

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County Court of Common Pleas
The Honorable Perry Gravely, Circuit Court Judge

Appellate Case No. 2017-0002411

Daniel Lopez,.....Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

WILLIAM G. YARBOROUGH III

LAUREN C. HOBBS

William G. Yarborough III, Attorney at Law, LLC
522 North Church St. Greenville, SC 29601
(864) 331-1612

COUNSEL FOR PETITIONER

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ISSUES PRESENTED FOR REVIEW

- I. **WHETHER THE PCR COURT ERRED IN FINDING NO CONSTITUTIONAL ERROR IN THE DISCOVERY VIOLATION REGARDING THE LOST VIDEO OF THE TRAFFIC STOP.**
- A. **DID THE PCR COURT ERR IN FINDING THAT THE RESULT OF THE SUPPRESSION MOTION WOULD NOT HAVE BEEN DIFFERENT HAD THE TRIAL JUDGE BEEN ABLE TO VIEW THE VIDEO DURING THE SUPPRESSION HEARING IF THE VIDEO CONTRADICTS THE OFFICER'S SUBJECTIVE AND SKEWED TESTIMONY ON THE CIRCUMSTANCES HE CITED AS GIVING RISE TO REASONABLE SUSPICION TO EXTEND THE STOP AS WELL AS THE CIRCUMSTANCES CITED AS AMOUNTING TO PROBABLE CAUSE JUSTIFYING A WARRANTLESS SEARCH OF PETITIONER VEHICLE?**

STATEMENT OF THE CASE

The Greenville County grand jury indicted Petitioner for trafficking cocaine and possession of a firearm with an obliterated serial number on March 15, 2005 (2005-GS-23-01956, 2005-GS-23-01957). The charges arose from a traffic stop on January 21, 2005. Christopher D. Scalzo, Esquire (Trial Counsel) represented Petitioner. Assistant Solicitor Joyce K. Monts prosecuted the case.

Trial Counsel also moved to suppress Petitioner's statement and the evidence seized from the traffic stop on the basis that the stop was unreasonably and illegally extended and Petitioner consent was rendered fruit of the poisonous tree, all in violation of the Fourth Amendment. 153, In. 3-23. After testimony was taken and the motion was heard, the motion to suppress was denied. Trial Counsel had also moved to sever the trial or to continue until Petitioner was present. After hearing testimony regarding four previously mailed bond cards to four listed addresses for Petitioner, the motion was denied. 147-151, In. 13-16. The jury trial proceeded in Petitioner's absence before the Honorable Victor Pyle, Jr. on October 12th through 13th 2009. Petitioner was tried along with Octavius Louis Nelson, whom had also been indicted for trafficking cocaine. The jury found Petitioner guilty on both charges. Nelson was found not guilty on trafficking cocaine. The sentence was sealed and Petitioner was later sentenced to twenty-five (25) years on the trafficking charge and five (5) years on the weapon charge concurrent on May 7, 2013 before the Honorable Letitia Verdin. App. p.p. 561-564.

Petitioner appealed his conviction and sentence and his appeal was perfected by Lara Caudy of South Carolina Commission of Indigent Defense. The issues on appeal related to the trial court's refusal to exclude the evidence and statements obtained as a result of the traffic stop

search and refusal to continue the trial until Petitioner was present. The South Carolina Court of Appeals affirmed his conviction and sentence. *State v. Lopez*, Op. No. 2015-UP-216.

Petitioner filed an application for post-conviction relief pro se on February 29, 2016, raising allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, Brady violations, and prosecutorial misconduct. The facts given to support the allegations include, respectively: failure to investigate; failure to inform Petitioner of plea offer; to properly argue and preserve direct appeal issue; "bench warrant and notice to appear"; "911 call"; unconstitutional search and seizure, and destruction of evidence. Respondent filed a return and motion for a more definite statement on August 16, 2016. Susannah Ross, Esquire was thereafter appointed to represent Petitioner on his PCR. On October 20, 2016, the PCR application was amended to incorporate and add the following grounds:

- (1) ineffective assistance of trial counsel for the failure to communicate with client, advise of plea offer, investigate, effectively argue and preserve search and seizure issues as well as Applicant's right to be present at trial, confront his accusers, be fully informed of the nature of the charges against him, and representation by informed counsel; and
- (2) Due process violations in that the Solicitor failed to produce Brady information and allowed destruction of evidence which amounted to an unconstitutional breakdown in the adversarial process.

An application addendum was filed on December 2nd, 2016 to incorporate and clarify the previously filed allegations, stating:

- 1) ineffective assistance of trial counsel in the failure to investigate, keep Applicant informed of plea negotiations, failure to make adequate objections and arguments to preserve the record for direct appeal, and failure to inform the Applicant of the full nature of the allegation against him.
- 2) Due process violations stemming from prosecutor's failure to produce and/or possible destruction of in-car video of stop and initial call of the stop, Brady violations in failure to procure and produce exculpatory material, and trying Applicant in his absence years after a bench warrant was issued without actual notice or assuring a knowing and voluntary waiver.

