

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Kendall Deval Martin — PETITIONER
(Your Name)

vs.

state of Mississippi — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Mississippi Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kendall Deval Martin
(Your Name)

P.O. Box 1419
(Address)

Leakesville, MS. 39451
(City, State, Zip Code)

601-394-5600
(Phone Number)

QUESTION(S) PRESENTED

- WHETHER THE TRIAL COURT ERRED IN OVERRULING MARTIN'S MOTION TO SUPPRESS HIS STATEMENTS AND THE EVIDENCE SEIZED IN STOP OF HIS VEHICLE ON OR ABOUT MARCH 27, 2013?

- WHETHER THE STATE FAILED TO PROVE THAT MARTIN WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED 99-19-81?

- WHETHER IF ANY STATUTE RULE OR REGULATION OF THE STATE OF MISSISSIPPI DEFINES AND OR REQUIRES OR AUTHORIZES THE PLACEMENT OF FOG LINES ON THE STATE'S PUBLIC STREETS ROADS OR HIGHWAYS? [SEE ALSO APPENDIX H AS TO THIS AND FOLLOWING QUESTIONS.]

- WHAT STATUTE IF ANY DESIGNATES A FOG LINE AS THE LIMIT OF THE ROADWAY ON WHICH IT IS PERMISSIBLE TO DRIVE?

- IS THE CARELESS DRIVING STATUTE MISSISSIPPI CODE SECTION 63-12-1213 UNCONSTITUTIONALLY VAGUE WHEN APPLIED TO MARTIN'S OPERATION OF THE VEHICLE HE WAS DRIVING AT THE TIME OF AND IMMEDIATELY PRIOR TO HIS ARREST IN THIS CASE?

- WHETHER A MAJORITY OF THIS COURT DECIDE THAT MARTIN HAVING BRIEFLY CROSSED I-20 FOG LINE WITHOUT ACTUALLY LEAVING THE ROADWAY AND THEREAFTER DRIVING REAL CLOSE TO THE FOG LINE AS DESCRIBED IN THE TESTIMONY OF DEPUTY SHERIFF JASON JOHNS DID NOT CONSTITUTE A CRIME WHAT LAWFUL JUSTIFICATION IF ANY DID DEPUTY JOHNS HAVE FOR THE TRAFFIC STOP IN THIS CASE?

QUESTION(S) PRESENTED

- WAS DEPUTY JOHNS'S TRAFFIC STOP OF MARTIN'S VEHICLE PRETEXTUAL? MORE SPECIFICALLY DEPUTY JOHNS TESTIFIED I'M ASSIGNED TO RANKIN COUNTY ON THE DRUG TASK FORCE AND THATS ALL I DO. HE FURTHER TESTIFIED I'VE BEEN DOING DRUG INTERDICTION WORK PRETTY MY ENTIRE CAREER. HE EXPLAINED DRUG INTERDICTION THUSLY WE ENFORCE TRAFFIC VIOLATION LAWS AND AS A RESULT OF THAT WE TRY TO APPREHEND CRIMINALS DURING THAT PROCESS. GIVEN THIS TESTIMONY AND THE FACT THAT MARTIN WAS NOT CHARGED WITH THE OFFENSE OF CARELESS DRIVING WHY SHOULD THIS COURT NOT CONCLUDE THAT JOHNS TRAFFIC STOP OF MARTIN WAS ANYTHING OTHER THAN A MEANS TO THE END OF LOOKING FOR ILLEGAL DRUGS IN MARTIN'S VEHICLE AND, THEREFORE, PRETEXTUAL?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

See attached and incorporated "Exhibit A"
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OTHER

"Exhibit A"

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at No. 2015-KA-00772-SCT; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Mississippi Supreme court appears at Appendix A to the petition and is

- ☐ reported at No. 2015-KA-00772-SCT; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was 10-19-17.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: 2-8-18, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment United States Constitution

