

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

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Certiorari to York County
Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2017-002355

KENNETH MORRIS,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX VOLUME II

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed no error in denying Appellant's motion to suppress the illegal narcotics discovered during a traffic stop because Appellant's detention was reasonable under the totality of the circumstances and the search of the vehicle was supported by probable cause.

STATEMENT OF THE CASE

Appellant Kenneth Darrell Morris, II was arrested following a traffic stop during which illegal narcotics were discovered. On July 3, 2008, the York County grand jury indicted Appellant for trafficking in Ecstasy and possession of marijuana with intent to distribute. A jury trial was held in the York County court of general sessions on April 15, 2009, with the Honorable John C. Hayes, III, circuit court judge, presiding. On April 17, 2009, the jury convicted Appellant of trafficking in Ecstasy and simple possession of marijuana. Appellant was sentenced to concurrent terms of thirty (30) years with a \$50,000 fine for the trafficking offense and one (1) year for the simple possession offense. Appellant subsequently filed a timely notice of appeal.

STATEMENT OF FACTS

On February 6, 2008, Appellant Kenneth Darrell Morris, II and a passenger, Brandon Nichols, were arrested after officers uncovered drugs in the trunk of the rental car Appellant was driving. (R. p. 63; pp. 64-65). At the outset of his trial, Appellant sought to suppress the recovered drugs as the fruits of an illegal search and an unlawful detention, and a suppression hearing was held. (R. p. 4).

During the suppression hearing, Officer L.T. Vinesett, Jr., an officer with the York County Sheriff's Office's Highway Interdiction Team, testified about his traffic stop of Appellant. (R. p. 6). On the day of the stop, Officer Vinesett, along with a state constable, was patrolling I-77 in York County. (R. p. 6). Officer Vinesett observed a Ford 500, a well-known rental car, following a truck too closely on the interstate. (R. p. 7). As the officer closed on the Ford, the driver made a quick exit from the interstate onto another highway. (R. p. 7). Officer Vinesett followed the Ford to a gas station, activated his blue lights, and initiated a traffic stop. (R. pp. 7-8).

After stopping the vehicle, Officer Vinesett approached from the passenger's side and observed two occupants. (R. p. 8). He asked the driver for his license and registration, and the occupants produced a license and rental agreement. (R. pp. 8-9). The rental agreement indicated the passenger, Nichols, had rented the vehicle and was the only authorized driver. (R. pp. 9-10).

At this time, Officer Vinesett noticed the smell of marijuana coming from the vehicle. (R. p. 10). Additionally, he observed hollowed-out cigars and loose tobacco scattered all over the interior of the car. (R. p. 11). The officer noted cigars are frequently hollowed out and the tobacco replaced with marijuana, allowing a drug user to

smoke marijuana while appearing to merely smoke an ordinary cigar. (R. p. 11). He then had Appellant step out of the vehicle and sit in the front passenger seat of his patrol car in order to avoid the rain. (R. p. 10; p. 13). After smelling the odor of marijuana, Officer Vinesett believed there was cause to extend the traffic stop and question Appellant and Nichols. (R. pp. 32-33).

When asked about where he was coming from, Appellant stated they were returning from Atlanta and had gone to visit some girls. (R. p. 13). Additionally, during the questioning, Appellant told Officer Vinesett about his prior criminal record. (R. p. 32). Outside of the presence of Appellant, Nichols offered a different account of their activities, stating they were coming from Atlanta and had gone to see Appellant's cousin play basketball. (R. p. 14). Nichols then stepped out of the Ford, and Officer Vinesett again noticed the odor of marijuana. (R. p. 14).

Officer Vinesett frisked Appellant with consent and allowed him to go to the restroom while accompanied by the state constable. (R. pp. 34-35). The officer then requested a canine unit. (R. p. 14; p. 35). In rainy weather, the police dog walked around the exterior of the car. (R. p. 15). After walking around the vehicle, the dog did not alert to the presence of drugs. (R. p. 15). Officer Vinesett noticed the police dog was not focusing on the vehicle, was shaking off rain water, and was looking around. (R. p. 15). The officer concluded the dog did not appear to like being out in the rain. (R. p. 15).

The officers on the scene requested consent to search the vehicle, but consent was not given. (R. pp. 15-16). Officer Vinesett informed Nichols he had smelled marijuana in the car during the stop, but Nichols denied any marijuana had been smoked. (State's Exhibit 16 - Videotape of the Traffic Stop). Without consent, Officer Vinesett searched

the interior of the car and then the trunk. (R. p. 16; pp. 40-41). In the trunk, he located a gift box with a sandwich bag inside containing 393 Ecstasy pills. (R. pp. 16-17). Following this discovery, both men were arrested. (R. p. 17). Although not discussed during the suppression hearing, a subsequent search of the vehicle at the police station revealed approximately one-half pound of marijuana hidden under the spare tire. (R. p. 66). The drugs recovered from the vehicle were analyzed and identified as illegal narcotics. (R. p. 70; p. 71).

On cross examination, Officer Vinesett testified the average traffic stop without any indicators of criminal activity usually lasts approximately five minutes. (R. p. 20). He acknowledged his lack of references to any indicators of the presence of drugs in his initial police report, but he revealed the indicators he observed at the scene, which consisted of the hollowed-out cigars and the smell of marijuana. (R. p. 23; p. 29). However, he conceded the drug dog's failure to alert was a fair indicator that no drugs were present. (R. p. 38). He also noted he was able to distinguish between the smell of marijuana and the smell of cigars. (R. pp. 43-44). Ultimately, Officer Vinesett determined, based on his training and the indicators he observed, someone was or had been smoking marijuana in the rental car. (R. p. 31). During the officer's testimony, the videotape of the traffic stop was played for the trial judge. (R. p. 46).

Commander Marvin Brown, the supervisor of the York County narcotics unit, also testified during the suppression hearing. (R. p. 49). Commander Brown indicated Officer Vinesett did not include any indicators in his initial incident report based on unit policies. (R. p. 49). He noted case summaries prepared after the incident report contained the reasons for the stop and all indicators. (R. p. 50). Officer Vinesett included

the indicators leading to the search in his case summary of Appellant's stop. (R. pp. 50-51).

Following argument from counsel, the trial judge denied the motion to suppress. (R. p. 57). The trial judge found the detention was reasonable and the scope of the stop was not exceeded. (R. p. 57). He ruled the stop was not excessively long, and the police dog's failure to alert to the presence of drugs did not require the detention to cease. (R. pp. 58-59). He also ruled the subsequent inventory search was valid. (R. p. 60). The trial judge based his rulings on the smell of marijuana, the training of the officer, and the testimony regarding the hollowed-out cigars and tobacco in the vehicle. (R. p. 57). While noting the inconsistencies in Appellant and Nichol's stories may have heightened the officer's suspicions, the trial judge declined to rely on those inconsistencies in reaching his decision. (R. pp. 61-62). Ultimately, the trial judge found the search was supported by probable cause. (R. p. 62).

ARGUMENT

The trial judge committed no error in denying Appellant's motion to suppress the illegal narcotics discovered during a traffic stop because Appellant's detention was reasonable under the totality of the circumstances and the search of the vehicle was supported by probable cause.

Appellant asserts the trial judge erred by refusing to suppress the illegal drugs recovered during a search of a rental vehicle driven by Appellant. Appellant contends his detention was unlawful and unreasonably long in violation of the Fourth Amendment, the officer's testimony regarding the odor of marijuana was not credible and was uncorroborated, the search of the vehicle was not supported by probable cause, and the search of the trunk unlawfully exceeded the permissible scope of the search. However, Appellant was lawfully stopped based on a traffic violation, and the traffic stop was conducted in a reasonable manner. Furthermore, any extension in the duration of the stop was supported by reasonable suspicion, and a subsequent search of the vehicle was supported by probable cause. The trial judge, after hearing and evaluating the testimony and evidence, properly denied Appellant's suppression motion. The trial judge's ruling should be affirmed.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, ___, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005).

A. The Detention

Appellant maintains his detention was unreasonably long in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures and was "a blatant fishing expedition for drugs." Appellant's traffic stop was reasonable, and any extension in the length and focus of the detention was supported by reasonable suspicion.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United

States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). While the Fourth Amendment requires a stop to be reasonable under the circumstances, a traffic stop is reasonable *per se* when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). The reasonableness of a stop or detention "is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996).

Once a lawful traffic stop is initiated, an officer may order the driver out of the vehicle and "may request a driver's license and vehicle registration, run a computer check, and issue a citation." Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)). Such an investigatory stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848.

Even if a traffic stop is initially lawful, the detention "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005); *see* Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). But, further detention for questioning subsequent to the conclusion of the purpose for the initial stop is not automatically unconstitutional. State v. Tindall, 379 S.C. 304, 310, 665 S.E.2d 188, 192 (Ct. App.

2008), cert. granted (Apr. 10, 2009). Continued questioning beyond the scope of the initial traffic stop is lawful and permissible if: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion consists of “a particularized and objective basis” that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. . . .” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.”).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In order for an officer to have reasonable suspicion regarding the presence of illegal drugs, the officer is required to have a particularized and objective basis arising from the totality of the circumstances that would lead an individual to suspect drugs are located in a lawfully stopped vehicle. State v. Banda, 371 S.C. 245, 254, n. 4, 639 S.E.2d 36, 41 (2006); see, e.g., United States v. Sokolow, 490 U.S. 1, 9 (1989) (finding factors, which might be innocent by themselves, can equate to reasonable suspicion when considered as a whole).

Furthermore, "a minor traffic violation arrest will not be rendered invalid by the fact it was a 'mere pretext for a narcotics search.'" State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191-192 (Ct. App. 2009) (citations omitted). "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996).

South Carolina courts have previously considered what constitutes reasonable suspicion of further criminal activity in the context of a traffic stop. Our courts have addressed situations where reasonable suspicion was present and where reasonable suspicion was lacking. However, the courts in all of these cases afforded great deference to the findings and conclusions of the trial judges.

In State v. Williams, the Court of Appeals affirmed the trial court's findings regarding the lack of reasonable suspicion. Id. at 605, 571 S.E.2d at 711. In Williams, the officer's only evidence of another crime was the prior suspension of the driver of the vehicle's license. Id. at 603, 571 S.E.2d at 710. The court concluded this evidence was insufficient to serve as the basis for reasonable suspicion, which was required to extend the scope of the detention. Id.

In State v. Pichardo, the Court of Appeals affirmed the trial court's suppression of recovered narcotics. Id. at 108, 623 S.E.2d at 853. The only evidence offered to establish suspicion was the nervousness of a passenger in the vehicle. Id. at 104, 623 S.E.2d at 851. The court concluded the passenger's nervousness alone was insufficient to establish reasonable suspicion in light of his inability to speak English. Id.

Recently, in State v. Rivera, the Court of Appeals affirmed the suppression of heroin recovered from the engine compartment of Rivera's vehicle. Id. at ___, 682 S.E.2d

at 311. The following indicators were present during the traffic stop: (1) Rivera and the passenger were nervous; (2) they offered somewhat inconsistent stories; (3) luggage was absent from the back-seat of the car; and (4) the car allegedly contained numerous air fresheners. Id. at ___, 682 S.E.2d at 310-311. The court affirmed the trial court's ruling, finding these indicators did not sufficiently establish a reasonable suspicion of criminal activity. Id. at ___, 682 S.E.2d at 311.

In State v. Butler, 353 S.C. 383, 385-386, 577 S.E.2d 498, 499 (Ct. App. 2003), an officer initiated a traffic stop of a van in which Butler was riding. The officer smelled an odor of alcohol, either coming from the driver or from inside the van. Id. The trial court concluded the odor of alcohol established reasonable suspicion. Id. at 388, 577 S.E.2d at 500. The Court of Appeals found the extension of the scope and duration of the traffic stop was justified based on reasonable suspicion of criminal activity. Id. at 390, 577 S.E.2d at 501. However, the court reversed the trial court, finding the subsequent frisk of Butler for weapons was unlawful. Id. at 392-393, 577 S.E.2d at 503.

In State v. Odom, 376 S.C. 330, 333, 656 S.E.2d 748, 750 (Ct. App. 2007), Odom's vehicle was stopped after an officer observed him driving without a seatbelt. As the officer approached Odom's vehicle, he smelled marijuana, observed a Swisher-Sweet cigar on the dashboard, and noticed a empty gun holster in the passenger seat. Id. Additionally, Odom admitted to smoking marijuana earlier that morning. Id. A pat-down search and subsequent search of the car resulted in the discovery of marijuana. Id. The Court of Appeals noted the smell of marijuana along with Odom's admissions and the cigar on the dashboard, "a common indicium of paraphernalia," created a reasonable suspicion of the existence of drugs. Id. at 335, 656 S.E.2d at 751. The Court of Appeals

affirmed the denial of Odom's suppression motion, concluding Odom's detainment and subsequent pat-down search were lawful. Id. at 338, 656 S.E.2d at 752.

In State v. Tindall, Tindall's car was stopped after he was observed speeding and following another vehicle too closely. Id. at 307, 665 S.E.2d at 190. Shortly thereafter, Tindall was given a warning ticket, but officers continued to question him. Id. Approximately fifteen to twenty minutes into the stop, Tindall consented to a search of the vehicle and cocaine was discovered. Id. The officer noticed several physical manifestations of nervousness, but he failed to include these indicators in his police report. Id. The trial court denied Tindall's suppression motion, and the Court of Appeals affirmed. Id. at 311, 665 S.E.2d at 192. The court found the initial traffic stop ended when Tindall's license was returned and he was issued a warning. Id. However, the officer had a reasonable suspicion of criminal activity warranting Tindall's further detention, which ultimately resulted in Tindall consenting to a search. Id. The court found reasonable suspicion from the following indicators: (1) Tindall was nervous even after receiving a warning; (2) Tindall was driving a rental car he had not rented; (3) Tindall was only driving one way; (4) Tindall's planned driving time was approximately eighteen hours in one day; and (5) the cities involved in the trip were known "drug hubs." Id.

In the case sub judice, the stop and detention of Appellant was objectively reasonable under the totality of the circumstances, and any further extension of the scope of the stop was supported by reasonable suspicion. Before initiating the initial stop of Appellant, Officer Vinesett observed the commission of a traffic violation. Appellant's stop was reasonable per se based on probable cause of a traffic violation.

Additionally, there was reasonable suspicion of additional criminal activity warranting further investigation beyond the scope of the initial stop. The facts of Appellant's case are analogous to the facts in Butler and Odom, where courts found reasonable suspicion warranting further investigation based on the odor of alcohol and the odor of marijuana, respectively. Officer Vinesett properly expanded the scope of his investigation after smelling marijuana when he approached the vehicle because this odor created reasonable suspicion drugs were present. Like in Odom, Officer Vinesett's suspicions were based on the smell of marijuana and additional factors as well, including the presence of hollowed-out cigars and loose tobacco in the passenger compartment, which the officer knew to be a common indicator of drug usage based on his training and experience, along with the inconsistent stories offered by Appellant and Nichols.

Officer Vinesett's testimony showed he shifted the focus of his stop only after observing a number of indicators of criminal activity. As in Tindall, an officer's failure to specifically include indicators in an initial police report does not preclude a trial judge from accepting the officer's testimony of those indicators at a subsequent suppression hearing. Clearly, under the totality of the circumstances, there were sufficient indicators establishing reasonable suspicion to expand the investigation. The trial judge properly considered all available testimony, and the evidence in the record supports his conclusions.

Appellant's challenge to the reasonableness of the stop primarily focuses on the length of the detention and the credibility of Officer Vinesett's testimony regarding the odor of marijuana. The length of the detention from the moment of the activation of the officer's blue lights to the time of Appellant's arrest was approximately fifteen minutes.

investigation, and the trial judge found that testimony credible. The trial court's ruling should be affirmed.

B. The Search

After determining whether the detention itself was reasonable, the analysis then shifts to the reasonableness of the search. Appellant argues the search of Appellant's rental vehicle was not supported by probable cause and the search of the trunk exceeded the permissible scope of the search. The officers had probable cause to search the entire vehicle. The search did not violate Appellant's Fourth Amendment rights, and the trial court properly denied the suppression motion. The trial judge's ruling and appellant's convictions should be affirmed.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) automobile exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981) (emphasis added).

The automobile exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290

(State's Exhibit 16 - Videotape of the Traffic Stop). While there is no firm rule as to the appropriate length of a stop and detention, Appellant's stop was arguably reasonable in length notwithstanding the existence of reasonable suspicion to expand the scope of the stop. See United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose."); see also State v. Jones, 364 S.C. 51, 58, 610 S.E.2d 846, 849-850 (Ct. App. 2005) (finding no further detention occurred in a lawful traffic stop lasting over ten minutes based on the circumstances of the stop). However, the trial judge properly concluded reasonable suspicion supported the extension of Appellant's stop.

Additionally, Officer Vinesett's testimony during the suppression hearing, specifically the testimony regarding the odor of marijuana and the hollowed-out cigars, established the basis for the extension of the traffic stop. While Appellant challenges the credibility of the officer's testimony, the trial judge was in the best position to weigh the credibility of the proffered testimony and evidence. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be the arbiter of [the witness'] credibility."). On appeal, the focus is on whether any evidence exists to support the trial court's ruling. Testimony in the record established a reasonable suspicion to support further

S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under this exception, law enforcement officers can conduct a search of an automobile based on probable cause alone. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995). "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482. Furthermore, the rationale for the search does not disappear even after the vehicle is immobilized or taken into police custody: State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008).

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all contents potentially containing the object of the search. Bultron, 318 S.C. at 332, 457 S.E.2d at 621, see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."). "The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." United States v. Ross, 456 U.S. 798, 823 (1982). "The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

Probable cause is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved."

Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). A probable cause determination depends upon the totality of the circumstances. State v. Adams, 291 S.C. 132, 133-134, 352 S.E.2d 483, 485 (1987).

South Carolina courts have not yet specifically decided whether an officer's detection of the odor of marijuana alone can equate to probable cause, which is necessary for a warrantless search of an automobile. However, a number of other jurisdictions have directly addressed this issue. The majority position in both state and federal courts is the odor of marijuana establishes probable cause justifying a warrantless search. See State v. Zamora, 114 Ariz. 75, 77, 559 P.2d 195, 197 (Ariz. Ct. App. 1976) (finding officer's detection of the faint odor of marijuana during a traffic stop, unverified by the other officers at the scene, provided probable cause to search the entire vehicle and trunk); State v. Betz, 815 So.2d 627, 633 (Fla. 2002) ("Our conclusion here aligns this Court with a number of our sister jurisdictions in which courts have concluded that the smell of burnt marijuana, in combination with other circumstances, leads to law enforcement officers' possession of probable cause to search the entirety of a motor vehicle."); State v. Folk, 238 Ga. App. 206, 208, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999) (holding officer's detection of the odor of burning marijuana alone constituted probable cause for a warrantless vehicle search); People v. Kazmierczak, 461 Mich. 411, 416, 605 N.W.2d 667, 669 (Mich. 2000) ("Like the majority of courts in other states and jurisdictions, we are persuaded that detection of the odor of either fresh marijuana or marijuana smoke, standing alone, provides probable cause for a warrantless search."); Cowan v. Mississippi

Bureau of Narcotics, 2 So.3d 759, 766 (Miss. Ct. App. 2009) (finding smell of marijuana upon opening passenger door provided officer with probable cause to search vehicle); State v. Smith, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (N.C. Ct. App. 2008) (finding officer's detection of the odor of marijuana established probable cause to search even in a situation where no drugs were ever recovered); see also United States v. Johns, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband."); see. e.g., Andrea Levinson Ben-Yosef, Annotation, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana – Federal Cases, 188 A.L.R. Fed. 487 (2003) ("The majority of courts have found that the odor of marijuana alone supplies probable cause for a warrantless search."); Andrea Levinson Ben-Yosef, Annotation, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana – State Cases, 114 A.L.R. 5th 173 (2003) ("The majority of courts have found that the odor of marijuana alone supplies probable cause for a warrantless search.").

Additionally, the Fourth Circuit Court of Appeals has addressed whether the odor of marijuana can establish probable cause. In United States v. Haley, 669 F.2d 201, 202 (4th Cir. 1982), an officer smelled the odor of marijuana on the defendants and inside of a vehicle lawfully stopped for speeding. Before getting a search warrant, the officer unlocked the trunk, opened a large garbage bag, and discovered marijuana. Id. at 203. The car was later searched after the officer procured what he believed to be a warrant, and over two hundred pounds of marijuana were found in the trunk. Id. The Court of Appeals found "[s]ufficient probable cause arises when the officer smells marijuana

inside the vehicle[,]" and reversed the district court's suppression of the drugs. Id. at 203-204.

In United States v. Scheetz, 293 F.3d 175 (4th Cir. 2002), the Fourth Circuit Court of Appeals again addressed the issue of whether probable cause can arise from the smell of marijuana. The defendant was stopped for performing an illegal u-turn directly after passing a sign notifying drivers of an impending police checkpoint. Id. at 182-183. An officer smelled marijuana emanating from the vehicle, and the car was searched. Id. at 183. The search revealed marijuana in a knapsack found in the vehicle. Id. The Court of Appeals affirmed the denial of the defendant's suppression motion, holding: "Once the car was properly stopped and the narcotics officers smelled marijuana, the narcotics officers properly conducted a search of the car." Id. at 184 (citing United States v. Morin, 949 F.2d 297, 300 (10th Cir. 1991)).

Although not controlling, the Maryland Court of Special Appeals addressed both probable cause based on the odor of marijuana and the scope of a resulting search in Wilson v. State, 174 Md. App. 434, 921 A.2d 881 (Md. Ct. Spec. App. 2007). In Wilson, an officer stopped Wilson's rental vehicle for speeding. Id. at 438, 921 A.2d at 883. While talking with Wilson, the officer smelled the odor of burnt marijuana and decided to search the vehicle. Id. During the search of the passenger compartment, the officer found no evidence of a crime. Id. However, a subsequent search of the trunk revealed over six pounds of marijuana. Id. After a thorough review of United States Supreme Court cases along with federal and state cases, the Maryland Court of Special Appeals concluded the odor of burnt marijuana emanating from a vehicle provides probable cause to believe

marijuana is located in the vehicle. Id. at 454, 921 A.2d at 892. In affirming the suppression of the recovered marijuana, the Court instructed:

To adopt appellant's argument, the trunk, or any other area outside of the passenger compartment, becomes a safe harbor for the transportation of drugs for both users and traffickers who use drugs. We are not persuaded that a Fourth Amendment reasonableness analysis dictates that result. Probable cause is a "flexible, common-sense standard" to be applied in a "practical" and "non-technical" manner.

Id. at 455-456, 921 A.2d at 893 (citations omitted).

While not in the context of an automobile stop, the South Carolina Supreme Court has previously addressed whether the odor of marijuana alone can equate to probable cause. In State v. Lane, 271 S.C. 68, 70, 245 S.E.2d 114, 115 (1978), a delivery man noticed an odor coming from two packages to be delivered to Lane's store. The delivery man contacted the police, an officer smelled the odor of marijuana coming from the packages, the smaller package was opened, and marijuana was discovered. Id. The officers obtained a warrant, allowed the delivery of the packages to be completed, and subsequently arrested Lane. Id. at 71, 245 S.E.2d at 115. At trial, the trial judge refused to admit the package opened without a warrant, but he allowed the admission of the second package. Id. at 71, 245 S.E.2d at 115-116. In determining whether the drugs recovered in the search of the second package were properly admitted, the Supreme Court considered whether the warrant to search the second package was independently supported by probable cause without relying on the knowledge obtained by opening the first package. Id. at 71, 245 S.E.2d at 116. The Court held: "From the record it is evident that the odor emanating from the packages alone was a sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law,

familiar with the odor of marijuana, believed the odor being emitted was that of marijuana." Id. at 72, 245 S.E.2d at 116.

In the case sub judice, the facts in the record clearly show the officers had probable cause to search Appellant's rental vehicle based on the totality of the circumstances. The testimony shows Officer Vinesett smelled the odor of marijuana emanating from the car. The trial judge, who was in the best position to weigh the credibility of the testimony and evidence, accepted Officer Vinesett's sworn statements. See State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."); see also Thompson v. Brunson, 283 S.C. 221, 228, 321 S.E.2d 622, 626 (Ct. App. 1984) ("The trial judge was in the best position to assess the veracity of the testimony of the witnesses and we will accord great weight to his findings.").

While the odor of marijuana was a factor to be considered in the analysis of the reasonableness of the detention, it is also relevant to the determination of the existence of probable cause to search. The officer's detection of the odor of marijuana established probable cause for the search. Additionally, the officer observed hollowed-out cigars and loose tobacco in the vehicle, which his training and experience told him was common drug paraphernalia. Also, Appellant and Nichols offered inconsistent explanations for the purpose of their trip, and Appellant was driving a rental vehicle he was not authorized to drive. Arguably, the officer's detection of the odor of marijuana alone was sufficient to establish probable cause. However, along with the additional indicators of criminal activity and of the presence of marijuana, Officer Vinesett clearly had grounds to find the

existence of "a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621.

While the police dog called to the scene failed to alert, this failure did not negate the officer's probable cause to search based on other indicators of criminal activity. Instead, it was merely a factor to be considered under the totality of the circumstances in deciding if probable cause existed. The lack of an alert by the police dog did not require Officer Vinesett to abandon his investigation and subsequent search when he had previously observed reliable indicators of criminal activity sufficient to establish probable cause.

Additionally, it is important to note the police dog's failure to alert in this case was erroneous. The vehicle examined by the police dog contained approximately one-half pound of marijuana concealed in its trunk, and the dog merely failed to alert. The testimony offered during the suppression hearing provided a possible explanation for the dog's failure to alert, which certainly was not based on the absence of drugs. The officers had probable cause to search the vehicle based on the totality of the circumstances independent of any alert or lack thereof by the police dog.

Under the automobile exception, the officers were authorized to search the entire vehicle, including the trunk where the drugs were discovered. See Ross, 456 U.S. at 825 ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."). Based on the odor of marijuana and the indicia of drug usage in the passenger compartment, the officers could reasonably conclude narcotics could be located in the

trunk of the car. Contrary to Appellant's assertion the search of the passenger compartment was supported by the "plain view" doctrine, the search of the entire car was supported by probable cause. Therefore, the search of the passenger compartment and trunk was lawful, and Appellant's Fourth Amendment rights were not violated.

In this case, the trial court found probable cause based on the totality of the circumstances of the stop, primarily arising from the officer's detection of the odor of marijuana. This probable cause was sufficient to warrant a search of the entire vehicle, including the trunk. The trial judge's findings are consistent with South Carolina case law and harmonize with the majority position in other state and federal jurisdictions. Furthermore, these findings were supported by the evidence in the record and should be afforded great deference on appeal.

The issue on appeal hinges on the existence of any evidence to support the trial court's ruling. The evidence in the record clearly establishes the detention of Appellant was reasonable and the subsequent search of the vehicle was supported by probable cause. The trial court properly refused to suppress the recovered drugs, and the evidence in the record supports this decision. Since there was no clear error, the trial judge's rulings and appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

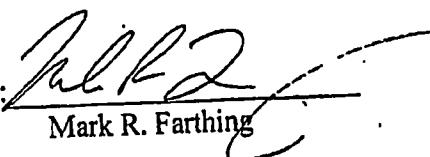
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March 15, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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March 15, 2010

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

State of South Carolina, ... Respondent,

v.

Kenneth Darrell Morris, II, ... Appellant.

REPLY BRIEF

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- I. Respondent's brief fails to address the fact that Officer Vinesett knew the hollowed-out cigars did not contain evidence of marijuana consumption before he conducted the search of the trunk.

The primary thrust of Respondent's argument appears to be that the odor of burnt marijuana "along with additional indicators of criminal activity" gave Vinesett probable cause to search Appellant's vehicle (Resp't's. Br. 22). Specifically, Respondent points to the hollowed-out cigars and loose tobacco Vinesett observed in the vehicle as "additional indicators of criminal activity." *Id.* However, this argument lacks merit because it does not square with the facts of the case. Vinesett knew that the partially smoked cigars he observed were not paraphernalia prior to the beginning of his search of the vehicle's trunk.

The Record on Appeal is clear on the fact that Vinesett never found any physical evidence of marijuana consumption inside the passenger compartment of the vehicle (R. p. 41, lines 2-10). Furthermore, the investigation that preceded this inspection uncovered no physical evidence to suggest the crime of marijuana consumption had been committed by either occupant of the vehicle. The search of Appellant's person produced no incriminating evidence, the search of the passenger yielded no incriminating evidence, and the drug dog did not alert on the vehicle. To further cement the error in Respondent's argument, Vinesett himself testified at the suppression hearing that he knew the passenger compartment of the vehicle contained no evidence of marijuana consumption before he initiated the search of the trunk (R. p. 42, lines 2-6).

As a result, Respondent's claim that Vinesett had probable cause to search the trunk of the vehicle based on the "odor of marijuana and the indicia of drugs [sic] usage in the passenger compartment," (Resp't's. Br. at 23), cannot be correct. The only way Vinesett's search can possibly withstand constitutional scrutiny is if this Court determines that one

officer's unverified allegation that he smelled burnt marijuana – without any physical evidence to corroborate his claim – is sufficient to provide probable cause to conduct a warrantless search of a vehicle under the Carroll Doctrine.

II. To hold that the odor of burnt marijuana alone is sufficient to give an officer probable cause to search the trunk of a vehicle would strip of meaning the requirement that an officer must consider the totality of the circumstances when making a probable cause determination.

Vinesett was the only law enforcement officer to allege he smelled burnt marijuana coming from the passenger compartment of Appellant's vehicle, although two other officers (and a trained drug dog) were also present at the scene. Further, the lone officer that claimed to detect burnt marijuana is even inconsistent with respect to the basic issue of when he first detected that odor.¹ Finally, the fact that Vinesett waited thirteen full minutes to claim he smelled burnt marijuana defies all logic because the odor of marijuana was ostensibly the reason he decided to extend the traffic stop (R. p. 33, lines 11-14). Based on the above recitation of the facts, Appellant respectfully submits that to permit an officer to search a vehicle based on nothing more than the uncorroborated odor of burnt marijuana would tremendously chill the Fourth Amendment rights of all South Carolinian motorists.

Respondent has made much of what appears to be a trend towards holding that the odor of burnt marijuana alone provides probable cause to search a vehicle without a warrant. (Resp't's. Br. at 18-19). Specifically, Respondent would have this Court adopt the approach taken by Maryland in Wilson v. State, 174 Md. App. 434, 921 A.2d 881 (Md. Ct. Spec. App.

¹ Vinesett claimed in his incident report that he smelled marijuana at the beginning of the traffic stop. But this does not square at all with (1) his actions during the course of the investigation or (2) his on-scene statement that he could have "sworn" he smelled marijuana when the passenger exited the vehicle. It should be no surprise that Vinesett's suppression hearing testimony was consistent with his written report, but that incident report does not accurately reflect the events as they actually unfolded.

2007). In Wilson, an officer observed a traffic infraction and executed a traffic stop. As the officer spoke with Wilson about the reason for the stop, he detected the odor of burnt marijuana. Id. at 438, 921 A.2d at 883.² He then ordered Wilson out of the car and proceeded to search the passenger compartment of the vehicle. Id., 921 A.2d at 883. The search of the passenger compartment produced no physical evidence that Wilson had consumed marijuana, but the officer still searched the trunk and found six and one-half pounds of marijuana inside a suitcase. Id., 921 A.2d at 883.

The Maryland court refused to create what it viewed as a "safe harbor" for drugs within a vehicle, and held "[t]he odor of burnt marijuana emanating from a vehicle provides probable cause to believe that additional marijuana is present elsewhere in the vehicle." Id. at 454, 921 A.2d at 892. Appellant respectfully disagrees with this position and the similar argument advanced in Respondent's brief. This approach is erroneous because it permits an officer to disregard the totality of the circumstances and to instead rely exclusively on one alleged odor. If an officer claims he smells burnt marijuana during a traffic stop, but a search of the vehicle's passenger compartment reveals no evidence of marijuana consumption, a search of each occupant of the vehicle produces no paraphernalia, and a drug dog fails to alert on the vehicle, then under the totality of the circumstances, it does not follow that the officer has still has probable cause to extend the scope of the search to the trunk.

South Carolina requires its law enforcement officers to utilize the totality of the circumstances test. State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (S.C. 1987). This test requires an officer to make "a justifiable determination, based upon the totality of

² As one would expect, the officer in Wilson addressed the odor of burnt marijuana with the driver immediately. As noted earlier, Vinesett waited thirteen minutes to mention the smell of burnt marijuana. He did not even mention the odor to his fellow officers when he had every opportunity and motivation to do so.

the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime . . . has been committed and incriminating evidence is involved." State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 2003).

Based on this standard, Vinesett conducted his search without probable cause because, at the time he made the conscious decision to open the trunk, his fourteen minute detention of Appellant produced no evidence of marijuana consumption. This is evidenced by the facts that Vinesett: (1) found no contraband on the person of Appellant or his passenger, (2) uncovered no contraband inside the passenger compartment of the Ford, and (3) the drug dog failed to alert on any part of the vehicle. Thus Vinesett neither had a "practical, nontechnical probability" that Appellant had consumed marijuana nor any "incriminating evidence" against the Appellant. All he had was his uncorroborated and unproven allegation that he smelled burnt marijuana with nothing to back it up. This evidence does not rise to the level of probable cause to conduct a warrantless search.

III. United States v. Ross does not stand for the proposition that an officer may search the trunk of a vehicle based on the alleged odor of burnt marijuana alone.

Appellant also disputes Respondent's contention that United States v. Ross, 456 U.S. 798 (1982), permits an officer to search the entire vehicle based on the alleged odor of burnt marijuana alone. (Resp't's Br. at 23). Contrary to this assertion, the Ross Court did not go so far as to provide an officer with blanket permission to search an entire vehicle because he or she claims to detect burnt marijuana (or any other odor). In Ross, officers received reliable information that Ross was selling narcotics out of his vehicle, a burgundy Chevrolet Malibu. Id. at 800. Later, the officers observed the Malibu being driven by a person matching Ross's description. When the officers stopped the Malibu and determined that Ross was indeed the

driver, they opened the trunk without a warrant, searched through a bag located inside the trunk, and found heroine powder. Id. at 801.

The Ross Court determined the search was proper and held the "scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." Id. at 824. To give this seemingly abstract statement real-life application, the Court explained as follows.

Probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, [and] probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. at 824. Post-Ross, several jurisdictions have had occasion to consider cases that involve the alleged odor of burnt marijuana emanating from a vehicle's passenger compartment and determined an uncorroborated odor of marijuana alone does not give an officer probable cause to conduct a search the trunk or make an arrest.³

Of particular noteworthiness is a recent case decided by the Massachusetts Supreme Court. In that case, the Commonwealth argued (pursuant to Ross) that "a search is permitted

³ See, e.g. State v. Farris, 109 Ohio St.3d 519, 849 N.E.2d 985 (Ohio 2006) (light odor of marijuana alone does not provide an officer with probable cause to search the trunk); State v. Schmadeka, 136 Idaho 595, 38 P.3d 633 (Idaho Ct. App. 2001) (odor of marijuana alone is not necessarily sufficient to justify a search of the trunk of a vehicle); State v. Grande, 164 Wash.2d 135, 187 P.3d 248 (Wash. 2008) ("The court's multifactor analysis does not support the State's argument here that marijuana odor itself is a basis for probable cause to arrest a passenger."); Com. v. Garden, 451 Mass. 43, 883 N.E.2d 905 (Mass. 2008) ("The search of the Honda's trunk in this case exceeded the permissible scope of the search because [the officer] could not reasonably have believed that the source of the smell of burnt marijuana would be found in the trunk."); State v. Morse, 331 Mont. 300, 132 P.3d 528 (Mont. 2006) ("Morse correctly points out that the odor of marijuana alone does not constitute probable cause.").

whenever officers have probable cause to believe there is contraband in a car.” Com. v. Garden, 451 Mass. 43, 51, 883 N.E.2d 905, 914 (Mass. 2008). The court disagreed and labeled the Commonwealth’s interpretation of Ross as “too broad.” Id., 883 N.E.2d at 914. Instead, the court concluded that “nothing . . . suggests that where automobiles are concerned, the general rule that officers limit their search to those locations where the objects of the search might reasonably be found is somehow suspended.” Id., 883 N.E.2d at 914.

In addition, the Tenth Circuit has addressed a case where the officer claimed to smell burnt marijuana but the subsequent search of the vehicle’s passenger compartment revealed no contraband. The court determined that “[t]he smell of burnt marijuana would lead a person of ordinary caution to believe the passenger compartment might contain marijuana. U.S. v. Nielsen, 9 F.3d 1487, 1491 (10th Cir. 1993). However, the court refused to broaden the scope of the search to the trunk because, “under the circumstances [] there was [not] a fair probability that the trunk contained marijuana, or that a disinterested magistrate would so hold if asked to issue a search warrant. Id. (emphasis in original).

In South Carolina, the automobile exception to the Fourth Amendment’s warrant requirement allows an officer to forego the requirement of seeking out a magistrate to issue a search warrant but only when the warrantless search “is based on facts that would justify the issuance of a warrant.” State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007). Appellant respectfully contends that the alleged odor of burnt marijuana, standing alone and without any corroborating evidence of criminal activity, should not be sufficient to provide an officer with probable cause to search the trunk of a vehicle. As the above cases illustrate, it is not reasonable for an officer to conclude that evidence of recent marijuana consumption would be found inside the locked trunk of a vehicle that, prior to the traffic stop, had been

traveling at a high rate of speed. The better policy is to require an officer to first confirm the presence of a suspicious odor prior to conducting a warrantless search of a vehicle's trunk.

IV. Respondent appears to confuse the reasonable suspicion standard with the standard for probable cause.

In its brief, Respondent argues that the odor of burnt marijuana and the presence of the hollowed-out cigars provided Vinesett with a reasonable suspicion of criminal activity sufficient to prolong the length of the detention. Respondent then argues the exact same evidence also provided Vinesett with probable cause to search. Respondent's argument fails for two reasons. First, probable cause is a higher standard than reasonable suspicion, so the same evidence should not be allowed to satisfy both standards. Second, an accurate view of the sequence of events as they actually unfolded reveals that, at the time Vinesett chose to search the vehicle, he actually possessed little or no evidence from which to conclude that his search would reveal incriminating evidence. As the length of the detention progressed, Vinesett's suspicions should have dissipated because the investigation continually revealed less and less evidence that Appellant had committed any crime related to the consumption of illegal drugs.

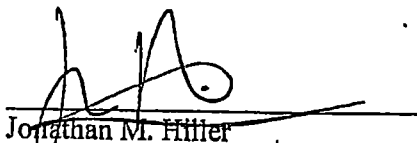
Respondent's brief attempts to justify the length of the detention by arguing that Vinesett's reasonable suspicion of criminal activity allowed him to extend the duration of the traffic stop (Resp't's. Br. at 8). According to Respondent's analysis, the officer's reasonable suspicion of criminal activity came from "the smell of marijuana and additional factors as well, including the presence of hollowed-out cigars and loose tobacco in the passenger compartment . . ." (Resp't's. Br. at 14). Later in the brief, Respondent asserts that the odor of burnt marijuana "along with additional indicators of criminal activity" gave Vinesett probable cause to search Appellant's vehicle (Resp't's. Br. 22).

Either Respondent's reasonable suspicion argument is unnecessary or the probable cause argument is incorrect because the prolonged detention yielded no further evidence of criminal conduct until the warrantless search of the trunk occurred. Appellant respectfully contends that the latter argument is incorrect. The alleged odor of marijuana together with the observation of potential contraband should at most create a reasonable suspicion of criminal activity. See State v. Odom, 376 S.C. 330, 334, 656 S.E.2d 748, 751 (Ct. App. 2007) (stating that the strong odor of marijuana coupled with the observation of a partially smoked cigar provided the officer with a reasonable suspicion of the existence of drugs). Thus, Vinesett never had probable cause to search Appellant's trunk, and the results of that search should have been suppressed as fruit of the poisoned tree.

Respectfully Submitted,



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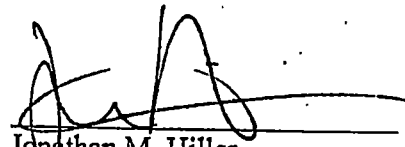
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ATTORNEYS FOR THE APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability, this Reply Brief of the Appellant complies with Rule 211(b), SCACR, and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

Dated: March 17, 2010



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kenneth Darrell Morris, II, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4872
Heard March 8, 2011 – Filed August 17, 2011
Withdrawn, Substituted and Refiled November 2, 2011

AFFIRMED

Johnny Gardner and Jonathan Hiller, both of
Conway, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General Mark R. Farthing, all of
Columbia; and Solicitor Kevin S. Brackett, of York,
for Respondent.

THOMAS, J.: During a traffic stop, police officers searched the trunk of a car driven by Kenneth Darrell Morris, II, and discovered a quantity of ecstasy pills. A large amount of marijuana was also found during the subsequent inventory search. During his trial for trafficking ecstasy and possession of marijuana with intent to distribute, Morris unsuccessfully moved to suppress the drugs as fruit of an illegal search. A jury convicted Morris of both charges. Morris appeals the trial court's decision not to suppress the drugs. We affirmed the decision in a published opinion filed August 17, 2011. We now issue this amended opinion to emphasize the outcome of this appeal is governed by our standard of review.

FACTS

On the afternoon of February 6, 2008, Morris and a passenger, Brandon Nichols, were traveling northbound on I-77 in York County in a rented Ford 500. While riding in an unmarked police cruiser, Officer L.T. Vinesett, Jr., and Constable W.E. Scott noticed the Ford following a truck too closely. The vehicle exited the interstate and proceeded to a gas station and rest area, where Officer Vinesett initiated a traffic stop.

Officer Vinesett approached the passenger side of the vehicle, where Nichols was sitting. Officer Vinesett asked for Morris's license and registration, and after a rental agreement was produced, Officer Vinesett noticed the car was rented to Nichols and Morris was not an authorized driver. Speaking through the passenger window, Officer Vinesett instructed Morris to exit the car, and as Morris opened the driver's side door, Officer Vinesett noticed hollowed Phillies Blunts¹ in the center console and blunt tobacco in the center console and on the floorboard.

To avoid the rain, Officer Vinesett had Morris sit in the front passenger seat of the police cruiser while he inquired about Morris's travel plans. Morris told him Nichols rented the vehicle the previous day in Greensboro, North Carolina, and they were on their way back from visiting some women

¹ Phillies Blunts are a brand of inexpensive, American-made cigars. The tobacco inside a Phillies Blunt is often emptied in order to roll a marijuana cigar.

in Atlanta, Georgia. Officer Vinesett also asked Morris whether Morris had a drug record. Morris disclosed he had been arrested for a marijuana offense when he was a minor.

Officer Vinesett returned to the Ford, and outside the presence of Morris, Nichols stated the pair was returning from a basketball game in Atlanta. Officer Vinesett consequently radioed for a nearby canine unit to bring a drug dog to the scene. He explained that he pulled over two men who offered conflicting stories of their plans, one of whom had a previous drug conviction, and that he had seen loose blunt tobacco in the car, suggesting they had been rolling marijuana in the blunts.

While waiting for the drug dog, Morris consented to a search of his person, and the search yielded no contraband. Morris then went to the restroom under Constable Scott's supervision. Officer Vinesett asked Nichols to exit the car and requested consent to search Nichols's person. Nichols consented, and again, the search yielded no contraband.

Moments later, Officer Gibson arrived with a drug dog. While Morris was still in the restroom, Officer Vinesett and Officer Gibson asked Nichols for permission to search the car, saying the officers would use the drug dog if consent was not given. Nichols refused to give consent, so Officer Gibson walked the dog around the car twice. The dog did not alert on either lap around the car and was returned to the police cruiser. Officer Vinesett again asked Nichols for consent to search the car, and Nichols again refused. Roughly thirteen minutes after the stop had been initiated, Nichols stated he "was ready to go."

Shortly thereafter, the officers held a conversation away from Morris and Nichols. Officer Vinesett returned to the Ford, leaned through the still open window of the car, and looked around for a few moments. He then returned to Nichols, who was still seated in the police cruiser, and stated that he could have "swor[n he] could smell some marijuana." Nichols responded that Officer Vinesett was confusing the smell of the Black & Mild he recently smoked with marijuana and he neither had marijuana, nor was he a marijuana smoker.

At that time, Officer Vinesett and Officer Gibson returned to the car and searched the passenger compartment. The emptied blunts contained no marijuana or marijuana residue, and the officers found no other evidence of contraband in the passenger compartment. However, Officer Vinesett searched the trunk and eventually found a plastic bag containing 393 ecstasy pills inside a gift box. The men were arrested slightly over fourteen minutes after the initiation of the stop. The car was impounded, and a subsequent inventory search of the car yielded nearly a half pound of marijuana hidden under the spare tire.

