IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID TREJO — APPELLANT

V. — NO. 2008-KA-2133-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. David Trejo, Appellant
3. Honorable David Guest, District Attorney
4. Honorable Samac S. Richardson, Circuit Court Judge

This the 29th day of April, 2009.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Madison County, Mississippi, and a judgment of conviction for possession of cocaine with intent to sell entered against David Trejo following a jury trial held on April 1, 2008, the Honorable Samac Richardson, Circuit Judge, presiding. (C.P. 43, 100, 173-74, Tr. 202-04, R.E. 4-5). Trejo was adjudged both a habitual offender under Mississippi Code Annotated Section 99-19-81 and a subsequent drug offender under Mississippi Code Annotated Section 41-29-147; he was sentenced to serve a term of sixty (60) years in the custody of the Mississippi Department of Corrections without the possibility of parole, probation, or any other form of early release, and ordered to pay a fine in the amount of two million dollars ($2,000,000) plus costs, fees, and assessments in the amount of two hundred seventy-five dollars and fifty cents ($275.50). (C.P. 173-74, Tr. 224-26, R.E. 6-7). The trial court denied Trejo's motion(s) for a new trial and/or motion for judgment notwithstanding the verdict.[1] (C.P. 102-07, 138-147, R.E. 8-24 (motion(s)) 25-27 (order)). Trejo now appeals to this honorable Court for relief.

STATEMENT OF THE FACTS

Around 1:00 a.m. on January 21, 2005, David Trejo ("Trejo") was traveling north on I-55 in between Madison and Canton in a vehicle bearing a Texas license plate; Pebbles Nutt ("Nutt") was riding in the passenger seat. (Tr. 58, 64, 76, 105-08). Trejo was travelling in the left-hand lane

[1] Trejo filed his own handwritten motion for a new trial an/or JNOV in addition to motion for a new trial and/or JNOV filed by his trial counsel. Both motions are included in the record and in the record excerpts.

at about sixty (60) mph; the speed limit was seventy (70) mph, and the minimum speed limit was forty-five (45) mph.[2] (Tr. 58, 64, 105-06). Sergeant Chris Picou ("Officer Picou") of the Madison County Sheriff's Department approached Trejo's vehicle from behind and began following him (tailgating him) only "a car-length-and-a-half or so." (Tr. 55-56,105-06, 129). Officer Picou flashed his bright headlights three times, waiting a few seconds in between flashes, and, when Trejo did not respond to the high-beams in his rear-view mirror, Officer Picou activated the blue lights on his patrol car and pulled Trejo over. (Tr. 56-58, 106, 130-31). According to Officer Picou, he flashed his bright headlights because he wanted Trejo to get out of his way so he could pass him. (Tr. 65, 68). Trejo's vehicle and Officer Picou's patrol car were the only vehicles on that particular area of the highway at the time. (Tr. 130).

At the suppression hearing and at trial, Officer Picou gave the following reasons for stopping Trejo's vehicle: (1) he was concerned that Trejo was intoxicated or tired; (2) Trejo had a Texas plate; and (3) Trejo was in the left-hand lane and not driving as fast as the law allows. (Tr. 56-58, 76, 86, 106-10, 135-36). Officer Picou repeatedly admitted that Trejo was not violating any traffic law at the time he stopped him; and he gave no testimony that Trejo's vehicle was swerving or otherwise being operated erratically. (Tr. 67, 69, 71, 75-76, 126, 136). Officer Picou claimed that he was concerned that Trejo was drunk or sleepy because Trejo did not switch lanes in response to the bright lights flashed in his rear-view mirror by a tailgating car. (Tr. 56-58, 106, 130-31). Although, Officer Picou claimed that road signs advising drivers of slower moving vehicles to stay to the right were

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[2] Officer Chris Picou testified (at the suppression hearing) that the minimum speed limit was forty-five (45) miles an hour. (Tr. 64). To the contrary, Mississippi Code Annotated Section 63-3-509(2) provides a minimum speed limit forty (40) mph for interstate highways with a speed limit of seventy (70) mph. Miss. Code Ann. § 63-3-509 (Rev. 2004).

located "all up and down the interstate," he cold not testify that any of these signs were even posted in the general area of the interstate at issue. (Tr. 107, 133-35).

After Trejo pulled over, Officer Picou walked to the passenger-side window and asked Trejo for his driver's license and insurance, and he asked where Trejo and Nutt were going. (Tr. 59-60, 108). Officer Picou testified that Trejo and Nutt appeared to be tired/sleepy and nervous when he approached the vehicle, and he smelled a strong odor of air freshener coming out of the vehicle. (Tr. 59, 69, 108-110). Trejo provided a valid driver's license and insurance, and he said that he and Nutt were traveling from Houston, Texas, to Ohio. (Tr. 64, 70-71, 75, 110). Trejo had no warrants out for his arrest, but a criminal history check indicated that Trejo had previously been convicted of drug offenses. (Tr. 60, 110-111).

