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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA  
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9 UNITED STATES OF AMERICA, )

10 Plaintiff, )

3:11-CR-00094-LRH-VPC

11 v. )

ORDER

12 ALBERT THOMAS WENDFELDT, )

13 Defendant. )  
14

15 Before the Court is Defendant Albert Thomas Wendfeldt's ("Wendfeldt") Motion to  
16 Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody Pursuant to 28 U.S.C.  
17 § 2255. Doc. #36.<sup>1</sup> The United States filed a Response (Doc. #40), to which Wendfeldt did not  
18 reply. After the Court ordered an evidentiary hearing (Doc. #41), Wendfeldt filed a Memorandum  
19 in Support of his Motion to Vacate (Doc. #44), to which the United States replied (Doc. #45). The  
20 Court held an evidentiary hearing on October 27, 2014, during which the Court viewed the video of  
21 Wendfeldt's driving and the traffic stop at issue and heard testimony from the arresting officer and  
22 an expert witness called by the defense.

23 **I. Factual Background**

24 Shortly before 10:40 p.m. on July 11, 2011, Nevada Highway Patrol ("NHP") Trooper Eric  
25 Lee ("Trooper Lee") observed Wendfeldt's vehicle, which was traveling westbound in the outside  
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<sup>1</sup> Refers to the Court's docket entry number.

1 lane of Interstate 80 near Reno, drive onto the north fog line several times within one mile. In his  
2 report, Officer Lee noted that the driver of the vehicle had violated Nevada Revised Statute  
3 (“NRS”) 484.305,<sup>2</sup> which provides that “[i]f a highway has two or more clearly marked lanes for  
4 traffic traveling in one direction, vehicles must: (a) Be driven as nearly as practicable entirely  
5 within a single lane.” Trooper Lee activated his emergency lights and effected a traffic stop at  
6 approximately 10:40 p.m. Upon making contact with Wendfeldt, Trooper Lee informed Wendfeldt  
7 that he stopped him because he was concerned that he may have been drinking and driving or  
8 possibly falling asleep behind the wheel. Wendfeldt explained that he had been driving all day and  
9 was only trying to get to Reno. Trooper Lee then asked “did you notice that you were having a hard  
10 time staying in the lane?” Wendfeldt responded “no.” Wendfeldt added that he was driving toward  
11 the right side of his lane because Trooper Lee was immediately behind him in the inside lane to the  
12 left.

13 While Wendfeldt was retrieving his license and registration, Trooper Lee observed that the  
14 interior of the vehicle had a “lived-in” appearance, with trash, clothing, and other items scattered  
15 about the vehicle. After Wendfeldt located the requested documentation, Trooper Lee conducted a  
16 weapons frisk. In response to Trooper Lee’s inquiry about previous trouble with law enforcement,  
17 Wendfeldt responded that his only trouble had been for driving under the influence.

18 Trooper Lee requested a records check on Wendfeldt at approximately 10:44 p.m. While  
19 waiting for the records check to return, Trooper Lee asked Wendfeldt a number of  
20 questions—primarily concerning his travels and occupation. At 10:53 p.m., Wendfeldt asked if  
21 they were done yet. Thereafter, Trooper Lee indicated that Wendfeldt’s driver’s license check had  
22 come back and Trooper Lee told Wendfeldt that he was free to leave. As Wendfeldt was walking  
23 back to his car, Trooper Lee reinitiated questioning and asked “do you have anything illegal inside  
24 the car?” Wendfeldt responded “no sir.” Trooper Lee then asked Wendfeldt if he had any  
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26 <sup>2</sup> NRS 484B.223(1) was substituted in revision for 484.305(1).

1 marijuana, heroin, cocaine, ecstasy, methamphetamines, or large sums of money. Wendfeldt  
2 responded “no sir” to each of these questions. At approximately 10:55 p.m., Trooper Lee asked  
3 “can I search your vehicle?” Wendfeldt responded “no sir.” Trooper Lee then said “why don’t you  
4 stand right over there,” referring to a location away from his vehicle and near the police vehicle.  
5 Next, Trooper Lee returned to his patrol car and took out his canine “Petey.” He then walked the  
6 dog to Wendfeldt’s vehicle, circled the vehicle, and the dog positively alerted in the area of a  
7 passenger door. Trooper Lee then detained Wendfeldt and obtained a search warrant. A search of  
8 locked containers in the trunk of the vehicle yielded discovery of sixty-five grams of  
9 methamphetamine, plastic bags, a digital scale, two handguns, and a shotgun.

