

No. _____

In the Supreme Court of the United States

DARIEN FISHER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

*On Petition for Writ of Certiorari to
the Court of Appeals of North Carolina*

PETITION FOR WRIT OF CERTIORARI

Robert L. Sirianni, Jr.

Counsel of Record

Michael M. Brownlee

BROWNSTONE, P.A.

400 North New York Avenue

Suite 215

Winter Park, Florida 32789

(407) 388-1900

Robert@brownstonelaw.com

Counsel for Petitioner

QUESTIONS PRESENTED

A police officer pulled Mr. Fisher over in North Carolina for driving without a seatbelt. The officer told Mr. Fisher he would receive a warning citation. Thereafter, Mr. Fisher was forced to wait an additional 20-25 minutes for the arrival of a K-9 unit. The officer testified that the following facts provided reasonable suspicion for Mr. Fisher's prolonged detention:

- He was driving diligently in a pack of traffic;
- His car was properly registered to his aunt;
- There was a handprint on the trunk of his car;
- He claimed he had been shopping but made no purchases;
- He did not ask why he was pulled over;
- There was a fast food bag in the car; and
- The car smelled like air freshener.

While Mr. Fisher awaited the K-9 unit, the officer returned to his cruiser to call law enforcement in Mr. Fisher's home county and learned Mr. Fisher was purportedly a known drug dealer with pending drug charges in that county.

1. Whether law enforcement had reasonable suspicion to justify Mr. Fisher's continued detention beyond the time reasonably required for issuing a warning citation?

2. Did the initially lawful seizure “become unlawful,” *Illinois v. Caballes*, 543 U.S. 405 (2005), when law enforcement prolonged the detention by withholding the warning citation to allow the officer to call police in Mr. Fisher’s home county and allow a K-9 unit to arrive 20-25 minutes later?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
DECISIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED ...	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE COURT OF APPEALS FOR NORTH CAROLINA IGNORED WELL-ESTABLISHED PRECEDENT FROM THIS COURT WHEN IT FOUND SERGEANT COX HAD REASONABLE SUSPICION TO CONTINUE DETAINING MR. FISHER	7
II. LOWER COURTS NEED GUIDANCE IN DETERMINING WHEN A LAWFUL STOP BECOMES UNLAWFUL BECAUSE POLICE PROLONG THE DETENTION BEYOND THE TIME NECESSARY TO RESOLVE THE INITIAL REASON FOR THE STOP	10

CONCLUSION	17
APPENDIX	
Appendix A: Order in the Supreme Court of North Carolina (January 30, 2013)	App. 1
Appendix B: Order in the Supreme Court of North Carolina (January 30, 2013)	App. 3
Appendix C: Opinion in the Court of Appeals of North Carolina (March 20, 2012)	App. 5
Appendix D: Judgment/Order or Other Disposition in the North Carolina General Court of Justice, Superior Division, Wayne County (February 3, 2011)	App. 17
Appendix E: Transcript, North Carolina General Court of Justice, Superior Division, Wayne County (February 3, 2011)	App. 19

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	17
<i>Arizona v. Johnson</i> , 555 U.S. 323 (2009)	7
<i>Florida v. Royer</i> , 460 U.S. 491 (1983)	11
<i>Illinois v. Caballes</i> , 543 U.S. 405 (2005)	ii, 10, 11
<i>Muehler v. Mena</i> , 544 U.S. 93 (2005)	10, 15-16
<i>New York v. Belton</i> , 453 U.S. 454 (1981)	17
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996)	17
<i>Reid v. Georgia</i> , 448 U.S. 438 (1980)	8
<i>State v. Fisher</i> , 725 S.E.2d 40 (N.C. Ct. App. 2012)	14, 15
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	7