Officer Picou returned to Trejo's vehicle, ordered him out, and asked him about his criminal history. (Tr. 60-61, 111). According to Officer Picou, Trejo told him that he had previously been arrested for stealing a car, but he failed to mention a drug offense. (Tr. 60-61). Officer Picou asked Trejo for consent to search his car, and Trejo refused. (Tr. 61, 111). Officer Picou then told Trejo that he was going to run his dog around the car, and he ordered Nutt out of the vehicle. (Tr. 61-62, 78, 111-12). As Nutt exited, she turned her back to Officer Picou, who ordered Nutt to turn around, noticed a bulge in her midsection, frisked her, and recovered four packages of cocaine from Nutt's person. (Tr. 62-63, 79, 112-113). At trial, the parties stipulated that the substance found on Nutt tested positive for cocaine. (Tr. 100).

Officer Picou then handcuffed Nutt with his only pair of handcuffs, and he ordered Trejo to lay on the ground until backup arrived. (Tr. 114). Officer Picou then allegedly advised Nutt and Trejo of their *Miranda* rights. (Tr. 114). At trial, Officer Picou, over defense objection, testified that

Trejo told him, "It's not hers. It's mine, so don't arrest her. Arrest me." (Tr. 114-15).

Prior to trial, Trejo filed a motion to suppress evidence, asserting that Officer Picou lacked probable cause or reasonable suspicion to stop his vehicle, and the detention was unreasonable in scope. (C.P. 21-24, 35-37, 121-126). After a hearing on the matter, the trial court overruled Trejo's motion to suppress. (Tr. 92-97).

SUMMARY OF THE ARGUMENT

The trial court erred in overruling Trejo's motion to suppress. Officer Picou's decision to stop Trejo's vehicle was made without probable cause or reasonable suspicion and constituted an unreasonable seizure in violation of Trejo's Fourth Amendment rights. Officer Picou repeatedly admitted that Trejo was not violating any laws at the time he pulled him over and further admitted that Trejo's Texas plate was part of the reason he pulled him over. Additionally, Officer Picou could point to no reasonable, articulable, objective factors to support his claim that he believed Trejo was intoxicated or tired. Accordingly, the trial court erred in overruling Trejo's motion to suppress evidence, and this Court should reverse Trejo's conviction, sentence, and fines and render a judgment of acquittal.

The State violated Trejo's due process rights by withholding the in-dash video recording of Trejo's stop. Officer Picou's decision to stop Trejo was inherently suspect, and the video recording of the stop possessed great potential for exculpatory and impeachment evidence that was crucial to Trejo's defense. Therefore, the State ignored its duty to preserve evidence that might be significant to Trejo's defense, and violated the United States Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Consequently, Trejo is entitled to a new trial.

The State also committed a discovery violation under Uniform Rule of Circuit and County

Court 9.04. Because Trejo's trial counsel failed to object as to the State's discovery violation and request a continuance to procure the tape (if possible) and review it for exculpatory and impeachment evidence, Trejo was denied the effective assistance of counsel and is entitled to a new trial.

Further, the trial court erred in refusing Instructions D-4 and D-5, which would have instructed the jury that if they found the State's failure to produce the tape was the result of bad faith or negligence, it could consider such as a diminishing factor in assessing the credibility of the Officer Picou's testimony. The trial court's failure to grant these instructions effectively eliminated any consideration of the State's seemingly intentional withholding, loss or destruction of the tape. The jury was entitled to consider this against the State in assessing credibility and weight, and Trejo was entitled to have the jury instructed that it was permissible to do so. The trial court's failure to so was reversible error and Trejo is entitled to a new trial.

Finally, the State failed to prove that Trejo was a habitual offender under Mississippi Code Annotated Section 99-19-81 and a subsequent drug offender under Section 41-29-147. In this regard, the State relied heavily on a computer generated NCIC report in its attempt to establish Trejo's habitual and subsequent drug offender status.' The NCIC report was inadmissible, and without it the State failed to prove Trejo's habitual and subsequent offender status. The trial court erred in admitting it into evidence and relying on it in adjudging Trejo as a habitual and a subsequent drug offender. Accordingly, Trejo requests that this Court remand this case for re-sentencing.

ARGUMENT

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

In reviewing this issue, this Court adopts a mixed standard of review. *Dies v. State*, 926 So.

2d 910, 917 (¶20) (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 (¶11) (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 (¶20); *Floyd*, 749 So. 2d at 113 (¶11).

