed with Petitioner's position and found that Officer Madej's determination that the smell of marijuana could not be accounted for by the small amount of marijuana found. (App. 16a-16a, 111a). Based upon this fact and other indicators of drug activity, the Ohio Supreme Court concluded that the warrantless search was permissible under *Ross* and *Houghton* and consistent with its prior decision in *Ohio v. Moore* 734 N.E.2d 804 (2000). (App. 6a).

III. Warrantless searches of containers within a vehicle are permissible under the motor vehicle exception.

Petitioner does not appear to take issue with warrantless searches made under the motor vehicle exception as first established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). What Petitioner takes issue with is whether there was requisite cause to search the envelopes in the back of his vehicle. In his view, the envelopes were incapable of containing the "object of the search".

In *United States v. Ross*, 456 U.S. 798 (1982), the Court examined whether the warrantless search of an automobile including a brown bag found in the trunk by police officers who had probable cause to believe the vehicle contained contraband, based upon a tip provided by an informant, was reasonable within the meaning of the Fourth Amendment. *Id.* at 799. In rendering its opinion, the Court upheld the warrantless search, holding that, "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825.

Seventeen years later the United States Supreme Court again examined warrantless searches of a container within a vehicle in *Wyoming v. Houghton*, 526 U.S. 295 (1999). In *Houghton*, a routine traffic stop was conducted, and the officer observed the driver to have a syringe. A purse, that a passenger claimed ownership of, was searched and more drug paraphernalia was

found. The Wyoming Supreme Court suppressed the evidence holding that while a police officer with probable cause to search a vehicle may search only those containers that might conceal to object of the search that the officer knows belongs to a person suspected of criminal activity or if there was a known opportunity to conceal contraband to avoid detection. The United States Supreme Court reversed and returned to its analysis in *Ross*. In explaining *Ross*, the *Houghton* Court explained, "neither *Ross* itself nor the historical evidence it relied upon admits a distinction among packages or containers based upon ownership. When probable cause to search for contraband in a car, it is reasonable for police officers [. . .] to examine packages and containers without a showing of individualized probable cause for each one." *Houghton*, at 302. Although, *Houghton* extended the rule in *Ross* to containers belonging to passengers, the salient point is that individualized probable cause is not necessary.

Petitioner claims that the Ohio Supreme Court's determination conflicts with *Ross* as he argues that *Ross* prohibits the warrantless search of the envelopes in the rear of Petitioner's vehicle because those envelopes were incapable of accounting for the billowing smell of marijuana. Thus, Petitioner's view of *Ross* is a narrow one that requires individualized suspicion as to each container within a vehicle and one that can eviscerate probable cause due to the lack of a single factor. Respondent disagrees with that assessment. Problematic to Petitioner's position is that even if this Court were to revisit *Ross* and *Houghton* under the

facts of this case, the record demonstrates that this is hardly the case of an officer trying to find a person inside a suitcase. Petitioner states in his petitioner, "it is similarly unreasonable to believe a package might contain an amount of marijuana so large it's odor is 'billowing out of the car' when said package emanates no such odor whatsoever." Petitioner at pg. 15.

Expanding beyond the facts articulated by Petitioner, Officer Madej opened the envelopes containing 150 individually wrapped packages of marijuana candy based upon factors other than the smell of marijuana. (App. 60a-61a). At the time Officer Madej could not rule out the envelopes from containing the source of the marijuana smell. (App. 125a). There is again a distinction between the smell of an exhibit in the courtroom and the state of the object from the officer's perspective as the investigation into drug activity unfolded. Even then in light of *Houghton*, the United States Supreme Court's decision in *Ross* should not be construed to limit a warrantless search to only those containers that have an individualized showing or probable cause so long as there is was objectively reasonable for those containers to contain contraband in connection with drug activity. The dissenting judge of the court of appeals found the premise for which the court of appeals based its decision and advanced by the Petitioner to be contrary to this Court's precedent and found the lack of smell not to be determinative. The dissenting judge recognized the methods in which the odor of drugs could be masked and found it logical to search the envelopes in Petitioner's vehicle. *Ohio v.*

Vega, 79 N.E.3d 600, 605 (Stewart, J. dissenting), (Ohio Ct. App. 2017), App. 18a-20a. Thus, the search of the envelopes was permissible.

Viewing the facts in this case under the totality of the circumstances demonstrate no conflict between the Ohio Supreme Court and the guidance offered by this Court in *United States v. Ross*, 456 U.S. 798 (1982), nor has Petitioner demonstrated any other conflict on the law that would warrant granting of the writ of certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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