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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; Mesa District Court; The Honorable David A. Bottger; Case Number 15CR700	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant OLIVIA NAVARRO-GONZALEZ	
Megan A. Ring Colorado State Public Defender CASEY MARK KLEKAS 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #51333	Case Number: 16CA728

REPLY BRIEF

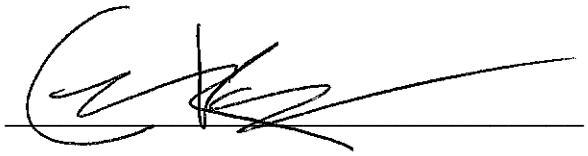
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

It contains 3,734 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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CONSTITUTIONAL AUTHORITIES

I. Police unlawfully detained Ms. Navarro for a prolonged traffic stop and, at the stop's conclusion, for a dog sniff.

a. The State concedes that police prolonged the initial stop by exceeding the time necessary to complete the traffic stop; this violates *Rodriguez v. United States*.

In *Rodriguez v. United States*, the Supreme Court stated, "We hold 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. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." 135 S. Ct. 1609, 1612 (2015) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)) (brackets in original).

In its Answer Brief, the State does not contest that the Trooper extended the stop beyond its initial purpose (to issue a written warning for failure to signal 200 feet before changing lanes). *See* AB, p 16. Instead, the State claims for the first time on appeal that the Trooper was justified in prolonging the stop beyond the time necessary to issue the traffic citation because the investigatory purpose had "shift[ed]." AB, p 18.

But no one, not the trial court, not the prosecutor, not even the Trooper claimed there was reasonable suspicion of a "new" wrongdoing based on the Trooper's initial observations. *See* CF, pp 70–72 (court's order); TR 12/07/15, p 90:12–18 (prosecutor's argument); *id.* at 29:3–11 (Trooper's testimony). After all, the Trooper admitted that he was suspicious of Ms. Navarro even before he pulled her over for a lane change violation—suspicious that she didn't wave at him and that she wasn't speeding. TR 12/07/15, pp 10–11, 38–40. To claim now that the investigatory purpose "shifted" is a factual and legal fiction.

The State's argument fails for another reason: it assumes the Trooper actually observed every "factor" on which the State now relies in his first conversation with Ms. Navarro. He did not, even holding aside the factors contradicted by video evidence. For instance, he did not know of her "inconsistent travel plans" until the Deputy arrived and proceeded to interview Ms. Navarro three separate times.

Rodriguez poses another problem for the State's argument—that a police officer may not incrementally prolong a traffic stop to investigate his suspicions. 135 S. Ct. at 1616. By lumping every "factor" together, the State is avoiding the problem that the Trooper (and Deputy)

prolonged the stop *in order to* investigate Ms. Navarro without reasonable suspicion. And when the officers did investigate, they came up empty-handed (her travel plans, even according to the Trooper, were never inconsistent, TR 12/07/15, p 56:19–25), or else they made unreasonable inferences based on limited information (for instance, the Trooper might have questioned Ms. Navarro about her apparent absence of luggage, which turned out, unsurprisingly, to be in the trunk, EX Motions, p 16).

The State does nothing to show that the Trooper was being "diligent[] and efficient[]" when he completed the consent-to-search form and then interviewed Ms. Navarro yet again (the fifth interview in twenty-two minutes) before and after he finally issued the lane change warning. Contrary to the State's claim, these three to eight minutes are, in fact, "measurable." AB, p 19; *see, e.g.*, *Rodriguez*, 135 S. Ct. at 1613–14, 1615–17 (holding that the stop was prolonged by seven or eight minutes and reversing court of appeals finding that such a delay was a "de minimis intrusion").

