No. 2PA17 DISTRICT EIGHTEEN

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford
	)	
JUAN ANTONIA MILLER	)	

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NEW BRIEF FOR DEFENDANT-APPELLEE

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Finally, the Court of Appeals correctly recognized that Mr. Miller's case was a special case and that body camera footage may have limitations:

> We also note that footage from an officer's body camera may not reveal the totality of the circumstances giving rise to a traffic stop. In some cases, however, it may be the best evidence of the interaction between an officer and a defendant. Because the footage was included in the record on appeal, it helps to alleviate concerns of reviewing an undeveloped record.

Miller, __ N.C. App. __, __ n.1, 795 S.E.2d at 376 n. 1. Given the facts of this case, the Court of Appeals correctly reviewed the body camera footage that the State introduced at trial. Furthermore, the Court of Appeals correctly credited the body camera evidence when it contradicted Officer Harris' testimony. Where the body camera footage was ambiguous, the Court of Appeals appropriately made no findings. For these reasons, the Court of Appeals correctly reviewed the body camera footage that the State introduced at trial.

II. THE COURT OF APPEALS OPINION WAS CORRECT

A. The Court of Appeals correctly ruled that assuming the seizure was lawful, Mr. Miller's consent, if given, was not valid.

The Court of Appeals correctly ruled that assuming the seizure was lawful, Mr. Miller's consent, if given, was not valid. *Miller*, __ N.C. App at __, 795 S.E.2d at 379. At the time Mr. Miller was searched, Officer Harris had

Mr. Miller's ID card. Officer Harris had postponed completion of the objective of the stop – a mere traffic matter – and was inquiring into unrelated matters. Officer Harris did not inform Mr. Miller that he was free to refuse a search. Mr. Miller was ordered to the back of the car and only asked for his consent *after* Officer Harris was behind him. The speed with which Officer Harris converted a routine traffic stop into an unrelated investigation into drugs and guns militates against any finding of consent. The Court of Appeals correctly concluded that "[t]his was textbook coercion." *Miller*, slip op. at 13.

As a factual matter, the State's claim that Officer Harris unequivocally testified that Mr. Miller consented to the search is incorrect. (State's Petition p 19; State's New Brief p 46) At trial, Officer Harris initially testified, "I asked him if I could check" but changed his testimony to, "Do you mind if I check?" after the prosecutor asked the question a second time. (T p 49) Officer Harris testified that Mr. Miller responded, "No." (T pp 48-49) Initially, Officer Harris testified Mr. Miller "placed his hands on the trunk of the vehicle and spread his legs." (T p 49) On cross-examination, Officer Harris testified that he understood "no" to mean, "Yes, you can search me," not, "No, don't check me," because, Officer Harris testified, Mr. Miller placed his hands on the car and bent over. (T pp 63-64) When later asked how Mr. Miller responded to his request to search, Officer Harris testified, "I guess you can play [the body-

camera video] back. I don't recall." (T pp 69-70) The State cannot be said to have met its burden when its only witness ultimately testifies on cross-examination that he does not recall how Mr. Miller responded to his request for the search.

Officer Harris testified that he "assumed" "no" to really mean, "Yes, you can search me" because Mr. Miller spread his feet, placed his hands on the car, and bent over. (T p 64) However, Officer Harris' testimony was contradicted by the body camera video. In reviewing the video of the traffic stop, the Court of Appeals noted that "Officer Harris had defendant turned around, facing the rear of the vehicle with his arms and legs spread *before he asked for defendant's consent*." *Id.* Furthermore, Mr. Miller's arms were in the air and not on the vehicle when the search was conducted.

Despite the equivocal testimony of Officer Harris, the State spends significant space in its brief arguing that Mr. Miller consented to the search. The State misses the point because the Court of Appeals never specifically found that Mr. Miller did or did not consent to the search. *Miller,* slip op. at 13. Instead, the Court of Appeals concluded that, assuming Mr. Miller consented, that consent was not valid. *Id.*

In the course of this case, the State has complained about several purported findings related to this issue. However, many of these "findings" were never made. Undersigned feels compelled to correct the record. On page

23 of its brief, the State claims that the Court of Appeals held that Officer Harris was "a liar." (State's New Brief p 23) However, the Court of Appeals never called Officer Harris a "liar." If anyone called Officer Harris' testimony into question it was Officer Harris himself because he could not say definitively what happened after he asked for consent.