Section 23 of the Mississippi Constitution

Mississippi Code Annotated Sections 41-29-141, 99-19-81

STATEMENT OF THE CASE

The following is quoted verbatim from Brief of Appellant/Petitioner in the Supreme of Mississippi:

This appeal proceeds from the Circuit Court of Rankin County, Mississippi, and a judgment of conviction for possession of marijuana with intent to sell entered against Kendall Martin following a jury trial held on March 4, 2015, the Honorable William Chapman, Circuit Judge, presiding. (C.P. 89). Martin was adjudged both a habitual offender under Mississippi Code Annotated section 99-19-81 and a subsequent drug offender under Mississippi Code Annotated 41-29-147. On April 16, 2015, he was sentenced to serve a term of sixty (60) years in the custody of the Mississippi Department of Corrections as a non-violent habitual offender without the possibility of parole, probation, or any other form of early release, and a fine in the amount of five thousand (\$5,000.00) was imposed, but suspended and all costs, fees and assessments were waived by the Court. (C.P. 89). The trial court denied Martin's motion for a new trial and/or motion for a judgment notwithstanding the verdict. (C.P. 126).

REASONS FOR GRANTING THE PETITION

See attached and incorporated pages 6-18

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STATEMENT OF THE FACTS

Around 4:55 p.m. on March 27, 2013, Kendall Martin ("Martin") was traveling eastbound on I-20 near the 66 mile marker in a 2013 Chevy SUV. (Tr. 124). Martin was travelling in the right-hand lane behind a tanker truck. (See video Exhibit of Traffic Stop at 16:55). Officer Jason Johns ("Officer Johns") of the Flowood Police Department was working with the Drug Task Force of the Rankin County Sheriff's Department that afternoon. (Tr. 123). At trial Officer Johns claimed that he saw Martin's vehicle cross over the white fog line twice, once before the tape began and once after he had already allegedly decided to stop Martin's vehicle.¹ (Tr. 126-127) Officer Johns testified that he did not activate his blue lights when he initially witnessed Martin cross the fog line, he instead pulled up beside Martin's vehicle to allegedly "make sure he was wearing his seatbelt" and to see if there were any other occupants in the vehicle. (Tr. 125). Officer Johns testified that he then pulled in behind Martin and cut his blue lights on and pulled him over. (Tr. 126). When asked whether his observation of Martin initially crossing the fog line was recorded on his dash camera, he testified that it only goes back fifteen seconds before he activated his blue lights and that the initial infraction for which he allegedly initiated the stop was not recorded because it occurred before the recording began. (Tr. 126). The dash camera video of the stop began recording at 16:55:51. (See Video of Traffic Stop). The recording begins by showing Officer Johns' vehicle in the left-hand lane traveling eastbound with a tanker truck beside him in the right-hand lane. (*Id.*) The video then shows Officer Johns slow down after having obviously passed Martin's vehicle and reduce his speed even further to get behind Martin's vehicle. (*Id.*) Finally, the video shows Officer Johns pull in behind Martin and pull him over. *Id.*

At the suppression hearing and at trial, the only reason that Officer Johns gave for pulling over

¹ Officer Johns testified that at the suppression hearing on February 17, 2015, that his dash cam recorder goes back twenty seconds after he activated his blue lights. (Tr. 28)

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Martin was that he allegedly crossed the fog line. (Tr. 28, 126, 146). Other than Officer John's statement, the state submitted no evidence which corroborated his testimony that he witnessed Martin cross the fog line prior to the recording. The dash camera in Officer Johns' vehicle clearly contradicts Officer John's testimony. (See Video of Traffic Stop, Tr. 126-127).

Officer Johns admitted that he had not determined to stop Martin until after he pulled along beside him and looked in his vehicle. (Tr. 152). At trial, Officer Johns also reluctantly admitted to saying on the recording that, "I wasn't even going to stop that mother fucker, and I said, no, I'm going to stop him." (Tr. 151). Officer Johns was ultimately asked whether his stop was the result of racial profiling based on his report of the incident and his description of the events. (Tr. 152). Specifically, the following exchange took place when Officer Johns was subjected to cross-examination at trial:

Q. ...I'm asking you were you or were you not going to pull my client over after you saw him cross the fog line the first time?

