THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Greenville County Court of Common Pleas
The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2018-000480

Karriem Provet,.....Petitioner,

v.

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

AMENDED PETITION FOR WRIT OF CERTIORARI II

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PCR COURT ERRED IN FINDING TRIAL COUNSEL NOT INEFFECTIVE FOR FAILING TO INVESTIGATE THE LENGTH OF THE TRAFFIC STOP AND INCONSISTENCIES IN TIME IN THE TRAFFIC STOP VIDEO AND THE RADIO LOGS WHEN SUCH INVESTIGATION WOULD HAVE REVEALED AT THE SUPPRESSION HEARING THAT THE OFFICER UNREASONABLY AND MEASURABLY EXTENDED THE TRAFFIC STOP IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS.

STATEMENT OF THE CASE

Petitioner was tried for trafficking cocaine 100 grams or more and resisting arrest before the Honorable Carmen T. Mullen on August 7th – 8th, 2007. Petitioner moved to suppress drug evidence from the traffic stop that formed the basis for the charges. App. pp. 159-160. Following a pre-trial evidentiary hearing, the motion was denied. App. p. 167-271. Petitioner was found guilty of both charges and was sentenced to one-year imprisonment for resisting arrest and twenty-five years, concurrent on the trafficking cocaine. charge App. p. 475; pp. 483-484.

Petitioner timely appealed. The Court of Appeals affirmed his conviction and sentence on January 31, 2011. *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011). This Court granted certiorari and following oral argument in June 2013, this Court affirmed the Court of Appeals's decision. *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (2013).

Petitioner filed a post-conviction relief application (PCR) raising numerous grounds on July 24, 2014. App. pp. 25-31. Respondent filed a return on January 8, 2015. App. pp. 34-37. An evidentiary hearing was held on June 26, 2017 before the Honorable Daniel Dewitt Hall. Undersigned counsel represented Petitioner. Assistant Attorney General DeShawn H. Mitchell represented Respondent. The PCR Court dismissed Petitioner's PCR on February 13, 2018. App. pp. 1-24. This appeal follows.

Suppression Hearing Testimony

The charges arose from a traffic stop on May 1, 2002 on Interstate 85 in Greenville County. App. p. 188, ln. 7-18. Corporal John Owens stopped him for following another car too closely and for a burned-out tag light. App. p. 188, ln. 7-25. After Petitioner complied with the request for his drivers license and registration, Owens directed him to exit the 1997 Ford Expedition and walk to the rear of the car. App. p. 188, ln. 14-22; p. 189, ln. 7; p. 190, ln. 1-6; p. 191, ln. 15-20. Petitioner informed Owens the car was registered to Petitioner's girlfriend, which Owens called a "third-

party vehicle". App. p. 190, ln. 7-8, 15-22. Owens also stated that he saw Petitioner heavily breathing and his hands shake. App. p. 191, ln. 1-3. Despite no indication he believed Petitioner had a weapon or may endanger his safety, Owens patted him down, finding no weapons or contraband. App. p. 192, ln. 1-19. Owens thereafter escorted Petitioner to the patrol car and began writing the warning citation. App. p. 192, ln.18-20. During this time, Owens prompted questions to Petitioner on various topics, both related and unrelated to the stop. App. p. 193. After questioning Petitioner, Owens called Officer Aman to bring the drug dog, and although Owens said he had been writing the ticket since shortly after pulling Petitioner over, Owens did not call dispatch for a check on Petitioner's drivers license or registration until this time. App. p. 197, ln. 1-4. Owens acknowledged that the traffic stop is not complete until he releases Petitioner and returns his license and registration. App. p. 215, ln. 14-18. Owens also stated that the time needed to write a warning ticket "depends on what is involved in writing the citation" and stated he wrote the citation as expeditiously as possible and did not delay the process. App. p. 225.

During the time Owens and Petitioner waited for Aman to arrive with the drug dog and for the documents check, Owens decided to return to the Ford Expedition, on what he called his "second approach" of the vehicle, to confirm that the VIN number matched that on the registration and the number on the windshield's sticker. App. p. 197, ln. 5-11; p. 198, ln. 3-4. As Owens checked the VIN number, he noticed the following items inside the car: fast food bags, several receipts, air freshener, and one (1) cellphone, none of which he noticed on his "initial approach of the vehicle" right after he had pulled Petitioner over. App. p. 198, ln. 1-16. Owens concluded that there was criminal activity afoot upon seeing these items on this "second approach." App. p. 198, ln. 18-22. Owens admitted that the one single cellphone did not trigger his suspicion. App. p. 217, ln. 12-16. Owens then returned to Petitioner at the patrol car and continued to wait for the

documentation check. App. p. 201, ln. 1-8. Officer Aman was arriving to the scene at this time. App. p. 201, ln. 4-5. App. p. 201, ln. 21-24. Aman stated that the stop lasted a few minutes after he arrived. App. p. 230, ln. 7-11

After receiving confirmation from dispatch, Owens gave Petitioner the warning citation and his belongings back. App. p. 201, ln. 1-8. With Aman at his side and within an arms-length of Petitioner, Owens then "asked him point-blank 'can I search your vehicle?'". App. p. 201, ln. 10-16; ln. 21-24; p. 218, ln. 9-13; p. 221, ln. 19-21, p. 227, ln. 13-17. Petitioner replied by asking: "Do you want to search my vehicle?". App. p. 201, ln. 12-16; ln. 21-24. Owens did not see Petitioner's hands shaking when he asked for consent to search. App. p. 216, ln. 16 – p. 217, ln. 4. According to Owens, Petitioner ultimately gave consent to search; whereas at the suppression hearing, Trial Counsel argued Petitioner's response was incoherent. App. p. 201, ln. 16-20; p. 247, ln. 19 – 25. Owens then instructed for the drug dog to sniff the car "even though I had consent. The canine is just another tool to use and maybe even expedite the situation." App. p. 203, ln. 3-6. Petitioner then ran across the highway and over the fence where he was ultimately apprehended and arrested. App. p. 204, ln. 6-13. After a positive alert from the dog, the car was searched and a plastic bag with cocaine was found. App. p. 205, ln. 1-17; App. p. 229, ln. 18-25.