The State has also asserted that Court of Appeals suggested that Officer Harris never asked for consent. (State's Response to Motion to Strike p 5) However, the Court of Appeals opinion never called into question the fact that Officer Harris requested consent. Specifically, the Court of Appeals found only that:

> Officer Harris testified that defendant verbally agreed to the search and placed his hands on the trunk of the vehicle, but the footage from the body camera reveals a different version of the interaction. Officer Harris had defendant turned around, facing the rear of the vehicle with his arms and legs spread *before he asked for defendant's consent*. This was textbook coercion. If defendant did respond to Officer Harris's request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights. *See State v. Vestal*, 278 N.C. 561, 578–79, 180 S.E.2d 755, 767 (1971).

Id. at __, 795 S.E.2d at 379.

Similarly, the Court of Appeals did not hold, as the State argues, that "consent had not been given." (State's New Brief p 45) The Court of Appeals explicitly declined to rule upon whether consent was given. It only found that

if it was, it "was certainly not a free and intelligent waiver of his constitutional rights."

Under the Fourth Amendment, a search conducted without a warrant issued upon a showing of probable cause is "per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967) (footnotes omitted). A search conducted pursuant to valid consent is one such exception to the Fourth Amendment's general warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

N.C. Gen. Stat. § 15A–221(b) provides the statutory definition of consent:

> Definition of "Consent".—As used in this Article, "consent" means a *statement* to the officer, made voluntarily and in accordance with the requirements of G.S. 15A–222, giving the officer permission to make a search.

N.C. Gen. Stat. § 15A–221(b) (emphasis added). In order to be valid, consent to search must be "clear and unequivocal[.]" *Pearson*, 348 N.C. at 277, 498 S.E.2d at 601. Moreover, "consent ... must be freely and intelligently given, without coercion, duress or fraud, and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights." *State v. Vestal,* 278 N.C. 561, 578–79, 180 S.E.2d 755, 767 (1971). Consent cannot be shown by mere acquiescence

to a show of police force. *Pearson*, 348 N.C. at 277, 498 S.E.2d at 601. The determination of whether consent was voluntary is based on the totality of the circumstances. *Buckner,* 473 F.3d at 554.

Evidence of Mr. Miller's consent was not "clear and unequivocal." As Mr. Miller's lawyer pointed out at trial, the meaning of a negative response to the question, "Do you mind if I check," is itself unclear. Such a response could reasonably be construed to mean, "No, don't check me." (T pp 63-64) Given the ambiguity in the response, assuming there was a response, it cannot be "clear and unequivocal." *See* Jeff Welty, *Do You Mind if I Search?* North Carolina Criminal Law Blog (Feb. 11, 2010), http://nccriminallaw.sog.unc.edu/do-you-mind-if-i-search (finding that officers should avoid using phrases like "Do you mind if I search?" because a response is ambiguous).

Although an officer is not *required* to inform a defendant that they have the right to refuse a request for consent to search, "knowledge of the right to refuse consent is one factor to be taken into account," *Bustamonte*, 412 U.S. at 227. Furthermore, the officer did not inform Mr. Miller that he had the right to consult with an attorney before reaching a decision. *United States v. Waksal*, 709 F.2d 653, 661 (11th Cir. 1983) (finding whether the officer informed the defendant he had the right to an attorney before

answering request for consent to be a factor in determining whether consent was freely given).

Because Officer Harris still possessed Mr. Miller's driver's license, the encounter in this case was not consensual. *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497. Furthermore, because Officer Harris retained Mr. Miller's license *while* asking for Mr. Miller's consent, Officer Harris "presented [Mr. Miller] with the untenable choice of ending the encounter with no legal means of actually leaving the scene, or consenting to further interaction with law enforcement in order to retrieve the documents." *United States v. Gamez*, 311 F. App'x 671, 674 (4th Cir. 2009); *see Waksal*, 709 F.2d at 662 (finding a key factor that police had defendant's airline ticket and driver's license when requesting consent); *United States v. Zavala*, 459 F. App'x 429, 434 (5th Cir. 2012) (finding that when an "the officer was still in possession of a defendant's personal effects, we have found it important that the officer expressly inform the suspect of his right to refuse consent").