As *Rodriguez* held, "[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably

required to complete the stop's mission." *Id.* at 1616 (citations, quotation marks, and brackets omitted). And, by continuing the stop for another seven-and-a-half minutes after she was cleared of any warrants to fill out a consent-to-search form, the Trooper detained Ms. Navarro past the time needed to handle the matter for which the stop was made. EX Video1 at 15:28:23–15:35:55. The State's new argument that he had reasonable suspicion at the outset was not even suggested below and is nonetheless wrong for the reasons stated in the Opening Brief and in the following section. *See* OB, pp 17–42. Thus, the Trooper violated *Rodriguez* by prolonging the stop and this Court should reverse on that basis alone.

b. The State claims there were "concrete" reasons that generic, innocent facts combined into reasonable suspicion. But it has none to offer beyond the Trooper's objectively unreasonable claims and what he learned *after* the search.

First, the State contends that this issue is not "preserved" as to "the trial court's use of certain evidence in its reasonable suspicion analysis." AB, p 7 n.3. This is wrong: preservation has nothing to do with appellate review of a trial court's finding of facts for suppression motions.

As the State says, "[f]or the first time on appeal, defendant points to statements made on the dash-cam video to suggest that Trooper Gosnell did not observe [certain] items until *after* the search." AB, pp 21–22 (emphasis in original). That's exactly right. *See* OB, pp 15–16, 23–25. And because this Court must determine "whether the district court's factual findings are *adequately supported by competent evidence in the record*," there is no "preservation" question here. *People v. Jordan*, 891 P.2d 1010, 1015, 1016 (Colo. 1995) (emphasis in original) (this inquiry "necessarily involves an examination of the evidence before the district court, and a determination of whether the evidence adequately supported the district court's ultimate legal conclusion").

Here, the trial court relied on three facts that were very significant to the Trooper's suspicion, and on which the State continues to place a great deal of emphasis. *See* AB, pp 12–13, 21–25, 29–32. Ms. Navarro's wallet was said to contain a very large sum of cash. It was also said to contain a Santa Muerte image, "a good luck token for drug smugglers." And the Trooper claimed to see two cell phones.[1]

[1] The State fails to respond to the fact that the Trooper himself had two cell phones, one of which he used to text the Deputy. TR 12/07/15, pp 53:15–54:2.

As argued in the Opening Brief, at 15–16, 23–25, the video confirms the Trooper never saw these items until after he searched her car: asked about her wallet, he says "She never had one. That I know of." EX Video2 at 16:15:20. The State claims there is ambiguity here. AB, pp 24–25. Certainly not. Not only did the Trooper say, to his knowledge, she never had a wallet, but he then follows up and directs the unknown officer (who was mid-way through mocking Ms. Navarro's Spanish accent) to someone who may know where her wallet is because it was said to contain a large sum of cash. EX Video2 at 16:15:28 ("Actually, Mike may know because he said there was $2000 somewhere.").[2]

In a footnote, the State claims there were actually two sums of money, one on Ms. Navarro's person and another in her wallet, according to the evidence at trial. AB, p 2 n.1. But there was no evidence at all—either at the suppression hearing *or at trial*—that Ms. Navarro carried two sums of cash, only that she had a single sum of $1,300 in her wallet (not $1,700, as the Trooper testified at the suppression hearing). TR 12/07/15, p 18:10–11; TR 01/13/16, p 54:10–14

[2] It is also telling that the Trooper never mentions these items to the Deputy when the Deputy first arrives. *See* EX Video1 at 15:18:17.

(Trooper's testimony), 218:5–10 (Deputy's testimony). This did not prevent the prosecutor from relying on facts not in evidence during opening and closing statements, TR 01/13/16, p 15:7–15, TR 01/14/16, p 74:6–20, and at sentencing. TR 03/11/16, p 6:1–4. And it has not stopped the State from doing the same here.[3]

The State also suggests that this Court should defer to the trial court in the face of contradictory video evidence. AB, pp 22–25. But it is well-established that this Court reviews audio and video recordings independently; in fact, the State cites a case that says that directly, and in the setting of the Fourth Amendment, not merely a police interrogation. *People v. Chavez-Barragan*, 379 P.3d 330, 334 n.1 (Colo. 2016). As the Court said, "We have independently reviewed the recording as we have done in other cases . . . . [and] perceive no conflict between the trial court's findings and the video recording." *Id.* (citing

[3] Earlier in its Answer Brief, the State references other statements made at trial (again, not to do with the issue of suppression). It says the supposed price of the drugs recovered was $428,000 to $500,000. AB, p 3 n.2. The State fails to mention where this figure came from: the Trooper based these figures on what "some guy" told him in the courthouse elevator that day, as the Trooper was on his way to testify. *See* TR 01/13/16, pp 130–31 ("Well, today I had a guy tell me in the elevator, creating small talk that, hey, you can get one of those for $35.").