<i>United States v. Botero-Ospina</i> , 71 F.3d 783 (10th Cir. 1995)	13
<i>United States v. Cortez</i> , 449 U.S. 411 (1981)	8
<i>United States v. Digiovanni</i> , 650 F.3d 498 (4th Cir. 2011)	9
<i>United States v. Everett</i> , 601 F.3d 484 (6th Cir. 2010)	14
<i>United States v. Guzman</i> , 864 F.2d 1512 (10th Cir. 1988)	12
<i>United States v. Harrison</i> , 606 F.3d 42 (2d Cir. 2010)	13
<i>United States v. Lockett</i> , 484 F.2d 89 (9th Cir. 1973)	12
<i>United States v. Mason</i> , 628 F.3d 123 (4th Cir. 2010)	13
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	11
<i>United States v. Peralez</i> , 526 F.3d 1115 (8th Cir.2008)	14
<i>United States v. Sokolow</i> , 490 U.S. 1 (1989)	8
<i>United States v. Valadez</i> , 267 F.3d 395 (5th Cir. 2001)	13

CONSTITUTIONAL PROVISION AND STATUTES

U.S. Const. amend. IV *passim*

28 U.S.C. § 1257(a) 1

OTHER AUTHORITY

Reid M. Bolton, Comment, *The Legality of Prolonged Traffic Stops After Herring: Brief Delays as Isolated Negligence*, 76 U. Chi. L. Rev. 1781 (2009) 12

PETITION FOR WRIT OF CERTIORARI

Darien Fisher respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for North Carolina in this matter.

DECISIONS BELOW

The trial court's form order granting Mr. Fisher's motion to suppress is unpublished and reprinted at App. 17. The trial court explained its rationale for granting the motion to suppress at the end of the hearing. The full transcript of the suppression hearing is reprinted at App 19. The Court of Appeals for North Carolina's opinion, which reversed the trial court's order, is published at 725 S.E.2d 40 (N.C. Ct. App. 2012), and reprinted at App. 5.

STATEMENT OF JURISDICTION

On February 3, 2011, the trial court entered its order granting Mr. Fisher's motion to suppress. App. 17. The State appealed to the Court of Appeals for North Carolina, which reversed the trial court's ruling in a March 20, 2012, opinion. App. 5. Mr. Fisher timely requested that the North Carolina Supreme Court review the Court of Appeals for North Carolina's opinion. That request was denied on January 24, 2013. App. 1. The Chief Justice granted Mr. Fisher's request for an extension of time within which to file the instant petition, and extended the time to file the petition to May 8, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

On February 9, 2010, a police officer pulled Mr. Fisher over for driving without wearing a seatbelt. The officer told Mr. Fisher he would only receive a warning citation. However, law enforcement refused to let him leave until a K-9 drug detection unit arrived. The unit arrived 20-25 minutes later. The dog alerted on Mr. Fisher's car, police searched the vehicle, and found marijuana in the trunk. Mr. Fisher was charged with one count of possession with intent to sell and deliver a controlled substance, and one count of keeping and maintaining a motor vehicle for the use of transporting controlled substances. Mr. Fisher moved to suppress, arguing that law enforcement violated his Fourth Amendment rights by detaining him for 20-25 minutes without reasonable suspicion.

At the suppression hearing, Sergeant Mike Cox, supervisor of a drug interdiction team with the Wayne County Police Department, testified that he was driving an unmarked police car on Highway 70 West when he observed Mr. Fisher driving without wearing his seatbelt. App. 7. According to Sergeant Cox, Mr. Fisher was driving in a “pack of traffic,” traveling approximately 70 miles per hour. *Id.* Mr. Fisher “was very diligent in his driving, looking straight ahead, [and] had both hands on the wheel[.]” Sergeant Cox stated that, when combined with other circumstances, a person driving in the “flow of traffic” is suspicious. *Id.*

Sergeant Cox followed Mr. Fisher for approximately twelve minutes (App. 41), during which time he noticed that the tag number on the vehicle did not match the tag numbers that are typically issued by the Goldsboro Department of Motor Vehicles. App. 7. He ran the tag number, which established that the car was registered to an elderly woman from Bayboro, North Carolina. Sergeant Cox interpreted this as a sign Mr. Fisher was a drug courier. *Id.* The car was properly registered, however, and Mr. Fisher later explained to Sergeant Cox that it was his aunt’s vehicle. App. 49.