10 On August 10, 2011, Wendfeldt was indicted by a federal grand jury on one count of  
11 Possession with Intent to Distribute a Controlled Substance in violation of 21 U.S.C. § 841(a)(1)  
12 and 841(b)(1)(A)(viii). Doc. #1. On August 30, 2011, federal public defender Cynthia S. Hahn  
13 (“Hahn”) was appointed counsel for Wendfeldt. Doc. #11. On February 2, 2012, Wendfeldt  
14 withdrew his previous plea of not guilty and entered a plea of guilty. Doc. #20. In the Plea  
15 Agreement, Wendfeldt stipulated to the following:

16 A Nevada Highway Patrol officer conducted a traffic stop of the defendant’s vehicle  
17 on Interstate 80 on July 11, 2011. After a drug detection dog alerted on the  
18 defendant’s vehicle, a search warrant was obtained for the vehicle. During a search  
of the vehicle trunk, the officer found approximately 65 grams of actual  
methamphetamine and three firearms. These items were found in locked containers.  
19 Doc. #21 at 5. On May 11, 2012, the Court entered judgment against Wendfeldt and sentenced him  
20 to a mandatory minimum of 120 months imprisonment to be followed by five years’ supervised  
21 release. Doc. #26.

## 22 **II. Legal Standard**

23 Nevada law states that in a highway with two or more lanes, vehicles must “[b]e driven as  
24 nearly as practicable entirely within a single lane.” NRS 484B.223(1). An infraction involving a  
25 minor cross over a fog lane does not by itself create reasonable suspicion to justify a traffic stop.  
26 *United States v. Delgado-Hernandez*, 283 Fed. Appx. 493, 498-99 (9th Cir. 2008) (holding that the

1 stop was unreasonable where the defendant crossed over the fog line twelve to fourteen inches and  
2 did not endanger other motorists).

3 It is well settled that a traffic stop is a seizure within the meaning of the Fourth  
4 Amendment. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *see also Whren v. United States*,  
5 517 U.S. 806, 809-10 (1996). The Ninth Circuit has held, in the context of an investigatory traffic  
6 stop, that an officer need only have reasonable suspicion to justify the seizure. *See United States v.*  
7 *Lopez-Soto*, 205 F.3d 1101, 1104-05 (9th Cir. 2000) (concluding that *Whren* did not alter the law  
8 that reasonable suspicion is enough to support an investigatory traffic stop under the Fourth  
9 Amendment); *see also Brendlin v. California*, 551 U.S. 249, 263 (2007) (concluding that a seizure  
10 begins at the moment the car comes to a halt on the side of the road). Reasonable suspicion  
11 requires “specific, articulable facts which, together with objective and reasonable inferences, form  
12 the basis for suspecting that the particular person detained is engaged in criminal activity.” *United*  
13 *States v. Michael R.*, 90 F.3d 340, 346 (9th Cir. 1996) (quoting *United States v. Garcia-Camacho*,  
14 53 F.3d 244, 246 (9th Cir. 1995)). In assessing the legality of an investigative stop, courts must  
15 consider the “totality of the circumstances.” *United States v. Cortez*, 449 U.S. 411, 417 (1981).

16 Pursuant to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside, or correct  
17 a sentence if “the sentence was imposed in violation of the Constitution or laws of the United  
18 States, or . . . the court was without jurisdiction to impose such sentence, or . . . the sentence was  
19 in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”  
20 28 U.S.C. § 2255. A petitioner can base a § 2255 motion on the ineffective assistance of counsel  
21 prior to conviction or a plea deal. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). If the  
22 Court determines that a motion to suppress would have been meritorious, the Court must then  
23 consider whether failure to file such a motion constituted ineffective assistance of counsel. *See*  
24 *Strickland*, 466 U.S. at 686. In order to prevail on an ineffective assistance of counsel claim, the  
25 petitioner has the burden of proving two elements. “First, the defendant must show that counsel’s  
26 performance was deficient,” meaning that counsel was not functioning as a competent advocate.

1 *Id.* at 687. “Second, the defendant must show that the deficient performance prejudiced the  
2 defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of  
3 a fair trial.” *Id.* The Court “must indulge a strong presumption that counsel’s conduct falls within  
4 the wide range of reasonable professional assistance.” *Id.* at 689.

### 5 **III. Discussion**

#### 6 **A. Likelihood of Success**

7 At issue first is whether the investigatory traffic stop ran afoul of the Fourth Amendment  
8 such that Wendfeldt would have succeeded had his counsel filed a motion to suppress. Wendfeldt  
9 contends that (1) the initial investigative traffic stop was not supported by reasonable suspicion, (2)  
10 the police questioning during the initial seizure was unreasonable, and (3) the subsequent external  
11 canine search of his vehicle was not supported by reasonable suspicion.