People v. Madrid, 179 P.3d 1010, 1014 (Colo. 2008) and *People v. Kutlak*, 364 P.3d 199, 203 (Colo. 2016)). There, the Court deferred when the video did not conflict with the findings below; here, there is a conflict, and thus no deference is due.

The State claims there were "concrete reasons" for finding innocent and generic facts suspicious—but it fails to say what they are, apart from the Trooper's "training and experience." *See* AB, pp 9–13, 26–28. For instance, in the Trooper's estimation, it is indicative of criminal behavior that Ms. Navarro had an "apparent absence of luggage" in the passenger compartment. But as the Opening Brief showed, she had luggage—two bags, in the trunk. OB, pp 13, 29. Thus, even where the Trooper pointed to particular facts, his inferences were not objectively reasonable, and do not deserve the deference the State urges.

The State says that the Trooper should be "afford[ed] . . . an opportunity" to explain the "inconsistency" between his testimony at the suppression hearing (and during Ms. Navarro's trial), and what the video clearly shows. AB, p 24. But he *was* confronted with his post-arrest statements, and he said, "I don't—I don't recall that, so I don't

know. I don't what you're talking about specifically." TR 12/07/15, pp 46–47.

Nonetheless, the State says challenging the validity of the Trooper's testimony with video evidence is somehow unfair or "inappropriate" on appeal. AB, p 24. The responsibility of this Court, however, is to ensure fundamental fairness to a criminal defendant and correct clear error on appeal. *Cf. Wend v. People*, 235 P.3d 1089, 1097–98 (Colo. 2010) (in the context of plain error review). In the face of contradictory video evidence, the trial court's reliance on the Trooper's testimony was clear error, and the other generic factors do not elevate the Trooper's hunch into reasonable, articulable suspicion.

II. The Deputy did not "try to control" the dog as it trespassed into Ms. Navarro's car four times.

The State frames this issue as a factual question, and claims the record supports the trial court's finding that Libby, the drug-detection dog, was not "commanded, encouraged or trained" to "st[i]ck its head through the open driver's and passenger side windows." AB, p 34 (quoting CF, p 70 n.1).

First, there is no factual dispute that Libby put her nose into Ms. Navarro's car four times.

Second, whether police encouraged or facilitated the drug-detection dog's trespass into Ms. Navarro's car is a legal conclusion, and legal conclusions are reviewed de novo. *Grassi v. People*, 320 P.3d 332, 335 (Colo. 2014); *cf. People v. Bailey*, 2018 CO 84, ¶¶ 24, 30 (finding that police had probable cause for a search *prior to* putting a drug-detection dog inside a suspect's car).

The State claims the Deputy's testimony that he "tried to control [the dog] the best he could" is sufficient to overcome the video evidence to the contrary, suggesting that because Libby's leap was instinctual and police did not ask Ms. Navarro to open the windows, no Fourth Amendment violation occurred. *See* AB, pp 35–39.

The State is wrong, first, in suggesting that "the windows had been rolled down by defendant prior to the encounter without instruction or encouragement from the officers." AB, p 37. Ms. Navarro had both her windows closed during almost the entirety of the encounter, and only rolled the windows down to speak with the officers. *See* EX Video1 at 15:19:55, 15:21:35 (the Deputy can be seen knocking on Ms. Navarro's closed windows at least twice). It's true that the Trooper did not expressly ask Ms. Navarro to leave her windows down.

But when she was last asked to exit the vehicle, under the Trooper's direction that she needed to step outside so he could explain the written lane change warning, she had an officer speaking to her at both windows. *See* EX Video1 at 15:33:45. And, after she denied the Trooper consent to search her car, he told her to remove her own dog from the car before the dog sniff. That the officers did not expressly ask Ms. Navarro to open her windows is not reason enough to excuse Libby's trespasses—not one but four times.

