Supreme Court of Ohio Clerk of Court - Filed October 01, 2015 - Case No. 2015-1568

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	**Case No. 2015-1568**
	*	
Plaintiff-Appellant,	*	**On Appeal from the Warren**
	*	**County Court of Appeals,**
v.	*	**Twelfth Appellate District**
	*	
JASON RAPHAEL,	*	**Court of Appeals Case Nos.**
	*	**CA2014-11-138 & CA2014-11-139**
And	*	
	*	
GREGORY CLAYTON	*	
	*	
Defendants-Appellees.	*	

STATE OF OHIO'S RESPONSE TO THE DEFENDANT-APPELLEES' MOTION AND MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Plaintiff-Appellant, State of Ohio, herein responds to Defendants-Appellees, Jason Raphael and Gregory Clayton, on the issue of jurisdiction, pursuant to S.Ct.Prac.R.[1] 3.2(A). This is not a case of public or great general interest. Defendants-Appellees are not public figures. This case is not in the public eye. In addition, this case does not pose any substantial constitutional questions that would affect the public. Moreover, Defendants-Appellees' propositions of law are without merit.

STATEMENT OF THE CASE AND FACTS

In Case No. 14CR29858, on March 17, 2014, in Warren County, Ohio, Defendant-Appellee, Jason Raphael, was indicted and charged, in Count 1, with Trafficking in Marihuana, R.C.[2] 2925.03(A)(2), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. Indictment, T.d. 02-14CR29858, p. 1. In Count 2, Raphael was charged with Possession of Marihuana, R.C. 2925.11(A), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. *Id.*

In Case No. 14CR29857, on March 17, 2014, in Warren County, Ohio, Defendant-Appellee, Gregory Clayton, was indicted and charged, in Count 1, with Trafficking in Marihuana, R.C. 2925.03(A)(2), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. Indictment, T.d. 02-

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[1] Rules of Practice of the Supreme Court of Ohio.

[2] Ohio Revised Code.

14CR29857, p. 1. In Count 2, Clayton was charged with Possession of Marihuana, R.C. 2925.11(A), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. *Id.* In Count 3, Clayton was charged with Permitting Drug Abuse, R.C. 2925.13(A), a fifth-degree felony. *Id.* at 2.

On June 25, 2014, Raphael and Clayton jointly moved the Warren County Court of Common Pleas to suppress evidence seized in their cases. Motion to Suppress with Supporting Memorandum, T.d. 13-14CR29858, & T.d. 14-14CR29857.

On August 27, 2014, the trial court began a two-day suppression hearing regarding Appellees' motions. Suppression Hearing, 08/27/2014, T.p. The State's first witness was Deputy Andrew Grossenbaugh of the Warren County Sheriff's Office. *Id.* at 4-76. Deputy Grossenbaugh explained that Warren County has two major drug corridors running through it: Interstate 71 (I-71) and Interstate 75 (I-75). *Id.* at 6.

Deputy Grossenbaugh testified that, at approximately 1:00 a.m. on February 11, 2014, he observed a Chrysler Pacifica with darkly-tinted windows traveling southbound at about 64 miles per hour, which was under the 70-miles-per-hour speed limit. *Id.* at 7. Deputy Grossenbaugh observed the vehicle commit a marked-lane violation. *Id.* at 12. Deputy Grossenbaugh initiated a traffic stop at about 1:35 a.m. *Id.*

Deputy Grossenbaugh testified that, when he approached the vehicle, he saw that the Pacifica's seats were folded down and there were eight large packages in the vehicle. *Id.* at 14. The packages were wrapped in moving blankets "and taped extremely tightly." *Id.* Deputy Grossenbaugh explained that this was significant to him because drug couriers often use moving blankets to wrap around drugs. *Id.* Deputy

Grossenbaugh testified that packages "were shaped in blocks, it appeared to me that through my training, they were very similar in size and shape to bundles of bulk amount marijuana." *Id.* at 18.