Owens elaborated on each of the factors he, and ultimately each court to address this case, found culminated to reasonable suspicion. Owens testified that he believed "third-party registration" in general was indicative of criminal activity, specifically drug transportation or trafficking, because it created a separation between the driver and the registered owner. App. p. 190. As for Owens's check on the VIN number on his second approach, Owens provided no reason to believe the car might have been stolen other than the registration to an individual other than Petitioner. It is interesting Owens found it prudent to ensure the VIN number matched even though

he had just called dispatch to verify it. Owens also explained that a majority of the drivers he has pulled over do not appear as nervous as Petitioner; but normally some drivers do appear nervous and breathe heavily. When Owens had asked where Petitioner had been coming from, Petitioner stated he was visiting his girlfriend and that he had stayed at a Holiday Inn during the visit. App. p. 193. Owens opined that this was odd because the point on I-85 at which he observed the traffic infractions was prior to an exit to a nearby Holiday Inn in the Greenville area. App. p. 193. However, Owens admitted he did not know which of the Holiday Inn's in the area Petitioner stayed and Petitioner, who is not from the area, was also unsure. App. p. 193. Owens testified he nonetheless believed that Petitioner "was giving [him] clues that he was deceptive in his answer or wasn't being completely truthful", but acknowledged still that Petitioner may not have known exactly where in the Greenville area he had been. App. p. 193, ln. 18-24. Also in response to Owens's questions during the time it purportedly took Owens to write the warning citation, Petitioner stated he had no weapons, alcohol, or drugs in the car. App. p. 195, ln. 3-15. Petitioner also stated that he had never been in trouble and had recently graduated from a technical skills program but was not then employed. App. p. 194, ln. 1-4. Owens found his unemployment suspicious because of the quantity gas needed to fuel a Ford Expedition and Petitioner's hotel stay. App. p. 194, ln. 4-12. Owens also seems to have read from the incident report or other notes at the hearing and a typo relates Petitioner as stating he had no luggage in the car, which was odd to Owens due to Petitioner's two-day visit. App. p. 194, ln. 20-25. Owens stated he later saw a duffel or travel bag in the backseat on his second approach. App. p. 195, ln. 1-2. Petitioner also informed Owens that the visit had been a "spur of the moment thing". App. p. 195, ln. 4. Additionally, Owens explained that he would increasingly narrow his questions as the stop continued "[d]epending on how broad his answer was to my question," but, "[i]t was not an interrogation or

anything like that." App. p. 195. Owens could not recall if he asked the same question multiple times or in multiple forms. App. p. 225, ln. 2-8. p. 191, ln. 6-9.

In regard to asking for consent to search, Owens conceded that he asked for consent right after returning Petitioner's documents, describing the sequence as returning the documents then—"slam, bam"— immediately asking for consent. App. p. 216, ln. 4-12. Aman or Owens did not inform Petitioner that he could refuse consent or that he was free to leave, not even when returning his driver's license and registration. App. p. 216, ln. 1-4; p. 224, ln. 25 – p. 225, ln. 1; p. 236. Owens repeatedly stated that when asking for consent to search, Petitioner was not free to go, and Owens would not have let him leave if he tried; yet believed nonetheless that "[Petitioner] should have felt free to go. He had all his items back." App. p. 221, ln. 24 – p. 222, ln. 11; p. 225, ln. 18-21. Owens had concluded criminal activity was afoot upon seeing the items in the car on his second approach; but if Owens had seen only Petitioner's hands shaking, quickened breathing, and third-party registration before issuing the warning citation it was "questionable" whether Owens would have let him go rather than extending the stop further. App. p. 223; p. 224, ln. 1-9.

The video of the stop was entered into evidence during the suppression hearing and at trial. App. p. 206, ln. 6 – p. 207, ln. 10; p. 310. The suppression hearing and trial operated on the premise the top lasted about ten (10) minutes before the citation was issued. App. p. 244, ln. 15-24; *see* Traffic Stop Video. The trial judge denied the suppression motion, finding the traffic stop's ten minute length reasonable and that the State had met its burden to prove Petitioner's consent was voluntary. App. p. 263, ln. 4-7.

PCR Hearing Testimony

At the hearing, PCR Counsel entered into evidence S.C. Highway Patrol's dispatch radio logs from the traffic stop ,which reveal that the stop lasted over an hour, rather than ten (10)

minutes long as purported at trial and depicted in the video. Respondent did not question or object to the authenticity of the dispatch records. App. p. 43, ln. 17-22. The codes used throughout the call log correspond to identifiable codes used between dispatch and law enforcement. App. p. 73, ln. 13-25. A document deciphering the codes was given to the PCR judge as well. App. p. 75, ln. 1-4. Further, the trial transcript contains Owens's translation of the codes he used when calling into dispatch, which are the same listed codes in the radio logs and heard on the video. App. p. 320, ln. 22 – p. 321, ln. 1-7. Specifically, Owens testified that code "10-27" stands for a drivers license check, code "10-28" stands for a vehicle registration check, and code "10-29" stands for an arrest warrant check. App. p. 320, ln. 22 – p. 321, ln. 1-7. During the hearing, Petitioner identified his North Carolina drivers license number 22226836 in the records, which is also listed on his arrest warrant. App. p. 141.

