

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
Larry B. Hyman, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001899

Jameco Abdul Toney,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Trial counsel erred in failing to enter the proper objections at trial in order to preserve for appellate review petitioner's Fourth Amendment issue from the trial (illegal seizure), and also his standing issue raised at trial as well in light of the holding in Byrd v. United States, 138 S.Ct. 1518 (2018).

RESPONDENT'S ISSUE PRESENTED

Did the PCR Court properly deny post-conviction relief where Counsel did not continually preserve a then-meritless objection to the fruits of the seizure and search of an overdue rental car that Petitioner was not authorized to drive, AND which the rightful owner requested be recovered by law enforcement?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Petitioner was indicted at the July 2011 term of the Darlington County Grand Jury for trafficking in marijuana, between 10 and 100 pounds, 2nd offense (2011-GS-16-00811). Christie Wise Henderson, Esq. represented Petitioner, and Zack Farr, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. Petitioner proceeded to trial before the Honorable R. Ferrell Cothran and a jury. The jury found Petitioner guilty as indicted on November 20, 2013. Judge Cothran sentenced Petitioner to imprisonment for a term of nine years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Jeffrey S. Stephens, Esq., who raised the following issue:

Did the trial court err by finding that the Appellant lacked standing to challenge both the search of the rental car he was driving and the unreasonable length of his detention as a 4th Amendment seizure?

Respondent argued that the issue was not preserved because defense counsel only objected during the hearing on the motion *in limine*, and further that the suppression motion was properly denied. By opinion decided October 19, 2016, the South Carolina Court of Appeals found the issue not preserved, did not comment on the merits, and affirmed Petitioner's convictions. State v. Toney, Op. No. 2016-UP-428 (S.C. Ct. App. 2016). The Remittitur was issued on November 4, 2016.

Petitioner filed his application for post-conviction relief on June 16, 2017 (2017-CP-16-00470). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, in that:
 - a. "Counsel was ineffective for failing to preserve for appeal whether trial court erred in finding Applicant lacked standing to challenge search of rental car and length of detention."

Respondent made its return on September 1, 2017, and an evidentiary hearing into the matter was convened on July 23, 2018, before the Honorable Larry B. Hyman, Jr. Petitioner was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr. (Undersigned), of the South Carolina Attorney General's Office, represented Respondent. By written order dated October 1, 2018, and filed October 9, 2018, Judge Hyman denied and dismissed the application.

Petitioner, by and through counsel Wanda H. Carter, Esq., filed a petition for writ of certiorari on May 31, 2019. This Return follows.

STATEMENT OF THE FACTS

a. The Traffic Stop and Petitioner's Arrest

Shortly before 12:20 p.m. on November 10, 2010, Corporal Brad Lawson of the Darlington County Sheriff's Office was positioned along the side of Interstate 20 monitoring eastbound traffic when he saw a tan Chevy Malibu make an abrupt lane change and nearly cut off another vehicle in an unsafe manner.¹ (Appx. 37-39; Appx. 159-160). In response, Corporal Lawson began pursuing the vehicle and observed its driver make another abrupt lane change. (Appx. 39, ll. 12-17; Appx. 161, ll. 9-12). The officer then pulled next to the vehicle to conduct a quick visual check of its interior and noticed the vehicle's rear windows were partially rolled down, which he thought was suspicious because of the noise open windows produce when a vehicle travels at interstate speeds, and because he knew drug traffickers frequently roll down vehicle windows to mask the odor of illegal drugs. (Appx. 40-41; Appx. 161-162; Appx. 186-87; Appx. 212, ll. 9-22). Corporal Lawson swung behind the vehicle and flashed his blue lights to initiate a traffic stop at approximately 12:20 p.m., and the driver of the vehicle quickly pulled over to the side of the interstate. (Appx. 41, ll. 10-14; Appx. 162-63).

At approximately 12:21 p.m., Corporal Lawson approached the vehicle and asked its driver and sole occupant, Petitioner Jameco Abdul Toney, to provide him with his driver's

¹ During trial, Corporal Lawson noted he worked for the Darlington County Sheriff's Office for ten years, had twelve total years of law enforcement experience, had spent the majority of his career working in narcotics, had received two to three hundred hours of training in regard to drug interdiction, and had significant experience in that area. (Appx. 37-38; Appx. 159-160; Appx. 182-183). Additionally, he indicated he had personally conducted thousands of traffic stops during his law enforcement career and had been trained to pick up on factors that are out of the ordinary while conducting a stop. (Appx. 182-183). Furthermore, Corporal Lawson noted he was able to distinguish between the regular level of nervousness typically present in a normal traffic stop and something greater based on his numerous hours of training and significant experience in conducting stops. (Appx. 209-210).