This Court has recently noted the importance of informing a defendant in custody of his right to refuse interrogation, an instruction that is similar to the one that could have been given in this case. *State v. Hammonds*, __ N.C. __, __, 804 S.E.2d 438, 444 (2017) ("officers failed to inform defendant that he was free to terminate the questioning").

The State appears to argue that Mr. Miller's behavior of raising his hands in the air and spreading his legs indicated his consent. However, as the video shows, this was happening before consent was ever requested. *Pearson*, 348 N.C. at 277, 498 S.E.2d at 601 (consent cannot be shown by mere acquiescence to a show of police force).

The State erroneously relies *on State v. Harper* and *State v. Graham*, for the proposition Mr. Miller's nonverbal conduct constituted valid consent. In *Harper* the Court of Appeals concluded that "defendant's nonverbal response *after* Detective Wilson knocked on the hotel room door, identified himself as a police officer, engaged in conversation" constituted valid consent. *State v. Harper*, 158 N.C. App. 595, 603, 582 S.E.2d 62, 68 (2003). In *Graham,* as in *Harper*, the defendant's nonverbal response occurred *after* the officer requested consent. *State v. Graham*, 149 N.C. App. 215, 219, 562 S.E.2d 286, 288 (2002). Clearly non-verbal conduct *after* a request for consent may be adequate in some cases.

But here, the non-verbal conduct the State relies on as evidence of consent occurred *before* or simultaneously while consent was requested. Unlike the consensual encounters in *Harper* and *Graham*, the defendant in this case was stopped on a highway by police, ordered out of his car in heavy traffic, ordered to the back of the car, followed from behind by a police officer

who retained his driver's license, and was already standing with his hands in the air *before* consent was sought.

The evidence in this case did not meet the State's burden to demonstrate that Mr. Miller's consent, if given, was freely and intelligently given, without coercion, duress or fraud. *Vestal,* 278 N.C. at 578–79, 180 S.E.2d at 767. For these reasons, the Court of Appeals correctly ruled that assuming the seizure was lawful, Mr. Miller's consent was not valid. *Miller*, __ N.C. App at __, 795 S.E.2d at 379. The unanimous decision should be affirmed.

B. The Court of Appeals correctly ruled that the search of Mr. Miller impermissibly extended the traffic stop.

The Court of Appeals correctly found that the stop of Mr. Miller was impermissibly extended because Officer Harris failed to "diligently pursue[] a means of investigation" designed to address the reasons for the stop. *Id.* at __, 795 S.E.2d at 377–78. *See Rodriguez v. United States*, __ U.S at __ 135 S. Ct. at 1614 (2015). The Court of Appeals decision should be affirmed.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A traffic stop constitutes a seizure under the Fourth Amendment. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Williams*, 201 N.C. App. 566, 570, 686 S.E.2d 905, 908 (2009). An investigative detention must be temporary and last no longer than necessary

to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

A constitutionally permissible traffic stop can become unlawful "if it is prolonged beyond the time reasonably required to complete" its purpose. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). In *Rodriguez v. United States,* the United States Supreme Court extended *Caballes* by holding that even a *de minimis* extension of a traffic stop for a non-traffic related search was a violation of the Fourth Amendment that warranted suppression of any evidence obtained pursuant to that search. *Rodriguez,* __ U.S. at __, 191 L. Ed. 2d at 500-01. This ruling strictly limited the scope of what an officer can do during a traffic stop and overruled previous cases holding that a search was permissible if the illegal detention was merely *de minimis*. *United States v. Williams*, 808 F.3d 238, 245 (4th Cir. 2015) (finding that *Rodriguez* overruled the previous government defense that an illegal detention was *de minimis* in nature); *State v. Warren*, __ N.C. App. __, __, 775 S.E.2d 362, 365 (2015), *aff'd,* __ N.C. __, 782 S.E.2d 509 (2016) (finding that *Rodriguez* overruled North Carolina's rule allowing for unfounded searches when the extension of the stop was *de minimis*).