According to the video, he was pulled over at 2102 or 9:02 p.m. Video; App. p. 91, ln. 12. The video shows Petitioner got out of the vehicle at Owens's request at 21:03 or 9:03 p.m. Video; p. 244,ln. 17-18. According to the video and trial testimony, his license and registration were called into dispatch at 21:08 or 9:08p.m. App. p. 97 ln. 23-25, p. 98, ln. 1. However, according to Owens's own trial testimony deciphering the meaning of the codes, Owens did not call dispatch for license and registration check until 2212 or 10:12 pm as shown by the radio logs. App. p. 155, 8th row down; p. 97, ln. 23-25, p. 98, ln. 1-2. Code 10-27 is also used at 2216 or 10:16. App. p. 155, 12th row down. Thus, contrary to the video and Owens's testimony about the length of the stop and time of each event, almost one (1) hour and ten (10) minutes passed between pulling Petitioner over and when Owens radioed for dispatch to check on the documents and for any arrest warrants.

Trial Counsel testified at the PCR hearing that suppression was the pivotal issue in the case with the length of the stop being a major factor. App. p. 46, ln. 3-4; p. 48, ln. 4-5. Trial Counsel

stated he did not view the video of the traffic stop until just prior to the suppression hearing. App. p. 46, ln. 16-19. Petitioner consequently did not view the video until just prior to the hearing as well. App. p. 66, ln. 24 – p. 47, ln. 1-3. Trial Counsel did not recall there being over an hour-long lag in the video's recording time. App. p. 49, ln. 14-25. Trial Counsel stated he did not think to review or use as evidence the dispatch radio logs showing this time lag but admitted they would have impacted the suppression ruling. App. p. 49, ln. 14 – p. 50, ln. 1-4; p. 53, ln. 4-8. Trial Counsel stated he thought the length of the traffic stop, then known to be around ten (10) minutes, was already long, but explained a traffic stop lasting an hour or more would have certainly strengthened the case for suppression. App. p. 52 – p. 53, ln. 1-2. Trial Counsel recalled that when viewing the video with Petitioner before the suppression hearing, Petitioner informed him that the entire traffic stop lasted far longer than what was depicted in the video. App. p. 55, ln. 12-16. Petitioner addressed this point to Trial Counsel in their previous meetings as well. App. p. 60, ln. 2-24.

Private investigator Peter Skidmore has over 25 years of experience in this particular field of evidence-gathering and investigation and was retained to investigate the video. App. p. 63, ln. 11 – p. 64, ln. 11-12. Skidmore had never worked as a highway patrolman but testified he was familiar with their recordkeeping from his past experience working on cases involving the department's records. App. p. 68, ln. 11-13. Skidmore obtained and reviewed a copy of the video and the radio logs and testified that two were not consistent with one another or with trial testimony regarding the timing and length of the officers' actions or the total length of the stop. App. p. 64, ln. 15-16, p. 65, ln. 6-9. Skidmore was only able to obtain a copy of the video. App. p. 65, 10-16. Skidmore had worked with an expert in California with the training and expertise necessary to determine whether the tape had been tampered with; but was unable to do so because the original

tape had long been destroyed. App. p. 64, ln. 20-25 – p. 65, ln. 1. Skidmore stated there is no apparent reason to explain the time discrepancy. App. p. 67, ln. 17-21.

Petitioner testified he had asked Trial Counsel to view the video before trial and even filed a motion *pro se* requesting some action from the court to allow him to watch it. App. p. 84 – p. 85, ln. 1-15. Before Skidmore received a complete copy of the radio logs, Petitioner testified he had first requested a copy in 2006 while detained pending trial because Trial Counsel still had not yet viewed the video or acted on his repeated assertions that the stop felt a long a period of time. App. p. 76, ln. 10-15; p. 113, ln. 12-21; p. 55, ln. 12-16; p. 85, ln. 16-25 – p. 86, ln. 1-18; p. 99, ln. 18-24; p. 112, ln. 2-16; p. 121, ln. 2-7. Petitioner did not receive any reply to his request at that time, and only obtained a copy, albeit incomplete, after he requested Appellate Counsel to obtain them. App. p. 76, ln. 10-15; p. 113, ln. 12-21. Petitioner stated he became motivated to seek these records because the stop's actual length was far longer than what was ultimately depicted at the suppression hearing and at trial. App. p. 79, ln. 10-22. Petitioner had told Trial Counsel this in their various meetings before trial. App. p. 85, ln. 16-25 – p. 86, ln. 1-18; p. 99, ln. 18-24; p. 112, ln. 2-16; p. 121, ln. 2-7. Prior to trial, Petitioner's wife obtained the video on his behalf from Trial Counsel and transcribed the events and timeline depicted when watching it. App. p. 120, ln. 7-25 – p. 121, ln. 1; p. 122, ln. 2-7. After reviewing this transcription, Petitioner put Trial Counsel on further notice that the video depicts the stop lasting approximately an hour shorter in length than what had actually occurred. App. p. 120-121. His wife also related the same to Trial Counsel because he still had not investigated this further as trial grew closer. App. p. 122. Even during the suppression hearing, Petitioner whispered to Trial Counsel that the testimony about the timing of the dog's arrival could not have been true. App. p. 112, ln. 20-24. Petitioner surmised that Trial Counsel did not try to investigate the length of the traffic stop because he did not believe Petitioner

claims. App. 112, ln. 9-10. Petitioner also knew of no explanation for the inconsistency. Petitioner also stated that he and Trial Counsel had never seriously discussed him testifying, and although Petitioner thought he might want to at the time, Trial Counsel advised, "[I]t was the State's burden, so let the video be the evidence." App. p. 113, ln. 10-11.

