

In the Supreme Court of the United States

ASHLEY EUGENE MOORE, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the factors articulated by the investigating officer together must serve to eliminate a substantial portion of innocent travelers in order to satisfy the Fourth Amendment's reasonable suspicion requirement to justify the extension of a traffic stop to conduct a drug dog sniff?
- II. Whether factors not considered or articulated by the investigating officer can provide the reasonable suspicion that the Fourth Amendment requires to justify the extension of a traffic stop to conduct a drug dog sniff?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court were
Petitioner Ashley Eugene Moore and Respondent State of South Carolina.

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PETITION FOR WRIT OF CERTIORARI

Counsel for Ashley Eugene Moore petitions this Court to issue a writ of certiorari to review the judgment of the South Carolina Supreme Court, which reversed the Court of Appeals and affirmed Petitioner's convictions for trafficking cocaine and possession of a weapon during the commission of a violent crime.

OPINION BELOW

The opinion of the South Carolina Supreme Court affirming Petitioner's convictions, decided January 27, 2016, is reported as State v. Ashley Eugene Moore, 781 S.E.2d 897 (S.C. 2016). App. A1.

JURISDICTION

The judgment of the South Carolina Court of Appeals was entered on September 27, 2013. App. A11. The Respondent's Petition for Rehearing was denied on September 27, 2013. Respondent filed a Petition for Writ of Certiorari with the South Carolina Supreme Court on October 28, 2013, which was granted by Order of the South Carolina Supreme Court on November 20, 2014. App. A10. The judgment of the South Carolina Supreme Court was entered on January 27, 2016. App. A1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because Petitioner is asserting the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. CONST. amend. IV. This case also involves the Fourteenth Amendment, which provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

At approximately 1:10 a.m. on June 30, 2010, Deputy Dale Owens and Corporal Ken Hancock performed a traffic stop of Petitioner Moore's vehicle on the Interstate 85 corridor. The deputies "paced" Moore and determined that he was speeding and failed to maintain his lane. They initiated a traffic stop and approached the passenger side of Moore's vehicle. Owens told Moore that he was stopped because of the traffic violations. Owens also smelled an odor of alcohol from the vehicle. Moore provided his license and a rental car agreement that listed Moore as an authorized driver. He also admitted that he had "a couple of drinks." The deputies asked Moore to get out of the vehicle and they patted him down for weapons. Corporal Hancock pulled a "wad of money" out of Moore's right front pants pocket and then placed it back into Moore's pocket.¹ After passing two of three field sobriety tests, the deputies determined that Moore was not impaired and issued a warning ticket.

Rather than concluding the traffic stop after issuing the warning, the deputies asked Moore for consent to search his vehicle. When Moore denied such consent, the deputies called Deputy Jason Carraway to bring his K-9 to the scene.² The stop was thus prolonged an additional fifteen minutes waiting for Carraway and the K-9 to arrive. A drug sniff was conducted and the K-9 alerted.

¹ Neither deputy actually saw the denomination of the bills or counted the cash in Moore's pocket prior to prolonging the stop. Nonetheless, Deputy Owens testified at the suppression hearing that the "wad" of money was "more folded money than [he] carr[ies]" and was "bordering a thousand dollars." The State later stipulated that the cash in Moore's pocket was approximately six hundred dollars.

² Deputy Carraway was part of the Spartanburg County Sheriff's Department's Drug Interdiction Task Force that was patrolling the Interstate 85 corridor, along with Deputy Owens, Corporal Hancock, and Deputy Donnie Gilbert.

Upon searching the vehicle, the deputies found a large amount of cocaine, four thousand dollars in cash, and a semi-automatic handgun in the trunk. Moore was charged with trafficking cocaine base (first offense) and possession of a weapon during the commission of a violent crime. Moore made a pre-trial motion to suppress to the items found in the trunk.