#### 12 **1. Initial Traffic Stop**

13 Trooper Lee articulated one observed traffic violation—failure to maintain a travel lane—to  
14 justify the investigatory traffic stop. Doc. #45-1, Ex. A. Specifically, the trooper observed  
15 Wendfeldt’s vehicle “drive onto the north fog line multiple times within one mile, as it traveled in  
16 the #2 westbound travel lane, which was contrary [to] and in violation of [NRS 484B.223].” *Id.*  
17 Although the Nevada Supreme Court has not interpreted NRS 484B.223 on this issue,<sup>3</sup> other courts  
18 have held that a minor, isolated crossing of a lane line does not violate a statute requiring a driver  
19 to safely maintain his or her travel lane. In *Delgado-Hernandez*, the Ninth Circuit concluded that  
20 the defendant did not violate NRS 484B.223(1) by briefly crossing over the fog line approximately  
21 twelve to fourteen inches one time. 283 Fed. Appx. at 496-99. The Ninth Circuit found significant  
22 the fact that the defendant was not speeding or otherwise driving in an erratic manner. *Id.* at 497-  
23 98. In *United States v. Lopez-Rojo*, No. 3:07-cr-0080, 2008 WL 2277495, at \*5 (D. Nev. May 29,

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25 <sup>3</sup> The Nevada Supreme Court has stated that “the gravamen of a charge for violating [NRS  
26 484B.223(1)] is that the driver changed a direct course of travel without giving the proper signal.” *Nevada v.*  
*Eighth Judicial Dist. Court*, 994 P.2d 692, 699 (Nev. 2000).

1 2008), this Court found that “[a]lthough the Nevada Supreme Court—or any other Nevada  
2 court—has not issued a opinion regarding what constitutes a failure to maintain a traffic lane,  
3 persuasive authority weighs in favor of finding that crossing over, as opposed to touching, a fog  
4 line constitutes [a violation of NRS 484B.223(1)].” Moreover, In *United States v. Raileanu*, No.  
5 2:13-cr-0038, 2013 WL 6913252, at \*2 (D. Nev. Dec. 30, 2013), the U.S. District Court for the  
6 District of Nevada concluded that the defendant did not violate NRS 484B.223(1) when he crossed  
7 over the fog line three times in one-quarter of a mile. Further, the court found that because the  
8 officer was mistaken about what constituted a violation of the law, reasonable suspicion was  
9 lacking and the stop was not justified. *Id.*

10 The Court finds the reasoning in the aforementioned cases to be persuasive, and notes that  
11 Wendfeldt’s conduct falls short of the conduct that these courts determined *could not* justify  
12 reasonable suspicion because Wendfeldt merely touched the line, and never crossed it. The Court  
13 benefits from having viewed the video of Wendfeldt’s driving and the stop at the evidentiary  
14 hearing. Although Wendfeldt’s right tires touched the fog line several times, he was not speeding  
15 or driving erratically in any way, and his driving posed no danger to any other motorists.  
16 Wendfeldt’s driving appears reasonable in light of the fact that a police vehicle was positioned in  
17 Wendfeldt’s blind spot in the parallel inside lane for an extended period of time. It is reasonable  
18 for a driver to drive to the outside of his traffic lane when another vehicle is positioned to the side  
19 and behind the driver’s vehicle in the inside lane. Additionally, Wendfeldt expressed to Trooper  
20 Lee in the opening seconds of their conversation following the traffic stop that the presence of the  
21 police vehicle was a reason that he moved toward the right side of the outside lane.

22 Thus, although Trooper Lee claimed that he initiated a traffic stop for “the safety of the  
23 innocent motoring public,” there is no indication that Wendfeldt was driving unlawfully,  
24 erratically, or in an otherwise unsafe manner. Additionally, the United States’ contention that  
25 “other relevant circumstances, including the late night hour and [Trooper Lee’s] suspicion that  
26 Wendfeldt may have been impaired or falling asleep,” does not appear to be supported by any

1 objective evidence other than Wendfeldt's observed driving patterns, which did not violate NRS  
2 484B.223(1). *See* Doc. #45 at 6. The Court therefore does not find that Wendfeldt's conduct  
3 invited suspicion that, under a totality of circumstances, justified Trooper Lee's stop. As such,  
4 Trooper Lee did not have the requisite reasonable suspicion necessary to justify the traffic stop at  
5 its inception.