An evidentiary hearing was held on April 18, 2017 before the Honorable Perry W. Gravely. Assistant Attorney General Ruston Neely appeared for Respondent. Ross appeared for Petitioner. Petitioner, Trial Counsel, Solicitor Monts and Officer Hines were present and testified at the hearing. The PCR was dismissed by way of written order filed October 6, 2017. A motion to alter or amend the judgement was filed on Petitioner's behalf October 18, 2017. An order denying the motion to alter or amend was filed on November 8, 2017. This appeal follows.

STATEMENT OF FACTS

Suppression Hearing and Trial Testimony

At the pre-trial motion to suppress, Officer Chris Hines testified that he first saw Petitioner at a pay phone near his vehicle at a gas station off Interstate 85 at 2:30 p.m. on January 21st, 2005. App. p. 156, ln. 2-17. Shortly thereafter, Hines was sitting in his patrol car on the side of the highway when he saw Petitioner's car pass at a high rate of speed. App. p. 156, ln. 14-17. Hines testified he did not use his radar gun when he first spotted Petitioner driving at what he believed was a high rate of speed. App. p. 156, ln. 18-21. Hines later used his radar gun as he pulled Petitioner over and clocked him driving at 72 miles per hour. App. p. 157, ln. 1-15. Once arriving at Petitioner's car at the passenger window, Hines could see into the car and saw no contraband or anything appearing to be illegal or criminal. App. p. 175, ln. 13-22. Hines noted that he saw a cellphone sitting on the passenger seat and an additional cellphone in the back seat, which he found odd because he believed he previously saw Petitioner using a payphone at a gas station. App. p. 158, ln. 10-23. Hines however did not ask Petitioner why he used a payphone instead of either cellphone, whether the second cellphone even belonged to him, whether either cellphone was not working, whom Petitioner called on the payphone, or what his conversation had been about. App. p. 175, ln. 4-11, ln. 19-25 – p. 176, ln. 1-7. Hines asked Petitioner for his license, registration, and insurance and Petitioner complied. App. 158, ln. 25 – p. 159, ln. 1. Hines noted that Petitioner had a Louisiana driver license, the car having Georgia plates, and that the car was registered in Petitioner's name in Georgia but with a different Georgia address than as noted on the insurance. App. p. 158, ln. 5-9; p. 159, ln. 12-23. Petitioner informed Hines that he had just moved to his current address, which incidentally would not be reflected in the paperwork just given. App. p. 159, ln. 20 – 160, ln. 1-7. The change of address "kind of raised a

red flag", causing Hines to believe Petitioner "[did not] have a steady place where he's laying his head at night." App. p. 161, ln. 8-11. Hines stated however that the car was not reported as stolen, Petitioner's name was reflected on all documents, and he had no outstanding warrants. App. 169, ln. 1-16. While the checks on the registration, license, and insurance were being done, Hines asked Petitioner to exit his car and come over and stand near his patrol car, which Hines testified was his standard procedure. App. pp. 170-171.

After running the checks, Hines testified he then informed Petitioner he was going to write him a warning ticket for speeding and began to write out the ticket. App. p. 150, ln. 12-21. Hines admitted that once he finished quickly writing the ticket, he did not immediately hand it to Petitioner and instead engaged him in conversation. P. 32, ln. 18-25; p. 33. During the conversation, Petitioner stated he "told on people" for Gwinnett County in Georgia. App. p. 160, ln. 13-25. Hines took this as Petitioner's attempt to befriend him or make Hines believe that Petitioner had some kind of affiliation with law enforcement. App. p. 160, ln. 13-25. Hines testified that Petitioner appeared nervous to him in that he spoke with a stutter and gave conflicting explanations on whom he had been visiting in North Carolina and where he had been in North Carolina. App. p. 161. Upon returning back from his patrol car to Petitioner's car at some point during the stop, Hines observed a Gwinnett County police department patch on the dash which also struck Hines as suspicious. App. 161, ln. 2-9. Hines testified he believed criminal activity was afoot due to his uncertainty as to where Petitioner lived, his inconsistent account of where he was coming from and going to, and the two cellphones in the car despite Hines believing he saw Petitioner previously use a payphone. App. p. 162, ln. 15-25. Although Hines felt it was suspicious that Petitioner had stated he was going home to Georgia when Petitioner had been driving towards North Carolina, Hines subsequently admitted on cross-