At the suppression hearing, the trial judge heard testimony from Deputies Owens and Carraway and viewed the video of the traffic stop.³ Owens testified that Moore's actions, including turning his left signal on immediately before his right signal, taking longer than normal to pull over, and picking up his cellphone when he got out of the car were all indicators of possible flight. However, Owens admitted that Moore never made any actual attempts to flee. Owens also testified that Moore was overly nervous, citing his alcohol consumption, smoking cigarettes, shaking hands, rapid pulse, and heavy breathing. Owens further testified that the following were indicative of drug trafficking: use of a cell phone, Moore's possession of a "large sum" of money despite being unemployed, driving a rental car rented by a third party, and travelling from a suburb of Atlanta (a known drug trafficking hub).

In making his ruling on the suppression motion, the trial judge specifically referenced his "doubts" that "the car was driven from Morganton to Lawrenceville and back to Marion to visit a grandmother." He also stated, "[F]or someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a[n] officer reasonable suspicions." The trial judge ultimately ruled:

³ Due to an equipment malfunction, no audio was recorded.

“[T]he other factors as noted, I have given those the weight required, and in this case I am going to refuse to suppress.”

Moore was convicted and sentenced to concurrent terms of imprisonment of twenty-five years on the trafficking cocaine base (first offense) and five years on the weapons offense. Moore filed a timely Notice of Intent to appeal.

On appeal, Moore argued to the South Carolina Court of Appeals that the trial court erred “in refusing to suppress the evidence found in the vehicle [Moore] was driving at the time of his arrest where: the officer’s continued detention of [Moore] exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment; the officer did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop; and [Moore] declined the officer’s request to search the vehicle.”

In a split decision, the Court of Appeals reversed Moore’s conviction in a published opinion. App. A11. The majority wrote: “We recognize that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion, but we do not believe the present factors eliminate a substantial portion of innocent travelers.” App. A18 (citing United States v. Digiovanni, 650 F.3d 498, 511-13 (4th Cir. 2011)). Viewing the factors in their totality, the Court found that “these facts did not provide Officer Owens with a reasonable suspicion of a serious crime.” App. A18. “As a result, the continued detention was illegal, and the drugs discovered during the search of the vehicle must be suppressed.” App. A18.

Chief Judge Few of the Court of Appeals dissented, writing: "I would affirm the trial court's decision denying Moore's motion to suppress because there is evidence in the record to support the trial court's factual findings, and its legal conclusions are not clearly erroneous." App. A19. Judge Few further wrote:

I agree many of the facts the officer observed are insignificant, and I share the majority's frustration over the officer's attempt to make innocent circumstances appear suspicious. In this case, however, the trial court made specific factual findings regarding observations it found to be significant, focusing on two key facts—the "large sum of wadded money in [Moore's] pocket"⁴ and Moore's explanation that he was driving to his grandmother's house at 1:00 a.m. Our standard of review forbids us to disagree with these findings if there is any evidence to support them.

App. A19.

The Court of Appeals denied the State of South Carolina's petition for rehearing en banc.

The South Carolina Supreme Court granted certiorari, App. A10, and reversed the Court of Appeals' decision in a published opinion. App. A1. The Supreme Court agreed with Judge Few's dissent that the majority of the Court of Appeals exceeded the proper scope of review. App. A6. The Court found: "While we acknowledge that many of the factors offered by the State seem innocent when viewed in isolation, there is evidence to support the trial court's finding of reasonable suspicion to prolong the traffic stop given the totality of the surrounding circumstances." App. A6.

⁴ Again, the *amount* of money in Moore's pocket was not known to the deputies prior to their decision to prolong the stop. They pulled Moore's cash out of his pocket during the pat down search for weapons and immediately put the money back in his pocket.

REASONS FOR GRANTING THE PETITION

I. The State and Federal Courts Are Not Consistent In Considering Whether The Factors Articulated By The Investigating Officer Together Must Serve To Eliminate A Substantial Portion Of Innocent Travelers In Order To Satisfy The Fourth Amendment's Reasonable Suspicion Requirement.