license along with the paperwork associated with the vehicle. (Appx. 41, ll. 10-16; Appx. 162-163). Petitioner handed his driver's license and a rental agreement for the vehicle to Corporal Lawson, but when he did so, the officer noticed Petitioner was extremely nervous: Petitioner's hands were shaking abnormally and he was breathing in a rapid and labored manner. (Appx. 41-42; Appx. 163, ll. 1-19). Corporal Lawson then checked the vehicle's paperwork and discovered Petitioner did not rent the car, the car was two days overdue to be returned to a rental agency located at the airport in Florence, and Petitioner was not authorized to drive it pursuant to the express terms of the rental agreement,² (Appx. 42-44; Appx. 48, ll. 20-23; Appx. 163-65; State's Trial Ex. # 3 (Rental Agreement)). As a result, Corporal Lawson asked Petitioner to step out of the vehicle. (Appx. 42-44; Appx. 164, ll. 2-11).

After Petitioner exited the rental vehicle, Corporal Lawson advised him of the purpose of the stop, began preparing a warning ticket, and asked dispatch to run a check of Petitioner's and the vehicle's information. (Appx. 43-45; Appx. 164-166). As the officer prepared the warning ticket, he asked Petitioner where he was coming from and discussed the circumstances surrounding the vehicle's rental. (Appx. 45-46; Appx. 62-63; Appx. 164-167). During their conversation, Petitioner claimed he obtained the rental vehicle from Timothy Sanders, briefly mentioned something about child support, and then asserted he was returning with the vehicle from Columbia after visiting an unemployment office located there.³ (Appx. 45-46; Appx. 164-

² Notably, Corporal Lawson discovered Petitioner had no authority to drive or possess the rental vehicle he was driving within two minutes of initiating the traffic stop. (Appx. 163-164; Appx. 199).

³ According to the information contained in the rental agreement, Sanders was the renter of the vehicle Petitioner was driving at the time of the stop, had rented the vehicle on November 6, 2010, was supposed to have returned the vehicle to the rental agency on November 8, 2010, and was the vehicle's lone authorized driver. (Appx. 44, ll. 1-12; Appx. 78-79; Appx. 134-136; Appx. 163-64; State's Trial Ex. # 3).

65). However, Petitioner, who began nervously using his hands while speaking to the officer, was unable to say precisely where the unemployment office was located even though he had purportedly visited it earlier that day. (Appx. 45-46; Appx. 165-66; Appx. 190, ll. 8-17). Based on Petitioner's suspicious responses, the signs of Petitioner's growing nervousness, and the other suspicious factors the officer detected during the course of the stop, Corporal Lawson began to suspect Petitioner was involved in criminal activity.⁴ (Appx. 47, ll. 5-24; Appx. 165-166; Appx. 190-191).

Roughly ten minutes after Corporal Lawson activated his blue lights, the officer asked Petitioner if there were any drugs or other illegal items located in the rental vehicle. (Appx. 49, ll. 6-15; Appx. 64-65; Appx. 167, ll. 3-12). In response, Petitioner denied there was anything illegal in the car but suspiciously turned away and looked back at the vehicle when asked if any marijuana was concealed inside. (Appx. 49, ll. 14-25; Appx. 167, ll. 10-24). Roughly two minutes later, Corporal Lawson asked Petitioner for permission to search the vehicle, and Petitioner replied he could not consent because it was not his vehicle. (Appx. 51-52; Appx. 67-68; Appx. 167-168). After that, Corporal Lawson contacted the rental agency, spoke with a customer service representative, and advised him of Petitioner's unauthorized use of the rental

⁴ In particular, Corporal Lawson stated he felt like Petitioner's responses did not make sense due to the fact the officer knew both an unemployment office and vehicle rental agency were located in much closer proximity to Petitioner's home in Hartsville than the ones Petitioner reported visiting, and the officer noted Petitioner also admitted during the course of the traffic stop he had previously been arrested on a drug charge in the past. (Appx. 45-46; Appx. 62-65; Appx. 165-166). Furthermore, Corporal Lawson indicated he noticed Petitioner developed significant "cotton mouth" and had a visibly pulsing carotid artery as the stop progressed, which were indicators of nervousness he did not typically observe during routine traffic stops. (Appx. 47, ll. 9-24; Appx. 190-191).

vehicle.⁵ (Appx. 50, ll. 1-10; Appx. 77-80; Appx. 135-136; Appx. 168-169). The customer service representative instructed him to take possession of the vehicle and search it because the rental agreement had been breached. (Appx. 50, ll. 11-19; Appx. 80-81; Appx. 136-137; Appx. 168-169).

