No. 12-10958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2012

****

WILLIAM WESLEY SELLARS, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

****

REPLY BRIEF OF PETITIONER

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The State contends that there is virtually no current conflict among courts around the nation on the Fourth Amendment question in this case. The State repeatedly claims that in the wake of *Illinois v. Caballes*, 543 U.S. 405 (2005), and *Arizona v. Johnson*, 555 U.S. 323 (2009), lower courts have consistently applied the *de minimis* concept to what it calls "the traffic stop context." (Brief in Opposition at 5, 8, 9)

The State's claim is pure fiction. Specifically, the State wrongly lumps two distinct Fourth Amendment contexts and issues together: (1) whether, during a

lawful traffic stop, the Fourth Amendment permits an officer to investigate criminal wrongdoing that is not related to the traffic violation without having at least reasonable suspicion of such wrongdoing; and (2) whether, after a lawful traffic stop has been completed, the Fourth Amendment permits an officer to detain a driver for any additional amount of time to investigate criminal wrongdoing that is not related to the traffic violation without having at least reasonable suspicion of such wrongdoing. This Court resolved the first issue in *Caballes* and *Johnson*. However, this case involves the second, constitutionally different issue – an issue that this Court has not addressed and that has generated the real and continuing split of authority discussed in the Petition for Writ of Certiorari at pp. 12-15.

For example, on pp. 8-9 of the Brief in Opposition, the State cites fifteen cases which it claims have applied the *de minimis* concept to "the traffic stop context." However, only one of those cases (*State v. Leyva*, 149 N.M. 435, 250 P.3d 861 (2011)) involves the detention of a driver after the completion of a traffic stop to investigate criminal wrongdoing that is not related to the traffic violation, without either reasonable suspicion or consent. Ten of those cases involve investigation conducted during traffic stops,[1] and three of the cases involve

[1] *United States v. Harrison*, 606 F.3d 42 (2nd Cir. 2010) (*per curiam*); *United States v. Taylor*, 596 F.3d 373 (7th Cir.), *cert. denied*, 130 S. Ct. 3485 (2010); *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008): *United States v.*

investigation based on reasonable suspicion or consent after a traffic stop.[2] One case involves both investigation conducted during a traffic stop and investigation based on reasonable suspicion after a traffic stop.[3]

The State further asserts that two other cases also support its claim that after *Caballes* and *Johnson*, lower courts around the country have applied the *de minimis* concept to "the traffic stop context:" *United States v. Everett*, 601 F.3d 484 (6th Cir. 2010), and *State v. Jenkins*, 298 Conn. 209, 3 A.3d 806 (2010). (Brief in Opposition at 9-11) However, both cases actually refute the State's claim. Both cases involve only investigations conducted during a traffic stop. Both cases expressly distinguish between an investigation conducted during a traffic stop into criminal activity not related to the traffic violation, and the detention of a driver after the completion of a traffic stop to investigate criminal

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Stewart, 473 F.3d 1265 (10th Cir. 2007); *United States v. Olivera-Mendez*, 484 F.3d 505 (8th Cir. 2007); *United States v. Martin*, 422 F.3d 597 (7th Cir. 2005); *United States v. Burton*, 334 F.3d 514 (6th Cir. 2003); *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (*en banc*); *State v. Griffin*, 949 So.2d 309 (Fla. Dist. Ct. App.), *discretionary review denied*, 958 So.2d 920 (2007); *Johnson v. Commonwealth*, 179 S.W.3d 882 (Ky. App. 2005), *review denied*, 2005 Ky. LEXIS 381 (Ky., Dec. 14, 2005).

[2] *United States v. Canipe*, 569 F.3d 597 (6th Cir. 2009); *United States v. Wallace*, 429 F.3d 969 (10th Cir. 2005); *United States v. Brigham*, 382 F.3d 500 (5th Cir. 2004) (*en banc*).