6 Even if Trooper Lee was mistaken in good faith about whether Wendfeldt's driving violated  
7 NRS 484B.223(1), this does not transform the unlawful traffic stop into a lawful one. *See United*  
8 *States v. King*, 244 F.3d 736, 739 (9th Cir. 2001) (finding that even "a good faith mistake of law by  
9 an officer cannot form the basis for reasonable suspicion"); *see also United States v. Twilley*, 222  
10 F.3d 1092, 1096 (9th Cir. 2000) (a mistake of law occurs when an officer believes that the  
11 suspected conduct is illegal even though the law does not actually prohibit it). Because the Court  
12 finds that the original stop was deficient, and that a motion to suppress would have been  
13 meritorious on this ground, the Court need not consider questions related to the remainder of the  
14 traffic stop. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable  
15 probability that, but for counsel's unprofessional errors, the result of the proceeding would have  
16 been different. A reasonable probability is a probability sufficient to undermine confidence in the  
17 outcome."); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) ("The exclusionary rule has  
18 traditionally barred from trial physical, tangible materials obtained during or as a direct result of an  
19 unlawful invasion."). However, the Court considers Wendfeldt's arguments regarding the  
20 reasonableness of his detention below.

## 21 **2. Questioning During Initial Seizure**

22 Wendfeldt also challenges the legality of his "prolonged detention," which he argues  
23 exceeded the scope and duration of the purported justification for the initial investigatory traffic  
24 stop. Doc. #44 at 7-9. To determine whether a detention is longer than justified under the  
25 circumstances, "it is appropriate to examine whether the police diligently pursued a means of  
26 investigation that was likely to confirm or dispel their suspicions quickly." *United States v.*

1 *Sharpe*, 470 U.S. 675, 686 (1985). “An officer’s inquiries into matters unrelated to the justification  
2 for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so  
3 long as those inquiries do not *measurably* extend the duration of the stop.” *Arizona v. Johnson*,  
4 555 U.S. 323, 333 (2009).

5 Assuming *arguendo* that the initial stop was permissible, the Court finds that although  
6 Trooper Lee asked Wendfeldt many questions unrelated to driving, such questions were  
7 permissible under *Sharpe and Johnson* because they did not unreasonably prolong the length of the  
8 stop. Trooper Lee called Wendfeldt’s license and registration in to dispatch and asked all questions  
9 while waiting eight to ten minutes for a response. Once dispatch responded, Trooper Lee  
10 immediately shook Wendfeldt’s hand and told him that he was free to go. This was not an  
11 unreasonably long traffic stop under controlling precedent. *See Muehler v. Mena*, 544 U.S. 93, 94  
12 (2005) (finding that questioning that does not prolong a lawful stop is not an additional seizure that  
13 requires separate reasonable suspicion); *United States v. Mendez*, 476 F.3d 1077, 1081 (9th Cir.  
14 2007) (holding that questioning outside the scope of the reason for stopping an individual “need not  
15 have been supported by separate reasonable suspicion”).

### 16 **3. Second Seizure**

17 Whether Trooper Lee unreasonably prolonged the stop by asking additional pointed  
18 questions regarding illegal possession after telling Wendfeldt that he was free to leave is a more  
19 difficult question. The Nevada Supreme Court directly addressed the issue of whether it is legal for  
20 an officer to conduct a second seizure after telling the driver that he can leave in *State v. Beckman*,  
21 305 P.3d 912 (Nev. 2013) (en banc). *Beckman* involved a traffic stop of an individual who was  
22 stopped for speeding. *Id.* at 914. After verifying Beckman’s license and registration, the officer  
23 told him that “everything checks good” and issued a warning. *Id.* When Beckman began to leave,  
24 the officer ordered him to stay until a drug-sniffing dog arrived at the scene. *Id.* When the canine  
25 arrived, it alerted to the presence of drugs, which was confirmed by a subsequent warrantless search  
26 of the vehicle. *Id.* The Court affirmed suppression of the evidence, holding that after telling an



1 individual that he is free to leave, a prolonged search “may be reasonable in three limited  
2 circumstances: when the extension of the stop was consensual, the delay was de minimis, or the  
3 officer lawfully receives information during the traffic stop that creates a reasonable suspicion of  
4 criminal conduct.” *Id.* at 917. The Court acknowledges that a decision of a state Supreme Court is  
5 not binding authority on this question. However, the Court finds that *Beckman* is persuasive, and  
6 that applying the principles of *Beckman* to the present facts supports the court’s conclusion that  
7 Wendfeldt’s second seizure was unlawful.<sup>4</sup>