Once he obtained consent to search the rental vehicle from the rental agency, Corporal Lawson explained what he was going to do to Petitioner and instructed him not to go back to the car. (Appx. 51-52; Appx. 168-69). Corporal Lawson was then interrupted by radio communications from other officers in his unit who were also involved in traffic stops at that time and spoke with them for several minutes. (Appx. 50-51; Appx. 169-170). At approximately 12:41 p.m., the officer began searching the rental vehicle while simultaneously trying to watch Petitioner, and he located a tote bag in the vehicle's trunk that felt like it contained illegal drugs. (Appx. 52-53; Appx. 170-171). When Corporal Lawson asked Petitioner what was in the bag, Petitioner bolted. (Appx. 53-54; Appx. 171, ll. 3-14). Petitioner did not get far before Corporal Lawson apprehended him and placed him under arrest.⁶ (Appx. 53-54; Appx. 171, ll. 14-17).

⁵Corporal Lawson made contact with the rental agency at approximately 12:34 p.m. and received permission to search the rental vehicle at approximately 12:36 p.m. (State's Trial Ex. # 1).

⁶Notably, following his arrest, Petitioner spontaneously began making statements to Corporal Lawson, indicated the package the officer found contained fifteen pounds of marijuana, and claimed he went to pick it up as a favor to another person. (Appx. 54-55; Appx. 172, ll. 5-20). Shortly after that, another officer arrived on the scene and advised Petitioner of his rights, and Petitioner repeated his claim he picked up the marijuana for someone else after waiving his rights. (Appx. 54-55; Appx. 85-86; Appx. 140-141). Petitioner then offered to cooperate with the officers and deliver the marijuana to its intended recipient while insisting he had been set up. (Appx. 55, ll. 15-22; Appx. 86, ll. 17-20; Appx. 141, ll. 6-19; Appx. 172, ll. 8-20). However, the officers elected not to attempt a controlled delivery in Petitioner's case. (Appx. 211-212).

b. The Trial

Petitioner was indicted for trafficking in marijuana, and he proceeded to trial. (Appx. 124, ll. 19-22; Appx. 312-13). At the outset of trial, Counsel moved to suppress the marijuana discovered during the search of the rental vehicle Petitioner was driving at the time of the traffic stop, and the trial judge conducted an *in limine* hearing on the matter. (Appx. 12, ll. 7-18).

During the hearing, Petitioner testified on his own behalf and offered his account of the traffic stop conducted on November 10, 2010. (Appx. 13-22). Specifically, Petitioner claimed he had been looking for a job that day and was travelling on Interstate 20 towards the airport at the time of the traffic stop with the intention of returning the rental vehicle he was driving to Timothy Sanders, the person who had actually rented it, since the vehicle was overdue to be returned to the rental agency. (Appx. 13-15). While driving towards the airport, Petitioner stated he changed lanes from the right lane to the left lane when he saw a police vehicle stopped on the side of the road and then safely changed lanes back into the right lane when he observed the lane was open. (Appx. 15-16). Petitioner continued and testified he was pulled over after making the lane change, was advised by Corporal Lawson the car was stolen, and provided the officer with his driver's license and the vehicle's rental agreement. (Appx. 16-17). Petitioner indicated Corporal Lawson then asked him to exit the vehicle, questioned him, and requested consent to search the car, which he declined to provide. (Appx. 17-18). Thereafter, Petitioner alleged the officer contacted the rental agency over thirty minutes into the stop and obtained consent to search the vehicle. (Appx. 18-19). He stated he then fled when Corporal Lawson approached the rental vehicle's trunk based on his past incidents with law enforcement officers but denied knowing there were any drugs inside the trunk. (Appx. 19-21). After that, he claimed the officer obtained his surrender at gunpoint, attempted to get him to provide information about

other people; and took him to jail when he would not provide that information. (Appx. 20-21). He admitted he correctly indicated there were fifteen pounds of marijuana in the trunk during his conversation with the officer but claimed that was simply the result of an accurate guess. (Appx. 32, ll. 2-8).

