No. _____

In the
Supreme Court of the United States

JOHNDRELL ELLIOTT,
Petitioner,
v.
STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

GIVEN A TRAFFIC STOP MADE BY THE STATE TROOPER, WHO WAS THE "DOG HANDLER" INVOLVED, WAS ACTUALLY IN THE PROCESS OF FINALIZING HIS TICKET WRITING, WHEN HE STOPS DOING SO AFTER JOINED BY OTHERS. HE THEN ORDERS THE PEOPLE OUT OF THE VEHICLE AND MAKE USE OF HIS DOG WHO THEN ALERTS: CAN THE DRUG OFFENSE ARREST BASED ON THESE FACTS SURVIVE *RODRIGUEZ V. U.S.*, 135 S. CT. 1609 (2015)?

II

GIVEN THE REMOVAL OF THE MOTORIST AND HIS PASSENGER FROM THEIR VEHICLE (BY A TROOPER) WHO WAS IN THE FINAL PHASES OF WRITING A WARNING TICKET (HERE FOR A WINDOW TINT VIOLATION), WHICH RENDERED THE VEHICLE A LAWFULLY PARKED VEHICLE, BE SEARCHED WITHOUT A WARRANT?

III

WHERE THE TROOPER WHO WAS FINALIZING HIS WRITING OF A TICKET (FOR A TINT VIOLATION), IS JOINED BY OTHER TROOPERS, LITERALLY STOPS DOING SO TO ORDER THE PEOPLE OUT OF THE VEHICLE SO HE CAN MAKE USE OF HIS "DOG": CAN THE USE OF THE DOG BE SAID TO BE ANYTHING OTHER THAN A WARRANTLESS SEARCH, WHICH REQUIRED PROBABLE CAUSE?

IV

IF THE TEST IS NOT WHETHER THE TRAFFIC STOP LASTED LONGER THAN THE AVERAGE TRAFFIC STOP, BUT WHETHER IT LASTED LONGER THAN WAS NECESSARY TO COMPLETE THE PURPOSE OF THE STOP, CAN IT BE SAID WITH IMPUNITY, THE TROOPER WAS JUSTIFIED IN INTERRUPTING HIS WRITING OF THE TICKET IN ORDER TO MAKE USE OF HIS DOG, AFTER WHICH THE MOTORISTS WERE REMOVED, THE DOG ALERTED?

STATEMENT OF RELATED PROCEEDINGS

There are no related cases or proceedings that Counsel is aware of.

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TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

To the Honorable, the Chief Justice and Associate Justices of The Supreme Court of the United States:

The Petitioner, Johndrell Elliott, respectfully prays that a Writ of Certiorari be issued to review the judgment entry in the Supreme Court of Ohio originally filed in this case on February 18, 2020.

OPINIONS BELOW

State v. Elliott, the Opinion centralized in this Petition, is reported as Guernsey County, Ohio, Court of Appeals No. 2119 Ohio 3594, and ____WL____. In this Petition it is designated as Appendix "B". The Order of the Ohio Supreme Court rendered on February 18, 2020, denying further Appellate review, is regarded herein as Appendix "A."

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Ohio Court of Appeals was rendered on November 6, 2019. This Petition is being seasonably filed, under favor of 28 U.S.C., §1254(1). This follows because the Order of the Ohio Supreme Court denying further Appellate Revision was rendered on February 18, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principle provisions of the United States Constitution involved in this case are the search and seizure clause of the Fourth Amendment and the self-

incriminating clause of the Fifth Amendment. Likewise, relevant here are the due process clauses of the Sixth and Fourteenth Amendments. The pertinent text of these reads as follows:

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.

AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 the laws.

STATEMENT OF THE CASE

Given the fact that when the Supreme Court indicated in *Caballes*[1] and *Arizona v. Johnson*[2] that the Fourth Amendment only tolerates certain investigations that are unrelated to officer's mission in connection with traffic stops, but only if they "did not lengthen the roadside detention," and it recognized

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[1] *Illinois v. Caballes*, 543 U.S. 405 (2005).