Sergeant Cox also noticed that there was a handprint on the trunk of the vehicle, which was otherwise dirty. According to Sergeant Cox, this indicated that something had recently been placed in the trunk, another purported indicator that the driver was a drug courier. App. 12. Based on that information, Sergeant Cox called his drug interdiction team and requested that his team pull over Mr. Fisher. The drug interdiction team responded that it would be

unable to pull Mr. Fisher over before he left the county. App. 27-28. Sergeant Cox then personally executed the traffic stop because Mr. Fisher was not wearing a seatbelt. App. 28.

Upon approaching the car, Sergeant Cox noticed the odor of air freshener, which he stated was often a sign that someone was involved in transporting drugs. He was unable, however, to locate any air fresheners inside the vehicle. App. 62-63. Mr. Fisher claimed that he was returning to his residence in Bayboro after taking a shopping trip to a mall in Smithfield, North Carolina. Sergeant Cox claimed that this explanation heightened his suspicions, because while Mr. Fisher purportedly traveled over two hours to go shopping, there were no bags in the car that he could observe. Mr. Fisher explained to Sergeant Cox that he went to the mall to shop for clothes, but nothing fit him. App. 8.

Sergeant Cox also testified that he found it suspicious that Mr. Fisher never asked why he had been stopped. He stated that usually someone had something to hide if he was not concerned with why he had been stopped. Additionally, Sergeant Cox noticed that Mr. Fisher had a fast food bag in his car, which indicated that Mr. Fisher was in a hurry, and did not want to leave his car unattended. App. 8.

After Mr. Fisher had been stopped for approximately 5 to 6 minutes, Sergeant Cox told Mr. Fisher he would be given a warning ticket for driving without wearing a seatbelt. App. 8. Sergeant Cox did not, however, begin writing up the ticket. App. 73. Instead, he accused Mr. Fisher of transporting drugs and ordered him out of the car. App. 76-78. Sergeant

Cox patted Mr. Fisher down and found no weapons or contraband. App. 78. He then asked Mr. Fisher if he consented to a search of his vehicle. Mr. Fisher refused and told Sergeant Cox he had no reason to search the vehicle. Mr. Fisher explained that he was in a hurry, and asked if he could be on his way. App. 73.

Sergeant Cox declined his request. According to Sergeant Cox's police report, at that point, he "believ[ed] that he had enough suspicion to believe that the vehicle contained illegal drugs, [and] called for a K-9 unit to sniff the exterior of the vehicle." App. 76. Then, while waiting for the K-9 unit, Sergeant Cox called Pamlico County, where Mr. Fisher resides, and asked a narcotics officer if he was familiar with Mr. Fisher. The narcotics officer stated that Mr. Fisher was a known drug dealer and had pending drug charges. App. 76-78.

According to Sergeant Cox, Mr. Fisher was nervous throughout the encounter, even after being told that he was only going to receive a warning. App 9. However, when asked to describe Mr. Fisher's "nervousness," Sergeant Cox admitted that Mr. Fisher did not display behavior that is typically associated with nervousness. Mr. Fisher freely answered all of Sergeant Cox's questions, his voice did not shake, his hands did not shake, and he was not sweating. App 70. On cross-examination, Sergeant Cox was ultimately unable to identify any actual manifestation of nervousness, and instead testified that "the nervousness part was – he never asked – he never asked why he stopped." App. 71.

