

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Oconee County

R. Lawton McIntosh, Circuit Court Judge

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RECEIVED

DEC 13 2011

S.C. Supreme Court

FERNANDO MONTEZ SAENZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

DAYNE C. PHILLIPS  
Appellate Defender

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ATTORNEY FOR PETITIONER

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### **ISSUE PRESENTED**

Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel's deficient investigation hindered his ability to cross-examine a key witness in Appellant's trial when trial counsel failed to subpoena Officer Colegrove's history of drug related searches where he initially issued a warning ticket, then conducted an exterior dog sniff based on his belief that "crime was afoot," and where his drug dog "alerted," but no drugs were found during the search?

## STATEMENT

### **Background**

On February 13, 2006, at approximately 8:38 am, Fernando Montes-Saenz (Petitioner) was stopped on I-85 by Officer Dale Colegrove, a canine officer with the Oconee County Sheriff's Department. App. 76, ll. 6-16; 338. During Officer Colegrove's initial encounter with Montes-Saenz, he realized that Montes-Saenz did not speak English. App. 79, ll. 17-19.

Without the aid of an interpreter, Officer Colegrove, instructed Montes-Saenz to exit the vehicle and to produce his driver's license, insurance information, and registration. App. 14, l. 20 – 15, l. 4. Despite the language barrier, Montes-Saenz exited the vehicle and produced a Texas identification card and the vehicles insurance information. App. 15, ll. 4-5; 18, ll. 9-18. No registration for the vehicle was found. App. 22, ll. 3-5.

Officer Colegrove then conducted a protective pat-down search of Montes-Saenz's person. App. 15, ll. 6-18. Although no contraband or firearms were found on Montes-Saenz's person, Officer Colegrove put Montes-Saenz in the back of his patrol car. App. 15, l. 21 – 16, l. 2. Once Montes-Saenz was in the back of the patrol car, Officer Colegrove contacted a bilingual dispatcher on his cell-phone to explain to Montes-Saenz that he was stopped for speeding and improper lane change. App. 16, l. 11-22.

At 8:44 am, Officer Colegrove told the bilingual dispatcher to inform Montes-Saenz that he was only going to receive a warning ticket. App. 18, l. 21 – 19, l. 8. However, after questioning Montes-Saenz about who the owned the vehicle, where he came from, and where he was going, Officer Colegrove maintained that an additional detention of Montes-Saenz was necessary based on Montes-Saenz's alleged suspicious behavior and surrounding suspicious circumstances.<sup>1</sup> App. 19, l.

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<sup>1</sup> See pages five and six of this petition for the alleged factors Officer Colegrove cited.

8 – 25, l. 16.

At 8:53 am, Officer Colegrove hung up the cell phone, “finished my warning,” and proceeded to have his drug dog conduct an exterior sniff of the vehicle. App. 26, ll. 20-24; 29, ll. 10-12. Officer Colegrove acknowledged that Montes-Saenz was at that time in “investigative detention” and “not free to leave.” App. 29, ll. 13-20. Officer Dana Beaty from the Oconee County Sheriff’s Office subsequently arrived to assist Officer Colegrove. App. 25, ll. 21-22.

Officer Colegrove alleged that his drug dog “alerted” during the exterior sniff that drugs were present, so he conducted an interior sniff of the vehicle, where he again alleged that his drug dog “alerted” to the presence of drugs. App. 28, ll. 4-21. Officers Colegrove and Beaty moved the vehicle farther off the road to search the vehicle. App. 30, ll. 22-24. Officer Colegrove testified that “[i]t was a lengthy search” before he found an “after market compartment” above the muffler (twenty-two minutes had since elapsed from the beginning of the detention). App. 30, ll. 11-19.

Officer Colegrove maintained that the car was moved to a truck stop about a mile away for safety reasons. App. 31, ll. 15-20. Upon arrival to the truck stop, the search of the vehicle continued. At 9:42 am, Officer Colegrove began to remove packages of cocaine from the vehicle. App. 33, ll. 6-11. Montes-Saenz was then arrested for trafficking cocaine.

### **Indictment**

On March 8, 2006, Montes-Saenz was indicted by the Oconee County Grand Jury for trafficking more than four-hundred grams of cocaine. App. 369–370.