At trial, Morris moved to suppress the drug evidence, arguing the officers illegally extended the scope and length of the traffic stop and probable cause did not support the search of the trunk. During the suppression hearing, Officer Vinesett testified that, although he failed to mention it to Constable Scott at the scene or Officer Gibson when he requested the dog, he smelled the odor of burnt marijuana when he first approached the car. The trial court denied the motion. It specifically discounted what Officer Vinesett classified as Morris's and Nichols's "inconsistent stories." However, it found Officer Vinesett's testimony regarding the smell of marijuana credible, and it held the length and scope of the stop was reasonable in light of the circumstances. Additionally, the trial court found that even though the dog did not alert on the car, the marijuana smell, loose tobacco, and hollowed blunts, in light of the officer's knowledge and experience, amounted to probable cause to search the entire car, including the trunk. This appeal followed.

ISSUES ON APPEAL

- I. Did the trial court err in finding the officers had reasonable suspicion to expand the scope and length of the traffic stop?
- II. Did the trial court err in finding the search of the trunk was supported by probable cause?

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, our standard of review is limited to the following:

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). "[T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).²

² Tindall articulated the standard of review subsequently repeated in Wright. However, Tindall's ensuing discussion included a footnote explaining that this standard of review requires a two-part analysis: (1) whether the record supports the trial court's factual findings and (2) whether those factual findings establish reasonable suspicion or probable cause. See Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5 ("While we acknowledge that we review under the deferential 'any evidence' standard, this Court still must review the record to determine if the trial judge's ultimate determination is supported by the evidence. In short, we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall." (citation omitted)).

I. Scope and Length of the Stop

Morris argues the trial court erred in failing to suppress the drugs because (1) Officer Vinesett's testimony he smelled burnt marijuana during the detention lacks credibility and (2) Officer Vinesett unlawfully extended the traffic stop.

Upon a lawful traffic stop, an officer "may order the driver to exit the vehicle ... [,] request a driver's license and vehicle registration, run a computer check, and issue a citation." State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citations omitted). However, a lawful traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005); see also Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). The extension of a lawful traffic stop is permitted if (1) the encounter becomes consensual or (2) the officer has a reasonable, articulable suspicion of other illegal activity. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion requires "a particularized and objective basis" that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). It "is something more than an inchoate and unparticularized suspicion or hunch." State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006). Therefore, in determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. Id.

Initially, we must reject Morris's first argument. Regardless of whether we believe Officer Vinesett's testimony that he smelled marijuana, the trial court found that testimony to be credible. The appellate court's task in reviewing the trial court's factual findings on a Fourth Amendment issue is simply to determine whether any evidence supports the trial court's findings. See State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("This Court's scope of review is determined by our State constitution which limits our scope of review in law cases to the correction of errors of law. In

criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." (citations omitted)).

We must also reject Morris's second argument. Under the facts of this case as found by the trial court, we must affirm the trial court's holding reasonable suspicion existed to extend the duration and scope of the stop for a reasonable investigation of drug activity. Officer Vinesett testified he smelled marijuana as he approached the car, and after requesting Morris's license and registration, he learned Morris was not an authorized driver. Cf. State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct. App. 2003) (finding that an officer's detection of the odor of alcohol during a traffic stop justified the extension of the stop based on the reasonable suspicion that open containers were located in the vehicle) (per curiam); see also State v. Odom, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct. App. 2007) (indicating that the sight of Swisher Sweet cigars, the strong odor of marijuana, the defendant's admission he smoked marijuana earlier in the day, and the presence of a gun holster in the back seat amounted to reasonable suspicion of the existence of drugs). Upon stopping the Ford, moreover, Officer Vinesett had the authority to order Morris out of the car, and when he did so, he observed the hollow blunts and loose tobacco, which in his experience indicated drug use. See Pichardo, 367 S.C. at 98, 623 S.E.2d at 847-48 (providing that upon a lawful traffic stop, an officer may order the driver out of the vehicle, "request a driver's license and vehicle registration, run a computer check, and issue a citation"). Thus, Officer Vinesett properly gained reasonable suspicion Morris and Nichols were using drugs, and he was permitted to take reasonable steps to confirm or dispel this suspicion. See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009) (providing that during a traffic stop, "the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity"; "[t]he scope and duration of [this investigative] detention must be strictly tied to and justified by the circumstances that rendered its initiation proper"; and normally, this permits an officer to attempt to obtain information confirming or dispelling the officer's suspicion), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011). He did

so by asking both Morris and Nichols a series of questions, receiving consent to search their persons, and calling in a drug dog.

II. The Search

Morris next argues the trial court erred in declining to suppress the drug evidence as fruit of an illegal search. Morris does not contest Officer Vinesett's search of the passenger compartment, but he argues Officer Vinesett lacked probable cause to search the trunk. We disagree.

The Fourth Amendment prohibits unreasonable searches, and a warrantless search generally is unreasonable. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, the ready mobility of and the lessened expectation of privacy in automobiles endorse an exception to that rule based upon probable cause. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). A probable cause analysis involves the use of a fact-based, objective perspective that requires more than reasonable suspicion of criminal activity:

Probable cause is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place. The principal components of the determination of probable cause will be whether the events which occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.

State v. Brown, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010) (internal citations omitted).

"The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993). Therefore, "[i]f probable cause justifies the [warrantless] search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." United States v. Ross, 456 U.S. 798, 825 (1982); see also State v. Brannon, 347 S.C. 85, 94, 552 S.E.2d 773, 777 (Ct. App. 2001) (Anderson, J., concurring in result only) ("Under the automobile exception, if probable cause exists to justify the warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.").

In this case, the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, "He had probable cause to search." In light of the summary nature of this ruling, we must determine whether the same factual findings that supported the finding of reasonable suspicion also support a determination of probable cause. Emphasizing our deferential standard of review, we determine they do.

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

CONCLUSION

For the aforementioned reasons, the ruling of the trial court is

AFFIRMED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

RECEIVED

SEP 01 2011

SC Court of Appeals

State of South Carolina, ... Respondent,

v.

Kenneth Darrell Morris, II, ... Appellant.

Opinion No. 4872

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Kenneth Darrell Morris, II petitions the Court for rehearing. In support of this Petition, the Appellant submits the following Fourth Circuit Court of Appeals Opinion: United States v. Stephen Gerard Digiovanni, ___ F. 3d ___ (4th Cir. 2011) (Opinion No.10-4417).

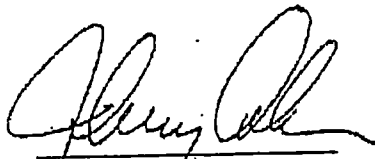
Digiovanni was decided during the pendency of this appeal. The undersigned is informed and believes that Digiovanni is relevant to the issues of the continued detention and the warrantless search of the vehicle in the present case.

Additionally, Appellant respectfully submits that the Court of Appeals opinion misapprehended the facts relative to the officer's allegation that he smelled marijuana and the law regarding probable cause for a warrantless search of an automobile.

Appellant submits that even if the officer smelled burnt marijuana that this fails to establish probable cause to search the trunk. Appellant respectfully submits that probable cause to search would only allow a search where the item might logically be found. *United States v. Ross* 456 U.S. 798 (1982). In the present case, it would not be reasonable to expect to find burnt marijuana in the trunk of the automobile.

Based on the above argument, the undersigned seeks rehearing.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

September 1, 2011

The South Carolina Court of Appeals

The State,

Respondent,

v.

Kenneth Darrell Morris, II,

Appellant.

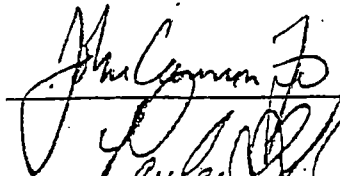
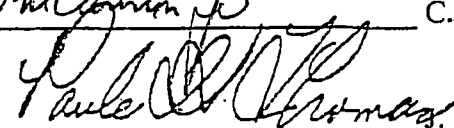
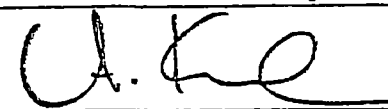
The Honorable John C. Hayes, III
York County
Trial Court Case No.
2008-GS-46-02834
2008-GS-46-02837

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded. Hence, there is no basis for granting a rehearing, and it is ordered that the Petition for Rehearing be denied. The Court hereby withdraws opinion number 4872, filed August 17, 2011, and substitutes the attached opinion to emphasize the outcome of this appeal is governed by our standard of review.

FILED

NOV 1 2011


C.J.

Paul W. Thomas

J.

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

Opinion No. 4872 (S.C. Ct. App. Filed August 17, 2011
Withdrawn, Substituted and Refiled November 2, 2011)

State of South Carolina, ... Respondent,

v.

Kenneth Darrell Morris, II, ... Petitioner

PETITION FOR WRIT OF CERTIORARI

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RULE 226 (d)(1), SCACR, CERTIFICATION

Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals and denied by the Court of Appeals on November 2, 2011.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in affirming the trial court's finding that the officers had reasonable suspicion to expand the scope and length of the traffic stop?
- II. Did the Court of Appeals err in affirming the trial court's finding that the search of the trunk was supported by probable cause?

STATEMENT OF THE CASE

The York County Grand Jury indicted Petitioner on July 3, 2008 for trafficking ecstasy and for possession of marijuana with intent to distribute. The grand jury also indicted a co-defendant, Brandon Nichols, (Nichols) who accepted a plea deal.

During the early afternoon hours of February 6, 2008, Petitioner and Nichols were driving northbound on I-77 through York County, SC. Around 2:00 p.m., Morris exited I-77 to take a brief rest stop at an Exxon gas station (R. p. 8, lines 2-3). As he pulled into the station's parking lot, Officer L.T. Vinesett Jr. (Vinesett) of the York County Highway Interdiction Team (HIT) executed a traffic stop on Morris's vehicle because he had observed Morris commit a traffic infraction on I-77. The time stamp on the camera mounted inside Vinesett's unmarked patrol car reveals the detention began at 14:06:18 p.m. Videotape: Kenneth Morris Traffic Stop (On file with the South Carolina Court of Appeals).

While speaking with Morris, Vinesett saw what he recognized as loose cigar tobacco laying around the center console area of the Ford (R. p. 11, lines 6-7). He also observed some partially-smoked, "hollowed out" cigars in the same vicinity (R. p. 11, line 5). The case summary report he prepared some days later indicates that Vinesett detected the smell of burnt marijuana too (R. p. 30, lines 5-14). But he did not mention this smell to Morris or Nichols. Instead, Vinesett ordered Morris out of the Ford to discuss the traffic violation (R. p. 75, lines 23-24). Because of rainy conditions that afternoon, he asked Morris to get into his patrol car (R. p. 13, lines 3-6).

The video recording of the traffic stop reveals that at 14:11:25 p.m. (just over five minutes into the detention) Vinesett ended his interrogation of Nichols, returned to his patrol car, and told Morris to get out. He placed Morris under the custody of Scott, (R. p. 80, lines

23-24), and then called Officer W.R. Gibson (Gibson), a K-9 officer with HIT (R. p. 81, lines 1-2). He asked Gibson to bring a drug dog to the scene (R. p. 35, lines 12-13). To support his request, Vinesett said he had detained two young guys coming from Atlanta (R. p. 81, lines 3-4). He told Gibson that Morris said they made the trip to visit some girls, but Nichols said they went to watch a basketball game. He also mentioned Morris's prior record and said he could see "shake"¹ inside the Ford (R. p. 81, lines 12-14). He never once mentioned the smell of burnt marijuana (R. p. 35-36, lines 24-25, 1-3).

Before the drug dog arrived, Vinesett asked Morris if he still needed to use the restroom (R. p. 82, lines 12-13). Morris responded that he did. But before he allowed Morris to go inside the gas station under Scott's supervision, Vinesett conducted a consensual search of Morris's person. It produced no contraband (R. p. 34, lines 10-17). Once Morris and Scott left the scene, Vinesett asked Nichols to step outside the Ford, and he complied.

He did not mention the smell of burnt marijuana to Nichols at this time; though much later in the stop Vinesett would state that when Nichols exited the Ford, he "swore [he] could smell some marijuana" (R. p. 87, lines 13-14). Instead, Vinesett completely ignored any odor he detected and asked for consent to search Nichols's person (R. p. 83, lines 15-16). After the search failed to reveal any evidence of illegal activity, Vinesett still made no mention of the smell of burnt marijuana. He merely told Nichols that the traffic stop was not over (R. p. 83, lines 22-23).

About the time Vinesett finished his search of Nichols (eight and one-half minutes

¹ The term "shake" is often used as a slang word for small fragments of marijuana. Urban Dictionary, <http://www.urbandictionary.com/define.php?term=shake> (last visited Nov. 23, 2009). However, very early on in the suppression hearing Vinesett readily admitted that he recognized the "shake" he saw in the passenger compartment of the Ford as loose tobacco, not loose marijuana (R. p. 11, lines 5-7).

after he made the stop) Gibson arrived at the gas station with the drug dog. Both officers tried to get consent to search the Ford with the threat that Gibson would get his dog out if Nichols refused to give consent (R. p. 84, lines 10-15). Nichols would not give his consent, so Gibson went for his dog (R. p. 37, lines 8-11).

Gibson walked the dog around the Ford twice with at least one window rolled down (R. p. 48, lines 15-18). The dog did not alert, and he finally gave up and returned the dog to his vehicle (R. p. 37, lines 23-25). Vinesett then asked Nichols for consent to search the Ford a second time. Nichols again refused to consent (R. p. 86, lines 15-18). The officers then engaged in a hushed conversation that Vinesett's microphone failed to capture. After that conversation ended (thirteen minutes into the detention) Vinesett for the first time claimed that he "swore [he] could smell some marijuana," (R. p. 87, lines 13-14), when Nichols exited the Ford. Not once during the detention did Vinesett say that he smelled burnt marijuana as he first approached the Ford, which was his testimony during the suppression hearing (R. p. 10, lines 16-22).

Nichols denied the allegation and attributed any odor Vinesett detected to his Black and Mild cigar (R. p. 87, lines 15-16). The officer walked over to the Ford and searched the center console area of the passenger compartment (R. p. 40-41, lines 22-25, 1-7). He examined the partially-smoked, "hollowed out" cigars he had seen earlier and determined those cigars did not contain any marijuana residue (R. p. 40, lines 5-11). The search of the passenger compartment produced no evidence that either Morris or Nichols had engaged in any criminal activity.

Without any further evidence, Vinesett then engaged in a full-blown search of the Ford. He opened the trunk and proceeded to rifle through the personal belongings it

contained. Inside a gift box, he found a plastic bag containing ecstasy pills (R. p. 16, lines 12-14). An inventory search conducted at the impound lot revealed marijuana hidden under the spare tire. From start to finish, the detention lasted just over fourteen minutes.

The trial began on April 15, 2009 and Petitioner moved to have the evidence suppressed. After conducting a hearing, the trial court denied the motion to suppress the drugs found in the vehicle (R. p. 57, lines 7-8).

On April 17, 2009, the jury returned a verdict of guilty on the charges of trafficking ecstasy on the lesser-included offense of simple possession of marijuana (R. p. 72, lines 22-23; R. p. 73, lines 2-4). the trial court sentenced Petitioner to 30 years in prison (R. p. 74, lines 22-25).

On April 17, 2009, the jury returned a verdict of guilty on the charges of trafficking ecstasy on the lesser-included offense of simple possession of marijuana (R. p. 72, lines 22-23; R. p. 73, lines 2-4). The trial judge sentenced Petitioner to 30 years in prison (R. p. 74, lines 22-25).

Petitioner appealed and after hearing oral arguments on March 8, 2011, the Court of Appeals affirmed. Petitioner timely sought rehearing on September 1, 2011, and on November 2, 2011 the Court of Appeals issued its order denying the Petition for Rehearing.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's finding that the officers had reasonable suspicion to expand the scope and length of the traffic stop.

The Fourth Amendment of the Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend IV. This constitutional protection extends to the use of automobiles. “[A]n automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of ‘reasonableness’ upon the exercise of discretion by [law enforcement officers].” State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). South Carolina courts have provided our officers with abundant guidance on what constitutes the reasonable exercise of discretion as they perform their law enforcement duties.

The decision to stop a vehicle is reasonable per se when an officer has probable cause to believe a traffic violation has occurred. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009) (citing Whren v. U.S., 517 U.S. 806 (1996)). “In carrying out the stop, an officer ‘may request a driver’s license and vehicle registration, run a computer check, and issue a citation . . .’” State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (quoting U.S. v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998)). But, prolonging the stop to engage in further questioning is “‘beyond the scope of the [] stop and . . . illegal unless the officer has a reasonable suspicion of a serious crime.’” Id. (quoting Sullivan, 138 F.3d at 131). Thus, even if an officer suspects that a person, who has been lawfully detained for a traffic violation, could be engaged in criminal activity, he or she cannot prolong the stop without “‘a particularized and objective basis’ that would lead [the officer] to suspect [the person] of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct.

App. 1997) (quoting U.S. v. Cortez, 449 U.S. 411 (1981)).

When an officer conducts a traffic stop after he or she observed a traffic infraction occur, that officer “may briefly detain the vehicle and its occupants . . .” Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (emphasis in original) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). During a typical traffic stop the officer may ask to see the driver’s license and vehicle registration, run a computer check, and issue a traffic citation.² Williams, 351 S.C. at 598, 571 S.E.2d at 707 (quoting Sullivan, 138 F.3d at 131). But the detention “must be temporary and last no longer than necessary to effectuate the purpose of the stop.” Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion).

In the typical case, after an officer has “fulfilled” the purpose for the initial traffic stop, the detention may only be extended if the officer has an objectively reasonable suspicion of illegal activity or if the encounter becomes consensual. State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 847-48 (S.C. Ct. App. 2005). In affirming the trial court’s denial of Petitioner’s motion to suppress the evidence, the Court of Appeals disagreed with Petitioner’s arguments that (1) Officer Vinesett’s testimony that he smelled burnt marijuana during the detention lacks credibility and (2) Officer Vinesett unlawfully extended the traffic stop.

As an initial matter, the Court of Appeals rejected Petitioner’s first argument based on the scope of review: “Regardless of whether we believe Officer Vinesett’s testimony that he smelled marijuana, the trial court found that testimony to be credible.” It is also significant

² The United States Supreme Court has held that law enforcement officers may even utilize drug detection techniques during a lawfully conducted traffic stop. Illinois v. Caballes, 125 U.S. 834 (2005). However, the Court also cautioned “a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” Id. at 837.

that the Court of Appeals amended opinion in this case emphasizes that the outcome of the appeal is governed by the standard of review.

Petitioner respectfully contends that the Court of Appeals misapprehended the standard of review in this case in two ways. First, the scope of review as set forth in Tindall requires the court to determine whether the record supports the lower courts assumed findings and whether those facts support a finding that the officer had reasonable suspicion or probable cause. State v. Tindall, 388 S.C.518, 698 S.E. 2d 203 (2010). Second, even using a deferential standard of review, the evidence in the case is clearly wrong.

Although the trial court accepted Vinesett's testimony that he smelled burnt marijuana during the traffic stop, (R. p. 59, lines 12-14), this Court is not bound by the trial court's factual finding on that point if it was clearly erroneous. See State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (defining the appropriate standard of review in Fourth Amendment cases); State v. Maybank, 352 S.C. 310, 318, 573 S.E.2d 851, 855 (Ct. App. 2002) ("[T]his Court is bound by the trial court's factual findings unless they lack evidentiary support or are clearly erroneous"). Appellant would respectfully urge this Court to examine all the evidence on the record under the appropriate standard of review. Then, after a thorough review of the video recording of the stop contrasted against Vinesett's testimony during the suppression hearing, to conclude the trial court's factual finding that Vinesett smelled burnt marijuana during the stop lacks evidentiary support.

Vinesett may have had some level of suspicion about drug activity on which he based his decision to extend the duration of the traffic stop. But the record contains two completely dissimilar versions of how that detention actually unfolded – and what those suspicions really were. One version is found in the video recording of the stop that played in open court (R. p.

46, lines 15-16). The other is found in Vinesett's case summary report, which was entered as a court's exhibit for the defense during the suppression hearing, (R. p. 24, line 15-16), and the testimony he gave during the suppression hearing.

No matter what revisionist account of the traffic stop Vinesett created in the case summary report he prepared in the days following the search, the incontrovertible video evidence is that he never once, not even to his fellow officers, breathed a word about the smell of burnt marijuana until he mentioned it to Nichols thirteen minutes into the detention (R. p. 41, lines 2-3; R. p. 87, lines 13-14). Further, the evidence of drug activity that he did vocalize during the traffic stop was insufficient to support a fourteen-minute traffic stop that was only cut short by a warrantless vehicle search.

Vinesett's failure to mention the odor of burnt marijuana is a very strong indication that the smell simply was not present.³ Further, the fact the drug dog failed to alert on the Ford, with the passenger window rolled down, a mere two minutes after Vinesett claimed he smelled marijuana also severely undermines Vinesett's credibility. Finally, the fact that Vinesett never found one shred of physical evidence to corroborate the smell strongly implies that he never detected the odor of burnt marijuana. For all these reasons the Court of Appeals erred in affirming, the trial court's finding that Vinesett smelled burnt marijuana during the traffic stop.

With respect to the extension of the traffic stop, Petitioner respectfully submits the Court of appeals erred in affirming the trial court's findings.

³ As a point of stark contrast to Vinesett's reaction to the odor he alleged to detect, compare another officer's reaction to the smell of marijuana. "When [the officer] returned to his patrol car with Ross's license and registration, he immediately told [his partner] that he had smelled marijuana in Ross's car and intended to investigate further, with her assistance. His subsequent conversation with Ross confirmed his suspicion that there was contraband in the car." United States v. Ross, 300 Fed. App'x. 386, 390 (6th Cir. 2008) (unreported decision).

The Court of Appeals, using the facts as found by the trial court, affirmed noting that the following reasons gave Vinesett reasonable suspicion that Petitioner and his codefendant were using drugs: Officer Vinesett testified he smelled marijuana; Petitioner was not an authorized driver; Vinesett observed hollow blunts and loose tobacco, which in his experience indicated drug use. Therefore, he was permitted to take reasonable steps to confirm or dispel this suspicion. The court further noted that Officer Vinesett "did so by asking Morris and Nichols a series of questions, receiving consent to search their persons, and calling in a drug dog."

Petitioner respectfully submits that the Court of Appeals either overlooked or misapprehended the fact that these three actions should have dispelled any reasonable suspicion of criminal behavior. Morris and Nichols answered the officers' questions. There was nothing suspicious about the rental agreement (that Morris was not an authorized driver). The officers' search of Morris and Nichols did not lead to any contraband (R. p. 34, lines 10-17) and the drug dog did not alert (R. p. 37, lines 23-25).

The Court of Appeals also overlooked the fact that the officers further extended the stop to search the passenger compartment of the car and found no contraband (R. p. 40-41, lines 22-25).

The question becomes to what point is Officer Vinesett permitted to continue the detention before he has dispelled a reasonable suspicion? Petitioner respectfully submits that the Court of Appeals either overlooked or misapprehended the fact that as the length of the detention progressed, Officer Vinesett's suspicions should have dissipated because his investigation continuously revealed less and less evidence of any crime related to the use of drugs.

At the conclusion of the suppression hearing, the trial court ruled that the “detention was not excessively long” (R. p. 58, line 23). For some reason, the trial judge’s analysis focused on the moment Vinesett got Nichols out of the Ford (before the drug dog arrived) so he could search him. When he issued his ruling, the trial judge stated:

I find the stop and detention, while it was about – I have got about thirteen minutes, based on the times I was jotting down, but I believe it was only about five minutes before they – from 14:07 to 14:12. I believe about 14:12 was when they got the passenger out and indicated he smelled marijuana, or at least I have got a statement about that within five minutes, but I think the detention was not excessively long. I don’t know that is any bright-line test for what is or is not a reasonable time

(R. p. 58, lines 1-25). Simply restated, the trial court’s logic appears to be as follows.

Vinesett got Nichols out of the Ford about five minutes into the detention. Then, about five minutes later, Vinesett said he smelled burnt marijuana back when Nichols exited the Ford.⁴ Thus, the length of the detention was not excessive.

The Court of Appeals overlooked the argument that the lower court’s analysis amounted to clear error. As a threshold matter, the trial court’s time calculations are inaccurate. The time stamp on the on-board camera that captured the stop reveals that Vinesett got Nichols out of the Ford a little over eight minutes after the traffic stop began. Five minutes into the stop, Vinesett was speaking with Nichols, but he was doing so to compare Nichols’s story to the one Morris had just provided. Then, from the inception of the stop, it took Vinesett a full thirteen minutes to allege that he smelled burnt marijuana. In the intervening time, the search of Morris and Nichols occurred, the drug dog failed to alert on the Ford, and the plain view search of the cigars in the passenger compartment did not corroborate the presence of that odor. Only after all the time it took to conduct the above

⁴ For reasons unstated, the trial judge either refused or neglected to credit Vinesett’s claim that he smelled burnt marijuana from the moment he approached the Ford.

investigation transpired did Vinesett allege he smelled burnt marijuana and search the Ford's trunk.

While he was supposed to be addressing a traffic infraction, Vinesett searched both Morris and Nichols, called a drug dog to the scene, and conducted a plain view search of the Ford's passenger compartment. Each extension of the detention provided no evidence that either Nichols or Morris had engaged in criminal activity, but the duration of the detention still continued to escalate. Accordingly, Petitioner request that this Court grant this Petition, review the Court of Appeals' decision, permit oral argument, and issue a decision finding the record did not support the trial court's determination that Vinesett had objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring so as to justify extending the scope and length of the detention in this case.

II. The Court of Appeals erred in affirming the trial court's finding that search of the trunk was supported by probable cause.

Though the Fourth Amendment will certainly permit an officer to expand the scope and duration of a traffic detention provided his or her reasonable suspicion of criminal activity is particularized and objective, a warrantless search of a vehicle will only withstand constitutional scrutiny if it is supported by probable cause. Ornelas v. U.S., 517 U.S. 690, 693 (1996) ("An investigatory stop is permissible . . . if supported by reasonable suspicion, and a warrantless search of a car is valid if based on probable cause.") (internal citations omitted); accord State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) ("Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary [if] the search is based on facts that would justify the issuance of a warrant . . .").

An officer has the probable cause needed to conduct a warrantless search when the "circumstances known to [the] officer are such as to warrant a person of reasonable caution

[to believe] that a search would reveal incriminating evidence.” State v. Moultrie, 316 S.C. 547, 552 fn. 3, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting U.S. v. Thornton, 733 F.2d 121, 127 (D.C. Cir. 1984). As the United States Supreme Court has explained, “the question is whether the totality of the circumstances is sufficient to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place.” Ornelas, 517 U.S. at 696 (emphasis supplied).

Petitioner contended at trial and on appeal that there was no probable cause for the officers to search the trunk of the vehicle that Petitioner was driving and that Petitioner’s motion to suppress the evidence should have been granted.

Although the trial court did not make separate rulings to support its finding of probable cause, the Court of Appeals affirmed:

In light of the summary nature of this ruling, we must determine whether the same factual findings that supported the finding of reasonable suspicion also support a determination of probable cause. Emphasizing our deferential standard of review, we determine they do.

The Court of Appeals based its holding on the lower courts specific findings that:

[I]n Officer Vinesett’s experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana.

Petitioner respectfully submits that the Court of Appeals erred in finding that these facts gave rise to probable cause. Even if those findings of fact made by the lower court did amount to reasonable suspicion, those suspicions were dispelled before Officer Vinesett opened the trunk. at the time he opened the trunk, Vinesett did not even have a reasonable suspicion that the Petitioner was engaged tin the use of marijuana. Therefore, Petitioner contends that Vinesett could not have had probable cause.

The Record on Appeal is clear on the fact that Vinesett never found any physical evidence of marijuana consumption inside the passenger compartment of the vehicle (R. p. 41, lines 2-10). Furthermore, the investigation that preceded this inspection uncovered no physical evidence to suggest the crime of marijuana consumption had been committed by either occupant of the vehicle. The search of Appellant's person produced no incriminating evidence, the search of the passenger yielded no incriminating evidence, and the drug dog did not alert on the vehicle. More importantly Vinesett himself testified at the suppression hearing that he knew the passenger compartment of the vehicle contained no evidence of marijuana consumption before he initiated the search of the trunk (R. p. 42, lines 2-6).

South Carolina requires its law enforcement officers to utilize the totality of the circumstances test. State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (S.C. 1987). This test requires an officer to make "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime . . . has been committed and incriminating evidence is involved." State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 2003).

Based on this standard, Vinesett conducted his search without probable cause because, at the time he made the conscious decision to open the trunk, his fourteen minute detention of Appellant produced no evidence of marijuana consumption. This is evidenced by the facts that Vinesett: (1) found no contraband on the person of Appellant or his passenger, (2) uncovered no contraband inside the passenger compartment of the Ford, and (3) the drug dog failed to alert on any part of the vehicle. Thus Vinesett neither had a "practical, nontechnical probability" that Appellant had consumed marijuana nor any

“incriminating evidence” against the Appellant. All he had was his uncorroborated and unproven allegation that he smelled burnt marijuana with nothing to back it up. This evidence does not rise to the level of probable cause to conduct a warrantless search.

The Court of Appeals also disagreed with Petitioner’s contention that even if Officer Vinesett had probable cause to search the vehicle, he did not have probable cause to search the trunk. Petitioner respectfully contends this was in error and the Court of appeals misapprehended United States v. Ross, 456 U.S. 798 (1982).

The Ross Court held the “scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” Id. at 824. To give this seemingly abstract statement real-life application, the Court explained as follows.

Probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, [and] probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. at 824. Post-Ross, several jurisdictions have had occasion to consider cases that involve the alleged odor of burnt marijuana emanating from a vehicle’s passenger compartment and determined an uncorroborated odor of marijuana alone does not give an officer probable cause to conduct a search the trunk or make an arrest.⁵

⁵ See, e.g. State v. Farris, 109 Ohio St.3d 519, 849 N.E.2d 985 (Ohio 2006) (light odor of marijuana alone does not provide an officer with probable cause to search the trunk); State v. Schmadeka, 136 Idaho 595, 38 P.3d 633 (Idaho Ct. App. 2001) (odor of marijuana alone is not necessarily sufficient to justify a search of the trunk of a vehicle); State v. Grande, 164 Wash.2d 135, 187 P.3d 248 (Wash. 2008) (“The court’s multifactor analysis does not support the State’s argument here that marijuana odor itself is a basis for probable cause to arrest a passenger.”); Com. v. Garden, 451 Mass. 43, 883 N.E.2d 905 (Mass. 2008) (“The

In the present case, Vinesett ignored the totality of the circumstances known to him when he searched the Ford, and he certainly was unable to corroborate his alleged detection of burnt marijuana. Neither the search of Morris nor the search of Nichols revealed any corroborating evidence of marijuana use; the drug dog failed to alert on any part of the Ford, and Vinesett examined the "hollowed out" cigars and concluded they contained no marijuana residue before he made the decision to search the Ford's trunk.⁶ Thus, to find Vinesett's search supported by probable cause only because he claimed to smell burnt marijuana would be to ignore the greater weight of the evidence and the totality of the circumstances known to him during the traffic stop.

But because not one of the investigative techniques he employed revealed any physical evidence of contraband, Vinesett was left without sufficient facts "to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place." Ornelas, 517 U.S. at 696. In the end, he acted without probable cause when he searched the Ford's trunk, so the trial court should have suppressed the fruit of the search.

Accordingly, Petitioner requests that this Court grant this Petition, review the Court of Appeals' decision, permit oral argument, and issue a decision finding the record did not support the trial court's determination that Vinesett had probable cause to search the trunk of the automobile.

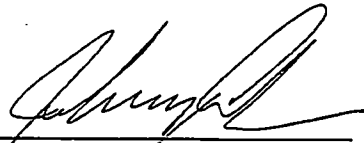
search of the Honda's trunk in this case exceeded the permissible scope of the search because [the officer] could not reasonably have believed that the source of the smell of burnt marijuana would be found in the trunk."); State v. Morse, 331 Mont. 300, 132 P.3d 528 (Mont. 2006) ("Morse correctly points out that the odor of marijuana alone does not constitute probable cause.").

⁶ Furthermore, the record contains no evidence that Morris or Nichols appeared to be under the influence of marijuana or any other controlled substance. Neither does it contain any evidence that the other officers at the scene (Gibson and Scott) also smelled burnt marijuana.

CONCLUSION

For the above reasons, Petitioner respectfully requests this Court grant this Petition, review the decision of the Court of Appeals in this matter, permit oral argument, and issue a decision reversing the trial court's decision denying Petitioner's motion to suppress the evidence obtained during the search of the automobile Petitioner was driving.

Respectfully Submitted,



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January 3, 2012

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

State of South Carolina, ... Respondent,

v.

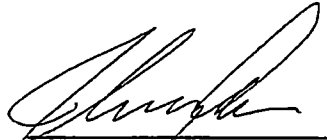
Kenneth Darrell Morris, II. Petitioner

PROOF OF SERVICE

The undersigned attorney hereby certifies that, on this 3rd day of January, 2012, a true copy of the Petition for a Writ of Certiorari in the above referenced case has been served upon Mark Farthing, Esq., via U.S. Mail at the address below with sufficient first class postage attached.

Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

I further certify that all parties required by the South Carolina Rules of Appellate Procedure have been served.



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January 3, 2012

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The Court of Appeals properly affirmed the trial judge's denial of Morris' suppression motion because, under the totality of the circumstances, the officers had a reasonable articulable suspicion justifying the extension of the traffic stop after detecting several suspicion factors indicative of drug activity, including the odor of marijuana, and had probable cause to search anywhere in the vehicle where drugs might be found, including in the trunk of the vehicle where the narcotics were discovered, based on the indicators of criminal activity detected by the officers. 8

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<u>State v. Corley</u> , 383 S.C. 232, 679 S.E.2d 187 (Ct. App. 2009).	10
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<u>United States v. Sokolow</u> , 490 U.S. 1 (1989).	12
<u>Whren v. United States</u> , 517 U.S. 806 (1996).	10
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<u>United States v. Jeffus</u> , 22 F.3d 554 (4th Cir. 1994).	14
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<u>United States v. Jones</u> , 44 F.3d 860 (10th Cir. 1995).	14
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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals properly affirmed the trial judge's denial of Morris' suppression motion because, under the totality of the circumstances, the officers had a reasonable articulable suspicion justifying the extension of the traffic stop after detecting several suspicion factors indicative of drug activity, including the odor of marijuana, and had probable cause to search anywhere in the vehicle where drugs might be found, including in the trunk of the vehicle where the narcotics were discovered, based on the indicators of criminal activity detected by the officers.

STATEMENT OF THE CASE

Procedural History

Petitioner Kenneth Darrell Morris, II was arrested following a traffic stop during which illegal narcotics were discovered. On July 3, 2008, the York County grand jury indicted Morris for trafficking in Ecstasy and possession of marijuana with intent to distribute. On April 15, 2009, a jury trial was commenced in the York County court of general sessions with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of trial, the jury convicted Morris of trafficking in Ecstasy and the lesser-included offense of simple possession of marijuana. The trial judge sentenced Morris to concurrent terms of imprisonment of thirty years for the trafficking conviction and one year for the simple possession conviction while fining Morris \$50,000 for the trafficking conviction. Morris then filed and perfected an appeal.

Subsequently, following oral argument, the Court of Appeals unanimously affirmed Morris' conviction. State v. Morris, Op. No. 4872 (S.C. Ct. App. filed Aug. 17, 2011). Morris petitioned the Court of Appeals for rehearing, and the petition was denied. However, the Court of Appeals withdrew its previous opinion and filed a substituted opinion. State v. Morris, Op. No. 4872 (S.C. Ct. App. re-filed Nov. 2, 2011). Morris then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

On the afternoon of February 6, 2008, Officer L.T. Vinesett, Jr., a member of the York County Sheriff's Office's highway interdiction team, was patrolling I-77 in York County with a state constable when he observed a Ford 500, which he knew to be a common rental car, following another vehicle too closely. (R. pp. 6-7). In response, Officer Vinesett drove towards the Ford. (R. p. 7). As the officer drew closer, the driver

of the Ford quickly exited the interstate and drove onto another highway. (R. p. 7).

Officer Vinesett followed the Ford to a gas station, activated his blue lights, and initiated a traffic stop. (R. pp. 7-8). The traffic stop began at approximately 2:06 p.m. (State's Ex. # 16 (Videotape of the Traffic Stop)).

After stopping the vehicle, Officer Vinesett approached from the passenger's side and observed two occupants inside. (R. p. 8). He asked the driver for his license and registration, and Petitioner Kenneth Darrell Morris, II, the driver of the vehicle, produced a North Carolina driver's license while Brandon Nichols, the passenger, produced a rental agreement for the Ford. (R. pp. 8-9). The rental agreement indicated Nichols rented the vehicle and was the only authorized driver. (R. pp. 9-10).

When Officer Vinesett initially approached the Ford, the passenger window of the vehicle was open. (R. p. 10). Through the open window, Officer Vinesett noticed an odor of marijuana emanating from inside. (R. p. 10). Additionally, he observed hollowed-out cigars and loose tobacco scattered all over the interior of the car, including on the center console and on the floorboards of the vehicle. (R. p. 11). Officer Vinesett took note of the hollowed-out cigars because his experience taught him that drug users commonly hollow out cigars and replace the tobacco inside with marijuana to allow the users to covertly smoke marijuana while creating the appearance they are only smoking cigars. (R. p. 11).

After obtaining Morris' license, Officer Vinesett asked Morris to step out of the vehicle and move to the front passenger seat of the officer's patrol car in order to avoid the rain. (R. p. 10; p. 13). Officer Vinesett spoke with Morris in the patrol car at approximately 2:08 p.m. (State's Ex. # 16). During his conversation with Officer Vinesett, Morris claimed he and Nichols were returning from a trip to Atlanta and had

gone to visit some girls. (R. p. 13). Morris also revealed he had a prior criminal record resulting from drug charges. (R. p. 32; p. 78; State's Ex. # 16). After speaking with Morris, Officer Vinesett left Morris in the patrol car and went to speak with Nichols. (R. p. 14). Officer Vinesett's conversation with Nichols took place at approximately 2:10 p.m. (State's Ex. # 16). Outside of the presence of Morris, Nichols offered a different account of their activities, claiming he and Morris were returning from Atlanta and had gone to see Morris' cousin play basketball. (R. p. 14). Nichols then exited the Ford, and Officer Vinesett again noticed the odor of marijuana coming from the vehicle. (R. p. 14).

After speaking with both Morris and Nichols, Officer Vinesett requested the assistance of a canine unit at approximately 2:12 p.m. (R. p. 35; State's Ex. # 16). At that time, Officer Vinesett also continued checking Morris' license while completing the initial purpose of the traffic stop. (R. p. 32). Officer Vinesett noted he was still working on the traffic stop at approximately 2:13 p.m. (State's Ex. # 16). Then, shortly before 2:14 p.m., Officer Vinesett frisked Morris with consent, allowed him to go to the restroom while accompanied by the state constable, and informed him the traffic stop was not yet complete. (R. pp. 34-35; State's Ex. # 16).

Thereafter, the requested canine officer arrived on the scene. (R. p. 14). At approximately 2:15 p.m., which was roughly nine minutes into the stop, the officers asked Nichols for consent to search the vehicle, and Nichols refused. (State's Ex. # 16). In the rainy weather conditions, the police dog walked around the exterior of the car at approximately 2:16:30 p.m. (R. p. 15; State's Ex. # 16). After walking around the vehicle, the dog did not alert to the presence of drugs. (R. p. 15). However, Officer Vinesett noticed the police dog was not focusing on the vehicle, was shaking off rain.

water, and was looking around. (R. p. 15). The officer concluded the dog did not appear to like being out in the rainy conditions. (R. p. 15).

Subsequently, Officer Vinesett informed Nichols he smelled marijuana in the car during the stop, but Nichols denied any marijuana had been smoked. (State's Ex. # 16). At approximately 2:20 p.m., which was roughly fourteen minutes into the stop, Officer Vinesett briefly searched the interior of the car without consent. (R. p. 16; pp. 40-41; State's Ex. # 16). The search of the interior lasted less than thirty seconds. (State's Ex. # 16). Officer Vinesett then looked into the trunk of the vehicle and, within less than thirty seconds, located a gift box with a sandwich bag inside containing 393 Ecstasy pills. (R. pp. 16-17; pp. 40-41; State's Ex. # 16). Following the discovery of the narcotics, both men were quickly arrested. (R. p. 17). Subsequently, approximately one-half pound of marijuana was discovered hidden under the spare tire during an inventory search of the vehicle. (R. p. 66). The drugs recovered from the vehicle were analyzed and conclusively identified as illegal narcotics. (R. p. 70; p. 71). Morris was then indicted for trafficking in Ecstasy and possession of marijuana with intent to distribute, and he proceeded to trial. (R. pp. 91-94).

At the outset of trial, Morris moved to suppress the recovered drugs as the fruits of an illegal search and an unlawful detention, and the trial judge conducted a suppression hearing on Morris' motion.¹ (R. p. 4). During the suppression hearing, Officer Vinesett recounted the details of the traffic stop. (R. p. 6). Specifically, Officer Vinesett testified he noticed the smell of marijuana coming from the vehicle when he initially approached the vehicle. (R. p. 10). After smelling the odor of marijuana, Officer Vinesett stated he believed there was cause to extend the traffic stop and question Morris

¹ A recording of the traffic stop was played during the suppression hearing. (Tr. p. 46; State's Ex. # 16).

and Nichols. (R. pp. 32-33). Furthermore, he testified about the hollowed-out cigars and loose tobacco he observed and the inferences he drew from those items. (R. p. 11).

Officer Vinesett also testified about the police dog's failure to alert on the vehicle and explained why he did not believe that lack of an alert was dispositive due to the dog's unfocused demeanor in the rain. (R. p. 15).

On cross-examination, Officer Vinesett testified the average traffic stop without any indicators of criminal activity usually lasted approximately five minutes. (R. p. 20). He further acknowledged he did not include references to any indicators of the presence of drugs in his initial police report, but he identified the indicators he observed at the scene, which primarily consisted of the hollowed-out cigars and the smell of marijuana.² (R. p. 23; p. 29). Additionally, he conceded the drug dog's failure to alert was a fair indicator that no drugs were present. (R. p. 38). However, he explained his experience enabled him to distinguish between the smell of marijuana and the smell of cigars and testified he concluded that, based on his training and the indicators he observed, someone was or had been smoking marijuana in the rental car. (R. p. 31; pp. 43-44).

At the conclusion of the hearing, defense counsel argued the extension of the traffic stop was not supported by a reasonable articulable suspicion and no probable cause existed to search the trunk of the vehicle. (R. pp. 51-56). After considering the arguments from counsel, the trial judge denied the motion to suppress. (R. p. 57). The trial judge found the detention was reasonable and the scope of the stop was not exceeded. (R. p. 57). He ruled the stop was not excessively long, and the police dog's

² In addition to Officer Vinesett's testimony, Commander Marvin Brown, the supervisor of the York County Sheriff's Office's narcotics unit, also testified during the suppression hearing. (R. p. 49). Commander Brown indicated Officer Vinesett did not include any indicators in his initial incident report based on unit policies. (R. p. 49). He noted case summaries prepared after the incident report contained the reasons for the stop and all indicators. (R. p. 50). Officer Vinesett included the indicators leading to the search in his case summary of Morris' stop. (R. pp. 50-51).

failure to alert to the presence of drugs did not require the officers to terminate the detention. (R. pp. 58-59). He also ruled the subsequent inventory search was valid. (R. p. 60). The trial judge based his rulings on the smell of marijuana, the training of the officer, and the testimony regarding the hollowed-out cigars and tobacco observed in the vehicle. (R. p. 57). While noting the inconsistencies in Morris and Nichol's stories may have heightened the officer's suspicions, the trial judge declined to rely on those inconsistencies in reaching his decision. (R. pp. 61-62). The trial judge also found the search was supported by probable cause. (R. p. 62). Thereafter, Morris was convicted of trafficking in Ecstasy and simple possession of marijuana, and he appealed.

On appeal, the Court of Appeals affirmed Morris' convictions. State v. Morris, 395 S.C. 600, 603, 720 S.E.2d 468, 469 (Ct. App. 2011). Regarding the reasonableness of the detention, the Court held the officer had reasonable suspicion to extend the length and scope of the traffic stop after the officer detected the odor of marijuana and observed hollowed-out cigars and loose tobacco in Morris' vehicle. Id. at 608, 720 S.E.2d at 471-472. In reaching that conclusion, the Court specifically noted the trial judge found Officer Vinesett's testimony regarding the smell of marijuana to be credible. Id. at 607-608, 720 S.E.2d at 471. Regarding the reasonableness of the search, the Court instructed:

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id. at 610, 720 S.E.2d at 473.