This Court should grant the petition to resolve whether the factors articulated by the investigating officer “together must serve to eliminate a substantial portion of innocent travelers” in order to satisfy the Fourth Amendment’s reasonable suspicion requirement. United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004); Karnes v. Skrutski, 62 F.3d 485, 493 (3rd Cir. 1995), *abrogated on other grounds by*, Curley v. Klem, 499 F.3d 199 (3^d Cir. 2007). The state and federal courts are not consistent in their consideration of this requirement, even though it is a proper application of this Court’s Fourth Amendment jurisprudence. The federal Courts of Appeals in the Third, Fourth, Eighth, Tenth, and Eleventh Circuits have all applied some variation of the “substantial portion” test. See Karnes, *supra*; Foreman, *supra*; United States v. Tapia, 912 F.2d 1367, 1371 (11th Cir. 1990); United States v. Neff, 681 F.3d 1134, 1142 (10th Cir. 2012); United States v. Carpenter, 462 F.3d 981, 987 (8th Cir. 2006). However, the First Circuit Court of Appeals and the state courts in Arizona and South Carolina have failed to adopt and, either implicitly or explicitly, rejected such a test. See United States v. Wright, 582 F.3d 199, 205 (1st Cir. 2009); State v. Evans, 332 P.3d 61 (Ariz. Ct. App. 2014), *aff’d*, 349 P.3d 205 (Ariz. 2015); State v. Moore, 746 S.E.2d 352 (S.C. Ct. App. 2013), reversed by 781 S.E.2d 897 (S.C. 2016).

This Court has made clear that factors which on their own may appear innocent *may*, under certain circumstances, constitute reasonable suspicion when viewed in the aggregate. See Terry v. Ohio, 392 U.S. 1, 2, 88 S.Ct. 1868, 1880-81 (1968) (holding there was reasonable suspicion where officer observed “a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation”); Illinois v. Gates, 462 U.S. 213, 243 n. 13, 103 S.Ct. 2317, 2335 n. 13 (1983). In United States v. Sokolow, 490 U.S. 1, 9, 109 S.Ct. 1581, 1586 (1989), this Court held that none of the cited factors was “by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”

Yet, in Reid v. Georgia, this Court determined that the officer lacked reasonable suspicion as a matter of law after finding that the majority of the circumstances described by the offer “describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.” 448 U.S. 438, 441, 100 S.Ct. 2752, 2754 (1980) (emphasis added). The remaining particularized facts could not have reasonably led to a suspicion of wrongdoing. Id. at 441, 100 S.Ct. at 2754. Thus, this Court found that the officer’s belief “was more an ‘inchoate and unparticularized suspicion or hunch,’ than a fair inference in the light of his experience,” which was “simply too slender a reed to support the seizure.” Id.

In Karnes v. Skrutski, the Third Circuit Court of Appeals noted an apparent tension between Reid and Sokolow “with respect to the ability to use circumstances or factors that appear innocent to find reasonable suspicion.” 62 F.3d 485, 492-93 (3rd Cir. 1995). The Karnes Court found that the two opinions could be reconciled by looking at the facts. Id. at 493. In Reid, “the observed actions of the two men . . . were not enough to present reasonable suspicion that they were engaged in criminal activity.” Id. Whereas in Sokolow, “[t]he Court focused on factors which it perceived as ‘out of the ordinary.’” Id. Thus, the Karnes Court found that “*Reid* and *Sokolow*, taken together, demonstrate it is not enough that law enforcement officials can articulate reasons why they stopped someone if those reasons are not probative of behavior in which few innocent people would engage—the factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied. This is a totality of the circumstances test.” Id. (emphasis added).

The Karnes Court found that the articulated factors, “both individually and collectively, were insufficient to provide reasonable suspicion that Karnes was not an innocent traveler.” Id. at 496. Though noting that “[i]t is possible for factors, although insufficient individually, to add up to reasonable suspicion . . .,” the Court held that it is “impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration *unless there are concrete reasons for such an interpretation.*” Id. (emphasis added); see also United States v. Mathurin, 561 F.3d

170 (3rd Cir. 2009) (applying the Karnes standard); United States v. Thompson, 772 F.3d 752 (3rd Cir. 2014) (same).