### **Suppression Hearing**

On November 27, 2006, a bench trial was held before the Honorable Howard P. King, where Montes-Saenz was represented by David Almarez (*pro hac vice* counsel from Texas) and Beattie Ashmore (local counsel). App. 1–207. The State was represented by solicitors Christina

Adams and Lindsey Simmons. App. 1.

Pre-trial, Montes-Saenz moved to suppress the drug evidence seized from the vehicle and filed a memorandum in support of his motion to suppress. App. 208–220. During the suppression hearing an interpreter was required for Montes-Saenz. App. 4, ll. 4-7.

### **Officer Dale Colegrove**

At the suppression hearing, Officer Colegrove maintained that he stopped Montes-Saenz for speeding (driving 75 mph in a 65 mph speed zone) and failing to signal prior to changing lanes. App. 11, ll. 3-7. Officer Colegrove also maintained that the continued detention was based on Montes-Saenz’s suspicious behavior and circumstances; specifically, Officer Colegrove alleged that he “suspected a crime was afoot.” App. 94, ll. 23-24.

As to Montes-Saenz’s suspicious behavior, Officer Colegrove alleged: (1) that he had “dry mouth, real cotton mouth;” (2) that he was “profusely sweating” on a cold day; (3) that his nervous behavior “never went away;” and (4) that his carotid artery in his neck was pulsating. App. 17, ll. 6-10; 19, ll. 8-10; 22, ll. 24-25.

As to the suspicious circumstances, Officer Colegrove maintained: (1) that Montes-Saenz presented a Texas identification card instead of a driver’s license; (2) that Montes-Saenz did not own the vehicle; (3) that the registration for the vehicle could not be found; (4) that Montes-Saenz was coming from Atlanta, Georgia, and going to Charlotte, North Carolina, which is a known drug trafficking route (5) that Montes-Saenz is from Laredo, Texas, which is known as a “source city” and “drug hub for drug trafficking; (6) that Montes-Saenz gave inconsistent statements as to who owned the vehicle; (7) that a temporary paper license plate was lying in the back seat of the vehicle; (8) that an air freshener was hanging in his car; and (8) that the vehicle, a Volkswagen Passat, is commonly used to transport drugs because it is “notorious for having [a] backseat compartment” to

store drugs. App. 13, ll. 13-15; 19, ll. 17-22; 21, ll. 13-19; 22, ll. 13-16; 24, ll. 6-25; 87, ll. 3-6.

On cross-examination, Officer Colegrove gave an overview of his training as a canine officer and testified that he had been working with his “patrol narcotic dog,” Zeno, for ten years. App. 43, l. 12 – 44, l. 3. Officer Colegrove maintained that he had only given “a handful” of tickets over the three years he had patrolled I-85, and that a majority of the time, he gives a warning ticket. App. 52, ll. 9-20. Officer Colegrove, however, was unable to remember how many drug arrests he had made on I-85, even when asked how many drug arrests in the last year. App. 53, l. 16 – 54, l. 8; 55, ll. 6-10.

Additionally, Officer Colegrove discussed his arrest of Mr. Craig Caldwell on February 2, 2006. App. 59, l. 23 – 60, l. 25. Officer Colegrove stopped Caldwell for allegedly following too closely to the car in front of him. Officer Colegrove admitted that although his drug dog “alerted” during the exterior sniff of Caldwell’s vehicle, no drugs were found inside the vehicle. App. 60, ll. 7-11. Instead, forged cashier’s checks were found and seized.<sup>2</sup> App. 60, ll. 12-16.

Officer Colegrove admitted that his incident report did not mention anything about Montes-Saenz sweating profusely. App. 78, l. 16 – 79, l. 11. However, Officer Colegrove stated that Montes-Saenz sweating was implied in the report by his statement that Montes-Saenz was crossing his hands and rubbing his palms on his knees. App. 79, ll. 7-11. Officer Colegrove also admitted that it is normal for him to ask a driver to get out of the vehicle for a routine speeding violation. App. 91, ll. 13-16.

