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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO CHARLESTON COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX

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¹ The Return also included the Record on Appeal and Appellate Records which have already been identified so they are not reproduced in this section.

1 THE COURT: Is there any of this that the State would be
2 seeking to use to impeach his credibility?

3 MS. LINDER: Nothing to impeach his credibility.

4 THE COURT: Oh, there's an '02 B&E motor vehicle, two
5 counts, and a burglary 3rd; but those would be beyond the ten
6 years, and no notice was given to the Defense of the intent
7 to use those.

8 Okay. Sir, do you wish to testify.

9 THE DEFENDANT: No, ma'am.

10 THE COURT: All right. You can take your seat.

11 Does the Defense have any other witnesses or any
12 evidence that they would be seeking to introduce, as Mr.
13 Nesbit does not desire to testify?

14 MS. GAY: No, Your Honor.

15 THE COURT: So does the Defense rest as well?

16 MS. GAY: Defense rests, and we renew our motion, Your
17 Honor.

18 THE COURT: Would the State like to respond?

19 MS. LINDER: Your Honor, I believe we stated our
20 position previously.

21 THE COURT: The Court would deny the motion based on its
22 previous ruling and incorporates that -- those findings into
23 this portion of the record.

24 If you all will give me a few minutes, we'll have charge
25 conference. I just need to print a couple things. Are there

1 any requests for any lesser included offenses?

2 MS. GAY: I think, based on the weight, we would like to
3 ask for possession with intent to distribute, think it
4 actually fits.

5 THE COURT: I just need to print a couple things and
6 we'll go over it, and we'll see if it's supported by the
7 facts; and then what I'll do is we'll bring back in the jury,
8 you'll be able to rest in their presence, and then we'll go
9 forward with the charge and instructions.

10 MS. GAY: In furtherance of that argument, there are two
11 packets of drugs. One of them is a smaller amount, and one
12 was a larger amount, the cocaine, and both of those there's a
13 smaller amount.

14 THE COURT: I can't hear you.

15 MS. GAY: There's smaller amounts. It's not just one
16 baggy. And so if we -- I mean, the jury may want to pick an
17 option of having him be convicted of one baggy and not the
18 other baggy.

19 THE COURT: I don't think you can. I think, the way the
20 law is structured, the packaging works against your client
21 because that supports the fact that he intended to distribute
22 it, sell it.

23 MS. GAY: Well, I understand, but that's my argument for
24 possibly getting a lesser included offense.

25 THE COURT: I'll think about it. Give me about ten

1 minutes, and then we'll have a charge conference.

2 (Recess held.)

3 THE COURT: State ready?

4 MS. LINDER: State's ready.

5 THE COURT: Defense ready?

6 MS. GAY: Yes, ma'am.

7 THE COURT: I will give the jury a general instruction
8 regarding their responsibility and my responsibility. I'll
9 give the judge witness credibility and believability. I'll
10 give them a general instruction regarding expert witness
11 testimony. I'll give them a general instruction on direct
12 and circumstantial evidence from State versus Grippon. I'll
13 then give general instruction that the charges, the arrest
14 and the indictment are not evidence or create any
15 presumptions, as well as on the presumption of innocence.
16 I'll charge Victor versus Nebraska on reasonable doubt. I'll
17 then instruct on the elements of failure to stop for a blue
18 light, which is 56-5-750; and then the elements of
19 trafficking in cocaine, which are the usual elements, without
20 me belaboring it at this time, which deals with the proof of
21 any mixture containing cocaine pursuant to
22 44-53-370(e)(2)(a), 10 grams or more but less than 28 grams,
23 as the testimony has been it was 21.25 grams of cocaine. And
24 then on the elements of possession with the intent to
25 distribute Methydone, which I may say commonly referred to as

1 bath salts, but I may not, just say Methylone. Now, I have
2 searched the statute. Is there any presumptive amount of
3 Methylone in the statute?

4 MS. LINDER: Not that I'm aware of, Your Honor.

5 THE COURT: I'm not either. I'll then instruct on
6 multiple charges. He's charged with several things. The
7 jury can acquit or convict him on any or all of them and that
8 they are to consider each and every element of these offenses
9 separately and independently based on the evidence that has
10 been presented, and then I will instruct on the form of the
11 verdict. Are there any exceptions to the charge as proposed
12 from the State?

13 MS. LINDER: None from the State.

14 THE COURT: From the Defense?

15 MS. GAY: Your Honor, in light of the fact that there is
16 no presumptive weight on the Methylone, I would ask you to
17 also charge possession as a lesser included, possession with
18 intent. We have multiple packages, but we have no deal. We
19 have no actual hand to hand. We have no information that's
20 been put into evidence that there was any kind of
21 distribution or sale going down or any type of -- so I would
22 just ask that you charge also possession.

23 THE COURT: Any exception from the State?

24 MS. LINDER: Judge, I believe that there was testimony
25 about the packaging, the overall weight, that it was not

1 personal use and about the -- what the cash on him indicates.
2 I don't believe possession charged as a lesser included is
3 warranted in this case.

4 THE COURT: And you can't get a valid prescription for
5 Methylone, I would imagine, correct?

6 MS. LINDER: No, Judge.

7 THE COURT: I'm going to instruct the lesser included
8 just because I don't really see any prejudice to the State in
9 instructing it. I will, however, note that the record is
10 void of any testimony that it was for his personal use or
11 that he simply possessed it, but I don't see any harm or foul
12 in instructing.

13 MS. LINDER: Thank you, Judge.

14 THE COURT: You're welcome. Is there anything further
15 from the Defense regarding any exceptions to the charge as
16 proposed?

17 MS. GAY: No, ma'am.

18 THE COURT: Now, PWID is a lesser included of
19 trafficking. Is there any request to instruct the lesser
20 included of PWID on the cocaine --

21 MS. GAY: Yes.

22 THE COURT: -- from the State or the Defense?

23 MS. GAY: I asked that right before you took the break,
24 to consider that. You said you would look into that. On
25 behalf of the defendant I would ask you to please charge

1 that.

2 THE COURT: What's the State's position?

3 MS. LINDER: Your Honor, I do not think that a
4 possession with intent to distribute cocaine charge should be
5 instructed to the jury, kind of exactly what Ms. Gay just
6 talked about the Methylone, there's been no evidence, no
7 testimony that there was a deal, that there was anything of
8 the sort, so in kind of her using her argument why possession
9 of Methylone should be charged, I would say that is why
10 possession with intent to distribute cocaine should not be
11 charged. It is possession of a weight, and that is what the
12 testimony has been.

13 MS. GAY: Just because I felt the need to have to do
14 this, it is a possession of a weight, but often in many cases
15 when there's possession with intent to distribute when there
16 isn't actual testimony of a sale that was set up or whatever,
17 this is up to the jury to determine the weight of the
18 packaging and those types of things to determine whether or
19 not they believe the person possessed with intent to
20 distribute or not, and I believe that we should give the jury
21 that option.

22 MS. LINDER: I'm sorry, Your Honor, in my response to
23 that, in the trafficking statute itself, even if you take
24 apart the end where it's just about the possession, it does
25 encompass, in the trafficking, possession with intent to

1 distribute, deliver, dispense, all of that is within the
2 trafficking statute itself, so I think it covers it.

3 THE COURT: Again, I don't see any prejudice to the
4 State in instructing PWID. PWID deals more -- less with
5 weight, State doesn't have a duty to prove weight,
6 responsibility to prove weight or the element of weight, but
7 it can be proven by the way it was packaged, the
8 circumstances surrounding it. In this instance the amount of
9 money he had on him, the way the drugs were packaged,
10 otherwise could conceivably support a PWID charge. However,
11 I would -- what concerns me a little is the State did not
12 present any testimony regarding -- usually when you testify
13 about the amount of cocaine, you also have the chemist
14 convert it to grains, and you all did not, and I was just
15 curious. Usually the chemist talks about the amount of grams
16 and grains of cocaine, and they didn't in this instance, so
17 I'm not going to instruct anything about the presumption of
18 the weight in the PWID under the statute because we don't
19 have any testimony regarding the conversion of the cocaine to
20 grains, so I'm not going to instruct that portion of it.

21 Okay. Anything further regarding requests for
22 instruction or exceptions to the Court's instructions from
23 the State?

24 MS. LINDER: Beg the Court's indulgence. I could
25 absolutely be wrong, but I thought in the statute it does

1 talk about anything over 1 gram of cocaine is the presumptive
2 weight.

3 THE COURT: I think it says one gram of marijuana. I
4 might need to look back to make sure.

5 MS. LINDER: Give me one second. I have the statute
6 right here.

7 THE COURT: I may have overlooked it. Give me one
8 second, Ms. Linder. You might be accurate, and I may have
9 deleted a portion of what I printed inadvertently.

10 MS. LINDER: Your Honor, in 44-53-370, if you look for
11 (b) (4), it's possession of more than one gram of cocaine, and
12 then it talks about other things, is prima facie evidence of
13 being guilty of violation of subsection (a), and subsection
14 (a) is the PWID.

15 THE COURT: Then I'll insert the one gram in the PWID
16 lesser included on the trafficking. Any exception from the
17 Defense?

18 MS. GAY: No, ma'am.

19 THE COURT: How does it read exactly, is it one gram or
20 more?

21 MS. LINDER: Judge, it says, possession of more than one
22 gram of cocaine. Yes, Judge.

23 THE COURT: Okay. Is there anything else we need to
24 take up before we proceed with closing arguments and
25 instructions, from the State?

1 MS. LINDER: Nothing from the State.

2 THE COURT: From the Defense?

3 MS. GAY: No, ma'am.

4 THE COURT: Can you all make sure all the evidence is in
5 place because I'm not going to stop. I might stop for a
6 restroom break, but let's just make sure.

7 (Brief pause.)

8 THE COURT: Okay. Is all the evidence in place?

9 MS. LINDER: It is, Your Honor.

10 THE COURT: Please bring in the jury. And I'll give you
11 the chance to rest in the presence of the jury, Ms. Gay, and
12 then we'll go into closing argument.

13 MS. GAY: Judge, I was wondering, I'd have to ask you if
14 it's even possible, but the packaging that they have, the
15 large package, I had wanted to cut the package open and hold
16 individual bags. She says I can't do that without talking to
17 you. And, I mean, I realize it's been put into evidence.

18 THE COURT: Let me see what you're talking about.

19 MS. LINDER: Your Honor, I believe she wants to cut open
20 the clear plastic sealed evidence bag to pull out all the
21 different bags of drugs, and I just said that's nothing I've
22 ever seen done, and it's certainly not up to me to do that
23 because if by chance there were a conviction or PCR, it was
24 retried, then the seal would be broken.

25 THE COURT: I guess I'm trying to figure out why you

1 need to.

2 Wait one second for me, please.

3 MS. GAY: I have my reason, but in the scheme of
4 things --

5 THE COURT: In the scheme of things, I can see how it's
6 packaged.

7 MS. LINDER: I guess the jury wouldn't be allowed --

8 THE COURT: No. It's a security issue, really, more
9 than anything else because these can be unsealed because
10 they're in just, basically, Ziploc bags. They're not even
11 Ziploc bags.

12 MS. GAY: So your concern is that they --

13 THE COURT: My concern is more of a safety issue, but I
14 don't see any prejudice to your client because it's clearly
15 visible from this large baggy how each individual one is
16 packaged and how many are inside. I mean, literally, you can
17 move it around to see how they're individually packaged, and
18 you can feel how they're individually packaged.

19 MS. GAY: I understand.

20 THE COURT: If it were different than that, I might let
21 you open it, but I just don't see anything could be
22 accomplished by that; and I have to balance that with the
23 security issues and the preservation issues, but I mean, it's
24 very clear -- and also from each baggy it's clear how each is
25 individually marked, and you can move it around, and you

1 can -- they can feel it, they can feel the contents, and they
2 can see, if you move it around, you can see each individual
3 bag that's in here and how much is in each individual bag.

4 MS. GAY: I understand.

5 THE COURT: So I think you can accomplish what you need
6 to in its current state.

7 All right. Tell them to bring in the jury.

8 (The jury enters the courtroom.)

9 THE BAILIFF: All present, Your Honor.

10 THE COURT: Thank you. You may be seated. The Defense
11 may proceed.

12 MS. GAY: Your Honor, at this time the Defense would
13 rest.

14 THE COURT: Madam forelady, ladies and gentlemen, both
15 the State and the Defense have rested their cases. The next
16 part of the process is closing arguments and the Court's
17 instructions. I would ask that you give the attorneys your
18 undivided attention. State may proceed.

19 MS. LINDER: Thank you, Your Honor, may it please the
20 Court.

21 THE COURT: Yes, ma'am.

22 MS. LINDER: In the beginning of this case yesterday Ms.
23 Mulkey told you that we live in a society of laws. In a
24 society of laws we, as citizens, have been afforded many
25 freedoms; and with those freedoms come a lot of

1 responsibilities, including obeying the laws. Deputies,
2 police officers are all sworn to uphold and enforce those
3 laws. In this case there are traffic laws, specifically
4 52-2-2150. That is that you must use your turn signal for
5 the continuous 100 feet leading up to and through making your
6 turn. There is also another law in this case that if law
7 enforcement signals to you, via blue lights or sirens, then
8 you must yield to law enforcement and stop for them.

9 This case also involves drug laws. It involves
10 possession, possession with intent to distribute, and it
11 involves trafficking. And the drugs that are involved in
12 this case are cocaine and Methyline, which are also bath
13 salts, which is a Schedule I. At the beginning of the trial
14 Ms. Gay told you that this is a very important day, very
15 important day for Mr. Nesbit, and I agree. I agree it's a
16 very important day. But for Mr. Nesbit and his choices and
17 his actions, we wouldn't all be here. I urge you to focus on
18 Mr. Nesbit when you go back there and deliberate.

19 I'd like to take a second and go through a little bit of
20 the testimony that you've heard over the past day or so. You
21 heard from Deputy Chavez. Eight years he's been with law
22 enforcement. Eight years he has done traffic violations. It
23 was June 16th of 2013. It was a normal patrol day. There
24 was extra law enforcement for traffic laws, speeding, running
25 a red light, running a stop sign, not using signals, just any

1 traffic violations. A lot of people around. It was summer
2 on Isle of Palms. It was a regular day for him. He and his
3 partner were sitting on opposite ends of a median in that
4 main drag of IOP, and then it was getting close to the end of
5 the shift, so he scooted around; and then he was just there
6 by himself, waiting out the rest of his shift, just having a
7 normal day. And in that normal day for Deputy Chavez he saw
8 somebody violate 56-5-2150 that all of us, when we go around
9 and are driving vehicles, we have to abide by those laws for
10 the safety of that driver and the safety of all other people
11 walking, riding, anything, on the rode. He attempted to make
12 a traffic stop. He saw somebody he didn't know not use a
13 turn signal. They didn't signal at all, and then they turned
14 right. You're here for the defendant's actions, Mr. Nesbit.
15 He did not signal 100 feet out as required by law, or 50 feet
16 out as required by law, or 45 or 40 or 35 or 30. He did not
17 signal all the way to the stop sign. He did not signal as he
18 was turning. He didn't signal at all. So Deputy Chavez did
19 what he's charged to do, did what we ask him to do, and he
20 activated his blue lights and sirens to initiate a traffic
21 stop.

22 You know, it could have all been over right then. Could
23 have pulled over, gotten a ticket, a warning, "There's a lot
24 of people. Make sure you use those signals." Could have
25 been a ticket. I don't even know how much that fine is. Who

1 knows? But Mr. Nesbit's actions made it to where we'll never
2 know. Mr. Nesbit saw those blue lights. You watched the
3 video. You saw him and then, oh, hey, now he's using that
4 turn signal, he's getting pulled over. He pulls over, after
5 not doing it at the stop sign at J.C. Long and Ocean
6 Boulevard. He goes onto Ninth, then he looks back, "I'm
7 going to the spot." It looks like he's turning over to slow
8 down for just an average everyday traffic stop that Deputy
9 Chavez has been doing for eight years, but then Mr. Nesbit's
10 actions, Mr. Nesbit's decision, Mr. Nesbit's choices changed
11 that moment, changed that day, and brought all of us here
12 together today. He took off. I mean, he took off. You
13 watched that video. The video is in evidence, if you want to
14 watch it again, feel free.

15 Deputy Chavez took you through the map, and he showed
16 you the intersection. He showed you 100 feet back. He
17 showed you the area that he could have put the light on and
18 he didn't. He showed you how he turned, and then he turned,
19 and then he turned, and then he took off. We even had to
20 move the map because it was such a long chase. He was
21 fleeing from Deputy Chavez. He was fleeing from the blue
22 lights and the sirens. Deputy Chavez told you he activated
23 his blue lights and sirens. You know he activated his blue
24 lights and sirens because that's what turned on his camera,
25 and when you watch that video, you hear the sirens, and you

1 see the reflections. And Mr. Nesbit's obviously knew that
2 was going on because he started pulling over, and he turned
3 around and said something about it before taking off and all
4 of that.

5 So let's talk about that. Went through the map. You
6 know, Judge Jefferson in her jury qualifications on Monday
7 morning talks a lot about Court TV and how it's really
8 exciting and entertaining, and it is not like that. She's
9 right. It's not like that, but, oh, my gosh, in this case
10 you actually have a video. I mean, very typically cars are
11 not equipped with cameras. Very typically there's no --
12 nothing for us to press play for you to watch for you to see
13 yourself the laws being broken, but in this case we saw it.
14 86 miles an hour he was going. He was weaving around, in the
15 bike lane, out of the bike lane, in the other traffic, all
16 over. He was failing to stop for a blue light. And the only
17 reason that that pursuit stopped was not for the hard work of
18 Deputy Chavez, unfortunately, was the defendant's actions.
19 He lost control of the vehicle because he was crazily,
20 recklessly driving it all over, and he ran into something.
21 His actions. His driving at the high rate of speed. His
22 wreck.

23 You know, when that wreck happened, it is a shame for
24 anyone ever to be injured, absolutely, and Deputy Chavez
25 pulled his cruiser up, did his duty. Because not only does

1 he have a duty to worry about traffic violations, he has the
2 duty for people's safety, including the safety of somebody
3 who was just running from him. He got out. He jumped out of
4 the car. He was there enforcing those laws. He jumped out
5 of the car. His duty was to preserve the scene. He had to
6 preserve the scene. He couldn't be moving stuff all over.
7 He also couldn't be moving his car all over. Whenever
8 there's a pursuit and then an accident, even though Deputy
9 Chavez was not involved in the accident, it's like, ooh,
10 hands off, you need an impartial other party, in this case
11 South Carolina Highway Patrol, who had to come and
12 investigate it. He couldn't move his car because of those
13 laws, those set of laws that we have. Those checks and
14 balances that give us so many amazing freedoms. Pulled up,
15 stopped his car, as he had to, and he was trying to -- he ran
16 around, trying to make sure he wasn't moving, trying to make
17 sure Mr. Nesbit wasn't trying to run. But, again, we're here
18 today because of the defendant, the defendant's actions, and
19 Mr. Nesbit tried to run. I think Deputy Chavez showed you he
20 was rocking and trying to get up. I mean, you just were in a
21 wreck, and you're trying to get up and run. So you heard him
22 on the video, Deputy Chavez is giving him -- stay on the
23 ground, stay on the ground, get on the ground, stay on the
24 ground. Yes, part of that is because he just ran from him.
25 He needed to place him under arrest, but part of that is

1 because, holy cow, this wreck just happened. You need to
2 stay still. Don't hurt yourself anymore. Are you hurt?
3 Don't hurt any more. So he went over there. He got him to
4 stay on the ground. He then cuffed him and just kind of
5 stayed there with him. Mr. Nesbit was covered in blood. He
6 just was in a horrible motorcycle accident, so he's just
7 standing with him, watching him, making sure he doesn't run
8 because earlier the defendant shows him that he was trying to
9 run, so Deputy Chavez had to stay and stand and watch and
10 make sure and wait for his back up.

11 Backup arrived. Deputy Buckhannon arrived on scene. As
12 soon as Deputy Buckhannon came up on scene. Chavez knew he
13 wasn't alone anymore. He doesn't have to stand guard over
14 Mr. Nesbit and just stand and watch and make sure that no
15 other cars are coming on scene. Because he's looking to
16 protect himself, Mr. Nesbit, everybody else in the community.
17 He doesn't want another car ramming in, driving. He doesn't
18 want any of that, so he's just standing, looking around,
19 keeping eyes on him, keeping eyes on him. As soon as
20 Buckhannon comes, Buckhannon's taking over that duty, so he's
21 able to continue the arrest process that he already started;
22 and part of that that goes along, as prescribed by law, is a
23 search incident to arrest. Pulling stuff out of your
24 pockets. I got an ID. I got nothing else. All right.
25 Let's go. If that was the case, he just would have gone to

1 the hospital and things would be fine. But, again, it's the
2 defendant's actions that bring us here today, which is why
3 that's where it didn't end.

4 When Deputy Chavez did the search of the defendant
5 instant to arrest, he looked in his pockets, similar to how I
6 just did, and he used kind of a lingo or code, saying loads
7 of 33, loads of 33. 33 means drugs. You know, so he did
8 that to let his backup, Deputy Buckhannon, know what was
9 going on, know the kind of situation there was. Then he also
10 talked about there was lots of cash. So as soon as hearing
11 that, Deputy Buckhannon, who arrived on scene kind of started
12 looking around at other traffic. Heard that, 33. Went to
13 his car. Got an evidence bag. Brought it over to him. It's
14 all on the video. You see Buckhannon bringing over the
15 evidence bag after Deputy Chavez indicates, loads of 33. So
16 everything that was taken off the defendant's person from his
17 pockets were put in the bag, and then Deputy Chavez testified
18 that he locked it in the back seat of his car. He was the
19 only one with the key. He'd checked the area before. There
20 was nothing in there. It's all the stuff off of his person.

21 You know, the Defense brought up a bunch of points about
22 prints. Why didn't you print the bags, why didn't you print
23 the bags, why didn't you print the bags. Well, you know, if
24 there was a wreck here, and then way over here something was
25 found that seemed out of place, you know, I don't know if

1 they belong to that guy or they don't, so maybe in those
2 situations you may try to print the bag to figure out who it
3 belonged -- who they belonged to. But in this case that
4 didn't happen because it was in his pockets, in his right and
5 his left pockets in his pants that he was wearing, pants that
6 he was wearing when he was driving the motorcycle, pants that
7 he was wearing when he wrecked the motorcycle, pants that he
8 had on him when Deputy Chavez searched him.

9 A lot of issues also are brought up about cameras. You
10 know, I was tickled that there was a video at all in this
11 case, honestly. You know what, sure, Deputy Buckhannon could
12 have said, I'm here to for backup oh, wait, am I in the shot
13 (indicating)? I mean, sure, I guess so, but both of them are
14 more concerned with a fellow citizen who is on the ground,
15 bleeding. Both of them were more concerned that other people
16 on the Isle of Palms, visiting, live there, whatever, were
17 going to come up on it and maybe get in the middle of
18 something. You know, that's what their focus was. Their
19 focus was the community's safety and the defendant's safety
20 and the defendant's injuries and health.

21 So, again, after all the defendant's choices there was
22 that wreck, and he was under arrest, and he got taken by EMS
23 to MUSC for medical attention. Deputy Buckhannon, as they
24 always do, again, prescribed by law, these society of laws we
25 live in, followed the evidence. At the very end of that very

1 long video -- seemed kind of boring for big chunks of it --
2 of the first clip, you see the ambulance take off, and then
3 you see Buckhannon's car drive off after it. That's what
4 happened. They both testified, Deputy Chavez and Deputy
5 Buckhannon testified that's what happened. That's procedure.
6 That's what we do.

7 Then crime scene came out. Erin Meyer, she testified
8 for you yesterday afternoon. There was video also when crime
9 scene went out, and that was that second clip that you all
10 watched. She took pictures. The pictures are here. They're
11 in evidence. You can check them out. You can look at them.
12 You'll have all this stuff back there with you. You know,
13 you can look at the pictures, and the evidence bag things are
14 being brought out of, you can look at all this stuff. All of
15 this is going to be back there with you. She took pictures.
16 That's her job. The law makes her do it. She then packaged
17 everything.

18 And then they had to count the money, so that was a very
19 long time on the video, and you saw them pulling out all this
20 money. Wads of money. Bills and bills and bills and bills
21 and bills. It was \$2,918. Out of that 103 bills were \$20
22 bills, so there were over 100 \$20 bills in that wad of cash
23 in his pocket. And as Deputy Chavez testified to you, that's
24 an indicator of sales. \$20 bills are common denominations
25 for drug transactions. So at the hospital Buckhannon was

1 with the defendant. He went in for medical attention. He
2 had his clothing cut off. Buckhannon stood there, watched
3 his clothes being cut off. Took the clothes as property, as
4 evidence, and then after Chavez finished with everything on
5 the scene, he then followed through, as he has to by law.
6 Went to the hospital. He got the bag from Buckhannon. All
7 right. Let's make sure nothing was amiss. I mean, he's
8 covered in blood on the street, so you weren't digging in
9 every nook and cranny, so he went through it, and in the
10 little coin pocket, that I still don't understand why they
11 put on jeans to this day, they found more drugs. They were
12 field tested. All of those drugs Deputy Chavez ended up
13 taking into evidence, as he has to as prescribed by law. He
14 has them all bagged. He takes them into evidence. He
15 submits them.

16 You heard a bunch of people -- kind of boring -- the
17 chain witnesses, little bit yesterday and first thing this
18 morning; and they're more or less saying, I took it, it
19 wasn't tampered here, I checked it here, I wrote this down, I
20 did this, and I put it back. That's what that is. We have
21 to go through that to show you that everything's above board
22 with how things are handled because this is a serious case.
23 Because every case, no matter how big or small, is serious.

24 You heard from the chemical analyst, Rene Hilton. She
25 talked to you. The weight of the total cocaine was 21.25

1 grams and the Methyloñe was 394., I believe, 66 grams. My
2 math is not good, so you feel free to add it up, tally it up
3 yourself. You're going to have these back there with you.
4 These were the lab reports that you saw up on the screen that
5 have which bag, what's the amount, what is it. You can add
6 them all up. And you're going to have these back there with
7 you. You'll have the drugs. You've got some Methyloñe,
8 looks like little -- she called them crystalline substances,
9 I think. You'll have those. You'll have this back there.
10 This is some cocaine, really big written right there so
11 you'll know what that is. You'll have this big bag of
12 cocaine, and you'll have this, all this Methyloñe. And
13 you'll see in this, you can move it around and do whatever
14 you want to the bag, check it out, touch it. It's all
15 sealed -- pardon me. It's all sealed, so you can go through
16 all that back there.

17 We're in a society of laws, and with those laws come
18 many freedoms and many duties. The Judge will talk to you
19 about what the law is in this case, and I urge you to listen
20 to her. She's a Judge for a reason. You need to listen to
21 everything, when it comes to the law, from her. But I just
22 want to briefly talk to you about it so you kind of know what
23 you're going to be looking for. Mr. Nesbit's charged with
24 failure to stop for a blue light. What that means is he was
25 operating a motor vehicle. Deputy Chavez testified a

1 motorcycle is a motor vehicle. And upon being signaled to
2 stop by blue lights and/or sirens he did not stop, and the
3 video I believe shows that.

4 Next he is charged with possession with intent to
5 distribute Methylone. Possession with intent to distribute
6 Methylone means that he possessed it, in this case in his
7 pockets. The with intent to distribute, when you think about
8 that, it's kind of a weird concept. More or less, all the
9 cash on him I would submit to you means he was selling. He
10 was dealing. I don't walk around with three grand in cash on
11 me. But if you don't think that, then you can look
12 (indicating). Four packages, all about the same weight,
13 multiple packaging, all measured out. You're allowed to
14 infer items into that if you believe it shows you that he had
15 the intent to distribute that. Distribute could be for
16 money. Distribute could be to share with a friend. It could
17 mean whatever.

18 He's also charged with trafficking in cocaine.
19 Trafficking cocaine is ultimately possessing cocaine of a
20 specific weight, and in this case I would submit to you that
21 he possessed cocaine. He had this in a pocket, and he had
22 this in his little coin pocket (indicating). He possessed
23 it. And the weight, it has to be over 10 grams and less than
24 28. So you heard testimony from the expert -- and like I
25 said, you're going to have these back there. You can read

1 the reports. You can read that she wrote on here, this one
2 alone is 19.53. I submit 19.53 is over 10 and under 28.

3 Back on June 16th of 2011 Mr. Nesbit made a lot of
4 choices, and his actions all have consequences, and that's
5 why we're here. On June 16th of 2011 Mr. Nesbit was driving
6 down J.C. Long. Didn't use his signal. Didn't use his
7 signal 100, 50 feet out, or at the stop sign when he turned.
8 Deputy Chavez did his job, which is to pull him over.
9 Mr. Nesbit continued on Ocean, decided to turn down Ninth,
10 looked like he was pulling over, then he took off, going down
11 Ninth and then down Palm Boulevard for a long time. He
12 failed to stop for blue lights, and then when he was being
13 arrested for failing to stop for blue lights, a search
14 incident to arrest occurs. It is what happens. And that's
15 when they found all of those drugs on him. He had all of
16 those drugs on him when he was fleeing from police, and he
17 had all of those drugs on him when he was ultimately, I'd say
18 caught by police, but, I mean, he was the architect of his
19 own life there. I mean, he fled, he wrecked, and we're here
20 today.

21 I ask that you go back, you consider all the evidence.
22 Like I said, you'll have all this for you. You'll also have
23 the video if you'd like to watch that. Consider everything,
24 please give it a lot of thought, and I'm confident that at
25 the end of the day you'll come back with a verdict of guilty

1 on all three counts, to trafficking cocaine, 10 to 28 grams,
2 guilty of possession with intent to distribute Methydone and
3 guilty of failure to stop for a blue light. Thank you.

4 THE COURT: You may proceed.

5 MS. GAY: Thank you, Your Honor, may it please the
6 Court.

7 THE COURT: You're welcome, yes, ma'am.

8 MS. GAY: We started this trial yesterday. We all met
9 on Monday. One of the things I told you all is how important
10 this is, how important it is to Mr. Nesbit, because it's
11 about his life and his future, and he's pled not guilty. But
12 he's guilty of failure to stop for a blue light, and that's a
13 fact. We've all -- he's seen the video. He did that. There
14 is no question whatsoever that he rode his motorcycle away
15 from law enforcement in an evasive manner, and he's guilty.
16 Now, he disputed, and you saw us cross-examine the officer
17 about the fact that he didn't use a turn signal in the
18 beginning, and that's -- you know, that's in dispute at this
19 point because, I mean, obviously the officer testified
20 eventually that -- well, he testified he was 100 percent
21 positive that he did. But, you know, on the video you can't
22 see it, and there's always question when things are not --
23 you know, when you don't have a movie of something. So
24 Mr. Nesbit says that he used his turn signal, or the
25 inference is that there was a turn signal used, but he did

1 fail to stop for the blue light, and so he's traveling away,
2 minding his own business. He's an African-American male on a
3 really nice Harley-Davidson on a beautiful Sunday afternoon
4 on the Isle of Palms, and he comes, and there's inference
5 that he did in fact use his signal; but then the officer gets
6 behind him, and we have testimony that he did not have a
7 driver's license, we have testimony that the car -- the
8 motorcycle belonged to someone else, not him, and so there's
9 all kinds of evidence that's in the record about why he may
10 have chosen to fail to stop for the blue light. Obviously,
11 the solicitor's, you know, position is, well, he had drugs on
12 him, and that's ultimately what's going on; but the officer
13 testified this was just going to be a standard stop, you
14 know, possibly a warning, possibly a ticket for failing to
15 use his turn signal, but with a man with no driver's license
16 and driving someone else's bike, you know, he chose not to.

17 So when we look at all that and when we talk about what
18 happened and the evidence in the case, we're totally aware
19 that he failed to stop for a blue light. The dispute becomes
20 later on what isn't on the videos, and that's what I told you
21 when we started this. We have two videos in this case. We
22 have a video of a camera facing forward with a man who's
23 outside of the view of the camera, where all the activity and
24 all the stuff that they claim is the incriminating facts in
25 this case, facts beyond change are that he's outside of that

1 camera view, and we don't have a picture of that; and so this
2 isn't as open and shut of a case as the solicitor would have
3 you believe because there's all kinds of possibility what
4 might have been going on there that we don't see. And what
5 we also know is that the officer testified that -- she says
6 that he could not have moved his vehicle. However, this is a
7 significant situation where he's coming up. Easily --
8 because he knows what's being filmed. Easily there could
9 have been a manipulation of the camera movement of the --
10 just tweak the car just so that it could be on video.
11 Because if that had happened, we may not be here. If we had
12 had everything on video so that we couldn't dispute -- you
13 know, so we could see what was transpiring, we may all not be
14 here; but we don't, and that's the fact.

15 The other video that we have is the video of the crime
16 scene, and with the video of the crime scene people coming
17 and weighing everything and taking all these bags out, we
18 don't have any video of the drug testing where they're doing
19 the field tests and they're making it turn blue or not. And
20 you see in these pictures that you'll get back in the jury
21 room that some of the stuff and even in the bags is blue,
22 area that is blue. We don't see any of that on video. So
23 here we have all this technology and all these trained
24 officers for eight years doing all these things, and this
25 most important stuff is not on camera. The most important

1 stuff about where and if he found the drugs on Mr. Nesbit,
2 whether or not the drugs tested presumptively -- you know,
3 turned blue on video, you don't have any of that on video.

4 But I think what's most interesting about the evidence
5 that was presented is that Detective Chavez and Detective
6 Buckhannon -- Deputy Chavez and Deputy Buckhannon have
7 different views of what happened. They have conflicting
8 testimony about what happened it. Chavez said that he did
9 not search Mr. Nesbit until Buckhannon came. Buckhannon says
10 that he had already searched Mr. Nesbit by the time he came.
11 So there's things that we -- things that witnesses said that
12 were inconsistent, and that's very important. You need to
13 think about that when you're back in the jury room.

14 The other thing that was interesting about Buckhannon is
15 that he had a car with a camera in it. He had a car that
16 could have come up and placed it -- placed his vehicle in a
17 situation that could have seen all of this, and he would
18 have -- we would have known so much more about this day and
19 what happened if he'd been able -- if he'd chosen to use his
20 camera and if he'd chosen -- he also said that he -- all of
21 them have little collar mikes, and we don't have any of that.
22 There's no evidence that was presented. He also testified
23 that he believed he put his video in evidence. We don't have
24 that. That video is not in evidence. We have no audio, no
25 video of what his car -- what he saw or said. And, you know,

1 his comment was, well, I believe I did put that in evidence.

2 Where is it?

3 You know, in any case what you have to consider is the
4 actual stuff they present and admit into evidence, and then
5 you have to consider the stuff that they don't have and the
6 lack of what they bring to the table because that is, as the
7 Judge charges you about the credibility of the witnesses and
8 the evidence, that's what they talk about, is what is not
9 here and also what is here. And what is not in this case is
10 what we're all about. We're all about whether or not there
11 may have been a much more effective way to show what was
12 going on. The officer admitted that he would have done
13 things differently, in hindsight knew that he should have
14 done things differently. Both of these officers were
15 testifying that there was a possibility that they could have
16 done it differently, and we would have a different set of
17 evidence today.

18 I think that what's interesting about the substances --
19 like I said, totally guilty of failure to stop for a blue
20 light. He crashes his car. He's on the ground. He's
21 obviously in need of medical assistance. One of the things
22 that they talk about is that -- Deputy Chavez talks about is
23 that there's blood everywhere. That's what he said. The
24 place is covered in blood. He doesn't want him to move
25 because there's blood everywhere. There's absolutely no

1 blood on any of these drug packages. Never was there any
2 blood on the drug packages. That's something to consider.
3 What I think that we sat around and discussed, as we were
4 discussing this closing argument, is where are the pants?
5 Where are they? These giant pants that are supposed to be
6 like a magic hat with rabbits and scarves and all kinds of
7 things popping out. Things this big in this -- you know in
8 these pictures -- that much stuff are supposed to be in these
9 magic pants somewhere, and the magic pants aren't in
10 evidence. She asked him, well, were they skinny jeans.
11 Well, obviously they weren't skinny jeans, but they are
12 alleging that -- I would have loved to have been able to cut
13 this open, which was not -- we can't do that because it's
14 packaged this way -- and taken each one of these and balled
15 them all up because these are all laying in here real nice
16 and neat, but balled up they're going to be about this big
17 (indicating). And then there's \$3,000 worth of --
18 100-and-something 20s, okay, balled up. If you watch the
19 video, they're laying each bill out. Okay. You take \$3,000
20 and ball it up, and it's like this big too (indicating). So
21 we've got, what, this much room in somebody's pocket, and
22 they're trying to ride a motorcycle. It was almost
23 impossible. And, you know, these magic pants are not in
24 evidence, and the reality and the possibility of that is how
25 could that be? You know, where are these pants? How could

1 we -- I mean, if they had brought the pants in, we could --
2 you, as the jury, could take it back and try to imagine
3 stuffing it in these pants to see whether or not it's even
4 possible. Is it even possible for all this stuff to be in
5 these pants? And, you know, this is someone else's bike.
6 There's containers and things and, you know, maybe the seat
7 lifts up or there's storage packs or something like that. I
8 mean, all kinds of possibilities on someone else's bike that
9 a gigantic package of drugs, you know, could have been in
10 that.

11 These drugs that they found in his pocket, okay, I
12 understand, they found some drugs in his pants that they
13 claimed he was wearing, the little money packet. That's
14 obviously a completely different situation. The officer
15 testified that he saw them get cut off of him and they handed
16 the pants over to Chavez, and I understand that, but these
17 other larger packages of drugs that are alleged to have been
18 taken off his person, how do we know they weren't taken out
19 of some other -- it's not on video. How do we know that they
20 weren't taken off of some other part of that motorcycle or
21 other place. And the concept that fingerprints don't matter
22 and -- well, why would they fingerprint them? Well, they do
23 matter, and they could have been fingerprinted. These are
24 plastic bags. Especially these (indicating). You know, if
25 we're having a conversation just about these is one thing,

1 but to have this much stuff that they're alleging belonged to
2 my client, there could have been so many opportunities to see
3 whether or not Mr. Nesbit's fingerprints were on these bags.
4 Plus there could have been so many opportunities to
5 fingerprint the larger grocery bag which was referred to,
6 which is also not in evidence. There would have been
7 opportunity to fingerprint that. It's plastic. So prints
8 would have been easy.

