

# LAW OFFICE OF WILLIAM G. YARBOROUGH, III

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March 12, 2018

The Honorable Daniel E. Shearouse  
Clerk of Court of the S.C. Supreme Court  
1231 Gervais Street  
Columbia, South Carolina 29201

Re: Petitioner Karriem Provet v. State of South Carolina, Respondent  
(Case No. 2014CP234666)

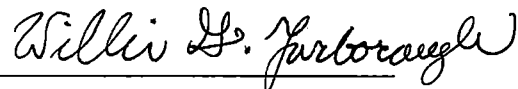
Dear Mr. Shearouse,

Enclosed for filing is Petitioner's Notice of Appeal in the above-captioned case. Also enclosed are the following:

1. A copy of the Order of Dismissal challenged on appeal
2. Proof of Service that the Notice of Appeal has been served upon the Respondent.

Please do not hesitate to contact my office at the mailing address, phone number, or email address listed above should you have any questions or concerns. Thank you.

Sincerely,



William G. Yarborough III

**RECEIVED**

MAR 19 2018

**S.C. SUPREME COURT**

Enclosures

cc: Assistant Attorney General Julie A. Coleman  
Greenville County Court of Common Pleas  
Petitioner Karriem Provet

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Honorable Daniel D. Hall, Circuit Court Judge

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Case No. 2014CP234666

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Karriem Provet # 00323386.....Petitioner

v.

State of South Carolina,.....Respondent.

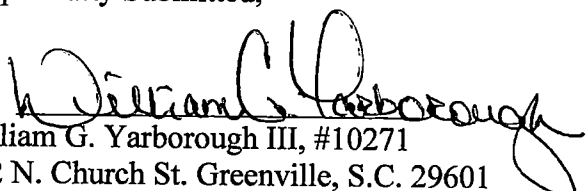
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NOTICE OF APPEAL

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Petitioner, Karriem Provet, by and through undersigned counsel, William G. Yarborough III, appeals the Honorable Daniel D. Hall's Order, dated February 13, 2018 and filed March 2, 2018, dismissing Petitioner's application for post-conviction relief in the above captioned case. The Petitioner received notice of entry of the Order on March 2, 2018. A copy of the Order of Dismissal is attached to this notice.

Respectfully Submitted,

By:   
William G. Yarborough III, #10271  
522 N. Church St. Greenville, S.C. 29601  
(864) 331-1612 Fax (864) 370-0022

Greenville, SC  
March 12, 2018

**RECEIVED**

MAR 10 2018

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Honorable Daniel D. Hall, Circuit Court Judge

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Case No. 2014CP234666

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Karriem Provet # 00323386,.....Petitioner

v.

State of South Carolina,.....Respondent.

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PROOF OF SERVICE

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I, Christie Reeves, paralegal to counsel for Petitioner, William G. Yarborough III, certify that I have today mailed for filing the Notice of Appeal and attached documents to the Honorable Daniel E. Shearouse, Clerk of Court, by depositing it in the U.S. Mail with sufficient postage attached, addressed to:

The Honorable Daniel E. Shearouse, Clerk of Court  
Clerk of Court of the S.C. Supreme Court  
1231 Gervais Street  
Columbia, South Carolina 29201

I further certify that I have today I served the enclosed Notice of Appeal upon Respondent, Assistant Attorney General Julie A. Coleman, by depositing it in the U.S. Mail with sufficient postage attached, addressed to:

Assistant Attorney Julie A. Coleman  
South Carolina Attorney General, The Honorable Alan Wilson  
P.O. Box 11549  
Columbia, South Carolina 29211.

Sworn to before me this 12<sup>th</sup>  
day of March, 2018

J. Allen Hay  
Notary Public for South Carolina

My commission expires: 12/30/23

Craig Rogers

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )  
 )  
 )  
 Karriem Provet, #323386, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent )

IN THE COURT OF COMMON PLEAS  
 THIRTEENTH JUDICIAL CIRCUIT

2014-CP-23-4666

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 PAUL B. WICKREY  
 GREENVILLE, SC

2018 MAR -2 AM 9:12  
*gn*

This matter comes before the Court by way of an application for Post-Conviction Relief filed on August 22, 2014. Respondent made its Return on or about January 28, 2015. An evidentiary hearing into the matter was convened on June 26, 2017 at the Greenville County Courthouse in Greenville, South Carolina at which time the Applicant was present in court and represented by William G. Yarborough III, Esquire. The Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, William B. Long, Jr, Esquire also testified. Additionally Peter Gordon Skidmore and Shontea Smith testified as witnesses for Petitioner. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records for the Department of Corrections, and all appellate records related to Petitioner convictions. .