A. I don't know. Probably I might have let him go, but when he hit it again, I mean, that did it.

Q. Yes, sir. But isn't it true that had you not pulled alongside my client and in the video that we just watched, in fact, my client was behind you and came into view, which indicates that your patrol vehicle was ahead of my client's vehicle?

A. Because I activated --

Q. Yes, sir.

A. -- and it backs up when I record.

Q. What I'm saying is, when my client's

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vehicle first comes into frame. --

A. Right.

Q. -- your vehicle was at least two car lengths ahead of my client. He passes you in the video we just watched?

A. I was beside him.

Q. No, sir, not when the video first starts playing, you're not beside him. He is behind you, because you see him come into frame. and he actually passes you. Then you get behind him, and that's when we see him cross the fog line --

A. Because he's slowing down, because I'm beside him.

Q. Okay. So isn't it true, Officer Johns, that you told the investigator that you called, "I wasn't even going to stop that mother fucker. and I said, no, I'm going to stop him"?

A. Do what?

Q. Did you or did you not tell Officer Vaughan on the phone, "I wasn't even going to stop that mother fucker, and I said, no, I'm going to stop him"?

A. I didn't tell Officer Vaughan that on the phone. Officer Vaughn was on the stop after he was arrested.

Q. So you told that personally to Officer Vaughan?

A. Things were said between me, him, and another deputy out there that has nothing to do with him. It was a conversation between us after his arrest.

Q. Yes, sir. And what I'm asking is, isn't it true that that's what you said?

A. Yeah, that's true.

Q. So, Officer Johns, it's true, then, that you were not going to pull him over when you first saw him cross the fog line. You pull up next to him. You identify him as a black male driving an out-of-state vehicle, and then you decide to get back behind him for what reason? Because he had not crossed the fog line before you got back behind him.

A. Are you saying I stopped him, because he's a black male.

Q. Officer Johns, I've read your own words, and I'm asking you to explain to this jury that you have said I was not going to pull him over when he first crossed the fog line. We see your vehicle then get into the left lane and pass him. For what reason would you have slowed down to get back behind my vehicle but for

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seeing who my client was?

A. Because when I saw the violation, that's what brought my attention to him. Then I pulled up alongside of him, which I normally do on every stop on I-20, and then I backed behind him. When I was behind him observing his driving behavior, because I seen him run on the line and over it the first time, and then the second time he did the same violation, other than he did not cross all the way on the shoulder, I stopped him. That's public safety. That's just like me saying, well, why don't you stop everybody you see speeding? Well, I don't pull everybody over doing a mile over the speed limit, that's discretion. I have the discretion to stop you or let you go depending on the violation, it's at my discretion.

(Tr. 150-153).

Nowhere in Officer John's testimony did he allege that he witnessed Martin appearing intoxicated, driving erratically or committing any other traffic offense other crossing the fog line before the recording began. The testimony elicited from Officer Johns on cross-examination clearly shows that he did not intend on stopping Martin, or as he referred to him "that mother f*cker," until after he had pulled beside him and saw that he was black.

After Martin pulled over, Officer Johns testified that he walked to the passenger-side window and asked Martin for his driver's license and insurance. (Tr. 128). Officer Johns testified at trial that he smelled

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a faint odor of marijuana and a strong odor of air fresheners.² (Tr. 128) Martin provided a valid driver's license and insurance, and he said that he was traveling from Texas to Alabama. (Tr. 129)

Officer Johns continued to ask Martin about issues that have nothing to do with the initial stop, including Martin's trip itinerary and his training for a truck driving school Martin attends. (See Transcript of Traffic Stop p. 2-3). Officer Johns then says that he is not going to give Martin a ticket for crossing the fog line. (See Transcript of Traffic Stop p. 5)