8 First, there was no consent for the search of Wendfeldt’s vehicle. The *Beckman* Court  
9 noted that any argument that consent existed for the search evaporated when Beckman asked “can I  
10 please go” and the officer responded “absolutely not.” *Id.* at 918. Wendfeldt’s statement refusing  
11 consent to search his vehicle was similarly unambiguous. After Trooper Lee told Wendfeldt that he  
12 was free to go and Wendfeldt started toward his car, the trooper asked “can I search your vehicle?”  
13 Wendfeldt responded “no sir.” At this point, Trooper Lee said “why don’t you stand right over  
14 there,” referring to a location away from Wendfeldt’s vehicle and near the patrol vehicle. Trooper  
15 Lee then obtained his canine from his patrol car, walked the dog arounds Wendfeldt’s vehicle, and  
16 the dog positively alerted while on the right passenger side of the vehicle. The Court is particularly  
17 troubled that Wendfeldt’s refusal to consent appears to be a factor in Trooper Lee’s decision to  
18 conduct the dog sniff. Trooper Lee stated at the evidentiary hearing that he did not intend to issue  
19 Wendfeldt a citation throughout the initial stop, and it is clear that the Trooper told Wendfeldt that  
20 he was free to go. It was not until Wendfeldt refused to consent to a search that Trooper Lee told  
21 him to stand aside so that he could conduct a dog sniff. Individuals have a right to refuse consent  
22 for a search, and the existence of this right requires that denial of consent not be a basis for  
23 reasonable suspicion. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 270-71 (1973) (finding  
24 that a search of a suspect’s vehicle without probable cause or consent violates the Fourth

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26 <sup>4</sup> *Beckman*, an en banc decision of the Nevada Supreme Court, based its reasoning largely on an  
exhaustive analysis of federal case law, substantially from the United States Supreme Court and the Ninth  
Circuit Court of Appeals.

1 Amendment); *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 841 (9th Cir. 2003), *abrogation on*  
2 *other grounds recognized by C.B. v. City of Sonora*, No. 11-17454, 2014 WL 5151632, at \*12 n.12  
3 (9th Cir. Oct. 15, 2014) (finding that refusal “to consent to a search cannot be a basis for the arrest  
4 unless [the officer] had a right to search” independent of the refusal); *Gasho v. United States*, 39  
5 F.3d 1420, 1439 (9th Cir. 1994) (noting that refusal to consent to a search “could not serve as a  
6 basis for finding criminal intent”); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978)  
7 (finding that refusing to consent to a search cannot be a crime, “[n]or can it be evidence of a  
8 crime”).

9 Second, the United States argues that the second seizure was *de minimus* because Trooper  
10 Lee had a canine in his vehicle and was able to conduct the dog sniff quickly, adding only a few  
11 minutes to the time of the stop. Doc. #45 at 10. The dog sniff occurred approximately two and a  
12 half minutes after Trooper Lee told Wendfeldt that he was free to leave. Although the second  
13 seizure here was not as long as the nine-minute delay in *Beckman*, the Court finds that it still was  
14 not *de minimus* under the circumstances present here. A drug sniff conducted during a legal traffic  
15 stop is not a search so long as it does not unreasonably prolong the stop. *Illinois v. Caballes*, 543  
16 U.S. 405, 407-08 (2005). Courts have been reluctant to set a specific time limit for what would  
17 constitute unreasonable delay. *See United States v. Turvin*, 517 F.3d 1097, 1102-03 (9th Cir. 2008)  
18 (discussing what would constitute unreasonable delay and declining to adopt a bright-line rule).

19 The Court benefits from having viewed the video of Wendfeldt’s stop. The video shows  
20 Wendfeldt waiting patiently for nearly thirteen minutes while Trooper Lee waited for a response  
21 from dispatch regarding the license and registration check. Wendfeldt did not appear more nervous  
22 than any citizen might be after being frisked for weapons and then being questioned for more than  
23 ten minutes at night on the side of the road by a trooper. After asking many questions of  
24 Wendfeldt, very few related to his driving, Trooper Lee concluded that Wendfeldt was free to leave  
25 when dispatch reported nothing irregular following the license and registration check. Because the  
26 Court does not believe that any reasonable suspicion existed to continue interrogating Wendfeldt

1 once he had been told he could leave, the Court finds that Trooper Lee’s additional pointed  
2 questions regarding whether Wendfeldt had illegal contraband, and then directing him to stand to  
3 the side of the patrol vehicle when Wendfeldt refused to consent to a search, were not *de minimus*.