[3] *United States v. Mason*, 628 F.3d 123 (4th Cir. 2010), *cert. denied*, 132 S. Ct. 329 (2011).

activity not related to the traffic violation. For example, in *Everett*, the Sixth Circuit applied the *de minimis* concept to an investigation conducted during a traffic stop, but the court explained that under *United States v. Urietta*, 520 F.3d 569 (6th Cir. 2008), the *de minimis* concept does not apply to the detention of a driver after the completion of a traffic stop. In making this distinction, the Sixth Circuit quoted this passage from *Urietta*:

> Under the *Fourth Amendment*, even the briefest of detentions is too long if the police lack a reasonable suspicion of specific criminal activity. In other words, law enforcement does not get a free pass to extend a lawful detention into an unlawful one simply because the unlawful extension was brief.

Everett, 601 F.3d at 492 n.9, quoting *Urietta*, 520 F.3d at 578-79 (internal citation omitted) (italics in original).

Despite the State's attempt to conflate court decisions about two distinct issues, the sharp Fourth Amendment conflict about post-stop detention is a continuing conflict that was not even addressed, much less resolved, by this Court in either *Caballes* or *Johnson*. It is a conflict about an important Fourth Amendment issue that merits resolution by this Court.

The State contends that the prohibition of additional detention of a driver after a traffic stop without reasonable suspicion of additional criminal wrongdoing is an "artificial" and "nonsensical" rule. (Brief in Opposition at 10) However, as

explained in the Petition for Writ of Certiorari, this rule is firmly anchored in Fourth Amendment precedent and principle. Once Det. McKaughan completed the traffic stop by returning petitioner's license and giving him a warning ticket, petitioner was in the same position under the Fourth Amendment as he was before Det. McKaughan saw him commit a traffic infraction: any detention of petitioner had to rest at least on reasonable suspicion. As the Supreme Court of Nebraska observed in *State v. Louthan*, 275 Neb. 101, 108, 744 N.W.2d 454, 462 (2008), the completion of a traffic stop is "a constitutionally significant line of demarcation. . . ." The rule that prohibits additional detention of a driver after a traffic stop without reasonable suspicion of additional criminal activity -- adopted by twelve federal and state courts (*see* Petition for Writ of Certiorari at 14) -- properly reflects the limits this Court has established as a matter of principle on an officer's constitutional authority to detain a person.

The State argues that this case is not an appropriate vehicle to resolve the Fourth Amendment question presented because, it claims, the trial court did not rule on that question and did not find facts necessary to resolve the question. (Brief in Opposition at 12-13) This contention distorts the record and misunderstands the nature of this Court's review. The trial court's written order, entered on June 13, 2011, patently ruled on the question here. That order appears in the Appendix to the Petition for Writ of Certiorari; petitioner also has

reproduced it in the Appendix to this Reply Brief. In Conclusion of Law #5, the trial court stated,

> That after giving the Defendant his driver's license and warning ticket, the purpose of the stop for the Defendant's failure to maintain his proper lane of travel was completed and any further detention of the Defendant must have been supported by reasonable suspicion of criminal activity afoot or the encounter must have become consensual. . . .

(Reply Brief Appendix at App. 4)

In Conclusion of Law #14, the trial court stated,

> That the prolonged detention of the Defendant was not supported by reasonable suspicion, did not become consensual between the Defendant and Detective McKaughan, and thus, the prolonged detention and subsequent search of the Defendant's vehicle was in violation of the Defendant's 4th Amendment rights. . . .

(Reply Brief Appendix at App. 5)

Further, it is the decision by the North Carolina Court of Appeals that petitioner challenges in this Court, and the Court of Appeals squarely decided the Fourth Amendment issue on the merits. The Court of Appeals expressly held that the additional detention of petitioner after the completion of the traffic stop "was a *de minimis* delay that did not rise to the level of a violation of defendant's constitutional rights under the *Fourth Amendment to the United States Constitution*." *State v. Sellars*, ___ N.C. App. ___, 730 S.E.2d 208, 213 (2012),

appeal dismissed, review denied, 366 N.C. 395, 736 S.E.2d 489 (2013) (italics in original).

