

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

NOV 25 2019

SC Court of Appeals

Appellate Case No. 2017-002411

Daniel Lopez,.....

.....Petitioner,

The State of South Carolina,.....

.....Respondent.

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1 of 3*

**PETITIONER'S REPLY  
TO PETITIONER'S**

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## ARGUMENT

### I. The PCR Court erred in finding there was no constitutional error regarding the missing traffic stop video.

Petitioner urges this Court to deny Respondent's request to deny certiorari because the Return replicates the same errors of law in the Order of Dismissal. The PCR Court and Respondent both erroneously apply the test for the destruction or loss of evidence, which is inapplicable here, and also incorrectly inject elements from that test and elsewhere into the *Brady*<sup>1</sup> and Rule 5 analyses.

For a first example, the PCR Court concluded Petitioner was not entitled to relief on the lost traffic stop video allegation because:

The testimony at the PCR [hearing] from the officer indicated that the video was not produced because he had changed departments and his videos had been boxed up without his knowledge. **For the failure to produce evidence in discovery to be a violation of a defendant's constitutional rights, there must be a showing of "bad faith" by the prosecution or law enforcement. See *State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015)...[T]here was no prejudice of abuse in the failure to produce the video...The Court finds that the explanation provided by the arresting officer appears valid.**

(App. p. 2; p. 16) (internal citations omitted) (emphasis added). Likewise, Respondent cites *Arizona v. Youngblood* and *Reaves* to repeatedly argue the PCR Court's conclusion was proper as **"the State provided a valid reason...and there is no evidence of bad faith."** (Return, pp. 5-8) (emphasis added). The determination by the PCR Court and Respondent's similar argument are based upon errors of law. Contrary to both arguments, Petitioner has no burden to demonstrate the invalidity of the State's explanation for the non-disclosure of the video or any burden to show fault or bad faith on the State's part or its agencies in order to obtain relief for a violation of *Brady* or Rule 5 on PCR.<sup>2,3</sup>

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<sup>1</sup> *Brady v. Maryland*, 373 US 83 (1963).

<sup>2</sup> See cases cited in Petition for Writ of Certiorari (pp. 18—20) and accompanying text on the showing required for relief under *Brady* and Rule 5. See also generally, *Earley v. State*, 418 S.C. 255, 792 S.E.2d 226 (2016) (demonstrating a PCR applicant is not required to make any of showing of bad faith to be entitled to relief for nondisclosure under Rule 5).

<sup>3</sup> Respondent also misconstrues *Brady*'s "suppressed by the prosecution" showing by treating it as if whether the video was suppressed turned on fault or the validity of the explanation:

The error of relying upon the “validity” of Hines’s explanation and the error of injecting a bad faith element into the analysis stem from the overarching flaw in both the Order and the Return in which the destruction or loss of evidence test set forth in *Youngblood* and *Reaves* is applied. Application of the destruction or loss of evidence test is an error of law. *Youngblood* and *Reaves* are inapplicable to Petitioner’s PCR allegations because while the traffic stop video was lost at the time of his trial, it was recovered in time for his PCR. South Carolina courts have not employed or have not explicitly considered the lost evidence standard in cases where like here, the evidence at issue was lost or had not been turned over to the defense at the time of trial but was available in time to be used at the PCR level. Further, by employing the destruction or loss of evidence test, the PCR Court and Respondent erroneously set a higher burden for Petitioner to satisfy to obtain relief because this test requires a showing of bad faith; whereas *Brady* and Rule 5 do not. Petitioner is likewise not required to making any showing in regard to the validity or invalidity of Hines’s explanation. As provided in the Petition, Petitioner’s PCR allegations are properly evaluated under *Brady* or Rule 5.

Additionally, application of the lost evidence test would effectively ignore that the video is no longer lost, thereby sidestepping a full analysis of Petitioner’s PCR grounds. Indeed, the Order of Dismissal shows that the PCR Court erred in by doing so: “In reviewing this matter from the standard applicable to PCR, this Court finds the Officer’s actions did not violate the “reasonable extension” test that has been recognized by South Carolina Courts or any other relevant federal case”. (App. pp. 15-16). Such reasoning and application of the lost evidence test is averse to a fundamental purpose of the PCR

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Petitioner has failed to show the videotape was ‘suppressed by the prosecution.’ Instead...the video tape was misplaced...[Hines’s] explanation, which was accepted as valid by the PCR Court and is uncontradicted, demonstrates the State did not suppress the video, but instead believed it to be lost at the time of trial.

(Return, pp. 6 –7). As discussed, Petitioner is not required to show bad faith or that the State’s explanation was invalid in order to obtain relief. “Suppression” in this context better equates to non-disclosure.

action, which contemplates the allegations such as Petitioner's that call upon the PCR Court to evaluate an attorney's performance, the State's conduct, or both relative to evidence not disclosed and not entered into the record at the time. The now-available video and Petitioner's related allegations thus fall squarely within a PCR action's objectives and cognizable for relief.

Also contrary to opposing argument, the allegations here do not trigger application of the newly-discovered evidence test, which is entirely inapplicable because the video was known to have existed before trial and was thus not first discovered after trial. *See e.g., State v. Mazzell*, No. 2005-UP-621 (Ct. App. Dec. 9, 2005) ("Evidence [] known to the defendant at the time of his trial cannot be considered 'new evidence' [to] receive a new trial.") (citing *Hayden v. State*, 278 S.C. 610, 299 S.E.2d 854 (1983) (outlining test elements)). Application of the newly-discovered evidence test is thus an error of law. This test also erroneously sets a higher burden for Petitioner to meet in order to obtain relief as it requires the evidence to be more than "merely impeaching", which is not a bar to relief on PCR under Brady and Rule 5. *See cases cited supra* and supporting text. As discussed in the Petition, the PCR grounds are appropriately examined under *Brady* and Rule 5.

**II. The PCR Court erroneously determined the result of the suppression hearing and trial would not have been different had the video been available.**

The PCR Court made errors of law in finding Petitioner failed to prove prejudice and there is otherwise no evidence of probative value to support it. The Return's argument mirrors these errors.

First, neither the PCR Court nor Respondent address the video's impact in light of trial court having only Hines's subjective testimony in which to decide, through an objective lens, whether reasonable suspicion existed to extend the stop.<sup>4</sup> The PCR Court erroneously reasoned the prejudice showing could not be met in this case by virtue of Trial Counsel having more information to cross-examine Hines had the video been available at the time. (App. p. 16). The Respondent adopts this

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<sup>4</sup> Respondent does argue "Hines had clear articulable reasonable suspicion without resort to any of the subjective opinions he formulated regarding Petitioner's responses or behaviors." (Return p. 10). *See pp. 13 - 17 herein to the contrary.*

reasoning, arguing the video is only “merely impeaching” and “would have simply allowed for additional cross-examination.” (Return, p. 5). This is an error of law as prejudice is determined on a case-by-case basis and this reasoning overlooks a wealth of cases where relief was granted for reasons similar to those presented here. Of these cases, the Court found the prejudice showing met where non-disclosure of certain material evidence or discovery deprived the defendant of using it to cross-examine or impeach a State’s witness. *See Jean v. Rice*, 945 F.2d 82, 86-87 (4<sup>th</sup> Cir. 1991) (granting habeas relief on the grounds that the State’s failure to turn over videotapes of witnesses under hypnosis deprived the petitioner of a fair trial because even though the defendant’s attorney was able to cross-examine several witnesses about hypnosis’s possible effects, he did not have the recordings to show contradictions within their testimony or to show the pervasive procedural flaws in the hypnosis); *State v. Goodson*, 276 S.C. 243, 247-48, 277 S.E.2d 602, 604-05 (1981) (remanding for a new trial where the State did not turn over a roll of film until the end of trial because although the film was damaged and what it depicted remained open to interpretation, the film nevertheless “casts serious doubt on [a State’s key witness’s] credibility...It could corroborate the appellant’s version of the facts. At the least, its existence, never mentioned in [the witness’s] statement or [trial] testimony, would provide...an opportunity to challenge the [witness’s] believability.”). Also functionally equivalent to Petitioner’s grounds are the cases where the material evidence had been turned over to the defense or was known and available to the defense, but counsel failed to cross-examine or impeach a State’s witness using it. *See e.g., Kollé v. State*, 386 S.C. 578, 690 S.E.2d 73 (2010) (“If plea counsel had [the call/dispatch logs], he could have effectively cross-examined the officers at the suppression hearing and pointed out the [numerous] discrepancies...Had plea counsel adequately attacked the credibility of the officers, there is a reasonable probability this would have influenced the trial judge’s decision regarding the existence of exigent circumstances, i.e., affected the outcome of the suppression motion.”); *McKnight v. State*, 378 S.C. 33, 54, 661 S.E.2d 354, 364 (2008) (holding the failure to enter the autopsy report into evidence was ineffective because “[it] was a powerful piece of documentary evidence that was crucial to [the] defense because it contradicted the State’s theory

of the case [and] would have served as hard evidence to undermine the conclusion of [a State experts], and remind[ed] jurors of the inconsistencies in the State's experts' testimony.”); *Roberts v. State*, 361 S.C. 1, 602 S.E.2d 768 (2004) (relief properly granted where attorney failed to present a video that contradicted a “jail house snitch’s” testimony about the defendant’s alleged incriminating statement as “it would have significantly impacted [the jailhouse witness’s credibility] a key witness for the State.”).

Thus, the prejudice showing can be met where non-disclosed or unutilized material evidence deprived the defendant of cross-examining or impeaching a State’s witness using that evidence. Also contrary to the PCR Court’s findings and the Return’s argument, *Jean v. Rice* demonstrates that relief may be warranted even where the evidence would have only allowed for further or more effective cross-examination on the particular subject had it been disclosed. *See Jean v. Rice, supra*.

As discussed thoroughly herein, the PCR Court further erred because Petitioner had satisfied his burden to prove prejudice because also contrary to the PCR Court’s findings (App. p. 16) and the Respondent’s argument (Return, p. 5-8), the video materially contradicts material facts and circumstances that Hines had articulated as amounting to reasonable suspicion. In explaining how he came to believe that criminal activity was occurring in order to extend the stop, Hines also omitted portions of the traffic stop which were only fully realized when the video resurfaced years later. This additional, material information further contradicts other portions of Hines’s testimony while also provides an innocuous explanation or clarification for things Hines found suspicious. The video is thus two-fold: 1) the showing of the video itself materially contradicts Hines’s testimony and provides additional information; 2) and Trial Counsel, as he testified extensively at the PCR hearing, could and would have cross-examined Hines on these contradictions and additions had the video been available. Because the video reveals things that Trial Counsel could not have known or learned, he also would have been made aware of additional theories and arguments to present at the suppression hearing. Had Trial Counsel been able to present these contradictions and omissions to the trial judge and cross-examine or impeach Hines using the video, there is a reasonable probability the result of the suppression hearing

would have been different. Each material contradiction and addition are addressed in turn and in chronological order where possible.

**The Setting of Traffic Stop / Petitioner's Direction of Travel/ Missing Exit to get on I-85 South**

It is significant that Hines's testimony fails to accurately describe the setting of the unconstitutional search and seizure. The video reveals that the traffic stop took place on what could barely be referred to as a shoulder lane, which was straddled by busy traffic. Petitioner's car was wedged between the most right-hand lane and a small triangular median for a turning lane, his car was parked just before the line that bordered the busy multilane intersection. On the passenger side of his car, cars are seen veering around the triangular median to make a right turn. A matter of inches separated Petitioner from the cars whizzing by on his driver's side as he exited his car at Hines's request at 14:25. Except for the actual dog sniff and search later on, Petitioner remains on this small island within the busy highway for the duration of the traffic stop. The video also reveals Petitioner had already gotten off the Interstate onto the ramp to get onto I-85 South towards Atlanta just ahead just as Hines turned on his blue lights. Although Hines conceded at trial that Petitioner could have easily been doing just this and thus not lying about his direction of travel or about his starting or end destination, he continued to push back against this theory. The video confirms not only that Petitioner had been poised to do just this, but also shows that Hines turned on his blue lights and pulled him over later than he had testified at trial.

**Petitioner's Demeanor**

First, despite Hines's testimony that Petitioner was suspiciously, nervously chatty: "like I say he started trying to befriend me" (App. p. 160), the video shows Hines initiated and kept up the conversation and had Petitioner exit his car so that Hines could talk to him more and hear him more clearly over the buzz of traffic. The video also conclusively refutes Hines's extensive description of Petitioner's nervous demeanor, including the testimony that he was "stumbling over his words", nervously chattering on,

avoided direct eye contact, and kept hands in his pockets.<sup>5</sup> (App. p. 160, ln. 21; p. 161, ln. 2—p. 162, ln. 3; p. 164, ln. 3-11; p. 207, ln. 25 —208, ln. 5). Petitioner's full body and face are clearly captured on the video, which shows he had a normal, friendly demeanor and was relatively very relaxed for someone surrounded on all sides by busy traffic after being directed by an officer to get out of his car. The video shows Petitioner was not stumbling over his words; the pace and tone of his voice are normal and steady as he answers Hines's questions. He also maintained direct eye contact with Hines. Petitioner's stance and body language are relaxed; his hands are not shaking, he is not fidgeting, his shoulders are not tense, and he is not bouncing or nervously shuffling his feet.

### **Petitioner's Addresses**

Hines testified that Petitioner had three different addresses between his insurance, drivers license, and registration and although dispatch reported all were valid, Hines testified it nevertheless "kind of raised a red flag. In my training, this guy doesn't have a steady place to where he's laying his head at night." (App. p. 160, ln. 8-11). However, the video shows that Hines omitted that he had asked Petitioner about this and that Petitioner had provided a reasonable explanation. Petitioner explained he had only just recently moved between Georgia and Louisiana and was still frequently making trips between the two for family that still lived there and had not yet made the change.

### **Petitioner's Supposed Lies and Evasiveness**

In response to Hines's questioning about what Petitioner did on his visit to North Carolina, Petitioner responded that he was visiting "my boy" who was stationed at an army base there. (App. p. 159; p. 208). At trial, Hines portrayed this response as unequivocally referring to a son and thus Petitioner must have been lying because Petitioner subsequently explained he had a daughter. (App. p. 161; p. 180, ln. 17 — p. 181; p. 208). Hines testified this made him very suspicious:

"[H]e goes from having a son to not having a son, to having a daughter. [I] think that speaks for itself. This whole thing is a matter of [ ] being deceiving, not forthcoming, trying to distance himself [from] what's he's actually doing. Because this whole premise

<sup>5</sup> As for putting his hands in his pockets, it was January and Petitioner did not have a winter coat, only a mere sweatshirt.

was he's coming from North Carolina. I was just trying to ask where he was coming from.

At that point, he's having to make up another story. It's lie after lie after lie[.]”

(App. p. 161 – p. 162; p. 180, ln. 17 — p. 181; p. 208). The video refutes this testimony. The conversation captured on video demonstrates Petitioner did not lie and that Hines did not actually interpret his responses as deceitful at the time. Not only does the video make clear that the “my boy” response was slang and used colloquially to refer rather to Petitioner’s male friend, but Petitioner had also explained what he had meant right then and there. He and Hines even talked about the slang’s true meaning, showing his understanding that “my boy” referred to a friend in North Carolina and not a son. Despite Hines’s trial testimony, the video shows he had no reason to believe Petitioner had lied about whether he had a daughter or son or where they lived. The video also demonstrates that any interpretation of Petitioner’s responses as deceitful was neither reasonable nor supported by their conversation.

Hines also portrayed Petitioner as evasive and deceitful at trial by stating Petitioner had mentioned working as a bouncer but had also held himself out as somehow affiliated with Gwinnett County law enforcement in that capacity. (App. p. 160). The video shows Hines’s testimony is a mischaracterization of the exchange. Rather, a statement referring to assisting law enforcement in a cooperative capacity is heard on video as a follow up statement to “I work with Gwinnett County.” Petitioner’s statement: “I work at *clubs* as a bouncer” is a separate statement.

**Point at which Hines Finished Writing the Warning Ticket and Checked the VIN number**

Using general terms, Hines testified that after checking the VIN number, he then finished writing the warning ticket and thereafter gave it to Petitioner along with his documentation. (App pp.169-172). Hines’s account of this sequence of events is refuted by the video. The video shows Hines heard back from dispatch that the check on Petitioner’s documentation was clear and that he had no arrest warrants at 14:24. Hines then exits his patrol car, heads over to Petitioner’s car, and directs him to exit his car. After the questioning and conversation previously described herein, Hines informed Petitioner he was going to write him a warning ticket for speeding at 14:28. Hines completes writing the ticket but does not hand it to Petitioner or return his documentation. Hines instead looks around in all directions, pauses

and appears to think for a moment, and then tells Petitioner to sit on the hood of the patrol car while Hines makes sure the car's listed VIN number matches that on his documentation. Hines then opened the driver side door and stuck his upper body inside (which also contradicts testimony that he checked the VIN number by peering through the windshield while standing outside the car). Hence, the video shows that Hines did not conclude the stop in that he did not return Petitioner's documentation or issue the warning ticket, even though he had already gotten the all clear from dispatch at 14:24 and had already put pen to paper for the very last time.

### **Hines's Questions**

The video shows that at 14:29 Hines returned to Petitioner at the patrol car where he asks unusual, if not slightly offensive, questions. Again, he still has not handed over the ticket or documentation. In addition to asking whether any weapons, "pot", or "coke" were in the car, Hines asked whether Petitioner was terrorist and whether he had any bombs. Petitioner appears somewhat puzzled and responded in the negative to all questions. Hines asked because he was "just trying to put people away."

### **Repeated Requests for Consent to Search Petitioner's Car**

Although there is testimony on the consent issue, Hines's trial testimony fully omits just how many times he "asked" Petitioner for consent to search his car. The video shows that after the needless VIN number check, Hines gave Petitioner the warning ticket and returned his documentation at 14:30. Hines then stated: "Slow down for me, okay?". Petitioner replied "Okay" with a chuckle but just before he turned to leave, Hines abruptly asked for consent to search. This is the first of many insistent, if not unrelenting, attempts to gain consent:

Hines: "Can I search your car?"

Petitioner: "Uhh, I mean we're kinda done...I think we're okay...No, I mean I think this is done. I mean I think we're okay here—"

Hines: (interrupting) "Can I search your car ? Can I search your car?"

Petitioner: "I mean do you have a reason?"

Hines: "Yes I do."

Petitioner: "What's the reas—"

- Hines: (interrupting) "I'm looking for a yes or no here."
- Petitioner: "Well, I want to leave, so."
- Hines: "I'm asking you a question yes or no"
- Petitioner: "I'm trying to...we already got it...over with, so...I'm trying to leave so."
- Hines: "I'm just asking you a question."
- Petitioner: "Well, if I could leave, I would appreciate it. I'm just asking if I could leave."
- Hines: "You can leave, but I'm going to detain your car and run my dog on your car. So you're welcome to wait on your car, that's up to you. You're free to go if you want to walk off, you're free to go" [pointing in the direction of oncoming traffic].

The subsequent dialogue generally tracks Hines's testimony (App. p. 174; pp. 177 – 178) that Petitioner finally agreed only after Hines stated that regardless of consent, he was going to conduct the dog sniff and would search his car if the dog alerted. Hines also told Petitioner he and his car would then be allowed to leave only if the dog did not alert.

The video reveals the compelled nature of how Hines obtained consent to search and also clearly refutes Hines's repeated testimony that it was practice to ask for consent in the "least intrusive manner" and "make them try to feel at ease." (App. p. 178, ln. 13-14; p. 164, ln. 13-17; p. 179, ln. 7-11.)

### Dog Sniff

Hines testified that he conducted the dog sniff as he always: starting with the front of the car on the driver's side, making his way towards the back of the car, and then up alongside the passenger side until he was again at the front of the car. (App. p. 213, ln. 12 -18). He testified the dog gave an "aggressive alert" by breathing heavily and scratching at the "left rear door seam area" when they made their way back down the driver side of the car again. ( App. p. 213, ln. 19 — p. 214, ln. 1). Hines explained that while other dogs will sit down to alert, his dog was taught to alert by scratching. (App. p. 214, ln. 2-5). He also testified that the dog alerted again near the right rear tire, which he could tell was an alert because her "breathing changed" once they moved to that area, and "she began sniffing intently, and then started scratching kind up in the tire." (App. p. 214, ln. 6-12). He testified that from those alerts, he "was pretty certain...the odor was coming somewhere in the rear of the vehicle" and so he began the search by starting with the trunk. (App. p. 215, ln. 2-5). Hines also explained that in an effort to prevent leading the dog to

alert and to remove any improper influence, he does not reward the dog for an alert by giving her a toy until after the sniff. (App. pp. 255 – 257.)

The video contradicts Hines's testimony; **the dog did not alert on Petitioner's car**. The dog did not scratch or "dig" at a certain area, sit down, bark, or exhibit any other behavior described as an alert. Despite Hines's testimony that he does not influence or lead the dog to give an alert, Hines is shown tapping and pointing to the trunk and other areas as they moved around the car. Between tapping and pointing, Hines lowers himself to the dog's level and brings his hand close to the dog's mouth before doing the same on another area, all the while saying repeatedly "here, here" at times and "good girl" to the dog. He even appears to give something to the dog or touch the dog's mouth at one point. After a full lap around the car, Hines brought the dog back to the rear passenger side area where he points to the right passenger side door area. The dog does not respond in any way to just his pointing; the dog's behavior did not change until the stop had conclude in which Hines patted her on the head while excitedly exclaiming "good girl, good girl" towards the dog. It was then and only then that the dog reacts in some way by excitedly jumping up and down with excitement. *See* cases cited and accompanying text at fn. 13 herein. According to Hines's own testimony, this reaction is not an alert and he is shown prompting it by using quick, playful hand gestures, and praising the dog in a noticeably excited tone.

### The Search

The video demonstrates that Hines omitted just how many times he searched the same areas of the car again and again. Hines rotates between each area after each unsuccessful search. He searched the backseat area on both the driver side and passenger side at least two (2) or three (3) times each. Hines searched the trunk and its contents four (4) times before finding narcotics in a cannister-like object. Hines did not find the drugs in this container until the fourth and final search of the trunk even though he had previously inspected and opened the container.

As demonstrated, the video does materially contradict Hines's testimony and provides additional material information. As discussed further herein, there is a reasonable probability that the outcome of

the suppression hearing would have been different had the video not been lost and had been disclosed because the contradictions and additional information erode the legality of both the extension of the stop and the consequent search and seizure.

A. The video refutes the basis found to establish reasonable suspicion.

Recall that Hines testified to the following factors as establishing reasonable suspicion:

- I-85's reputation as a drug corridor or "pipeline" (App. p 163, ln 9-10; p 180, ln 4-10);
- The different Georgia street addresses and one Louisiana address on his documentation (App. p. 159);
- Petitioner's prior street addresses' proximity to Atlanta, a "known city" for trafficking (App. p. 156);
- His direction of travel on I-85 relative to one route from North Carolina to Atlanta (App. p. 162);
- Two cellphones seen in different areas of car and his earlier payphone use (App. p. 162, ln. 22-24);
- Nervous demeanor and evasive behavior (App. p. 159 – p 162; p 164; pp. 207 – 208);
- Lies about having a son and law enforcement affiliation (App p 180 – p 181; 208; p 160).<sup>6</sup>

Petitioner met his burden to prove prejudice because the video directly refutes Hines's testimony on several factors the trial judge found to combine to support reasonable suspicion such as Petitioner's supposed nervousness<sup>7</sup> and his supposed evasiveness or lies<sup>8</sup> about his children and affiliation with law

<sup>6</sup> As discussed herein, it is also significant that Hines could not sufficiently, if at all, explain how the alleged false statements, different addresses, and prior payphone use with two cellphones in the car indicated or were relevant to drug activity or some crime. *See infra United States v. Bowman*, 884 F.3d 200 (4<sup>th</sup> Cir. 2018) *and accompanying text*; *see also State v. Burgess*, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (Ct. App. 2011) ("The State must be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance."); *State v. Butler*, 353 S.C. 383, 393-94, 577 S.E.2d 498, 503 (Ct. App. 2003) (rejecting the officer's opinion that certain instances were suspicious because he could not articulate what his "*specific suspicions*" were) (italics added).

<sup>7</sup> Even if *arguendo* he did seem nervous, the inherently unsafe setting of the stop provides a reasonable explanation, as well as the nervousness expected of any motorist stopped by police. *See State v. Moore*, 415 S.C. 245, 781 S.E.2d 897 (2016). ("General nervousness will almost invariably be present in a traffic stop."). Hines's suspicion about Petitioner's inability at first to remember the name of the army base his "son" [friend] was stationed at is too of questionable weight. *See State v. Alston*, 422 S.C. 270, 811 S.E.2d 747 (2018) (finding the defendant's misstatement about his children's ages innocuous rather than indicative of untruthfulness as "most people are stressed to some extent by an extended traffic stop"). Also, courts have increasingly discounted this factor. *See Id.* (stating the trial court properly declined to focus on nervousness); *Bowman*, 884 F.3d at 214 (same). Hines's belaboring every little instance he perceived as a sign of nervousness is problematic as well because our Supreme Court has 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." *See supra Moore*.

<sup>8</sup> Even if *arguendo* Petitioner's statements could be interpreted as untruthful or evasive, no part of his statements was established as being significant or relevant to drug activity or some other crime. *Bowman* is instructive here, in which the Court held "false statements without more, will typically be insufficient."

enforcement. The video also provides clarification and demonstrates the innocuity for other things that when taken together were found to establish reasonable suspicion. For example, the video shows Petitioner gave a reasonable, innocuous reason for the different street addresses on his documentation. Hines's testimony that he found it suspicious and indicative of criminal behavior not only omitted this fact, but also made it seem as though there were no innocuous alternative explanations for the different addresses. (App. p. 160). Additionally, even though Hines testified he was very suspicious about Petitioner's use of a payphone while having cellphones in the car, the video makes clear Hines failed to ask any of the number of expected questions that accompany this degree of suspicion; such as whom Petitioner had called using the payphone or why, or any questions as to whether either cellphone had signal or were roaming, charged, or even belonged to Petitioner. This is significant because questioning or investigation into matters unrelated to the original purpose of the traffic stop—speeding—are permitted “to verify or dispel [an] officer's suspicion” and are examined in a traffic stop extension case. *See e.g., Florida v. Royer*, 460 U.S. 491, 500 (1983); *State v. Rodriguez*, 323 S.C. 484, 494 476 S.E.2d 161 (Ct. App. 1996). The countless alternative innocuous scenarios for both the different addresses and payphone/cellphones factors<sup>9</sup> diminish, if not extinguish, their weight within the totality of the circumstances found to establish reasonable suspicion. *See Bowman*, 884 F.3d at 218 (assigning very little weight to the defendant's unemployment because the officer could not explain its connection to

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884 F.3d at 216. The Court accordingly assigned little or no weight to the officer's belief the defendant lied about the duration of his drive because “[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 [the defendant] had not been truthful.” *Id.* It is also significant that Hines could only say he believed Petitioner was not being truthful about *something*, (App. p. 176) but he could not say what with any degree of specificity. *See supra, Burgess, Butler, Bowman.*

<sup>9</sup> Hines failed to specify how Petitioner's prior payphone use and having two cell phones was relevant to drug activity or some crime. As for the different addresses, Hines subsequently testified the different addresses made him suspicious because it “is common for somebody that doesn't want anyone to know where [they can] be tracked down.” (App. p. 240). This explanation is illogical and dubious in light of Hines's testimony that he had Petitioner's full current address and all of the documentation were under Petitioner's name and verified by dispatch.

drug trafficking; without more, the Court found it “totally innocuous” due to the countless possibilities that could account for his nice car and ability to go on vacation).

With the afore-discussed factors either refuted or discounted as a result of the video, the only factors remaining to combine to amount to reasonable suspicion are: I-85’s general reputation as a drug corridor; his previous addresses’ proximity to the Atlanta Metro area, a “known city” for trafficking; and Petitioner’s direction of travel. Pursuant to case law and the record, respectively, these remaining factors taken together fail to amount to reasonable suspicion. First, Hines admitted at trial that he had no indication that Petitioner was driving on I-85 for a drug-trafficking purpose (App. p. 183), and courts have discredited the reputation of a residential area or highway for frequent drug activity as a factor to the reasonable suspicion analysis. *Alston*, 422 S.C. at 286-87, 811 S.E.2d at 755-56 (“[W]e are unpersuaded that traveling on I-85 [indicates involvement in] criminal activity given ‘the number of persons using the interstate highways as drug corridors pales in comparison to the number of innocent travelers on those roads.’”). *See also Id.* (“While some drug traffickers may hail from [the greater Atlanta area, which the officer called a ‘major hub for criminal activity’], the majority of residents do not engage in criminal activity.”); *State v. Anderson*, 415 S.C. 441, 447-48, 783 S.E.2d 51, 55 (2016). Petitioner’s direction of travel also contributes little to the totality of the circumstances in order to amount to reasonable suspicion. Hines dogmatically felt that because Petitioner was on I-85 North when Hines spotted him speeding, he must then have been untruthful when stating he was driving to Atlanta from North Carolina. (App. p. 162). Yet Hines conceded at trial Petitioner possibly could have just as easily been en route to get onto I-85 South towards Atlanta given the exit he took, and also acknowledged there are several ways to get to Atlanta from North Carolina. (App. pp. 156 – 166; pp. 236 – 238). Also worth consideration is Petitioner’s unfamiliarity with the area and that he had been scanning the restaurants listed at the exit on either side deciding what he wanted to eat. (App. p. 165, ln. 15 — p. 166, ln. 25). Each of these factors are innocuous themselves and conglomeration thereof fails to eliminate many innocent drivers. *United States v. Sokolow*, 490 U.S. 1 (1989) (holding an officer’s articulated facts must

in their totality serve to eliminate a substantial portion of innocent travelers before reasonable suspicion will exist); *see also Bowman*, 884 F.3d at 219 (“Although the nature of the totality-of-the-circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion, it is “impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are *concrete* reasons for such an interpretation.”)(italics added). Not only are there no such concrete reasons here, but other circumstances also weigh against the totality of the factors as amounting to reasonable suspicion. Hines knew of no information, such as prior criminal history, about Petitioner that would lend support to his suspicions. (App. p. 213, 18-21). Hines did not report any odor or paraphernalia associated with narcotics coming from or within the car, or any behavior associated with narcotic use from Petitioner. Petitioner did not hesitate when complying Hines’s request for his documents, to exit his vehicle, or to submit to a pat down search. (App. p. 213, ln. 9-17). Petitioner did not have any drugs or weapons on his person. The stop was also for a relatively minor traffic infraction. Therefore, because the weight of each of these remaining factors is scant according to relevant case law or rendered dubious by the record, respectively, these remaining factors taken together fail to rise to the level of reasonable suspicion. The extension of the stop and consequent search and seizure thus violated the Fourth Amendment, and there is thus a reasonable probability that the drugs would have been suppressed had the video been available.

The errors the PCR Court are even more apparent when considering that Hines’s conclusory statements was found to establish reasonable suspicion alone. Even when pressed, Hines could not provide a sufficiently specific explanation as to how *all* the factors, singularly *and when taken together*, indicated Petitioner was engaged in drug activity. (App. p. 183; p. 162, ln. 24-25; p. 163, ln. 23— p. 164, ln. 2; p. 176, ln. 11-15; p. 181; p. 244; p. 250). Rather, Hines could only state he felt some type of criminal activity was going on and offered his conclusory opinion that it was highly likely to be drug activity. (App. p. p. 183; p. 163; pp. 250 – 251). Especially with the revelations gained through the video, Hines therefore did not have reasonable, articulable suspicion to extend the traffic stop. *Burgess*. 394

S.C. at 415, 714 S.E.2d at 921 (“[T]he State ‘must do more than simply label a behavior as ‘suspicious’ to make it so.’ The State must “be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.”); *Butler*, 353 S.C. at 393-94, 577 S.E.2d at 503 (rejecting the officer’s opinion that certain circumstances were suspicious because he could not articulate what his “*specific* suspicions” were and “failed to specify the particular facts upon which he based any fear that the passengers were armed and dangerous”). Moreover, the insufficiency of the totality of the circumstances to amount to reasonable suspicion cannot be saved by deferring to Hines’s experience in the face of all the video reveals. Although an officer’s experience and intuition is relevant to the reasonable suspicion determination, “a wealth of experience will [not] overcome a complete absence of articulable facts” and “[a]n officer’s impression that an individual is engaged in criminal activity, without confirmation, does not amount to reasonable suspicion.” *See Illinois v. Wardlow*, 528 U.S. 119, 125, (2000); *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997); *United States v. McCoy*, 513 F.3d 405, 415 (4th Cir. 2008).

The video reveals that Hines had heard back from dispatch and finished writing the warning ticket *before* the needless check on the VIN number. The traffic stop should have concluded at that point, but the video shows Hines did not then give the warning ticket to Petitioner or return his documentation. *See e.g., State v. Pichardo*, 367 S.C. 84, 98-99, 623 S.E.2d 840, 848 (2005) (“The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants’ clean records, three minutes before the officers sought consent to search... Accordingly, the officers should have ended the detention....[T]he failure to release the defendants violated the Fourth Amendment.”); *State v. Jones*, 64 S.C. 51, 610 S.E.2d 846 (Ct. 2005). Because the circumstances did not support reasonable suspicion and Hines had no reason to believe the car was stolen, Hines’s check on the VIN number unlawfully extended the stop further and appears more like a “fishing expedition” or an attempt to spot something additional inside the car that would supplement the circumstances enough to give rise to

reasonable suspicion or probable cause. Moreover, the traffic stop was further illegally extended when Hines continued to essentially bully Petitioner into giving consent to search after Petitioner had already declined and stated his desire to leave. Hines could not legally detain Petitioner after the first time he refused consent due to the lack of reasonable suspicion. The stop was further extended to conduct the dog sniff and through the repeated searches of the same areas of Petitioner's car. *See infra* p.18-20 herein.

**B. The video refutes the finding that the extension became consensual, and demonstrates Petitioner's consent was not voluntary, but was rather invalid as the exploitation of an illegal stop.**<sup>10</sup>

There is a reasonable probability the result of the suppression motion would have been different had the video been available because despite the trial court's findings, the video shows the extension of the stop could not alternatively be justified as consensual.<sup>11</sup> Based upon a similar factual basis, his consent to search was not voluntary and was rather invalid as the exploitation of an illegal detention.<sup>12</sup> First, the extension of the stop was not an constitutional encounter, Hines had seized Petitioner anew following the point at which the stop did or should have concluded. *See Pichardo*, 367 S.C. at 99-100, 623 S.E.2d at 848. Full realization of the stop's hazardous setting by way of the video also impacts these issues. A reasonable person in Petitioner's position would not have felt free to leave the encounter or refuse consent with an unrelenting officer an arms-length away while standing in a narrow lane of a busy intersection. Hines is also shown as staring hard at Petitioner and uses an impatient, stern tone when pressing for consent, making him noticeably and understandably uncomfortable. *See Rodriguez*, 323

<sup>10</sup> The points are addressed together as the support in the record for each issue is substantially the same.

<sup>11</sup> Neither the PCR Court nor Respondent address this or probable cause. Discussion of these issues is provided to underscore the PCR Court's errors in concluding Petitioner failed to prove prejudice. As in there is a reasonable probability the result of the suppression hearing would have been different because the video demonstrates the extension of the stop was not justified on either basis. Likewise, the video shows the search was not supported by voluntary, valid consent or probable cause. *See infra* p. 17-21.

<sup>12</sup> Also of note, the State would have been required at trial to meet a higher showing to prove Petitioner's consent was valid because as shown by the video, the extension of the stop was illegal. *See Pichardo*, 367 S.C. at 100-01, 105, 623 S.E.2d at 847-48, 851 (holding consent after an unconstitutional detention is "per se invalid unless it is both voluntary and not an exploitation of the unlawful detention...Proof of a voluntary consent alone is not sufficient.").

S.C. at 492, 476 S.E.2d at 166 (noting certain language or the tone of the officer's voice may indicate that compliance with the officer's request might be compelled). It is also not as though Hines had informed Petitioner that he was free to leave or could decline consent or decline with no strings attached. Instead, Hines stated if he did not want to give consent, he was free to leave but his car would stay to be seized, sniffed, and searched if the dog alerted. Hines also informed Petitioner he and his car could leave only if the dog did not alert. No reasonable person in Petitioner's position would have felt free to leave or decline consent given this qualification on their freedom and the seizure of their property. *Id.* at 491, 476 S.E.2d at 165 ("A reasonable person would not have believed he was free to walk away from two police detectives who informed him that all he needed to do was cooperate with their request to search his belongings and, if nothing incriminating was discovered, he would then be 'clear to go.'"). Hines's proposal does not present a voluntary choice or plan of action given that they were in the middle of a highway, Petitioner would be without any mode of transportation, and he was unfamiliar with the area and lived out of state. He had to consent because he truly had nowhere to go and literally could not walk away from the encounter. *See Spears*, 420 S.C. at 372, 802 S.E.2d at 807 ("A consensual encounter between a[n] officer and a person is predicated on the person being able to 'disregard the officer's questions and *walk away*.'") (italics in original). *See also Rodriguez*, 323 S.C. at 491-92.

Moreover, Petitioner's consent is per se invalid because it was the product of an extended stop without reasonable suspicion and there is nothing in the record to rebut that presumption. *See State v. Tindall*, 388 S.C. 518, 523-24, 698 S.E.2d 203, 206 (2010). *See also Pichardo*, 367 S.C. at 105, 623 S.E.2d at 851 (listing the factors relevant to whether consent is an exploitation of an illegal stop: "the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct.") With warning citation and documentation in hand, Petitioner was just turning to leave when Hines suddenly asked for consent to search; there were no intervening events/ *See State v. Williams*, 351 S.C. 591, 601-02, 605, 571 S.E.2d 703, 711 (Ct. App. 2002). Suddenly bombarding Petitioner with a request to search after giving him his documents and the warning ticket

also parallels the situation in *Pichardo*. In *Pichardo*, consent to search was found to be involuntary and invalid as an exploitation of an illegal detention when it was obtained after the officer had returned the driver's documents and said goodbye only to turn right back around and ask for permission to search. 367 S.C. at 102-05, 623 S.E.2d at 850-53. See also *Williams*, 351 S.C. at 602-03, 571 S.E.2d at 708-10. Further, there is scant if no legal basis for Hines's conduct because: 1) the stop was illegally extended without reasonable suspicion or as a consensual encounter; 2) dilatory tactics were employed, such as the needless VIN number check; and 3) in light of the bullying-like manner in which Hines gained consent, in which he presented Petitioner with a choice that was really no a choice at all.

C. Probable cause is not an alternative basis for the consequent search and seizure

Moreover, the video reveals that the search could not pass constitutional muster on the basis of probable cause as an alternative to consent. Probable cause certainly did not exist, because the circumstances failed to rise to the level of reasonable suspicion, a lower threshold than probable cause. Hines admitted even he knew he did not have probable cause to search, at least prior to the dog sniff: "You put them altogether and it paints the big picture....It raised reasonable suspicion. I didn't say I had probable cause [ ] that time he had drugs in the car." (App. p. 183, ln. 3-22). The video shows however that probable cause did not exist after the dog sniff either because the dog did not alert on Petitioner's car, let alone "aggressively" alert despite Hines's testimony to the contrary. See *United States v. Diaz*, No. 2:16-cr-00055-DCN, 2018WL1697386 (D.S.C. Apr. 6, 2018) (granting the motion to suppress stolen or fraudulent credit cards found during a traffic stop search because the drug dog did not alert and neither probable cause to search nor reasonable suspicion to detain occupants thereafter otherwise existed);<sup>13</sup> *United States v. Davis*, 2005 F.3d 345 (6<sup>th</sup> Cir. 2005) (holding "there were no grounds for the

<sup>13</sup> The District Court of South Carolina in *Diaz* expressed concern that officer testimony was the only evidence provided to establish the dog had alerted; as in this case, the video shows the dog did not alert. *Id.* at \*13. The *Diaz* Court gave no credence to an "indication" by the dog, a small behavior change, because according to the handler's testimony, this was not the behavior the dog had been trained to exhibit or even among other common alert behaviors used by other agencies. *Id.* at \*13-14. The *Diaz* Court thus refused to defer to the officer's opinion that the dog nonetheless alerted because "[t]o allow

police to continue to believe that the vehicle contained narcotics [or ultimately search] after [the drug dog] failed to alert"; although many courts have held that a drug dog's failure to alert does not automatically destroy probable cause, the continued detention and consequent search in this case violated the Fourth Amendment because probable cause to search did not otherwise exist and the officers had no other grounds to continue to detain them). *See also generally State v. Morris*, 411 S.C. 571, 582, 769 S.E.2d 854, 860 (2015) (Pleicones, J. dissenting) ("In my opinion, once the drug dog failed to alert, the already marginal 'objectively reasonable suspicion' to search the vehicle and its trunk evaporated.").

In light of the foregoing, the PCR Court findings are based upon errors of law and there is no evidence of probative value to support them. There is a reasonable probability the result of the suppression hearing would have been different because 1) the video contained invaluable cross-examination and impeachment material to Petitioner, and 2) the contradictions and additional information revealed by the video erodes the basis found to establish reasonable suspicion. The availability of the video also has other significant ramifications in that it reveals neither consent nor probable cause could alternatively justify the extension or the consequent search. Hence, the prejudice showing was satisfied because through the availability of the video, it is clear Hines illegally extended the stop, which consequently resulted in a search and seizure that violated Petitioner's Fourth Amendment rights. The narcotics and gun found are rendered inadmissible as fruit of the poisonous tree.

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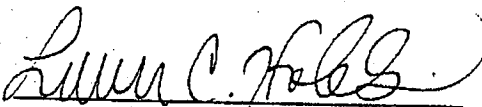
a search predicated upon an officer's interpretation of the utterly minimalist lesser showing exhibited by the dog...would be tantamount to permitting officers to issue their own search warrants based upon their own subjective analysis, something the Framers explicitly prohibited." *Id.* at \*14 (quoting *United States v. Wilson*, 995 F. Supp. 2d 455 (W.D.N.C. 2014) (a case very similar to *Diaz*) ("A court cannot accept a handler's subjective determination that a dog has made some otherwise undetectable alert, which conclusion would be...immune from review" [and] "unacceptable" [ ] "[g]iven the nature of the constitutional rights at issue.")). This concern about an officer's subjective and largely unsubstantiated opinion as the sole support presented for the alert parallels the same concerns here if the PCR Court's erroneous conclusion that the video would not have changed the outcome of the suppression hearing were to be affirmed.

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully urges this Court to reverse the PCR Court's Order of Dismissal, as well as his convictions and sentence, and remand this case for a new trial.

Respectfully submitted,

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