Deputy Grossenbaugh testified that Clayton was the driver and Raphael was the passenger. *Id.* at 14. Deputy Grossenbaugh observed Raphael speaking on a cell phone. *Id.* Deputy Grossenbaugh asked Raphael for identification, but he said he did not have any. *Id.* at 14-15. Raphael could not provide his social security number. *Id.* at 15. Deputy Grossenbaugh found Raphael's lack of identification suspicious. *Id.* Deputy Grossenbaugh testified that, in his experience, when a person claims not to know or remember his social security number, that person often has an active warrant or does not want to be identified. *Id.* at 16.

Deputy Grossenbaugh testified that the Pacifica was registered to an 84-year-old lady from Cincinnati, Ohio. *Id.* at 16-17. Deputy Grossenbaugh found this suspicious. *Id.* at 17. Clayton told Deputy Grossenbaugh that the vehicle belonged to Clayton's aunt; however, this did not allay the deputy's suspicion. *Id.* Deputy Grossenbaugh testified that he observed five cell phones in the vehicle. *Id.*

Deputy Grossenbaugh testified that, when he first made contact with Clayton and Raphael, both were shaking excessively and were avoiding eye contact with the deputy. *Id.* at 22. Deputy Grossenbaugh characterized Raphael's and Clayton's behavior as extremely nervous. *Id.* Deputy Grossenbaugh testified, "Clayton's pulse was extremely visible in his neck." *Id.* Deputy Grossenbaugh found all of this behavior unusual. *Id.* Deputy Grossenbaugh testified that the fact that owner of the vehicle was

not there; the block-shaped packages; the multiple cell phones; the failure of Raphael to produce identification; and Raphael's and Clayton's extreme nervousness indicated criminal activity. *Id.* at 22-23. Specifically, all this information indicated that they were drug couriers. *Id.* at 23.

Deputy Grossenbaugh explained that, using the name and date of birth provided by Raphael, he was unable to confirm Raphael's identity. *Id.* at 25.

Deputy Grossenbaugh testified that, initially, Clayton indicated that he and Raphael were moving to Cincinnati. *Id.* Seconds later, Clayton told the deputy that he, Clayton, was moving to Columbus. *Id.* Deputy Grossenbaugh found this significant since the Pacifica was loaded. *Id.* "If they're moving to Columbus, generally their car would be empty on a return trip back to Cincinnati." *Id.*

Deputy Grossenbaugh testified that, after gathering this information, he asked for an additional officer and asked for a canine unit. *Id.* at 24.

Deputy Grossenbaugh testified that he was able to confirm Clayton's identity. *Id.* at 26. The deputy learned that Clayton had been charged with "a drug abuse charge and a weapons type charge;" however, the deputy was not sure whether Clayton had been convicted of those offenses. *Id.*

Deputy Grossenbaugh testified that, eventually, Deputy Ascencio arrived as backup. *Id.* The deputies separated Defendants-Appellants and interviewed them individually. *Id.* at 26-27. Deputy Grossenbaugh interviewed Clayton. *Id.* Clayton told Deputy Grossenbaugh that Clayton and Raphael were moving Clayton's aunt's stuff. *Id.* Deputy Grossenbaugh asked what stuff, and Clayton respond "like furniture stuff or

antique stuff." *Id.* Deputy Grossenbaugh testified that the packages did not look like furniture or antiques because the packages were wrapped tightly, leading Deputy Grossenbaugh to believe that if the packages were antiques they were broken. *Id.* at 27-28. Further, the packages were all very similar in size and shape. *Id.* at 28. Clayton indicated that his aunt had died "and that's why they were moving her from Columbus to Cincinnati" despite the fact the vehicle was registered in Cincinnati. *Id.* This information heightened Deputy Grossenbaugh's suspicion. *Id.*

Deputy Grossenbaugh asked Clayton how long Clayton had known Raphael. *Id.* Clayton told Deputy Grossenbaugh that he, Clayton, and Raphael had known each other "since they were kids." *Id.* Clayton stated that he and Raphael had grown up together. *Id.* Deputy Grossenbaugh testified that these statements became significant later when he conferred with Deputy Ascencio. *Id.* at 28-29. Deputy Ascencio relayed to Deputy Grossenbaugh that Raphael stated that he, Raphael, and Clayton had only known each other for a couple of, or a few, months. *Id.* at 29. Raphael also told Deputy Ascencio that Raphael and Clayton were not taking anything to Columbus. *Id.*

Deputy Grossenbaugh asked for consent to search the vehicle, but Clayton declined. *Id.* Clayton continued to avoid eye contact and to shake excessively. *Id.*

Deputy Grossenbaugh testified that the canine unit arrived at about 2:00 a.m. *Id.* at 31. Deputy Grossenbaugh testified that it was common to use canine units during traffic stops and that drug dealers know that. *Id.* at 32. Deputy Grossenbaugh explained that large scale drug operations often use various substances and multiple layers to mask the odor of illegal drugs to fool drug dogs. *Id.*

Deputy Grossenbaugh testified that he had witnessed canine searches where the drug dog did not alert but drugs were still found. *Id.* Deputy Grossenbaugh testified that using a drug dog was only one tool that he relied during a possible drug interdiction investigation. *Id.* at 33. Deputy Grossenbaugh knew all of this on February 11, 2014. *Id.* Deputy Grossenbaugh testified that the drug dog did not alert on the Pacifica. *Id.* Despite this, Deputy Grossenbaugh continued to investigate due to the observations and information that he had uncovered. *Id.* Deputy Grossenbaugh testified that it was his and Deputy Ascencio's opinion that the packages in the Pacifica were marijuana bales. *Id.* Deputy Grossenbaugh testified that the drug dog's failure to alert did not lessen his suspicions at all. *Id.*

Deputy Grossenbaugh testified that he contacted Detective Schweitzer of the Warren County Drug Taskforce to help to obtain a search warrant. *Id.* While waiting for Detective Schweitzer, Clayton stayed, without handcuffs, in the back of Deputy Grossenbaugh's cruiser. *Id.* at 34. Raphael stayed, without handcuffs, in the back of Deputy Ascencio's cruiser. *Id.* Deputy Grossenbaugh testified that Detective Schweitzer arrived around 2:50 a.m. and observed the packages in the back of Pacifica and agreed with Deputy Grossenbaugh and Deputy Ascencio that the packages were bales of marijuana. *Id.*

Deputy Grossenbaugh testified that the Pacifica was driven to the taskforce's headquarters. *Id.* at 35. Appellees were transported to the sheriff's office and placed in interview rooms. *Id.* Deputy Grossenbaugh helped Detective Schweitzer draft the affidavit for the search warrant. *Id.*

Deputy Grossenbaugh testified about State's Exhibit No. 6, the affidavit to the search warrant, and about State's Exhibit No. 7, the search warrant. *Id.* at 36. Deputy Grossenbaugh testified that the affidavit contained the fact that the drug dog did not alert on the Pacifica. *Id.* Deputy Grossenbaugh testified that Detective Schweitzer took the affidavit and search warrant to Judge Peeler of the Warren County Court of Common Pleas and that the judge signed it. *Id.* at 37.

Deputy Grossenbaugh testified that the search warrant was executed and bales of marijuana were discovered. *Id.* When the packages were opened, it was discovered that the packages had been wrapped multiple times in plastic and paper, with the strong odor of ammonia. *Id.*

During cross-examination, Deputy Grossenbaugh testified that he believed that he had probable cause to seek a search warrant. *Id.* at 61. Deputy Grossenbaugh further testified, "To get a search warrant was made--the probable cause--everything we had was before the canine got there, however, we pursued the search warrant after the canine and consent was denied." *Id.* Deputy Grossenbaugh further testified that, after the drug dog failed to alert, he still had strong probable cause that the packages were bales of marijuana and that he was aware of drug dogs not alerting on vehicles in which drugs were discovered. *Id.* at 64. Regarding Detective Schweitzer, Deputy Grossenbaugh testified that the detective had several years of experience with drug interdiction and had greater experience at drafting search warrants than the deputy. *Id.* at 66. Deputy Grossenbaugh admitted that he has only written one, perhaps two, search warrants during his career. *Id.*

After Deputy Grossenbaugh's testimony, Deputy Randy Ascencio took the stand. Suppression Hearing, 08/27/2014, T.p., pp. 77-100, & Suppression Hearing, 10/27/2014, T.p., pp. 4-28. Deputy Ascencio testified that he spoke with Raphael. Suppression Hearing, 08/27/2014, T.p, p. 87. Raphael told Deputy Ascencio that Raphael and Clayton were traveling from Columbus to Cincinnati. *Id.* Raphael indicated that he and Clayton were moving furniture for Clayton's dead aunt. *Id.* Raphael expressed confusion about whether he and Clayton were transporting the packages from Columbus to Cincinnati or from Cincinnati to Columbus. *Id.* at 89. But Raphael indicated that the packages were already in the vehicle when Clayton picked up Raphael in Cincinnati. *Id.* This contradicted Clayton's story that they had picked up the packages in Columbus and was moving them to Cincinnati. *Id.* Deputy Ascencio asked Raphael about how long Raphael and Clayton had known each other. *Id.* at 88. Raphael told Deputy Ascencio that he, Raphael, had known Clayton for a couple of, or a few, months. *Id.*

After Deputy Ascencio, Detective Dan Schweitzer of the Warren County Sheriff's Office assigned to the Warren County Drug Taskforce testified. *Id.* at 33-77. Detective Schweitzer testified that he drafted an affidavit for a search warrant for the vehicle. *Id.* While the detective was drafting the affidavit, he was aware that the drug dog had not alerted on the Pacifica. *Id.* at 45. Detective Schweitzer testified that he included this fact in the affidavit. *Id.* Judge Peeler signed the search warrant even though the affidavit had stated that the drug dog had failed to alert. *Id.*

After hearing the evidence, the trial court granted Defendants-Appellees'

suppression motion. Decision and Order, 11/17/2104, T.d. 16-14CR29857 & T.d. 15-14CR29858, p. 6.

The State appealed to the Warren County Court of Appeals, Twelfth Appellate District. *State v. Raphael*, 12th Dist. Nos. CA2014-11-138 & CA2014-11-139, 2015-Ohio-3179, ¶1. The Twelfth District reversed the trial court's decision granting the Defendants-Appellees' suppression motion, holding that deputies had probable cause to search Defendants-Appellees' vehicle, despite the fact that the canine unit failed to alert, and could have searched the vehicle pursuant to the automobile exception. *Id.* at ¶¶24-25. The Twelfth District held that the detention of the vehicle to obtain a search warrant did not run afoul of the Fourth Amendment. *Id.* at ¶25. Finally, the Twelfth District held that the dog's failure to alert did not destroy the probable cause that the deputies had prior to the canine search. *Id.* at ¶26.

ARGUMENT

Response To Propositions of Law I and II: The Warren County Court of Appeals, Twelfth Appellate District, did not err when it reversed the trial court's decision to suppress because the deputies had probable cause to search Defendants-Appellees' vehicle prior to the arrival of the canine unit.

In Defendants-Appellees' first proposition of law, they argue that the Twelfth District erred when it reversed the trial court's decision granting their suppression motion because there were no reasonable, articulable suspicion to justify the continued detention of the vehicle once the canine unit failed to alert. To support this argument, Defendants-Appellees cite *State v. Casey*, 12th Dist. No. CA2013-10-090, 2014-Ohio-2586, and *Rodriquez v. United States*, _____ U.S. _____, 135 S.Ct. 1609, 191 L. Ed. 2d

492 (2015). In Defendants-Appellees' second proposition, they argue that the good faith exception does not apply and insist that *Rodriquez* controls the result of this case.

In this case, the deputies had no need for additional reasonable, articulable suspicion to continue the detention of Defendants-Appellees' vehicle. Prior to the canine's failure to alert, the deputies knew that Defendants-Appellees possessed multiple cell phones. See *State v. Carter*, 11th Dist. No. 2003-P-0007, 2004-Ohio-1181, ¶40 (The presence of **one** cell phone in the vehicle's center console was a factor, among others, that supported the officer's reasonable suspicion of criminal activity.). The deputies knew about the inconsistencies between Clayton's three statements regarding the purpose of the trip and knew about the inconsistencies between Clayton's stories and Raphael's story. See *State v. Stephenson*, 12th Dist. No. CA2014-05-073, 2015-Ohio-233, ¶23 (Inconsistent statements about purpose of trip was a factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.). The deputies knew about the inconsistencies between Clayton's story and Raphael's story about how long they had known one another. See *Stephenson*, 2015-Ohio-233, at ¶23 (Inconsistent statements about how long driver and passenger had known one another was a factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.). The deputies knew that Clayton had been previously charged with drug and weapons offenses. See *Carter*, 2004-Ohio-1181, at ¶40 (A suspect's prior drug convictions, along with other factors, may support an officer's reasonable suspicion of criminal activity.). The deputies knew that

Defendants-Appellees were traveling along a major drug corridor. See *Stephenson*, 2015-Ohio-233, at ¶23 (Travel along a major drug corridor, I-71, was one factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.), see also *United States v. Pack*, 612 F.3d 341, 361 (5th Cir. 2010) (Travel along a major drug corridor in Texas, was one factor, among others, that supported officer's reasonable, articulable suspicion of unspecified criminal activity.). The deputies knew that Raphael did not have valid identification, and they could not confirm Raphael's identity. See *State v. Jones*, 3rd Dist. No. 5-11-01, 2011-Ohio-4181, ¶5 (Failure of the passenger to produce identification was one factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.). Further, the deputies knew that all eight packages in the back of Defendants-Appellees' vehicle had uniform shape and size and resembled bales of marijuana. See *United States v. Hindhaugh*, 10th Cir. No. 98-3096, 1999 U.S. App. LEXIS 80, p. *7 (Jan. 5, 1999) (Block shapes visible in a duffle bag in a vehicle were a factor, among others, that supported officer's reasonable, articulable suspicion of criminal activity.). This evidence was uncontroverted. And it not only supported reasonable, articulable suspicion to extend the duration of the stop beyond its initial purpose but this evidence also constituted probable cause to search the vehicle.

Further, the failure of the canine unit to alert did not negate any of the probable cause in this case. In *State v. Alexander*, 151 Ohio App. 3d 590, 2003-Ohio-760, 784 N.E.2d 1225, ¶56, the Eighth Appellate District held that a drug dog's failure to alert did

not nullify a law enforcement agent's suspicion that the suspect carried drugs. In *State v. Clark*, 2nd Dist. No. 18314, 2000 Ohio App. LEXIS 5110, pp. *17-*18 (Nov. 3, 2000), the Second Appellate District held that a drug dog's failure to alert did not negate all of the other "drug courier" characteristics that were present. A dog's failure to alert is simply a neutral factor for the State when analyzing whether or not an officer has reasonable, articulable suspicion. *Id.* at *18. In 1981, the United States Court of Appeals, First Circuit, held that a drug dog's failure to alert does not destroy the probable cause that would otherwise exist. *United States v. Jodoin*, 672 F.2d 232, 236 (1st Cir. 1982). "It is just another element to be considered by the magistrate." *Id.*

Additionally, in *United States v. Glover*, 104 F.3d 1570, 1577 (10th Cir. 1997), the defendant argued that, because a drug dog's positive alert supplies probable cause, then the absence of an alert must negate or nullify probable cause. The Tenth Circuit rejected this argument, noting that "drug-detecting dogs have not supplanted the neutral and detached magistrate as the arbiter of probable cause." *Id.* Further, in *United States v. Ramirez*, 342 F.3d 1210, 1212 (10th Cir. 2003), the defendant argued that a drug dog's failure to alert eliminated reasonable suspicion. The Tenth Circuit rejected this argument, holding that neither a positive alert nor a negative alert change the factors that constituted reasonable, articulable suspicion in the first place. *Id.* at 1212-1213.

So how do we know that this uncontroverted evidence constituted probable cause? We know because a neutral and detached magistrate—in the form of Judge Peeler of the Warren County Court of Common Pleas—considered all of the factors

adduced at the suppression hearing. And Judge Peeler concluded, despite the drug dog's failure to alert, that the deputies had probable cause to search the vehicle.

The affidavit of the search warrant included all the factors previously mentioned, including the dog's failure to alert. Further, the deputies were aware of all the factors included in the affidavit, except for the failure to alert, before the canine unit arrived. So, if all these factors were sufficient to support probable cause in light of the drug dog's failure to alert, then it stands to reason that the deputies had probable cause to search the vehicle prior to the arrival of the canine unit. In other words, the deputies did not need the canine unit. The deputies could have legally searched the vehicle pursuant to the automobile exception to the warrant requirement. Therefore, the Twelfth District did not err when it so held and reversed the trial court's decision.

Regarding the Twelfth District's opinion in *Casey*, the Twelfth District held that nervousness, in and of itself, is insufficient to constitute reasonable, articulable suspicion to continue a detention beyond the initial purpose of the traffic stop. 2014-Ohio-2586, ¶¶26-27. However, in this present case, a cursory review of the record shows that the deputies had far more than nervousness to justify the detention of Defendants-Appellees' vehicle. Thus, *Casey* offers Defendants-Appellees no relief.

As for *Rodriquez*, the United States Supreme Court granted certiorari regarding "the question whether police routinely may extend an otherwise-completed traffic stop, absent reason-able suspicion, in order to conduct a dog sniff." 135 S.Ct. at 1614. The *Rodriquez* court reversed, holding, "Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against

unreasonable seizures." *Id*. at paragraph one of the syllabus.

In this case, the trial court concluded that Defendants-Appellees' behavior after the initial stop constituted reasonable suspicion to further detain Defendants-Appellees until the arrival of the canine unit. Decision and Order, 11/17/2104, T.d. 16-14CR29857 & T.d. 15-14CR29858, p. 4. This was a correct application of the law to the facts and comported with the United States Supreme Court's decision in *Rodriquez*. So this case falls outside the scope of *Rodriquez*.

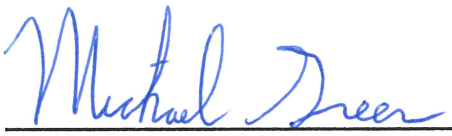
As for the good faith exception to the exclusionary rule, the Twelfth District did not apply the good faith exception in its decision. So the application of the good faith exception is not an issue before this Court.

When it comes down to brass tacks, the deputies in this case had probable cause to search Defendants-Appellees' vehicle before the arrival of the canine unit. And the canine unit's failure to alert did not negate any of the deputies' probable cause to search. Further, neither *Casey* nor *Rodriquez* apply to this case. Thus, Defendants-Appellees have failed to demonstrate that the Twelfth District erred. So this Court should not grant jurisdiction regarding Defendants-Appellees' first or second propositions of law.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Warren County Court of Appeals, Twelfth Appellate District, and neither accept jurisdiction nor grant leave for the appeal of Jason Raphael and Gregory Clayton since their propositions of law lack merit. Moreover, this Court should not accept jurisdiction over this appeal because Defendants-Appellees have neither raised a substantial constitutional question nor presented an issue of public or great general interest.

Respectfully submitted,



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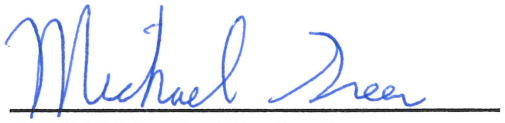
CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was mailed by ordinary U.S. mail to Defendants-Appellees' counsel: Mr. Robert G. Kelly, and Mr. Edward T. Kathman, 4353 Montgomery Road, Norwood, Ohio 45212 on this 1st day of October, 2015.



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