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 (¶6) (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 (¶12) (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 (¶6). 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 Picou lacked probable cause and/or a reasonable suspicion to stop Trejo'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 (¶6) (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 (¶17) (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 (¶6) (citing *Florida v. J. L.*, 529 U.S. 266, 271, 120 S.Ct. 1375 (2000)). 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 Picou lacked probable cause and/or a reasonable suspicion to make the initial stop of Trejo's vehicle. As explained in more detail below, Officer Picou (admittedly) had no reason to believe that Trejo was breaking any law at the time he pulled him over; he likewise had no reasonable objective basis to conclude that Trejo was intoxicated or sleepy; and his admitted reliance on Trejo's Texas licence plate as a basis for stopping Trejo is patently

pretextual and strongly indicative that profiling on Officer Picou's part sparked the hunch upon which Trejo's stop was predicated.

First, and most telling, is Officer Picou's repeated admission(s) that Trejo was not violating any traffic law at the time he stopped him:

[Defense Counsel]: Okay, But is it against the law, let's say I'm coming up behind a somebody and I want them to move over because I'm late for court and Judge Richardson is going to be mad at me if I don't get there on time, it's not against the law for me to [flash my headlights] but its not against the law for that person not to move over either, is it?

[Officer Picou]: No.

. . .

[Defense Counsel]: And he had not broken any traffic laws [at the time you stopped him]?

[Officer Picou]: No, ma'am.

. . .

[Officer Picou]: As I approached him [to ask for his license and insurance], none - - none of the factors existed. I didn't - - I didn't know where he was coming from, where he was going. Before I approached the vehicle, I didn't know about the overwhelming odor of air freshener. I didn't know they were going to be nervous. **Prior to me, you know, making contact with him, I didn't know anything.**

. . .

[Defense Counsel]: And you had determined that no laws had been broken at that point?

[Officer Picou]: At that very - - yes ma'am.

. . .

[Defense Counsel]: So you pulled the vehicle over because it was traveling slower than the speed limit but faster than the minimum speed limit, correct?

[Officer Picou}: Yes.

[Defense Counsel]: And you pulled the vehicle over because they were in the left lane, correct?

[Officer Picou]: That's part of the reason, correct.

[Defense Counsel]: And you pulled the vehicle over because it had Texas plates?

[Officer Picou]: That was part of the reason.

[Defense Counsel]: And you indicated that you wanted to check to make sure they were okay?

[Officer Picou]: When they didn't respond to my signal to move over [headlights] that could indicate an impaired driver or a sleepy driver, which is what we run into that time of the morning with people from out of state very often.

[Defense Counsel]: **But no law has been broken - -**

[Officer Picou]: **No.**

[Defense Counsel]: **- - causing you to pull Mr. Trejo's vehicle over?**

[Officer Picou]: **No.**

(Tr. 69, 71, 75-76, 126, 135-36) (emphasis added).

Thus, the record makes abundantly clear that Officer Picou had no probable cause or reasonable suspicion that Trejo was committing a traffic violation at the time he decided to pull him over; he readily and repeatedly admitted as much.

Second, Officer Picou's claim that he pulled Trejo over to check and make sure that he was ok–not intoxicated or sleepy–was not supported by any reasonable, articulable, objective factors.

Officer Picou claimed that he was concerned Trejo was drunk or tired because Trejo did not move over when he (Officer Picou) flashed his bright headlights in Trejo's rear-view mirror. Officer Picou's claim that he believed Trejo was tired or drunk is belied by his repeated admission(s) that he did not believe that Trejo was breaking any laws at the time he pulled him over. Moreover, aside from Officer Picou's bare assertion that he thought Trejo might be drunk or tired, the record is devoid of any objective basis to support his assumption. Significantly, Officer Picou never testified that Trejo's vehicle was swerving or otherwise being operated erratically.

Because Officer Trejo could point to no reasonable, objective, articulable factors in support of his concern that Trejo was intoxicated or sleepy, his claim is, at best, subject to characterization as "an inchoate and unparticularized suspicion or hunch." *Rainer*, 944 So. 2d at 118 (¶6) (quoting *Wardlow*, 528 U.S. at 123-24, 120 S.Ct. 673). Therefore, Officer Picou's hunch that Trejo was drunk or sleepy was an unreasonable basis for stopping Trejo's vehicle.

Third, Officer Trejo himself admitted that part of the reason that he stopped Trejo was because he had Texas plates. While Officer Trejo's honesty in this regard is commendable, his admission sheds light, perhaps, on his true basis for deciding to stop Trejo and strongly suggests that Officer Picou profiled Trejo as a drug smuggler because he was driving a car with Texas plates at a late hour. Again, it is significant that Officer Picou repeatedly admitted that he did not believe that Trejo was breaking any laws at the time he pulled him over.