ARGUMENT

The Court of Appeals properly affirmed the trial judge's denial of Morris' suppression motion because, under the totality of the circumstances, the officers had a reasonable articulable suspicion justifying the extension of the traffic stop after detecting several suspicion factors indicative of drug activity, including the odor of marijuana, and had probable cause to search anywhere in the vehicle where drugs might be found, including in the trunk of the vehicle where the narcotics were discovered, based on the indicators of criminal activity detected by the officers.

Morris contends the Court of Appeals erred in affirming the trial judge's denial of his suppression motion. Morris maintains the officers did not have a reasonable articulable suspicion justifying the expansion of the scope and length of the traffic stop and did not have probable cause to search the trunk of the vehicle Morris was driving. To the contrary, the officers possessed a reasonable articulable suspicion of criminal activity under the totality of the circumstances after detecting several suspicious factors consistent with drug activity, including the odor of marijuana. Furthermore, based on the detection of the odor of marijuana along with the other suspicious factors, the officers had probable cause to search anywhere in the vehicle where marijuana might be found, including in the trunk. Accordingly, the trial judge properly denied Morris' motion to suppress the drugs discovered during the search of the car, and the Court of Appeals correctly affirmed the trial judge's ruling after finding it was supported by the evidence. Morris' petition for a writ of certiorari should be denied.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57,

66, 528 S.E.2d 661, 666 (2000) (“[W]e will review the trial court’s ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling.”). The reviewing court may conduct its own review of the record to determine whether the trial judge’s ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

ANALYSIS

A. Reasonableness of the Detention

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”).

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). While the Fourth Amendment requires a stop to be reasonable under the circumstances, a traffic stop is reasonable per

se when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). The reasonableness of a stop or detention “is measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 39 (1996). “[A] minor traffic violation arrest will not be rendered invalid by the fact it was a ‘mere pretext for a narcotics search.’ ” State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191-192 (Ct. App. 2009) (citations omitted). “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” Whren v. United States, 517 U.S. 806, 813 (1996).

Once a lawful traffic stop is initiated, an officer may order the driver out of the vehicle and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”)

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and

the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Id.

Reasonable suspicion consists of “ ‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.’ ” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’ ” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781).

The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). In order for an officer to have reasonable suspicion regarding the presence of illegal drugs, the officer is required to

have a particularized and objective basis arising from the totality of the circumstances that would lead an individual to suspect drugs are located in a lawfully stopped vehicle. State v. Banda, 371 S.C. 245, 254, n. 4, 639 S.E.2d 36, 41 (2006).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 ("Courts must look at the 'cumulative information available' to the officer . . . and not find a stop unjustified based merely on a 'piecemeal refutation of each individual' fact and inference[.]" (citations omitted)). Instead, all of the circumstances of the stop must be considered as a whole to determine whether the officer's actions were reasonable in light of all of the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) ("[J]ust as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion."). "In applying the concept of reasonable suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.' " Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). Thus, the presence of several factors seemingly consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

In the case sub judice, the traffic stop and detention of Morris was objectively reasonable under the totality of the circumstances, and any further extension of the scope of the stop was supported by reasonable articulable suspicion. Initially, Officer Vinesett unquestionably had probable cause to initiate the traffic stop after observing Morris

commit a traffic infraction. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred."). Thereafter, during the course of the ensuing traffic stop, Officer Vinesett developed a reasonable articulable suspicion based on the suspicious factors he detected, which permitted the officer to extend the scope and duration of the stop.

Most critically, Officer Vinesett detected the odor of marijuana and observed hollowed-out cigars and loose tobacco scattered throughout the vehicle shortly after initiating the traffic stop. Based on his training and experience, Officer Vinesett perceived the smell of marijuana and the hollowed-out cigars to be strong indicators that marijuana might be hidden in the vehicle. See State v. Odom, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct. App. 2007) (holding the officer had a reasonable articulable suspicion of the existence of drugs after smelling a strong odor of marijuana, observing a cigar on the dashboard, hearing Odom admit he has smoked marijuana earlier, and seeing an empty holster in vehicle); State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct. App. 2003) (holding the officer was justified in extended the scope of a traffic stop after smelling the odor of alcohol). Furthermore, although not relied upon by the trial judge in his analysis of the stop, Morris and his passenger presented inconsistent stories to the officers about their trip, Morris was driving a rental car, which has been recognized as an indicator of drug activity, and Morris and his passenger stated they were travelling from Atlanta, which has been recognized as a known drug hub. See Wallace, 392 S.C. at 55, 707 S.E.2d at 455 (finding inconsistent stories between a driver and passenger, third-party vehicle ownership, and Atlanta's status as a drug hub to be relevant factors in establishing a reasonable articulable suspicion of drug activity); Provet, 391 S.C. at 504,

706 S.E.2d at 518 (considering the fact third-party vehicle ownership is commonly connected with drug trafficking in finding the officer had reasonable suspicion to extend a traffic stop). However, even without consideration of those additional factors, the odor of marijuana and the presence of the hollowed-out cigars established a reasonable articulable suspicion of criminal activity under the totality of the circumstances. Therefore, Officer Vinesett was justified in expanded the scope of his investigation and the length of the traffic stop.

Morris' challenge to the reasonableness of the stop primarily focuses on the length of the detention and the credibility of Officer Vinesett's testimony regarding the odor of marijuana. The length of the detention from the moment of the activation of the officer's blue lights to the time of Morris' arrest was approximately fifteen minutes. Cf. Provet, 391 S.C. at 499, 706 S.E.2d at 516 (finding the initial traffic stop was not unreasonably extended even if the officer's questioning was unrelated to the purpose of the traffic stop where the entire stop lasted less than eleven minutes). While there is no firm rule as to the appropriate length of a stop and detention, Morris' stop was arguably reasonable in length notwithstanding the existence of reasonable suspicion to expand the scope of the stop. See United States v. Sharpe, 470 U.S. 675, 683 (1985) (finding a twenty-minute detention during an investigatory traffic stop was objectively reasonable); see also Branch, 537 F.3d at 338 ("We begin with the basic fact that much of Branch's 30-minute detention was justified by the 'ordinary inquiries incident' to a routine traffic stop." (citations omitted)); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); see, e.g., United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory

stop to be reasonable). Regardless, under the totality of the circumstances, the officer was justified in extending the stop based upon reasonable suspicion even if the scope of the initial traffic stop was exceeded.

Regarding the credibility of Officer Vinesett's testimony, the trial judge was in the best position to weigh the credibility of the testimony and evidence presented during the suppression hearing. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be the arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."). Critically, the trial judge found Officer Vinesett's unrefuted testimony in regards to the odor of marijuana to be credible, and the trial judge's factual findings are entitled to substantial deference on appeal. See Baccus, 367 S.C. at 48, 625 S.E.2d at 220 ("This Court is bound by the trial court's factual findings unless they are clearly erroneous.").

Applying the appropriate deferential standard of review, the evidence and testimony presented during the suppression hearing established Officer Vinesett conducted the traffic stop in a reasonable manner and developed a reasonable articulable suspicion of criminal activity before extending the stop. See Segura v. United States, 468 U.S. 796, 806 (1984) ("By its terms, the Fourth Amendment forbids only 'unreasonable' searches and seizures."). The trial judge properly determined the traffic stop was reasonable under the totality of the circumstances, and his ruling was supported by the

evidence. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”). The Court of Appeals properly affirmed the trial judge’s ruling. Morris’ petition for a writ of certiorari should be denied.

B. Validity of the Search

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment’s warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have recognized several exceptions to the warrant requirement, including the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981).

The automobile exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under this exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995). “If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.” Weaver, 374 S.C. at 320, 649 S.E.2d at 482. Furthermore, the rationale for the search does not disappear even after the vehicle is immobilized or taken into police custody. State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008).

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all of its contents potentially containing the object of the search. Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (“We hold that police officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.”). “The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause.” United States v. Ross, 456 U.S. 798, 823 (1982). “The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

Probable cause is “a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved.” Bultron, 318 S.C. at 332, 457 S.E.2d at 621. “Probable cause may be found somewhere between suspicion and sufficient evidence to convict.” State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). However, the probable cause standard does not require absolute certainty. In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007).

Numerous courts have considered the issue of the level of significance that the existence of an odor of marijuana has to a probable cause determination. The overwhelming majority position in both state and federal courts is the detection of an odor of marijuana establishes probable cause justifying a warrantless search. See State v.

Zamora, 114 Ariz. 75, 77, 559 P.2d 195, 197 (Ariz. Ct. App. 1976) (finding an officer's detection of the faint odor of marijuana during a traffic stop, unverified by the other officers at the scene, provided probable cause to search the entire vehicle and trunk); State v. Betz, 815 So. 2d 627, 633 (Fla. 2002) ("Our conclusion here aligns this Court with a number of our sister jurisdictions in which courts have concluded that the smell of burnt marijuana, in combination with other circumstances, leads to law enforcement officers' possession of probable cause to search the entirety of a motor vehicle."); State v. Folk, 238 Ga. App. 206, 208, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999) (holding an officer's detection of the odor of burning marijuana alone constituted probable cause for a warrantless vehicle search); People v. Kazmierczak, 461 Mich. 411, 416, 605 N.W.2d 667, 669 (Mich. 2000) ("Like the majority of courts in other states and jurisdictions, we are persuaded that detection of the odor of either fresh marijuana or marijuana smoke, standing alone, provides probable cause for a warrantless search."); Cowan v. Mississippi Bureau of Narcotics, 2 So.3d 759, 766 (Miss. Ct. App. 2009) (finding an officer had probable cause to search after smelling marijuana upon opening a passenger door); State v. Smith, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (N.C. Ct. App. 2008) (finding an officer's detection of the odor of marijuana established probable cause to search even in a situation where no drugs were ever recovered); see also United States v. Johns, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband."); see, e.g., Andrea Levinson Ben-Yosef, Annotation, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana – Federal Cases, 188 A.L.R. Fed. 487 (2003) ("The majority of courts have found that the odor of marijuana alone supplies probable cause for a warrantless search."); Andrea Levinson Ben-Yosef, Annotation, Validity of

Warrantless Search of Motor Vehicle Based on Odor of Marijuana – State Cases, 114

A.L.R. 5th 173 (2003) (“The majority of courts have found that the odor of marijuana alone supplies probable cause for a warrantless search.”).

Additionally, the Fourth Circuit Court of Appeals has addressed whether the odor of marijuana can establish probable cause. In United States v. Haley, 669 F.2d 201, 202 (4th Cir. 1982), an officer smelled marijuana on the defendants and inside of a vehicle lawfully stopped for speeding. Before getting a search warrant, the officer unlocked the trunk, opened a large garbage bag, and discovered marijuana. Id. at 203. The car was later searched after the officer procured what he believed to be a warrant, and over two hundred pounds of marijuana were found in the trunk. Id. The Court of Appeals found “[s]ufficient probable cause arises when the officer smells marijuana inside the vehicle[.]” and reversed the district court’s suppression of the drugs. Id. at 203-204.

Thereafter, in United States v. Scheetz, 293 F.3d 175 (4th Cir. 2002), the Fourth Circuit Court of Appeals again addressed the issue of whether probable cause can arise from the smell of marijuana. The defendant in Scheetz was stopped for performing an illegal u-turn directly after passing a sign notifying drivers of an impending police checkpoint. Id. at 182-183. An officer smelled marijuana emanating from the vehicle, and the car was searched. Id. at 183. The search revealed marijuana in a knapsack found in the vehicle. Id. The Court of Appeals affirmed the denial of the defendant’s suppression motion, holding: “Once the car was properly stopped and the narcotics officers smelled marijuana, the narcotics officers properly conducted a search of the car.” Id. at 184 (citing United States v. Morin, 949 F.2d 297, 300 (10th Cir. 1991)).

Although not controlling, the Maryland Court of Special Appeals addressed both probable cause based on the odor of marijuana and the scope of a resulting search in

Wilson v. State, 174 Md. App. 434, 921 A.2d 881 (Md. Ct. Spec. App. 2007). In Wilson, an officer stopped Wilson's rental vehicle for speeding. Id. at 438, 921 A.2d at 883.

While talking with Wilson, the officer smelled the odor of burnt marijuana and decided to search the vehicle. Id. During the search of the passenger compartment, the officer found no evidence of a crime. Id. However, a subsequent search of the trunk revealed over six pounds of marijuana. Id. After a thorough review of United States Supreme Court cases along with federal and state cases, the Maryland Court of Special Appeals concluded the odor of burnt marijuana emanating from a vehicle provides probable cause to believe marijuana is located in the vehicle. Id. at 454, 921 A.2d at 892. In affirming the suppression of the recovered marijuana, the Court instructed:

To adopt appellant's argument, the trunk, or any other area outside of the passenger compartment, becomes a safe harbor for the transportation of drugs for both users and traffickers who use drugs. We are not persuaded that a Fourth Amendment reasonableness analysis dictates that result. Probable cause is a "flexible, common-sense standard" to be applied in a "practical" and "non-technical" manner.

Id. at 455-456, 921 A.2d at 893 (citations omitted).

Similarly, the South Carolina Supreme Court has previously addressed whether the detection of the odor of marijuana alone can equate to probable cause. In State v. Lane, 271 S.C. 68, 70, 245 S.E.2d 114, 115 (1978), a delivery man noticed an odor coming from two packages that were scheduled to be delivered to Lane's store. The delivery man contacted the police, an officer detected the odor of marijuana coming from the packages, the smaller package was opened, and marijuana was discovered. Id. The officers obtained a warrant, allowed the delivery of the packages to be completed, and subsequently arrested Lane. Id. at 71, 245 S.E.2d at 115. At trial, the trial judge refused to admit the package opened without a warrant, but he allowed the admission of the

second package. Id. at 71, 245 S.E.2d at 115-116. In determining whether the drugs recovered in the search of the second package were properly admitted, the Supreme Court considered whether the warrant to search the second package was independently supported by probable cause without relying on the knowledge obtained by opening the first package. Id. at 71, 245 S.E.2d at 116. The Court held: "From the record it is evident that the odor emanating from the packages alone was a sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana." Id. at 72, 245 S.E.2d at 116.

In the case at bar, the officers had probable cause to search Morris' rental vehicle based on the totality of the circumstances. Most significantly, Officer Vinesett testified he smelled the odor of marijuana emanating from the car. The detection of the odor of marijuana coupled with the discovered of the hollowed-out cigars, which are commonly used to conceal marijuana use, established probable cause to search anywhere in the vehicle where marijuana might be hidden. Furthermore, Morris and Nichols offered inconsistent explanations for the purpose of their trip, and Morris was driving a rental vehicle he was not authorized to drive. Although the officer's detection of the odor of marijuana alone established a probable cause basis to conclude marijuana was hidden in the vehicle, the additional indicators of criminal activity coupled with the detection of the odor of marijuana provided Officer Vinesett with grounds to find the existence of "a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621.

Morris' challenge to the reasonableness of the search focuses primarily on his contention that Officer Vinesett's suspicion that the crime of "marijuana consumption"

had been committed was allegedly dispelled before he searched the trunk. Initially, after Officer Vinesett detected the odor of burnt marijuana in the Ford, he had probable cause to believe the occupants of the vehicle were or had been in possession of marijuana, which was a necessary prerequisite for them to be able to smoke or consume it. See S.C. Code Ann. § 44-53-370(c) (prohibiting the possession – not consumption – of any controlled substance, including marijuana). Thus, Officer Vinesett had probable cause to look for marijuana in the vehicle. See, e.g., United States v. Lewis, 606 F.3d 193, 198 (4th Cir. 2010) (“When Lewis rolled down his window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the officers possessed probable cause to search the vehicle[.]”); United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004) (“While smelling marijuana does not assure that marijuana is still present, the odor certainly provides probable cause to believe that it is.”). Thereafter, Officer Vinesett observed hollowed-out cigars in the vehicle but did not locate any marijuana in his search of the interior. However, the fact he located hollowed-out cigars, which had not been used to smoke tobacco since the officer noticed it had been removed from them, supported his probable cause belief marijuana was hidden in the vehicle. Furthermore, although the police dog called to the scene failed to alert to the presence of narcotics, that failure did not negate the officer’s probable cause to search based on other indicators of criminal activity he observed, particularly in light of the fact the officer believed the dog’s failure to alert was due to its distracted, unfocused demeanor.³ Instead, the failure to alert was merely one factor to be considered under the totality of the circumstances in

³ Notably, the officer’s belief that the police dog’s failure to alert was not due to an absence of marijuana in the vehicle proved to be correct. Approximately one-half of a pound of marijuana was discovered hidden in the trunk of the vehicle Morris’ was driving. (R. p. 66). Thus, the police dog’s failure to alert was not because there was no marijuana for the dog to detect.

deciding if probable cause existed and, critically, did not require Officer Vinesett to abandon his investigation in light of the other indicators of criminal activity he detected.⁴

Under the automobile exception, the officers were authorized to search anywhere in the vehicle where marijuana could be concealed, including the trunk where the drugs were ultimately discovered. See Ross, 456 U.S. at 825 ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."). Based on detection of the odor of marijuana and the discovery of the hollowed-out cigars, which Officer Vinesett knew to be commonly associated with drug use, in the passenger compartment, the officers had probable cause to believe narcotics could be located in the trunk of the car because it was

⁴ Although the impact of a drug-detection dog's failure to alert has not yet been addressed in South Carolina, the overwhelming majority of courts considering the issue have concluded it is simply a factor to be considered under the totality of the circumstances and does not negate the existence of other factors establishing probable cause. See United States v. Jodoin, 672 F.2d 232, 236 (1st Cir. 1982) ("The dog's failure to react does not, in our view, destroy the 'probable cause' that would otherwise exist. It is just another element to be considered by the magistrate."), abrogated on other grounds by Bloate v. United States, ___ U.S. ___, 130 S. Ct. 1345 (2010); United States v. Frost, 999 F.2d 737, 744 (3rd Cir. 1997) (finding a drug-sniffing dog's failure to alert on a suitcase did not eliminate probable cause justifying a search of the suitcase derived from the other existing factors); United States v. Ramirez, 342 F.3d 1210, 1212-1213 (10th Cir. 2003) ("The factors giving rise to reasonable suspicion in the first place remained unchanged by the positive or negative results of the first sniff test. . . . We will not require investigators to cease an otherwise reasonable investigation solely because a dog fails to alert, particularly when we have refused to require that a dog sniff test be conducted at all."); State v. Sanchez-Loredo, 42 Kan. App. 2d 1023, 1029, 220 P.3d 374, 378 (Kan. Ct. App. 2009) (holding a drug-detection dog's failure to alert to the presence of narcotics did not eliminate the probable cause already established by the other circumstances); State v. Jackson, 42 So. 3d 368, 374 (La. 2010) (finding the officer had probable cause to search the vehicle after detecting the odor of marijuana even though a drug-sniffing dog failed to alert on the vehicle); McKay v. State, 149 Md. App. 176, 188, 814 A.2d 592, 599 (Md. Ct. Spec. App. 2002) ("[A] drug sniffing dog's failure to detect drugs does not automatically negate probable cause. It is, instead, but one factor to be considered in the probable cause determination."); State v. Williamson, 146 N.M. 488, 499, 212 P.3d 376, 387 (N.M. 2009) (finding a drug-detection dog's failure to alert did not negate probable cause for the search where the dog's failure to alert was sufficiently explained under the circumstances); State v. Alexander, 151 Ohio App. 3d 590, 604, 784 N.E.2d 1225, 1236 (Ohio Ct. App. 2003) (holding a drug-sniffing dog's failure to alert on a bag did not negate the other circumstances establishing probable cause and, instead, was a single factor to consider when evaluating the totality of the circumstances); Commonwealth v. Brown, 924 A.2d 1283, 1289 (Pa. Super. Ct. 2007) ("[T]he failure of a trained dog to respond to the alleged presence of narcotics is but one factor to be considered in adjudging whether the totality of the circumstances establishes probable cause. Given the recognized fallibility of the dogs' sense of smell and its vulnerability to confusion by other ambient odors, a dog's failure to alert will not defeat probable cause where other factors, viewed within the totality of the circumstances, continue to support it.").

an area where marijuana could easily be concealed. See Lane, 271 S.C. at 72, 245 S.E.2d at 116 (finding the detection of the odor of marijuana alone established probable cause supporting the issuance of a search warrant); see, e.g., Wilson, 174 Md. App. at 455, 921 A.2d at 892 ("It is not unreasonable for an officer to believe that the odor of burnt marijuana indicates current possession of unsmoked marijuana somewhere inside of the vehicle, including the trunk."). Accordingly, the search of the entire car, including the trunk, was supported by probable cause. Therefore, the search of the passenger compartment and trunk was lawful under the totality of the circumstances, and the search was not unreasonable. See Foster, 269 S.C. at 378, 237 S.E.2d at 591 ("It is only unreasonable searches and seizures that are prohibited.").

The trial judge properly determined the search of the vehicle was supported by probable cause under the totality of the circumstances of the traffic stop. That probable cause, which primarily arose from the officer's detection of the odor of marijuana, was sufficient to warrant a search of the entire vehicle, including the trunk. See Texas v. Brown, 460 U.S. 730, 741 (1983) (instructing probable cause is a flexible, common-sense standard). The trial judge's ruling was supported by the evidence and was entitled to substantial deference on appeal. Because the trial judge's ruling was supported by the evidence, the Court of Appeals correctly affirmed the denial of Morris' suppression motion. See Wright, 391 S.C. at 442, 706 S.E.2d at 326 ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."). Morris' petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

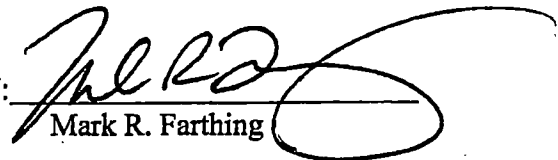
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ATTORNEYS FOR RESPONDENT

April 5, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

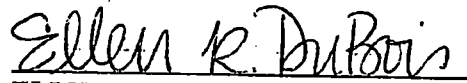
Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Johnny Gardner, Esquire
212 Main Street
Conway, SC 29526

I further certify that all parties required by Rule to be served have been served.
This 5th day of April, 2012.


ELLEN R. DuBOIS
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The Supreme Court of South Carolina

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The State, Respondent,

DEC 19 2013

v.

ATTORNEY GENERAL

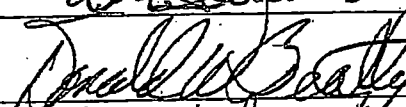
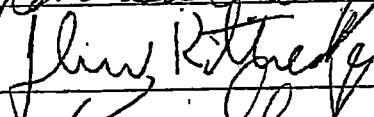
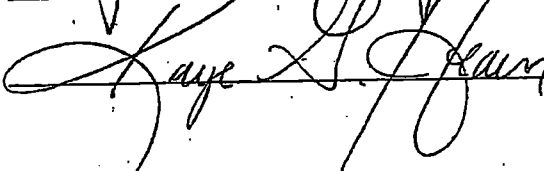
File

Kenneth Darrell Morris, II, Petitioner.

Appellate Case No. 2011-203786

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

December 19, 2013

cc:

The Honorable Jenny Abbott Kitchings
Johnny Gardner, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire

Salley W. Elliott, Esquire
Mark Reynolds Farthing, Esquire
Kevin Scott Brackett, Esquire
David Hamilton

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 31 2014

On Writ of Certiorari to the Court of Appeals
Appeal from York County
John C. Hayes, III, Circuit Court Judge

S.C. Supreme Court

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

v.

Kenneth Darrell Morris, II.....Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUES ON APPEAL

I

The Court of Appeals erred in affirming the trial court's finding that the officers had reasonable suspicion to expand the scope and length of the traffic stop.

II

The Court of Appeals erred in affirming the trial court's finding that search of the trunk was supported by probable cause.

STATEMENT OF THE CASE

A grand jury indicted Petitioner for trafficking ecstasy and possession of marijuana with intent to distribute. A pre-trial motion to suppress drugs found during a traffic stop was denied by the Honorable John C. Hayes, III. Petitioner's jury trial began on April 15, 2009. On April 17, 2009, the jury returned a verdict of guilty on the charges of trafficking ecstasy and on the lesser-included offense of simple possession of marijuana. Petitioner was sentenced to thirty years in prison.

Petitioner filed a timely Notice of Appeal to the Court of Appeals. After hearing oral argument on March 8, 2011, the Court of Appeals affirmed Petitioner's conviction. The Court of Appeals issued a published decision on August 17, 2011 that affirmed the trial court's ruling. Petitioner timely sought rehearing on September 1, 2011. On November 2, 2011 the Court of Appeals issued an amended decision affirming Petitioner's conviction. This Court granted Petitioner's Petition for a Writ of Certiorari on December 19, 2013.

STATEMENT OF THE FACTS

During the afternoon on February 6, 2008, Petitioner and a passenger were driving north on I-77 through South Carolina. They were travelling back to North Carolina from Georgia in a rented Ford 500 with a North Carolina license plate. Though he was not listed as a permitted driver on the rental agreement, Petitioner was driving the car.

Around 2:00 p.m., Petitioner exited the Interstate to stop at gas station. As Petitioner turned into the gas station's parking lot, Officer Vinesett of the York County Highway Interdiction Team activated his blue lights. Vinesett had noticed Petitioner's car while it was still on the Interstate and followed it down the off ramp. Vinesett's initial statement to Petitioner during the traffic stop was that he blue-lighted Petitioner's car at the gas station because it had been following an eighteen-wheel transfer trailer truck too closely on I-77. It

was raining. The time stamp on the video recording of the traffic stop reveals the detention of Petitioner began at 2:06 p.m. (Traffic Stop Video, filed with S.C. Court of Appeals).

While at the vehicle's window speaking with Petitioner, Vinesett saw some loose cigar tobacco scattered around the center console area. (R. p. 11, lines 6-7). He also saw partially-smoked, hollowed out cigars in the same area (R. p. 11, line 5). Later during the detention, he told a fellow officer about the loose tobacco and the cigars when he later called for a K-9 unit. The report that Vinesett prepared several days later says he smelled burnt marijuana when he first made contact with Petitioner's car. (R. p. 30, lines 5-14).

Vinesett did not mention the smell of marijuana to Petitioner or to the passenger. Instead, he asked Petitioner to step out of his vehicle to discuss the traffic violation (R. p. 75, lines 23-24). Because of rainy conditions that afternoon, Vinesett asked Petitioner to get into his patrol car (R. p. 13, lines 3-6). Once inside the unmarked patrol car, they never discussed the stated reason for the traffic stop. After fishing for information from Petitioner about his travel plans, Vinesett left his patrol car to pose similar questions to the passenger.

According to the video recording of the traffic stop, at 2:11 p.m. (a little over five minutes into the detention) Vinesett ended his conversation with the passenger. He returned to his patrol car, and told Petitioner to get out. He placed Petitioner in the custody of another officer at the scene, (R. p. 80, lines 23-24), and called for a K-9 unit over his radio. (R. p. 81, lines 1-2). At this point in the detention, Petitioner was detained outside of the car with the other officer, and the passenger remained inside the car in his seat.

Vinesett supported his request for a drug dog by saying that he had detained two young guys coming up from Atlanta (R. p. 81, lines 3-4). He told the K-9 unit that Petitioner said they made the trip to visit some girls, but the passenger said they went to watch a basketball game. He also mentioned Petitioner's prior record. (He asked Petitioner if he had

been convicted of any drug offenses instead of discussing the reason for the traffic stop).

Vinesett also told the K-9 officer he saw "shake"¹ inside their car. (R. p. 81, lines 12-14).

Though it should have been his strongest justification for calling out a drug dog to the scene,

Vinesett did not mention the smell of burnt marijuana. (R. p. 35-36, lines 24-25. 1-3).

Before the drug dog arrived, Vinesett asked Petitioner if he still needed to use the restroom (R. p. 82, lines 12-13). Petitioner said that he did. Before he allowed Petitioner to go inside the gas station (under the other officer's supervision) Vinesett first conducted a consensual search of Petitioner's person. It produced no contraband (R. p. 34, lines 10-17). Once Petitioner and the other officer left the scene, Vinesett then ordered the passenger to step outside of the car. He complied.

While he did not mention the smell of burnt marijuana to the passenger at this time; later in the stop Vinesett would state that when the passenger exited the car, he "swore [he] could smell some marijuana" (R. p. 87, lines 13-14). However, Vinesett did not react in any way to the odor that he later alleged he detected. Rather he asked for and received consent to search the passenger. (R. p. 83, lines 15-16). After this pat down search failed to reveal evidence of illegal activity, Vinesett still did not mention smelling burnt marijuana. He merely told the passenger that the traffic stop was not over (R. p. 83, lines 22-23).

When Vinesett finished his search of the passenger, eight and one-half minutes had elapsed since the traffic stop and detention began. When the K-9 unit arrived at the gas station, Vinesett and the dog's handler first tried to get consent to search from the passenger. They threatened that they would get the drug dog out if consent to search was refused. (R. p.

¹ Shake is often used as a slang word for small fragments of marijuana. Urban Dictionary, <http://www.urbandictionary.com/define.php?term=shake> (last visited Nov. 23, 2009). But during the suppression hearing Vinesett readily admitted that he recognized the "shake" he saw in the car's console area as loose tobacco, not loose marijuana (App. p. __, lines 5-7).

84, lines 10-15). The passenger refused to provide consent, so the dog handler went to get the drug dog from his vehicle (R. p. 37, lines 8-11). The video recording of the traffic stop shows that it was still raining lightly while the drug dog worked.

The dog walked around the car twice, with at least one window rolled down (R. p. 48, lines 15-18). The dog did not alert, and the handler finally gave up and returned the dog to his vehicle (R. p. 37, lines 23-25). Vinesett then asked the passenger for consent to search the car a second time. The passenger again refused to give consent. (R. p. 86, lines 15-18).

Vinesett and the dog's handler then engaged in a hushed conversation that Vinesett's lapel microphone failed to capture.

Then, after this conversation and thirteen minutes into the detention Vinesett – for the very first time – claimed that he “swore [he] could smell some marijuana,” (R. p. 87, lines 13-14), when the passenger exited the car. Not once during the entirety of the video-recorded detention did Vinesett say that he smelled burnt marijuana as he first approached the car. However, his testimony under oath during the suppression hearing was that he smelled the odor of marijuana when he first came up to the passenger window. (R. p. 10, lines 16-22).

The passenger denied the allegation and attributed the odor to his Black and Mild cigar (R. p. 87, lines 15-16). Vinesett walked over to the car and searched the center console area of the passenger compartment (R. p. 40-41, lines 22-25, 1-7). He examined the partially-smoked, “hollowed out” cigars he had seen earlier and determined those cigars did not contain any marijuana residue (R. p. 40, lines 5-11). At this point in the detention, the pat down search of the car's occupants had produced no evidence of criminal activity; the drug dog search had produced no evidence of criminal activity, and the passenger compartment of the car had produced no evidence that either Petitioner or the passenger had engaged in any criminal activity whatsoever.

Without any further evidence of criminal activity to rely on, Vinesett then engaged in a full-blown search of the car. He opened the car's trunk and proceeded to rummage through the personal belongings it contained. Inside a closed gift box, Vinesett found a plastic bag containing ecstasy pills (R. p. 16, lines 12-14). He immediately arrested Petitioner and the passenger. Later, an inventory search of the car conducted at the impound lot resulted in the discovery of raw marijuana hidden underneath the spare tire.

From start of the traffic stop, to the warrantless search of the car's trunk and the arrest of Petitioner and the passenger, the detention lasted just over fourteen minutes. The detention ended when Vinesett arrested Petitioner following his decision not to seek a search warrant.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's finding that the officers had reasonable suspicion to expand the scope and duration of the traffic stop.

The Fourth Amendment of the Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. This constitutional protection extends to the use of automobiles. "[A]n automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of 'reasonableness' upon the exercise of discretion by [law enforcement officers]." State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). South Carolina courts have provided law enforcement officers with abundant, clear guidance on what constitutes the reasonable exercise of discretion as they perform their duties.

The decision to stop a vehicle is reasonable per se when an officer has probable cause to believe a traffic violation has occurred. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009) (citing Whren v. U.S., 517 U.S. 806 (1996)). "In carrying out the stop,

an officer 'may request a driver's license and vehicle registration, run a computer check, and issue a citation . . .'" State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (quoting U.S. v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998)).

But, prolonging the stop to engage in further questioning is "beyond the scope of the [] stop and . . . illegal unless the officer has a reasonable suspicion of a serious crime." Id. (quoting Sullivan, 138 F.3d at 131). Thus, even if an officer suspects that a person who has been lawfully detained for a traffic violation could be engaged in criminal activity, that officer cannot prolong the stop without "a particularized and objective basis' that would lead [the officer] to suspect [the person] of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting U.S. v. Cortez, 449 U.S. 411 (1981)).

When an officer conducts a traffic stop after observing a traffic infraction, that officer "may briefly detain the vehicle and its occupants . . ." Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (emphasis in original) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)). During a typical traffic stop the officer may ask to see the driver's license and vehicle registration, run a computer check, and issue a traffic citation.² Williams, 351 S.C. at 598, 571 S.E.2d at 707 (quoting Sullivan, 138 F.3d at 131). But the detention "must be temporary and last no longer than necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion). In a typical case, after an officer has achieved the purpose of the initial traffic stop, the detention may only be extended if the officer has an objectively reasonable suspicion of illegal activity or if the encounter becomes consensual. State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 847-48 (S.C. Ct. App. 2005).

² The United States Supreme Court has held that law enforcement officers may even utilize drug detection techniques during a lawfully conducted traffic stop. Illinois v. Caballes, 125 U.S. 834 (2005). However, the Court also cautioned "a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Id. at 837.

In the case presently before this Court, the Court of Appeals found that Vinesett had reasonable suspicion to extend the traffic stop beyond requesting a driver's license and proof of registration and running a computer check. The court pointed to Vinesett's observation of hollow blunts and loose tobacco, Vinesett's claim that he smelled the odor of burnt marijuana and the fact Petitioner was not an authorized driver of a rented car. State v. Morris, 395 S.C. 600, 608, 720 S.E.2d 468, 472 (C.t App. 2011). The Court of Appeals then considered the search itself and found that Vinesett's search of the entire car was supported by probable cause. Morris, 395 S.C at 609, 720 S.E.2d at 472.

The court concluded its opinion by acknowledging "the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, 'He had probable cause to search.'" Morris, 395 S.C. at 610, 720 S.E.2d at 473. When it determined that the facts that supported reasonable suspicion to extend the stop (hollowed-out cigars, the odor of marijuana and an unauthorized driver of a rental car) also provided probable cause for the search, the Court of Appeals explicitly "emphasiz[ed] our deferential standard of review." Id., 720 S.E.2d at 472.

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe [Petitioner] and [the passenger] possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id., 720 S.E.2d at 472.

The Court of Appeals acknowledged this Court's instruction in State v. Tindall that the deferential abuse of discretion standard "does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the

evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (S.C. 2010). In a footnote the opinion noted that Tindall

requires a two-part analysis: (1) whether the record supports the trial court's factual findings and (2) whether those factual findings establish reasonable suspicion or probable cause. See Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5 ("While we acknowledge that we review under the deferential 'any evidence' standard, this Court still must review the record to determine if the trial judge's ultimate determination is supported by the evidence. In short, we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime to justify continued detention of Tindall." (citation omitted)).

Morris, 395 S.C. at 611 n.2, 720 S.E.2d at 473 n.2. (citing Tindall, 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5.

Petitioner contends that the record in this case does not support the trial court's finding that the odor of marijuana was present and further that Vinesett did not have reasonable suspicion to extend the scope and duration of the traffic stop or probable cause to search the car. For the following reasons, both the trial court erred when it did not suppress drugs seized as a result of a warrantless search, and the Court of Appeals erred when it failed to reverse the trial court's ruling.

A. Vinesett's claim that the odor of marijuana was present during the traffic stop lacks credibility.

Although the trial court accepted Vinesett's testimony that he smelled marijuana during the traffic stop as credible, (R. p. 59, lines 12-14), this Court is not bound by the trial court's factual finding on that point if it was clearly erroneous. See State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (defining the appropriate standard of review in Fourth Amendment cases); State v. Maybank, 352 S.C. 310, 318, 573 S.E.2d 851, 855 (Ct. App. 2002) ("[T]his Court is bound by the trial court's factual findings unless they lack evidentiary support or are clearly erroneous"). With all due respect, the use of the word "credible" on the

record should not be a death knell to a Fourth Amendment challenge to the presence of either reasonable suspicion or probable cause.

Petitioner respectfully urges this Court to examine all the evidence on the record – including the video recording of the traffic stop. The video (1) accurately captures the traffic stop and (2) does not harmonize with Vinesett's testimony and written report, both of which aver that he smelled marijuana when he first approached Petitioner's car. The fact that Vinesett claimed to have smelled burnt marijuana during the stop thus lacks evidentiary support. Petitioner respectfully submits that this Court is not bound by that finding and the trial court abused his discretion when it accepted Vinesett's testimony.

Vinesett observed a Ford 500, what he knew to be a common rental car, with North Carolina tags on the Interstate. He followed the car off I-77 and waited until it pulled into a gas station to ticket the driver for committing a traffic infraction. Vinesett certainly had a suspicion about drug activity. When he spoke with Petitioner in his patrol car he asked Petitioner whether he had been arrested for drugs in the past rather than discussing the traffic infraction. (R. p. 75, lines 23-24).

The incontrovertible video and audio evidence is that Vinesett never once, not even to his fellow officer over a secure police channel when calling for a K-9 unit, breathed one word about the smell of burnt marijuana. He first mentioned it to the passenger a full thirteen minutes into the detention (R. p. 41, lines 2-3; R. p. 87, lines 13-14). When he finally mentioned the odor, Vinesett said he "swore" he smelled marijuana when the passenger got out of the car, not when Vinesett first approached the car.

Without alleging the odor of marijuana, Vinesett had no other cause to search. Up until that point, the investigation had produced nothing to confirm Vinesett's suspicion. The pat down of Petitioner and the passenger proved fruitless, the drug dog failed to alert on the

car, and Vinesett knew the cigars in the car's cabin were just cigars. The fact Vinesett did not so much as mention the odor of burnt marijuana until he had nothing else to justify a search is a very strong indication that the smell simply was not present.³

The fact the drug dog failed to alert on the car, with its passenger window rolled down, a mere two minutes after Vinesett claimed he smelled marijuana also severely undermines his credibility. Finally, the fact that Vinesett never found one shred of physical evidence to corroborate the smell suggests that he never detected the odor of burnt marijuana. For all these reasons, the Court of Appeals erred in affirming the trial court's finding that Vinesett claimed to have smelled burnt marijuana during the traffic stop.

B. Vinesett's suspicion dissipated throughout the extended duration of the traffic stop and when he finally searched, he had nothing but the alleged smell of marijuana.

The Court of Appeals, using the facts as found by the trial court, affirmed the denial of the suppression motion. The court noted that the following facts provided Vinesett with a reasonable suspicion that Petitioner and the passenger were using drugs: Vinesett testified he smelled marijuana; Petitioner was not an authorized driver on a rental agreement, and the observed hollow blunts and loose tobacco, which in Vinesett's experience indicated drug use. Morris, 395 S.C. at 608, 720 S.E.2d at 472. Were this Court to discount the odor of marijuana the only suspicion that Vinesett had left is the hollowed-out cigars and the fact Petitioner should not have been driving a vehicle rented by the passenger. The latter (driving a rental without authorization) is simply not evidence of drug activity. The former (hollowed-out cigars) arguably could be considered reasonable suspicion of drug activity.

³ As a point of stark contrast to Vinesett's reaction to the odor he alleged to detect, compare another officer's reaction to the smell of marijuana. "When [the officer] returned to his patrol car with Ross's license and registration, he immediately told [his partner] that he had smelled marijuana in Ross's car and intended to investigate further, with her assistance. His subsequent conversation with Ross confirmed his suspicion that there was contraband in the car." United States v. Ross, 300 Fed. App'x. 386, 390 (6th Cir. 2008) (unreported decision).

Based on the reasonable suspicion Vinesett articulated, the Court of Appeals held that he “properly gained reasonable suspicion [Petitioner] and [the passenger] were using drugs, and he was permitted to take reasonable steps to confirm or dispel this suspicion.” Id. at 608-09, 720 S.E.2d at 472 (emphasis provided). The court further noted that Vinesett actually did just this “by asking [Petitioner] and [the passenger] a series of questions, receiving consent to search their persons, and calling in a drug dog.” Id. at 609, 720 S.E.2d at 472.

Petitioner respectfully submits that the Court of Appeals overlooked the fact that these three actions dispelled any reasonable suspicion of criminal behavior. Petitioner and [the passenger] answered all of the officer’s questions to the point where even the trial judge discounted Vinesett’s claim that their stories were inconsistent. Id. at 606, 720 S.E.2d at 470. Though Petitioner was permitted to drive the car under the rental agreement, nothing was inherently suspicious about the rental agreement. Vinesett’s search of pat down search of Petitioner and the passenger lead to no contraband, (R. p. 34, lines 10-17), and the drug dog did not alert on any part of the car. (R. p. 37, lines 23-25). Further, the Court of Appeals appears to have neglected the fact that Vinesett and a fellow officer also extended the duration and scope of the stop to conduct a cursory search of the passenger compartment of the car and, again, found no contraband (R. p. 40-41, lines 22-25):

The critical Fourth Amendment question is: to what point is Vinesett permitted to continue a detention, already extended in both scope and duration, in order to confirm or dispell a reasonable suspicion? Petitioner respectfully submits that Vinesett’s suspicions should have dissipated as the detention progressed because his investigation continuously revealed less and less evidence of any suspicion related to the use of drugs. At the point where the cursory inspection of the cabin of the car confirmed the hollowed-out cigars had not been used to smoke marijuana, Petitioner contends that any reasonable suspicion held by

Vinesett should have been fully expelled. Possession of marijuana is a necessary prerequisite to smoking marijuana, and once Vinesett realized the partially-smoked, hollowed-out cigars contained no marijuana, his reasonable suspicion should have been dispelled.⁴ Without any more reasonable suspicion of drug activity, Vinesett should have either allowed Petitioner and the passenger to leave (with the passenger driving) or should have returned to the reason for the traffic stop. However, Vinesett searched the car instead.

At the conclusion of the suppression hearing, the trial court ruled that the “detention was not excessively long” (R. p. 58, line 23). For some reason, the trial court’s analysis focused on the moment Vinesett got the passenger out of the car (before the drug dog arrived) so he could conduct a pat down search of his person. When issuing this ruling, the trial court stated that:

I find the stop and detention, while it was about – I have got about thirteen minutes, based on the times I was jotting down, but I believe it was only about five minutes before they – from 14:07 to 14:12. I believe about 14:12 was when they got the passenger out and indicated he smelled marijuana, or at least I have got a statement about that within five minutes, but I think the detention was not excessively long. I don’t know that is any bright-line test for what is or is not a reasonable time

(R. p. 58, lines 1-25). Simply restated, the trial court’s logic appears to be as follows:

Vinesett got the passenger out of the car about five minutes into the detention. Then, about five minutes later, Vinesett said he smelled burnt marijuana back when the passenger exited the car.⁵ Thus, the length of the detention was not excessive.

The Court of Appeals erroneously discounted Petitioner’s argument that the trial court’s analysis amounted to clear error. As a threshold matter, the trial court’s time

⁴ Further, the lack of marijuana inside a partially-smoked cigar should also have dispelled the odor of marijuana that Vinesett “swore” he smelled when the passenger exited the vehicle.

⁵ For reasons unknown, the trial court never credited Vinesett’s claim that he smelled burnt marijuana from the moment he approached the car.

calculations are inaccurate. The time stamp on the on-board camera that captured the stop reveals that Vinesett got the passenger out of the rented car a little over eight minutes after the traffic stop began. Five minutes into the stop, Vinesett was speaking with the passenger, but he was doing so to compare his story to the one Petitioner had just provided. Then, from the inception of the stop, it took Vinesett a full thirteen minutes to allege that he smelled burnt marijuana. In the intervening time, the search of Petitioner and the passenger occurred, the drug dog failed to alert on the car, and the inspection of the cigars in the passenger compartment did not corroborate the presence of the odor of marijuana. Only after all the time it took to conduct the above investigation transpired did Vinesett allege he smelled burnt marijuana and search the car's trunk.

While he was supposed to be addressing a traffic infraction, Vinesett searched both Petitioner and the passenger, called a drug dog to the scene, and conducted an inspection of the car's passenger compartment. Each extension of the detention provided no evidence that either Petitioner or the passenger had engaged in criminal activity, but the duration of the detention still continued to escalate.

If this Court is not inclined to be persuaded by Petitioner's argument that Vinesett's alleged detection of the smell of marijuana lacks credibility and should thus be completely discounted, the fact still remains that every additional step Vinesett took to confirm or dispel his reasonable suspicion also should have dispelled the alleged presence of the odor of marijuana. No marijuana was found in the cabin of the car, nor on the persons of its occupants, and the drug dog failed to detect such an odor with the car's window rolled down. Vinesett simply did not find any evidence to support his suspicions regarding drug usage.