In *Rodriguez*, the Supreme Court found that an officer may, in addition to writing out a traffic citation, perform checks that "serve the *same objective* as enforcement of the traffic code[.]" *Rodriguez,* __ U.S. at __, 191 L. Ed. 2d at

499 (emphasis added). These checks include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* Apart from these inquiries, an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop. *But … he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*" *Id.* (emphasis added). Unrelated checks, the Court explained in *Rodriguez,* are matters that do not "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.*

The Supreme Court also held that these ordinary inquiries do not include "measure[s] aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.' " *Rodriguez*, 135 S. Ct. at 1615 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 40–41 (2000)). "On-scene investigation into other crimes" "detours" from the mission of enforcing the traffic laws and ensuring officer safety inherent in each traffic stop. *Id.* at 1616. *See also id.* at 1616 ("Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general."). Thus, a Fourth Amendment violation occurs when an officer "prolongs the detention just to fish further for evidence of wrongdoing." *Utah v. Strieff*, __ U.S. __, __, 136 S.

Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting); *see also State v. Jackson*, 199 N.C. App. 236, 242-44, 681 S.E.2d 492, 496–98 (2009).

The North Carolina Court of Appeals, after reviewing the *Rodriguez* decision, concluded that "[u]nrelated investigation is not necessarily prohibited, but extending the stop to conduct such an investigation is prohibited." *State v. Castillo*, __ N.C. App. __, __, 787 S.E.2d 48, 53, *appeal dismissed, rev. denied,* __ N.C. __, 792 S.E.2d 784 (2016); *see also State v. Parker*, 183 N.C. App. 1, 9, 644 S.E.2d 235, 241-42 (2007) (a pre-*Rodriguez* decision holding that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity"); *United States v. Peralez,* 526 F.3d 1115, 1121 (8th Cir. 2008) (Pre-*Rodriguez* case finding that "off-topic questions" that extended the duration of a stop resulted in unlawful extension).

Before *Rodriguez* was decided, the Court of Appeals held in *State v. Jackson* that an officer's questions about the presence of weapons and drugs unlawfully extended a traffic stop which should have otherwise been completed. *Jackson*, 199 N.C. App. at 242-44, 681 S.E.2d at 496–98. In *Jackson*, the officer had stopped the vehicle on suspicion that the defendant was driving without a license. *Id.* at 238, 681 S.E.2d at 494. The defendant, who had recently moved back to North Carolina, produced a valid Kentucky

driver's license. *Id.* The officer later acknowledged that the stop "was pretty much over" after she checked his license, but she began a separate investigation. *Id.* at 238–39, 681 S.E.2d at 494. Based on these facts, the Court of Appeals reversed the trial court's order denying Jackson's motion to suppress. *Id.* at 244, 681 S.E.2d at 498. In *Jackson*, the Court of Appeals found that in order to extend a lawful stop beyond its original purpose, "there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual." *Id.* at 241–42, 681 S.E.2d at 496 (citing *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 755, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008)). *See also State v. Cottrell*, 234 N.C. App. 736, 744, 760 S.E.2d 274, 280 (2014) (finding that after a mission is complete, an officer is required to have the defendant's consent or grounds which provide a reasonable and articulable suspicion in order to justify further delay before asking defendant additional questions); *Bedient*, __ N.C. App. at __, 786 S.E.2d at 328 (same result).

The Court of Appeals correctly applied *Rodriguez* and *Jackson* to the facts of Mr. Miller's case. As the body-camera video showed, neither of the officers at the scene were conducting business reasonably related to the *purpose* of the stop. As Officer Harris ordered Mr. Miller out of the car and began his search, the remaining officer can be seen standing with Mr. Sutton.