Finally, this Court's decision in the closely analogous case of *Couldery v. State*, 890 So. 2d 959, 960-61 (¶¶1-3) (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 (¶¶1-3). The defendant moved from the right lane to the left lane as he passed a Mississipi 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 licence 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 (¶¶10-13). This Court considered the relevant statutes concerning 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.* at (¶13). "Accordingly, this Court [found] that the traffic stop was not valid." *Id.*

Additionally, this Court rejected the State's argument that the defendant's stop was proper under the "good faith exception." *Id.* at 964-66 (¶¶17-22). In so doing this Court easily determined that the good faith exception did not apply because there was no dispute that the defendant was not committing a traffic violation when he was stopped; therefore, the officer "had no reasonable basis to believe that [the defendant] was committing a traffic violation in driving in the left-hand lane of the interstate." *Id* at (¶22).

As in *Couldery*, Trejo's conduct in driving in the left lane clearly did not constitute a traffic violation. Also, as in *Couldery*, Trejo's stop was not justified under the good faith exception, as even Officer Picou himself confirmed that he did not believe that Trejo was violating any traffic law at the time he pulled him over. Additionally, Officer Picou's claim that he pulled Trejo over because he thought Trejo was intoxicated or sleepy was clearly no more that a hunch and cannot be considered reasonable, as the record contained no objective articulable facts that would lead a reasonable officer to believe that Trejo was intoxicated or sleepy. Consequently, Trejo'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 cocaine or Trejo's alleged confession, justice requires that this Court reverse (and/or vacate) his conviction, sentence, and fine(s) and render a verdict of acquittal in Trejo's favor.

B. Trejo'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 Picou had probable cause or reasonable suspicion to support Trejo'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 (¶¶23-24). "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 19 2, 196-97 (5th Cir. 2003) (citing *United States v. Gonzalez*, 328 F.3d 755, 758 (5th Cir.2003)). We turn again to this Court's decision in *Couldery*.

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 (¶¶23-25). 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. at (¶24).

So to in the instant case, the record does not support a finding that Officer Picou was justified in detaining Trejo beyond the scope of an ordinary traffic stop. Driving late at night with out-of-state tags in a vehicle that smells very fresh while appearing sleepy or a little nervous does not indicate that one is smuggling drugs. Thus, the trial court should have granted Trejo's motion to suppress for this reason also.

II. THE STATE VIOLATED TREJO'S DUE PROCESS RIGHTS BY "LOSING" OR OTHERWISE FAILING TO PRESERVE OR PRODUCE THE IN-DASH VIDEO RECORDING OF TREJO'S TRAFFIC STOP.

During trial, Officer Picou testified that his patrol car was equipped with an in-dash camera that is activated when the car's blue lights are turned on. (Tr. 140-41). The camera recorded Trejo's stop, the validity of which is gravely suspect. (Tr. 140-41). Officer Picou testified that he gave the tape to the former D.A., and, when he (Officer Picou) went back to Madison County Sheriffs's Department to get the tape it was not there. (Tr. 145). According to Officer Picou: *"The D.A.'s office wanted to keep it and they kept it.* So I don't know where it is at." (Tr. 145) (emphasis added).

As explained below, the State, by withholding the video tape recording of Trejo's stop, violated Trejo's due process rights by disregarding its duty to preserve evidence that might be significant to Trejo's case. The State also violated Trejo's due process rights under the United States Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

A. The State failed to meet is burden of preserving evidence that might be expected to play a significant role in Trejo's defense, i.e., the video tape recording of Trejo's traffic stop.

In light of a defendant's due process rights, the State has a duty to preserve evidence which "might be expected to play a significant role in the suspect's defense." *Tolbert v. State*, 511 So. 2d 1368, 1372 (Miss. 1987) (quoting *California v. Trombetta*, 467 U.S. 479, 488, 104 S.Ct. 2528, 2534 (1984)). A defendant is entitled to a new trial when (1) "the exculpatory nature and value of the evidence [was] apparent before the evidence was lost," and (2) "the defendant [has] no way of obtaining comparable evidence by other means." *Cox v. State*, 849 So. 2d 1257, 1266 (¶25) (Miss. 2003) (citing *Tolbert*, 511 So.2d at 1372). "[T]he intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator." *Tolbert*, 511 So. 2d at 1372-73 (quoting *Washington v. State*, 478 So. 2d 1028, 1032-33 (Miss. 1985)). This presumption arises "where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent." *Id.*

In the instant case, Officer Picou was the State's only witness; thus, his reliability was determinative of Trejo's guilt or innocence and it certain that the in-dash video recording of Trejo's stop "might [have been] expected to play a significant role in [his] defense." *Tolbert*, 511 So. 2d at 1372 (quoting *Trombetta*, 467 U.S. at 488, 104 S.Ct. 2528). Significantly, the presumption of

intentional spoilation of the video tape was raised, as the evidence indicated that the video tape was "lost" or otherwise destroyed intentionally with a desire to suppress the truth. To this end, Officer Picou testified that he gave the tape to the former D.A., and "[t]he D.A.'s office wanted to keep it and they kept it." (Tr. 145). Also, the integrity of Trejo's stop was gravely suspect in the first place, and Officer Picou was the only State's witness. This is evidence that the tape was intentionally "lost" with a desire to suppress the truth. Thus, the presumption arises that the evidence was intentionally suppressed. Because the prosecution "lost" the video tape, Trejo has no way of obtaining comparable documentary evidence by other means.