After careful review of the videotape of the traffic stop, Petitioner requests that this Court determine the record does not support the trial court's determination that Vinesett had

an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring so as to justify extending the scope and length of the detention in this case. Simply put, the extended traffic stop yielded no evidence of criminal activity until Vinesett chose to search the car without probable cause or a warrant. To hold otherwise would permit officers to engage in fishing expeditions for criminal activity in violation of the Fourth Amendment.

II. The Court of Appeals erred in affirming the trial court's finding that search of the car was supported by probable cause.

Though the Fourth Amendment will certainly permit an officer to expand the scope and duration of a traffic detention provided his or her reasonable suspicion of criminal activity is particularized and objective, a warrantless search of a vehicle will only withstand constitutional scrutiny if it is supported by probable cause. Ornelas v. U.S., 517 U.S. 690, 693 (1996) ("An investigatory stop is permissible . . . if supported by reasonable suspicion, and a warrantless search of a car is valid if based on probable cause.") (internal citations omitted); accord State v. Weaver, 374 S.C. 313, 320, 649 S.E.2d 479, 482 (2007) ("Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary [if] the search is based on facts that would justify the issuance of a warrant . . .").

An officer has the probable cause needed to conduct a warrantless search when the "circumstances known to [the] officer are such as to warrant a person of reasonable caution [to believe] that a search would reveal incriminating evidence." State v. Moultrie, 316 S.C. 547, 552 fn. 3, 451 S.E.2d 34, 37 (Ct. App. 1994) (quoting U.S. v. Thornton, 733 F.2d 121, 127 (D.C. Cir. 1984). As the United States Supreme Court has explained, "the question is whether the totality of the circumstances is sufficient to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place." Ornelas, 517 U.S. at 696 (emphasis supplied).

A. The search of car was not supported by probable cause.

Petitioner contended at trial and on appeal that no probable cause existed that would allow Vinesett to search the trunk of the car. As noted previously, the Court of Appeals' opinion acknowledged that "the trial court made no separate rulings to support its finding of probable cause beyond those supporting its pronouncement of reasonable suspicion. The trial court simply stated, 'He had probable cause to search.'" Morris, 395 S.C. at 610, 720 S.E.2d at 473. When it determined that the facts that supported reasonable suspicion to extend the stop (hollowed-out cigars, the odor of marijuana and an unauthorized driver of a rental) also provided probable cause for the search, the Court of Appeals explicitly "emphasiz[ed] our deferential standard of review." Id., 720 S.E.2d at 472.

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe [Petitioner] and [the passenger] possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id., 720 S.E.2d at 472.

Petitioner respectfully submits that the Court of Appeals erred in finding that these facts gave rise to probable cause. Even if those findings of fact made by the lower court did amount to reasonable suspicion, each and every one of suspicions had been dispelled before Officer Vinesett opened the trunk of Petitioner's car. At the time he opened the trunk, Vinesett lacked even a reasonable suspicion that the Petitioner was engaged in the use of marijuana. Therefore, Petitioner contends that Vinesett could not have had probable cause sufficient to justify the full-blown search of the packages inside the trunk of the car.

The Record on Appeal is clear on the fact that Vinesett never found any physical evidence of marijuana consumption inside the passenger compartment of the vehicle (R. p. 41, lines 2-10). Furthermore, the investigation that preceded this inspection uncovered no physical evidence to suggest the crimes of marijuana possession or consumption had been committed by either occupant of the vehicle. The search of Petitioner's person produced no incriminating evidence, the search of the passenger yielded no incriminating evidence, and the drug dog did not alert on the vehicle. More importantly Vinesett himself testified at the suppression hearing that he knew the passenger compartment of the vehicle contained no evidence of marijuana consumption before he made the decision to initiate a warrantless search of the trunk (R. p. 42, lines 2-6).

South Carolina law requires officers to use the totality of the circumstances test when determining whether probable cause exists. State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (S.C. 1987). This test requires that an officer make "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime . . . has been committed and incriminating evidence is involved." State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 2003).

Based on this standard as articulated, Vinesett conducted his search without probable cause. He did so because, at the time he made the conscious decision to open the trunk, his fourteen-minute detention of Petitioner produced no evidence of marijuana possession or consumption. This is evidenced by the facts that Vinesett: (1) found no contraband on the person of Petitioner or his passenger, (2) uncovered no contraband inside the passenger compartment of the car, and (3) the drug dog failed to alert on any part of the vehicle. Thus Vinesett neither had a "practical, nontechnical probability" that Petitioner had possessed or

consumed marijuana nor any "incriminating evidence" against Petitioner. All he had was his uncorroborated and unproven allegation that he smelled burnt marijuana with nothing in the way of hard evidence to back it up. This does not rise to the level of probable cause that will allow an officer to conduct a warrantless search.

B. In the alternative, even if this Court finds Vinesett had probable cause to search the passenger compartment of the car, he still lacked probable cause to search the trunk of the car for evidence of marijuana possession or consumption.

Petitioner's primary probable cause argument is that Vinesett lacked probable cause to search the car at all for the reasons stated above. However, in the alternative, if this Court is persuaded that Vinesett smelled marijuana and had the right to conduct a warrantless search as a result, then Petitioner argues that Vinesett still lacked the right to search the trunk of Petitioner's car. The Court of Appeals considered this argument and disagreed with Petitioner's contention that, even if Vinesett had probable cause to search the cabin of the vehicle, he did not have probable cause to search the trunk. Petitioner respectfully contends this was in error and the Court of Appeals misapprehended United States v. Ross, 456 U.S. 798 (1982).

The Ross Court held the "scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." Id. at 824. To give this seemingly abstract statement real-life application, the Court explained as follows.

Probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, [and] probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. at 824. Post-Ross, several jurisdictions have had occasion to consider cases that involve the alleged odor of burnt marijuana emanating from a vehicle's passenger compartment and determined an uncorroborated odor of marijuana alone does not give an officer probable cause to conduct a search of the trunk or make an arrest.⁶

In the present case, Vinesett ignored the totality of the circumstances known to him when he searched the car, and he certainly was unable to corroborate his alleged detection of burnt marijuana. Neither the search of Petitioner nor the search of the passenger revealed any corroborating evidence of marijuana use; the drug dog failed to alert on any part of the car, and Vinesett examined the "hollowed out" cigars and concluded they contained no marijuana residue before he made the decision to search the car's trunk.⁷ Thus, to find Vinesett's search supported by probable cause only because he claimed to smell burnt marijuana would be to ignore the greater weight of the evidence and the totality of the circumstances known to him during the traffic stop.

But because not one of the many investigative techniques he employed revealed any physical evidence of contraband, Vinesett was left without sufficient facts "to warrant a

⁶ See, e.g. State v. Farris, 109 Ohio St.3d 519, 849 N.E.2d 985 (Ohio 2006) (light odor of marijuana alone does not provide an officer with probable cause to search the trunk); State v. Schmadeka, 136 Idaho 595, 38 P.3d 633 (Idaho Ct. App. 2001) (odor of marijuana alone is not necessarily sufficient to justify a search of the trunk of a vehicle); State v. Grande, 164 Wash.2d 135, 187 P.3d 248 (Wash. 2008) ("The court's multifactored analysis does not support the State's argument here that marijuana odor itself is a basis for probable cause to arrest a passenger."); Com. v. Garden, 451 Mass. 43, 883 N.E.2d 905 (Mass. 2008) ("The search of the Honda's trunk in this case exceeded the permissible scope of the search because [the officer] could not reasonably have believed that the source of the smell of burnt marijuana would be found in the trunk."); State v. Morse, 331 Mont. 300, 132 P.3d 528 (Mont. 2006) ("Morse correctly points out that the odor of marijuana alone does not constitute probable cause.").

⁷ Furthermore, the record contains no evidence that Petitioner or the passenger appeared to be under the influence of marijuana. Neither does it contain any evidence that either of the other officers at the scene also smelled burnt marijuana.

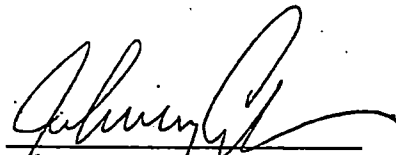
reasonable person to believe that contraband or evidence of a crime will be found in a particular place.” Ornelas, 517 U.S. at 696. In the end, he acted without probable cause when he searched the car’s trunk, so the trial court should have suppressed the fruit of the search.

Accordingly, Petitioner requests that this Court review this case, grant oral argument if deemed appropriate, and ultimately issue a decision that holds, based on the totality of the circumstances known to him, Vinezett did not have probable cause to search any part of the car driven by Petitioner.

CONCLUSION

For the above reasons, Petitioner respectfully requests this Court to issue a decision that reverses the Court of Appeals and suppresses the evidence obtained during the warrantless search of the car Petitioner was driving.

Respectfully Submitted,



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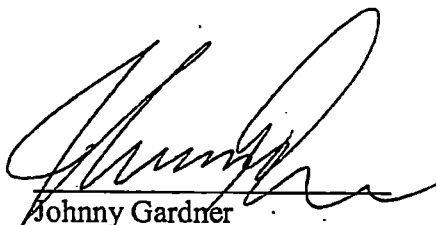
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March 24, 2014

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability, this Brief of the Petitioner complies with Rule 211(b), SCACR, and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

Dated: March 24, 2014



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

John C. Haynes, III, Circuit Court Judge

RECEIVED

MAR 31 2014

S.C. Supreme Court

State of South Carolina, ... Respondent,

v.

Kenneth Darrell Morris, II, ... Appellant.

PROOF OF SERVICE

I, Victoria Hucks Bailey, hereby certify that I have served the within Brief of Petitioner, Appendix and Record On Appeal upon Mark R. Farthing, Esq., by depositing three copies of the same in the United States Mail, with sufficient first class postage attached, addressed to:

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March 28, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2011-203786

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

Petitioner.

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<u>Katz v. United States</u> , 389 U.S. 347, 353 (1967).	32
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<u>Maryland v. Buie</u> , 494 U.S. 325 (1990).	11
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<u>Cowan v. Mississippi Bureau of Narcotics</u> , 2 So. 3d 759 (Miss. Ct. App. 2009).	23
<u>Jones v. State</u> , 319 Ga. App. 678, 738 S.E.2d 130 (Ga. Ct. App. 2013).	18
<u>McKay v. State</u> , 149 Md. App. 176, 814 A.2d 592 (Md. Ct. Spec. App. 2002).	29
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<u>State v. Betz</u> , 815 So. 2d 627 (Fla. 2002).	22
<u>State v. Folk</u> , 238 Ga. App. 206, 521 S.E.2d 194 (Ga. Ct. App. 1999).	22
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<u>United States v. Beard</u> , 708 F.3d 1062 (8th Cir. 2013).	18
<u>United States v. Branch</u> , 537 F.3d 328 (4th Cir. 2008).	12, 14, 17
<u>United States v. Derverger</u> , 337 F. App'x 34 (2nd Cir. 2009).	17
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<u>United States v. Hargrove</u> , 647 F.2d 411 (4th Cir. 1981).	33
<u>United States v. Harrison</u> , 606 F.3d 42 (2nd Cir. 2010).	17
<u>United States v. Humphries</u> , 372 F.3d 653 (4th Cir. 2004).	28
<u>United States v. Jeffus</u> , 22 F.3d 554 (4th Cir. 1994).	17
<u>United States v. Jodoin</u> , 672 F.2d 232 (1st Cir. 1982).	28
<u>United States v. Jones</u> , 44 F.3d 860 (10th Cir. 1995).	17
<u>United States v. Kennedy</u> , 638 F.3d 159 (3rd Cir. 2011).	33, 34
<u>United States v. Lewis</u> , 606 F.3d 193 (4th Cir. 2010).	27
<u>United States v. Luster</u> , 324 Fed. App'x 224 (4th Cir. 2009).	34
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<u>United States v. Morin</u> , 949 F.2d 297 (10th Cir. 1991).	24
<u>United States v. Ramirez</u> , 342 F.3d 1210 (10th Cir. 2003).	28
<u>United States v. Scheetz</u> , 293 F.3d 175 (4th Cir. 2002).	24
<u>United States v. Sullivan</u> , 138 F.3d 126 (4th Cir. 1998).	11
<u>United States v. Wellons</u> , 32 F.3d 117 (4th Cir. 1994).	34
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<u>Wilson v. State</u> , 174 Md. App. 434, 921 A.2d 881 (Md. Ct. Spec. App. 2007).	25, 26, 29
 <u>Other Authorities:</u>	
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STATEMENT OF ISSUES ON APPEAL

I.

The Court of Appeals properly affirmed the trial judge's denial of Morris' suppression motion because, under the totality of the circumstances, the officers developed a reasonable articulable suspicion of criminal activity justifying an extension of the scope and length of the traffic stop after they detected multiple suspicious factors indicative of drug activity during the course of the stop, including the odor of marijuana, and had probable cause to search anywhere in the vehicle where marijuana might be found, including in the trunk of the vehicle where the drugs were discovered, based on their detection of those indicators of criminal activity.

II.

Even assuming that the search of the rental vehicle's trunk was somehow improper, the decisions of the Court of Appeals and the trial judge should be affirmed because Morris had no legitimate expectation of privacy in either the vehicle or the vehicle's trunk in light of the facts that he did not rent the vehicle, he was not authorized to drive the vehicle, he had no lawful right to control the vehicle, he had no actual possessory interest in the vehicle, and he had no connection to the vehicle's true owner.

STATEMENT OF THE CASE

Petitioner Kenneth Darrell Morris, II was arrested following a traffic stop during which illegal drugs were discovered. On July 3, 2008, the York County grand jury indicted Morris for one count of trafficking in ecstasy and one count of possession of marijuana with intent to distribute. On April 15, 2009, a jury trial was commenced in the York County court of general sessions with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of trial, the jury convicted Morris of trafficking in ecstasy and the lesser-included offense of simple possession of marijuana. Following the verdict, the trial judge sentenced Morris to concurrent terms of imprisonment of thirty years for the trafficking conviction and one year for the simple possession conviction while fining Morris \$50,000 for the trafficking conviction. Morris then timely filed and perfected an appeal.

Subsequently, following oral argument, the Court of Appeals unanimously affirmed Morris' convictions. State v. Morris, Op. No. 4872 (S.C. Ct. App. filed Aug. 17, 2011). Morris petitioned the Court of Appeals for rehearing, and the petition was denied. However, the Court of Appeals withdrew its previous opinion and filed a substituted opinion. State v. Morris, Op. No. 4872 (S.C. Ct. App. re-filed Nov. 2, 2011). Morris then filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted on December 19, 2013.

STATEMENT OF FACTS

On the afternoon of February 6, 2008, Officer L.T. Vinesett, Jr., a member of the York County Sheriff's Office's highway interdiction team, was patrolling I-77 in York County with a state constable when he observed the driver of a Ford 500, which he knew to be a common rental car, commit a traffic infraction by following another vehicle too closely. (R. pp. 6-7). As a result, Officer Vinesett drove towards the Ford, and, when he did so, the driver of the Ford quickly exited the interstate onto another highway. (R. p. 7). Officer Vinesett then followed the Ford to a gas station, activated his blue lights, and initiated a traffic stop. (R. pp. 7-8). The traffic stop began at approximately 2:06 p.m. (State's Ex. # 16 (Recording of the Traffic Stop)).

After stopping the vehicle, Officer Vinesett approached from the passenger's side and observed two occupants inside. (R. p. 8). He asked the driver for his license and registration, and Petitioner Kenneth Darrell Morris, II, the driver of the vehicle, produced a North Carolina driver's license while Brandon Nichols, the passenger, produced a rental agreement for the Ford. (R. pp. 8-9). The rental agreement stated that Nichols rented the vehicle, listed Nichols as the authorized driver, and specifically indicated that no other drivers were authorized to drive the vehicle. (R. pp. 9-10).

When Officer Vinesett initially approached the Ford, the passenger window of the vehicle was open. (R. p. 10). Through the open window, Officer Vinesett detected an odor of marijuana emanating from inside. (R. p. 10). Additionally, he observed hollowed-out cigars and loose tobacco scattered all over the interior of the car, including on the center console and on the floorboards of the vehicle. (R. p. 11). Officer Vinesett took note of the hollowed-out cigars because his experience taught him that drug users commonly hollow out cigars and replace the tobacco inside with marijuana to allow the

users to covertly smoke marijuana while creating the appearance that they are only smoking cigars. (R. p. 11).

After obtaining Morris' license, Officer Vinesett asked Morris to step out of the vehicle and move to the front passenger seat of the officer's patrol car in order to avoid the rain. (R. p. 10; p. 13). Officer Vinesett spoke with Morris in the patrol car at approximately 2:08 p.m. (State's Ex. # 16). During their conversation, Morris claimed that he and Nichols were returning from a trip to Atlanta and had gone to visit some girls. (R. p. 13). Morris also revealed that he had a prior criminal record resulting from drug charges. (R. p. 32; p. 78; State's Ex. # 16). After speaking with Morris, Officer Vinesett left Morris in the patrol car and went to speak with Nichols. (R. p. 14). Officer Vinesett's conversation with Nichols took place at approximately 2:10 p.m. (State's Ex. # 16). Outside of the presence of Morris, Nichols offered a different account of their activities, claiming that he and Morris were returning from Atlanta and had gone to see a cousin play basketball. (R. p. 14). Nichols then exited the Ford, and Officer Vinesett again noticed the odor of marijuana coming from the vehicle. (R. p. 14).

After speaking with both Morris and Nichols, Officer Vinesett requested the assistance of a canine unit at approximately 2:12 p.m. (R. p. 35; State's Ex. # 16). At that time, Officer Vinesett also continued checking Morris' license while completing the initial purpose of the traffic stop. (R. p. 32). Officer Vinesett noted that he was still working on the traffic stop at approximately 2:13 p.m. (State's Ex. # 16). Then, shortly before 2:14 p.m., Officer Vinesett frisked Morris with consent, allowed him to go to the restroom while accompanied by the state constable, and informed him that the traffic stop was not yet complete. (R. pp. 34-35; State's Ex. # 16).

Thereafter, the requested canine officer arrived on the scene. (R. p. 14). At approximately 2:15 p.m., which was roughly nine minutes into the stop, the officers asked Nichols for consent to search the vehicle, and Nichols refused. (State's Ex. # 16). In the rainy weather conditions, the police dog then walked around the exterior of the car at approximately 2:16 p.m. (R. p. 15; State's Ex. # 16). After walking around the vehicle, the dog did not alert to the presence of drugs. (R. p. 15). However, Officer Vinesett, who was familiar with the police dog and had previously observed it performing sniff searches on vehicles, noticed that the dog was not focusing on the vehicle, was shaking off rain water, and was looking around. (R. p. 15). Based on his observations, the officer concluded that the dog did not appear to like being out in the rainy conditions. (R. p. 15).

Subsequently, Officer Vinesett informed Nichols that he smelled marijuana in the car during the stop, but Nichols denied any marijuana had been smoked. (State's Ex. # 16). At approximately 2:20 p.m., which was roughly fourteen minutes into the stop, Officer Vinesett briefly searched the interior of the car without consent. (R. p. 16; pp. 40-41; State's Ex. # 16). The search of the interior lasted less than thirty seconds. (State's Ex. # 16). Officer Vinesett then looked into the trunk of the vehicle and, within less than thirty seconds, located a gift box with a sandwich bag inside containing 393 ecstasy pills. (R. pp. 16-17; pp. 40-41; State's Ex. # 16). Following the discovery of the drugs, both men were quickly arrested. (R. p. 17). Subsequently, approximately one-half pound of marijuana was discovered hidden under the spare tire during an inventory search of the vehicle. (R. p. 66). The drugs recovered from the vehicle were analyzed and conclusively identified as ecstasy and marijuana. (R. p. 70; p. 71). Morris was then

indicted for trafficking in ecstasy and possession of marijuana with intent to distribute, and he proceeded to trial. (R. pp. 91-94).

At the outset of trial, Morris moved to suppress the recovered drugs as the fruits of an illegal search and an unlawful detention, and the trial judge conducted a suppression hearing on Morris' motion.¹ (R. p. 4). During the suppression hearing, Officer Vinesett recounted the details of the traffic stop. (R. p. 6). Specifically, Officer Vinesett testified that he noticed the smell of marijuana coming from the vehicle when he initially approached the vehicle. (R. p. 10). After smelling the odor of marijuana, Officer Vinesett stated that he believed there was cause to extend the traffic stop and question Morris and Nichols. (R. pp. 32-33). Furthermore, he testified about the hollowed-out cigars and loose tobacco that he observed and the inferences that he drew from those items. (R. p. 11). Officer Vinesett also testified about the police dog's failure to alert on the vehicle and explained why he did not believe that the lack of an alert was dispositive due to the dog's unfocused demeanor in the rain. (R. p. 15).

On cross-examination, Officer Vinesett testified that the average traffic stop without any indicators of criminal activity usually lasted approximately five minutes. (R. p. 20). He further acknowledged that he did not include references to any indicators of the presence of drugs in his initial police report, but he specifically identified the indicators that he observed at the scene, which primarily consisted of the loose tobacco, the hollowed-out cigars, and the smell of marijuana, during his testimony.² (R. p. 23; pp.

¹ A recording of the traffic stop was played during the suppression hearing. (Tr. p. 46; State's Ex. # 16).

² In addition to Officer Vinesett's testimony, Commander Marvin Brown, the supervisor of the York County Sheriff's Office's narcotics unit, also testified during the suppression hearing. (R. p. 49). Commander Brown indicated that Officer Vinesett did not include any indicators of criminal activity in his initial incident report based on unit policies. (R. p. 49). However, he noted that Officer Vinesett included the reason for the stop and all of the indicators of criminal activity that he observed during the course of the

27-29). Additionally, he conceded that the drug dog's failure to alert was a fair indicator that no drugs were present. (R. p. 38). However, he explained that his experience enabled him to distinguish between the smell of marijuana and the smell of cigars and testified that he believed, based on his training and the indicators that he had detected, that someone was or had been smoking marijuana in the rental car. (R. p. 31; pp. 43-44).

At the conclusion of the hearing, defense counsel argued that the extension of the traffic stop was not supported by reasonable articulable suspicion and that no probable cause existed to search the trunk of the vehicle. (R. pp. 51-56). In response, the solicitor asserted that Officer Vinesett's detection of the odor of marijuana during the traffic stop established probable cause and authorized the officer to search any area or container in the vehicle where the object of the search – marijuana – could be hidden. (Tr. pp. 56-57). After considering the arguments of counsel, the trial judge denied the motion to suppress. (R. p. 57). In denying the motion, the trial judge found that the detention was reasonable and that the scope of the stop was not exceeded. (R. p. 57). He further ruled that the stop was not excessively long and that the police dog's failure to alert to the presence of drugs did not require the officers to terminate the stop or their investigation. (R. pp. 58-59). The trial judge based his ruling on the smell of marijuana, the training of the officer, and the testimony regarding the hollowed-out cigars and loose tobacco observed in the vehicle. (R. p. 57). While noting the inconsistencies in Morris and Nichol's stories may have heightened the officer's suspicions, the trial judge declined to rely on those inconsistencies in reaching his decision. (R. pp. 61-62). The trial judge also found the search was supported by probable cause. (R. p. 62). Thereafter, the drugs were admitted

stop in the case summary report that he prepared subsequent to filling out the incident report. (R. pp. 50-51).

into evidence over Morris' objection, the jury convicted Morris of trafficking in ecstasy and simple possession of marijuana, and Morris appealed. (Tr. pp. 67-69; pp. 72-73).

On appeal, the Court of Appeals affirmed Morris' convictions. State v. Morris, 395 S.C. 600, 603, 720 S.E.2d 468, 469 (Ct. App. 2011). Regarding the reasonableness of the detention, the Court held that Officer Vinesett had reasonable suspicion to extend the length and scope of the traffic stop after the officer detected the odor of marijuana and observed hollowed-out cigars and loose tobacco in Morris' rental vehicle. Id. at 608, 720 S.E.2d at 471-472. In reaching that conclusion, the Court specifically noted that the trial judge found Officer Vinesett's testimony regarding the smell of marijuana to be credible. Id. at 607-608, 720 S.E.2d at 471. Regarding the reasonableness of the search, the Court instructed:

The trial court specifically found that in Officer Vinesett's experience blunts are often hollowed to accommodate the smoking of marijuana. Similarly, the loose tobacco in the car indicated the blunts were recently hollowed in the car. Considering these factors in conjunction with the background odor of marijuana, the circumstances are sufficient to warrant a reasonable and prudent person to believe Morris and Nichols possessed marijuana. Accordingly, the officers had probable cause to search anywhere in the vehicle where marijuana could be located. The trial court properly admitted the drug evidence discovered in the trunk.

Id. at 610, 720 S.E.2d at 473.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

ARGUMENT

I.

The Court of Appeals properly affirmed the trial judge's denial of Morris' suppression motion because, under the totality of the circumstances, the officers developed a reasonable articulable suspicion of criminal activity justifying an extension of the scope and length of the traffic stop after they detected multiple suspicious factors indicative of drug activity during the course of the stop, including the odor of marijuana, and had probable cause to search anywhere in the vehicle where marijuana might be found, including in the trunk of the vehicle where the drugs were discovered, based on their detection of those indicators of criminal activity.

Morris contends that the Court of Appeals erred in affirming the trial judge's denial of his suppression motion. In support of that contention, Morris maintains that the officers did not develop reasonable articulable suspicion justifying the expansion of the scope and length of the traffic stop and did not have probable cause to search the trunk of the vehicle that Morris was driving. To the contrary, the officers developed reasonable articulable suspicion of criminal activity under the totality of the circumstances after detecting multiple suspicious factors consistent with drug activity, including the odor of marijuana, during the course of a lawful traffic stop. Based on the officers' detection of the odor of marijuana along with the other suspicious factors, the officers were justified in expanding the scope and duration of the traffic stop and had probable cause to search anywhere in the vehicle where marijuana might be found, including in the trunk. Accordingly, the trial judge properly denied Morris' motion to suppress the drugs discovered during the search of the car, and the Court of Appeals correctly affirmed the trial judge's ruling. Morris' convictions should be affirmed.

A. Reasonableness of the Detention

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S.

Const. amend. IV. “The touchstone of the Fourth Amendment is reasonableness.”

Florida v. Jimeno, 500 U.S. 248, 250 (1991). As a result, only unreasonable searches and seizures are constitutionally prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”).

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). The reasonableness of a stop or detention “is measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 39 (1996). However, the initiation of a traffic stop is reasonable per se when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). Furthermore, “a minor traffic violation arrest will not be rendered invalid by the fact it was a ‘mere pretext for a narcotics search.’ ” State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191-192 (Ct. App. 2009) (citations omitted). “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” Whren v. United States, 517 U.S. 806, 813 (1996).

A lawful traffic stop begins at the point that an officer stops a vehicle to investigate a traffic violation and “ordinarily continues, and remains reasonable, for the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see

Maryland v. Wilson, 519 U.S. 408, 415 (1997) (“[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”). “Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.” Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not measurably extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing that additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”).

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where:

(1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Id.

Reasonable suspicion consists of “ ‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.’ ” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’ ” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781), cert. dismissed as improvidently granted, 401 S.C. 264, 737 S.E.2d 480 (2012). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.”).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In

reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 (“Courts must look at the ‘cumulative information available’ to the officer . . . and not find a stop unjustified based merely on a ‘piecemeal refutation of each individual’ fact and inference[.]” (citations omitted)). Instead, all of the circumstances of the stop, including the officer’s own experience and specialized training, must be considered as a whole to determine whether the officer’s actions were reasonable in light of all of the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[W]e have said repeatedly that [reviewing courts] must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’ ” (citations omitted)). “In applying the concept of reasonable suspicion to the various facts of a case, ‘[i]t is the entire mosaic that counts, not single tiles.’ ” Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). Thus, the presence of several factors seemingly consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

In the case sub judice, the traffic stop and detention of Morris was objectively reasonable under the totality of the circumstances, and any further extension of the scope

and duration of the stop was supported by reasonable articulable suspicion. Initially, Officer Vinesett unquestionably had probable cause to initiate the traffic stop after observing Morris commit a traffic infraction. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) (“As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred.”); see also S.C. Code Ann. § 56-5-1930(a) (prohibiting drivers in South Carolina from following other vehicles “more closely than is reasonable and prudent”). Thereafter, during the course of the ensuing traffic stop, Officer Vinesett developed reasonable articulable suspicion of criminal activity based on the suspicious factors that he detected, which permitted the officer to extend the scope and duration of the stop.

Most critically, Officer Vinesett detected the odor of marijuana and observed hollowed-out cigars and loose tobacco scattered throughout the vehicle shortly after initiating the traffic stop. Based on his training and experience, Officer Vinesett perceived the smell of marijuana, the loose tobacco, and the hollowed-out cigars to be strong indicators that the crime of possession of marijuana had been committed or was being committed and that marijuana might be hidden in the vehicle. See State v. Odom, 376 S.C. 330, 335, 656 S.E.2d 748, 751 (Ct. App. 2007) (holding that an officer had reasonable articulable suspicion of the existence of drugs after smelling a strong odor of marijuana, observing a cigar on the dashboard, hearing Odom admit that he had smoked marijuana earlier, and seeing an empty holster in the vehicle); State v. Butler, 353 S.C. 383, 390, 577 S.E.2d 498, 501 (Ct. App. 2003) (holding that an officer was justified in extending the scope of a traffic stop after smelling the odor of alcohol). Furthermore, although not relied upon by the trial judge in his analysis of the stop, there were other indicators of criminal activity present during the traffic stop, including the facts that

Morris and his passenger presented inconsistent stories to the officers about their trip, that Morris was driving a rental car, which has been recognized as an indicator of drug activity, and that Morris and his passenger stated that they were returning from a one-day trip to Atlanta, which has been recognized as a known drug hub. See Wallace, 392 S.C. at 55, 707 S.E.2d at 455 (finding inconsistent stories between a driver and passenger, third-party vehicle ownership, and Atlanta's status as a drug hub to be relevant factors in establishing a reasonable articulable suspicion of drug activity); Provet, 391 S.C. at 504, 706 S.E.2d at 518 (considering the fact that third-party vehicle ownership is commonly connected with drug trafficking in finding that an officer had reasonable suspicion to extend a traffic stop). Therefore, under the totality of the circumstances, Officer Vinesett developed reasonable articulable suspicion of drug activity during the course of the traffic stop based on the indicators of criminal activity that he observed and detected. See State v. Banda, 371 S.C. 245, 254, n. 4, 639 S.E.2d 36, 41 (2006) (" 'Reasonable suspicion' in [the context of a traffic stop] requires an officer to have 'a particularized and objective basis,' based on the totality of the circumstances, that would lead one to suspect that drugs are present in the vehicle lawfully stopped." (citations omitted)); see also Robinson v. State, 407 S.C. 169, ___, 754 S.E.2d 862, 870, n. 9 (2014) ("[T]he facts and inferences relied on by the officer must be articulable, not necessarily articulated."). As a result, Officer Vinesett was justified in expanding the scope of his investigation and the length of the traffic stop.

In challenging the reasonableness of the traffic stop on appeal, Morris primarily focuses on the length of the detention and the credibility of Officer Vinesett's testimony regarding his detection of the odor of marijuana. Regarding the length of the detention, only fifteen minutes elapsed from the moment that Officer Vinesett activated his blue

lights to the moment of Morris' arrest. Cf. Provet, 391 S.C. at 499, 706 S.E.2d at 516 (finding that a traffic stop was not unreasonably extended even if the officer's questioning was unrelated to the purpose of the traffic stop where the entire stop lasted less than eleven minutes). While there is no firm rule as to the appropriate length of a stop and detention, Morris' traffic stop was not unreasonable in length notwithstanding the existence of reasonable suspicion to expand the scope of the stop, and the traffic stop was not measurably extended by the officers' actions unrelated to the initial purpose of the stop. See State v. Provet, 405 S.C. 101, 109, 747 S.E.2d 453, 457-458 (2013) ("We agree with the trial court and the Court of Appeals that ten minutes was a reasonable length of time for the initial traffic stop and that [the officer's] off-topic questions did not measurably extend the duration of the stop."); see also United States v. Sharpe, 470 U.S. 675, 683 (1985) (concluding that a twenty-minute detention during an investigatory traffic stop was objectively reasonable); Branch, 537 F.3d at 338 ("We begin with the basic fact that much of Branch's 30-minute detention was justified by the 'ordinary inquiries incident' to a routine traffic stop." (citations omitted)); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); see, e.g., United States v. Harrison, 606 F.3d 42, 45 (2nd Cir. 2010) (finding that an officer who had all of the information necessary to issue a traffic ticket after speaking with the driver did not measurably extend the traffic stop by subsequently speaking with the passengers for several minutes in an attempt to corroborate the driver's story); United States v. Derverger, 337 F. App'x 34, 36 (2nd Cir. 2009) ("We conclude without any need for further factfinding that the five minutes of questioning did not significantly extend the time Derverger was detained."); United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); United States v. Hardy, 855 F.2d

753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory stop to be reasonable).

However, even assuming the stop in Morris' case was measurably extended by the officers' actions during the stop, the officers were justified in doing so after developing reasonable articulable suspicion of criminal activity during the course of the stop.

Regarding the credibility of Officer Vinesett's testimony, the trial judge, who was in the best position to weigh the credibility of the testimony and evidence presented during the suppression hearing, specifically found Officer Vinesett's testimony regarding the presence of an odor of marijuana to be credible. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be the arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."). Due to the trial judge's advantage of personally hearing the testimony and being in a position to personally evaluate the credibility of the witnesses, the trial judge's factual findings are entitled to substantial deference on appeal, and there is nothing suggesting the trial judge's findings in Morris' case were clearly erroneous. See Baccus, 367 S.C. at 48, 625 S.E.2d at 220 ("This Court is bound by the trial court's factual findings unless they are clearly erroneous."); see also United States v. Beard, 708 F.3d 1062, 1066 (8th Cir. 2013) (recognizing that credibility determinations are virtually unreviewable on appeal due to the deferential standard of review to which such determinations are entitled); cf. Jones v. State, 319 Ga. App. 678, 679, 738 S.E.2d 130, 131 (Ga. Ct. App. 2013) ("Jones argues

that the officer's uncorroborated claim that he smelled marijuana was merely pretextual, and he points to inconsistencies in the officer's testimony as to whether the odor detected was of burnt or raw marijuana. This challenge to the officer's credibility is meritless. . . . Notwithstanding the attempted impeachment and the absence of corroboration of the officer's testimony, it was for the trial court, sitting as finder of fact in ruling on the motion to suppress, to determine the credibility of the officer's testimony. Accordingly, the trial court was authorized to find that the officer gave credible testimony that he smelled both burnt and raw marijuana emitting from the car, which provided probable cause for the search." (citations omitted)).

In conclusion, the evidence and testimony presented during the suppression hearing established that the officers conducted the traffic stop in a reasonable manner. Furthermore, the evidence and testimony presented during the hearing established that the officers developed reasonable articulable suspicion based on their detection of numerous indicators of criminal activity during the course of the traffic stop, including the odor of marijuana. As a result, even assuming that the officers' actions measurably extended the traffic stop, the officers were justified in doing so under the totality of the circumstances. See Segura v. United States, 468 U.S. 796, 806 (1984) ("By its terms, the Fourth Amendment forbids only 'unreasonable' searches and seizures."). Therefore, the trial judge properly determined that the traffic stop was reasonable and that Morris' constitutional rights were not violated by his detention during the stop, and his ruling was supported by the evidence. See Provet, 405 S.C. at 107, 747 S.E.2d at 456 ("South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court's ruling." (citations omitted)); State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When

reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”). For the foregoing reasons, the Court of Appeals committed no error in affirming the trial judge’s ruling. Morris’ convictions should be affirmed.

B. Validity of the Search

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment’s warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, “warrantless searches [and seizures] are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement.” Kentucky v. King, __ U.S. __, 131 S. Ct. 1849, 1858 (2011).

South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; and (7) the abandonment exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Pursuant to the various accepted exceptions to the warrant requirement, a warrantless search or seizure will withstand constitutional scrutiny so long as the circumstances establish the existence of an exception along with the existence of probable cause. State v. Bultron, 318 S.C. 323, 331-332, 457 S.E.2d 616, 621 (Ct. App. 1995).

One of the recognized and accepted exceptions is the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). That exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under the automobile exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. Bultron, 318 S.C. at 332, 457 S.E.2d at 621. “If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.” Weaver, 374 S.C. at 320, 649 S.E.2d at 482; see also State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008) (recognizing that the rationale for a vehicle search under the automobile exception is not negated even if the vehicle is immobilized or taken into police custody).

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all of its contents potentially containing the object of the search. Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (“We hold that police officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.”). “The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause.” United States v. Ross, 456 U.S. 798, 823 (1982). “The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

Probable cause is “a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved.”

Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as “a fair probability that contraband or evidence of a crime will be found”). “Probable cause may be found somewhere between suspicion and sufficient evidence to convict.” State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). However, the probable cause standard does not require absolute certainty. In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007).

Numerous courts have considered the issue of the level of significance that the existence of an odor of marijuana has to a probable cause determination. The overwhelming majority position in both state and federal courts is that the detection of an odor of marijuana during a traffic stop establishes probable cause sufficient to justify a warrantless search of an automobile. See State v. Zamora, 114 Ariz. 75, 77, 559 P.2d 195, 197 (Ariz. Ct. App. 1976) (finding an officer’s detection of the faint odor of marijuana during a traffic stop, which was unverified by the other officers at the scene, provided probable cause to search the entire vehicle and trunk); State v. Betz, 815 So. 2d 627, 633 (Fla. 2002) (“Our conclusion here aligns this Court with a number of our sister jurisdictions in which courts have concluded that the smell of burnt marijuana, in combination with other circumstances, leads to law enforcement officers’ possession of probable cause to search the entirety of a motor vehicle.”); State v. Folk, 238 Ga. App. 206, 208, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999) (holding that an officer’s detection of

the odor of burning marijuana alone constituted probable cause for a warrantless vehicle search); People v. Kazmierczak, 461 Mich. 411, 416, 605 N.W.2d 667, 669 (Mich. 2000) (“Like the majority of courts in other states and jurisdictions, we are persuaded that detection of the odor of either fresh marijuana or marijuana smoke, standing alone, provides probable cause for a warrantless search.”); Cowan v. Mississippi Bureau of Narcotics, 2 So. 3d 759, 766 (Miss. Ct. App. 2009) (finding that an officer had probable cause to search after smelling marijuana upon opening a passenger door); People v. Robinson, 103 A.D.3d 421, 421-422, 959 N.Y.S.2d 188, 189 (N.Y. App. Div. 2013) (“When the police asked defendant to roll down the windows, they detected an odor of marijuana. This was sufficient, by itself, to provide probable cause to arrest defendant and search the car[.]”); State v. Smith, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (N.C. Ct. App. 2008) (finding that an officer’s detection of the odor of marijuana established probable cause to search even though no drugs were ever recovered); see also United States v. Johns, 469 U.S. 478, 482 (1985) (“After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband.”); see, e.g., Andrea Levinson Ben-Yosef, Annotation, Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana – Federal Cases, 188 A.L.R. Fed. 487 (2003) (“The majority of courts have found that the odor of marijuana alone supplies probable cause for a warrantless search.”).

Significantly, the Fourth Circuit Court of Appeals addressed the issue of whether the odor of marijuana can establish probable cause for a warrantless search during a traffic stop in United States v. Haley, 669 F.2d 201 (4th Cir. 1982). In that case, an officer smelled marijuana on the defendants and inside of a vehicle lawfully stopped for speeding. Id. at 202. Based on his detection of the odor of marijuana, the officer

unlocked the trunk, opened a large garbage bag, and discovered marijuana inside. Id. at 203. The car was later searched after the officer procured what he believed to be a warrant, and over two hundred pounds of marijuana were found in the trunk. Id. Subsequently, Haley challenged the validity of the search during trial, and the district court judge suppressed the drugs based on the officer's failure to obtain a warrant before searching the vehicle. Id. at 202. However, on appeal, the Court of Appeals reversed the district court judge's suppression of the drugs. Id. at 203-204. In reaching that decision, the Court of Appeals concluded that the circumstances justified a warrantless search of the vehicle and instructed that "[s]ufficient probable cause arises when the officer smells marijuana inside the vehicle[.]" Id. at 203-204.

Similarly, in United States v. Scheetz, 293 F.3d 175 (4th Cir. 2002), the Fourth Circuit Court of Appeals again addressed the issue of whether probable cause can arise from the detection of the odor of marijuana. In that case, the defendant was stopped for performing an illegal U-turn directly after passing a sign notifying drivers of an impending police checkpoint. Id. at 182-183. During the stop, an officer smelled marijuana emanating from the vehicle, and the car was searched. Id. at 183. The search revealed marijuana in a knapsack found inside of the vehicle. Id. Subsequently, during trial, the defendant sought the suppression of the drugs, and his suppression motion was denied. Id. Thereafter, on appeal, the Court of Appeals affirmed the denial of the defendant's suppression motion, holding: "Once the car was properly stopped and the narcotics officers smelled marijuana, the narcotics officers properly conducted a search of the car." Id. at 184 (citing United States v. Morin, 949 F.2d 297, 300 (10th Cir. 1991)).

Likewise, in a highly instructive opinion, the Maryland Court of Special Appeals addressed the issues of whether probable cause arises from the detection of the odor of

marijuana during a traffic stop and what scope is permitted for a search following the detection of such an odor in Wilson v. State, 174 Md. App. 434, 921 A.2d 881 (Md. Ct. Spec. App. 2007). In that case, an officer stopped Wilson's rental vehicle for speeding. Id. at 438, 921 A.2d at 883. Thereafter, while talking with Wilson, the officer smelled the odor of burnt marijuana and decided to search the vehicle. Id. During the search of the passenger compartment, the officer found no evidence of a crime. Id. However, a subsequent search of the trunk revealed over six pounds of marijuana. Id. Wilson then proceeded to trial and sought the suppression of the marijuana found in the search, and the trial judge denied his motion. Id. at 437, 921 A.2d at 882. Subsequently, on appeal, the Court of Special Appeals conducted a thorough review of the appellate precedent of the United States Supreme Court along with opinions from federal and state courts before concluding that the odor of burnt marijuana emanating from a vehicle provides probable cause to believe that marijuana is located in the vehicle. Id. at 454, 921 A.2d at 892. Based on that conclusion, the Court of Special Appeals affirmed the denial of Wilson's suppression motion and instructed:

To adopt appellant's argument [that the detection of the odor of burnt marijuana only establishes probable cause for a search of a vehicle's passenger compartment], the trunk, or any other area outside of the passenger compartment, becomes a safe harbor for the transportation of drugs for both users and traffickers who use drugs. We are not persuaded that a Fourth Amendment reasonableness analysis dictates that result. Probable cause is a "flexible, common-sense standard" to be applied in a "practical" and "non-technical" manner.

Id. at 455-456, 921 A.2d at 893 (citations omitted).

Most importantly, this Court has also previously addressed whether the detection of the odor of marijuana alone can establish probable cause. In State v. Lane, 271 S.C. 68, 70, 245 S.E.2d 114, 115 (1978), a delivery man noticed an odor coming from two

packages that were scheduled to be delivered to Lane's store. The delivery man contacted the police, an officer detected the odor of marijuana coming from the packages, the smaller package was opened, and marijuana was discovered. Id. The officers then obtained a warrant, allowed the delivery of the packages to be completed, and arrested Lane after the packages were delivered to his store. Id. at 71, 245 S.E.2d at 115. Subsequently, during trial, Lane challenged the admission of the drugs, and the trial judge granted his motion in respect to the package opened without a warrant while denying his motion in respect to the second package. Id. at 71, 245 S.E.2d at 115-116. Thereafter, in reviewing the trial judge's ruling on appeal, this Court considered whether the warrant to search the second package was independently supported by probable cause without relying on the knowledge obtained by opening the first package. Id. at 71, 245 S.E.2d at 116. Upon conducting that analysis, this Court held: "From the record it is evident that the odor emanating from the packages alone was a sufficient basis to establish probable cause as to their contents when it is considered that an officer of the law, familiar with the odor of marijuana, believed the odor being emitted was that of marijuana." Id. at 72, 245 S.E.2d at 116. As a result, this Court affirmed the trial judge's ruling. Id.