Neither officer was conducting investigations related to the purpose of enforcing the traffic code. Officer Harris still had Mr. Miller's identification and had not written Mr. Miller a traffic citation. In reviewing these facts, the Court of Appeals concluded that:

> an officer cannot justify an extended detention on his or her own artful inaction. As *Rodriguez* makes clear, it is not whether the challenged police conduct "occurs before or after the officer issues a ticket" but whether it "prolongs—*i.e.*, adds time to—the stop." *Rodriguez*, 135 S.Ct. at 1616 (citation and internal quotation marks omitted). The more appropriate question, therefore, is whether Officer Harris "diligently pursued a means of investigation" designed to address the reasons for the stop.

Miller, __ N.C. App at __, 795 S.E.2d at 377–78. The Court of Appeals correctly ruled that the search of Mr. Miller unlawfully extended the stop in violation of *Rodriguez*.

The fact that the search in this case occurred in the middle of the stop, as opposed to the end of the stop, is immaterial. The search in *Rodriguez* was conducted when the routine traffic stop was nearing an end. However, the Court stated that "[t]he critical question … is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—i.e., adds time to—'the stop' ". *Rodriguez*, __ U.S. at __, 191 L. Ed. 2d at 499. Thus, in *People v. Pulling*, __ N.E.3d __ (Ill. Ct. App. June 17, 2015), the court found that an officer violated the defendant's Fourth

Amendment rights when the officer "interrupted his traffic citation preparation to conduct a free-air sniff based on an unparticularized suspicion of criminal activity[.]" In *Pulling,* the sniff took place during the stop, while the sniff in *Rodriguez* took place at the end of the stop. However, the Court in *Pulling* found that "this positional difference of the point at which the sniff occurs has no impact on our ruling," because "the dog sniff added time to the total duration of the stop at issue[.]" *Id.*

The State claims that federal courts have taken no issue with similar cases in the wake of *Rodriguez.* (State's Brief p 44) In support of this proposition, the State cites *West v. United States*, 100 A.3d 1076 (D.C. 2014). However, *West* was decided *before Rodriguez*. The fact that the United States Supreme Court denied certiorari review hardly signals the High Court's approval of the court's ruling in *West. See, e.g., Stewart v. McCoy*, 537 U.S. 993, 123 S. Ct. 468, 470 (2002) (stating that denial of certiorari "should not be taken as an endorsement of the reasoning of the Court of Appeals").

More recently, this Court found that an eight or nine second extension was not unconstitutional where the extension was caused by a weapons frisk conducted before the defendant was asked to enter an officer's vehicle. *Bullock,* slip op. at 11-12. First, this Court found that the frisk was permissible because the defendant was going to enter the officer's car while the officer conducted warrant and criminal history checks and officer safety

justified a quick frisk. *Id.* Second, this Court found that the extension did not "measurably extend" the traffic stop's duration in a way that would require reasonable suspicion. *Id.*

The facts of *Bullock* are different from the facts of Mr. Miller's case. As an initial matter, Mr. Miller was never asked to enter Officer Harris' vehicle. For this reason, Mr. Miller's case does not implicate the safety concerns identified in *Bullock.* Second, the defendant in *Bullock* clearly and unequivocally consented to the search. However, as argued in this brief, the evidence of Mr. Miller's consent was equivocal at best. Third, the frisk in *Bullock* was conducted in order to allow the officer to conduct a warrant check. In Mr. Miller's case, as the video shows, neither officer was taking actions reasonably related to the purpose of the mission when the extension took place. Fourth, the officer informed Bullock he would receive a warning before he conducted his frisk. In this case, Officer Harris abandoned the mission entirely before conducting an unrelated search.

Finally, the extension in this case is arguably longer than the extension in *Bullock*. In *Bullock*, this Court measured the time that it took to conduct the frisk as eight or nine seconds. *Id.* at 11. In Mr. Miller's case, the off-topic questions begin as soon as Mr. Miller exits his car. (State's Exhibit #2 2:25) The other officer can be seen standing with Mr. Sutton watching Officer Harris conduct the search. He is not conducting any other police business.

The search is not completed until around the 3:00 mark. Thus, this extension is arguably 30-35 seconds in length, longer than the extension in *Bullock*.