However, instead of ending the stop after Officer Johns had decided not to issue a citation for the alleged infraction, he unnecessarily prolongs the stop. (Transcript of Traffic Stop p. 2-5). Officer Johns asked Martin for consent to search his car, and Martin did not give an affirmative answer. (Transcript of Traffic Stop 3, 5). Officer Johns then began searching Martin's vehicle anyway. (*Id.* at 5) He took several minutes to thoroughly search the front of the vehicle and finding no contraband, he began searching the back of the vehicle. (See Video of Traffic Stop 6-7). It was then, and only then, that Officer Johns found a closed duffle bag that contained several pounds of marijuana in vacuum sealed bags. (Tr. 132). Officer Johns then told Martin to get on the ground and advised Martin of his *Miranda* rights. (Tr. 132-133).

Prior to trial, Martin filed two motions to motion to suppress evidence, asserting that Officer Johns lacked probable cause or reasonable suspicion to stop his vehicle, and the detention was unreasonable in scope. (C.P. 23, 53). After a hearing on the matter, the trial court overruled Martin's motion to suppress. (Tr. 49).

SUMMARY OF THE ARGUMENT

The trial court erred in overruling Martin's motion to suppress. Officer Johns' decision to stop Martin's vehicle was made without probable cause or reasonable suspicion and constituted an unreasonable seizure in violation of Martin's Fourth Amendment rights. Officer Johns stated that he almost didn't pull over Martin, and the video evidence does not support Officer Johns' testimony at trial. Officer Johns reluctantly admitted at trial that he had not determined whether he was going to stop

² Although Officer Johns testified that he smelled a faint odor of marijuana when he initially stopped Martin, it was later revealed through the testimony of Officer Vaughn that the only marijuana found in Martin's vehicle was in vacuum sealed bags. (Tr. 154)

Martin until he pulled alongside Martin. (Tr. 150-153). It was only at that angle, however, that Officer Johns could determine Martin was African-American. Additionally, Officer Johns could point to no reasonable, articulable, objective factors to support his claim he had not racially profiled Martin, but instead he admitted that he had not decided to stop Martin until he had been able to observe him alongside his vehicle. Additionally, the video evidence even shows Officer Johns' vehicle several car lengths ahead of Martin when the video begins, further supporting the notion that it was not any action taken by Martin before the video that triggered Officer Johns to fall back behind Martin. As illustrated in the excerpt of the cross-examination of Officer Johns, it was only after he passed Martin, that he had made a conscious decision to pull behind Martin, follow him and stop him. (Tr. 151-153). Accordingly, the trial court erred in overruling Martin's motion to suppress evidence, and this Court should reverse Martin's conviction, sentence, and render a judgment of acquittal.

Finally, the Trial Court erred in holding that Martin was a habitual offender under Mississippi Code Annotated Section 99-19-81. In this regard, the Trial Court held that where a defendant that had multiple felonies that occurred at different times and the defendant was ordered to serve the sentences concurrently would still qualify as a habitual offender. This ruling is contrary to the statutory language, which states "Charges separately brought and arising out of separate incidences at different times, and who shall have been sentenced to separate terms of one year or more." The sentences for all of Martin's prior felonies were to run concurrently and were not in fact separate terms of one year or more. Miss. Code Ann. § 99-19-81. (Tr. 232) Accordingly, Martin requests that this Court remand this case for re-sentencing.

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING MARTIN'S MOTION TO SUPPRESS.

In reviewing this issue, this Court adopts a mixed standard of review. *Dies v. State*, 926 So. 2d 910, 917 (Miss. 2006). Determinations of reasonable suspicion and/or probable cause are questions of

law which are reviewed de novo. *Id.* (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663 (1996)); *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 113 (Miss. 1999). The trial court's findings of fact are reviewed under the substantial evidence/clearly erroneous standard of review. *Dies*, 926 So. 2d at 917; *Floyd*, 749 So. 2d at 113.