[2] *Arizona v. Johnson*, 555 U.S. 323 (2009).

that it could "become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket" *Rodriguez v. United States,* 135 S. Ct. 1612 (2015). Also, it is a given, because the Court said so, that the stop must be "temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

As we read the cases, it is clear enough, here, that this is a matter of great public or general issue; as well as, a substantial constitutional question to be reckoned with. It was created by the Opinion rendered, herein, indeed when this Appellate Court made a determination that; inasmuch as, the average time for the issuance of a traffic ticket being 10-20 minutes, if the officers are able to obtain probable cause to search within that time frame, that would be okay. And, that would invariably be so for those who live in Ohio. Indeed, as our Court of Appeals put it, their reference to the critical time interval seems clearly to make that point. *See* ¶¶24-25, of the Opinion, referred to herein as Appendix "B." The fact that this was a finding not made by the trial Court bears clearly on the issues postured by these facts. This is especially so since any findings that Trooper Hawkins did not prolong this stop to make use of his dog after Elliott had been virtually cleared to go would be a prevarication. Our thesis, here, is verified for those who read objectively the referred to pages of the Transcript.

Given the jurisprudence provided us in *Rodriguez v. United States*, which the Court below fully credits us with relying on, and rightly so, its rejection of the

following thesis for which it stands clearly qualifies this case for review. This follows because the Opinion below clearly clashes with the following thesis for which *Rodriguez* now stands for. Indeed, to approve this conviction, it must agree with the Court below that *Rodriguez* did not articulate, indeed categorically, the tenet that: absent reasonable suspicion of some sort of criminal activity *unrelated* to the primary purpose of the stop, the police may not routinely extend the duration of the stop, however briefly, to conduct a canine sniff or undertake any other such non-routine criminal investigation (as was done, here) for clearly ulterior reasons.

Let's be very clear: the following paragraphs of the Court's opinion are clear enough. Indeed, they aptly posture the dispositive issues in this case. Here, Reference is to ¶¶'s 7 and 8 of the Opinion labeled *State v. Elliott,* 2019-Ohio-3594. It is attached here as Appendix "B" (*infra*, at App. 2). Here it states, which is not quite accurate,[3] that:

> {¶7} While Hawkins was reviewing the records of both men, Trooper Roe arrived . . . Hawkins . . . decided . . . to walk his canine around appellant's vehicle. Both men were asked to exit the vehicle while this took place. The canine alerted . . .
> {¶8} From stop to dog sniff, the stop took 16 minutes and 35 seconds.

Given the awesome significance of *Rodriguez v. United States*, 135 S. Ct. 1612 (2015), one must first

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[3] The actual testimony shows no probable cause existed.

understand the Court there held that the "*seven or eight-minute delay" involved, related to the dog, was only a de minimus intrusion under the Fourth Amendment "was not of constitutional significance*." *Id.* at 1614-15. (*Emphasis supplied*.) Postured by the above insuperable showings, this counsel truly believes it is disingenuous to even suppose that the intended use of the dog, here, was a planned event. For sure, it was at all times fully scripted to occur so that the trooper could hopefully verify his *suspicions*. This being that because the occupants of the vehicle had these extensive drug conviction histories, the likelihood was good there was evidence of a crime in the vehicle that was amenable to a dog search. In our view, the notion that they had engaged in certain ill-defined movements inside the vehicle, was a conjuration. This latter thesis is verified by the fact that the summoned back up was only sought after the decision to use the dog was reached. This follows because, otherwise, the hole in their rationale would have been even more obvious.

So, let's be very clear. Johndrell Elliott does indeed challenge the legality of what he regards as the "prolonged detention" he was subjected to. This done in the wake of his having been stopped for a very minor traffic offense. The claim is: these officers exceeded any reasonable time duration related to the purported justification for the stop itself.

So postured, given the stop arguably was justified, the law is clear. Its's justification still must then be assessed for reasonableness. With that being so, surely the Court of Appeals (we believed) fully understood

this. For sure, as well, there is nothing that shows the Ohio Courts did. This follows because there was nothing written by the trial Court that shows the findings were made to support any finding that the critical time involved here was only 16 minutes. Likewise, who made the finding that this time span was within the average range for such stops. Clearly, it was simply imputed by the appeals Court, which is not fair. This follows because findings on dispositive issues are mandatory; and must be "supported by credible evidence." *See* Appendix "B," Opinion, ¶¶16-17.

How the Court of Appeals determined and resolved the issues involving what facts determined by the trial Court on the duration issues involved here, and which the Appellate Court relied on, we were not told. Given its reasoning pattern was unstated, it has to be that something is wrong with that picture. It could very well be that the Court of Appeals simply ignored the role it was supposed to play, here. For sure, it is clear the dispositive finding of fact was made by the Court of Appeals and then imputed to the trial Court. Clearly, as well, the Court of Appeals seemingly failed to understand its role was that of a reviewing Court. It was supposed to review the finding made by the trial Court, not make its own findings.