In the case at bar, the officers had probable cause to search Morris' rental vehicle based on the totality of the circumstances. Most significantly, Officer Vinesett testified that he smelled the odor of marijuana emanating from the car. Based on his detection of the odor of marijuana, Officer Vinesett had a probable cause basis to believe that marijuana would be located in the vehicle and was justified in searching anywhere in the vehicle that marijuana could be hidden, which included the trunk and the containers inside of it. See Wilson, 174 Md. App. at 454-455, 921 A.2d at 892 ("The reality is that marijuana and other illegal drugs, by their very nature, can be stored almost anywhere

within a vehicle. . . . The odor of burnt marijuana emanating from a vehicle provides probable cause to believe that additional marijuana is present elsewhere in the vehicle.”). Furthermore, his probable cause basis was further supported by his detection of other indicators of criminal activity, including the hollowed-out cigars that he recognized as being commonly used to conceal marijuana use, the loose tobacco from the cigars scattered all over the vehicle, the inconsistent explanations for the purpose of their trip offered by Morris and Nichols, and the fact that Morris and Nichols were using a rental vehicle for a one-day trip to a known drug hub. Although the officer’s detection of the odor of marijuana alone established a probable cause basis to conclude marijuana was hidden in the vehicle, the additional indicators of criminal activity coupled with the detection of the odor of marijuana unquestionably provided Officer Vinesett with grounds to find the existence of “a practical, nontechnical probability that a crime [wa]s being committed or ha[d] been committed and incriminating evidence [wa]s involved.” Bultron, 318 S.C. at 332, 457 S.E.2d at 621.

Morris’ challenge to the reasonableness of the search focuses primarily on his contention that Officer Vinesett’s suspicion that the crime of “marijuana consumption” had been committed was allegedly dispelled before he searched the trunk. Initially, after Officer Vinesett detected the odor of burnt marijuana in the Ford, he had probable cause to believe the occupants of the vehicle were or had been in possession of marijuana, which was a necessary prerequisite for them to be able to smoke or consume it. See S.C. Code Ann. § 44-53-370(c) (prohibiting the possession – not consumption – of any controlled substance, including marijuana). Thus, Officer Vinesett had probable cause to search for marijuana in the vehicle anywhere it could be contained or hidden. See, e.g., United States v. Lewis, 606 F.3d 193, 198 (4th Cir. 2010) (“When Lewis rolled down his

window to comply, Mills smelled the odor of marijuana emanating from the vehicle. At that point, the officers possessed probable cause to search the vehicle[.]”); United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004) (“While smelling marijuana does not assure that marijuana is still present, the odor certainly provides probable cause to believe that it is.”). Thereafter, Officer Vinesett observed hollowed-out cigars in the vehicle but did not locate any marijuana in his search of the interior. However, the fact that he located hollowed-out cigars, which had not been used to smoke tobacco since the officer noticed that the tobacco had been removed from them, supported his probable cause belief that marijuana was hidden in the vehicle. Furthermore, although the police dog called to the scene failed to alert to the presence of narcotics, that failure did not negate the officer’s probable cause basis to search based on his own personal detection of marijuana and the other indicators of criminal activity that he had observed, particularly in light of the fact that the officer was familiar with the dog and believed its failure to alert was due to its distracted, unfocused demeanor.³ Instead, the failure to alert was merely one factor to be considered under the totality of the circumstances in deciding if probable cause existed and, critically, did not require Officer Vinesett to abandon his investigation in light of the other indicators of criminal activity that he had detected.⁴

³ Notably, the officer’s belief that the police dog’s failure to alert was not due to an absence of marijuana in the vehicle proved to be correct. Approximately one-half of a pound of marijuana was discovered hidden in the trunk of the vehicle that Morris was driving. (R. p. 66). Thus, the police dog’s failure to alert was unquestionably not because there was no marijuana for the dog to detect.

⁴ Although the impact of a drug-detection dog’s failure to alert has not yet been addressed in South Carolina, the overwhelming majority of courts considering the issue have concluded that it is simply a factor to be considered under the totality of the circumstances and does not negate the existence of other factors establishing probable cause. See United States v. Jodoin, 672 F.2d 232, 236 (1st Cir. 1982) (“The dog’s failure to react does not, in our view, destroy the ‘probable cause’ that would otherwise exist. It is just another element to be considered by the magistrate.”), abrogated on other grounds by Bloat v. United States, __ U.S. __, 130 S. Ct. 1345 (2010); United States v. Frost, 999 F.2d 737, 744 (3rd Cir. 1997) (finding that a drug-sniffing dog’s failure to alert on a suitcase did not eliminate probable cause justifying a search of the suitcase derived from the other existing factors); United States v. Ramirez, 342 F.3d 1210, 1212-1213 (10th Cir. 2003) (“The factors giving rise to reasonable suspicion in the first place remained

Under the automobile exception, the officers were authorized to search anywhere in the vehicle where marijuana could be concealed, including the trunk where the drugs were ultimately discovered. See Ross, 456 U.S. at 825 (“If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”). Based on Officer Vinesett’s detection of the odor of marijuana and observation of the loose tobacco and hollowed-out cigars, which the officer knew to be commonly associated with drug use, in the passenger compartment, the officers had a probable cause basis to believe that drugs would likely be located in the trunk of the car due to the fact that it was an area where marijuana could easily be concealed. See Lane, 271 S.C. at 72, 245 S.E.2d at 116 (finding that the detection of the odor of marijuana alone established probable cause supporting the issuance of a search warrant); see also Wilson, 174 Md. App. at 455, 921 A.2d at 892 (“It is not unreasonable for an officer to believe that the odor of burnt marijuana indicates current possession of unsmoked marijuana somewhere inside of the vehicle, including the trunk.”); see, e.g., Gates, 462 U.S. at 244, n. 13 (“[P]robable cause requires only a

unchanged by the positive or negative results of the first sniff test. . . . We will not require investigators to cease an otherwise reasonable investigation solely because a dog fails to alert, particularly when we have refused to require that a dog sniff test be conducted at all.”); State v. Sanchez-Loredo, 42 Kan. App. 2d 1023, 1029, 220 P.3d 374, 378 (Kan. Ct. App. 2009) (holding that a drug-detection dog’s failure to alert to the presence of narcotics did not eliminate the probable cause already established by the other circumstances); State v. Jackson, 42 So. 3d 368, 374 (La. 2010) (finding that an officer had probable cause to search a vehicle after detecting the odor of marijuana even though a drug-sniffing dog failed to alert on the vehicle); McKay v. State, 149 Md. App. 176, 188, 814 A.2d 592, 599 (Md. Ct. Spec. App. 2002) (“[A] drug sniffing dog’s failure to detect drugs does not automatically negate probable cause. It is, instead, but one factor to be considered in the probable cause determination.”); State v. Williamson, 146 N.M. 488, 499, 212 P.3d 376, 387 (N.M. 2009) (finding that a drug-detection dog’s failure to alert did not negate probable cause for the search where the dog’s failure to alert was sufficiently explained under the circumstances); State v. Alexander, 151 Ohio App. 3d 590, 604, 784 N.E.2d 1225, 1236 (Ohio Ct. App. 2003) (holding that a drug-sniffing dog’s failure to alert on a bag did not negate the other circumstances establishing probable cause and, instead, was a single factor to consider when evaluating the totality of the circumstances); Commonwealth v. Brown, 924 A.2d 1283, 1289 (Pa. Super. Ct. 2007) (“[T]he failure of a trained dog to respond to the alleged presence of narcotics is but one factor to be considered in adjudging whether the totality of the circumstances establishes probable cause. Given the recognized fallibility of the dogs’ sense of smell and its vulnerability to confusion by other ambient odors, a dog’s failure to alert will not defeat probable cause where other factors, viewed within the totality of the circumstances, continue to support it.”).

probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our citizens demands.”). Accordingly, the search of the entire car, including the trunk, was supported by probable cause, and the search was reasonable and lawful under the totality of the circumstances. See Foster, 269 S.C. at 378, 237 S.E.2d at 591 (“It is only unreasonable searches and seizures that are prohibited.”).

In conclusion, the officer’s detection of the odor of marijuana and discovery of other indicators of criminal activity gave rise to a fair probability that marijuana was concealed in Morris’ vehicle. See Texas v. Brown, 460 U.S. 730, 741 (1983) (instructing that probable cause is a flexible, common-sense standard). As a result, the trial judge properly determined that the search of the vehicle and the vehicle’s trunk was supported by probable cause under the totality of the circumstances of the traffic stop, and his ruling was fully supported by the evidence. See Wright, 391 S.C. at 442, 706 S.E.2d at 326 (“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”). For the foregoing reasons, the trial judge did not err in denying Morris’ suppression motion, and the Court of Appeals correctly affirmed the trial judge’s ruling. Morris’ convictions should be affirmed.

II.

Even assuming that the search of the rental vehicle's trunk was somehow improper, the decisions of the Court of Appeals and the trial judge should be affirmed because Morris had no legitimate expectation of privacy in either the vehicle or the vehicle's trunk in light of the facts that he did not rent the vehicle, he was not authorized to drive the vehicle, he had no lawful right to control the vehicle, he had no actual possessory interest in the vehicle, and he had no connection to the vehicle's true owner.

Even assuming that the search of the rental's vehicle trunk was somehow improper, Morris was not entitled to the benefits of the exclusionary rule because he failed to establish that his own constitutional rights were violated by the search of the trunk. Critically, the evidence and testimony presented during the suppression hearing established that Morris was not an authorized driver of the rental vehicle and had no connection of any kind to the rental company that actually owned the vehicle. As a result, Morris did not have – and did not assert that he had – a legitimate expectation of privacy in either the rental vehicle or the rental vehicle's trunk. Absent such a legitimate expectation of privacy in the area that was searched by the officers, Morris could not properly challenge the propriety of the search conducted by the officers and was not entitled to have the drugs discovered during the search excluded from evidence during his trial. Accordingly, even if the Court of Appeals and the trial judge erred in ruling upon the propriety of the search of the rental vehicle's trunk, their decisions should not be reversed on appeal. Morris' convictions should be affirmed.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. For purposes of the Fourth Amendment, a search occurs when “an expectation of privacy that society is prepared to consider reasonable is infringed.” United States v. Jacobsen, 466 U.S. 109, 113 (1984). Likewise, a seizure occurs when there is some meaningful interference with an individual's possessory interest in property

or with the individual's freedom of movement. Id.; see Terry v. Ohio, 392 U.S. 1, 16, n. 16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

Importantly though, the rights protected by the Fourth Amendment are personal rights and cannot be vicariously asserted. Alderman v. United States, 394 U.S. 165, 174 (1969). As a result, a criminal defendant asserting a challenge to an allegedly unreasonable search or seizure must establish that his own personal Fourth Amendment rights were violated by that search or seizure in order to be entitled to the benefits of the exclusionary rule. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see Rakas v. Illinois, 439 U.S. 128, 132, n. 1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.").

"[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143 (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A legitimate expectation of privacy is both subjective and objective in nature. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). In order to establish a legitimate expectation of privacy, an individual must show: (1) that the individual had a subjective expectation that the area searched would remain free from intrusion; and (2) that the individual's subjective expectation is one that society recognizes as reasonable. Id.; see Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing that a subjective

expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable).

In Morris' case, the evidence and testimony presented during the suppression hearing established that Nichols was the only authorized driver of the rental vehicle and that no other drivers were permitted to drive the vehicle, which meant that Morris was driving the vehicle involved in the traffic stop without valid authorization. As Morris was an unauthorized driver of the rental vehicle, he had no legitimate claim to the vehicle, no lawful right to control the vehicle, and no possessory interest in the vehicle. See United States v. Hargrove, 647 F.2d 411, 412 (4th Cir. 1981) (“[O]ne who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile. . . . A person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects, whether or not they are enclosed in some sort of a container[.]”). Moreover, since he did not personally rent the vehicle and was not listed or identified in the rental agreement, Morris had no connection whatsoever to the actual owner of the rental vehicle. See United States v. Kennedy, 638 F.3d 159, 165 (3rd Cir. 2011) (“An authorized driver on the rental agreement has lawful possession of the vehicle and, within the scope of the rental agreement, may legitimately exclude others from using it. In contrast, an unauthorized driver has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude. The lack of such an interest supports the position that it is objectively unreasonable for an unauthorized driver to expect privacy in the vehicle.” (citations omitted)). As a result, Morris did not have an expectation of privacy in the rental vehicle that society accepts or recognizes as legitimate and could not properly claim that his own constitutional rights were violated

by the search of the vehicle's trunk. See Missouri, 361 S.C. at 112, 603 S.E.2d at 596 ("A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable."); see also Kennedy, 638 F.3d at 165 ("[A]s a general rule, the driver of a rental car who has been [l]ent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exists extraordinary circumstances suggesting an expectation of privacy."); United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) ("[A]ppellant, as an unauthorized driver of the rented car, had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights."); see, e.g., United States v. Luster, 324 Fed. App'x 224, 225 (4th Cir. 2009) ("An unauthorized driver of a rented car has 'no legitimate privacy interest in the car' and, therefore, a search of the car 'cannot have violated his Fourth Amendment rights.' This conclusion is not altered where the authorized lessee allows the unauthorized driver to drive the rental vehicle, as an unauthorized driver still does not have permission of the rental company, the owner of the vehicle." (citations omitted)); cf. Rakas, 439 U.S. at 148-149 (recognizing that a mere passenger in a vehicle would normally not have a legitimate expectation of privacy in the vehicle's trunk or glove box or in the area underneath the vehicle's seats).

In challenging the propriety of the search of the rental vehicle's trunk during trial, Morris did not present any evidence or testimony to establish that he had a subjective or legitimate expectation of privacy in the vehicle, the vehicle's trunk, or any of the items in the vehicle's trunk, including the gift box containing the ecstasy, and, thus, failed to establish that his own constitutional rights were violated by the search of the trunk. See

Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (“Petitioner, of course, bears the burden of proving not only that the search of Cox’s purse was illegal, but also that he had a legitimate expectation of privacy in that purse.”); McKnight, 291 S.C. at 114, 352 S.E.2d at 473 (“One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated.” (italics in original)); see also State v. Robinson, 396 S.C. 577, 583, 722 S.E.2d 820, 823 (Ct. App. 2012) (“For Robinson to establish a Fourth Amendment violation, he must show a legitimate expectation of privacy on the porch.”). Because Morris failed to establish that he had a legitimate expectation of privacy in the area searched by the officers, Morris could not properly claim the protections of the Fourth Amendment in challenging the propriety of the search during trial or on appeal. See United States v. Salvucci, 448 U.S. 83, 85 (1980) (“[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated.”); Rakas, 439 U.S. at 134 (“A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search or a third person’s premises or property has not had any of his Fourth Amendment rights infringed.”). Therefore, the drugs recovered during the search of the rental vehicle were properly admitted into evidence during trial. Accordingly, even assuming that the search of the rental vehicle’s trunk was somehow improper, the decisions of the Court of Appeals and the trial judge should not be reversed on appeal. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); see also Sec. & Exch. Comm’n v. Chenery Corp., 318 U.S. 80, 88 (1943) (“[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower

court relied upon a wrong ground or gave a wrong reason.’ The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.” (citations omitted)). Appellant’s convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals and the judgment and conviction of the trial court should be affirmed.

Respectfully submitted,

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Attorney General

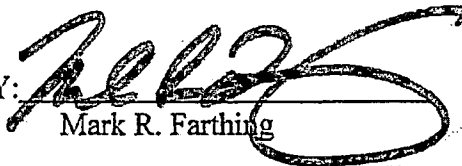
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April 21, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2011-203786

THE STATE,

Respondent,

vs.

KENNETH DARRELL MORRIS, II,

Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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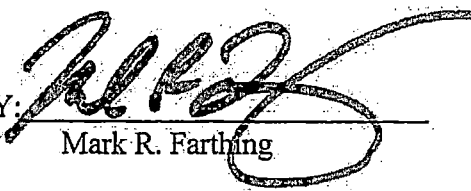
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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 21st day of April, 2014.

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v.

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REPLY BRIEF

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<u>United States v. Wellons</u> , 32 F.3d 117 (4th Cir. 1994).....	1

Though the argument was never made below, Respondent now argues that Petitioner lacks standing to bring a Fourth Amendment challenge to his seizure and the search of the rented vehicle that he was driving. Respondent makes this argument because Petitioner was not an authorized driver of the rented vehicle pulled over by Officer Vinesett. It is true that the renter and only authorized driver of the vehicle was the passenger, Brandon Nichols.

As with so many issues involving the Fourth Amendment, a split of authority exists on the question of whether or not an unauthorized driver of a rented vehicle has a legitimate expectation of privacy in the area searched. Respondent wants this Court to adopt the rule followed by the Fourth Circuit. The rule in the Fourth Circuit (as well as in several other circuits including the First, Third, Fifth and Tenth) is that “an unauthorized driver of the rented car, ha[s] no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights.” United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994).

Respondent’s argument mirrors the Fourth Circuit’s rule and would have this Court hold that “[a]n unauthorized driver of a rented car has ‘no legitimate privacy interest in the car’ and, therefore, a search of the car ‘cannot have violated his Fourth Amendment rights.’ This conclusion is not altered where the authorized lessee allows the unauthorized driver to drive the rented vehicle . . .” United States v. Luster, 324 Fed. App’x 224, 225 (4th Cir. 2009) (internal citations omitted) (emphasis added). Petitioner respectfully maintains that the approach urged by Respondent is too arcane, as evidenced by the following authorities.

- I. **As the permissive driver of the rented vehicle, Petitioner has standing to bring a Fourth Amendment challenge. The passenger, who rented the vehicle, gave Petitioner permission to drive it.**

“[Federal circuit] courts have developed at least three different approaches to determining when an unauthorized driver of a rental car has standing to challenge a search.”

United States v. Thomas, 447 F.3d 1191, 1196 (9th Cir. 2006). “The first approach is seen in the Fourth, Fifth, and Tenth Circuits.” Id. at 1196. “These courts have all adopted a bright-line test: An individual not listed on the rental agreement lacks standing to object to a search. Their cases reason that because an unauthorized driver lacks a property or possessory interest in the car, the driver does not have an expectation of privacy in it.” Id. at 1196-97. Case law handed down more recently has observed that this bright-line test is simply too rigid. See, e.g. State v. Cutler, 144 Idaho 272, 275, 159 P.3d 909, 912 (Idaho App. 2007) (“Given the increasingly common utilization of rental vehicles for a myriad of purposes and our view that a bright line rule fails to address the ensuing complexities, we are convinced the Sixth Circuit Court’s totality of the circumstances approach best addresses the issue.”).

The second approach, which Petitioner submits is a better more reasoned approach, has been adopted by the Eighth and Ninth Circuits and is a modified bright-line approach. This approach generally disallows standing “unless the unauthorized driver can show he or she had the permission of the authorized driver.” Thomas, 447 F.3d at 1197. This second approach grants standing to an unauthorized driver but only “after a showing of ‘consensual possession’ of the rental car”. Id. at 1997 (citing United States v. Muhammad, 58 F.3d 353, 355 (8th Cir. 1995) (per curiam)).

Finally, the third approach has been adopted by the Sixth Circuit and “examines the totality of the circumstances in determining whether a non-authorized driver had a reasonable expectation of privacy.” Id. (citing United States v. Smith, 263 F.3d 571 (6th Cir. 2001). The Sixth Circuit recognized “a broad presumption against granting unauthorized drivers standing to challenge a search. However, the [Sixth Circuit] stated that the ‘rigid [bright-line] test is inappropriate, given that we must determine whether [the defendant] had a legitimate expectation of privacy which was reasonable in light of all the surrounding circumstances.’”

Id. (quoting Smith, 263 F.3d at 586). The Sixth Circuit's test "consider[s] a range of factors, including: (1) whether the defendant had a driver's license; (2) the relationship between the unauthorized driver and the lessee; (3) the driver's ability to present rental documents; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company . . ." Id. at 1198 (quoting Smith, 263 F.3d at 586).

After considering the three approaches followed by the circuits, the Ninth Circuit "reject[ed] the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search." Id. at 1198. The Ninth Circuit refused to "base constitutional standing entirely on a rental agreement to which the unauthorized driver was not a party." Id. at 1198-99. See also Rakas v. Illinois, 439, U.S. 128, 143, 99 S.Ct. 421, ___ (1978) "'Arcane distinctions developed in property and tort law . . . ought not . . . control' the reasonableness of an expectation of privacy.'" (internal citations omitted).

The Ninth Circuit concluded "an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter." Id. at 1199.

Apply the above persuasive authorities to the case now before the Court, Petitioner must admit that he would lack standing if the Court were to adopt the bright line lest adopted in the Fourth Circuit and others. He simply was not listed as a permissive driver and was behind the wheel of the vehicle when it was stopped. However, Petitioner urges this Court to adopt a non-arcane, reasonable rule that does not base the applicability and ability to invoke sacred constitutional rights on a mere contract to rent a car.

Under the approach adopted by the Eighth and Ninth Circuits, Petitioner believes that he possesses standing to bring a Fourth Amendment challenge. The facts of this case, as presented below, are that Petitioner was driving a rented vehicle from Atlanta to North

Carolina while accompanied by a passenger who had rented the vehicle. The fact that Petitioner and the renter (i.e. authorized driver) were travelling together in the rented vehicle should be a sufficient fact in and of itself to establish standing under the modified bright line approach, and Petitioner respectfully maintains that he has standing to bring his Fourth Amendment challenge.

Further, if this Court inclined to adopt the Sixth Circuit's totality of the circumstances approach, Petitioner asserts that he still has standing to bring a Fourth Amendment challenge. Again, the facts of this case as presented below are that Petitioner was driving a rented vehicle from Atlanta to North Carolina while accompanied by a passenger who had rented the vehicle. Petitioner presented his driver's license and the passenger gave Officer Vinesett a copy of the rental agreement. Further Officer Vinesett established that Petitioner and the passenger were travelling together back from a road trip to Atlanta. (All of the above fact were established when the video recording of the traffic stop played in open court during the suppression hearing.) These factors taken together should be more than sufficient to establish that Petitioner had a reasonable expectation of privacy in the rented vehicle he was driving under the totality of the circumstances. As he was driving with the consent of the authorized driver, his passenger, Petitioner respectfully maintains that he has standing.

II. This Court has already impliedly rejected Respondent's argument. The driver in State v. Tindall was an unauthorized driver of a rented vehicle. He was merely paid \$1,500 to drive a vehicle he did not rent.

In recent years, this Court decided the case of State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010). In that case, Tindall was pulled over in Oconee County for speeding in a rented vehicle; he was also charged with following too closely and failing to maintain his lane. Id. at 204. The officer searched the vehicle and found a large quantity of illegal drugs. Following the search, "Tindall was placed in custody and given Miranda warnings, after

which he gave a statement to the officer admitting that he was being paid \$1,500 to drive the Jeep from Atlanta to Durham. Id. at 204-05.

This Court focused on the information available to the officer when he extended the scope and duration of the traffic stop and reversed Tindall's conviction. The Court observed:

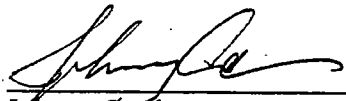
[a]t that point, the officer had ascertained the following information: (1) Tindall was driving to Durham to meet his brother; (2) Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous.

Id. at 206 (emphasis supplied). The Court concluded "[w]e find these facts did not provide the officer with a 'reasonable suspicion' that a serious crime was afoot. Id.

Though not an issue addressed by this Court in Tindall, the fact that Tindall was an unauthorized driver (and sole occupant) of a rented vehicle was not fatal to his Fourth Amendment challenge. Further unlike the facts present in Tindall, Petitioner was present in the car with the renter of the vehicle and not merely a paid courier as was Tindall.

CONCLUSION

For the above-stated reasons, Petitioner respectfully maintains that Respondent's argument that he lacks standing to bring a Fourth Amendment challenge is (1) based on Fourth Circuit case law that has been rejected by well-reasoned opinions from the Sixth, Eighth and Ninth Circuits and (2) inconsistent with South Carolina precedent as expressed in State v. Tindall. As such, Petitioner maintains he has standing to bring his challenge.


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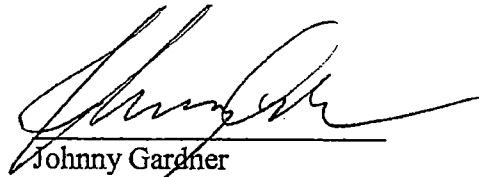
May 12, 2014

Attorney for Petitioner

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability, this Brief of the Petitioner complies with Rule 211(b), SCACR, and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

Dated: May 12, 2014



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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Kenneth Darrell Morris, II, Petitioner.

Appellate Case No. 2011-203786

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27488
Heard June 24, 2014 – Filed January 28, 2015

AFFIRMED

Johnny Gardner, of Johnny Gardner Law Group, P.A., of
Conway, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, Assistant
Attorney General Mark R. Farthing, all of Columbia, and
Kevin S. Brackett, of York, for Respondent.

JUSTICE HEARN: Kenneth Darrell Morris, II challenges the trial court's denial of his motion to suppress ecstasy and marijuana discovered during a traffic

stop, arguing they were obtained as the fruits of an illegal search and seizure in violation of the Fourth Amendment. We disagree, finding the officers had both reasonable suspicion of criminal activity and probable cause to conduct a warrantless search of the entire vehicle. Accordingly, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

Morris was driving on Interstate 77 through York County with Brandon Nichols in a rental vehicle. Officer L.T. Vinesett, Jr. and Constable W.E. Scott observed Morris commit a traffic violation by following a truck too closely. The officers followed Morris as he exited the interstate and initiated a traffic stop as he pulled into a gas station.

Vinesett approached the passenger side of the vehicle and requested that Morris produce his driver's license and registration. Vinesett then asked Morris to exit the vehicle and accompany him to the police cruiser. As Vinesett ran Morris's license, he asked Morris several questions about where the two men were traveling from and what they did there. Morris told Vinesett they went "to see some girls" in Atlanta and were on their way back to North Carolina. Vinesett returned to the rental vehicle and spoke briefly with Nichols, who stated he and Morris were returning from Atlanta after going to see a cousin play basketball.

Vinesett radioed Officer Gibson of the York County Police Department for a K-9 unit. While waiting for the K-9 unit to arrive, Scott conducted a consensual search of Morris, which yielded no contraband. After stating repeatedly that he had to use the restroom, Morris was escorted to the restroom by Scott.

Nichols also asked to use the restroom. He exited the vehicle and consented to a search of his person by Vinesett, which yielded no contraband. Vinesett told Nichols he would have to wait to use the restroom until Morris returned. Vinesett asked Nichols if he smoked marijuana earlier in the day and said he swore he smelled marijuana when Nichols exited the vehicle. Nichols stated the smell was from a Black & Mild cigar and that he did not smoke marijuana. A few minutes later, Gibson arrived to perform a K-9 search of the vehicle with Justice, a trained drug detection dog.

Vinesett and Gibson asked Nichols for his consent to search the vehicle, which Nichols refused, stating there was no contraband. Gibson then escorted Justice around the exterior of the vehicle twice; however, Justice did not alert at any point. Vinesett then conducted a search of the vehicle, beginning with the interior and proceeding to the trunk. Although he did not find any contraband in

the passenger compartment, Vinesett discovered a plastic bag in the trunk containing 393 ecstasy pills concealed within a small gift bag. Following the discovery of ecstasy, Morris and Nichols were placed under arrest. During a more thorough search after the arrests, officers discovered a plastic bag containing a half a pound of marijuana underneath the spare tire.

Morris was indicted on charges of trafficking ecstasy and possession of marijuana with intent to distribute. Prior to trial, Morris moved to suppress the drugs as the fruit of an illegal search and seizure. At the hearing, Vinesett testified he is a member of the York County Highway Interdiction Team (HIT Team). He stated that as part of his HIT training, he has attended several national training sessions on highway interdiction and drug enforcement. When questioned about the stop, Vinesett noted he smelled an odor of marijuana when he first approached the vehicle and spoke to Morris and Nichols. He stated he also observed several hollowed out Phillies Blunt¹ cigars in the center console of the vehicle, and loose blunt tobacco scattered over the frontal interior of the vehicle. He testified that although the smell of marijuana was the biggest indicator of criminal activity, other indicators of drug trafficking were present, including the inconsistent stories about traveling to Atlanta, the fact the vehicle was rented, and the presence of several consumed cans of Red Bull. When asked about the K-9 search, Vinesett conceded this was a fair indicator that no drugs were present, but stated Justice failed to keep his nose on the vehicle as he usually did during a search and instead frequently stopped to shake the water off, explaining he assumed Justice did not like being out in the rain.

Ultimately, the trial court denied Morris' motion, finding the officers had reasonable suspicion of criminal activity based on Vinesett's testimony that he smelled marijuana and the presence of hollowed out blunts.² In addition, the court stated there was no requirement that a stop cease because the police dog failed to alert, and at a length of roughly thirteen minutes, the traffic stop was not excessively long, nor unreasonably extended. Finally, the trial court found the officers had probable cause to search the vehicle, but did not articulate the specific reasoning for this finding.

¹ Phillies Blunts are an inexpensive brand of cigar. Vinesett testified that people "hollow [the blunt] out and place the marijuana in there, so if you did see them riding down the road smoking anything, it would look like they were just smoking a [Phillies] blunt."

² The court analogized the hollowed out blunts to finding a crack pipe within a vehicle.

Morris was convicted of trafficking ecstasy and simple possession of marijuana. The court sentenced Morris to thirty years' imprisonment and fined him \$50,000.00 for the ecstasy charge. It additionally sentenced him to a year imprisonment for the marijuana charge, to run concurrently. Morris appealed his conviction to the court of appeals which affirmed in *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011). We granted certiorari.

ISSUES PRESENTED

- I. Did the court of appeals err in affirming the trial court's finding that the officers had reasonable suspicion of criminal activity to extend the length of the traffic stop?
- II. Did the court of appeals err in affirming the trial court's finding that the officers had probable cause to conduct a full search of the entire vehicle?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). "The appellate court will reverse only when there is clear error." *State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004).

LAW/ANALYSIS

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A traffic stop and the detention of persons during such a stop constitutes a seizure. *State v. Maybank*, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002).

I. REASONABLE SUSPICION

Morris argues the trial court erred in finding the officers had reasonable suspicion to extend the scope of the traffic stop in violation of his Fourth Amendment rights. In addition, he argues the officers illegally prolonged the duration of the traffic stop. We disagree.

In carrying out a routine traffic stop, law enforcement may request a driver's license and vehicle registration, run a computer check, and issue a citation;

however, any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). To determine whether reasonable suspicion exists, an officer, by a totality of the circumstances, must have a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Reasonable suspicion does not entail a set of legal rules, but "entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004).

Vinesett testified to the presence of several facts which from his experience and training, indicated drug trafficking. Vinesett stated that when he approached the passenger side of the vehicle, he detected the odor of marijuana³ and observed several hollowed out Phillies Blunt cigars in a cup in the center console. Vinesett stated that in his experience, individuals unroll Phillies Blunt cigars, discard the tobacco, and then reroll them with marijuana to appear as if the individual is smoking a normal cigar. Additionally, he testified that Morris and Nichols gave different stories of their purpose in traveling to Atlanta. He noted there were several empty Red Bull cans, indicative of a need to stay awake for long periods of time while driving. Vinesett also noted that Morris drove a rented vehicle, which is an indicator of drug trafficking. Looking at the totality of the circumstances from the point of view of the reasonably prudent police officer, we find there is evidence in the record to support the trial court's conclusion that a reasonable suspicion of criminal activity existed.

Furthermore, we believe Morris's claim that the length of the stop was unduly prolonged is without merit. In total, Morris's traffic stop lasted roughly thirteen minutes. Recently, we held ten minutes was a reasonable amount of time for an initial traffic stop, and that off-topic questions did not unduly extend the duration of the stop. *State v. Provet*, 405 S.C. 101, 109, 747 S.E.2d 453, 458 (2013). We cannot say a thirteen minute stop was unduly prolonged or burdensome, especially where a reasonable suspicion to extend the stop existed at

³ Morris asks us to reexamine the record and make a new credibility determination of Vinesett's testimony. Specifically, Morris suggests that because Vinesett did not tell Morris that he smelled marijuana at the beginning of the stop, Vinesett's testimony that he smelled marijuana lacks credibility. However, the trial court found Vinesett's testimony credible, and that determination is left to its discretion. See *State v. Tutton*, 354 S.C. 319, 325–26, 580 S.E.2d 186, 190 (Ct. App. 2003).

the outset. At no point did the officers leave Morris and Nichols detained without purpose or instruction. In addition, we note that Morris and Nichols' frequent requests to use the restroom throughout the entirety of the stop contributed to its duration.

Because there is evidence in the record that supports the finding of a reasonable suspicion of criminal activity, we find no error in the court of appeals' affirmance of the trial court on this issue.

II. PROBABLE CAUSE

Morris also argues the trial court erred in determining probable cause existed to search the rental vehicle. In particular, he argues officers lacked probable cause to search the trunk of the car. We disagree.

The Fourth Amendment requires that a warrant for search and seizure be supported by probable cause. U.S. Const. amend. IV. Therefore, a warrantless search is per se unreasonable and violative of the Fourth Amendment unless the search falls within one of several well-recognized exceptions to the warrant requirement. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). These exceptions "include (1) search incident to a lawful arrest, (2) 'hot pursuit', (3) stop and frisk, (4) automobile exception, (5) the 'plain view' doctrine, and (6) consent." *State v. Bailey*, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). The automobile exception to requiring a search warrant exists in recognition of "the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained" and "the lessened expectation of privacy in motor vehicles which are subject to government regulation." *State v. Cox*, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). To survive a Fourth Amendment challenge to a warrantless search, the State must establish the officer had probable cause and demonstrate one of the exceptions to the prohibition against warrantless searches and seizures applies. *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

Similar to reasonable suspicion, probable cause is a fluid concept. Probable cause is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Probable cause to conduct a search exists where "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Id.* at 696. "The principle components of a determination of . . . probable cause will be the events which

occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause." *Id.* Therefore, determining whether an officer has probable cause to conduct a warrantless search depends on the totality of the circumstances. *State v. Brannon*, 347 S.C. 85, 92, 552 S.E.2d 773, 776 (Ct. App. 2001).

We find the record supports the conclusion that Vinesett had probable cause to search the entire vehicle. The scope of a "warrantless search . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982). Although Morris argues that because Vinesett failed to find drugs in the passenger compartment of the vehicle, he lacked probable cause to search the trunk, this contention mistakes the object for which Vinesett had probable cause to search. Vinesett was not simply looking for burnt marijuana based on the smell he detected at the inception of the stop. In our view, it is clear the object of his search was raw marijuana. Vinesett observed other indicators of drug possession or trafficking that led him to the reasonable belief that contraband would be found within the vehicle. The unrolled and hollowed Phillies Blunt cigars in the console suggest the future intent of marijuana use, not recent use. Additionally, Morris and Nichols told inconsistent stories, drove a rental car, and had several empty cans of Red Bull. Although those factors appear banal independently, cumulatively they indicated drug trafficking to Vinesett, based on his training and expertise. Accordingly, under our any evidence standard of review, we find the record supports the conclusion Vinesett reasonably believed the contraband he suspected could be found in the trunk of the vehicle. We therefore hold the court of appeals did not err in affirming the trial court's finding Vinesett had probable cause to search the entire vehicle.⁴

⁴ Morris contends the failure of the drug dog to alert militates against the conclusion Vinesett had probable cause to search the trunk. Although the failure to alert is certainly a consideration in determining probable cause under the totality of the circumstances, it is not dispositive. Other jurisdictions have held that if a drug detection dog fails to alert during a search, it does not defeat probable cause. See *United States v. Davis*, 430 F.3d 345, 367 (6th Cir. 2005) (citing cases and acknowledging "a near universal recognition that a drug-sniffing dog's failure to alert does not necessarily destroy probable cause"); *United States v. Ramirez*, 342 F.3d 1210, 1213 (10th Cir. 2003) ("We will not require investigators to cease an otherwise reasonable investigation solely because a dog fails to alert, particularly

CONCLUSION

Accordingly, because we find evidence in the record to support the trial judge's findings that Vinesett had reasonable suspicion to extend the traffic stop and probable cause to search the entire vehicle, we affirm the court of appeals.

TOAL, C.J., and KITTREDGE, J., concur. PLEICONES, J., dissenting in a separate opinion in which BEATTY, J., concurs.

when we have refused to require that a dog sniff test be conducted at all."); *McKay v. State*, 814 A.2d 592, 599 (Md. Ct. Spec. App. 2002) ("[A] drug sniffing dog's failure to detect drugs does not automatically negate probable cause."); *see also Illinois v. Caballes*, 543 U.S. 405, 411–412 (2005) (Souter, J., dissenting) ("The infallible dog . . . is a creature of legal fiction . . . their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers [or] the limitations of the dogs themselves . . ."). Furthermore, Vinesett gave a reasonable explanation for why he believed the dog did not conduct a proper search.

JUSTICE PLEICONES: I respectfully dissent. In my view, it is a close question whether petitioner's traffic stop was unlawfully extended. *See State v. Hewins*, 409 S.C. 93, 760 S.E.2d 814 (2014). In any case, I would reverse the Court of Appeals' affirmance of the denial of petitioner's suppression motion. In my opinion, once the drug dog failed to alert, the already marginal "objectively reasonable suspicion" to search the vehicle and its trunk evaporated.⁵ *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (2013).

I would reverse and remand for a new trial.

BEATTY, J., concurs.

⁵ I am not persuaded by the majority's reliance on the dissent in *United States v. Davis*, 430 F.3d 345 (6th Cir. 2005). In *Davis*, the majority noted the dissent relied exclusively on cases where "even without the dog's alert there was probable cause to justify a more extended detention, whereas in this case there was only the more limited basis of reasonable suspicion." *Id.* at 359. As in *Davis*, here the State had at most only a "reasonable suspicion" that petitioner possessed illegal drugs.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

ON WRIT ON CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM YORK COUNTY
THE HONORABLE JOHN C. HAYES, III., CIRCUIT COURT JUDGE

Opinion No. 27488 (S.C. filed January 28, 2015)

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

v.

Kenneth Darrell Morris, II,.....Petitioner.

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, Petitioner Kenneth Darrell Morris, II, respectfully petitions this Court for a rehearing of Opinion No. 27488, dated January 28, 2015. Petitioner respectfully submits that rehearing is warranted in this case because the Court overlooked or misapprehended Petitioner's argument.

Standard of Review

Petitioner respectfully contends that the Court misapprehended the standard of review in this case in two ways. First, the scope of review as set forth in Tindall requires the Court to determine whether the record supports the lower courts assumed findings and whether those facts support a finding that the officer had reasonable suspicion or probable cause. State v. Tindall, 388 S.C.518, 698 S.E. 2d 203 (2010).

Second, even using a deferential standard of review, a common sense view of the evidence law enforcement relied upon to search did not rise to the level of reasonable suspicion required to extend the scope and duration of a traffic stop let alone rise to the standard of probable cause to allow the warrantless search of Petitioner's vehicle.

Reasonable Suspicion

To determine whether reasonable suspicion exists, an officer, by a totality of the circumstances, must have a "particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18 (1981).

Petitioner respectfully submits that the Court either overlooked or misapprehended the fact that as the length of the detention progressed, Officer Vinesett's suspicions should have dissipated because his investigation continuously revealed less and less evidence of any crime related to the use of drugs.

Therefore, under the totality of the circumstances, there was no particularized and objective basis for suspecting the Petitioner of criminal activity.

Probable Cause

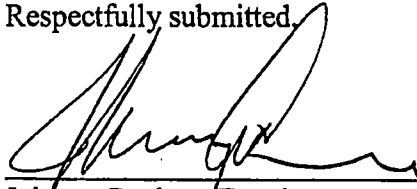
The standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. The determination of probable cause depends on totality of circumstances. State v. Brannon, 347 S.C. 85, 92, 552 S.E. 2d 773, 776 (Ct. App. 2001).

Petitioner respectfully submits that the Court either overlooked or misapprehended the fact that by the time the officers completed their investigation and search of Morris and Nichols, the interior of the vehicle, the investigation of the cigars, and the use of a drug dog, there was no probable cause of a crime. Prior to opening the trunk, every possible indicator of a crime had been thoroughly investigated by the officers and no illegal activity was discovered.

CONCLUSION

For the above reasons, Petitioner respectfully requests this Court grant Rehearing and issue a decision reversing the Court of Appeals decision affirming the trial court's decision denying Petitioner's motion to suppress the evidence obtained during the search of the automobile Petitioner was driving.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Johnny Gardner', is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA

In the Supreme Court

S.C. Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM YORK COUNTY
THE HONORABLE JOHN C. HAYES, III., CIRCUIT COURT JUDGE

Opinion No. 27488 (S.C. filed January 28, 2015)

Kenneth Darrell Morris, II. Petitioner,

v.

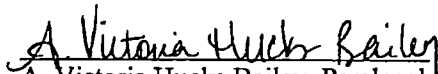
State of South Carolina, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that, on this 19th day of February, 2015, a true copy of the Appellant's Petition for Rehearing in the above referenced case has been served upon Mark Farthing, Esquire, Assistant Attorney General, by depositing a copy of same in the U.S. Mail, at the address below with sufficient first class postage attached.

Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29201

I further certify that all parties required by the South Carolina Rules of Appellate Procedure have been served.


A. Victoria Hucks Bailey, Paralegal
Johnny Gardner, Esquire
Johnny Gardner Law Group, P.A.
212 Main Street
Conway, SC 29526
(843) 248-7135
(843) 248-0270 (facsimile)
ATTORNEYS FOR PETITIONER



JOHNNY GARDNER LAW GROUP, P.A.

DUI • PERSONAL INJURY • CRIMINAL • FAMILY • REAL ESTATE • EMPLOYMENT LAW

JOHNNY GARDNER
JIM FELDMAN
BILL LUSE
HEATHER MOORE

February 19, 2015

VIA HAND DELIVERY

The Honorable Brenda F. Shealy
Deputy Clerk of Court
Supreme Court Of South Carolina
1231 Gervais Street
Columbia, SC 29201

RECEIVED

FEB 19 2015

Re: *The State v. Kenneth Darrell Morris, II*
Appellate Case No.: 2011-203786
Opinion No. 27488

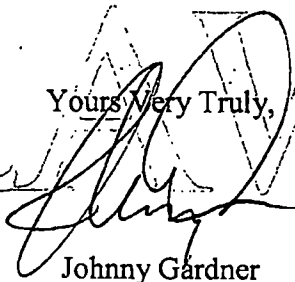
S.C. Supreme Court

Dear Madam Clerk:

Please find enclosed for filing the original and nine (9) copies of a *Petition for Rehearing* in reference to the above case. I have also enclosed a *Proof of Service* of this document upon counsel for the respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. Should you need any additional information, please do not hesitate to contact this office.

With kindest regards, I remain,

Yours Very Truly,

Johnny Gardner

JG/vhb

Enclosures: As stated above

Wherever life takes you, we'll be there.

212 MAIN STREET • CONWAY, SC 29526 • 843.248.7135 • FAX: 843.248.0270
1601 OAK STREET • SUITE 201 • MYRTLE BEACH, SC 29577 • 843.839.4795 • FAX: 843.839.7009
WWW.JOHNNGARDNERLAW.COM • INFO@JOHNNGARDNERLAW.COM

The Supreme Court of South Carolina

The State, Respondent,

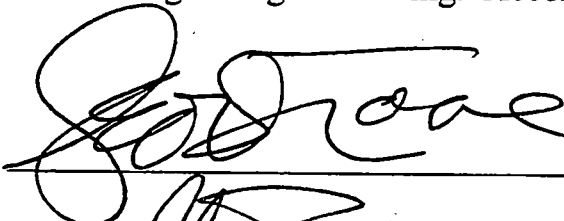
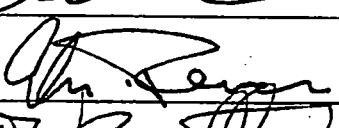
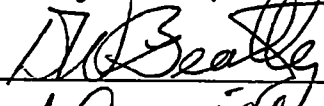
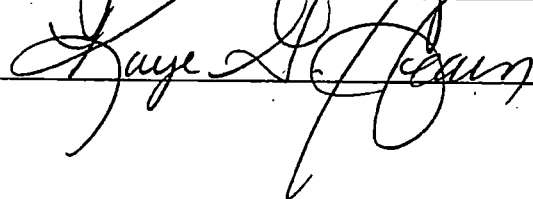
v.

Kenneth Darrell Morris, II, Petitioner.

Appellate Case No. 2011-203786

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	CJ.
	J.
	J.
	J.
	J.

Columbia, South Carolina

April 9, 2015

cc:

Johnny Gardner, Esquire

Alan McCrory Wilson, Esquire

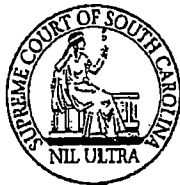
John W. McIntosh, Esquire

Salley W. Elliott, Esquire

Mark Reynolds Farthing, Esquire

Kevin Scott Brackett, Esquire

David Hamilton



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

April 9, 2015

The Honorable David Hamilton
PO Box 649
York SC 29745-0649

RECEIVED

APR 09 2015

ATTORNEY GENERALS
OFFICE
MF file & close

REMITTITUR

Re: The State v. Kenneth D. Morris, II
Lower Court Case No. 2008GS4602834, 2008GS4602837
Appellate Case No. 2011-203786

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

Daniel E. Shearouse
BS

CLERK

cc: Johnny Gardner, Esquire
Mark Reynolds Farthing, Esquire
Kevin Scott Brackett, Esquire

FORM 5
CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA

2015 SEP 21 PM 2:28

County of York

Kenneth D. Morris #33430

Full name and prison number (if any) of Applicant

v.