9 You know, as far as the drugs go, with the weights of
10 the drugs, the drugs, the Judge is going to instruct you
11 about drug weights and drug weights are not the only piece of
12 evidence that goes into a charge. It has to do with other
13 things as well. And there's going to be some -- the bigger
14 charges, the possession with intent to distribute Methylone,
15 and there's the even bigger charge of the trafficking
16 cocaine. She's also going to charge you on some lesser
17 included offenses that have to do with other factors and
18 things. We call them lesser included because they're the
19 same charge but maybe they don't rise to the level of the
20 next charge. If this is the big pot, and you're making
21 chilli, and it's a big pot of chilli, here's the beans. The
22 beans don't just make the chilli. You add in other stuff,
23 but you can also pull the beans out and that's a separate --
24 that's a separate charge. That's like a lesser included
25 charge. So again, you, the jury, are going to have to decide

1 what you believe, if any, of what's going on with these drugs
2 in terms of the evidence and the elements of the charge
3 but -- and like I said, we understand the pants thing. You
4 know, in many ways we understand that they claim they came
5 out of the coin pocket of his pants; but these other drugs
6 and the fact that it's not on video at all and there's this
7 motorcycle that belongs to someone else that we don't have
8 any idea -- we did not see -- we heard testimony that it was
9 taken off this person, but we don't see that. And in this
10 case with the type of technology that they have and the type
11 of police officers' training and the amount of time they've
12 been officers, we should be seeing more. We should be seeing
13 the fact that this search is on video. We should have this
14 today for this jury. These guys know what has to be shown to
15 a jury to prove something, and that's the point is that
16 today, and when I started this case with you all, I told you
17 there's video of a lot of stuff, but there's not video of
18 what we need. There's not video of the things that matter.
19 There's things out of the scope of this camera, and the
20 credibility and/or the possibility of them not coming from
21 where these officers say -- this officer says. I'm not
22 calling him -- you know, saying he's not telling the truth.
23 I'm just saying, you've seen, he's stressed; he's busy.
24 There's a point in the video where he just becomes silent and
25 you think the guy's just going to go whoa. It's obviously a

1 very, very stressful event. And, you know, somehow that
2 stuff made it into the second video on top of the car,
3 turning blue already and all that, but we don't see the in
4 between. We don't see what really happened. We don't have a
5 record of that. And then they're piling all these drugs out
6 and claiming that they came out of his pockets, without
7 seeing the pants. How do we even know if that's possible or
8 not?

9 You know, it's like one of those things they say, hey,
10 in horseshoes it's one of the things that you can be close
11 and still get points. This isn't horseshoes. This is life,
12 Henry Nesbit's life. He's got family. He's a person. He's
13 a man. He's got a future. He's got things in his world that
14 are important. As we said in the beginning, this is the most
15 important day of his life. We can't just be close here. We
16 can't be close. And the Judge is going to instruct you about
17 what reasonable doubt is. As I said in the beginning, it's a
18 doubt which would cause a reasonable person to hesitate to
19 act. And I firmly believe you're going to find some doubts
20 when you go back there. I firmly believe you're going to
21 have them in your head and in your heart, and you're going to
22 go, you know, this isn't enough. It's just not enough. Why?
23 Why do we not have the rest of the stuff. These questions
24 that it leaves us with, how can we then choose to convict
25 somebody on this, and how can we choose to take somebody's

1 freedom away based on this.

2 You know, America has the greatest system in the world,
3 and all the jury process that we have is because we have a
4 right, as citizens, to have members of the community, our
5 peers, make decisions. Not the police, not the solicitor's
6 office but members of the community can come in and say, you
7 know, we don't see this as being enough to convict. And you
8 know, the last thing I'd like to tell you is that -- it's
9 goofy, and I want to tell you that ahead of time, it's goofy,
10 but many people have said in the course of a criminal case a
11 person charged with a crime gets called a lot of things. He
12 gets called inmate. He gets called defendant. He gets
13 called a lot of things. He gets called the guilty dude,
14 whatever. But in the long run Mr. Nesbit wants you to call
15 him Henry Nesbit, the innocent man. That's his name. He's
16 not a defendant. He's not -- you know, he's not an inmate.
17 He's a man, and his name is Henry Nesbit, and he would ask
18 you when you go back to the jury room to please go through
19 all this evidence and figure out could that stuff have been
20 in a pocket or not. Is there some other possible way that it
21 could have been in some other situation that has to do with
22 that motorcycle that doesn't even belong to him and please
23 find him not guilty.

24 THE COURT: Would you all move that podium for me,
25 please.

1 Does anyone need to use the restroom, or is everyone
2 comfortable?

3 MS. GAY: I'd like to use the restroom. Can I make it
4 quick?

5 THE COURT: Yes. Ladies and gentlemen, we're going to
6 take a very brief restroom break. This should be less than
7 five minutes. Please do not discuss the case and please
8 leave your notepads in your seats.

9 (Jury exits the courtroom.)

10 (Recess held.)

11 THE COURT: State ready to proceed?

12 MS. LINDER: State's ready to proceed.

13 THE COURT: Defense ready to proceed?

14 MS. GAY: Yes, ma'am. Your Honor, may I approach?

15 THE COURT: Mm-hmm.

16 (A bench conference was held off the record.)

17 THE COURT: Mr. Nesbit, I did not hear anything improper
18 or inappropriate that your counsel argued. She argued within
19 the ambit of the evidence that was presented, and that's what
20 I just told her.

21 THE DEFENDANT: I didn't say improper, I was just --
22 never mind.

23 MS. LINDER: Judge, I don't know if it's necessary for
24 the trafficking --

25 THE COURT: Let me ask one quick question. Is there any

1 exception to the form of the verdict from the State?

2 MS. LINDER: Yes, Judge. That's what we're saying for
3 the trafficking I didn't know if we needed it to say 10 to 28
4 grams, since that's an element of it.

5 THE COURT: No.

6 MS. LINDER: Okay. I just wanted to make sure.

7 THE COURT: No. I've never done it that way.

8 MS. GAY: Can I see it one second?

9 THE COURT: Because I'm going to instruct them that
10 that's -- because there are different categories of weight in
11 that statute.

12 MS. LINDER: Yes.

13 THE COURT: That's not the only category. If it was the
14 only category, I might.

15 MS. LINDER: Thank you, Judge.

16 THE COURT: You're welcome. Any exceptions to the form
17 of the verdict from the State?

18 MS. LINDER: None from the State, Your Honor.

19 THE COURT: From the Defense?

20 MS. GAY: No, ma'am.

21 THE COURT: Are we ready to proceed with instruction,
22 from the State?

23 MS. LINDER: Yes, Judge.

24 THE COURT: From the Defense.

25 MS. GAY: None, Your Honor.

1 THE COURT: Okay. Please bring in the jury.

2 (The jury enters the courtroom.)

3 THE BAILIFF: All present, Your Honor.

4 THE COURT: Thank you. Ladies and gentlemen, you may be
5 seated. During this trial, ladies and gentlemen, you and I
6 have certain duties to perform. As the trial judge, it is my
7 responsibility to provide over the trial of this case. I
8 also have the duty to rule upon or pass upon the
9 admissibility of evidence offered during this trial. You are
10 to consider only the competent evidence before you, and you
11 are to disregard and disabuse from your mind any testimony
12 ordered stricken from the record in this case during the
13 progress of this trial if there has been any. You are to
14 consider only the testimony which has been presented from the
15 witness stand, together with any exhibits which have been
16 made a part of the record in this case. I have the
17 additional duty to charge or instruct you on the law
18 applicable to this case. As the presiding judge, I'm the
19 sole judge of the law of this case, and it is your duty as
20 jurors to accept and apply the law as I now state it to you.
21 If you have a preconceived idea as to what you believe the
22 law should be or what the lawsuit ought to be in a case or in
23 this case and it should not agree with what I now tell you
24 the law is, you are obligated under your oath to abandon this
25 preconception on your part because you are sworn to accept

1 the law and apply the law precisely as I now state it to you.

2 In every case tried in this Court before a jury the jury
3 becomes the sole and exclusive judges of the facts. You, the
4 jury, are the judges of the facts in this case. This Court
5 is the judge of the law. The constitution of our state has
6 declared that a trial judge shall not intimate, state,
7 comment upon or make any statement to a trial jury about the
8 facts in a case. Since you, the jury, are the sole judges of
9 the facts in this case, you are not to infer anything from
10 what I've said during the progress of this trial in ruling
11 upon the admissibility of evidence or otherwise or anything
12 that I say now to you during the course of this instruction
13 that I have any opinion about the facts. The law does not
14 allow me to have an opinion about the facts. This is a
15 matter solely for you, the jury, to determine.

16 As jurors then it is your duty, as I've instructed you,
17 to determine the effect, the value, the weight and the truth
18 of the evidence presented during this trial. Necessarily,
19 you must assess the credibility of the witnesses who have
20 testified in this case. Credibility is simply a legalistic
21 term meaning the believability of each witness who has
22 testified. It becomes your duty, as jurors, to analyze and
23 evaluate the evidence and determine that evidence which
24 convinces you of its truth. Some of the things you may
25 consider as you decide whether or not to believe a witness's

1 testimony about a particular matter include what was the
2 manner and appearance of the witness who testified, was he or
3 she straightforward or hesitant in answering, was the
4 testimony of a witness consistent or inconsistent, how did
5 the witness come to know the facts that he or she testified
6 to, or what was his or her ability to know these facts, is
7 there some reason a witness would want to give testimony
8 which would help or hurt one side or the other, in other
9 words, was the witness biased or prejudiced, and was the
10 testimony of a witness strengthened or weakened by other
11 testimony or evidence.

12 I further instruct you that in determining the question
13 of the credibility or believability of witnesses who have
14 testified you may believe one witness as against several
15 witnesses or several witnesses as against one witness. You
16 may believe a part of the testimony of a witness and reject
17 the remaining part of the testimony of that same witness. If
18 you have a good and sound reason, you may believe the
19 testimony of a witness in its entirety or reject the
20 testimony of a witness in its entirety. You may consider the
21 demeanor of the witness, that is, the manner and appearance
22 of the witness from the witness stand. Of course, ladies and
23 gentlemen, throughout this process you have but one
24 objective, to seek the truth regardless of its source.

25 I further instruct you that our rules of evidence

1 ordinarily do not permit witnesses to testify to opinions or
2 conclusions. An exception to this rule exists for witnesses
3 we call expert witnesses. A witness, who by their education,
4 training and experience has become an expert in some art,
5 science or profession or calling may state an opinion as to
6 relevant and material matters in which the witness claims to
7 be an expert and may also state the reasons for that opinion.
8 You should consider any expert opinion received in this case
9 like any other evidence. Give it the weight you think it
10 deserves. If you decide that the opinion of an expert
11 witness is not based on sufficient education and experience
12 or if you conclude that the reasons given in support of the
13 opinion are not sound or that the opinion is outweighed by
14 other evidence, you may disregard the opinion entirely. An
15 expert witness's testimony is to be given no greater weight
16 than that of other witnesses simply because the witness is an
17 expert, and you are not required to accept an expert's
18 opinion even though it is not contradicted.

19 Ladies and gentlemen, there are two types of evidence
20 which are presented during a trial, direct evidence and
21 circumstantial evidence. Direct evidence is the testimony of
22 a person who asserts or claims to have actual knowledge of a
23 fact such as an eye witness. Circumstantial evidence is
24 proof of a chain of facts and circumstances indicating the
25 existence of a fact. The law makes absolutely no distinction

1 between the weight or value to be given to either direct or
2 circumstantial evidence, nor is a greater degree of certainty
3 required of circumstantial evidence than of direct evidence.
4 You should weigh all of the evidence in this case. After
5 weighing all the evidence, if you are not convinced of the
6 guilt of the defendant beyond a reasonable doubt, you must
7 find the defendant not guilty. Conversely, if you are
8 convinced of the guilt of the defendant beyond a reasonable
9 doubt, then you must find him guilty. I instruct you, ladies
10 and gentlemen, that the fact that the defendant was arrested,
11 charged and indicted is not evidence in this case and cannot
12 be considered by you as evidence of guilt in this case, nor
13 does it create any presumption or inference of guilt. This
14 documentation, ladies and gentlemen, are simply the formal
15 written instruments which contain the charge or charges made
16 against a defendant. They serve as the formal documentation
17 by which the case is processed or brought into this court.

18 The defendant has pled not guilty to the indictments,
19 and that plea casts the burden on the State to prove the
20 defendant guilty because a person charged with committing a
21 criminal offense in South Carolina is never required to prove
22 themselves innocent. I charge you, madam forelady, ladies
23 and gentlemen, that it is a cardinal and important rule of
24 the law and evidence that the defendant in a criminal trial,
25 no matter what the seriousness of the charge or charges made

1 against him may be, will always be presumed to be innocent of
2 the crime or crimes for which he is indicted unless his guilt
3 has been proven by evidence satisfying you of that guilt
4 beyond a reasonable doubt. This presumption of innocence
5 does not cease when you retire to deliberate, but it
6 accompanies the defendant from the time of his appearance or
7 arraignment throughout the trial until you reach a verdict in
8 this case. Our Supreme Court has said that the presumption
9 of innocence is like a robe of righteousness placed about the
10 shoulders of the defendant, and it remains with him and
11 assigns him to that class, the innocent, until that
12 presumptive robe of righteousness has been stripped from his
13 person by evidence satisfying you of that guilt beyond a
14 reasonable doubt. The presumption of innocence is not mere
15 legal theory. It is not just a legal phrase. It is a
16 substantial right to which every defendant is entitled unless
17 you, the jury, are satisfied from the evidence of his guilt
18 beyond a reasonable doubt.

19 The State has the burden of proving the defendant guilty
20 beyond a reasonable doubt. Some of you may have served as
21 jurors in civil cases where you were told that it is only
22 necessary to prove that a fact is more likely true than not
23 true, such as by the greater weight or the preponderance of
24 the evidence. In criminal cases the State's proof must be
25 more powerful than that, it must be beyond a reasonable

1 doubt. Proof beyond a reasonable doubt is proof that leaves
2 you firmly convinced of the defendant's guilt. There are
3 very few things in this world that we know with absolute
4 certainty, and in criminal cases the law does not require
5 proof that overcomes every possible doubt. If, based on your
6 consideration of the evidence, you are firmly convinced that
7 the defendant is guilty of the crimes charged, you must find
8 the defendant guilty. If, on the other hand, you think there
9 is a real possibility that the defendant is not guilty, you
10 must give him the benefit of that doubt and find him not
11 guilty.

12 If you could bear with me just one moment, ladies and
13 gentlemen.

14 I further instruct you, ladies and gentlemen, and
15 emphasize that the fact that the defendant did not testify is
16 not a factor to be considered by you in any way in your
17 deliberation and in your consideration on the question of the
18 guilt or innocence of the defendant. It must not be
19 considered by you in any manner whatsoever. A defendant has
20 the constitutional right to remain silent, and the assertion
21 of this right must not be considered by you in your
22 deliberations. I repeat, under your oath you are to draw no
23 conclusion whatsoever from the fact that the defendant in
24 this case did not testify. The fact that this defendant did
25 not testify should not be discussed in any manner whatsoever

1 in the jury room. The defendant does not have a burden of
2 proof in this case. The burden of proof, as I've stated to
3 you, is on the State. The defendant is not required to prove
4 his innocence. The burden of proof remains on the State to
5 prove guilt beyond a reasonable doubt.

6 The defendant is charged with failing to stop for a blue
7 light. In order to prove this crime the State must prove
8 beyond a reasonable doubt that the defendant was driving a
9 motor vehicle, that the defendant was driving the motor
10 vehicle on a road, street or highway of this state, that the
11 defendant was signaled to stop by a law enforcement vehicle
12 by means of a siren or flashing light and that the defendant
13 did not stop. In determining whether or not there are
14 mitigating circumstances which would justify the defendant's
15 failure to stop for the blue light you may consider actual
16 road conditions, actual roadside conditions, other conditions
17 such as lighting and weather, officer, driver and/or
18 passenger safety, and any other circumstances you believe to
19 reasonably mitigate the alleged violation. An official
20 signal requiring a motorist to stop may be a siren or
21 flashing lights, but both are not required. An attempt to
22 increase the speed of a vehicle or in some other manner avoid
23 the pursuing law enforcement vehicle when signaled by a siren
24 or flashing light may be considered as evidence of failure to
25 stop for a blue light; however, it is merely an evidentiary

1 fact to be taken into consideration by you along with all the
2 other evidence in the case and to be given the weight, value
3 and effect you decide it should receive.

4 The defendant is charged with trafficking in cocaine.
5 The State must prove beyond a reasonable doubt that the
6 defendant knowingly sold, manufactured, cultivated,
7 delivered, purchased, brought into the State, provided
8 financial assistance, or otherwise aided, abetted, attempted
9 or conspired to sell, manufacture, cultivate, deliver,
10 purchase or bring into this state, was knowingly in actual or
11 constructive possession, knowingly attempted to become in
12 actual possession of cocaine. The State must also prove
13 beyond a reasonable doubt that the amount of cocaine, or any
14 mixture containing cocaine, was 10 grams or more but less
15 than 28 grams. To prove possession the State must prove
16 beyond a reasonable doubt that the defendant had both the
17 power and intent to control the disposition or use of the
18 cocaine.

19 Possession may either be actual or constructive. Actual
20 possession means that the cocaine was in the actual, physical
21 custody of the defendant. Constructive possession means that
22 the defendant had dominion and control or the right to
23 exercise dominion or control over either the cocaine itself
24 or the property on which the cocaine was found. Mere
25 presence at the scene where the drugs were found is not

1 enough to prove possession. Actual knowledge of the presence
2 of the cocaine is strong evidence of the defendant's intent
3 to control its disposition or use. The defendant's knowledge
4 and possession may be inferred when a substance is found on
5 the property under the defendant's control; however, this
6 inference is simply an evidentiary fact to be taken into
7 consideration by you along with the other evidence in the
8 case and to be given the weight, value and effect you decide
9 it should have. Two or more persons may have joint
10 possession of a drug. To deliver means to actually
11 constructively or attempt to transfer the drug. Distribute
12 means to deliver other than by administering or dispensing a
13 drug. Manufacture means to produce, prepare, convert,
14 process, plant, cultivate, grow or harvest a drug naturally
15 or chemically. Manufacturing includes any packaging or
16 repackaging of the drug or labeling or relabeling of the
17 drug's container.

18 Included within the offense of trafficking is the lesser
19 offense of possession with intent to distribute. Possession
20 with intent to distribute contains all of the elements of
21 trafficking except the amount of the cocaine. In addition,
22 the State must prove beyond a reasonable doubt that the
23 defendant had the intent to distribute the cocaine. In order
24 to prove possession with intent to distribute the State must
25 prove beyond a reasonable doubt that the defendant possessed

1 cocaine with the intent to distribute it. To prove, as I've
2 previously instructed, to prove possession the State must
3 prove beyond a reasonable doubt that the defendant had both
4 the power and intent to control the disposition or use of the
5 cocaine. Possession may either be actual or constructive.
6 Actual possession means that the cocaine was in the actual
7 physical custody of the defendant. Constructive possession
8 means that the defendant had dominion and control or the
9 right to exercise dominion or control over either the cocaine
10 itself or the property on which the cocaine was found. Mere
11 presence at the scene where the drugs were found is not
12 enough to prove possession. Actual knowledge of the presence
13 of the cocaine is strong evidence of the defendant's intent
14 to control its disposition or use.

15 The defendant's knowledge and possession may be inferred
16 when a substance is found on the property under the
17 defendant's control; however, this inference is simply an
18 evidentiary fact to be taken into consideration by you along
19 with the other evidence in the case and to be given the
20 weight, value and effect you decide it should receive. Two
21 or more persons may have joint possession of a drug. The
22 State must also prove beyond a reasonable doubt that the
23 intent -- that the defendant intended to distribute the
24 cocaine. Distribute means to deliver other than by
25 administering or dispensing a drug. Intent may be shown by

1 acts and conduct of the defendant and other circumstances
2 from which you may naturally and reasonably infer intent. In
3 determining whether the defendant had the intent to
4 distribute the cocaine you may consider the circumstances
5 surrounding the defendant's alleged possession, you may
6 consider the amount of the substance alleged to have been
7 possessed, the manner in which it was allegedly possessed,
8 the place where it was allegedly possessed and other factors
9 which you consider to be important. You must find that the
10 defendant did not intend to have the cocaine solely for his
11 own use.

12 I instruct you the possession of more than one gram of
13 cocaine creates an inference that the defendant possessed the
14 cocaine with the intent to distribute it. I further instruct
15 you that this inference does not relieve the State from
16 proving beyond a reasonable doubt that the defendant had the
17 intent to distribute it. It is simply an evidentiary fact to
18 be taken into consideration by you along with the other
19 evidence in the case and to be given the value, the weight
20 and effect you decide it should have.

21 The defendant is also charged with possession with
22 intent to distribute Methylone, or as it is referred to in
23 the indictment, Methylone (bath salts). The State must prove
24 beyond a reasonable doubt that the defendant possessed
25 Methylone with the intent to distribute it. To prove

1 possession the State must prove beyond a reasonable doubt
2 that the defendant had both the power and intent to control
3 the disposition or use of the Methylone. Possession may
4 either be actual or constructive. Actual possession means
5 that the Methylone was in the actual, physical custody of the
6 defendant. Constructive possession means that the defendant
7 had the dominion or control or the right to exercise dominion
8 or control over either the Methylone itself or the property
9 on which the Methylone was found. Mere presence at the scene
10 where the drugs were found is not enough to prove possession.
11 Actual knowledge of the presence of the Methylone is strong
12 evidence of the defendant's intent to control its disposition
13 or use. The defendant's knowledge and possession may be
14 inferred when a substance is found on the property under the
15 defendant's control; however, this inference is simply an
16 evidentiary fact to be taken into consideration by you along
17 with the other evidence in the case and to be given the
18 weight, value and effect you decide it should have. Two or
19 more persons may have joint possession of a drug.

20 The State must also prove beyond a reasonable doubt that
21 the defendant intended to distribute the Methylone.
22 Distribute means to deliver other than by administering or
23 dispensing a drug. Intent may be shown by acts and conduct
24 of the defendant and other circumstances from which you may
25 naturally and reasonably infer intent. In determining

1 whether the defendant had the intent to distribute the
2 Methyloone you may consider the circumstances surrounding the
3 defendant's alleged possession. You may consider the amount
4 of the substance alleged to have been possessed, the manner
5 in which it was allegedly possessed, the place where it was
6 allegedly possessed and other facts which you consider to be
7 important. You must find that the defendant did not intend
8 to have the Methyloone solely for his own use.

9 Included within the offense of possession with intent to
10 distribute is the lesser offense of simple possession.
11 Simple possession does not require an intent to distribute
12 the Methyloone. The defendant -- in order to prove possession
13 of Methyloone the State must prove beyond a reasonable doubt
14 that the defendant knowingly or intentionally possessed
15 Methyloone. Knowingly means with knowledge, consciously, not
16 accidentally. Intentionally means willfully intending the
17 result which actually occurs, not accidentally or
18 involuntarily. Intent may be shown by acts and conduct of
19 the defendant and other circumstances from which you may
20 naturally and reasonably infer intent. To prove possession
21 the State must prove beyond a reasonable doubt that the
22 defendant had both the power and intent to control the
23 disposition or use of the Methyloone. Possession may either
24 be actual or constructive. Actual possession means that the
25 Methyloone was in the actual physical custody of the

1 defendant. Constructive possession means that the defendant
2 had dominion and control or the right to exercise dominion or
3 control over either the Methydone itself or the property on
4 which the Methydone was found. Mere presence at the scene
5 where the drugs were found is not enough to prove possession.
6 Actual knowledge of the presence of the Methydone is strong
7 evidence of the defendant's intent to control its disposition
8 or use. The defendant's knowledge and possession may be
9 inferred when a substance is found on the property under the
10 defendant's control; however, this inference is simply an
11 evidentiary fact to be taken into consideration by you along
12 with the other evidence in the case and to be given the
13 weight, value and effect you decide it should have. Two or
14 more persons may have joint possession of a drug.

15 Ladies and gentlemen, the indictments in this case
16 allege several different offenses against the defendant.
17 Those charges are Indictment 2013-5527, failure to stop for a
18 blue light; 2013-5634, trafficking in cocaine; and 2013-5639,
19 possession with the intent to distribute Methydone. Each
20 indictment alleges -- charges a separate and distinct
21 offense. You must decide each indictment separately on the
22 evidence and the law applicable to it, uninfluenced by your
23 decision as to any other indictment. The defendant may be
24 convicted or acquitted on any or all of the offenses charged.
25 You will be asked to write a separate verdict of guilty or

1 not guilty for each indictment. There are several possible
2 verdicts for each of the indictments. I will read each of
3 those to you. You don't have to try to write it down. The
4 verdict form will go into the jury room with you, and there's
5 absolutely no significance whatsoever to the order in which I
6 state these potential verdicts. It is simply that one must
7 be stated first. As to Indictment 2013-GS-10-5527, we, the
8 jury, by unanimous consent find the defendant guilty of
9 failure to stop for a blue light, or not guilty. As to
10 Indictment 2013-5634, we, the jury, by unanimous consent find
11 the defendant guilty of trafficking in cocaine, or as to the
12 lesser included offense, guilty of possession with intent to
13 distribute cocaine, or not guilty. And Indictment 2013-5639,
14 we, the jury, by unanimous consent find the defendant guilty
15 of possession with the intent to distribute Methylone, or as
16 to the lesser included offense, guilty of possession of
17 Methylone, or not guilty. Again, there's no significance
18 whatsoever to the order in which I state these potential
19 verdicts. It is simply that one must be stated first.

20 Ladies and gentlemen, in order for you to reach a
21 verdict your decision must be unanimous, which means all 12
22 of you must agree in order to reach a verdict on each and
23 every indictment. Again, your verdict must be unanimous,
24 which means that all 12 of you must agree in order to reach a
25 verdict. Madam forelady, when the jury has reached a

1 unanimous verdict on each indictment, it is your
2 responsibility to fill out each verdict form and to sign and
3 date each form and to knock on the door and advise the
4 bailiffs that the jury has reached a verdict. Ladies and
5 gentlemen, if you have any questions during deliberations,
6 please know that there will be a delay in our response and
7 that is because there's a procedure that I must follow in
8 answering your questions, so know that if you have a
9 question, that there will be a delay because we are following
10 that process. Again, your verdict must be a unanimous one,
11 and just as a reminder, your foreperson does not have any
12 greater vote or voice than you do. It is purely an
13 administrative function. They fill out the verdict form and
14 write out any questions during the deliberations. Madam
15 forelady, if the jury has any questions, it will be your
16 responsibility to write those questions out, and then, again,
17 knock on the door and advise the bailiffs that the jury has a
18 question.

19 Ladies and gentlemen, I'm going to ask that you return
20 to your jury room, but do not yet begin your deliberations.
21 I have some matters of law that I need to take up with the
22 attorneys that may require further instruction or
23 clarification of an instruction. However, if there's no
24 further instruction, we will send in your notepads, the
25 evidence and the verdict form, and at that time you will be

1 allowed to begin your deliberations. Your lunch has also
2 arrived. It is in the jury room, and so I just wanted you to
3 know that so that if we don't need you any further, you'll be
4 allowed to go ahead and start eating and begin your
5 deliberations. If you'll go with the bailiffs, please.

6 (Jury exits the courtroom at 12:44 p.m.)

7 THE COURT: You may be seated. Are there any exceptions
8 to the charge from the State?

9 MS. LINDER: No, Your Honor.

10 THE COURT: From the Defense?

11 MS. GAY: No, Your Honor.

12 THE COURT: All right. Could you all make sure for me
13 one more time that all the evidence is in place so the
14 bailiffs can take that in?

15 Is all the evidence in place?

16 MR. NELSON: Yes, Your Honor.

17 THE COURT: The record should reflect that the jury
18 began deliberations at 12:45. Their lunch is already here.
19 It came as we were getting ready to charge, and I already had
20 the bailiffs put it in there with their drinks, so they will
21 be eating. I would suggest you all go take about 30 minutes
22 to go get something to eat as well because that's about how
23 long it will take them, if anybody wants to smoke, to go
24 outside; and then if we have any questions, it will probably
25 be soon after that. So you'll all have a chance to eat, and

1 if you all could leave your cell phone numbers with my clerk
2 in the event we need to contact you short of that timeframe.

3 (Recess held.)

4 THE COURT: The jury has sent a note, would like to view
5 video. Do you have a password for that laptop that's in the
6 jury room that hooks up to the monitor?

7 THE CLERK: We do. They have a laptop in there.

8 THE COURT: Let's go figure that out because I don't
9 think they should have to come back in here to watch it.
10 They should be able to watch it like they want to watch it.
11 In one of the other jury rooms we have a clean laptop and it
12 goes to a TV monitor, so I've just got to get the password
13 and make sure that it's working as it should, and we've got
14 to test drive it right quick. Is there any exception to that
15 from the State?

16 MS. LINDER: None from the State.

17 THE COURT: From the Defense?

18 MR. NELSON: No. Is there any mention which video they
19 want to watch.

20 MS. LINDER: It's one video; there are two clips.

21 THE COURT: They just said video, so I assumed we'll put
22 it in and they can -- they'll watch whatever they determine
23 they want to watch. It will be marked as a Court's Exhibit,
24 let me go see how this works and make sure it does work.

25 (Brief pause.)

1 THE COURT: For whatever reason we can't get a signal
2 for the monitor in the other jury room, so we just took the
3 laptop, the clerk's laptop, and we tested out the DVD to make
4 sure it worked, and it does, and so they have it, and I told
5 the clerk to let them know that if they wanted to see it on a
6 bigger screen than the computer to let us know and we'd bring
7 them back into the courtroom for that. Is there an exception
8 from the State?

9 MS. LINDER: None from the State.

10 THE COURT: From the Defense?

11 MS. GAY: None, Your Honor.

12 THE COURT: Okay. We'll keep you posted.

13 (The Court's Exhibit 1 marked for identification.)

14 (Recess held.)

15 THE COURT: Okay. The jury sent a note out to me, and
16 the first note was can't decide on 2013-GS-10-5634, question
17 for Judge.

18 MR. NELSON: Which indictment is that, Judge?

19 THE COURT: That's the trafficking in cocaine.

20 MR. NELSON: Thank you.

21 THE COURT: So I sent the note back -- as you can tell,
22 they balled it up and put it in the garbage can -- and told
23 them that they had to write out what their question was.
24 They sent this note out: Can we select the lesser charge for
25 cocaine possession even though the law says greater than 10

1 grams is trafficking. And I think the simple answer is yes.
2 It's a lesser included offense.

3 Oh, you know what -- I just read this note again -- I'm
4 thinking PWID, not possession.

5 MS. LINDER: Correct.

6 THE COURT: I think I need more clarity on this note
7 because I need to figure out what they're asking. Can we
8 select the lesser charge for cocaine possession. Well, the
9 only thing they could be talking about is PWID because those
10 are the only two that are on the verdict form. They may have
11 used different terminology, but those are the only two
12 options.

13 MR. NELSON: They might also be thinking about the
14 charge you gave for the possession with intent of Methyloine.

15 THE COURT: No.

16 MR. NELSON: Even though you didn't charge it for the
17 trafficking, they might, I don't know, I'm just --

18 THE COURT: I don't think so. Juries are very direct
19 when they ask questions. If that was the case, they would
20 have said possession of Methyloine. They only have two
21 options on that verdict form, which is trafficking and PWID.
22 And when I charge possession with intent, possession is one
23 of the elements that you instruct, and you instruct actual
24 and constructive possession, so that is my thought process of
25 what they're asking, but I could also always ask the

1 foreperson to come in and clarify for me, but the problem is
2 I don't want them getting into their internal deliberations,
3 and I don't want her to tell me too much.

4 MS. LINDER: One option is just to read both of the
5 statutes to them.

6 THE COURT: Why would I do that? Why would I take 15
7 minutes to reinstruct something they've already listened to
8 when they haven't indicated to me they want me to do that? I
9 know exactly what they're asking. When you instruct on
10 trafficking, it says one of the elements the State has to
11 prove is that it was more than 10 grams but less than 28.
12 When you instruct PWID cocaine it says that --

13 MR. NELSON: It refers to the grams.

14 THE COURT: Exactly, and I think what the -- I don't
15 want to say confusion, and I don't want to anticipate what
16 they're doing in there because their internal deliberations
17 are private, but there might be -- I don't know whether
18 they -- the PWID is included in the trafficking, and so they
19 have the option. They can pick the less -- in other words,
20 they're not required to find trafficking, even if the State
21 proved up to 28 grams, if they feel the PWID is proven as
22 well. I think the simple answer is yes. I don't want to
23 make it overly complicated.

24 MS. LINDER: Judge, I think if they're asking if they
25 can choose --

1 THE COURT: I'm not going tell them they can only pick
2 trafficking because that's not correct.

3 MS. LINDER: No, no, no, Judge, what I'm saying is if
4 they're saying can they pick possession, I think our position
5 is the response should be you can pick trafficking or you can
6 pick the lesser included, which is possession with intent to
7 distribute.

8 THE COURT: Well, that's a fair answer.

9 MS. GAY: And then the other question on his behalf,
10 Your Honor, is we would ask maybe for a King charge because I
11 think that is exactly what they're saying.

12 THE COURT: It's a little late at this point for a King
13 charge because it would draw undue attention to it at this
14 point. It would almost, in my estimation, be almost a charge
15 on the facts at this stage in the game.

16 MS. GAY: I understand.

17 THE COURT: Because then I basically would be telling
18 them that you don't have any choice, but the way that is
19 worded, outside of the context of an entire instruction,
20 would almost be an instruction on the facts at this point.
21 And I don't know that it's prejudicial to your client. I
22 think it -- I don't know that it's necessary. They're
23 asking, do we have the option to pick between the greater and
24 the lesser, and the answer is, yes, it's always their option.

25 So I think I could simply write on this note, you can

1 select trafficking in cocaine, or you can select possession
2 with the intent to distribute cocaine. How did you word
3 that, Ms. Linder? I can't remember what you said.

4 MS. LINDER: I believe I said something like, you can
5 select trafficking in cocaine or you can select the lesser
6 included offense of possession with intent to distribute
7 cocaine.

8 MR. NELSON: Or, Judge, you can go another route and say
9 the only options you have are what are on the verdict form,
10 trafficking or possession with intent.

11 THE COURT: I think the confusion is with the amounts
12 and they don't -- should not be left with the misapprehension
13 that's their only option because it's not.

14 MR. NELSON: Yes, Your Honor.

15 THE COURT: And they said possession, and I don't think
16 that is any indication that they're confused because it's
17 possession with the intent to distribute cocaine, I just
18 think they didn't write out PWID.

19 Is there any exception to me writing on the note, you
20 can select trafficking in cocaine or the lesser included
21 offense of possession with the intent to distribute cocaine.

22 MR. NELSON: Or not guilty.

23 THE COURT: They didn't ask me that question. That's
24 already on the form. They already know with that.

25 MS. LINDER: I agree with that response, Your Honor.

1 THE COURT: Is there any exception from the Defense to
2 that response?

3 MS. GAY: One moment, please.

4 One thing that we could add, Your Honor, is the weight
5 of the drugs is just a factor for your consideration.

6 THE COURT: I've already instructed that. It is not
7 just a factor because in the trafficking it's mandatory that
8 the State prove one of those quantities in their elements.
9 In PWID it is not mandatory, it is only an evidentiary fact
10 to consider, and I instructed both of those, and I think for
11 me to state that is misleading. That's not a correct
12 statement of the law. Then it gets overly complicated.

13 MS. GAY: I understand, but you're telling them they
14 don't have to --

15 THE COURT: They can pick either one, that's their
16 choice. I don't want them leaving with the impression that
17 they have to do one or the other, and I have already
18 instructed them on the full elements of trafficking and the
19 full elements of PWID, and I saw them writing down the
20 elements as I was instructing. You may have some people in
21 there who were feeling like, well, they proved -- we have to
22 pick this one because you have a chemist that came in and
23 testified and they don't.

24 MS. GAY: Right, I understand.

25 THE COURT: And I don't want them left with that

1 misapprehension.

2 Is there any exception from the Defense to the Court
3 responding as I've already stated for the record?

4 MS. GAY: No, Your Honor.

5 (The Court's Exhibit 2 marked for identification.)

6 MS. GAY: Your Honor, Mr. Nesbit would like for you to
7 consider the possibility in your note of stating,
8 trafficking, PWID or not guilty. He's asked me to ask you
9 that.

10 THE COURT: I've already addressed that. It is already
11 on the form. I've already instructed them as to that. And I
12 have already instructed you that there is no hybrid
13 representation. You either represent Mr. Nesbit or you
14 don't. If he tells you something, you can articulate that
15 for the Court.

16 MS. GAY: I understand.

17 THE COURT: I think they're clear they can select not
18 guilty, and if that was their consternation, they would have
19 said that in the note. And they still might find not guilty.
20 Who knows. Their internal deliberations are secret, and I'm
21 not going to go but so far into the question because I'm not
22 going to have them disclosing exactly what they're
23 discussing.

24 Okay. You all can approach to look at what I wrote on
25 the note.

1 MR. NELSON: Yes, Your Honor.

2 MS. LINDER: Yes, Your Honor.

3 THE COURT: Any exception from the State?

4 MS. LINDER: No exception from the State.

5 THE COURT: Any exception from the Defense?

6 MR. NELSON: No.

7 THE COURT: We'll mark that as a Court's Exhibit and
8 then give it to the bailiff.

9 (The Court's Exhibit 3 premarked for identification.)

10 THE COURT: And then you all need to instruct the jury
11 to make sure they don't discard any notes.

12 (Recess held.)

13 THE COURT: The jury has reached a verdict. Is there
14 anything before we bring in the jury from the State?

15 MS. LINDER: Nothing from the State.

16 THE COURT: From the Defense?

17 MS. GAY: No, Your Honor.

18 THE COURT: Please bring in the jury.

19 (The jury enters the courtroom at 4:53 p.m.)

20 THE BAILIFF: All present, Your Honor.

21 THE COURT: You may be seated. Madam forelady, is it
22 correct that the jury has reached a verdict?

23 THE FOREPERSON: Yes.

24 THE COURT: If you would give the verdict forms to the
25 bailiff for me, please.

1 Madam clerk (indicating).

2 Sir, if you would stand for publication of the verdict.

3 THE CLERK: In the Court of General Sessions for the
4 Ninth Judicial Circuit, Indictment No. 2013-GS-10-5527, State
5 of South Carolina, County of Charleston, versus Henry Oliver
6 Nesbit, Jr., the defendant, as to the indictment we, the
7 jury, by unanimous consent find the defendant guilty of
8 failure to stop for a blue light, signed, Forelady Gloria
9 Jenkins, May 8, 2014. As to the Indictment No.
10 2013-GS-10-5634, we, the jury, by the unanimous consent find
11 the defendant guilty of possession with intent to distribute
12 cocaine, signed, Forelady Gloria Jenkins, May 8, 2014. As to
13 Indictment No. 2013-GS-10-5639, we, the jury, by unanimous
14 consent find the defendant guilty of possession of Methylone
15 (bath salts), signed Gloria Jenkins, foreperson, May 8, 2014.