Under Mississippi law, it is well-established "that the provisions for search and seizure are strictly construed against the state and in favor of the citizen." *Barker v. State*, 241 So. 2d 355, 358 (Miss. 1970). All evidence obtained as a result of an unreasonable search or seizure is inadmissible. *McFarlin v. State*, 883 So. 2d 594, 598-9 (Miss. Ct. App. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968)).

"The Fourth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution of 1890 prohibit unreasonable searches and seizures. . . ." *Rainer v. State*, 944 So. 2d 115, 118 (Miss. Ct. App. 2006) (citing *U. S. v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157 (1982)). Traffic stops are considered seizures within the meaning of the Fourth Amendment. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391 (1979); *Howard v. State*, 987 So. 2d 506, 509-10 (Miss. Ct. App. 2008). The appellate courts of this State have analyzed traffic stops under the framework set forth for investigatory stops under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). *See e.g., Dies*, 926 So. 2d at 917-18 (21); *Floyd*, 749 So. 2d at 114 (14); *Couldery v. State*, 890 So. 2d 956 (Miss. Ct. App. 2004); *Rainer*, 944 So. 2d at 118 (16). The reasonableness of a *Terry* stop is determined under a two-prong inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19-20.

A. Officer Johns lacked probable cause and/or a reasonable suspicion to stop Martin's vehicle; therefore, the stop was not justified at its inception.

An officer may make a brief investigatory stop "when the officer has a reasonable suspicion that criminal activity is afoot." *Rainer*, 944 So. 2d at 118 (citing *Terry*, 392 U.S. at 30-31, 88 S.Ct. 1868). The officer may not rely on "an inchoate and unparticularized suspicion or hunch;" instead he or she "must be able to point to specific and articulable facts that justify the intrusion." *Id.* (citing *Terry*, 392 U.S. at 21, 88 S.Ct. 1868; *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 120 S.Ct. 673 (2000)). In determining whether an

officer possessed reasonable suspicion, this Court "must consider whether, taking into account the totality of the circumstances, the detaining officers had a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Floyd*, 749 So. 2d at 144-15 (quoting *U.S. v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 694-95 (1981)). "Furthermore, the reasonableness of official suspicion must be measured by what the officers knew before they initiated the search." *Rainer*, 944 So. 2d at 118 (citing *Florida v. J. L.*, 529 U.S. 266, 271, 120 S.Ct. 1375 (2000)). A traffic stop is one of the types of seizures that must be reasonable under the Fourth Amendment. It is classified as an investigatory stop, which is reasonable if there is probable cause to believe that the driver's conduct constitutes a traffic violation or specific reasonable suspicion that other criminal activity is afoot. *Moore v. State*, 986 So.2d 928, 933 (Miss. 2008). The State bears the burden of showing that a challenged search or seizure is based on suitable evidence. *Caning v. State*, 226 So.2d 747, 752 (Miss. 1969); *Davis v. State*, 660 So.2d 1228, 1238 (Miss. 1995). The United States Supreme Court has also stated that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769 (1996) (citing *Delaware*, 440 U.S. at 659, 99 S.Ct. 1391).

In the instant case, Officer Johns lacked probable cause and/or a reasonable suspicion to make the initial stop of Martin's vehicle. As explained in more detail in the statement of facts above, Officer Johns' initial reason for approaching Martin's vehicle was not in fact the reason why he stopped Martin. It was only after Officer Johns had pulled alongside Martin and had an opportunity to see that he was African-American, that he decided that he would pull back behind Martin, follow him and stop him for crossing and or touching the fog line an alleged second time. (Tr. 150-153). Officer Johns even told Martin that he was not going to issue him a citation for crossing the fog line. (Transcript of Traffic Stop p. 2-5). The fact that Officer Johns admitted that he had not determined whether he was going to stop Martin until after he had pulled alongside of Martin's vehicle and looked inside the vehicle is strongly indicative that profiling on Officer John's part sparked the hunch upon which the stop was predicated.

The record makes abundantly clear that Officer Johns had no probable cause or reasonable

suspicion that Martin was committing a traffic violation at the time he decided to pull him over. (Tr. 150-153). The fact that the video does not support Officer Johns' claim that he pulled Martin over for initially crossing the fog line and that it was only after he had pulled beside Martin that he clearly decided to pull behind Martin and stop him show that his motivation for stopping Martin was not supported by any reasonable, articulable or objective factors. (See Video of Traffic Stop). Furthermore, the video is in direct contradiction to Officer Johns' testimony of the facts. *Id.*

Because Officer Johns could not point to any reasonable, objective, or articulable factors in support of his assertion that Martin was driving carelessly and the video evidence was in direct contradiction to his testimony, his allegations are, at best, subject to characterization as "an inchoate and unparticularized suspicion or hunch." *Rainer*, 944 So. 2d at 118 (quoting *Wardlow*, 528 U.S. at 123-24, 120 S.Ct. 673). Therefore, Officer Johns' hunch that Martin was involved in some illegal activity was an unreasonable basis for stopping Martin's vehicle.

Finally, this Court's decision in the closely analogous case of *Couldery v. State*, 890 So. 2d 959, 960-61 (Miss. Ct. App. 2004) is controlling. In *Couldery*, the defendant was traveling east on Interstate 20 in a car bearing California plates. *Couldery*, 890 So. 2d at 960-61. The defendant moved from the right lane to the left lane as he passed a Mississippi Highway Patrol car parked on the right hand shoulder. *Id.* The defendant continued driving in the left lane, and the officer followed the defendant and pulled him over about thirty seconds later. *Id.* The officer checked the defendant's license and registration and discovered no outstanding warrants. *Id.* The officer questioned the defendant about his trip, and requested consent to search his vehicle, which the defendant refused. *Id.* The officer ordered the defendant to follow him to a nearby gas station where a drug dog showed interest in the trunk of the defendant's car, where a search revealed two suitcases of steroids. *Id.*

On appeal, the defendant challenged the trial court's denial of his motion to suppress the steroids, and this Court considered whether the officer possessed probable cause/reasonable suspicion to make the initial stop of his vehicle. *Id.* at 962-64. This Court considered the relevant statutes concerning

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driving a vehicle in the left lane (Mississippi Code Annotated Sections 63-3-611 and 63-3-601) and held that they applied only to two-lane highways, not to four-lane highways. *Id.* This Court further held that the defendant's action in driving in the left lane of the eastbound portion of Interstate 20-a roadway designated for one-way traffic-was exempted by Section 63-3-601(4) which exempts "roadways 'designated and signposted for one-way traffic.'" *Id.* "Accordingly, this Court [found] that the traffic stop was not valid." *Id.*

As in *Couldery*, Martin's conduct, as vividly illustrated on the dash camera of John's vehicle, clearly did not constitute a traffic violation which would give rise to probable cause to stop his vehicle. Consequently, Martin's stop was an unreasonable seizure made in violation of his Fourth Amendment rights, and the trial court erred in denying his motion to suppress. Therefore, without evidence of the marijuana obtained from the illegal search of Martin's vehicle, justice requires that this Court reverse (and/or vacate) his conviction, sentence, and render a verdict of acquittal in Martin's favor.

B. Martin's detention was not reasonably related in scope to the circumstances which allegedly justified the stop in the first place.

Furthermore, even assuming, arguendo, that Officer Johns had probable cause or reasonable suspicion to support Martin's initial stop, his actions were not reasonably related in scope to the circumstances that 'justified' a brief traffic stop, and the detention lasted longer than necessary to effect the purpose of the stop. *U S v. Jensen*, 462 F.3d 399, 404 (5th Cir. 2005); *Couldery*, 890 So. 2d at 966 (1123-24). "When the purposes of the stop are resolved and the officer's initial suspicions have been verified or dispelled, the detention must end unless there is additional reasonable suspicion supported by articulable facts." *U S v. Grant*, 349 F.3d 192, 196-97 (5th Cir. 2003)(citing *United States v. Gonzalez*, 328 F.3d 755, 758 (5th Cir.2003)). Police activities during a stop must be reasonably related to the specific suspicion that formed the basis for the stop, and the stop must end if all such activities are completed without discovering facts that would justify further investigation. *U.S. v. Pack*, 612 F.3d 341, 350 (5th Cir. 2010). Officer Johns' statement, "before I let you go" indicated that he was ready to