4 Third, the Court is not persuaded by the United States’ argument that the initial stop gave  
5 Trooper Lee reasonable suspicion of criminal conduct. The United States argues that four factors  
6 that occurred during the traffic stop contributed to Trooper Lee’s reasonable suspicion: “1)  
7 Wendfeldt’s uncontrolled shaking as he provided his vehicle documentation; 2) trash, clothing, and  
8 miscellaneous items scattered throughout Wendfeldt’s car, which is consistent with drug  
9 transporters . . . ; 3) Wendfeldt’s vague, indefinite, and conflicting statements about his travel  
10 plans; and 4) Wendfeldt’s failure to fully disclose his prior encounters with law enforcement.”  
11 Doc. #45 at 11. Courts often rely on conclusions of police officers because their experiences  
12 enable them to notice factors that “might well elude an untrained person.” *Cortez*, 449 U.S. at 418.  
13 “Factors such as nervousness are part of a reasonable suspicion analysis but, standing alone, carry  
14 little weight because many citizens become nervous during a traffic stop, even when they have  
15 nothing to hide.” *Beckman*, 305 P.3d at 918 (citing *United States v. Arvizu*, 534 U.S. 266, 275  
16 (2002)).

17 Again, the Court benefits from having viewed the video of Wendfeldt’s stop. First, even  
18 assuming that Trooper Lee noticed some factors in person that did not translate on the video, the  
19 video does not show any indication of “uncontrolled shaking” or that Wendfeldt was more nervous  
20 than many citizens might be while stopped by a Trooper on the side of the road at night.<sup>5</sup> See  
21 *United States v. Chavez-Venezuela*, 268 F.3d 719, 725 (9th Cir. 2001), *overruled on other grounds*  
22 *by Muehler v. Mena*, 544 U.S. 93 (2005) (“[I]t is common for most people to exhibit signs of  
23 nervousness when confronted by a law enforcement officer whether or not the person is currently  
24 engaged in criminal activity.”) Second, Wendfeldt explained to Trooper Lee that he was driving to

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25 <sup>5</sup> After frisking Wendfeldt for weapons and nine minutes into the stop, Trooper Lee said “you seem  
26 nervous” after Wendfeldt asked why Trooper Lee was asking so many questions. Wendfeldt responded “I have  
no reason for standing here, and I don’t know what you’re doing.”

1 Washington State to visit his children; such a long drive would justify the presence of clothing or  
2 other miscellaneous items in Wendfeldt's car.<sup>6</sup> Third, the Court finds that Wendfeldt's stated travel  
3 plans were not so vague as to arouse the additional suspicion necessary to justify a second seizure  
4 after telling Wendfeldt that he was free to go. *See United States v. Sokolow*, 490 U.S. 1, 2 (1989)  
5 (noting that odd travel schedules can be "quite consistent with innocent travel"). Fourth, although  
6 it is true that Wendfeldt told Trooper Lee that he had a prior DUI conviction while concealing that  
7 he had a prior misdemeanor drug charge, this alone is not enough to create reasonable suspicion  
8 under these circumstances. *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) ("[A]  
9 prior criminal history alone cannot establish reasonable suspicion.").

10 The Court acknowledges that even if individual factors would not justify reasonable  
11 suspicion, many factors can contribute to a finding of reasonable suspicion based on the officer's  
12 training and experience. *See Sokolow*, 490 U.S. at 9 (finding that any one of the cited factors was  
13 not by itself proof of illegal conduct, but taken together they amounted to reasonable suspicion).  
14 Under these facts, however, and the fact Trooper Lee had no reasonable suspicion to conduct the  
15 initial stop, the Court finds that the totality of circumstances does not support Trooper Lee's  
16 finding that reasonable suspicion existed for the second seizure. *See United States v. Sigmond-*  
17 *Ballesteros*, 258 F.3d 1117, 1127 (9th Cir. 2001) (finding no reasonable suspicion under totality of  
18 circumstances where officer cited a lane change and move off the main road, hand gestures in the  
19 vehicle, notoriety of the route for smuggling, proximity to border, and missing rear seat, among  
20 other factors, to support reasonable suspicion); *United States v. Hernandez-Alvarado*, 891 F.2d  
21 1414, 1418-19 (9th Cir. 1989) (finding no reasonable suspicion based on the totality of  
22 circumstances where the officer based his suspicion on nervous demeanor of driver and passengers,  
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24 <sup>6</sup> Wendfeldt told Trooper Lee that he was traveling from Arizona to Seattle to visit his two children,  
25 who live in Eastern Washington and Seattle. In response to questions by Trooper Lee, the sixty-one year old  
26 Wendfeldt responded that he would be in Washington State for one to two weeks, and that his children were  
expecting him. When asked why he was driving rather than flying to Seattle, Wendfeldt responded that he  
wanted to give the car to his daughter as a gift and that he would fly on his return trip.