According to Sergeant Cox, it took approximately 20 to 25 minutes for the canine unit to arrive. Emmy, the drug detection dog, was handled by Corporal Ryan Sasser. As Corporal Sasser walked Emmy around the car, the dog “indicated” on the door seams, which signaled to the Sergeants that there were drugs in Mr. Fisher's car. After the dog alerted, Corporal Sasser put her back in the patrol car. Corporal Sasser estimated that 5 to 7 minutes passed from the time he brought Emmy out to conduct the sniff and when he put her back in the car. App 87. The officers searched the car and discovered two pounds of marijuana in the trunk.

On February 3, 2011, the trial court granted Mr. Fisher's motion to suppress, finding that Sergeant Cox did not have an “articulable reason” for the search to justify detaining Mr. Fisher beyond the time necessary to issue a warning citation. App. 97-105. The State appealed to the Court of Appeals for North Carolina, which reversed the trial court’s ruling in a March 20, 2012, opinion. App. 5. Mr. Fisher timely requested that the North Carolina Supreme Court review the Court of Appeals for North Carolina’s opinion. That request was denied on January 24, 2013. App. 1.

This timely filed petition follows.

REASONS FOR GRANTING THE WRIT**I. THE COURT OF APPEALS FOR NORTH CAROLINA IGNORED WELL-ESTABLISHED PRECEDENT FROM THIS COURT WHEN IT FOUND SERGEANT COX HAD REASONABLE SUSPICION TO CONTINUE DETAINING MR. FISHER.**

The most compelling reason for granting this writ is that the Court of Appeals for North Carolina ignored well-established case law from this Court when it found Sergeant Cox had reasonable suspicion to justify the continued seizure of Mr. Fisher once Mr. Fisher was informed he would receive a warning citation. The facts are not in dispute. According to Sergeant Cox's own testimony, he ordered Mr. Fisher out of his car, patted him down for weapons¹, requested a search of the vehicle for drugs, and refused Mr. Fisher's request to leave. The following facts supported Sergeant Cox's "reasonable" suspicion that Mr. Fisher was transporting drugs to justify prolonging the detention by withholding the warning citation so he could call police in Mr. Fisher's home county and allow a K-9 unit's arrival 20-25 minutes later: Mr. Fisher was

¹ Although it was not addressed below, it is worth noting that Sergeant Cox had no basis for frisking Mr. Fisher. Sergeant Cox never suggested, and the record does not show, that Sergeant Cox suspected Mr. Fisher was armed and dangerous. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (holding that frisk is only appropriate where officer reasonably suspects); *Arizona v. Johnson*, 555 U.S. 323 (2009) (holding frisk permissible based on reasonable suspicion that suspect is armed and dangerous, even if officer does not suspect criminal activity).

diligently driving his aunt's freshly-scented and properly registered car home from an unsuccessful shopping trip. The car had a hand print on the trunk, and Mr. Fisher appeared to have consumed fast food at some point during his voyage. When Sergeant Cox activated his lights, Mr. Fisher promptly and safely pulled over. When Sergeant Cox encountered Mr. Fisher, he was "polite and cooperative" (App. 59) and answered all of Sergeant Cox's questions, but did not ask why he had been pulled over. During the encounter, Mr. Fisher's hands did not shake, his voice did not shake, and he was not sweating.

As the trial court found, the facts cited by Sergeant Cox in support of his suspicion that Mr. Fisher was transporting drugs abjectly fail to meet any formulation of the reasonable suspicion standard articulated by this Court and elucidated through its case law. Judged in their totality, the facts cited by Sergeant Cox do not constitute a "particularized and objective basis" for suspecting criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-418 (1981). Instead, the factual basis for Sergeant Cox's detention of Mr. Fisher is better described as an "inchoate and unparticularized suspicion or hunch." *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also Reid v. Georgia*, 448 U.S. 438, 441 (1980) (no reasonable suspicion where DEA agent believed the following factors indicated the defendant was a drug courier: (1) defendant flew into Atlanta from Fort Lauderdale, a source city for cocaine; (2) he arrived early in the morning, when police activity was believed to be at a low ebb; (3) he did not check his luggage; and (4) the defendant and his companion appeared to be attempting to hide the fact that they were together); *see*

also *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011) (holding that officer who prolonged a traffic stop to investigate drug activity based on the following facts did not have reasonable suspicion: the defendant was driving a rental car from Florida, a source state, on I-95, a drug corridor, the car was clean, two shirts were hanging from the rear passenger compartment, a hygiene bag was on the back seat, and the defendant's hands were trembling. The court expressed concern about "the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity," and called the troopers reliance on the hanging shirts, the hygiene bag, and the cleanliness of the car "absurd.").