16 Ladies and gentlemen of the jury, if this is your
17 verdict, please raise your right hand.

18 (All members of the jury raised their right hand.)

19 THE CLERK: Thank you.

20 THE COURT: Is there any request to poll the jury from
21 the State?

22 MS. LINDER: None from the State, Your Honor.

23 THE COURT: From the Defense?

24 MS. GAY: One moment, please.

25 No, Your Honor.

1 THE COURT: Ladies and gentlemen, we thank you for your
2 time and your attention to this case. We know that jury
3 service is thankless, based on what we pay you, and we
4 apologize in advance, but it is absolutely no indication of
5 how very much we value your service to us. We try cases with
6 juries probably -- we usually have four trial courts
7 operating every week with the exception of only a few weeks,
8 and we hold court every week with the exception of holidays.
9 We have one of the busiest trial circuits in the state.
10 Richland County, which is Columbia, the capital, and
11 Greenville probably are the only two counties or circuits
12 that have as many cases on the trial rosters and work in
13 terms of trial work as much as Charleston County does. We
14 would not be able to do what we do without you all being
15 willing to come and sit as the fact finders in cases. While
16 there are cases where the Court acts as the fact finder, the
17 majority of what we do involves the need of citizens to act
18 as the fact finders in the cases. South Carolina has one of
19 the largest case filings per capita per judge in the nation
20 at 5,000 cases per judge. We have 49 circuit judges -- well,
21 46, who hear cases throughout the state. For those of you
22 who do not know, our constitution requires that circuit
23 judges rotate throughout the state. Before we had our great
24 budget crisis, generally, circuit judges live outside of
25 their circuit for the months of January through June, and

1 then they come home during the months of July through
2 December, which means we literally live someplace else for
3 six months and then we come home for six months, only home on
4 weekends. Because of the budget crisis our travel was
5 suspended for a good while, but we have resumed limited
6 travel, where we travel about a week a month throughout the
7 state. Our system is very unusual. It is one of the rare
8 systems in the country where judges rotate throughout the
9 state and have statewide jurisdiction to hear and dispose of
10 cases.

11 Just so that you have a point of reference, the City of
12 Philadelphia has nine judges that only hear murder cases.
13 The State of South Carolina, with our retired judges, has 51
14 judges who hear every type of case, civil and criminal,
15 throughout the entire state. And even with that we still
16 dispose of cases more quickly than most states, in about 18
17 months, which is almost unheard of because most states take
18 four to five years to dispose of litigation. So even with
19 our limited resources we still do what is a tremendous job in
20 terms of being able to handle our overwhelming dockets.

21 And just so that you know, in this building we don't
22 only hold circuit court, which is both civil and criminal,
23 but on the second floor we have four to five family courts
24 that operate on a daily basis as well as the Master-in-Equity
25 that holds court on the second floor, and the Probate Court

1 is also located in this building that often has two to three
2 judges hearing cases as well. So I just give you that
3 anecdotal information so that you can know just how very much
4 we appreciate your service to us. Our system is the only
5 kind where individual citizens determine what the facts are
6 in a case, apply the law to those facts and then render
7 verdicts.

8 We are going to move to post-trial motions and
9 sentencing. If any of you would like to remain for that
10 process, please let the bailiffs know, you can actually just
11 raise your hand, and we'll allow you to remain in the
12 courtroom. Those who wish to be excused certainly can be at
13 this time, and you all are excused for the remainder of the
14 week. If you need a work excuse today, we can provide those
15 for you, since it is already 5:00, and the deputy clerks at
16 the windows downstairs have probably already left for the
17 evening. Otherwise they will be mailed to you along with
18 your checks.

19 You are welcome to discuss this case if you would like.
20 By the name token, you don't have to discuss the case.
21 Lawyers will often contact you to get feedback on their
22 performance. That's why we call it the practice of law
23 because you never quite perfect it, so people always want to
24 get feedback on how they performed, how they could do things
25 better, and just to have a layperson's perspective on the

1 process and the fact finding part of that process because it
2 is often helpful to lawyers as they try new cases that come
3 through the system.

4 Again, if you would like to remain for sentencing -- is
5 there anyone who would like to remain for the sentencing, if
6 so if you'd raise your hand for me. Okay, since there's no
7 one --

8 JUROR: I would like to.

9 THE COURT: Okay. You're welcome, and any of you are
10 welcome to remain. Otherwise, if you do not wish to remain,
11 you are excused with the Court's profound thanks.

12 I'll hear post-trial motions, and then if you all can
13 get sentencing sheets for me. Thanks.

14 (Brief pause.)

15 THE COURT: Are there any post-trial motions?

16 MS. GAY: Your Honor, there's motion to set aside the
17 verdict. Notwithstanding the fact that, even though they
18 convicted him, we don't believe the evidence would have been
19 sufficient in follow-up of our motion for directed verdict
20 and our renewed motion at the end of my case.

21 THE COURT: Would the State like to respond?

22 MS. LINDER: Your Honor --

23 MS. GAY: And reiterating my prior objections with
24 regard to the motion to suppress and such.

25 THE COURT: Yes, ma'am.

1 MS. LINDER: Your Honor, I believe that regards to Ms.
2 Gay's previous objections or motions, I believe that I've
3 already argued enough on the record. I don't believe
4 anything has changed. With her motion to set aside the
5 verdict, I would ask that you deny that motion. I believe
6 that there is ample testimony and exhibits to support the
7 jury finding this verdict, and I believe that the jury showed
8 that they absolutely took this very seriously. They took a
9 lot of time deliberating over this. They reviewed the video.
10 They asked multiple questions. I think that they did give
11 this careful thought and attention, and we would ask that you
12 deny that motion.

13 THE COURT: The record reflects that the jury gave this
14 great deliberation. They deliberated from 12:45 until 4:50,
15 which -- and that they gave careful consideration to the
16 facts as well as to the law, applying the law to those facts.
17 There is no basis to set aside the verdict. There is more
18 than ample factual support in the record for, even if he had
19 been found culpable on the greater offenses, there's more
20 than ample evidence to support the findings on the lesser
21 included offenses of PWID cocaine as well as possession of
22 Methyldone, and certainly there's more than adequate evidence
23 in the record regarding the failure to stop with the video
24 that is a contemporaneous record of the entire process of him
25 being notified that law enforcement was -- had commanded him

1 to stop and that he then took evasive action to evade them
2 and failed to stop. Therefore, the motion to set aside the
3 verdict is denied, and the Court incorporates its previous
4 rulings on the previous motions as well as the motion for
5 directed verdict in these findings.

6 Now, that then leaves us -- to make sure that I'm clear,
7 his prior record, he had an '05 parole revocation for failure
8 to stop for a blue light and possession of stolen -- and he
9 had a possession of a stolen motor vehicle in '05, is that
10 correct, and an assault with intent to kill; in '02,
11 possession of stolen gun; in '02, two counts of breaking
12 entering a motor vehicle and burglary in the 3rd degree;
13 2009, DUS, which is driving under suspension, 2nd, and
14 operating a car without a South Carolina driver's license;
15 2007, possession of crack cocaine 1st and a failure to stop
16 for a blue light, and possession with the intent to
17 distribute cocaine 1st, two counts, and also a proximity
18 charge. Is that his accurate record?

19 MS. LINDER: I believe so. I just went through it
20 again. I don't know if you have, in 2007 he also has a
21 possession of marijuana conviction.

22 THE COURT: I'm sorry. I didn't hear you.

23 MS. LINDER: 2007 possession marijuana conviction. I
24 don't know if you had that down.

25 THE COURT: I did not.

1 MS. LINDER: Yes, Judge, I believe that covers
2 everything that he has.

3 THE COURT: With these convictions what enhancement
4 would they be?

5 MS. LINDER: These are third or subsequent.

6 THE COURT: On both the possession of the Methyldone and
7 the PWID, correct?

8 MS. LINDER: Yes, Judge.

9 THE COURT: And also the failure to stop. There's an
10 enhancement. He has a previous failure to stop, doesn't he?

11 MS. LINDER: He does.

12 MS. GAY: He does.

13 THE COURT: So this would be his second failure to stop.

14 MS. LINDER: He has a failure to stop in 2006 and
15 failure to stop in 2008. This is the third. And, Your
16 Honor, Ms. Mulkey went back to our office to get -- we have
17 two sentencing sheets but don't have a third, so she went
18 back to the office to get those.

19 THE COURT: I just wanted to make sure I have the range
20 of penalty correct. On failure to stop that would be a
21 maximum of five years and a minimum of 90 days or \$500 and
22 his license has to be suspended, correct?

23 MS. LINDER: Correct.

24 THE COURT: On PWID cocaine, third or subsequent,
25 minimum of ten years, maximum of 30 years and/or \$50,000

1 fine, and that's a serious with no suspension and no
2 probation but is not classified as violent, correct?

3 MS. LINDER: Correct.

4 THE COURT: And on possession of Methydone, third or
5 subsequent, zero to one and/or 2,000.

6 MS. LINDER: Yes, that is what I have.

7 THE COURT: All right. How long's he been in jail, Ms.
8 Gay?

9 MS. GAY: He's been in jail --

10 THE COURT: Has he been in jail since the date of this
11 incident?

12 MS. GAY: No. I think it's July 26th.

13 THE COURT: July 26th of what year?

14 MS. GAY: 2013.

15 THE COURT: Was that because his bond was revoked
16 because he has other charges?

17 MS. GAY: No. He got re-arrested on a different charge,
18 Your Honor.

19 THE COURT: Which also begs the question, does he want
20 to dispose of some of these other charges and is the State
21 amenable to that?

22 MS. GAY: Maybe if you gave us some time, Your Honor.

23 THE COURT: No time like the present. You all have been
24 discussing it for a while. I don't think the State's going
25 to be amenable to doing anything. They're not going to bring

1 him back from the Department of Corrections to plea. If
2 anything, they're going to do an enhancement and serve him
3 with an LWOP notice.

4 MS. GAY: That's what I was about ready to try to
5 explain to him.

6 THE COURT: What's he still have outstanding?

7 MS. LINDER: Your Honor, he still has outstanding
8 multiple other arrests: Temporary use of a vehicle, two
9 failure to stop for blue lights, two habitual traffic
10 offenders, possession of stolen motor vehicle, possession of
11 controlled substance, trafficking cocaine.

12 THE COURT: I need you to slow down. Trafficking
13 cocaine.

14 MS. LINDER: Trafficking cocaine, possession of a weapon
15 during the commission of a violent crime, two counts of hit
16 and run and possession with intent to distribute cocaine.
17 Those are from multiple separate arrests.

18 THE COURT: What were you willing to nolle pros
19 previously?

20 MS. LINDER: Your Honor, honestly, I hadn't really
21 gotten to which charges I was willing to nolle pros because
22 Mr. Nesbit said he was not interested in any sort of plea
23 offer.

24 THE COURT: What you need to explain to him, Ms. Gay, is
25 that he will not get anything, once he goes to the Department

1 of Corrections, he's not going get any more time on these
2 things that are outstanding.

3 MS. GAY: I understand that.

4 THE COURT: So the clock's going to be ticking. Now, I
5 don't want him to plead guilty if he doesn't feel he's
6 guilty. If he wants a trial on these other things, he needs
7 to avail himself of this process. As I told him before, I'm
8 a great believer in the trial system. I've never vacated a
9 verdict. I've never questioned what a jury has done. I have
10 great confidence in their ability to make the right decision.

11 MS. GAY: Hold on. Can we just have a minute?

12 THE COURT: Mm-hmm. Is there any restitution that's due
13 on any of these hit and runs?

14 MS. LINDER: No, Your Honor, the State's not seeking any
15 restitution on any of the hit and runs.

16 THE COURT: Is there any restitution on the possession
17 of a stolen motor vehicle?

18 MS. LINDER: Your Honor, to be candid with the Court,
19 due to Mr. Nesbit's prior record and the volume of charges he
20 had, there's really no point for us to try to get money out
21 of him. I mean, all of these things have mandatory minimums
22 along with his record making him have mandatory minimums, so
23 we were not seeking any restitution on any of his outstanding
24 charges.

25 THE COURT: The only one that was going to have a

1 mandatory minimum at this point is the PWID and the
2 trafficking. Possession of a stolen motor vehicle is not,
3 nor the habitual traffic offender or the -- well, the failure
4 to stop doesn't have mandatory time either.

5 MS. LINDER: Correct, Judge, but how the arrests were
6 broken up, the trafficking has the mandatory time, the weapon
7 has an automatic five, and then the other drug charge, and
8 those were kind of spread out through his arrests, and we
9 just didn't feel it necessary or appropriate to be going
10 after money.

11 THE COURT: I agree with what you're saying.

12 (Brief recess.)

13 THE COURT: All right. Are we ready to proceed?

14 MS. LINDER: State's ready.

15 THE COURT: Defense ready to proceed? Be glad to hear
16 any argument.

17 MS. GAY: From me?

18 THE COURT: State goes first, usually.

19 MS. LINDER: Your Honor is very aware of the facts of
20 the case, as you were sitting here throughout, and you're
21 also aware of the defendant's prior record and the numerous
22 pending charges that he still has in our office. We believe
23 that Mr. Nesbit is a danger to our society. We believe that
24 his criminal history spans a variety of different agencies in
25 this area, and we believe at this point a very substantial

1 sentence for the upper end would be appropriate, and
2 depending on the sentence, we may be able to just dispose of
3 the other charges without serving him life notice.

4 THE COURT: Ms. Gay?

5 MS. GAY: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 MS. GAY: Mr. Nesbit is 29 years old. His mother has
8 been with him in the courtroom throughout this trial, Your
9 Honor. Her name is Rebecca Nesbit. She's the woman that's
10 been sitting behind him in the black jacket, Your Honor. He
11 has two children which he, before his arrest and during the
12 course of his time, has worked to support. His family owns
13 an upholstery business, and so he's done some of that on his
14 own, plus he's done other work. As a group I think they do a
15 lot of upholstery. He is --

16 THE COURT: How old are the children?

17 MS. GAY: Two and three, Your Honor. There's been a lot
18 of facts that came out in this trial about the -- you know,
19 he admitted to certain things that he did, and then he said
20 that he wasn't in possession or control of the drugs, but
21 obviously the jury has spoken at this point, and he's aware
22 of that. He would ask you to please consider a sentence on
23 the lower end of the range, just so that he can begin to take
24 care of his children as much as possible, and in the process,
25 Your Honor, we would ask you to give him credit for the time

1 served since July of last year. He's been -- there was a
2 point where his bonds were revoked also, so we would just ask
3 that -- it's the date of arrest. What was the date of arrest
4 for the July arrest?

5 26th of July, I believe it's the 26th of July, but I can
6 look at my file on that, Your Honor, but he's been in jail
7 continuously since then.

8 How many days did you spend in jail when you were first
9 arrested?

10 THE DEFENDANT: Eight, nine days.

11 MS. GAY: Eight extra days, and I'll get that date, Your
12 Honor.

13 THE COURT: They'll calculate it. They'll get a report
14 from the jail. I don't calculate time. The statute requires
15 the Department of Corrections to calculate time. If I put 20
16 days on there, that's all he's going to get, even if he has
17 40. They'll get a report of how many days he's served and
18 they'll give him his pre-detention time.

19 MS. GAY: Thank you, Your Honor. We would just ask you
20 to please be as lenient as possible.

21 THE COURT: Ma'am, is there anything you would like to
22 state for the record on your son's behalf?

23 MS. NESBIT: Just like for, if you can just be a little
24 bit more lenient on him so he can help with raising those
25 children.

1 THE COURT: Ma'am, could you state your name for the
2 record?

3 MS. NESBIT: My name is Rebecca.

4 THE COURT: Nesbit?

5 MS. NESBIT: Nesbit.

6 THE COURT: Is there anything else you'd like to tell
7 me, ma'am?

8 MS. NESBIT: I know he may have made some poor choices,
9 but he's really a good person, and he's not really a harm to
10 society. I think everything he did he did it to himself. He
11 didn't hurt nobody.

12 THE COURT: Thank you, ma'am.

13 Sir, is there anything you'd like to state for the
14 record on your own behalf?

15 (No audible response.)

16 THE COURT: Record should indicate that the defendant's
17 indicated he did not want to speak on his own behalf. Is
18 there anything further from the State?

19 MS. LINDER: Nothing further, Your Honor.

20 THE COURT: Does your client need any alcohol or drug
21 treatment Ms. Gay?

22 MS. GAY: He says no, Your Honor.

23 THE COURT: How old is your client, Ms. Gay?

24 MS. GAY: 29, Your Honor.

25 THE COURT: Sir, if you would stand for sentencing. On

1 failure to stop for a blue light, sir, you're sentenced to
2 the State Department of Corrections for a period of five
3 years. On the possession of Methylone you're sentenced to
4 one year. On the PWID cocaine you're sentenced to the State
5 Department of Corrections for a period of 15 years. You will
6 get credit for the time that you have served, and these
7 sentences will run concurrently with one another. That time
8 will be calculated by the Department of Corrections pursuant
9 to 24-13-40. Thank you all very much.

10 MS. LINDER: If I may approach, I have the certified
11 convictions for the drug priors to make a Court's Exhibit.

12 THE COURT: That's fine. Just give it to the court
13 reporter.

14 MS. LINDER: Thank you.

15 (The Court's Exhibit 4 marked for identification.)

16 --- END OF TRANSCRIPT OF RECORD ---

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25

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF CHARLESTON

4

5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the First Judicial Circuit Court for Charleston County,
11 South Carolina, on the 8th of May, 2014.

12 I further certify that I am neither related to nor
13 counsel for any party to the cause pending or interested in
14 the events thereof.

15 October 6, 2014

16

17 /s/ Ruth L. Mott

18 Official Court Reporter

19

20

21

22

23

24

25

JPG20130604613

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2013008740B

ARREST WARRANT NUMBER

2013A1010203901

DATE OF ARREST

July 27, 2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

SEP 09 2013

VERDICT

Foreperson of Petit Jury

Date:

INDICT

582
DOCKET NO. 2013GS1005634

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

September Term 2013

THE STATE

vs.

HENRY OLIVER NESBIT JR

DOB: [REDACTED]

B/M

Indictment for

Trafficking in Cocaine

FILED

9/24/2013 9:01:00 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

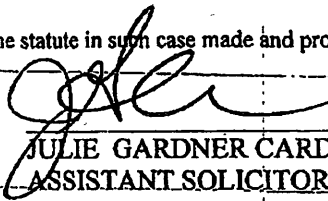
INDICTMENT

At a Court of General Sessions, convened on September 9, 2013 the Grand Jurors of Charleston County present upon their oath:

Trafficking in Cocaine

That in Charleston County, South Carolina, on or about June 16, 2013, the Defendant, HENRY OLIVER NESBIT JR, unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: cocaine, in excess of 10 grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JULIE GARDNER CARDILLO
ASSISTANT SOLICITOR

JPG20130604613

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2013008740B

ARREST WARRANT NUMBER

2013A1010203902

DATE OF ARREST

July 27, 2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

SEP 09 2013

VERDICT

Foreperson of Petit Jury

Date:

INDICT

584

DOCKET NO. 2013GS1005639

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

September Term 2013

THE STATE

vs.

HENRY OLIVER NESBIT JR.

DOB: [REDACTED]

B/M

Indictment for

Possession With Intent to Distribute
Methylone (Bath Salts)

FILED

9/24/2013 9:01:00 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

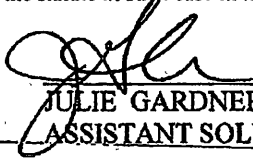
INDICTMENT

At a Court of General Sessions, convened on September 9, 2013 the Grand Jurors of Charleston County present upon their oath:

Possession With Intent to Distribute Methylnone (Bath Salts)

That in Charleston County, South Carolina, on or about June 16, 2013, the Defendant, HENRY OLIVER NESBIT JR, did manufacture, distribute, dispense, deliver, purchase; or did aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase; or did possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue, to wit: methylnone; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JULIE GARDNER CARDILLO
ASSISTANT SOLICITOR

JPG20130604613

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2013008740B

ARREST WARRANT NUMBER

51804GF

DATE OF ARREST

June 17, 2013

ACTION OF GRAND JURY

TRUE BILL

Forperson of Grand Jury

Date:

SEP 09 2013

VERDICT

Foreperson of Petit Jury

Date:

INDICT

586

DOCKET NO. 2013GS1005527

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

September Term 2013

THE STATE

vs.

HENRY OLIVER NESBIT JR

DOB: [REDACTED]

B/M

Indictment for

Failure to Stop for Blue Light

FILED

9/24/2013 9:01:00 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

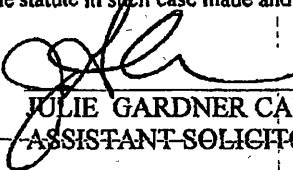
INDICTMENT

At a Court of General Sessions, convened on September 9, 2013 the Grand Jurors of Charleston County present upon their oath:

Failure to Stop for Blue Light

That in Charleston County, South Carolina, on or about June 16, 2013, the Defendant, HENRY OLIVER NESBIT JR, while driving a motor vehicle on a road, street, or highway of the State, did knowingly, willfully, intentionally, and in the absence of mitigating circumstances, fail to stop for a law enforcement vehicle after being signaled by a flashing light and/or a siren to do so; all in violation of Section 56-5-750 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JULIE GARDNER CARDILLO
ASSISTANT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 9, 2014

Robert M. Pachak

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
 STATE VS.
Henry Oliver Nesbit Jr

AKA:
 Race: BLACK Sex: M Age: 29

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Mount Pleasant, SC 29464

DL#: [REDACTED] SID#: SC01421253

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: PWID/Dist. of Cocaine/LSD/other Narcotic drugs in Sch. I(b) & (c)/Sched. II, 3rd offense

INDICTMENT/CASE#: 2013GS1005634

A/W#: 2013A1010203901

Date of Offense: 6/16/2013

S.C. Code § : 44-53-0370(e)(2)(a)1

CDR Code #: 0278

SENTENCE SHEET

in violation of § 44-53-0370(b)(1) of the S.C. Code of Laws, bearing CDR Code # 0185

☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Stephanie B. Linder 72656 SC Bar# 63773 Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-GS-10-5527, 5639
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine: \$

§ 14-1-206 (Assessments 107.5 %) \$

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$ 150.00

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ 8.40

TOTAL \$ 288.40

PTUP

 days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel,

§ 47.12 requires \$500 be paid to Clerk

during probation.

Presiding Judge

Judge Code: 2128

Sentence Date: 5-8-2014

Clerk of Court/ Deputy Clerk

Court Reporter: Ruth Mott

SCCA/217 (03/2011)

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

DEC 09 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

HENRY NESBIT,

APPELLANT

APPELLATE CASE NO. 2014-001231

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES**Cases**

<u>Matthews v. State</u> , 300 S.C. 238, 387 S.E.2d 258 (1990).....	6
<u>State v. Fennell</u> , 263 S.C. 216, 209 S.E.2d 433 (1974)	6
<u>State v. Gosnell</u> , 341 S.C. 627, 535 S.E.2d 453 (Ct.App. 2000)	6

Constitutional Provisions

S.C. Const. Art. 5, § 21	6

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in not instructing the jury on possession of cocaine as a lesser included offense of trafficking in cocaine?

STATEMENT OF THE CASE

Appellant was convicted of failure to stop for a blue light, possession with intent to distribute cocaine, and possession with intent to distribute methylene after a jury trial held before the Honorable Debra L. Jefferson on May 5 – 8, 2014, in Charleston County. Respective sentences of five (5) years, fifteen (15) years, and one (1) year were imposed. Melissa Gray, Esquire, and Michael Nelson, Esquire, were the trial attorneys. Lauren Mulkey, Esquire, and Stephanie Linder, Esquire, were the assistant solicitors.

This appeal follows.

ARGUMENT

The trial court erred in not instructing the jury on possession of cocaine as a lesser included offense of trafficking in cocaine.

Appellant was originally indicted for trafficking in cocaine. That indictment read as follows:

That in Charleston County, South Carolina, on or about June 16, 2013, the Defendant, HENRY OLIVER NESBIT JR, unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: cocaine, in excess of 10 grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

What happened in this case was that Deputy Chavez with Charleston County Sheriff's Office was assigned to off-duty patrol at the Isle of Palms Police Department to assist them with extra traffic enforcement and crowd control during the busy time of the beach season. He was parked in front of the Windjammer in the median. He observed appellant approaching the intersection of JC Long Boulevard at Ocean Boulevard and make a turn without using his turn signal. Deputy Chavez initiated a stop. (R. p. 91, line 17 – p. 93, line 19).

Appellant was driving a brown Harley Davidson motorcycle. When the blue lights were activated, appellant started to slow down and make a right-hand turn onto a side street and then took off at a high rate of speed. (R. p. 97, lines 1 – 15). Deputy Chavez pursued appellant and during the chase, appellant got in a wreck. Chavez arrested appellant for failing to stop and he placed him in handcuffs. He then searched him and found a large amount of cash and several bags of narcotics. (R. p. 100, line 21 –

p. 101, line 5). One bag of cocaine contained 1.72 grams of cocaine. The other bag contained 19.53 grams of cocaine. (R. p. 196, lines 3 – 7).

The trial judge agreed to charge the law of possession with intent to distribute cocaine as a lesser included offense of trafficking in cocaine. (R. p. 212, lines 3 – 4). No mention, however, was made of charging on possession of cocaine as a lesser included offense of trafficking in cocaine. The trial court committed error in failing to charge on possession of cocaine.

Article 5, § 21 of the South Carolina Constitution mandates that judges “shall declare the law.” An indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (Ct.App. 2000); State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974). Because possession of cocaine is a lesser included offense of possession with intent to distribute cocaine and possession with intent to distribute cocaine is a lesser included offense of trafficking in cocaine, Matthews v. State, 300 S.C. 238, 387 S.E.2d 258 (1990), possession of cocaine should be a lesser included offense of trafficking in cocaine.

CONCLUSION

Because the trial court failed to charge on the lesser included offense of possession of cocaine, appellant's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2014.

598
STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY NESBIT,

APPELLANT

APPELLATE CASE NO. 2014-001231

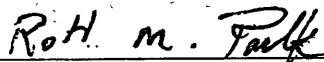
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Henry Nesbit states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Deadra L. Jefferson, which was held on May 8, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Henry Nesbit.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2014.

599
STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY NESBIT,

APPELLANT

APPELLATE CASE NO. 2014-001231

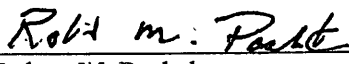
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript (May 5 – 7, 2014)
- (3) Entire Trial Transcript (May 8, 2014)

I certify that this designation contains no matter which is irrelevant to this appeal.

December 9, 2014


Robert M. Pachak
Appellate Defender

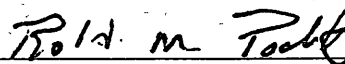
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

600
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 9, 2014



Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

RECEIVED
DEC 09 2014
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

HENRY NESBIT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Henry Nesbit, #292341 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 9th day of December, 2014.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of December, 2014.

Pala C. K... (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Henry Oliver Nesbit, Jr., Appellant.

Appellate Case No. 2014-001231

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2015-UP-483
Submitted August 1, 2015 – Filed October 14, 2015

APPEAL DISMISSED

Appellate Defender Robert M. Pachak, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Salley W. Elliott,
both of Columbia, for Respondent.

PER CURIAM: Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 30, 2015

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: The State v. Henry Nesbit
Lower Court Case No. 2013GS1005527, 2013GS1005634, 2013GS1005639
Appellate Case No. 2014-001231

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Henry Nesbit, 292341
Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire
Robert M. Pachak, Esquire
The Honorable Deadra L. Jefferson

STATE OF SOUTH CAROLINA

605

COUNTY OF CharlestonHenry Nesbit, Jr. #292341

Plaintiff(s)

vs.

State of South Carolina

Defendant(s)

(Please Print)

Submitted By: Henry NesbitAddress: Heiber Corp. Inst.Post Office Box 203Ridgewill, S.C. 29472

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached).

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	☐ 20 -CP-	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)

Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☒ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
	☐ Forfeiture-Petition (840)	☐ Transcript of Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture-Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement	☐ Worker's Comp (960)
		☐ Payment Rights Application (760)	☐ Zoning Board (970)
		☐ Confession of Judgment (770)	☐ Public Service Commission (990)
		☐ Petition for Workers	☐ Employment Security Commission (991)
		☐ Compensation Settlement	
		☐ Approval (780)	
		☐ Other (799)	☐ Other (999)

Special/Complex/Other

☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Foreign Subpoenas (650)
☐ Other (699)	☐ Motion to Quash Subpoena in Out-of-County Action (660)
☐ Sexual Predator (670)	

Submitting Party Signature: _____

Date: _____

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (06/2013)

Page 1 of 2

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF CharlestonHenry Nesbit, Jr. #292341

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

2016-CP-10-2761
IN THE COURT OF COMMON PLEAS
CLERK OF COURT
2016 MAY 26 AM 11:27
FILED
JULIA ARMSTRONG
CLERK OF COURT

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Charleston County Gen. Sess. Court
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Failure to Stop for blue light, Possession with intent to distribute
 - (b) Cocaine, Possession with intent to distribute Methyldone
 - (c) 2013-CS-10-5634
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May 7, 2014 sentenced to 15 years
 - (b) June 18, 2014 sentenced to 5 years consecutive

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 14, 2015
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Dismissed after review pursuant to Anders vs. California
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) See Attach Sheet
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attach Sheet
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NO
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) This is the first opportunity to present these grounds to any
- (b) Court
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? ☒ _____
- (c) your sentencing? ☒ _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Melissa Gay, Esq.
- ii. Michael Nelson, Esq.
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial and Sentencing
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
New Trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

I, HN, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Henry & Nestor Jr.

SWORN to and subscribed before me this 30th
day of March, 2016.

Leuchon Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, HN, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Henry O. Nantz Jr.
Applicant

SWORN or affirmed to and subscribed before me this
30th day of March, 2016.

Ludrean Bryant
Notary Public

My Commission Expires: May 26, 2020

Attach Sheet

Pursuant to S.C. Code of Laws Section 17-27-20-120 An Application for Post Conviction Relief Filed Pursuant to Chapter 17 section 17-27-20(1)(b) must be filed within one (1) year after entry of a Judgment or Conviction or within one (1) year after the sending of the remittitur to the Lower Court from an appeal of the final decision upon an appeal which ever is later.

Applicant set forth this Cause of Action Pursuant to the Judgment that are set forth in Chapter 17- section 17-27-20(1)(b) "Collateral" attack upon and grounds of alleged error heretofore available under this uniform Post Conviction Act that are being submitted or amended.

The Applicant asserts (2) grounds for relief at this time (1) ineffective assistance of trial Counsel (2) violation of S.C. Chain of Custody Laws in the handling of drugs in Applicant Case. Applicant also asserts that due to his lack of understanding of the Law, Applicant request that Counsel be appointed Pursuant to N.I.C. SCRCiv.P., and S.C. Code of Laws 17-27-90.

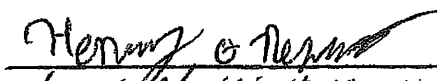
Applicant asserts that there are further grounds to be raised but due to the lack of record and without such, and the assistance of Counsel, it would be chronologically impossible for the Applicant to carry such a burden to show his entitlement for relief by a preponderance of the evidence and for the appointment of Counsel to insure that all available grounds for relief are included in the application S.C. Code of Laws 17-27-90

Therefore, Applicant request that this Court appoint Counsel in the above mentioned application. Applicant moves this Honorable Court to grant leave to amend this application in this Cause of action due to the lack of Counsel and and Applicant is a lay person at law.

Applicant seeks this Court approval of this application so that Applicant right to a PCR won't be deem abandon due to the fact that Applicant has only (1) year to file this Application from the date of a final Judgment or from the remittitur to the Lower Court which ever comes first.

Respectfully Submitted,

March, 2016


 Henry Nesbit # 292341



ALAN WILSON
ATTORNEY GENERAL

April 13, 2017

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2210

Re: Henry Nesbit, Jr., #292341 v. State of South Carolina
2016-CP-10-2761

Dear Ms. Armstrong:

Enclosed please find the original **Return and Partial Motion to Dismiss and Motion for a More Definite Statement** of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

Alicia A. Olive
Assistant Attorney General

AAO/bea

Enclosures

PCR Application

Charleston County Clerk Records

SCDC Records

Record on Appeal

Appellate Records

cc: Mark L. Archer, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Henry Nesbit, Jr., #292341,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2016-CP-10-2761

**RETURN AND PARTIAL MOTION TO
DISMISS AND MOTION FOR A
MORE DEFINITE STATEMENT**

FILED
2017 APR 14 PM 1:45
BY J. ARMSTRONG
CLERK OF COURT

In response to the post-conviction relief application filed on May 26, 2016, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. Applicant was indicted by the September 2013 term of the Charleston County Grand Jury for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute ("PWID") methyline (bath salts) (2013-GS-10-5639). Melissa Gay, Esquire and Michael Nelson, Esquire represented him. On May 5-8, 2014, Applicant proceeded to trial before the Honorable Deadra L. Jefferson and a jury. On May 8, 2014, the jury found Applicant guilty as indicted for failure to stop for a blue light and guilty of the lesser-included-offenses of PWID cocaine and possession of methyline. Judge Jefferson sentenced Applicant to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of methyline.¹

¹ Applicant states in his application that he was sentenced to a consecutive five-year term on June 18, 2014. Upon information and belief, this sentence arose from a guilty plea to other charges. (2012-GS-10-5706, -5707, counts 1 and 2) and (2013-GS-10-6603, and -6604). Applicant does not challenge these convictions in his application.

Applicant appealed. Robert M. Pachak, Esquire represented Applicant on appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v. Nesbit, Op. No. 2015-UP-483 (S.C. Ct. App. 2015). The Remittitur was returned on October 30, 2015.

Attached to this Return and incorporated by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Record on Appeal, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
2. "Violation of SC chain of custody laws in handling of drugs in Applicant's case"

III.

Applicant asserts he received ineffective assistance of counsel. Respondent submits this allegation is without merit but requests an evidentiary hearing to fully resolve the issue. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the

two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18; 386 S.E.2d at 625.

Respondent submits that Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that are not conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant alleges "Violation of SC chain of custody laws in handling of drugs in Applicant's case." Respondent submits this allegation should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy . . . *Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.*

S.C. Code Ann. § 17-27-20 (emphasis added).

“Violation of SC chain of custody laws in handling of drugs in Applicant’s case” is not a claim cognizable under the act. Furthermore, Respondent interprets this as an allegation that the evidence presented by the State was insufficient. The post-conviction relief court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. § 17-27-20(a)(6) (“[T]his section *shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.*”) (emphasis added). For this reason and pursuant to Rule 12(b)(6), SCRPC, Respondent moves to dismiss this allegation for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

V.

Respondent also moves for a more definite statement in regards to his allegation of ineffective assistance of trial counsel. In his Application, Applicant has failed to set forth any facts to “support each ground” or to explain with any specificity whatsoever the facts upon which his claim are based. The Uniform Post-Conviction Procedure Act requires the Applicant to “*specifically set*

forth the grounds upon which the application is based.” S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Applicant states that once he obtains counsel, he will amend his application to set forth additional grounds for relief. Because Applicant is now represented by Counsel, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VI.

Similarly, Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained above is hereby denied.

VIII.

WHEREFORE, Respondent moves for a more definite statement, requests that an evidentiary hearing be held solely for the purpose of determining whether the Applicant's trial counsel was ineffective, and moves to dismiss all other claims.

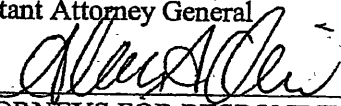
Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

ALICIA OLIVE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

April 18th, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

HENRY NESBIT, JR., #292341,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2016-CP-10-2761

AFFIDAVIT OF SERVICE BY MAIL

BY

JULIE J. ARMSTRONG
CLERK OF COURT
APR 14 PM 1:45

FILED

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Partial Motion to Dismiss and Motion for a More Definite Statement** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mark L. Archer, Esquire
 Archer Law Office, PA
 Post Office Box 971
 Mount Pleasant, South Carolina 29465-0971

DATED this 13th day of April, 2017.

Brianna Amone
 Brianna Amone, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

Henri Nesbitt, Jr. #292341

Plaintiff(s)

vs.

State of South Carolina

Defendant(s)

(Please Print)

Submitted By: Henri Nesbitt

Address: Wheeler Court Inst.

Post Office Box 205

Ridgewill, S.C. 29472

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

☐ Contracts ☐ Assurances (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	☐ Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Erroneous Notice of Motion Case # 20-CP ☐ Nonnew Life Med Neg (230) ☐ Other (299)	☐ Torts - Personal Injury ☐ Assault/Stricken Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	☐ Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Machine Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)

☐ Inmate Petitions ☐ Habeas (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Administrative Law/Relief ☐ Refuse to Re-License (600) ☐ Judicial Review (610) ☐ Relief (620) ☐ Permanent Injunction (630) ☐ Preliminary Injunction (640) ☐ Forfeiture/Consent Order (650) ☐ Other (699)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript of Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate Civil (910) ☐ Magistrate Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDC (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (980) ☐ Employment Security Commission (991) ☐ Other (999)

Special/Complex/Other

☐ Environmental (1000) ☐ Automobile Acc. (1010) ☐ Medical (1020) ☐ Other (1099)	☐ Pharmaceuticals (1030) ☐ Child/Child Practices (1040) ☐ Tobacco Subpoenas (1050) ☐ Motion to Dismiss Subpoena in Out-of-State Actions (1060)

Submitting Party Signature: _____

Date: _____

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SERCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

SCCA 7234 (06/2013)

Page 1 of 2

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF CharlestonHenry Nesbit, Jr. #292341

Full name and prison number (if any) of Applicant

State of South Carolina

2016 CP-10-2761
IN THE COURT OF COMMON PLEAS
CLERK OF COURT
2016 MAY 26 AM 11:27
FILED
JULIA ARSTRONG

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page, or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Charleston County Gen. Sess. Court
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Failure to Stop for blue light, Possession with intent to distribute
 - (b) Cocaine, Possession with intent to distribute Methyline
 - (c) 2013-GS-10-5634
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May 7, 2014 Sentenced to 15 years
 - (b) June 18, 2014 Sentenced to 5 years consecutive

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 14, 2015
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Dismissed after review pursuant to Anders vs. California
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See Attach Sheet

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Attach Sheet

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. ND

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first opportunity to present these grounds to any

(b) Court

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? ☒ _____
- (c) your sentencing? ☒ _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Melissa Gay, Esq.

ii. Michael Nelson, Esq.