Officer Colegrove alleged that Montes-Saenz’s actions were suspicious, so he decided to “run the dog for that free air sniff.” App. 96, ll. 12-16. Officer Colegrove acknowledged that

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<sup>2</sup> In *United States v. Caldwell*, 8:06-152 (D.S.C. August 8, 2006), United States District Court Judge Joseph F. Anderson, Jr., suppressed the forged checks, and the case was dismissed. App. 285–292.

Officer Beaty did prevent Montes-Saenz from exiting the back of the patrol car *after* Montes-Saenz was told that he was only being issued a warning ticket. App. 96, ll. 19-23. (emphasis added).

Officer Colegrove testified that he “used the dog alert basically as the warrant.” App. 98, ll. 1-6. Officer Colegrove maintained that although his dog falsely “alerted” in *Caldwell* (i.e., no drugs were found), Caldwell had subsequently failed a drug test on the same day. App. 102, ll. 1-6.

Additionally, trial counsel questioned Officer Colegrove concerning: (1) whether his radar was working properly when it detected Montes-Saenz’s speed; (2) whether he used racial profiling as a reason to stop Montes-Saenz; (3) whether the initial traffic stop was legal; and (4) whether the second detention was warranted. App. 66–67; 149.

#### **Officer Kenneth Washington**

At the suppression hearing, Officer Kenneth Washington of the Oconee Sheriff’s Office stated that although Laredo, Texas, where Montes-Saenz is from, is not considered a “source city,” it is near a “source city [located] in what we call the pipeline.” App. 114, l. 21 – 116, l. 13. Specifically, Officer Washington described a “source city” as “a location where drugs . . . [are] being brought into a city . . . at distribution points.” App. 114, ll. 22-24.

On cross-examination, Officer Washington acknowledged that he considered “Atlanta, Houston, Texas, Chicago, Illinois, Los Angeles, New York, [and] Miami” as “source cities.” App. 117, ll. 6-10. Officer Washington also acknowledged that it is against the law to racially profile. App. 121, ll. 13-18.

#### **Fernando Montes-Saenz**

At the suppression hearing, Montes-Saenz testified that he noticed the officers were in the process of searching a vehicle on the side of the road when Officer Colegrove got into his car and began to follow him. App. 126, ll. 6-25; 127, ll. 10-14. Montes-Saenz also testified that he was not

speeding because he slowed down from sixty-five miles-per-hour to sixty-three miles-per-hour when he drove past the two officers. App. 127, ll. 5-7.

Montes-Saenz testified that Officer Colegrove pulled up beside him, looked at him, and then pulled him over. App. 127, l. 20 – 128, l. 12. Montes-Saenz also testified that he was not acting nervous while he was detained and that Officer Beaty was leaning against his door not allowing him to leave after he had already been issued a warning ticket. App. 129, ll. 15-16; 130, ll. 1-13.

### **Trial Counsel's Arguments**

At the suppression hearing, trial counsel argued that Officer Colegrove stops people based on a pretextual basis to search for drugs (i.e., racial profiling). App. 139, ll. 13-19. Trial counsel also argued that Officer Colegrove's mentality is to give a warning, then cite factors for a second detention, which allow him to go on a "fishing expedition" to search for drugs. App. 142, l. 12 – 145, l. 12. Specifically, trial counsel argued that Officer Colegrove's "job is to find drugs no matter how he does it." App. 143, ll. 4-13.

Furthermore, trial counsel cited *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (finding that although "extreme nervousness" is a factor to be considered in a reasonable suspicion analysis, courts must be skeptical of using nervousness as a factor because a traffic stop is an "unsettling show of authority" that may "create substantial anxiety."); *State v. Pichardo*, 367 S.C. 84, 98-99, 623 S.E.2d 840, 848 (Ct. App. 2005) (finding that a lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission" because "[o]nce the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."); *State v. Forrester*, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001) (finding that "suspects are free to limit the scope of the searches to which they consent," and "[w]hen relying on the consent of a suspect, a police officer's search must not exceed the

scope of the consent granted or the search becomes unreasonable.”); and *United States v. Caldwell*, 8:06-152 (D.S.C. August 8, 2006). App. 140, l. 7 – 141, l. 15.