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end the stop and did not believe he had grounds to require any further delay. Continuing to ask questions improperly extended the stop, therefore the search and the statements and evidence that resulted from further questioning should have been excluded. In *Couldery*, this Court, assuming for argument's sake only that the stop was justified, held that the officer's later observation that the defendant was large in stature, owned a gym, had bloodshot eyes and was undertaking an unusual trip, did not indicate that the defendant was trafficking steroids. *Couldery*, 890 So. 2d at 966-67. In so finding, this Court stated:

Under the totality of the circumstances, even if the stop was proper, Officer Vincent should have ticketed Couldery and left him to journey home. Nothing in the record supports a finding that Vincent was justified in further detaining Couldery beyond the ordinary scope of a brief traffic stop.

Id.

So to in the instant case, the record does not support a finding that Officer Johns was justified in detaining Martin beyond the scope of an ordinary traffic stop. Driving in the afternoon with out-of-state tags in a rental vehicle that smells very fresh does not indicate that one is smuggling drugs. Although Officer Johns alleged that he smelled a faint odor of marijuana, it was later testified by Officer Vaughn that all of the marijuana was in vacuum sealed bags. (Tr. 154) Thus, the trial court should have granted Martin's motion to suppress for this reason also.

**II. THE TRIAL COURT ERRED IN HOLDING THAT MARTIN
WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE
ANNOTATED SECTION 99-19-81 AND THE TRIAL COURT ERRED IN
SENTENCING MARTIN AS SUCH.**

During sentencing, the State attempted to establish that Martin was a habitual offender under Mississippi Code Annotated Section 99-19-81. To prove this, the State alleged that Martin had previously been convicted of and sentenced to one year or more for four separate felonies that occurred in Alabama.

The State introduced certified copies judgements of conviction for the felonies, however, the State failed to show that the sentences for these felonies were to be served separately. The statutory

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language of 99-19-81 referring to the requirements to be a habitual offender: "Charges separately brought and arising out of separate incidences at different times, and who shall have been sentenced to separate terms of one year or more." The sentences for all of Martin's prior felonies were to run concurrently and were not in fact separate terms of one year or more. Miss. Code Ann. § 99-19-81. (Tr. 232) The Trial Court held that where a defendant that had multiple felonies that occurred at different times and the defendant was ordered to serve the sentences concurrently would still qualify as a habitual offender. This ruling is contrary to the statutory language. The Trial Court, therefore, erred in holding that Martin was a habitual offender under Mississippi Code Annotated § 99-19-81.

A defendant has "a fundamental right to be free from an illegal sentence." *Clark v. State*, 960 So. 2d 521, 524 (19)(Miss. Ct. App. 2006) (citing *Sneed v. State*, 722 So.2d 1255, 1257 (111)(Miss.1998)). The Mississippi Supreme Court has held that the issue of whether a defendant has been erroneously adjudged a habitual offender is subject to plain error review. See *Smith v. State*, 477 So. 2d 191, 195-96 (Miss.1985).

In order to sentence a defendant as a habitual offender, the State bears the burden of proving all of the elements beyond a reasonable doubt. *Ellis v. State*, 485 So.2d 1062, 1063 (Miss.1986); *Vince v. State*, 844 So. 2d 510, 517 (Miss. Ct. App. 2003). Accordingly, this Court should reverse the sentence entered in the trial court and remand this case for re-sentencing.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not-been specifically raised, Martin respectfully requests that this honorable Court reverse the conviction, sentence and fines entered in the trial court and render a judgment of acquittal. In the alternative, Martin requests that this Court reverse his conviction sentence and fines and remand this case for a new trial or for re-sentencing without enhanced status.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kendall Martin

Date: 3-28-18