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

I, HN, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Henry & Nettie Jm.

SWORN to and subscribed before me this 30th
day of March, 2016.

Lucian Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, HN, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Henry O. Nelson
Applicant

SWORN or affirmed to and subscribed before me this
30th day of March, 2016.

Ludrecia Bryant
Notary Public

My Commission Expires: May 26, 2020

Attach Sheet

Pursuant to S.C. Code of Laws Section 17-27-10-120 An Application for Post Conviction Relief Filed Pursuant to Chapter 17 section 17-27-20(1)(b) must be filed within one (1) year after entry of a Judgment of Conviction or within one (1) year after the sending of the remittitur to the Lower Court from an appeal of the final decision upon an appeal which ever is later.

Applicant set forth this Cause of Action Pursuant to the Judgment that are set forth in Chapter 17- section 17-27-20(1)(b) "Collateral" attack upon and grounds of alleged error heretofore available under this uniform Post Conviction Act that are being submitted or amended.

The Applicant asserts (2) grounds for relief at this time (1) ineffective assistance of trial Counsel (2) violation of S.C. Chain of Custody Laws in the handling of drugs in Applicant case. Applicant also asserts that due to his lack of understanding of the Law, Applicant request that Counsel be appointed Pursuant to 71.1(d) SCRLiv. P., and S.C. Code of Laws 17-27-90.

Applicant asserts that there are further grounds to be raised but due to the lack of record and without such, and the assistance of Counsel, it would be chronologically impossible for the Applicant to carry such a burden to show his entitlement for relief by a preponderance of the evidence and for the appointment of Counsel to insure that all available grounds for relief are included in the application S.C. Code of Laws 17-27-90

Therefore, Applicant request that this Court appoint Counsel in the above mentioned application. Applicant moves this Honorable Court to grant leave to amend this application in this cause of action due to the lack of Counsel and and Applicant is a lay person at law.

Applicant seeks this Court approval of this application so that Applicant right to a PCR won't be deem abandon due to the fact that Applicant has only (1) year to file this Application from the date of a final Judgment or from the remittitur to the Lower Court which ever comes first.

Respectfully Submitted,

March _____, 2016

Henry O. Nesbit
Henry Nesbit # 292341

ARREST WARRANT

2013A1010203901

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston 2013-008740P

THE STATE
against

Henry Oliver Nesbit, Jr

Address:

Mount Pleasant, SC 29466-

Phone: SSN:
 Sex: M Race: B Height: 6 1 Weight: 230DL State: SC DL #:
 DOB: Agency ORI #: SC0100000

Prosecuting Agency: Charleston County Sheriff

Prosecuting Officer: M. Gurrieri - 0111

Offense: Drugs / Trafficking in cocaine, 10 g or more, but
less than 28 g - 1st offense

Offense Code: 0278

Code/Ordinance Sec: 44-53-0370(c)(2)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Henry Oliver Nesbit, Jr
on 7-26-13

Signature of Bondable Law Enforcement Officer

RETURN WARRANT TO:

Bond Court
3870 Leeds Avenue, Suite 106
North Charleston, SC 29405

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCGA 518Personally appeared before me the affiant M. Gurrieri who
being duly sworn deposes and says that defendant Henry Oliver Nesbit, Jr
did within this county and state on or about 7/16/2013 violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Charleston)
in the following particulars:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 10 g or more, but less than 28 g - 1st offense

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Affiant's Address 3505 Pinchaven DriveCharleston, SC 29405-Affiant's Telephone (843)202-1700

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 7/16/2013 defendant Henry Oliver Nesbit, Jr
did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of Charleston) as set forth below.

DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 10 g or more, but less than 28 g - 1st offense

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before meon 7/15/2013Signature of Issuing Judge
Linda Schwartz Lombard
Judge Code: 7004

(L.S.)

Judge's Address 3870 Leeds Avenue, Suite 106North Charleston, SC 29405-7469Judge's Telephone (843)746-9822Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

BAIL set by

Judge

Baldwin

on

7-27-13

Type and Amount:

100,000

Name of Surety:

PRELIMINARY HEARING held by

Judge

on

Defendant Attorney:

Decision:

DISPOSITION before

Judge

on

by

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition:

Sentence:

JURORS

WITNESSES

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

CODEFENDANTS



FILED

2013 JUL 31 AM 11:18

JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF: CharlestonSTATE: VS.Henry Oliver Nesbit Jr

AKA:

Race: BLACK Sex: M Age: 29DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip: Mount Pleasant, SC 29464DL#: [REDACTED] SID#: SC01421253*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: PWID/Dist. of Cocaine/LSD/other Narcotic drugs in Sch. I(b) & (c)/Sched. II, 3rd offensein violation of § 44-53-0370(b)(1) of the S.C. Code of Laws, bearing CDR Code # 0185☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45 w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

AFFEST:

Stephanie B.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-GS-10-5527, 5639☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 8.40
TOTAL		\$ 288.40

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS1005634A/W#: 2013A1010203901Date of Offense: 6/16/2013S.C. Code § : 44-53-0370(e)(2)(a)1CDR Code #: 0278

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 44-53-0370(b)(1) of the S.C. Code of Laws, bearing CDR Code # 0185☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45 w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

AFFEST:

Stephanie B.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-GS-10-5527, 5639☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 8.40
TOTAL		\$ 288.40

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

PTUP days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

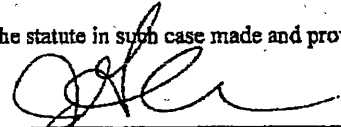
INDICTMENT

At a Court of General Sessions, convened on September 9, 2013 the Grand Jurors of Charleston County present upon their oath:

Trafficking in Cocaine

That in Charleston County, South Carolina, on or about June 16, 2013, the Defendant, HENRY OLIVER NESBIT JR., unlawfully and knowingly did sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: cocaine, in excess of 10 grams; in violation of 44-53-370 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JULIE GARDNER CARDILLO
ASSISTANT SOLICITOR

JPG20130604613

WITNESSES

Charleston County Sheriff

AGENCY CASE NUMBER

2013008740B

ARREST WARRANT NUMBER

2013A1010203901

DATE OF ARREST

July 27, 2013

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

SEP 9 2013

VERDICT

Foreperson of Petit Jury

INDICT

DOCKET NO. 2013GS1005634

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

September Term 2013

THE STATE

vs.

HENRY OLIVER NESBIT JR

DOB: 1985-04-16

B/M

Indictment for

Trafficking in Cocaine

636

**COUNTY OF CHARLESTON
SHERIFF'S OFFICE**

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

AFFIDAVIT

Personally appeared before me, a Magistrate of this County, one Detective M. Gurrieri, who, first being duly sworn, deposes and says that

HENRY OLIVER NESBIT JR

did within this County and State on the 16th day of June, 2013, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE

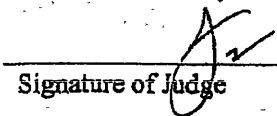
**VIOLATION SECTION 44-53-370 OF THE SOUTH CAROLINA CODE OF LAWS, AS
AMENDED (Trafficking in Cocaine)**

The affiant states that there is probable cause to believe that the defendant named above did commit the crime set forth, and that such probable cause is based on the following facts:

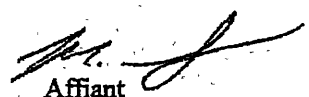
That on June 16th, 2013, at approximately 1947 hours, while at or near JC Long Boulevard, in the Isle of Palms section of the County and State aforesaid, the above named defendant did violate section 44-53-370 "Trafficking in Cocaine." The defendant did willfully and unlawfully have in his possession and under his control a quantity of a white powder substance. The substance was packaged in two separate plastic bags with an approximate combined weight of 21.0 grams. The white powder substances field-tested and laboratory tested presumptive for cocaine. The white powder substances were located on the defendant's person after he was placed under arrest for failure to stop for blue lights, habitual offender, failure to signal and simple possession of marijuana.

The above is true and believable based on the personal observations of Detective M. Gurrieri and Deputy G. Chavez who are witnesses to prove the same in such case made and provided against the peace and dignity of the State of South Carolina.

Sworn to and subscribed before me
on this the 15th day of July, 2013.


Signature of Judge

(L>S>)


Affiant

Address: 3505 Pinehaven Drive
N. Charleston, SC 29405
Phone: (843) 554-4700

11:37:30 Monday, June 27, 2016

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 06/27/16
 OMCOMITA RELEASE DATE SCREEN C056427
 SCDC# > 292341 LOC: LIEBER
 NESBIT JR, HENRY O SCDC CLASSIFICATION...: NON-VIOLENT
 OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
 SEXUAL PREDATOR...: NOT APP
 DNA STATUS...: COMPLETED
 GPS REQUIREMENT...: N
 PREA DECISION...:
 CURRENT SENTENCE: 020-00-000 CONSECUTIVE SENTENCE...: Y
 020-00-000 CURRENT SENT START DATE: 07/26/2013
 PROJECTED COMPLETION DATES
 MAXOUT DATE: 03/18/2027 CURRENT EWC ..: 5 F 5
 YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
 INITIAL PAROLE DATE: 03/18/2027 NEXT PAROLE HEARING DATE: 03/18/2027

 TOTAL GT DAYS EARNED: 000580 LABOR CREW/WORK PROG DATE: 99/99/9999
 TOTAL EARNED WORK CREDITS ...: 000076 LABOR CREW DISQ REASON:
 TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
 TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 00/00/00
 TOTAL SERVICE TIME EARNED ...: 001066 ISS.....

 PFKEYS: 5:HISTORY OF DATE CHANGES

South Carolina Department of Corrections

Classification Summary Reports

Date: Monday, June 27, 2016

Classification Summary Reports

Inmate Number

292341

Submit

SCDC ID

Name

Sex/Race

Status

00292341 NESBIT JR, HENRY O. M/B INCARCERATED
Y 00292341 NESBIT JR, HENRY O. M/B RELEASE

Classification Summary Report for NESBIT JR, HENRY O.

Create PDF

SCDC# 00292341

CLASSIFICATION SUMMARY REPORT DATED 06/27/2016

NESBIT JR, HENRY O

FBI# 284314WB5

OFFENDER TYPE: ADULT-STRAIGHT SENTENCE

INSTITUTION: LIEBER

SECURITY/CUST: 3 MEDIUM

CURR INCARC SENT: 20 YRS 0 MOS 0 DAYS

VICTIM WITNESS: SEPREQ:Y

MED CLASS:

INST RESTRICT: NO RESTRICTION

MENTAL CLASS: NMH (NO MENTAL HEALTH TRE

CURRENT PROGRAM: NO CURRENT PROGRAM

SEX REGISTRY: N

DNA: C

AGE: 31



RESIDENT STABILITY: NA

DORMROOMBUNK CODE: AB 0051 A

PROJ MAXOUT DATE: 03/18/2027

PROJ PAROLE DATE: 03/18/2027

EWC JOB: FOOD SERVICE AIDE

ASSIGNMENT: CAFETERIA

EWC LEVEL: SF5 EEC LEVEL:

EDUC PGM: NO CURR EDUC PROGRAM

PREVIOUS NUMBERS:

Y00292341

SENTENCE

SENTENCE

Classing Summary Reports - Report View

Page 2 of 4

CURRENT OFFENSES	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
FIREARMS PROVISION	5	0	0	CHARLESTON	06/18/2014	N	3	12GS1005707
MDP NARC SCHED-2ND SUBSE	5	0	0	CHARLESTON	06/18/2014	N	3	13GS1006603+
FAIL TO STOP FOR OFFICER	3	0	0	CHARLESTON	06/18/2014	N	2	12GS1005706
FAIL TO STOP FOR OFFICER	5	0	0	CHARLESTON	04/29/2014	N	2	13GS1005527
MDP NARC SCHED-3RD,SUBSE	15	0	0	CHARLESTON	07/26/2013	N	3	13GS1005634
ILLEGAL DRUGS POSSESS	1	0	0	CHARLESTON	07/26/2013	N	2	13GS1005639
COCAINE POSS INT/DISTR	3	0	0	CHARLESTON	05/24/2007	N	2	08GS10-1296

COMPLETED OFFENSES	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
COCAINE POSS INT/DISTR	3	0	0	CHARLESTON	05/24/2007	N	2	08GS10-1298
FAIL TO STOP FOR OFFICER	3	0	0	CHARLESTON	05/24/2007	N	2	07GS10-9440
ILL.DRUGS DISTR PROX SCH	3	0	0	CHARLESTON	05/24/2007	N	2	08GS10-1297
POSS METH/COC BASE 1ST	3	0	0	CHARLESTON	05/20/2007	N	2	07GS10-8063
ASSAULT W/INT TO KILL	2	0	0	HORRY	02/08/2006	N	4	05GS262664
POSSESS STOLEN VEHICLE	2	0	0	HORRY	02/08/2006	N	2	05GS262661
FAIL TO STOP FOR OFFICER	2	0	0	HORRY	02/08/2006	N	2	05GS262663

PRIOR COMMITMENTS OVER 90 DAYS:

06/12/2002

POSSESSION OF WEAPON

PREVIOUS OFFENSES	PREVSCDCID	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
ASSAULT W/INT TO KILL	Y00292341	2	0	0	HORRY	02/08/2006	N	4	05GS26-2664
BURGLARY-3RD DEGREE	Y00292341	4	0	0	CHARLESTON	12/03/2002	N	2	02GS10-5808
POSSESS STOLEN VEHICLE	Y00292341	2	0	0	HORRY	02/08/2006	N	2	05GS262661
POSSESS STOLEN VEHICLE	Y00292341	2	0	0	HORRY	02/08/2006	N	2	05GS26-2661
BREAKING INTO MOTOR VEH	Y00292341	4	0	0	CHARLESTON	12/03/2002	N	2	02GS10-5683+
FAIL TO STOP FOR OFFICER	Y00292341	2	0	0	HORRY	02/08/2006	N	2	05GS26-2663

DETAINEES (HOLD,WANTED,NOTIFY):

COCAINE POSS INT/DISTR	WANTED	PRESIDING JUDGE	CATEG:2
COCAINE DISTRIBUTION	WANTED	PRESIDING JUDGE	CATEG:2
ARMED ROBBERY	NOTIFY	OPEN ARRESTNOTIFICATION	CATEG:4
TRAF COCAINE(10-28G,1ST)	WANTED	PRESIDING JUDGE	CATEG:4
HIT AND RUN	WANTED	PRESIDING JUDGE	CATEG:3
ILLEGAL DRUGS POSSESS	WANTED	PRESIDING JUDGE	CATEG:2

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

11/19/2015	POSSESSION OF A WEAPON	CONVICTED	MAJOR DISC. HEARING	N
07/25/2014	FIGHTING WITHOUT A WEAPON	CONVICTED	MAJOR DISC. HEARING	N
12/12/2003	FIGHTING WITHOUT A WEAPON	DISMISSED	MAJOR DISC. HEARING	

PREVIOUS ASSAULTIVE DISCIPLINARIES:

NO PREVIOUS ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

12/01/2015	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM
11/19/2015	POSSESSION OF CONTRABAND	CONVICTED	MAJOR DISC. HEARING
11/19/2015	USE,POSS NARC,MARIJ,UNAUTH DRUG,INHALANT	CONVICTED	MAJOR DISC. HEARING
11/19/2015	POSS. OR/ATTEMPT TO POSSESS CELL PHONE	CONVICTED	MAJOR DISC. HEARING
10/22/2015	POSS. OR/ATTEMPT TO POSSESS CELL PHONE	CONVICTED	MAJOR DISC. HEARING
10/22/2015	POSSESSION OF CONTRABAND	CONVICTED	MAJOR DISC. HEARING
09/02/2015	POSS. OR/ATTEMPT TO POSSESS CELL PHONE	CONVICTED	MAJOR DISC. HEARING
09/02/2015	POSSESSION OF CONTRABAND	CONVICTED	MAJOR DISC. HEARING
06/20/2015	POSS. OR/ATTEMPT TO POSSESS CELL PHONE	NOT GUILTY	MAJOR DISC. HEARING
06/16/2015	EXHIBITIONISM AND PUBLIC MASTURBATION	NOT GUILTY	MAJOR DISC. HEARING
02/09/2015	USE,POSS NARC,MARIJ,UNAUTH DRUG,INHALANT	CONVICTED	MAJOR DISC. HEARING
01/04/2015	SMUGGLING/CONSPIRACY SMUGGLE CONTRABAND	CONVICTED	MAJOR DISC. HEARING
01/13/2009	REFUSING OR FAILING OBEY ORDERS	CLOSED	OTHER ACTION TAKEN/INFORM
01/09/2009	DAMAGE,DESTROY PROP. VALUED LESS \$100.	CLOSED	OTHER ACTION TAKEN/INFORM
11/02/2008	OUT OF PLACE	CONVICTED	MAJOR DISC. HEARING
06/29/2008	OUT OF PLACE	NOT GUILTY	MAJOR DISC. HEARING
06/21/2008	REFUSING OR FAILING OBEY ORDERS	CLOSED	OTHER ACTION TAKEN/INFORM
06/21/2008	POSSESSION OF CONTRABAND	CLOSED	OTHER ACTION TAKEN/INFORM
06/09/2008	CREATING UNNECESSARY NOISE	CLOSED	OTHER ACTION TAKEN/INFORM
06/09/2008	REFUSING OR FAILING OBEY ORDERS	CLOSED	OTHER ACTION TAKEN/INFORM
05/15/2008	POSSESSION OF CONTRABAND	CLOSED	OTHER ACTION TAKEN/INFORM
09/02/2006	INTERFERING WITH COUNT	CLOSED	OTHER ACTION TAKEN/INFORM
08/06/2006	REFUSING TO WORK	CLOSED	OTHER ACTION TAKEN/INFORM
02/17/2006	REFUSING OR FAILING OBEY ORDERS	CLOSED	OTHER ACTION TAKEN/INFORM
03/08/2004	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM
02/09/2004	DAMAGE,DESTROY,PROP.VALUE AT \$100./MORE	CONVICTED	MINOR DISC. HEARING
11/10/2003	REFUSING TO ATTEND COMPULSORY PROGRAM	CLOSED	OTHER ACTION TAKEN/INFORM
08/16/2003	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM
08/05/2003	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM

PREVIOUS NON-ASSAULTIVE DISCIPLINARIES:

NO PREVIOUS NON-ASSAULTIVE DISCIPLINARIES HISTORY

HISTORY OF MOVEMENTS:

07/30/2014	LIEBER	INCARCERATED	ADMINISTRATIVE
06/20/2014	KIRKLAND	INCARCERATED	RETURN FROM COURT
06/16/2014	CHARLESTON CO	AUTH ABSENCE (AWL)	TO COURT
05/13/2014	KIRKLAND	INCARCERATED	R&E PROCESSING
05/13/2014	LIEBER	INCARCERATED	NEW SENT W/O PR/CS/SF REV
01/30/2009	CHARLESTON CO	PROBATION	RELEASED TO PROBATION
07/07/2008	MACDOUGALL CORR INST	INCARCERATED	ADMINISTRATIVE
07/07/2008	KIRKLAND	INCARCERATED	MEDICAL
05/05/2008	MACDOUGALL CORR INST	INCARCERATED	ADMINISTRATIVE
04/07/2008	KIRKLAND	INCARCERATED	NEW ADMISSION
02/01/2007	UNK	RELEASE	EXPIRATION OF SENTENCE
01/31/2007	CHARLESTON CO	AUTH ABSENCE (AWL)	TO COURT
09/15/2006	TURBEVILLE	INCARCERATED	YOA CONVERSION
09/13/2006	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
09/13/2006	KIRKLAND	INCARCERATED	MEDICAL
02/08/2006	TURBEVILLE	INCARCERATED	RETURN FROM COURT
02/08/2006	HORRY CO	AUTH ABSENCE (AWL)	TO COURT
12/08/2005	TURBEVILLE	INCARCERATED	ADMINISTRATIVE

Classing Summary Reports - Report View

Page 4 of 4

11/15/2005	KIRKLAND	INCARCERATED	R&E PROCESSING
11/15/2005	LIEBER	INCARCERATED	YOA PAROLE VIOLATOR
06/07/2005	CHARLESTON CO	AUTH ABSENCE (AWL)	LOCKUP-FRM EPA,SF,PAR,PRB
05/31/2005	UNK	DEAD TIME	WARRANT ISSUED
03/31/2004	CHARLESTON CO	YOA PAROLE - CONDITIONAL	PAROLE BOARD ACTION
07/25/2003	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
07/01/2003	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
07/01/2003	KIRKLAND	INCARCERATED	MEDICAL
05/05/2003	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
04/14/2003	KIRKLAND	INCARCERATED	R&E PROCESSING
04/14/2003	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
FOOD SERVICE AIDE	03/28/2016	-		5F5
FOOD SERVICE AIDE	12/04/2014	06/22/2015	PLACED IN ST/SP CUSTODY	3F5
WARDKEEPER ASSISTANT	09/24/2014	12/03/2014	INMATE REQUEST	3F5
GENERAL WORKER	11/07/2008	01/30/2009	RELEASED/PAROLED	3F5
GENERAL WORKER	09/23/2008	11/06/2008	ASLT/DRUG/MAJOR DISC	2F5
FOOD SERVICE AIDE	07/11/2008	09/22/2008	INMATE REQUEST	2F5
FOOD SERVICE AIDE	07/03/2008	07/10/2008	MI ELIGIBLE FOR LEVEL 2	3F5
FOOD SERVICE AIDE	05/06/2008	07/02/2008	ASLT/DRUG/MAJOR DISC	2F5
RECREATION AIDE	09/19/2006	01/31/2007	COURT	2F5
WARDKEEPER ASSISTANT	12/09/2005	09/18/2006	INMATE REQUEST	2F5
WARDKEEPER ASSISTANT	12/19/2003	02/05/2004	INMATE REQUEST	3F5
FARM WORKER	05/08/2003	07/25/2003	INSTIT TRANSFER	2F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
LVL 2 - FULL TIME(NO EWC)	03/12/2004	03/31/2004	RELEASED/PAROLED
LVL 2 - FULL TIME(NO EWC)	02/06/2004	03/11/2004	MI ELIGIBLE FOR LEVEL 2
LVL 2 - FULL TIME(NO EWC)	12/19/2003	12/19/2003	LATERAL TRANSFER
LVL 2 - FULL TIME(NO EWC)	08/08/2003	12/18/2003	ASLT/DRUG/MAJOR DISC
LVL 2 - FULL TIME(NO EWC)	08/07/2003	08/07/2003	MI ELIGIBLE FOR LEVEL 2

***** END OF REPORT *****

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Source : SummaryReport.jsp

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 [Version: 1.4.12 Built: 02/03/2015 11:57:23 AM Time: 11:39:34 AM]

South Carolina Department of Corrections

Classification Summary Reports

Date: Monday, June 27, 2016

Classification Summary Reports

Inmate Number

292341

Submit

SCDC ID

00292341

Name

NESBIT JR, HENRY O

Sex/Race

M B

Status

INCARCERATED

Y 00292341

NESBIT JR, HENRY O

M B

RELEASE

Classification Summary Report for NESBIT JR, HENRY O

Create PDF

SCDC#: Y00292341

CLASSIFICATION SUMMARY REPORT DATED 06/27/2016

NESBIT JR, HENRY O

FBI# 284314WB5

OFFENDER: YOASC-INDETERMINATE
TYPE: SENTE

INSTITUTION: UNK

SECURITY/CUST: 2 MINIMUM IN

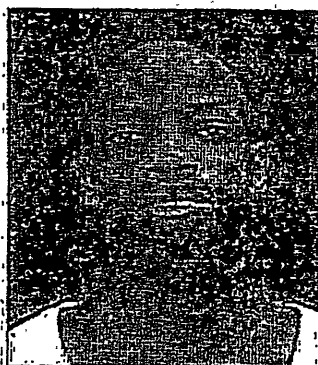
CURR INCARC SENT: 4 YRS 0 MOS 0 DAYS

VICTIM
WITNESS: SEPREQ: NMED:
CLASS:INST.
RESTRICT: NO RESTRICTIONMENTAL
CLASS: NMH (NO MENTAL HEALTH
TRECURRENT
PROGRAM: NO CURRENT PROGRAM

SEX-REGISTRY: N

DNA: C

AGE: 31



RESIDENT STABILITY: NA

DORMROOMBUNK CODE:

PROJ MAXOUT DATE: 12/10/2007

PROJ PAROLE DATE: 12/10/2007

EWC JOB: NO CURRENT JOB

ASSIGNMENT:

EWC
LEVEL: 0 EEC LEVEL:

EDUC PGM: NO CURR EDUC PROGRAM

PREVIOUS NUMBERS:

NO PREVIOUS NUMBERS

CURRENT OFFENSES:

SENTENCE
YRS MOS DYS COUNTYSENTENCE
START V/NV CAT INDICT

Classing Summary Reports - Report View

Page 2 of 3

ASSAULT W/INT TO KILL	2	0	0	HORRY	02/08/2006	N	4	05GS26-2664
FAIL TO STOP FOR OFFICER	2	0	0	HORRY	02/08/2006	N	2	05GS26-2663
POSSESS STOLEN VEHICLE	2	0	0	HORRY	02/08/2006	N	2	05GS26-2661
BURGLARY-3RD DEGREE	4	0	0	CHARLESTON	12/03/2002	N	2	02GS10-5808
BREAKING INTO MOTOR VEH	4	0	0	CHARLESTON	12/03/2002	N	2	02GS10-5683+

COMPLETED OFFENSES

NO COMPLETED OFFENSES

PRIOR COMMITMENTS OVER 90 DAYS:

INMATE HAS NO PRIORS

OFFENSES UNDER PREVIOUS NUMBER:

NO PREVIOUS OFFENSES

DETAINERS (HOLD,WANTED,NOTIFY):

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

12/12/2003	FIGHTING WITHOUT A WEAPON	DISMISSED	MAJOR DISC. HEARING

PREVIOUS ASSAULTIVE DISCIPLINARIES:

NO PREVIOUS ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

09/02/2006	INTERFERING WITH COUNT	CLOSED	OTHER ACTION TAKEN/INFORM
08/06/2006	REFUSING TO WORK	CLOSED	OTHER ACTION TAKEN/INFORM
02/17/2006	REFUSING OR FAILING OBEY ORDERS	CLOSED	OTHER ACTION TAKEN/INFORM
03/08/2004	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM
02/09/2004	DAMAGE,DESTROY,PROP.VALUE AT \$100./MORE	CONVICTED	MINOR DISC. HEARING
11/10/2003	REFUSING TO ATTEND COMPULSORY PROGRAM	CLOSED	OTHER ACTION TAKEN/INFORM
08/16/2003	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM
08/05/2003	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM

PREVIOUS NON-ASSAULTIVE DISCIPLINARIES:

NO PREVIOUS NON-ASSAULTIVE DISCIPLINARIES HISTORY

HISTORY OF MOVEMENTS:

09/15/2006	UNK	RELEASE	YOA CONVERSION
09/13/2006	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
09/13/2006	KIRKLAND	INCARCERATED	MEDICAL
02/08/2006	TURBEVILLE	INCARCERATED	RETURN FROM COURT
02/08/2006	HORRY CO	AUTH ABSENCE (AWL)	TO COURT
12/08/2005	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
11/15/2005	KIRKLAND	INCARCERATED	R&E PROCESSING
11/15/2005	LIEBER	INCARCERATED	YOA PAROLE VIOLATOR
06/07/2005	CHARLESTON CO	AUTH ABSENCE (AWL)	LOCKUP-FRM EPA,SF,PAR,PRB
05/31/2005	UNK	DEAD TIME	WARRANT ISSUED
03/31/2004	CHARLESTON CO	YOA PAROLE - CONDITIONAL	PAROLE BOARD ACTION

Classing Summary Reports - Report View

Page 3 of 3

07/25/2003	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
07/01/2003	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
07/01/2003	KIRKLAND	INCARCERATED	MEDICAL
05/05/2003	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
04/14/2003	KIRKLAND	INCARCERATED	R&E PROCESSING
04/14/2003	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
WARDKEEPER ASSISTANT	12/09/2005	09/15/2006	RELEASED/PAROLED	2F5
WARDKEEPER ASSISTANT	12/19/2003	02/05/2004	INMATE REQUEST	3F5
FARM WORKER	05/08/2003	07/25/2003	INSTIT TRANSFER	2F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
LVL 2 - FULL TIME(NO EWC)	03/12/2004	03/31/2004	RELEASED/PAROLED
LVL 3 - FULL TIME(NO EWC)	02/06/2004	03/11/2004	MI ELIGIBLE FOR LEVEL 2
LVL 3 - FULL TIME(NO EWC)	12/19/2003	12/19/2003	LATERAL TRANSFER
LVL 2 - FULL TIME(NO EWC)	08/08/2003	12/18/2003	ASLT/DRUG/MAJOR DISC
LVL 3 - FULL TIME(NO EWC)	08/07/2003	08/07/2003	MI ELIGIBLE FOR LEVEL 2

***** END OF REPORT *****

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 [Version: 1.4.12 Built: 02/03/2015 11:57:23 AM Time: 11:39:46 AM]

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
STATE VS.Henry Oliver Nesbit Jr

AKA:

Race: BLACK Sex: M Age: 29DOB: [REDACTED]Address: [REDACTED]City, State, Zip: Mount Pleasant, SC 29466DL#: [REDACTED] SID#: SC01421253*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes how the Defendant who was
TO: Possession of a Firearm or Knife During Commission of a Violent Crime

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS1005707A/W#: M998867Date of Offense: 6/29/2012S.C. Code §: 16-23-0490CDR Code #: 0549

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADSIn violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.ATTEST
Stephanie B. Binder
Binder, Stephanie B.SC Bar# 72656Defendant [Signature]Attorney for Defendant [Signature]SC Bar# 63773WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: current 15 yr SCDC sentence
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/ Deputy Clerk [Signature]Court Reporter: Amanda Henderson

SCCA/217 (03/2011)

PTUP _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/B beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.Presiding Judge [Signature]Judge Code: 2134Sentence Date: 6/18/12

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Charleston

VS.

Henry Oliver Nesbit Jr

AKA:

Race: BLACK Sex: M Age: 29

DOB: SS#:

Address:

City, State, Zip: Mount Pleasant, SC 29466

DL#: SID#: SC01421253

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Possession of a Firearm or Knife During Commission of a Violent Crime

in violation of § 16-23-0490

of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.ATTEST
Stephanie B. Binder, Stephanie B.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center,
for a determinate term of _____ days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: commit 15 yr SCDC sentence with other sentences imposed today
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5%)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

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IN THE COURT GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS1005707

A/W#: M998867

Date of Offense: 6/29/2012

S.C. Code § : 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Amanda Hallender

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2134

Sentence Date: 6/18/14

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
 STATE VS.
Henry Oliver Nesbit Jr

AKA:

Race: BLACK Sex: M Age: 29

DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED] DrCity, State, Zip: Mount Pleasant, SC 29466DL#: [REDACTED] SID#: SC01421253*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Failure to stop for a blue light, no injury or death, 1st offense

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS1005706A/W#: M998866Date of Offense: 6/29/2012S.C. Code §: 56-05-0750(B)(1)CDR Code #: 0065

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

in violation of § 56-05-0750(B)(1) of the S.C. Code of Laws, bearing CDR Code # 0065
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS

☐ Mandatory GPS(CSC) ☐ §17-25-45
 w/minor 1st or Lowd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
 The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, (defendant's initials)

ATTEST: Stephanie B. F2656 x [Signature] 63773
 Under, Stephanie B. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 3 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: Mount 15 yr SC DC sentence
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
 Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)
 § 14-1-211(A)(1) (Conv. Surcharge) \$100
 § 14-1-211(A)(2) (DUI Surcharge) \$100
 § 56-5-2995 (DUI Assessment) \$12
 § 56-1-286 (DUI Breath Test) \$25
 Proviso 47.9 (Public Def/Prob) \$500
 § 14-1-212 (Law Enforce. Funding) \$25
 § 14-1-213 (Drug Court Surcharge) \$150
 § 50-21-114(BUI Breath Test Fee) \$50
 § 56-5-2942(J) (Vehicle Assessment) \$40/ea
 Proviso 90.5 (SCJA Surcharge) \$5
 3% to County (if paid in installments)
 TOTAL

PTUP _____ days/hours Public Service Employment
 Obtain GED ☐
 Attend Voc. Rehab. or Job Corp. ☐
 May serve W/E beginning _____
 Substance Abuse Counseling ☐
 Random Drug/Alcohol testing ☐
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

☐ Appointed PD or appointed other counsel
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk: [Signature]Court Reporter: Amanda Hadden

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2134Sentence Date: 10/18/12

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Charleston

VS.

Henry Oliver Nesbit Jr

AKA:

Race: BLACK

Sex: M

Age: 29

DOB: [REDACTED]

SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip:

Mount Pleasant, SC 29464

DL#:

SID#: SC01421253

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: PWID/Dist. of Cocaine/LSD/other Narcotic drugs in Sch. I(b) & (c)/Sched. II, 2nd offense

in violation of § 44-53-0370(b)(1)

of the S.C. Code of Laws, bearing CDR Code #

0184

☐ NON-VIOLENT☐ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS(CSC☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury,

(defendant's initials)

The plea is:

☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,

Recommendation by the State

ATTEST:

Stephanie B. [Signature]

72656

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,

for a determinate term of

5 days/months/years or

and/or to pay a fine of \$

provided that upon the service of

days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code

§ 24-13-40 to be calculated and applied

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing

SPECIAL CONDITIONS:

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforc. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

\$100

\$

\$100

\$

\$12

\$

\$25

\$

\$500

\$

\$25

\$

\$150

\$

\$50

\$

\$40/ca

\$

\$5

\$

\$8.40

\$

\$288.40

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS1006603

A/W#: 2013A1010204106

Date of Offense: 7/22/2013

S.C. Code § : 44-53-0370(b)(1)

CDR Code #: 0185

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADSThe charge is: ☒ As Indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury,

(defendant's initials)

The plea is:

☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,

Recommendation by the State

ATTEST:

Stephanie B. [Signature]

72656

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,

for a determinate term of

5 days/months/years or

and/or to pay a fine of \$

provided that upon the service of

days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code

§ 24-13-40 to be calculated and applied

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing

SPECIAL CONDITIONS:

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforc. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

\$100

\$

\$100

\$

\$12

\$

\$25

\$

\$500

\$

\$25

\$

\$150

\$

\$50

\$

\$40/ca

\$

\$5

\$

\$8.40

\$

\$288.40

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS1006603

A/W#: 2013A1010204106

Date of Offense: 7/22/2013

S.C. Code § : 44-53-0370(b)(1)

CDR Code #: 0185

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADSThe charge is: ☒ As Indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury,

(defendant's initials)

The plea is:

☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,

Recommendation by the State

ATTEST:

Stephanie B. [Signature]

72656

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,

for a determinate term of

5 days/months/years or

and/or to pay a fine of \$

provided that upon the service of

days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code

§ 24-13-40 to be calculated and applied

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing

SPECIAL CONDITIONS:

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforc. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

\$100

\$

\$100

\$

\$12

\$

\$25

\$

\$500

\$

\$25

\$

\$150

\$

\$50

\$

\$40/ca

\$

\$5

\$

\$8.40

\$

\$288.40

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Charleston

VS.

Henry Oliver Nesbit Jr.

AKA:

Race: BLACK

Sex: M

Age: 29

DOB:

Address:

City, State, Zip: Mount Pleasant, SC 29464

DL#:

SID#: SC01421253

*CDL: Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: PWID/Dist. of Cocaine/LSD/other Narcotic drugs in Sch. I(b) & (c)/Sched. II, 2nd offense

in violation of § 44-53-0370(b)(1)

☐ NON-VIOLENT☐ VIOLENT

of the S.C. Code of Laws, bearing CDR Code #

0185

☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS(CSC
w/minor 1st or 2nd Act)☐ §17-25-43

The charge is:

☒ As Indicted,☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury

(defendant's initials)

The plea is:

☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State

ATTEST:

Stephanie B.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,

for a determinate term of

5 days/months/years or

☐ under the Youthful Offender Act not to exceed

years

and/or to pay a fine of \$

provided that upon the service of

days/months/years and/or payment

of \$

plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or☒ CONSECUTIVE to sentence on:

Mount 15 yr SC DC Statute

The Defendant is to be given credit for time served pursuant to S.C. Code

§ 24-13-40 to be calculated and applied

by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$

plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

Proviso 90.5 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

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\$

\$

\$

\$

\$

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

2134

6/18/14

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
 STATE VS.
Henry Oliver Nesbit Jr

INDICTMENT/CASE#: 2013GS1005327

AKA: _____
 Race: BLACK Sex: M Age: 29

A/W#: 51804GPDOB: [REDACTED] SS#: [REDACTED]Date of Offense: 6/16/2013Address: [REDACTED] DrS.C. Code §: 56-05-0750(C)(2)City, State, Zip: Mount Pleasant, SC 29486CDR Code #: 2398DL#: [REDACTED] SID#: SC01421253

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Traffic / Failure to stop for a blue light, no injury or deathin violation of § 56-05-0750(B)(2)of the S.C. Code of Laws, bearing CDR Code # 2396☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS(CSC☐ §17-25-45

w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(defendant's initials)

The plea is: ☒ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.TEST: Stephanie B. Nesbit 72656
 Linder, Stephanie B. SC Bar# _____

Defendant

Attorney for Defendant

SC Bar# 6377

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,for a determinate term of 90 days/months/years or☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____, provided that upon the service of _____ days/months/years and/or payment

of \$ _____, plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-GS-10-5634, 5639☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms:

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

Proviso 47.9 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114 (DUI Breath Test Fee)

§ 56-5-2942(I) (Vehicle Assessment)

Proviso 90.5 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.Henry Oliver Nesbit Jr

AKA:

Race: BLACK Sex: M Age: 29DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Mount Pleasant, SC 29464DL#: [REDACTED] SID#: SC01421253*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: PWID/Dist. of Cocaine/LSD/other Narcotic drugs in Sch. I(b) & (c)/Sched. II, 3rd offense

☒ CONVICTED OF or ☐ PLEADS

in violation of § 44-53-0370(b)(1)

of the S.C. Code of Laws, bearing CDR Code #

0185☒ NON-VIOLENT☐ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS(CSC☐ §17-25-45

w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☒ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(defendant's initials)

The plea is: ☒ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.Steph Blund 72656
Linder, Stephanie B. SC Bar#

Defendant

Attorney for Defendant

63773
SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,for a determinate term of 15 days/months/years or☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$ provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:2013-GS-10-5527, 5639

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ <u>150.00</u>
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ca	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>8.40</u>
TOTAL	\$	\$ <u>288.40</u>

Clerk of Court/ Deputy Clerk

Court Reporter: Ruth Mott

SCCA/217 (03/2011)

INDICTMENT/CASE#: 2013GS1005634A/W#: 2013A1010203901Date of Offense: 6/16/2013S.C. Code § : 44-53-0370(e)(2)(a)1CDR Code #: 0278

SENTENCE SHEET

Presiding Judge [Signature]Judge Code: 2128Sentence Date: 5-8-2014

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
STATE VS.Henry Oliver Nesbit Jr

AKA:

Race: BLACK Sex: M Age: 29DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED] DriveCity/State/Zip: Mount Pleasant, SC 29464DL#: [REDACTED] SID#: SC01421253*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Poss. of Heroin/LSD/Schedule I(b),(c), & Schedule narcotics, 3rd offense

in violation of § 44-53-0370(d)(2) of the S.C. Code of Laws, bearing CDR Code # 0178 0180
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Prosecution to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, (defendant's initials)Steph Blum 721656 W 63773
Under, Stephanie B. SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 1 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-GS-10-5527-5634
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP
Total: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$3.75
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$150.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$5.00
3%-to County (if paid in installments)	\$	\$8.40
TOTAL		\$288.40

Clerk of Court/ Deputy Clerk Ruth MattCourt Reporter: Ruth Matt

SCCA/217 (03/2011)

IN THE COURT GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS1005639A/W#: 2013A1010203902Date of Offense: 6/16/2013S.C. Code § : 44-53-0370(b)(2)CDR Code #: 0186

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSPresiding Judge [Signature]Judge Code: 2128Sentence Date: 5-8-2014

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston)Henry Nesbit, Jr. #292341)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2016-CP-10-2761

AMENDED

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention
McCormick Correctional Institution
2. Name and location of Court which imposed sentence
charleston County General Sessions
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-10-5634; (Trafficking in Cocaine)
 - (b) 2013-GS-10-5527;(Blue Light Violation)

- (c) 2013-GS-10-5639 (Possession with intent Methylohe)
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) May 7 2014 15 years
- (b) June 18, 2014 5 years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty 2013-GS-10-6603; 2013-GS-10-6604; 2012-GS-10-5705 to 5707
- (b) after a plea of not guilty 2013-GS-10-5634; 2013-GS-10-5527; 2013-GS-10-5639
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. APPEAL DISMISSED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. OCTOBER 14, 2015
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. DISMISSED PURSUANT TO ANDERS V. CALIFORNIA
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) THIS IS FIRST TIME GROUNDS PRESENTED

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" ☒ one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. MELISSA GAY

ii. MICHAEL NELSON

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL & SENTENCING

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

NEW TRIAL

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

VERIFICATION

I, HENRY NESBIT, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

X Henry Nesbit Jr

SWORN to and subscribed before me this 27
day of June 2018.