With regard to the facts necessary to decide this case, the only such facts mentioned by the State that were not found by the trial court are the location of the dog during the stop and the duration of the additional detention after the stop was completed. (Brief in Opposition at 12-13) However, the State neglects to inform the Court that the North Carolina Court of Appeals made its own findings about those two facts based on the videotape of the stop. The Court of Appeals found that the dog was in the back seat of Det. McKaughan's car while petitioner was in the police car. *Sellars*, ___ N.C. App. at ___, 730 S.E.2d at 209. The Court of Appeals also found that four minutes and thirty-seven seconds elapsed from the time Det. McKaughan returned Mr. Sellars' license and Mr. Sellars tried to leave the police car until the dog first alerted on the car. *Sellars*, ___ N.C. App. at ___, 730 S.E.2d at 209, 213.

The videotape of the stop, which both the Court of Appeals and the trial court reviewed, shows the duration of the stop and relevant times during the stop with unquestionable (and unquestioned) accuracy. The videotape includes a continuous digital display of the elapsed time throughout the stop. Petitioner will gladly make a DVD of the videotape available to the Court; the actual videotape

introduced into evidence as an exhibit in the suppression hearing will be available to the Court if the Court grants the petition for certiorari. As observed at p. 8 of the petition for writ of certiorari, the videotape of the stop shows that three minutes and three seconds elapsed from the time Mr. Sellars refused to consent to a search of his car until the dog first alerted. Three minutes elapsed from the time Det. McKaughan told Mr. Sellars that he would conduct a drug-dog sniff until the dog first alerted. A reasonable person in petitioner's situation would not have felt free to "terminate the encounter" (*Florida v. Bostick*, 501 U.S. 429, 439 (1991)), once Det. McKaughan told him that he would conduct a drug-dog sniff.

The State argues that a two-minute discussion between Det. McKaughan and petitioner about drug-dog sniffs, which occurred after the detective announced that he would conduct a dog sniff and before the dog sniff began, should not be counted as part of the additional detention. Accordingly, the State suggests that the duration of the additional detention should be measured from the end of that discussion until the dog first alerted and, therefore, that the additional detention lasted about one minute. (Brief in Opposition at 13) However, regardless of whether the relevant additional detention lasted four minutes and thirty-seven seconds after the stop was complete, or three minutes, or one minute, the federal question in this case is clear, and it is clearly presented by the record in this case: whether the additional detention of petitioner for any amount of time to conduct a

drug-dog sniff of the car violated the Fourth Amendment's prohibition against unreasonable seizures if the officer did not have at least reasonable suspicion to believe the car contained drugs.

Finally, the State argues that the Court should not review this case because even if the Court were to rule that the detention of a driver for any amount of time after the completion of a traffic stop requires at least reasonable suspicion under the Fourth Amendment, Det. McKaughan had reasonable suspicion in this case. (Brief in Opposition at 13-15) Once again, the State's argument misunderstands the nature of this Court's review. As both parties have observed, the sole basis of the decision by the North Carolina Court of Appeals was that court's holding that the additional detention of petitioner after the completion of the traffic stop was a *de minimis* delay that did not violate the Fourth Amendment. The Court of Appeals expressly declined to consider the State's alternative argument that Det. McKaughan had reasonable suspicion to extend the detention of petitioner after completing the traffic stop. *Sellars*, ___ N.C. App. at ___, 730 S.E.2d at 210. The Fourth Amendment issue presented on this record is the single issue decided by the Court of Appeals: whether, after an officer completes a traffic stop for a traffic violation, the Fourth Amendment requires that the officer have reasonable suspicion in order to detain a driver for any additional amount of time to investigate criminal wrongdoing that is not related to the traffic violation.

If this Court reverses the Court of Appeals' decision on the Fourth Amendment question presented, the Court's standard procedure would call for a remand to the Court of Appeals to determine whether Det. McKaughan had reasonable suspicion in this case. For example, in *Brendlin v. California*, 551 U.S. 249 (2007), after this Court held that a traffic stop constitutes a Fourth Amendment seizure of passengers in a car as well as the driver, the Court remanded the case to the state courts "to consider in the first instance whether suppression turns on any other issue." *Id*. at 263. *See also J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011) (after holding that *Miranda* custody analysis includes consideration of a juvenile suspect's age if it is known to the officer or objectively apparent, Court remands the case to state courts to apply that holding in determining whether the suspect in the case was in custody).