At the conclusion of the PCR hearing, PCR Counsel argued that Trial Counsel was deficient for failing to investigate the length of the stop after being put on notice numerous times well before trial that the video the State would play was inconsistent with what had actually occurred by one hour. App. p. 128, ln. 15-25 – p. 131. PCR Counsel argued that had Trial Counsel presented the evidence that the length of the stop was over an hour, there is a reasonable probability that the suppression motion would have been granted. App. p. 128, ln. 15-25 – p. 131; p. 135, ln. 2-8. Respondent countered by arguing that Petitioner had not met either prong under *Strickland* and was thus not entitled to post-conviction relief. App. p. 132.

The PCR Court denied relief, reasoning that it could not find Trial Counsel deficient because Petitioner and Skidmore were unable to interpret the radio logs because neither were the author nor worked for the Department of Public Safety. App. pp. 19-20. At the PCR hearing, Petitioner had identified the vehicle he drove and his drivers license number in the radio logs, and the PCR Court had Owens's trial testimony deciphering the meaning of the codes in the logs, as well as a guide to the codes used.

ARGUMENT

I. The PCR Court erred in finding Trial Counsel not ineffective for failing to investigate the length of the traffic stop, the inconsistences in time in the traffic stop video and the radio logs, because such investigation would have revealed that the officer unreasonably and measurably extended the traffic stop in violation of Petitioner's Fourth Amendment rights.

Relief is warranted for the violation of the right to effective assistance of counsel when the defendant demonstrates counsel's performance was deficient and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1985). Counsel is deficient when his or her performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.* at 688. The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland,* at 694; *see also Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). When the ineffective assistance allegation is counsel's failure to articulate a Fourth Amendment claim, the defendant must show the claim is meritorious and but for counsel's error, the outcome of the suppression motion or the trial verdict would have been different. *See Sikes v. State*, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994).

As explained herein, Trial Counsel's failure to investigate the actual length of the traffic stop was deficient and prejudicial in violation of Petitioner's right to the effective assistance of counsel guaranteed by the Sixth Amendment and its counterpart in the South Carolina State Constitution. U.S. Const. amend. VI; S.C. Const. art. I § 14.

First, Trial Counsel's error was deficient because Petitioner had put him on notice several times that he remembered the stop lasting about one hour during their meetings prior to trial, upon viewing the video together, and even during the suppression hearing. App. p. 85, ln. 16-25 – p. 86, ln. 1-18; p. 112, ln. 2-16,17-24. *See Strickland*, 466 U.S. at 691 (noting counsel's conversations with the defendant may be critical when assessing counsel's investigation decisions). It is well-

settled that "attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an *independent* investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011) (italics added); *see also McKnight* v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). In short, trial counsel has a duty to either conduct a reasonable investigation or make a reasonable decision that an investigation is unnecessary. *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). In this case, Trial Counsel failed to do either. Trial Counsel had ample time and opportunity prior to trial to view the video of the stop, investigate further, and gather the dispatch radio logs. In doing so, he would have easily discovered the severe time discrepancy. Trial Counsel gave no reason as to why he did not follow up in any way on Petitioner's assertions. Trial Counsel cannot make a reasonable decision that renders further investigation unnecessary when he did not follow up on Petitioner's claims to any extent or view the video until just prior to trial when the opportunity to investigate had already passed. *See McKnight*, at 45 ("[S]trategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'")). *See also Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (holding counsel was ineffective because he could easily have investigated and discovered the prosecuting witness/victim did not want her son—the defendant—prosecuted). Rather, Trial Counsel let the video speak for itself and accepted the time frame as stated in Owen's testimony and depicted in the video. App. p. 244, ln. 14-25 Trial Counsel did exactly what he had advised Petitioner: "[I]t was the State's burden, so let the video be the evidence." App. p. 113, ln. 10-11. *See Bagwell v. State*, 410 S.C. 259, 255-66, 763 S.E.2d 630, 633-35 (Ct. App. 2014) (stressing counsel's duty to conduct an independent investigation rather than relying upon results from the State's investigation).

Petitioner's claim that the stop was measurably and unreasonably extended is meritorious. Owens's actions and extensive questioning comprise the very type of dilatory tactics prohibited by the Fourth Amendment. The tolerable duration of police inquiries during a traffic stop, and thus the reasonableness of the traffic stop, are determined by the stop's "mission", *i.e.*, to address the traffic violation and attend to related safety concerns. *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015) (citing *Illinois v. Cabellas*, 543 U.S. 405, 407 (2005)). "Because the traffic infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.'" *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Authority for the traffic stop thus "ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). Accordingly, a traffic stop becomes unlawful when unrelated inquiries or other actions by the officer measurably extend the stop beyond the time reasonably required to issue a traffic ticket absent reasonable suspicion. *Id.* at 1614-1615 (citing *Cabellas*, 543 U.S. at 407; *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)). An officer cannot avoid this rule by employing dilatory tactics. *Provet*, 405 S.C. at 108, 747 S.E.2d at 457. In *State v. Rodriquez*, the Court of Appeals held the trial court erred in denying the defendant's suppression motion because the officers did not act diligently when investigating a drug trafficking tip in which they stopped the defendant and another individual on foot after they disembarked from a train. 323 S.C. 484, 493-494, 476 S.E.2d 161, 166-167 (Ct. App. 1996). The Court reasoned: "[e]ven assuming an investigative detention was proper at that point, we find a [30] minute detention while the officers attempted to elicit incriminating evidence from Rodriquez is the type of fishing expedition denounced [in *Sikes*]." *Id. See also Id.* (noting officers did not timely arrange to have a drug dog at the train station even after learning the defendant's train was late). *See also*

Rodriguez, 135 S.Ct. at 1616 (holding the critical question is whether the drug dog sniff prolongs or adds time to the stop). *Cf. Provet*, 391 S.C. at 499-500, 706 S.E.2d at 516.

Petitioner was pulled over at 9:02 p.m. and Owens did not call in to dispatch for a documents check until 10:12 p.m. Owens concluded that there was reasonable suspicion only upon seeing the fast food bags, air freshener, receipts, cellphone, or the mistaken lack of luggage on his "second approach". App. p. 198, ln. 1-22. Owens made his second approach *after* calling into dispatch for documents and arrests check, and *after* all the questioning, which is now shown by the radio logs to last around an hour in length.[1] App. p. 196, ln. 22-25 – p. 198. Subtracting the few minutes from the second approach forward from the total one hour and 10 minute duration of the traffic stop reveals that a significant amount of time was spent on the unrelated questioning of Petitioner and waiting for the drug dog. Approximately one hour of questioning before Owens performed a step vital to completing the traffic stop violates the principle that officers are to conduct the stop diligently in order to quickly confirm or dispel suspicions. *See Rodriquez,* 323 S.C. at 494, 476 S.E.2d at 166. *Cf. United States v. Hill*, 852 F.3d 377, 384 (4th Cir. 2017) (holding the stop was not unreasonably extended because the drug dog's arrival was "contemporaneous with the diligent pursuit of the mission of the stop", which was not otherwise executed in a "deliberately slow or inefficient manner [to] expand a criminal investigation" without reasonable suspicion). Further, it is well-settled "diligence is not present where the [] officer 'definitely abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation' or where the unrelated questions 'constituted the bulk of the interaction between the officer and the defendant.'" *United States v. Digiovanni*, 650 F.3d 498, 508-09 (4th Cir. 2011).

[1] Only a few minutes passed between Owen's second approach and the conclusion of the stop. *See* App. pp. 197-201; p. 230, ln. 7-11. All the questioning occurred prior to the second approach and request for consent followed Aman's arrival after the second approach.

Here, Owens's behavior falls under both situations provided by *Digiovanni*. Because he began writing out the citation at the start of the stop and did not complete it until after nearly an hour of unrelated questions, he abandoned the traffic offense purpose for the stop. The questioning in and of itself and his trip back to the car to purportedly check the VIN number constitute as "another sustained course of investigation" for what he believed was drug trafficking. The hour long questioning of course comprised a bulk of the nearly one hour and ten minutes long traffic stop Thus, it is clear Owens's questioning unreasonably and measurably extended the stop.

Trial Counsel's failure to investigate and use the radio logs at the suppression hearing was prejudicial because there is a reasonable probability that but for this error, the suppression motion would have been successful, and thus the verdict would have been not guilty if the case had not ended in dismissal. Insertion of the newly-revealed length of the stop into the analyses conducted by the courts that have addressed Petitioner's case is instructive. Each court to address this case was presented with a record that operated on the premise that the traffic stop lasted approximately only ten (10) minutes before Petitioner's flight, with only but a few of those minutes allotted for Owens's questioning and waiting for the drug dog. The duration of the stop and the timing of the events proved significant to each court to address the reasonableness of the stop and whether it was impermissibly extended. The trial court found: "We know by the video in looking at the time and as stated [ ] by Mr. Long [] the traffic stop lasted about 10 minutes approximately. That was reasonable in my opinion." App. p. 263, ln. 2-7. The trial court then shifted gears and found Petitioner's consent to search was voluntarily made and that Owens's observations of items on his second approach justified extending the stop further on the basis of reasonable suspicion. App. p. 263, ln. 8 – p. 269. The Court of Appeals and this Court found no reversible error in the trial court's ruling or reasoning. *See Provet*, 391 S.C. at 499-500, 706 S.E.2d at 515 *see also. Provet*, 405 S.C.

at 110-111; 114-115, 747 S.E.2d at 457-458, 460. In light of the reasoning employed by the trial judge and on appeal, it is evident that the total length of the stop and the duration of Owens's questioning were pivotal to the outcome of the suppression issue. Because the radio logs reveal Owens's questioning in search of a crime lasted over an hour rather than the ten minutes as previously thought, relief is warranted.

Revelation of the true time of the traffic stop underscores the lack of reasonable suspicion to extend the stop by one hour, as well as the fishing expedition and illegal seizure that it became through Owens's questioning in search of evidence of a crime, as well as waiting for the drug dog to arrive. The radio logs' reveal of the timing of Owens's observations on his second approach and the dilatory tactics used aligns with the rationale in *State v. Tindall*. In *Tindall,* this Court held suppression was warranted because Tindall's statements, which indicated criminal activity to partly support reasonable suspicion, were elicited after the stop had already been illegally extended by the officer continuing to question Tindall without completing the objective of the stop—issuing the warning. 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010) Similar to *Tindall*, many of the factors giving rise to Owens's purported reasonable suspicion were unknown to him before he measurably and unreasonably prolonged the stop by one hour through unrelated questioning. In light of the dilatory tactics used, it is thus significant that it was not until Owens's second approach that he had concluded that criminal activity was afoot. App. p. 198, ln. 18-22.

Indeed, reasonable suspicion did not exist to extend the stop or to justify the continuing questions, and relief is warranted because Owens only gained the information to support reasonable suspicion upon seeing the items on his second approach *after he had already illegally extended the stop by one hour*. Prior to Owens's second approach, Owens had observed only Petitioner's hands shaking and accelerated breathing, the lack of luggage in the vehicle, and the

vehicle registration to a girlfriend of Petitioner rather than himself. Also prior to the second approach, Owens then only knew from Petitioner's responses to his questions that Petitioner was unemployed despite driving an expensive vehicle to fuel and staying at a Holiday Inn, and had been pulled over just prior to the exit for the Holiday Inn right off the interstate. App. p. 193-194, ln. 1-19. Addressing each of these circumstances in turn, they fail to amount to reasonable suspicion to extend the stop or justify dilatory tactics like the one hour of questioning without calling into dispatch for a documents check.[2]

Although nervousness can exist among other factors arising to reasonable suspicion, Owens admitted that normally, some drivers appear nervous and have accelerated breathing. App. p. 191, ln. 6-9. Owens also belabored the point of Petitioner's nervousness and separated indicators of nervousness as if each carried their own weight in the analysis. In *State v. Moore*, this Court expressed "wear[iness] [of] the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion." 415 S.C. 245, 254-255, 781 S.E.2d 897, 902 (2016). *See also United States v. Bowman*, 884 F.3d 200, 214 (4th Cir. 2018) (holding nervousness "is of limited value to reasonable suspicion analyses."). Further, Owens observed nervousness from Petitioner when handing over his drivers license and registration, yet also testified Petitioner exhibited no hesitation in complying with Owens's request for these items. App. p. 211, ln. 9-17.

Next, there is generally some logic to Owens's suspicion about third-party vehicle registration. Yet Owens had no information as to why Petitioner may be driving his girlfriend's vehicle, and this general theory carries little weight when considering no separation can be created between a driver and the registered owner when they are admittedly in a romantic relationship.

[2] Petitioner asserts reasonable suspicion did not exist at any time during the stop; the focus herein on lack of reasonable suspicion prior to Owens's second approach is due to the lack of reasonable suspicion for the entire stop having been raised at the suppression hearing and on appeal. Petitioner nonetheless respectfully urges this Court to revisit the issue beyond this narrower context.

As to the lack of luggage in the vehicle for a two-day visit, Owens could not view all areas and compartments of the vehicle that could hold luggage at that point and Petitioner had stated the trip had been "a spur of the moment thing." Owens also testified that Petitioner's unemployment was "another clue or indicator in the business of drug trafficking" because the Ford Expedition "requires a lot of gas" and he had stayed at a hotel, leading him to imagine the criminal methods Petitioner used to cover these expenses. App. p. 194, ln. 4-12. Unemployment as a factor has been viewed with a particularly skeptical lens by some courts. In *Bowman*, a case with facts very similar to Petitioner's case, the Fourth Circuit assigned very little weight to the defendant's unemployment because it is too "totally innocuous" due to the countless other possibilities: "[T]emporary unemployment does not mean that vacations are financially unattainable. [Defendant] may have saved money for the trip; he may have been the donee of a wealthy relative...he might have won the lottery, [etc.]" *Id.* at 217-18. Here, Owens had no other information on Petitioner's finances and did not inquire as to how he paid for the hotel and gas or whom did and why, even though Owens would narrow each question based upon Petitioner's previous answer. App. p. 195, ln. 10-21. Regardless, no connection was made between his unemployment and criminal activity and without such connection, it is innocuous and carries little weight.

Owens's suspicion about observing Petitioner's driving at a location prior to an exit for a Holiday Inn establishes an equally tenuous connection to criminal activity. Owens admitted he did not know which of the Holiday Inns in the area he had stayed and even acknowledged that Petitioner, whom is not from the area, was unsure as well. App. p. 193, ln. 13-24. Owens nonetheless believed Petitioner "was giving [him] clues that he was deceptive in his answer or wasn't being completely truthful." App. p. 193, ln. 18-24. Although "false statements can be considered in establishing reasonable suspicion...without more, [it] will typically be insufficient."

Bowman at 216. In *Bowman*, the Court gave it little weight to the officer's belief the defendant was untruthful about the duration of his trip: "[t]he government neither apprised us of what, if any, significance such a falsehood normally has in the illicit drug trade, nor what inferences [the officer] drew from his belief that Bowman had not been truthful." *Id.* Similar to *Bowman*, if there was any falsehood in Petitioner's statements, it does not sufficiently indicate criminal activity and a connection to some crime was not otherwise established.

Each of the aforementioned factors identified by Owens have little, if any, basis to sufficiently suggest criminal activity. *See Id.* at 215 (holding if an officer cannot sufficiently articulate why some behavior is suggestive of criminal behavior other than to label it "suspicious" then it is not particularly probative). Viewed together, the aforementioned factors fail to amount to reasonable suspicion and yield no more than a hunch. *Id.* at 219 ("[I]t is 'impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such interpretation.'"). Not only does the conglomeration of these factors fail to eliminate many innocent drivers, but Petitioner's responses to other questions weigh against Owens's hunch. Petitioner never hesitated in complying with Owens's request for his documents, to exit his car, or submit to a pat down search. App. p. 211, ln. 9-17. Owens also knew of no negative information, like prior criminal history, about Petitioner. App. p. 211, 18-21. The stop was for minor traffic infractions, and Owens neither reported any odor or drug paraphernalia nor observed any behavior associated with drug use. Petitioner did not have a criminal record, or any drugs or weapons. Petitioner had just graduated from a technical program.

The absence of facts giving rise to reasonable suspicion underscores that the stop was measurably and unreasonably extended to fish for evidence of some crime. Also indicative of this is Owens's check on the VIN number, the stated purpose for the second approach. Yet there was

nothing to suggest the car might be stolen other than the third-party registration; which suggests relatively little of auto theft in this way because it was registered to Petitioner's girlfriend. Further, the fishing expedition nature to the extensive questioning and the lack of reasonable suspicion before the second approach is clear from Owens's own testimony. Owens testified "it was questionable" whether he would have completed the stop and allowed Petitioner to leave, rather than extend it, based only upon Owens's observations before the extensive questioning and the second approach—the accelerated breathing, shaking hands, and third-party registration. App. pp. 223-224. Owens further explained: "[I]t depends on the questions and the answers he is going to give me or what other indicators I might visually observe. Like I said, he also got numerous air fresheners...The fast food bags, the cell phone, the other things." App. p. 224. This testimony serves as Owens's acknowledgment that he did not have reasonable suspicion before the second approach, let alone before he asked Petitioner unrelated questions for nearly an hour, as well as his knowledge or plan that eliciting more information from Petitioner could provide any and all facts that would elevate mere suspicion to a reasonable suspicion. *Cf. Milledge v. State*, 422 S.C. 366, 379, 811 S.E.2d 796, 803 (2018) ("[T]he deputies did not detain Milledge for an excessive period in an attempt to question him and possibly gain probable cause to search").

The prejudice resulting from Trial Counsel's error also has a rippling effect on the consent to search. As revealed by the radio logs, the dilatory tactics and unreasonable and measurable extension of the traffic stop rendered Petitioner's consent to search fruit of the poisonous tree. *See State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620 (1996). "[W]hen an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is "both voluntary *and* not an exploitation of the unlawful [detention]." *State v. Williams*, 351 S.C. 591, 604-05, 571 S.E.2d 703, 710-11 (Ct. App. 2002), *cert. denied* Jun. 27. 2003. Thus, the State

would have been required to meet a higher burden to prove Petitioner's consent was voluntary and not an exploitation of the unlawful seizure, which it would not have been able to do had the radio logs been presented at the suppression hearing. *See State v. Pichardo,* 367 S.C. 84, 105-06, 623 S.E.2d 840, 851-52 (Ct. App. 2005). *See also Provet*, 405 S.C. at 115, 747 S.E.2d at 460 (distinguishing *Provet* from *Pichardo* on this issue). The factors relevant to this determination include "the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct." *Pichardo,* at 105, 623 S.E.2d at 851. As conceded by the State at the suppression hearing, it was not a consensual encounter. App. p. 251, ln. 9-10. When asking Petitioner for consent, Owens and Aman were within an arm's reach and all three men were standing in the small area of the patrol car's open passenger door. The blue lights were also flashing. Further, the over hour-long detention of Petitioner on the side of the interstate expresses a much greater coercive atmosphere than the ten (10) minute stop previously considered, which aligns this case more with *State v. Pichardo* than before. In *Pichardo*, this Court affirmed the trial court's order suppressing drugs from an illegal search and seizure after the officer had returned the documents to the driver and said goodbye to him and his passenger before turning right back around and asking for permission to search. 367 S.C. 84, 102-05, 623 S.E.2d 840, 850-53 (Ct. App. 2005). Just as in *Pichardo*, Petitioner was not told at any time that he was free to leave, although not a requirement of officers to do so, and had also been directed to exit his car and move to another a location before having his person searched. *See Id.* at 102-03, 623 S.E.2d at 850. Like *Pichardo*, the tone of the encounter turned investigatory as Owens's questions prompted Petitioner to respond that no drugs or guns were in the car and that he had never been in trouble in his life. Also like in *Pichardo*, Owens asked Petitioner for consent to search shortly after another officer arrived on scene. *See Id.* at 93, 623 S.E.2d at 845. Both in *Pichardo* and in this