[Signature] (L.S.)
Notary Public

My Commission Expires: 10/2/27

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Henry Nesbitt, JR, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Henry Nesbitt, JR.
Applicant

SWORN or affirmed to and subscribed before me this

27 day of June, _____
[Signature]
Notary Public

My Commission Expires: 10/21/2027

CONTINUATION SHEET

10. & 11 (continuation)

A. Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf.

B. Counsel failed to locate and examine all of the states evidence prior to trial.

C. Counsel failed to present evidence he believes was exculpatory.

D. Counsel failed to request a jury charge on simple possession.

E. Alternatively counsel failed to object to a charge of possession with intent to distribute.

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston)

Henry Nesbit, Jr. #292341)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2016-CP-10-2781

SECOND

AMENDED

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention _____
McCormick Correctional Institution
2. Name and location of Court which imposed sentence _____
charleston County General Sessions
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-10-5634; (Trafficking in Cocaine)
 - (b) 2013-GS-10-5527; (Blue Light Violation)

- (c) 2013-GS-10-5639 (Possession with intent Methyldone)
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) May 7 2014 15 years
- (b) June 18, 2014 5 years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty 2013-GS-10-6603; 2013-GS-10-6604; 2012-GS-10-5705 to 5707
- (b) after a plea of not guilty 2013-GS-10-5634; 2013-GS-10-5527; 2013-GS-10-5639
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. APPEAL DISMISSED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. OCTOBER 14, 2015
- ii. _____
- iii. _____
- (d) If known, citations of any written opinion or orders entered pursuant to such results:
- i. DISMISSED PURSUANT TO ANDERS V. CALIFORNIA
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of counsel including: See attached sheet.
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED SHEET
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) THIS IS FIRST TIME GROUNDS PRESENTED

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" ☒ one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. MELISSA GAY

ii. MICHAEL NELSON

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL & SENTENCING

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

NEW TRIAL

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

VERIFICATION

I, HENRY NESBIT, JR., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

X Henry Nesbit Jr.

SWORN to and subscribed before me this 6
day of September, 2018.

Mat S. Ah (L.S.)
Notary Public

My Commission Expires: 10/2/2027

Mat S. Ah
Attorney for Petitioner

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, HENRY NESBIT, JR, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

x Henry Nesbit, Jr.
Applicant

SWORN or affirmed to and subscribed before me this

6 day of September 2018

[Signature]
Notary Public

My Commission Expires: 10/21/2018

CONTINUATION SHEET

10. & 11 (continuation)

- A. Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf.
- B. Counsel failed to locate and examine all of the states evidence prior to trial.
- C. Counsel failed to present evidence he believes was exculpatory.
- D. Counsel failed to request a jury charge on simple possession.
- E. Alternatively counsel failed to object to a charge of possession with intent to distribute.
- F. Counsel failed to inquire of and object to chain of custody on drugs submitted into evidence.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Henry Nesbit, Jr., SCDC #292341

Applicant,

v.

State of South Carolina

Respondent,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2016-CP-10-2761

AMENDED RETURN

Respondent, making its amended return to the application for Post-Conviction Relief (PCR) filed on May 26, 2016, and amended application filed on September 6, 2018 would respectfully show this Court:

I. Procedural History

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. During its September 2013 term, the Charleston County Grand Jury indicted Applicant for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute ("PWID") methydone (bath salts) (2013-GS-10-5639). Melissa Gay, Esquire and Michael Nelson, Esquire represented him. On May 5-8, 2014, Applicant proceeded to trial before the Honorable Deadra L. Jefferson and a jury. On May 8, 2014, the jury convicted Applicant as indicted for failure to stop for a blue light and the lesser-included-offenses of PWID cocaine and possession of methydone. Judge Jefferson sentenced Applicant to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of methydone.

Applicant appealed. Robert M. Pachak, Esquire represented Applicant on appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v. Nesbit, Op. No. 2015-UP-483 (S.C. Ct. App. 2015). The Remittitur was returned to the circuit court on October 30, 2015.

II. Facts of the Case

This case begins with Deputy Chavez of the Charleston County Sheriff's Office. Deputy Chavez was assigned to off-duty patrol at the Isle of Palms Police Department to assist them with extra traffic enforcement and crowd control during the busy time of the beach season. Deputy Chavez was parked in front of the Windjammer in the median. Deputy Chavez observed Applicant approaching the intersection of JC Long Boulevard at Ocean Boulevard and make a turn using his turn signal. A traffic stop was initiated. (Tr. p. 91, line 17 – p. 93, line 19).

Applicant was driving a brown Harley Davidson motorcycle. When the blue lights were activated, Applicant started to slow down and make a right-hand turn onto a side street and then took off at a high rate of speed. (Tr. p. 97, lines 1 – 15). Deputy Chavez pursued Applicant and during the chase, Applicant wrecked his motorcycle. Deputy Chavez arrested Applicant for failing to stop for blue lights and placed him in handcuffs. Deputy Chavez then searched Applicant and found a large amount of cash and several bags of narcotics. (Tr. p. 100, line 21- p. 101, line 5). One bag of cocaine contained 1.72 grams of cocaine, the other bag contained 19.53 grams of cocaine. (Tr. p. 196, lines 3 – 7). Deputy Chavez also found 394.66 grams of a brown crystallized substance, which turned out to be Methylone. (Tr. p. 197, lines 23 – 25).

The trial judge agreed to charge the law of possession with intent to distribute cocaine as a lesser included offense of trafficking in cocaine. (Tr. p. 212, lines 3 – 4). The trial judge also

agreed to charge simple possession after discussing the Methylone charge with counsel. (Tr. p. 210, line 7 – 12).

III. Current Post-Conviction Relief Action

Applicant proceeded to file this post-conviction relief application on May 26, 2016. The State filed its Return and Partial Motion to Dismiss and Motion for a More Definite Statement on April 13, 2017. Applicant filed an amendment to his post-conviction relief application on June 28, 2018.

Attached to this Return and incorporated by referenced are the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Record on Appeal, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

In his filing, Applicant answers Question 10 of the Application for Post-Conviction Relief with the words "See Attach Sheet." The Applicant alleged in this first application that he was being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
2. "Violation of SC chain of custody laws in handling of drugs in Applicant's case"

The State filed its Return and Partial Motion to Dismiss and Motion for a More Definite Statement on April 13, 2017.

Thereafter, on June 28, 2018, Applicant through counsel Mark Archer, filed an Amended Application for Post-Conviction Relief. In this amended application, Applicant incorporates the previously mentioned attachment and sets forth the following grounds for post-conviction relief:

1. "Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf.
2. Counsel failed to locate and examine all of the state's evidence prior to trial.
3. Counsel failed to present evidence he believes was exculpatory.
4. Counsel failed to request a jury charge on simple possession.
5. Alternatively counsel failed to object to a charge of possession with intent to distribute.

IV. Response to Allegations of Ineffective Assistance of Counsel

A. General Ineffective Assistance of Counsel

Respondent submits Applicant's allegations of ineffective assistance of trial counsel are without merit. In a post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E. 2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." Id. (citing

Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

B. Failure to Explain Fifth Amendment Rights

Applicant alleges that counsel did not fully explain the benefits and detriments of testifying at trial and therefore could not make an intelligent decision as to the waiver of his Fifth Amendment rights. However, the record establishes Applicant made a knowing and intelligent waiver of his rights with his responses to the trial judge's thorough colloquy. In South Carolina, the defendant must know the consequences of his decision whether or not to testify and the defendant can knowingly and intelligently waive his right if a proper colloquy is given by the judge. The following is the South Carolina Supreme Court's language concerning what is important for the defendant to understand in making a knowing and intelligent waiver:

If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations. State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985). A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. See State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (waiver of Fifth Amendment right must be knowing and voluntary), overruled in part on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000)."

This Court in *Brown v. State* also made clear that an "on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." See e.g. Myers v. State, 248 S.C. 539, 151 S.E.2d 665 (1966). Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). Applicant made a

knowing and voluntary waiver of his right to testify on the record and trial counsel was therefore not ineffective.

C. Response to Charge Related Allegations

The Applicant alleges that counsel was ineffective for not requesting a charge of simple possession and not objecting to a charge of possession with intent to distribute. The record directly refutes the allegation that counsel did not request a charge of simple possession and counsel's testimony would be required to determine the trial strategy for not objecting to the possession with intent to distribute charge. The trial transcript clearly indicates that counsel asked for and received a charge of simple possession. (Tr. p. 209, line 15 – p. 210, line 12). The decision of counsel to request a lesser-included charge is within the purview of trial strategy and does not inherently invoke any presumption of ineffective assistance. In contrast, the decision whether or not to ask for a lesser-included is solely with counsel. The concurring opinion in Abney v. State makes clear this decision is a matter of trial strategy, which invokes the deference afforded to strategy decisions made by counsel. The South Carolina Court of Appeals states the standard for deference given to strategy decisions in Abney:

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on

investigation.” Strickland, 466 U.S. at 691, 104 S.Ct. 2052. Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 546–47 (Ct. App. 2014)

Counsel appears to make a strategy-based argument to the trial judge relating to reducing the exposure to her client by requesting the lesser-included charge of possession with intent to distribute, but testimony from counsel would be most dispositive on the issue (Tr. p. 211, line 13-21).

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State 279 S.C. 264, 305 S.E.2d 247 (1983).

V. Response to Chain of Custody Allegation

Applicant alleges “Violation of SC chain of custody laws in handling of drugs in Applicant’s case.” Respondent submits this allegation should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act S.C. Code Ann. §17-27-10 to 160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... *Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.*

S.C. Code Ann. §17-27-20 (emphasis added).

“Violation of SC chain of custody laws in handling of drugs in Applicant’s case” is not a claim cognizable under the act. Furthermore, Respondent interprets this as an allegation that the evidence presented by the State was insufficient. The post-conviction relief court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. §17-27-20(a)(6) (“[T]his section *shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.*”) (emphasis added). For this reason and pursuant to Rule 12(b)(6) SCRCF, Respondent moves to dismiss this allegation for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

VI. Response to Any and All other Allegations

Each and every allegation contained within the application and amended application not expressly admitted, qualified, or explained in this amended return is hereby denied. Applicant’s allegations that counsel did not examine all state’s evidence and did not present exculpatory evidence cannot be directly refuted by the record. The State requests an evidentiary hearing on these allegations.

Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. Any claims not specifically laid out in the post-conviction relief application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §17-27-10 to - 160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC, Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to §17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII. Conclusion

WHEREFORE, Respondent requests the Court's dismissal of all other allegations as set forth in Applicant's original application be made final. Moreover, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

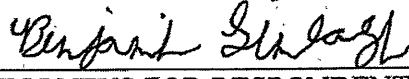
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Sept 25, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Henry Nesbit, Jr., #292341

Applicant,

v.

State of South Carolina

Respondent,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

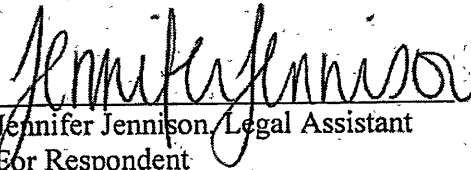
Case No.: 2016-CP-10-2761

Affidavit of Service by Mail

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Amended Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mark L. Archer, Esquire
Archer Law Office, PA
Post Office Box 971
Mount Pleasant, SC 29465-0971

DATED this the 25th day of September, 2018.


Jennifer Jennison, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Henry Nesbit, Jr.,	)	CASE NO. 2016-CP-10-02761
	)	
PETITIONER,	)	TRANSCRIPT OF RECORD
	)	CERTIFIED COPY
VS.	)	
	)	
The State of South Carolina,	)	
	)	
RESPONDENT.	)	

December 6, 2018

Charleston, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr.

A P P E A R A N C E S:

Mark A. Peper, Esquire
For the Petitioner

Benjamin H. Limbaugh, Esquire
For the Respondent

Certified Transcript Provided For: Jerry N. Theos, Esq.

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E X

(PW) - DENOTES PETITIONER WITNESS

HEARING - PCR -- 03

WITNESSES(PW) Henry Nesbit, Jr.

Direct Examination by Mark Peper -- 07

Cross-Examination by Benjamin Limbaugh -- 29

(PW) Michael Nelson:

Direct Examination by Mark Peper -- 33

Cross-Examination by Benjamin Limbaugh -- 44

Redirect Examination by Mark Peper -- 49

Recross-Examination by Benjamin Limbaugh -- 52

(PW) Lisa Gay:

Direct Examination by Mark Peper -- 53

Cross-Examination by Benjamin Limbaugh -- 80

EXHIBITS - None ProfferedCERTIFICATION OF TRANSCRIPT -- 87

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 MR. LIMBAUGH: May it please the court, Your Honor.

2 THE COURT: Yes, sir.

3 MR. LIMBAUGH: The next case is Mr. Henry Nesbit,
4 Junior, Case Number 2016-CP-10-2761. The applicant is
5 incarcerated with the South Carolina Department of
6 Corrections pursuant to the Charleston County Clerk of
7 Court's order of commitment.

8 Appearing at the September 2013 term the Charleston
9 County grand jury indicted the applicant for failure to stop
10 for a blue light, trafficking cocaine, and possession with
11 intent to distribute methyllone.

12 Melissa Gay, Esquire, and Michael Nelson, Esquire,
13 represented him. On May 5th through 8th, 2014, the
14 applicant proceeded to trial before the Honorable Deidre L.
15 Jefferson and a jury.

16 On May 8th, 2014, the jury convicted applicant as
17 indicted for failure to stop for a blue light and the lesser
18 included offenses of PWID cocaine and possession of
19 methyllone.

20 Judge Jefferson sentenced the applicant to concurrent
21 terms of fifteen years for PWID cocaine, five years for
22 failure to stop for a blue light, and one year for
23 possession of methyllone.

24 THE COURT: Concurrent? They are all concurrent?

25 MR. LIMBAUGH: Yes, sir, Your Honor.

1 MR. LIMBAUGH: The applicant appealed -- the applicant
2 appealed his case. Robert Paychak, Esquire, represented
3 applicant on appeal and filed a brief pursuant to Anders v.
4 California on the applicant's behalf. The South Carolina
5 Court of Appeals dismissed the applicant's appeal in an
6 unpublished opinion, State v. Nesbit.

7 The remittitur was returned to the circuit court on
8 October 30th, 2015. Applicant proceeded to file his
9 post-conviction relief application on May 26th, 2016.

10 The State filed its return and partial motion to
11 dismiss and motion for a more definite statement on April
12 13th, 2017. Applicant filed an amendment to his
13 post-conviction relief application on June 28th, 2018.

14 In his filing the applicant answers Question 10 of the
15 application for post-conviction relief with the words "see
16 attached sheet". The applicant alleged in this first
17 application that he was being held in custody unlawfully for
18 the following reasons: Ineffective assistance of trial
19 counsel, violation of South Carolina chain of custody laws,
20 and handling of drugs in applicant's case.

21 The State filed its return and partial motion to
22 dismiss, a motion for a more definite statement, on April
23 13th, 2017.

24 Thereafter on June 28th, 2018, applicant through
25 counsel, Mark Archer, filed an amended application for

1 post-conviction relief.

2 In this amended application the applicant incorporates
3 the previously mentioned attachment and sets forth the
4 following grounds for post-conviction relief:

5 Counsel never fully explained the benefits and
6 detriments of the petitioner testifying at trial so that the
7 defendant petitioner was unable to make an intelligent
8 decision as to whether to testify in his own behalf.

9 Counsel failed to locate and examine all of the State's
10 evidence prior to trial.

11 Counsel failed to present evidence he believes was
12 exculpatory.

13 Counsel failed to request a jury charge on simple
14 possession. Alternatively, counsel failed to object to a
15 charge of possession with intent to distribute.

16 I will now hand it over to his current PCR counsel, Mr.
17 Mark Peper.

18 THE COURT: All right. Do you have -- just a minute.
19 Do you have a copy of the amended application? All I am
20 able to locate in this file is the application with the
21 attached sheet.

22 (WHEREUPON, counselors confer.)

23 MR. PEPER: Your Honor, may it please the court?

24 THE COURT: Sure.

25 MR. PEPER: Judge, we have -- as stated by the State,

1 we have two amended applications. What we can do -- and we
2 only have one copy of the most recent one which is the one
3 we are here for today in September.

4 We have a clean copy of the one filed in June if Your
5 Honor would like to review that. The only thing different
6 in the June amended application and the September amended
7 application which we intend to go forward on here today is
8 the additional claim labeled "F" that the counsel failed to
9 inquire of and object to chain of custody on drugs submitted
10 into evidence. Which it -- that may end up simply just
11 being a trial strategy. Which we will get into.

12 But if we could just simply put on the record that we
13 will be going forward on this amended application that we
14 are handing with an additional claim.

15 THE COURT: That is fine. That -- of course that is in
16 his original application.

17 MR. PEPER: That is correct.

18 THE COURT: That issue.

19 MR. PEPER: That is correct.

20 MR. LIMBAUGH: Yes, sir, Your Honor.

21 THE COURT: Well, let me just have what you have.

22 MR. PEPER: Okay.

23 (WHEREUPON, document provided to the court.)

24 THE COURT: All right. Mr. Peper, you may proceed.

25 MR. PEPER: Thank you, Your Honor. May it please the

1 court. Judge, as the AG's office has stated, we are here on
2 PCR for ineffective assistance of counsel.

3 We are going to try to streamline some things as much
4 as we can today, Judge. I believe there are three pertinent
5 issues for your consideration, mainly dealing with the scope
6 of representation, some various decisions regarding waiving
7 an informed plea, and then certain issues that came up at
8 trial that the petitioner believes called for a ruling under
9 Strickland that the performance was deficient and that but
10 for that deficiency it would be reasonably probable that a
11 different outcome would have occurred.

12 That said, Judge, we would call the petitioner to the
13 stand.

14 THE COURT: Come around, Mr. Nesbit.

15 (WHEREUPON, the witness was duly sworn.)

16 THE CLERK: For the record please state your name and
17 spell your last name.

18 THE WITNESS: Henry Nesbit, N-E-S-B-I-T.

19 **DIRECT EXAMINATION BY MR. PEPER OF HENRY NESBIT:**

20 Q. Good morning, Mr. Nesbit.

21 A. Good morning.

22 Q. You are currently located at McCormick; is that
23 correct?

24 A. Correct.

25 Q. All right. And give me just kind of the brief

1 background as to why you were in the custody of the
2 Department of Corrections.

3 A. I was allegedly charged with trafficking in cocaine,
4 possession of methylone, and failure to stop for a blue
5 light.

6 Q. Okay. And was there also a marijuana charge as well?

7 A. A simple possession of marijuana, yes, sir.

8 Q. All right. Now is it my understanding that you went to
9 trial on those three charges just - let's just clear the
10 record - that being the failure to stop for a blue light,
11 trafficking of cocaine, and possession with intent to
12 distribute methylone; ---

13 A. Yes, sir.

14 Q. --- is that correct? Okay. All right. Now who
15 represented you at the trial of this case?

16 A. Melissa Gay.

17 Q. All right. Did any other defense counsel represent you
18 at that trial?

19 A. Not that I hired, no. But there was another attorney
20 in there, Michael Nelson.

21 Q. Okay. At what point did you retain either or both Ms.
22 Gay and Mr. Nelson?

23 A. When I was going for a bond reduction -- or I was going
24 for a bond on two charges, I believe; and they got -- it was
25 a warrant listed actually. And that is when I ended up

1 retaining Melissa Gay.

2 Q. Okay. So just to clarify, would that have been on or
3 about June 16 of 2014 was your initial arrest date on these
4 charges; is that correct?

5 A. No, sir.

6 Q. Excuse me, May 8th?

7 A. No, sir.

8 Q. All right. You had two sets of charges; you had a set
9 of charges from May 8th and then a set of charges from June
10 18th; do you agree with that?

11 A. No, sir. That was a trial on May 8th in 2014.

12 Q. Well, I understand that. But the prior Father's Day of
13 2013 that is when you were arrested on these specific
14 charges, correct?

15 A. Right. Correct.

16 Q. Okay. Did you immediately retain the services of Ms.
17 Gay and Mr. Nelson at that point?

18 A. No, sir.

19 Q. Okay. Do you recall what month of 2013 or '14 for that
20 matter that you retained their services?

21 A. Ooh, not -- not exactly. It was -- I would say August,
22 September or so.

23 Q. Of what year?

24 A. 2013.

25 Q. Okay. And you went to trial in May of 2014, correct?

1 A. Correct.

2 Q. All right. So is it your testimony that they
3 represented you for approximately eight or nine months?

4 A. Correct.

5 Q. Okay. In those eight or nine months how many times --
6 let me ask you this: Were you incarcerated the entire time
7 of their representation?

8 A. No.

9 Q. Okay. When you first retained them you were out of
10 jail?

11 A. I was -- I was in jail.

12 Q. You were in jail?

13 A. I was in jail.

14 Q. Okay. Did you come home?

15 A. I came home.

16 Q. For how long?

17 A. For a month and eleven days.

18 Q. Okay. And then you went back in?

19 A. For the charges that were allegedly filed, right.

20 Q. Okay. Prior to being released for that month and
21 eleven days did you have an opportunity to meet in person
22 with Ms. Gay or Mr. Nelson at the Al Cannon Detention
23 Center?

24 A. No, sir.

25 Q. All right. When you were released for a month and

1 eleven days did you have the opportunity to meet with either
2 of them?

3 A. No, sir.

4 Q. When you were placed back in Al Cannon Detention Center
5 where you were held, and have still been held in custody to
6 date, correct, ---

7 A. Right.

8 Q. --- okay, approximately how many times while you were
9 at Al Cannon Detention Center awaiting trial on this charge
10 which would -- the trial in May, did you meet personally
11 with Michael Nelson?

12 A. No, sir.

13 Q. How many times?

14 A. None.

15 Q. Okay. None. Okay. All right. How many times did you
16 personally meet with Lisa Gay?

17 A. Probably once or twice.

18 Q. Okay. Are you guessing or are you just not sure
19 or ...?

20 A. Twice is the most.

21 Q. Okay. All right. On either of those occasions did she
22 go over the crimes that you have been charged with?

23 A. Yes, sir.

24 Q. All right. Did she go over the elements of those
25 crimes?

1 A. No, sir.

2 Q. Did she discuss with you the burden of proof to convict
3 you, what the State had to prove in order to convict you at
4 trial?

5 A. No, sir.

6 Q. Did she go over any defenses that you may have at
7 trial?

8 A. No, sir.

9 Q. Did she discuss with you the evidence, physical or
10 otherwise?

11 A. No, sir.

12 Q. Did she discuss with you the fact that the traffic stop
13 was recorded on a dash cam footage?

14 A. No, sir.

15 Q. Did she ever show you any dash cam footage?

16 A. I saw the footage the day of trial.

17 Q. I am asking you while you were in jail awaiting
18 trial ---

19 A. No, sir.

20 Q. --- did she ever show you the video footage?

21 A. No, sir.

22 Q. Did she ever discuss with you your right to testify at
23 trial?

24 A. Yes, sir.

25 Q. Tell me about that. Now this would have been while you

1 were in Al Cannon, right?

2 A. No -- no, sir.

3 Q. Okay.

4 A. No, sir.

5 Q. All right. While you are in custody prior to trial did
6 she discuss with you the law regarding actual or
7 constructive possession?

8 A. No, sir.

9 Q. Did she discuss with you the fact that she had
10 interviewed any of the witnesses?

11 A. No, sir.

12 Q. Did you instruct her to speak with anyone on your
13 behalf?

14 A. No, sir.

15 Q. Did she explain to you your right to cross-examine
16 witnesses?

17 A. No, sir.

18 Q. Did she discuss with you what we refer to in the legal
19 community as lesser included charges of the specific crimes
20 that you had been charged with?

21 A. No, sir.

22 Q. So she did not explain to you that if you went to trial
23 on trafficking that the jury could also consider possession
24 with intent to distribute or even possession of those drugs?

25 A. No, sir.

1 Q. Was it your understanding that at the trial of this
2 case, to use your words, this was an all or nothing guilty
3 or not guilty on just the three crimes you had been charged
4 with?

5 A. Yes, sir.

6 Q. You were not aware that the jury could possibly be
7 charged with multiple underlying offenses, lesser included
8 offenses?

9 A. No, sir.

10 Q. All right. And again I believe you were getting ready
11 to tell me about the video. The traffic stop itself why was
12 that was so important in this case in your mind?

13 A. The traffic stop itself?

14 Q. Correct, what was caught on video.

15 A. The high-speed chase.

16 Q. Okay.

17 A. And no drugs were caught on video.

18 Q. Okay. And when did you first learn that no drugs could
19 be seen or discussed on the video?

20 A. The day -- the morning of trial.

21 Q. The morning of trial?

22 A. Yes, sir.

23 Q. At that point had you been offered a plea?

24 A. The plea was already on the table before that.

25 Q. All right. Was it on the table during the time that

1 you were in the Al Cannon Detention Center?

2 A. Yes, sir.

3 Q. Was it presented to you -- how was that plea offer
4 presented to you; how did you learn of it?

5 A. At 18 to 25.

6 Q. How did you learn of it? Who told you about it?

7 A. Melissa Gay.

8 Q. Okay. Is that -- did she tell you that on the phone or
9 did she tell you that in person?

10 A. In person.

11 Q. Okay. Was that the first time she met with you or the
12 second time?

13 A. The first time.

14 Q. Okay. So when she relayed that plea offer to you is it
15 your testimony that she had not yet done any of that long
16 list we just discussed?

17 A. Correct.

18 Q. Okay. So at that point in time were you able to make
19 an informed decision as to whether or not it was in your
20 best interest to take a plea?

21 A. No, sir.

22 Q. Why not?

23 A. Because I was not advised of anything that was going on
24 with the case yet.

25 Q. Okay. Was there a subsequent plea offer, a second plea

1 offer prior to trial?

2 A. Yes, sir.

3 Q. Had anything changed at that point when a second offer
4 was made?

5 A. It was a 15-year plea -- well, it was a 15 to 25 with
6 the -- I guess lawyer being able to offer -- to ask for the
7 lower end.

8 Q. Well, I understand that. I understand it was a
9 different plea. My question is when the different plea was
10 offered to you at that point had anything changed to where
11 you then could make an informed decision as to whether or
12 not to accept the plea?

13 A. No, sir.

14 Q. Okay. And then finally the morning of trial, or
15 possibly I guess the next day, was another plea offer
16 extended to you, a final plea offer?

17 A. Yes, sir.

18 Q. And you rejected that as well, correct?

19 A. Right.

20 Q. Now at that point in time you had seen the video
21 because it had been shown to you just as it was shown to
22 everybody else the morning of trial, correct?

23 A. Correct.

24 Q. Okay. But any of those other issues we discussed,
25 lesser included, right to testify, etc., etc., had any of

1 that yet to be discussed with you?

2 A. No, sir.

3 Q. And so at that point at the final plea offer when you
4 turned it down on the record with Judge Jefferson that day
5 was that a reasonably informed -- did you have the ability
6 to make a reasonably informed decision as to whether or not
7 to accept a plea?

8 A. No, sir.

9 Q. Okay. Let's talk about the trial itself event. In
10 your application you alleged that counsel failed to locate
11 and examine all of the State's evidence prior to trial. Can
12 you tell the court what you mean by that allegation?

13 A. There were some pants that the drugs were allegedly
14 found in. And in court they testified that the pants was in
15 evidence -- well, the pants were a part of evidence. And
16 they were never in trial.

17 And I guess Melissa Gay was trying to show the jury
18 that it is impossible to put all of these drugs inside those
19 pants and the pants was not here to show the jury that.

20 Q. Why were -- why were -- when you mean the pants weren't
21 here, were they in the courtroom?

22 A. No, sir.

23 Q. Where were they?

24 A. No one knows. The State never brought it forward. It
25 was in evidence. That they ---

1 Q. So it was logged into evidence, correct; we know that?

2 A. Right.

3 Q. Okay. But did either of your attorneys physically ever
4 see the pants?

5 A. No, sir.

6 Q. To your knowledge?

7 A. No, sir.

8 Q. Okay. Was there any discussion with your attorneys as
9 to whether or not to collect that piece of evidence and put
10 it into evidence on your behalf?

11 A. No, sir.

12 Q. Did your -- did either of your attorneys move any
13 evidence into -- move any items into evidence on your
14 behalf?

15 A. No, sir.

16 Q. You submitted no evidence in your defense?

17 A. No, sir.

18 Q. Did you testify?

19 A. No, sir.

20 Q. And so after the State rested its case did the defense
21 rest its case as well?

22 A. Yes, sir.

23 Q. Okay. Let's talk about another allegation that you
24 were unable to make an intelligent decision as to whether to
25 testify on your own behalf. Explain that allegation to the

1 court.

2 A. Okay. I was -- I was informed by Melissa Gay that if I
3 was -- it was in my best interest not to testify because I
4 could be possibly cross-examined about prior charges and
5 also I wanted to have the last closing argument in trial.

6 I had retained Melissa Gay and I had trust in her
7 because she was my attorney. So I took her advice and
8 didn't take the stand.

9 Q. So, if I understand you correctly, you were advised not
10 to testify for two reasons. One is it would open your prior
11 criminal history up on cross-examination; is that correct?

12 A. Correct.

13 Q. And two, it would by testifying you would no longer be
14 able to argue last to the jury?

15 A. Correct.

16 Q. Okay. And in your opinion did either of those outweigh
17 the benefit of testifying before the jury?

18 A. No, sir.

19 Q. You wanted to testify, correct?

20 A. Yes, sir.

21 Q. All right. Well, when -- do you recall standing up at
22 defense table and do you recall Judge Jefferson going over
23 your right to testify with you?

24 A. Yes, sir.

25 Q. And do you recall when she eventually asked you do you

1 wish to testify do you recall saying no?

2 A. Yes, sir.

3 Q. Why would you say that?

4 A. Because I was advised by my attorney. And I hired her
5 and I felt like I was going with the best interest of my
6 attorney's decision.

7 Q. Not your best interest, ---

8 A. Not my best ---

9 Q. --- what you wanted to do, but what they wanted you to
10 do?

11 A. Right.

12 Q. All right.

13 A. Because I don't have any -- I am not experienced with
14 the law like that.

15 Q. Right.

16 A. So I didn't know.

17 Q. Now it appears as though -- well, let me just ask you
18 this. What was your defense at trial? What was the defense
19 theme?

20 A. The drugs were never mine. I had no knowledge of the
21 drugs until a month and eleven days later.

22 Q. Okay.

23 A. After I was released from jail already.

24 Q. So in other words the drugs that were found, wherever
25 they were found, all over the place after you wrecked the

1 motorcycle, correct, ---

2 A. Correct.

3 Q. --- your position is that you never had either actual
4 possession or constructive possession of those drugs?

5 A. Correct.

6 Q. And you were never able to tell the jury that, correct?

7 A. Correct.

8 Q. And that was the central theme of your case?

9 A. Yes, sir.

10 Q. So if that is the central theme of your case how were
11 you able to tell the jury that through other witnesses or
12 additional evidence other than your own words?

13 A. I wasn't.

14 Q. Now do you recall there being a question posed to the
15 litigants regarding any request for specific jury charges?

16 A. Can you repeat that?

17 Q. Yeah. Yeah, that was a bad question. I apologize.

18 When the court instructed the parties that she was
19 going to charge the elements of trafficking cocaine do you
20 recall her asking either the State or your counsel if there
21 was a request for any lesser included charges to be charged
22 to the jury?

23 A. Yes, sir.

24 Q. Okay. And is it fair to say that Ms. Gay originally
25 said, no, there are none; is that correct?

1 A. Correct.

2 Q. And then Judge Jefferson said, well, do you want me to
3 charge PWID cocaine; at which point Mr. Gay said, yes?

4 A. Correct.

5 Q. All right. So you did get what we call a lesser
6 included charge?

7 A. Correct.

8 Q. All right. Now if you look back to what we were
9 discussing earlier, trafficking is what you believed you
10 were going to trial on; correct?

11 A. Correct.

12 Q. And then after the State rested and after the defense
13 rested is when you first learned that they actually could
14 have the option of acquitting you on trafficking but finding
15 you guilty on possession of intent to distribute cocaine,
16 correct?

17 A. Correct.

18 Q. All right. Now was there ever a request by your
19 defense counsel to charge the lesser included of possession
20 of cocaine?

21 A. No, sir.

22 Q. Okay. With regards to the possession with intent to
23 distribute methylene I believe your testimony is that you
24 thought that was an all or nothing charge for the jury to
25 consider just like the trafficking cocaine was, correct?

1 A. Correct.

2 Q. Now counsel did request a lesser included of possession
3 of methyldone; is that correct?

4 A. Correct.

5 Q. Is that the first time that you learned similar to the
6 trafficking that the jury could acquit you on the original
7 PWID but convict you on the lesser included possession?

8 A. Correct.

9 Q. Okay. You allege that counsel failed to request a jury
10 charge on that possession of coc and then alternatively
11 failed to object to a charge of PWID. Now PWID was actually
12 charged, right?

13 A. Right.

14 Q. Okay.

15 A. Correct.

16 Q. So your focus today is on the fact that they failed to
17 request the simple possession; is that fair?

18 A. And or trafficking or none.

19 Q. Okay. Right.

20 A. Because the State ---

21 Q. The lesser ---

22 A. --- didn't meet all of the elements of trafficking.

23 Q. My question is this, because this is what we have to
24 prove: Why would that have made a difference; why could
25 it -- why would it have been probable that had possession

1 been submitted to the jury that you would not have been
2 convicted as you were?

3 A. Because the jury came back with a selection saying they
4 can't decide on the trafficking charge and they asked the
5 judge can they select possession as a lesser included
6 offense in when they were deliberating.

7 Q. Okay. So you are referring to a jury question that was
8 submitted to the court?

9 A. Yes, sir.

10 Q. All right. And it had to do with whether or not they
11 could select a lesser included even though they had not been
12 given that as an option?

13 A. Correct.

14 Q. Okay. And do you recall the specific question that the
15 jury sent out being: Can we select a lesser charge for
16 cocaine possession even though the law says greater than ten
17 as was charged to us?

18 Is that what you are referring to?

19 A. Correct.

20 Q. Okay. And your position is that they clearly were
21 struggling with the worrying of trafficking or possession
22 with intent to distribute and you feel as though it is more
23 probable than not that had they been allowed to consider
24 just the possession of the cocaine that although they may
25 have found you guilty on that they would not have found you

1 guilty on the PWID or the trafficking?

2 A. Correct.

3 Q. Very good. Okay.

4 MR. PEPER: Court's indulgence, Your Honor.

5 Q. One of your allegations in your amended application is
6 that counsel failed to present evidence that you believe was
7 exculpatory, okay. Now we have talked about the pants
8 themselves. Is there any other evidence that you are
9 referring to in that allegation?

10 A. Not physical evidence. But evidence that happened
11 along the course of me being allegedly charged with these
12 drugs I was going to let the jury know at least that the day
13 that the officers were claiming that these alleged drugs
14 were found I was never charged with it until a month and
15 eleven days later; I had no knowledge of it; I went to jail
16 for simple possession of marijuana, failure to stop for a
17 blue light, use of a vehicle without the owner's consent,
18 and driving under suspension third; I was released from
19 county jail eight days later, and a month and eleven days
20 later I was charged with the drugs that they allegedly
21 claimed came out of my pockets.

22 Q. And that is why you went back into custody?

23 A. Yes, sir.

24 Q. Okay. All right. And you believe that that should
25 have been ---

1 A. Addressed to the jury.

2 Q. Very good. Very good. What was the chain of custody
3 issue that you referred to in your allegation on the amended
4 application?

5 A. The trafficking charge. There was an officer
6 testifying in court that he did not sign off on the bag.
7 And prior to that, he admitted the possession charge the
8 only way he recognized it is his signature is on the bag.
9 But he is testifying that he I saying I believe that this is
10 the trafficking bag.

11 And she asked him how do you recognize it. And he
12 said, I turned it over to evidence. And she said, is your
13 initial on the bag. And he said, not at this time, no.