Although the issue of whether Det. McKaughan had reasonable suspicion to detain petitioner after completing the traffic stop is not relevant to whether this case is a suitable vehicle for considering the Fourth Amendment question presented, petitioner will briefly discuss the issue to show that the State's argument is meritless and that it should not dissuade the Court from reviewing this case. Petitioner notes at the outset that the trial court ruled that Det. McKaughan did not have reasonable suspicion to justify the additional detention after completing the

traffic stop. *See* Order of the Superior Court of Forsyth County, June 13, 2011, Conclusions of Law ## 6-9, 14. (Reply Brief App. 4-5)

The State cites four facts that it claims gave Det. McKaughan reasonable suspicion to detain Mr. Sellars after completing the traffic stop: the time it took Mr. Sellars to stop, his statement that he had driven a long way, his nervousness, and the computer alert from the Burlington Police Department. The first two alleged facts are refuted by the record. First, as found by the trial court in the Order of the Superior Court of Forsyth County, June 13, 2011, Finding of Fact # 4 (Reply Brief App. 2), and as proven by the videotape of the stop, Mr. Sellars began to move toward the shoulder of the highway immediately after Det. McKaughan turned on his police car's blue lights. The videotape shows that Mr. Sellars took only ten seconds to maneuver across two lanes of traffic on an Interstate highway onto the shoulder, and that he then took only twenty seconds to come to a stop. Second, Burlington is a significant distance from Winston-Salem: 49 miles.

The only two relevant facts, then, are Mr. Sellars' nervousness and the computer alert. Although Mr. Sellars was nervous during the stop, the trial court found that he "he did not display extreme nervousness" and that "at all times the Defendant was polite, cooperative, and responsive to Detective McKaughan's questions." Order of the Superior Court of Forsyth County, June 13, 2011, Finding

of Fact #12, Conclusion of Law # 7 (Reply Brief App. 2, 4). Moreover, courts around the country have acknowledged that many drivers are nervous during traffic stops. *Urietta*, 520 F.3d at 577; *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997). The trial court discounted the value of the computer alert that Det. McKaughan received from the Burlington Police Department that Mr. Sellars was a "drug dealer" and a "known felon" because the alert did not mention any drug convictions and Det. McKaughan did not determine whether the information in the alert was current. Order of the Superior Court of Forsyth County, June 13, 2011, Finding of Fact #14, Conclusion of Law #8 (Reply Brief App. 2, 4)

In concluding that these two facts did not create reasonable suspicion, the trial court followed this Court's precedent by considering the facts together. *See generally United States v. Arvizu*, 534 U.S. 266, 273 (2002). The trial court found,

> [t]hat when combined together, the Defendant's nervousness and the communications alert do not form a sufficient basis to support a finding that Detective McKaughan had reasonable suspicion to continue to detain the Defendant after the original purpose of the traffic stop was satisfied. . . .

Order of the Superior Court of Forsyth County, June 13, 2011, Conclusion of Law #9 (Reply Brief App. 4) In sum, whether Det. McKaughan had reasonable suspicion to detain petitioner after completing the traffic stop is not relevant to the suitability of this case as a vehicle for this court's resolution of the Fourth

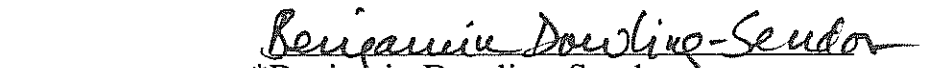
Amendment issue presented in this case. In any event, the record shows that Det. McKaughan did not have reasonable suspicion.

This case gives the Court an ideal opportunity to resolve the Fourth Amendment issue that has divided courts around the nation, an issue that is cleanly presented by the record below. This Court should review this case to provide the guidance that is necessary to uphold the Fourth Amendment's prohibition against unreasonable seizures.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, Petitioner respectfully requests that a writ of certiorari issue to review the decision of the North Carolina Court of Appeals.

Respectfully submitted, this the 24th day of September, 2013.