In *United States v. Caldwell*, Officer Colegrove maintained that he stopped Caldwell for following the car in front of the defendant too closely. App. 285–292. Officer Colegrove also maintained that he noticed a strong smell from several air fresheners which were hanging on the rear-view mirror. App. 285; 292.

While detained, Caldwell explained to Officer Colegrove that he was driving his son’s car to Charlotte, North Carolina to see a basketball game. App. 285; 286. Officer Colegrove subsequently told Caldwell that he was going to issue him a warning ticket, but instead of allowing him to leave, Officer Colegrove had him exit the vehicle. App. 286; 287.

Officer Colegrove then asked Caldwell if he could search the vehicle, and Caldwell denied Officer Colegrove’s request. App. 286. Officer Colegrove handed Caldwell his “papers” back to him and conducted an exterior dog sniff of his vehicle. App. 286. During the exterior dog sniff, Officer Colegrove indicated that his drug dog “alerted” on the trunk and on the passenger’s side door of the vehicle. App. 286. At the conclusion of the search, no drugs were found; however, several fake identification cards and forged cashier’s checks were found. App. 287.

Similarly, Officer Colegrove cited several factors that constituted reasonable suspicion: (1) Caldwell was driving with Georgia plates; (2) the car was registered to his son; (3) Caldwell presented a New York driver’s license; (4) Caldwell appeared nervous; (5) the air fresheners hanging in the car’s rear-view mirror; (6) Caldwell’s responses to Officer’s Colegrove’s questions concerning whether there were guns or cocaine in the car; and (7) Caldwell coming from Atlanta and going to Charlotte on I-85, a known drug corridor. App. 289; 290.

In granting the motion to suppress, Chief Judge Anderson held that based on the totality of the circumstances, Officer Colegrove lacked reasonable suspicion to support his continued detention of Caldwell for the time necessary to conduct the dog sniff, and found it unnecessary to address the legality of the stop or whether the drug dog actually alerted. App. 287. Specifically, Judge Anderson found that the dog sniff was “undisputedly conducted after the purpose of the traffic stop—the issuance of the warning—had been completed” and that no reasonable suspicion existed in *Caldwell* because the factors given did not “eliminate a substantial portion of travelers.” App. 289.

Based on the foregoing cases and Officer Colegrove’s similar and coincidental factors used to show reasonable suspicion and to support a continued detention, trial counsel argued that the trial judge should grant Montes-Saenz’s motion to dismiss. App. 156, l. 3 – 159, l. 22.

#### **Motion to Suppress Denied**

The trial judge subsequently denied Montes-Saenz’s motion to suppress. App. 160, l. 8 – 165, l. 16. In reaching his decision, the trial judge held: (1) that the initial traffic stop was legal; (2) that the dog sniff was not a second detention because the factors given by Officer Colegrove established probable cause to search; (3) that even if there was a second detention, it was supported by reasonable suspicion; and (4) that “the situation facing Judge Anderson [in *Caldwell*] was a great deal different tha[n] it is here . . . [So] based upon the totality of the circumstances there was nothing improper about the search and seizure of the drugs in this case. App. 165, ll. 2-16.

#### **Verdict and Sentence**

On November 28, 2006, Judge King found Montes-Saenz guilty of trafficking more than four-hundred grams of cocaine and sentenced him to thirty years imprisonment. App. 205, ll. 2-5. A timely Notice of Appeal was subsequently filed.

## **South Carolina Court of Appeals**

On October 9, 2008, the South Carolina Court of Appeals in an unpublished opinion affirmed Montes-Saenz's conviction and sentence (*State v. Montes-Saenz*, Op. No. 2008-UP-548). App. 259–260. Beattie Ashmore represented Montes-Saenz on direct appeal, and the State was represented by Harold M. Coombs. App. 230–258.

## **PCR**

On April 20, 2009, Montes-Saenz filed his PCR application requesting relief (2009-CP-37-0493). App. 261–267. Attached to his PCR application, Montes-Saenz also filed a memorandum in support of his application alleging his trial counsel failed to investigate the facts and circumstances of the traffic stop. App. 268–292. The Respondent filed its Return on October 1, 2009. App. 293–297.