In United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004), the Fourth Circuit Court of Appeals similarly interpreted Sokolow, as “teach[ing] us that . . . [t]he articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.” See also United States v. McCoy, 513 F.3d 405, 413 (4th Cir. 2008) (“Under the Supreme Court’s decision in *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), an officer’s articulated facts must in their totality serve to eliminate a substantial portion of innocent travelers before reasonable suspicion will exist.”); United States v. Digiovanni, 650 F.3d 498, 513 (4th Cir. 2011); United States v. Williams, 808 F.3d 238, 252 (4th Cir. 2015); United States v. Mason, 628 F.3d 123 (4th Cir. 2010).

The Tenth and Eleventh Circuit Courts of Appeals have likewise found that the court must determine that the facts together serve to eliminate a substantial portion of innocent travelers in order to constitute reasonable suspicion. See United States v. Tapia, 912 F.2d 1367, 1371 (11th Cir. 1990) (“[N]either police officers nor courts should sanction as ‘reasonably suspicious’ a combination of factors that could plausibly describe the behavior of a large portion of the motorists engaged in travel upon our interstate highways.”); United States v. Boyce, 351 F.2d 1102, 1109 (11th Cir. 2003); United States v. Neff, 681 F.3d 1134, 1142 (10th Cir. 2012) (“[E]ven considering the totality of the circumstances, Neff’s conduct conformed to the

patterns of everyday travel. While *Terry* accepts the risk that officers may stop innocent people, the articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.” (internal citations and quotations omitted)).

The Eighth Circuit Court of Appeals has not provided the same discussion of the requirement that the facts must in their totality serve to eliminate a substantial portion of innocent travelers. However, it did apply such a standard in United States v. Carpenter, finding that though “some innocent travelers” may have engaged in the same conduct and behavior as the defendant, the circumstances were “sufficiently unusual and suspicious that they eliminate a substantial portion of innocent travelers and provide reasonable suspicion to justify the brief detention of Carpenter for the purpose of conducting a dog sniff of the vehicle.” 462 F.3d 981, 987 (8th Cir. 2006).

The failure of some courts to apply the “substantial portion” test to a culmination of innocent factors is, at least in part, based on this Court’s decision in United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744 (2002). In rejecting Arvizu’s argument that the Court “must rule in his favor because the facts suggested a family in a minivan on a holiday outing,” this Court wrote:

A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct. Undoubtedly, each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.

534 U.S. at 277-78, 122 S.Ct. at 753 (internal citations omitted).

In the majority opinion in United States v. Wright, the First Circuit Court of Appeals noted that this Court has instructed that in viewing the “totality of the circumstances,” the court should not engage in a “divide-and-conquer analysis” whereby it determines “whether each of the facts supporting reasonable suspicion are ‘susceptible to an innocent explanation.’” 582 F.3d 199, 205 (1st Cir. 2009) (citing Arvizu, 534 U.S. 266, 122 S.Ct. 744). “Thus, ‘a determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.’” Id. In his dissenting opinion in Wright, Judge Kermit Lipez wrote:

I recognize that reasonable suspicion is not defeated by the possibility that the conduct observed was innocent. Mere possibility, however, is also not enough to establish reasonable suspicion. **The facts before us do not depict accumulating circumstances that, in totality, support a reasonable suspicion that Wright possessed a gun or other contraband, but show instead a consistent course of conduct that, even taken as a whole, strengthens only the inference that Wright did not want to interact with the police.**

582 F.3d at 230 (Lipez, dissenting) (internal citations omitted) (emphasis added). Judge Lipez understood that a culmination of innocent factors alone was not sufficient. Rather, as the Third Circuit Court of Appeals articulated in Karnes, there must be “concrete reasons” to interpret “a combination of wholly innocent factors” as “a suspicious conglomeration.” 62 F.3d at 496.

In State v. Evans, the Arizona Court of Appeals directly questioned the validity of the holding in Foreman, and other cases like it. 332 P.3d 61 (Ariz. Ct. App. 2014), *aff'd*, 349 P.3d 205 (Ariz. 2015). Even though it had cited Foreman in prior cases, the Court of Appeals wrote:

Upon closer review, however, we question whether it is a correct statement of the law to the extent it articulates a standard not present in *Sokolow II*. The cited language is not derived from the Supreme Court's own discussion of the issues raised in *Sokolow*; instead, it resembles the Ninth Circuit's holding, which the Supreme Court reversed. *Sokolow II*, 490 U.S. at 6–7, 10, 109 S.Ct. 1581, *rev'g United States v. Sokolow*, 831 F.2d 1413 (9th Cir.1987) (*Sokolow I*).