State of South Carolina

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS

2015 SEP 46 2859

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Corr. Inst. 430 Oaklawn Rd. Pelzer,
SC. 29669

2. Name and location of Court which imposed sentence
York County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) Brandon Nichols

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2008-46-2834 (possession of marijuana)

(b) 2008-GS-46-2837 (trafficking in Ecstasy)

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) one year for the marijuana 4/15-09
- (b) 30-years trafficking Ecstasy 4/15/09
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty trial by jury and judge
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. denied relief
- ii. denied relief
- iii. _____
- (c) the date of each such result:
- i. Heard 3/08/11 filed 8/17/2011, refiled 11/02/11
- ii. Certiorari denied 4/9/15
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Op.No.4872
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/a
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of counsel
- (b) the application will be amended as needed.
- (c) denial of due process
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) counsel failed to enter the statement of Brandon
- (b) Nichols into evidence for the jury's consideration.
- (c) The statement was critical in determining guilt
and innocence as the jury requested it.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. n/a
- ii. n/a
- iii. n/a
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. n/a
- iii. n/a
- iv. _____

(c) the disposition thereof:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(d) the date of each such disposition:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. n/a
- ii. n/a
- iii. n/a
- iv. n/a

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

first filing for post conviction relief

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. n/a
- ii. n/a
- iii. n/a

(b) the proceedings in which each ground was raised:

- i. n/a
- ii. n/a
- iii. n/a

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) first filing for post conviction relief
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. _____
- ii. Irby Walker and Johnny Gardner, Esquires
Johnny Gardner Law Group, P.A.
- iii. 212 Main Street, Conway, SC. 29526
- (b) the proceedings at which each such attorney represented you:
- i. trial, sentencing and direct appeal
- ii. _____
- iii. _____

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Kenneth D. Morris, II, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give
security thereof.

Kenneth D. Morris II
Applicant

SWORN or affirmed to and subscribed before me this
16 day of September 2015.
Tamara C. Currell
Notary Public

My Commission Expires: My Commission Expires
September 25, 2023

19. State clearly the relief you seek in filing this application:
vacate sentences and convictions and remand for new
trial or in the alternative whatever relief this
court deems just and appropriate

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Kenneth D. Morris, II, being duly sworn
upon my oath, depose and say that I have subscribed to the foregoing application; that I know the
contents thereof; that it includes every ground known to me for vacating, setting aside or
correcting the conviction and sentence attacked in this application; and that the matters and
allegations therein set forth are true.

Kenneth D. Morris II

SWORN to and subscribed before me this 16
day of September, 2015.

Kamaia Conwell (L.S.)
Notary Public

My Commission Expires:

My Commission Expires
September 25, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	OF THE SIXTEENTH CIRCUIT
	)	
Kenneth Darrell Morris II,	)	
S.C.D.C. No. , 334303	)	2015-CP-46-2859
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed September 21, 2015 the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The York County Grand Jury indicted the Applicant at the July 2008 term of General Sessions for trafficking ecstasy (MDMA) (2008-GS-46-02837) and possession of marijuana with intent to distribute (2008-GS-46-02834). Irby Walker and Johnny Gardner, Esquires represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On April, 17 2009 the Honorable John C. Hayes, III sentenced the Applicant to thirty (30) years imprisonment and to pay a fine of \$50,000 for trafficking in ecstasy and one (1) year imprisonment for the lesser included offense of simple possession of marijuana (3rd offense), to be served concurrently.

A notice of appeal was filed at the South Carolina Court of Appeals. Mr. Gardner perfected the appeal in the form of a direct appeal. The Court of Appeals affirmed the Applicant's conviction and sentence on August 17, 2011. State v. Morris, 395 S.C. 600, 720

S.E.2d 468 (Ct. App. 2011). The South Carolina Supreme Court granted certiorari and affirmed the opinion of the Court of Appeals. State v. Morris, 411 S.C. 571, 576, 769 S.E.2d 854, 856 (2015), reh'g denied (Apr. 9, 2015). The Remittitur was sent on April 9, 2015.

Attached herewith and incorporated herein by reference are the records of the York County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel.
 - a. "Counsel failed to enter the statement of Brandon Nichols into evidence for the jury's consideration. The statement was critical in determining guilt and innocence as the jury requested it."
2. Denial of Due Process.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. “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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

Applicant also alleges due process violations. These allegations appear to be merely recitations of her grounds for ineffective assistance of counsel. Therefore, Respondent submits these allegations are without merit and incorporates its response in Part III, supra.

In the event Applicant alleges independent claims of due process violations, Respondent submits such claims are likewise without merit. A due process violation only occurs “when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.” State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (citing 21 Am.Jur.2d, Criminal Law § 640 (1981)). Respondent submits the record fully demonstrates Applicant’s plea procedures fully complied with the requirements of due process. Accordingly, Respondent submits this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCP.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

[signatures on following page]

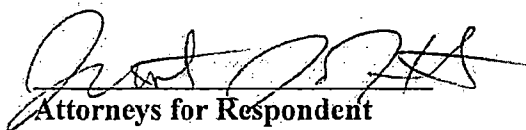
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: 
Attorneys for Respondent

March 10, 2016

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

2015-CP-46-2859

KENNETH D. MORRIS, II, #334303

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

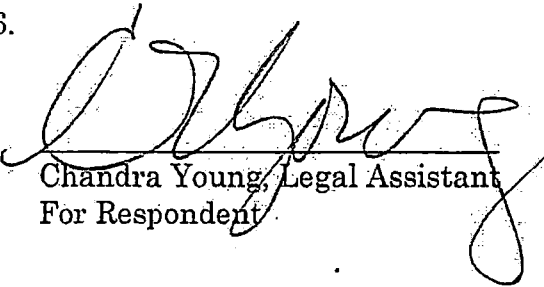
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Leah B. Moody, Esquire
235 East Main Street; Suite 115
Rock Hill, SC 29730

DATED this 10th day of March, 2016.


Chandra Young, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Kenneth D. Morris, II #334303

Plaintiff,

vs.

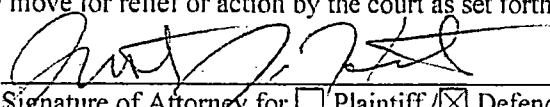
State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-46-2859

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Leah B. Moody, Esquire, Bar No. _____ Address: 235 East Main St; Ste 115 Rock Hill, SC 29730 Phone: _____ Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: Justin J. Hunter, Bar No. 101254 Address: PO Box 11549 Columbia, SC 29211-1549 Phone: 803-734-3737 Fax 803-734-4113 E-mail: _____ Other: _____	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Estimated Time Needed: _____	
		Court Reporter Needed: ☐ YES / ☐ NO	
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant		March 10, 2016 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: \$ _____			
☒ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support			
☐ Domestic Abuse or Abuse and Neglect			
☐ Indigent Status ☐ State Agency v. Indigent Party			
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief			
☐ Motion for Stay in Bankruptcy			
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)			
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____			
☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order.		JUDGE CODE _____	
☐ Other: _____		Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____			
☐ MOTION FEE COLLECTED: \$ _____			
☐ CONTESTED - AMOUNT DUE: \$ _____			

FORM 5

STATE OF SOUTH CAROLINA FILED-RECEIVED
COUNTY OF YORK 2016 JUL 19 AM 11:40 IN THE COURT OF COMMON PLEAS

Kenneth D. Morris, No. 334303
Full name and prison number (if any) of Applicant
DAVID HAMILTON
C.C.P. & ES
YORK COUNTY, SC

2016 CP46-2141

v.
State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence York County, Court of General Sessions, York, SC
3. Name(s) of co-defendant(s) (if any) Brandon Nichols
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-46-2834 (possession of marijuana)
 - (b) 2008-46-2837 (trafficking Estacy)
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 15, 2009 - one year possession of marijuana

CERTIFIED TRUE COPY
2016 JUL 21 PM 4:37
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Revised 3/2003

- (b) April 15, 2009 - 30 years trafficking Ecstasy
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. conviction affirmed
- ii. conviction affirmed
- iii. _____
- (c) the date of each such result:
- i. November 2, 2011
- ii. April 9, 2015
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011).
- ii. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015)
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

Revised 3/2003

- (a) Trial counsel was ineffective in preparing for trial
 - (b) Trial counsel was ineffective in failing to effectively cross-examine the co-defendant
 - (c) Trial Counsel was ineffective in not objecting to a burden shifting charge given by the trial judge. The charge also violated the Constitution of the State of South Carolina.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Trial counsel failed to bring to trial the Notary Public who notarized the affidavit signed by the co-defendant. This witness could have impeached the co-defendant's testimony that he did not voluntarily sign the affidavit. The affidavit impeached his trial testimony.
 - (b) The trial counsel was ineffective in failing to cross-examine the co-defendant as to the punishment he was facing prior to making a deal with the state to plea to a lesser offense and testify against the applicant. This impeachment would have attacked the credibility of the witness.
 - (c) Trial Counsel failed to object to the charge to the jury stating "A defendnat's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." Tr. at 317, ll 8-10. This charge improperly shifted the burden to the applicant and is a charge on the facts in violation of Article V, Sec. 21 of the Constitution of the State of South Carolina.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. N/A
 - ii. _____

- iii. _____
iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
ii. _____
iii. _____
iv. _____
- (c) the disposition thereof:
- i. N/A
ii. _____
iii. _____
iv. _____
- (d) the date of each such disposition:
- i. N/A
ii. _____
iii. _____
iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
ii. _____
iii. _____
iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
ii. _____
iii. _____

- (b) the proceedings in which each ground was raised:
- i. N/A
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Infective assistance of counsel can only be raised in a post conviction relief hearing

- (b) No objection was made by trial counsel to the jury charge.
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Irdy Walker and Johnny Gardner, Johnny Gardner Law Group, P.A., 212 Main St., Conway, SC 29526
 - ii. C. Rauch Wise, 305 Main St., Greenwood, SC 29646
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Trial, sentencing and appeal.
 - ii. Preparation in the Amended Post Conviction Relief Petition
 - iii. _____

19. State clearly the relief you seek in filing this application:

A new trial

20. Are you now under sentence from any other court that you have not challenged?

No.

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STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Kenneth D. Morris, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Kenneth D. Morris

SWORN to and subscribed before me this 30th
day of JUNE, 2014.
[Signature] (L.S.)
Notary Public

My Commission Expires: 12/7/2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Kenneth Darrell Morris II,)
S.C.D.C. No. 334303,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-2859
2016-CP-46-2141

ORDER OF MERGER

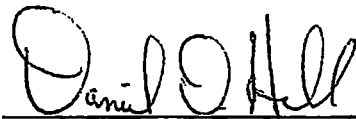
FILED-RECEIVED
2016 OCT 10 AM 8:37
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Applicant in the above captioned matter has filed multiple applications for post-conviction relief. The first was filed on September 21, 2015, under 2015-CP-46-2859. A second application was filed on July 19, 2016, under 2016-CP-46-2141. Both applications challenge the same indictments (2008-GS-46-02837, 2008-GS-46-02834) and convictions. Since an applicant is not generally permitted to have multiple post-conviction relief proceedings in regards to the *same convictions* (See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); S.C. Code Ann. § 17-27-90), Respondent hereby moves to have the two proceedings merged and that the second application (2016-CP-46-2141) be considered an *amendment* to the initial application for post-conviction relief (2015-CP-46-2859).

The York County Clerk of Court is therefore ordered to merge the two cases, with docket number 2015-CP-46-2859 being the surviving case. Hereafter, the word "Application" will refer to docket number 2015-CP-46-2859 and the word "Amendment" will refer to docket number 2016-CP-46-2141, which will be considered an amendment to the application for post-conviction relief.

IT IS THEREFORE ORDERED that the York County Clerk of Court merge docket number 2016-CP-46-2141 into docket number 2015-CP-46-2859, with file 2015-CP-46-2859 being the surviving file and all future pleadings bearing docket number 2015-CP-46-2859. Docket number 2016-CP-46-2141 will be dismissed upon the merger.

AND IT IS SO ORDERED this 6th day of October, 2016.



THE HONORABLE DANIEL D. HALL
Chief Administrative Judge
Sixteenth Judicial Circuit

York, South Carolina

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4602859
2016 CP4602141**

Kenneth D Norris

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Justin J. Hunter

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/Daniel D. Hall

2753

10/6/2016

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on October 10, 2016, and a copy mailed first class or placed in the appropriate attorney's box on October 10, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Leah B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock Hill, SC 29730 (appointed attorney on case 15CP4602859)
C. Rauch Wise 305 Main Street Greenwood, SC 29646 (retained counsel on case 2016CP4602141)

Justin James Hunter PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 5

2015CP4602859

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK)

Kenneth D. Morris, No. 334303)

Full name and prison number (if any) of Applicant.)

Amended

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

FILED-RECEIVED
2017 FEB -2 PM 1:02
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence York County, Court of General Sessions, York, SC
3. Name(s) of co-defendant(s) (if any) Brandon Nichols

Revised 3/2003

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
- (a) 2008-46-2834 (possession of marijuana)
 - (b) 2008-46-2837 (trafficking Estacy)
 - ©
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 15, 2009 - one year possession of marijuana
 - (b) April 15, 2009 - 30 years trafficking Ecstasy
 - ©
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty
 - (b) after a plea of not guilty X
 - © after a plea of nolo contendere
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - I. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court
 - iii.
 - (b) the result in each such Court to which you appealed:
 - I. conviction affirmed
 - ii. conviction affirmed
 - iii.
 - © the date of each such result:
 - I. November 2, 2011
 - ii. April 9, 2015
 - iii.
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - I. State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (Ct. App. 2011).

ii. State v. Morris, 411 S.C. 571, 769 S.E.2d 854 (2015)

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b)

(c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Trial counsel was ineffective in preparing for trial

(b) Trial counsel was ineffective in failing to effectively cross-examine the co-defendant

(c) Trial Counsel was ineffective in not objecting to a burden shifting charge given by the trial judge. The charge also violated the Constitution of the State of South Carolina

(d) Trial Counsel was ineffective in failing to request a charge of the lesser included offense of Possession of Estacy with intent to distribute.

(e) Trial Counsel was ineffective in failing introduce a prior inconsistent statement and to ask the trial judge to instruct the jury that the prior inconsistent statement of co-defendant Brandon Nickles could be considered by the jury as substantive evidence.

(f) Trial Counsel at trial and in his brief on appeal failed to differentiate a "Philly Blunt" and a "Black and Mild" cigar which created confusion at the appellate level as the South Carolina Supreme Court affirmed the conviction on the factual error that a "Philly Blunt" was found in the automobile.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial counsel failed to bring to trial the Notary Public who notarized the affidavit signed by the co-defendant. This witness could have impeached the co-defendant's testimony that he did not voluntarily sign the affidavit. The affidavit impeached his trial testimony.

(b) The trial counsel was ineffective in failing to cross-examine the co-defendant as to the punishment he was facing prior to making a deal with the state to plea to a lesser offense and testify against the applicant. This impeachment would have attacked the credibility of the

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witness.

© Trial Counsel failed to object to the charge to the jury stating "A defendnat's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." Tr. at 317, ll 8-10. This charge improperly shifted the burden to the applicant and is a charge on the facts in violation of Article V, Sec. 21 of the Constitution of the State of South Carolina.

(d) South Carolina Code Sec. 44-53-370(b) provides "The offense of posession with intent to distribute described in Section 44-53-370(a) is a lesser indlcued offense to the offenses of trafficking based upon possession described in this subsection." The legislature has mandated that possession with intent be a lesser included offesne and trial counsel did not request such a charge.

(e) At the trial, the co-defendant was cross-examined by trail counsel as to a prior inconsistent statement. (Rec. on App. at 200, l 19 to 206, l 11). The statement which he admitted making was inconsistent with his trial testimony. Had trial counsel requested, the trial judge would have been required to inform the jury that the contents of the inconsistent statement was admissible as substantive evidence. See, State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). Also, trial counsel failed to introduce the statement as an exhibit.

(f). In State's Exhibits 2-6, a picture of the type of cigar found in the automobile Kenneth Morris was driving is shown. This cigar is a "Black and Mild" which is not used to make a holder for marijuana. In the brief of Trial Counsel, he failed to make this distinction. As a result, the appellate court referred to the cigar as a "Philly Blunt" which is commonly used to smoke marijuana.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

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(a) the specific nature thereof:

I. N/A

ii. —

iii. —

iv. —

(b) the name and location of the Court in which each was filed:

I. N/A

ii. —

iii. —

iv. —

(c) the disposition thereof:

I. N/A

ii. —

iii. —

iv. —

(d) the date of each such disposition:

I. N/A

ii. —

iii. —

iv. —

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

I. N/A

ii. —

iii. —

iv. —

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

Revised 3/2003

I. N/A

ii. —

iii. —

(b) the proceedings in which each ground was raised:

I. N/A

ii. —

iii. —

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Infective assistance of counsel can only be raised in a post conviction relief hearing

(b) No objection was made by trial counsel to the jury charge.

© —

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

© your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

I. Irdy Walker and Johnny Gardner, Johnny Gardner Law Group, P.A., 212 Main St., Conway, SC 29526

ii. C. Rauch Wise, 305 Main St., Greenwood, SC 29646

iii. —

(b) the proceedings at which each such attorney represented you:

I. Trial, sentencing and appeal.

ii. Preparation in the Amended Post Conviction Relief Petition

Revised 3/2003

iii. —

19. State clearly the relief you seek in filing this application:

A new trial

20. Are you now under sentence from any other court that you have not challenged?

No.

VERIFICATION

I, Kenneth D. Morris, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

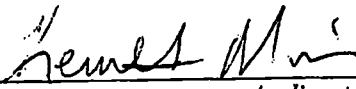
_____(L.S.)
Notary Public

My Commission Expires: _____

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

1 day of February, 2017.



Notary Public

My Commission Expires: 12/7/2019

FILED-RECEIVED
2017 FEB -2 PM 1:02
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
Kenneth Morris	Mr. Wise	P.5-29
	Mr. Hunter	P.30-34
Johnny Gardner	Mr. Hunter	P.35-50
	Mr. Wise	P.50-57
Court Reporter's Certificate	Page	P.59

I N D E X

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
Appl.1	Court of Appeals Opinion		
	<i>State v. Kenneth Morris</i>		P.13
	(January 28, 2015.)		
Appl.2	One Black and Mild		
	Two Philllies Blunts		P.15
Appl.3	S C Appellate Court		
	Final Brief		P.20

Reporter's Note: All Exhibits were filed with the York
County Clerk of Court's Office.

1 (COURT IN SESSION WEDNESDAY, FEBRUARY 1, 2017 AT 11:05
2 AM.)

3 (APPLICANT, KENNETH MORRIS, ENTERS COURTROOM.)

4 THE COURT: Thank you. You may be seated.

5 MR. HUNTER: May it please the court, your Honor.

6 The next case is *Kenneth Morris versus State of South*
7 *Carolina* 2015-CP-46-2-8-5-9. Your Honor, he was indicted
8 at the June 2008 term in York County for trafficking
9 ecstasy and PWID marijuana. He was represented by Mr. Irby
10 Walker and Johnny Gardner.

11 On April 15th, 2009 he began a jury trial and was
12 found guilty of the lesser included offense of possession
13 of marijuana sentenced to one year. He was found guilty as
14 indicted for trafficking ecstasy and sentenced to thirty
15 years. It was a third offense.

16 Your Honor, he did file a direct appeal that was
17 prepared by Mr. Gardner. On August 17th, 2011 the Court of
18 Appeals confirmed his convictions in a published opinion.
19 The Supreme Court then granted Cert and confirmed the Court
20 of Appeals where a remittuter was eventually sent April
21 9th, 2015.

22 He filed this current action September 21st, 2015.
23 He's here today represented by Mr. Rauch Wise.

24 MR. WISE: Your Honor, I do have an amended *Post*
25 *Conviction Relief Petition* that I sent to Mr. Hunter last

1 week. That's the original, I'll file it with the court,
2 and here's a copy.

3 (DOCUMENTS RECEIVED UP BY THE COURT.)

4 MR. WISE: It had a couple of new allegations in it.
5 And with that we're ready.

6 THE COURT: Yes, sir.

7 MR. WISE: I'd like to call Mr. Kenneth Morris first.

8 THE COURT: Just come right up here and let the Clerk
9 of Court swear you in.

10 MADAM CLERK: Mr. Morris, you can place your -- before
11 you get on the bench, place your left hand on the Bible and
12 raise your right as far as you can.

13 (WHEREUPON, KENNETH MORRIS,
14 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

15 MADAM CLERK: Just take a seat. Watch your step up
16 there.

17 THE COURT: Mr. Morris, the lady over to your right is
18 a court reporter, she's taking down everything that's said.
19 I need you to speak up loud so that she can hear you and
20 also your lawyer is gonna be on the opposite side of the
21 courtroom, okay.

22 MR. MORRIS: Yes, your Honor.

23 DIRECT EXAMINATION

24 KENNETH MORRIS BY MR. WISE:

25 Q. Please give us your full name.

1 A. Kenneth Darrell Morris, the II.

2 Q. And how old are you, Mr. Morris?

3 A. Thirty seven.

4 Q. Thirty seven?

5 A. Yes, sir.

6 Q. Okay. I thought you were younger than that for some
7 reason. Don't ask me why. And where are you from?

8 A. Wilmington, North Carolina.

9 Q. And how far did you go in school?

10 A. I graduated from college.

11 Q. And what college did you graduate from?

12 A. North Carolina A&T State University.

13 Q. At the time of this incident in 2008 where were you
14 working at that point?

15 A. Youth Enhancement in Wilmington, North Carolina.

16 Q. And where?

17 A. Youth Enhancement ---

18 Q. And what is that?

19 A. --- in Wilmington, North Carolina. We help problem
20 youth in the community.

21 Q. Okay.

22 A. And problem adults.

23 Q. All right. And how long had you been working there?

24 A. Almost two years.

25 Q. Okay. Now, you had occasion, you were stopped in

1 York County back in -- I can't remember the month now --
2 2008.

3 A. February.

4 Q. It was February of 2008?

5 A. Yes, sir.

6 Q. Roughly eight years ago. Seven years. Nine years
7 ago, right?

8 A. I would say yeah, almost nine years ago.

9 Q. Okay. All right, you had a trial and some -- The car
10 you were in was rented by who?

11 A. Mr. Brandon Nichols.

12 Q. All right. And there was some drugs found in the
13 trunk of the car?

14 A. Yes.

15 Q. And you were driving at the time?

16 A. Yes, sir.

17 Q. All right. You eventually hired Mr. Irby Walker to
18 represent you?

19 A. Yes, sir.

20 Q. How did that come about?

21 A. I initially hired Mr. Christopher Wellborn.

22 Q. Uh-huh.

23 A. And Mr. Christopher Wellborn told me that it was a
24 hundred percent legal search and seizure.

25 Q. Uh-huh.

1 A. But at the last minute he told me that he thought I
2 should take a plea because of the judge ---

3 Q. Uh-huh.

4 A. --- that was on the case.

5 Q. Uh-huh.

6 A. But he did also thought it was a hundred percent legal
7 search and seizure.

8 Q. Right.

9 A. So I decided to switch lawyers.

10 Q. Okay.

11 A. And a person I knew in North Carolina had sent me to
12 Mr. Irby Walker.

13 Q. Okay. And he lived down in Conway?

14 A. Yes, sir.

15 Q. Okay. And so you went to trial in the case?

16 A. Yes, sir.

17 Q. And I think ultimately your conviction was affirmed
18 in a three two decision?

19 A. Yes, sir.

20 Q. All right. Let's go back to the trial matter.

21 You and I have discussed this matter?

22 A. Yes, sir.

23 Q. All right. There was several things that we thought
24 counsel did not do they should have done?

25 A. Yes, sir.

1 Q. First of all let's deal first with the affidavit
2 from the co-defendant. Tell me about that.

3 A. Mr. Nichols once we understood ---

4 Q. Let me back up one second ---

5 A. Okay.

6 Q. --- so the judge can understand something. Did you
7 make bond?

8 A. Yes, sir.

9 Q. You got released on bond?

10 A. Yes, sir.

11 Q. What about Mr. Nichols?

12 A. Yes, sir.

13 Q. And did y'all -- How far apart did y'all live back in
14 North Carolina?

15 A. Maybe three hours. Maybe two and a half to three
16 hours.

17 Q. No, no. That was a bad question and a right answer.
18 You and Mr. Nichols are from North Carolina?

19 A. Yes, sir. We're from the same place.

20 Q. All right. How far apart did the two of you live
21 in North Carolina?

22 A. At the time?

23 Q. From each other.

24 A. Maybe two and a half to three hours. But my --

25 Q. All right. Where did he live?

1 A. My daughter lives in the same place. Greensboro,
2 North Carolina.

3 Q. And where did you live?

4 A. I was living in Wilmington, North Carolina.

5 Q. Okay. All right. So y'all were some miles apart?

6 A. Yes, sir.

7 Q. Did -- Tell me about the statement that you obtained
8 from Mr. Nichols.

9 A. Mr. Nichols at the time of the statement I had moved
10 to Greensboro, North Carolina ---

11 Q. Uh-huh.

12 A. --- to be close to my daughter.

13 Q. Uh-huh.

14 A. Mr. Nichols explained to me that he made a bad
15 decision ---

16 Q. Uh-huh.

17 A. --- because he didn't want to be away from his family.

18 Q. Uh-huh.

19 A. And he was pressured into writing the statement
20 against me ---

21 Q. Uh-huh.

22 A. --- to avoid jail time.

23 Q. All right.

24 A. So he notified me and somebody that I knew that he
25 wanted to do the right thing because they told him he

1 wouldn't get any jail time and he thought I wouldn't get
2 any jail time either. That's why he wrote a statement
3 against me.

4 Q. Okay.

5 A. So he decided to write a affidavit to tell the truth.

6 Q. And how did that -- Was that an actual affidavit
7 signed?

8 A. Yes, sir.

9 Q. And was given to your attorney?

10 A. Yes, sir.

11 Q. All right. Was that statement introduced at trial?

12 A. It wasn't introduced into evidence.

13 Q. It was not an exhibit?

14 A. No, sir.

15 Q. And you think it should have been?

16 A. I definitely think it should have been because on
17 page -- on page 329 ---

18 Q. Yes.

19 A. --- of my transcript ---

20 Q. Uh-huh.

21 A. --- the jury -- while the jury was deliberating they

22 Q. Right.

23 A. -- came out and ask the judge on page 5 -- I mean on
24 329 and line 5 it said "We would like to see Mr. Nichols
25 statement that he signed at the notary." So I feel like

1 the jury while they were deliberating that could have been
2 a major part of my guilt or innocence.

3 Q. Was that any indication the jury was concerned about
4 his statement?

5 A. I believe it was.

6 Q. All right. But never introduced as an exhibit?

7 A. No, sir.

8 Q. All right. And I believe you're now aware that if it
9 had been introduced as an exhibit that the jury could have
10 been instructed what about that statement as far as how
11 they consider it?

12 A. From my understanding and from the things I read about
13 cases, ---

14 Q. Uh-huh.

15 A. --- upon my lawyer's request they could have used his
16 testimony to say his testimony could have been
17 impeachable.

18 Q. And also could the jury consider it as a true
19 statement, a subsequent statement?

20 A. Yes, sir, I believe it would a been considered as
21 a subsequent statement.

22 Q. All right. Now, you also had a question about -- Let
23 me go -- Let's go through this for a bit. In the -- In
24 affirming the opinion and affirming this decision, the
25 Court of Appeals I believe in footnote 1 made a reference

1 to what is commonly called a Philly Blunt.

2 A. Yes, sir.

3 Q. Is that correct under the facts of this case?

4 A. No, sir, not at all.

5 Q. Let me see if I can find -- I want to hand you --

6 I want to introduce this as an exhibit. It's a copy
7 of the opinion of *State versus Morris* which was decided
8 January 28th, 2015.

9 Here you go.

10 MADAM COURT REPORTER: Can I call it an Applicant's?

11 An Applicant's Exhibit, Judge?

12 THE COURT: That will be fine.

13 MR. WISE: Thank you.

14 (WHEREUPON, APPLICANT'S EXHIBIT NUMBER ONE, IDENTIFIED
15 AND MARKED, RECEIVED INTO EVIDENCE.)

16 BY MR. WISE:

17 Q. And that's your copy of the opinion in your case.

18 A. Yes, sir.

19 Q. And look at footnote 1.

20 A. Footnote 1. I see it.

21 Q. You find it?

22 A. Yes, sir.

23 Q. What does the court say there?

24 A. Footnote 1 the court opinion is "Philly blunts are an"
25 expensive -- "inexpensive brand of cigar. Vinesett

1 testified that people hollow [the blunt] out and place the
2 marijuana in there so if they did see them riding down the
3 road smoking anything, it would look like they were just
4 smoking a [Philly's] blunt."

5 Q. All right. Now, is that a correct statement of the
6 facts of this case?

7 A. No, sir. A Philly Blunt was never found in the car.

8 MR. WISE: Your Honor, we have State's Exhibits 2
9 through 7, which I don't know if we can take 'em out of the
10 exhibit packet, but they need to be at least reviewed by
11 the Court. And I would reference that 2 through 7 are what
12 I think the court needs to review.

13 MR. HUNTER: May I see what specifically is on those?

14 MR. WISE: Sure.

15 (MR. HUNTER REVIEWING EXHIBITS AT SIDE BAR AT 11:15
16 AM.)

17 MR. HUNTER: No objection.

18 THE COURT: These are State's ---

19 MR. WISE: At the trial.

20 THE COURT: --- at the trial.

21 MR. WISE: That's the trial testimony.

22 THE COURT: Do I have these in the --

23 MR. HUNTER: No, your Honor, those are not in your
24 packet.

25 MR. WISE: They would not be in your packet.

1 Q. Now, I have here a plastic bag containing three type
2 -- three cigars. Can you identify those?

3 A. Yes. Two of ---

4 Q. Hold on.

5 A. --- 'em are Phillies Blunts which were --

6 Q. We're getting out of cycle. You recognize a Phillies
7 blunt?

8 A. Two of 'em are Phillies Blunts and one of 'em is a
9 Black and Mild.

10 Q. All right.

11 MR. WISE: Your Honor, I'd like to introduce these
12 three as exhibits.

13 MR. HUNTER: No, objection.

14 (WHEREUPON, APPLICANT'S EXHIBIT NUMBER TWO, IDENTIFIED
15 AND MARKED, RECEIVED INTO EVIDENCE.)

16 THE COURT: What's the Exhibit number?

17 MADAM COURT REPORTER: Applicant's 2.

18 BY MR. WISE:

19 Q. Now, I don't know if you need to hold on to 'em to
20 tell me the difference, but tell me the difference --

21 First of all, let me -- I want to show you what's
22 marked as State's Exhibit 7 at the trial of your case.

23 I believe 7 and 4. All right. Do you recognize in
24 looking at Exhibit 7 and 4, do you recognize a cigar in
25 there?

1 A. I recognize two Black and Mild's.

2 Q. Black and Mild's?

3 A. Yes, sir.

4 Q. All right. And is there one black -- I mean how
5 many are in each picture?

6 A. One.

7 Q. One in each picture?

8 A. Yes, sir.

9 Q. And that is the one with the filter tip on it?

10 A. Filter tip yes, sir.

11 THE COURT: Excuse me, and what did you call it?

12 A. They are Black and Mild's.

13 THE COURT: Black?

14 A. Black and Mild.

15 THE COURT: Black and Mild.

16 A. Yes, sir. Yes, your Honor.

17 THE COURT: All right.

18 BY MR. WISE:

19 Q. Is that the same type of cigarette in Applicant's or
20 same type of smoking found in Applicant's 2?

21 A. Yes, sir.

22 Q. All right. Is that a Philly Blunt?

23 A. No, sir.

24 Q. Is that -- Anybody ever remotely called that a Philly
25 Blunt?

1 A. No, sir.

2 Q. All right. I want you to look through pictures 2, 3,
3 5, and 6. All right.

4 MR. WISE: These are State's Exhibits 2, 3, 5, and 6
5 in the trial of this case.

6 (WITNESS COMPLYING.)

7 Q. Do any of those pictures show a Philly Blunt?

8 A. No, sir.

9 Q. Now, a Philly Blunt would be the bigger cigar in
10 Applicant's No. 2?

11 A. Yes, sir.

12 Q. All right. Was there references to Philly Blunt
13 during the trial of this case?

14 A. Yes, their referenced throughout my whole trial.

15 Q. All right.

16 A. By the officer.

17 Q. By the officer and by trial counsel?

18 A. Any by my trial counsel. My trial counsel actually
19 he -- you know I let him know that what they were
20 explaining that a Philly Blunt was not a Philly ---

21 Q. Uh-huh.

22 A. --- Blunt which is used to smoke marijuana.

23 Q. Right.

24 A. He still called it Phillies Blunts throughout my
25 trial.

- 1 Q. Turn to -- Let's see, 177 of the transcript. And look
2 at line 13 of 177 and read what line -- The question your
3 trial counsel ask.
- 4 A. You said line 13?
- 5 Q. Line 13, yes.
- 6 A. "And get these. You see the blunts more clearly I
7 assume."
- 8 Q. All right.
- 9 A. "You're on the car now, right?"
- 10 Q. And were there blunts in the car?
- 11 A. No, sir.
- 12 Q. All right. And did you call that to your trial
13 counsel's attention?
- 14 A. I let my trial counsel know that because I felt it
15 created an illusion that ---
- 16 Q. Uh-huh.
- 17 A. --- we was smoking marijuana out of Phillie Blunts ---
- 18 Q. All right.
- 19 A. --- which was not the case.
- 20 Q. Okay. Now I want to show you State's Exhibit 3. And
21 there are some little circular looking things in there.
- 22 A. Yes, sir.
- 23 Q. All right. What are those?
- 24 A. Those are the liner of a Black and Mild that they
25 referred to as cancer paper ---

1 Q. Uh-huh.

2 A. --- which is pulled out of the Black and Mild.

3 Q. So is the liner that's inside the small smoking device
4 in Applicant's 2?

5 A. Yes, sir.

6 Q. All right. Are there any such liner's in a Phillie
7 Blunt?

8 A. No, sir.

9 Q. Now, did that confusion continue forward in the
10 brief on appeal?

11 A. I believe that it did because numerous occasions ---

12 Q. Uh-huh.

13 A. --- on appeal in my brief's they're referred to as
14 Phillie Blunts ---

15 Q. Uh-huh.

16 A. --- which as you stated in the opinion of the - the
17 direct appeal court judges.

18 Q. All right.

19 MR. WISE: I believe your brief on appeal for the
20 appellate is part of the record in this case?

21 MR. HUNTER: Of the appellate, no, sir, no its not.

22 MR. WISE: It is not?

23 MR. HUNTER: Not that its been entered in the packet.

24 MR. WISE: Okay. Not part of the appeals file?

25 MR. HUNTER: Its not part of it but I can supplement

1 it.

2 MR. WISE: All right. I have a copy but mine's marked
3 on. I have no objection to introducing it if he has no
4 objection to my markings. But what I've done is mark what
5 is referred to Blunt at several places. Just mark it like
6 that. No handwritten notes.

7 (SIDE BAR BETWEEN ATTORNEYS.)

8 MR. HUNTER: I have no problem with the brief marked
9 submitted.

10 MR. WISE: Then I would introduce this as Applicant's
11 3.

12 THE COURT: Let me ask you to do this.

13 Your introducing things into evidence that she will
14 have. I will leave here after tomorrow and I will not have
15 what she has. It's up to you to make me a copy of that as
16 well after you introduce it.

17 (WHEREUPON, APPLICANT'S EXHIBIT NUMBER 3, IDENTIFIED
18 AND MARKED, RECEIVED INTO THE RECORD.)

19 MR. WISE: Can you take the exhibits with you?

20 MADAM COURT REPORTER: You've got to go through the
21 Clerk, Judge, to get 'em.

22 THE COURT: I know. Sometimes its an act of Congress
23 during a trial.

24 MR. WISE: We'll need to make a -- Yeah, we'll need to
25 make a copy of that and the transcript you will have.

1 THE COURT: The transcript is Applicant's?

2 MADAM COURT REPORTER: Three. What he just handed me,
3 Judge, is Applicant's 3.

4 MR. WISE: That's the Brief from Appellate.

5 Q. All right. First of all on the statement of the facts
6 on page 2 of the brief. Don't worry about your admitting
7 it. I got it.

8 Read the marked portion on there as what was said in
9 the brief.

10 A. It states that "He also observed some partially
11 smoked hollowed out cigars in the same vicinity."

12 Q. All right. Are there any partially smoked hollowed
13 out cigars in the tran -- in the pictures?

14 A. No, sir.

15 Q. All right. I'm gonna call your attention also to
16 page 9 of the brief, and look at the bracketed portion
17 there.

18 And what was said in the brief on page 9 in the
19 bracketed portion?

20 A. It states, "He based his finding on Vinesett's
21 detection of burnt marijuana and the officers knowledge
22 that hollowed out cigars can be used to smoke marijuana."

23 Q. All right. Again, were there any hollowed out cigars
24 there?

25 A. No, sir.

1 Q. In the pictures?

2 A. No, sir.

3 Q. And again on page 10 the marked portion.

4 A. "Vinesett also testified that, based on his training
5 and experience, he suspected the cigars he saw had been
6 hollowed out for the purpose of smoking marijuana."

7 Q. All right. Now Mr. Vinesett did in fact testify
8 that he observed hollowed out cigars, correct?

9 A. Yes, numerous times.

10 Q. Did your attorney attack that as being not accurate?

11 A. No, he didn't. I thought he was ineffective for that.

12 Q. All right.

13 A. Because he even mentioned that that -- even though
14 that wasn't indicated, so, I felt that he was ineffective
15 for stating that that could have been an indicator and not
16 determined these hollowed out cigars, blunts, were not
17 hollowed out blunts because it's creating an illusion that
18 we were gonna smoke marijuana.

19 Q. Okay. So there are numerous references to hollowed-
20 out cigars which in your brief which were not accurate?

21 A. Yes, sir.

22 Q. Okay. Do you think that led to confusion with the
23 South Carolina Supreme Court?

24 A. Yes, sir, definitely could have led to confusion.

25 Q. All right. Now, --

1 A. Because a footnote from the Supreme Court ---

2 Q. Uh-huh.

3 A. --- opinion stated that hollowed out blunts, Phillie
4 Blunts, are used to smoke marijuana.

5 Q. And they made particular reference to that?

6 A. Yes, sir.

7 Q. Okay. Now, I believe your attorney actually had some
8 Phillie Blunt and a Black and Mild at court?

9 A. Yes, sir.

10 Q. And did he ever introduce those exhibits so the jury
11 could have them to take to the jury room to compare?

12 A. No, sir, he didn't introduce them as exhibits.

13 Q. All right. Did he ever explain the circular paper
14 in there in any way?

15 A. No, sir, he never explained it come out -- it comes
16 out of Black and Mild.

17 Q. And you -- Your co-defendant testified against you?

18 A. Yes, sir.

19 Q. And I believe the lawyer at the opening statement
20 commented about the fact that the co-defendant had got a
21 deal?

22 A. Yes, sir.

23 Q. And your basically -- And on page 118 he said Nichols
24 got a deal and you will hear what his deal was; is that
25 correct?

1 A. Yes, sir.

2 Q. And then the deal was for probation?

3 A. Two years probation.

4 Q. Do you think it would have impacted the credibility
5 of Mr. Nichols in the eyes of the jury had the jury known
6 the true nature of his deal?

7 A. Yes, sir, I definitely believe if they knew the
8 nature of his deal that he took a deal to get probation it
9 might a discredited his testimony.

10 Q. Right. But did you know that whether they knew --
11 Was the jury ever -- Was he ever cross-examined about the
12 possible sentence he had?

13 A. No, my lawyer never cross-examined him about his
14 sentence.

15 Q. And do you know that that is a proper subject of
16 cross-examination?

17 A. I didn't know that at the time.

18 Q. You know it now?

19 A. Yes, sir.

20 Q. Okay. Under *State versus Mizzell* which was decided
21 April 29th, 2002 by the South Carolina Supreme Court?

22 A. Yes, sir.

23 Q. All right. Do you think it would have impacted the
24 jury's opinion of his credibility if they had known that he
25 was testifying in exchange for getting away from a twenty-

1 five year mandatory sentence?

2 A. I definitely believe so because like -- like I spoke
3 on earlier, during their deliberations they wanted to see a
4 copy of his affidavit so his testimony seemed to be in
5 question to me, so if my lawyer would have presented this
6 information I believe that they could have -- they might a
7 looked at his testimony as impeachment.

8 Q. Did the transcript indicate that they were concerned
9 about his testimony?

10 A. Yes, sir. I stated that.

11 Q. All right. Now there was also a jury charge to the
12 jury in this case on page 317 of the transcript at line 8
13 through 10, all right. I ask you to read lines 8 through
14 10 of page 317 at the point the judge charged.

15 A. 317 lines 8 through 10?

16 Q. Right.

17 A. "A defendant's knowledge and possession may be
18 inferred when a substance is found on the property under
19 the defendant's control."

20 Q. All right. And were you driving the car?

21 A. Yes, sir.

22 Q. Okay. So the car was under your control?

23 A. At the time.

24 Q. At the time; is that correct?

25 A. Right. Yes, sir.

1 Q. Do you think that's the proper charge?

2 A. No, sir.

3 Q. All right. And it's a legal argument. Do you have
4 an opinion as to whether or not that kind of shifted the
5 burden a little bit?

6 A. I do believe it shifted the burden because like it
7 refers to in the charge, ---

8 Q. Uh-huh.

9 A. --- just because I was driving I don't feel like
10 I should a been held responsible for what was in the car.

11 Q. Okay. Now, the jury convicted you of trafficking
12 ecstasy?

13 A. Yes, sir.

14 Q. And they convicted you of just possession of
15 marijuana?

16 A. Yes, sir.

17 Q. And how much marijuana was there?

18 A. It stated in the record that it was a half a pound.

19 Q. Okay. Have you since learned that by statute there is
20 a lesser included to trafficking?

21 A. Yes, sir.

22 Q. And that's a possession with intent?

23 A. Yes, sir.

24 Q. All right.

25 MR. WISE: And I call the Court's attention to

1 44-53-370 sub-paragraph -- Oh, what is it? Let me get back
2 to my -- Sub-paragraph (B) at the very end it says for the
3 record "the offense of possession with intent to distribute
4 described in 44-53-370(A) is a lesser included offense to
5 the offenses of trafficking based upon possession described
6 in this sub-section."

7 Q. So you did not get the charge on possession with
8 intent?

9 A. No, sir.

10 Q. Do you think based upon what the jury did in your
11 case do you think that would have been beneficial --

12 A. I think based upon them driving -- I think they had a
13 lot of -- I think they were very undecided on the situation
14 based upon them dropping the marijuana to a possession
15 charge. I think if they would a known that, that my trail
16 lawyer would a brought that to their attention, or it would
17 a been a charge by the judge, that it would a been a strong
18 chance that they would a wanted to give a lesser charge.

19 Q. Either individually or accumulative, do you think
20 these errors hurt your case?

21 A. I think these errors hurt my case in a major way.

22 Q. Okay.

23 MR. WISE: Thank you. Answer any questions the
24 State may have.

25 MR. HUNTER: Just a few questions.

1 MR. MORRIS: Mr. Wise, could I put one more thing on
2 the record?

3 MR. WISE: Whoa.

4 MR. MORRIS: Oh, I'm sorry. Sorry, your Honor.

5 MR. WISE: Hold on. Let me check my list.

6 MR. MORRIS: Okay.

7 MR. WISE: I may have missed something.

8 Q. Does it relate to the issues that we've discussed?

9 A. Yes, sir.

10 Q. Oh.

11 A. Basically to the issue of the blunt.

12 Q. Oh, yeah. Go ahead. Excuse me.

13 A. On page 180.

14 Q. Uh-huh.

15 A. Like I stated, like we was speaking earlier, as far
16 as I feel like it created a illusion that was created with
17 these Phillie Blunts - - -

18 Q. Uh-huh.

19 A. --- they went on and in the direct appeal opinion and
20 the opinion of the South Carolina Supreme Court. Mr.
21 Vinesett testified on page 180 of line 7 that it is a
22 blunt. But on 19, line 19 on the same page 180 my lawyer
23 ask him have you ever in your career seen anybody arrested
24 ---

25 Q. Uh-huh.

1 A. --- anybody with a marijuana cigarette with a filter
2 on it ---

3 Q. Uh-huh.

4 A. --- which is on a Black and Mild -

5 Q. Uh-huh.

6 A. --- Mr. Vinesett says he doesn't know.

7 Q. Okay.

8 A. And he stated numerous times that he's very
9 knowledgeable of Phillies Blunt's cigars.

10 Q. Does it --

11 A. I feel that was ineffective on my lawyer not to
12 present the Black and Mild into evidence being as Mr.
13 Vinesett admitted on the stand that he never -- he doesn't
14 know of anyone smoking marijuana out of a Black and Mild.