examination that Petitioner had gotten off an exit that has a ramp to get onto to I-85 south towards Georgia when Hines had pulled him over. App. p. 165, ln. 14 – p. 166, ln. 1-10. Hines also acknowledged that the car's VIN number matched the insurance and registration bearing Petitioner's name. App. 168, ln. 20 – p. 169, ln. 1-10. Hines noted that the area Petitioner was traveling was a "pipeline" for drug activity and his Petitioner's stutter, which he took for nervousness rather than as a speech impediment, added to his belief of ongoing criminal activity. App. pp. 163 – 164, ln. 1-11. Hines also stated, "[W]e deal with nervous people every day out there." App. p. 180, ln. 16. However, Hines was inconsistent in articulating whether this was or was not a factor in his reasonable suspicion or why he wanted to hold him and search the car:

Trial Counsel: [Y]ou talked about I-85 being a pipeline for drug activity, and that was factoring into your suspicion, and why you wanted to hold him and search the car; is that right?

Hines: No. I mean, 85 is a known drug corridor.

App. p. 179, ln. 19-23. Hines subsequently testified that I-85 being a drug corridor played into his belief that there was criminal activity. App. p. 179, ln. 23-25; p. 180, ln. 1-10. However, Hines testified he had no indication Petitioner was using I-85 for that purpose. App. p. 182, ln. 25; p. 1-3. Hines's belief that Petitioner was not being truthful about something, but admitted he did know what exactly Petitioner might be lying about. App. p. 176, ln. 13-15. When specifically asked what connection anything from the traffic stop had with drugs, Hines had no specific explanation as how any and all of these factors combined amount to the possibility of Petitioner being involved with narcotics or that narcotics were inside the vehicle. App. p. 181, 10-25. Further, Hines testified any one thing Petitioner said did not indicate criminal drug activity, and in response to specific questioning, Hines testified that all factors Hines identified raised reasonable suspicion of general criminal activity rather reasonable suspicion of drug activity. App. p. 183, ln. 4-22. Hines stated there was a "high probability" that the general criminal

activity was going to drug related, but not because of anything Hines observed in the car or from Petitioner or anything Petitioner said, but instead because of other things, like I-85 being a drug corridor. App. p. 183, ln. 23-25; p. 184, ln. 1.

At point Hines decided he was going to ask for consent to search the vehicle so that the search could be done in the "least intrusive way" and see what his response was; even though Hines stated he already believed he had "articulable suspicion to run the drug dog" at that point anyway. App. p. 164, ln. 12-21. Hines stated he did not have probable cause at that time that there was drugs inside the car in order to search without consent or a warrant however. App. p. 183, ln. 12-14.

Petitioner stated he did not really want to give consent to search the vehicle and stated he just wanted to leave. App. 174; p. 274, ln. 11-17. Hines informed him he was free to go but told Petitioner his car was not free to go and that he would need to leave his car with the officers because they were going to search it. App. p. 174. Recall that when Hines tells Petitioner he is free to go but he would have to leave his car, they are standing on the side of the road off an exit on Interstate 85 and Hines knew Petitioner lived hours away in Georgia. App. 173, ln. 24-25 – p. 174, ln. 1-25. After being told he could go but his car must stay, Petitioner gave permission for Hines to run the dog but did not state the officers could search it. App. p. 177, ln. 24-25 – p. 178, ln. 1-6. Hines stated that regardless of Petitioner allowing them to run the dog around the car, Petitioner had no say in it and he was going to do a dog sniff anyways. App. p. 179, ln. 12-17. Hines initially stated he wanted Petitioner to leave the vehicle because he wanted to run the dog around the car because of what Hines "observed thus far in the traffic stop." App. p. 174, ln. 24-25; p. 175, ln. 1-3. But Hines later testified he told him he could go because "I'm trying to put him at ease letting me know, hey, he may be free to go. So he thinks in his mind, hey, you know,

"I'm not going to cause any trouble." App. p. 176, ln. 16-19. Despite this portion of Hines's testimony, Hines had no indication Petitioner would pose a physical threat to him, or had any weapons on his person or in his car and Hines did not pat down Petitioner or search the vehicle for weapons.

On cross-examination, Hines admitted he had called for a back-up officer, Deputy McBee, early in the stop for assistance in searching the vehicle. App. p. 173; p. 247, ln. 28-21. although he had previously testified he did not believe criminal activity was occurring until after his conversation with Petitioner, which had occurred while he was writing the ticket. App. p. 173. Hines also admitted he had a K-9 in his patrol vehicle the entire time. App. p. 173.