II

Clearly then, as well, the Court of Appeals, either, because it failed to grasp the depth of the issues here, or its role in this process (or both), simply put, reached the wrong conclusions. For it is also clear the Court's assessment of the law is, and likewise was, completely and indisputably wrong. Here, we start with certain

basic tenets, or truths. It starts with *Rodriguez v. United States*, 135 S. Ct. 1612 (2015). There, the charge made that there was an illegal prolongation of a "valid" stop in order to conduct a canine sniff. *Id.* at 1612. There, the "canine officer," not unlike the trooper here, was the officer charged with writing the ticket. In *Rodriguez*, after the stop, he called in to verify whether the operation of the vehicle was lawful and for a routine check. Not unlike the situation here, having (illegally) *compelled* the passenger to identify himself, it then happened for reasons that are not clear, after reading about the records of the travelers, and for reasons unrelated to the issuance of a ticket, the Record is clear the officer truly wanted to have the dog do its work. Thus, it happened that, after the other officers arrived - - and this is what happened here, the canine officer then put his dog to work.

STATEMENT OF THE FACTS

The facts, here, show that even before making use of the dog to validate these people, the trooper had targeted them as being drug dealers. For sure, it was because of their records he sent for assistance. This shows he fully intended (all along) to make use of that dog - - come what may. Given that background, it is also compellingly relevant that while the officer started writing the warning ticket, which he told them was all that was going to happen, which meant to them would then be on their way, the facts show that once the other officers arrived, the officers then ordered both people out of their vehicle. Clearly all that took time. It was afterwards the trooper who made the stop then put his

dog to work. For sure, while it was doing so, the dog alerted to the hood of the vehicle.

As to how much time it took for the trooper to study their long records, call for the backup (since he intended all along) to make use of the dog, we do know. We also do know that these considerations were ignored in the trial Court's ratiocinations. If it were, otherwise, he would have made the finding required, here. Our belief is that this trooper's use of the dog, following his calls for assistance were wasted minutes. Clearly then, what these failures by the trial Judge tell us is that: when he denied our Motion, he did not have a clue as to whether for these extra-curricular activities taken that did not relate to the stop could be resorted to with impunity. What this all means is the conclusion that the delays we are talking about could be validated if they did not take too much time, which is what the Appellate Court held.

Having said all that, let's see how *Rodriguez* works, here. First off, we know that "like a *Terry* stop, context is determined by the seizure's mission - - to address the traffic violation that warranted the stop, and attend to related safety concerns [here]." *Id.* at 1614. Here, too, this Court made it a point to note officers "may not [deal with unrelated matters] in a way that prolongs the stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 1615.

What thus magnified the issue for this Court could not be any clearer. It centralizes the fact that nowhere therein did our Court even bother to address the issue made even more critical here by the decision rendered

in the *Rodriguez* decision itself. Instead of doing that, our Court simply told us his stated reason for doing so magnifies our disbelief it was enough the total time involved was not unreasonable. The trooper had convinced this Court the average time it takes for all traffic stops (including those in which dogs are used) is only 10-20 minutes and the time involved here, which was approximated was sixteen (16) minutes it was reasonable.

While reliance on that nonsense was bad enough, it was nonetheless a question of fact the resolution of which was conjured up by a reviewing Court. It was then imputed to the trial level Court - - in a sort of cart before the horse scenario. Still, let's also be very clear. When the Appeal Court reasoned the total time lapsed here was sixteen (16) minutes or so in its opinion, as the Court concluded in its Opinion, it was relying on an estimate it had bene given. Appendix "B," Opinion, ¶¶24-25. For here, the Record shows that with full knowledge that a tinted window violation had occurred, and with knowledge he would be issuing only a warning citation, the trooper (rather than write up the ticket, which he said could be done "roughly" in a minute [tr. at 31-32]), took more than the six (6) minutes that elapsed before he learned about the extensive records these people had (*ibid*). This time lapse must be further extended to accommodate the time the Trooper spent studying their records while he remained seated in his vehicle. Tr. at 55-56. Also see Tr. at 52, where the Trooper explained (after they were good to go), he thought it was okay, as he put it, he had "to wait … for the criminal history to come back from dispatch." Tr. at 152-53. Clearly these procrastinations

were the sole reasons for the delay that were created, here.

Here, too, let's be clear. Some of us already know what the *Rodriguez* Court also knew, and we suppose so does and did the Courts here, that a dog sniff is not an element of a traffic stop. *Ibid.* Consider the fact that in *United States v. Evans*, 786 F.3d 779 (2015), shortly after *Rodriguez* was decided, that Court ruled an officer's prolongation of the traffic stop to conduct both an ex-felon's registration check and a 'dog sniff' violated the Fourth Amendment *unless* the officers had independent reasonable suspicion to support the prolongation.

II

To avoid any possible argument that in counsel's efforts here, which admittedly are intense, he may have somehow ignored his ethical and constitutional obligation, not have let any of his arguably less than perfect beliefs influence his actions, we submit the following chronology as being the best we could do with this Record. It shows, as we read the Record, some time elapsed after the stop was made. It was at 2:01 and 2:43 seconds when the troopers and Elliott started talking about the tint issue, after which the trooper concluded his measurement and said he would be issuing a warning citation. Tr. at 18. At least this much is clear. We know he already had the driver's paperwork when they talked about the tint, for the estimated :20 seconds it took to do so. It was then only 14:03:23. Tr. at 23. The dispatcher was then contacted at 14:05:27 (*id.* at 30), and by 14:11:18 (*id.* at 35), it was said they were already good to go.

In all this, we have to factor into our ratiocinations, indeed into our thinking, here, that "from 14:05:27 to 14:11:18 while . . . [he was] sitting in his car . . . [that he learned] both of them were good" to go, yet he was still "going through their driving record on . . . [his] computer," but he was still not writing the ticket. Tr. at 31-32.

Let's be clear. This officer testified it would have taken him only two (2) minutes to write the ticket (*Id.* at 56) Still, the facts show "from 14:05:27 to 14:11:18," that instead of writing the ticket, he "was going through their driving record on the computer screen in . . . [his] car." *Ibid.* As to this unbelievable reality, the Trooper, also clearly insinuated his belief was there would never be any reason to write a ticket, here. This follows because clearly his intent at all times was to make use of his dog. In any event, this must be so because there was this "six-minute period of time . . . [when he could have but he] didn't attempt to write the warning." *Id.* at 32.

The efficacy of this sequence is compellingly significant. Indeed, because when one reads this trial transcript, and truly examines its content, not only realistically but objectively, the story it tells is real. This to the end that the appropriate resolution can be made, here, in the light of fundamental criteria as it was augmented by *Rodriguez*. Here, too, the trial Record is most clear. The trooper conceded for sure "there was no need for him to be concerned with the passengers' driving record and criminal history." Tr. at 51. And, that his only real concern was whether or not "his license was suspended" or if he was wanted, we

suppose. *Id.* at 51-52. Yet, time was spent, we say wasted, while the trooper was "waiting for criminal histor[ies] to come back." *Ibid.* What is significant, is this waiting occurred after he had all the information he needed from the dispatcher. Indeed, it was obtained "within a couple minutes." *Id.* at 52. So why the wait?

III

Also, let's be clear: we are indeed contending that the utilization of the "canine," also referred to herein as the "dog," was indeed to have him make "a search." For sure, clearly what he did was a search for contraband. Simply put, this was a search for probable cause to make a warrantless search for a basis to arrest. This we know to be true. To be sure, Trooper Hawkins told the Court, as much; hence he told us, as well. This segment of the Record (here being referred to) shows that to be so. Indeed, it is here the Record reveals:

> Q. You aware that in Ohio you can get a telephonic search warrant in about 15 minutes?
>
> A. It depends on where you're at on the scene.
>
> Q. Well, all you have to do is be near a telephone; right?
>
> A. I did not obtain a telephonic search warrant.
>
> Q. I understand. But you had the . . . cell phone, didn't you?
>
> A. Yes.

Q. And you - - you know that Ohio authorizes the issuance of search warrants telephonically?

A. Yes.

Q. Right. These people were . . . being detained?

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On the basis of the fact that you had probable cause to search the car?

A. I had probable cause to search the car.

Q. Right. But what - - what are the exigent circumstances that eliminate any need to have a warrant to do so?

A. There was none.

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Q. And there's no reason why the search couldn't be delayed 10 or 15 minutes while you got authorization from the Judge to search that car?

A. I suppose not.

Tr. at 47-49. *Cf.*, Appendix "B," Opinion, ¶15. Surely given this compellingly cogent admission, which shows that time was not of the essence here, there has to be a reason the Ohio Court's discussion of this issue is, and was, so egregiously flawed. As far as our Appellate Court's thinking, we really do not know what to say, except perhaps that we are not even slightly surprised.

In my view, they still believe this Court made a mistake when it decided *Mapp v. Ohio* and *Beck v. Ohio*.

Here it is worth repeating, after this stop was made, clearly nothing happened that even slightly delayed the trooper resolving any and all aspects of his traffic investigation. Indeed, the fact this is so could not be any clearer. Indeed, as one Court, even before *Rodriguez* put it: the test in these situations is not (as our Court held) whether the stop lasted longer than the average stop, of this type, but whether the motorist was detained longer than was necessary to complete the trooper's mission that was generated by the reason the stop was made, which in this instance was not to have been the purpose of this stop. *Cf., United States v. Bell*, 820 F.3d 535 (6th Cir. 2009). Clearly then, if that is so, then it is beyond dispute that satisfying this trooper's curiosity, as to whether this motorist's car could pass a drug sniffing test was not only irrelevant here, it also unduly extended the traffic stop. For sure, in violation of his Fourth Amendment rights. Here, too, let's be clear as well, given the traffic stop was over, to validate the use of the dog, clearly the Court must hold that it was not a separate Fourth Amendment issue. Because it could not be related to the stop. *See United States v. Oliver Mendez*, 484 F.3d 565 (2007).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The essence then of the Appellant's version of the dispositive events, here, is they show that Johndrell Elliott plead conditionally to the offense he was convicted of because the trial Court refused to suppress

evidence obtained by these State troopers in the wake of the warrantless stop and the vehicle search made after a dog alerted. The facts show the stop occurred at 14:01:03. Tr. at 7. The alert occurred at 14:16:52. The trooper had already learned from his dispatcher at 14:11:18 that Elliott and his passenger's credentials were in order and that there were no outstanding warrants. Thus, they were good to go. *Id.* at 31.

Also, this officer conceded asking for a criminal history check was unusual for him. *Id.* at 53. Also, he told us it takes him at most perhaps two (2) minutes to write the warning ticket he had in mind writing. *Id.* at 56. Still, he decided to wait for their criminal records, which took an additional perhaps six (6) minutes. *Id.* at 31-32. (*Emphasis supplied*.) During which time produced nothing in connection with the issuance of a ticket. *Id.* at 32. Next, he says he did talk to a trooper, named Roe, who asked if he needed him there. *Id.* at 42. At 14:11, trooper Hawkins says he was told they had very extensive convictions in their histories. *Id.* at 39. Also, trooper Roe and another trooper arrived. After a further discussion between Hawkins and one of the other troopers, in which they plotted a strategy, they opted to have the motorists get out of the vehicle and while they admittedly lacked the reasonable suspicion required by *Terry v. Ohio*, the men they had seized were frisked, for the officers' protection - - of course to no avail. *Id.* at 39-40. *See also* Tr. at 43-45. After this time-consuming event happened Hawkins got his dog out of the vehicle. It then happened that the dog alerted. This whole episode occurred after the traffic violation investigation was over and the drug investigation has been launched.

Here, of course, we have contended and our challenge shows, the troopers violated his Fourth Amendment rights. For sure, they detained him longer than was necessary for Hawkins to have processed his investigation as to whether Johndrell Elliott was operating his vehicle with illegally tinted windows. Simply put, the trial Court inferentially determined the time involved to do these things was not exceeded. Indeed, it has to be determined they did nothing wrong. This being so, because everything he did was not only necessary but the delays that occurred were reasonable, and they were in fact articulable suspicions (that were made clear to the Court), the appeals Court held that the trooper was justified in his prolonging their admitted detention.

Even this is not all, because the Court of Appeals, after making the above finding and imputing it to the trial Court, also believed no warrant was necessary, here. Doubtlessly this was because this is what the officer said - - in effect. Thus, our appeals Court reasoned that the time involved being within the ambit of the officer's estimate of 10-20 minutes it takes to go from stop to the issuance of a ticket there was nothing wrong here. *See* Appendix "B," Opinion, ¶¶17, 25.

In our judgment, two (2) things, at least are wrong with that finding made by our Court of Appeals. This follows because none of its prerogatives allow it to make dispositive findings and then impute them to the trial Judge, which is what it did. As to this, clearly something is wrong with the Appellate Court's vision. This follows if they see in these facts a picture that shows a sufficient factual basis existed to justify the

prolongation (of this very minor traffic stop beyond the few minutes) that was required to deal with it - - not their innate suspicions. Indeed, given as the Opinion shows, the trooper here, who was the dog handler, in lieu of signing and giving our Petitioner the ticket, ordered the driver and the passenger out of their vehicle. And, afterwards retrieved his dog. This for the sole purpose of having him do his thing. Thus, we are contending that was wrong. Indeed, what these troopers did here was to, for reasons not related to its duties as a traffic officer, use the dog to search for probable cause.

ARGUMENT NO. I:

GIVEN THERE IS, AND WAS, NO JUSTIFICATION WHATSOEVER FOR THE USE OF THE CANINE HERE, IT INEXORABLY FOLLOWS THE DELAYS REQUIRED TO DO SO, BEING INDEFENSIBLE, IT MUST BE DEEMED UNCONSTITUTIONAL IN THE WAKE OF *RODRIGUEZ*.

Aside from the various arguments made, here, one of which shows the Trooper stopped writing the warning ticket after he had asked for record checks, they were nonetheless cleared to go. Still, he called for back-up. This inquiry was so he could find out if they could pass his canine test. With these facts being the given here, there are several tenets that the Court below would simply ignore. These include the compelling fact that a seizure justified by the interest in issuing a ticket can be, and did turn, unlawful when it was prolonged beyond the time reasonably required

to complete the officer's sole mission (under that circumstance). *See Illinois v. Caballas*, 543 U.S. 405, 407-408 (2005). And, even the Trooper had to know this. What we all know is that if the use of the dog prolongs the stop, it is unreasonable. *Id.*

Given the facts, and we concede the totality of the circumstances must also be reckoned with, clearly we have a violation for, we know, this stop was prolonged even before the other officer was sent for, and as a result of the wait for him and the unwarranted removal (- - *i.e.*, illegal seizure) of the people in the vehicle to facilitate the deployment of the dog. For sure, we also have to reckon with the fact that it is clear that rather than expeditiously conduct the record check and prepare to issue the ticket citation, this Trooper actually embarked on a different mission. This was to make use of his special skills with "his" dog. This it is clear. He had to know that, given the stop being his true mission was to issue the ticket, this other investigation he embarked on could only result in a prolongation of his original mission, which he had to, and did, put on the back burner.

With that being so, his use of the dog, knowing full well that perforce there would be this delay, it follows the result of the dog test was, in our judgment constitutionally prohibited. Given the fact of the impermissible prolongation of the traffic stop that occurred, the finding of fact, made by the Court of Appeals, that inasmuch as the total elapsed time, between the stop and surfacing of probable cause was reasonable could be imputed to the trial Judge with impunity. This clearly follows because, as the Court

recognized the fact to be and even said so, the Trooper who was literally writing the ticket, and had almost completed doing so, actually stopped writing the ticket when joined by the other trooper. It was at that point, he first ordered the people out of their car to facilitate the search of the vehicle - - this by making use of the "drug dog." Clearly, these people were, if not under arrest, seized without probable cause.

Given the fact that, for all intents and purposes, the investigation of the minor traffic offense was over, the removal thereafter of the motorist from the vehicle to facilitate the use of a canine must be deemed a search; hence, probable cause was required to make use a drug dog to sniff the vehicle and the people. Here, not unlike was the situation in *Rodriguez*, the investigation (which had already been prolonged), was over before the officers launched a full-fledged drug investigation. It entailed the use of a canine stop, which alerted. We believe *Rodriguez* compels a reversal here.

Of course, it could not be any clearer the lack of any finding, made by the trial court, that the prolongation of this ordinary traffic stop, which allowed them to conduct a canine investigation, was launched without the required basis for doing so. So postured, it follows it was illegal, unconstitutional, and indefensible. This thesis is augmented by the further fact that the occupants of a vehicle (stopped for a traffic offense) cleared any and all permissible inquiries that were conducted. Thus, their removal thereafter from the vehicle in order to facilitate the use of a canine, which then alerted, cannot be defended and validated in law, logic or commonsense. Here, the facts are clear: trooper

Hawkins had one purpose all along; for sure once he asked for assistance, that was to search this vehicle and he needed probable cause to do so. Surely that is clear enough. He needed the dog to alert.

ARGUMENT NO. II:

GIVEN A CANINE WAS PURPOSEFULLY MANEUVERED TO ALERT, IF POSSIBLE, WITH REFERENCE TO A LAWFULLY PARKED VEHICLE THAT WAS UNOCCUPIED AT THE TIME, IT INEXORABLY FOLLOWS THAT ABSENT EXIGENT CIRCUMSTANCES A WARRANT WOULD BE REQUIRED TO CONDUCT A SEARCH BASED SOLELY ON ANY PROBABLE CAUSE SUPPLIED BY SUCH ALERT.

Given that in *Rodriguez v. United States*, the Supreme Court flatly rejected the so-called *de minimis* Fourth Amendment rule that was literally conjured up (in that case), which was, so to speak, not unlike what was done by the Ohio's Fifth District Court of Appeals for this case. That is, the *Rodriguez* Court held, contrary to our Court below, that: "a police stop exceeding the time against unreasonable seizures." *Id.* at 1615. (*Emphasis supplied*.) Clearly then, contrary to the Court below, the *Rodriguez* Court openly declared a "seizure justified only by a police observed traffic violation . . . become[s] unlawful if it is prolonged beyond the time reasonably required . . . [to ticket] the violation." *Ibid.* As that Court saw it, these steps were "more analogous to a so-called *Terry* stop . . . than a formal arrest." And, as they saw it "like a *Terry* stop,

the tolerable duration of police inquiries in the traffic stop context is determined by the seizure's mission" - - to address the traffic violation that warranted the stop. Here, they cited *Caballes*, 543 U.S., at 407, which also makes the point totally ignored by our Court in its rush to judgment (if that was the reason) that authority for the seizure thus ends when the various tasks tied to the traffic infraction, or infractions, should have been completed. *Ibid.*

With all that being so, given that the utilization of the dog, cannot possibly be tied to any traffic offense (moving or otherwise), it surely has to be that the Courts below saw it otherwise. For sure, the Record shows that the investigation was over. It also shows when the backup finally arrived, they were told this was so. Tr. at 32. It was then Hawkins (the original trooper), led by Trooper Roe, then began their drug investigation. If we are wrong, surely this is what we should be since no Court will tell us why that is not so. Here, according to our Court, given the officer's testimony that the average time involved in the writing of a traffic ticket is 16 minutes or so and the time involved was in that area, the Courts of Ohio will be using that as a bench mark.

Let's be very clear here, our belief is that none were *de minimis*, and the nervousness thesis the trooper related to Elliott did not provide even a hypothesis of reasonable suspicion upon which to expand the scope of this vehicle stop. Stated another way, the result of the canine sniff, search in our judgment - - a *sine qua non* of any arguable hypothesis of probable cause to search this car was (in our judgment) the direct result of the

unlawfully protracted, and prolonged, seizure of these motorists. Accordingly, the evidence used to convict should have been suppressed.

Here, too, this original stop was lawful because Elliott never denied he was speeding. In that regard, some of us know at least 80-90% of motorists speed on these Interstates. This tells us these troopers literally pick from that group of speeders, and those that make lane changes without signaling. Because this is so, especially in Ohio, where the officers are among the worst in the world, these officers, as those involved here clearly were, know how to delay finalizing the traffic stop until after they have satisfied themselves that all of their hunches were unfounded. With this being so, the law is clear: when an officer has obtained sufficient evidence to issue is traffic citation or ticket, any continuation beyond that point without probable cause to arrest is unreasonable and for that reason is indefensible.

ARGUMENT NO. III:

ONCE THE TRAFFIC OFFICER HERE, INDICATED THE TRAFFIC INVESTIGATION WAS OVER, AND THE MOTORIST WOULD BE RELEASED MOMENTARILY FROM THE INVESTIGATIVE SEIZURE; IT INEXORABLY FOLLOWS, THE DETENTION RELATED TO THE TRAFFIC STOP WAS OVER; HENCE, ANY FURTHER DETENTION UNRELATED TO THE STOP REQUIRED PROBABLE CAUSE TO ARREST (OR DETAIN), WHICH IF NON-EXISTENT (THE CASE, HERE), CANNOT SURVIVE MEANINGFUL SCRUTINY.

What really augments the positions here taken, indeed that an arrest had occurred before the search that revealed the Appellant's possession of the weapon which formed the basis for his conviction, is both easily put and compellingly clear. Indeed, what makes it so very clear is that given the investigative seizures talked about in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Sibron v. New York*, 392 U.S. 40 (1968), then clearly what these officers did cannot possibly be defended. For the activity this detective claims was the predicate basis for his actions, which all occurred after the traffic stop had been fully investigated, was stale. With this being so, the bottom line here, for us, is truly and insuperably cogent, this is so the apparent position of the Court to the contrary, notwithstanding. For sure, as well, there is nothing in this Record that shows anything that would justify any type of further

investigative detention beyond that required to deal with the traffic offense itself.

With that being so, the Motion to Suppress should have been granted, here. This follows because, as put by the Sixth Circuit, indeed in *United States v. Bell*, 555 F.3d 535 (6th Cir. 2009), contrary to the Ohio Court of Appeals, the test is not whether this motorist was detained longer than that required for the average traffic stop. Rather, the apt question is whether he was detained longer then was necessary for the Trooper to have fully completed his investigation of the traffic stop he had compelled this motorist to submit to (*id.* at 538). Simply put then, the use of the dog was not needed to complete the stop. With that being so, it was also irrelevant to the stop to make any use of the dog, which surely extended the inconvenience to the motorist.