Although the State claims that the Deputy did not facilitate or encourage Libby to trespass into Ms. Navarro's car, the video clearly shows the Deputy allow her to jump up four separate times, and he never once pulls her down. Again, he appears to even wave Libby up at one point. EX Video1 at 15:37:44. The Deputy's testimony does not overcome the video evidence. While he did say,

> *She jumped up on the driver's side, the open window. Through the open window. Smelled the inside of the car. Put her paws up. Trying to control her the best I can . . .*

he also said,

> *I'm not going to pull her away from the car. I just let her do her thing.*

TR 12/07/15, p 75:10–14, 74:12–14.

The State says Libby gave "multiple positive alerts" by breathing, stopping, staring, and sitting. AB, p 38, 38 n.9. But if the State were correct, there is nothing the dog could do that *wouldn't* be an alert. Indeed, Deputy Miller admitted that the dog was originally smell-searching the Trooper's police cruiser as he approached Ms. Navarro's car. TR 12/07/15, p 74:17–21 ("She doesn't know the difference of what car I want her to search."). The dog only actually sat after the fourth intrusion, and like in *Felders*, the video does not show Libby alerting in any sense whatsoever (stopping, staring, etc.) before she makes her first intrusion. *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 877 (10th Cir. 2014) (finding the dog "almost immediately jumped in the vehicle").

It is important to note that Libby is not an ordinary dog, particularly for Fourth Amendment purposes. She is a "super-sensitive instrument":

> [D]rug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners.
> . . .
>
> They are to the poodle down the street as high-powered binoculars are to a piece of plain glass.

> Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell).

Florida v. Jardines, 569 U.S. 1, 12–13 (2013) (Kagan, Ginsburg, Sotomayor, JJ., concurring) (citing *Florida v. Harris*, 568 U.S. 237 (2013)).

Here, the Deputy allowed not just one, but four trespasses into Ms. Navarro's car. And the trespasses were not with just the Deputy's nose, but the nose of a "super-sensitive" police instrument employed to search what could not be sensed in plain view or plain smell. This was a trespass, and because it was not supported by probable cause, it was an unreasonable search.

III. Under *McKnight*, the dog's alert did not provide probable cause; this is reversible even under plain error review because an error is "plain" according to the law at the time of appeal, not trial.

The State does not challenge the underlying rationale of *McKnight*—that when trained to detect non-contraband, including legalized amounts of marijuana, a dog's alert does not provide probable cause for police to conduct a warrantless search. *People v. McKnight*, 2017 COA 93. Even the Deputy expressed concern that the dog's alert might have been to non-contraband, asking Ms. Navarro, immediately

after the dog sniff, "[i]s there a reason why my dog would be hitting on the car? . . . You haven't smoked any small or personal use amounts of marijuana?" EX Video1 at 15:40:10.[4]

Instead, the State says this issue (whether the dog's alert provided probable cause when it was trained to alert to marijuana) was waived, or at best receives plain error review. AB, pp 39–41. Three responses follow.

First, the State makes no showing of which "known right" was intentionally relinquished, or *how so* when Ms. Navarro challenged the constitutionality of the warrantless search. *See People v. Rediger*, 416 P.3d 893, 902 (Colo. 2018). Thus, waiver is not at issue.

Second, this issue should be considered preserved: Ms. Navarro challenged the constitutionality of the search under the U.S. and Colorado Constitutions, CF, p 37; the prosecution then had the burden to show the warrantless (and presumptively unreasonable) search fell within one of the narrowly defined exceptions to the warrant

[4] The Trooper also noted this in his Probable Cause Affidavit. CF, p 4 ("At approximately 1541 hours Deputy Miller notified me that his K-9 did alert to the vehicle. Deputy Miller asked Ms. Navarro if she had any marijuana in the vehicle. Ms. Navarro stated that she did not. Deputy Miller asked Ms. Navarro if there was any reason why his K-9 would alert to the vehicle. Ms. Navarro stated that she did not know.").

requirement, *People v. Jansen*, 713 P.2d 907, 911 (Colo. 1986); and they did so by arguing that police had probable cause based on the dog's alert. *See* TR 12/07/15, p 3:4–5 (claiming "the dog alerted, and based on that alert, there was probable cause for a search"). The trial court found the dog alerted to "the odor of illegal drugs," CF, p 70, and that "[t]he alert by Investigator Miller's dog provided probable cause for the subsequent search." *Id.* at 72. Thus, the question of whether the dog's alert provided probable cause for the warrantless search is preserved for this Court's de novo review.