## **Evidentiary Hearing**

On March 14, 2011, an evidentiary hearing was held at the Oconee County Courthouse before the Honorable R. Lawton McIntosh. App. 298–337. Montes-Saenz was represented by Tjay Bagwell, and the Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office. App. 298. At the PCR evidentiary hearing, Montes-Saenz testified on his own behalf. App. 314. Montes-Saenz's trial counsel, David Almaraz, also testified at the evidentiary hearing. App. 321.

## **Fernando Montes-Saenz**

At the evidentiary hearing, Montes-Saenz's testimony was consistent with his testimony during the suppression hearing; however, Montes-Saenz did clarify for the PCR judge that the dog sniff occurred *after* Officer Colegrove had issued the warning ticket. App. 315, ll. 8-13. (emphasis added). Montes-Saenz also testified that his trial counsel (*pro hac vice*), David Almaraz, only saw

him once before trial, which was the first time that they had ever met each other.<sup>3</sup> App. 318, ll. 9-13.

#### **David Almaraz (trial counsel)**

At the evidentiary hearing, Montes-Saenz's trial counsel, David Almaraz, maintained that the reason he did not present any additional evidence after the trial judge denied the motion to suppress was because [prior to the hearing [he] had filed an extensive memorandum of law to support [his] motion to suppress." App. 323, ll. 16-17. Almaraz also maintained that he cross-examined Officer Colegrove "for at least two hours or more" during the suppression hearing and that the "record speaks for itself as to [his] defense of Mr. Montes." App. 323, ll. 19-21.

Furthermore, Almaraz stated that he did not take part in Montes-Saenz's appeal. App. 321, ll. 1-19.

#### **PCR Counsel's Argument**

At the evidentiary hearing, Montes-Saenz's PCR counsel argued that his trial counsel was ineffective for failing to properly argue Montes-Saenz's motion to suppress. App. 330, l. 19 – 331, l. 11. Specifically, his PCR counsel cited *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010), where the South Carolina Supreme Court held that the trial court should have suppressed drug evidence seized by Officer Colegrove, and argued that the circumstances in *Tindall* were "almost exactly the same." App. 312, ll. 10-20.

#### **Order of Dismissal**

On May 19, 2011, Judge R. Lawton McIntosh ruled in his Order of Dismissal that Montes-Saenz failed to prove that his trial counsel provided ineffective assistance of counsel for failing to adequately argue the motion to suppress. App. 364–368. Specifically, the PCR court found that in

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<sup>3</sup> Montes-Saenz's wife, who lives in Laredo, Texas, hired David Almaraz. App. 318, l. 23–319, l. 2.

this case, “the facts giving rise to the experienced officer’s reasonable suspicion to conduct a dog sniff came forth during the normal course of the stop and prior to the issuance of the warning” was different from the facts in *State v. Tindall* because Tindall had no reported problems with his license or his vehicle. App. 367.

Judge McIntosh also held that “[n]o other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.” App. 368.

This petition follows.

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel's deficient investigation hindered his ability to cross-examine a key witness in Appellant's trial because trial counsel failed to subpoena Officer Colegrove's history of drug related searches where he initially issued a warning ticket, then conducted an exterior dog sniff based on his belief that "crime was afoot," and where his drug dog "alerted," but no drugs were found during the search.**

Because trial counsel failed to subpoena Officer Colegrove's history of drug related searches where he initially issued a warning ticket, then conducted an exterior dog sniff based on his belief that "crime was afoot," and where his drug dog "alerted," but no drugs were found during the search, trial counsel's performance was deficient for his failure to properly conduct a reasonable investigation. Thus, the PCR court erred in holding that trial counsel provided effective assistance of counsel.<sup>4</sup> App. 364–368; *See Strickland v. Washington*, 466 U.S. 668 (1984) (provides that a petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings); *see also Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 692; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

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<sup>4</sup> Although this was not explicitly argued in the evidentiary hearing, nor was it specifically addressed in the Order of Dismissal, the PCR court did indirectly address this issue in the Order of dismissal. App. 364–368.