14 So it was very difficult for him to identify something
15 that he has no signature.

16 Q. Okay. And what do you say, that that should have been
17 explored further through either other testimony or
18 specifically your testimony to the jury; is that your
19 position?

20 A. Yes, sir.

21 Q. Okay. All right. All right. Now you are aware that
22 any strategy decision made by counsel at trial doesn't
23 necessarily constitute ineffective assistance of counsel; do
24 you understand that?

25 A. Correct.

1 Q. Now the strategy decision though you understand has to
2 be made in consultation with you, correct?

3 A. Correct.

4 Q. So all of these things that we have referred to here
5 today were they thoroughly discussed with you either prior
6 to trial or during the trial of the case?

7 A. No, sir.

8 Q. Were you aware that in closing argument your attorney
9 was going to tell the jury to find you guilty of the failure
10 to stop for a blue light?

11 A. No, sir.

12 Q. Had you known that would you have gone to trial on
13 failure to stop for a blue light?

14 A. No, sir.

15 Q. Did you know that counsel or the State could ask for
16 lesser included offenses?

17 A. No, sir.

18 Q. Had you known that would you have gone to trial?

19 A. No, sir.

20 Q. Is there anything else that we have not covered within
21 the scope of ineffective assistance of counsel that you
22 believe the court should be made aware of?

23 A. She failed to object to the chain of custody with the
24 2.8 grams which was the lesser charge that was found also.
25 And for shifting the burden on the lesser included offense

1 in closing arguments.

2 Q. Okay.

3 A. I have -- I left the paper on ---

4 Q. No, I am with you. And you appealed the conviction,
5 correct?

6 A. Yes, sir.

7 Q. All right. And if my understanding is correct an
8 Anders brief was filed saying there were no appealable
9 issues; is that correct?

10 A. Correct.

11 Q. And I believe -- well, you understand that if the
12 judge, the trial judge, doesn't make a ruling on an issue at
13 trial then that issue is not preserved for appeal; correct?

14 A. Correct.

15 Q. And so your position is that had objections been timely
16 made you would have had the ability to appeal certain items
17 such as the chain of custody issue, correct?

18 A. Correct.

19 Q. Very good. Is there anything else that you would like
20 the court to know?

21 A. No, sir.

22 MR. PEPER: All right. That is all we have, Judge.

23 Thank you.

24 THE COURT: Cross-examination. Answer questions from
25 the attorney general, please.

1 MR. NESBIT: Okay.

2 MR. LIMBAUGH: Thank you, Your Honor.

3 **CROSS-EXAMINATION BY MR. LIMBAUGH OF HENRY NESBIT:**

4 Q. How are you doing today, Mr. Nesbit?

5 A. How are you doing?

6 Q. Doing good. Thank you. So just to go over a few
7 things. How many times again did you say that you met with
8 Ms. Gay when you were in prison?

9 A. None in prison. Once -- twice in county jail.

10 Q. My apologies. Did anybody else from the Public
11 Defender's office come talk to you, or was it just Ms. Gay?

12 A. Just Ms. Gay.

13 Q. Okay. So when Mr. Peper was asking you questions you
14 said you didn't talk about broader things in these couple of
15 meetings. What did you talk about with Ms. Gay?

16 A. The motion and discovery. We went over -- I was passed
17 over the motion to the case and just general topics of the
18 case about they are going to trial, this is the plea,
19 whatever. Just going over the motion. Just reading it
20 basically. But none of the tapes or anything were involved.

21 Q. She went over the rest of the -- went over the rest of
22 the discovery with you though; is that what she was doing?

23 A. Yes, sir.

24 Q. Okay. Did -- so you said she didn't go over any of the
25 elements of the charges?

1 A. No, sir.

2 Q. No. Did she go over any defenses with you, what your
3 strategy at trial might be?

4 A. No, sir.

5 Q. That wasn't in any of your general discussions about
6 the case?

7 A. No, sir.

8 Q. What is the relief you are looking for from this court
9 today; do you want your -- one of those original pleas back?

10 A. Or remanded a new trial.

11 Q. So I believe you said on direct that you told Judge
12 Jefferson that you didn't want to testify; is that correct?

13 A. Correct.

14 Q. And was that your decision?

15 A. No, sir.

16 Q. Can you explain that for me?

17 A. I retained Melissa Gay as my attorney. So I took her
18 advice by not testifying because she said it was in with my
19 best interest not to because I could be cross-examined for
20 prior convictions and I ultimately wanted the last closing
21 arguments in trial.

22 Q. You understood everything that Judge Jefferson said to
23 you when she was asking you about your constitutional right
24 to testify and everything; is that correct?

25 A. No, sir, not as much as I understood my lawyer, sir.

1 She told -- I hired her. I retained her. I was going with
2 my best interest with my attorney.

3 Q. Were you under oath when you told Judge Jefferson that
4 you didn't want to testify?

5 A. Yes, sir.

6 Q. Okay. So you say I believe on direct that you thought
7 your trial was all or nothing on trafficking?

8 A. Correct.

9 Q. Okay. And that you didn't know that lesser included
10 could be asked for?

11 A. No, sir. Correct.

12 Q. But in your application now you believe that your
13 attorney should have asked for a simple possession charge?

14 A. Yes, sir. After knowing that it was -- reading up in
15 the law library, studying the cases up in prison, finding
16 that out, that is when I found it all out.

17 Q. So you believe it was -- you want her to ask for a
18 possession charge on one thing, but you didn't want a lesser
19 included on another?

20 A. Can you repeat that, sir?

21 Q. I apologize. That was a little muddy. So now you
22 think your counsel should have asked for a lesser included
23 charge I believe on the cocaine, but you didn't want the
24 possession with intent to distribute lesser included on the
25 trafficking?

1 A. It was all or none as my understanding, like I told
2 you. And when I went to prison and I started studying I
3 started finding out more as I went to prison.

4 So the decision was already made on my behalf was
5 always -- that -- I never had any knowledge of a lesser
6 included offense. I never was advised about it. I never
7 had anything -- never heard about it.

8 Q. Okay. What all did Ms. Gay or Mr. Nelson talk to you
9 about prior to trial, I mean in jail or right before trial;
10 did they go over the elements with you, the defenses?

11 A. No, sir.

12 Q. Not even right before trial?

13 A. No, sir.

14 Q. Okay.

15 MR. LIMBAUGH: A moment's indulgence, Your Honor.

16 That is all I have for this witness, Your Honor.

17 THE COURT: Redirect.

18 MR. PEPER: None, Your Honor. Thank you.

19 THE COURT: All right, sir. You may come down.

20 MR. PEPER: The petitioner calls Michael Nelson.

21 (WHEREUPON, the witness was duly sworn.)

22 THE CLERK: State your name and spell your last.

23 THE WITNESS: Michael Nelson, N-E-L-S-O-N.

24 MR. PEPER: May it please the court.

25 THE COURT: You may proceed.

1 MR. PEPER: Thank you, Your Honor.

2 **DIRECT EXAMINATION BY MR. PEPER OF MICHAEL NELSON:**

3 Q. Mr. Nelson, how are you?

4 A. Good. How are you doing?

5 Q. Good. Be brief.

6 You weren't too involved in this case, correct?

7 A. Trying the case, yes.

8 Q. Right.

9 A. Throughout the life of it, no.

10 Q. Okay. Do you remember by any chance -- the trial was
11 in May, May 14th or whatever; do you remember when you came
12 on board the defense team?

13 A. About two or three weeks before. I ran into Ms. Gay in
14 the hall. She asked me if I would help her try the case.

15 Q. Okay. And two weeks later you tried the case?

16 A. Ballpark, yes.

17 Q. Now I presume that Ms. Gay shared the Rule 5 discovery
18 material with you ---

19 A. Yes.

20 Q. --- in that time that you reviewed it? Did you have a
21 chance to review that with the petitioner?

22 A. I believe I met with him with Ms. Gay a couple of days
23 before trial and the morning of.

24 Q. Okay. The video issue has come up. And I believe a
25 pretrial motion was made to suppress or really to throw out

1 the probable cause, correct?

2 A. Correct.

3 Q. Did you have a chance to review that video?

4 A. I did review the video.

5 Q. Did you have a chance to show the video and discuss the
6 video with the petitioner?

7 A. I did not, no.

8 Q. Other than a couple of days prior to was there any
9 other face-to-face meetings with the petitioner?

10 A. Prior to trial?

11 Q. That you had prior to trial.

12 A. I believe once or twice at the most.

13 Q. Okay. And do you recall where that meeting occurred?

14 A. I believe we met him at the jail once.

15 Q. Okay.

16 A. I believe, yes, I believe we met him at the jail once.

17 Q. All right. Were you able to discuss lesser included
18 offenses with him?

19 A. For a plea or for the trial?

20 Q. For the trial.

21 A. I don't -- I do not believe I spoke to him about that.

22 Q. Were you ever able to discuss with him your inability
23 to move into evidence the pants he was wearing that night?

24 A. Did I discuss that? I don't know.

25 Q. Okay. Have you ever seen the pants that he was wearing

1 that night?

2 A. In pictures, yes. In person, no.

3 Q. All right. And just so the court is clear and I am
4 clear, my understanding is that all of the drugs or a
5 majority of the drugs along with a bunch of money were all
6 found in his pants, correct, allegedly?

7 A. I believe there was some in the motorcycle.

8 Q. Okay.

9 A. I believe so. But I would have to go back and look at
10 the transcript ---

11 Q. All right.

12 A. --- to be positive.

13 Q. Is it fair to say that -- and I am simply reading
14 between the lines here in the trial transcript. Is it fair
15 to say that your questioning of witnesses was along the
16 lines of it is impossible that this much stuff could have
17 been in the pants?

18 A. We went down that road, yes.

19 Q. Right. Okay. And the State did not produce the pants
20 at trial, correct?

21 A. I do not believe so.

22 Q. All right. And the defense did not move those pants
23 into evidence, correct?

24 A. Correct.

25 Q. And so the jury never got to see for themselves the

1 size of the pants, correct?

2 A. Correct.

3 THE COURT: There was a picture?

4 MR. PEPER: Thank you, Judge.

5 Q. Did the jury get to see a picture of the pants, to your
6 knowledge?

7 A. I -- I believe the State might have put something in.
8 But I couldn't tell you off of the top of my head.

9 Q. Okay. At any point in your ---

10 A. The defense never entered anything, if that is what you
11 are ---

12 Q. Did you ever put the pants on a projector and point to
13 the pants or anything on cross?

14 A. Did I? No.

15 Q. Okay. Did you personally have the ability to discuss
16 with the petitioner the risk and/or benefit of testifying on
17 his own behalf?

18 A. Yes, we did.

19 Q. All right. Do you recall when that conversation
20 occurred?

21 A. I believe it was spoke to him in little bits during the
22 trial and then right after the State rested.

23 Q. Okay. But not prior to the trial you didn't have that
24 conversation with him?

25 A. We spoke very briefly. But that wasn't our primary

1 concern. I believe we told him testifying would be a -
2 quieted.

3 Q. Okay. And do you recall what the basis for your - what
4 that advice was?

5 A. Well, a couple. First thing, you always want to close
6 last; so we would like to do that. Also we were scared that
7 cross-examination the -- specifically the if you didn't know
8 the drugs were there why did you have a hundred mile per
9 hour car chase.

10 Q. Okay. How were you -- and was that kind of the theme
11 of the trial that he did not have actual or constructive
12 possession of the drugs?

13 A. That is what we were going for.

14 Q. All right. How were you attempting to do that without
15 putting him on the stand?

16 A. Well, I believe the motorcycle he was riding was not
17 his. So we were going down that. But like I said, our
18 concern was if you didn't know the drugs were there why were
19 you in a car chase for running a stop sign.

20 Q. All right.

21 A. So we didn't want to put him on the stand to ---

22 A. We didn't think he would come up with a plausible
23 answer to that question that would satisfy a jury.

24 Q. Well, if he told you he didn't know it was a cop, that
25 would be a plausible answer; right?

1 A. I don't believe he ever said that. Because the blue
2 lights were on.

3 Q. Okay.

4 THE COURT: Give me a factual recitation of what
5 happened out there, please.

6 MR. PEPER: Yes, sir. I apologize.

7 THE COURT: No, you don't have to apologize. I just --
8 you said he was arrested once, ---

9 MR. PEPER: Right.

10 THE COURT: --- got out of jail on bond, was rearrested
11 apparently when this motorcycle accident occurred?

12 MR. PEPER: So the motorcycle accident occurred.

13 THE COURT: What happened first?

14 MR. PEPER: It happened first. He was taken to jail on
15 moving violations. Essentially DUS, possession of a stolen
16 motor vehicle I believe it was.

17 (WHEREUPON, client confers with Mr. Peper.)

18 MR. PEPER: Use of vehicle without permission.

19 MR. LIMBAUGH: Failure to stop.

20 MR. PEPER: Failure to stop for blue light.

21 THE COURT: All right. That is ---

22 MR. PEPER: He was then release ---

23 THE COURT: That is the chase?

24 MR. PEPER: That is the chase where the drugs were
25 found. Okay. So ---

1 THE COURT: But they weren't found immediately?

2 MR. PEPER: They were found immediately.

3 THE COURT: But he wasn't charged immediately?

4 MR. PEPER: That is correct. Those warrants were not
5 served on him. The drugs that we tried the case on were not
6 served on him until a month and eleven days later.

7 THE COURT: They had obviously been tested? Maybe not?

8 MR. PEPER: At that point in time -- well, a field
9 test was done the day of, ---

10 THE COURT: Field test.

11 MR. PEPER: --- Judge. And so that was one of the
12 issues I think the petitioner was concerned about is why
13 were those warrants not served on him that very same night.
14 As a matter of fact he was taken to the hospital and was in
15 police custody.

16 THE COURT: With his pants on?

17 MR. PEPER: That is where the pants were taken off of
18 him. That is exactly right.

19 THE COURT: At the hospital?

20 MR. PEPER: That is exactly right. By law enforcement.

21 NESBIT: The hospital staff.

22 MR. PEPER: Well, by hospital staff given to according
23 to the chain given to law enforcement.

24 THE COURT: Go ahead.

25 MR. PEPER: Thank you.

1 THE COURT: Thank you.

2 MR. PEPER: Yes, sir.

3 Q. Had you ever seen the actual warrants?

4 A. I believe the discovery Lisa -- or Ms. Gay sent me,
5 yes.

6 Q. Okay. All right. So the original discovery would have
7 included the warrants from the night of the incident
8 regarding the moving violations, failure to stop, etc.,
9 along with the warrants that you were -- the drug
10 warrants ---

11 A. Yes.

12 Q. --- they were serving -- okay. All right.

13 The petitioner testified that he was pretty adamant
14 that he wanted to testify on his own behalf. Is that your
15 recollection of the conversation if there was a
16 conversation?

17 A. There was a conversation. And myself and Ms. Gay told
18 him we thought it was in his -- it would be in his -- it
19 would not be a good idea for him to testify.

20 Q. Okay.

21 A. I don't remember how adamant he was or was not. He
22 could have been. I do not remember. But we thought it was
23 in the best interest for him not to.

24 Q. All right. And you based that belief, I believe you
25 testified earlier, for on two things. One is that you

1 wanted to have the closing argument, ---

2 A. Correct.

3 Q. --- the defense wanted to make the last argument; and,
4 two, credibility on cross-examination?

5 A. Not so much credibility. There were some answers that
6 would have been very tough for him to do.

7 Q. Okay.

8 A. Specifically if you didn't know the drugs were in
9 the -- if you didn't have the drugs on you why were you
10 going 100 miles per hour ---

11 Q. Right.

12 A. --- on a Sunday afternoon on Isle of Palms.

13 Q. But that goes to credibility, correct?

14 A. More or less, yes.

15 Q. As would attacking his credibility based on prior
16 convictions, correct?

17 A. Correct.

18 Q. All right. Was that discussed with him as well?

19 A. With him, yes.

20 Q. Okay.

21 THE COURT: What did this counsel know about prior
22 convictions?

23 Q. At the time that you proceeded to trial did you go over
24 his criminal record with him?

25 A. Did I? We talked about -- it was -- it was an enhanced

1 case, wasn't it?

2 Q. Yes.

3 A. Yeah, we talked about that.

4 Q. Okay.

5 A. And what -- and then when we were talking about if he
6 should testify, what could come in, and what couldn't have
7 come in.

8 Q. Very good.

9 THE COURT: That was discussed with him?

10 THE WITNESS: Yes, Your Honor; but that would have
11 been ---

12 THE COURT: The ---

13 THE WITNESS: I'm sorry.

14 THE COURT: The impeachable defenses?

15 THE WITNESS: Yes, Your Honor. But that would have
16 been Ms. ---

17 THE COURT: Offense. Impeachable offense.

18 THE WITNESS: I did not have that conversation prior to
19 the trial. That would have been after the State rested and
20 we were discussing with him whether or not he should
21 testify.

22 THE COURT: Okay. And that was not discussed pretrial?

23 THE WITNESS: Not -- not by myself, Your Honor.

24 THE COURT: Okay.

25 Q. Do you recall the jury submitting a question to the

1 court?

2 A. Yes.

3 Q. During deliberations?

4 A. Yes.

5 Q. Do you -- can you tell the court here today what your
6 recollection of that specific issue was?

7 A. Well, is that what you were discussing earlier, the
8 possession?

9 Q. Yes.

10 A. I remember they came out and asked, much like you were
11 discussing earlier, if they could look into convicting him
12 of possession of coke.

13 Q. Okay. And is it -- is it my understanding that they
14 were given the option of trafficking cocaine?

15 A. Yes, sir.

16 Q. Or possession with intent to distribute cocaine,
17 correct?

18 A. Yes, sir.

19 Q. And their question was do we have to convict on these
20 or acquit on these or can we consider possession of the
21 cocaine, correct?

22 A. According to the transcript, yes.

23 Q. Right. And ultimately the answer was?

24 A. No.

25 Q. No. Right. And you didn't ask for a possession of

1 cocaine charge, ---

2 A. No.

3 Q. --- correct? Okay. But I believe you did ask for a
4 possession of on the meth charge, correct?

5 A. Yes.

6 Q. As in addition to the PWID as charged?

7 A. Yes, sir.

8 Q. And he was convicted of the lesser included possession,
9 correct?

10 A. Correct.

11 Q. Very good.

12 MR. PEPER: One second, Judge. That's all we have.

13 Thank you.

14 (WHEREUPON, Mr. Peper confers with client.)

15 MR. PEPER: Hang on, Judge, one second. I'm sorry.

16 (WHEREUPON, Mr. Peper confers with client.)

17 MR. PEPER: We are good. Thank you. Thank you, Your
18 Honor.

19 THE COURT: Cross-examination.

20 MR. LIMBAUGH: Thank you, Your Honor.

21 **CROSS-EXAMINATION BY MR. LIMBAUGH OF MICHAEL NELSON:**

22 Q. Good morning, Mr. Nelson.

23 A. How are you doing?

24 Q. Good. How long have you been practicing law?

25 A. Fourteen years, give or take.

1 Q. How much of that has been criminal?

2 A. Fourteen years, give or take.

3 Q. Okay. I know we had a brief discussion with Mr. Peper
4 on the record, but can you give me a little bit more about
5 the State's evidence in this case against Mr. Nesbit?

6 A. Yeah. Just briefly the facts that I remember them was
7 that he was blue-lighted on Isle of Palms early afternoon on
8 a Sunday right in front of the Windjammer for not putting on
9 his blinker a hundred feet in advance.

10 A car chase -- excuse me, a motorcycle chase ensued.

11 It was about a hundred miles per hour. He laid down his
12 bike. That is when the officers came upon him. He was
13 arrested for failure to stop, a couple of other things.
14 They found the drugs on -- in his pants and I believe in the
15 motorcycle.

16 Q. Okay. When officers came up on Mr. Nesbit he was -- he
17 had just been involved in the motorcycle wreck; is that
18 correct?

19 A. Yes. He was on the ground I believe.

20 Q. Okay. Were the -- do you remember the drugs to be
21 found in his pants and in his motorcycle; is that -- do you
22 remember?

23 A. I believe so, but I would have to look at the
24 transcript and make sure.

25 Q. Okay. So how many times again do you say that you

1 recall meeting with Mr. Nesbit pretrial?

2 A. I believe I met with him two, maybe three times. I
3 remember twice.

4 Q. Okay.

5 A. Maybe three.

6 Q. Do you remember going over the elements of the offenses
7 with him?

8 A. Possession plus WID.

9 Q. Okay. And I believe you said you reviewed discovery
10 with him; is that correct?

11 A. I am sorry; say that again.

12 Q. Did you review the discovery with him?

13 A. We went over the facts of the case and what the
14 allegations were. I didn't go through page by page with
15 him.

16 Q. Okay. Did Mr. Nesbit give you any leads to follow, any
17 investigation that he wanted you to do?

18 A. Myself, no. But, once again, I was on the case for
19 two, maybe three weeks.

20 Q. You said you had a pretty thorough discussion with him
21 after the State rested about his right to testify; is that
22 correct?

23 A. Yes, Your Honor -- excuse me. Yes, Judge Jefferson
24 told us to take some time to talk to him about whether he
25 wants to testify or not.

1 Q. And was your advice based upon your strategy with the
2 case to advise him not to testify?

3 A. Yes.

4 Q. Okay. I believe you said it was because you didn't
5 believe he could come up with an appropriate answer for
6 the ---

7 A. I believe any answer he would have said to if you
8 didn't know the drugs were there or why did you start a car
9 chase would not have impressed the jury.

10 Q. Because at that point it would have just been failure
11 to stop; is that correct? And failure to signal when he was
12 originally ---

13 A. Yes.

14 Q. --- blue lighted? Okay. Let's get to the jury
15 charges ---

16 A. Yes, sir.

17 Q. --- real quick. Did you believe there was evidence or
18 merit to ask for possession on the cocaine?

19 A. No.

20 Q. Okay.

21 A. There was no testimony -- no testimony of anything like
22 the weight of the drugs were over ten grams.

23 Q. Okay. And typically there has to be some evidence on
24 the record for you to ask for a lesser included, right; is
25 that correct?

1 A. Correct.

2 Q. Okay. Were you surprised that you got the possession
3 with intent to distribute charge on the methyldone?

4 A. For the methyldone for a possession charge, not so much.
5 No, that was I believe that possession with intent was based
6 on the inference of over a gram being possession with
7 intent.

8 Q. Okay. So you asked for the charges that you believed
9 had merit; is that correct?

10 A. I believe we asked for possession with intent after
11 prompted by Judge Jefferson.

12 Q. Okay. And in your discussions with you or Ms. Gay did
13 a possession charge ever come up in the conversations on the
14 cocaine?

15 A. We were somewhat surprised she was willing to give us a
16 possession with intent. So we discussed possession, but we
17 didn't think there was a basis for it.

18 Q. Okay. You said you didn't review the traffic stop
19 video with Mr. Nesbit prior to trial. Is there any
20 particular reason for that or ...?

21 A. I got hired and was already at trial. I thought Lisa
22 had shown him in the past.

23 Q. Okay.

24 A. I'm sorry. Ms. Gay. I apologize.

25 THE COURT: Sir, I didn't understand what you said.

1 THE WITNESS: I said her first name, and I apologized
2 and called her Ms. Gay.

3 Q. Did Mr. Nesbit seem to understand his conversations
4 that you had with him either pretrial or during the trial?

5 A. That is my belief.

6 Q. Okay.

7 MR. LIMBAUGH: A moment's indulgence, Your Honor.

8 Q. Do you recall any specific reason why you didn't
9 introduce the pants into evidence or introduce the pictures?

10 A. I believe we wanted to keep -- we didn't want to put
11 anything into evidence that would take away our last close?

12 Q. I believe you said that on direct. So your -- and so
13 it appears you were pretty concerned about having that last
14 argument; is that correct?

15 A. My belief is it is always good to have the last word in
16 front of a jury.

17 THE COURT: Who made the last argument?

18 THE WITNESS: Ms. Gay.

19 MR. LIMBAUGH: That is all I have for this witness,
20 Your Honor.

21 THE COURT: Redirect.

22 MR. PEPER: Thank you, Your Honor.

23 THE COURT: Yes, redirect.

24 MR. PEPER: Thank you, Judge.

25 **REDIRECT EXAMINATION BY MR. PEPER OF MICHAEL NELSON:**

1 Q. Mr. Nelson, you were discussing your belief or your
2 surprise that the court instructed the lesser included
3 PWID ---

4 A. Yes, sir.

5 Q. --- cocaine on the trafficking. Okay. Do you recall
6 having a conversation with the court regarding that specific
7 issue?

8 A. My -- my -- how I remember it was are there any
9 charges, and Judge Jefferson asked do you want possession
10 with intent. And obviously we did it, to take it away from
11 a 25-year sentence ---

12 Q. Right.

13 A. --- so it would be lower.

14 Q. Do you recall discussing with the court the fact that
15 the State never converted the cocaine into grams or grains?

16 A. I believe it was in grams. I don't believe they
17 testified as to grains.

18 Q. Right.

19 A. And I believe that we spoke about this the other day.
20 I think I started with something and was cut off.

21 Q. That is correct, but -- what -- what was your argument
22 going to be to the Court regarding converting it to grains;
23 what effect would that have had?

24 A. What effect to the jury or more ---

25 Q. What effect to any charges that might have been given?

1 A. I think we were -- I think I was going down a route
2 trying to get a possession with intent charge.

3 Q. Right. And your roundabout way of doing that was
4 essentially that there has been no evidence to prove weight
5 in this case, correct?

6 A. In grains, yes.

7 Q. Which is the traditional way that it is done, correct?

8 A chemist testifies at trial, it is reduced down to
9 grains ---

10 A. Well, yes and no. They come back with weight and
11 grains.

12 Q. Okay.

13 A. Grams and grains.

14 Q. Do you recall the court saying we don't have any
15 testimony regarding the conversion of the cocaine to grains
16 so I am not going to instruct that portion of it, correct?

17 A. I would have to look at the transcript. But I am not
18 doubting it if you are saying.

19 Q. Okay. All right. And I believe you testified on cross
20 with regards to the jury question ---

21 A. About possession?

22 Q. About possession, right. Did -- when the jury question
23 came out did either you or co-counsel make an argument that
24 the jury should be brought back in and charged with
25 possession?

1 A. We did not, no.

2 Q. Okay. And so the result of that jury question was a
3 note that you approved, Ms. Gay approved, that simply said
4 they can pick either one, that is their choice; either one
5 being trafficking or PWID, correct?

6 A. Correct.

7 Q. Okay. All right. That's all I have. Thank you.

8 THE COURT: Anything further?

9 MR. LIMBAUGH: Just briefly, Your Honor.

10 **RECROSS EXAMINATION BY MR. LIMBAUGH OF MICHAEL NELSON:**

11 Q. Is it typical in your practice to see the weight done
12 in grams?

13 A. Yes. That is how SLED comes back. But it also has
14 grains.

15 MR. LIMBAUGH: That is all I have, Your Honor.

16 THE COURT: Thank you very much. You may come down.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: May this witness be excused?

19 MR. PEPER: Yes.

20 THE COURT: Without objection.

21 MR. PEPER: Petitioner calls Lisa Gay, Your Honor.

22 THE COURT: Come around.

23 (WHEREUPON, the witness was duly sworn.)

24 THE CLERK: State your name and spell your last name
25 for the record.

1 THE WITNESS: My name is Lisa Gay. My last name is
2 spelled G-A-Y.

3 MR. PEPER: May it please the court.

4 THE COURT: You may proceed.

5 **DIRECT EXAMINATION BY MR. PEPER OF LISA GAY:**

6 Q. Ms. Gay, how are you?

7 A. I am okay.

8 Q. Good. You have been in the courtroom this entire
9 proceeding, correct?

10 A. Yes.

11 Q. Okay. And so you have heard the testimony of both the
12 petitioner and Mr. Nelson, correct?

13 A. Yes.

14 Q. All right. I want to go over a few housekeeping
15 matters. You have been practicing law for how long now?

16 A. I was admitted to the bar in 1991. So almost 30 years.

17 Q. Okay. And I probably should know the answer to this,
18 but I don't. I presume you primarily handle just criminal
19 defense, correct?

20 A. Over the last 25 years I have done some other things
21 also. But I was a Charleston County public defender for
22 five years before I went in private practice. So in the
23 entire time I have been doing criminal law.

24 Q. Okay. Very good. Now the testimony to date has been
25 that you were retained soon after the trafficking cocaine

1 warrant and the PWID meth warrant were served upon the
2 petitioner. Is that your understanding of the timeline; is
3 that about when you were retained?

4 A. Okay, I don't have my file. And I have talked to you
5 about that. I don't have my file because it is with -- I
6 had some issues. I am currently suspended; and so my file
7 is with a receiver, Perye Lumpkin. So I know Mr. Nesbit
8 enough to tell you what I remember, but I don't have
9 documents that I can refer to.

10 Henry had a number of different arrests. I don't
11 remember when I get involved and which ones were pending at
12 that time and which ones ultimately came up.

13 When he went to trial he had the motorcycle incident
14 pending and he had the other one that he ultimately pled
15 guilty to that ran concurrent.

16 So when you were asking, Your Honor, the scenario of
17 how this went I just -- I have not heard this clearly.

18 When -- he was riding someone else's motorcycle. So
19 when he wrecked the motorcycle the video, the car video dash
20 camera, was -- I mean you could see everything except him
21 laying on the ground.

22 I mean there was a broad screen, and then Mr. Nesbit's
23 head is sort of right outside of the screen. So when they
24 come with the stretcher to get him, you know, you see the
25 stretcher and then you see that and then the stretcher goes

1 back out to the EMS. But you couldn't actually see Henry on
2 the ground from the dash cam video.

3 There was in evidence there was a large bag of drugs.
4 And it was not in his pocket at the time that he was on the
5 ground. It was on the ground. And so my argument at
6 closing argument was is that it was not his motorcycle and
7 that motorcycles have, you know, sort of some things under
8 the seat that are compartments that ---

9 THE COURT: Saddle ---

10 MS. GAY: Yes.

11 THE COURT: Saddlebags?

12 MS. GAY: Well, more like under the seat or somewhere
13 like that.

14 And that ultimately the drugs that were found on the
15 ground were not Henry's, he did not have dominion and
16 control of them. Because there's no possible way that this
17 very large bag of drugs could have been in anybody's pants
18 pocket.

19 And that is -- when the jury came with the verdict that
20 they did, they did not convict him of trafficking. So they
21 believe or bought into the fact that those drugs on the
22 ground were not Henry Nesbit's.

23 And so but I just wanted to explain the scenario a
24 little better. Because they weren't in his pocket. They
25 were just on the ground as part of the wreck. And so I

1 argued that they weren't his, they -- it came out of the
2 motorcycle, the motorcycle wasn't his and he would not have
3 had dominion and control.

4 The problem was is when he went to the hospital there
5 was a small quantity, very very small quantity, of cocaine;
6 and I guess a little bit of meth, Mark, ---

7 MR. PEPER: Correct.

8 A. --- in his pocket, in his little like money pocket. So
9 when they cut the pants off of him and investigated further
10 they found some itty-bitty quantity of more of a possession
11 weight of drugs on his person at the hospital.

12 The pants were not taken into evidence because they
13 were cut off of him and went away as part of the medical
14 procedure.

15 And so when the jury was contemplating the verdict and
16 came back with the question they were indicating that they
17 would have wanted to plead -- you know, convict him of
18 possession. Because it was such a small quantity. There
19 was -- it wasn't even a gram.

20 So in essence I should have asked for a possession
21 charge so that -- as -- and I did think about what am I
22 supposed to do now, the jury is trying to convict him of
23 possession. But at that time it was too late.

24 So it wasn't a strategic move. I just didn't think
25 of -- I didn't do it right. That is my position. That is

1 my testimony.

2 But because I didn't think about the fact that it
3 didn't even weigh a gram and if they did do what I wanted
4 them to do what would have been their ability to, you know,
5 to consider it since it wasn't even a gram. There was no
6 evidence of intent having -- you know, with the stuff that
7 was in his pocket.

8 And so what is your question now? I mean I have
9 listened to other things about stuff about through the
10 testimony that are very specific.

11 That is really what was going on is that they should
12 have been given a possession charge because it really there
13 was no evidence that could have gone to intent. And when
14 they, as we call it, split the baby or whatever, when they
15 decided to not convict him of the drugs on the ground, they
16 were left with, well, we believe he had cocaine in his
17 pocket when he got to the hospital, this is our only option.
18 But in fact there really was no evidence to support that
19 charge.

20 Q. No ---

21 A. There was evidence to support a possession charge but
22 not possession with intent.

23 Q. And are you -- if I understand your testimony correctly
24 you are pretty confident that had you asked for a possession
25 charge because there was evidence to support that charge

1 that charge would have been given to the jury?

2 A. Yes, it should have been.

3 Q. Okay.

4 A. And I was I think astonished that Judge Jefferson even
5 chose to give the possession with intent to distribute
6 lesser included. I think in her mind she -- the way the
7 drugs were presented was a kind of total weight thing.

8 Q. Right.

9 A. But they had specific facts and testimony about how
10 much was on -- you know, on the ground. It wasn't in his
11 pocket but on the ground.

12 And then so what was left was the idea that this
13 itty-bitty amount was part of what was in his pocket. And
14 so when she gave the possession with intent charge I think
15 in her mind she was thinking, oh, well -- I am not sure what
16 she was thinking.

17 But I don't think that -- I think that if we had all
18 really realized that if the jury did what I was telling them
19 to do and didn't hold him accountable for the stuff on the
20 ground that we were left with just this tiny little bit and
21 I should have argued in my request for charges that, you
22 know, this tiny little bit doesn't have any evidence of
23 intent; it just has that -- you know, it is just a
24 possessory quantity.

25 THE COURT: What was the evidence of that?

1 MS. GAY: That it was in his pocket when ---

2 THE COURT: Yeah, what is the evidence -- what was the
3 evidence?

4 MS. GAY: The evidence is -- I guess was ---

5 THE COURT: He didn't say it?

6 MS. GAY: Well, the evidence of possession ---

7 THE COURT: The pants were thrown away. So what was
8 the evidence ---

9 MS. GAY: That it was ---

10 THE COURT: --- that the minor amount of drugs ---

11 MS. GAY: A tiny amount. Yes, sir.

12 THE COURT: Well, tiny amount of drugs.

13 MS. GAY: Minor.

14 THE COURT: Minor, tiny.

15 MS. GAY: Was on his person.

16 THE COURT: What evidence was there of that?

17 MS. GAY: That they found the cocaine in his pocket.

18 THE COURT: So they found it?

19 MS. GAY: They found -- in the money pocket of the
20 jeans, ---

21 THE COURT: I understand.

22 MS. GAY: --- the little fifth pocket, they found a
23 little tiny bit of cocaine. And so the evidence of
24 possessing it ---

25 THE COURT: They testified to that?

1 MS. GAY: They testified to that, yes.

2 THE COURT: Okay. Thank you.

3 MS. GAY: That was in evidence that they had found it
4 in the pants when he got to the hospital. The pants were
5 not kept. So, you know, in my closing I was saying he is
6 not guilty of anything or whatever. But the jury asked the
7 question that indicated ---

8 THE COURT: I understand.

9 I'm sorry to interrupt you, counsel.

10 MR. PEPER: No, no, that's okay. Thank you Judge.

11 Q. Ms. Gay, the initial officer in that would have been --

12 I apologize -- that made the stop would have been Mr.

13 Chavez, correct?

14 A. Okay. If you say so. I don't have the transcript.

15 Q. Yeah, I gotcha. He did -- did he locate the drugs that
16 were found in his pants?

17 A. No, I don't believe he did.

18 Q. All right. That was located by Officer Buck Hammond,
19 correct, that followed him to the ---

20 A. To the -- to the hospital.

21 Q. Hospital.

22 A. Yes.

23 Q. That is correct. And although Chavez didn't find it,
24 both Chavez and Buck Hammond testified at trial that a -- and
25 I want to use that word -- a bag inside right, front pocket

1 field-tested presumptive for methamphetamines along with
2 cash; is that correct?

3 A. Yes.

4 Q. That was their testimony?

5 A. Yes.

6 Q. And as a matter of fact exhibit -- State's Exhibit
7 13 -- excuse me, 12, which was a bag that included the drugs
8 that were found in the pants pocket, the jeans pocket, was
9 admitted into evidence; correct?

10 A. Yes.

11 Q. And you believe that that alone is what the jury wanted
12 to convict him of ---

13 A. Yes.

14 Q. --- but couldn't, correct?

15 A. Well, they did in their own mind because they picked
16 possession with -- okay, these bags ---

17 Q. Yeah, I gotcha. I gotcha.

18 A. Thirty-two -- it was like thirty something grams of
19 cocaine.

20 Q. Yeah.

21 A. So if -- on the ground. So if they were going to -- if
22 they had found the ground -- you know, the drugs on the
23 ground were Mr. Nesbit's there is no possible way that under
24 the law that they could have convicted him of PWID or
25 possession with intent to distribute because it was three

1 times the statutory weight of a trafficking charge.

2 And so I firmly believe that their question indicated
3 that they had already decided that he wasn't responsible for
4 that, that my closing argument convinced them that those
5 came from a motorcycle that he didn't own and they weren't
6 in his pocket, it was illogical, and that they were focusing
7 on what that -- you know, what was there at the time he was
8 in the hospital.

9 And that an evidence of a possession ---

10 Q. Correct.

11 A. --- but no evidence whatsoever of an intent to
12 distribute. There was nothing presented that would have
13 been evidence of intent to distribute. Not even weight.

14 Q. And to your point, they couldn't acquit on the
15 trafficking or PWID because there was cocaine; right?

16 A. On his person.

17 Q. On his person, right?

18 A. Right. Yes, sir.

19 Q. They couldn't acquit on the lesser included possession
20 of meth because it was on his person?

21 A. Right.

22 Q. Correct?

23 A. Yes, sir.

24 Q. Right. And so to your point they struggled with the
25 trafficking in PWID because they thought that was dealing

1 with what was found on him. They had already moved on from
2 the weight that was found in the curtilage of this
3 motorcycle incident, correct?

4 A. That is my professional opinion.

5 Q. Right.

6 A. Because, as I said, it was over 30 -- it was a lot of
7 drugs.

8 Q. Right.

9 A. So there was -- if they were going to -- if they even
10 considered at all that he had dominion and control of those
11 drugs they would have had to convict him of trafficking.

12 Q. I am with you. And that was essentially your theme,
13 correct?

14 A. Yes.

15 Q. Yes. All right. Now you haven't spoken with many
16 jurors ---

17 A. No.

18 Q. --- since then? Okay. Right. But ---

19 A. I take that back. Sometimes I do talk to jurors
20 afterwards. And I may have actually had a conversation with
21 a juror after his trial.