Following Petitioner's testimony, the solicitor proffered the testimony of several witnesses, including Corporal Lawson and William McKenzie, the consumer service representative from Avis Budget Rental Company who spoke with the officer during the traffic stop. During that testimony, Corporal Lawson recounted the circumstances of the traffic stop he conducted on the date of the incident and identified the factors he observed during the course of the stop that correctly led him to believe Petitioner was engaged in criminal activity. (Appx. 39-73). Likewise, McKenzie confirmed he spoke with Corporal Lawson on the date of the incident, granted the officer permission to search the vehicle, and asked the officer to prevent Petitioner, who was not authorized to drive the vehicle, from continuing to drive it. (Appx. 78-81).

Following the witnesses' testimony, Counsel argued the incriminating evidence discovered during the course of the traffic stop should be suppressed "as the result of an unlawful search of the vehicle." (Appx. 88, ll. 2-5). In support of that contention, Counsel asserted the initial traffic stop of the rental vehicle was unlawful in light of Petitioner's testimony he safely changed lanes before he was pulled over. (Appx. 88-89). Furthermore, Counsel contended the officer unlawfully prolonged and measurably extended the traffic stop by questioning Petitioner on matters unrelated to the initial purpose of the traffic stop without possessing reasonable articulable suspicion of criminal activity. (Appx. 89-96). Critically, however, Counsel conceded the officer knew Petitioner was not authorized to drive the vehicle he was driving within "mere minutes" of initiating the stop. (Appx. 93, ll. 13-19).

In response, the solicitor initially asserted Petitioner did not have a legitimate expectation of privacy in the rental vehicle and could not raise a constitutional challenge due to the fact he was not authorized to drive it, citing to the Fourth Circuit Court of Appeals' opinion in United States v. Wellons, 32 F.3d 117 (4th Cir. 1994). (Appx. 96-97). However, notwithstanding Petitioner's asserted expectation of privacy in the rental vehicle, the solicitor argued the traffic stop was proper and supported by probable cause based on the testimony establishing the officer initiated the traffic stop after observing Petitioner make an unsafe lane change. (Appx. 98). Furthermore, the solicitor argued the officer possessed reasonable articulable suspicion of criminal activity based on the following factors he observed during the course of the traffic stop: (1) the rental vehicle's windows were partially rolled down while it was travelling along the interstate; (2) Petitioner's hands were noticeably shaking and he was breathing heavily; (3) Petitioner rambled during the stop; (4) Petitioner provided inconsistent information about where he had been; (5) Petitioner's nervousness increased instead of abated as the stop progressed; (6) Petitioner's carotid artery was *visibly* pulsing; (7) Petitioner developed "cotton mouth" during the stop; (8) Petitioner was driving a vehicle he neither rented nor owned; (9) Petitioner did not know where the place he claimed to have been coming from in Columbia was located; (10) Petitioner used his hands excessively as he talked to the officer; (11) Petitioner looked back at the rental vehicle when asked about marijuana; and (12) Petitioner admitted he had a prior drug history. (Appx. 98-100). The solicitor further noted the officer obtained consent to search the car from the rental agency during the course of the stop and was instructed to take possession of the rental vehicle from Petitioner. (Appx. 100, ll. 5-18).

After listening to the arguments of counsel, the trial judge decided to wait to address the matter until the following day so he could discuss the issue further with the parties. (Appx. 114,

ll. 11-12). The trial judge resumed the *in limine* hearing the following morning, and Counsel asserted Petitioner had standing to raise a constitutional challenge to the search of the rental vehicle in light of the fact he was challenging the legality of the initial seizure and detention instead of simply challenging the propriety of the search alone. (Appx. 114-118). In support of that position, defense counsel cited to a footnote from the decision issued in United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012), in which the Fourth Circuit Court of Appeals noted Mubdi alleged the decision in Wellons was not applicable to his case in light of the fact he was challenging the legality of a seizure instead of a search. (Appx. 114-118). In response, the trial judge noted the Fourth Circuit Court of Appeals in Mubdi upheld the search in that case only after finding the seizure to be proper in light of the presence of factors consistent with the factors present in Petitioner's case, including the unauthorized use of a rental vehicle. (Appx. 118, ll. 11-19). Counsel then agreed with the trial judge's reading of the Mubdi decision but argued that decision was not based on the decision in Wellons. (Appx. 118-119). Furthermore, Counsel asserted the South Carolina Supreme Court decision in State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), established individuals in South Carolina have greater rights to challenge evidence introduced against them than the rights afforded by the United States Constitution. (Appx. 119-121).