case, the officers asked for consent to search after dilatory tactics were used and their documentation had already been returned. *See Id.* at 101, 623 S.E.2d at 849. Also similar to *Pichardo,* Owens's unreasonably delayed calling dispatch for checks on Petitioner's documentation, which "prolonged the initial stop beyond its proper scope, render[ing] the ensuing encounter more coercive than consensual." *Id.* at 103, 623 S.E.2d at 850. Also similar to the officer asking for consent after saying goodbye in *Pichardo*, there was no "distinct ending point which is ascertainable to both the officers charged with enforcing the law and the citizens whom they encounter" here because Owens asked for consent after an hour of questioning and retuning his documentation. *See Id.* at 104, 623 S.E.2d 850-51. There was very little time between the unlawful detention and Owen's "request" for consent and consequently, there was no intervening event between the two to dissipate the unlawful detention's effect. *See Williams*, at 605, 571 S.E.2d at 711. The unjustified hour of time that passed from when Owens pulled Petitioner over and called in for a check on his documentation and consequently, the opportunity to fish for evidence of a crime, constitutes as misconduct under this determination. *See Id.* at 106-08, 623 S.E.2d at 851-53. Owens issuing the ticket and returning Petitioner's documentation occurring simultaneous to or immediately after the drug dog's arrival is as suspiciously convenient as it is probative of fishing and misconduct. Further, any legal basis for Owens's conduct is severely, if not fatally, diminished due to the dilatory tactics employed. Therefore, in light of all that is revealed by the radio logs, Petitioner's consent was not voluntary and was rather an exploitation of an illegal stop. Thus, but for Trial Counsel's error in failing to investigate the length of the stop and obtain the radio logs, there is a reasonable probability the outcome of the suppression hearing would have been different.

The prejudice determination also evaluates the impact of Trial Counsel's error relative to the State's case and whether the evidence was merely cumulative. *See Sikes*, 448 S.E.2d at 563.

See e.g., Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (where evidence is cumulative to or does not otherwise aid the evidence admitted, no prejudice results from counsel's failure to bring it forward). Here, apart from the drugs seized and the evidence of flight, no other evidence existed for the State to prove drug trafficking or resisting arrest beyond a reasonable doubt. *See Sikes, supra*; *see also Bagwell,* 410 S.C. at 266-67, 763 S.E.2d at 634; *McKnight,* 378 S.C. at 54-55, 661 S.E.2d at 365. Further, the suppression hearing and trial operated on the premise that the traffic stop lasted only ten (10) minutes, with mere minutes separating Owens pulling Petitioner over and calling for a documents check and for the drug dog. Even Trial Counsel characterized the ten (10) minute stop as "a normal period of time" when arguing for suppression. App. p. 248, ln. 17-18. No evidence of any kind was introduced to the contrary. Further, At the PCR Hearing, Trial Counsel also testified that evidence showing the actual length of the stop was over an hour would have likely made a difference to the ruling on the suppression motion. *See Bagwell, supra* ("[P]rejudice may be found because trial counsel admitted the results of the DNA test 'may have affected' the [trial] outcome"); *see also Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998). Thus, but for Trial Counsel's failure to investigate, there is a reasonable probability the ruling on the suppression motion and the trial verdict would have been different.

Lastly, the PCR Court imprudently dismissed the probative value of the radio logs. With no authenticity issue, the PCR Court appears to draw on the principles in Rule 602 and Rule 701 in reasoning that it could not find Trial Counsel ineffective because neither Petitioner and Skidmore had ever worked for the Department of Public Safety nor wrote the radio logs themselves, and thus could not interpret them. These reasons are unsubstantiated and an error of law. Petitioner's testimony did not contravene either Rule 602 or 701; he was present during the stop, had watched the video, and reviewed the radio logs. *See e.g., State v. Wright*, No. 2011–UP–

363, at *1, fn. 1 (Ct. App. June 30, 2011). Petitioner also identified the drivers license number in the radio logs as his own and pointed out that his arrest warrants verified it was his driver license number. App. p. 104, ln. 12-22. As for Skidmore, he reviewed the records and video. *See Saj v. Saj,* No. 2015–UP–571 (Ct. App. 2015) ("The GAL testified she reviewed Mother's medical records...thus, she had personal knowledge of the records."). His testimony complies with Rule 602 and 701 as it pertained the contents of the radio logs, his obtaining of the video and radio logs, as well as the original video's unavailability. Yet even if Skidmore's past experience working with the Departments' records were to be discounted, it would not foreclose review on the merits for this issue or relief. At trial, Owens interpreted the meaning of the codes used in the portion of the radio logs now at issue. The PCR judge acknowledged that he had the entire lower court record to consider, as well as the radio logs and material deciphering the codes used at the bench throughout the hearing to follow along and understand the radio logs and the testimony. App. p. 75, ln. 1-4; p. 79, ln. 3-9; p. 95, ln. 24 – p. 96, ln. 4; 110, ln. 1-3. The PCR Court thus had all materials necessary to consider the merits of this ground.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully urges this Honorable Court to grant certiorari, reverse the PCR Court's order, and remand for a new trial.

Respectfully submitted,

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County Court of Common Pleas
The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2018-000480

Karriem Provet,.....Petitioner,

v.

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

PROOF OF SERVICE

The undersigned hereby certifies, swears, and affirms that the Amended Petition for Writ of Certiorari in response to the Court's Order granting Respondent's Motion to Strike was mailed through the U.S. postal mail for filing and service upon Respondent respectively, with sufficient postage attached, to the following addresses:

The Daniel E. Shearouse, Clerk of Court
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Senior Assistant Deputy Attorney General Megan Harrison Jameson
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The undersigned further certifies that all parties required to be served pursuant to the appellate court rules have been served.

This 19th day of November, 2018

Lauren C. Hobbis, #103190
Associate Attorney
William G. Yarborough III, Attorney at Law, LLC

Sworn before me this 19th day
of November, 2018

Notary Public of South Carolina
My commission expires: 06-08-2022

RACHAEL L. ALEJANDRO
NOTARY PUBLIC
MY COMMISSION EXPIRES 6/8/2022
SOUTH CAROLINA