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CONTENTS OF APPENDIX

NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
FORSYTH COUNTY	)	10 CRS 59457, 58

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**ORDER**
	)	
WILLIAM WESLEY SELLARS, Jr.	)	
	)	
Defendant.	)	

THIS CAUSE coming on to be heard and being heard on May 17, 2011 before the Honorable L. Todd Burke, Superior Court Judge of the Twenty-First Judicial District, Forsyth County, North Carolina, for hearing on the Defendant's Motion to Suppress Evidence seized from inside the Defendant's vehicle after a routine traffic stop on September 16, 2010;

AND IT APPEARING TO THE COURT that the Defendant is represented in the above-entitled action by his attorney, James E. Quander, of Winston-Salem, North Carolina, and that the State of North Carolina is represented in the above-entitled action by Assistant District Attorney, Bobby Gale;

AND IT FURTHER APPEARING TO THE COURT, after a review of the Court file and the pleadings filed herein, after viewing a police video recording presented by the State of the traffic stop, seizure, search, and arrest of the Defendant, after hearing testimony from Detective P.L. McKaughan of the Winston-Salem Police Department, and after considering the arguments of Counsel for the State and for the Defendant, that the Court makes and enters the following:

FINDINGS OF FACT

1. That on September 16, 2010, Detective P.L. McKaughan and Officer K.L. Jones of the Winston-Salem Police Department were sitting stationary on Interstate 40 in Winston-Salem, North Carolina.

2. That Detective McKaughan initially noticed the vehicle driven by the Defendant approaching him traveling approximately 65 miles per hour in a 65 miles per hour zone and then slow down to approximately 55 miles per hour.

3. That Detective McKaughan did not stop the Defendant for the above-stated reason; instead, followed the Defendant and eventually stopped the Defendant for crossing over his lane of travel on at least two occasions.

4. That after Detective McKaughan activated his blue lights, the Defendant began exiting to the shoulder of the highway within a few seconds.

5. That based on the Defendant's driving mannerisms, Detective McKaughan decided to investigate whether the Defendant was impaired, fatigued, or otherwise unable to safely operate his vehicle because of the weaving.

6. That upon initial contact with the Defendant, Detective McKaughan immediately determined that the Defendant was not suffering from any physical impairment or fatigue that compromised safe operation of the vehicle.

7. That Detective McKaughan then asked the Defendant for his driver' license. Upon receipt of the driver's license, Detective McKaughan advised the Defendant that he was not going to issue a ticket.

8. That Detective McKaughan noticed the Defendant's right hand shaking as the Defendant handed Detective McKaughan his driver's license.

9. That, after receiving the Defendant's driver's license, Detective McKaughan decided to elevate the route traffic stop to a "highway interdiction stop," whereby he would separate the Defendant from the passenger and have the Defendant sit in his police car while he talked to the Defendant.

10. That Detective McKaughan requested the Defendant to exit his vehicle and sit with him in his police car. The Defendant complied with this request. Meanwhile, Officer Jones stood outside the passenger's window of the Defendant's car.

11. That as the Defendant sat in the police car with Detective McKaughan, he and the Detective McKaughan engaged in casual conversation.

12. That at all times the Defendant was polite, cooperative, and responsive to Detective McKaughan's questions.

13. That while with the Defendant inside the police car, Detective McKaughan learned through his police communication computer that Burlington Police Department put an alert in the system that the Defendant had some prior contact with the Burlington Police Department at an unknown time.

14. That Detective McKaughan never verified when the alert was entered into the system about the Defendant, nor did Detective McKaughan learn if the Defendant had any prior narcotics convictions or record. That Detective McKaughan did not take any further action to investigate the validity alert.

15. That Detective McKaughan testified that he determined that he was going to detain the Defendant for the purpose of an open air K-9 sniff prior to returning the Defendant's driver's license and issuing a warning ticket.

16. That after learning about the alerts in the police computer system, Detective McKaughan returned the Defendant's driver's license and issued him a warning ticket.

17. That Detective McKaughan testified that the Defendant was not free to leave even after he returned the Defendant his driver's license and issued a warning ticket.