After thoroughly discussing the issue with Counsel, the trial judge noted Petitioner had standing in regard to his person but did not have a reasonable expectation of privacy in the rental vehicle since he was not authorized to drive it. (Appx. 121, ll. 3-19). Additionally, the trial judge indicated the rental agency certainly had the authority to allow the officer to search the rental vehicle. (Appx. 121, ll. 19-21). The trial judge further noted the search in the Mubdi case was determined to be proper based on the existence of sufficient factors to warrant an extension

of the traffic stop. (Appx. 121-22). The trial judge then denied Petitioner's suppression motion while citing to the decision in Wellons. (Appx. 123-124).

During the subsequent trial, several witnesses testified for the State about the events of November 10, 2010, including in regard to Petitioner's unauthorized use of the rental vehicle, the discovery of roughly fifteen pounds of marijuana during the traffic stop, and the incriminating statements Petitioner made following his arrest. (Appx. 133-146). Sergeant Garry Billiott, an expert in marijuana analysis, testified he analyzed the marijuana recovered during the traffic stop, confirmed it was marijuana, and measured it weighed 14.83 pounds.⁷ (Appx. 147-158). Finally, Corporal Lawson testified as the fifth and final witness for the State and discussed the details of his stop of the rental vehicle Petitioner was driving on the date of the incident, his discovery of marijuana during the course of the stop, his subsequent arrest of Petitioner, and the incriminating admissions Petitioner made following his arrest. (Appx. 159-211). Additionally, during the officer's testimony, the solicitor moved to admit the marijuana discovered during the search, and Counsel responded: "No objections[,] Your Honor." (Appx. 175, ll. 9-14). The trial judge then admitted the marijuana into evidence "without objection." (Appx. 175, ll. 15-17).

Subsequently, at the conclusion of trial, the jury convicted Petitioner as indicted. (Appx. 254, ll. 10-14). Following the verdict, the trial judge sentenced Petitioner to a nine-year term of imprisonment. (Appx. 261, ll. 14-22).

c. The PCR Evidentiary Hearing

Counsel testified at the very brief evidentiary hearing that Petitioner's case was her "first experience dealing with that specific issue of a third party driver of a rental car." (Appx. 288, ll.

⁷ During Sergeant Billiott's testimony, the solicitor moved for the marijuana analysis report prepared by the officer to be admitted into evidence, and the trial judge admitted it after defense counsel expressly stated she had "[n]o objections" to that report. (Appx. 149-150).

20-22). Counsel testified that, at the time, there was not South Carolina precedent specifically on point to support or defeat her argument, but that her motion to suppress the fruits of the seizure and search was denied. (Appx. 288-89). Counsel admitted she did not renew the objection during trial, and did not indicate any reason for failing to object. (Appx. 289, ll. 6-20).

The PCR court entertained brief arguments setting the stage of the issue before it, but primarily directed the parties to submit briefs. (Appx. 290-94). Speaking freely at the end of the hearing, the PCR court acknowledged the existence of new precedent and observed:

[THE COURT:] But now it appears that that law has changed, and how does that shift, make a difference here?

MR. BOOZER: I would argue the benefit should come down to him.

THE COURT: I mean, otherwise, he could, you know, he would have had the Appellate Court, if they preserve it, Appellate Court would have heard it. They would have affirmed. If she had preserved it they would have affirmed and he would be serving his sentence and that would be the end of it.

But it would appear now that she did him a [great] service by not preserving it because we might be looking at it years down the road when the law is changed.

(Appx. 294, ll. 7-20). Ultimately the PCR court accepted Respondent's brief and issued an order consistent therewith. (Appx. 296-311).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

As to the underlying criminal case, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). The appellate court must affirm the trial court if there is any evidence supporting the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE PETITIONER ALREADY CONCEDED THAT BYRD V. UNITED STATES WAS INAPPLICABLE IN THIS POST-CONVICTION RELIEF MATTER, SUCH THAT PETITIONER HAD NO STANDING TO CHALLENGE THE SEARCH UNDER THE GOVERNING LAW AT THE TIME, AND BECAUSE THE SEIZURE AND SEARCH WAS REASONABLE IRRESPECTIVE OF STANDING.

The PCR court properly denied Petitioner's application for post-conviction relief because, under the law prevailing at the time, he had no standing as an unauthorized driver to challenge the legality of the search of the rental car, because the search was reasonable irrespective of Petitioner's standing, and because he abandoned the property when he bolted from the car. As such, Counsel's pre-trial objection was sure to fail, and her failure to persist in her clairvoyance as to standing and renew the objection during trial would not have changed the outcome at trial or on appeal. Accordingly, the petition for writ of certiorari should be denied.

- a. Petitioner conceded below that Byrd v. United States was inapplicable in this matter, and Counsel cannot be held ineffective for having failed to foresee it, notwithstanding her *in limine* arguments against precedent.**

First, Petitioner rightly conceded in his post-hearing "Memo in Support of PCR" that Byrd v. United States, 138 S.Ct. 1518 (2018) would not apply for the purposes of his PCR action. To the extent Petitioner now argues in reliance upon Byrd in his petition for writ of certiorari, he cannot do so. See Ramirez v. State, 413 S.C. 351, 373, 776 S.E.2d 101, 113 (Ct. App. 2015) rev'd on other grounds, 419 S.C. 14, 795 S.E.2d 841 (2017) (barring PCR applicant from arguing on appeal that a mental health evaluation was newly-discovered evidence where he conceded before the PCR court that it was not); State v. Benton, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (an issue is not preserved for appellate consideration where the party raising the issue conceded it in trial court).

Counsel's performance can only be adjudged in light of the law in effect at the time of trial. It is a long-standing rule that an attorney is not required to be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial. Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) (citing Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)). Typically the rule arises in PCR matters where an applicant alleges defense counsel was ineffective for failing to present *at all* an argument or law not recognized or in effect until after trial. See, e.g. Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not deficient in failing to argue battered spouse syndrome six years before its recognition in State v. Hill⁸); Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (counsel not deficient in failing to object to "reach the truth" jury instruction five years before its prohibition in State v. Daniels⁹); Winkler v. State, 418 S.C. 643, 653-54, 795 S.E.2d 686, 692 (2016) (counsel not deficient in failing to object to trial court's refusal to answer jury question about what would happen if they failed to reach a unanimous sentencing verdict, where no precedent existed at the time of trial to support such an objection).

The present facts are somewhat unique, insofar as Counsel briefly "held the crystal ball" and offered an argument for Petitioner's Fourth Amendment standing in the pre-trial hearing that channeled elements of the holding issued years later in Byrd. However, there is no precedent in our law of which Respondent is aware to provide that a defense attorney who is temporarily prescient must at all points thereafter be held to the continued maintenance of his or her foresight. To the contrary, courts have held that Counsel should not be held to the standard of an oracle after evidently and unknowingly divining the legal future, as the rule is that an attorney is

⁸ 387 S.C. 398, 339 S.E.2d 121 (1986).

⁹ 401 S.C. 251, 737 S.E.2d 473 (2012).

not required to make meritless objections under then-existing precedent, *even if* the predicate argument necessary to do so has already been laid out. See United States v. Fields, 565 F.3d 290, 297 (5th Cir. 2009) (“The mere fact that [co-defendant] was prescient or fortunate enough to preserve an Apprendi-based¹⁰ objection that was later found meritorious under changed law does not require a finding that Fields’s [sic] counsel and the counsel of Fields’s [sic] other co-defendant were constitutionally ineffective for not making a similar objection.”); Green v. Johnson, 116 F.3d 1115 (5th Cir. 1997) (appellate counsel not ineffective where he failed to raise an argument against precedent preserved at trial, where the precedent it argued against was not overturned until after the appeal became final); Thompson v. Warden, Belmont Corr. Inst., 598 F.3d 281 (6th Cir. 2010) (appellate counsel not ineffective for failing to raise a Blakely¹¹ issue on appeal, where the effect of the case was not extended to Ohio state courts until a year after Thompson’s appeal was briefed and argued). Had Counsel not made the prescient argument at all, there would certainly be no deficiency, so it would be nonsensical to provide greater relief to Petitioner by virtue of the fact that Counsel went above and beyond the level of competence expected of attorneys in this state and tested prior to trial an argument against the tide of precedent. Whether or not Counsel was deficient can only be adjudged in light of the law in effect at the time of trial, and the law at the time of trial provides that her argument was then-meritless, such that she was not obliged to make it at all.

¹⁰ Apprendi v. New Jersey, 530 U.S. 466 (2000).

¹¹ Blakely v. Washington, 542 U.S. 296 (2004).

b. As the unauthorized driver of a rental car, Petitioner had no legitimate expectation of privacy in the car and no standing otherwise to challenge the search.