1 sudden reduction of speed upon noticing police officer, presence of two-way antenna on the  
2 vehicle, defendant's residence in an area known for narcotics activity, license plate bracket  
3 indicating purchase of car at a dealership known for drug trafficking, and the size of defendant's  
4 truck as evidence supporting reasonable suspicion).

5 In a recent civil forfeiture case, this Court held that an officer's prolonged interrogation was  
6 reasonable under the totality of circumstances because the officer reported six total factors that  
7 contributed to his reasonable suspicion: 1) noticing the smell of marijuana; 2) strong odor of air  
8 freshener in the vehicle; 3) expired rental agreement; 4) unusually nervous and frantic demeanor; 5)  
9 prior conviction for drug trafficking; and 6) odd travel plans and stressed reaction to questions  
10 regarding said travel plans. *United States v. \$102,836.00*, 9 F. Supp. 3d 1152, 1161 (D. Nev.  
11 2014). That case is distinguishable for two reasons. First, the individual was initially stopped for  
12 speeding and an obstructively-placed Global Positioning System device on the windshield; the  
13 arrest was therefore not, as here, predicated on a faulty initial stop. Second, under the totality of  
14 circumstances analysis, the officer in *\$102,836.00* observed significantly more evidence to support  
15 his finding of reasonable suspicion.<sup>7</sup> Here, the totality of the circumstances analysis is insufficient  
16 to show that Trooper Lee had more than an "inchoate and unparticularized suspicion" of  
17 Wendfeldt's criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968); *United States v. Motley*,  
18 344 Fed. Appx. 445, 448 (9th Cir. 2009) (finding that a traffic stop that "revealed no independent  
19 evidence of illicit narcotics activity" did not establish reasonable suspicion).

20 Because of the foregoing, the Court finds that Wendfeldt's second seizure was not  
21 supported by consent, was not *de minimus*, and was not supported by additional reasonable  
22 suspicion. Accordingly, even if the initial traffic stop were justified, prolonging the interrogation  
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24 <sup>7</sup> The officer smelled marijuana on the suspect's person during the stop, and the suspect told the officer  
25 that he had a prior record for drug trafficking. *\$102,836.00*, 9 F. Supp. 3d at 1155. The officer also stated that  
26 the existence of an expired vehicle rental agreement is common for drug traffickers. *Id.* Finally, the suspect's  
nervousness was much more pronounced: he "repeatedly put his hands into his pockets and then removed them,  
was pacing in front of [the officer] and kicking the dirt beneath his feet, and exhibited other signs of undue  
stress." *Id.* at 1160.

1 of Wendfeldt after saying he was free to leave was impermissible. Because evidence against  
2 Wendfeldt never would have been discovered but for the illegal traffic stop, the failure of  
3 Wendfeldt's counsel to file a motion to suppress prejudiced Wendfeldt's defense and had a  
4 substantial impact on the result. *See Strickland*, 466 U.S. at 694 (finding that ineffective assistance  
5 of counsel only applies when there is a "reasonable probability that, but for counsel's  
6 unprofessional errors, the result of the proceeding would have been different").

7 **B. Application of § 2255**

8 If the Court determines that an individual's conviction is premised on a faulty stop, a § 2255  
9 motion must still be dismissed if counsel's decision not to use a particular litigation tactic was  
10 strategic. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1985) ("Only those habeas petitioners  
11 who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of  
12 their attorneys will be granted the writ and will be entitled to retrial without the challenged  
13 evidence."). The United States argues that regardless of whether the Court determines that Trooper  
14 Lee had reasonable suspicion for the stop, the Court must deny Wendfeldt's § 2255 motion unless  
15 Wendfeldt shows that "his prior attorney's failure to litigate that claim was the result of gross  
16 negligence." Doc. #45 at 12. The United States argues further that Wendfeldt's counsel's decision  
17 not to file a motion to suppress was strategic—not indicative of "gross incompetence"—because an  
18 unsuccessful motion could have resulted in a longer sentence for Wendfeldt. *Id.* The Court "must  
19 apply a 'strong presumption' that counsel's representation was within the 'wide range' of  
20 reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 787  
21 (2011). This "strong presumption" also requires the Court to deem that "counsel's attention to  
22 certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Id.* at 790.