The trial judge did not let Trial Counsel question Hines on the actual running of the drug and or the search itself. App. p. 184. In arguing to suppress the drugs, Trial Counsel argued that Hines unreasonably extended the traffic stop and thus the subsequent search was illegal. App. p. 185, ln. 13-25 – p. 187. Trial Counsel also argued that "nervous[ness] does not equal reasonable suspicion" and that Hines did not articulate circumstances rising to reasonable suspicion. App. p. 186, ln. 7-16. Trial Counsel referred to Petitioner's consent for the drug dog to be run around the car (which the officers do not need for a dog sniff pursuant to then-existing law) but did not clarify that Petitioner never consented to a search of the vehicle or being detained. App. p. 187, ln. 11-22. The trial judge countered Trial Counsel's argument with the holding of *State v. Reyes* that the unrelated questioning does not unconstitutionally extend the stop if the officer can articulate reasonable suspicion of some kind of illegal activity or if the encounter becomes consensual. App. p. 188, ln. 12-25 – p. 189, ln. 1-2. The trial judge denied the motion to suppress, finding that the officer had "objectively, reasonable, and articulable suspicion of illegal activity" and that Petitioner had consented, and the encounter was consensual. App. p. 189, ln. 1-

3. As for suppressing Petitioner's statements during and stemming from the illegal traffic stop, Trial Counsel argued "[A]ny consent [the officers] would have gotten after that, everything is tainted from that point forward." App. p. 191, ln. 1-7. Trial Counsel did not cross-examine any of the officers regarding the taking of Petitioner's statement and presented no other evidence to support suppression of the statements because Petitioner was not present. App. p. 190, ln. 15-17. The trial judge also denied the motion to suppress Petitioner's statements, finding that Petitioner was properly advised of Miranda rights, and freely and voluntarily gave a statement without the pressure of coercive police tactics. App. p. 190, ln. 18-25.

Trial proceeded and the evidence was presented that the drug dog alerted to the back rear tire of the vehicle and a search of the trunk revealed a handgun with the serial numbers scratched off and cocaine in a cognac bottle box with a field weight of 518.5 grams. App. pp. 213-219, ln. 9-12. Petitioner was arrested and handcuffed, after which he informed Deputy McBee he was willing to cooperate. App. p. 222, ln. 6-10; p. 329. As per his effort to cooperate, Petitioner told the officers the drugs were actually going to Greenville with delivery to be made at the waffle house to a man in a dark colored truck, later identified as codefendant Octavius Nelson. App. p. 222, ln. 6-10; p. 224, ln. 3-7. Using this information, officers went to the meet up location to arrest the person Petitioner had intended to delivery the drugs to. App. p. 224, ln. 3-25. Nelson was identified, apprehended, and consequently prosecuted as a result of Petitioner's cooperation. App. pp. 277-279. Petitioner also gave detailed information in his statement on other individuals involved in the cocaine transport on both the selling and receiving end. App. p. 312, ln. 20-25 – p. 314, ln. 1-7.

PCR Hearing Testimony

The now recovered video of the traffic stop was played in full at the PCR hearing (Applicant's Ex. 1). App. p. 69. Petitioner stated he did not get to view the video of the traffic stop until PCR Counsel Susannah Ross showed it to him. App. p. 55, ln. 7-8; p. 66, ln. 7-15. Petitioner had tried to get a copy of the video by writing the sheriff's office numerous times after learning that there was a video from Hines's incident report and from the transcript of the suppression hearing. App. p. 55, ln. 10-14. Petitioner testified that the video would have shown the truth of what actually happened during the traffic stop and shown there was no justification for the consequent search of his car. App. p. 58, ln. 24-25 – p. 59, ln. 1-3.

Trial Counsel testified that he filed the standard discovery motions in Petitioner's case prior to trial. App. p. 70, ln. 14-19. Initial discovery such as law enforcement incident reports put Trial Counsel on notice of the existence of the video of the traffic stop. App. p. 70, ln. 20-24; p. 71, ln. 4-8. Trial Counsel did not get to watch the video of the traffic stop prior to trial, the video had been misplaced during the four (4) years between the arrest and trial. App. p. 71, ln. 7-10. Trial Counsel could not recall at what point the video was lost during that time, but conceded that he did not file any further motions to compel the State to furnish the video once becoming aware of its existence. App. p. 70, ln. 25 – p. 71, ln. 1-2. Trial Counsel did not request a jury charge about the destruction of the video and the permissible inference against the State. App. p. 79, ln. 13-16. Further, when asked whether the video would have had any impact after viewing the video for the first time at the PCR hearing, Trial Counsel stated the video would have been beneficial, particularly in reference to winning the suppression motion. App. p. 71, ln. 13-25. Specifically, Trial Counsel testified that the video would have refuted the facts Hines testified as culminating into reasonable suspicion to extend the traffic stop and run the drug dog around the

car and consequently search Petitioner's vehicle. App. p. 71, ln. 17-25. *Infra*. The video also showed things that could not possibly be objectively or accurately depicted by Hines's testimony, such as the physical actions by the drug dog including whether the dog alerted to the presence of narcotics according to Hines's definition of passive versus aggressive alerts or pursuant to Trial Counsel's familiarity with common principles of drug dog sniffs in working with experience in past cases with drug dogs. App. p. 72, ln. 1-25; pp. 74-76, ln. 1-14. Trial Counsel became aware of facts through the video that were otherwise undiscoverable and thus unusable to support the motion to suppress or cross-examine Hines with, such as Hines's unreasonable characterization of Petitioner's statements as lying or misrepresenting whom he had been visiting and where in North Carolina and how many children he had:

[U]ntil I watched the video I could never get the context of the conversation because I didn't have the benefit of seeing what would have happened. And you can tell I didn't argue that in the suppression hearing. I wasn't able to argue the more accurate explanation for why he was talking about boy versus having a child and not having a son but having a daughter.¹

App. p. 72, ln. 24-25 – p. 73, ln. 1-6. *See also* p. 76, ln. 5-14; p. 79, ln. 22-25 – p. 80, ln. 1; p. 79, ln. 16-21. Trial Counsel conceded that without the video, he could not sufficiently argue Hines did not have articulable reasonable suspicion to extend the stop because Hines provided primarily subjective reasons that Trial Counsel could not refute without seeing the video. App. p. 73, ln. 17-24. The value of the video to the success of the motion to suppress could not have been gleaned from any other piece of evidence: "It's a video of an event and had things in there that I would not have been able to – and could not at the time know or replicate." App. p. 77, ln. 23-25. Trial Counsel further explained the significance of the video to this point in that the trial court and the Court of Appeals only had the subjective testimony of Hines when deciding the search

¹ Referring to pages 22-23 of the trial transcript, pages 159-160 of the Appendix.

issue but his testimony was in direct contrast with what the video actually showed. App. p. 87, ln. 17-19; p. 80, ln. 2-10.² For the purposes of the outcome of the suppression hearing and appeal on this issue, Trial Counsel conceded that the video would not have changed the thousands of hours training Hines had in drug interdiction when Petitioner's vehicle was searched, the two cellphones in the vehicle, or that Petitioner exited I-85 at a high-rate of speed. However, Trial Counsel remained steadfast that the video would have changed, or accurately shown, the facts Hines characterized as suspicious in alone and in culmination with one another. App. p. 88, ln. 1-25 – p. 95, ln. 1-13. *See infra*. Trial Counsel also stated that after watching the video, the stop was impermissibly extended for the dog to sniff around the car and that the video could have affected the outcome of the suppression motion had the video been shown at the hearing. App. p. 102, ln. 10-25 – p. 103, ln. 1-9.

Assistant Solicitor Joyce Monts testified she had been aware that there was a video of the traffic stop from Hines because it was referenced in his report. App. p. 5-6. Monts had not seen the video at the time of trial and informed Trial Counsel at some point that it was missing. App. p. 110, ln. 9-14. Monts stated that normally any video would have been turned over in the regular course of the discovery process, including Hines's video had it not been lost. App. p. 110, ln. 1-2; 18-22.³ Monts could not recall when she had been informed or discovered that the video had been lost and at some point had contacted Hines about it prior to trial, in which he informed her that the video had been in a vault and was somehow lost when he switched from the traffic unit

² At the close of the PCR hearing, Respondent argued that the determination of whether to grant relief on this ground should be made through the lens of the Court of Appeals's opinion. App. p. 129, ln. 21 – p. 133, ln. 11-16.

³ Monts did turn over the video from McBee's camera to the defense in discovery prior to trial. App. p. 110, ln. 21-22. That video does not show what is happening in Petitioner's car during the search or what the dog is doing due to the positioning of the three vehicles on the side of the highway. *See Ex. 1*; p. 113, ln. 17-25 – p. 114, ln. 1-114.

to the air support unit in 2006. App. p. 109, ln. 25 – p. App. p. 110, 1-9. *See also* App p. 116, ln. 6-11. Monts had asked the sheriff's office to find the video but did not inquire in the sheriff's office's efforts to find the video. App. p. 110, ln. 23-25 – p. 111, ln. 1-2. It was not until years later when Petitioner's PCR application was filed that Monts contacted Hines again to try to find the video: "[W]e talked about where it could be. I asked him to look again since time had gone on and look and see just per chance, due diligence, look some more to see if you could find it this time." App. p. 112, ln. 21-25 – p. 113, ln. 1-5. The video was found during this second search by Hines. App. p. 113, ln. 6-11.