Under the law prevailing prior to Byrd, Petitioner had no standing to assert a Fourth Amendment expectation of privacy because he was not authorized to drive the overdue rental car he was driving, such that Counsel was arguing against precedent in a fashion that far exceeds what is necessary to satisfy the Constitution's requirements for effective assistance of counsel. Before a criminal defendant can challenge the propriety of a search or seizure, the defendant seeking to raise such a challenge must establish that his own personal Fourth Amendment rights were violated by that search or seizure in order to be entitled to the benefits of the exclusionary rule. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see also Rakas v. Illinois, 439 U.S. 128, 132, n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."). That is true because rights protected by the Fourth Amendment are personal rights and cannot be vicariously asserted. Alderman v. United States, 394 U.S. 165, 174 (1969).

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

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

Leading into the November 18, 2013, trial, the prevailing law in the United States Court of Appeals for the Fourth Circuit, of which South Carolina is a part, as well as other jurisdictions, was that the unauthorized driver of a rental vehicle had no reasonable expectation of privacy because he had no legitimate claim to the vehicle itself, no lawful right to control the vehicle, and no right whatsoever to possess the vehicle. See United States v. Hargrove, 647 F.2d 411, 412 (4th Cir. 1981) (“[O]ne who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile. . . . A person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects, whether or not they are enclosed in some sort of a container[.]”); see also United States v. Kennedy, 638 F.3d 159, 165 (3d Cir. 2011) (“An authorized driver on the rental agreement has lawful possession of the vehicle and, within the scope of the rental agreement, may legitimately exclude others from using it. In contrast, an unauthorized driver has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude. The lack of such an interest supports the position that it is objectively unreasonable for an unauthorized driver to expect privacy in the vehicle.”); United States v. Luster, 324 F.App’x 224, 225 (4th Cir. 2009) (“An unauthorized driver of a rented car has ‘no legitimate privacy interest in the car’ and, therefore, a search of the car ‘cannot have violated his Fourth Amendment rights.’”). “This conclusion is not altered where the authorized lessee allows the unauthorized driver to drive the rental vehicle, as an unauthorized driver still does not have permission of the rental company, the owner of the vehicle.” Luster, 324 F.App’x at 225; see also United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (“[A]ppellant, as an

unauthorized driver of the rented car, had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights.”).

The undisputed facts provide that Petitioner was not listed as an authorized driver on the rental agreement, but rather Petitioner claimed that he obtained the rental car from one Timothy Sanders, who was the authorized renter of the vehicle. (Appx. 28-29; Appx. 32-33; Appx. 41-46; Appx. 60-61). Under Wellons, good law at the time of trial and at the time of appeal, those facts are dispositive—Petitioner had no standing to assert an expectation of privacy as the unauthorized driver of a rental car. As such, Counsel’s failure to renew the objection at trial is of no consequence because it was meritless under long-standing and broadly accepted precedent.

- c. Even if Petitioner did have standing to challenge the stop and seizure, the validity of the stop and search was entirely reasonable and appropriate under the law, such that Counsel’s efforts to suppress the fruits of the search were doomed.**

Even if the Court found Petitioner had standing prior to Byrd, despite the considerable precedent to the contrary, Petitioner also cannot show prejudice from Counsel’s failure to preserve the issue of the validity of the stop and search because it was entirely reasonable and appropriate under the law. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991). Consequently, only unreasonable searches and seizures are constitutionally prohibited, and law enforcement officers are not required to be perfect or mistake-free in order to be in compliance with the requirements of the Fourth Amendment. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977).

Pursuant to the Fourth Amendment, “[a] police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity.” State v. Blassingame,

338 S.C. 240, 248, 525 S.E.2d 535, 539 (Ct. App. 1999). For Fourth Amendment purposes, an automobile stop, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). However, the initiation of an automobile stop is *per se* reasonable when either probable cause exists to believe a traffic violation has occurred or reasonable suspicion exists to believe the occupants of the vehicle are involved in criminal activity. See Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) (“[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity.”); State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002) (“Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable *per se*.”); Whren v. United States, 517 U.S. 806, 810 (1996) (“An automobile stop is thus subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”).

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and “ordinarily continues, and remains reasonable, for the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” State v. Pichardo, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)). “Normally, the stop ends when the police have

no further need to control the scene, and inform the driver and passengers they are free to leave.”
Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not measurably extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”). Continued questioning beyond the time reasonably necessary required to complete a traffic stop is lawful and permissible where (1) the officer has a reasonable articulable suspicion of other illegal activity, or (2) the traffic stop becomes a consensual encounter. Id., 367 S.C. at 99, 623 S.E.2d at 848.

Reasonable suspicion consists of “‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.’” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v.

Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. All of the circumstances of the stop, including the officer’s own experience and specialized training, must be considered as a whole to determine whether the officer’s actions were reasonable in light of all the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[W]e have said repeatedly that [reviewing courts] must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” (citations omitted)). Thus, the presence of several factors individually consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

In the present matter, law enforcement pulled Petitioner over after observing Petitioner make an unsafe lane change—a traffic violation. See S.C. Code Ann. § 56-5-1900. Therefore,

the traffic stop of the rental vehicle was reasonable and proper. Within two minutes of the stop, law enforcement discovered Petitioner was not authorized to possess or drive the vehicle after reviewing the rental contract provided by Petitioner, and further discovered the vehicle was two days overdue. Those two facts immediately constituted reasonable suspicion of criminal activity and necessitated an extension of the traffic stop, which distinguishes the present case from the facts in Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), and State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009). Whereas Sikes, Tindall, and Rivera were all yanked out of their cars and detained at some length despite providing valid paperwork, Petitioner provided registration documentation (the rental agreement) that indicated he should not have been driving the car in the first place, which provided the reasonable suspicion necessary to justify prolonging the stop *to figure out if the car was stolen*. See Sikes, 323 S.C. at 30, 448 S.E.2d at 562 (acknowledging that upon a stop for a traffic violation, law enforcement may briefly “detain the vehicle and its occupants while he examines the vehicle registration and the driver’s license[,]” explaining that the scope and duration of seizure is “tied to and justified by the circumstances which rendered its initiation proper.”).

Both before and after the initial discovery that Petitioner was not authorized to drive the car, law enforcement also detected numerous other indicators which, taken together, provided for reasonable suspicion of criminal activity:

- (1) the rental car’s windows were partially rolled down while it was travelling along the interstate, which the officer knew was commonly used to mask the odor of illegal drugs;
- (2) Petitioner exhibited signs of excessive nervousness above and beyond those exhibited by drivers during routine traffic stops conducted by the officer;

- (3) Petitioner's nervousness increased over time, which law enforcement identified as unusual;
- (4) Petitioner provided inconsistent information about where he had been and did not know where the place he claimed to have been coming from in Columbia was located;
- (5) the responses Petitioner provided did not make sense based on the fact he lived in close proximity to an unemployment office and rental agency he bypassed for ones much farther away; and
- (6) Petitioner reacted differently and suspiciously looked back at the rental vehicle when asked if there was any marijuana hidden in it.

Given these factors and the considerable experience of the investigating officer, law enforcement had reasonable suspicion to believe Petitioner was involved in criminal activity independent of the traffic violation he committed and, as a result, was fully justified in expanding the scope of the investigation and the length of the traffic stop. Accordingly, because law enforcement had probable cause to initiate the traffic stop and detected numerous factors providing for reasonable suspicion that Petitioner was involved in criminal activity during the course of the stop, law enforcement's seizure of Petitioner during the stop was entirely reasonable and did not violate any of his constitutional rights.

Finally, Petitioner abandoned the car and its contents. "Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment." State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (1988)). The same applies when the abandonment is in response to lawful police action. Id., 319 S.C. at 460, 462 S.E.2d at 283. After law enforcement popped the trunk of the rental car and touched a bag contained therein, Petitioner fled and abandoned the rental car and its

contents, and upon his immediate capture volunteered that there was fifteen pounds of marijuana in the package in the trunk. (Appx. 52-54). Therefore, Petitioner can show no prejudice from Counsel's failure to preserve the matter for appeal because even if Petitioner had standing to challenge the search, he had *no chance* of invalidating the search and excluding the evidence at trial or otherwise prevailing on appeal.

CONCLUSION

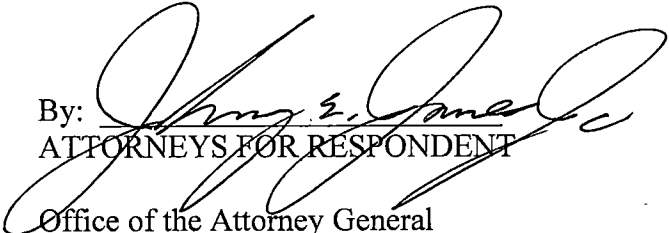
For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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4 Oct., 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-001899

JAMECO ABDUL TONEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

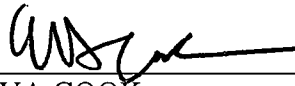
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
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Post Office Box 11589
Columbia, South Carolina 29211

This 4th Day of October, 2019



EVA COOK
Legal Assistant for Respondent