Surely, the State may not meet its burden to preserve evidence that may be significant to a defendant's case by simply saying, in essence, "yeah, we wanted to keep that evidence." If this is sufficient, then the State, as a mater of practical reality, has *no duty at all* to preserve evidence favorable to the defendant. This so because the State solely possesses the evidence and the defendant has no access to it and, therefore, has no way of discovering its contents and its significance to his case, much less proving its significance; more importantly, the defendant has no way of presenting that evidence to the jury at trial.

In light of the foregoing, justice requires that this Court hold that the State failed to meet its burden of preserving the video tape of the traffic stop. Accordingly, Trejo is entitled to a new trial.

B. The State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), in failing to turn over the video.

Prior to trial, Trejo filed two very thorough motions for discovery; the second motion specifically stated: "This motion is made under authority of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)" and averred that all of the relevant articles were "significant and constitute

substantial material evidence, and will be useful to the named defendant as evidence upon him at trial." (C.P. 14-16, 27-32). The second motion also moved the trial court for an order directing the District Attorney to produce all such evidence to defense counsel if any part of the requested evidence was not produced prior to trial. (C.P. 30).

"The Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment." *California v. Trombetta*, 467 U.S. 479, 481, 104 S.Ct. 2528, 2529-30 (1984) (citing *U. S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)). For *Brady* purposes, "[f]avorable evidence includes that which is either directly exculpatory or items which can be used for impeachment purposes." *Manning v. State*, 929 So. 2d 885, 890-91 (¶13) (Miss. 2006) (citing *Giglio v. U. S.*, 405 U.S. 150, 153-55, 92 S.Ct. 763 (1972)). The United States Supreme Court has held that "when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility . . . violates due process." *Manning*, 929 So. 2d at 891 (¶17) (citing *Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763).

> To prove a *Brady* violation, the defendant must show:
>
> (a) that the State possessed evidence favorable to the defendant (including impeachment evidence); (b) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (c) that the prosecution suppressed the favorable evidence; and (d) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Manning, 929 So. 2d at 891 (¶15) (citing *Todd v. State*, 806 So. 2d 1086, 1091-92 (Miss. 2001)).

In the instant case, the video recording of Trejo's traffic stop, if not wholly exculpatory, could have, at least, been used to impeach Officer Picou's testimony. The State's intentional suppression

or destruction of the tape, likewise, destroyed Trejo's opportunity of reviewing the tape and demonstrating with specificity the exculpatory or impeachment evidence contained therein. However, because that Officer Picou was the State's only witness, and due to the inherently suspect nature of the stop, the exculpatory or impeachment value the tape should be presumed. Because the State kept the tape, Trejo dis not possess it and could not have obtained it himself with reasonable diligence. It is safe to conclude that the video tape was suppressed on the State's part. And finally, had the tape been disclosed, there is a reasonable probability that the exculpatory and/or impeachment value of the evidence would have resulted in a different result, in that, Trejo's motion to suppress might have been granted, and/or, Officer Picou's testimony would have been subject to impeachment and, thereby, disbelief on the part of the jury. Accordingly, the State committed a Brady violation in withholding the tape, and Trejo is entitled to a new trial.

III. THE STATE COMMITTED A DISCOVERY VIOLATION BY FAILING TO PRODUCE THE IN-DASH VIDEO RECORDING OF TREJO'S STOP, AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING OBJECT TO THE STATE'S FAILURE AND FAILING TO REQUEST A CONTINUANCE.

As stated above, Trejo filed two very thorough motions for discovery; the second of which specifically stated that the motion was made "under authority of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)" and averred that all of the relevant articles were "significant and constitute substantial material evidence, and will be useful to the named defendant as evidence upon him at trial." (C.P. 14-16, 27-32). The second motion also moved the trial court for an order directing the District Attorney to produce all such evidence to defense counsel if any part of the requested evidence was not produced prior to trial. (C.P. 30).

At trial Officer Picou testified that his patrol car was equipped with an in-dash camera which

recorded Trejo's stop. (Tr. 140-41). He went on to state that he gave the tape to the former D.A., and, "[t]he D.A.'s office wanted to keep it and they kept it. So I don't know where it is at." (Tr. 145).