Under *Rodriguez* there are two factors that need to be reviewed when determining if an extension is unreasonable. First, the Court must determine if the unrelated questioning "measurably extend[ed]" the stop. *Rodriguez*, 135 S. Ct. at 1615. As this Court noted in *Bullock*, this part of the inquiry looks at the total length of time that the unrelated questions extended the stop. Second, "in determining the reasonable duration of a stop, it [is] appropriate to examine whether the police diligently pursued [the] investigation" *Id.* at 1614. The frisk in *Bullock* arguably passed both of these tests because the suspicionless search 1) was extremely brief and 2) was conducted while the officer was conducting a search for warrants, a task explicitly approved of as part of the normal course of a routine traffic stop in *Rodriguez*. In this case, on the other hand, the questions about drugs and guns were wholly unrelated to the purpose of the traffic stop. Furthermore, the request was not tethered to the safety concerns identified in *Bullock* because Officer Harris never told Mr. Miller to get into his police car. In this case, the Court of Appeals correctly found that Officer Harris did not diligently pursue the purpose of the stop. For these reasons, the stop in this case, unlike the stop in *Bullock*, was "measurably extended" in violation *Rodriguez*.

Although this Court expressly did not rule on the issue because it was not presented below, the underlying facts of *Bullock* give rise to the question as to whether the officer in *Bullock* would have had reasonable suspicion to extend the stop. Bullock was speeding, weaving, and following trucks too closely. *Bullock*, slip op. at 5. He was driving a rental but he was not listed as an authorized driver. *Id.* He was traveling a well-known drug corridor. *Id.* He had two cell phones and his hands were trembling when he handed his license to the officer. Id. His destination did not match his travel route. *Id.* at 6. Although this Court did not express an opinion as to whether these factors gave rise to reasonable suspicion, this Court seemed to suggest they would have. *Bullock*, slip op. at 14 fn. 4. In contrast, as explained more fully below, the facts of this case do not give rise to any suspicion of unusual activity.

Finally, to the extent this issue hinges solely on the length of time the stop was extended, Mr. Miller contends that the extension in this case was longer than the extension in *Bullock*, and not related to the mission of the stop, therefore violating *Rodriguez* and requiring reversal. In *Rodriguez*, the Supreme Court did not place a lower limit on what might constitute an unconstitutional extension. On the contrary, at oral argument in *Rodriguez* Justice Roberts implied "a violation of the Fourth Amendment for [only] two minutes" is still a violation of the constitution. *See* Tr. of Oral Arg. 36, *Rodriguez,* 135 S. Ct. 1615. Federal courts have found that an

unconstitutional detention can occur when a police officer prolongs a traffic stop with unrelated questions for as little as thirty seconds. *See United States v. Flores*, No. 5:16-CR-1098, 2017 WL 2937577, at *5 (S.D. Tex. Apr. 4, 2017) (recognizing that the circuit has found extensions of thirty seconds to be unconstitutional).

In addition, the Court of Appeals correctly ruled that Officer Harris lacked reasonable suspicion to extend the stop. *Miller*, __ N.C. App at __, 795 S.E.2d at 378–79. The Court of Appeals correctly found that the mere fact that Officer Harris previously saw the vehicle while he was patrolling "problem" areas was "not sufficient, either by itself or in conjunction with the other 'factors' identified by the State, to establish reasonable suspicion of criminal activity." *Id.* Presence in a "high-crime area", in the absence of other suspicious factors, does not constitute reasonable suspicion. *See, e.g., Brown v. Texas*, 443 U.S. 47 (1979); *State v. Butler*, 331 N.C. 227, 234–35, 415 S.E.2d 719, 722 (1992) (defendant's presence with others on a corner known for drug-related activity would not, standing alone, justify investigatory stop); *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) ("To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.") Furthermore, the Court of

Appeals correctly found that there was nothing "incongruent" about Mr. Miller's travel plans and that the remaining factors identified by the State were nothing more than evidence of "innocent travel." *Miller*, __ N.C. App at __, 795 S.E.2d at 378–79.

The State speculates, without any record evidence, and for the first time on appeal, that Officer Harris may have seen a gun in the car or smelled marijuana. Mr. Miller was not charged with possession of a gun or possession of marijuana. The State's arguments amount to pure speculation with no basis in the record. The State's theory at trial makes it clear that neither of these things happened. The prosecutors proceeded at trial solely on the theory that the search was based on consent, not reasonable suspicion, or probable cause.