Third, the error is reversible even under plain error review. The State contends that the error was not "plain" because *McKnight* had not been decided at the time of Ms. Navarro's suppression hearing,[5] and thus the trial court's finding did not violate clearly established case law. AB, pp 45–46. According to the U.S. Supreme Court, however, the law at the time of the hearing is not the law that matters for the purposes of plain error review. *Henderson v. United States*, 568 U.S. 266, 268–70 (2013). In *Henderson*, for example, the Court held that an error is

[5] Amendment 64, which legalized possession of small amounts of marijuana, was in effect at the time of trial. Colo. Const. art. XVIII, § 16(3)(a) (effective December 10, 2012).

"plain" for the purposes of plain error review if it is plain at the time of appellate review. *Id.* (overruling the court of appeals decision that an error is plain only if it was clear under the law at the time of trial); *see also Johnson v. United States*, 520 U.S. 461, 468 (1997) (holding that even "where the law at the time of trial was settled and clearly *contrary* to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration.") (emphasis added); *but see People v. Garcia*, 2017 COA 1, ¶¶ 9–10 (finding no plain error based on the jury instructions that existed at the time of trial), *petition for cert. granted*, No. 17SC147 (Colo. Oct. 16, 2017). Thus, the controlling law for plain error review is the law at the time of appeal.

And, under *McKnight*, the dog's alert here did not provide probable cause for the police to conduct a warrantless search of Ms. Navarro's car. The State "acknowledge[s] that, as written, the trial court's order appears to base its relevant probable cause determination on [the dog's] alert alone." AB, p 42. As the trial court stated, "**The factors cited above provided reasonable suspicion** to justify Defendant's detention beyond the traffic stop so the dog sniff could occur. **The alert by Investigator Miller's dog provided probable**

cause for the subsequent search." CF, p 72 (emphasis added). Thus, the language of the trial court prevents "assum[ing]," as the State urges, that the court incorporated the "factors cited above" within its probable cause determination. AB, p 43.

In any event, even if those factors were joined with the dog's alert, it would not rise to probable cause. As argued above and in the Opening Brief, those generic factors did not support the objective basis required for an investigatory stop, let alone probable cause for a warrantless search. The State does not respond to the arguments in the Opening Brief about why each factor was either of almost no weight or factually incorrect. Instead, it heads for cover behind the "totality of the circumstances." But what were they? That, by obeying traffic laws, she was not like the "general motoring public"? TR 12/07/15, pp 10–11. That she was, according to the Deputy, "up to no good"? EX Video1 at 15:41:54. As Justice Hood, joined by Justice Gabriel, wrote in dissent:

> These unremarkable circumstances are followed by a dog alert that is almost meaningless under current Colorado law. If the "fair probability" required for probable cause really means something more than reasonable suspicion, what we have here isn't enough for probable cause, even when taking the facts in combination.

People v. Cox, 401 P.3d 509, 516 (Colo. 2017) (Hood, Gabriel, JJ., dissenting). Because the police lacked probable cause to search Ms. Navarro's car, the fruit of that unlawful search should be suppressed.

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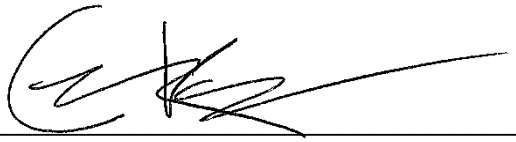

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CERTIFICATE OF SERVICE

I certify that, on October 29, 2018, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on Frank R. Lawson of the Attorney General's Office.