The State's failure to produce the tape in discovery constituted a discovery violation under Uniform Rule of Cicuit and County Court 9.04, as the video recording potentially possessed exculpatory material and/or impeachment material, and, as per Officer Picou's testimony, an alleged roadside confession made by Trejo. See URCCC 9.04(A)(2) (any recorded statement of the defendant) and 9.04(A)(6) (any exculpatory material).

When Officer Picou provided testified as to the existence of the video recording, defense counsel failed to object as to the State's discovery violation and failed to request a continuance to attempt to procure the tape and examine its contents for exculpatory evidence and/or evidence that could be used to impeach Officer Trejo's testimony. Also, the tape possessed the potential establish that Trejo's seizure was unreasonable, and therefore, it could have been used to suppress the evidence obtained as a result of the illegal stop. This prejudiced Trejo's defense, therefore, he received ineffective assistance of counsel.[3]

Although this Court ordinarily does not, it may address a claim of ineffective assistance of counsel on direct appeal if "the record affirmatively shows ineffectiveness of constitutional

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[3] Appellate counsel submits that Trejo has voiced numerous grounds of concern on the issue of ineffective assistance in addition to the reason presented in this direct appeal. Appellate counsel submits, that in his professional judgement, defense counsel's failure to object to the State's discovery violation and failure to request a continuance to compel the State to produce the tape, is/are the only ground(s) of ineffective assistance apparent from the record. On behalf of Appellate counsel requests that all grounds not apparent in the record which are not specifically raised in this direct appeal be preserved so that Trejo, if necessary, may be able to present them in the procedurally proper vehicle–a motion for post-conviction relief.

dimensions." *Fannings v. State*, 997 So. 2d 953, 965 (¶37) (Miss. Ct. App. 2008) (quoting *Wilcher v. State*, 863 So. 2d 776, 825 (¶171) (Miss .2003)). To establish a claim of ineffective assistance of counsel, the defendant must show that: (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *Ravencraft v. State*, 989 So. 2d 437, 443 (¶31) (Miss. Ct. App. 2008). The defendant bears the burden of proving both prongs and faces a rebuttable presumption that trial counsel's performance "is within the wide range of reasonable conduct and that his attorney's decisions were strategic." *Id.* (citing *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993)). The defendant may rebut this presumption, however, by "demonstrat[ing] that, but for his attorney's unprofessional errors, the outcome of his trial would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

Under the first prong, "the errors of counsel's performance must be so serious that they prevented counsel from functioning as the Sixth Amendment guarantees." *Havard v. State*, 928 So. 2d 771, 781 (¶8) (Miss. 2006) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). Under the second prong, "the errors of counsel must have been so serious that they deprived the defendant of a fair trial, that being a trial with a reliable result." *Id.*

In the instant case, defense counsel's failure to object to the State's discovery violation in failing to produce the tape in discovery constituted deficient performance. Because Officer Picou was the State's only witness, his credibility was critical to Trejo's defense. Also, the validity and integrity of Trejo's stop was severely in question. When it came to light that the whole thing was video taped, defense counsel should have objected and requested a continuance so that the tape could be procured, if possible, and reviewed for exculpatory and/or impeachment evidence.

Defense counsel's failure to do so prejudiced Trejo's defense and deprived him of a fair trial, in that, the result reached was not reliable. This is so because the prosecution's bad faith was called into question by its failure to produce the tape for the admitted reason that "[t]he D.A.'s office wanted to keep it and they kept it." (Tr. 145). A continuance and a motion to compel the State to produce the tape were necessary in this situation to ensure that a reliable result was reached in Trejo's case. The failure to object, deprived Trejo of the opportunity to use the tape as exculpatory evidence or to impeach the testimony of the State's only witness, Officer Picou. Accordingly, Trejo received ineffective assistance of counsel, and he is entitled to a new trial.

IV. THE TRIAL COURT ERRED IN REFUSING REQUESTED JURY INSTRUCTIONS D-4 AND D-5.

"A defendant is entitled to have jury instructions given which present his theory of the case," so long as the instruction correctly states the law and is supported by the evidence. *Howell v. State*, 860 So. 2d 704, 745 (Miss. 2003) (citing *Heidel v. State*, 587 So. 2d 835, 842 (Miss. 1991)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." *Milano v. State*, 790 So. 2d 179, 184 (Miss. 2001). "Every accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal." *Chinn v. State*, 958 So. 2d 1223, 1225 (¶13) (Miss. 2007). "This Court will never permit an accused to be denied this fundamental right." *Id.* (quoting *O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988)).