**PROCEDURAL HISTORY**

Applicant is presently confined with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was

indicted by the November 2002 term of the Greenville County Grand Jury for resisting arrest (2002-GS-23-4288) and by the May 2005 term for trafficking cocaine (2005-GS-23-3478). William B. Long, Esquire represented the Applicant.

On August 7, 2007, Applicant proceeded to trial before the Honorable Carmen T. Mullen and a jury. The jury convicted Applicant of resisting arrest and trafficking cocaine. Judge Mullen sentenced Applicant to concurrent terms of one year for resisting arrest and twenty-five years for trafficking cocaine.

A notice of appeal was filed at the South Carolina Court of Appeals. Tricia A. Blanchette, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences on January 31, 2011. State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011). After the Applicant filed a petition for writ of certiorari at the South Carolina Supreme Court, the Court granted the petition and the parties submitted briefs. The Supreme Court affirmed the Court of Appeals on August 14, 2013. State v. Provet, 405 S. C. 101, 747 S.E.2d 453 (2013). The Remittitur was sent on August 30, 2013.

### **FACTUAL HISTORY**

On May 24, 2005, the Greenville County Grand Jury indicted Applicant on one count of trafficking cocaine, more than 100 grams, and one count of resisting arrest. The matter was called for a jury trial on August 7, 2007, before the Honorable Carmen T. Mullen, Circuit Court Judge.

Prior to trial, Applicant moved to suppress all evidence, including a videotape of the traffic stop at issue and drugs seized from the car. He asserted his detention was unconstitutional because it was not based on reasonable suspicion of criminal activity. He further asserted he did not consent to the search of his car, and even if he did, it was involuntary because the detention

was illegal and the circumstances were coercive. (Trial Transcript [TT], pp. 24-25, 84-89, 95-96; Record on Appeal [R.], pp. 24-25, 84-89, 95-96).

*In camera*, Corporal J.D. Owens (“Cpl. Owens”) of the South Carolina Highway Patrol testified he supervises the upstate region of the Aggressive Criminal Enforcement Unit that targets, *inter alia*, drug trafficking, and he has worked with the Unit since 1998. On May 1, 2002, he was patrolling Interstate 85 in Greenville County when he noticed a 1997 Ford Expedition following another vehicle too closely and operating with a defective tag light. He stopped the Expedition and approached it on the passenger side. Applicant was driving the vehicle and there were no passengers. (TT, pp. 27-30; R., pp. 27-30).

Cpl. Owens asked Applicant for his driver’s license and the vehicle registration. When Applicant handed the documents to Cpl. Owens, his hands were shaking and his breathing was accelerated beyond the nervousness displayed by “the majority of the people pulled over for a simple traffic violation.” In addition, the vehicle was registered to a third party who was not present, which Cpl. Owens testified is very common in drug trafficking situations. (TT, pp. 30-31; R., pp. 30-31).

Cpl. Owens asked Applicant to get out and step to the rear of the vehicle, which is routine in traffic stop situations, and Applicant consented to be patted down for weapons. After the pat down, Cpl. Owens and Applicant walked over to the passenger side of the patrol car, and Cpl. Owens began talking with Applicant while he was writing out a warning ticket for the traffic violations. (TT, pp. 31-32; R., pp. 31-32).

Applicant told Cpl. Owens he had visited his girlfriend and had just left a Greenville Holiday Inn, but was unable to say where the motel was located. Cpl. Owens first observed the Expedition on the interstate before the exit for the only Holiday Inn in the area, so he knew

Applicant had not just left that motel. Based on Applicant's demeanor and responses, Cpl. Owens believed he was being deceptive. (TT, pp. 32-33; R., pp. 32-33).