Hines could not recall when he was asked by the solicitor's office to look for the video prior to trial, only that it would have been between 2006 when he transferred units and prior to trial in 2009. App. p. 118, ln. 2-12. Hines testified that the traffic unit, his unit at the time of Petitioner's arrest in 2005, was the only unit of the sheriff's office that had in-car videos. App. p. 116, 23-25. Each officer of the traffic division kept their in-car videos, including Hines's video in this case, on each of their own assigned shelf in a storage cabinet, and explained that a supervisor would have to unlock the cabinet each time someone wanted to view it. App. p. 117, ln. 4-8. By internal office policy, the videos were kept there unless being viewed and were not subject to be destroyed until after trial or permission from the solicitor. App. p. 117, ln. 9-15. Hines remembered he would always leave his videos in the same spot in that cabinet when at the traffic unit. App. p. 117, ln. 21-25. When Hines left the unit, he also left the in-car videos in the storage cabinet. App. p. 118, ln. 19-25. At some point between 2006-2009, Hines went to look for the video at the request of Monts and found the contents of the shelf, excluding the video at issue here, had been moved to a box which he then stored in new office at the air support unit building. App. p. 119, ln. 1-7. Hines discovered that the video had been moved to another

building by the time Hines came to look for the video at the second request of Monts when the video became an issue for PCR. App. p. 118, ln. 21-25 – p. 119, ln. 1-17. Hines’s opinion of the events of the day of Petitioner’s arrest did not change after he watched the newly-found video. App. p. 122, ln. 10-11. PCR Counsel objected to allowing Hines from opining on the search, and the dog sniff in particular, while the video played on the grounds that the testimony would again be subjective and it is “too late to have active memories of what’s happening” on the video. App. p. 122, ln. 12-20. The PCR Court had concerns as well and his opinions were not omitted. App. p. 122, ln. 21 – p. 123, ln. 14.

STANDARD OF REVIEW

The PCR applicant has the burden of proving the allegations of his PCR petition. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Upon review, if no probative evidence exists to support the findings, this Court will reverse the order of the PCR court. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The Court also defers to the PCR court’s findings on matters of credibility. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). In contrast, questions of law are reviewed *de novo*. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

ARGUMENT

I. THE PCR COURT ERRED IN FINDING NO CONSTITUTIONAL ERROR IN THE DISCOVERY VIOLATION REGARDING THE LOST VIDEO OF THE TRAFFIC STOP.

The PCR Court's order of dismissal must be reversed because it is based on an error of law. In the order of dismissal and the order following the post-hearing motion to alter or amend the judgment, the PCR Court failed to apply the proper standard in determining whether the discovery violation and loss of the video constituted as constitutional error requiring reversal. Despite Trial Counsel's overwhelming testimony to the contrary, the PCR Court reasoned that the video neither provided any additional material information nor materially contradicted the officer's testimony to ultimately conclude that there was no prejudice to Petitioner and no abuse of discovery. App. p. 16; p. 2. The initial order of dismissal makes no mention of the test for the State's failure to preserve evidence or the *Brady* determination. Neither order addresses the constitutional error determination. The PCR Court thus committed an error of law by failing to address the issues related to the loss of the video under the correct standard and the issues must be reviewed *de novo*.

The video here was evidence the State had planned to use during its case and chief and also evidence that fell under the discovery motions Trial Counsel filed. The video and the loss thereof thus invokes inquiry under both standards. "The rules encompassed in *Brady*, and its progeny, and Rule 5 are separate and impose different duties. Therefore, separate analysis must be used to determine if either has been violated." *State v. Kennerly*, 331 S.C. 442, 452, 503 S.E.2d 214, 219 (Ct.App.1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999). However, "[d]espite the different underpinnings of *Brady* and Rule 5, each has the same goal of ensuring the criminal defendant's right to a fair trial. Neither is designed 'to displace the adversary system as the

primary means by which truth is uncovered, but [rather] to ensure that a miscarriage of justice does not occur.” *State v. Kennerly*, 331 S.C. 442,453-54, 503 S.E.2d 214, 219-20 (Ct. App. 1998) (quoting authorities omitted). The *Brady* disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The *Brady* rule requires the prosecution to disclose evidence that is: 1) in its possession; 2) favorable to the accused; and 3) material to guilt or punishment, including impeachment. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976). Under this rule, the prosecution always has the duty to disclose regardless of whether the defendant makes a specific request, and the rule applies to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995); *State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590 (1997). A “*Brady* claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.” *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). “This rule applies to impeachment evidence as well as exculpatory evidence.” *Id.* *See also State v. Gathers*, 295 S.C. 476, 481, 369 S.E.2d 140, 143 (1988) (“In determining the materiality of nondisclosed evidence, this [c]ourt will consider it in the context of the entire record.”). “In a *Brady* analysis, information is not deemed ‘material’ if the defense discovers the information in time to adequately use it at trial.” *Kennerly*, 331 S.C. at 453-54, 503 S.E.2d at 220. Rather, “[m]ateriality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense.” *Porter v. State*, 368

S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (citing *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220)). See also *State v. Jones*, 325 S.C. 310, 320, 479 S.E.2d 517, 522 (Ct.App.1996).