At trial, defense counsel submitted jury instructions D-4 and D-5, which both dealt with the State's negligence or wilfulness in failing to produce the in-dash video recording of Trejo's stop and would have instructed the jury that it could consider such in accessing the weight and credibility to

give Officer Picou's testimony. (Tr. 165-66). Instruction D-4 provided:

> It is a defense theory that the prosecution's investigation evidence in this case was negligent, incomplete, purposefully distorted and/or not done in good faith. You are to assess the credibility of the investigative evidence together with all of the other evidence. Investigation which is thorough and conducted in good faith may be credible while an investigation which is incomplete, negligent or in bad faith may be found to have lesser value or no value at all. In deciding the credibility of the witnesses and the weight, if any, to give the prosecution evidence, consider whether the investigation was negligent and/or conducted in bad faith.

(C.P. 67-68).

Instruction D-5 provided:

> When potential evidence is not pursued by the party in the best position to make such an investigation, one may infer that the potential results of that investigation would be unfavorable to the party's cause. If you find the State investigation in this matter to be negligent, incomplete, purposefully distorted and/or not done in good faith, you may draw an adverse inference against the prosecution. This adverse inference may leave you with a reasonable doubt as to the defendant's guilt.

(C.P. 69-70).

The trial court denied both instructions and told defense counsel that he could only argue to the jury that the tape was lost. (Tr. 165-66). In so doing, the trial court exacerbated the prejudice caused by the State's failure to produce the tape in the first place and effectively "swept under the carpet" the State's slovenly and seemingly intentional investigative work; more importantly, the jury was not instructed that it was permitted to consider this as a diminishing factor against the credibility or probative force of the State's only witness' (Officer Picou's) testimony. Because Officer Picou was the State's only witness, the weight and credibility of his testimony was crucial to both the State's case and Trejo's defense. Thus, Trejo had a fundamental right to have the jury properly instructed that it was allowed to consider any bad faith on the State's part against the State in assessing the credibility of Officer Picou's testimony. As explained below, this severely prejudiced

Trejo's case and constituted reversible error.

Instructions D-4 and D-5 correctly stated the law. The United States Supreme Court has noted that, "[w]hen the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." *Kyles v. Whitley*, 514 U.S. 419, 446 n. 15 (1995); see also *Id.* at 442 n. 13 (discussing the utility of attacking police investigations as "shoddy").

In the context of a the State's withholding of evidence, the Fifth Circuit has awarded a new trial where the withholding of evidence possessed the potential for discrediting the police methods used to assemble the case against the defendant. *See Lindsey v. King*, 769 F. 2d 1034, 1042 (5th Cir. 1985). Similarly, the Tenth Circuit has held that, "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant. . . ." *Bowen v. Maynard*, 799 F. 2d 593, 613 (10th Cir. 1986).

Thus, the United States Supreme Court and the Fifth Circuit have held that the integrity of police investigation is probative of the weight and/or credibility of the State's case. The jury in the instant case should have been instructed that, if it found that the investigation was handled in bad faith or negligently, it was permitted to consider that as a factor diminishing the weight and credibility of Officer Picou's testimony. Instructions D-4 and D-5 correctly stated the law.

Also, Instructions D-4 and D-5 were supported by the evidence. Trejo's stop was recorded by an in-dash video in Officer Picou's patrol car. (Tr. 145). Officer Picou was the only witness called by the State and his testimony was crucial. The video recording would obviously be significant to the case; however, when asked about the tape, Officer Picou's only excuse for the tapes

absence was: "The DA's office wanted to keep it and they kept it. So I don't know where it is at." (Tr. 145). This is evidence from which the jury could make the factual finding that Officer Picou and/or the State exercised bad faith in handling the investigation and the evidence in its possession.

In sum Instructions D-4 and D-5 would have properly instructed the jury that it *may* draw an adverse inference against the prosecution if it found the investigation to be negligent and/or done in bad faith. The State was in the best (or rather the only) position to know where this potentially exculpatory evidence was located if it hadn't been intentionally destroyed. The State either failed to turn the evidence over because it intentionally destroyed or withheld it or it neglected to keep track of where evidence was and who had control over it. The result was that a crucial piece of evidence in Trejo's trial was missing, a piece of evidence that could have been used to impeach Officer Trejo's testimony. The evidence might have even proven Trejo's innocence; but no one will ever know because the State failed in its duty to protect the evidence. A reasonable juror could easily draw the logical inference that the tape was unfavorable to the State, and, for that reason, the State destroyed it, intentionally withheld it, or negligently and conveniently lost it.

Because the integrity of the State's investigation is probative of credibility, Instructions D-4 and D-5 were legally proper and the trial court committed reversible error in refusing them. This resulted in prejudice to Trejo's defense, as it exacerbated harm caused by the denial of Trejo's due process rights, and it effectively denied the existence of any negative inference as to bad faith in the State's failure to produce the video tape or, more generally, the prosecution's conduct in assembling of and bringing of the case against Trejo. Accordingly, Trejo is entitled to a new trial.