The State complains that the Court of Appeals found that Officer Harris—whose job was part of the Greensboro Police Department's Tactical Narcotics Team—was "more concerned with discovering contraband than issuing traffic tickets." (State's New Brief p 22). The finding was wholly unremarkable and entirely supported by the record. Officer Harris testified at trial that it is his job to "concentrate" on the seizure of drugs and guns. (T p 40) He further testified that on the night in question he was, in fact, looking for "drug activity, gun activity, vice activity." (T p 41) His division, the Tactical Narcotics Team is responsible "for the investigation of crime

including, but not limited, to open-air drug sales, street-level narcotic operations, violent criminal activity, gun crimes and prostitution."[2] As seen on the body camera video, Officer Harris converted what would have been a routine traffic stop into a search for guns and drugs within a very short period of time. In order to do so, he abandoned the original purpose of the mission. Given the sequence of events shown in the video, as well as Officer Harris' testimony, the finding is unassailable. In any event, the Court of Appeals decision did not turn on the subjective intent of Officer Harris. The decision was based on the objective fact – shown in the video – that Officer Harris did not take steps to issue a citation and complete the traffic stop before launching into an unrelated and unfounded investigation for drugs and guns.

There are additional policy reasons for disallowing officers to extend traffic stops with suspicion-less searches. Although many Americans have been stopped for traffic citations, "few may realize how degrading a stop can be when the officer is looking for more." *Strieff,* __ U.S. at __, 136 S. Ct. at 206 (Sotomayor, J., dissenting). In Greensboro, where this stop took place, the indignities of these kinds of searches are disproportionately shouldered by the African-American population as those individuals are more than twice

[2] http://www.greensboro-nc.gov/index.aspx?page=1957.

as likely to be searched when compared to white drivers. Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES, Oct. 24, 2015, at A1, available at http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?_r=0. As Justice Sotomayor eloquently explained:

> This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Strieff, __ U.S. at __, 136 S.Ct. at 2069-71 (Sotomayor, J., dissenting) (citations omitted). The real or perceived racial bias in the treatment of minorities has resulted in widespread public distrust in the fairness, integrity and public reputation of judicial proceedings. *See* Rich Moran and Renee Stepler, The Racial Confidence Gap in Police Performance (Pew Research Center, 29 September 2015), last found at http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/.

The request to search Mr. Miller was outside the scope of a routine traffic stop, conducted without reasonable suspicion, and extended the stop in violation of *Rodriguez,* __ U.S. at __, 191 L. Ed. 2d at 500-01. Accordingly, a

unanimous panel of the Court of Appeals correctly concluded that Mr. Miller was entitled to a new trial.

III. ASSUMING *ARGUENDO* THIS COURT FINDS NO PREJUDICE UNDER PLAIN ERROR, THIS CASE SHOULD BE REMANDED TO THE COURT OF APPEALS AS MR. MILLER ALSO RAISED AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND THE STANDARD FOR PREJUDICE IN AN IAC CLAIM IS LOWER THAN THE STANDARD FOR PREJUDICE IN A PLAIN ERROR CLAIM.

The standard of prejudice for an ineffective assistance of counsel claim is significantly lower than the prejudice standard for plain error. *State v. Joplin*, 318 N.C. 126, 132, 347 S.E.2d 421, 425 (1986). Accordingly, even if this Court finds the error in this case did not rise to the level of plain error, this case should still be remanded to the Court of Appeals for review under the lower IAC standard. *See, e.g., State v. Canty*, 224 N.C. App. 514, 521, 736 S.E.2d 532, 537 (2012), *writ denied, review denied,* 366 N.C. 578, 739 S.E.2d 850 (2013) (finding IAC after declining to review case for plain error).

To show prejudice under plain error, a defendant must establish "that, after examination of the entire record, the error had a *probable impact* on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 334 (internal citations and quotation marks omitted). "Probable" means "more likely than not" or "a preponderance of the evidence." *United*