18. That after giving the Defendant his driver's license and warning ticket the initial basis for the traffic stop concluded.

19. That Detective McKaughan then indicated to the Defendant that he wanted to ask some follow-up questions. Detective McKaughan asked the Defendant if he had any drugs or weapons in his car. The Defendant responded that he did not have any drugs or weapons in his car. To which the Defendant stated that there were no guns or drugs in the car.

20. That Detective McKaughan requested consent from the Defendant to allow the open air K-9 sniff which the Defendant refused.

21. That Detective McKaughan then instructed the Defendant to walk to and stand near Officer Jones while K-9 "Basco" performed an open air sniff.

22. That Detective McKaughan retrieved "Basco" from his police vehicle and conducted an open air sniff.

23. That after "Basco" indicated the presence of narcotics in the vehicle, Detective McKaughan began searching the Defendant's vehicle and located a bag of cocaine inside the passenger area of the Defendant's vehicle.

Based upon the above Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

1. That the Plaintiff and the Defendant are properly before the Court; that this Court has jurisdiction over the parties hereto and of the subject matter herein;
2. That Detective McKaughan's sole basis for stopping the Defendant was because the Defendant failed to maintain his proper lane of travel and

Detective McKaughan wanted to determine if the Defendant was impaired or fatigued;

3. That Detective McKaughan had sufficient time to talk to the Defendant to determine that he was only going to write a warning ticket because he immediately determined that the Defendant was not impaired or fatigued and could effectively operate his vehicle safely;
4. That, as a result, Detective McKaughan had sufficient time reasonably required to complete his investigation to determine if the Defendant was impaired or fatigued;
5. That after giving the Defendant his driver's license and warning ticket, the purpose of the stop for the Defendant's failure to maintain his proper lane of travel was completed and any further detention of the Defendant must have been supported by reasonable suspicion of criminal activity afoot or the encounter must have become consensual;
6. That nervousness of the Defendant and information learned about the Defendant by the police during detention of the Defendant can be used as factors in assessing the totality of circumstances to support findings of reasonable suspicion;
7. That in this case the Defendant did not display extreme nervousness in that Detective McKaughan only noticed the Defendant's right hand shaking during the detention and his heart beating fast. That the Defendant was cooperative and responsive to the detective's questions throughout the entire encounter;
8. That while Detective McKaughan did obtain an alert through police communication from Burlington Police Department that the Defendant was a "drug dealer" and "known felon," Detective McKaughan did not learn of any narcotics convictions against the Defendant, the temporal proximity of the alert, and any other details about the particular alert about the Defendant.
9. That when combined together, the Defendant's nervousness and the communications alert do not form a sufficient basis to support a finding that Detective McKaughan had reasonable suspicion to continue to detain the Defendant after the original purpose of the traffic stop was satisfied; That Detective McKaughan had determined he was going to allow his K-9 Basco to perform an open air sniff prior to giving the Defendant his driver's license and warning ticket;
10. That, further, Detective McKaughan testified that the Defendant was not free to leave even once he gave the Defendant back his driver's license and issued the warning ticket;
11. That, in addition, Officer Jones' continued presence at the passenger side of the Defendant's vehicle and the presence of K-9 Basco created an environment whereby a reasonable person in the Defendant's shoes would not feel free to leave;
12. That Detective McKaughan instructed the Defendant to walk to Officer Jones and stand there until the sniff was complete;

13. That as a result, the officer's further detention of the Defendant did not rise to the level of being a consensual encounter between the Defendant and Detective McKaughan;
14. That the prolonged detention of the Defendant was not supported by reasonable suspicion, did not become consensual between the Defendant and Detective McKaughan, and thus, the prolonged detention and subsequent search of the Defendant's vehicle was in violation of the Defendant's 4th Amendment rights;

Based upon the above Findings of Fact and Conclusions of Law, and with the consent of the parties hereto,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

That the Defendant's Motion to Suppress the evidence located in the Defendant's vehicle is hereby granted;

This the 13th day of June, 20011, *nunc pro tunc,* May 17, 2011.

The Honorable L. Todd Burke
Superior Court Judge Presiding