Applicant also told Cpl. Owens the vehicle belonged to a different girlfriend from the one he had been visiting, he was unemployed, and he had been in Greenville for two days but had no luggage in the vehicle. All of these factors, combined with his knowledge and experience and Applicant's use of delaying tactics in responding to questions, further aroused Cpl. Owens' suspicions, and he called for a drug canine unit to respond to the scene. He also requested a check on Applicant's driver's license and the vehicle registration since the vehicle was registered to a third party. (TT, pp. 33-37; R., pp. 33-37).

While waiting for the canine unit to arrive and completion of the license and registration checks, Cpl. Owens went back to the Expedition to compare the VIN numbers on the vehicle and the registration in case the vehicle was stolen. When he approached the vehicle at that time, he observed numerous fast food bags and air fresheners inside the vehicle, as well as a cell phone and receipts in the center console. (TT, pp. 37-38; R., pp. 37-38).

Cpl. Owens testified the fast food bags and cell phone were significant to him because drug traffickers try to move fast since there is the potential for violence, they have time deadlines to move the product, and they have to stay in constant contact with others involved in the transactions. He further testified the numerous air fresheners were significant because they are used to disguise odors from law enforcement and drug detection canines. In addition, Cpl. Owens saw a bag on the rear seat even though Applicant told him he had no luggage. Based on all these factors, Cpl. Owens suspected criminal activity. (TT, pp. 38-40, 53-57; R., pp. 38-40, 53-57).

After checking the VIN number and receiving information from the license and

registration checks, Cpl. Owens wrote out a warning ticket for the traffic violations and explained it to Applicant. As this was happening, Corporal Eddie Aman ("Cpl. Aman") arrived on the scene with the drug canine. He left the canine in his vehicle, walked up to where Cpl. Owens and Applicant were standing next to Cpl. Owens' patrol car, and stood there while Cpl. Owens explained the ticket to Applicant. (TT, p. 41; R., p. 41).

When Cpl. Owens finished explaining the ticket to Applicant, he handed him his license and the vehicle registration back. This occurred approximately ten minutes after Cpl. Owens initiated the traffic stop. (TT, pp. 41, 84; R., pp. 41, 84).

Cpl. Owens then asked Applicant if he could search the Expedition. Applicant consented, and Cpl. Owen told Cpl. Aman to run the canine around the vehicle. Prior to getting the canine out of his patrol car, Cpl. Aman went to check for anything in or around the Expedition that might be harmful to or contaminated by the canine. There was some fast food in the front passenger floor board, and when Cpl Aman reached in and picked it up, Applicant fled across six lanes of traffic on I-85, the center concrete barrier, the guard rail down the embankment and along the fence line. Cpl. Owens and Cpl. Aman pursued and caught him, and returned him to the scene. (TT, pp. 41-44, 57-65; R., pp. 41-44, 57-65).

After they returned to the scene, Cpl. Aman ran the canine around the Expedition. Inside the fast food container Cpl. Aman saw earlier, the officers found a plastic bag of white powder that field tested positive for cocaine. (TT, pp. 44-45; R., pp. 44-45).

Cpl. Aman testified Cpl. Owens was talking to Applicant when he arrived on the scene. After he walked up to them, Cpl. Owens received the information on the license and registration checks, and finished explaining the ticket to Applicant. Cpl. Owens then asked Applicant for consent to search the vehicle, and he consented. Cpl. Aman then went to inspect the roadway for

glass or other hazards, and remove any food.<sup>1</sup> There was a partially open fast food chicken box in the passenger floorboard, and a Zip-loc type plastic bag was sticking out the top. As Cpl. Aman folded the top back to see what was inside, Applicant ran across the interstate. (TT, pp. 66-74; R., pp. 66-74).

After they apprehended Applicant, Cpl. Aman ran his canine around the vehicle and the canine positively alerted. The bag Cpl. Aman previously observed was removed, and the substance inside field tested positive for cocaine. (TT,p.69, 77-78; R., pp. 69, 77-78).

After hearing the testimony and reviewing the videotape from Cpl. Owens' patrol car, the circuit court found the initial traffic stop was legitimate, Cpl. Owens articulated factors supporting a reasonable basis to detain Applicant and request consent to search, Applicant consented to the search, and his consent was voluntary under the circumstances. Based on those findings, the court denied Applicant's motion to suppress the evidence. (TT, pp.101-112; R., pp. 101-112).

Cpl. Owens and Cpl. Aman testified at trial consistent with their pre-trial testimony.<sup>2</sup> (TT,pp.132-185;R.,pp.132-185). A forensic chemist testified the substance found in Applicant's vehicle was 220 grams of cocaine. (TT, p. 219; R., p. 219).

The jury convicted Applicant of trafficking cocaine and resisting arrest, and the circuit court sentenced him to the mandatory twenty-five years incarceration on the trafficking conviction, and one year incarceration, concurrent, on the resisting arrest conviction. (TT, pp.

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<sup>1</sup>According to the videotape and Cpl. Owens' trial testimony, Cpl. Aman specifically asked Applicant whether there was food in the vehicle. When Applicant told him there was food in there, Cpl. Aman told him he was going to get the food out and put it on top of the vehicle so the canine would not get into it. (TT, pp. 146-147, State's Exhibit 1; R., pp. 146-147).

<sup>2</sup>Cpl. Owens also testified he detected an "overwhelming" odor of air fresheners when he initially approached the Expedition, which meant the presence of more than one air freshener, a tactic commonly used to mask odors from law enforcement. (TT, pp. 137-138; R., pp. 137-138).

309-310, 316-318; R., pp. 309-310, 316-318). This appeal followed.

### **ALLEGATIONS**

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
  - a. Failed to challenge and object to initial traffic stop.
  - b. Failed to challenge and object to reasonable suspicion.
  - c. Failed to challenge and object to officer testimony about air freshener.
  - d. Failed to challenge and object that the officer lacked probable cause for the second detention.
  - e. Failed to challenge and object to a “copie of copie” of the vehicle transport video being put into evidence.
  - f. Failed to view vehicle transport video with the Applicant.
  - g. Failed to subpoena radio transmission tapes and call logs.
  - h. Failed to challenge and object to the resisting arrest charge.
  - i. Failed to challenge the K-9 certification.
  - j. Failed to properly prepare for trial.
  - k. Failed to challenge and investigate why the case was dismissed with leave to restore.
  - l. Failed to challenge the chain of custody.
  - m. Failed to challenge and object to the length of time the evidence was in the officer’s control.
  - n. Failed to subpoena the evidence custodian.
2. Procedural due process.
3. Prosecutorial misconduct.

### **SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING**

#### **Trial Counsel**

Trial counsel was called on direct examination by Applicant. Trial counsel testified the majority of his practice was trial work split evenly between criminal and domestic. He testified he represented Applicant and during that time the majority of his practice was criminal defense work. He testified Applicant’s charges dealt with a traffic stop and the events subsequent to that

stop. He testified the issue of suppression was a major issue in the case. Trial counsel testified he was sure he filed discovery motions and had the discovery for the case. He testified he reviewed the videotape of the traffic stop prior to the suppression motion as it was a key bit of evidence with respect to the suppression hearing. He testified the first time he viewed the video tape together with Applicant was at the courthouse before the suppression hearing. He testified he met with Applicant a number of times before the suppression hearing and the trial. He testified Applicant felt as though his constitutional rights were violated adding that he thought it was a pretty good suppression case. He testified he thought he developed a good record for the appellate level as to whether or not Applicant's rights were violated because of the lengthy period of time Applicant was on the side of the road. Trial counsel testified he was challenging the length of the stop and anything that flowed after. He testified he did not recall after being questioned about whether the video recording of the traffic stop had ten minute lag. He testified that if the radio logs from the South Carolina Highway Patrol would have shown there was a lag of one hour and ten minutes between the stop and the drug dog getting there that would have changed his argument during suppression. He testified he did not get the radio logs and did not think to get them. He testified there were a number of appellate cases pending as to what constituted an unreasonable amount of time for a traffic stop in terms of a Fourth amendment violation during the time Applicant's case was going on. He further testified he thought the issue of someone being in custody does not necessary mean that person is under arrest but rather when a person is not free to leave. He testified in this case Applicant was not under arrest. He further testified that if the radio logs show that Applicant's detention on the side of the road was an hour and six minutes versus ten minutes it would have strengthen Applicant's case. He testified he did not think to review any call logs in this case.

On cross-examination, Trial counsel testified he was not the first lawyer in the case but believed he received all of the discovery in this case. He testified he met with Applicant a number of times and there were a lot of discussions about plea offers, but Applicant rejected any thought of pleading guilty. He testified during conversations with Applicant the length of the traffic stop came up and whether the stop lasted too long from the time of the stop until the time that he was placed under arrest. He testified he had an opportunity to have a suppression hearing and cross-examine the arresting officer and the K-9 officer. He testified he would have asked the officers questions about time as it related to the incident.

Peter Skidmore

Peter Skidmore testified that he was a private investigator in South Carolina and North Carolina. Mr. Skidmore testified he was hired by Applicant's wife. He testified he reviewed the video tape of the traffic stop in this case. He testified he went to interview Applicant and went through everything with him as far as the traffic stop and his concerns. He testified from there he started to investigate the tape and the radio call logs. Mr. Skidmore testified he found the call logs did not match up with the videotape and that there was an hour and ten minute discrepancy between them. He testified he thought either the call log was wrong or the tape as wrong. He testified he then wanted to get a person that could verify if the tape had potentially been tampered with. He testified he found out the original tape had been destroyed and his expert in California could not determine if the copy he reviewed had been tampered with. He testified if he would have been in trial mode, he would have done more investigation into the officers and their disciplinary history.

On cross-examination, Mr. Skidmore testified he never worked for the Department of Public Safety and that he had never been a highway patrolman. He further testified he did not

talk to anybody from highway patrol about the radio logs at all. He testified he did not even talk to the person who wrote out the actual radio log.

On re-direct, Mr. Skidmore testified he reviewed the notes from the radio logs several times and there was a discrepancy of an hour and ten minutes between the radio logs and the tape.

#### Applicant

Applicant testified he was familiar with the records from the Department of Public Safety and that he actually got them through a FIOA request while he was in prison. He testified he reviewed the radio logs and found his driver's license and license tag numbers. He testified his driver's license was called in at 2212 (10:12pm) based on the radio logs. He then testified he was stopped by the police at 2102 (9:02pm). Applicant testified by the time his driver's license had been called in he had been on the side of the road for an hour and ten minutes waiting for a K-9 to come. He testified he had not changed the radio logs once he received them and they had his driver's license on them plus the car he was driving. He testified he viewed the video of the traffic stop on the day of trial for the first time and he knew he was out on the highway longer than the video showed waiting for a K-9 to come. Applicant testified he wrote the Department of Transportation a FIOA request before he went to trial and they did not respond to him about the radio logs prior to trial. Applicant testified once he got the radio logs he looked at them and discovered he was on the side of the highway for an hour and ten minutes. He testified a motion to see the video tape of the traffic stop while Trial counsel was representing him because he had never been shown it prior to trial. Applicant testified the reason Trial counsel gave him for not showing him the tape before trial was because Trial counsel did not have a place to show it to him because Applicant was in Greenville County Detention Center at the time. Applicant

testified after he reviewed the tape during the first day of trial, he told Trial counsel the tape was wrong and he was out on the side of the road waiting for a K-9 for about an hour. He testified Trial counsel did not do anything to help him and he felt as though his Fourth Amendment rights had been violated. Applicant he testified once he got his license, registration and a warning ticket, the officer made him wait. He testified on the day he was arrested there were a lot of officers on the roads and he was pulled over by one of them. He testified he cooperated with the police office and gave them his registration and license and the officer started questioning him. He testified the officer pulled him over at 2102 (9:02pm.) and the video shows he was pulled at 9:02 pm. Applicant testified the officer asked him where he was going, who he came to see, and how long he had been in Greenville. Applicant testified the officer asked him if he could search his car and Applicant said no. Applicant testified he wanted to challenge the stop but Trial counsel did not. He testified he told his appellate counsel the traffic stop lasted longer than ten minutes. He testified the issue was not preserved for the record. Applicant testified a drug dog was called in by the officer six minutes into the stop but the drug dog did not come until 2218 (10:18 pm), about an hour and a few minutes. He testified the video looks as though the K-9 showed up within a ten-minute time frame.

Applicant testified the video was edited and he hired Mr. Peter Skidmore to get the original copy but he was unable to get it. He testified Caroline Horlbeck, Esquire, was his original PCR attorney and she tried to get the original video and they wrote her saying the original had been destroyed. He testified he told Trial counsel he had been on the side of the road for one hour before the K-9 came. Applicant testified he was able to get the radio logs and they were sent to his appellate counsel but they were only three pages long. Applicant then testified that is when he did a FIOA request and got the complete radio log. He testified he wrote the

Highway Patrol requesting the radio logs prior to trial but they never responded.

Applicant testified he felt as though his warrant was improper because it states he got caught with 28 grams and less than 100 but he was tried for 100 to 200 grams. He testified he asked Trial counsel about it but he was not able to get to the bottom of it however he was charged with one weight of drugs but tried for another. He testified when he was arrested and they weighed the drug, they were 28 grams but more than 100, but when it went to SLED they said the drugs weighed 200 to 400 grams. He testified the first indictment was dismissed, the second indictment was dismissed with leave to restore and the third indictment was 100 to 200 grams. He testified if Trial counsel would have shown him the video he would have taken the three-year plea deal that was offered.

On cross-examination, Applicant testified Trial counsel was his second attorney as he had previously hired Dick Warder. He testified he met with Trial counsel numerous times and he discussed the traffic stop with him during these meetings. Applicant testified he discussed the length of time of the stop with Trial counsel but Trial counsel did not believe him. He testified he wanted to testify at trial but Trial counsel told him it was the State's burden. He testified drugs were found in his car during the stop and he tried to run away during the stop because he was scared. He testified he told Trial counsel exactly what happened during the traffic stop and Trial counsel chose not to move forward with the information and simply ignored what Applicant told him.

Shontea Smith

Shontea Smith testified that she had been in a relationship with Applicant since 2005. She testified she had a number of dealings with Applicant's attorney. She testified she was adamant Applicant should not hire Trial counsel as Applicant had told her Trial counsel dozed off in the

initial meeting between them. She testified she received a copy of the video tape of the traffic stop from trial counsel. She testified she took notes after watching the video. Ms. Smith testified she told Trial counsel Applicant was adamant the time of the traffic stop was not nearly as long as Applicant was actually on the side of the road. She testified Applicant never got a chance to see the video prior to trial. She testified she compared the radio logs and the video tape and she found there was an hour difference between what was taking place on the video as compared to the radio logs.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). This Court finds the testimony of Counsel to be credible. This Court further finds that the testimony by Applicant is not credible.

#### **Ineffective Assistance of Counsel**

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel 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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel. Applicant also failed to prove he was prejudiced by the alleged deficiencies. As a matter of general impression, this Court finds the testimony of Applicant's counsel to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

**Failed to challenge and object to initial traffic stop and reasonable suspicion.**

Applicant alleges Trial counsel failed to challenge and object to the initial traffic stop. Trial counsel testified the issue of suppression was a major issue in the case. Trial counsel

testified he was sure he filed discovery motions and had the discovery for the case. He testified he reviewed the videotape of the traffic stop prior to the suppression motion as it was a key bit of evidence with respect to the suppression hearing. He testified he met with Applicant a number of times before the suppression hearing and the trial. He testified he thought he developed a good record for the appellate level as to whether or not Applicant's rights were violated because of the lengthy period of time Applicant was on the side of the road. Trial counsel testified he was challenging the length of the stop and anything that flowed after the traffic stop. This Court finds Applicant has failed to meet his burden of proving Trial Counsel was ineffective. Not only does this Court find trial counsel's testimony credible concerning this issue, the trial transcript reflects Trial counsel moved to suppress all evidence, including a videotape of the traffic stop at issue and drugs seized from the car. TT pp. 24-25, 84-89, 95-96. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel further challenged and objected to the initial traffic stop. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

**Failed to challenge and object to officer testimony about an air freshener.**

Applicant alleges Trial counsel failed to challenge and object to the arresting officer's testimony about an air freshener. As previously mentioned, Trial counsel testified that during Applicant's suppression hearing prior to trial he was challenging the length of the traffic stop and

anything that flowed from it. This Court finds after a review of the record that Trial counsel effectively cross-examined the arresting officer during Applicant's suppression hearing and at trial regarding matters which included the air fresheners. TT pp. 48-65, 151-165. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel further challenged and objected to the officer's testimony about an air freshener. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

**Failed to challenge and object that the officer lacked probable cause for the second detention.**

Applicant alleges Trial counsel failed to challenge and object that the officer lacked probable cause for the second detention. Prior to trial, Applicant had a suppression hearing in which Trial counsel argued to the trial judge that the traffic stop was unreasonably extended. TT pp.84-89. Moreover, Trial counsel testified he was challenging the length of the traffic stop and anything that flowed after. This Court finds the record shows Trial counsel challenged the length of the stop and whether the officer had probable cause for the continued detention. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his

representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel further challenged and objected that the officer lacked probable cause for the second detention. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

**Failed to challenge and object to a “copy of a copy” of the vehicle transport video being put into evidence.**

Applicant alleges Trial counsel failed to challenge and object to a “copy of a copy” of the vehicle transport video being put in to evidence. Prior to the State offering the video of the traffic stop in to the record during the suppression hearing, Trial counsel asked the arresting officer if the video being introduced was a complete video of the arrest to which the officer responded in the affirmative. TT.pg. 46-47. Afterward, counsel cross-examined the arresting officer extensively about the traffic stop and what was depicted on the video. TT pp. 48-65, 151-165. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel further challenged and objected to a copy of a copy” of the vehicle transport video being put in to evidence. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

**Failed to view vehicle transport video with the Applicant.**

Applicant alleges Trial counsel failed to view the vehicle transport video with Applicant. Applicant testified he viewed the video of the traffic stop on the day of trial for the first time. Applicant testified Trial counsel told him he did not show Applicant the tape before trial because Trial counsel did not have a place to show the video to Applicant because he was in Greenville County Detention Center at the time. Trial counsel testified he reviewed the videotape of the traffic stop prior to the suppression hearing as it was a key piece of evidence with respect to the suppression hearing. Trial counsel testified the first time he viewed the video tape together with Applicant was at the courthouse before the suppression hearing. He testified he met with Applicant a number of times before the suppression hearing and the trial. This Court finds Trial counsel was not ineffective for failing to view the vehicle transport video with Applicant. While Applicant did testify he only viewed the video tape for the first time right before trial, Trial counsel viewed the video prior to the suppression hearing. Given this, Trial counsel was prepared to argue on behalf of Applicant at the suppression hearing with the information he saw on the video tape. Moreover, on cross-examination, Applicant testified he met with Trial counsel numerous times and he discussed the traffic stop with him during these meetings along with the length of time of the stop. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel viewed the vehicle transport video with Applicant. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably

effective assistance. The allegations are denied and dismissed.

**Failed to subpoena radio transmission tapes and call logs.**

Applicant alleges Trial counsel failed to subpoena radio transmission tapes and call logs from the night of Applicant's traffic stop. Trial counsel testified he did not get the radio logs and did not think to get them. Applicant testified he got the radio logs from the Department of Public Safety and that he actually got them through a FIOA request while he was in prison. Applicant went on to testify that he reviewed the logs and they showed he was actually on the side of the road for longer than the video of the traffic stop showed. After a review of the record this Court finds Applicant has failed to show Trial counsel was ineffective or that he was prejudiced by Trial counsel performance. While Applicant and his private investigator opined about the radio call logs and what they contained, Applicant failed to call anyone from the Department of Public Safety to testify concerning the call logs concerning their content or makeup. While there is no question the records were authentic as Applicant had a records custodian from the Department of Public Safety authenticate them, this Court cannot rely on Applicant or his private investigator's interpretation of these records as neither wrote the radio call logs or work for the Department of Public Safety. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel subpoenaed the radio transmission tapes and call logs from the night of Applicant's

traffic stop. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

**Failed to challenge and object to the resisting arrest charge.**

Applicant alleged in his application Trial counsel failed to challenge and object to the resisting arrest charge. Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds Applicant failed to prove there was any evidence of this allegation. Accordingly, this Court denies and dismisses this allegation.

**Failed to challenge the K-9 certification.**

Applicant alleged in his application Trial counsel failed to challenge the K-9 certification. Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds Applicant failed to prove there was any evidence of this allegation. Accordingly, this Court denies and dismisses this allegation.

**Failed to properly prepare for trial.**

Applicant alleges Trial counsel failed to properly prepare for trial. Trial counsel testified he was sure he filed discovery motions and had the discovery for the case. He testified he reviewed the videotape of the traffic stop prior to the suppression motion as it was a key bit of evidence with respect to the suppression hearing. He testified he met with Applicant a number of times before the suppression hearing and the trial. Applicant also testified he met with Trial counsel numerous times and he discussed the traffic stop with him during these meetings. While Trial counsel did not subpoena the radio logs concerning Applicant's arrest from the Department of Public Safety, he met with Applicant numerous times to discuss the case. Additionally, he also attempted to suppress the evidence from the arrest, including a videotape of the traffic stop at issue and drugs seized from the car. Therefore, this Court finds Applicant has failed to prove the

first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel prepared differently. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

**Failed to challenge and investigate why the case was dismissed with leave to restore.**

Applicant alleged in his application Trial counsel failed to investigate why the case was dismissed with leave to restore. Applicant very briefly testified his first indictment was dismissed and his second indictment was also dismissed with leave to restore. However, this testimony failed to show any irregularities with respect to Applicant’s case. Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. Applicant has failed to show the outcome of his trial would have been different had Trial counsel challenged and investigated why his case was dismissed with leave to restore. This Court concludes Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. The allegations are denied and dismissed.

**Failed to challenge the chain of custody.**

Applicant alleged in his application Trial counsel failed to challenge the chain of custody. Applicant did not present any evidence on this allegation at the PCR hearing. To the extent

Applicant is arguing there were issues with the chain of custody of the drugs found on him or the video recording of the traffic stop, Applicant has failed to meet his burden of proof regarding this allegation. Accordingly, this Court denies and dismisses this allegation.

**Failed to challenge and object to the length of time the evidence was in the officer's control.**

Applicant alleged in his application Trial counsel failed to challenge and object to the length of time the evidence was in the officer's control. To the extent Applicant is arguing there were issues with the chain of custody of the drugs found on him or the video recording of the traffic stop, Applicant has failed to meet his burden of proof regarding this allegation. Accordingly, this Court denies and dismisses this allegation.

**Failed to subpoena the evidence custodian.**

Applicant alleges Trial counsel failed to subpoena the evidence custodian. To the extent Applicant is arguing there were issues with the chain of custody of the drugs found on him or the video recording of the traffic stop, Applicant has failed to meet his burden of proof regarding this allegation. Accordingly, this Court finds Applicant failed to prove there was any evidence of this allegation. Accordingly, this Court denies and dismisses this allegation.

**Procedural Due Process**

Applicant alleged in his application a procedural due process violation. Applicant did not present any evidence on this allegation at the PCR hearing or specify what constitutional violations were infringed upon. Accordingly, this Court finds Applicant failed to prove there was any evidence of prosecutorial misconduct. Accordingly, this Court denies and dismisses this allegation.

**Prosecutorial Misconduct**

Applicant alleged in his application prosecutorial misconduct. Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds Applicant failed to prove there was any evidence of prosecutorial misconduct. Accordingly, this Court denies and dismisses this allegation.

Furthermore, to the extent Applicant is claiming prosecutorial misconduct has been discovered post-trial and could not have been discovered in the exercise of due diligence prior to trial, in evaluating post-trial Brady<sup>3</sup> claims, the applicant must show (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10<sup>th</sup> Cir. 1988). The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985).

"Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. See Clark, 315 S.C. 385.

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<sup>3</sup> Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963).

Applicant has failed to show the State withheld any evidence that would have produced a different outcome at his trial. Accordingly, this Court denies and dismisses this allegation.

### CONCLUSION

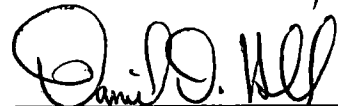
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. Reffer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

### IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 13<sup>th</sup> day of February, 2018.



DANIEL D. HALL  
Presiding Judge  
Thirteenth Judicial Circuit

York, South Carolina