22 I don't -- I don't remember specifically which one it
23 is.

24 Q. Okay.

25 A. But I did have a couple of trials not too very long ago

1 that I spoke to some jurors. One guy I saw as I was walking
2 across the street. So it is possible that I did talk to one
3 of the jurors.

4 Q. But if you did are you able to testify today as to what
5 the contents ---

6 A. No.

7 Q. --- of what that conversation was? Okay. All right.

8 There was a pretty long-winded conversation between
9 Judge Jefferson, the State, and yourself regarding how do we
10 handle that question; correct?

11 A. Yes, because there it was like all of a sudden reality
12 that that is what this jury is doing. And who's the
13 prosecutor? I can't remember.

14 Q. Stephanie.

15 A. Total shock. Totally in shock that somehow they
16 were -- this was the kind of questions that were coming up.
17 And so I mean because she believed that she had sort of a
18 clear-cut case. And so we were all sort of confronted with,
19 well, I guess that is what they are doing back there now.

20 And I said, well, oh, no, you know, we should have
21 given them a possession charge. But at that time I couldn't
22 ask for a new jury charge.

23 Q. Right.

24 A. I don't think that was appropriate at that stage.

25 Q. I would agree. And I think the court agreed with you

1 as well. Do you recall that the concern that Judge
2 Jefferson had about if I do bring them back in that it
3 appears as though I am interfering with ---

4 A. Yes.

5 Q. --- their jury deliberations, correct?

6 A. Yes.

7 Q. And so at that point in time it was just too late to
8 remedy?

9 A. Yes.

10 Q. Even though it was very clear to the State, the defense
11 counsel and the court that they weren't convicted on
12 trafficking and PWID, they were trying -- I mean that was a
13 specific question, can we do possession even though you
14 didn't give us that option, right?

15 A. Right. They were informing us that that is what they
16 really wanted to do ---

17 Q. And in your ---

18 A. --- and that is what they believed the evidence proved.
19 And there wasn't an option for that.

20 Q. Right. And your firm belief is that there was
21 reasonable probability that had you requested the possession
22 charge not only would it have been charged but he would have
23 been acquitted of the PWID?

24 A. Yes, but that takes into account what Judge Jefferson
25 would have done. And of course ---

1 Q. Well, I understand that.

2 A. --- I don't know what Judge Jefferson would have done.

3 But I should have asked for it because of the evidence that
4 was presented at that time. And I didn't.

5 Q. Once the question came back out she couldn't bring them
6 back in and charge them with possession if she wanted to?

7 A. No.

8 Q. Right.

9 A. Well, I don't believe so.

10 Q. Right. Okay. Thank you very much.

11 The only other thing I want to discuss with you real
12 quick is because it was so important to lay that theme that
13 all of the stuff that was found there wasn't his, right; in
14 a perfect world you would agree with me that you would want
15 him to just tell the jury that; right? I mean that is
16 all -- that is tough to get across to a jury without the
17 defendant saying that, right?

18 A. I don't have an answer to that. I have tried hundreds
19 of cases, and it is my professional opinion that it is not
20 helpful to defendants often to testify. But that is their
21 choice. And I do explain it to them. Personally ---

22 Q. Let me ask it another way.

23 A. I felt like I did a pretty good job of setting the
24 stage.

25 Q. Clearly -- I clearly agree as evidenced by what

1 happened with the jury question and so on and so forth. But
2 and I asked you a bad question. My question is this: Did
3 you speak with Mr. Nesbit about his decision to testify?

4 A. Yes.

5 Q. The testimony we heard earlier from Mr. Nelson was that
6 y'all believed any benefit of him testifying would be
7 outweighed by the risk, ---

8 A. Yes.

9 Q. --- attacking his credibility so on and so forth?

10 A. Yes.

11 Q. Did you also -- were you also concerned that the State
12 would go into his prior criminal history, convictions?

13 A. I can't remember right now. I think there is some law
14 that says that they can't really impeach him on prior drug
15 convictions because they are too similar to the one that he
16 is charged with. There may have been other things on Mr.
17 Nesbit's record that were impeachable.

18 But often it just opens up a can of worms when you are
19 trying to go in a certain direction and some answer that the
20 defendant may say that he thinks is helpful or whatever may
21 turn the jury in a way that I didn't want him to.

22 So I wouldn't have thought it was in his best interest
23 but -- and I would have talked to him about it. And would
24 have told him that I didn't think it was in his best
25 interest.

1 Q. Yes.

2 A. But whether or not he chose to testify or not, as I --
3 as you said, I thought we had a pretty good outcome ---

4 Q. Right.

5 A. --- with him not testifying.

6 Q. And I am with you that it has to be his decision and
7 you clearly allowed him to make that decision. But it has
8 to be an informed decision. And I wonder out loud was he
9 aware what if any of his prior convictions would come into
10 evidence had he taken the stand; did you have that
11 discussion with him?

12 A. Yes. And there -- in the motions portion of the
13 hearing -- of the trial I always file a motion called a
14 motion regarding prior convictions. It is a written motion
15 that I file in every case.

16 And anything that would have been impeachable would
17 have been discussed at that time and the -- or should have
18 been. And Ms. Linder would have put on the record if he
19 testifies these are the things that we are going to talk
20 about. And I don't remember what they were. But there
21 would have been things.

22 I would have informed him of everything that he would
23 have been impeached with if anything; and, you know, done
24 that part of my job.

25 Q. Do you know for a fact whether you filed that specific

1 motion in this case?

2 A. It is a part of a package that is done in some written
3 motions. It is where when voir dire, sequester of witness,
4 prior convictions, statements of the defendant.

5 It is just -- I mean if I didn't it would be bizarre.
6 But it is the whole packet of trial motions that I file
7 every time I am going to go to trial.

8 Q. Okay.

9 A. I just don't remember.

10 Q. Is it my understanding that after he made the decision
11 not to testify that is when the court informed the parties
12 that none of his prior criminal history would come in for
13 impeachment purposes?

14 A. I don't remember.

15 Q. Okay.

16 A. That really -- that was only a factor, I mean of -- one
17 factor of what was going on in terms of why I would have
18 recommend one way or the other for to testify or not.

19 Q. Well, I understand it was just a factor with your
20 concern. You were more concerned about getting tripped up
21 and all of that stuff. I have got that.

22 But that would certainly be something that the
23 defendant would want to know; before I testify, before I
24 make this decision, Ms. Attorney or Mr. Attorney, are they
25 going to be able to tell the jury about my prior

1 convictions?

2 A. I understand that that is significant. I don't recall
3 how that went in this. But, ---

4 Q. Okay.

5 A. --- you know, I do recall telling him what I believe to
6 be my advice. And it may -- it is possible that I didn't
7 know or -- I can't -- I just really don't remember.

8 Q. He didn't fight too much on that, ---

9 A. No.

10 Q. --- did he?

11 A. No.

12 Q. He said you are the lawyer, I am rolling with it;
13 right?

14 A. He was very very involved in his trial. I don't
15 remember. I'm sorry.

16 Q. That's okay.

17 A. And he didn't testify. And he did ---

18 Q. Right.

19 A. --- I think put that on the record. And so.

20 Q. In the colloquy that the court had there was not a
21 lengthy discussion, a sidebar or anything like -- it was
22 do -- have you discussed it, yes; do you intend to testify,
23 no; I mean it was very clear-cut, right?

24 A. Okay.

25 Q. You don't recall having to take a break and spend more

1 time with him about the decision or anything like that,
2 right?

3 A. In the course of trials what she usually does is she
4 breaks before that and gives us a little bit of time to
5 think about it. It might be just a scheduled break for the
6 court. There is always more than a few minutes to talk
7 about it. But I don't recall it being any significant issue
8 that he and I had any discussion about.

9 Q. Okay.

10 A. You know, major discussion about.

11 Q. Yeah. I gotcha. And I am not trying to set you up or
12 anything. I am just asking ---

13 A. I understand.

14 Q. --- what you recall. Let me just ask you this. You
15 have heard the testimony of Mr. Nesbit regarding kind of the
16 scope of your representation leading up to trial. Do you
17 agree or disagree that you were only able to meet with him
18 on two occasions at the Detention Center?

19 A. I don't recall. I had -- he is a phone caller type of
20 person. So I would imagine that I had multiple telephone
21 calls that involved, you know, talking to him about his
22 life.

23 I have an investigator that worked for me who would
24 often go to the jail. He worked for me for 20 something
25 years. And he would go if I wasn't able to and, you know,

1 transfer information and be a part of the process.

2 So it was -- I don't remember how many times I met with
3 him. I do remember fully discussing with him what our
4 approach was going to be, how we were going to end up in a
5 trial, and what we needed to do. So and that he had other
6 stuff pending and that, you know, how that was going to --
7 if he got this convicted.

8 It was a third offense which is one of the reasons why
9 he got the PWID sentence that he did. So, you know, how he
10 was going to get affected if he -- on other things if he was
11 convicted of this. You know subsequent trials, all of that.
12 We had all of those conversations.

13 Q. Okay. And so he was sentenced to a PWID third,
14 correct?

15 A. Yes.

16 Q. All right. And the difference between a PWID third and
17 a possession third is significant, correct?

18 A. Yes. A possession third I think is zero to ten. And a
19 PWID third obviously has a mandatory minimum sentence which
20 is something different.

21 And so -- and the -- it is possible that on the
22 possession third it can even be suspended to less. And I
23 would have -- my position was he might of should have got
24 about five years or something.

25 Q. Uh-huh. Uh-huh. Could have been suspended on the --

1 on all of them?

2 A. Yes.

3 Q. On all of them.

4 A. I don't remember if his failure to stop for a blue
5 light was a first or more than a first. I think it was more
6 than a first. But, you know, there was just indication that
7 the sentence could have been a whole lot less if it had been
8 a possession.

9 Q. Well, we know those priors were coming in; so I don't
10 think he had a prior -- do you agree or disagree with Mr.
11 Nesbit's position that lesser included offenses were not
12 thoroughly or even mentioned to him prior to the start of
13 trial?

14 A. Okay, so the plan during trial and the approach at
15 closing argument of splitting them up and some things like
16 that and arguing that he wasn't responsible, it was ---

17 Q. Let me stop you if you don't mind, Ms. Gay. I am with
18 you on date of trial forward. I am talking about prior to
19 trial do you recall having discussions with him about the
20 court potentially being able to charge the jury with lesser
21 includeds?

22 A. I don't remember. I don't remember about talking to
23 him about a trial and whether the court could do it. I
24 remember being prepared to ask for the lesser included of
25 possession with intent to distribute. And I probably would

1 have told him that while we were there.

2 Discussions about trying to get a lesser included on a
3 plea in his case were pretty much nonexistent because the
4 prosecutor had given certain plea offers that he had
5 rejected.

6 So, you know, we discussed if she dropped it down to
7 this or if you dropped it down to that, whether it was a
8 first or a second or a third or whatever. All of those
9 things had been discussed. But whether he understood them
10 or not, I don't know.

11 Q. And so you are not aware as to whether or not when he
12 made the decision to go to trial whether or not he
13 understood, as he has testified to, that it was either all
14 or nothing, it was either guilty or acquittal on
15 trafficking, guilty or acquittal on PWID meth, guilty or
16 acquittal on failure to stop?

17 A. It evolved.

18 Q. Right, but I mean prior ---

19 A. And good stuff came out in the trial that we could use
20 to sort of make that last approach in the closing argument.

21 Q. Yes.

22 A. Having discussions with the prosecutor about whether
23 she would just focus on what was in his pocket for a
24 possession as opposed to what was on the ground was never a
25 possible discussion.

1 Q. I understand that but ---

2 A. Because she wasn't going there.

3 Q. He had testified and you heard him earlier saying that
4 had I known it was more than just all or nothing on the
5 warrants I was charged with that may have affected my
6 decision as to whether or not to proceed to trial. Would
7 you agree with that testimony of him or not?

8 A. I think the problem is is that that was never possible
9 because the prosecutor was never splitting them up like
10 that.

11 Q. I am not talking about a plea. I am talking about his
12 testimony was that he thought he -- when he decided to go to
13 trial, when he turned down a plea, after talking with you
14 and all, when he decided to go to trial, he thought the only
15 things on the verdict form was going to be: guilty, not
16 guilty, trafficking; guilty, not guilty, PWID meth; guilty,
17 not guilty, failure to stop.

18 Do you agree or disagree ---

19 A. I think we all ---

20 Q. --- with his testimony?

21 A. --- believed that that was going to be the only
22 options, ---

23 Q. I gotcha.

24 A. --- including me, until the trial started.

25 Q. Okay.

1 A. And once the trial started and different information
2 became available and there was different ways to argue
3 things and it was looking good for let's split this up and
4 some things like that, some really great evidence came out
5 in trial on the stand that was -- that gave -- that, you
6 know, evolved the process.

7 So, okay, yes, when we started the trial he thought
8 that it was a, you know, all or nothing. But I also thought
9 that it was an all or nothing. And I just as the trial
10 evolved realized there was a better way to handle it and a
11 more logical way to resolve it. And the jury followed that
12 path.

13 Q. And so it would make sense that if you thought it was
14 an all or nothing there weren't any pretrial discussions
15 about the fact that it is possible that the judge could also
16 charge lesser included?

17 A. That didn't occur to me at the time.

18 Q. Gotcha.

19 A. But it did as the trial evolved.

20 Q. Okay. Yeah, I am with you. And as the trial evolved
21 and certain elements in evidence came in, that is when you
22 start realizing, oh, we have got lesser included all over
23 the place here; right?

24 A. Yes. See, part of the thing is is that the video --
25 Mr. Nesbit wasn't on the video. So how someone was going to

1 testify to what they saw when they walked up and saw him on
2 the ground was not necessarily very clear in the police
3 report.

4 So when the officer got up and said all of this really
5 good stuff about the bag being, you know, six, seven, eight
6 inches away from his body, that was a good thing. And so,
7 you know, it evolved that we could argue that that was not
8 even his.

9 Because the motorcycle and then it became, you know,
10 that the jury was only focusing on what was in his pocket.

11 Q. That video you speak of do you ---

12 A. The dash cam.

13 Q. --- know when you first showed that to Mr. Nesbit?

14 A. I don't remember. But he had seen it. And it was good
15 for him because it didn't have him or anything about -- you
16 know, if the bag -- example, if he had been laying on the
17 ground and the bag was in his pocket and only part of it was
18 hanging out then, you know, that would have been -- because
19 they said in the police report that there was a bag in his
20 pocket.

21 MR. PEPER: Court's indulgence one moment, Your Honor.

22 Q. Thanks ---

23 A. There -- I mean there was one other issue.

24 Q. Is there anything else that you would like to inform
25 the court about regarding the allegations presented today?

1 And I will leave it at that.

2 A. He talked about a drug report and a chain of custody.

3 And it is in the testimony that the officer did not

4 acknowledge his signature on the chain of custody form. I

5 missed that.

6 In the testimony and what was going on he -- I did not

7 object to the entry of the drug report even though the

8 officer did say that he did not acknowledge that it was his

9 signature.

10 And that's what he talked about. That was his final

11 amended application that came in I guess in September. And

12 some documents were presented. And I read some things. And

13 it is in the transcript that I did not object to that.

14 Q. And therefore he was not able to appeal that specific

15 issue, ---

16 A. Right.

17 Q. --- right?

18 A. And he was not able to appeal because it was not

19 preserved. And so he testified to it. And I mean I am

20 sorry if I am just jumping in here and saying it. But it is

21 true that I did not object to that. And ---

22 THE COURT: It is on the report?

23 MS. GAY: Okay, so there was a drug report on a chain

24 of custody. And officers testified.

25 THE COURT: From -- where was the report from?

1 MS. GAY: What -- what agent -- the Isle of Palms. The
2 Isle of Palms. The police officer's report.

3 THE COURT: A local agency?

4 MS. GAY: A local agency that arrested him. And an
5 officer was testifying about the report and he -- they
6 asked -- I asked -- or the solicitor asked is this your --
7 is this your signature. And he said, I don't think so. And
8 then -- or something like that.

9 And she never comes back around to connect that he
10 actually acknowledges that it is his signature and that he
11 is -- you know, because in order ---

12 THE COURT: They did their own drug testing?

13 MS. GAY: Yes. And so in the chain he is a witness
14 who -- you know, of course they are admitting the
15 document ---

16 THE COURT: So you never admitted the chain?

17 MS. GAY: I never objected to the admission of the
18 document ---

19 THE COURT: Before ---

20 MS. GAY: --- based on ---

21 THE COURT: Before it was issued -- I mean before the
22 evidence came out had you with the solicitor agreed to the
23 chain?

24 MS. GAY: No.

25 Q. When State's Exhibit 16, which was the chain of

1 custody, was offered into evidence did you object to it
2 coming into evidence?

3 A. No, because I didn't catch ---

4 Q. Right ---

5 A. --- that this -- that I had missed the fact that the
6 officer had not properly laid the foundation. I didn't
7 catch that. And so in my mind ---

8 THE COURT: You don't know whether Judge Jefferson
9 would have allowed it anyway?

10 MS. GAY: Right. Yes, sir. I don't know if I had
11 objected what she would have done. But I didn't object. I
12 didn't create -- I didn't properly object to that for it to
13 be handled by the court to determine how they were going to
14 handle it.

15 And that has been something recently -- or within the
16 last however how long, that I have looked back and read the
17 transcript and realized that I did not object and that I
18 should have.

19 Q. Thank you very much.

20 A. Is there anything else?

21 Q. Not from the petitioner.

22 THE COURT: Cross-examination.

23 MS. GAY: Yes, sir, but I was just wondering ---

24 **CROSS-EXAMINATION BY MR. LIMBAUGH OF LISA GAY:**

25 Q. Hi, Ms. Gay.

1 A. Yes.

2 Q. I will be significantly briefer, as Mr. Peper has gone
3 over a lot with you.

4 I haven't been doing this as long as either of you; but
5 I believe if on the verdict form it was PWID, trafficking,
6 and not guilty; correct ---

7 A. That would have been on the verdict form, yes.

8 Q. The verdict form. Why could the jury not just find
9 your client not guilty if he was charged incorrectly?

10 A. Well, I think the problem was is that there were two
11 sets of drugs. And there was the drugs that were on the
12 ground, and there was the drugs that were in his pocket.

13 And so the -- it is obvious from the verdict that the
14 jury did not hold him accountable or were not going to find
15 him guilty of what they found on the ground, which was a
16 very large quantity of drugs which had to be trafficking.
17 Had to be trafficking. There was no way it could have been
18 imagined that it was something less than -- you know, it was
19 30-something grams.

20 So it is obvious from the verdict, in my professional
21 opinion, that they focused on what was on his -- in his
22 pocket.

23 And what with in his pocket was an amount of drugs -- a
24 very minimal amount of cocaine, but it was an amount that
25 there was no evidence of any intent to distribute.

1 It was in all regards a possessionary amount. Small
2 that was on his possession, having no -- you know, no
3 scales, no deals, no -- no extra money in his pocket, no --
4 it wasn't over at gram. I mean all these things that can be
5 inferred as elements of intent to distribute, they were not
6 there.

7 Q. I believe Mr. Nesbit wishes now that he had asked for a
8 possession charge. But your testimony today seems to be
9 that there wasn't weight enough for PWID or trafficking. So
10 if that's the case the jury could have just found him not
11 guilty, correct?

12 A. I don't think the jury was ever going to find him not
13 guilty of what was in his pocket, because it was a pair of
14 pants that he was wearing when they cut it off of him and
15 when he got to the hospital.

16 So you made a comment just now that I don't agree with.
17 The weight would have been there for trafficking because the
18 amount of drugs on the ground that they found after the
19 motorcycle accident would definitely have been enough for a
20 trafficking charge. And so using weight alone as what is
21 the evid- -- what evidence was presented, once they
22 determined that they didn't want to convict him of what was
23 on the ground the only thing left was less than a gram in
24 his pocket.

25 Q. Or not guilty?

1 A. Or not guilty. But, see, he possessed the cocaine in
2 his pocket, because he was wearing the pants. So that was
3 so not -- I mean that is actual possession. That wasn't
4 even constructive possession.

5 So if we are doing it from a legal perspective the
6 stuff on the ground they were arguing constructive
7 possession, you know, how you get to him being the owner of
8 it. The stuff on his person was actual possession because
9 it was in his pocket.

10 Q. I will move on. So your decision to not put up a case
11 was that so you could have the last argument?

12 A. Probably. Yes, sir.

13 Q. Do you believe that is important for you -- for the
14 defense?

15 A. Yes.

16 Q. Okay. And you testified the pants weren't put into
17 evidence because they were destroyed when he went to the
18 hospital; is that correct?

19 A. Yes.

20 Q. Okay. So you didn't have the opportunity to put them
21 into evidence because they were no longer there; is that
22 correct?

23 A. I believe they were pictures of different things
24 about -- maybe even pictures of him laying on the ground. I
25 can't remember.

1 But the pants were just -- were not put into evidence
2 by the police. And they didn't gather them from the nursing
3 staff or the medical professionals at the hospital.

4 So I didn't have an opportunity to have anything -- I
5 mean in my closing argument I said, well, you know, where is
6 the pants, what happened here. But nobody's pants would
7 have been big enough for that much drugs to be put in. The
8 package was literally that big (motioning).

9 Q. Did -- I just can't recall. I apologize. Did you go
10 over the video with him ---

11 A. Yes.

12 Q. --- prior to trial? Okay.

13 A. And you see the dash cam video didn't have him in it.
14 So like the dash cam -- and the dash is like this
15 (motioning). And he was probably four inches out of view.

16 Because you can see the EMS stretcher coming and then
17 they put him on it and immediately his head is rolled back.
18 So it was -- I mean it was from here (motioning) to here
19 (motioning). You know, from right -- it was two feet. But
20 he wasn't in the video.

21 Q. Okay.

22 MR. LIMBAUGH: One moment, Your Honor.

23 Q. You said you believed that there were multiple
24 telephone calls within the jail prior to going to trial?

25 A. Yes, sir.

1 Q. Did you discuss your trial strategy and possible
2 defenses with him?

3 A. Yes. A lot of it is the defendants have like all kinds
4 of things they want to talk about. But as you do more of it
5 you just go I will talk to you in the building, we will
6 figure that out when we get there.

7 So I mean I understood that he wanted a trial. And I
8 knew what to do next. And, you know, he obviously had --
9 was telling me that it wasn't his. And as I said, the
10 motorcycle wasn't his. So that made logical sense.

11 Q. Okay. I believe you testified earlier that he was --
12 you believed he was very involved in the trial process?

13 A. Yes.

14 Q. And you were -- Mr. Nelson, you, didn't force him not
15 to testify; you just gave your professional opinion; is that
16 correct?

17 A. Right.

18 Q. Okay. There was a pretty thorough follow through with
19 Judge Jefferson about that?

20 A. Yes.

21 MR. LIMBAUGH: That is all I have, Your Honor.

22 THE COURT: Anything further?

23 MR. PEPER: No, thank you.

24 THE COURT: You may come down. Thank you very much.

25 MS. GAY: May I be excused, sir, from the rest of the

1 day?

2 THE COURT: If you give me a chance to excuse you I
3 will be glad to.

4 MS. GAY: Okay.

5 THE COURT: Can this witness be excused?

6 MR. PEPER: We have no objection, Your Honor.

7 THE COURT: Without objection. All right. We will ---

8 MS. GAY: Thank you, sir.

9 THE COURT: Ms. Gay.

10 MS. GAY: Yes, sir.

11 (WHEREUPON, discussions regarding unrelated case with Ms.
12 Gay's appearance were had.)

13 THE COURT: All right. Let's take -- let's do this.
14 Let me get -- thirty days, proposed orders satisfactory?

15 MR. PEPER: Yes, sir, Your Honor.

16 THE COURT: All right. Good. Thank you very much.

17 MR. LIMBAUGH: Thank you.

18 MR. PEPER: Thank you very much.

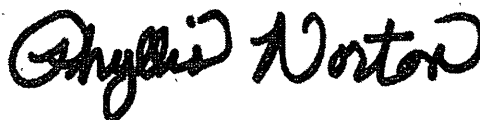
19 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on December 6, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

A handwritten signature in black ink that reads "Phyllis Norton". The signature is written in a cursive, flowing style.

PHYLLIS NORTON, CVR

Date: April 12, 2019

Certified Transcript Provided For: Jerry N. Theos, Esq.
Certification Reference #2019-0412

STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)

Henry Nesbit, Jr., SCDC #292341)

Applicant,)

v.)

State of South Carolina)

Respondent,)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2016-CP-10-2761

ORDER OF DISMISSAL

FILED
 2019 FEB 22 PM 3:27
 JULIE J. ARMSTRONG
 CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief filed on May 26, 2016, by Henry Nesbit Jr. (Applicant), alleging he was entitled to post-conviction relief based on constitutionally ineffective counsel and a violation of South Carolina chain of custody laws in handling of drugs in Applicant's case. Applicant amended his application to include the following claims: Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf, counsel failed to locate and examine all of the state's evidence prior to trial, counsel failed to present evidence he believes was exculpatory, counsel failed to request a jury charge on simple possession, and alternatively counsel failed to object to a charge of possession with intent to distribute. Respondent served its return on September 28, 2018, requesting an evidentiary hearing be convened on the application.

An evidentiary hearing was held on December 6, 2018, before this Court at the Charleston County Courthouse. Applicant was present and was represented by counsel Mark Peper. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office. At the hearing, testimony was taken from trial counsel Melisa Gay, trial counsel Michael Nelson, and Applicant.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

Procedural History

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. During its September 2013 term, the Charleston County Grand Jury indicted Applicant for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute ("PWID") methyldone (bath salts) (2013-GS-10-5639). Melisa Gay, Esquire and Michael Nelson, Esquire represented him. On May 5-8, 2014, Applicant proceeded to trial before the Honorable Deadra L. Jefferson and a jury. On May 8, 2014, the jury convicted Applicant as indicted for failure to stop for a blue light and the lesser-included-offenses of PWID cocaine and possession of methyldone. Judge Jefferson sentenced Applicant to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of methyldone.

Applicant appealed. Robert M. Pachak, Esquire represented Applicant on appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v. Nesbit, Op. No. 2015-UP-483 (S.C. Ct. App. 2015). The Remittitur was returned to the circuit court on October 30, 2015.

Facts of the Case

This case begins with Deputy Chavez of the Charleston County Sheriff's Office. Deputy Chavez was assigned to off-duty patrol at the Isle of Palms Police Department to assist them with extra traffic enforcement and crowd control during the busy time of the beach season. Deputy

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Chavez was parked in front of the Windjammer in the median. Deputy Chavez observed Applicant approaching the intersection of JC Long Boulevard at Ocean Boulevard and make a turn/using his turn signal. A traffic stop was initiated. (Tr. p. 91, line 17 – p. 93, line 19). NOT 

Applicant was driving a brown Harley Davidson motorcycle. When the blue lights were activated, Applicant started to slow down and make a right-hand turn onto a side street and then took off at a high rate of speed. (Tr. p. 97, lines 1 – 15). Deputy Chavez pursued Applicant and during the chase, Applicant wrecked his motorcycle. Deputy Chavez arrested Applicant for failing to stop for blue lights and placed him in handcuffs. Deputy Chavez then searched Applicant and found a large amount of cash and several bags of narcotics. (Tr. p. 100, line 21- p. 101, line 5). One bag of cocaine contained 1.72 grams of cocaine, the other bag contained 19.53 grams of cocaine. (Tr. p. 196, lines 3 – 7). Deputy Chavez also found 394.66 grams of a brown crystallized substance, which turned out to be Methyline. (Tr. p. 197, lines 23 – 25).

The trial judge agreed to charge the law of possession with intent to distribute cocaine as a lesser included offense of trafficking in cocaine. (Tr. p. 212, lines 3 – 4). The trial judge also agreed to charge simple possession after discussing the Methyline charge with counsel. (Tr. p. 210, line 7 – 12).

Current Post-Conviction Relief Action

Applicant proceeded to file this post-conviction relief application on May 26, 2016. The State filed its Return and Partial Motion to Dismiss and Motion for a More Definite Statement on April 13, 2017. Applicant filed an amendment to his post-conviction relief application on June 28, 2018.



In his filing, Applicant answers Question 10 of the Application for Post-Conviction Relief with the words "See Attach Sheet." The Applicant alleged in this first application that he was being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
2. "Violation of SC chain of custody laws in handling of drugs in Applicant's case"

The State filed its Return and Partial Motion to Dismiss and Motion for a More Definite Statement on April 13, 2017.

Thereafter, on June 28, 2018, Applicant through counsel Mark Archer, filed an Amended Application for Post-Conviction Relief. In this amended application, Applicant incorporates the previously mentioned attachment and sets forth the following grounds for post-conviction relief:

1. "Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf.
2. Counsel failed to locate and examine all of the state's evidence prior to trial.
3. Counsel failed to present evidence he believes was exculpatory.
4. Counsel failed to request a jury charge on simple possession.
5. Alternatively counsel failed to object to a charge of possession with intent to distribute.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant

Applicant testified that he was originally represented by Melisa Gay and that Michael Nelson was brought on right before trial. Applicant testified that counsel represented him eight to nine months prior to trial. Applicant testified that he retained counsel while he was incarcerated and did not meet with them when he was out. Applicant testified that he never met with Mr.

Nelson and that he only met with Ms. Gay one or two times. Applicant testified that counsel did



not go over the elements of the offenses with him and did not review the evidence. Applicant testified that he did not see the law enforcement video while incarcerated and did not discuss testifying at trial while incarcerated. Applicant testified that counsel did not discuss his rights with him. Applicant testified that counsel did not discuss lesser included offenses with him. Applicant testified that counsel communicated a plea offer to him while he was incarcerated, the offer was a recommendation of eighteen to twenty-five years. Applicant testified that there was a second plea offer brought to him while he was in jail that was a recommendation of fifteen to twenty-five years. Applicant testified that there was a third plea offer before trial that he also rejected.

Applicant testified that there was a pair of pants that was in evidence, but that was never presented at trial. Applicant testified that his attorneys never saw the pants and that they did not move anything into evidence. Applicant testified that he did not put up a case and that they rested after the State's case. Applicant testified that counsel told him that he should not testify because he could be cross-examined and they wanted to have the last argument. Applicant testified that he wanted to testify at trial. Applicant testified that he wanted to tell the jury he was not arrested until a later time on the drug charges. Applicant testified that he thought his trial was all or nothing on the indicted charges and was unaware of the potential for lesser-included offenses. Applicant testified that he had an issue with the chain of custody and that the officer's signature was not actually on one of the bags of drugs in evidence.

Counsel Nelson

Nelson testified that he met with Applicant once or twice while he was incarcerated. Counsel testified that he did not personally review the video with Applicant. Nelson testified that he did not go over lesser-included offenses with Applicant. Nelson testified that he did not



discuss the pants with Applicant and that he saw pictures of the pants. Nelson testified that he made sure to question witnesses about the size of the pants and whether or not it was plausible the drugs could have been in the pants. Nelson testified that he discussed the risks of testifying with Applicant and that he was worried about cross-examination. Nelson testified that he thought it was very important to have the last argument to the jury in this case. Nelson testified that he saw the warrants and reviewed the discovery. Nelson testified that he did not request that the jury be brought back out and charged on possession after the question was asked. Nelson testified that he was surprised that he got the jury charge on possession with intent to distribute.

Counsel Gay

Gay testified that she reviewed the law enforcement video and thought that it was helpful to Applicant. Gay testified that you could only see Applicant's head in the video and it did not show anything that would be useful to the State. Gay testified that the motorcycle was not his and that the drugs were never in Applicant's dominion or control. Gay testified she believed that the jury bought in to the idea that the drugs that were found with the motorcycle were not Applicant's. Gay testified that they found small quantities of cocaine and meth when his pants were removed at the hospital. Gay testified that pants were cut off of Applicant and were taken away as part of the medical procedure. Gay testified that in hindsight she should've asked for a possession jury charge. Gay testified that the drugs were presented as a total weight and were not broken up by what was on the ground and what was found on Applicant's person. Gay testified that she believes it would not have been appropriate to ask for a jury charge on possession once the jury asked the question. Gay testified that she told Applicant that it would not be a good idea for him to testify at trial. Gay testified that she had a discussion with Applicant about potential past charges that could be brought out on cross-examination if he were to testify. Gay testified

that she had multiple telephone calls with Applicant to discuss the case. Gay testified that she discussed the trial and strategy with Applicant. Gay testified that she discussed the elements of the offenses with Applicant. Gay testified that as the trial evolved, the strategy to ask for lesser-included offense charges also evolved. Gay testified that Applicant saw the law enforcement video before trial. Gay testified that the law enforcement officer did not acknowledge it was his signature on the drug report and that she did not object, but she also was unsure as to what the judge would have done with that objection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel against trial counsel, Michael Nelson and Melisa Gay. Each allegation is addressed fully below.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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Strickland does not guarantee perfect representation, only a “reasonably competent attorney.” 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge “post hoc rationalization” for counsel’s decision making that contradicts the available evidence of counsel’s actions, Wiggins, 539 U.S. at 526-527, neither

may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689-690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id.

at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant's allegation is addressed fully below:

Allegations

Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf.

This Court finds that both counsel, and Applicant testified that Applicant was fully advised of the benefits and detriments of testifying at trial. Applicant testified that counsel advised him that it would not be wise to take the stand and submit himself to cross-examine. Counsel testified

that they advised Applicant that cross-examination would not be helpful to their case and that they believed having last argument would be most beneficial. This Court finds counsel's reasoning for advising Applicant not to testify was a valid trial strategy. "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 546-47 (Ct. App. 2014) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 691. Counsel's decision not to request jury instructions on lesser-included offenses was a valid trial strategy. See Abney, 408 S.C. at 46-47, 757 S.E.2d at 546-47 (recognizing counsel's decision not to request a jury instruction on lesser included offenses can be a valid trial strategy). Therefore, this allegation is denied and dismissed with prejudice. Therefore, Applicant has failed to show either deficiency or prejudice, thus this allegation is dismissed.

Counsel failed to locate and examine all of the state's evidence prior to trial

This Court finds that counsel was not deficient for failing to locate all of the evidence in Applicant's case. Testimony at the evidentiary hearing brought out that Applicant's pants were not introduced into evidence by either the defense or the State. Applicant's allegation was that trial counsel should have introduced the pants into evidence in an attempt to bolster his defense that he could not have had the drugs on his person. Counsel testified that the pants were cut off of Applicant at the hospital as part of a medical procedure resulting from the motorcycle accident.

and were destroyed. The evidence presented shows that the pants were not available to either party to be introduced into evidence. Counsel testified that they thoroughly described the pants to the jury and felt that the jury believed their theory of the case, that the drugs were not actually on Applicant's person. Therefore, Applicant has failed to show deficiency or prejudice, thus this allegation is dismissed.

Counsel failed to present evidence he believes was exculpatory

This Court dismisses this allegation for the reasons set forth above. This Court interprets this allegation to reference the same evidence as the allegation above. Therefore, this allegation is dismissed as well.

Counsel failed to request a jury charge on simple possession

This Court does not find Applicant's testimony credible concerning the allegation that counsel should have requested a jury charge on simple possession. Applicant testified consistently that he believed his trial was all-or-nothing on the indicted charges, however, he now wants his counsel to have requested a charge for a lesser-included offense. Mr. Nelson, one of Applicant's trial counsel, testified that he did not believe that he would have gotten a charge on simple possession if he requested one and did not think the facts were appropriate to request one. Ms. Gay, Applicant's other trial counsel, testified that she should have requested a charge on simple possession in hindsight, but that it did not occur to her at the time. Both counsel testified that Applicant was involved in the trial strategy throughout the trial, including the decision to request certain jury charges. This court finds that failing to request a lesser-included charge in favor of an "all-or-nothing" approach is a valid trial strategy and is not deficient performance on the part of counsel. Indeed, where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*,

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317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 778, 778-79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such a strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. U.S.*, 564 F.2d 1071 (4th Cir. 1977)). Therefore, this court dismisses this allegation.

Alternatively counsel failed to object to a charge of possession with intent to distribute

This court finds that Applicant has failed to show deficiency on the part of trial counsel concerning this allegation. Applicant contends that counsel should have objected to a jury charge on the lesser-included offense of possession with intent to distribute. Mr. Nelson testified that they did not object to the charge because they felt that it was beneficial to their case, exposing Applicant to less risk. Mr. Nelson also testified that he was surprised to even get the charge on possession with intent to distribute, as he was not sure the facts existed to merit such a charge. This court finds that counsel was not deficient for failing to object to a jury charge of possession with intent to distribute, as minimizing the risk to Applicant was a valid trial strategy. The trial court is required to charge a jury on a lesser-included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). However, the trial court is only required to include this jury charge when the parties request it. A trial court does not have a duty to *sua sponte* provide a charge of a less-included offense where it is warranted by the evidence. *State v. Parker*, 315 S.C. 230, 236-37, 433 S.E.2d 831, 834 (1993) (finding the trial court did not err by failing to charge the jury on a lesser included offense because such charge was not

requested; "there was no duty on the court to *sua sponte* provide the charge," and the evidence did not warrant the charge). Therefore, this court dismisses the allegation.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 15 day of February, 2019.


 G. THOMAS COOPER
 Presiding Judge
 Ninth Judicial Circuit

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2016-CP-10-2761

State of South Carolina,

Respondent,

v.

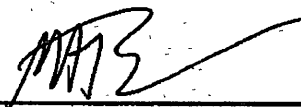
Henry Nesbit, Jr. SCDC
 #292341,

Appellant.

NOTICE OF APPEAL

Henry Nesbit, Jr. SCDC #292341 appeals the Order of Dismissal of the Honorable G. Thomas Cooper dated February 15, 2019. Appellant received written notice of entry of this Order of Dismissal of Post-Conviction Relief on February 27, 2019.

February 28, 2019


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FILED
 2019 MAR -4 PM 1:43
 JULIE J. ARMSTRONG
 CLERK OF COURT

STATE OF SOUTH CAROLINA

In the Court of Common Pleas

 APPEAL FROM CHARLESTON COUNTY
 G. Thomas Cooper, Circuit Court Judge

 Case No: 2016-CP-10-2761

 FILED
 2019 MAR -4 PM 1:43
 JULIE J ARMSTRONG
 CLERK OF COURT
 BY _____

THE STATE OF SOUTH CAROLINA, ... Respondent,

v.

HENRY NESBIT, JR. #292341, ... Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served counsel for the Respondent and Clerk of Court, with a copy of the NOTICE OF INTENT TO APPEAL by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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February 28, 2019



 Mark A. Peper, Esq.

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Nov 16 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge
Deadra L. Jefferson, Trial Court Judge

Appellate Case No.: 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITIONER'S BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether trial counsel rendered ineffective assistance by failing to request a jury instruction for the lesser-included offense of simple possession of cocaine.