Id. at 66. The Evans Court further found Foreman to be inconsistent with this Court's holding in Arvizu, that “[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.” *Id.* at 67.

The South Carolina Court of Appeals applied the Foreman standard in the present case, writing: “We recognize that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion, **but we do not believe the present factors eliminate a substantial portion of innocent travelers.**” App. A18. The Court of Appeals found that viewed in their totality, the relevant facts presented by the State showed: “Moore was driving to visit a family member, Moore was driving a vehicle rented by a third-party, he was coming from a major city known as a drug hub and traveling along a known drug route, he assumed the felony position, and he displayed nervous conduct throughout the entire stop.” *Id.* at 357. The Court of Appeals found that those facts did not present the officer with a reasonable suspicion of a serious crime such that Moore’s “continued detention was illegal, and the drugs discovered during the search of the vehicle must be suppressed.” *Id.*

The South Carolina Court of Appeals applied the same Foreman standard in State v. Provet, 706 S.E.2d 513, 519 (S.C. Ct. App. 2011), *aff'd*, 405 S.C. 101 (S.C.

2013), finding that “the combination of the commonplace items (i.e., numerous air fresheners, fast food bags, and several receipts) together with the surrounding circumstances (i.e., traveling two days without any luggage and inconsistent stories about where he was coming from and going to) eliminate a substantial portion of innocent travelers.” Markedly absent from the South Carolina Supreme Court’s reversal in the present case and its affirmance in Provet is any discussion of whether the cited factors together “serve to eliminate a substantial portion of innocent travelers.” App. A1; State v. Provet, 405 S.C. 101 (S.C. 2013).

Thus, there is a conflict between the federal and state courts regarding whether and how the factors cited in support of reasonable suspicion must “serve to eliminate a substantial portion of innocent travelers.” As such, the standard applied to a defendant’s constitutional right against unreasonable search and seizure turns on the happenstance of whether the state or federal authorities brings the charges and in which circuit. Only this Court’s review can establish a national rule that eliminates an intolerably high risk of inconsistent protections. See, e.g., Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve conflict between the Eleventh Circuit and the Florida Supreme Court over disputed First Amendment standard). The obvious confusion over the interplay between the innocent nature of certain factors and their assessment under the totality of the circumstances can be resolved through the application of the standard announced in Karnes and Foreman, which is: The articulated factors together must serve to eliminate a substantial portion of innocent travelers before

the requirement of reasonable suspicion will be satisfied. In order for a combination of wholly innocent factors to combine into a suspicious conglomeration, there must be concrete reasons for such an interpretation.

II. A Court's Consideration Of Factors Not Considered Or Articulated By The Investigating Officer In Determining Whether Reasonable Suspicion Existed To Justify The Extension Of A Traffic Stop Ignores This Court's Prohibition On Using Hindsight To Color The Evaluation Of The Reasonableness Of A Search And Seizure

This case presents a compelling need for this Court's review because the South Carolina Supreme Court, in affirming Moore's convictions, has sanctioned the consideration of factors never considered or articulated by the investigating officer to support a finding of reasonable suspicion. This Court has cautioned against allowing "hindsight" to "color[] the evaluation of the reasonableness of a search or seizure." United States v. Martinez-Fuerte, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086 (1976); see United States v. Montoya de Hernandez, 473 U.S. 531, 560, 105 S.Ct. 3304, 3320 (1985) (Brennan, J. and Marshall, J., dissenting) ("Although we now know that De Hernandez was indeed guilty of smuggling drugs internally, such *post hoc* rationalizations have no place in our Fourth Amendment jurisprudence, which demands that we "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure.").

In Judge Lipez's dissent in United States v. Wright, 582 F.3d 199, 231 (1st Cir. 2009) (Lipez, dissenting), he wrote: "[I]f the constitutional determination of reasonable suspicion rests on unsupported inferences, judicially noticed facts, vague references to experience or a general pattern of crime in the area, the

constitutional analysis becomes little more than a means of justifying a search or seizure on the basis of its result.” In United States v. Foster, the Fourth Circuit Court of Appeals made clear that in the context of an investigative stop, the government cannot use the ends to justify the means. 634 F.3d 243, 248-49 (4th Cir. 2011). The Foster Court wrote:

Moreover, we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception. Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone—whether he or she is one of the most affluent or most vulnerable members of our community. See *Terry*, 392 U.S. at 12–13, 88 S.Ct. 1868 (“Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”). We appreciate that police are often called upon to make very difficult decisions about when to conduct *Terry* stops, and, for that reason, we give them leeway to make these determinations. Nonetheless, the Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 565, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (noting that a purpose of the Fourth Amendment is to “prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure”).

Id. (emphasis added); see also United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011); United States v. Mason, 628 F.3d 123 (4th Cir. 2010) (Gregory, dissenting), cert. denied 132 S.Ct. 329 (2011).

The Second Circuit Court of Appeals’ decision in United States v. Colon, 250 F.3d 130 (2nd Cir. 2001), is also instructive. In Colon, it was undisputed that absent additional information known to only to the 911 operator, there was no reasonable

suspicion for the officer to conduct a stop and frisk. 250 F.3d at 134. Thus, the sole issue on appeal was “whether the civilian 911 operator’s knowledge may be imputed to the dispatching or arresting officers.” Id. In holding that the operator’s knowledge could not be imputed to the officer, the Court held that “[i]mputing information known only to the civilian operator and not conveyed to the dispatching and then arresting officers would . . . vitiate the privacy safeguards of the Fourth Amendment and their requirement that an officer may conduct a *Terry* stop **only if the officer has a reasonable suspicion supported by articulable facts**, by permitting a search where *no* law enforcement officials ever had sufficient information to provide a reasonable suspicion for the search.” Id. at 137 (emphasis added) (internal quotations and citations omitted). The Court further found :

The fact that the 911 operator turned out, after the fact, to have additional information which would have given the arresting officers reasonable suspicion cannot retroactively make their actions objectively reasonable. *Cf. Whiteley*, 401 U.S. at 565 n. 8, 91 S.Ct. 1031 (“Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.”)

Id. at 138.

Likewise, factors that were not considered or articulated by the officer should not be relied upon in the context of whether there is reasonable suspicion to justify the extension of a stop. Only this Court’s review can eliminate the improper reliance on such factors by reviewing courts and return meaning to the reasonable suspicion requirement of the Fourth Amendment.

III. The Decision Below Is Wrong

The South Carolina Supreme Court's decision below relied on factors unarticulated by the officer and failed to determine whether the remaining factors eliminated a substantial portion of innocent travelers so as to support a finding of reasonable suspicion. In denying the suppression motion, the Trial Judge in Moore's case stated:

In particular, the problem I have with the or the facts that are revealed by the rental agreement indicate the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton [North Carolina] to Lawrenceville [Georgia] and back to Marion [North Carolina] to visit a grandmother. That's a long way to go around to visit your grandmother. Morganton and Marion is a much shorter trip.

So, it appears that he may have been less than truthful about the purpose of this trip.

As a majority of the South Carolina Court of Appeals properly held, there was no evidence in the record to support this finding by the Trial Court, constituting clear error.

While the rental agreement may have indicated that the car was rented by a third-party in North Carolina that afternoon, Officer Owens' testimony indicated that that he believed that Moore was traveling from Lawrenceville, Georgia to North Carolina. The officer noted that it was a third-party rental, but made no reference to its rental in North Carolina. In fact, though Officer Owens later testified at trial that the rental agreement shows the car was rented in North Carolina, his testimony at the suppression hearing was that the vehicle was rented in Georgia. This indicates that Officer Owens was not aware that the vehicle was rented in North Carolina at

the time of the stop; in fact, he was not aware of it until the solicitor pointed out that fact to the court at the end of the suppression hearing. Thus, any inconsistency between the rental agreement and Moore's statements could not have factored into the officer's objective determination of "reasonable suspicion" because they were not known to the officer during the traffic stop.

The other specific factor referenced by the Trial Court was that an unemployed person was carrying a large amount of cash in their pocket. The South Carolina Court of Appeals' majority found that because the officer did not know the amount of cash held by Moore, "this fact does not reasonably contribute to his reasonable suspicion." During a patdown conducted by Officer Owens on Moore, Owens testified that he "felt what I perceived as a large sum of wadded money in his pocket." Deputy Hancock pulled out the wad of money from Moore's pocket, but then immediately put it back in Moore's pocket. Though neither officer counted the money, Officer Owens testified at the suppression hearing testified that it was "bordering a thousand dollars." Later on in the trial, the State stipulated that it was approximately six hundred dollars. Where the officers did not know at the time how much cash Moore was actually carrying, the Trial Court's finding that "for someone unemployed, to be carrying such a large amount of cash in their pocket also would obviously give a [sic] officer reasonable suspicions" is unsupported by the actual evidence.

Further, the trial judge's statement indicates that there is no legitimate reason an unemployed person could have a large amount of cash; however, someone unemployed may validly possess a large amount of cash for a variety of reasons

including, they are only recently unemployed, they do not have a bank account and therefore cash their unemployment benefits checks, they withdrew cash from money saved while employed, or they are paid cash for legal side-jobs that would not qualify as "employment" *per se*. See United States v. Letsinger, 93 F.3d 140, 148 (4th Cir. 1996) (Hall, J., dissenting) (calling the attachment of suspicion to the payment of an unknown amount of cash, which is legal tender, for a train ticket "elitist" and "misguided"). There was no testimony that the officers asked Moore for any explanation for how he validly had a sum of cash despite his unemployment, and an automatic inference of illegality is not reasonable. See, e.g., Foster, 624 F.3d at 247 (casting doubt on the government's argument that the passenger's lack of immediate visibility was "suspicious behavior" when "there are an infinite number of reasonable explanations, unrelated to any criminal behavior, to explain what a passenger would not immediately be visible in a car.").

Thus, the South Carolina Court of Appeals' majority properly held that the two primary factors relied upon by the Trial Court in determining that the officers had reasonable suspicion of illegal activity to lengthen the traffic stop detention of Moore were not supported by any evidence. The Court of Appeals analyzed the remaining factors advanced by the State and correctly determined that they did not, when taken together, give rise to reasonable suspicion when they do not eliminate a substantial portion of innocent travelers. The Court of Appeals found that any indicators of flight "lost much of their significance once Moore cooperated and stayed through the initial traffic stop and sobriety test." They also found that many of the factors listed were

individual indicators of nervousness, a bolstering attempt by the State. As discussed *supra*, the Court of Appeals determined that any reliance on the cash in Moore's pocket was not reasonable when the officers did not even know the amount. Lastly, Moore's admission that he consumed alcohol was not a relevant factor to reasonable suspicion, beyond the nervousness previously addressed, because the officer admitted that Moore was not impaired and he was not going to be cited for any alcohol-related offense.

The South Carolina Court of Appeals recognized that under the totality of circumstances analysis, multiple seemingly innocent factors can give rise to reasonable suspicion when taken together; however, they found that such culmination into reasonable suspicion did not occur here. Therefore, the South Carolina Court of Appeals' majority correctly reversed the Trial Court's denial of Moore's motion to suppress the contraband found during the illegal search. The South Carolina Supreme Court erred in reversing the Court of Appeals' decision.

Thus, reversal is warranted.

CONCLUSION:

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

April 26, 2016

In the Supreme Court of the United States

ASHLEY EUGENE MOORE, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

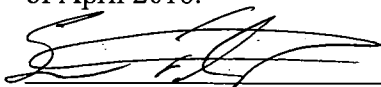
***ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT***

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel for Respondent, the State of South Carolina, J. Benjamin Aplin, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 26th day of April, 2016. Counsel is also today, April 26, 2016, sending a copy of the petition for writ of certiorari and appendix to opposing counsel by e-mail to: baplin@scag.gov.


SUSAN B. HACKETT
Counsel of Record

SWORN TO BEFORE me this 26th day
of April 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

