

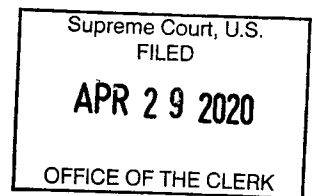
UNITED STATES SUPREME COURT

6-25-2020

No. 19-7431 **20-5187**  
(1:18 - CV-00163 - F.D.W.)

**ORIGINAL**

THOMAS LEE BRENNAN  
DAN RIVER PRISON WORK FARM  
981 MURRAY ROAD  
BLANCH, NC 27212



PETITIONER - APPELLANT

v.

ERIC A. HOOKS, ATTORNEY GENERAL OF THE STATE OF N. CAROLINA

RESPONDENT - APPELLANT

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PETITION FOR WRIT OF CERTIORARI

## Questions Presented for Review

- 1) Was Mr. Brennan's 6<sup>th</sup> amendment right to effective assistance violated when Mr. Brennan's Trial atty. Failed to file a timely complete notice or motion to suppress the key evidence at trial
- 2) Was Mr. Brennan's 6<sup>th</sup> amendment rights violated to effective assistance of counsel violated when his appellate atty. David Viers refused to argue or include his Trial atty's I.A.C. claim on Direct appeal,
- 3) Can law enforcement violate Mr. Brennan's 4<sup>th</sup> amendment rights at any time because of Mr. Brennan's permanent physical and mental disabilities,
- 4) Was Mr. Brennan's 4<sup>th</sup> amendment right against unlawful or illegal search and seizure violated when Mr. Brennan stopped on 4-2-14 by the Haywood County Sheriff's Dept. for more than 30 minutes w/out reasonable suspicion.

Questions Presented for Review Rule 12.1 (A)

- 1) Was Mr. Brennan's 6<sup>th</sup> amendment Right violated when his trial attorney failed to file a timely complete motion to suppress?
- 2) Was Mr. Brennan's 6<sup>th</sup> amendment Right violated when his appeals attorney failed to include the suppression issue in the initial appeal or file a motion of appropriate relief?
- 3) Was Mr. Brennan's 4<sup>th</sup> amendment Rights violated when officers Beck and Phillips extended the time of the stop without reasonable suspicion?
- 4) Was Mr. Brennan's 14<sup>th</sup> amendment rights violated when he was denied the opportunity to present evidence that would have defeated Detectives' assertions of reasonable suspicion?
- 5) Was Mr. Brennan's right to Due Process violated 5<sup>th</sup> amendment when his attorney failed to obtain a suppression hearing where he could have offered evidence and testimony to defeat Detectives Beck and Phillips' assertions of reasonable suspicion, when Chief District Court Judge Frank D. Whitney relied on officers Beck and Phillips' uncontested testimony at trial.

## INTRODUCTION AND SUMMARY OF THE ISSUES

In April 2014, Mr. Brennan was stopped for a minor traffic violation – failing to signal before turning – by two undercover drug detectives who were conducting surveillance on the home of a Haywood County man named Robert Guinn. As soon as the detectives stopped Mr. Brennan they immediately and completely abandoned the mission of the traffic stop – investigation into the traffic violation that warranted the stop – and began a sustained and detailed investigation aimed at detecting evidence of ordinary criminal wrongdoing. The detectives requested consent to search Mr. Brennan's car. When Mr. Brennan refused consent, he was seized for thirty minutes while the detectives called for back-up and tried to find a canine officer and dog to perform a drug sniff of the car. After prolonged efforts to find an available officer and dog, a canine officer arrived with a dog that alerted to the presence of drugs. The car was searched, and an hour after Mr. Brennan was stopped he was arrested.

Mr. Brennan's trial attorney filed a motion to suppress. However, the motion to suppress was untimely and the trial court dismissed it. Mr. Brennan was convicted and gave notice of appeal. On appeal his

appellate attorney did not raise the issue of trial counsel's ineffectiveness for failing to file a timely motion to suppress.

Mr. Brennan filed a motion for appropriate relief in Haywood County Superior Court and argued that his trial attorney was ineffective for failing to file a timely motion to suppress. The Honorable Bradley Letts denied the MAR without hearing after finding that the claim regarding trial counsel's ineffectiveness could have been raised by appellate counsel on direct review. Judge Letts' conclusion that Mr. Brennan's MAR was procedurally defaulted is legally erroneous in light of decisions of this Court and of our Supreme Court holding that claims of ineffective assistance of counsel cannot be raised on direct review, even if counsel's deficient performance is apparent on the face of the record, when the resolution of the claim requires further factual development.

The record in Mr. Brennan's case was not sufficiently developed to allow appellate counsel to raise the claim in the direct appeal because a contested hearing regarding the circumstances surrounding the traffic stop had never been held. Without a fully developed record on the merits of the underlying issue – the constitutionality of the length of the

traffic stop — appellate counsel was not in a position to challenge trial counsel's ineffectiveness for failing to file a timely and meritorious motion to suppress. The record available to appellate counsel regarding the traffic stop consisted of the trial transcript which contained testimony that defendant left a known drug house, failed to signal before turning, and appeared nervous. Those factors do not provide reasonable suspicion to extend the traffic stop. However, the evidence regarding those factors came from the testimony of the detectives during trial, where the question was one of guilt or innocence, not whether or not the police had constitutionally sufficient reasonable suspicion to extend the traffic stop. Without the incentive, or necessity, to develop testimony from the detectives regarding the issue of reasonable suspicion, the record lacks the testimony and evidence which appellate counsel would need in order to brief this issue in the direct appeal. In similar circumstances, our appellate courts have held these sort of claims must be raised in an MAR and resolved at an evidentiary hearing in Superior Court.

Accordingly, Judge Letts erred in denying Mr. Brennan's MAR. Mr. Brennan's case must be remanded for an evidentiary hearing on the

substantive issue — whether trial counsel was ineffective for failing to file a timely motion to suppress.

### **STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

#### ***A. The April 2, 2014 search and seizure of Mr. Brennan***

On April 2, 2014, the Haywood County Sheriff's Department was surveilling the home of Robert Guinn in the Barefoot Ridge community of Haywood County. (App. 77)<sup>1</sup> The Sheriff's Department had received calls from neighbors complaining about heavy traffic to and from Mr. Guinn's house and the Department was aware that Mr. Guinn was involved in several on-going narcotic investigations. (App. 77) Accordingly, narcotics detective Micah Phillips and general crimes detective Matthew Beck were undercover in an unmarked car in a pasture near the entrance to Mr. Guinn's neighborhood watching the home. (App. 75-79, 212-13)

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<sup>1</sup> Mr. Brennan appealed his judgment and commitment to this Court in 2015. A copy of his record on appeal was filed in case number COA15-885. The four volumes of his trial transcripts were uploaded by court reporter Debra Covelli and are available in COA15-885. However, to ensure compliance with Rule 21(c) of the Rules of Appellate Procedure, the transcripts and all relevant documents are appended to this petition.

At approximately 7:30 p.m. that evening, the undercover detectives saw a white Chevrolet Tahoe driven by Mr. Brennan leave the Guinn residence. Mr. Brennan drove away from the Guinn home, stopped alongside a white truck and chatted briefly with the driver, and then continued to the exit point of the neighborhood. Mr. Brennan stopped at a stop sign, looked in the direction of the undercover officers, looked back and forth and hesitated for 20-30 seconds, then pulled out onto the road. The detectives immediately followed him. Mr. Brennan began to tap his breaks and look at the undercover officers in the mirror. After driving for several blocks, Mr. Brennan abruptly slowed down, forcing Detective Beck to slow down rapidly, and turned into a church parking lot without signaling first. However, Mr. Brennan belatedly activated his turn signal during the middle of the turn. (App. 92, 104, 215-218)

At approximately 7:34 p.m., Detective Beck activated his blue lights and stopped Mr. Brennan for turning without signaling. (App. 92, 104, 219) As soon as the vehicles came to a stop, Mr. Brennan exited his vehicle. He was instructed to return to his car and he complied without incident. Detective Phillips approached the driver's



side door while Detective Beck stood at the rear driver's side corner of Mr. Brennan's car. (App. 93, 220) Detective Phillips thought Mr. Brennan was nervous, acting "very fidgety," and appeared to have constricted pupils. Mr. Brennan expressed anger and frustration with the police, telling Detective Phillips that the police were harassing him and he had been stopped the night before by another police department. (App. 93-94)

Detective Phillips asked for and received Mr. Brennan's license and immediately began questioning him about Mr. Guinn. Detective Phillips asked if Mr. Brennan had been to Mr. Guinn's home. Mr. Brennan said he had and explained he had been to the Guinn residence to pay an employee. Detective Phillips asked Mr. Brennan about methamphetamines at the Guinn residence. Detective Phillips asked Mr. Brennan about drug trafficking at the Guinn residence. Detective Phillips asked Mr. Brennan if he had any illegal substances in the car and if he would consent to a search. Mr. Brennan refused consent. (App. 93-94, 119-120, 220-21) In response, Detective Phillips informed Mr. Brennan that he would call for a canine officer. (App. 95)

The detectives called the Canton Police Department and requested a canine officer. They were told none were available. They called the Haywood Sheriff's Department and asked if any canine was available in any nearby department. Eventually, they were informed that a canine officer with the Maggie Valley police department was available. (App. 96, 221) The detectives also requested back-up and several other deputies began arriving to assist. (App. 95, 221, 265)

Mr. Brennan's driver's license was not returned to him. Neither detective wrote Mr. Brennan a ticket for making an unsafe turn. Although Detective Phillips testified that Mr. Brennan's pupils were constricted, thus possibly indicating the influence of narcotics, neither detective conducted field sobriety tests upon him. Instead Mr. Brennan was instructed to move away from his vehicle and wait next to an outbuilding. Mr. Brennan waited next to the outbuilding while the detectives were locating a canine officer, waiting for the canine officer to arrive, calling for back-up, and waiting for back-up to arrive. During this time, Mr. Brennan was angry and verbally argumentative. The detectives thought he might try to run or fight. He did neither. (App. 95-97, 221)

At approximately 7:52 p.m., Maggie Valley canine officer Michael Blaylock received a request to assist the detectives. (App. 105) At approximately 8:00 p.m., Officer Blaylock and his dog Cairo arrived at the church parking lot. (App. 105) Cairo performed an exterior drug sniff of the Tahoe and alerted on the lower left back corner of the car. (App. 110) The car was searched and the officers found methamphetamine and marijuana. At approximately 8:23 p.m., Mr. Brennan was arrested. (App. 105)

***B. The proceedings at trial***

On September 15, 2014, Mr. Brennan was indicted for possession with intent to manufacture, sell, and deliver methamphetamine, misdemeanor possession of marijuana, possession of drug paraphernalia, and attaining habitual felon status. (App. 431-33) On October 13, 2014, the state gave notice of its intent to use evidence obtained by virtue of the search of Mr. Brennan's car, thus triggering the ten-day time limit for filing a motion to suppress pursuant to N.C. Gen. Stat. § 15A-976(b). (App. 439) Over three months later, on February 2, 2015, Mr. Brennan's trial attorney filed a motion to suppress. (App. 434-37)

Mr. Brennan's jury trial began on February 9, 2015 before the Honorable Gary Gavenus in Haywood County Superior Court. On February 10, 2015, Judge Gavenus dismissed defense counsel's motion to suppress. Judge Gavenus found that the motion to suppress failed to comply with N.C. Gen. Stat. §§ 15A-976(b) and 15A-977(a) because it was not timely filed nor did the affidavit in support of the motion allege the facts necessary to support the motion. (App. 438-42) On February 12, 2015, Mr. Brennan was found guilty as charged and sentenced to 84 to 113 months incarceration. (App. 443-47) Mr. Brennan gave notice of appeal.

### *C. The proceedings on direct appeal*

On September 3, 2015, Mr. Brennan's appointed appellate attorney, David Weiss, filed a direct appeal brief with this Court raising one issue. Appellate counsel argued that the state produced insufficient evidence to sustain the conviction for possession with intent to sell, deliver, or manufacture methamphetamine. (App. 451) On May 3, 2016, this Court issued a unanimous unpublished opinion denying Mr. Brennan's argument and affirming his convictions and sentences. (App. 456)

*D. The motion for appropriate relief*

On April 7, 2017, Mr. Brennan filed a motion for appropriate relief in Haywood County Superior Court. (App. 457-68). The MAR alleged that trial counsel was ineffective for failing to timely file a motion to suppress with an appropriate supporting affidavit. (App. 462-66). The MAR further alleged that there were meritorious grounds for the motion to suppress and if trial counsel had timely filed an adequate motion to suppress, Mr. Brennan would have had a better outcome at trial and on appeal.<sup>2</sup> (App. 467)

The State did not file a response and a hearing was not held.

On July 20, 2017, the Honorable Bradley Letts issued an order denying the MAR. (App. 486). Judge Letts found that the claim regarding trial counsel's ineffectiveness could have been raised by appellate counsel on direct review. (App. 488). Judge Letts further found that MAR counsel did not provide justification for appellate

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<sup>2</sup> The MAR filed on behalf of Mr. Brennan does not contain page 12. Therefore, that version of the MAR is included in the Appendix at pages 457-470. Undersigned counsel obtained from MAR counsel a copy of the MAR with the missing page and has included it in the Appendix at pages 471-485.

counsel's failure to raise the claim on direct review. (App. 488) Judge Letts therefore concluded that the MAR was procedurally defaulted. (App. 488-89)

On August 16, 2017, Mr. Brennan gave notice of appeal. (App. 491) On August 24, 2017, the Office of the Appellate Defender was appointed to represent Mr. Brennan in the filing of a petition for writ of certiorari to this Court and thereafter was assigned to undersigned counsel. (App. 492-94)

#### **REASONS WHY THE WRIT SHOULD ISSUE**

Appellate Rule 21(a)(1) provides "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief." Certiorari should be allowed "when the ends of justice will be ... promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924).

This Court should issue its writ of certiorari to review the trial court's order denying Mr. Brennan's motion for appropriate relief. Review may be had under Appellate Rule 21 and § 15A-1422.

whether his trial attorney provided him with the effective assistance of counsel. Judge Letts erred in denying Mr. Brennan an evidentiary hearing on his MAR and in concluding that appellate counsel was in a position to raise a claim of trial counsel's effectiveness on direct review. Accordingly, this matter must be remanded to the Superior Court with instructions to fully address whether trial counsel's performance was deficient and, if so, if that deficient performance prejudiced Mr. Brennan.

**II. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO REVIEW THE JULY 20, 2017 ORDER DENYING MR. BRENNAN'S MOTION FOR APPROPRIATE RELIEF BECAUSE MR. BRENNAN HAS A MERITORIOUS FOURTH AMENDMENT CLAIM.**

***A. Introduction***

If the allegations in Mr. Brennan's MAR are proven, Mr. Brennan was unconstitutionally seized when two undercover detectives stopped him for a moving violation and immediately diverted from the mission of the stop into a sustained drug interdiction which extended the scope and duration of the stop far beyond that necessary to resolve the basis for the stop – Mr. Brennan's failure to signal before turning. The

detectives asked for consent to search Mr. Brennan's car and when he refused, the detectives began searching for a canine officer and dog to conduct a sniff of the exterior of the car. Mr. Brennan was detained for thirty minutes while the detectives conducted their on-scene investigation and awaited the arrival of the canine officer and dog. The detectives lacked reasonable articulable suspicion that criminal activity was afoot so as to justify this prolonged detention of Mr. Brennan.

When a police officer stops an automobile and detains the occupants briefly, the stop amounts to a seizure within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10, 135 L.Ed.2d 89 (1996). "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." *Whren*, 517 U.S. at 810. Because a traffic stop "is more analogous to an investigative detention than a custodial arrest," a traffic stop, whether based on probable cause or reasonable suspicion, is governed by the standard of *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968). *United States v. DiGiovanni*, 650 F.3d 498, 506 (4th Cir. 2011), *abrogated in part on other grounds by Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, 191 L.Ed.2d 492 (2015).



Pursuant to *Terry*, the propriety of a traffic stop is analyzed in two parts: (1) whether the police officer's actions were justified at its inception and (2) whether the police officer's subsequent actions were reasonably related to the scope of the circumstances that justified the stop. *DiGiovanni*, 650 F.3d at 506. Under *Terry*'s first prong, a police officer's actions in stopping a driver are justified if the officer observes the driver commit a traffic violation. *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008). Under *Terry*'s second prong, the seizure must be limited both in scope and duration. *DiGiovanni*, 650 F.3d at 507, citing *Florida v. Royer*, 460 U.S. 491, 500, 75 L.Ed.2d 229, 238 (1983). The parameters of the scope and duration limitations require that an officer act diligently in accomplishing the purposes of the stop; that is, investigating whether a traffic infraction occurred and issuing a ticket. *DiGiovanni*, 650 F.3d at 508-509. If a police officer extends the stop in order to investigate a matter outside the scope of the initial stop, the officer must have reasonable suspicion that criminal activity is afoot, or obtain valid consent. *Branch*, 537 F.3d at 337; *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (2008).

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In Mr. Brennan's case, the police did not act diligently in investigating the traffic violation and extended the scope and duration of the stop without the necessary reasonable suspicion to do so.

***B. The MAR alleged sufficient facts to show that had the motion to suppress been timely filed it would have been granted. Thus, Judge Letts erred in denying the MAR without an evidentiary hearing and in concluding that appellate counsel could have raised the claim in Mr. Brennan's direct appeal.***

Mr. Brennan's MAR alleged sufficient facts that, if proved, would show that had trial counsel timely filed the motion to suppress, it would have been granted. However, without an evidentiary hearing the merits of this claim cannot be resolved by our appellate courts either on direct review or through this petition for writ of certiorari.

An evidentiary hearing is necessary to resolve multiple factual issues. Undersigned counsel asserts that the evidence on the record supports the Petitioner's argument herein, but recognizes that at trial the prosecution did not have the same incentive to develop facts regarding the circumstances of the stop, the factors regarding reasonable suspicion, and the officer's impressions and actions, that the prosecutor would have at an evidentiary hearing on this issue. Therefore, at an evidentiary hearing the prosecutor may have contrary

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evidence to that which is currently reflected on the record. At an evidentiary hearing the court may draw inferences unfavorable to the defendant. Additionally, at an evidentiary hearing it may develop that trial counsel may have had a strategic reason for the failure to timely file the motion to suppress. See *State v. Gerald*, 227 N.C. App. 127, 131, 742 S.E.2d 280, 283 (2013) *rev'd*, 2013 N.C. LEXIS 1519, at \*2 (N.C. Aug. 27, 2013)(State posited several possible strategic reasons why trial counsel may have failed to file a motion to suppress, including allowing trial counsel the benefit of cross-examination of law enforcement officers for their actions during the search and seizure). And, when a claim gives rise to such questions of trial strategy, "an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine such issues." *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001).

These are issues which cannot be definitively determined from the cold record. Thus, appellate counsel was not in a position to raise this claim on direct appeal and Judge Letts erred in concluding to the contrary.

**C. The state's evidence was that the police observed Mr. Brennan commit a traffic violation.**

The detectives testified they observed Mr. Brennan begin his turn without signaling, which forced Detective Beck to brake suddenly to avoid hitting Mr. Brennan, thus creating the justification for the stop, and satisfying the first prong of the Terry analysis. However, once Mr. Brennan was stopped, the detectives immediately and "definitively abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation," *DiGiovanni*, 650 F.3d at 507, quoting *United States v. Everett*, 601 F.3d 484, 495 (6th Cir. 2010), which violated Mr. Brennan's Fourth Amendment rights.

**D. The seizure of Mr. Brennan was neither limited in scope nor duration.**

Mr. Brennan's MAR alleged sufficient fact that, if proved, would show that his seizure was neither limited in scope nor duration. To satisfy the constitution, Terry's second prong requires that a seizure be limited in both scope and duration. This is determined by a reviewing court asking two questions. *First*, were the officer's actions subsequent to the stop reasonably related in scope to the circumstances that justified the stop? *DiGiovanni*, 650 F.3d at 507. *Second*, was the



duration of the stop limited to the time reasonably required to complete the mission of the traffic stop? *Id.*

The resolution of these questions is answered by reviewing the totality of the circumstances in which the following factors are considered: (1) what was the officer's diligence in investigating whether the traffic infraction occurred and in issuing a ticket; (2) what was the subject matter of the unrelated questing and was it conducted out of officer safety concerns; (3) was the officer's overall course of action, viewed objectively and in its totality, reasonably directed towards the proper ends of the stop; (4) was the stop extended beyond the time necessary to effectuate the purpose of the stop; and (5) was the delay *de minimis*. *DiGiovanni*, 650 F.3d at 508-09. Applying the totality of the circumstances test to the trial evidence regarding the stop in this case establishes that at every turn Detectives Phillips and Beck chose to conduct an extensive, time-consuming, and ultimately unconstitutional, drug investigation instead of a traffic infraction investigation.

The first factor in the totality of the circumstances test is diligence – did the officer act with diligence in investigating whether the traffic



infraction occurred and issuing a ticket. This is critical because authority for the seizure ends when the tasks associated with the traffic infraction are, or reasonably should have been, completed. *Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 191 L.Ed.2d 492, 498 (2015). "[D]iligence is not present where the police officer 'definitively abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation' or where the unrelated questions 'constituted the bulk of the interaction' between the police officer and the defendant." *DiGiovanni*, 650 F.3d at 508-09, quoting *Everett*, 601 F.3d at 495.

After stopping Mr. Brennan, the detectives made no effort to investigate Mr. Brennan's failure to signal. They never wrote Mr. Brennan a ticket, or gave him a warning, for the traffic infraction. They did not ask for his registration or proof of insurance. They did not perform a driver's license check. The detectives did nothing to investigate whether the infraction occurred or why it occurred. They simply stopped Mr. Brennan, took his driver's license, abandoned any investigation regarding the traffic violation, and immediately undertook



a lengthy investigation regarding drugs and the individual whose home they were surveilling — Mr. Guinn. (App. 119)

Once Detective Phillips had Mr. Brennan's driver's license, he was seized and no longer free to leave. *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2007). After obtaining his license, the detective then immediately began questioning Mr. Brennan about drugs. Mr. Brennan was asked if he had been at the Guinn home. Mr. Brennan was asked questions about the Guinn home. Mr. Brennan was asked about drug trafficking at the Guinn home. Mr. Brennan was asked about methamphetamines at the Guinn home. Mr. Brennan was asked if he had any illegal substances in his car. Mr. Brennan was asked for consent to search his car and when he denied to give consent, he was told a canine officer would be called. Back-up officers were called and arrived. (Tpp. 93-94, 119-120, 220-21) None of those actions or questions were related to the justification for the stop. Rather, the actions and questions bespeak an utter lack of diligence on the part of the officers. *DiGiovanni*, 650 F.3d at 510.

The second factor in the totality of the circumstances test concerns the subject matter of the questioning — what was the subject matter of the unrelated questioning and was it conducted out of officer safety concerns. The constitution tolerates police inquiries during a traffic stop insofar as those questions relate to the “mission” of the stop — addressing the traffic violation that warranted the stop. *Rodriguez*, \_\_\_ U.S. at \_\_\_, 191 L.Ed.2d at 498.

In this case, the subject matter of the unrelated questioning was confined to two topics: drugs and Mr. Guinn’s house. None of the questions related to the mission of the stop — investigating Mr. Brennan’s failure to signal before turning. None of those questions addressed officer safety concerns. The only officer safety matter occurred immediately after Mr. Brennan was stopped. The detectives testified that Mr. Brennan stopped his car, exited it, and began to walk towards their car. Because officer safety requires a driver to remain in his vehicle, they instructed him to return to his car, and Mr. Brennan complied without incident. (App. 92-93, 219)



The third factor is whether the officer's overall actions, viewed both objectively and in its totality, were reasonably directed towards the proper ends of the stop. In this case it is clear that the entirety of the detectives' actions were not directed towards resolving the basis for the stop — Mr. Brennan's failure to signal before turning. The detectives' utter failure to pursue anything remotely related to the traffic violation establishes that the purpose of the stop was general drug interdiction. This is underscored by the fact that both detectives testified that after stopping Mr. Brennan and observing his behavior (his speech patterns, pupils, and nervous fidgety behavior), they believed him to be under the influence. (App. 203) However, the detectives also testified that they decided they would neither arrest him for driving under the influence nor administer field sobriety tests. (App. 195, 234) The failure of the detectives to act upon Mr. Brennan's potential impairment indicates they were not interested in the constitutional mission of the stop and seizure — enforcement of the traffic code. Rather, they had one purpose — unconstitutional general drug interdiction.

The fourth factor is duration — whether the stop was extended beyond the time necessary to effectuate the purpose of the stop. A routine traffic stop for a minor traffic infraction should result in an equally abbreviated detention, where things such as a driver's license check, registration, insurance, and warrant check are performed. See, *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004). Mr. Brennan was stopped at 7:34 p.m. and the canine officer arrived at 8:00 p.m. (App. 93, 105) That period of time far exceeded the time necessary to write a ticket for the failure to signal. In fact, had the officers written Mr. Brennan a ticket (or issued a warning) for the traffic infraction and returned his license to him, Mr. Brennan would have left the scene before the canine officer arrived. If the detectives believed Mr. Brennan was driving under the influence, as they testified his behavior might have suggested, they could have performed field sobriety tests. If they had done so and he had passed, they would have written him a ticket (or issued a warning) for the traffic infraction, returned his license, and Mr. Brennan would have left the scene before the canine officer arrived. Alternatively, had he failed the sobriety tests, the detectives would have arrested him, his car would have been



impounded and an inventory search performed at which time the controlled substances would have been discovered. But under each scenario, investigation of the constitutional purpose for the stop, that is, enforcement of the traffic code and assurance that drivers are operating vehicles in a safe and lawful manner, would have been completed well under the time that Mr. Brennan remained seized while the detectives waited for the canine officer to arrive. Clearly, the stop was extended beyond the time necessary to effectuate its purpose.

The fifth factor is whether the delay was *de minimis*.<sup>5</sup> While there is no specific time limit on the length of traffic stops, a delay that can be characterized as *de minimis* will not be recognized as a Fourth Amendment violation. *United States v. Mason*, 628 F.3d 123, 132 (4th Cir. 2010). The thirty minute delay caused by: (1) the detectives'

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<sup>5</sup> At the time of Mr. Brennan's arrest, the totality of the circumstances test included the *de minimis* factor. However, after Mr. Brennan's trial, case law moved even further in his favor on this issue. *Rodriguez*, \_\_\_ U.S. \_\_\_, 191 L.Ed.2d 492 (2015). *Rodriguez* abrogated the *de minimis* factor as a part of the totality of the circumstances test. *United States v. Bowman*, \_\_\_ F.3d \_\_\_, \_\_\_, 2108 U.S. App. LEXIS 5194, \*27 (March 1, 2018). However, because it was a factor to be evaluated by a reviewing court at the time of Mr. Brennan's 2014 traffic stop, it will be addressed herein.

questioning of Mr. Brennan regarding a crime completely unrelated to the event that provided justification for the stop; (2) locating a canine officer and dog; and, (3) the time spent waiting for the canine officer and dog to arrive, immeasurably extended the time Mr. Brennan was detained and violated his constitutional rights.

***E. The detectives lacked reasonable suspicion that criminal activity was afoot.***

Mr. Brennan's MAR alleged sufficient fact which, if proved, would show that the officers lacked reasonable suspicion that criminal activity was afoot so as to prolong the traffic stop. North Carolina law establishes that an officer may detain a driver by prolonging a traffic stop if the officer has "reasonable articulable suspicion that illegal activity is afoot." *State v. Reed*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2018 N.C. App. LEXIS 52, \*13 (2018), quoting *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166-67 (2010). The reasonable suspicion standard is objective and entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life. *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004). "Factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion." *DiGiovanni*, 650 F.3d at



511, citing *United States v. Sokolow*, 490 U.S. 1, 9, 104 L.Ed.2d 1, 11 (1989). But those factors "collectively must serve to eliminate 'a substantial portion of innocent travelers,'" *DiGiovanni*, 650 F.3d at 511, citing *Foreman*, 369 F.3d 781, in order to give rise to individualized suspicion of criminal activity.

In deciding to abandon the traffic infraction purpose of the stop to allow for an investigation into drugs, the detectives relied on the following facts: (1) Mr. Brennan's behavior; (2) Mr. Brennan's driving; and, (3) Mr. Brennan's act of immediately exiting the vehicle when the detectives stopped him. (App. 122) Those factors provide insufficient indicia of suspicious activity for the following reasons.

First, Detectives Phillips' and Beck's ability to accurately evaluate factors which constitute reasonable suspicion is unreliable in light of their training and experience as well as the Haywood County Sheriff's Department's procedures regarding traffic stops. During trial, Detective Phillips explained the Haywood County Sheriff's Department's procedures regarding searches and seizures. He testified that when an individual refuses to consent to a search of their automobile, the "normal procedure" is to then call for a canine officer

and dog to conduct a sniff of the exterior of the vehicle. (App. 122) Under that procedure, the constitutional choice to give or withhold consent is illusory in Haywood County. With every traffic stop a driver is faced with the choice, should a sheriff's deputy request to search their car, of consenting and allowing their car to be searched, or withholding consent and remaining seized until a drug dog arrives to perform a sniff of the exterior of the vehicle. Either choice leads to the same outcome: violation of the driver's Fourth Amendment right to be free from unreasonable searches and seizures.

Additionally, Detective Phillips was an undercover drug detective who had made over 200 drug arrests and Detective Beck was an undercover general crimes detective. Neither detective was a patrolman, neither detective was assigned to traffic enforcement, and their mission that night was surveillance of a suspected drug trafficker's home. (App. 75-76, 197, 202, 207, 213-14, 230) It is unsurprising that the detectives devoted the entirety of the traffic stop to general drug interdiction in light of the fact that their background, training and expertise did not provide them with the necessary tools to conduct constitutional traffic stops.

Because the reasonable suspicion standard is an objective, commonsense one, the law recognizes and affords trained and experienced officers in the field a degree of deference regarding the presence or non-existence of reasonable suspicion. *Foreman*, 369 F.3d at 782; *Williams*, 336 N.C. at 116, 726 S.E.2d at 167. However, officers in the field who are ignorant of, or in willful disregard of, the constitution are not entitled to that deference. That is because their lack of understanding of the constitutional limits on the right to search and seizure casts doubt upon their credibility and ability to judge whether or not reasonable suspicion exists.

Second, North Carolina case law establishes that these factors are insufficient to provide reasonable suspicion to extend the stop. In *State v. Bedient*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 786 S.E.2d 319, 325 (2016), this Court recently held that a driver's nervousness, twitching, and stuttering combined with the fact that she had been seen with a known drug dealer (who was not in the car at the time of the stop) were not sufficient circumstances to provide reasonable suspicion to extend the traffic stop. And, in *State v. Myles*, 188 N.C. App. 42, 47, 50, 51, 654 S.E.2d 753, 756, 757, 758 (2008), this Court found that the defendant's



extremely nervous behavior, specifically his fast heartbeat, and the fact that his rental car was one day overdue, did not provide the officer with reasonable suspicion to extend the traffic stop.

*Third*, Mr. Brennan's driving, his behavior, and his exit from the vehicle immediately after being stopped was explained by Mr. Brennan to the detectives at the time of the stop. Mr. Brennan was upset and angry. He had been stopped by the police the night before and subjected to a search of his vehicle. He felt that the police were harassing him. (App. 93-94) As a result, he engaged in behavior commensurate with those feelings. When he left the Guinn residence and was immediately followed by an unmarked police car, he was alert and aware of being followed and watched the car closely. When the detectives stopped him, he immediately exited his car and began expressing his displeasure and frustration to the detectives. And, throughout the lengthy seizure to which he was subjected, Mr. Brennan continued to express those feelings. In light of those circumstances, the detectives' articulated facts "simply do not eliminate a substantial portion of innocent travelers." *United States v. Brugal*, 209 F.3d 353, 361 (4th Cir. 2000)(en banc).



Grounds on which jurisdiction is invoked

Under the United States Constitution Mr. Brennan has the right to effective assistance of Counsel; a defendant's right to counsel is violated if his attorney makes a mistake that a reasonable attorney would not have made and if there is a reasonable probability that the procedure would have turned out differently for the mistake.

In Mr. Brennan's case his trial attorney unreasonably failed to comply with statutory requirements for the motion to suppress the state's key evidence. Had he acted reasonably, there is a reasonable probability that either the court would have granted the motion to suppress or he would have received a new trial on direct appeal.

The Fourth amendment of the United States Constitution protects the right of the people against unreasonable searches and to secure their persons, houses, papers, and effects against unreasonable searches and seizures. The seizure of a driver past the scope of a traffic stop without his consent or reasonable articulable suspicion that illegal activity is afoot, is unreasonable. Here the officers immediately abandoned the purpose of the stop and started an illegal drug investigation without reasonable suspicion at court the officers testified that Mr. Brennan was impaired but failed to follow through with this investigation also. yet the court would speculate with out any evidence. at this point Mr. Brennan's seizure was illegal, these circumstances give the United States Supreme Court jurisdiction.

Reference to the Opinions of lower Courts

A

Rule, 14.1 (D)

In Summary

at approx. 7:30 PM on April 2<sup>nd</sup> 2015 Mr. Brennan was stopped after leaving a residence that Hayward Cnty. narcotics officers were surveilling. Detectives immediately abandoned the purpose of the stop "turning w/out signaling", officers started an illegal unrelated drug investigation. Mr. Brennan was detained 30 minutes or more while officers located a drugs dog because Mr. Brennan refused permission for officers to search his vehicle. The dog arrived at approx 8:00 PM the dog hit on the vehicle. Mr. Brennan was arrested for Poss. w/intent of methamphetamine. On 2-2-15 appointed counsel filed a motion to suppress. On 2-9-15 a hearing was held to determine if the motion was filed properly. The court determined the motion was filed late and it was incomplete, the trial judge dismissed the motion allowing illegally seized evidence into trial.

B

Mr. Brennan was convicted of "Poss. w/ intent Habitual Felon" and sentenced to 84 - 113 months. 2-13-15 Mr. Brennan gave N.D.A. and asked appointment of counsel to file a M.A.R. on the grounds his trial atty had filed a late and incomplete Motion to suppress arguing I.A.C. The appellate defender appointed David Viess who informed Mr. Brennan M.A.R. could only be filed after the appeals process was over and he refused to include his trial attorney's failure to file a proper motion to suppress in Mr. Brennan's appeal. In May of 2016 N.C. Court of appeals Denied Mr. Brennan's appeal. In March 2017 Mr. Brennan filed a M.A.R. arguing I.A.C. for the suppression issue. On July 17, 2017 Superior Court Judge Letts Denied the M.A.R. on the grounds that Mr. Brennan should have included the issue on his initial appeal.

C

Mr. Brennan appealed. On August 8th 2017 the appellate  
defender appointed Jane Allen. On March 2018 Jane Allen  
filed a writ of Certiorari to the N.C. appeals Court. The petition  
was denied w/out explanation, Mr. Brennan filed a Habeas Petition  
in April 2018. Chief District Judge Frank D. Whitney Denied the petition  
In his opinion the Judge stated "The state had met the bare  
minimum of reasonable suspicion."

This is where Mr. Brennan argues his rights were violated  
to effective assistance of Counsel. Judge F.D.W. is only relying on  
testimony from the police for issues the police abandoned. Mr  
Brennan was denied the opportunity to give testimony and present  
evidence that could have defeated these officers assertions  
of reasonable suspicion. At trial Mr. Brennan was not charged  
with any crime related to these allegations. His objective

D

was to prove his innocence not the legality of the search and seizure on April 2<sup>nd</sup> 2014.

During the sentencing phase there was some testimony of Mr. Brennan's being shot. Mr. Brennan sustained severe nerve damage and was being treated for it. Most of these officers' assertions were based on Mr. Brennan's permanent disabilities. If officers had pursued these suspicions Mr. Brennan would have been able to defend himself. Mr. Brennan didn't see the necessity of disputing these allegations and trial atty. told him not to testify.

It is also worthy to note that there was video of the interrogation of Mr. Brennan that prosecutors intentionally failed to introduce into evidence. This video would clearly show Mr. Brennan suffered neurological impairments not intoxication, combined with these officers unprofessional conduct this case should be allowed to move forward.

In Conclusion

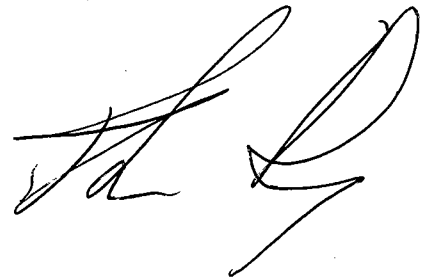
The Haywood County Sheriffs Detectives failed to execute a legal traffic stop by immediately abandoning the reason for the stop, also failing to investigate their suspicions of Brennan's impairment, illegally extending the time of the stop to bring a Drug Dog to the scene. Violating Mr. Brennan's 4<sup>th</sup> amendment Rights.

Mr. Brennan's trial attorney Jonathan Song failed to file a timely complete motion to suppress the key evidence. Violating Mr. Brennan's 6<sup>th</sup> amendment Rights.

Mr. Brennan's appellate attorney David Weiss failed to file a M.A.R. or include Mr. Brennan's trial attorney's I.A.C. claim for not filing a proper motion to suppress. Violated Mr. Brennan's 6<sup>th</sup> and 5<sup>th</sup> amendment Rights.

F.

Had Mr. Brennum's trial and appeal attorneys acted properly Mr. Brennum would have been granted an Evidentiary Hearing in the M.A.R. Court.

A handwritten signature in cursive script, appearing to be 'J. L. G.', written in dark ink.

## Conclusion and Prayer for Relief

Mr. Brennan's rights under North Carolina and United States Constitution were violated when his trial attorney failed to act as a reasonable attorney and properly move to suppress the state's essential evidence. But for the failure to file a proper motion to suppress, there is a reasonable probability that Mr. Brennan would have had a better outcome on appeal. On appeal his appellate attorney failed to include this matter in Mr. Brennan's 2018 initial appeal, denying Mr. Brennan's right to effective assistance of counsel.

Therefore, Thomas Lee Brennan moves the Court:

1. Grant this writ of certiorari
2. Vacate his convictions in the above matters,
3. Order a new trial
4. Appoint counsel
5. Allow Mr. Brennan to proceed "in forma pauperis"
6. Grant any further relief the Court deems proper.

Respectfully Submitted

14 Day of May 2020

Thomas Brennan