Here, Officer Cox's reliance on certain factors to support his belief Mr. Fisher was hauling drugs was similarly absurd. Namely, no weight should have been given to driving in a pack of traffic. Driving in a pack of traffic is not just consistent with innocent activity, it has nothing to do with drug activity. The same is true for driving a car properly registered to a family member and consuming fast food. Even more troubling, it is certain that Officer Cox would have considered opposite behavior – speeding ahead or lagging behind a pack of traffic, for example – as evidence of drug transport. Therefore, any type of highway driving is susceptible to interpretation as a sign of drug transport. This Court should not countenance an officer's use of arbitrary and meaningless fluff to bolster his claim that his suspicion of drug activity is reasonable.

The only fact cited by Sergeant Cox which arguably inched his suspicion towards reasonableness is the

information he received from law enforcement in Mr. Fisher's home county concerning his purported reputation as a drug dealer. However, this information was gleaned *after* Sergeant Cox decided to continue Mr. Fisher's seizure beyond the time reasonably required to issue the warning citation. As discussed in the next section, the Court of Appeals for North Carolina's consideration of this information when it assessed whether Sergeant Cox had reasonable suspicion to justify prolonging the detention merits review by this Court.

II. LOWER COURTS NEED GUIDANCE IN DETERMINING WHEN A LAWFUL STOP BECOMES UNLAWFUL BECAUSE POLICE PROLONG THE DETENTION BEYOND THE TIME NECESSARY TO RESOLVE THE INITIAL REASON FOR THE STOP.

In *Caballes*, this Court held that a dog sniff conducted during a concededly lawful traffic stop that only reveals the presence of a prohibited substance does not violate the Fourth Amendment. However, the Court noted: “[a] seizure that is justified solely by the interest in issuing a warning ticket to a driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Caballes*, 543 U.S. at 407; *see also Muehler v. Mena*, 544 U.S. 93, 101 (2005) (holding that questioning defendant about her immigration status, unrelated to the reason for the original, lawful seizure, did not constitute an additional seizure because the detention was not prolonged by the questioning). Because the dog sniff in *Caballes* did not delay the otherwise lawful stop, there was no Fourth Amendment violation.

Hence, the *Caballes* decision indicates that in a case where a lawful traffic stop is prolonged beyond the time reasonably required to issue a warning ticket to await arrival of a K-9 unit, the seizure will violate the Fourth Amendment if there is no independent justification. This is that case.

At the motion to suppress hearing, all parties agreed that the initial traffic stop was lawful. When Sergeant Cox told Mr. Fisher he would receive a warning citation, the “mission” of the initial lawful seizure was complete. The question is - did the lawful seizure transform into an unlawful seizure because it was prolonged beyond the time necessary to write the citation?² The answer is yes.

Mr. Fisher was seized anew when he asked for permission to leave and was informed he needed to wait for the K-9. The suspected criminal activity was completely unrelated to the basis for the initial stop. As discussed above, Officer Cox did not have reasonable suspicion to justify further detention. Instead of writing the warning ticket and releasing Mr. Fisher, he withheld the ticket and commenced a drug investigation that lasted 20-25 minutes. At the moment Mr. Fisher was subjected to further detention, his Fourth Amendment rights were violated. *See, e.g., Florida v. Royer*, 460 U.S. 491, 498 (1983) (holding that citizen “may not be detained *even momentarily* without objective, reasonable grounds for doing so”) (emphasis added) *citing United States v. Mendenhall*, 446 U.S.