23 If convicted, Wendfeldt faced a mandatory minimum of 120 months in prison. Doc. #26.  
24 The United States argued in its pleadings and at the evidentiary hearing that because Wendfeldt  
25 faced the possibility of a shorter sentence for pleading guilty (the difference between 135 to 168  
26 months and 121 to 151 months), the decision not to file a motion to suppress may have been

1 strategic. Doc. #45 at 12. But the record does not indicate that Wendfeldt's counsel took any  
2 measures to maintain a strong bargaining position in negotiations with the United States. If, for  
3 example, counsel had filed a motion to suppress and then withdrawn it after the United States  
4 agreed to a favorable sentence, then this would be indicative of strategy rather than ineffective  
5 assistance. Defendant states that his counsel never even considered the possibility of filing a  
6 motion to suppress. Doc. #36 at 4. The only apparent negotiation that counsel engaged in appears  
7 to be for application of a safety valve that was not in fact possible under controlling case law. *Id.* at  
8 6; see *United States v. Yopez*, 704 F.3d 1087, 1091 (9th Cir. 2012) (en banc) (reversing application  
9 of safety valve for individual who had only nonviolent prior offenses in strict reliance on the  
10 requirement that an individual meet all five factors in the safety valve statute). Based on the  
11 record, however, it appears that Wendfeldt's counsel made no attempt to garner a bargaining  
12 position against the United States despite the likelihood of success of a motion to suppress and the  
13 fact that Wendfeldt faced a mandatory minimum sentence of ten years.

14 “[A] single, serious error may support a claim of ineffective assistance of counsel.”  
15 *Kimmelman*, 477 U.S. at 383. In *Premo v. Moore*, the Supreme Court held that under *Strickland*,  
16 the defendant's attorney's effectiveness was not constitutionally deficient despite the failure to  
17 move to suppress a taped confession. 562 U.S. 115, 131 S. Ct. 733, 743 (2011). This reversed an  
18 en banc decision of the Ninth Circuit Court of Appeals stating that considering the application of a  
19 mandatory minimum sentence, “we cannot conclude that counsel's failure to move to suppress [the  
20 defendant's] formal, taped confession was harmless.” *Moore v. Czerniak*, 574 F.3d 1092, 1113  
21 (9th Cir. 2009), *overruled by Moore*, 131 S. Ct. at 743. In addition to stating that the motion to  
22 suppress Moore's confession might have been fruitless, the Supreme Court noted that the  
23 defendant's “decision to plead no contest allowed him to avoid a possible sentence of life without  
24 parole or death.” *Moore*, 131 S. Ct. at 744.

25 Understanding the importance of *Strickland*'s deferential standard, the Court declines to  
26 follow the result of *Moore* for two reasons. First, as discussed *supra*, the Court finds that had

1 Wendfeldt's attorney filed a motion to suppress, it would have been successful. Second, Wendfeldt  
2 did not receive substantial benefits from his plea bargain comparable to *Moore*, given that he faced  
3 a mandatory minimum of 120 months regardless of the terms of the plea bargain. Under these  
4 facts, the Court finds that Wendfeldt's counsel's decision not to file a motion to suppress was  
5 objectively unreasonable, and that this decision prejudiced Wendfeldt. *See Strickland*, 466 U.S. at  
6 687-88 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the  
7 defendant must show that counsel's representation fell below an objective standard of  
8 reasonableness.").

9 Accordingly, given the problems associated with Wendfeldt's initial stop and the  
10 unreasonable nature of Trooper Lee's decision to prolong the stop after telling Wendfeldt that he  
11 was free to leave, the Court finds that the failure to file a motion to suppress surpassed mere  
12 strategy. In light of the sparse evidence against Wendfeldt absent the traffic stop and long sentence  
13 that Wendfeldt faced if convicted, failure to file a motion to suppress was objectively unreasonable  
14 and constituted ineffective assistance of counsel under § 2255.

#### 15 **IV. Conclusion**

16 The Court concludes that Wendfeldt has satisfied the requirements to establish ineffective  
17 assistance of counsel under § 2255, even in light of the strict standard established by *Strickland*.  
18 First, the Court finds that a motion to suppress would have been meritorious. Second, Wendfeldt's  
19 counsel's attorney was deficient in neglecting to file a motion to suppress. Finally, the ineffective  
20 assistance of counsel prejudiced Wendfeldt's defense because without the evidence conducted as a  
21 result of the illegal search, there is a strong likelihood that he never would have been convicted.

22 IT IS THEREFORE ORDERED that Wendfeldt's Motion to Vacate under 28 U.S.C.  
23 § 2255 (Doc. #36) is GRANTED.

24 IT IS SO ORDERED.

25 DATED this 7th day of November, 2014.

26   
LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE