

**In The
Supreme Court of the United States**

—◆—
RAUL DE LA ROSA,

Petitioner,

v.

TROOPER MARK WHITE,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
REPLY BRIEF OF PETITIONER

—◆—
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INTRODUCTION

The people have the right to use our highways without fear that every interaction with a law enforcement officer will turn into a violation of their constitutional rights, just as the officers sworn to protect and defend us have the right to know what they can do without running afoul of the boundaries between permissible and impermissible in pursuit of their duties. De La Rosa requests that the brevity requirement of *Terry v. Ohio*, 392 U.S. 1 (1968) be restored such that the distinction between a *Terry* stop accompanying a completed traffic stop and a *de facto* arrest accompanying a completed traffic stop is clear and not heavily dependent upon the alleged diligence of law enforcement.



ARGUMENT

White argues certiorari should be denied because the issue of a detention requiring probable cause was not “pressed by De La Rosa or passed upon below.” (White Opp., at 5-6). The relevant paragraph of De La Rosa’s initial complaint reads:

The arrest was unlawful and in violation of plaintiff’s rights under the Constitution, in that:

- a. Defendant did not observe plaintiff violating any law and accordingly had no reason to stop and arrest him;

- b. Defendant had neither reasonable suspicion nor probable cause to stop plaintiff's vehicle;
- c. Plaintiff was arrested without probable cause or reasonable suspicion;
- d. Plaintiff was detained longer than necessary to accomplish any ostensible reason for the stop;
- e. Plaintiff was questioned and detained contrary to his rights under the law.

(Appendix on Interlocutory Appeal to the Eighth Circuit Court of Appeals, at J.A. 0007 ¶ 5). Subparagraph c. pleads an arrest without probable cause and subparagraphs d. and e. are broad enough to encompass the argument that De La Rosa's prolonged detention required probable cause. Further, De La Rosa's brief opposing summary judgment in the district court argued, in an underlined heading, "The inquiry after the traffic stop and search was conducted without reasonable suspicion and without probable cause" and also cited White's admission, during a suppression hearing in state court, that he lacked probable cause to prolong the stop. See *De La Rosa v. White*, Case No. 4:14-cv-3055, Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment, at 2 (filed on January 5, 2015). The *de facto* arrest issue was thus "pressed" below, and if "pressed," it need not have been "passed upon below." See *United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule, as the dissent correctly notes, precludes grant of certiorari only when

‘the question presented was not pressed or passed upon below.’ . . . [T]his rule operates (as it is phrased) in the disjunctive”).

Alternatively, because the reasonable suspicion and probable cause arguments are connected in substance, because the record is sufficiently developed to allow this Court to pass on the *de facto* arrest issue, and because the controlling precedent at the time of the arguments below, including *United States v. Sharpe*, 470 U.S. 675 (1985) and *United States v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994), directed the parties (and district court decision at issue) to a review of White’s actions based on asserted reasonable suspicion, this Court’s prudential limitation on granting certiorari for only matters “pressed or passed upon below” should be waived in this instance. *See Illinois v. Gates*, 462 U.S. 213, 219 (1983) (“Several of our more recent cases have treated the so-called ‘not pressed or passed upon below’ rule as merely a prudential restriction”). De La Rosa was as much wronged by the unwarranted *Terry* expansion discussed in his first question presented as by White’s disregard for his then-existing constitutional rights.

Further, and even if this Court deems review of the *de facto* arrest issue improper for any reason, an equally important issue is the facts endorsed by the Eighth Circuit Court of Appeals as “arguable reasonable suspicion,”¹ in a decision directly contrary to the

¹ The articulation of the qualified immunity standard as “arguable reasonable suspicion” or “arguable probable cause” has

district court’s ruling below, and issued less than two years after this Court’s opinion in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). Moreover, the dearth of on-point “reasonable suspicion” authority presented by White heralds the error below. White cites to no single case in which a lack of nervousness supported a finding of reasonable suspicion or a related finding of qualified immunity, let alone a case involving facts similar to this case and holding reasonable suspicion existed.