STATEMENT OF THE CASE

This is an appeal of the denial of Appellant Henry Nesbit, Jr.'s application for post-conviction relief ("PCR"). The application was filed on May 26, 2016 and claimed that Nesbit was entitled to relief based on constitutionally ineffective assistance of counsel and a violation of South Carolina chain of custody laws in the handling of drugs in Nesbit's criminal case. (R. p. 605-613). Respondent served its return and partial motion to dismiss¹ on April 14, 2017. (R. p. 614-652). Nesbit then filed an amended application for post-conviction relief on June 28, 2018 and a second amended application for post-conviction relief on September 6, 2018. (R. p. 653-659; 660-667). Respondent served its amended return on September 25, 2018, requesting an evidentiary hearing be convened on the application. (R. p. 668-678). An evidentiary hearing was held on December 6, 2018. (R. p. 679-765). On February 15, 2019², the court issued its Order of Dismissal, denying Nesbit relief. (R. p. 766-779). Nesbit filed a Notice of Appeal on March 4, 2019³. (R. p. 780-781).

¹ As noted in the Index, the Return and Partial Motion to Dismiss also included the Record on Appeal and Appellate Records which were identified in prior sections of the Index.

² Filed February 22, 2019.

³ Mailed on February 28, 2019.

Nesbit is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of Commitment. (R. p. 650-652). During its September 2013 term, the Charleston County Grand Jury indicted Nesbit for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute ("PWID") methyldone (bath salts) (2013-GS-10-5639). (R. p. 287-292). Melissa Gay, Esquire and Michael Nelson, Esquire represented Nesbit at trial on May 5-8, 2014, before a jury and the Honorable Deadra L. Jefferson. The jury convicted Nesbit as indicted for failure to stop for a blue light, and the lesser-included offenses of PWID cocaine and possession of methyldone. (R. p. 270). Judge Jefferson sentenced Nesbit to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of methyldone. (R. p. 284-285; 650-652).

Nesbit appealed and was represented by Robert M. Pachak, Esquire, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) on Nesbit's behalf. (R. p. 590-601). The South Carolina Court of Appeals dismissed Nesbit's appeal in an unpublished opinion. *State v. Nesbit*, No. 2015-UP-483, 2015 WL 5970097 (S.C. Ct. App. Oct. 14, 2015). (R. p. 602-603). The remittitur was returned to the circuit court on October 30, 2015. (R. p. 604).

STANDARD OF REVIEW

An appellate court must affirm the factual findings of the PCR court if they are supported by any probative evidence in the record. *Reeves v. State*, 415 S.C. 366, 373,

782 S.E.2d 747, 750 (Ct. App. 2015). However, reversal is appropriate where the PCR court's decision is controlled by an error of law, *id.*, or unsupported by the evidence, *Garren v. State*, 423 S.C. 1, 11, 813 S.E.2d 704, 710 (2018). The appellate court's standard of review in PCR cases depends on the specific issue before it. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The appellate court defers to a PCR court's factual findings and will uphold them if there is evidence in the record to support them. *Id.* The court, however, reviews questions of law de novo, with no deference to trial courts. *Id.* at 180-81, 810 S.E.2d at 839.

STATEMENT OF THE FACTS

Nesbit was represented at his criminal trial by attorneys Melissa Gay and Michael Nelson. The criminal charges against Nesbit stem from an incident that occurred on June 16, 2013, when Deputy Chavez tried to affect a traffic stop on the Harley Davidson motorcycle being driven by Nesbit. (R. p. 92-93). The traffic stop was for failing to use a turn signal when making a turn. (R. p. 92-98). The Harley Davidson motorcycle Nesbit was driving did not belong to him. (R. p. 125:14-19).

Deputy Chavez initiated the stop by activating his blue lights, but Nesbit, after starting to slow down and making a right-hand turn, took off at a high rate of speed. (R. p. 96-97). Deputy Chavez pursued Nesbit and during the chase Nesbit had a collision and fell off the motorcycle. (R. p. 98-99). Deputy Chavez arrested Nesbit for failing to stop for a blue light and placed Nesbit in handcuffs. (R. p. 99-100).

Deputy Chavez then searched Nesbit and found a large amount of U.S. currency (approximately \$2,900) and several bags of narcotics in his front pockets. (R. p. 101). The majority of the money was "in smaller bills, 20s". (R. p. 101:10). The money was in Nesbit's right front pocket. (R. p. 101:25, 102:1). "There was approximately \$108 in 5's, 10's and 1's. There was approximately 7- to \$750 in 100's and 50's. And the rest was in 20's. And I believe that was approximately 100 or 103, 102, \$20 bills stuffed, crushed, shoved inside his pocket...shoved, wadded, pushed in." (R. p. 131:12-21). Nesbit "had over 100 actual bills...wadded up" in his right front pocket. (R. p. 133:15-23).

In Nesbit's right front pocket, Chavez also found a clear plastic baggy that had a sizeable amount of white powdery substance that Chavez believed to be cocaine. (R. p. 101:25 - 102:1-4). In Nesbit's left front pocket, Deputy Chavez found a "brown grocery-style plastic bag...that had four individual freezer style bags that had an amount of a brown crystallized substance inside...each one of the baggies." (R. p. 102:5-9). Another "freezer-style bag that had a small amount of the brown crystallized substance" was also found in Nesbit's right front pocket. (R. p. 102:10-13). Nesbit also had cigarettes in his jean pockets. (R. p. 132:13-19, 142:1-13). Deputy Chavez seized all these items and placed them in an evidence bag and placed the bag in his patrol vehicle. (R. p. 104:8-10).

Nesbit was then transported to the Medical University of South Carolina ("M.U.S.C." or "hospital") for treatment. (R. p. 109:23-25, 110:1-3). Deputy Buckhannon had followed the ambulance that had transported Nesbit to the hospital. (R. p. 110:1-7). At the hospital, medical staff had cut off Nesbit's pants to administer treatment. (R. p.

110:12-17). When Deputy Chavez arrived at the hospital, he took custody from Buckhannon of the cut-off pants that had been placed in a bag. (R. p. 110:12-18). Deputy Chavez then searched the pants and in the right coin pocket he found a "small baggy of white powdery substance and another small baggy with green plant-like material in it." (R. p. 110:18-25).

Deputy Chavez testified that Deputy Buckhannon collected Nesbit's clothes at the hospital and turned them over to Chavez. (R. p. 138:2-10). Chavez testified that he inventoried the jeans because they were part of the evidence, and he had a duty to maintain Nesbit's property. (R. p. 110:23-25, 111:1-5). Deputy Buckhannon testified that the medical staff cut off all of Nesbit's clothes at the hospital. (R. p. 151:9-11). Buckhannon witnessed this and gathered Nesbit's clothes off of the ground and put them into an evidence bag. (R. p. 151:12-17). Buckhannon kept the bag until Chavez arrived and then turned it over to Chavez. (R. p. 151:20-25, 152:1-15). The jeans, however, were not introduced into evidence at trial.

A drug analysis performed on the items seized from Nesbit indicated that the cocaine found in Nesbit's right front pocket weighed 19.53 grams, and the cocaine found later in Nesbit's coin pocket weighed 1.72 grams. (R. p. 196:3-7). The methylene found in Nesbit's left front pocket weighed a total of 394.66 grams. (R. p. 197:23-25).

Deputy Chavez testified that the various bags found on Nesbit were not submitted for fingerprinting although he could have done so if he had chosen to. (R. p. 140:23-25, 141:1-16).

Nesbit did not testify at trial and the defense offered no evidence.

Following the presentation of evidence, defense counsel requested a lesser-included offense instruction of simple possession of methyldone, which request the trial court granted. (R. p. 209-210). The defense also requested a lesser-included offense instruction on possession with intent to distribute ("PWID") cocaine which request the court granted. (R. p. 207:2-4, 10-25; 210-212). Attorney Gay argued that the charge was warranted by the fact that there were "two packets of drugs. One of them is a smaller amount and one was a larger amount, the cocaine, and both of those there's a smaller amount...It's not just one baggie. And so if we – I mean, the jury may want to pick an option of having him convicted of one baggy and not the other baggy." (R. p. 207:10-18). Despite this argument, the defense did not request an instruction on the lesser-included offense of simple possession of cocaine.

In closing argument, defense counsel Gay argued that given the size of the bags allegedly found in Nesbit's pants pocket, along with the many wadded up bills and the cigarettes, the drugs could not have been in Nesbit's pocket because they could not fit in his pockets, and, so, must have been on the ground after being thrown out of the motorcycle during the crash. (R. p. 235-237). Because the motorcycle did not belong to Nesbit, counsel argued that he did not know the drugs were in the motorcycle and thus did not actually or constructively possess the drugs, and therefore was not criminally liable for such drugs. (R. p. 235-236). Counsel recognized, however, that the small amount of cocaine found at the hospital in Nesbit's coin pocket was a "completely

different situation." (R. p. 236:11-18). Gay told the jury that "in many ways we understand that they claim they came out of the coin pocket of his pants," but the other drugs were a different matter. (R. p. 238:3-9).

During jury deliberations, the jury sent a note to the court stating that it could not decide on the cocaine offense (2013-GS-10-5634). (R. p. 262:15-6). The court sent the note back and informed the jury that "they had to write out what their question was." (R. p. 262:22-23). The jury then sent a note stating: "Can we select the lesser charge for cocaine possession even though the law says greater than 10 grams is trafficking." (R. p. 262:24-25–263:1). The court and counsel discussed how to respond, and the court initially stated: "And I think the simple answer is yes. It's a lesser included offense. Oh, you know what -- I just read this note again -- I'm thinking PWID, not possession." (R. p. 263:1-4). The court continued:

THE COURT: I think I need more clarity on this note because I need to figure out what they're asking. Can we select the lesser charge for cocaine possession. Well, the only thing they could be talking about is PWID because those are the only two that are on the verdict form. They may have used different terminology, but those are the only two options.

(R. p. 263:6-12).

Attorney Nelson stated: "They might also be thinking about the charge you gave for the possession with intent of Methylone." (R. p. 263:13-14). The court responded: "No...I don't think so." (R. p. 263:15, 18). The court continued:

Juries are very direct when they ask questions. If that was the case, they would have said possession of Methylone. They only have two options on that verdict form, which is trafficking and PWID. And when I charge possession with intent, possession is one of the elements that you instruct, and you instruct actual and

constructive possession, so that is my thought process of what they're asking, but I could also always ask the foreperson to come in and clarify for me, but the problem is I don't want them getting into their internal deliberations, and I don't want her to tell me too much.

(R. p. 263:18-25, 264:1-3).

After further discussion the court ruled that it would respond by writing a note to the jury stating that it could "select trafficking in cocaine or the lesser included offense of possession with intent to distribute cocaine." (R. p. 266:19-21). There was no objection to the court's response. (R. p. 268-269). A verdict was later returned which included a finding of guilt for PWID cocaine. (R. p. 270:9-12).

At the PCR hearing on Nesbit's claims of ineffective assistance of counsel at trial, Nesbit and his two attorneys who represented him at trial, Michael Nelson and Lisa Gay, testified. Nesbit testified that he met personally with Gay only once or twice and never met Nelson while he was in detention awaiting trial. (R. p. 689:8-20). Nesbit understood from his attorney that their strategy was "all or nothing", i.e. either guilty or not guilty of the crimes as charged. (R. p. 692:1-9). Nesbit was not made aware that the jury could possibly convict him of a lesser-included offense. (R. p. 692:6-9).

Nesbit testified at the PCR hearing that his defense was that the drugs at issue were not his and that he never had actual or constructive possession of them, but that they had apparently been in the motorcycle and came out after the accident. (R. p. 698-699). He was not able to tell the jury this, however, because his attorney advised him not to testify at trial. (R. p. 699:6-13). Nesbit further testified that counsel was ineffective in failing to request a lesser-included offense instruction of simple possession of cocaine,

and that the jury's note about being able to convict of possession supports such claim. (R. p. 701-703).

Attorney Nelson testified that he was hired only about two or three weeks before the trial and was hired to assist in trying the case. (R. p. 711:13-16). Nelson met Nesbit only a couple of days before trial and on the morning of trial. (R. p. 711:22-23). Nelson testified that because the money and the "majority of drugs" were found in Nesbit's pants, his questioning of witnesses was "along the lines of it is impossible that this much stuff could have been in the pants." (R. p. 713:13-18).

Attorney Gay testified at the PCR hearing that defense counsel had an "all or nothing" strategy at trial, i.e. either Nesbit would be convicted as charged or acquitted. (R. p. 754:7-18). Gay's argument was essentially that the large amount of drugs could not have been in Nesbit's pockets but must have been on the ground and have come from the motorcycle, which did not belong to Nesbit. Gay testified that "nobody's pants would have been big enough for that much drugs to be put in. The package was literally that big (motioning)." (R. p. 762:6-8).

Gay testified, however, that counsel's strategy "evolved" at trial when "different information became available", referring to the separate bags of cocaine found on Nesbit, and particularly the small bag found in his coin pocket at the hospital. (R. p. 753-755).

Attorney Gay testified that not requesting a lesser-included instruction on mere possession of cocaine was not a strategic move, but that she just "didn't do it right" because she "didn't think about the fact that [the cocaine found in Nesbit's pants' pocket]

didn't even weigh a gram...and there was no evidence of intent" with the small amount of cocaine in the pants' pocket. (R. p. 734-737). Thus, according to Gay, the jury should have been instructed on the lesser charge of simple possession. (R. p. 735-736). Gay testified that, based on the jury's question during deliberation, it would have convicted Nesbit only of simple possession (as it did for the possession of methyllone). (R. p. 734-741). Gay testified that because of the small amount of cocaine found in the coin pocket and the lack of any evidence of the intent to distribute, the evidence supported the simple possession instruction and, if requested, would have been given. (R. p. 735-741). Gay testified that the jury's question about possession indicated that had they had the option of convicting Nesbit only of simple possession they would have done so. (R. p. 734:15-23, 735:11-19, 739:11-25, 740-741, 743:10-19). Gay further testified: "I don't think the jury was ever going to find him not guilty of what was in his pocket, because it was a pair of pants that he was wearing when they cut it off of him and when he got to the hospital...[but] once they [the jury] determined that they didn't want to convict him of what was on the ground the only thing left was less than a gram in his pocket." (R. p. 760:12-24).

With regard to why she did not introduce the jeans Nesbit had been wearing into evidence, Gay testified that the "pants had been cut off of [Nesbit] and went away as part of the medical procedure." (R. p. 734:12-14). "The pants were not kept." (R. p. 738:4-5). Gay testified that the police did not "gather [the pants] from the nursing staff or the medical professionals at the hospital" and were "destroyed when he went to the hospital."

(R. p. 761:16-22, 762:2-3). This, of course, contradicts the testimony presented at trial that the police collected Nesbit's clothing as evidence.

ARGUMENT

TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE AT NESBIT'S TRIAL BY FAILING TO REQUEST A LESSER-INCLUDED OFFENSE INSTRUCTION ON SIMPLE POSSESSION OF COCAINE.

The United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving (1) counsel failed to render reasonably effective assistance under the prevailing professional norms; and (2) counsel's deficient performance prejudiced the defendant's case. *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). To prove trial counsel's performance was deficient, an applicant must show counsel's representation fell below an objective standard of reasonableness. *Smalls*, 422 S.C. at 181; *see, Strickland*, 466 U.S. at 688. Prejudice, as required for the second prong of the *Strickland* test, is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Reeves v. State*, 415 S.C. 366, 373, 782 S.E.2d 747, 750 (Ct. App. 2015) (citing *Strickland*, 466 U.S. at 693). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In determining whether the applicant has proven prejudice, the PCR court should consider the specific

impact counsel's error had on the outcome of the trial. *Smalls v. State*, 422 S.C. at 188, 810 S.E.2d at 843; *see Strickland*, 466 U.S. at 695-96.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. *Reeves v. State*, 415 S.C. at 375-76, 782 S.E.2d at 752 (citing *Strickland*, 466 U.S. at 691). At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Id.* at 376, 782 S.E.2d at 752. Strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Id.* Counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. *Id.* It is counsel's duty to develop a trial strategy and discuss it with her client. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018).

It is recognized that trial counsel is not ineffective when she can articulate a valid strategic reason for failing to request a lesser offense instruction. *Abney v. State*, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014), *cert. denied* (Jan. 5, 2015). Nevertheless, while the court is reluctant to second-guess counsel's strategic decisions, the decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. *Stone v. State*, 419 S.C. 370, 383-84, 798 S.E.2d 561, 568-69 (2017); *see United States v. Allmendinger*, 894 F.3d 121, 129-30 (4th Cir. 2018) (even if counsel has a strategic reason for decision, the decision still must pass the test of reasonableness and not every purported strategic reason will pass such test; in the

case before it, counsel's purported strategic rationale for decision rested on a "faulty foundation", and thus his performance was deficient and constituted ineffective assistance).

Here, defense counsel's professed strategy and reason for not requesting a lesser-included offense instruction on simple possession of cocaine was an "all or nothing" strategy. While in some circumstances an "all or nothing" strategy can constitute a valid basis for not requesting a lesser-included offense instruction, *see Abney v. State*, 408 S.C. at 50-51, 57, 757 S.E.2d at 549, 552 (Pieper, J., concurring), counsel's strategy in this case was flawed, ineffectively applied and was based on a failure to adequately investigate and prepare for trial. *See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (counsel's all-or-nothing approach in death penalty sentencing phase was unreasonable and constituted ineffective assistance).

The PCR court's findings and reasoning in its Order of Dismissal mirrors trial counsel's flawed reasoning with respect to their "all or nothing" strategy. On one hand, the court found the failure to request the instruction on possession was based on a valid "all or nothing" trial strategy, even though the state's evidence at trial was that a large amount of cocaine was first found on Nesbit at the scene in his pants pocket, while later, at the hospital, a small baggie of cocaine was found in the coin pocket of Nesbit's jeans after hospital staff had cut off the jeans to administer medical care. Given such evidence, there was no valid basis for counsel's strategy, as attorney Gay admitted at the PCR hearing.

Counsel, apparently, overlooked or was not aware prior to trial that this small bag had been found in the coin pocket at the hospital. As Gay testified at the PCR hearing, her trial strategy evolved when this evidence was presented and she realized that, for purposes of jury argument, the large bag of cocaine could be separated from the small bag, and the jury could find Nesbit possessed the small bag but not the large one. Gay's argument to the jury essentially conceded possession of the small bag in the coin pocket, while differentiating the large bag, which she argued could not have been in Nesbit's pocket, but, rather, must have been on the ground after being thrown out of the motorcycle's storage compartment as a result of the crash. Since the motorcycle did not belong to Nesbit, counsel argued that he did not know the cocaine was in the motorcycle and thus was not criminally responsible for that cocaine. But counsel should have been aware before trial of the State's evidence pertaining to the small bag – this should not have come as a surprise, as it appeared to. Accordingly, counsel's "all or nothing" strategy was made after an insufficient investigation and was unreasonable.

Gay's testimony at the PCR hearing confirms this. She admitted her decision not to request a single possession charge was not a strategic move, but that she just failed to "do it right" and failed to consider the small amount of cocaine found in the coin pocket, which possession she essentially conceded in closing argument at trial. Gay further testified that had she requested the simple possession instruction, it should have been given. In fact, at the PCR hearing, trial counsel was crystal clear when she testified as follows:

So in essence I should have asked for a possession charge so that – as – and I did think about what am I supposed to do now, the jury is trying to convict him of possession. But at that time it was too late. **So it wasn't a strategic move.** I just didn't think of – I didn't do it right. . . . [T]hey should have been given a possession charge because it really there was no evidence that could have gone to intent.

(R. p. 734:20-25, 735:11-13) (emphasis added).

“Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citation omitted). To the contrary, trial counsel could not have been more explicit when she stated the failure to request the lesser included charge for simple possession of cocaine was not strategic. Trial counsel admits she did not request the proper charge.

Simple possession of cocaine, 3rd offense, carries a penalty of 0-10 years and/or up to a \$12,500 fine. S.C. Code § 44-53-370(d)(3). The offense of possession with intent to distribute cocaine, 3rd offense, which Petitioner was convicted of, carries 10-30 years and/or up to a \$50,000 fine. S.C. Code § 44-53-370(b)(1). Ultimately, Petitioner was given a sentence of 15 years for the conviction of possession with intent to distribute cocaine. (R. p. 589). It cannot be argued that it is a strategic decision to expose a client to a lengthier sentence of incarceration. If the jury had been charged and given the option of finding Defendant guilty of simple possession of cocaine on the verdict form, there is a reasonable probability that the result of the proceeding would have been different as the sentence for simple possession of cocaine is significantly less than that of possession with intent to distribute cocaine.

Trial counsel was quite candid when she stated that the simple possession charge should have been given to the jury:

Q. [Y]ou are pretty confident that had you asked for a possession charge because there was evidence to support that charge that charge would have been given to the jury?

A. Yes, it should have been.

(R. p. 735:24 - 736:2).

There is no question that a charge for simple possession of cocaine was warranted in Petitioner's criminal trial and his trial counsel was ineffective for failing to request the same, thereby prejudicing Petitioner.

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) supports this conclusion. In *Brightman*, the court held that the defendant was entitled to a lesser-included offense instruction of simple possession of crack cocaine where he was charged with PWID crack cocaine. The court explained that the PWID statute (S.C.C.A. § 44-53-375(B)) provided that possession of one gram or more of crack cocaine is "prima facie" evidence of intent to distribute, and such language creates only a permissible inference which the jury may accept or reject as a conviction of PWID. *Brightman*, 336 S.C. at 350, 520 S.E.2d at 615. Thus, because the jury was free to reject the permissible statutory inference, the jury could have found the defendant guilty of the lesser-included offense of simple possession and, therefore, the defendant was entitled to an instruction on simple possession. *Id.* at 351, 520 S.E.2d at 615. Here, the trial court agreed to give the jury an instruction on the

lesser-included offense of PWID cocaine, and, so, would also have given an instruction on simple possession if requested. *See Brightman*.

Despite counsel's obvious mistake in adopting the "all or nothing" strategy, the PCR court nevertheless points to it as a justification for counsel's failure to request a simple possession instruction. At the same time, the court goes on to find that counsel was also justified in requesting a lesser-included instruction for PWID cocaine. The court accepted counsel's explanation that they felt such instruction was beneficial to Nesbit because it minimized his risk and thus was a valid trial strategy. Of course, such strategy is inconsistent with an "all or nothing" strategy, and inconsistent with trying to minimize Nesbit's risk, which strategy would have been advanced by requesting an instruction for simple possession, as counsel did on the charge pertaining to methyldone. Clearly, then, counsel had no valid or consistent strategy with regard to requesting lesser-included jury instructions and, similarly, the PCR court erroneously relied on trial counsel's flawed strategy to justify counsel's deficient performance. The PCR court also ignored Gay's testimony at the PCR hearing that her decision was not a strategic choice but a mistake. Accordingly, counsel's failure to request a simple possession instruction constitutes deficient performance, and the PCR court's finding to the contrary is erroneous and its factual findings are not supported by probative evidence.

It is clear that counsel's deficient performance also prejudiced Nesbit, as demonstrated by the jury's question during deliberations. The question indicated that the jury wanted to convict Nesbit only of simple possession of cocaine. Had defense counsel

requested such an instruction, which then should have been given, *see Brightman v. State*, this option would have been available and Nesbit would have been convicted of a much less serious crime (simple possession of cocaine) and been subject to a much less severe sentence than was imposed. Accordingly, Nesbit was prejudiced by counsel's deficient performance in failing to request a lesser-included offense instruction for simple possession of cocaine. Therefore, counsel rendered constitutionally ineffective assistance at trial and the PCR court's holding to the contrary is erroneous.

CONCLUSION

Based upon the foregoing, counsel rendered constitutionally ineffective assistance of counsel to Nesbit at trial by failing to request a charge on simple possession of cocaine. Therefore, the PCR court's Order should be reversed and Nesbit's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Nov 16 2021

SC Court of Appeals

November 12, 2021
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The undersigned certifies that this Brief complies with Rule 211(b), SCACR.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

On Writ of Certiorari to Charleston County
The Honorable Deadra L. Jefferson, Trial Court Judge
The Honorable G. Thomas Cooper, Jr., Post-Conviction Relief Judge

Appellate Case No. 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

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ISSUE STATEMENT

Whether Nesbit proved his trial attorneys were ineffective for failing to request a charge on simple possession of cocaine where his two attorneys agreed during trial there was no basis for the charge based on the amount of drugs found on Nesbit, and whether Nesbit showed the result of trial would have probably been different had counsel requested the charge.

STATEMENT OF THE CASE

This case arose from a traffic stop on the Isle of Palms. When signaled to stop, Nesbit fled police, crashing the motorcycle he was driving. (App.92–99). The arresting officer found nearly \$3,000 in cash stuffed into Nesbit's pants pocket. (App.101; 131). Police also found bags containing two different types of narcotic drugs. The first was a "brown crystalline substance" later identified as Methylone. (App.102). It was contained in four "freezer-style bags" recovered from Nesbit's front left pocket. (App.102). The Methylone field-tested positive for methamphetamine, and totaled nearly a pound. (App.102–08).

In Nesbit's right front pocket the officer recovered another freezer bag containing a white powdery substance later identified as cocaine. (App.102; 133–34). This bag contained 19.53 grams of cocaine. (App.102). A much smaller amount, 2 grams, was later found during an inventory search of Nesbit's pants, which were confiscated at the hospital after being cut off by medical staff. (App.110).

In September 2013, a Charleston County Grand Jury indicted Nesbit for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute Methylone (2013-GS-10-5639). The indictment charging Nesbit with trafficking in cocaine charged him for the combined weight of the two packages found on his person, 21 grams. (App.636).

Melisa Gay, Esquire and Michael Nelson, Esquire represented Nesbit. He proceeded to jury trial on May 5-8, 2014, before the Honorable Deadra L. Jefferson.

At the close of trial, Nesbit requested and received a charge on the lesser included offense of simple possession of Methylone. (App.209). He also requested and received a charge on the lesser included offense of PWID cocaine, but did not request a charge on simple possession of cocaine. During their deliberations, the jury sent a note stating that they "couldn't decide" on the cocaine charge. (App.262). The court sent a note back asking them "what their question was." The jury asked: "can we select the lesser charge for cocaine possession even though the law says greater than 10 grams is trafficking?" (App.262–63). The trial court concluded the jury was referring to the lesser included charge of PWID cocaine, not cocaine possession. (App.263). It explained, "I just think they didn't write out PWID." (App.266). The court sent back a response of "yes," i.e. that the jury could select the lesser included charge of PWID. (App.265–66).

Nesbit was convicted for failure to stop for a blue light and the lesser-included-offenses of PWID cocaine and possession of Methylone. Judge Jefferson sentenced him to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of Methylone.

Nesbit timely appealed his conviction, raising one issue—that the trial court erred by failing to charge the lesser included offense of possession of cocaine. Appellate counsel, Robert Pachak, Esquire, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Nesbit's behalf. (App.592). The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v.

Nesbit, Op. No. 2015-UP-483 (S.C. Ct. App. 2015). The Remittitur was returned to the circuit court on October 30, 2015.

Nesbit filed an application for post-conviction relief on May 26, 2016, raising several claims of ineffective assistance of counsel. An evidentiary hearing was held on December 6, 2018, at the Charleston County Courthouse before the Honorable G. Thomas Cooper. Nesbit was present and was represented by counsel, Mark Peper, Esquire. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office. At the hearing, testimony was taken from trial counsel Melisa Gay, trial counsel Michael Nelson, and Nesbit. The PCR court denied relief in an order dated February 15, 2019. (App.779).

Nesbit appeals from this order raising one ground: that trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of simple possession of cocaine.

STANDARD OF REVIEW

The appellate court will defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). However, questions of law are reviewed de novo, with no deference to trial courts. Id.

ARGUMENT

Nesbit failed to show his trial attorneys were ineffective for failing to request a charge on simple possession of cocaine because his two attorneys reasonably agreed during trial there was no basis for the charge based on the amount of drugs found on Nesbit. He has also failed to show the result of trial would have probably been different had counsel requested the charge.

Nesbit has failed to show his trial attorneys were ineffective for failing to request a charge on simple possession because his two attorneys reasonably agreed during trial there was no basis for the charge based on the amount of drugs found on Nesbit. He has also failed to show the result of trial would have been different had counsel requested the charge because the evidence strongly supported a verdict of guilty for PWID. This Court should affirm.

A. The Strickland Standard.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668. Strickland does not guarantee perfect representation, only a “reasonably competent attorney.” Strickland, 466 U.S. at 687.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, an applicant must

prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Even if there is reason to think that counsel's conduct "was far from exemplary," a court still may not grant relief if "[t]he record does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021).

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

B. Trial counsel was not ineffective.

The PCR court correctly found trial counsel was not ineffective for failing to request a charge on simple possession of cocaine. This finding is supported by trial counsel Nelson's testimony that he did not believe he had a meritorious basis to request a charge of simple possession based on the weight of the cocaine recovered. (App.725). 20 grams of cocaine were recovered—far more than the 1 gram supporting an inference of intent to distribute under the statute. Nesbit did not testify, and there was no testimony presented that the 20 grams of cocaine was for his personal use. Nelson testified he discussed the issue with Gay at trial and both "didn't think there was a basis for it." (App.726).

Counsel Gay testified at the PCR hearing that she should have requested a simple possession charge, but she was referring to the small amount of cocaine found in Nesbit's pants pocket at the hospital. (App.734). As stated above, Nesbit was charged with trafficking cocaine based on the total amount found on his person—approximately 20 grams. He was not charged separately for the approximately 1 gram found at the hospital. Counsel Gay claimed—inaccurately—at the evidentiary hearing that the remaining 19 grams were found on the ground near Nesbit, instead of in his pocket. This is not consistent with the officer's trial testimony that he recovered the bag containing 19 grams from Nesbit's pocket at the scene of the accident. (App.102; 133–34; 137). Referencing the small amount found at the hospital, Counsel Gay explained: "I didn't think about the fact that it didn't even weigh a gram There was no evidence of intent . . . with the stuff that was in his pocket." (App.735). She claimed she should have requested a simple

possession charge because the amount of cocaine found on Nesbit was "tiny" and "minor" and "just a possessory quantity." (App.736–37). She claimed the cocaine found on Nesbit did not support a charge on PWID because there "was nothing presented that would have been evidence of intent to distribute. Not even weight." (App.740). However, she agreed that the overall amount of cocaine Nesbit was charged with possessing was "a lot of drugs." (App.741).

Counsel Gay did not have her file with her at the evidentiary hearing. (App.732). She was clearly not familiar with the evidence. Thus, her testimony that she should have requested a simple possession charge based on the "itty-bitty" amount found in Nesbit's pocket at the hospital is not consistent with the evidence produced, and does not accurately reflect the decisions she and Counsel Nelson were faced with at trial. (App.734). Of course, if Nesbit were charged with PWID based only on the 1 gram recovered during the inventory search of his pants, any competent attorney should have requested a simple possession charge. But that is not what happened in this case. Nesbit was charged with PWID based on possession of 20 grams of cocaine and a wad of \$3,000 cash. Counsel Gay's testimony at the PCR hearing indicates a fundamental misunderstanding of the evidence presented at trial.

Based on the evidence presented, Nesbit's attorneys reasonably concluded they did not have a good faith basis for requesting a charge on simple possession of cocaine. "There should be a good-faith basis for any motion filed in a court." United States v. Tart, 877 F.2d 61 (4th Cir. 1989). An attorney's decision not to request a

charge on a lesser included offense does not constitute ineffectiveness when the attorney has a valid strategic reason. See Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 547 (Ct. App. 2014). Trial counsel reasonably believed the only viable defense to the cocaine charge was to dispute whether Nesbit was actually in possession of the bag containing 19 grams of cocaine. This was the focus of Counsel Gay's closing argument. (App.529–33). The PCR court concluded this was reasonable trial strategy. Under the extremely deferential Strickland standard, trial counsels' decision not to request a charge on simple possession was not so far outside prevailing professional norms that it constitutes ineffective assistance of counsel. This Court should affirm.

C. Nesbit was not prejudiced.

Even if counsel was ineffective, Nesbit has not proven prejudice. Nesbit argues that the jury's note during deliberations shows they "wanted to convict [him] only of simple possession of cocaine." Brief of Petitioner at 17. This is speculative, and the trial court found otherwise. Trafficking in cocaine is based solely on possession of more than 10 grams. The evidence supported a trafficking conviction because Nesbit was found in possession of 20 grams. The jury was likely asking whether they were required to convict Nesbit of trafficking based on the weight of the cocaine, or whether they could convict him of the lesser included PWID. Even though the jury sent a note asking whether they could convict Nesbit of "possession," the trial court reasonably concluded that they were referring to "PWID," but simply did not "write out" the entire name of the offense. (App.262).

Besides, the jury could have always found Nesbit not guilty of either charge, as was made clear in the jury instructions. If they truly felt he was guilty of possession only, they would have simply checked the "not guilty" box on the verdict form. Nesbit has not shown prejudice. This Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court affirm the decision of the lower court.

Respectfully submitted,

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Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

March 21, 2022

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Henry Nesbit, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000381

Appeal From Charleston County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2023-UP-086
Submitted November 1, 2022 – Filed March 15, 2023

AFFIRMED

Jeffrey Wayne Buncher, Jr., of Uricchio Howe Krell
Jacobson Toporek Theos & Keith, PA, and Jerry
Nicholas Theos, of Theos Law Firm, LLC, both of
Charleston, for Petitioner.

Assistant Attorney General Joshua Abraham Edwards, of
Columbia, for Respondent.

PER CURIAM: This Court granted certiorari to review the post-conviction relief (PCR) court's finding that Petitioner failed to prove his trial counsel was

ineffective for not requesting a jury instruction on the lesser-included offense of simple possession of cocaine. We affirm.

We find that probative evidence supports the PCR court's finding that trial counsel was not deficient for failing to request a jury instruction on the lesser-included offense of simple possession of cocaine. *See Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (holding a reviewing court "will uphold [the factual findings of the PCR court] if there is any evidence of probative value to support them"); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (providing that deficiency is the first prong of an ineffective assistance of counsel claim); *id.* at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). There was no evidence presented at trial from which the jury could have concluded that Petitioner possessed less than one gram of cocaine. Thus, Petitioner was not entitled to a jury instruction on simple possession, and trial counsel was not deficient for failing to request such an instruction. *See State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) ("The law to be charged to the jury is determined by the evidence presented at trial."); *id.* ("The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense."); S.C. Code Ann. § 44-53-370(d)(3) (2018) (providing that a person possessing one gram or less of cocaine is guilty of simple possession of cocaine).

AFFIRMED.¹

GEATHERS and MCDONALD, JJ., and HILL, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Mar 30 2023

SC Court of Appeals

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

Appellate Case No.: 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

HENRY NESBIT, JR.'S PETITION FOR REHEARING

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TOPOREK & KEITH, P.A.

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Attorneys for Petitioner

ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Petitioner Henry Nesbit, Jr., petitions this Court for rehearing of the Court's decision in Henry Nesbit, Jr., v. State of South Carolina, Unpublished Opinion No. 2023-UP-086 (S.C. Ct. App. filed March 15, 2023). Petitioner submits that the Court misapprehended the law or overlooked the evidence when it affirmed the PCR court's finding that trial counsel was not deficient. The Court's opinion is contrary to the applicable standard, in that the PCR court's decision is controlled by an error of law or unsupported by the evidence. Petitioner respectfully requests the Court reconsider its decision for the reasons stated in its briefs, including the following:

i. Trial Counsel rendered constitutionally ineffective assistance at Petitioner Nesbit's trial by failing to request a lesser-included offense instruction on simple possession of cocaine.

The Court should reconsider its decision because trial counsel admitted there was no valid basis for counsel's "all or nothing" trial strategy and that trial counsel should have requested a lesser-included offense instruction on simple possession of cocaine. Trial counsel admitted at the PCR hearing that the decision was not a strategic choice but a mistake. Trial counsel admitted at the PCR hearing that it became evident at the trial of this matter that the large bag of cocaine could be separated from the small bag as the large bag could not have been in Petitioner's pocket. Trial counsel admitted at the PCR hearing that the jury could have found that Petitioner possessed the small bag but not the large bag as she could have argued that the large bag came from the motorcycle which did not belong to Petitioner. Trial counsel admitted at the PCR hearing that she could have argued that Petitioner did not know the large bag of cocaine was in the motorcycle and thus Petitioner was not criminally responsible for that cocaine. Trial counsel's "all or nothing" trial strategy was made due to an insufficient

investigation and was objectively unreasonable. Petitioner was prejudiced by trial counsel's failure to request a lesser-included offense instruction for simple possession of cocaine as it exposed Petitioner to a lengthier sentence of incarceration.

CONCLUSION

For the reasons set forth herein and in Petitioner's Brief, the Court should grant the petition for rehearing and reconsider its decision. Petitioner requests the Court reverse the PCR court's order and Nesbit's convictions should be reversed and the case remanded for a new trial.

URICCHIO HOWE KRELL JACOBSON
TOPOREK & KEITH, P.A.

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March 30, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

Appellate Case No.: 2019-000381

RECEIVED

Mar 30 2023

SC Court of Appeals

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I, Jeff Buncher, hereby certify that I have served the Petition for Rehearing via the e-filing system on March 30, 2023 and via e-mail to Respondent's counsel.

URICCHIO HOWE KRELL JACOBSON
TOPOREK & KEITH, P.A.

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The South Carolina Court of Appeals

Henry Nesbit, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000381

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 A. J.

Columbia, South Carolina

cc:

Jerry Nicholas Theos, Esquire
Jeffrey Wayne Buncher, Jr., Esquire
Joshua Abraham Edwards, Esquire

FILED
Apr 26 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

Appellate Case No.: 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION TO WITHDRAW AS COUNSEL

The undersigned counsel for Petitioner Henry Nesbit, Jr. hereby petitions the Court for an order relieving Jerry N. Theos of the Theos Law Firm, LLC and Jeffrey Buncher, Jr. of the law firm of Uricchio, Howe, Krell, Jacobson, Toporek & Keith, P.A. as counsel for the Petitioner pursuant to Rule 264(b), SCACR. In accordance with Rule 264(b), SCACR, the undersigned counsel has provided proper notice of their intent to withdraw as counsel to Petitioner and Respondent. Petitioner consents to the requested relief.

Therefore, the undersigned counsel respectfully requests the Court to relieve them as counsel for Petitioner Henry Nesbit, Jr.

[Signature Block on Next Page]

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April 26, 2023

Apr 26 2023**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

Appellate Case No.: 2019-000381

Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I hereby certify that I have served the Petition to Withdraw as Counsel via e-mail to Respondent's counsel on April 26, 2023.

s/Jerry N. Theos

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