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bulter*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Id.* at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

### **Deficient Performance**

In this case, trial counsel failed "to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State" when he did not subpoena Officer Colegrove's history of drug related searches, particularly in light of *United States v. Caldwell*, 8:06-152 (D.S.C. August 8, 2006), where Judge Anderson granted the defendant's motion to dismiss when Officer Colegrove's drug dog falsely "alerted" and no drugs were found during the search of the defendant's vehicle. App. 60, ll. 7-11; 285-292; *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Furthermore, in *Strickland*, 466 U.S. at 691, the United States Supreme Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590

(2007) (provides that “[w]ithout a doubt, ‘[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.’”) (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986)). The United States Supreme Court has also held that “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Based on the known evidence, a competent and reasonable attorney would have investigated further into Officer Colegrove’s prior drug arrests and would have been able to adequately cross-examine Officer Colegrove, the State’s key witness. *See Wiggins*, 539 U.S. at 27. This is because Montes-Saenz’s trial counsel should have interviewed Officer Colegrove prior to trial since trial counsel would have also known (1) that Officer Colegrove almost always gives a warning ticket and (2) that Officer Colegrove believes that it is normal practice to ask a driver to get out of the vehicle for a routine traffic violation. *See Id.* at 524-27 (counsel fell short of professional standards for not expanding his investigation); *Ard*, 372 S.C. 318, 642 S.E.2d 590.

Accordingly, trial counsel had a duty to subpoena Officer Colegrove’s history of drug related searches where he initially issued a warning ticket, then conducted an exterior dog sniff based on his belief that “crime was afoot,” and where his drug dog “alerted,” but no drugs were found during the search, to properly cross-examine Officer Colegrove during the suppression hearing. *See Strickland*, 466 U.S. at 694; *see also McKnight*, 378 S.C. at 46, 661 S.E.2d at 360.

Trial counsel’s performance was constitutionally deficient, as it fell well below an objective standard of reasonableness. *See Id.*; *see also Bulter*, 286 S.C. 441, 334 S.E.2d 813. Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel because trial counsel’s deficient investigation hindered his ability to cross-examine a key witness in

Appellant's trial. *Id.*

### **Prejudice**

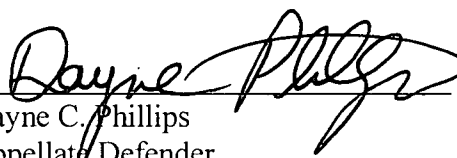
As to prejudice, there is a reasonable probability that Montes-Saenz's case would have been dismissed if his trial counsel's performance would not have been deficient since the drug evidence would have been suppressed. This is evinced by *United States v. Caldwell*, 8:06-152 (D.S.C. August 8, 2006), and *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010), where in both cases, the drug evidence was suppressed after Officer Colegrove had conducted an illegal search and seizure of the defendants' vehicle. App. 285–292; 312, ll. 10-20. Accordingly, trial counsel's performance prejudiced Montez-Saenz's right to a fair trial since it “undermine[d] confidence in the outcome of [his] trial.” See *Strickland*, 466 U.S. at 694; see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Because there is a reasonable probability that but for trial counsel's deficient investigation, trial counsel could have properly cross-examined Officer Colegrove during the suppression hearing to prove that the issuance of the warning ticket terminated the stop, and Montes-Saenz's continued detention was unconstitutional. *Id.* Therefore, the PCR judge erred in holding that trial counsel provided effective assistance of counsel. App. 364–368; *Id.*

**CONCLUSION**

Based on the foregoing reasons, Fernando Montes-Saenz's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of December, 2011.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Oconee County

R. Lawton McIntosh, Circuit Court Judge  
\_\_\_\_\_

FERNANDO MONTEZ SAENZ,

PETITIONER,

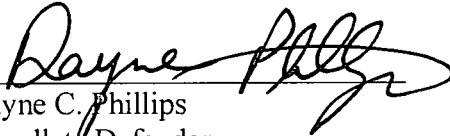
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STATE OF SOUTH CAROLINA,

RESPONDENT

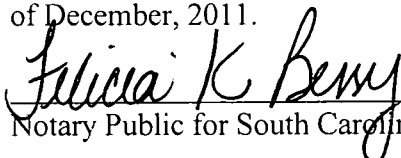
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Kaelon E. May, Esquire this 13th day of December, 2011.

  
\_\_\_\_\_  
Dayne C. Phillips  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day  
of December, 2011.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: June 21, 2020.