V. THE STATE FAILED TO PROVE THAT TREJO WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-81 OR A SUBSEQUENT OFFENDER UNDER SECTION 41-29-

147, AND THE TRIAL COURT ERRED IN SENTENCING TREJO AS SUCH.

During sentencing, the State attempted to establish that Trejo was a habitual offender under Mississippi Code Annotated Section 99-19-81. To prove this, the State alleged that Trejo had previously been convicted of and sentenced to one year or more for (1) unauthorized use of a motor vehicle in Cameron County, Texas, and (2) possession of cocaine in 1997 in the United States District Court for the Southern District of Texas. (Tr. 205, Ex. S-1, S-3).

To prove Trejo's conviction for unauthorized use of a motor vehicle, the State offered a certified copy of a judgement of conviction and sentence of six years for one Guadalupe Leal. (Tr. 205, Ex. S-1). The State then attempted to prove that Guadalupe Leal was an alias of Trejo by calling Officer David Ruth of the Rankin and Madison County District Attorneys' office(s) to testify that he ran an NCIC report on Trejo and used an F.B.I. number obtained therefrom to request the judgment of conviction from Texas. (Tr. 215). Officer Ruth testified that the conviction he received from Texas was the conviction against Guadalupe Leal. (Tr. 215). Officer Ruth claimed that a fingerprint sheet attached to the judgment of conviction had the letters "D.T." appearing next to the defendant's fingerprint. (Tr. 216, Ex. S-1). Officer Ruth then testified that a case history of Cameron County, Texas, obtained over the computer on a "Pacer" system revealed that the same case number in the Leal's case appeared in a search of Trejo's history. (Tr. 216).

To prove Trejo's alleged conviction for possession of cocaine, the State offered a certified copy of an order revoking Trejo's parole and ordering him to serve eight months imprisonment. (Tr. 220-22, Ex. S-3). The revocation order states neither the nature of the underlying offense nor the sentence received for conviction for the underlying offense. (See Ex. S-2). Officer Ruth attempted

to supplement the information in the revocation order by testifying that he ran an NCIC report on Trejo which revealed that he was convicted in the same cause number for possession of a controlled substance. The unauthenticated computer printout of the NCIC or "Pacer" report was admitted into evidence over defense objection. (Tr. 218-224, Ex. S-3). The State relied on this same evidence in its attempt to establish that Trejo was a subsequent drug offender under Section 41-29-147. (Tr. 206, Ex. S-3).

A defendant has "a fundamental right to be free from an illegal sentence." *Clark v. State*, 960 So. 2d 521, 524 (¶9) (Miss. Ct. App. 2006) (citing *Sneed v. State*, 722 So.2d 1255, 1257 (¶11) (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 (¶22) (Miss. Ct. App. 2003). This Court has, on multiple occasions, held that NCIC computer printouts offered to establish a defendant's prior convictions are subject to exclusion as inadmissible hearsay because the accuracy of such compilations cannot be sufficiently certified by the NCIC compiler. *See e.g., Vince v. State*, 844 So. 2d 510, 518 (¶24) (Miss. Ct. App. 2003); . *Harveston v. State*, 798 So. 2d 638, 640-41 (¶¶5-11) (Miss. Ct. App. 2001); *Sanders v. State*, 786 So. 2d 1078, 1082 (¶11) (Miss. Ct. App. 2001).

In the instant case, the trial court erred in admitting and relying on the unauthenticated NCIC computer printout report in ruling that the State established Trejo's habitual offender status and his subsequent drug offender status. The State failed to establish the NCIC report's admissiblity.

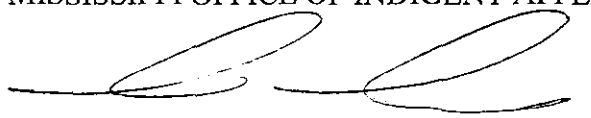
Harveston, 798 So. 2d at 641 (¶9) ("The burden of showing the admissibility of evidence is on the proponent of the evidence.")(citation omitted). Under Harveston and Sanders, the NCIC report and the information contained therein was/were unreliable and inadmissible under the hearsay rules. The order revoking Trejo's parole, on its face, was insufficient to establish that he was previously convicted of possession of a controlled substance, as it did not reflect the nature of the underlying offense. Thus, without the inadmissible information contained in the NCIC report, the State failed to prove Trejo's habitual and subsequent drug offender status. Therefore, the trial court erred in admitting them into evidence and in relying on them in adjudging Trejo a habitual offender and a subsequent drug offender. 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, Trejo 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, Trejo 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.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for David Trejo, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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