Impeachment evidence can be material. *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996). A “reasonable probability” is demonstrated when the suppression “undermines confidence in the outcome of the trial.” *Id.* (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375)); see also *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981) (The State's failure to disclose information warrants a reversal as a *Brady* violation only if the omission deprived the defendant of a fair trial). Stated differently, “the determination is whether the defendant received a trial resulting in a verdict worthy of confidence”, and once that *Brady* violation is established, reversal is required. *Kyles v. Whitley*, 514 U.S. 419, 433-434, 115 S.Ct. 1555, (1995). *But see State v. Goodson*, 276 S.C. 243, 277 S.E.2d 602 (1981) (“Instead, the appellate court's function is to determine whether the appellant's right to a fair trial has been impaired.”). Moreover, whether the prosecutor's failure to disclosure evidence pursuant to *Brady* is due to negligence or an intentional act is irrelevant because a court may find a *Brady* violation regardless of the good or bad faith of the prosecutor. *Gibson v. State*, 334 S.C. 515, 528, 514 S.E.2d 320, 327 (1999).

Where evidence is destroyed rather than merely failed to be disclosed to defense, a due process violation occurs where the State destroyed the evidence in bad faith, or that the evidence possessed an exculpatory value apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means. *State v. Cheeseboro*, 346 S.C. 526, 538–39, 552 S.E.2d 300, 307 (2001).

As opposed to the constitutional dictates of *Brady*, Rule 5 is a creature of judicial discovery mechanisms, providing that:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects,

buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Rule 5(a)(1)(C), SCRCrimP. Rule 5 applies to evidence within the actual possession of the prosecution and seems to also apply to evidence within the possession of other government agencies. *See State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590 (1997). The definition of “material” for purposes of Rule 5 is the same as the definition as in the *Brady* context. *See Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 482 S.E.2d 53 (Ct. App. 1997) (*per curiam*). Once a Rule 5 violation is presented, reversal is required where the defendant suffered prejudice from the violation. *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996); *State v. Wilkins*, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992).

The loss of the video under either *Brady* and Rule 5 was a prejudicial and constitutional error that warrants granting a new trial. As demonstrated by Monts and Hines, the video was in the possession of the State at the time Trial Counsel filed discovery motions for it to be turned over. The video was not turned over to the defense even though up to several years had passed from the filing of the discovery motions until it was lost. Petitioner and Trial Counsel thus were unable to see the video prior to trial and use the video for suppression hearing purposes and throughout trial. The video was favorable to Petitioner because it directly contradicted Hines’s testimony on the circumstances that the trial court found amounted to articulable reasonable suspicion. In the video, it is patent that Petitioner is not exhibiting the behavior that Hines found indicative of nervousness, he is not bouncing around or shaking or chatting excessively. Trial Counsel also testified he would have argued such to the trial court had he been given the video. The video also would have allowed Trial Counsel to show the trial court that Petitioner was equally as likely to almost have missed his exit when Hines began his pursuit, rather than Hines’s

unsubstantiated position that Petitioner's speed in exiting the highway was somehow suspicious. Another factor identified by Hines as amounting to reasonable suspicion was Petitioner giving him supposedly "lie after lie" regarding where he was going and coming from and whom he had been visiting. Hines testified that Petitioner kept changing his answer on whether he had a daughter or son and Hines took this as a lie. However, the video shows, and Trial Counsel would have so argued at the suppression hearing, that Petitioner is clearly using "my boy" colloquially in regard to a male friend rather than using it to refer to a son. App. p. 72-73. As Trial Counsel testified, even Petitioner's documents showing four different addresses — a fact rather than Hines's interpretation — was not reasonably or accurately reflected through Hines's testimony. App. p. 88, ln. 11-25. As also argued by Trial Counsel, Hines's interpretation on whether Petitioner was lying about where he was going, Georgia, and where he was coming from, North Carolina, was unreasonable. App. p. 90-91. The video instead reflects that Petitioner was heading in a different direction than where he said he was going because he was merely trying to see what restaurants were along the nearby exits. App. p. 90-91. Rather than just having Hines testimony alone, the video also would have shown, and Trial Counsel would have argued, that the dog did not alert to the presence of drugs in the vehicle in that the dog does not lay down, scratch any part of the car, or bark. Ex. 1; App. p. 76, ln. 5-14. Even if the dog had alerted, with the video Trial Counsel would have been able to argue that Hines was leading the dog where to sniff along the car and improperly rewarded the dog in order to induce the dog to alert. App. p. 76, ln. 5-14. Moreover, even though Trial Counsel cross-examined Hines on all of these factors and the dog sniff, it does not render the loss of the video not unconstitutional or unprejudicial in light of standard used for determining suppression motions. In deciding whether reasonable suspicion or probable cause exists, the trial judge must determine whether the subjective testimony of the facts and circumstances given by an