CONCLUSION

The crucial thing, here, is that even though from all the information the Trooper had (as he said himself), for all intents and purposes, Elliott was good to go *before* Trooper Roe (and the other trooper) arrived, specifically at 14:12. However, he did not facilitate his release. As he put it: "once I received . . . their criminal histories [he still believed] . . . there possibly had been some criminal activity going on" (tr. at 39) - - *i.e.*, "drug related activity" (*id.* at 40). Thus, it is clear, since Roe had asked earlier if Trooper Hawkins "wanted him to come there" and even though he didn't have any reason "other than the K-9" (*id.* at 42-43), and the "criminal history" (*ibid*), the dog was then used. Any other reading of this Record simply cannot pass muster. Indeed, this is what one gets from the above showing.

It demonstrates the turn everything took once Trooper Roe arrived, when it turned into a side show (the reference here is to pgs. 32-37 which verify this).

The Appellate Court, despite Hawkins' categorical testimony that when trooper Roe arrived, he decided to capitulate to Roe's "expertise." He indeed showed, and allowed him to sort of take-over, as he did. Tr. at 33-37. This happened although he had already concluded they were good to go. If it were otherwise, he would not have told trooper Roe "the only thing I really got is the driver's a little nervous . . .." *Id.* at 32. However, it is clear Hawkins wanted Trooper Roe to "talk to them." This because he had a lot of experience as far as dealing with criminal patrol stuff - - whatever that means. Tr. at 32-33. Indeed, as Hawkins wanted Trooper Roe to check them out, hence, that is what eventuated the use of the dog. No other explanation makes sense or is even possible.

II

Given *Rodriguez*, we truly believe the first question before this Court asks: whether the original officer diligently pursued his mission. Clearly, it was to ticket a motorist for a very minor traffic offense. So postured, it follows the question that arises asks: whether he had a reasonable suspicion to justify the prolongation of the original seizure. Here, we know the point the original trooper cleared the occupants through the criminal history checks that were done. This reality is compellingly significant, here. It tells us they were clear to go. But that did not happen.

In any event, and this question was not even addressed by the trial Court; hence, must be regarded as inferentially a finding that was made by the Court of Appeals. Indeed, despite the fact the law is clear, it cannot make findings and impute them to the trial Court. For sure, the finding made by the Court of Appeals, which in any event was baseless, has to be (since this prolongation that occurred), that the Trooper had a faint suspicion to prolong the stop in order for him to make use of his canine. Given our belief that the use of the dog outside the vehicle simply cannot be justified by any observation made of the supposed interactions (by and between the people inside the vehicle) before they were asked to exit before the dog made his stroll. Indeed, how can it be said that the use of the dog was without a purpose. Given it could not be any clearer the officer lacked probable cause to search, resulted in the dog supposedly alerting.

III

If it is still true that in Ohio, the home of Dollrae Mapp (*v. Ohio*) and William Beck (*v. Ohio*), and the doctrine those cases spawned made it clear that if these troopers wanted to search these motorists, they needed probable cause. And once they belatedly removed the people from the vehicle, they truly needed a search warrant to make use of their dog. So postured, the search conducted not only fails because of the lack of probable cause, but also because of the lack of a warrant. In making these unassailable contentions we are indeed centralizing the finding made for us, not by the trial Court (which in any event should never have

been done [for obvious reasons]), but because it is absolutely indefensible. Here, we have reference by the Appeals Court that the denial of the Motion to Suppress was justified because the Trooper completed the stop within a reasonable length of time. (Judgment Entry, C. P. Ct., Appeals given that Appx. "C", at page 3.)

Clearly then, unless we are terribly wrong here, the trooper stopped the Petitioner's vehicle, no one would deny that once he submitted, as he did, he had been seized. And, with that being so, his Fourth Amendment rights vested at that point. Thus the length and scope of his detention were (as put by *Terry v. Ohio*, 392 U.S. 1 (1968), strictly tied to and justified by the circumstances which rendered its initiation permissible. *Id.* at. 16. Under this thesis, the officer was only permitted to obtain the identification data and execute a resolution of his traffic investigation. And once that was completed the purpose for which the stop was made is deemed to be over. This follows because at that point, with those functions being over, any further detention can only be validated in accordance with fundamental criteria. And, that cannot be done here. And, what is more important is that it was not done here.

Respectfully submitted,

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