² Although the Court of Appeals for North Carolina did not reach this issue, Mr. Fisher raised this argument in his Answer Brief.

544, 556 (1980); *see also* Reid M. Bolton, Comment, *The Legality of Prolonged Traffic Stops After Herring: Brief Delays as Isolated Negligence*, 76 U. Chi. L. Rev. 1781, 1796-97 (2009) (arguing that “all delays, whether miniscule [sic] or time consuming,” violate the Fourth Amendment).

Courts around the country are divided, however, on the question of whether *any* prolonged detention, unsupported by independent suspicion, is permissible, or whether a brief prolonged detention is appropriate, even if unsupported by independent suspicion. For instance, many courts hold that *any* prolonged detention violates the Fourth Amendment if its purpose is to investigate activity unrelated to the original stop and unsupported by reasonable suspicion. *See, e.g., United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973) (holding that when officers ordered defendant to their car after he jaywalked, he was seized, and the Fourth Amendment required that the length and scope of the detention be “strictly tied to and justified by the circumstances which rendered its initiation permissible.” This standard permitted police to detain jaywalker only for enough time to obtain identification and issue a citation. Because both of those functions were complete, and police lacked reasonable suspicion that he had an outstanding warrant, continued detention to run a warrant check violated the Fourth Amendment.); *see also United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988) (where officer stops driver for seatbelt violation, issues warning ticket, but begins questioning driver to determine whether he is hauling drugs without letting the driver know he was free to leave, drugs found during consensual search should be suppressed because officer unreasonably delayed the

stop: “[a]lthough the stop in this case may well have been of short duration, it nevertheless unreasonably extended beyond the length necessary for its only legitimate purpose—the issuance of a warning or citation for a seatbelt violation.”) *overruled on other grounds by United States v. Botero–Ospina*, 71 F.3d 783, 787 (10th Cir. 1995); *accord United States v. Valadez*, 267 F.3d 395 (5th Cir. 2001) (driver stopped on suspicion of an expired vehicle registration sticker and illegal window tinting who was detained after the officer determined that the registration sticker was valid and the window tinting legal in order to await results of a computer check on outstanding warrants and the driver's criminal history without any reasonable suspicion to support such an inquiry, violated the driver's Fourth Amendment rights: “[f]urther detention was not lawful after the point at which the purposes of the stop was [sic] resolved.”).

Other courts, however, have reached the opposite conclusion. To wit, a detention prolonged beyond the time reasonably necessary to complete the initial stop’s “mission” for the purpose of investigating activity unrelated to the initial stop and unsupported by reasonable suspicion is permissible if the delay is brief. These courts reason either that a brief delay does not implicate the Fourth Amendment, or represents a permissible *de minimus* intrusion on Fourth Amendment rights. *See, e.g., United States v. Mason*, 628 F.3d 123 (4th Cir. 2010) (holding one or two minutes devoted to questions unrelated to the reason for the stop constituted only slight delay that raised no Fourth Amendment concern); *United States v. Harrison*, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose

of the traffic stop did not prolong the stop so as to render it unconstitutional); *United States v. Peralez*, 526 F.3d 1115 (8th Cir.2008) (extending traffic stop by ten minutes to ask drug-related questions was unreasonable); *See generally United States v. Everett*, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is *de minimis* depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).

This Court should resolve the conflict between those courts that adhere to a strict “no prolongation” test, and those courts that permit *de minimus* prolongation. The distinction, a strict “no prolongation” rule versus a “*de minimus* is permissible under the totality of the circumstances” rule, is critical in this case. The Court of Appeals for North Carolina considered information discovered *after* the detention was prolonged. It held:

As a preliminary matter, we recognize that Sergeant Cox did not know that defendant had pending drug charges in another county until after the canine unit was called; however, when reviewing the totality of the circumstances, we are still permitted to take this factor into account. Granted, reasonable suspicion must exist at the moment the Sergeant decides to detain the defendant beyond the issuing of the citation; however, that does not mean that all other factors that arise during the detention should not be considered in the court's analysis.