individual police officer would lead an objectively reasonable person to find criminal activity was afoot or that a crime had been committed. The standard is one of objective reasonableness but it relies upon and considers subjective testimony. Without the video and only Hines's testimony to consider, the trial court had no other option to take Hines's testimony *at face value* and from there determine whether reasonable suspicion and probable cause existed under an objective reasonableness standard.

- A. THE PCR COURT ERRED IN FINDING THAT THE RESULT OF THE SUPPRESSION MOTION WOULD NOT HAVE BEEN DIFFERENT HAD THE TRIAL JUDGE BEEN ABLE TO VIEW THE VIDEO DURING THE SUPPRESSION HEARING BECAUSE THE VIDEO CONTRADICTS THE OFFICER'S SUBJECTIVE AND SKEWED TESTIMONY ON THE CIRCUMSTANCES HE CITED AS GIVING RISE TO REASONABLE SUSPICION TO EXTEND THE STOP AS WELL AS THE CIRCUMSTANCES CITED AS AMOUNTING TO PROBABLE CAUSE JUSTIFYING A WARRANTLESS SEARCH OF THE VEHICLE.

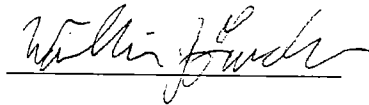
It is a well-settled principle of Fourth Amendment law that the officer cannot extend a traffic stop without reasonable suspicion of another crime. *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct 781 (2009); *Illinois v. Cabellas*, 543 U.S. 405, 409, 235 S.Ct. 834 (2005). Here, once Hines returned Petitioner's documentation, that seizure ended and another began once he asked Petitioner for consent to search. The trial court had found the second seizure was not an unlawful seizure, and thus did not warrant suppression of the drugs, because he had already found reasonable suspicion existed and that Petitioner's consent to run the dog around the car made the extension consensual. Hines allowing for Petitioner to leave but not his car is not a consensual encounter as Petitioner was not effectively or actually free to leave. Moreover, using the continued seizure of his car as a condition to try to get consent is as impermissible and violative of the Fourth Amendment as seen in *State v. Pichardo*, in which the officer turned

around and asked the driver for consent to search after he had already returned his documents, said goodbye, and thereby ended the traffic stop. *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005). Thus, because it was not a consensual or lawful extension of the stop, the only permissible remaining way to extend the stop in order to run the dog around the vehicle was if Hines had reasonable suspicion of an additional crime. The trial court and the Court of Appeals had both found that Hines had articulable reasonable suspicion to extend the stop. However, as Trial Counsel extensively testified at the PCR hearing, the video refutes the finding of reasonable suspicion because it demonstrates that the absence of the factors Hines had identified as amounting to reasonable suspicion. As per the video and Trial Counsel's testimony, the video refutes the following factors of reasonable suspicion: Petitioner's nervousness; lying or misleading as to his addresses, where he had been and was heading to, and whom he had been visiting; the suspicious exit he made from I-85. With these factors refuted, the only factors remaining to support reasonable suspicion are merely that I-85 is known as a drug corridor and there were two cellphones in the car. Precedent in this state has found insufficient showings of reasonable suspicion to extend a traffic stop on more than these two remaining factors. *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010); *State v. Williams*, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002). Therefore, without reasonable suspicion, Hines's running of the dog is an unconstitutional extension of the stop. *Rodriguez v. United States*, -U.S.-, 135 S.Ct. 1609 (2015). The drugs consequently found in the vehicle are impermissible fruit of the poisonous tree from an unlawful seizure. Thus, had the video been turned over to the defense and shown during the suppression hearing, there is a reasonable probability that the trial court would have granted it. The PCR Court thus erred in denying relief.

CONCLUSION

In light of the foregoing, Petitioner respectfully requests this Honorable Court to reverse the PCR Court's order of dismissal and remand for a new trial.

Respectfully submitted,



William G. Yarborough, III
Attorney for Petitioner
522 North Church Street
Greenville, SC 29601
(864) 331-1612
SC Bar No.: 10271

Greenville, SC
September 7, 2018

October 19th 2018

I, Lauren C. Felti (attify) that I have ~~been~~ filed
with the System Court the enclosed key hand
delivery. I shall ~~make~~ serve same on
Respondent.

Lauren C. F.

Lauren C. F.
#103190

W.L. F. Law
522 N. Church Street
Greenwell St.