White also argues that De La Rosa’s Petition was deficient for failing to discuss *Rodriguez*, and argues that *Rodriguez* demonstrated the “settled nature” of the issue decided in *United States v. Sharpe*, 470 U.S. 675 (1985), which White asserts to be “that the standard for detaining a motorist beyond completion of a traffic stop to await a dog sniff is ‘reasonable suspicion of criminal activity.’” (White Opp., at 7-8).

been the subject of scholarly debate, an apparent split of authority among the circuit courts of appeals, and the subject in whole and in part, respectively, of at least two recent Petitions for Writ of Certiorari to the Eighth Circuit Court of Appeals. See Petition for Writ of Certiorari, *Ransom v. Grisafe*, No. 15-647, 2015 WL 7252902 (Nov. 9, 2015) (questioning the “arguable probable cause” standard in question presented), *cert. denied*, 136 S. Ct. 838 (2016); Petition for Writ of Certiorari, *Bowden v. Meinberg*, No. 15-1067, 2016 WL 738172, at 18-22 (Feb. 19, 2016) (discussing problems with “arguable probable cause” standard), *cert. denied*, 136 S. Ct. 1717; see also Tal J. Lifshitz, Note, “*Arguable Probable Cause*”: An Unwarranted Approach to Qualified Immunity, 65 U. Miami L. Rev. 1159, 1177-78 (Summer 2011) (discussing circuit split and arguing against articulation of the qualified immunity standard as “arguable probable cause”).

De La Rosa reads *Rodriguez* differently in at least two important respects. *Rodriguez* held that “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures” and therefore that a dog sniff occurring after a completed traffic stop must be supported by individualized suspicion. 135 S. Ct. at 1612, 1616-1617. However, the detention in *Rodriguez* for a canine sniff was only 7 to 8 minutes, not the 50 minutes experienced by De La Rosa and therefore the Court had no occasion to consider whether probable cause might be required to extend the traffic stop or whether *Terry*’s brevity requirement was exceeded. *Rodriguez*, 135 S. Ct. at 1614. *Rodriguez* is therefore distinguishable.

Further, in *Rodriguez*, Justices Thomas, Alito, and Kennedy each dissented and argued the majority opinion departed from prior precedent and disregarded the “ultimate touchstone of the Fourth Amendment” – “reasonableness.” 135 S. Ct. at 1617 (Thomas, J., dissenting); 135 S. Ct. 1624 (Alito, J., dissenting) (“The Court refuses to address the real Fourth Amendment question: whether the stop was unreasonably prolonged.”). Reading the *Rodriguez* majority and dissenting opinions together, one is hard-pressed to discern any “settled” matters of Fourth Amendment jurisprudence beyond the exact issue presented therein.

Moreover, the *Rodriguez* opinion was not on file at the time that White stopped and detained De La Rosa on March 8, 2012. Therefore, any light it sheds as to the constitutional questions discussed, are not

instructive on the issue of White's asserted qualified immunity. What is clear is that the prolonged stop and detention of De La Rosa violated clearly established law in existence at the time of the stop, as aptly described by the district court. (Pet. App. 21-31). However, and to the extent *Rodriguez* enforced individual Fourth Amendment rights and endorsed limiting the bounds of a traffic stop to its intended purpose, it is consonant with the relief De La Rosa seeks in his Petition. A review of the first twenty-two minutes of this traffic stop should be enough to convince an unbiased viewer that White's arguments regarding the events leading to this action are unavailing. During that brief initial period of the stop we see De La Rosa fully compliant and conversational. We also see an officer of the state police making light of De La Rosa's Hispanic sounding last name.

Finally, and in response to White's initial argument regarding the record in this matter, De La Rosa consents to review of his Petition on the facts as set forth by the Eighth Circuit Court of Appeals at pages 5 to 7 in Petitioner's Appendix as White argues would be appropriate, supplemented only by Trooper White's summary judgment affidavit and accompanying statement of facts, which, as White argues, were accepted by the district court and Eighth Circuit as undisputed. (White Opp., at 1-2). This Petition does not challenge the factual findings below.² De La Rosa would be

² De La Rosa is not conceding that the current factual record is accurate, and if the matter is tried at any point in the future,

remiss, however, if he did not also reference the existing and complete transcript of the state court suppression hearing, cited by the district court within its decision, and the video recording of the prolonged stop, complete with sound, that was submitted to the Eighth Circuit Court of Appeals. *See* Joint Appendix to the Eighth Circuit Court of Appeals, at J.A. 0037-0090.³

CONCLUSION

Based on all of the foregoing and the Petition filed in this case, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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does not waive his right to prove facts that differ from those accepted as true thus far.

³ These exhibits to De La Rosa's opposition to White's motion for summary judgment were not stricken from the record as White requested and therefore properly compose part of the record before the district court and Eighth Circuit Court of Appeals. (Pet. App. 17-19).

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