15 Q. Okay. And yet he had a Black and Mild in the
16 courtroom with him?

17 A. Yes, sir.

18 Q. Okay. That he could have introduced?

19 A. That he could have introduced.

20 Q. All right.

21 MR. WISE: Thank you.

22 MR. HUNTER: Just a few questions.

23 MR. MORRIS: Yes, sir.

24 CROSS-EXAMINATION

25 KENNETH MORRIS BY MR. HUNTER:

1 Q. So while trafficking ecstasy I believe the -- your
2 statement that you gave to police that was entered into
3 evidence, you said that you and Nichols pled to the ecstasy
4 fifty fifty?

5 A. No, sir, I never submitted a statement into evidence.

6 Q. Okay. The statement that you gave to police at a
7 police station you said we're splitting this fifty fifty?

8 A. What statement are you referring to? I never gave a
9 statement to the police.

10 Q. Referring to the statement that Commander Brown
11 testified to.

12 A. Okay. I'm listening.

13 Q. So I'm referring to that statement --

14 A. I never made a statement saying I was ---

15 Q. --- did you tell --

16 A. --- splitting.

17 Q. Okay. When you talk to him, did you tell him we're
18 splitting this fifty fifty?

19 A. No, sir, I never made a statement.

20 Q. You never said that?

21 A. I never signed a statement or made a statement of
22 that nature.

23 Q. Well I didn't ask you if you signed a statement. I'm
24 asking you if you made a statement.

25 A. No, sir.

1 MR. HUNTER: I beg the Court's indulgence one second.

2 Q. Do you have the transcript up there?

3 A. Not in totality.

4 MR. WISE: He has the transcript now.

5 MR. HUNTER: Okay.

6 Q. Okay. At the top of page 78 is Commander Brown
7 testifying. I'm looking at lines 1 through 3. I got us at
8 page 78 lines 1 through 3.

9 A. Okay. I'm on page 78.

10 Q. Okay. Commander Brown testified "Morris stated that
11 he and Nichols were gonna split the pills but that the
12 marijuana belonged to him." So you agree that according to
13 the Commander you told him y'all were gonna split the
14 pills, correct?

15 A. No, sir.

16 Q. Is that not what that statement says?

17 A. The statement says that but that's not the statement
18 I made.

19 Q. Well that's not what I'm asking. Is that what the
20 statement says?

21 A. Yeah, that's what the statement says, yes, sir.

22 Q. Okay. And I believe Commander or Lieutenant Dalton
23 says the same thing.

24 MR. HUNTER: And I will beg the Court's indulgence to
25 find that real quick.

1 Q. I'm looking at page -- looking at page 88, Lieutenant
2 Jason Dalton is testifying. Again, that's page 88 looking
3 at lines 17 through 18.

4 A. Yes, sir.

5 Q. His testimony there, "he" being you "repeated that the
6 pills were to be split between him and the other individual
7 Mr. Nichols". So that statement was testified to, correct?

8 A. Now that's what he testified to.

9 Q. Okay. Thank you. Now, was there ever any testimony
10 or any evidence that you were only in possession of some of
11 the pills?

12 A. There were never any testimony not that I remember.
13 Not that I recall there were never any testimony period
14 that said that I -- that was shown that said I made the
15 statement either.

16 Q. Okay. What I'm trying to ask is, was there any --
17 was there ever a statement that you were only responsible
18 for some but not all the pills?

19 A. In this transcript?

20 Q. Right.

21 A. I'm not aware of.

22 Q. Okay. Thanks. That's all I have for that one.

23 Now as far as the -- Where is it? As far as the
24 co-defendant's affidavit, didn't your attorney -- I think
25 he essentially read out the entire affidavit in his closing

1 argument did he not?

2 A. Not that I'm aware of.

3 MR. HUNTER: I beg the Court's indulgence one second.

4 Q. I'm looking at page 301, was the defense closing.

5 I apologize, I looked at the wrong --

6 MR. HUNTER: I beg the Court's indulgence one second.

7 (PAUSE.)

8 Q. Okay. Page 305, Mr. Walker's closing, looking at
9 lines, starting at line 8, he said, "Brandon Nichols" -- I
10 apologize. Do you have the transcript at page 305?

11 A. Yes, sir. Yes, sir.

12 Q. Would you just read lines 8 through 19.

13 A. Lines 8 through 19 states,

14 "Brandon Nichols, did Brandon Nichols lie?

15 Yeah.

16 What did Nichols say?

17 I ask him to read or I read his statement which
18 he admitted. He said it on March the 12th, 2009,
19 that this is -- this is the date he pled guilty. If
20 y'all don't remember I was put under the most pressure
21 of my life. I was scared and confused about my
22 situation that was at hand. Some of the statements
23 that I made concerning Kenneth Morris and myself were
24 not true. I was not aware that Mr. Morris purchased
25 marijuana, nor did I see him place any quantity in the

1 vehicle.

2 Okay. Mr. Morris was not aware of the purchase of
3 ecstasy and had no knowledge of it? It's signed as
4 notarized.

5 Okay."

6 Q. So you agree that your attorney essentially read out
7 the affidavit to the jury in the closing argument?

8 A. I agree that he read it. But I also agree that the
9 jury needed -- When they deliberated they wanted to
10 actually -- see the actual affidavit which he never placed
11 as an exhibit into evidence.

12 MR. HUNTER: I don't have anything else from this
13 witness. Thank you, sir.

14 THE COURT: Any redirect limited to what he went into?

15 MR. WISE: No, sir, your Honor. I think we covered it
16 all.

17 THE COURT: Thank you, sir, you may step down.

18 MR. MORRIS: All right.

19 THE COURT: Be careful with that step.

20 (WITNESS LEAVES WITNESS STAND.)

21 MR. WISE: Your Honor, with that the Applicant will
22 rest, your Honor.

23 MR. HUNTER: Your Honor, the State would call Mr.
24 Johnny Gardner.

25 THE COURT: Sir, just come right up to the Clerk of

1 Court and let her swear you in.

2 A. Sir?

3 THE COURT: Come right here.

4 MADAM CLERK: If I can have you place your left hand
5 on the Bible and raise your right.

6 (WHEREUPON, JOHNNY GARDNER, BEING
7 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

8 MADAM CLERK: Thank you. Just watch your step up
9 there.

10 DIRECT EXAMINATION

11 JOHNNY GARDNER BY MR. HUNTER:

12 Q. Mr. Gardner, how are you doing? Would you please
13 state your name for the record?

14 A. Johnny Gardner.

15 Q. Can you give us just a brief background about your
16 legal career?

17 A. I been practicing about twenty-five years, most of
18 that criminal defense law.

19 Q. Can you just describe how you became involved in Mr.
20 Morris' case?

21 A. Yes. Irby Walker was the lawyer and I was at his
22 office one day and he ask me if I could help him argue a
23 motion to suppress, and he explained to me what was
24 happening and I met with the client I'm pretty sure for a
25 few minutes. And I went back to my office, we did not work

1 together, he was just a friend of mine, and I put together
2 a brief and it took me a while to put it together. And I
3 don't remember how much time we had, but I think the State
4 had already filed their brief and I don't think that I had
5 enough time to file mine until we got here to court, so I
6 think the judge got it late but it was filed in time. I
7 mean it was filed prior to the hearing. And all I did was
8 the hearing and I didn't have anything to do with the
9 trial.

10 Q. How well informed were you with the facts of this
11 case?

12 A. I watched the trial so I feel pretty good about it.

13 Q. But prior to trial were you privy to any of the
14 investigation?

15 A. I watched the video.

16 Q. From the traffic stop?

17 A. Yes.

18 Q. Okay. And other than, I guess, the motion to suppress
19 what else was your involvement?

20 A. That was it.

21 Q. Okay. Now post trial you were involved, correct?

22 A. Yes, after the trial John Hiller and I, Irby had some
23 issues ---

24 And I can go into that if I need to, your Honor,

25 --- but suffice to say Irby had some issues and so I

1 met with the Applicant's mother at my office and John
2 Hiller and I, Jonathan Hiller who is a very very smart kid,
3 he and I did the appeal. And then John moved to somewhere
4 else, Greenville or somewhere, so he helped me with the
5 Supreme Court portion of it but we didn't know if he was
6 gonna be able to be there for the arguments so I finished
7 it up.

8 Q. Okay. And you -- has carried that all the way to the
9 Supreme Court?

10 A. Yes.

11 Q. Okay. Now just to go over the allegations here and
12 I'll just start at the beginning. The co-defendant's
13 affidavit that he gave right after he pled, can you
14 describe what you knew to be the circumstances around that?

15 A. All I know about that was what came out during the
16 trial.

17 Q. So you hadn't seen it before that?

18 A. I don't know if I did or not. I think that I had read
19 the police report. I don't think it was much of a police
20 report. But I couldn't swear that I saw the affidavit, or
21 even the police report, but I think I saw the police
22 report.

23 Q. Okay. And just to give the judge some background or
24 additional background, how was his statement used during
25 trial?

1 A. You know, I don't recall exactly. I guess Irby used
2 it to impeach the client. I don't recall. I can't -- I
3 don't think I would feel comfortable testifying about that.

4 Q. Okay.

5 MR. HUNTER: And, Judge, at this time I do want to put
6 it on the record, as alluded to Irby Walker plead guilty on
7 some other charges years ago. He, I believe, is still
8 currently on probation. Our office has tried or
9 essentially all of 2016 to find him, contact him, we have
10 been unsuccessful in every effort to locate him. I just
11 want to put on the record that its -- we believe that it's
12 not a fault to the State that we are unable to locate, find
13 him, or bring him here today.

14 THE COURT: Irby Walker was the trial lawyer?

15 MR. HUNTER: He was the main trial lawyer that Mr.
16 Gardner assisted on. If you read, in looking at the
17 transcript Mr. Gardner did have some arguments here and
18 there, but mainly Irby Walker did most of this trial
19 including the openings and closings. But the State feels
20 to put upon te record that we've been diligent in trying to
21 contact him to get him here. Every time we send mail to
22 him it gets returned right back to us and we are still
23 unable to find a phone number for him.

24 THE COURT: And that --

25 MR. WISE: And the Applicant has no reason to contest

1 those facts.

2 THE COURT: All right.

3 MR. WISE: So we stipulate that he's simply not
4 available.

5 THE COURT: Okay. Because I have -- If I've ever
6 heard the name Irby Walker I don't know so I have no idea
7 what y'all are talking about but I'll just take it as
8 stipulated that he's not available.

9 MR. HUNTER: Right.

10 MR. WISE: He was the trial -- the primary trial
11 counsel.

12 THE COURT: Okay.

13 MR. WISE: He, sometime after this trial, pled to some
14 charges and was disbarred and has basically vanished.

15 THE COURT: Okay. Thank you, sir.

16 MR. HUNTER: Yes, your Honor. And again, not that the
17 State's trying to hide anything or skate by, but I think
18 Mr. Wise can agree most of this will be legal argument and
19 legal briefing so I apologize that Mr. Gardner is not able
20 to fully answer what we're looking for.

21 THE COURT: Certainly.

22 BY MR. HUNTER:

23 Q. Okay. So, again, you didn't really have anything to
24 do with the co-defendant's statement?

25 A. No. And I appreciate you saying I was -- did some

1 arguments here and there. I don't recall any of that. I
2 thought that my -- I know what I was ask to do and what I
3 was ask to do was do the suppression motion. But I did set
4 through the whole trial so you know how trial lawyers are,
5 they may have said something at one time or another, but I
6 don't think I made any official appearances. But if you
7 say I did I'm not arguing with you.

8 Q. And I could be mainly referring to the suppression
9 hearing.

10 A. Yeah, that was -- I did the suppression hearing.

11 Q. Okay, so let's talk a little bit about the co-
12 defendant's punishment.

13 A. Okay.

14 Q. I guess the ability to cross him on his punishment.

15 Do you recall during trial if Mr. Walker ever
16 discussed or crossed Brandon Nichols on the fact that he
17 made a plea deal?

18 A. You know I would defer to the transcript. I don't
19 have an independent recollection. I did hear earlier
20 today, I been in court since this morning, I did hear
21 somebody in this case talk about early he said in the
22 opening statement that the co-defendant lied or something
23 like that. I may have gotten that confused but that's what
24 I heard.

25 Q. Okay. And I think we'll get to that in a minute, but

1 just regarding his, I guess the time that he was facing, do
2 you remember, I believe it was right before closing
3 argument when -- Do you remember what Irby ask the judge or
4 I guess the State tried to preclude Irby from asking or
5 telling the jury about his potential sentence, do you
6 recall that portion?

7 A. I don't have any recollection of that.

8 Q. Okay.

9 A. I did hear some talk about that and to the best of
10 my recollection that was never -- Irby never went into that
11 and we all -- I, personally when I cross examine a co-
12 operating co-defendant, I always say you're looking at life
13 in prison or you're looking at thirty years and now you're
14 getting probation or whatever the circumstances are.

15 Q. Right. And do you remember Mr. Walker making that
16 apparent during his cross-examination ---

17 A. No.

18 Q. --- that he got a probationary sentence?

19 A. I don't think so. I don't remember it at all.

20 Q. Okay. I understand.

21 A. I don't know if he went into it or not.

22 Q. Do you remember the judge saying right before the
23 State's closing when they were discussing those terms with
24 the judge he's essentially telling Mr. Walker I'm gonna ask
25 you to stay away from penalties?

1 MR. WISE: You can refer to the transcript record.

2 BY MR. HUNTER:

3 Q. Page 272 of the transcript. I apologize. 272, and
4 this is right before closing arguments. I'm looking at
5 line, starting at line 16, page 272. Do you recall the
6 judge saying I'm gonna ask you to stay away from penalties.
7 I don't believe what is going to happen. You can certainly
8 argue that Mr. Nichols rather than let himself be exposed
9 to a prison term, you can get there another way.

10 Do you remember that conversation?

11 A. I don't remember that but that wouldn't sound like a
12 good summation of the law to me. I might be wrong but, I
13 mean, I thought that we always went into that with the
14 defendant. Maybe not in a closing but certainly it's in
15 the record every case I've ever tried.

16 Q. Okay. Well I'll move on since you don't have a
17 recollection of that one. Now do you remember the judge's
18 charge on constructive possession? And again this was
19 alluded to earlier. I believe it's line --

20 A. At the --

21 Q. I'm sorry. This is mostly the judge --

22 A. That's okay. I don't remember that. But I heard
23 y'all talking about that and I never heard of a lesser
24 included on trafficking.

25 Q. That's -- that's established.

1 MR. HUNTER: May I approach, your Honor.

2 Q. I'm looking at page 317, and this is lines 8 through
3 13. 8 through 13 right there.

4 A. Okay.

5 Q. Can you read that please?

6 (WITNESS COMPLIES.)

7 A. Okay. I don't recall the judge reading that part but
8 I mean it's in the --

9 Q. Well based on your knowledge as a criminal defense
10 attorney, do you recall that being an incorrect statement
11 of the law?

12 A. I don't know if that's incorrect or not. I'm sure
13 the Supreme Court has decided. But I mean I've heard stuff
14 like that. I've heard two people can share it and ---

15 Q. Okay.

16 A. --- the driver, dominion and control, those kind of
17 words.

18 Q. Okay.

19 A. That language.

20 Q. Now I'm gonna turn to the allegation about the charge
21 of a lesser included offense. Was there any -- As far as
22 you remember, based on your recollection, any discussion
23 about lesser includeds?

24 A. Pretty good. I feel pretty confident that we never
25 discussed that period. Because I remember talking to you

1 on the phone and that was the first time that it ever --
2 that I had ever heard that before because I didn't think it
3 was such a thing. And then I talked with Mr. Wise on the
4 phone and he said that yeah, there is a lesser included but
5 I did not know anything about a lesser included to that
6 charge.

7 Q. And you are aware of the minimum that was required
8 for trafficking, correct, in this case?

9 A. Twenty-five. I think --

10 Q. For MDA?

11 A. I think it was twenty-five was the minimum and
12 thirty-five I think.

13 Q. Oh, the minimum amount required to make a trafficking?

14 A. Oh, no I don't.

15 Q. Were you -- Okay. And I guess as far as the minimum
16 amount that's concerned, based on your experience if
17 someone has a minimum required for trafficking do they
18 typically get a lesser included as well?

19 A. I don't -- I don't think I've ever heard of a lesser
20 included on a trafficking case. And I'm not saying that
21 I'm right on that, I just never heard of that. I've never
22 heard of everything.

23 Q. Okay.

24 A. We had a big trafficking case down in Georgetown last
25 week and it ended up settling but we were picking apart --

1 There were four or five people, most of 'em from Arizona,
2 that came down here and all of 'em had substantial amounts
3 and the solicitor just added it all up, and we took the
4 position that individually it didn't reach the level of
5 trafficking, but it settled at the end so we never got
6 until -- the judge never made a decision on the law.

7 Q. But based on your knowledge of this case, and I guess
8 also from the suppression hearing, was there ever any
9 evidence that he only possessed some and that the co-
10 defendant possessed more, I guess more than half of the
11 amount?

12 A. I don't recall any evidence of the applicant
13 possessing any drugs at all during this trial - period.
14 Now, I heard y'all talking about it a while ago where
15 somebody -- one or two people testified that he said that
16 he had it. I don't know why I missed that at the trial,
17 but that's the first that I heard of that that I recall. I
18 don't recall a *Jackson v. Denno* hearing, I don't recall
19 anything at all about this young man making a statement
20 about that he had the drugs.

21 Q. I understand. And I guess lastly I'll just go to the
22 -- well not lastly, but as far as one of your discussions,
23 lastly about the difference between the Black and Milds and
24 the Phillie Blunts. Do you remember, was it only referred
25 to as -- Was it referred to as Phillie Blunt every time

1 they talked about this?

2 A. You know, I don't recall if it was every time but I
3 listened to the testimony this morning, and I read the
4 Supreme Court opinion, that after listening to it today,
5 that appears to be significant. And I do recall Irby
6 asking somebody if you smoke marijuana with a filter
7 because everybody knows you don't smoke marijuana with a
8 filter. And I don't know how this thing escalated into
9 blunt. I don't know if that was just like we use Xerox for
10 copy machines, I don't know if somebody was trying to say
11 that blunts apply to all cigars. But Phillie Blunt is a
12 cigar and Black and Mild is a cigar. And I had bought them
13 at the convenience store and I have no explanation why they
14 were not introduced into evidence.

15 Q. Okay.

16 A. Or attempted to introduce into evidence.

17 Q. Okay. As far as the Black and Mild's are concerned,
18 and you said you purchased one, ---

19 A. Yes, sir.

20 Q. --- correct? Can -- Since you purchased one, and if
21 you know, can you empty the tobacco out of those?

22 A. I didn't try to do that. I left it in the package
23 that it came in. It was single, it was a single cigar and
24 the other one was a single cigar. And I've never attempted
25 to do that. I've never smoked one of those type cigars.

1 I've smoked a cigar in the past but I've never tried to
2 take the tobacco out of it.

3 But I do know that a Black and Tan is what the officer
4 was talking about with the young man on the video tape. I
5 know that's what was in the car based on the photos and I
6 know that that Black and Tan has a filter on it. And I
7 know that the other cigar does not have a filter on it.

8 And I know that the Supreme Court referred to that
9 other cigar as a Phillie Blunt and that that was the one
10 that can commonly be packed with marijuana. It's a
11 different cigar, not in this case, but it was referred to
12 in this case by the Supreme Court.

13 And I don't know if that's something that was -- I
14 don't know how that escalated to that point, but it appears
15 from listening today, to the two lawyers and the witness,
16 that this thing escalated, it was confusion, and it got out
17 of control and the Supreme Court may have relied on it in
18 affirming this case.

19 Q. Now do you remember during Mr. Walker's closing --

20 MR. HUNTER: And this is on 301 for your reference,
21 your Honor.

22 Q. Do you remember Mr. Gardner, Mr. Irby -- Mr. Walker
23 talking about the fact that what was found, this is a Black
24 and Mild, do you remember him bringing out the fact that he
25 believed they were Black and Milds?

1 A. I don't but I hope he did. Do you -- Was there an
2 objection to something he did in the opening? Because I
3 remember talking to him that morning about some things that
4 I thought would be good and I don't think he did any of
5 'em. And I think he tried to do one and he messed it up so
6 bad that the solicitor objected and the judge agreed with
7 the solicitor on it.

8 Q. And without --

9 MR. HUNTER: Your Honor, I believe what he's referring
10 to is where he -- I'll find the exact page -- but I believe
11 he starts referring to some story about an elephant.

12 A. Now, I don't remember that part.

13 Q. Okay.

14 A. But what I testified -- I'm not trying --

15 Q. Okay.

16 A. What I'm trying to say is what I remember about that
17 and there may have been more to it. I mean obviously there
18 was more to it.

19 Q. Okay. Now just as far as these Black and Milds are
20 concerned, and or the Phillie Blunts, since you obviously
21 watched the video, you've looked at the evidence regarding
22 the suppression hearing, can you just tell us what was
23 found in the car?

24 A. Black -- As far as cigarettes they were Black and Tan.

25 Q. Well does -- Was any -- Were they still intact at the

1 time?

2 A. No. The photos -- I saw those photos after the trial.
3 I'm pretty sure because I remember saying to either you or
4 Mr. Wise, I can't remember, the way that the -- it appeared
5 to me to be that they might of been staged or something or
6 for photos I've seen investigators do that in the past
7 where they put stuff up and take pictures of it and
8 everything. But it looked like, if I remember right, it
9 looked like you could tell that the cigar was a Black and
10 Tan, not a Phillie Blunt, if that was your question.

11 Q. And what you're referring to it was completely intact?

12 A. No. I think -- And I looked at 'em this morning to
13 refresh my memory and I see 'em sitting over there, it
14 looked like some of 'em had been smoked. And it looked
15 like there was something laying down there. I heard the
16 testimony earlier about, if I heard it right, that was
17 papers out of the cigar.

18 Q. Okay. Do you recall what was found in the floorboard
19 in the car?

20 A. Tobacco. Is that what you're talking about?

21 Q. That is what I'm referring to.

22 A. Okay.

23 Q. Do you have any idea where that came from?

24 A. It probably came out of the cigar.

25 Q. Came out?

1 A. I'm guessing it probably came out of the cigar.

2 Q. Okay. As in emptied out?

3 A. As in that's where it originated. I don't know how
4 it came out.

5 Q. Okay. It was out. Originated in the cigar, ended up
6 on the floorboard?

7 A. That would be my guess, yeah, because it makes sense
8 that was the source of the tobacco.

9 Q. Okay. I appreciate you coming here ---

10 A. Yes, sir.

11 Q. --- based on your limited knowledge of this case and
12 I appreciate it.

13 MR. HUNTER: That's all I have for this witness, your
14 Honor.

15 MR. GARDNER: Thank you, sir.

16 CROSS-EXAMINATION

17 JOHNNY GARDNER BY MR. WISE:

18 Q. South Carolina Code 44-53-370, and here is the
19 highlighted portion at the end of subsection B.

20 A. This is -- Okay. I had never heard of that before.

21 Q. All right. Do you think if -- By statute it's
22 possession with intent is a lesser included?

23 A. Yes, sir, from what -- based on that.

24 Q. And that was not called to the judge's attention?

25 A. No, sir.

1 Q. In your brief you -- Well let me back up one second
2 before we get to that. You've had a chance to look at
3 these pictures and refresh your memory a little bit.

4 A. Yes, sir.

5 Q. All right. And you've -- are familiar and even before
6 today of what a Phillie Blunt ---

7 A. Yeah.

8 Q. --- looked like?

9 A. Yes, sir, bigger.

10 Q. All right.

11 A. A Phillie Blunt is the big one and the Black and Tan
12 is the small one that has a filter on it.

13 Q. Okay. That is correct?

14 A. Yes, sir.

15 Q. And what you see in State's Exhibit --

16 THE COURT: I've got two up here.

17 BY MR. WISE:

18 Q. State's Exhibits 4 and 7 is basically a Black and Tan
19 or a Black and Mild. What's it really called? Black and
20 Mild.

21 A. Is it Black and Mild?

22 Q. Black and Mild.

23 A. See, that's another thing we've got mixed up. Black
24 and Tan, Black and Mild.

25 Q. Right. Boyd seized the butt end of a Black and Mild?

1 A. Yes, sir. Number 7 is absolutely a cigar with a
2 filter on the end of it ---

3 Q. All right.

4 A. --- so that would be the Black and Mild and so is 4.

5 Q. All right. Now, when you argued the case, on page --
6 You ain't got the transcript in front of you have you?

7 A. I have the brief.

8 Q. Okay. Look at page 16, line 5, and this was during
9 the motion portion of the trial.

10 A. Yes, sir. Line 5, yes, sir.

11 Q. All right. The officer there was referring to
12 Exhibit 2. All right. Correct?

13 A. Yes, sir.

14 Q. And he makes the statement and referred to a lot
15 of hollowed-out blunts?

16 A. Right.

17 Q. Is -- Look at Exhibit 2. Is that a hollowed-out
18 blunt?

19 A. And that's -- Again, I don't -- I guess I looked at
20 this while we were talking. It would make sense but I
21 didn't recall that until afterwards. But no, that's not a
22 hollowed-out blunt at all. I should have ask him about
23 that.

24 Q. All right. And the officer wasn't corrected?

25 A. No, sir.

1 Q. Okay. And then when you wrote your brief, you made
2 numerous references to hollowed-out blunts. If you'll look
3 at your brief.

4 A. Yes, correct. Yeah.

5 Q. I think you and I discussed that earlier?

6 A. Yes, sir.

7 Q. Okay. Did you ever attempt to clarify in there that
8 there were no hollowed-out blunts in fact found in this
9 car?

10 A. No, we didn't. I don't think so.

11 Q. Okay.

12 A. And what I mean by that is I think the focus was on
13 the fact that there were cigars there that had been smoked
14 but they were left over. There was enough to tell that
15 there was no marijuana in the car.

16 Q. And the court -- the Supreme Court at least laid
17 great emphasis on the fact that there were hollowed-out
18 Phillies Blunts found in the car?

19 A. Yes, sir.

20 Q. Is that a correct factual statement?

21 A. No, sir, that is not. Based on this case there was
22 no Phillie Blunts in the car, no Phillie Blunts involved in
23 it. And to the best I can tell no -- looking at the
24 Exhibit -- no hollowed-out cigars. There's testimony in
25 the record from Vinesett who was the police officer that

1 said he found that. And I can explain Monday morning
2 quarter back, and I might be wrong, but it appears to me
3 that Vinesett testified I found hollowed-out cigars so
4 everybody just assumed that he found hollowed-out cigars
5 and that's what we wrote about.

6 Q. All PCR's are Monday morning quarterbacks.

7 A. Okay. All right.

8 Q. So, but that was never corrected through the defense's
9 testimony?

10 A. The best I can tell that was never corrected.

11 Q. All right. Now, you and Ms. Faraby I assume discussed
12 the issues in this trial, or about this trial.

13 A. The biggest thing we discussed was the suppression
14 hearing.

15 Q. Suppression hearing.

16 A. And the morning of we were talking about closing
17 argument. We talked about that.

18 Q. Okay. And I believe on page 64 of the transcript
19 Judge Hayes actually used -- made reference to the blunt in
20 ruling against your motion.

21 A. Oh, boy. Okay. I've got page 64.

22 Q. I believe it's down toward the bottom. I didn't put
23 the line of that. I apologize.

24 A. Also the blunt.

25 THE COURT: Line 23.

1 A. Yeah, that's the judge talking I believe.

2 Q. Right.

3 A. Okay.

4 Q. So he made reference to blunt?

5 A. Yes, sir.

6 Q. And that was not corrected?

7 A. No, sir.

8 Q. All right. Now, did you and Mr. Irby ever, or Mr.
9 Walker, ever discuss some trial strategy beyond the --
10 beyond the suppression hearing?

11 A. I think there might a been a short discussion about
12 whether or not the defendant should testify.

13 Q. Okay. Now, on the issue of the charge to the jury ---

14 A. Yes, sir.

15 Q. --- and by inference. Are you familiar with or
16 have you had a chance to review Article V, Section 21 of
17 the Constitution of the State of South Carolina?

18 A. I haven't reviewed it lately.

19 Q. Well if I tell you what it says you're probably
20 familiar with it even though not by number, right?

21 A. Yes, sir.

22 Q. Are you aware of the fact that in the South Carolina
23 judges are not allowed to charge facts to the jury?

24 A. Oh, very much. I think we just had one of those come
25 out ---

1 Q. Okay.

2 A. --- a couple of months ago.

3 Q. I figured you were familiar with the principle.

4 Are you familiar with two very old cases in South
5 Carolina one being the State -- *Finch versus Atlanta and*
6 *Sea Railroad Company* which is found in 69 S.E. 208 back in
7 1907? And *Yarborough versus Southern Railroad* which is 58
8 S.E. 936 also 1907 in which they held that -- the Supreme
9 Court held that a judge cannot tell a jury they can infer
10 something from facts?

11 A. I think I've read those. Maybe not the whole case
12 but part of that case.

13 Q. The concept?

14 A. Yeah, because I used to do a lot and still do a lot
15 of DUI stuff and there's always an inference, talk about an
16 inference in that.

17 Q. Right.

18 A. So I -- the answer is yes, sir, I'm sorry.

19 Q. And then that would have struck you that telling the
20 jury that they are to take a one fact and highlight it
21 above all others which he instructed in this case would be
22 a charge on the facts?

23 A. No, sir.

24 Q. Okay. And you agree that when a judge tells a jury
25 that they can infer dominion and control over -- of drugs

1 over control of the car, that's pretty much telling the
2 jury that the guy's driving the car is guilty?

3 A. I think, yeah. I've never -- I've heard that charge
4 before. I've used that before. I started out as a
5 prosecutor you know.

6 Q. Uh-huh.

7 A. It was - We started out by saying okay, we got the
8 driver let's get the rest of 'em. So I've never heard it.
9 I've never read anything against that.

10 Q. Well, but when a judge tells the jury they can take
11 the fact that a defendant is driving the car, and gives
12 special inference to it, that is -- that clearly would
13 be --

14 A. Anytime you say special inferences now that we can
15 say that yes, I agree.

16 Q. Be a charge on the facts?

17 A. I agree with you, yes, sir.

18 Q. And there was no objection made to that issue either?

19 A. No, sir.

20 Q. All right.

21 MR. WISE: Thank you. That's all I have.

22 THE COURT: Any redirect limited to what he went into?

23 MR. HUNTER: No, your Honor.

24 THE COURT: Thank you, sir, you may step down.

25 MR. GARDNER: Thank you, Judge.

1 THE COURT: Watch your step.

2 (WITNESS LEAVES WITNESS STAND.)

3 MR. HUNTER: Your Honor, I would ask that we be
4 allowed to file briefs on this. I'm sure Mr. Wise would
5 agree with that.

6 MR. WISE: I always agree to filing another brief.

7 MR. HUNTER: Just mainly because this has to do with
8 most with legal issues.

9 MR. WISE: Right.

10 THE COURT: Thirty days?

11 MR. HUNTER: Thirty days sounds good.

12 MR. WISE: That would be fine.

13 THE COURT: Okay.

14 MR. HUNTER: Appreciate it, your Honor.

15 MR. WISE: All right.

16 MR. HUNTER: Your Honor, we have one more case. I
17 don't want to tell you what to do but we have one more case
18 if you'd like to just keep going.

19 THE COURT: How long?

20 MR. HUNTER: Should be forty-five minutes. Hour max.

21 THE COURT: All right. We'll take a short break and
22 come back.

23 MR. HUNTER: Thank you.

24 (COURT AT EASE AT 12:10 PM.)

25 (END OF TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda S. Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 1st day of February, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda S. Nelson

Wanda S. Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: November 27 / 2017

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

Kenneth D. Morris,
Inmate No. 334303

Applicant,

-vs-

State of South Carolina.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

ORDER

2015-CP-46-2859

FILED-RECEIVED
2017 JUN 21 PM 1:34
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This is a Post-Conviction Relief Application. Applicant, Kenneth D. Morris, is serving a 30 year sentence at the South Carolina Department of Correction. Morris went to trial charged with the offenses of trafficking in ecstasy and possession with intent to distribute marijuana. A jury convicted Morris of the trafficking charge but did not convict him of the possession with intent to distribute charge. They found him guilty of the lesser included offense of possession of marijuana.

Morris raises five issues in his Post-Conviction Relief Application. After conducting an evidentiary hearing, reviewing the trial transcript, two appellate decisions involving the trial and the briefs from both sides, this court's decision is to grant the application. Each issue raised by Morris will be discussed separately, but either separately or cumulatively they afford a basis for granting the application.

FACTS

As previously stated, Morris went to trial charged with trafficking in ecstasy and possession with the intent to distribute marijuana. Both substances were located by law enforcement after a

traffic stop in the trunk of the car not owned by Morris. The car was rented by Morris' co-defendant Brandon Nichols. At the time of the traffic stop for following too closely, however, the car was being driven by Morris. Morris and Nichols both consented to a search of their persons. However it was Nichols, again the renter of the car, who would not consent to a search of his automobile. Twice the K-9 dog failed to alert to the existence of contraband in the car. After not locating contraband in the passenger compartment, law enforcement searched the trunk where the ecstasy was located hidden in a wrapped bag. Subsequently the marijuana was located hidden under the spare tire in the tire well. No finger prints were found by the police on the bags containing the drugs.

At the trial of case and in the appeal of case to the Court of Appeals and Supreme Court, the constitutional validity of the search was a significant issue. The South Carolina Supreme Court in affirming the conviction and search noted that the presence of "Phillies Blunt" cigars. *See, State v. Morris*, 411 S.C. 571, 576, 769 S.E.2d 854, 857 (2015) n. 1 and 2. The Supreme Court and the Court of Appeals used this finding in sustaining probable cause for the search.

The testimony at the trial consistently referred to the interior of the automobile as containing "Phillies Blunts" or "blunts." Tr. at 131, 117 to 133, 123; 177, 113 to 179, 123. The brief of Morris on appeal also constantly referred to the cigar in the automobile as being a "blunt" or "Phillies Blunt." In both written opinions by the appellate courts, the courts made special mention of the "Phillies Blunt."

Prior to Morris's trial, Nichols pled guilty to possession of ecstasy and a marijuana charge. He received a two year probationary sentence in exchange for testifying "truthfully". Nichols testified both he and Morris bought the ecstasy. But he testified the marijuana was solely Morris',

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he stated he pled to the marijuana charge because he knew the marijuana was in the car he had rented. The attorney for Morris attempted to impeach Nichols by referring to an affidavit Nichols had signed. In the affidavit Nichols stated "I was not aware that Mr. Morris had purchased marijuana and did not see him place any quantity in the vehicle." He also stated, "Mr. Morris was not aware of the purchase of the ecstasy and had no knowledge of it." While the substance of the affidavit was read into the record, the affidavit itself was never introduced into evidence. The jury, during deliberations, asked about a copy of the affidavit. The affidavit was not provided to the jury because trial counsel had not introduced the affidavit during the course of the trial. Tr. at 329, ll 5-6. Further, trial counsel did not cross examine the co-defendant as to the sentence he was facing before he agreed to testify for the state.

In the charge to the jury, the trial court instructed the jury "A defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." Tr. at 317, ll 8-10. No objection was made to this charge. Moreover, the trial counsel further did not request that possession with intent to distribute be charged as a lesser included offense of trafficking.

The jury returned a verdict of trafficking in Ecstasy and the lesser included offense of possession of marijuana. He was sentence to a term of imprisonment of 30 years.

ISSUES ON POST-CONVICTION RELIEF

I. Trial counsel was ineffective in failing to effectively cross examine the co-defendant

In *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) our Supreme Court ruled that a defense attorney may cross-examine and impeach the credibility of a testifying co-defendant as to the possible sentence the testifying co-defendant is facing. The Court said:

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The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.
Id. at 333, 563 S.E.2d at 318.

The *Mizzell* case was decided over seven years before the trial of this case. In this case the co-defendant had reached a plea bargain for probation which was considerably less than the mandatory minimum sentence of three years, if it were his first offense. The fact that the plea was negotiated prior to trial does not impact on the prejudice in the failure to cross-examine Brandon Nichols on the sentence he was facing before he agreed to the plea deal.

This South Carolina Supreme Court has held that the failure to impeach a witness in a criminal sexual conduct case is a ground for granting a post-conviction relief petition. *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998). In this case, the jury was concerned about the testimony of the co-defendant as they asked for a copy of the statement he gave exonerating Morris. The failure to inform the jury that Nichols avoided at least three years in prison would have had an impact on the jury in judging the credibility of Nichols.¹ Had the jury known the co-defendant was avoiding a mandatory sentence of at least three years, they well could have rejected his credibility. Trial counsel was ineffective in failing to cross-examine Nichols as to his punishment. This failure was prejudicial to Morris.

II. Trial counsel was ineffective in failing to request a charge of the lesser included offense of possession of Ecstasy with intent to distribute.

By statute, possession with intent to distribute is a lesser included of the offense of

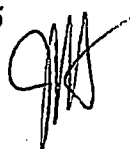
¹ The jury could have also reasonably assumed that Morris would receive a somewhat similar sentence to Nichols as Nichols testimony was they were both equally in on the drug deal.

trafficking Ecstasy. *See*, S.C. Code § 44-53-370(b). The legislature has made this determination and as such, a lesser included charge would be required if the trial counsel had requested it. Co-counsel for Morris testified at the post-conviction relief hearing. Morris' trial counsel has since been disbarred and could not be located. Co-counsel testified he was not aware of the provision in the code by which possession with intent is a lesser included of trafficking. In this case, the jury gave Morris the benefit of the doubt and convicted him of possession of marijuana rather than possession with intent to distribute. The fact that the jury found him guilty of the lesser included offense of possession of marijuana also reflects that the jury understood the significance of credibility or lack thereof of the co-defendant. By not requesting a lesser included offense charge, the jury was denied the option of convicting Morris of the lesser included offense of possession of ecstasy. Therefore, the prejudice is clear. Nothing in this record suggests that the jury would not have also given Morris the benefit of the doubt and convicted him of the lesser included. At the very least, the jury should have been given that option. The failure to request the lesser included offense was ineffective assistance of counsel.² The failure to give such a charge was prejudicial to Morris.

III. The trial counsel failed to introduce the sworn statement of Brandon Nichols and therefore was not able to request a jury instruction that the statement can be considered as substantive evidence.

Trial counsel cross-examined Brandon Nichols on the prior affidavit he had given the exonerated Kenneth Morris. He did not introduce the statement. Tr. at 200, l 19 to 206, l 10.

² Possession of Ecstasy with intent to distribute third offense carries a minimum penalty of 10 years. S. C. Code § 44-53-370(b)(1).

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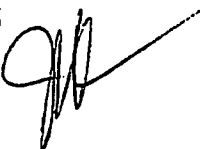
As a result, the jury heard the impeaching information contained in the statement. Under the principles established in *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982) an inconsistent statement may be used as substantive evidence. The Court said "Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination." *Id.* at 581 300 S.E.2d at 69. The Court in *Copeland* further recognized that prior to the decision, a Court should instruct a jury that the inconsistent statement is admissible only for impeachment purposes. The reasoning from the decision is that now the trial judge should instruct the jury that the inconsistent statement may be considered as substantive evidence.

In this case, the trial counsel did not introduce the statement. Therefore, he was not entitled to a charge from the trial court that the statement could be considered as substantive evidence. As noted earlier, the jury had some concerns about the testimony of Nichols. They specifically requested a copy of the statement. The record in this case establishes that had the statement been introduced and the jury instructed that they could consider the statement as substantive evidence, the result in this case would have been different. Trial counsel was ineffective in failing to introduce this statement. The failure to introduce the statement was prejudicial to Morris.

IV. Trial counsel failed to object to the charge to the jury stating "A defendant's knowledge and possession may be inferred when a substance is found on property under the defendant's control." Tr. at 317, ll 8-10.

A. Such an Inference Charge is not Supported by the Prior Decisions in South Carolina

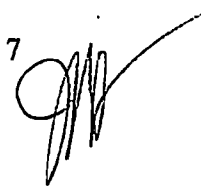
The historical basis for so instructing a jury is simply not supported by a logical reading of

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the prior cases in South Carolina. The basis for such a charge is generally attributed to *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987). In *Adams* the Supreme Court said "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." *Id.* at 135, 352 S.E.2d at 486. In support of this statement the Court cited *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981). But *Hudson* does not support such a charge. All *Hudson* holds is that if a defendant is exercising dominion and control over the premises, then the case should be submitted to the jury. The Court in *Hudson* said "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge which may be sufficient to carry the case to the jury." *Id.* at 203, 284 S.E.2d at 775. The Court in *Hudson* made no reference to a jury charge. For the jury to reach such a conclusion on their own without an instruction from judge is certainly permissible. To give the State the edge by telling, and thus encouraging, the jury they may make such an inference, is not permissible.

In addition in *Adams* and *Hudson* the drugs were found on the property either owned or the residence of the defendant. In the present case, Morris was merely the driver of an automobile rented by the co-defendant. To tell a jury they may infer knowledge and possession from the fact that Morris was the driver of an automobile rented by a third party is a misleading charge on the facts. What this charge tells the jury is that in a close case, they may use the fact that the defendant was driving an automobile owned by a third party as evidence of his knowledge and possession of the drugs and therefore his guilt. Few people who drive automobiles owned by a third party know of the content of those automobiles.

In *Leary v. United States*, 385 U.S. 6 (1969) the United States Supreme Court addressed

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the question of whether congress could constitutionally pass a statute that established a presumption of knowledge of illegal importation from the mere fact that the defendant possessed a small amount of marijuana. In rejecting such a presumption the Court held "Such information is not within specialized judicial competence or completely common place." *Id.* at 38. Likewise, under the facts of this case, it is not commonplace to infer knowledge and possession of the contents of an automobile from the fact that a person was driving an automobile they did not own. As there is no basis in fact to support such an inference, the charge also violates the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America.

To what use did the jury use the inference? While this question obviously cannot be answered with certainty, the Court can only assume the jury followed the judge's instructions. That being true, the reasonable assumption is that the jury used the inference if the case were close simply because that is what they were instructed to do. The jury would be less likely to use the inference if the evidence against a defendant is very strong. When the jury decides that in a close case, they will use the inference to persuade them the case has been proven beyond a reasonable doubt, then the burden of proof required of the State has been lessened. This would violate the principles established in *In Re Winship*, 397 U.S. 358 (1970). When the only means the State has to win a case is to tell the jury they may infer guilt from the proof of certain facts, the State has not proven its case beyond a reasonable doubt. Arguably when two equally plausible conclusions can be drawn from the same set of fact, the government has not met its burden of eliminating other reasonable hypothesis and therefore has not met its burden of proof.

In discussing the use of presumptions and inferences, the United States Supreme Court has

said "But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." *Tot v. United States*, 319 U.S. 463, 468 (1943). Common knowledge and experience would require one to conclude that few, if any, are fully aware of the contents of an automobile they may borrow from a friend or even rent. This is even more so when the item in controversy is concealed in a bag in the trunk of an automobile. If the legislature may not create such a rule, then neither may the courts.

The Supreme Court of Washington has also discussed the question of a permissive inference in the context of an inference of intent to steal from breaking into a residence. The Court said "Because it was not the sole and sufficient proof of intent in these consolidated cases, the inference is constitutional if intent to commit a crime more likely than not flows from unlawful entry." *State v. Brunson*, 128 Wash.2d 98, 112, 905 P.2d 346, 353 (1995). And again certainly knowledge of the contents of an automobile rented by someone else is not a fact that more likely than not flows from such possession.

The Mississippi Supreme Court, and several others, have said "When the State's case is based entirely upon circumstantial evidence the State is required to prove the defendant guilty not only beyond a reasonable doubt but to the exclusion of every reasonable hypothesis consistent with innocence." *Cotton v. State*, 144 So.3d 137, 140 (Miss.2014). This obligation cannot be met by telling a jury they may infer one version of the facts over another. *See, also, Owen v. State*, 432 So.2d 579, 581 (Fla.App. 2 Dist.,1983) ("It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must also eliminate all reasonable hypotheses of innocence."); *People v. Wolter*, 396 N.E.2d 1102, 1106, 33 Ill.Dec. 378, 382, 78 Ill.App.3d 32,

38 (Ill.App. 1 Dist., 1979) ("The undoubted rule in such case is that, before a conviction can properly be had upon purely circumstantial evidence, the guilt of the accused must be so thoroughly established as to exclude every reasonable hypothesis of his innocence."); *Davis v. State*, 90 So.2d 629, 632 (Fla. 1956) ("Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence."); *Clemmer v. Commonwealth*, 208 Va. 661, 666, 159 S.E.2d 664, 667 (1968) ("The Commonwealth's evidence must exclude every reasonable hypothesis of innocence."). South Carolina does not apply such a high standard of review on appeal. *State v. Larmand*, 415 S.C. 23, 780 S.2d 892 (2015). This does not mean that this Court should approve a charge to the jury that instructs them to give a preference to the State's theory of the case. Also, such a charge in essence tells the jury that they may infer that Brandon Nichols is telling the truth. If they can infer knowledge and possession of the drugs by the fact Morris was driving the automobile, they are in essence being told they can infer Nichols is being truthful.

No doubt eliminating a charge that the jury may infer knowledge, dominion and control of the drugs from control of the automobile where the drugs are found will result in some guilty individuals not being convicted. But it will also assure that some innocent defendant will not be convicted. As was said by the Pennsylvania Supreme Court:

It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent. If such a trade-off is acceptable, why not suspend the hearsay rule entirely when the Commonwealth introduces evidence in a criminal case? More defendants, guilty and innocent alike, would undoubtedly be convicted. The same result would obtain if we allowed the Commonwealth to introduce coerced confessions.

However, such a trade-off is not acceptable. It is a

fundamental precept of law in Pennsylvania that one charged with crime, be it murder, child abuse, or keeping a public nuisance, comes to trial clothed in the presumption of innocence. If we bear this in mind, we will be less tempted to distort the law of evidence in favor of the Commonwealth in order to increase the conviction rate. The Commonwealth should be bound by the same rules of evidence, including the hearsay rule, as other litigants.
Commonwealth v. Bujanowski, 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992).

B. Charging the Jury They may Infer Knowledge, Dominion and Control of Drugs Found in the Automobile Under the Control of Timothy Pulley is a Charge on the Facts in Violation of Article V, § 21 of the Constitution of the State of South Carolina.

Article V, § 21 of the Constitution of the State of South Carolina provides "Judges shall not charge juries in respect to matters of fact, but shall declare the law." This provision simply means that judge may not tell a jury to place emphasis on one fact over another. To do so is to instruct the jury as to the importance of certain facts to the exclusion of others. In interpreting this provision our Supreme Court has held that a trial court may not charge a jury that they can infer acceptance by the railroad of a package left on their loading dock for a period of time. As the Court said:

The circuit judge laid down in the charge of the proposition that the jury might properly infer the consent of the railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection. In view of the issues made on the trial, we think this was a charge on the facts. *Yarborough v. Southern Ry.*, 78 S.C. 103, ___, 58 S.E. 936, 937 (1907).

The Court held that charging such an inference is a comment upon the facts in violation of the State constitution.

In *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907) the South Carolina Supreme Court held that instructing a jury they may infer negligence from particular facts was a

comment on the facts in violation of our State constitution. The Court said:

What inferences may be drawn from the circumstances appearing on the trial, from the direct evidence, from the manner of the witnesses, the introduction of evidence, or the failure to introduce it-all are for the jury. The Constitution does not allow the presiding judge to state the evidence, much less does it allow him to single out any particular act or omission of the defendant, and instruct the jury that, if that appears, then they may infer that the defendant was negligent. *Id.* at ___, 69 S.E. at 209.

In this case the trial judge singled out a particular fact - who was driving the automobile - and instructed the jury they may infer he was the possessor of the drugs. Such a charge is a charge on the facts in violation of our constitution. The charge takes one particular fact, and heightens it above all the others. What if the drugs were found under the floor mat on the passenger side where a passenger was sitting? Could the trial judge have charged that the jury may infer that drugs found under the floor mat are in the possession of the person sitting on that side of the automobile? That charge would actually make more factual sense than saying a person driving an automobile knows what is in the automobile. This is especially true when the person is not the owner of the automobile. No trial court would ever charge that a jury can infer the defendant did not possess the drugs because he was not the owner of the house or automobile. Why is the State the only party to achieve such an inference charge?

In *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (1992) the defendant requested that a charge to the jury simply stating that the absence of motive "is to be duly considered by you in weighing the question of guilt regarding him." *Id.* at 240, 414 S.E.2d at 183. The Court held that such a charge was improper as it was a charge on the facts in violation of the state constitution. As the Supreme Court held "Thus, the trial judge was requested, in effect, to charge that particular

evidence (*i.e.* evidence of lack of motive) is entitled to receive weight or consideration. The requested charge is clearly a charge on the fact that the jury was to determine." *Id.* at 241, 414 S.E.2d at 184. Any inference charge is legally no different. A judge in essence would tell the jury that particular evidence is entitled to receive special weigh or consideration

In *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942)³ the defendant had requested a simple charge that the testimony of a co-defendant was to be "received by the jury with caution and should be scrutinized by the jury with great caution." *Id.* at ___, 23 S.E.2d at 249. In holding the trial court did not commit error, the South Carolina Supreme Court said "A judge cannot express in his charge, or intimate any opinion as to the *weight or sufficiency* of testimony of accomplice without violating the prohibition of the Constitution as to charging upon the facts." *Id.* (emphasis added). When a judge instructs a jury that they may infer guilt from the fact that the defendant is in control of the automobile, that judge is both expressing and intimating an opinion as to the weight and sufficiency of the evidence. He is making a comment on the facts and telling a jury what they may do with those particular facts. Such a statement violates the State Constitution in that it is a comment on a particular fact of the case. The comment as to an inference tells the jury to place special emphasis on one fact above all others. The cases establishing this principle are over 100 years old. Trial counsel should have made an objection to the charge. His failure to do so rendered his representation of Morris ineffective. His failure to object was prejudicial to Morris.

V. Trial counsel and appellate counsel were ineffective in failing to differentiate between a

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T. FELDOR DORN, GUNS OF MEETING STREET (The University of South Carolina Press 2006) chronicles this murder and trial in great detail.

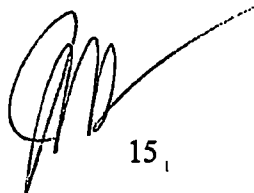
"Phillies Blunt" and a "Black and Mild" which failure lead to confusion as to the trial court and appellate courts on the issue of whether there was probable cause to search the automobile.

At the trial of the case, the investigating officer testified he observed he observed a "blunt" cigar. He testified "I saw a lot of hollowed out Blunt." Tr. at 16, 15. He testified that the "blunt" cigar was an indication that one had been smoking marijuana in the automobile. Tr. at 16, 11 13-14.; Tr. at 131, 1 4-25; Tr. At 133, 11 4-23. This testimony was also discussed on cross examination. Tr. at 33, 1 14 to 34, 1 13 (at pre-trial hearing); Tr. at 177, 1 19 to 178, 1 20. The trial judge referred to "blunts" in his ruling. Tr. at 62, 11 17-21. In the brief before the South Carolina Supreme Court appellate counsel used the word "blunt" or the phrase "hollowed out cigar" no less than six times. Br. of Petitioner at 7, 8, 10, 12, 15, and 18. The terms also appear throughout the Brief of Appellant before the South Carolina Court of Appeals.

In both appellate court opinions, the courts found probable cause to search the automobile based upon "Phillies Blunts" being found in the automobile. The Court of Appeals said "Officer Vinesett noticed hollowed "Phillies Blunts" in the center console and blunt tobacco in the center console and on the floorboard." *State v. Morris*, 395 S.C. 600, 604, 720 S.E.2d 468, 469 (Ct. App. 2011). A footnote in the case further said "Phillies Blunts" are a brand of inexpensive, American-made cigars. The tobacco inside a "Phillies Blunt" is often emptied in order to roll a marijuana cigar." *Id.* at 604, 720 S.E.2d at 469, n. 1. The South Carolina Supreme Court likewise noted "He [Officer L. T. Vinesett] stated he also observed several hollowed out "Phillies Blunt" cigars in the center console of the vehicle, and loose blunt tobacco scattered over the frontal interior of the vehicle." *State v. Morris*, 411 S.C. 571, 576, 769 S.E.2d 854, 857 (2015). In a footnote they also noted "Phillies Blunts" are an inexpensive brand of cigar. Vinesett testified that people

"hollow [the blunt] out and place the marijuana in there, so if you did see them riding down the road smoking anything, it would look like they were just smoking a [Phillies] blunt." *Id* at 77, 769 S.E.2d at 857, n. 1.

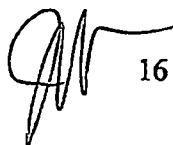
At the Post-Conviction Relief hearing counsel introduced a "Phillies Blunt" and a "Black and Mild." Morris testified the remnants found in the automobile were from a "Black and Mild" and not a "Phillies Blunt." The trial exhibits introduced at trial and viewed by the Court at the Post-Conviction Relief hearing show no "Phillies Blunt" or any "blunt" was found in the automobile. The difference between a "Phillies Blunt" and a "Black and Mild" is very clear. Besides the "Black and Mild" being considerably smaller, the "Black and Mild" has a tip which the "Phillies Blunt" does not. The two simply cannot be confused.

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long, sweeping horizontal stroke extending to the right.

Had trial counsel pointed out to the trial judge that no "Phillies Blunt" was found in the automobile, instead of agreeing that "blunts" were found, the trial judge well could have found no probable cause. The impact of this error is even more compounded when the appellate decisions are reviewed. The Supreme Court, in a 3-2 decision, placed special emphasis on the presence of a "Phillies Blunt" to find probable cause to search the automobile. Both trial and appellate counsel erred in failing to point out that no "Phillies Blunt" was in the automobile being driven by Morris. This error was not minor nor inconsequential. From reading the record the decision by the trial court and the appellate courts was based upon "blunts" being found. This error was significant and easily could have been the difference between probable cause and no probable cause having been found. Trial counsel was ineffective in failing to make the distinction between a "Phillies Blunt" and a "Black and Mild." Appellate counsel was ineffective in continuing this error on appeal. Both errors were prejudicial to Morris.

VI. Cumulative error

The South Carolina Appellate courts have never squarely addresses the issue of cumulative error in the context of a Post-Conviction Relief Petition. But the court has discussed the concept of cumulative error. The South Carolina Supreme Court has said cumulative error "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor's improper argument and improperly excluded evidence warranted reversal).



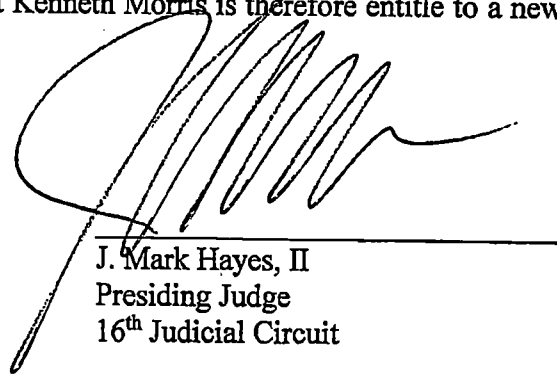
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In this case, the errors taken as a whole show that Morris was denied a fair trial. While this Court believes that any one error is sufficient to grant him relief, when taken together, Morris has established that if the cumulative errors not occurred, he would have had a different result in the trial. This Court grants the application for post-conviction relief and remands the case for a new trial.

CONCLUSION

Based upon the review of the transcript of record in this matter, the testimony of the witnesses at the Post-Conviction Relief hearing, and the relevant law, this Court concludes that trial and appellate counsel were ineffective and that Kenneth Morris is therefore entitle to a new trial.

June 16, 2017



J. Mark Hayes, II
Presiding Judge
16th Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4602859

Kenneth D Morris		Souh Carolina State Of	

PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/J. Mark Hayes, III

Circuit Court Judge

2132

Judge Code

6/16/2017

Date

For Clerk of Court Office Use Only

This judgment was entered on **June 21, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **June 21, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Leah B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock
Hill, SC 29730
Clarence Rauch Wise 305 Main St. Greenwood, SC 29646

Justin James Hunter PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Kenneth Morris,)
S.C.D.C. No. 334303,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
OF THE SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-2859

MOTION TO RECONSIDER

Respondent, pursuant to Rules 59(a) and (e), SCRCP, would respectfully show unto this Court:

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 21, 2015. Respondent made its Return on or about March 18, 2016. An evidentiary hearing into the matter was convened on February 1, 2017, at the Moss Justice Center in York, South Carolina. Morris was present at the hearing and represented by Rauch Wise, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Morris testified on his own behalf. Morris's trial counsel, Johnny Gardner, Esquire, also testified. By an order filed June 21, 2017, this Court granted relief. Respondent received a copy of this order on Monday, July 26, 2017. Respondent respectfully asks this Court to reconsider its ruling for the following reasons.

ANALYSIS OF ALLEGATIONS

I. Trial counsel was ineffective in failing to effectively cross examine the co-defendant

The PCR Court granted relief on the ground that Trial Counsel was ineffective in failing to cross-examine the codefendant, Brandon Nichols, as to the punishment he was facing prior to

making a deal with the State to plead to a lesser offense and testify against Morris. The PCR Court ruled mainly that this impeachment would have attacked Nichols' credibility.

This issue was introduced during the trial by the State prior to the closing arguments when the following took place:

The State: I don't think Mr. Walker would do this, but out of an abundance of caution I would ask the court to preclude him in closing from making any mention of the potential sentence in this case under the law of State v. Mizell. It's irrelevant to whether he is guilty or not guilty and it's unfairly prejudicial to the State, so I would ask that the defense be precluded from making any mention of potential sentence.

Trial Counsel: I never intended to mention the years. I certainly intend to mention he's going to prison. I mean, any idiot would know that.

The State: I object to any sentence. It's irrelevant to whether he committed the crime or not.

Trial Court: I'm going to ask you to stay away from the penalty.

Transcript p. 271, ll. 5-19. (emphasis added).

Trial Counsel then argued to the trial judge that the defense should be allowed to mention the Nichols' plea deal, after which the trial judge stated:

Trial Court: I'm going to ask you to stay away from penalties. I don't believe what is going to happen. You can certainly argue that [Nichols], rather than letting himself be exposed to a prison term. I mean, you can get there another way...But I'm not going to let you argue directly that this man is going to jail, but you can argue that the other man to keep out of jail has cut a deal.

Transcript p. 272, ll. 16-24. (emphasis added)

Counsel was not ineffective for failing to cross-examine the Codefendant on the punishment he was facing prior to making the plea deal. First, our Courts have held "[t]he jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence." State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315,

318 (2002). Nichols was charged with PWID marijuana, first offense, and pled to PWID marijuana, first offense. He was also charged with trafficking MDMA, first offense, and pled to PWID, first offense. The potential sentences to the crimes he was charged with are completely irrelevant to Morris's guilt or innocence, especially when the judge made it clear on two occasions that he did not want the attorneys discussing penalties, and when it was clear to the jury that Nichols pled to a probationary sentence. It was clear from the Nichols' direct testimony that he got a plea deal for probation and agreed to testify against Morris. The State brought out the following from Nichols:

The State: Did you plead guilty to being involved with the Ecstasy?

Nichols: Yes, sir.

The State: Did you get a deal?

Nichols: Yes, sir, I got one.

The State: What was your deal?

Nichols: Probation, testify truthfully.

Transcript p. 188, l. 22 – p. 189, l. 3. His plea deal and probationary sentence were also brought out on cross-examination by Trial Counsel, during the State's closing argument, and during Morris's closing argument. The relevant information was well established before the jury and the Nichols was impeached about his probationary plea.

Most importantly, the PCR Court clearly erred as Morris cannot prove prejudice. Morris has failed to show that the outcome of his trial would have been different had the jurors known the exact amount of years that Nichols was facing on his original charges. The PCR Court only says that this would have impacted the jury's judgment of Nichols' credibility. Morris cannot prove that the outcome would have been different especially given the fact that the trial judge made it clear on two occasions that he was not going to allow the mention of penalties. The PCR Court cannot find Trial Counsel ineffective for failing to do that which the Trial Judge made clear he was not going to allow.

II. Trial counsel was ineffective in failing to request a charge of the lesser included offense of possession of Ecstasy with intent to distribute.

The PCR Court granted relief on the ground that Trial Counsel was ineffective for failing to request the charge of the lesser included offense of possession of ecstasy. South Carolina Code Sec. 44-53-370(b) provides "The offense of possession with intent to distribute described in Section 44-53-370(a) is a lesser included offense to the offenses of trafficking based upon possession described in this subsection."

The PCR Court erred and its reasoning is incorrect for the following reasons. The predicate weight for trafficking ecstasy is **100 or more dosage units**. S.C. Code Ann. § 44-53-370(e)(8). Morris was charged with trafficking 393 ecstasy pills, however because only 254 pills were tested, the State presented to the jury that he trafficked **254 pills**. The testimony revealed from the State and from Morris only showed that the jury should find Morris in possession of all of the pills, none of the pills, or half of the pills (127 pills, splitting 50/50 with Codefendant). There was never any evidence presented that he possessed less than the minimum required for trafficking.

The PCR Court clearly erred as its holding is against Sellers v. State, which even the trial judge in Morris's trial agreed "pretty well address[ed]" the issue of whether Morris was entitled to the lesser included offense. Transcript p. 254, ll. 15-19. The Court in Sellers holds,

A defendant is not entitled to a lesser-included charge of possession with intent to distribute when there is evidence that the amount involved exceeded minimum for trafficking. State v. Grandy, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991).

In the present case, there is no evidence in the record that would entitle Respondent to a charge on lesser-included offenses...Second, as to the trafficking charge, Respondent **did not present evidence that he possessed less than the minimum required for trafficking**. In fact, the only evidence before the jury was that the amount of methamphetamines in question would constitute trafficking. In addition, the State presented the only evidence as to the amount of drugs at issue, which included testimony that Respondent possessed enough methamphetamines to warrant a trafficking charge. As a result, Respondent was

not entitled to a lesser-included charge, such as possession with intent to distribute, for the trafficking charge.

Sellers v. State, 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005) (emphasis added).

There was never any evidence presented that Morris possessed less than 100 pills of ecstasy – this alone shows that the PCR Court erred as the jury charge on possession with intent to distribute ecstasy would not be proper as not supported by the facts. Counsel cannot be ineffective for failing to request a jury charge that is not supported by the facts. Coincidentally, Morris did not present nor did the PCR Court find that Morris possessed an amount that would justify a lesser included offense. The PCR Court's ruling errs as a matter of law because there was no evidence presented that Morris possessed less than the minimum required for trafficking. Again, the PCR Court's holding contradicts South Carolina case law. Sellers v. State, 362 S.C. 182, 190, 607 S.E.2d 82, 86 (2005) ("A defendant is not entitled to a lesser-included charge of possession with intent to distribute when there is evidence that the amount involved exceeded minimum for trafficking.") citing State v. Grandy, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991). Here the only evidence presented to the trial court was that the amount the jury could find attributable to Morris was greater than the minimum for trafficking. Accordingly, the PCR Court erred in finding Trial Counsel deficient.

The PCR Court also clearly erred in finding that Applicant met his burden of proving prejudice. To grant relief, the PCR Court has to find that Trial Counsel was deficient and that the deficiency prejudiced Morris. Finding prejudice means that Morris met his burden of proving that the outcome would have been different but for the alleged deficiency. See Strickland v. Washington. Here, the PCR Court clearly erred in finding that Morris was prejudiced as Morris failed to prove that the outcome of the trial would have been different. The PCR Court speculates with no supporting evidence that the jury maybe would have found him guilty of the lesser

included. Such speculation cannot uphold the Applicant's burden of proving the prejudice prong. Additionally, there is no prejudice because it is clear how the trial court would have ruled had Counsel asked for the lesser included offense. Given his indication that he was relying on State v. Sellers, it is abundantly clear how the trial judge would have ruled had Trial Counsel asked for the lesser included offense and the PCR Court erred in finding that the result would have been different.

III. The trial counsel failed to introduce the sworn statement of Brandon Nichols and therefore was not able to request a jury instruction that the statement can be considered as substantive evidence.

The PCR Court granted relief on the ground that Trial Counsel did not introduce an affidavit of codefendant Nichols as to a prior inconsistent statement during his cross examination of Nichols.

First, Trial Counsel was not deficient for failing to introduce the statement as an exhibit because this would not have been allowed under the evidence rules. Rule 613 states in part that "if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible." SCRE 613(b). In this case, Nichols admitted during direct and cross examination to making the prior inconsistent statement. See Transcript p. 191; 197 ll. 10-13; 200 l. 20-22; 202 ll. 20-23; 205 ll. 15-23. Since Nichols was shown his statement and admitted that he made the statement, extrinsic evidence of the statement would not have been admissible according to the Rules of Evidence. Therefore, the PCR Court clearly erred in finding that Counsel was deficient for failing to introduce the statement as an exhibit.

Second, Trial Counsel was not deficient for failing to ask the trial judge to tell the jury that they could consider the contents of the inconsistent statement as substantive evidence. State v. Copeland holds that "testimony of prior inconsistent statements [can be] used as substantive evidence when the declarant testifies at trial and is subject to cross examination." Copeland, 278

S.C. 572, 581, 300 S.E.2d 63, 69 (1982). All testimony can be considered by the jury as evidence, and this includes the contents of Nichols' inconsistent statement that was read into the record during Nichols' cross-examination and again during the Morris's closing argument. Morris's case is not inconsistent with Copeland because Nichols' testimony regarding his inconsistent statement was used as evidence. Additionally, in his standard introductory comments to the jury, the trial judge informed them that it is solely up to them to examine the evidence; to believe all, none, or part of witnesses' testimony; and to assess the credibility of any witnesses. The judge also reiterated this during jury charges. See Transcript p. 312-313.

Morris was not prejudiced by Trial Counsel's actions. Nichols admitted to making the statement and was heavily cross-examined and impeached by Trial Counsel regarding the circumstances around this statement. Moreover, the statement was read into evidence through Trial Counsel during cross examination. See Transcript p. 202-205. The statement was also read by Trial Counsel during his closing argument. Transcript p. 305, ll. 8-19. It is clear that the jury was able to learn of the contents of the statement and was able to consider the testimony regarding the statement as evidence. Accordingly, the PCR Court clearly erred in its ruling.

IV. Trial counsel failed to object to the charge to the jury stating "A defendant's knowledge and possession may be inferred when a substance is found on property under the defendant's control " Tr. at 317, ll. 8-10.

The PCR Court erred in granting relief on the basis that Trial Counsel was ineffective for failing to object to the charge to the jury stating "A defendant's knowledge and possession may be inferred when a substance is found on the property under the defendant's control." Transcript p. 317, ll. 8-10. The PCR Court improperly found this charge improperly shifted the burden to the Morris and is a charge on the facts in violation of Article V, Sec. 21 of the Constitution of the State of South Carolina.

The PCR Court's holding is in direct contravention with current South Carolina law. Furthermore, the charge that was given is directly from the South Carolina Judicial Department's Circuit Court standard jury charge book and simply defines constructive possession. State v. Adams, which has not been overturned, holds

The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976). The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence.

State v. Adams, 291 S.C. 132, 135–36, 352 S.E.2d 483, 486 (1987). The PCR Court lengthy rationale into the cases behind Adams only diverts from two simple facts – (1) the given charge is directly from the Judicial Department's charge book and from Adams, and (2) the language used in Adams has never been overturned. The PCR Court's ruling is directly against current case law.

A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). Morris was driving the car. The drugs were found in the car, which was under his control. Because the trial judge gave the correct interpretation of the law as outlined in State v. Adams, the jury charge was not objectionable and Counsel was not ineffective for failing to object.

Despite the PCR Court's lengthy attempt to review the history of this issue and cite cases from Mississippi, Florida, Illinois, Pennsylvania, and Virginia – the bottom line is that the South Carolina case of State v. Adams is the current law in South Carolina. This case has no negative treatment on any of its holdings and the charge derived from the case is used so commonly that it has been solidified in the standard jury charge book for circuit court judges in South Carolina.

The PCR Court clearly erred in holding that the charge is not supported by prior decisions in South Carolina.

The PCR Court also erred because the charge giving the definition of constructive possession was clearly not a comment on the facts. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989) ("Under South Carolina law, it is a general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused."). Nowhere in the charge does the trial judge indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. The charge states the current law in South Carolina.

The State would also point out that the PCR Court's analysis and holding on this issue clearly deviate from Morris's issue presented and instead read as a seven page manifesto that include tangentially-related cases from over one-hundred years ago, cases well outside South Carolina law, and even rhetorical questions that are out of place and improper for the PCR Court to make in its findings from the PCR hearing. Despite opposing counsel's strong opinions on this issue, the PCR Court should reconsider its ruling as it is clearly in contravention to current non-overturned case law and the established principle of constructive possession.

V. Trial counsel and appellate counsel were ineffective in failing to differentiate between a "Phillies Blunt" and a "Black and Mild" which failure lead to confusion as to the trial court and appellate courts on the issue of whether there was probable cause to search the automobile.

The PCR Court granted relief on the ground that Trial Counsel failed to make the distinction between a "Phillies Blunt" and a "Black and Mild" which failure lead to confusion as to the trial court and appellate courts on the issue of whether there was probable cause to search the automobile. The PCR Court erred for the following reasons.

Trial Counsel was not ineffective for failing to differentiate between the Philly Blunt and Black and Mild cigar. Throughout the trial, the cigars or cigar-shaped objects seen in the vehicle by the responding police officers were referred to as "blunts," "black and milds," and "Philly Blunts." The police officers saw what they believed to be hollowed out blunts, saw loose tobacco on the floorboard, smelled burnt marijuana, and compared the inconsistent stories of Morris and Nichols – giving rise to the reasonable suspicion to extend the traffic stop and the probable cause to search the car. The actual name or type of cigar or cigar-shaped object was never definitively specified, nor was it pertinent in the trial court's decision to find that probable cause existed to search the vehicle. The trial court denied the motion to suppress, finding that reasonable suspicion existed to extend the stop, and explained that the "main indicator" leading to its ruling was the smell of marijuana, along with what the officers believed to be hollowed-out blunts, and loose tobacco in the car. Transcript p. 64, l. 21 – p. 65, l. 3. Nowhere did the trial court indicate that it was denying the motion based on the fact that the objects found were "Philly Blunts" and not "Black and Milds." The basis of the ruling was, **along with other factors**, that the **officers believed at the time** of the stop that they saw hollowed out cigar shaped objects that had been emptied and were going to be used to smoke marijuana.

Additionally, there is no indication that the Court of Appeals relied specifically on the fact that the object was called a Philly Blunt and not a Black and Mild. **The Court of Appeals still found that reasonable suspicion existed based on the many factors that existed.** One can smoke marijuana out of many objects, and the specific name of the cigar found does not exonerate Morris in this situation. Trial Counsel argued to the trial judge and to the jury that there was no evidence of contraband, but was unsuccessful in his persuasion.

Essentially, the fact remains that the hollowed out cigars or cigar shaped tubes were just one factor that led to findings of reasonable suspicion and probable cause. Most importantly, it does not matter what the objects seen actually ended up being – all that matters is that the officers saw what they subjectively believed at the time to be hollowed out tubes that could have been used to smoke marijuana. Their observation was one of several factors contributing to their formulation of reasonable suspicion and later probable cause to search. The PCR Court erred in concluding that Morris was prejudiced because the other factors, outlined in the trial court's ruling on the issue and the appellate court's decision, still existed that contributed to reasonable suspicion and probable cause to search. The PCR Court's findings are clear error.

VI. Cumulative Error

The PCR Court granted relief on the ground that the errors as a whole show that Morris was denied a fair trial. No appellate courts in South Carolina recognize the cumulative error doctrine in a PCR proceeding. The PCR Court clearly erred as the doctrine of cumulative error, although often raised in post-conviction relief proceedings, contradicts the use of the Strickland two-prong test, requiring both deficiency and prejudice for a finding of ineffective assistance of counsel. The correct test is outlined as follows:

"A two-prong test for determining effective assistance of counsel has been set forth by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, a defendant must show that counsel's performance was deficient. Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' 466 U.S. at 688, 104 S.Ct. at 2065. The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' The defendant is required to overcome the presumption that counsel was effective in order to receive relief."

Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

The PCR Court is required to test Trial Counsel's alleged errors by applying the two-prong test to each alleged error. The PCR Court clearly erred by applying a different standard of review. Accordingly, the PCR Court should reconsider applying this incorrect standard.

CONCLUSION

For the foregoing reasons, Respondent requests that this Court reconsider its ruling.

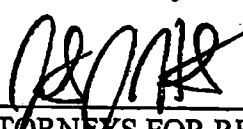
Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
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MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

By: 
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July 10, 2017

STATE OF SOUTH CAROLINA

COUNTY OF YORK

KENNETH MORRIS, #334303

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON PLEAS

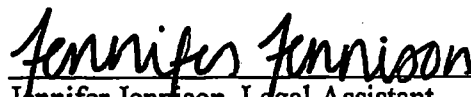
2015-CP-46-2859

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Reconsider** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Clarence Rauch Wise, Esquire
305 Main St.
Greenwood, SC 29646

DATED this the 6th day of July, 2017.


Jennifer Jennison, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
 Kenneth D. Morris,	)	
Inmate № 334303	)	
	)	
Applicant,	)	
	)	Reply to Motion to Reconsider
-vs-	)	
	)	2015-CP-46-2859
State of South Carolina.	)	

1. Trial Counsel was ineffective in failing to effectively cross examine the co-defendant.

The State argues that the punishment to which the co-defendant, Brandon Nichols was facing is not relevant. This is simply not the law in South Carolina. *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002) clearly and unequivocally holds that defense counsel may cross examine the co-defendant as to the possible punishment they are facing. This is most important to this case as, under the original charge, the co-defendant was facing a mandatory minimum term of imprisonment. Under his plea deal, which involved testifying against Kenneth Morris, the co-defendant would receive probation. Such cross-examination would have significantly impacted the credibility of the co-defendant.

The prejudice as to Mr. Morris is obvious. The co-defendant admitted his involvement in trafficking Ecstasy but added that Mr. Morris was also involved. Had they known that Mr. Nichols, based upon his testimony that implicated Mr. Morris, was avoiding mandatory prison time, they easily could have reached a different conclusion. The record contains evidence that he

had previously given a statement that exonerated Mr. Morris. His avoiding prison time could have easily explained to the jury why his testimony changed.

II. Trial counsel was ineffective in failing to request a charge of lesser included offense of possession of Ecstasy with intent to distribute.

The State's reliance upon *State v. Sellers*, 362 S.C. 182, 607 S.E.2d (2005) is misplaced. The provision of the code relevant to this case was added in 2000 under Act 355. *Sellers* was tried before 2000. The Supreme Court noted "This Court affirmed his convictions and sentences on direct appeal. *State v. Sellers*, Op. No. 99-MO-79 (S.C. Sup. Ct. filed November 15, 1999)." *Id.* at 187, 607 S.E.2d at 84. As the *Sellers* case was tried before the statute was amended to add the provision about possession with intent being a lesser included of trafficking, it has no application to this case.

As the lesser included should have been charged under the statute, as noted in the order the prejudice is obvious. The jury reduced the charge on possession with intent to distribute marijuana to possession. The jury likely would have reduced the Ecstasy charge. In fact, if possession of Ecstasy had been charge there is a good probability the jury would have convicted Mr. Morris of that charge as that is what Mr. Nichols had entered a plea. Nothing in this record suggests the jury would not have convicted Mr. Morris of the lesser included.

III. The trial counsel failed to introduce the sworn statement of Brandon Nichols and therefore was not able to request a jury instruction that the statement can be considered as substantive evidence.

The prior statement made by Mr. Nichols was admissible. As our Court of Appeals has said concerning the admission of a prior inconsistent written statement, "When the issue is

whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal.” *State v. Carmack*, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010). In the present case, the admission was not unequivocal. The co-defendant stated he was coerced into making the statement. In recognition of this principle, the State at the trial below took the position that any reference to the statement would require that the Defendant introduce the statement. Tr. at 198, ll 5-9. As the State concluded its argument “I don’t think it is fair for him to get the benefit of it without offering it into evidence.” The statement, had the defense so sought, would have been admissible. The jury would have been told they may consider the written affidavit as substantive evidence.

The State appears to argue that even the impeachment could be considered by the jury. While that is correct, there was no request by trial counsel below asking the judge to instruct the jury that the prior inconsistent statement could be used as substantive evidence. All the jury knew was that it was a prior inconsistent statement.

Mr. Morris was prejudiced in this case because while the jury could consider the statement, they were not told they could consider it as substantive evidence. This was prejudicial error.

IV. Trial counsel failed to object to the charge to the jury stating “A defendant’s knowledge and possession may be inferred when a substance is found on property under the defendant’s control.” Tr. at 317, ll 8-10.

This provision clearly violates the State Constitution as to a comment on the facts. *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987) never addresses the question of whether the charge violated Article V, § 21 of the Constitution of the State of South Carolina. Therefore, the

reliance of the State upon that case is not helpful to discussing this issue. The two old railroad cases cited in the order clearly hold a charge as to an inference is a violation of the State Constitution. The *Adams* case is the current law in South Carolina but it is not the current law in South Carolina when the objection is based upon a violation of the State Constitution. As the constitutional issue was not raised in the appeal, the South Carolina Supreme Court could not address it. As former Chief Justice Alex Sanders has said "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 182, 325 S.E.2d 550, 562 (Ct. App. 1984). The Court in *Adams* was not asked the question. The Court, therefore gave no answer.

The State argues that the jury charge as a whole contained a correct statement of the law. In this case, the jury charge as a whole is hopelessly confusing. At one point the jury is instructed they may infer the defendant possessed the drugs because he was driving the automobile. Later the judge instructs the jury "Mere presence at the scene where drugs are found is not alone enough to prove possession." Tr. at 317, ll 3-4; 323, 2-5. Then the jury is told "He is entitled to the benefit of any reasonable doubt that you have on the issue." Tr. at 311, 125 to 312, 11. How can all three statement be reconciled? Mere presence is not enough, but if he is merely present driving the care you can infer he is guilty. If a driver can be inferred to possess the drugs, why give a mere presence charge? How does a jury give the defendant the benefit of the doubt if the trial judge has also told them they may infer he is guilty because he is driving the automobile. This is especially true when there is no question he was driving the automobile. Taken as a whole, the charge is not correct, but confusing. A confusing charge can never be a correct statement of the law. As our Supreme Court has said "A jury charge is no place for purposeful

ambiguity.” *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Here the charge, when taken as a whole, in addition to violating the State Constitution, would be an example of purposeful ambiguity.

The prejudice to the defendant in instructing the jury in violation of our State Constitution is obvious. The fact that Mr. Morris was the driver of the automobile should not have been singled out as a fact from which guilt may be inferred. Such a charge elevates that one fact above all others in violation of our State Constitution. The fact of who was driving under the judge’s charge is more important than who rented the automobile. The fortuitous act of who was driving the automobile at the time of the stop becomes more important than the deliberate act of who rented the automobile.

V. Trial counsel and appellate counsel were ineffective in failing to differentiate between a “Phillies Blunt” and a “Black and Mild” which failure lead to confusion as the trial court and appellate courts on the issue of whether there was probable cause to search the automobile.

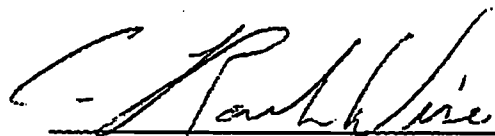
In its motion to reconsider the State argues “Throughout the trial, the cigars or cigar-shaped objects seen in the vehicle by the responding police officers were referred to as “blunts,” “black and milds” and “Phillies Blunts.” From the defendant’s perspective, the label “Black and Mild” was seldom used in the transcript. In the Court of Appeals opinion, the term “Black and Mild” or any phrase associated with the words is used once. The words “Phillies Blunt” or “blunt” is used nine times. In the Supreme Court opinion the term “Black and Mild” or any phrase associated with the words is used once. The words “Phillies Blunt” or “blunt” is used ten times. Clearly both appellate courts treated the object found in the automobile as a “blunt or

Phillies Blunt" and not a "Black and Mild." The State has not argued that the item found in the automobile was not a Black and Mild nor have they argued, for they cannot, that the two items are similar. Granted the trial court and the appellate courts both cited other factors, there is no question that all three placed special emphasis upon the fact that a Phillies Blunt was found in the automobile. This finding is factually wrong. When the other courts placed special emphasis on the presence of a Phillies Blunt, even though they mentioned other factors, this erroneous finding had to be prejudicial to Mr. Morris.

VI Cumulative error

The State properly recognizes that cumulative error analysis is an open question in South Carolina. The mere fact that under *Strickland v. Washington*, 466 U.S. 668 (1984) requires a two prong test of error and prejudice, does not preclude a court from finding a cumulative error. *Strickland*, as with all cases, limited by the issues presented in that case. A cumulative error analysis was not before the Court. As noted in the Order, if the South Carolina Supreme Court has recognized cumulative error in considering the cumulative affect of a solicitor's closing argument, this Court should be authorized to find cumulative error in numerous errors of trial counsel.

October 5, 2017



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FILED-RECEIVED
 STATE OF SOUTH CAROLINA)
 2017 NOV -3 PM 12:49) IN THE COURT OF COMMON PLEAS
 COUNTY OF YORK)
 DAVID H. LITTON
 C.C.C. JUDGE
 YORK COUNTY, SC

Kenneth D. Morris,

Inmate № 334303

Applicant,

-vs-

State of South Carolina.

Respondent.

Order on Motion to Reconsider

2015-CP-46-2859

This matter come before me upon the Motion of the State pursuant to Rule 59 to Reconsider the decision previously entered in this matter. Based upon the following reasons, the Court respectfully denies the Motion to Reconsider. In denying this Motion the Court is considers the standard by which a Post Conviction Relief is to be granted. As said by our South Carolina Supreme Court "In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Prejudice is proven by showing a reasonable probability that the outcome of the trial would have been different.

I. Trial Counsel was ineffective in failing to effectively cross examine the co-defendant.

State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) clearly and unequivocally holds that defense counsel may cross examine the co-defendant as to the possible punishment they are



facing. While the witness testified that he was receiving a probationary sentence, the jury never knew he was facing a mandatory minimum mandatory sentence. The jury easily could have assumed he was receiving no real benefit from his testimony as he was being given a record and probation. Had the witness been cross examined as to his minimum sentence, the defense would have an easy explanation as to why the co-defendant would have claimed the written affidavit was coerced. The prejudice to Mr. Morris is further evident from the fact that the State made a specific motion to exclude from closing argument any reference to the mandatory minimum sentence. The reasonable probability that the result would have been different is clearly evident.

II. Trial Counsel was ineffective in failing to request a charge of the lesser included offense of possession of Ecstasy with intent to distribute.

The determination of this issue is strictly a case of statutory interpretation. The State's reliance in its Motion upon *State v. Sellers*, 362 S.C. 182, 607 S.E.2d (2005) is misplaced. The provision of the code relevant to this case was added in 2000 under Act 355. *Sellers* was tried before 2000. The Supreme Court noted "This Court affirmed his convictions and sentences on direct appeal. *State v. Sellers*, Op. No. 99-MO-79 (S.C. Sup. Ct. filed November 15, 1999)." *Id.* at 187, 607 S.E.2d at 84. As the *Sellers* case was tried before the statute was amended to add the provision about possession with intent being a lesser included of trafficking, it has no application to this case.

As the lesser included should have been charged under the statute, as noted in the order, the prejudice is obvious. The jury reduced the charge on possession with intent to distribute marijuana to possession. The jury likely would have reduced the Ecstasy charge. Nothing in this record suggests anything but that there is a reasonable probability the jury would have



convicted Mr. Morris of the lesser included offense.

III. The trial Counsel failed to introduce the sworn statement of Brandon Nichols and therefore was not able to request a jury instruction that the statement can be considered as substantive evidence.

On this issue the State has contended that the statement would not have been admissible as Brandon Nichols admitted making the statement and therefore the state itself would not have been admissible under Rule 613(b) of the South Carolina Rules of Evidence. As our Court of Appeals has said concerning the admission of a prior inconsistent written statement, "When the issue is whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal." *State v. Carmack*, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010). In the present case, the admission was not unequivocal. The co-defendant stated he was coerced into making the statement. In recognition of this principle, the State at the trial below took the position that any reference to the statement would require that the Defendant introduce the statement. Tr. at 198, ll 5-9. As the State concluded its argument "I don't think it is fair for him to get the benefit of it without offering it into evidence." The statement, had the defense so sought, would have been admitted.

Mr. Morris was prejudiced in this case because while the jury could consider the statement, they were not told they could consider it as substantive evidence. The jury was concerned about the statement as they specifically asked to see the statement. The jury said "we would like to see Mr. Nichols [sic] statement that he signed at the notary." Tr. at 329, ll 5-6. Based upon these factors, there is a reasonable probability that the outcome of the trial would have been different if the statement had been introduced into evidence and the jury had seen and



examined the statement.

IV. Trial counsel failed to object to the charge to the jury stating "A defendant's knowledge and possession may be inferred when a substance is found on property under the defendant's control." Tr. at 317, ll 8-10.

In its Motion to Reconsider the State never attempted to distinguish *Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907) and *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907). These two cases hold that based upon a party proving one fact, the jury may not be told they may infer another fact. The Court held such a statement violates what is now Article V, § 21 of the Constitution of the State of South Carolina which prohibits a judge from commenting on the facts. The State has not argued that the Court's reliance upon those cases was misplaced. Instead, the State has argued that *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987) permits such a charge. *Adams* is distinguishable due to the fact that the case was not decided on state constitutional grounds. The issue of a charge on the facts was simply not addressed in the opinion and therefore is not precedent as to how our State Constitution should be interpreted. As the jury was improperly instructed concerning the inference that Mr. Morris' possession may be inferred simply because he was driving the rental car, there is a reasonable probability that the result may have been different had the jury been properly instructed.

V. Trial counsel and appellate counsel were ineffective in failing to differentiate between a "Phillies Blunt" and a "Black and Mild" which failure lead to confusion as to the trial and appellate courts on the issue of whether there was probable cause to search the automobile.

The State contends in its Motion to Reconsider "Nowhere did the trial court indicate that



it was denying the motion based on the fact that the objects found were "Philly Blunts" and not "Black and Milds." The term "Black and Milds" was not brought up until the cross examination of the officer. Tr. at 48, ll 16 to 49, ll 19. In that cross examination, the arresting officer never indicated that the Black and Mild had been used to smoke marijuana. He never indicated a Black and Mild, based on his experience, had ever been used to smoke marijuana. He did testify that a blunt cigar is a brand. Tr. at 16, ll 15-16. This would indicate that the officer knew the difference between a Phillies Blunt and a Black and Mild. Based upon the exhibits introduced at trial a Black and Mild should not be confused with a Phillies Blunt. In ruling on this matter the trial judge never made even a slight reference to Black and Mild. He made three references to "blunts." Based upon the testimony at trial and the exhibits introduced at trial, there is a reasonable probability that had the proper information been presented to the trial court and appellate courts, the result would have been different.

VI. Cumulative Error

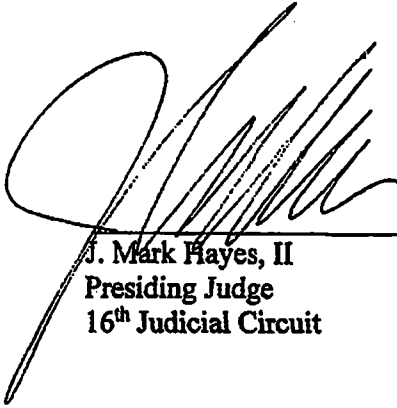
The Court, in its original order, acknowledged that cumulative error analysis had not been recognized in South Carolina, nor has it been prohibited. The Court believes that any one error would be sufficient to grant relief, two of the errors are so interlinked, that the error of any one issue, is enhanced when both are considered together. Issues I and III involved the credibility of Brandon Nichols. When both are considered together the prejudiced to the Applicant is enhanced. Also, considering all the errors together the trial as a whole had numerous errors that were prejudicial to the applicant. Based upon a reading of the record, the testimony at the Post Conviction Relief hearing and considering the errors collectively, there is a reasonable probability that had all the errors not occurred the result of the trial would have been different.



For the foregoing reasons, the Motion of the State to Reconsider this matter is hereby denied.

IT IS SO ORDERED

October 23, 2017



J. Mark Hayes, II
Presiding Judge
16th Judicial Circuit

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4602859**

Kenneth D Morris		South Carolina State Of	

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION
ORDER ON MOTION TO RECONSIDER**

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ J MARK HAYES II
Circuit Court Judge

2132
Judge Code

11/3/2017
Date

For Clerk of Court Office Use Only

This judgment was entered on 11/3/2017, and a copy mailed first class or placed in the appropriate attorney's box or 11/3/2017, to attorneys of record or to parties (when appearing pro se) as follows:

Leah B. Moody 235 E. Main St., Ste 115 PO Box 1015 Rock
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Clarence Rauch Wise 305 Main St. Greenwood, SC 29646

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29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