State v. Fisher, 725 S.E.2d 40, 44 (N.C. Ct. App. 2012) (internal citations omitted). Along with the other reasons provided by Sergeant Cox, the court held that the information discovered after he decided to detain Mr. Fisher beyond the time necessary to issue the citation established reasonable suspicion of drug activity. The court recognized that reasonable suspicion must exist when the Sergeant decides to elongate the detention, but nonetheless opted to consider the information. The court stated: “The extended detention of defendant is ongoing from the time of the traffic citation until the canine unit arrives and additional factors that present themselves during that time are relevant to why the detention continued until the canine unit arrived.” *Id.* Therefore, the court implicitly rejected a “no prolongation” rule.

If a “no prolongation” rule is proper, then there is no question the Court of Appeals for North Carolina erred in considering information gleaned after the prolongation was underway. On the other hand, if a *de minimus* intrusion is permissible, then arguably if the time which elapsed between the citation warning and the call to law enforcement in Mr. Fisher’s home county was brief enough, the Court of Appeals for North Carolina is on solid ground. Even if the time which passed from the discovery of the new information and the arrival of the K-9 unit was too great, Officer Cox’s belief that he had reasonable suspicion gains more traction, and presents a closer question.

In addition, the propriety of a “no prolongation” rule bears on the reasonableness of Officer Cox’s questioning Mr. Fisher about drug activity wholly unrelated to the seatbelt violation. *See Muehler v.*

Mena, 544 U.S. 93, 101 (2005) (holding that questioning defendant about her immigration status, unrelated to the reason for the original, lawful seizure, did not constitute an additional seizure because the detention was not prolonged by the questioning). The questioning regarding drug activity, the request for consent to search Mr. Fisher's car, and the patdown all occurred *after* the time reasonably required to issue a citation had elapsed. Thus, under a "no prolongation" rule, the questioning undoubtedly prolonged the detention and gave rise to a new seizure. Because the seizure was not independently justified, it constituted a Fourth Amendment violation. If a brief delay is permissible, however, and the time between the citation warning and the call to law enforcement in Mr. Fisher's home county was sufficiently brief, then Officer Cox's suspicionless questioning may have been proper.

Finally, this Court should grant Mr. Fisher's writ not only to resolve the split in the lower courts, but also because of serious liberty concerns implicated by this issue. As explained above, it is now the law of the land in many federal circuits and states that a detention prolonged after the time reasonably necessary to investigate activity unrelated to the initial stop and unsupported by reasonable suspicion is permissible if the delay is brief. This is a startling proposition.

If the "mission" of the initial traffic stop is complete, and no reasonable suspicion justifies continued detention, the effect of these holdings is to permit government seizure of citizens for no reason. Even if this Court agrees that these courts are correct in holding this practice reasonable under the Fourth

Amendment, it merits explanation, if for nothing else than to assuage the fear of the ordinary citizen wondering why she is being detained for no “articulable reason.” In addition, given the liberty interests at stake, it would be useful to provide “law enforcement officers with a defined ‘set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.’” *Ornelas v. United States*, 517 U.S. 690 (1996) quoting *New York v. Belton*, 453 U.S. 454, 458 (1981) abrogated on other grounds by *Arizona v. Gant*, 556 U.S. 332 (2009).

CONCLUSION

For the reasons described herein, the Petitioner respectfully requests that this Court grant their petition for a writ of certiorari, and review the proceedings below.

Respectfully submitted on this 8th day of May, 2013.

Robert L. Sirianni Jr., Esq.
Counsel of Record
Michael M. Brownlee
BROWNSTONE, P.A.
400 N. New York Ave.
Suite 215
Winter Park, Florida 32789
(800) 215-1835
Robert@brownstonelaw.com